Office of the
Commissioner of
Official Languages

Commissariat
aux langues
officielles

LANGUAGE RIGHTS

2005-2006

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FOREWORD

This year marks the 25th anniversary of the *Canadian Charter of Rights and Freedoms*, which makes it a fitting time to reflect on the development and evolution of language rights. During the last quarter century, the Charter has been a driving force behind the judiciary's interpretation and enforcement of rights and liberties, including language rights. The rights and constitutional principles enshrined in the Charter have also had an important effect on federal and provincial language legislation and on the quest of official language minority communities for substantive equality.

This publication examines the legal landscape of language rights, as determined by recent court decisions. One must recognize, however, that any legal evolution of language rights must be understood as part of a larger national conversation between Parliament, the courts and the provinces, a dialogue that has helped shape official languages policy in our country.

The courts, as a crucial part of this dialogue, confirm the government's responsibilities in regards to language rights. They are called upon to define and clarify various rights and obligations and also to craft remedies in cases of non-compliance. A good example of this is the landmark case of *Doucet-Boudreau*, in which the Supreme Court of Canada recognized the power of the courts in crafting creative remedies to ensure that governments fully and meaningfully carry out their language obligations. In the *Fédération Franco-Ténoise* case, the Northwest Territories Supreme Court relied on its remedial powers to grant, inter alia, mandatory orders requiring the territorial government to put into place a comprehensive plan for the implementation of the Northwest Territories *Official Languages Act* and to create a cooperation committee bringing together representatives of the territorial government and the French-speaking community in order to involve the community in the drafting, administration and promotion of the plan. Such a remedy confirms the essential role played by official language minority communities in the implementation of linguistic obligations by the governments and their institutions.

More recently, this dialogue has inspired legislative change in the form of amendments to the federal *Official Languages Act* in 2005. In its 2004 *Forum des maires* decision, the Federal Court of Appeal had to consider the issue of whether Part VII of the *Official Languages Act* imposed a legally enforceable duty on the federal government and indicated that this debate should take place in Parliament rather than in the courts. Parliament in turn responded by voting to strengthen the Act, reinforcing the Canadian government's commitment to enhancing the vitality of official language minority communities. The amended *Official Languages Act* requires federal institutions to take "positive measures" to implement this commitment and attributes a right of action to aggrieved citizens or groups under Part VII. The measures adopted by Parliament are a shining example of the application of subsection 16(3) of the Charter, which allows Parliament and the legislatures to advance the equality of status or use of English and French and to build upon the constitutional language guarantees of the Charter and the *Constitution Act, 1867*.

Substantive equality continues to be the standard that underpins the dialogue on language rights in Canada. As stated by the Supreme Court of Canada in *Beaulac*, the principle of substantive equality ". . . provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State [...]. It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation." The nature of such obligations was examined in *Fédération franco-ténoise*, and the Supreme Court of the Northwest Territories found that the territorial government had the duty not only to take measures towards implementing language rights, but also to provide a specific result, such as a service or communication of equal quality in the official language chosen by the member of the public.

Recent case law demonstrates a progression in the area of language rights. Whereas traditionally official language minority communities have had recourse to the courts to assert their rights, legal actions are increasingly being used to define the scope of those rights and to clarify their implementation. This, in turn, is helping to develop and shape Canadian language policy.

However, the equality of English and French and the vitality of official language minority communities cannot depend solely on the courts. All stakeholders must work together to further develop and consolidate Canada's linguistic framework. To this end, my hope is that I can build bridges, between government and minority communities, between majority and minority communities, and, in some cases, between the minority communities themselves, to ensure that a meaningful dialogue can take place and shape the future of language rights in Canada.

Graham Fraser
Commissioner of Official Languages

INTRODUCTION

This report summarizes and analyzes the principal decisions on language rights rendered by Canadian courts in 2005 and 2006. While not exhaustive, this document is intended as a reference tool for people directly or indirectly interested in these rights.

The cases considered in this report illustrate the variety of areas affected by language rights. Judgments have dealt *inter alia* with minority language education, use of the two official languages before Parliament, language rights in the courts, public access to government services in the official language of choice and the vitality and development of official language minority communities.

Several judgments examined in this report reaffirm the method for interpreting language rights set out in *Beaulac,*[1] which states that language rights must be interpreted purposively and in a manner that is consistent with the preservation and development of official language communities. However, the split decision of the Supreme Court of Canada in *Charlebois v. Saint John (City)*[2] qualifies the role of the courts that are called upon to interpret legislation whose constitutionality is not being challenged.

Other judgments confirm the relationship between the language used by the government and the vitality of official language minority communities. Accordingly, in *Fédération franco-ténoise*,[3] the Supreme Court of the Northwest Territories recognized the important influence of government actions on "the life experience and perceptions of the members of a language group but also on the very legitimacy of the group's language." Various other judgments have once again affirmed the role of certain minority institutions in the vitality of official language minority communities, thereby following the Ontario Court of Appeal judgment in *Lalonde*[4] and relying on the unwritten constitutional principle of respect for and protection of minority rights.

The right to minority language education continues to be a topic of discussion. The Supreme Court of Canada's judgments in *Solski* and *Gosselin*,[5] which clarify eligibility rules for English schooling in Quebec, illustrate the importance of the particular context of each province in implementing this right. While *Solski* dealt with the right of Anglophone parents in Quebec to have their children educated in the minority language, *Gosselin* concerned a claim by Francophone parents who cited the right to equality in order to obtain access to English schools in Quebec.

At the same time, a number of judgments analyzed in this report have introduced a new concept in the application of language rights: that of the obligation of result.[6] Under this concept, derived from civil law, it is not enough for a government institution to simply take measures to ensure certain language obligations are respected. Accordingly, in *Thibodeau v. Air Canada*,[7] the Federal Court concluded that Air Canada was subject to an obligation of result and had to ensure that its subsidiaries complied with their language obligations, which consist of providing services and communications of equal quality in both official languages. The measures taken by Air Canada to comply with its language obligations could not exempt it from all liability when the result intended by the language obligation in question had not been achieved.

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

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

3 *Fédération franco-ténoise v. Canada (Attorney General)*, 2006 NWTSC 20 at para. 601 (decision on appeal before the Northwest Territories Court of Appeal) [*FFT*].

4 *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 577 [*Lalonde*]. This decision was examined in *Language Rights 2001-2002* (online: Office of the Commissioner of Official Languages <http://www.ocol-clo.gc.ca/archives/lr_dl/2001-2002/2001_fw-ap_e.htm>).

5 *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 201, 2005 SCC 14 [*Solski*]; *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 238, 2005 SCC 15 [*Gosselin*]. The Quebec Court of Appeal decisions in these cases were summarized in *Languages Rights 2001-2002*, *ibid.*

6 See *FFT, supra* note 3, and *Thibodeau v. Air Canada,* [2006] 2 F.C.R. 70, 2005 FC 1156 (decision on appeal before the Federal Court of Appeal) [*Thibodeau*].

7 *Thibodeau, ibid*. at paras. 26–48.

In addition, some new questions arose on the nature of the constitutional language obligations that are the responsibility of federal institutions when acting on behalf of a province. In *Canada v. Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc.*,[8] the Federal Court of Appeal held that Royal Canadian Mounted Police members acting as New Brunswick provincial police are required to comply with the constitutional language obligations that are the responsibility of federal institutions, and not those particular to the province of New Brunswick. However, the debate on this issue is not over, since the case has been appealed to the Supreme Court of Canada.

Finally, though no decision has been rendered on the nature of the obligations of federal institutions with regard to the development and vitality of official language minority communities, it is important to note that Parliament has adopted amendments to Part VII of the *Official Languages Act* to clarify its meaning and scope. By imposing on federal institutions the obligation to take positive measures to promote linguistic duality in Canadian society and offering complainants the right to file a court action if such obligations are not respected, the new Part VII will henceforth be an essential tool for the promotion and development of official language minority communities.

8 *Canada v. Société des Acadiens et des Acadiennes du Nouveau-Brunswick Inc.*, 2006 FCA 196 (leave to appeal to S.C.C. granted, [2006] C.S.C.R. no 309) [*Société des Acadiens*].

1. MINORITY LANGUAGE EDUCATION RIGHTS

Section 23 of the *Canadian Charter of Rights and Freedoms* (Charter) gives parents belonging to an official language minority the right to have their children educated in that language. In addition to the right to access to minority language instruction, section 23 also guarantees the right to minority language educational facilities and the right to manage and control those facilities. Provinces and territories are responsible for the implementation of minority language education rights.

The rights conferred by section 23 are both collective and individual. They are individual in the sense that they apply to parents belonging to one of the three rights-holder categories:[9] persons whose first language learned and still understood is that of the minority of the province in which they reside, those who have received their primary school instruction in Canada in the minority language of the province where they reside and those whose child has received or is receiving primary or secondary school instruction in the minority language of the province where they reside. The collective aspect of the rights conferred by section 23 results from the fact that their purpose is to protect and preserve both official languages and the cultures associated with them throughout Canada. Thus, the scope and nature of the obligations on governments to provide facilities and programs varies in terms of the number of students likely to make use of such services.[10]

Over the years, the courts have developed various principles to guide the interpretation of section 23. First, as the Supreme Court of Canada explained in *Mahe*, section 23 must be interpreted in accordance with its purpose, which is to maintain the two official languages of Canada and to give the minority control over "those aspects of education which pertain to or have an effect upon their language and culture."[11] The Court later added that the remedial nature of section 23 must also be taken into account and an interpretation based on the purpose of that provision "is based on the true purpose of redressing past injustices and providing the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced."[12] Finally, the application of section 23 is contextual, meaning that it depends on the unique situation of the linguistic minority in each province.[13]

Most court actions seeking to enforce section 23 of the Charter have dealt with the right to minority language educational facilities and the right to manage and control these facilities. In *Mahe*, the Supreme Court of Canada held that it is essential that parents belonging to a minority language community have a certain amount of management and control over the educational facilities in which their children are taught in order to ensure that the language and culture of linguistic minorities in each province survive and flourish.[14] The content of these rights depends largely on the number of children who may make use of them, that is, the "rights holders." For example, in some cases, the right to these facilities may require the establishment of separate classes for the minority within majority schools, while in other cases the number of students might warrant the creation of minority schools entirely separate from those of the majority.[15] As for the right to management and control of these facilities, this could mean representation of the minority on a majority school board, while in other cases it could require the existence of minority school boards.[16]

The right conferred by section 23 also includes that of having an education of equivalent quality to that which is provided to the members of the language majority:

> Section 23 is premised on the fact that substantive equality requires that official language minorities be treated differently, if necessary, according to

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

10 *Mahe v. Alberta*, [1990] 1 S.C.R. 342 at 366-367 [*Mahe*].

11 *Ibid.* at 375.

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

13 *Reference re Public Schools Act (Man.), supra* note 9 at 851.

14 *Mahe, supra* note 10 at 371–372.

15 *Referencen re Public Schools Act (Man.), supra* note 9 at 855.

16 *Mahe, supra* note 10 at 374.

> their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language majority.[17]

Finally, in order to ensure respect for minority language education rights, the courts have had recourse to "specific remedial measures" to correct the situation created by government inaction. This was the case in *Doucet-Boudreau*,[18] in which a trial judge who had found that there was a breach of section 23 of the Charter declared the Court competent to obtain updates on the instructions issued to the province to provide French-language teaching facilities within specified deadlines. The Supreme Court of Canada held that such remedial measures had proven necessary since the risk of assimilation would continue to increase as long as the government did not fulfill its obligations under section 23 of the Charter.[19]

Over the two-year period covered by this report, two judgments of the Supreme Court of Canada have dealt with Quebec legislation on minority language education. More specifically, in *Gosselin*, the Supreme Court had to consider the request by certain members of the Francophone majority in Quebec to exercise a right belonging to the province's Anglophone minority.

1.1 Access to English-language education in Quebec

In Quebec, access to English-language schools derives its constitutional source from paragraph 23(1)(b) and subsection 23(2) of the Charter.[20] Subsections 73(1) and (2) of the *Charter of the French Language*[21] (CFL) give the right to English education to children:

> (1) [...] whose father or mother is a Canadian citizen and received elementary instruction in English in Canada, provided that that instruction constitutes the major part of the elementary instruction he or she received in Canada;
>
> (2) [...] whose father or mother is a Canadian citizen and who has received or is receiving elementary or secondary instruction in English in Canada, and the brothers and sisters of that child, provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada. [emphasis added]

Section 73 also states that English instruction received in Quebec in a private educational institution and English instruction received pursuant to a special authorization shall be disregarded in calculating the instruction received.

The judgments considered in this part analyzed section 73 of the CFL in light of section 23 of the Charter and confirmed the contextual approach taken by the Supreme Court of Canada in interpreting and applying minority language instruction rights. They also considered the difficult question of the accessibility of minority language education in Quebec, in a context where the majority language of the province is nevertheless the minority language in Canada as a whole.

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17 *Arsenault-Cameron, supra* note 12 at para. 31.

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

19 *Ibid.* at para. 29.

20 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), *1982*, c. 11. Paragraph 23(1)(a) of the Charter has never come into force in Quebec: see section 59 of the *Constitution Act, 1982*.

21 *Charter of the French Language*, R.S.Q. c. C-11 [*CFL*].

Solski (Tutor of) v. Quebec (Attorney General)

In *Solski*,[22] the Supreme Court considered the question of Anglophone minority language education rights in Quebec. It had to decide whether subsection 73(2) of the CFL, which requires that children receive the "major part" of their education in English in order to obtain certificates of eligibility to attend English-language public schools, was consistent with subsection 23(2) of the Charter.

The parents of three families had requested certificates of eligibility to allow their children to attend English-language public schools in Quebec. These certificates were denied on the basis that the children had not completed the "major part" of their instruction in English as required by subsection 73(2) of the CFL. The Quebec Minister interpreted this requirement according to a mathematical formula, only considering the number of months spent studying in each language, without taking into account other factors such as the existence of education programs, learning problems or other difficulties. The Review Committee on Language Instruction and the Quebec Administrative Tribunal upheld these decisions with regards to two of the families. During the proceedings before the Administrative Tribunal, one family asked the Superior Court to render a declaratory judgment on the legality of subsection 73(2) of the CFL.

In its judgment, the Superior Court held that subsection 73(2) was inconsistent with subsection 23(2) of the Charter to the extent that it limited the category of persons eligible to receive minority language education beyond the provisions of the Charter. However, the Court of Appeal set aside the Superior Court's decision, concluding that the "major part" requirement set out in subsection 73(2) was consistent with the Charter.

In a unanimous decision, the Supreme Court allowed the appeal in part. It began its analysis by discussing the rules of interpretation applicable to section 23 of the Charter and by insisting on their national scope and remedial nature. These rights must be given a broad and liberal interpretation, taking into account the differences between the minority language community in Quebec and the minority language communities in other provinces and territories. Thus, the Court indicated that the application of subsection 23(2) should be contextual, meaning that the provinces may implement this right according to their individual situations.

>> 1. "Major part" requirement

The Supreme Court rejected the mathematical application of the "major part" requirement in favour of a qualitative assessment of the child's educational experience. This involved determining whether the child received a "significant part" of his or her instruction, taken as a whole, in the minority language.[23] Ultimately, the Court concluded "the past and present educational experience of the child is the best indicator of genuine commitment to a minority language education."[24]

>> 2. Factors to be considered in determining commitment

The subjective assessment suggested by the Supreme Court attempts to identify the existence or absence of a commitment by the child to education in the minority language. This assessment involves reviewing the child's situation as a whole, including a review of all the following criteria:

(i) Length of time instruction was received in each language

Subsection 23(2) of the Charter does not specify a minimum amount of time a child must be instructed in a minority language to benefit from the right guaranteed therein. According to the Court, the length of instruction must objectively and subjectively indicate a sufficient link to the minority language. The more time a child spends in a minority language education program, the easier it is to conclude that a stronger link exists to that language than to the majority language.

