

CHAPTER TWENTY-FOUR

LANGUAGE RIGHTS

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I. INTRODUCTION

At every stage of Canada's constitutional development, language has been a matter of the highest importance. Surprisingly, this preoccupation with language does not appear explicitly in those parts of the Constitution where one might expect it. For example, neither ss 91 nor 92 of the *Constitution Act, 1867* contains a specific enumerated power on the subject of language. Instead, language is treated as an ancillary matter, permitting both levels of government to legislate with respect to it, subject to any specific limitations in the Constitution.

Section 133 of the *Constitution Act, 1867* marked a compromise essential to Confederation by setting down rules for language use in government and judicial proceedings both federally and in Quebec. As noted in Chapter 4, *The Late Nineteenth Century: The Courts Set an Initial Course*, similar guarantees were inserted in the *Manitoba Act, 1870*.

The Charter provisions relating to language (ss 16-23) present a more modern understanding of entitlements for those who are members of French and English minority language communities. This pattern is reflected in the amendment provisions of the *Constitution Act, 1982*, which make special provision for changes to the Constitution with respect to language (ss 41(c), 43(b)).

In addition to these specific provisions, more general provisions may apply. While language is not included in the prohibited grounds of discrimination in the equality guarantee (s 15), it could someday be treated as an analogous ground, and language cases have arisen as division of powers concerns as well as freedom of expression claims under the Charter.

Before turning to language rights litigation in our courts, this chapter provides an introduction to the values and history underlying claims to constitutional protection of language rights. When you read the cases, you will see that the Supreme Court, at times, treats language claims like fundamental human rights and, at others, approaches them as less universal forms of entitlements not subject to the purposive mode of interpretation. The latter approach is based on the idea that language rights are rooted in historical, political compromises particular to Canada. As well, while language rights may involve individuals, they are also a form of group rights.

A Braën, “Language Rights”

in Michel Bastarache, ed. *Language Rights in Canada* (Montreal: Éditions Yvon Blais, 1987) 3 at 25-30 (footnotes omitted)

The language issue has always been a dominant theme in Canadian life. Indeed, it was raised during the colonial period, from the first contacts between the French and English settlers and the native populations. ...

The French language arrived in this country at the beginning of the colonial period, with the first settlers from France. Contacts were quickly established between the French and English settlers who, in disregard of the native inhabitants, were in conflict over the possession of the territory. In 1713, by the *Treaty of Utrecht*, France surrendered to England its territory of Acadia which comprised, at that time, a large part of what are today the Maritime Provinces. The treaty preserved the freedom of the catholic religion, subject to the laws of England. No provision of the treaty referred to the language question but by the change in sovereignty, English became the language of administration. The English language rapidly became, especially after the Deportation of 1755, the only language of legislation and of the courts in the Maritime Provinces.

In Canada, with the surrender of Quebec in 1759, the evolution was different. The *Articles of Capitulation of Quebec* guaranteed the freedom of exercise of the catholic religion but did not refer to the question of language. Section 42 of the *Articles of Capitulation of Montreal, 1760*, provided for the continuation of the customs of the French population. Did this terminology form the basis for a certain protection of the French language? In any event, General Amherst merely stated that the inhabitants had become subjects of the king. Under the military government, caution seems to have been the guiding principle. The government allowed the use of the French language in the courts and in the drafting of ordinances. Indeed, this constitutes the origin of functional bilingualism in the legislation and in the administration of justice in Quebec.

In 1763, the *Treaty of Paris* officially ceded Canada to England. As in the former documents, freedom of exercise of the catholic religion is guaranteed but nothing is said on the issue of language. The *Royal Proclamation of October 7, 1763*, *Murray's Commission* on November 21, 1763 and the *Instructions to Governor Murray*, December 7, 1763 granted full scope to the Governor to introduce English private law and to promote the assimilation of the francophone population. This policy of assimilation, however, was rapidly overcome by the authorization to use the French language in the administration of justice. Increasing discontent on the part of the French-speaking population, political disturbances in the New England colonies and the desire to gain the trust of the francophone population of Canada resulted in the adoption by the British Parliament of the *Quebec Act of 1774*. This Act re-established French private law and guaranteed freedom of exercise of the catholic religion. None of its provisions dealt with language. At that time, however, language and religion were closely related. The debates and statutory registers of the legislative council were drafted in French and in English, as were the ordinances; bilingualism became established as a matter of course in the administration of justice.

After the Rebellion of 1837-1838, the constitution of 1791 was suspended. Lord Durham was appointed to conduct an inquiry. In his report he recommended, *inter alia*, the establishment of responsible government and the union of both provinces to ensure that the francophone population became a minority, in order to hasten its assimilation. In 1840, London adopted the *Act of Union*. Section 41 of that imperial Act abolished French as a language of legislation and provided that English be the

only official language. The United Parliament mitigated this measure by adopting in 1848 an Act designed to establish a process of translation and of publication of the laws in both languages. The British Parliament repealed section 41 in 1848 and the courts seemed to pursue, during this period, a bilingual tradition. This system continued until Confederation, in 1867. Noting the fact, the Royal Commission on Bilingualism and Biculturalism has stated that Ontario, during 18 years, experienced a bilingual system.

The *Constitution Act, 1867*, contains only one provision granting language rights, section 93 of this Act [not being ...] germane to this issue. Section 133 specifies that everyone has a right to use the French or the English language in the debates or the business of the houses of Parliament of Canada and of Quebec. It provides moreover that the records and journals of those assemblies must be kept in both languages. Finally, everyone is entitled to the use of French or English before the courts established under the authority of the Parliament of Canada or that of Quebec. These provisions constitute, at the most, what has been termed "seminal official bilingualism."

Manitoba was created in 1870. Section 23 of the *Manitoba Act, 1870* is analogous to section 133. Despite this, the French-speaking population having become a minority, the Legislative Assembly of that province adopted in 1890 an Act declaring English to be the only official language of legislation and the courts. The same year, the system of confessional schools was abolished and replaced by a public school system where the language of instruction was English. Except during a brief period where the Greenway-Laurier compromise was applied, that system was maintained. Only since the recent judicial challenges of the Act of 1890 has there been any important movement on the language question in that province.

The Northwest Territories and part of Rupert's Land were integrated with Canada in 1870 and placed under the authority of the Canadian Parliament. In 1877, the latter instituted bilingualism in the council and courts of those territories. A campaign on the part of opponents of the French fact incited the Canadian Parliament to amend its legislation in 1891 in order to enable the council to regulate its debate and records. Soon after that, in 1892 English unilingualism was decreed.

Saskatchewan and Alberta were admitted into the Union in 1905. The acts creating these provinces provide that the laws in force in those territories shall continue to apply thus making it arguable that the French language is endowed with some legal status. Recent judicial decisions have confirmed this point of view.

In Ontario, anti-catholic and anti-French pressure resulted in the adoption in 1912-1913, of regulation 17 which reduced to insignificant proportions the use of French as a language of instruction. Apart from the issue of official bilingualism, language in the educational context continued to be a problem in that province even after the adoption of the *Constitutional Act, 1982*. In 1986 a bill concerning government services in French was introduced.

Following the Laurendeau-Dunton report, the Canadian Parliament adopted, in 1969, its *Official Languages Act*. The Act was severely tested at the time of the air controllers' crisis in 1976. Also inspired by that report and directed by the Robichaud Government, New Brunswick, in 1968, adopted French and English as its two official languages. In 1981, an Act went as far as to recognize the equality of both official language communities. Despite this, the establishment of true bilingualism in that province appears a difficult objective, judging by the reactions to a recent report *Towards Equality of Official Languages in New Brunswick* (Bastarache-Poirier report).

On many occasions, Quebec has legislated in matters of language. However, the national question took on a new dimension with the adoption of the *French Language Charter* (Loi 101), in 1977. This Act provides that French be the only official language of legislation, of the administration of justice and of public administration.

Even if the language rights of the English-speaking minority are generally recognized, in particular its educational rights, some aspects of that Act are heavily criticized, such as the provisions dealing with the language of business signs and the language of instruction of new immigrants. An impressive series of court challenges has partly dismantled this legislative scheme.

Patriation of the Canadian constitution was effected by the adoption of the *Constitution Act, 1982*. Sections 16 to 22 of this Act set out the language guarantees of Canadians with respect to the Federal Government and the Government of New Brunswick. Section 23 affirms the right to instruction in an official minority language and to minority administered educational facilities. Since then, a number of court challenges have attempted to determine the scope of this section.

Pierre A Coulombe, Language Rights in French Canada

(New York: Peter Lang, 1995) at 90-94 (endnotes omitted)

Justifying Strong Language Rights

Whether we are talking about official bilingualism at the federal level, Quebec's Bill 101, or New Brunswick's Bill 88, community rights such as these are often perceived as illiberal attacks on universal moral rights that protect autonomy. While it is true that an important strand of democratic tradition is conceived along those lines, it tends to obfuscate the justifications for these rights. Anglophones living in North America do not need to think about protecting the English language simply because market forces always privilege the dominant linguistic group. Moreover, allophone immigrants will choose to learn English as the dominant language in order to maximize their chances of integration and upward mobility. This process guarantees a continued supply (so to speak) of new anglophones and brings further pressures to assimilate all linguistic minorities, including French. Given these ... conditions, how could the Quebec state afford to be culturally neutral? How could the New Brunswick government not recognize community rights for Acadia? The rationale for state intervention in linguistic matters is no different from the rationale for intervening in matters such as social welfare, education, the environment and security: market forces benefit the powerful and, in this particular case, are incapable of sustaining linguistic minorities and of fostering proper relations between the various language groups of a given polity.

Many will object to such arguments, invoking the danger that strong language rights pose to individual freedoms. Language rights, they will say, should be limited to the protection of some of the conditions for personal autonomy, such as the right to freedom of action within one's own private affairs. These would include the rights against undue interference in private language use and against discrimination on the basis of language. Few are those who will deny us the right to speak our language at home and on the streets, to use it in letters and on the telephone, to keep our native names and surnames, to use our language within our cultural and religious institutions, newspapers, radio stations, and community centres. We could also add to this list the right to an interpreter in judicial proceedings, a language right derived from the right to a fair trial.

Why are these language rights more easily defensible? Because they are typically associated with state tolerance, or, put differently, they are rights *against* state interference rather than ones that require a positive state intervention. The right not to be interfered with within one's private sphere of language activity and that of not being

discriminated against on the basis of language are derived from the right to privacy and fairness, respectively. They can be grounded in the interests of all citizens of a liberal polity, regardless of their particular community status. Were I the last person speaking my language, I would still have the right against undue interference and discrimination. For our purposes such rights can be called negative language rights, for the duties they involve are negative duties: *not* interfering in a person's language use, and treating everyone equally *regardless* of the language spoken

... Positive state intervention is necessary to promote minority languages, for their vulnerability in a free market environment cannot be disputed. Unrestrained competition between languages will not bring about linguistic harmony, but a subordination of minority languages to the dominant language, and a subordination of the minority community to the dominant community. The idea of state neutrality is deceitful in this context, for *laissez-faire de facto* prejudices the dominant language in terms of its use and status. ...