(ii) Stage of education at which the choice of language of instruction is made

On the one hand, the language of instruction received at the start of a child's educational experience may indicate an intention to choose that language for the rest of his or her schooling. On the other hand, the choice of language of instruction made at the time of entry into secondary school may be a sign of a clearer commitment to the minority language.

22 *Solski, supra* note 5.
23 *Ibid.* at para. 28.
24 *Ibid.*

(iii) Programs available where the child is or was living

The lack of programs of instruction in the minority language in the area where the child did his or her schooling must be taken into account. Where minority language education was not available, instruction in the majority language is not conclusive. Moreover, it is conceivable that, in provinces other than Quebec, a child could have been sent to a majority language school by assimilated parents who then, in the later stages of the child's educational experience, changed their minds and registered the child in a minority language school so that he or she could reintegrate into the minority language community.

(iv) Existence of learning disabilities or other difficulties

Children may have learning difficulties in the majority language, such that they would be penalized if they had to continue studies in that language.

The Court noted that the relevance of each factor varies with the facts of each case, the circumstances of the particular child and his or her school career. The factors listed above are thus a guide and not an exhaustive list.

Essentially, the "major part" requirement must be interpreted as synonymous with the "significant part" of instruction and must be open to flexible interpretation. The evaluation of what constitutes a significant part is both subjective and objective. It is subjective in the sense that it is necessary to look at the child's situation as a whole. It is also objective because it requires an assessment of the child's personal circumstances and educational experience, to ensure that his or her admission to minority language instruction is consistent with the general objectives of subsection 23(2).[25]

Finally, the Court indicated that as a general rule instruction in immersion programs cannot give rise to a right to instruction in minority language schools.[26] In the Court's opinion, education in immersion programs amounts to education in the majority language. The Court stated that it would be contrary to the purpose of section 23 to equate immersion programs with minority language education, given the essential role played by culture in minority language instruction.[27]

The Court did not rule on the question as to whether instruction in a private school could give rise to a right under subsection 23(2) of the Charter, since the constitutionality of Bill 104[28] was not raised. This question is currently before the Quebec Court of Appeal.[29]

To summarize, the Supreme Court held that subsection 73(2) of the CFL is not inconsistent with section 23 of the Charter. It therefore did not have to rule on the question of whether section 1 of the Charter could be used to justify a departure from section 23.[30] In view of the educational experience of the children involved in this appeal, the Court concluded that they were eligible for minority language education.

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25 *Ibid.*

26 *Ibid.* at para. 50.

27 It should be noted that the Supreme Court's decision in *Solski* resulted in allowing Mr. Parasiuk, whose action was reported in *Language Rights 2003-2004* (online: Office of the Commissioner of Official Languages, <http://www.ocol-clo.gc.ca/archives/lr_dl/2003-2004/2003_fw-ap_e.htm>), to have his children educated in English. Mr. Parasiuk's child had been refused access to English-language instruction in Quebec because of Mr. Parasiuk's French-immersion instruction while a student in an English-language school in Manitoba (see *P.M. c. Ministre de l'Éducation du Québec et al.* (February 19, 2004), SAS-Q-094035-0212 (T.A.Q.) and *Parasiuk c. Tribunal administratif du Québec et al.* (June 25, 2004), Montréal 500-17-019502-049 (C.S.Q.)).

28 In 2002, the Quebec Legislature enacted Bill 104, which amended section 73 of the CFL by excluding from the calculation of the "major part" requirement all instruction received in a non-subsidized English-language school (S.Q. 2002, c. 28, s. 3).

29 See *T.B. c. Québec (Ministre de l'Éducation)*, 2005 QCCA 635; *H.Ha.N. c. Québec (Ministre de l'Éducation)*, 2006 QCCA 248.

30 However, the Court mentioned that the unique historical and social context of each province is relevant when provincial approaches to the implementation of the rights provided for in section 23 of the Charter are concerned and in situations where there is a need for justification under section 1 of the Charter: *Solski, supra* note 5 at para. 21.

1.2 Right to minority language instruction and right to equality

Gosselin (Tutor of) v. Quebec (Attorney General)

In this case,[31] heard with *Solski*,[32] the Supreme Court had to assess the constitutional right to minority language instruction in light of the right to equality.

Most of the appellants were parents born in Quebec who had received their education in French in that province. These families claimed the right to English-language education for their children, who under section 73 of the CFL were not eligible to attend English schools. The families initiated proceedings in the Quebec Superior Court to obtain the right to have their children educated in English.

They argued in court that the provisions of the CFL on the language of education were discriminatory because they did not give French-speaking parents the choice of enrolling their children in English schools, whereas English-speaking parents were free to choose their children's language of education in Quebec public schools. In their view, the CFL made a distinction between, on the one hand, children who met the eligibility requirement provided for by section 73 of the CFL, and on the other, the majority of Francophone children in Quebec, who do not meet the requirement. The appellants were of the view that this distinction infringed on the right to equality guaranteed by sections 10 and 12 of the Quebec *Charter of Human Rights and Freedoms* and section 15 of the Charter. In their opinion, the principle of equality requires that all children in Quebec have access to English education if they want it. The appeal thus essentially hinged on the relationship between equality rights, on the one hand, and language rights guaranteed to minorities, on the other.

The families' actions were dismissed by the Superior Court and the Quebec Court of Appeal. The Supreme Court of Canada also dismissed their appeal.

From the outset, the Supreme Court noted that the appellants were members of the Francophone majority in Quebec and were not entitled to the rights guaranteed under section 23 of the Charter. Therefore, their status and situation differed from that of the appellants in *Solski*. The Court further noted that these parents were seeking to take advantage of the right to equality to alter the categories of rights holders under section 23 of the Charter so as to benefit from a right that only belonged to members of the linguistic minority.

>> 1. Section 73 of the *Charter of French Language*

The Court concluded that the appellants, by seeking to use the right to equality to benefit from a right guaranteed in Quebec only to the English-language minority, were not taking into account the relationship between section 73 of the CFL and section 23 of the Charter. The Court also dismissed the appellants' argument that section 73 of the CFL was intended to distinguish entire categories of children and exclude them from eligibility for a public service. It indicated that the purpose of section 73 was not to exclude, but rather to "implement the positive constitutional responsibility incumbent upon all provinces to offer minority-language instruction to its minority-language community"[33] [emphasis in original].

>> 2. Right to equality and section 23 of the *Canadian Charter of Rights and Freedoms*

Proceeding with its analysis, the Supreme Court noted that any review of minority language education rights must begin with the guarantees provided for in section 23 of the Charter. It repeated its comments from *Mahe*[34] that "a notion of equality between Canada's official language groups is obviously present" in section 23, but it was "if anything, an exception [to the right to equality] in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada."[35] It noted that, in the context of minority language education, substantive equality may require different treatment, if necessary, to provide official

31 *Gosselin, supra* note 5.

32 *Solski, supra* note 5.

33 *Gosselin, supra* note 5 at para. 16.

34 *Mahe, supra* note 10.

35 *Ibid.* at 369.

language minorities with a level of education equivalent to that of the official language majority. Referring to a conclusion reached in *Arsenault-Cameron*,[36] the Court explained that section 23 of the Charter could be seen not as an exception to the right to equality, but instead as a fulfillment of this right for linguistic minorities.[37]

The Court pointed out that there is no hierarchy of constitutional provisions, that is, the right to equality does not have priority over the right to minority language education. Thus, the appellants could not use equality guarantees to invalidate other rights expressly conferred by the Constitution.

>> 3. Implementation of the right to minority language education in Quebec

Finally, the Court considered the application of section 23 of the Charter in Quebec. It emphasized the purpose of this provision, which is to protect and promote the minority language community's vitality and development.

Considering the facts of the case, the Court noted that the appellants were members of the Francophone majority in Quebec, and as such their wish to have their children educated in English did not fall under the purpose of section 23 of the Charter. On the contrary, the Court indicated that the admission of members of the linguistic majority to minority schools could have harmful consequences, especially in Quebec's particular situation, where the existence of English-language schools should not be a barrier to the desire to protect and enhance French as the majority language in Quebec, though it is still the minority language in Canada as a whole.

In short, the Court dismissed the appellants' appeal and concluded that minority language education rights were not subordinate to the right to equality.

36 *Arsenault-Cameron, supra* note 12.

37 *Gosselin, supra* note 5 at para. 21.

2. LANGUAGE RIGHTS AND PROCEEDINGS OF PARLIAMENT

Section 133 of the *Constitution Act, 1867* and subsection 17(1) of the *Canadian Charter of Rights and Freedoms* (Charter) entrenched the right of every person to use either official language in the debates and proceedings of Parliament. This right is reaffirmed in Part I of the *Official Languages Act* (OLA), which makes French and English the official languages of Parliament. This part of the OLA also imposes on Parliament the duty to provide simultaneous interpretation of its debates and other proceedings. Furthermore, reports of debates or other proceedings of Parliament must be reported in the official language in which it was said and a translation of it into the other official language must be included.

These rights and duties, which are rarely the subject of court actions, are intended to give English and French equal rights and privileges of use in parliamentary activities, such as the debates of the House of Commons and Senate and the work of their committees. During the period covered by this report, only one decision considered the content of the right provided for by Part I of the OLA, in the context of the language of documents tendered by a member of the public who appeared as a witness before a parliamentary committee.

2.1 Language rights of witnesses appearing before parliamentary committees

Knopf v. Canada (Speaker of the House of Commons)

The Federal Court's judgment[38] in this case raises the question of the interpretation of section 4 of the OLA and section 17 of the Charter, to determine whether a parliamentary committee's refusal to distribute unilingual documents , tendered by a witness in support of his appearance before this committee, to its members was an infringement of his language rights.

The applicant, Mr. Knopf, had testified in English, the language of his choice, before the Standing Committee on Canadian Heritage (Committee) in April 2004, and the clerk of the Committee had accepted the unilingual English documents tendered in support of his appearance. However, the chair of the Committee refused to distribute the documents to Committee members in accordance with a motion adopted earlier authorizing the clerk to only distribute documents to the members that were written in both official languages.

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

Mr. Knopf subsequently filed an action in the Federal Court pursuant to section 77 of the OLA. He asked the Court, among other things, to declare that his language rights provided for in sections 16 and 17 of the Charter and section 4 of the OLA had been infringed upon by the Committee and to order all committees of the House of Commons to accept, distribute and consider relevant documents submitted by all witnesses in either official language, without the documentation having to be translated beforehand.

The three parties involved in the case, that is, the applicant, Mr. Knopf; the respondent, the Speaker of the House of Commons of Canada; and the respondent, the Attorney General of Canada, each characterized the issue differently. For the applicant, it consisted primarily of determining whether the OLA or the Charter gave him the right to tender unilingual documents for immediate distribution to Committee members, and whether the Committee had the right, because of parliamentary privilege, to refuse to distribute

38 *Knopf v. Canada (Speaker of the House of Commons)*, 2006 FC 808.

the unilingual documents to Committee members. The Speaker of the House of Commons summed up the question in the following manner: could the House and its committees, by virtue of parliamentary privilege, establish their own internal procedures free from interference from the courts or other outside entities? The Attorney General wanted to know if Mr. Knopf's right to express himself in the official language of his choice obligated a House of Commons committee to distribute unilingual documents to its members.

Layden-Stevenson J. of the Federal Court dismissed Mr. Knopf's application on the ground that there was no infringement of his language rights. Furthermore, she noted that the Court could not review the Committee's decision since it was protected by parliamentary privilege.

>> 1. Whether the Committee's refusal to distribute the documents was a breach of the *Official Languages Act*

It should be noted that subsection 4(1) of the OLA gives everyone the right "to use either [official language] in any debates and other proceedings of Parliament." As to whether or not Mr. Knopf's language rights had been infringed upon, the Court concluded that the Committee's refusal to distribute documents prepared only in English was not a breach of subsection 4(1) of the OLA. It pointed out that this provision protects everyone's right, including that of witnesses, to speak in the official language of his or her choice during committee proceedings and debates, but does not confer the right to have a document circulated in the official language chosen by the witness. Since Mr. Knopf was able to address the Committee in the official language of his choice, it follows that his language rights were respected. In the judge's view, his request to have unilingual documents distributed to Committee members was not a question of language rights: rather, it was a challenge to the way in which the Committee conducted its business.

In short, the Court held that, in form, Mr. Knopf's complaint related to language rights, but in substance, it was concerned more with the Committee's decision and its refusal to consider the documents submitted by the applicant.

>> 2. Whether the Committee's decision was protected by parliamentary privilege

In view of her conclusion that there was no infringement of the applicant's language rights, the judge considered that it was unnecessary for her to address the issue of parliamentary privilege. However, she did consider the issue since it was the focus of most of the arguments at the hearing.

Following the principles established by the Supreme Court in *Vaid*,[39] the judge noted that there has long been an inherent category of parliamentary privilege regarding the control exercised by the Houses of Parliament over their day-to-day procedure. As the distribution of documents directly affects the internal operations of the Committee, that is, the House's right to determine its own rules of procedure and to conduct its activities without interference, the privilege was established in this case. Consequently, the judge indicated that it was for Parliament, and not the courts, to determine whether exercising this privilege was necessary or appropriate in a particular case. In short, the Committee's decision not to distribute the documents could not be reviewed by the Court.

>> 3. Costs and related charges

Finally, on the question of costs and related charges, Mr. Knopf had referred to subsection 81(2) of the OLA, which provides that where a court is of the opinion that an application raises an important new principle in relation to the Act, it shall order that costs be awarded to the applicant. On this point, the judge concluded that the issues raised in this case were important, but did not fall within the parameters of subsection 81(2). The action was accordingly dismissed, with each party bearing its own costs.

It should be noted that Mr. Knopf has appealed this decision to the Federal Court of Appeal.[40]

39 *Canada (House of Commons) v. Vaid,* [2005] 1 S.C.R. 667, 2005 SCC 30.

40 Federal Court of Appeal file A-402-06.

3. LANGUAGE RIGHTS IN THE COURTS

The right to use both official languages in the courts is guaranteed by several constitutional documents, including the *Canadian Charter of Rights and Freedoms* (Charter), the *Constitution Act, 1867* and the *Manitoba Act, 1870*. Several provisions of federal and provincial statutes, such as the *Criminal Code*, Part III of the federal *Official Languages Act* (OLA) and the New Brunswick *Official Languages Act* (N.B. OLA), complement the bilingualism of federal, and in some cases provincial, judicial institutions.

The federal and provincial governments, each in its sphere of jurisdiction, regulate various aspects of official language use in the courts. The federal government, for its part, regulates the use of official languages in criminal cases and in federal courts. As for the provinces, they set the standards to be respected concerning the use of official languages in civil proceedings. It should be noted that provinces or territories authorized to handle federal offences act on behalf of federal authorities and therefore must ensure language rights provided for in federal legislation are respected.[41]

The language obligations imposed on the courts during criminal proceedings are set out in Part XVII of the *Criminal Code*. The provisions dealing with the language rights of the accused, in other words, sections 530 and 530.1, guarantee their right to speak and be understood by a judge or a judge and jury in the official language of their choice. Section 530 provides that, among other things, accused who are not represented by counsel must be advised of their right to a trial in their own language by the judge before whom they first appear. Section 530.1 clarifies the practical consequences of an order granted under section 530. These provisions apply to all provincial courts that conduct criminal trials. Their purpose is to "provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity."[42]

The language obligations to which the courts are subject in civil proceedings derive, for their part, from the Constitution and federal and provincial legislation. Section 19 of the Charter guarantees 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 or the courts of New Brunswick. Part III of the OLA adds to this fundamental right certain institutional obligations to facilitate access to the federal courts[43] in either official language. These obligations include the duty to ensure that witnesses appearing before them can be heard in the official language of their choice without suffering any detriment thereby; to offer simultaneous interpretation services at the request of any party; to ensure that the judge hearing a case understands the official language of the parties without the assistance of an interpreter;[44] and to publish decisions in both official languages simultaneously or at the earliest possible time. As for federal institutions that are party to civil proceedings, they have the obligation to use, for their arguments and pleadings, the official language chosen by the civil party.

For some time, language rights in the courts were given a restrictive interpretation. In *Société des Acadiens v. Association of Parents for Fairness in Education*,[45] the Supreme Court of Canada held that the language rights guaranteed in the Charter were based on a political compromise and "the courts should approach them with more restraint than they would in construing legal rights [embodied in ss. 7 to 14 of the Charter]." This restrictive interpretation deviated from earlier decisions on language rights,[46] which favoured a liberal interpretation and were based on the purpose of the rights.

41 *Canada (Commissioner of Official Languages) v. Canada (Department of Justice)*, 2001 FCT 239 [*Contraventions case*].

42 *Beaulac, supra* note 1 at para. 34, relying on *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 at 749.

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

44 This duty applies to all federal tribunals with the exception of the Supreme Court of Canada: see section 16 of the OLA.

45 *Société des Acadiens v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549.

46 See for ex. *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182; *Attorney General of Quebec v. Blaikie,* [1979] 2 S.C.R. 1016 and *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

Several judgments following *Société des Acadiens* were influenced by the principle of political compromise before the Supreme Court of Canada rejected it in *R. v. Beaulac*.[47] In that case, the Court held that the fact that language rights resulted from a political compromise had no effect on their scope and that such rights "must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada"[48] [emphasis in original].

The judgment in *Beaulac* also noted that language rights and the right to a fair trial are distinct rights.[49] While the fairness of a trial concerns the right of the accused to understand the trial and be understood,[50] language rights are positive rights that have a completely different purpose, namely the preservation and development of minority official language communities in Canada.

During the two-year period covered by this report, the courts handed down several judgments on the question of official languages in the administration of justice. For example, while discussing the obligation of a municipality to use the official language chosen by the civil party in civil proceedings, the split decision of the Supreme Court of Canada in *Charlebois* considered the broader question of the importance of the constitutional and legislative context in interpreting language rights.

3.1 Institutions with language obligations in the New Brunswick courts

Charlebois v. Saint John (City)

In this case,[51] the Supreme Court of Canada considered the question of the interpretation to be given to the word "institution" in the N.B. OLA.[52] It had to decide whether the City of Saint John (City) was an "institution" subject to the obligation of using the official language chosen by the appellant in a civil proceeding that the appellant had initiated against the City. The Court also had to determine the scope of this obligation.

The appellant, Mr. Charlebois, had challenged a parking ticket issued by the City in English only. His application was drafted in French. The City and the New Brunswick Attorney General filed motions to strike Mr. Charlebois's challenge. The motion filed by the City was drafted in English only and its counsel's arguments were made in English. Mr. Charlebois objected to the fact that the City defended itself in English only on the ground that section 22 of the N.B. OLA was applicable to the City and required it to use the language that he had chosen for the proceedings.

On this point, the Court of Queen's Bench[53] and the New Brunswick Court of Appeal[54] had held that municipalities were not institutions in the sense of section 1 of the N.B. OLA and consequently did not have a duty, under section 22 of that Act, to file pleadings and present arguments in the official language chosen by Mr. Charlebois.

The Court of Queen's Bench and the Court of Appeal were of the opinion that an interpretation of the word "institution" that included municipalities was inconsistent with the N.B. OLA. They came to this conclusion mainly by considering sections 27 and 36 of the N.B. OLA. Section 27 of the N.B. OLA provides that members of the public have the right to "communicate with any institution and to receive its services in the official

47 *Beaulac, supra* note 1.
48 *Ibid.* at para. 25.
49 *Ibid.* at para. 41.
50 This right is enshrined in section 14 of the Charter, according to which "A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter."
51 *Charlebois v. Saint John (S.C.C.), supra* note 2.
52 S.N.B., c. O-0.5.
53 *Charlebois v. Saint John (City)* (2002), 255 N.B.R. (2d) 396, 2002 NBQB 382.
54 *Charlebois v. Saint John (City)* (2004), 275 N.B.R. (2d) 203, 2004 NBCA 49 [*Charlebois v. Saint John (C.A.)*].

language of their choice." For its part, section 36 provides that municipalities and cities whose official language minority population represents at least 20% of the total population "shall offer the services and communications prescribed by regulation in both official languages." Thus, if municipalities were considered "institutions," they would be required to provide all services and communications in both languages, while municipalities whose official language minority population represented at least 20% of the total population would only be required to provide the communications and services that were prescribed by regulation in both languages. The lower courts were of the opinion that a restrictive interpretation of the word "institution" (that excludes municipalities) remedied this inconsistency.

During the Supreme Court hearing, Mr. Charlebois and the Association des juristes d'expression française du Nouveau-Brunswick argued that the Court of Queen's Bench and the Court of Appeal had erred in interpreting the word "institution" restrictively. In their opinion, a broad and liberal interpretation of this word did not lead to an inconsistent result since the provisions that dealt specifically with municipalities (35 to 38 of the N.B. OLA) were exceptions to the general provisions of the Act, including sections 22 and 27.

The second question put to the Court had to do with the scope of section 22 of the N.B. OLA, namely whether the duty to use the official language chosen by the civil party for arguments and pleadings extended to evidence submitted during proceedings. On this point, both the majority and the dissenting judges concluded that "oral or written pleadings" did not include items of evidence tendered during the course of a proceeding.

In a split decision,[55] the Supreme Court dismissed Mr. Charlebois's appeal. The Court was divided on the first question, which concerned the interpretive principles applicable to language rights.

Reasons for the majority

>> 1. Meaning of "institution"

Charron J., for the majority, first considered the analysis of the New Brunswick Court of Appeal and noted that the case rested solely on the interpretation given to the word "institution" used in section 22 of the N.B. OLA and defined in section 1, and not on the constitutionality of section 22. She applied the modern method of statutory interpretation, which involves "[reading] the words of an Act . . . in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[56]

She went on to analyse the ordinary and grammatical meaning of the definition of the word "institution" in section 1 of the N.B. OLA, noting that the words "municipality" and "city" were absent from the long list of bodies included in the definition. The question that then arose was whether municipalities and cities constituted bodies "established to perform a governmental function by or pursuant to an Act of the Legislature or by or under the authority of the Lieutenant-Governor in Council."[57]

The judge acknowledged that the N.B. OLA was the province's legislative response to the duties imposed upon it by the Charter. However, she noted that the province's constitutional obligations did not mandate a single solution:

> . . . there is room for flexibility . . . This brings us back to the question of statutory interpretation that occupies us: what approach did the province of New Brunswick adopt in respect of its municipalities to meet its constitutional obligations?[58]

55 McLachlin C.J., Major J., Fish J. and Abella J. agreed with the majority reasons written by Charron J. whereas Bastarache J., Binnie J., LeBel J. and Deschamps J. dissented.

56 *Charlebois v. Saint John (S.C.C.), supra* note 2 at para. 10 (citing E.A. Dreidger, *Construction of Statutes*, 2nd ed., 1983, p. 87).

57 *Charlebois v. Saint John (S.C.C.)*, *ibid.* at para. 11.

58 *Ibid.* at para. 15.

Considering the structure of the N.B. OLA, Charron J. noted that it contained various headings, one being "Municipalities," which set out specific language duties in certain areas of activity or service delivery.[59] Since the N.B. OLA imposes specific language obligations on municipalities, they are not subject to the same obligations as "institutions." Instead, municipalities have the option, and not the obligation, of declaring themselves bound by the provisions of the N.B. OLA.[60] Moreover, as a matter of statutory interpretation, the Court noted that there was "no doubt . . . that the more restrictive approach was open to the Legislature" and that this interpretation was the only one "that creates no illogical or incoherent consequences when read in the context of the statute as a whole."[61] Since the appellants had not challenged the constitutionality of the Legislature's choice to prefer a restrictive approach, the judge concluded that it had the option of making this choice.

>> 2. Interpretation of statutes when their constitutionality is not challenged

Charron J. then considered the interpretation adopted by the dissenting judges, by which the specific obligations set out under the heading "Municipalities" are interpreted as exceptions to the general provisions applicable to institutions. She felt that such an approach was incongruous and inconsistent "with the limited role that Charter values can play as an interpretative tool."[62]

The majority therefore concluded that, in an action turning on statutory interpretation, the use of the values recognized in the Charter as an interpretative tool has its limits. One should favour the modern method of statutory interpretation and only use the principle of interpretation based on respect for Charter values in cases of genuine ambiguity, "where a statutory provision is subject to differing, but equally plausible, interpretations."[63]

Charron J. explained the reasons for such an approach:

> In the context of this case, resorting to this tool [statutory interpretation based on Charter values] exemplifies how its misuse can effectively pre-empt the judicial review of the constitutional validity of the statutory provision. It risks distorting the Legislature's intent and depriving it of the opportunity to justify any breach, if so found, as a reasonable limit under s. 1 of the Charter.[64]

Consequently, the majority of the Court concluded that the word "institution" did not include municipalities and dismissed the appellants' appeal with costs.

> <u>Dissenting reasons</u>

>> 3. Importance of the legislative context and the presumption of compliance with the *Canadian Charter of Rights and Freedoms*

The dissenting judges, for their part, *per* Bastarache J., felt that the majority of the Court had been too formalistic in its approach. They indicated that the ordinary rules of statutory interpretation should continue to guide the courts, but that the legislative background and the presumption of compliance with the Charter were of particular importance. In their opinion, by adopting the N.B. OLA in 2002, the Legislature was following up on the New Brunswick Court of Appeal's judgment in *Charlebois v. Moncton*,[65] which had concluded that municipalities were subject to constitutional language

59 See for example sections 31 and 32 of the N.B. OLA, which pertain to policing services, and sections 33 and 34, which pertain to health services.

60 Section 37 of the N.B. OLA provides that: "A municipality may, by by-law of its municipal council, declare itself bound by the provisions of this Act and nothing in this Act shall be interpreted so as to limit the authority of municipalities to promote the equality of status and use of English and French."

61 *Charlebois v. Saint John (S.C.C.), supra* note 2 at para. 21.

62 *Ibid.* at para. 19.

63 *Ibid.* at para. 23 (citing Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42 at para. 62).

64 *Charlebois v. Saint John (S.C.C.), ibid.* at para. 24.

65 *Charlebois v. Moncton (City)* (2001), 242 N.B.R. (2d) 259, 2001 NBCA 117 [*Charlebois v. Moncton*].

obligations. Therefore, according to the dissenting judges, it would have been more appropriate for the courts to take a positive stance and see "whether it was necessary to limit the scope of the newly defined term in light of the difficulties posed by the drafting of the OLA."[66]

Bastarache J. indicated that when the Legislature chooses to extend minority rights protection, as it did with the N.B. OLA, the courts should not adopt a restrictive interpretation in order to avoid an inconsistent result. Rather, they should search for "a meaning consistent with the protection of minorities and the achievement of equal rights for the two official languages and language communities that can be reconciled with the wording of the legislation whenever possible."[67] For the dissenting judges, it was therefore necessary to follow the rules of interpretation stated in *Beaulac* and not to dismiss, even in the presence of imperfect drafting, the Legislature's broader intent of subjecting municipalities to the language obligations provided for in legislation designed to promote the equality of official languages and official language communities in New Brunswick.

3.2 Translation of documents when parties use different official languages

Bolduc v. Pozzebon

In this case,[68] the Ontario Superior Court considered the issue of the translation of documents and pleadings when civil parties use different official languages.

The plaintiff, a Francophone, initiated legal proceedings in the Ontario Superior Court in Toronto seeking recognition of an ownership right. She filed her pleadings in French. The defendants and their counsel did not speak French. They asked the Court to order the plaintiff to translate all the documents and pleadings that she had filed in the case.

Wilson J. dismissed the defendants' application. She indicated that the Ontario *Courts of Justice Act*[69] (CJA) does not require documents filed in French to be translated into English. Rather, section 125 of the CJA provides that English and French are the official languages of the Ontario courts. Section 126 provides *inter alia* that a party to a case may file pleadings and other documents drafted in French when the hearing is held in any area named in Schedule II of the Act (the City of Toronto is one such area).

The defendants filed a motion for leave to appeal this judgment in the Divisional Court. They maintained that Wilson J. had erred in her interpretation of sections 125 and 126 of the CJA. They further alleged that sections 125 and 126 of the CJA are unconstitutional, in that they contravene sections 14, 15 and 16 of the Charter.

Carnwath J. of the Divisional Court dismissed the defendants' motion. To begin, he indicated that sections 125 and 126 of the CJA do not require either the Court or the plaintiff to provide an English translation of documents and pleadings filed in French. He also stated that section 14 of the Charter, which guarantees the right to the assistance of an interpreter for parties or witnesses who cannot follow the proceedings, did not impose in this case an obligation to provide the translation requested by the defendants. As for section 15 of the Charter, which grants equality rights, the judge relied on the judgment by the Ontario Divisional Court in *Montfort*,[70] which stated that "s. 15 of the Charter may not be used as a back door to enhance language rights beyond what is specifically provided for elsewhere in the Charter."[71] Finally, the judge dismissed the defendants' argument that sections 125 and 126 of the CJA were contrary to section 16 of the Charter. In so doing, he denied the defendants leave to appeal Wilson J.'s decision.

66 *Charlebois v. Saint John (S.C.C.), supra* note 2 at para. 32.

67 *Ibid.* at para. 38.

68 *Bolduc v. Pozzebon* (June 6, 2005), Toronto 05-CV-289563 PDI, (Ont. S.C.), decision by Wilson J.; *Pozzebon v. Bolduc* (September 21, 2005), Toronto (Ont. Div. Ct.), decision by Carnwath J.

69 R.S.O. 1990, ch. C.43.

70 *Lalonde v. Ontario (Health Services Restructuring Commission)* (1999), 48 O.R. (3d) 50.

71 Cited with permission by the Ontario Court of Appeal in *Lalonde, supra* note 4 at para. 96.

3.3 Holding a bilingual trial when co-accused ask to be tried in different official languages

R. v. Sarrazin

In *Sarrazin*,[72] the Court of Appeal for Ontario had to decide whether sections 530 and 530.1 of the *Criminal Code* allowed it to order a bilingual trial in the context of a joint trial, when the co-accused asked to be tried in different official languages.

The three co-accused for murder in this trial were Francophones. Two of the accused, whose counsel were Anglophone, requested a trial in English, while the third, whose counsel was Francophone, requested a trial in French. The trial judge chose to hold a bilingual trial, at which the Crown addressed the jury in French in its opening statement and in English in its closing address. The judge addressed the Anglophone counsel in English and the Francophone counsel in French, and alternated between the two languages in his communications with the jury. In oral arguments, examinations and other communications, the Anglophone counsel spoke in English while the Francophone counsel spoke in French. Of the 38 witnesses, 29 testified in English and 9 in French. Simultaneous interpretation was available for everyone except the judge and jury.