As far as Quebec is concerned, the reasons for active state language planning are many, but most are primarily socioeconomic: despite its solid majority status—approximately 80% of the Quebecois have had French as a mother tongue during this century—French was long subordinate to English, especially in the economy where English was the language of those who held economic power. Before state intervention, French was used in the lower echelons of economic life, while English was used in the upper echelons, and so bilingualism was experienced differently depending if one was French- or English-speaking: “The social pressures for using French as a language of communication at work are more strongly felt by lower status anglophones, while the pressures to use English increases as francophones rise in the corporate world.” In this cultural division of labour, the subordinate position of the French language and the subordinate position of French Canadians appeared as two sides of the same coin since francophones and anglophones were not equals in the economic realm. In short, French would tend to be relegated to the private sphere, in the homes, schools, and churches. ...

This situation was compounded by the widely held belief that even in French-speaking Quebec English is the language of prestige. As Gerard Bergeron notes, it was natural to believe so when generations after generations saw that all important things happen in English, and that knowing English opens the doors to the good life. Moreover, a study comparing French- and English-speakers of equal education and job status revealed that English-speakers were perceived by both anglophones and francophones as being more intelligent, having a better job and a higher education. The inferiority complex of French Canadians, reflecting a low self-esteem, led some to despise their origins and to identify with the Anglo-American lifestyle. There was some truth to the idea that capital spoke English and labour spoke French, and linguistic identity and self-esteem were certain to suffer from it. Not surprisingly, diagnosing this disequilibrium motivated a corresponding state intervention.

Another reason for state language planning remains the need to respond to [certain] factors which threaten Quebec's relative weight in the federation, not to mention French Canada's cultural security within Quebec itself. The decline of Quebec's population relative to the Canadian whole translates itself into a greater minority status for Quebec within the federation. Quebec's share of members of Parliament went from 33.5% in 1867 to 25.4% in 1990, and is expected to go down to 20% or less in about a century. In addition to weakening Quebec's political power in the federation, the demographic decline of the Quebecois population of French origins creates a cultural insecurity insofar as traditional cultural traits are lost.

Jacques Henripin cites three demographic challenges facing Quebec. First, the birth rate of the Quebecois (1.6 children per couple) is inferior to the required rate

for replacing generations (2 children per couple); as a result, the population is growing old. A second problem is the high emigration rate towards other provinces. Anglophones leave Quebec at a rate fifteen times higher than francophones, allophones (those who have neither French nor English as a mother tongue) at a rate five times higher. This means that immigration, despite what is often believed, contributes little to counteracting the low birth rate since Quebec must accept three immigrants in order to keep one. A third problem relates to the difficult integration of immigrants in Montreal, in part because of the attraction that the English language has there. English is still the language which most immigrants adopt, although the situation is improving.

Before Bill 101, immigrant parents, especially those living in Montreal, would often choose English as the language of schooling for their children. In 1970, 8.3% of students in Montreal's English schools were French, while only 1.9% of students in French schools were English. Significantly, 22.5% of students in English schools were allophones, compared to merely 0.9% in French schools. And in 1961, language transfers of allophones toward French were in the proportion of 23.2% in Montreal, as compared with 56.6% in the rest of Quebec. Between 1945 and 1966, 80% of immigrants integrated into the anglophone community of Quebec, the great majority of them in Montreal.

Various studies and governmental reports have concurred that these concerns were and still are legitimate and, thus, that there are grounds for taking steps to ensure that the French language is protected in Quebec, namely by sending an unequivocal message to immigrants: French, not English, is the majority language in Quebec. Even the Supreme Court of Canada argued that the circumstances discussed above "favoured the use of the English language despite the predominance in Quebec of a francophone population ... prior to the enactment of the legislation at issue [Bill 101] ...". No one seriously challenges the difficulties French is facing in Quebec; what is debated is the scope of language legislation and its impact on other language rights.

As can be expected, Acadians also have had to face major sociodemographic obstacles, but with little or no collective means at their disposal. Assimilation has reached high levels in Prince Edward Island and Nova Scotia, where by 1961 the majority of those of French extraction no longer declared French as their mother tongue. And of those who could still speak French, less than 40% spoke it at home by 1971.

II. LANGUAGE RIGHTS AND THE CONSTITUTION

A. THE FEDERAL BARGAIN

As noted above, although federalism as a system of government was adopted in part to deal with the claims of French-speaking Canadians, ss 91 and 92 of the *Constitution Act, 1867* are silent in respect to language. As noted in Chapter 3, *From Contact to Confederation*, the 1867 arrangements became acceptable to many Quebecois due to the opportunity that federalism offered for French-speakers to form a majority in Quebec and thus to make laws on a wide range of subjects, as opposed to the content of the division of powers in respect to language specifically.

As described earlier, s 133 of the *Constitution Act, 1867* is the express, original constitutional bargain in respect to language. The section addresses the language issue in the context of parliamentary debate, legislative enactment, and court proceedings. It provides:

Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

This final version of s 133 was more stringent than its earlier drafts, which had merely permitted, as opposed to mandated, publication of legislative journals and laws in both English and French. The mandatory provision prevailed in order to preclude the possibility that the majority in the federal or Quebec legislatures might choose to publish parliamentary proceedings and enactments only in its own language and thus prejudice the minority language group.

Jones v AG of New Brunswick, [1975] 2 SCR 182, 1974 CanLII 164 addressed the ability of the federal Parliament to enact the *Official Languages Act* (now RSC 1985, c 31 (4th Supp)), which made English and French the official languages of Canada within federal institutions, such as Parliament and the courts under federal jurisdiction. The Supreme Court of Canada upheld the federal Act, as well as New Brunswick legislation (enacted under the s 92(14) class of subject "Administration of Justice in the Province"), which similarly stipulated that both French and English were the official languages of the courts of that province. The Court made clear that s 133 of the *Constitution Act, 1867* set down minimum constitutional protection for language, but this did not preclude Parliament or a legislature from conferring additional "rights or privileges" or imposing additional "obligations" (at 192) in respect to the English and French languages. The only proviso was that the enacting legislature must conform to the rules of the division of powers.

The Court returned to the question of general legislative jurisdiction in respect to language in *Devine v Quebec (AG)*, [1988] 2 SCR 790, 1988 CanLII 20. One issue before the Court was the legislative jurisdiction of the National Assembly to enact those parts of Quebec's *Charter of the French Language*, CQLR c C-11 that mandated the use of French, and in some instances French only, in commercial dealings. The Court ruled unanimously that this legislation fell within provincial legislative jurisdiction:

[14] ... In order to be valid, provincial legislation with respect to language must be truly in relation to an institution or activity that is otherwise within provincial legislative jurisdiction.

• • •

[16] ... It is true, as the preamble of the *Charter of the French Language* indicates, that one of its objects is "to make of French the language of ... commerce and business" but that object necessarily involves the regulation of an aspect of commerce and business within the province, whatever the nature of the effect of such regulation may be. The purpose and effect of the challenged provisions of Chapter VII of the *Charter of the French Language* entitled "The Language of Commerce and Business" is to regulate an aspect of the manner in which commerce and business in the province may be carried on and as such they are in relation to such commerce and business. That the overall object of the *Charter of the French Language* is the enhancement of the status of the French language in Quebec does not make the challenged provisions any less an intended regulation of an aspect of commerce within the province. As such, they fall within provincial legislative jurisdiction under the *Constitution Act, 1867*.

The 1867 language strictures set down in s 133 were applicable only to the federal government and to Quebec. Similar requirements were later applied to Manitoba, Saskatchewan,

and Alberta. The *Manitoba Act, 1870*, SC 1870, c 3, s 23, passed by Parliament and confirmed by the UK Parliament, applied the s 133 type requirements to the new province of Manitoba: see *British North America Act, 1871*, ss 5 and 6. The *North-West Territories Act*, RSC 1886, c 50, s 110, a non-entrenched enactment, provided similar language guarantees for the territory that would become Saskatchewan and Alberta. These provisions reflected the fact that the population of these provinces at the time was largely French-speaking and was expected to stay that way.

In deliberate contradiction to the terms of the *Manitoba Act, 1870*, Manitoba passed the *Official Language Act* in 1890, which set down that English only would be the language of the legislature and the courts. Lower court rulings in 1892, 1909, and 1976 invalidated this enactment, finding it inconsistent with the requirements of the entrenched *Manitoba Act*. The Manitoba governments did not treat these decisions as authoritative, although they did not appeal them either. One might have expected that these decisions, and the failure of the Manitoba government to comply or appeal, would have become the subject of intense political debate, both in Manitoba and nationally. The demographic makeup of the province had changed so much in the intervening decades, however, that the French-speaking minority lacked the political clout to press their cause further. Moreover, as described in Chapter 4, the energy of that community was at the time directed at opposing provincial policies diminishing the opportunity for education in French in the denominational schools.

The question of the validity of the 1890 legislation finally reached the Supreme Court of Canada in *Attorney General of Manitoba v Forest*, [1979] 2 SCR 1032, 1979 CanLII 242. The Court ruled that the entrenched *Manitoba Act* provisions prevailed over the provincial enactment. This ruling raised the possibility that all the enactments of the Manitoba legislature since 1890 were invalid because they had been enacted only in English. In *Re Manitoba Language Rights*, [1985] 1 SCR 721, 1985 CanLII 33 [*Manitoba Language Reference*], the Supreme Court considered this possibility. It characterized the strictures of the *Manitoba Act*, requiring the enactment of all legislation in both English and French, as mandatory and not merely directory—with the consequence that the body of Manitoba legislation passed in breach of the language enactment requirement was invalid. To avoid a legal vacuum, the Court went on to recognize the temporary validity of these laws until the language requirements could be satisfied by translation, through a temporary suspension of the declaration of invalidity. (This aspect of the decision is discussed further in Chapter 25, Enforcement of Rights.) The Court identified the purpose of both s 133 of the *Constitution Act, 1867* and of the *Manitoba Act, 1870* as “to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike” (at 739). The Court stated (at 744):

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

Similar litigation arose in Saskatchewan and Alberta in respect to the availability of French-language court proceedings. In *R v Mercure*, [1988] 1 SCR 234, 1988 CanLII 107, the accused applied to have the provincial court proceed with his trial in French on the basis of s 110 of the *North-West Territories Act*. The Supreme Court found that this Act was continued in force by s 16 of the *Saskatchewan Act, 1905*. Section 110 provided language rights substantially the same as s 133 of the *Constitution Act, 1867*. However, the Court differentiated the legal regime of language requirements in Saskatchewan from that in Manitoba. The *Manitoba Act* was constitutionally entrenched and bound the legislature of Manitoba; the Saskatchewan legislature, however, was free to alter the terms of the *North-West Territories Act* because it was not

entrenched. Following this ruling, the Saskatchewan legislature enacted legislation dispensing with the language stipulations mirroring s 133—in part to avoid the necessity of having to translate and re-enact all its statutes passed only in English (*Language Act*, SS 1988-89, c L-6.1).

A similar holding with regard to Alberta, in *R v Paquette*, [1990] 2 SCR 1103, 1990 CanLII 37, led to similar legislation in that province (*Languages Act/Loi linguistique*, SA 1988, c L-7.5).

B. CHARTER LANGUAGE RIGHTS

As noted in Chapter 16, *The Advent of the Charter*, a number of commentators view language rights as the original core of the Charter project. Whether or not that is correct, ss 16 to 23 of the Charter constitute strong recognition of the major importance of language in Canadian constitutionalism. These sections recognize the official, equal status of English and French in the business of the federal and New Brunswick governments and also guarantee a level of minority language education throughout Canada. The detail and range of these provisions reflect fidelity to the idea of Canada as a country founded by English- and French-speaking people. With respect to minority language education, at least, the Constitution also espouses a form of “personality principle” of language, rather than a solely territorial one—provinces cannot opt for unilingualism, and an individual’s right to French or English education can be exercised throughout the country.