At the end of the trial, two of the accused were convicted of, among other things, second-degree murder, and the third was convicted of manslaughter. Each filed an appeal against the guilty verdicts, arguing among other things that their language rights had not been respected.

On appeal, the appellants argued that the bilingual trial had infringed upon their right to have their trial conducted in the official language of their choice, given that the judge and prosecutor did not speak the accuseds' language of choice for lengthy intervals. They maintained that the trial judge should have ordered separate trials, in English for the appellants wishing to have a trial in English, and in French for the appellant wishing to have a trial in French. The Ontario Court of Appeal dismissed the appellants' arguments in this regard, ruling instead that the trial judge had not erred in holding a bilingual trial. However, a new trial was ordered on other grounds.

>> 1. Section 530 of the *Criminal Code*

The Court began its analysis by considering the concept of a "bilingual trial," to determine whether sections 530 and 530.1 of the *Criminal Code* permitted a trial to be held where the judge and counsel used both official languages, or simply a trial held in one language before a bilingual judge and jury. It indicated that the concept of a "bilingual trial" meant a trial before a judge and jury who speak English and French, during which the two languages are used interchangeably, depending on who is speaking and the context. Therefore, the judges and prosecutors in a bilingual trial must themselves be bilingual, but others can use the official language of their choice and use translation and interpretation services as needed.

The Court noted that section 530 of the *Criminal Code* provides for three types of trials, a trial before a judge sitting alone or a judge and jury who speak: (a) the official language of the accused, (b) the official language in which the accused can best give testimony, or (c) both official languages, if circumstances warrant. Relying on the Supreme Court's judgment in *Beaulac*,[73] and in particular the Supreme Court's conclusion that section 530.1 applies to bilingual trials,[74] the Court of Appeal considered that the combined effect of these provisions was a trial following a bilingual procedure. Accordingly, the right of the accused to a trial in the official language of his or her choice does not mean that the judge and prosecutor must only use that language if the circumstances require that a bilingual trial be held.

72 *R. v. Sarrazin* (2005), 75 O.R. (3d) 485 (Ont. C.A.) [*Sarrazin*].

73 *Beaulac, supra* note 1.

74 *Ibid.* at para. 49.

>> 2. Whether circumstances required a bilingual trial to be held

The Court noted that the rule of law governing the holding of separate trials in joint venture enterprises or conspiracy cases is well established: it is in the best interest of justice that the persons accused of conspiracy be tried jointly, unless it can be proven that a joint trial would result in an injustice.[75] In support of this rule, the Court mentioned several reasons, including the risk of inconsistent verdicts, savings for the parties concerned and society as a whole, and inconvenience to the witnesses. It is with regard to these principles that the Court considered the appellants' request for separate trials in different official languages.

While recognizing that the language rights provided for in sections 530 and 530.1 of the *Criminal Code* are fundamental, the Court also noted that they are not absolute. Thus, they cannot prevail in every case over the principles applicable to the separation of co-accused. Rather, the Court stated the following:

> . . . the decision whether to grant severance, and separate language trials, is a matter of discretion to be exercised in the circumstances of each case, in accordance with the principles enunciated in *Beaulac* with respect to language rights, and the principles that govern severance with respect to severance.[76]

The Court's analysis of the factors relevant to both language rights and separate trials allowed it to determine that the circumstances at hand warranted a joint trial. Consequently, it concluded that the trial judge had not erred in ordering a bilingual trial. Given that the trial judge's decision was discretionary and deserved great deference, the Court of Appeal dismissed this ground of appeal.

3.4 Language of charge to the jury in a bilingual trial

R. v. Oliynyk

This case[77] raised the question of the language to be used by a judge in his or her charge to the jury in the context of a bilingual trial before the Supreme Court of British Columbia.

Three people were jointly charged with conspiracy to import and traffic in cocaine. Two of the accused and their counsel were unilingual Anglophones, while the third, whose mother tongue was French, requested a trial before a French-speaking judge and jury. The three accused opted for a bilingual trial pursuant to section 530 of the *Criminal Code*. In so doing, the following procedure was considered: if the accused Francophone decided to testify, he could do so in French, while his lawyer, who was bilingual, would have the option of addressing the jury and presenting his arguments in French. The Crown Attorney, the presiding judge and the members of the jury were bilingual. At issue was the language of the judge's charge to the jury.

Counsel for the accused Francophone argued that the charge to the jury had to be entirely in French in order to respect his client's language rights. He maintained that it would be unfair or inappropriate for the charge to be given half in English and half in French, or that the charge be translated. According to him, the accused Francophone had to be able to understand all of the judge's charge to the jury in order for his language rights to be respected. Thus, he maintained that the charge as a whole should be delivered in both languages, although it would not be necessary for both versions to be identical.

For its part, the Crown brought up the risks involved in giving the charge to the jury in both languages, given the complexity of a conspiracy trial and the difficulty of saying exactly the same thing in English and in French. It suggested instead that the judge give the charge in the language in which the evidence had been presented. The charge to the jury would thus be given in both languages, but the same thing would not be repeated each time. An interpreter would be available for the Francophone accused as well as for Anglophone counsel and accused.

75 *Sarrazin, supra* note 72 at para. 59.
76 *Ibid.* at para. 62.
77 *R. v. Oliynyk*, 2006 BCSC 85.

In reply, each of the accused made the argument that his right to a trial in the language of his choice would be infringed upon if he had to hear the judge's charge, in whole or in part, in the official language that was not his own.

MacKenzie J. accepted the Crown's proposition. She noted that the trial was taking place before a bilingual judge and jury in order to avoid, among other things, having the jury hear the charge twice. Relying on the Ontario Court of Appeal's judgment in *Sarrazin*,[78] she indicated that the language rights provided for in sections 530 and 530.1 of the *Criminal Code*, though fundamental, are not absolute, and must be applied in light of other principles, such as those underlying the holding of a joint trial.

Thus, in a bilingual trial such as this one, the judge indicated she had to find a balance between the language rights of the three accused and the interests of the administration of justice. She concluded that the duty of the judge and Crown counsel to speak and understand the language of the accused did not imply exclusive use of that language in the context of a bilingual trial where the co-accused elect to have their trials in different official languages. Furthermore, the fact that Anglophone witnesses gave testimony in English, and Francophone witnesses or other witnesses called by the defence gave testimony in French meant that the jury could evaluate for itself the nuances and subtleties of language that might change the meaning of the words spoken. In fact, this would allow for a better assessment of the credibility of witnesses and a better review of the evidence presented.

For these reasons, MacKenzie J. held that the final charge regarding English testimony would be given in English, and the final charge regarding French testimony would be given in French. The charge to the jury on questions of law would be in both languages, without it being necessary to repeat the same thing in each language. The judge thus dismissed the applications made by the accused.

78 *Sarrazin, supra* note 72. This decision is examined in section 3.3 of this report.

4. LANGUAGE RIGHTS AND SERVICE TO THE PUBLIC

Section 20 of the *Canadian Charter of Rights and Freedoms* (Charter) grants two fundamental rights to members of the public: the right to receive services from and communicate with federal institutions and the institutions of New Brunswick in either official language. While the obligation imposed on New Brunswick applies to all of the province's institutions, wherever they may be, the obligation on federal institutions depends on certain criteria: the communication or service must originate from the head or central office of the institution concerned or any other office located in an area where there is significant demand for the use of English or French, or an office that, because of its nature, is required to provide services in both official languages.

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

The *Official Languages (Communications with and Services to the Public) Regulations* specify the situations in which communications and services must be offered in both official languages, dealing in particular with the concepts of "significant demand" and "nature of the office" used in Part IV of the OLA.

The use of a language by government authorities is an important aspect of protecting the vitality of communities speaking that language. Accordingly, in *Fédération franco-ténoise*, the Court concluded on the basis of the evidence presented that the use of a language in the public sphere, in particular in government communications and services, contributes to the legitimacy of that language and encourages its use by members of the language group.[79]

The principle of active offer is an essential part of the public's right to communicate with government institutions and receive their services. Under that principle, the institution required to offer its services in both official languages must inform all members of the public of their right to communicate and receive services in the official language of their choice. Although active offer is expressly provided for in some language legislation,[80] it is nevertheless an inherent component of the public's right to use the official language of its choice in communications with government institutions, since it offers them a real choice between English and French. As it appears from the two judgments handed down in the period covered by this report, the right to be served in the language of one's choice includes the right to be informed of that choice.[81]

In ruling on the nature of the obligation of institutions to provide services and communications in both official languages, the courts have adopted the concept of the obligation of result. Under this concept, the standard imposed on institutions is to provide a specific, given result, in other words, a service or communication of equal quality in the official language chosen by the member of the public, and not simply to take reasonable measures to fulfill their obligations.

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

79 *FFT, supra* note 3 at para. 601.

80 See for example section 28 of the OLA and sections 28.1 and 31 of the N.B. OLA.

81 See, among others, *FFT, supra* note 3 and *R. v. McGraw*, 2006 NBQB 216 [*McGraw*].

4.1 Constitutional language obligations applicable to the Royal Canadian Mounted Police when acting as provincial police in New Brunswick

Canada v. Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc.

In *Société des Acadiens et Acadiennes*,[82] the Federal Court and the Federal Court of Appeal ruled on the constitutional language obligations of the Royal Canadian Mounted Police (RCMP) when providing provincial policing services in New Brunswick.

The plaintiff, Ms. Paulin, had filed a complaint with the federal Office of the Commissioner of Official Languages (OCOL) because the RCMP officer from the Woodstock detachment who had stopped her for speeding on the Trans-Canada Highway in New Brunswick was unable to provide her with service in French and did not call for a bilingual colleague. In its investigation report, OCOL concluded that the complaint was justified.

Ms. Paulin subsequently filed an action in the Federal Court pursuant to the Charter. This action concerned the services offered by the RCMP Woodstock detachment on the Trans-Canada Highway in New Brunswick, particularly the obligations provided for in paragraph 6(1)(d) of the *Official Languages (Communications with and Services to the Public) Regulations* (Regulations). At the same time, the *Société des Acadiens et Acadiennes du Nouveau-Brunswick* (SAANB) filed a court action against the RCMP arguing that any review of the functions of RCMP positions in New Brunswick to determine their language requirements should take into account the unique characteristics of New Brunswick in matters of language, and in particular section 16.1 and subsections 16(2) and in 20(2) of the Charter. The two cases were joined for hearing.

The plaintiffs argued in court that the provisions of the Charter that are of general application in the territory of New Brunswick, namely section 16.1 and subsections 16(2) and 20(2), as well as the provisions of the New Brunswick *Official Languages Act* (N.B. OLA), apply to the RCMP, as it is acting on behalf of the province and is therefore required to observe the same constitutional obligations.

In its defence, the RCMP argued that performing policing services in New Brunswick under a contract with the province does not alter its status as a federal institution. Consequently, it maintained that it is subject to the same constitutional and legislative provisions as other federal institutions, whether in New Brunswick or not.

Federal Court judgment

Gauthier J. of the Federal Court first considered the question of whether the RCMP should observe the constitutional language obligations specific to New Brunswick, namely the obligations provided for in subsection 20(2) of the Charter for the province's institutions. The judge answered this question in the affirmative: in her opinion, although the RCMP is a federal institution, it is subject to the control of the provincial Attorney General or Minister responsible for policing services when it provides provincial policing services under its contract. Furthermore, in issuing a ticket to Ms. Paulin pursuant to the New Brunswick *Motor Vehicle Act*,[83] the RCMP officer was performing a provincial government function. Accordingly, when the RCMP is acting in accordance with provincial legislation, it has to be bound by the specific constitutional obligations of the province provided for in subsection 20(2) of the Charter.

In regards to the second question, whether a federal institution such as the RCMP should take subsection 16.1(1) into account when interpreting the concept of "significant demand" found in paragraph 20(1)(a) of the Charter, in section 22 of the federal OLA and in the Regulations, the judge concluded that it was for the Governor in Council to enact regulations into law that comply with all constitutional language obligations. As long as the Regulations are valid, it is not up to the RCMP to interpret them, but rather enforce them. Given the specificity of the Regulations, the RCMP has no discretion, even though there is nothing to prevent it from going beyond its statutory duties if it deems it appropriate.

82 *Société des Acadiens, supra* note 8, rev'g [2006] 1 F.C.R. 490, 2005 FC 1172 (F.C.).

83 *Motor Vehicle Act*, R.S.N.B. 1973, c. M-17.

As to whether paragraph 6(1)(d) of the Regulations imposed an obligation on the RCMP to provide its services in both official languages throughout the territory served by the Woodstock detachment, the judge did not rule on this point, since evidence was not available at the hearing.

In conclusion, the Court noted that subsection 20(2) of the Charter applied to the provincial policing services offered by the RCMP under its agreement with the province of New Brunswick. The RCMP was given a year to meet the language obligations issuing from this declaration.

The Attorney General of Canada appealed the judgment.

Federal Court of Appeal judgment

In a unanimous ruling,[84] the Federal Court of Appeal allowed the appeal and overturned Gauthier J.'s decision.

The primary question before the Court of Appeal was whether the RCMP had a duty to comply with the specific constitutional obligations of the province as set forth in sections 16.1 and subsections 16(2) and 20(2) of the Charter. From the outset, the Federal Court of Appeal noted that this question dealt with the accountability of a third party, in this case the RCMP, for compliance with language obligations imposed by the Charter on its principal, specifically the Government of New Brunswick.

The Court of Appeal unanimously answered this question in the negative. Essentially, it accepted the position of the appellant Attorney General of Canada, who argued that the constitutional language obligations in subsection 20(2) of the Charter applied only to the province of New Brunswick. Consequently, the Court concluded that as a federal institution, the RCMP had to comply with the language obligations imposed on it by the federal OLA and the obligations provided for in subsection 20(1) of the Charter, even when it was acting on behalf of the province.

The Court of Appeal clearly indicated that it is the province that remains responsible for the relevant obligations imposed by subsection 20(2) of the Charter and the N.B. OLA.[85] It emphasized the distinction between the linguistic provisions governing the RCMP as a federal institution and the additional language obligations that the province might impose under a service contract.

Thus, the judgment of the Federal Court of Appeal confirmed that as a federal institution, the RCMP must meet the language obligations imposed on it by subsection 20(1) of the Charter, even when acting as a police force for a province that is not subject to constitutional obligations in official language matters. It also confirmed the Federal Court's decision in the contraventions case,[86] holding that the person on whom constitutional obligations are imposed cannot avoid them by delegating them to others.

The secondary question before the Court was to determine whether the Federal Court was the appropriate forum to hear the case. As indicated by the Court of Appeal, the misidentification of the party owing the obligations had led to the misidentification of the Court competent to hear the resulting proceeding. As the case had to do with constitutional language obligations in New Brunswick, the Court of Appeal found that the Court of Queen's Bench of that province should actually have heard the case.

The Supreme Court of Canada has agreed to hear the appeal of this judgment.

84 *Société des Acadiens, supra* note 8.
85 *Ibid.* at para. 2.
86 *Contraventions case, supra* note 41.

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

R. v. McGraw

In this case,[87] the New Brunswick Court of Queen's Bench ruled on the principle of the active offer of service stated in section 31 of the N.B. OLA.

Mr. McGraw was stopped by an RCMP officer in the village of Tracadie-Sheila, a predominantly Francophone community on the Acadian Peninsula, and received two tickets pursuant to the *Motor Vehicle Act*.[88] Both tickets were written in French and the communication between the RCMP officer and Mr. McGraw was entirely in French.

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

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

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

On appeal, McIntyre J. began his analysis by mentioning that the N.B. OLA was enacted in 2002 to advance institutional bilingualism in the province. He noted the comments by the Supreme Court in *Charlebois*[89] that "the OLA is the province's legislative response to its obligations under the *Canadian Charter of Rights and Freedoms* in relation to institutional bilingualism in New Brunswick".[90] In examining subsection 31(1) of the Act, McIntyre J. noted that this provision created a dual right, namely (1) to communicate with and receive the services of a police officer in the official language of choice, and (2) to be informed of that choice. In his opinion, the right to be informed of the existence of the right to choose the language of communication and service is essential in order to exercise that right.

The judge went on to note that the right to language choice belongs to the member of the public and not the police officer. Thus, even if the member of the public responds in the language in which the communication was initiated, the police officer cannot assume that the language in which the response was made reflects the individual's choice. Consequently, McIntyre J. concluded that there had been an infringement of the accused's right to be informed of his choice of language under subsection 31(1) of the N.B. OLA. He therefore overturned the Provincial Court's decision.

Having then to determine the appropriate remedy for a breach of section 31 of the N.B. OLA, the Court indicated that under subsection 116(1) of the *Provincial Offences Procedure Act*,[91] subsection 686(2) of the *Criminal Code*[92] applied. This *Criminal Code* provision allows a court of appeal to quash a conviction and direct a judgment or verdict of acquittal to be entered, or order a new trial.

Given the distinct status of language rights in New Brunswick, the principle of substantive equality and the preamble to the N.B. OLA, McIntyre J. found that the only effective remedy was to order that the information be quashed and to declare the charge a nullity. Accordingly, the guilty verdict was quashed and Mr. McGraw was acquitted.

87 *McGraw, supra* note 81.

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

89 *Charlebois v. Saint John (S.C.C.), supra* note 2. Decision examined in section 3.1 of this report.

90 *Ibid.* at para. 13.

91 S.N.B. 1987 c. P-22.1.

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

4.3 Services offered by Air Canada subsidiaries

Thibodeau v. Air Canada

This judgment[93] deals with the language obligations to which Air Canada is subject pursuant to the *Air Canada Public Participation Act*[94] (ACPPA). It is in accordance with this Act that Air Canada is subject to the federal OLA and is required to ensure that its subsidiaries offer their services to and communicate with the public in both official languages.

In this case, the appellant, Mr. Thibodeau, had not received service in French on board a Montréal-Ottawa Air Ontario flight, even though there was significant demand for French on board the flight. He subsequently filed a complaint with OCOL, which concluded in its investigation report that Air Canada and its subsidiary Air Ontario had not fulfilled their obligations under subsection 10(2) of the ACPPA and Part IV of the OLA.

Mr. Thibodeau then filed an action against Air Canada and its subsidiary, Air Canada Regional Inc., in the Federal Court pursuant to section 77 of the OLA. He sought several remedies, including damages, a letter of apology from Air Canada, a declaration that Air Canada had not respected its language obligations and a declaration that Air Canada's quasi-constitutional language obligations had priority over the provisions of collective agreements governing employer-employee relations.

In a judgment rendered August 24, 2005, Beaudry J. of the Federal Court allowed Mr. Thibodeau's action against Air Canada.

>> 1. Nature of the obligation: obligation of means or obligation of result?

The judge concluded that the obligation imposed on Air Canada by section 10 of the ACPPA and Part IV of the OLA is an obligation of result and not an obligation of means as claimed by Air Canada. To arrive at this conclusion, he conducted an analysis of the standard meaning of the words used in subsection 10(2) of the ACPPA,[95] the background to the ACPPA and the intention of Parliament in adopting the OLA and the ACPPA.

In the judge's view, the standard meaning of the words used in section 10 of the ACPPA suggests that when the legislator used the French phrase "est tenu de veiller à," it was attempting to translate the meaning of the English version ("has the duty to ensure"), which is "wording . . . stronger than the language in the French version."[96] The judge also dismissed Air Canada's claims that the provisions of the ACPPA have to be interpreted in light of the *Canadian Aviation Regulations*[97] that, unlike the ACPPA, clearly provide for an obligation of result. The judge noted that any interpretation of section 10 of the ACPPA should instead be made in light of the OLA, which is the quasi-constitutional statute referred to by the ACPPA. In so doing, Beaudry J. confirmed that sections 23 and 25 of the OLA imposed obligations of result on the institutions concerned.

In the judge's opinion, an obligation of result arises when the party owing the duty (in this case, Air Canada) is required to provide a specific and determined result:

> The obligation of result, on the contrary, suffices to impose a presumption of fault on the respondent. Accordingly, in order to prove it is not liable, the respondent must establish that the non-performance or harm results from a *force majeure*. Absence of fault is not sufficient to exonerate it.[98]

93 *Thibodeau, supra* note 6.

94 R.S., 1985, c. 35 (4th Supp.)

95 This provision provides that "if air services, including incidental services, are provided or made available by a subsidiary of the Corporation, the Corporation has the duty to ensure that any of the subsidiary's customers can communicate with the subsidiary in respect of those services, and obtain those services from the subsidiary, in either official language in any case where those services, if provided by the Corporation, would be required under Part IV of the *Official Languages Act* to be provided in either official language" ("la Société est tenue de veiller à ce que les services aériens, y compris les services connexes, offerts par ses filiales à leurs clients le soient, et à ce que ces clients puissent communiquer avec celles-ci relativement à ces services, dans l'une ou l'autre des langues officielles dans le cas où, offrant elle-même les services, elle serait tenue, au titre de la partie IV de la *Loi sur les langues officielles*, à une telle obligation").

96 *Thibodeau, supra* note 6 at para. 38.

97 SOR/96-433.

98 *Thibodeau, supra* note 6 at para. 35.

The evidence on record established that Air Canada had not provided service in French on August 14, 2000 on the flight in question. As Air Canada had presented no evidence of *force majeure* preventing it from fulfilling its statutory obligation, the judge dismissed its arguments that it should avoid liability in view of the steps it had taken to comply with the OLA. However, these steps were considered relevant in determining the relief to be granted.

>> 2. Whether provisions of a collective agreement take precedence over language obligations

In response to Air Canada's claims that its subsidiaries were bound by the provisions of their employees' collective agreements and thus unable to fulfill their language obligations, the judge concluded that section 82 of the OLA provides that Parts I to IV of the OLA prevail over provisions that are inconsistent with any other federal legislation, including the *Canada Labour Code*[99] (CLC). Thus, "[t]he collective agreements under the aegis of the CLC must not be incompatible with the implementation of the OLA's purpose. If some incompatibility develops, the OLA will prevail over the provisions of the collective agreement."[100] Based on this principle, the judge concluded that Air Canada should make the necessary arrangements with its unions to comply with the OLA.

>> 3. Admissibility as evidence of the OCOL investigation report and reports from the Standing Joint Committee on Official Languages

The defendants raised a number of questions relating to the admissibility of the evidence provided by the applicant. Firstly, the judge held that Standing Joint Committee on Official Languages reports could be admitted as evidence to assist the judge in determining appropriate relief, insofar as they paint a picture of the problems existing when the reports were prepared. Secondly, the judge ruled that an affidavit filed by an OCOL employee in another action (which was discontinued) without the exhibits being attached was not admissible as evidence. Finally, the judge reiterated, as in the recent ruling of the Federal Court of Appeal in *Forum des maires*,[101] that the investigation report by OCOL was admissible as evidence, but that the conclusions stated in the report were not binding on the Court.

>> 4. Whether Air Canada is subject to the provisions of the *Canadian Charter of Rights and Freedoms*

The applicant had argued that the Charter applies to the activities of Air Canada and its subsidiaries. Given that Air Canada's incorporating legislation states that the Corporation is not an agent of the Crown, that Air Canada is now a private company, that it does not exercise a government function and that it does not implement a government policy or program, the judge concluded that Air Canada and its subsidiaries are not subject to the Charter.

>> 5. Just and appropriate remedy in the circumstances

In a separate judgment on remedies,[102] Beaudry J. relied on the principles stated by the Supreme Court of Canada in *Doucet-Boudreau*[103] for determining the just and appropriate remedy in the circumstances.

With regard to the declaratory orders, he held that the order of August 24, 2005 sufficed to establish that Air Canada was subject to the OLA, that Air Canada had not fulfilled its language obligations toward Mr. Thibodeau, that the collective agreements signed by Air Canada must not be inconsistent with the implementation of the purpose of the OLA and that the OLA takes precedence over collective agreements when they are incompatible with the OLA.

As for the mandatory order sought by Mr. Thibodeau requiring Air Canada to take certain steps to comply with the OLA within six months, the judge held that such an order was not justified in this case since no proof of a systemic breach had been presented. The judge also took into account that the

99 R.S., 1985, c. L-2.

100 *Thibodeau, supra* note 6 at para. 97.

101 *Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency)*, [2004] 4 F.C.R. 276, 2004 FCA 263 at para. 21 [*Forum des maires*].

102 *Thibodeau v. Air Canada*, 2005 CF 1621 (December 1, 2005).

103 *Doucet-Boudreau, supra* note 18. This decision was reported in *Language Rights 2003-2004, supra* note 27.

seriousness of the breaches in the case at hand could be distinguished from other judicial proceedings in which such orders were granted.[104]

The judge concluded that the application for damages made by the applicant had already been settled in decisions that were part of the claims process during the restructuring of Air Canada in Ontario Superior Court.

With regard to the letter of apology sought by the applicant, the judge ruled that such a letter was justified given the circumstances and the persistence Mr. Thibodeau had shown in order to obtain judicial recognition that his language rights had been infringed upon. However, he deemed that the circumstances did not justify displaying the letter at all of its customer service counters.

The judge refused to award the applicant costs as he was representing himself, requested no assistance from counsel and was not a lawyer himself. However, he held that the applicant was nevertheless entitled to compensation for the time spent ensuring his language rights were respected. He thus awarded Mr. Thibodeau a sum of money for the expenses he had incurred appearing in court and to compensate him for the time spent preparing the pleadings and reviewing the legislation and case law submitted by both himself and the other parties.

It should be noted that this judgment was appealed by Air Canada and is currently before the Federal Court of Appeal.

4.4 Access to services of equal quality

Desrochers v. Canada (Industry)

The judgments by the Federal Court and the Federal Court of Appeal[105] raise issues regarding the interpretation and implementation of Part IV of the OLA, in particular when an institution delivers one of its programs through a third party.

The applicant, Mr. DesRochers, is president of the Centre d'avancement et de leadership en développement économique communautaire de la Huronie (CALDECH), a non-profit organization whose mission is to ensure greater participation by Francophones in the local economy. In 2000, Mr. DesRochers and CALDECH filed a complaint with OCOL. In the complaint, they alleged that Industry Canada was not providing equal services in English and French with respect to its Community Futures Program. This program, whose purpose is to promote economic development by helping groups improve and diversify their communities, is delivered throughout Canada by local non-profit organizations known as Community Futures Development Corporations (CFDCs), which Industry Canada finances. CFDCs provide strategic community planning services, support to small and medium businesses and access to financing. The CFDC in Penetanguishene, Ontario, serving Mr. DesRochers' and CALDECH's region, is the North Simcoe Community Futures Development Corporation (North Simcoe CFDC).

In its investigation report, OCOL concluded that the complaint was justified, given that the services offered by the North Simcoe CFDC to its French-speaking customers were, in number and quality, far from comparable to the services offered to its English-speaking clients. OCOL also found that Industry Canada had failed to fulfill the federal government's commitment under Part VII of the OLA to support the development of the Francophone community in North Simcoe. Accordingly, it made four recommendations to Industry Canada. It then followed-up on the recommendations to ensure that they had been implemented and found that the Francophone community of North Simcoe was still not receiving equal services with respect to the Community Futures Program.

CALDECH filed an action in Federal Court, seeking a ruling that there had been a breach of Parts IV and VII of the OLA and subsections 16(1) and 20(1) of the Charter, as well as damages.

104 See for example *Doucet v. Canada (F.C.)*, [2005] 1 F.C.R. 671, 2004 FC 1444; *Forum des maires, supra* note 101; *Lavigne v. Canada (Human Resources Development) (T.D.)* [1997] 1 F.C. 305.

105 *Desrochers v. Canada (Industry) (F.C.)*, [2005] 4 F.C.R. 3, 2005 FC 987 [*Desrochers (F.C.)*]; *Desrochers v. Canada (Industry)*, 2006 FCA 374 [*Desrochers (F.C.A.)*], leave to appeal to S.C.C. requested.

Federal Court judgment

Harrington J. dismissed CALDECH's application on the ground that the evidence did not show that there had been a breach of Part IV of the OLA. In his opinion, the "[North Simcoe CFDC] is able to communicate with the public in French and provides (equal) service."[106] Consequently, he did not feel it necessary to consider the question of remedies.

>> 1. Interpretation of the *Official Languages Act*

From the outset, the judge stated that the case did not concern Part VII, but rather Part IV of the OLA. This distinction is important because the investigation reports by OCOL had dealt with Parts IV and VII.

As for the method of interpretation to be applied, the judge indicated that all statutes are subject to the modern standard of statutory interpretation. However, he added that the quasi-constitutional status of the OLA meant that it must be interpreted in a manner that gives particular consideration to unwritten constitutional principles and the history of English- and French-speaking minorities.[107]

>> 2. Application of the *Official Languages Act*

The Attorney General of Canada argued that the situation at hand did not fall within the scope of Part IV of the OLA since Industry Canada was not directly providing services to the public, nor was it dealing directly with the beneficiaries of the Community Futures Program. For their part, the applicants relied on section 25 of the OLA, which imposes on federal institutions a duty to ensure that services offered to the public by third parties on their behalf are available in both languages. The judge accordingly considered the meaning of the expression "on its behalf" used in section 25 of the OLA.

In his analysis, the judge relied on the Supreme Court of Canada's judgment in *Eldridge v. British Columbia*,[108] in which the Court had concluded that certain private organizations could be part of the "government" and be subject to the Charter when they exercised delegated government powers or were responsible for the implementation of government policy. At the end of his analysis, the judge concluded that the North Simcoe CFDC "is implementing a specific governmental policy or program, the Community Futures Program". Accordingly, he held that Industry Canada had a duty to ensure that the North Simcoe CFDC provided equal services in both official languages, as if it was providing these services itself.

Industry Canada claimed that it discharged its responsibility under the Treasury Board's policy on grants and contributions.[109] It had included a language clause in the financing agreement dealing with the provision of services and communications in both official languages. The Court held that this could not replace its obligations under the OLA:

> A constitutional right cannot be reduced to what could best be charitably described as a contractual stipulation for the benefit of a third party. [...] Put another way, a federal institution cannot contract out of its Charter and official language obligations.[110]

>> 3. Right of the North Simcoe Francophone minority to services of equal quality

To determine whether Industry Canada had discharged its obligations under section 25 of the OLA, the judge examined the factual situation as it existed at the time the action was filed. He examined three particular incidents: telephone service, a meeting with the Director General and a series of public breakfast meetings, which all took place in English only. However, he found that the evidence was not sufficient to conclude there had been a breach of Part IV of the OLA or of the Charter.

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106 *Desrochers* (*F.C.*), *ibid.* at para. 73.