The provisions pose interesting questions about the continuing role of this idea of Canada in the context of a country that today possesses a dramatically different demographic makeup than it did in 1867, as well as greater sensitivity to both the historical and current claims of its Indigenous inhabitants.

Sections 16 to 23 contain a number of striking features. For example, s 16 introduces the language of equality into the formulation of language entitlements: “English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.” Sections 16(2), 17(2), 18(2), 19(2), and 20(2) bring New Brunswick into the regime of institutional bilingualism, discussed earlier in reference to the Prairie provinces. Added to the legislative and judicial contexts is the availability of communication with federal and New Brunswick government institutions in either English or French. Considerable pressure was brought to bear upon Ontario to take on these constitutional strictures as well, but the Ontario government has resisted on the ground that incremental, statutory adherence to institutional bilingualism was more acceptable in the prevailing political climate.

A further section concerning linguistic rights in New Brunswick was added on April 7, 1993, when the *Constitution Act, 1982* was amended (under s 43 of that Act) to include the following:

16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

III. INTERPRETING LANGUAGE RIGHTS

As you read the cases that follow, note the different approaches taken by the Supreme Court of Canada in the interpretation of language rights. The first case deals with s 133, while those following interpret Charter provisions.

Att Gen of Quebec v Blaikie

[1979] 2 SCR 1016, 1979 CanLII 21

[*Blaikie No 1* raised three issues regarding the interpretation of s 133 of the *Constitution Act, 1867* in the context of Quebec's *Charter of the French Language*, which made French the official language of the province. The first issue was the content of s 133's requirement that "Acts" of "the Legislature of Quebec"—that is, the Quebec National Assembly—"be printed and published" in both English and French. The Supreme Court determined that the National Assembly of Quebec did not comply with s 133 when it produced merely unofficial English translations of its enactments, including subordinate legislation. The second issue was whether regulations issued under the authority of Quebec statutes were held to be "Acts" within s 133; the Court held that they were. The excerpt below deals with the third issue—whether the right to use English or French before "any of the Courts of Quebec" extended to adjudicative tribunals.]

THE COURT (Laskin CJ and Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte, and McIntyre JJ):

[T]he reference in s. 133 to "any of the Courts of Quebec" ought to be considered broadly as including not only so-called s. 96 [of the *Constitution Act, 1867*] Courts but also Courts established by the Province and administered by provincially appointed Judges. It is not a long distance from this latter class of tribunal to those which exercise judicial power, although they are not courts in the traditional sense. If they are statutory agencies which are adjudicative, applying legal principles to the assertion of claims under their constituent legislation, rather than settling issues on grounds of expediency or administrative policy, they are judicial bodies, however some of their procedures may differ not only from those of Courts but also from those of other adjudicative bodies. In the rudimentary state of administrative law in 1867, it is not surprising that there was no reference to non-curial adjudicative agencies. Today, they play a significant role in the control of a wide range of individual and corporate activities, subjecting them to various norms of conduct which are at the same time limitations on the jurisdiction of the agencies and on the legal position of those caught by them. The guarantee given for the use of French or English in Court proceedings should not be liable to curtailment by provincial substitution of adjudicative agencies for Courts to such extent as is compatible with s. 96 of the *British North America Act, 1867*.

Two judgments of the Privy Council, which wrestled with similar questions of principle in the construction of the *British North America Act, 1867* are, to some degree, apposite here. In *Edwards v. Attorney General of Canada*, [1930] A.C. 124, the "persons" case (respecting the qualification of women for appointment to the Senate under s. 24), there are observations by Lord Sankey of the need to give the *British North America Act* a broad interpretation attuned to changing circumstances: "The *British North America Act*," he said, at p. 136, "planted in Canada a living tree capable of growth and expansion within its natural limits." Dealing, as this Court is here, with a constitutional guarantee, it would be overly technical to ignore the modern development of non-curial adjudicative agencies which play so important a role in our society, and to refuse to extend to proceedings before them the guarantee to the right to use either French or English by those subject to their jurisdiction.

In *Attorney General of Ontario v. Attorney General of Canada*, [1947] A.C. 127 (the *Privy Council Appeals Reference*), Viscount Jowitt said in the course of his discussion of the issues, that "it is, as their Lordships think, irrelevant that the question is one that might have seemed unreal at the date of the *British North America Act*. To such

an organic statute the flexible interpretation must be given which changing circumstances require” (at p. 154).

Although there are clear points of distinction between these two cases and the issue of the scope of s. 133, in its reference to the Courts of Quebec, they nonetheless lend support to what is to us the proper approach to an entrenched provision, that is, to make it effective through the range of institutions which exercise judicial power, be they called courts or adjudicative agencies. In our opinion, therefore, the guarantee and requirements of s. 133 extend to both.

It follows that the guarantee in s. 133 of the use of either French or English “by any person or in any pleading or process in or issuing from ... all or any of the Courts of Quebec” applies to both ordinary Courts and other adjudicative tribunals. Hence, not only is the option to use either language given to any person involved in proceedings before the Courts of Quebec or its other adjudicative tribunals (and this covers both written and oral submissions) but documents emanating from such bodies or issued in their name or under their authority may be in either language, and this option extends to the issuing and publication of judgments or other orders.

NOTES

1. In *Attorney General of Quebec v Blaikie*, [1981] 1 SCR 312, 1981 CanLII 14 [Blaikie No 2], the Court further elaborated on its earlier pronouncement by finding that subordinate legislation made by non-governmental officials or bodies, but subject to government approval, fell within the requirements of enactment in both English and French as did the rules of practice in the courts. In contrast, municipal by-laws and school board by-laws fell outside the requirements of s 133 because those regulations did not require governmental approval to be legally effective. In reaching these conclusions, the Court rejected the argument put forward by Quebec that its authority to amend its provincial constitution, under then s 92(1) of the *Constitution Act, 1867*, extended to alteration of the provisions of s 133 applicable to the province. A similar argument was rejected in the companion case, *Attorney General of Manitoba v Forest*, [1979] 2 SCR 1032, 1979 CanLII 242, with respect to the *Manitoba Act*.

2. The case that follows, *Société des Acadiens*, deals with language rights under s 19(2) of the Charter in court proceedings. It was decided on the same day as *MacDonald v City of Montreal*, [1986] 1 SCR 460, 1986 CanLII 65, which interpreted s 133 of the *Constitution Act, 1867*. In *Société des Acadiens*, the appellants objected that a member of the New Brunswick Court of Appeal, who sat on a leave to appeal application, did not have sufficient knowledge of French to understand their argument in that language, and thus their rights under s 19(2) of the Charter were infringed. In *MacDonald*, the appellant relied on s 133 of the *Constitution Act, 1867* to object to the validity of a summons issued only in French by the Municipal Court of Montreal. Both cases reached the same result—the provisions guarantee the litigant the right to choose to use French or English in the course of judicial proceedings, but they do not guarantee that the proceedings themselves will be conducted in the language that they choose.

Société des Acadiens v Association of Parents

[1986] 1 SCR 549, 1986 CanLII 66

BEETZ J (Estey, Chouinard, Lamer, and Le Dain JJ concurring):

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[53] It is my view that the rights guaranteed by s. 19(2) of the *Charter* are of the same nature and scope as those guaranteed by s. 133 of the *Constitution Act, 1867*

with respect to the courts of Canada and the courts of Quebec. As was held by the majority at pp. 498 to 501 in *MacDonald*, these are essentially language rights unrelated to and not to be confused with the requirements of natural justice. These language rights are the same as those which are guaranteed by s. 17 of the *Charter* with respect to parliamentary debates. They vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice. And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice.

[54] I am reinforced in this view by the contrasting wording of s. 20 of the *Charter*. Here, the *Charter* has expressly provided for the right to communicate in either official language with some offices of an institution of the Parliament or Government of Canada and with any office of an institution of the Legislature or Government of New Brunswick. The right to communicate in either language postulates the right to be heard or understood in either language.

[55] I am further reinforced in this view by the fact that those who drafted the *Charter* had another explicit model they could have used had they been so inclined, namely s. 13(1) of the *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. O-1:

13(1) Subject to section 15, in any proceeding before a court, any person appearing or giving evidence may be heard in the official language of his choice and such choice is not to place that person at any disadvantage.

[56] Here again, s. 13(1) of the Act, unlike the *Charter*, has expressly provided for the right to be heard in the official language of one's choice. Those who drafted s. 19(2) of the *Charter* and agreed to it could easily have followed the language of s. 13(1) of the *Official Languages of New Brunswick Act* instead of that of s. 133 of the *Constitution Act, 1867*. That they did not do so is a clear signal that they wanted to provide for a different effect, namely the effect of s. 133. If the people of the Province of New Brunswick were agreeable to have a provision like s. 13(1) of the *Official Languages of New Brunswick Act* as part of their law, they did not agree to see it entrenched in the Constitution. I do not think it should be forced upon them under the guise of constitutional interpretation.

[57] The only other provision, apart from s. 20, in that part of the *Charter* entitled "Official Languages of Canada," which ensures communication or understanding in both official languages is that of s. 18. It provides for bilingualism at the legislative level. In *MacDonald* one can read the following passage, in the reasons of the majority, at p. 496:

Section 133 has not introduced a comprehensive scheme or system of official bilingualism, even potentially, but a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism at the option of the speaker in Parliamentary debates and at the option of the speaker, writer or issuer in judicial proceedings or processes. Such a limited scheme can perhaps be said to facilitate communication and understanding, up to a point, but only as far as it goes and it does not guarantee that the speaker, writer or issuer of proceedings or processes will be understood in the language of his choice by those he is addressing.

[58] The scheme has now been made more comprehensive in the *Charter* with the addition of New Brunswick to Quebec—and Manitoba—and with new provisions such as s. 20. But where the scheme deliberately follows the model of s. 133 of the *Constitution Act, 1867*, as it does in s. 19(2), it should, in my opinion, be similarly construed.

[59] I must again cite a passage of the reasons of the majority, at p. 500, in *MacDonald* relating to s. 133 of the *Constitution Act, 1867* but which is equally applicable, a *fortiori*, to the official languages provisions of the *Charter*:

This is not to put the English and the French languages on the same footing as other languages. Not only are the English and the French languages placed in a position of equality, they are also given a preferential position over all other languages. And this equality as well as this preferential position are both constitutionally protected by s. 133 of the *Constitution Act, 1867*. Without the protection of this provision, one of the two official languages could, by simple legislative enactment, be given a degree of preference over the other as was attempted in Chapter III of Title 1 of the *Charter of the French Language*, invalidated in *Blaikie No. 1*. English unilingualism, French unilingualism and, for that matter, unilingualism in any other language could also be imposed by simple legislative enactment. Thus it can be seen that, if s. 133 guarantees but a minimum, this minimum is far from being insubstantial.