107 *Ibid.* at para. 21.

108 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

109 Treasury Board Policy on Grants and Contributions – Official Languages (online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/OffLang/CHAP1_4_e.asp>).

110 *Desrochers (F.C.), supra* note 105 at para. 42.

Federal Court of Appeal judgment

The Federal Court of Appeal allowed the appeal by Mr. DesRochers and CALDECH.[111] It reversed the trial judge's decision on the basis that the judge had erred in considering the factual situation that existed at the time the action was filed in 2004, rather than at the time the complaint was made in 2000. While concluding that Industry Canada had not met its language obligations in the provision of services at the time the complaint was filed, the Court of Appeal nevertheless found that the situation had subsequently been corrected and that there was no need to award the relief sought by the appellants.

>> 1. Application of section 25 of the *Official Languages Act* to the North Simcoe CFDC

The issue to be determined was whether the North Simcoe CFDC was acting on behalf of Industry Canada within the meaning of section 25 of the OLA. On this point, the Court first noted that the phrase "on behalf of" meant acting for a person or for the benefit of that person. It further considered that a third party did not need prior authorization from a federal institution to act on its behalf: rather, a third party may act in concert or partnership with the institution and exercise the powers delegated to it, without having obtained prior authorization. It therefore set out the following criteria for determining whether a third party is acting on behalf of a federal institution within the meaning of section 25 of the OLA:

> . . . the issue is whether, given the facts and circumstances of the case, the third party is providing the services of a federal institution or a federal government program with the accreditation, agreement, confirmation, consent, acceptance or approval of the institution or the government.[112]

After examining the case at bar, the Court held that the Community Futures Development Program was an Industry Canada program, and accordingly, that the North Simcoe CFDC was acting on the government's behalf in establishing and implementing the Program. It dismissed the respondents' argument that the Program was not a government program and concluded that the institution was offering more than mere financial support to the North Simcoe CFDC. It based its conclusion on the control exercised by the Department, particularly over the definition, nature and scope of the Program; the manner in which services were provided; North Simcoe's policies and procedures regarding personnel; the operation of the investment fund; the provision of its small business counselling and assistance services; and the general administration of the Program. Consequently, the Court held that the terms of the agreement concluded between Industry Canada and the North Simcoe CFDC indicated that their relationship went well beyond mere financial support.

>> 2. Principle of substantive equality in communications with the public and in the provision of services by federal institutions

The Court held that the principle of equality "is equality at the level of communication with federal institutions and equality at the level of receipt of services in either language."[113] This means that services must be available in both official languages and communication must also be able to take place in those two languages. However, the Court noted that what was required was "equal linguistic access" to regional economic development services rather than "access to equal regional economic development services."[114] Thus, it explained that the purpose of Part IV was "to help the official language minorities preserve and promote their language and cultural identity by enabling them to have access, in the official language of their choice, to the government services that are available."[115]

The Court concluded that Part IV of the OLA did not give the linguistic minority a right to be consulted or participate in the development of programs, though it added that it would be strongly desirable. It agreed with the argument that when establishing services, federal institutions should take into account the particular needs and culture of minority communities. However, this is not a requirement of Part IV of the OLA. At the most, this could be a requirement under the

111 *Desrochers* (*F.C.A.*), *supra* note 105.
112 *Ibid.* at para. 51.
113 *Ibid.* at para. 33.
114 *Ibid.*
115 *Ibid.* at para. 41.

Department of Industry Act.[116] According to the Court, Part IV of the OLA simply provided for a right to receive services in either official language. In doing so, it made the distinction between the case at bar and *Beaulac*, which mentions "equal access to services of equal quality for members of both official language communities in Canada"[117] on the grounds that *Beaulac* dealt with the "absolute right" of the accused to a trial in the official language of his or her choice.[118]

>> 3. Date at which the alleged breaches of the *Official Languages Act* should be assessed

It was on this point that the Court of Appeal's judgment differed from Harrington J.'s decision at trial. While the latter had concluded that the date the proceedings were filed on in October 2004 was the relevant date in determining whether there had been a breach of the OLA, the Court of Appeal instead relied on the judgment in *Forum des maires*,[119] according to which the relevant facts for determining whether there had been a breach of the OLA were those existing at the time the complaint was filed with OCOL, in March 2000. The Court of Appeal found that if the trial judge had chosen this date as the relevant one for examining the violations of the OLA, he would have allowed the appellants' action, since it was clear that at that time the services provided by the North Simcoe CFDC on behalf of Industry Canada were not offered in both official languages.

>> 4. Just and appropriate remedy in the circumstances and entitlement to costs

On the question of remedies, the Court of Appeal affirmed the trial judge's conclusion that any breach of the OLA had ceased by the time the action was filed and when the action was heard, as a result of remedial provisions made to the services offered by the North Simcoe CFDC. The trial judge had held that none of the relief sought by the appellants was available to them, except for costs, which he chose not to award.

However, the Court of Appeal concluded that the appellants should be entitled to costs, given that their application was valid at the time the complaint was filed with OCOL and that they had prevailed on the issue of the application of section 25 of the OLA.

In short, the Court concluded that the services provided by the North Simcoe CFDC were in fact in both official languages. It did not accept the argument by the appellants and the intervener that the services offered should take into account the specific needs of the Francophone community in order to respect the standard of substantive equality.

It should be noted that leave to appeal this decision to the Supreme Court of Canada has been filed.[120]

116 *Department of Industry Act, S.C.*, 1995, c.1.
117 *Beaulac, supra* note 1 at para. 22.
118 *Desrochers (F.C.A.), supra* note 105 at para. 39.
119 *Forum des maires, supra* note 101.
120 Court file no. 31815.

4.5 Language rights in the Northwest Territories

Fédération franco-ténoise v. Attorney General of Canada

In this case,[121] the Supreme Court of the Northwest Territories was asked to rule on the nature and scope of the language obligations of the Government of the Northwest Territories (GNWT) and the federal government in the Northwest Territories (N.W.T.).

The *Fédération franco-ténoise*, the Éditions franco-ténoises and others filed an action in the Supreme Court of the N.W.T. against the GNWT and the Government of Canada seeking general, special and punitive or exemplary damages resulting from the lack of services in French.

The action against the GNWT sought recognition that its linguistic responsibilities are subject to sections 16 and 20 of the Charter on account of its constitutional status as a subordinate or delegate of the Government of Canada, and that the language provisions introduced by the GNWT are not equivalent to the language regime adopted by the Government of Canada, which constitutes a breach of sections 16, 18 and 20 of the Charter.

The action against the Government of Canada sought (1) recognition of the Government of Canada's linguistic responsibilities in the N.W.T.; (2) a declaratory judgment that the Government of Canada had abdicated its ultimate responsibility for guaranteeing the level of communications and government services available in French in the N.W.T. and that it failed to fulfill its obligations imposed by sections 16, 18 and 20 of the Charter, the unwritten principle of respect for and protection of minority rights, and the obligation imposed on it by section 41 of the OLA.

In its defence, the GNWT denied any fault or accusation of bad faith. It also claimed that it did not have to comply with sections 16 to 20 of the Charter and denied having acted contrary to the Charter.

For its part, the Government of Canada argued that the GNWT is a government that is "responsible, independent and distinct from the federal government," whose status is similar to that of a province. Consequently, the Government of Canada argued that it had entirely discharged its obligations to the Francophone minority by signing agreements with the GNWT to provide ongoing financing of the provision of services in French. The Government of Canada felt that the GNWT had to assume its own obligations in this respect.

The trial was held in Yellowknife in the fall of 2005. The Court heard 51 witnesses during a hearing that lasted 33 days. Moreau J. handed down her judgment in the spring of 2006. Essentially, she concluded that the GNWT had not fulfilled its obligations under the territorial language legislation. Accordingly, she found it was unnecessary to rule on the application of the Charter to the GNWT and dismissed the plaintiffs' action against the Government of Canada.

>> 1. Historical and political background of the Northwest Territories *Official Languages Act*

After reviewing the historical background of language rights in the N.W.T., the Court noted that the Northwest Territories *Official Languages Act* [122] (N.W.T. OLA) "is the result of a delicate political compromise," since

> (i) the legislation was adopted to resolve uncertainty surrounding the status of official bilingualism in the N.W.T.;
>
> (ii) its background attested to the federal government's commitment to promoting respect for official language rights throughout the country;
>
> (iii) through its entrenchment, its provisions were sheltered from unilateral attack by a majority in the N.W.T. Legislative Assembly;
>
> (iv) its adoption as law respected local concerns about the legislative autonomy of the N.W.T.; and
>
> (v) the N.W.T. used it as an opportunity to preserve and promote Aboriginal languages through territorial legislative measures and a federal funding commitment.[123]

121 *FFT, supra* note 3.

122 Northwest Territories *Official Languages Act*, R.S.N.W.T. 1988, c. O-1 [N.W.T. OLA].

123 *FFT, supra* note 3 at para. 94.

The Court proceeded with an analysis of the demographic, geographic and social context of the N.W.T. OLA and of its philosophical and legal context. Then, taking all these factors into account, it reviewed the fundamental principles for interpreting language rights.

>> 2. Principles of interpretation applied by the Court

In its analysis, the Court observed the similarity between the N.W.T. OLA provisions and the corresponding provisions of the Charter as well as the fundamental nature of the language rights it protects. Noting that the N.W.T. OLA "forms part of the privileged category of quasi-constitutional legislation",[124] Moreau J. set out the principles that should be used in analysing the Act:

> In my view, the OLA N.W.T. must be interpreted to recognize:
>
> (i) the underlying principles of the Constitution, in particular federalism and the protection of minorities;
>
> (ii) its remedial aspect, in light of the historic context of institutional unilingualism that persisted in the N.W.T. for over seventy years and in light of the federal bilingualism program at the national level reflected in the language provisions of the Charter; and
>
> (iii) the statement in para. 25 of *Beaulac* that language rights be "in all cases interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada" and in light of the importance of language rights as "a fundamental tool for the preservation and protection of official language communities where they do apply."[125]

>> 3. Nature of the obligations of the Northwest Territories *Official Languages Act*

Another question raised at the trial was that of the nature of government obligations in matters of official languages. The Court accepted the argument made by the Commissioner of Official Languages that the obligations deriving from the N.W.T. OLA are obligations of result, that is, an obligation to achieve a specific result, namely the substantive equality of status and use of the language concerned. It came to this conclusion by taking several factors into account, including the quasi-constitutional nature of the rights guaranteed by the N.W.T. OLA, the modern method of interpreting language rights, the need for positive action on the government's part to give effect to these rights and the principle of equality underlying the provisions of the N.W.T. OLA. In so doing, the Court dismissed the argument by the territorial defendants, who maintained that the standard imposed on them concerning the provision of French-language services and communications "is that of good faith and reasonableness."[126]

Although they enjoy a degree of discretion in choosing the means taken to meet their obligations of result, the Court indicated that, in order to fulfill those obligations, the territorial defendants must satisfy the requirements of substantive equality. Consequently, in order to demonstrate that it had met its obligations under the N.W.T. OLA, the GNWT could not simply show that it had "acted in good faith" or "taken reasonable steps."

>> 4. Evaluation of allegations and breaches established by the evidence

After reviewing the many allegations made by the plaintiffs and the evidence presented in support of them, Moreau J. noted that the breaches established by the evidence were not isolated or exceptional. Rather, they indicated "the existence of a serious and widespread problem in the N.W.T. concerning the implementation of the rights in question."[127] In view of the nature, diversity and seriousness of the breaches established by the evidence, the Court concluded that they reflected a problem with the implementation of language rights in the N.W.T., a problem that, in its view, could not be resolved by isolated remedial measures dealing only with the particular, alleged cases.

>> 5. Active offer as an inherent component of the right to services and communications in the language of choice

During the trial, one of the issues was whether the GNWT had an obligation to actively offer its services in both official languages, since the N.W.T. OLA does not contain an explicit provision stipulating such an obligation. Noting the applicable

124 *Ibid.* at para. 132.
125 *Ibid.*
126 *Ibid.* at para. 144.
127 *Ibid.* at para. 784.

principles of interpretation, in particular the principle of substantive equality, and relying on *Beaulac*, the Court considered "that implicit in language obligations is a duty to supply the means of benefiting from the language right."[128] According to the judge, an active offer is one of those means. Therefore, for the right to use the official language of choice in communicating with the head or central administration of government institutions to be given full effect, individuals must be offered a real choice between English and French.

>> 6. Breaches at the territorial level

As noted above, the plaintiffs brought the action against the GNWT and the federal government. However, the Court found that only the breaches by the territorial government were at the source of the breaches established by the evidence. These breaches did not ensue from the N.W.T. OLA, but rather from a poor understanding of language rights on the part of the people responsible for implementing the N.W.T. OLA, the lack of a general implementation plan and the lack of a regular, well-established procedure for controlling services.

Regarding the plaintiffs' action against the Attorney General of Canada, the Court held that in its opinion it was not necessary to consider the application of the language provisions of the Charter to the GNWT and dismissed the action against the Government of Canada.

>> 7. Just and appropriate remedy in the circumstances

The Court concluded that the alleged breaches were not isolated cases, but instead represented examples of systemic deficiencies. This conclusion underpinned the remedial orders made by the Court. As noted above, it considered that the established breaches were primarily a result of the GNWT's persistent refusal to adopt an overall implementation plan and centralize the application of the N.W.T. OLA.

In support of the range of remedies granted, the Court indicated that taking positive corrective measures was necessary to preserve and promote official language communities. It found that the judicial and executive branches would have to open a dialogue, "the court providing some elements of the solution while granting the executive the necessary flexibility to develop appropriate solutions."[129]

The Court therefore made four declaratory orders, in particular regarding communications and the provision of services in French by government institutions and the N.W.T. Languages Commissioner, the publication of debates in French and the language of job postings and calls for tender by the GNWT and certain other public bodies.

The Court also made six mandatory orders, which included requiring the GNWT to ensure the implementation of the N.W.T. OLA and the drafting of a comprehensive implementation plan in relation to its obligations towards communications and the provision of services by government institutions. Furthermore, the Court recognized the importance of the Francophone community's participation in the planning process and affirmed that this would enable the GNWT to more effectively discharge its responsibilities under the N.W.T. OLA.

It should be noted that the GNWT is appealing this decision to the N.W.T. Court of Appeal. The plaintiffs have also appealed the decision dismissing the action against the Government of Canada.

128 *Ibid.* at para. 693.
129 *Ibid.* at para. 883.

4.6 Language of offence notices in the City of Winnipeg

R. v. Rémillard

The Provincial Court of Manitoba considered the scope of the City of Winnipeg's obligation to issue bilingual offence notices.

The accused had received speeding tickets in Winnipeg through an image capturing system. They challenged the validity of the tickets, given that the information regarding the offences was written on the bilingual forms in English only, which they argued was contrary to Part 9 of the *City of Winnipeg Charter*[130] (Winnipeg Charter) and municipal by-law no. 8154/2002 (By-law). Accordingly, the Court first had to determine whether the tickets sent to the accused were consistent with the City of Winnipeg's language obligations, and secondly, whether the City had taken all reasonable measures to fulfill its language obligations. The Court found in the accuseds' favour: it noted that the City had a duty to provide fully bilingual documents and notices to residents of the Riel district[131] and had not taken the necessary measures to comply with its obligations in these circumstances.