[60] The common law right of the parties to be heard and understood by a court and the right to understand what is going on in court is not a language right but an aspect of the right to a fair hearing. It is a broader and more universal right than language rights. It extends to everyone including those who speak or understand neither official language. It belongs to the category of rights which in the *Charter* are designated as legal rights and indeed it is protected at least in part by provisions such as those of ss. 7 and 14 of the *Charter*

[61] The fundamental nature of this common law right to a fair hearing was stressed in *MacDonald*, in the reasons of the majority, at pp. 499-500:

It should be absolutely clear however that this common law right to a fair hearing, including the right of the defendant to understand what is going on in court and to be understood is a fundamental right deeply and firmly embedded in the very fabric of the Canadian legal system. That is why certain aspects of this right are entrenched in general as well as specific provisions of the *Charter* such as s. 7, relating to life, liberty and security of the person and s. 14, relating to the assistance of an interpreter. While Parliament or the Legislature of a province may, pursuant to s. 33 of the *Charter*, expressly declare that an Act or a provision thereof shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the *Charter*, it is almost inconceivable that they would do away altogether with the fundamental common law right itself, assuming that they could do so.

[62] While legal rights as well as language rights belong to the category of fundamental rights,

[i]t would constitute an error either to import the requirements of natural justice into ... language rights ... or vice versa, or to relate one type of right to the other Both types of rights are conceptually different To link these two types of rights is to risk distorting both rather than re-enforcing either.

[63] ... Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in s. 7 of the *Charter*, are so broad as to call for frequent judicial determination.

[64] Language rights, on the other hand, although some of them have been enlarged and incorporated into the *Charter*, remain nonetheless founded on political compromise.

[65] This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause

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

[66] Such an attitude of judicial restraint is in my view compatible with s. 16 of the *Charter*, the introductory section of the part entitled "Official Languages of Canada."

[67] Section 19(2) being the substantive provision which governs the case at bar, we need not concern ourselves with the substantive content of s. 16, whatever it may be. But something should be said about the interpretative effect of s. 16 as well as the question of the equality of the two official languages.

[68] I think it is accurate to say that s. 16 of the *Charter* does contain a principle of advancement or progress in the equality of status or use of the two official languages. I find it highly significant however that this principle of advancement is linked with the legislative process referred to in s. 16(3), which is a codification of the rule in *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182. The legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise.

[69] One should also take into consideration the constitutional amending formula with respect to the use of official languages. Under s. 41(c) of the *Constitution Act, 1982*, the unanimous consent of the Senate and House of Commons and of the legislative assembly of each province is required for that purpose but "subject to section 43." Section 43 provides for the constitutional amendment of provisions relating to some but not all provinces and requires the "resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies." It is public knowledge that some provinces other than New Brunswick—and apart from Quebec and Manitoba—were expected ultimately to opt into the constitutional scheme or part of the constitutional scheme prescribed by ss. 16 to 22 of the *Charter*, and a flexible form of constitutional amendment was provided to achieve such an advancement of language rights. But again, this is a form of advancement brought about through a political process, not a judicial one.

[70] If however the provinces were told that the scheme provided by ss. 16 to 22 of the *Charter* was inherently dynamic and progressive, apart from legislation and constitutional amendment, and that the speed of progress of this scheme was to be controlled mainly by the courts, they would have no means to know with relative precision what it was that they were opting into. This would certainly increase their hesitation in so doing and would run contrary to the principle of advancement contained in s. 16(3).

[71] In my opinion, s. 16 of the *Charter* confirms the rule that the courts should exercise restraint in their interpretation of language rights provisions.

[72] I do not think the interpretation I adopt for s. 19(2) of the *Charter* offends the equality provision of s. 16. Either official language may be used by anyone in any court of New Brunswick or written by anyone in any pleading in or process issuing from any such court. The guarantee of language equality is not, however, a guarantee that the official language used will be understood by the person to whom the pleading or process is addressed.

[73] Before I leave this question of equality however, I wish to indicate that if one should hold that the right to be understood in the official language used in court is a language right governed by the equality provision of s. 16, one would have gone a considerable distance towards the adoption of a constitutional requirement which could not be met except by a bilingual judiciary. Such a requirement would have far reaching consequences and would constitute a surprisingly roundabout and implicit way of amending the judicature provisions of the Constitution of Canada.

[Chief Justice Dickson and Wilson J each wrote separate reasons concurring in the conclusion that the appeal should be dismissed. However, both took the view that the right to use either English or French in court included the right to be understood by the judge or judges hearing the case. Chief Justice Dickson left open the question of what techniques might satisfy this obligation—for example, the use of interpreters or simultaneous translation. Wilson J held that the judge's level of understanding "must be such that the full flavour of the argument can be appreciated."]

NOTES AND QUESTIONS

1. Whose interests are understood to be protected by s 19(2) of the Charter in this case, or by s 133 in *MacDonald*? Is the Court's approach to interpretation here consistent with its earlier approach in *Blaikie*?

2. What is the significance of the characterization of language rights as forged by historic political compromise? Is this characterization valid? Is the interpretive posture that flows from it inevitable?

3. The restrictive approach taken by *Société des Acadiens* and *MacDonald* to the interpretation of language rights attracted the Court's criticism in two judgments. The first is *R v Beaulac*, [1999] 1 SCR 768, 1999 CanLII 684. *Beaulac* concerned the interpretation of ss 530(1) and (4) of the *Criminal Code* which govern the language of criminal trials. In discussing the correct interpretation to be given to those provisions, Bastarache J (speaking for seven members of the Court) stated in *obiter* that "the existence of a political compromise is without consequence with regard to the scope of language rights" (at para 24); "[l]anguage rights must *in all cases* be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada"; and "[t]o the extent that *Société des Acadiens du Nouveau-Brunswick* ... stands for a restrictive interpretation of language rights, it is to be rejected" (at para 25). Chief Justice Lamer and Binnie J, although concurring in Bastarache J's interpretation of the relevant provisions of the *Criminal Code*, expressly distanced themselves from this aspect of Bastarache J's judgment, stating that "[a] re-assessment of the Court's approach to *Charter* language rights developed in *Société des Acadiens* and reiterated in subsequent cases is not necessary or desirable in this appeal" (at para 5). However, in *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1, a case arising under s 23 of the Charter (discussed below), the Court unanimously approved Bastarache J's statements in *Beaulac*, stating that "the fact that constitutional language rights resulted from a political compromise is not unique to language rights and does not affect their scope" (at para 27). Neither *Beaulac* nor *Arsenault-Cameron* dealt squarely with s 19(2) of the Charter or s 133 of the *Constitution Act, 1867*, the two constitutional provisions at issue in *Société des Acadiens* and *MacDonald*, and so the specific holdings in those decisions have not been overruled. But in light of *Beaulac* and *Arsenault-Cameron*, would those cases be decided the same way today?

4. Michael MacMillan notes that there are two ways to justify language rights—on the theoretical basis that they share the essential elements of human rights, and on a more empirical or inductive basis that supports language rights on the basis of public attitudes and social practices: see Michael MacMillan, "Linking Theory to Practice: Comments on 'The Constitutional Protection of Language'" in David Schneiderman, ed, *Language and the State: The Law and Politics of Identity* (Cowansville, Que: Éditions Yvon Blais, 1991) at 59.

5. In *MacDonald*, Beetz J made a distinction between language rights and legal rights, explaining their interaction as follows:

[110] Suppose that a person is charged with a criminal offence drafted in either the French or the English language and that person does not understand the language of the charge. It goes without saying that this person cannot be asked to plead and be tried upon

the charge in these circumstances. What will happen as a matter of practice as well as of law is that the judge will call upon a sworn interpreter to translate the charge into a language that the accused can understand. But this is so whether the accused speaks only German or Cantonese and has nothing to do with what s. 133 stands for. Provision is made for this different purpose by other enactments relating for instance to interpreters and under other principles of law some of which are now enshrined in the provisions of distinct constitutional or quasi-constitutional instruments, such as s. 2(g) of the *Canadian Bill of Rights* and s. 14 of the Charter, also relating to interpreters. ...

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[114] It is axiomatic that everyone has a common law right to a fair hearing, including the right to be informed of the case one has to meet and the right to make full answer and defence. Where the defendant cannot understand the proceedings because he is unable to understand the language in which they are being conducted, or because he is deaf, the effective exercise of these rights may well impose a consequential duty upon the court to provide adequate translation. But the right of the defendant to understand what is going on in court and to be understood is not a separate right, nor a language right, but an aspect of the right to a fair hearing.

The constitutional right to an interpreter in s 14 of the Charter is discussed in *R v Tran*, [1994] 2 SCR 951, 1994 CanLII 56. For a skeptical treatment of “legislative bilingualism” in historically English-speaking provinces, see *Caron v Alberta*, 2015 SCC 56.

Does the above discussion of English and French, as differentiated from other languages, reflect the special place of English and French in the history of the Canadian Constitution, or does it depart from that history in recognition of Canada as a multicultural—and thus multilingual—society?

6. Section 23 of the Charter contains the minority language education guarantees. It is distinctive in that it imposes obligations on all provinces, unlike the institutional bilingualism provisions that currently apply to Quebec, New Brunswick, and Manitoba. But not all of s 23 applies in Quebec. By virtue of s 59 of the *Constitution Act, 1982*, s 23(1)(a) does not come into effect in Quebec until authorized by the “legislative assembly or government of Quebec.” This provision reflects Quebec’s concern that immigrants have tended to gravitate to the anglophone community. Therefore, access to English language education in Quebec depends on the parents being citizens who received primary school instruction in English in Canada.

Section 23 was the focus of one of the earliest Charter cases to reach the Supreme Court of Canada, *AG (Que) v Quebec Protestant School Boards*, [1984] 2 SCR 66, 1984 CanLII 32. The Court struck down the portions of Quebec’s *Charter of the French Language* that gave access to English language schools only to the children of persons who had been educated in English in Quebec. This provision, known as the “Quebec clause,” clashed with the “Canada clause” contained in s 23(1)(b), which offered minority language schooling in Quebec to the children of parents who had received primary instruction in English, not just in Quebec but in any other part of Canada. The judgment of the Court characterized the legislation as having the purpose of ousting the Canada clause of the Charter, rather than limiting its reach. Therefore, s 1 of the Charter could not save it.

7. The major Supreme Court judgment on s 23 of the Charter is *Mahe v Alberta*, immediately below. For the Court, this case was the first attempt at determining the scope of the rights to educational facilities for minority language groups. Note how the Court tries to set out some general principles for application in this and the many other fact situations that will arise across the country—in effect, initiating an ongoing dialogue between courts and legislatures about the appropriate design of minority language educational systems.

Mahe v Alberta

[1990] 1 SCR 342, 1990 CanLII 133

DICKSON CJ (Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, and Cory JJ concurring):

Section 23 is one component in Canada's constitutional protection of the official languages. The section is especially important in this regard, however, because of the vital role of education in preserving and encouraging linguistic and cultural vitality. It thus represents a linchpin in this nation's commitment to the values of bilingualism and biculturalism.

The appellants claim that their rights under s. 23 are not satisfied by the existing educational system in Edmonton nor by the legislation under which it operates, resulting in an erosion of their cultural heritage, contrary to the spirit and intent of the *Charter*. In particular, the appellants argue that s. 23 guarantees the right, in Edmonton, to the "management and control" of a minority-language school—that is, to a Francophone school run by a Francophone school board. Our task then is to determine the meaning of s. 23 of the *Charter*.

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The appellants Jean-Claude Mahe and Paul Dubé are parents whose first language learned and still understood is French. The appellant Angeline Martel is a parent who received her primary school instruction in French. All three have school age children, and thus qualify under s. 23(1) of the *Charter* as persons who, subject to certain limitations, "have the right to have their children receive primary and secondary school instruction" in the language of the linguistic minority population of the province—in this case, the French language. They may therefore conveniently be called "s. 23 parents," and their children "s. 23 students." ...

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At the heart of this appeal is the claim of the appellants that the term "minority language educational facilities" referred to in s. 23(3)(b) includes administration by distinct school boards. The respondent takes the position that the word "facilities" means a school building. The respondent submits that the rights of the Francophone minority in metropolitan Edmonton have not been denied because those rights are being met with current Francophone educational facilities.

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The primary issue raised by this appeal is the degree, if any, of "management and control" of a French language school which should be accorded to s. 23 parents in Edmonton. (The phrase "management and control," it should be noted, is not a term of art: it appears to have been introduced in earlier s. 23 cases and has now gained such currency that it was utilized by all the groups in this appeal.) The appellants appear to accept that, with a few exceptions, the government has provided whatever other services or rights might be mandated in Edmonton under s. 23: their fundamental complaint is that they do not have the exclusive management and control of the existing Francophone schools. ...

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There are two general questions which must be answered in order to decide this appeal: (1) do the rights which s. 23 mandates, depending upon the numbers of students, include a right to management and control; and (2) if so, is the number of students in Edmonton sufficient to invoke this right? I will begin with the first question.

It appeared to be common ground between the parties that if a right to management and control is provided by s. 23, it must be found in the right to "minority

language educational facilities” set out in subs. (3)(b). Before this particular subsection can be examined, however, it is essential to consider two general matters: (1) the purpose of s. 23; and (2) the relationship between the different subsections and paragraphs which comprise s. 23. In interpreting s. 23, as in interpreting any provision of the *Charter*, it is crucial to consider the underlying purpose of the section. As to the second matter, the structure of s. 23 makes it imperative that each part of the section be read in the context of all of the constituent parts.

(1) The Purpose of Section 23

The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.

My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them. The cultural importance of language was recognized by this Court in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 748-49:

Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, *a means by which a people may express its cultural identity*. [Emphasis added.]

Similar recognition was granted by the Royal Commission on Bilingualism and Biculturalism, itself a major force in the eventual entrenchment of language rights in the *Charter*. At page 8 of Book II of its report, the Commission stated:

Language is also the key to cultural development. Language and culture are not synonymous, but the vitality of the language is a necessary condition for the complete preservation of a culture.

And at p. 19, in a comment on the role of minority language schools, the Commission added:

These schools are essential for the development of both official languages and cultures; ... the aim must be to provide for members of the minority an education appropriate to their *linguistic and cultural identity*. ... [Emphasis added.]

In addition, it is worth noting that minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where the minority community can meet and facilities which they can use to express their culture.

A further important aspect of the purpose of s. 23 is the role of the section as a *remedial* provision. It was designed to remedy an existing problem in Canada, and hence to alter the status quo. ...

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In my view the appellants are fully justified in submitting that “history reveals that s. 23 was designed to correct, on a national scale, the progressive erosion of minority official language groups and to give effect to the concept of the ‘equal partnership’ of the two official language groups in the context of education.”

The remedial aspect of s. 23 was indirectly questioned by the respondent and several of the interveners in an argument which they put forward for a “narrow construction” of s. 23. ...

[Reference to Beetz J’s comments on the political nature of language rights and the restrictive role of the courts in their interpretation is omitted.]

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I do not believe that these words support the proposition that s. 23 should be given a particularly narrow construction, or that its remedial purpose should be ignored. Beetz J makes it clear in this quotation that language rights are not cast in stone nor immune from judicial interpretation. ... Beetz J’s warning that courts should be careful in interpreting language rights is a sound one. Section 23 provides a perfect example of why such caution is advisable. The provision provides for a novel form of legal right, quite different from the type of legal rights which courts have traditionally dealt with. Both its genesis and its form are evidence of the unusual nature of s. 23. Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures. Careful interpretation of such a section is wise: however, this does not mean that courts should not “breathe life” into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose.

(2) The Context of Section 23(3)(b): An Overview of Section 23

The proper way of interpreting s. 23, in my opinion, is to view the section as providing a general right to minority language instruction. Paragraphs (a) and (b) of subs. (3) qualify this general right: para. (a) adds that the right to instruction is only guaranteed where the “number of children” warrants, while para. (b) further qualifies the general right to instruction by adding that where numbers warrant it includes a right to “minority language educational facilities.” In my view, subs. (3)(b) is included in order to indicate the upper range of possible institutional requirements which may be mandated by s. 23 (the government may, of course, provide more than the minimum required by s. 23).

Another way of expressing the above interpretation of s. 23 is to say that s. 23 should be viewed as encompassing a “sliding scale” of requirement, with subs. (3)(b) indicating the upper level of this range and the term “instruction” in subs. (3)(a) indicating the lower level. The idea of a sliding scale is simply that s. 23 guarantees whatever type and level of rights and services is appropriate in order to provide minority language instruction for the particular number of students involved.

The sliding scale approach can be contrasted with that which views s. 23 as only encompassing two rights—one with respect to instruction and one with respect to facilities—each providing a certain level of services appropriate for one of two numerical thresholds. On this interpretation of s. 23, which could be called the “separate rights” approach, a specified number of s. 23 students would trigger a particular level of instruction, while a greater, specified number of students would require, in addition, a particular level of minority language educational facilities. Where the number of students fell between the two threshold numbers, only the lower level of instruction would be required.

The sliding scale approach is preferable to the separate rights approach, not only because it accords with the text of s. 23, but also because it is consistent with the purpose of s. 23. The sliding scale approach ensures that the minority group receives the full amount of protection that its numbers warrant. Under the separate rights approach, if it were accepted, for example, that “X” number of students ensured a right to full management and control, then presumably “X – 1” students would not

bring about any rights to management and control or even to a school building. Given the variety of possible means of fulfilling the purpose of s. 23, such a result is unacceptable. Moreover, the separate rights approach places parties like the appellants in the paradoxical position of forwarding an argument which, if accepted, might ultimately harm the overall position of minority language students in Canada. If, for instance, the appellants succeeded in persuading this Court that s. 23 mandates a completely separate school board—as opposed to some sort of representation on an existing board—then other groups of s. 23 parents with slightly fewer numbers might find themselves without a right to any degree of management and control—even though their numbers might justify granting them some degree of management and control.

The only way to avoid the weaknesses of the separate rights approach would be to lower the numbers requirement—with the result that it would be impractical to require governments to provide more than the minimum level of minority language educational services. In my view, it is more sensible, and consistent with the purpose of s. 23, to interpret s. 23 as requiring whatever minority language educational protection the number of students in any particular case warrants. Section 23 simply mandates that governments do whatever is practical in the situation to preserve and promote minority language education.

There are outer limits to the sliding scale of s. 23. In general, s. 23 may not require that anything be done in situations where there are a small number of minority language students. There is little that governments can be required to do, for instance, in the case of a solitary, isolated minority language student. Section 23 requires, at a minimum, that “instruction” take place in the minority language: if there are too few students to justify a programme which qualifies as “minority language instruction,” then s. 23 will not require any programmes be put in place. However, the question of what is the “minimum” programme which could constitute “instruction,” and the further question of how many students might be required in order to warrant such a programme, are not at issue in this appeal and I will not be addressing them. The question at issue here concerns only the “upper level” of the possible range of requirements under s. 23—that is, the requirements where there are a relatively large number of s. 23 students.

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In my view, the words of s. 23(3)(b) are consistent with and supportive of the conclusion that s. 23 mandates, where the numbers warrant, a measure of management and control. Consider, first, the words of subs. (3)(b) in the context of the entire section. Instruction must take place somewhere and accordingly the right to “instruction” includes an implicit right to be instructed in facilities. If the term “minority language educational facilities” is not viewed as encompassing a degree of management and control, then there would not appear to be any purpose in including it in s. 23. This common sense conclusion militates against interpreting “facilities” as a reference to physical structures. Indeed, once the sliding scale approach is accepted it becomes unnecessary to focus too intently upon the word “facilities.” Rather, the text of s. 23 supports viewing the entire term “minority language educational facilities” as setting out an upper level of management and control.

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The foregoing textual analysis of s. 23(3)(b) is strongly supported by a consideration of the overall purpose of s. 23. That purpose, as discussed earlier, is to preserve and promote minority language and culture throughout Canada. In my view, it is essential, in order to further this purpose, that, where the numbers warrant, minority language parents possess a measure of management and control over the educational facilities in which their children are taught. Such management and control is

vital to ensure that their language and culture flourish. It is necessary because a variety of management issues in education, *e.g.*, curricula, hiring, expenditures, can affect linguistic and cultural concerns. I think it incontrovertible that the health and survival of the minority language and culture can be affected in subtle but important ways by decisions relating to these issues. To give but one example, most decisions pertaining to curricula clearly have an influence on the language and culture of the minority students.

Furthermore, as the historical context in which s. 23 was enacted suggests, minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority. ...

Section 23 clearly encompasses a right to management and control. On its own, however, the phrase "management and control" is imprecise and requires further specification. This can be accomplished by considering what type of management and control is needed in order to fulfill the purpose of s. 23.

The appellants argue for a completely independent Francophone school board. Much is to be said in support of this position and indeed it may be said to reflect the ideal. ... Historically, separate or denominational boards have been the principal bulwarks of minority language education in the absence of any provision for minority representation and authority within public or common school boards. Such independent boards constitute, for the minority, institutions which it can consider its own with all this entails in terms of opportunity of working in its own language and of sharing a common culture, interests and understanding and being afforded the fullest measure of representation and control. These are particularly important in setting overall priorities and responding to the special educational needs of the minority.

In some circumstances an independent Francophone school board is necessary to meet the purpose of s. 23. However, where the number of students enrolled in minority schools is relatively small, the ability of an independent board to fulfill this purpose may be reduced and other approaches may be appropriate whereby the minority is able to identify with the school but has the benefit of participating in a larger organization through representation and a certain exclusive authority within the majority school board. Under these circumstances, such an arrangement avoids the isolation of an independent school district from the physical resources which the majority school district enjoys and facilitates the sharing of resources with the majority board, something which can be crucial for smaller minority schools. By virtue of having a larger student population, it can be expected that the majority board would have greater access to new educational developments and resources. Where the number of s. 23 students is not sufficiently large, a complete isolation of the minority schools would tend to frustrate the purpose of s. 23 because, in the long run, it would contribute to a decline in the status of the minority language group and its educational facilities. Graduates of the minority schools would be less well-prepared (thus hindering career opportunities for the minority) and potential students would be disinclined to enter minority language schools.

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Perhaps the most important point to stress is that completely separate school boards are not necessarily the best means of fulfilling the purpose of s. 23. What is essential, however, to satisfy that purpose is that the minority language group have control over those aspects of education which pertain to or have an effect upon their language and culture. This degree of control can be achieved to a substantial extent by guaranteeing representation of the minority on a shared school board and by

giving these representatives exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns.

To give but one example, the right to tax (which would accompany the creation of an independent school district), is not, in my view, essential to satisfy the concerns of s. 23 with linguistic and cultural security. Section 23 guarantees that minority schools shall receive public funds, but it is not necessary that the funds be derived through a separate tax base provided adequate funding is otherwise assured. Similar observations can be made in respect of other features of separate school districts.