>> 1. Interpretation of statutory framework

The Court first recalled the modern method of interpretation, according to which 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."[132] It then considered the principles of interpretation to be used in language rights matters set out by the Supreme Court in *Beaulac*[133] and noted that the interpretation "must not only remain mindful of the concept of substantive equality, but it must also be compatible 'with the preservation and development of official language communities in Canada.'"[134]

>> 2. Scope of the City of Winnipeg's language obligations

In order to determine the City's language obligations, Joyal J. examined Part 9 of the Winnipeg Charter and the By-law. The Winnipeg Charter provides that documents and notices sent out by the City to residents of the Riel district are to be in both official languages.[135] It also provides that the City is required at all times to have in full force a by-law respecting the implementation of Part 9 of the Winnipeg Charter, which contains a schedule identifying the date after which each service described in the By-law will be provided in both official languages at an office also designated in the By-law.[136]

The Court found that two of the By-law's main objectives provided for standardization in the delivery of municipal services to the Riel residents in French. In view of the principle of substantive equality, standardization means that residents of the designated area "have a right to not only a predictable and standardized service, but also a service which [...] is indistinguishable from that which Anglophone residents receive."[137] In short, the Court was of the view that the residents of Riel were entitled to services in French that were as readily accessible as and of a comparable quality to those offered in English. After reviewing the facts, it concluded that by not providing the accused with a fully translated offence notice, the City was offering an inferior service to its Francophone residents, both in terms of quality and accessibility.

In response to the Crown's argument that the duty to provide fully bilingual documents might infringe on the right of a peace officer to swear offence notices or other information in the official language of his or her choice, the Court noted that peace officers are free to draft and swear documents in the language of their choice, so long as the documents are later translated. The creation of a bilingual document through translation does not infringe upon the officer's right to use the official language of his or her choice.

130 *City of Winnipeg Charter*, S.M. 2002, c. 39.
131 City of Winnipeg ward where the By-Law applies.
132 *R. v. Rémillard*, [2005] M.J. No. 467 (QL) at para. 39 [*Rémillard*].
133 *Beaulac, supra* note 1.
134 *Rémillard, supra* note 132 at para. 42.
135 *City of Winnipeg Charter, supra* note 130, s. 456(1). Under subsection 451(1), "designated area" means the area of the Riel Community, the area in which all of the accused in this case reside.
136 *Ibid.* s. 460(1).
137 *Rémillard, supra* note 132 at para. 58.

In so doing, the Court concluded that the offence notices sent to the accused did not fulfill the City's obligations to send the residents of Riel fully bilingual documents and notices.

>> 3. Measures taken by the City to comply with its language obligations

Under subsection 452(3) of the Winnipeg Charter, the City's language obligations are subject "to such limitations as circumstances make reasonable and necessary, if the city has taken all reasonable measures to comply with this Part." Based on this provision, the Crown argued that it had made considerable efforts to translate the offence notices. However, in reviewing the evidence, the judge found that the Crown did not justify its use of the current system, which does not allow fully bilingual documents to be provided. Also, the Crown did not show that it is impossible or difficult to change the system, nor did it establish that measures had been taken to improve the coordination of provincial services and the City's initiatives to provide bilingual documents. Consequently, the Court came to the conclusion that the City had not made the necessary effort under the circumstances to fulfill its language obligations, adding that the measures to be taken were not unreasonable.

>> 4. Court's jurisdiction to grant a remedy

On this point, the Court accepted the accuseds' argument that it had jurisdiction to grant a remedy. The fact that subsection 452(3) was included in the Winnipeg Charter indicated that the City could be called on to defend the reasonable character of its efforts to comply with its language obligations. Thus, contrary to what the Crown had argued, filing a complaint with the Ombudsman is not the only possible recourse for allegations of the City's failure to observe the Winnipeg Charter or by-laws.

Since the City failed to fulfill its obligation to provide fully bilingual offence notices, the Court considered that they contained a formal defect. Joyal J. consequently quashed the offence notices and dismissed the charges against the accused.

This judgment is currently on appeal before the Manitoba Court of Appeal.

4.7 Bilingualism in the City of Ottawa

Canadians for Language Fairness v. Ottawa (City)

In this case,[138] the Ontario Superior Court considered the legality and constitutionality of the City of Ottawa's policy and municipal by-law on bilingualism.

The applicant, Canadians for Language Fairness, challenged the legality and constitutionality of municipal by-law 2001-170 (By-law) adopted by the City of Ottawa and the City of Ottawa's Bilingualism Policy (Policy). It sought a ruling that the By-law and the Policy were *ultra vires*, or outside the powers of the City, and that the By-law was contrary to the freedom of expression guaranteed in subsection 2(*b*) of the Charter.

According to the By-law, the citizens of Ottawa have the right to communicate with and receive services from the City in the official language of their choice in accordance with the Policy. The Policy provides, among other things, that members of the City's work units offering service to employees or the public should be able to communicate in both official languages at all times. This requires, among other things, that senior management positions be designated bilingual.

In the Ontario Superior Court, the applicant argued that the *French Language Services Act*[139] (FLSA) of Ontario did not authorize the City of Ottawa to adopt the By-law. It further argued that the City had exceeded the jurisdiction conferred on it by the FLSA in adopting a policy requiring all City managers

138 *Canadians for Language Fairness v. Ottawa (City)* [2006] O.J. No. 3969 (QL) [*Canadians for Language Fairness*].
139 *French Language Services Act*, R.S.O. 1990, chap. F.32.

to be bilingual. Further, the applicant maintained that the By-law and the Policy "are discriminatory . . . and they arbitrarily permit designation of various employment positions within the City as bilingual with no limit or regard to the rights of the majority."[140] In its opinion, the process by which positions were designated bilingual was unfair.

The City of Ottawa, for its part, argued that the By-law and Policy were valid since they had been adopted within the scope of its powers and were authorized by several statutes. It also relied on various pieces of evidence dealing with principles of language rights and the history of bilingualism in Ottawa as a basis for arguing that the measures taken were valid and fair.

In its judgment, the Court upheld the validity of the City of Ottawa's By-law and Policy. In so doing, it dismissed the application.

>> 1. Legality of the By-law and Policy

(i) Limits of the power conferred on the City of Ottawa

On this point, the Court reviewed the case law cited by the applicant and concluded that the City of Ottawa had acted within the limits of the power conferred on it by the province. Basing itself on sections 8 and 9 of the *Municipal Act, 2001*,[141] it considered the modern method of interpretation applied by the Supreme Court of Canada to municipal powers. In accordance with this approach, the general powers conferred on municipalities by the provinces are intended to give them some flexibility in fulfilling their statutory purposes.[142] The Court noted that one of the fundamental characteristics of such powers was the ability of municipalities to develop policies detailing how services would be offered and how their employees would work in both official languages.

(ii) Statistics

The applicant also challenged the definition of "Francophone" used by the City, on the ground that the definition exaggerated the number of Francophone residents. The Court disagreed with the calculation method used by the applicant as well as its argument that unilingual Anglophones were placed at a disadvantage by the Policy. Métivier J. also noted that the policy allowed for the appointment of a unilingual person, based on merit, to one of the positions designated bilingual. She further noted that the implementation of the policy had not prevented unilingual Anglophones from being appointed to senior management positions.

The Court noted that the protection of minority rights, including the protection of French language and culture, was one of the primary objectives of Confederation. Citing the unwritten principle of respect for and protection of minority rights, it held that the majority should not be able to determine the methods used to protect minority rights.

(iii) Purpose of the *French Language Services Act*

While subsequently considering the applicant's argument that the By-law and Policy exceeded the purpose of the FLSA, Métivier J. quickly reviewed the principles for the interpretation of language rights. Relying on the Ontario Court of Appeal's judgment in *Lalonde*,[143] she concluded that "the purpose of the FLSA is to promote the use of French and English, and to advance the equalization of status or use of English and French while offering services in French and thus protecting the rights of the minority Francophone population in Ontario."[144] She added that the By-law served that purpose.

(iv) Language as a work skill

The judge confirmed that the language proficiency required for positions designated bilingual was just one of the skills necessary to perform employment-related duties. Under the Policy, the services offered by the City in various places would vary, the designations would be different for each position and these designations would reflect a variety of needs. In short, the designation process was based on the real needs of each position, and language skills were thus an integral part of the skills required for each position.

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140 *Canadians for Language Fairness, supra* note 138 at para. 29.

141 *Municipal Act*, 2001, S.O. 2001, c. 25.

142 *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19.

143 *Lalonde, supra* note 4.

144 *Canadians for Language Fairness, supra* note 138 at para. 92.

The judge noted that all necessary measures have been taken to protect unilingual employees by only designating some positions as bilingual and by applying the merit principle so that the best candidate could obtain a position on condition that he or she learn the other official language. This condition, she explained, is "a reasonable cost in the circumstances."[145]

>> 2. Constitutionality of the By-law and Policy

The applicant had also argued in court that the By-law and Policy infringed on the freedom of expression of unilingual Anglophones and were discriminatory. When dismissing this argument, the Court noted that no evidence had been submitted to support this allegation, except for census data indicating that Anglophones were a majority of the City's population. Noting that the By-law and Policy had been established to ensure observance of the language rights of the City's inhabitants and that the necessary steps had been taken to protect unilingual employees, the Court concluded there had been no infringement of the Charter. It therefore confirmed the constitutionality of the disputed measures.

145 *Ibid.* at para. 105.

5. ACTIONS PROVIDED FOR BY FEDERAL AND PROVINCIAL OFFICIAL LANGUAGES LEGISLATION

Several means exist for applying to the courts to ensure that government institutions fulfill the language obligations imposed on them by the *Canadian Charter of Rights and Freedoms* (Charter) and various other statutes and regulations. Subsection 24(1) of the Charter and certain provisions of federal and provincial legislation provide a right to action for persons who consider that their language rights have not been respected. In some circumstances, it is also possible to ask a court to undertake a judicial review of a ministerial or government decision when it infringes on the language rights of official language minorities. Both court actions and applications for judicial review have proven to be an effective means for enforcing and implementing language rights.

The judgments handed down on the issue of actions in the period covered by this report were primarily concerned with actions available under the federal *Official Languages Act* (OLA) and the New Brunswick *Official Languages Act* (N.B. OLA).

At the federal level, the OLA provides a right to action for any person who has filed a complaint with the Commissioner of Official Languages under certain provisions and parts of the OLA.[146] The purpose of the action is to determine the merits of the complaint filed with the Commissioner and secure a remedy that is appropriate and just under the circumstances.[147] An action may thus be brought against a federal institution, either by a complainant who has filed a complaint with the Commissioner of Official Languages, or by the Commissioner with the complainant's consent. If the Court considers that the federal institution has not complied with the OLA, it may grant such remedy as it considers appropriate and just in the circumstances. One decision analyzed in this report considers the possibility of bringing an action under Part X of the OLA when the complainants are covered by a collective agreement.

In New Brunswick, the *Official Languages Act* of 2002 provides for an action in the New Brunswick Court of Queen's Bench by any individual who has filed a complaint with the Commissioner of Official Languages of that province and is not satisfied with the findings of the investigation. One decision handed down during the period covered by this report deals with the possibility of bringing an action under the N.B. OLA without having previously filed a complaint with the province's Commissioner of Official Languages.

5.1 Action under Part X of the federal *Official Languages Act* where a collective agreement exists

Norton v. VIA Rail Canada Inc.

This decision[148] considered the actions available under the OLA when the case involves language issues in the context of labour relations subject to a collective agreement.

The appellants were part of a group of 39 VIA Rail Inc. (VIA) employees who had filed complaints with the Office of the Commissioner of Official Languages (OCOL). Their complaints raised issues about the impact of VIA's language policy on their opportunities for advancement and full-time employment in Western Canada. In particular, the appellants challenged the bilingualism requirement imposed by VIA for certain positions designated bilingual. OCOL investigated these complaints and issued a report concluding that some aspects of the 39 complaints were valid.

Some employees who had filed complaints with OCOL filed applications in Federal Court seeking an order requiring VIA to implement the recommendations made in the investigation report.

146 OLA, s. 77. An application for court remedy can be filed with the Federal Court to ensure compliance with sections 4 to 7, and 10 to 13 or 91 as well as parts IV, V or VII of the OLA.

147 *Forum des maires, supra* note 101 at para. 17.

148 *Norton v. Via Rail Canada Inc.*, 2005 FCA 205, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 360.

VIA objected to the complainants' application, alleging that the Federal Court was not authorized to hear the applications for two reasons: (1) the Federal Court did not have jurisdiction to require VIA to implement the Commissioner's recommendations since they entailed no legal duty, and (2) under the collective agreement, the issue fell within the exclusive jurisdiction of the grievance adjudicator.

To begin with, a Federal Court prothonotary ruled in VIA's favour and rendered an order dismissing the appellants' applications. On appeal to the Federal Court, the judge also accepted VIA's arguments. The appellants then appealed to the Federal Court of Appeal, which allowed their appeal.

>> 1. Refusal to terminate action

According to the majority of Federal Court of Appeal judges, the circumstances of this case did not justify the use of the Court's discretionary power to dismiss the applications filed before a hearing was held. According to the criteria developed previously by the Federal Court of Appeal, such an order should only be made in very exceptional cases where the application "is so clearly improper as to be bereft of any possibility of success."[149] In this case, the Court was not completely persuaded that the complainants' application was doomed to failure and concluded that it was for the judge hearing the case to assess the merits of the application. For example, before determining whether a remedy was appropriate, the question of whether the collective agreement barred all action under section 77 of the OLA would have to be resolved. Thus, the majority of the Court of Appeal concluded that a debate on the points at issue should not be foreclosed without first holding a hearing. It thus dismissed VIA's motion to strike the applications, ruling that the Federal Court should not have summarily dismissed them.

VIA filed an application for leave to appeal to the Supreme Court of Canada, which was dismissed. As the procedural questions have now been resolved, the complainants may proceed with their initial applications in the Federal Court.

5.2 Action under section 43 of the New Brunswick *Official Languages Act*

Caraquet (Town) v. New Brunswick (Minister of Health and Wellness)

In this case,[150] the New Brunswick Court of Appeal ruled on the procedure to be followed in filing an action for a breach of the N.B. OLA.

The applicants challenged a decision by the New Brunswick Minister of Health and Wellness to close L'Enfant-Jésus Hospital in Caraquet and convert it into a community health centre. Under the *Regional Health Authorities Act*[151] (RHAA), this hospital was designated as French speaking. The Minister's decision provided that surgical and obstetric services in Caraquet would be transferred to Chaleur Regional Hospital in Bathurst, designated bilingual under the RHAA, while emergency services would be transferred to Tracadie-Sheila Hospital, which was designated as French speaking.

Following the Minister's decision, the applicants filed an application for judicial review with the New Brunswick Court of Queen's Bench as well as a complaint with the New Brunswick Commissioner of Official Languages. The applicants argued that the Minister's decision was not consistent with the provisions of the Charter, the unwritten constitutional principles of respect for and protection of minority rights, the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*[152] and the N.B. OLA. The Commissioner refused to hear the complaint as the case was already before the courts.

149 *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc. (C.A)*, [1995] 1 F.C. 588.

150 *Caraquet (Town) v. New Brunswick (Minister of Health and Wellness)* (2005), 282 N.B.R. (2d) 112, 2005 NBCA 34.

151 *Regional Health Authorities Act*, S.N.B. 2002, c. R-5.05.

152 *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, S.N.B. 1981, c. O-1.1.