It is not possible to give an exact description of what is required in every case in order to ensure that the minority language group has control over those aspects of minority language education which pertain to or have an effect upon minority language and culture. Imposing a specific form of educational system in the multitude of different circumstances which exist across Canada would be unrealistic and self-defeating. The problems with mandating "specific modalities" have been recognized by all of the courts in Canada which have considered s. 23. At this stage of early development of s. 23 jurisprudence, the appropriate response for the courts is to describe in general terms the requirements mandated. It is up to the public authorities to satisfy these general requirements. Where there are alternative ways of satisfying the requirements, the public authorities may choose the means of fulfilling their duties. In some instances this approach may result in further litigation to determine whether the general requirements mandated by the court have been implemented. I see no way to avoid this result, as the alternative of a uniform detailed order runs the real risk of imposing impractical solutions. Section 23 is a new type of legal right in Canada and thus requires new responses from the courts.

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In my view, the measure of management and control required by s. 23 of the Charter may, depending on the numbers of students to be served, warrant an independent school board. Where numbers do not warrant granting this maximum level of management and control, however, they may nonetheless be sufficient to require linguistic minority representation on an existing school board. In this latter case:

- (1) The representation of the linguistic minority on local boards or other public authorities which administer minority language instruction or facilities should be guaranteed;
- (2) The number of minority language representatives on the board should be, at a minimum, proportional to the number of minority language students in the school district, i.e., the number of minority language students for whom the board is responsible;
- (3) The minority language representatives should have exclusive authority to make decisions relating to the minority language instruction and facilities, including:
 - (a) expenditures of funds provided for such instruction and facilities;
 - (b) appointment and direction of those responsible for the administration of such instruction and facilities;
 - (c) establishment of programs of instruction;
 - (d) recruitment and assignment of teachers and other personnel; and
 - (e) making of agreements for education and services for minority language pupils.

I do not doubt that in future cases courts will have occasion to expand upon or refine these words. It is impossible at this stage in the development of s. 23 to foresee all of the circumstances relevant to its implementation.

There are a few general comments I wish to add in respect of the above description. First, the matter of the quality of education to be provided to the minority students was not dealt with above because, strictly speaking, it does not pertain to the issue of management and control. It is, of course, an important issue and one which was raised in this appeal. I think it should be self-evident that in situations where the above degree of management and control is warranted the quality of education provided to the minority should in principle be on a basis of equality with the majority. This proposition follows directly from the purpose of s. 23. However, the specific form of educational system provided to the minority need not be identical to that provided to the majority. The different circumstances under which various schools find themselves, as well as the demands of a minority language education itself, make such a requirement impractical and undesirable. It should be stressed that the funds allocated for the minority language schools must be at least equivalent on a per student basis to the funds allocated to the majority schools. Special circumstances may warrant an allocation for minority language schools that exceeds the per capita allocation for majority schools. I am confident that this will be taken into account not only in the enabling legislation, but in budgetary discussions of the board.

With respect to funding, the reference point for determining the number of students will normally be the pupils actually receiving minority language education. During the period in which a minority language education programme is getting started, however, it would seem reasonable to budget for the number of students who can realistically be seen as attending the school once operations are well established. This may be one example of a special circumstance which calls for a higher allocation of funds for minority education programmes. It could also be seen, however, as a consideration which would equally be extended to a majority language programme during its start-up period.

Second, provincial and local authorities may, of course, give minority groups a greater degree of management and control than that described above. Section 23 only mandates a minimum level of management and control in a given situation; it does not set a ceiling.

Third, there are a variety of different forms of institutional structures which will satisfy the above guidelines. I have stressed this aspect of the flexibility of s. 23 before, but this feature bears repeating. The constant in any acceptable scheme of minority representation, however, will be the granting of representation proportional to the number of minority language students who fall under the responsibility of the particular school board.

Fourth, the persons who will exercise the measure of management and control described above are "s. 23 parents" or persons such parents designate as their representatives. I appreciate that because of the wording of s. 23 these parents may not be culturally a part of the minority language group. This could occasionally result in persons who are not, strictly speaking, members of the minority language group exercising some control over minority language education. This would be a rare occurrence, and is not reason to lessen the degree of management and control given to s. 23 parents.

Fifth, I wish to emphasize that the above description is only meant to cover the degree of management and control which, short of a separate school board, is required under s. 23 where the number of s. 23 students is significant enough to warrant moving towards the upper level of the sliding scale. Other degrees of management and control may be required in situations where the numbers do not justify granting full rights of management and control. What is required in any case will turn on what the "numbers warrant."

Finally, it should be noted that the management and control accorded to s. 23 parents does not preclude provincial regulation. The province has an interest both in the content and the qualitative standards of educational programmes. Such programmes can be imposed without infringing s. 23, in so far as they do not interfere with the linguistic and cultural concerns of the minority.

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Appeal allowed.

Denise Réaume & Leslie Green, "Education and Linguistic Security in the Charter"

(1989) 34 McGill LJ 777 (footnotes omitted)

I. The Value of Linguistic Security

Two mischievous notions about language rights have some currency in Canada. The first is that language rights are a mere product of political compromise and have no foundation in principle. The second contradicts the first. According to it, language rights are founded on the principle of survival: governments have a duty to ensure that minority languages continue into the future. These are not politically innocent notions, for each has implications for the way in which language rights should be interpreted and the weight they should be given. But they are both founded on mistakes.

The first confuses the *genesis* of constitutional rights with their *justification*. All rights entrenched in positive law have a particular form that attempts to make concrete certain abstract values which the law prizes. Every constitutional right thus marks a kind of compromise between competing interpretations of the values it protects; every one strikes some balance between legislative sovereignty and minority protections; every one can be protected only by a combination of non-interference and positive action on the part of government. Because these are features of all constitutional rights, they do not distinguish language rights from the rest and therefore provide no ground for interpreting them differently. That is why the Supreme Court of Canada, to whom this first mistake is due, has not been able to draw the proposed distinction between "compromise- and principle-based" rights in a consistent and persuasive way. Such truth as there is in the idea amounts to this: the courts must give effect to the terms of a constitutional agreement without, under the guise of interpretation, amending them. That claim is as harmless as it is sound. It does nothing to show what those terms are, nor how courts should proceed when they are equivocal. Thus, the claim that they originate in a compromise does not in fact justify the Court's recent policy of reading some language rights restrictively.

The second view, according to which minority language rights are rooted in the principle of survival, makes a different error. It confuses the *justification* of a right with the likely *by-product* of its exercise. Minority languages are under threat from a variety of sources, but they die out for a common reason: they are abandoned by their speakers. Language rights aim to protect speakers from certain pressures to abandon their languages. When linguistic choices are made in a secure environment, roughly, one without unfair pressure to conform to majority practices, they will in fact typically lead to a higher rate of survival. Does it follow, then, that the aim of language rights is to protect the endangered species of the linguistic world?

We can test that hypothesis by considering some policies aimed at ensuring language survival. Suppose, for example, that one of the majority English provinces

required all French speakers to send their children to French schools and denied them access to English instruction. Or suppose that by residential zoning it attempted to reduce ... declining minorities [from marrying outside their group]. Set aside the question of whether these measures would violate other rights, and let us ask simply whether *as far as language goes*, they are aimed in the right direction. Could they be said to take at least one step towards justice? On reflection that seems dubious. The problem is not simply that language rights and other liberties are here in conflict, but that moral rights to language use are *themselves* violated by the policies in question. Prohibiting the minorities from learning the majority language and banning minority-language instruction offend common principles: they attack linguistic security by creating unfair pressures to conform. These pressures do not become acceptable when they are inflicted on a minority within the minority community itself. Draconian measures to promote minority languages may evince a kind of concern for the health of the languages, but they do not give appropriate concern for the interests of their speakers.

That security and not survival is the root value is suggested by considering the importance of language. Apart from its instrumental value in communication, language is also an important marker of identity. Those who wish to use minority languages do so partly as an expression of belonging to and identifying with a community. But language use has this valuable expressive dimension only if rooted in a free and fair context. Those who are forced to use a particular language cannot be thought thereby to express their identity. That does not mean that language must be consciously chosen. Language is only partially a realm of free choice. Children have a mother tongue long before they develop the capacity for reflective and informed choice about ethnic identification, and parents typically transmit their mother tongues as a matter of course. But these normal processes of social development contribute value to their outcomes only in circumstances which are fair and unbiased. Thus, while facilitating minority language education and requiring it both promote the survival of minority languages, this equivalence in consequences does not establish an equivalence in aim. The point of language rights is to give speakers a secure environment in which to make choices about language use, and in which ethnic identification can have positive value.

The confusion of survival and security is easily made, for the conditions threatening security also make survival less likely. Evidence of assimilation and decline among the francophone minorities made it clear that the lack of adequate protection in the 1867 constitution had exacerbated their demographic fragility, and the desire to remedy this was a driving force of the language rights provisions. Nonetheless, the decline of the minorities is a symptom and not itself a disease. It is presumptive evidence that there is strong and potentially unfair social pressure to abandon their language. But this evidence is rebuttable. It is possible (though not probable under normal circumstances) that even in a completely secure environment, some members of minority language groups would still make free and informed decisions to integrate with a majority community. The need to identify with a community may be deeply rooted in human nature, but we know that there is nonetheless much flexibility regarding the community with which one identifies.

These considerations suggest that it is not the survival of languages but the security of their speakers that justifies language rights. To have linguistic security in the fullest sense is to have the opportunity, without serious impediments, to live a full life in a community of people who share one's language. This opportunity is taken for granted by those in linguistically homogeneous societies and by those who speak the majority language in multilingual societies. Through sheer numbers they enjoy *de facto* linguistic security without need for special legal protections. No doors are

closed, and no aspects of human fulfillment are unavailable on account of language. Abandoning one's mother tongue (oneself or on behalf of one's children) is of course a conceivable option for them, but not one to which they are driven by force of social circumstance and not one which will even be considered in the normal course of life. It is otherwise for members of linguistic minorities. Without special protections, minority language speakers are inevitably placed under strong pressures to abandon their mother tongue. Because of its central role in every aspect of human cooperation, people share a common interest in communicating with others. To be excluded from this is to be denied most of what is valued in life. The more restricted the existence available in one's mother tongue the more rational it becomes to take up the language that offers greater opportunities. This does not mean that the minority language speakers do not value their language or communities, any more than the decision of hold-up victims to part with their wallets means that they do not value their money. It means simply that there are some burdens that outweigh it, and some costs that it is unjust to expect them to bear. ...

The role of government in protecting linguistic security is thus easily explained. The familiar official language rights serve the interests of linguistic security by facilitating participation in activities under government control. Participation in political life involves communication with officials. A community that could not participate in the political life of its country would be severely handicapped, and, if participation must be on the majority's terms, then the incentive to assimilate is obvious. Similarly, the denial of government services, whether the court system or the kind of everyday help and advice that many government departments provide, turns the use of one's mother tongue into a handicap and sometimes even a source of shame. But, unlike ethnic groups, government has no mother tongue of its own. The choice of its working languages is a matter over which the government has complete control. Participation can therefore be guaranteed in one's own language without sacrificing the legitimate interests of others. How does education fit into the emerging picture?

The system of education, particularly at the primary and secondary levels, makes major contributions to the security of one's linguistic environment. Provision for minority language education is a complex good with many different facets. For convenience, we distinguish two main aspects. There are powerful *individual benefits* of children being able to learn in their mother-tongue The absence of minority language education is quite obviously a powerful assimilative force. Children grow up with a grasp of their mother tongue which is inadequate for the kind of adult pursuits which require strong communication skills. In such circumstances it is hardly surprising that people abandon their first language and do not teach it to their children. Before long, such a community ceases to be viable and its language, if it persists at all, has merely folkloric status.

Education cannot however be fully understood as an individual good. Minority language instruction benefits the linguistic group as well. It has *collective benefits* which flow from the language being a vehicle of instruction. For example, it provides and renews cultural capital. This is true at the level of both "high" and "popular" culture: the productive and appreciative capacities must be nurtured and trained through a comprehensive education. Musicians, writers, artists obviously depend on and draw on common cultural capital in representing and contesting the life of the community. But even folk and oral traditions, sporting culture, etc., all draw on a stock of common forms and images. In modern societies this capital is largely controlled by the educational system.

Other direct collective benefits are more instrumental: the education system provides jobs for members of the minority community. There are also indirect collective benefits For one thing, a community with public institutions will have greater visibility and status. More importantly, an educational facility such as a neighbourhood school is an important focus of social and cultural activities for the community, especially in smaller towns. And managing a school system by electing trustees, hiring teachers, setting policy, *etc.* are all important parts of the political life of such communities and contribute to their richness and vitality.

These are only some of the ways in which minority-language education enters the collective life of the community. Many of them exhibit interesting structural features. Some collective benefits are *public goods* in the economists' sense: none can be excluded from their benefits and they do not diminish with consumption. This is clearly the case with respect to the diffuse effects of a minority language education system on the security, status, and vitality of the community. And, where publicly funded education is the norm, it is true of educational options themselves: they become available to any parents who wish to take advantage of them. Moreover, the existence of these schools makes the entire community more vital in diffuse ways which generate benefits even for those who do not directly participate in its activities. For example, the increased use of minority languages obviously increases the instrumental value of being able to speak them, and this benefit accrues to all.

But minority-language instruction has further collective benefits which, though excludable, are social and non-rival. Where these flow from the inherent value of participating with others in some social activity, we call them *participatory goods*. A school plays a significant role in fostering human relationships, teaching co-operation, and imparting other social skills in a way that could not be achieved under a system of private individual tuition. Public education is the central means by which children are introduced to and can participate in the cultural traditions of their community. Management and control of an education system, similarly, provides a forum in which parents can exercise and develop skills of self-government. In all these ways, minority language education has a significant social role.

NOTES AND QUESTION

1. *Mahe*, in effect, sets up a dialogue between the legislative and judicial branches on the meaning of s 23, as governments attempt to implement the section. For further discussion by the Supreme Court of Canada, see *Reference re Public Schools Act (Man)*, s 79(3), (4) and (7), [1993] 1 SCR 839, 1993 CanLII 119, where the Court was asked to determine the meaning of s 23(3)(b), the right to receive instruction in "minority language educational facilities." The Court concluded that s 23 requires that the educational facilities be of or belong to the minority group and includes a right to a distinct physical setting. However, as in *Mahe*, it declined to elaborate on what this might mean in a given fact situation. Again, the Court emphasized that the determination of whether facilities are appropriate can only be undertaken on the basis of a distinct geographic region. The Court also determined that the Manitoba *Public Schools Act* did not meet the province's constitutional obligations. Given the number of potential French-language students, s 23 required the establishment of an independent French-language school board under the exclusive management and control of the French-speaking language minority.

2. For a critique of the *Mahe* decision on the grounds that it is overly activist and a departure from the appropriate judicial reading of history, legislative purpose, and constitutional text, see Robert G Richards, "Mahe v Alberta: Management and Control of Minority Language Education" (1991) 36 McGill LJ 216 at 224:

The Court chose to overlook a fundamental point when it said that management and control must be read into section 23 because the historical absence of these rights had led to a failure to provide minority language education. Section 23 *itself* guarantees minority language instruction and facilities. Minority language groups no longer need political influence or control of school boards to get instruction and facilities. They have a constitutional right to them which can be enforced in court if necessary. The very purpose of section 23 is to break the link between the availability of minority language education and political control of school boards or legislatures.

Thus, it seems clear that the purpose and focus of section 23 would have been more appropriately stated in more concrete and specific terms than those chosen by the Chief Justice. As the section itself says, it is aimed at guaranteeing rights to primary and secondary education in the official minority language of each province. The preservation of cultural and linguistic integrity is not the *direct* object of section 23. The availability of minority language education will have an impact on assimilation but that is the *effect* of the section rather than its immediate purpose. Section 23 can easily become over-inflated if it is seen as being aimed directly at guaranteeing linguistic and cultural vitality.

3. Joseph Magnet, in *Official Language of Canada* (Cowansville, Que: Éditions Yvon Blais, 1995) at 80-83, is critical of the principle of linguistic security discussed by Réaume and Green, above. He argues that to create true linguistic security for minority language communities, government would have to intervene in language policy in an ambitious manner—and this is an unrealistic expectation. Moreover, he criticizes their attempt to justify language rights on a single basis because this approach ignores the complexity of the issue. For example, he identifies an additional justification for language rights—namely, that they manage conflict between Canada’s linguistic communities.

4. The Supreme Court applied *Mahe* in *Arsenault-Cameron* (discussed above), in which the Court held that the right of a minority language community to management and control encompassed a right to control over the location of minority language instruction and facilities. In *Arsenault-Cameron*, parents from Summerside, Prince Edward Island and its environs challenged the decision of the provincial minister of education to provide bus transportation to a French-language school in a neighbouring district, as opposed to establishing a school in the Summerside area. The Court held that this decision was for the minority language community (in that case, acting through a French-language school board) to make because it would likely be based on “cultural or linguistic considerations” (at para 47) that are better understood by the minority language community itself. In addition to this purposive argument, the Court pointed to the text of s 23, in particular the term “wherever in the province” in s 23(3)(a), to support the conclusion that the right to management and control included a right to choice of location. Do you agree? The Court, however, stated that the right to choice of location is “subject to objective provincial norms and guidelines that are consistent with s. 23” (at para 54)—for example, those regarding “[s]chool size, facilities, transportation and assembly of students” (at para 53).

5. In both *Mahe* and the *Manitoba Language Reference*, above, the Court gave only declaratory relief that set out guidelines for future action by government in consultation with the minority language population. In other cases, plaintiffs have sought structural remedies. Indeed, the majority of claims for structural relief under the Charter have arisen in the context of minority language education rights. For example, in *Marchand v Simcoe County Board of Education*, 1986 CanLII 2671, 29 DLR (4th) 596 (Ont H Ct J), Sirois J ordered the defendant school board to provide the facilities and funding necessary to achieve instruction and facilities in the French-language secondary school equivalent to those in the English stream and to establish industrial arts and shop programs at the French-language secondary school

equivalent to those in the English schools. In *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003 SCC 62](#), discussed in Chapter 25, a majority of the Court found that a trial judge was justified in retaining jurisdiction over the case and requiring the government to report back to the Court and the parties on its progress in making minority language schools available after the judge had issued a declaration that the s 23 minority language educational rights of francophones in Nova Scotia had been violated.

6. *Lalonde v Ontario (Commission de restructuration des services de santé)*, [2001 CanLII 21164](#), [56 OR \(3d\) 505 \(CA\)](#) presents an interesting variation on the language rights cases discussed above. In *Lalonde*, the Ontario Court of Appeal struck down the decision of the Ontario Health Services Restructuring Commission to close the Montfort Hospital. The hospital was the only hospital in the province where French-language services were available on a full-time basis. Moreover, because the working language of the hospital was French, it was the only hospital in the province where health care professionals were trained in French. The Court rejected constitutional challenges to the discussion to close the hospital on the basis of ss 15 and 16(3). However, the Court found that the commission had exercised its statutory discretion unreasonably by failing to consider, and to justify, any departure from the unwritten constitutional principle of the “protection of minorities” (at para 79) laid down by the Supreme Court in the *Reference re Secession of Quebec*, [\[1998\] 2 SCR 217](#), [1998 CanLII 793](#), excerpted in Chapter 2, Judicial Review and Constitutional Interpretation. The Government of Ontario decided not to appeal this judgment.

7. The legislative measures in the *Ford* case, immediately below, could be seen as an example of Quebec’s vigorous efforts to protect linguistic security for francophones. Its importance in this chapter is to show how the Supreme Court has extended language rights protection beyond the explicit guarantees described so far and how it has tried to reconcile the interests of different linguistic communities when they come into conflict.

In interpreting s 2(b), the guarantee of freedom of expression, to include protection against the suppression of one’s language by the state, the Court has given added protection not only to English and French minorities but also to other linguistic communities. Note, however, that there is a difference between s 2(b) and the language rights described so far because the latter confer positive rights whereas the guarantee in s 2(b) has been understood in primarily negative terms, restricting the state’s ability to prevent the use of a language but not requiring that the state confer services. As well, the language rights guaranteed through s 2(b) are vulnerable to legislative override under s 33.

Ford v Quebec (AG)

[\[1988\] 2 SCR 712](#), [1988 CanLII 19](#)

[This case involved a challenge to ss 58 and 69 of the Quebec *Charter of the French Language*, which required that signs, posters, and commercial advertising be solely in the French language and that only the French version of a firm name be used. The legislation was attacked under both the Charter and the Quebec *Charter of Human Rights and Freedoms*, CQLR c C-12. The editing here emphasizes the former. The override power found in s 33 of the Charter was also involved, and the parts of the judgment dealing with that issue are found in Chapter 17, The Framework of the Charter. The case also involved important rulings on freedom of expression, discussed in Chapter 20, Freedom of Expression.]

THE COURT (Dickson CJ and Beetz, McIntyre, Lamer, and Wilson JJ):

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**VII Whether the Freedom of Expression Guaranteed by
Section 2(b) of the Canadian Charter of Rights and Freedoms
and by Section 3 of the Quebec Charter of Human Rights and
Freedoms Includes the Freedom to Express Oneself in the
Language of One's Choice**

[39] In so far as this issue is concerned, the words "freedom of expression" in s. 2(b) of the Canadian *Charter* and s. 3 of the Quebec *Charter* should be given the same meaning. As indicated above, both the Superior Court and the Court of Appeal held that freedom of expression includes the freedom to express oneself in the language of one's choice. ...

[40] The conclusion of the Superior Court and the Court of Appeal on this issue is correct. Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality. That the concept of "expression" in s. 2(b) of the Canadian *Charter* and s. 3 of the Quebec *Charter* goes beyond mere content is indicated by the specific protection accorded to "freedom of thought, belief [and] opinion" in s. 2 and to "freedom of conscience" and "freedom of opinion" in s. 3. That suggests that "freedom of expression" is intended to extend to more than the content of expression in its narrow sense.

[41] The Attorney-General of Quebec made several submissions against the conclusion reached by the Superior Court and the Court of Appeal on this issue, the most important of which may be summarized as follows: (a) in determining the meaning of freedom of expression the court should apply the distinction between the message and the medium which must have been known to the framers of the Canadian and Quebec Charters; (b) the express provision for the guarantee of language rights in ss. 16 to 23 of the Canadian *Charter* indicate that it was not intended that a language freedom should result incidentally from the guarantee of freedom of expression in s. 2(b); (c) the recognition of a freedom to express oneself in the language of one's choice under s. 2(b) of the Canadian *Charter* and s. 3 of the Quebec *Charter* would undermine the special and limited constitutional position of the specific guarantees of language rights in s. 133 of the *Constitution Act, 1867* and ss. 16 to 23 of the Canadian *Charter* that was emphasized by the Court in *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460 and *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549; and (d) the recognition that freedom of expression includes the freedom to express oneself in the language of one's choice would be contrary to the views expressed on this issue by the European Commission of Human Rights and the European Court of Human Rights.