The New Brunswick Court of Queen's Bench dismissed the applicants' action[153] on the ground that they had not followed the procedure provided for in the N.B. OLA. Relying on the Court of Appeal's judgment in *Charlebois*,[154] the Court indicated that the procedure for complaints and investigations in section 43 of the N.B. OLA requires a complainant to first file a complaint with the New Brunswick Commissioner of Official Languages. Then, if the complainant is not satisfied with the Commissioner's findings, he or she may file an action in the New Brunswick Court of Queen's Bench pursuant to subsection 43(18) of the N.B. OLA. The Court thus dismissed the applicants' application, and they appealed the decision to the Court of Appeal.

The appeal was allowed by the New Brunswick Court of Appeal, which held that the Court of Queen's Bench had jurisdiction to hear the appellants' action. It concluded that neither section 43 of the N.B. OLA nor the Court of Appeal's judgment in *Charlebois*[155] could serve as a basis for dismissing the action, since (1) the appellants' claims were not based solely on the N.B. OLA, but were based also on the Charter and unwritten constitutional principles; and (2) even if they had relied only on the N.B. OLA, subsection 43(20) states that section 43 "does not affect any other right". Given this provision, the Court found that the actions provided for in section 43 are not unique, nor are they exclusive, and it is possible to bring an action without having first filed a complaint with the Office of the Commissioner of Official Languages for New Brunswick.

As such, the Court of Appeal allowed the appellants' action and allowed the case to be heard on its merits by a trial court. Following this decision, the Town of Caraquet filed an application for an injunction to suspend any change in the status of L'Enfant-Jésus Hospital in Caraquet and the services provided there. This application was dismissed on the ground that there was not enough evidence to justify issuing an injunction.[156]

Following the conversion of the hospital into a community health centre, the Town of Caraquet discontinued its legal proceedings against the province.

153 *Caraquet (Town) v. New Brunswick (Minister of Health and Wellness)* (2005), 280 N.B.R. (2d) 146, 2005 NBBR 3.

154 *Charlebois v. Saint John (C.A.), supra* note 54.

155 *Ibid.*

156 *Caraquet (Town) v. New Brunswick (Minister of Health and Wellness)*, 2005 NBBR 358.

6. VITALITY AND DEVELOPMENT OF OFFICIAL LANGUAGE MINORITY COMMUNITIES

6.1 Impact of ministerial decisions on the vitality of official language minority communities

Just as the use of the minority official language in government services and communications contributes to the vitality of official language minority communities, the presence of certain institutions in those communities plays a key part in their preservation and enhancement. Besides being essential themselves to the enhancement and development of a minority community, the institutions, and the services they offer in the minority language, are often of symbolic value to the community. In *Lalonde*,[157] the Ontario Court of Appeal recognized the important and vital role played by the Montfort Hospital for the Ontario Francophone minority and concluded that the Health Services Restructuring Commission had to take this into account when making decisions on the future of the institution.

Ministerial decisions must be consistent with the Constitution. Consequently, since its recognition by the Supreme Court of Canada in the *Reference re Secession of Quebec*, the unwritten principle of respect for and protection of minority rights has been cited several times in cases involving the rights of official language minority communities. Thus, when a government institution is required to exercise its powers in keeping with the public interest, the courts may review its decisions if it has not taken the principle of respect for and protection of minority language rights into account.[158] This principle may also serve as an interpretive tool for language obligations imposed by federal and provincial statutes and the rights they confer.[159]

Two judgments handed down during the period covered by this report deal with the impact of ministerial decisions on official language minorities and on respect for the unwritten constitutional principle of respect for and protection of minority rights in the making of such decisions. The first concerned the decision to relocate an office of a provincial institution from an area of Ontario with a strong concentration of Francophones to a largely Anglophone area, while the second involved the decision to close a French-language college of applied arts and technology in Ontario. Although these judgments demonstrate the courts' willingness to apply the principle of respect for and protection of minority rights as a tool in interpreting rights, the facts presented to the courts did not persuade the judges to allow the applications made by the communities concerned.

Giroux v. Ontario (Minister of Consumer and Business Services)

In *Giroux*,[160] the Ontario Divisional Court had to consider certain decisions made by provincial institutions to determine whether they respected the language rights of the residents of Welland.

The applicants made two applications to the Court. The first concerned the Minister of Consumer and Business Services, who had decided to relocate the Land Registry Office (LRO) from Welland to St. Catharines. As a result of this relocation, the residents of Welland had to travel 23 km to use its services.

157 *Lalonde, supra* note 4.

158 *Ibid.* at para. 180.

159 *Charlebois v. Moncton, supra* note 65 at para. 55. The Court of Appeal added, at para. 58, that "the argument that this unwritten and underlying principle can also be used independently of any constitutional text, as a basis of an application for judicial review to strike down government action is not very convincing".

160 *Giroux v. Ontario (Minister of Consumer and Business Services)* (2005), 75 O.R. (3d) 759 [*Giroux*].

The applicants objected to the move, alleging that it contravened the *French Language Services Act*[161] (FLSA) and the unwritten constitutional principle of respect for and protection of minority rights.

In court, they argued that each closure of a Government of Ontario service point in Welland sent the message that it was not worth making the effort required to live in French.

Secondly, the applicants asked the Court for a declaration so that the Richelieu Residence for seniors in Welland could retain the right and power to administer and control the waiting list of individuals wishing to live there. The *Social Housing Reform Act, 2000*[162] (SHRA) created an agency responsible for the administration of provincial funding available to subsidize rent in the Niagara Region. The applicants did not want to give up control of this list to the new agency. In their opinion, they should maintain control over the waiting list to preserve the Francophone environment of the institution.

>> 1. Decision to relocate the Land Registry Office

The Court first considered the question of whether the province had contravened subsection 5(1) of the FLSA in deciding to relocate the LRO from Welland to St. Catharines. This provision of the FLSA gave each person the right to communicate in French with and receive available services in French from any head or central office of a government agency or institution of the Legislature.

In the Court's opinion, the obligation imposed on the government agency by section 5 of the FLSA is to provide services in French. Nothing requires such services to be offered by a particular office. Furthermore, the Court concluded that subsection 5(1) did not guarantee that once a government office was established in a designated area, it could not be closed or relocated. The Court further noted that there had been no loss of services, since French services continued to be offered despite the relocation of the LRO to St. Catharines.

In response to the applicants' argument that the closure of the Welland LRO was comparable to that of the Montfort Hospital in *Lalonde*, the Court noted that the main difference between the two cases was the special, unique and significant role played by the Montfort Hospital in the community, especially as it is the only Ontario hospital providing a Francophone environment for training doctors. By comparison, the Court noted that there was no evidence in the present case to show that the LRO played an active role in Welland, "apart from the loss of the bilingual signage advertising the Niagara South LRO".[163]

The applicants had also relied on the constitutional principle of respect for minorities and other interpretive principles applicable to language rights in support of their arguments. Since the Court held that the Welland LRO was not an institution playing a special, unique and significant role (as in the case of the Montfort Hospital), it concluded that the government's decision to close the Welland LRO did not have "'serious consequences for the Franco-Ontarian minority' to the point of engaging the constitutional principle of respect for and protection of minorities." The Court said the following regarding these principles:

> With the exception of the constitutional principle of respect for and protection of minorities which, in certain situations, has normative legal force [...] the principles of interpretation referred to do not grant the minority protection against any government action that could have a negative impact on the minority. They merely serve to interpret the rights and protections granted to the minority by legislation or by the constitution.[164]

>> 2. Richelieu Residence waiting list

The Court did not accept the argument put forward by the applicants, who had asked the Court to interpret the FLSA and its Regulations in light of the principle of respect for and protection of minority rights so as to give the Richelieu Residence the right to administer its own waiting list. Rather, the Court was of the opinion that the factual record was incomplete and the orders requested by the applicants were premature. Accordingly, it indicated that the Richelieu Residence should instead explore, together with the agency responsible for administering the list, the options available under the FLSA.

161 R.S.O. 1990, c. F.32.

162 S.O. 2000, c. 27.

163 *Giroux, supra* note 160 at para. 29.

164 *Ibid.* at para. 32.

In short, the Divisional Court dismissed the application concerning relocation of the LRO and also dismissed the applications relating to the Richelieu Residence. The Ontario Court of Appeal and the Supreme Court of Canada denied the applicants leave to appeal.[165]

Gigliotti v. Conseil d'administration du Collège des Grands Lacs

In this case,[166] the Ontario Divisional Court had to rule whether the closure of a French-language college of applied arts and technology in Ontario was consistent with the unwritten constitutional principle of respect for and protection of minority rights.

The Gigliotti case asked the Court to quash the decision by the Ontario Minister of Training, Colleges and Universities (Minister) to close the Collège des Grands Lacs (Collège) in 2001. This Francophone community college, located in Toronto, served the Francophone community of central and southwestern Ontario. It was one of three colleges of applied arts and technology in Ontario providing French-language education, the other two being in Ottawa (La Cité collégiale) and Sudbury (Collège Boréal).

For several years, the Collège had difficulty attracting enough students to deliver quality educational programs to the Francophone community of Ontario. Despite the measures taken to assist the Collège, it was unable to meet performance targets in terms of both student levels and administrative costs. As a result, in October 2001, the Collège's Board recommended that the Minister close it. The Minister approved the Board's recommendation the following day.

The applicants, representing the Collège's teaching and support staff, accordingly filed an application for judicial review in the Divisional Court seeking to have the Minister's decision quashed for two reasons: first, they alleged that the Minister had exceeded her jurisdiction when she made the decision, and second, they argued that the Minister's decision was not consistent with the unwritten constitutional principle of respect for and protection of minority rights.

>> 1. Dismissal of the application

The Court dismissed the applicants' application for delay and refused to grant them the relief they sought.

>> 2. Whether the Minister's decision infringed upon the unwritten constitutional principle of respect for and protection of minority rights

On this point, the applicants relied on the Ontario Court of Appeal's judgment in *Lalonde*,[167] which quashed the decision of the Health Services Restructuring Commission to close the Montfort Hospital because it infringed on the FLSA and was contrary to the constitutional principle of respect for and protection of minority rights.

Although the Court refused the action on the basis of delay, it nonetheless ruled on the language arguments raised by the applicants. First, the Court noted the importance of the unwritten constitutional principles, indicating that they assist in the interpretation of constitutional texts and can, in certain circumstances, give rise to significant legal obligations that could limit government action. It noted that in *Lalonde* the Ontario Court of Appeal had concluded that the unwritten principles included an obligation on the part of government decision-makers to consider the special role of minority institutions and their importance in protecting Francophone language and culture.

Secondly, the Court considered the evidence submitted to determine whether the unwritten constitutional principle of respect for and protection of minority rights had been observed. The Court noted that 12 of the 17 members of the Collège's Board, who had decided to close the institution, represented the Franco-Ontarian community. Furthermore, the evidence demonstrated that the Minister and the Ministry had taken the interests of the minority community into consideration, including the repercussions the closure of the Collège would have on Franco-Ontarians. These facts allowed the Court to distinguish the present case from *Montfort*, in which the decision had been made, despite opposition from the Francophone community, by a government organization that did not recognize the unique and significant role

165 [2006] C.S.C.R. no 19 (QL).

166 *Gigliotti v. Conseil d'administration du Collège des Grands Lacs* (2005), 76 O.R. (3d) 561.

167 *Lalonde, supra* note 4.

Montfort played as a Francophone hospital. In the present case, however, the Court did not find that there was any evidence to show that the Collège played a unique or significant role in the Francophone community. The Collège was not the only one in the province that provided college education in French, and additional programs were offered at the Collège Boréal in order to fill the gap in the central and southwestern region of the province.

These objections led the Court to conclude that the decision to close the Collège was consistent with the unwritten constitutional principle of respect for and protection of minority rights.

>> 3. Whether the Minister had the authority to close the Collège under the *Ministry of Training, Colleges and Universities Act*[168]

The Court considered the relevant provisions and determined that the Minister did not need legislation to specifically grant her the authority to close the Collège. Contrary to the applicants' arguments, the Court found that the Minister did not have a duty to hold public hearings or direct consultations with the teachers or students prior to accepting the recommendation by the Board of the Collège. Accordingly, the Court concluded that the Minister had the authority to close the Collège under the legislation existing at that time.

6.2 Amendments made to Part VII of the *Official Languages Act*

Part VII of the *Official Languages Act* (OLA) sets out the federal government's commitment to enhance the vitality of Anglophone and Francophone minorities in Canada and support their development, as well as to foster full recognition and use of both English and French in Canadian society. Since this commitment was included in the OLA in 1988, there has been uncertainty as to its scope and meaning.

The question as to whether section 41 of Part VII was declaratory or executory in nature was one of the issues in *Forum des maires*,[169] a judgment discussed in the *Language Rights 2003–2004* report. In that case, the Federal Court of Appeal had concluded that the commitment provided for in Part VII of the OLA was declaratory in nature, and section 41 did not create a right or obligation that could be enforced by the courts.[170] The Court also indicated that discussion on the nature of section 41 should take place in Parliament and not in the courts.[171]

This is effectively what happened, since significant legislative amendments were made in 2005 to Part VII of the OLA.[172] Bill S-3, which became the *Act to Amend the Official Languages Act (Promotion of English and French)*,[173] added three important elements to the OLA.

First, the legislative amendments clarified the obligations imposed on federal institutions. Subsection 41(2) now provides that federal institutions have a duty to ensure that positive measures are taken to implement the federal government's commitment to enhance the development of Anglophone and Francophone minorities in Canada and to assist their development and foster the full recognition of English and French in Canadian society. Each federal institution now has a responsibility to take concrete measures to support the development of official language communities in Canada and to promote linguistic duality.

168 R.S.O., 1990, c. M.19.
169 *Forum des maires, supra* note 101.
170 *Ibid.* at para. 46.
171 *Ibid.* at para. 44.
172 On this topic, see "Amending the Act—A Positive Turning Point", Chapter 1 of the Commissioner of Official Languages Annual Report 2005-2006, which outlines the history of the amendments made to Part VII of the OLA.
173 S.C. 2005, c. 41.

Second, the amendments to the Act make it possible for the Governor in Council to adopt regulations to specify how the obligations imposed by Part VII of the OLA are to be carried out.

Third, the OLA now includes the possibility of a court action under Part VII. Subsection 77(1) was amended so that following a complaint, an action may be brought in the event of inaction or breaches of the obligations provided for in Part VII.

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

The legislative amendments to Part VII of the OLA led the Supreme Court of Canada to withdraw leave to appeal in *Forum des maires*.[174] In that case, the Supreme Court had agreed to consider the question of the scope of Part VII of the OLA. However, in view of the amendments made to Part VII a few weeks before the hearing was scheduled, the Court held that the questions of law that were the subject of the appeal were no longer of importance to the public and consequently withdrew the leave to appeal.

There have been no judgments dealing with the content of the obligations provided for in Part VII of the OLA during the period covered by this report. However, the courts will have the opportunity to consider the obligations of the new Part VII of the OLA in an application for judicial review filed in the Federal Court by the Fédération des communautés francophones et acadienne du Canada against the federal government's decision to cease providing financial support for the Court Challenges Program.[175] The purpose of this program was to give financial support to individuals and groups to assist them in filing court actions on constitutional questions, including language issues. Among the reasons for the application for judicial review, the applicant mentioned that the decision is contrary to the obligations set out in Part VII of the OLA, the principle of progression toward equality recognized in section 16 of the Charter, constitutional principles such as the principle of respect for and protection of minority rights, and the government's fiduciary obligation toward official language minorities.

174 *Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency)*, [2005] 3 S.C.R. 906, 2005 SCC 85.
175 Federal Court file T-1860-06.