[42] The distinction between the message and the medium was applied by Dugas J. of the Superior Court in *Devine v. Procureur général du Québec*, [[1982] SC 355, aff'd 1986 CanLII 395, [1987] RJQ 50 (CA), rev'd in part [1988] 2 SCR 790, 1988 CanLII 20], in holding that freedom of expression does not include freedom to express oneself in the language of one's choice. It has already been indicated why that distinction is inappropriate as applied to language as a means of expression because of the intimate relationship between language and meaning. As one of the authorities on language quoted by the appellant Singer in the *Devine* appeal, J. Fishman, *The Sociology of Language* [Rowley, Mass: Newbury House Publishers, 1972], at p. 4, puts it: "... language is not merely a *means* of interpersonal communication and

influence. It is not merely a *carrier* of content, whether latent or manifest. Language itself is content, a reference for loyalties and animosities, an indicator of social statuses and personal relationships, a marker of situations and topics as well as of the societal goals and the large-scale value-laden arenas of interaction that typify every speech community." As has been noted this quality or characteristic of language is acknowledged by the *Charter of the French Language* itself where, in the first paragraph of its preamble, it states: "Whereas the French language, the distinctive language of a people that is in the majority French-speaking, is the instrument by which that people has articulated its identity."

[43] The second and third of the submissions of the Attorney-General of Quebec, which have been summarized above, with reference to the implications for this issue of the express or specific guarantees of language rights in s. 133 of the *Constitution Act, 1867*, and ss. 16 to 23 of the *Canadian Charter of Rights and Freedoms*, are closely related and may be addressed together. These special guarantees of language rights do not, by implication, preclude a construction of freedom of expression that includes the freedom to express oneself in the language of one's choice. A general freedom to express oneself in the language of one's choice and the special guarantees of language rights in certain areas of governmental activity or jurisdiction—the legislature and administration, the courts and education—are quite different things. The latter have, as this court has indicated in *MacDonald, supra*, and *Société des Acadiens, supra*, their own special historical, political and constitutional basis. The central unifying feature of all of the language rights given explicit recognition in the Constitution of Canada is that they pertain to governmental institutions and for the most part they oblige the government to provide for, or at least tolerate, the use of both official languages. In this sense they are more akin to rights, properly understood, than freedoms. They grant entitlement to a specific benefit from the government or in relation to one's dealing with the government. Correspondingly, the government is obliged to provide certain services or benefits in both languages or at least permit use of either language by persons conducting certain affairs with the government. They do not ensure, as does a guaranteed freedom, that within a given broad range of private conduct, an individual will be free to choose his or her own course of activity. The language rights in the Constitution impose obligations on government and governmental institutions that are in the words of Beetz J. in *MacDonald*, a "precise scheme," providing specific opportunities to use English or French, or to receive services in English or French, in concrete, readily ascertainable and limited circumstances. In contrast, what the respondents seek in this case is a freedom as that term was explained by Dickson J. (as he then was) in *R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 336: "Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or constraint." The respondents seek to be free of the state imposed requirement that their commercial signs and advertising be in French only, and seek the freedom, in the entirely private or non-governmental realm of commercial activity, to display signs and advertising in the language of their choice as well as that of French. Manifestly the respondents are not seeking to use the language of their choice in any form of direct relations with any branch of government and are not seeking to oblige government to provide them any services or other benefits in the language of their choice. In this sense the respondents are asserting a freedom, the freedom to express oneself in the language of one's choice in an area of non-governmental activity, as opposed to a language right of the kind guaranteed in the Constitution. The

recognition that freedom of expression includes the freedom to express oneself in the language of one's choice does not undermine or run counter to the special guarantees of official language rights in areas of governmental jurisdiction or responsibility. The legal structure, function and obligations of government institutions with respect to the English and French languages are in no way affected by the recognition that freedom of expression includes the freedom to express oneself in the language of one's choice in areas outside of those for which the special guarantees of language have been provided.

[44] The decisions of the European Commission of Human Rights and the European Court of Human Rights on which the Attorney-General of Quebec relied are all distinguishable on the same basis, apart from the fact that, as Bisson J.A. observed in the Court of Appeal, they arose in an entirely different constitutional context. They all involved claims to language rights in relations with government that would have imposed some obligation on government. ...

[The discussion about whether the guarantee of freedom of expression extends to commercial expression has been omitted. The Court concluded that the fact that the signs in issue had a commercial purpose did not remove the expression contained therein from the scope of protected freedom. Having found an infringement of freedom of expression, the Court turned to s 1 of the Canadian Charter and s 9.1 of the Quebec Charter.]

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[72] The section 1 and s. 9.1 materials consist of some fourteen items ranging in nature from the general theory of language policy and planning to statistical analysis of the position of the French language in Quebec and Canada. The material deals with two matters of particular relevance to the issue in the appeal: (1) the vulnerable position of the French language in Quebec and Canada, which is the reason for the language policy reflected in the *Charter of the French Language*; and (2) the importance attached by language planning theory to the role of language in the public domain, including the communication or expression by language contemplated by the challenged provisions of the *Charter of the French Language*. As to the first, the material amply establishes the importance of the legislative purpose reflected in the *Charter of the French Language* and that it is a response to a substantial and pressing need. Indeed, this was conceded by the respondents both in the Court of Appeal and in this court. The vulnerable position of the French language in Quebec and Canada was described in a series of reports ... beginning ... in 1969 ... It is reflected in statistics referred to in these reports and in later studies forming part of the materials, with due adjustment made in the light of the submissions of the appellant Singer in *Devine* with respect to some of the later statistical material. The causal factors for the threatened position of the French language that have generally been identified are: (a) the declining birth rate of Quebec francophones resulting in a decline in the Quebec francophone proportion of the Canadian population as a whole; (b) the decline of the francophone population outside Quebec as a result of assimilation; (c) the greater rate of assimilation of immigrants to ... the anglophone community of Quebec; and (d) the continuing dominance of English at the higher levels of the economic sector. These factors have favoured the use of the English language despite the predominance in Quebec of a francophone population. Thus, in the period prior to the enactment of the legislation at issue, the "visage linguistique" of Quebec often gave the impression that English had become as significant as French. This "visage linguistique" reinforced the concern among francophones that English was gaining in importance, that the French language was threatened and that it would ultimately disappear. It strongly suggested to young and ambitious francophones

that the language of success was almost exclusively English. It confirmed to anglophones that there was no great need to learn the majority language. And it suggested to immigrants that the prudent course lay in joining the anglophone community. The aim of such provisions as ss. 58 and 69 of the *Charter of the French Language* was, in the words of its preamble, "to see the quality and influence of the French language assured." The threat to the French language demonstrated to the government that it should, in particular, take steps to assure that the "visage linguistique" of Quebec would reflect the predominance of the French language.

[73] The section 1 and s. 9.1 materials establish that the aim of the language policy underlying the *Charter of the French Language* was a serious and legitimate one. They indicate the concern about the survival of the French language and the perceived need for an adequate legislative response to the problem. Moreover, they indicate a rational connection between protecting the French language and assuring that the reality of Quebec society is communicated through the "visage linguistique." The s. 1 and s. 9.1 materials do not, however, demonstrate that the requirement of the use of French only is either necessary for the achievement of the legislative objective or proportionate to it. That specific question is simply not addressed by the materials. Indeed, in his factum and oral argument the Attorney General of Quebec did not attempt to justify the requirement of the exclusive use of French. He concentrated on the reasons for the adoption of the *Charter of the French Language* and the earlier language legislation, which, as was noted above, were conceded by the respondents. The Attorney General of Quebec relied on what he referred to as the general democratic legitimacy of Quebec language policy without referring explicitly to the requirement of the exclusive use of French. Insofar as proportionality is concerned, the Attorney General of Quebec referred to the American jurisprudence with respect to commercial speech He did, however, refer in justification of the requirement of the exclusive use of French to the attenuation of this requirement reflected in ss. 59 to 62 of the *Charter of the French Language* and the regulations. He submitted that these exceptions ... indicate the concern for carefully designed measures and for interfering as little as possible with commercial expression. The qualifications of the requirement of the exclusive use of French in other provisions of the *Charter of the French Language* and the regulations do not make ss. 58 and 69 any less prohibitions of the use of any language other than French as applied to the respondents. The issue is whether any such prohibition is justified. In the opinion of this Court it has not been demonstrated that the prohibition ... is necessary to the defence and enhancement of the status of the French language in Quebec or that it is proportionate to that legislative purpose. Since the evidence put to us by the government showed that the predominance of the French language was not reflected in the "visage linguistique" of Quebec, the governmental response could well have been tailored to meet that specific problem and to impair freedom of expression minimally. Thus, whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "visage linguistique" in Quebec and therefore justified under [s 9.1 of] the Quebec *Charter* and [s 1 of] the Canadian *Charter*, requiring the exclusive use of French has not been so justified. French could be required in addition to any other language or it could be required to have greater visibility than that accorded to other languages. Such measures would ensure that the "visage linguistique" reflected the demography of Quebec: the predominant language is French. This reality should be communicated to all citizens and non-citizens alike, irrespective of their mother tongue. But exclusivity for the French language has not survived the scrutiny of a proportionality test and does not reflect the reality of Quebec society. Accordingly, we are of the view that the limit imposed on freedom of expression by

s. 58 of the *Charter of the French Language* respecting the exclusive use of French on public signs and posters and in commercial advertising is not justified under s. 9.1 of the Quebec *Charter*. In like measure, the limit imposed on freedom of expression by s. 69 of the *Charter of the French Language* respecting the exclusive use of the French version of a firm name is not justified under either s. 9.1 of the Quebec *Charter* or s. 1 of the Canadian *Charter*.

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Appeal dismissed.

NOTE

When Quebec enacted new legislation restricting the use of English in outdoor signs—and protected it from Charter scrutiny through the use of s 33 of the Charter—several anglophones from Quebec brought a complaint under the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976). Their argument, *inter alia*, was that the sign law violated art 19 of the Covenant, which reads in part:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health and morals.

The United Nations Human Rights Committee took a position similar to the Supreme Court of Canada (*Ballantyne v Canada*, 359/1989, 385/1989), stating:

11.4 Any restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraphs 3(a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the restrictions on outdoor advertising are indeed provided for by law, the issue to be addressed is whether they are necessary for the respect of the rights of others. The rights of others could only be the rights of the francophone minority within Canada under article 27. This is the right to use their own language, which is not jeopardized by the freedom of others to advertise in other than the French language. Nor does the Committee have reason to believe that public order would be jeopardized by commercial advertising outdoors in a language other than French. The Committee notes that the State party does not seek to defend Bill 178 on these grounds. Any constraints under paragraphs 3(a) and 3(b) of article 19 would in any event have to be shown to be necessary. The Committee believes that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English. A state may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice. The Committee accordingly concludes that there has been a violation of article 19, paragraph 2.

In 1993, Quebec changed its language legislation once again so as to permit the use of English on signs, provided French was predominant (*Charter of the French Language*, RSQ 1985, c C-11, s 58, as amended by SQ 1993, c 40). The override of the Charter, enacted in 1988 (SQ 1988, c 54, s 10), was not renewed. A constitutional challenge to s 58, on the basis of, *inter alia*, s 2(b), was rejected by the Quebec Court of Appeal in *Enterprises WFH Ltée c Québec (Procureure Général du)*, 2001 CanLII 17598, [2001] RJQ 2557 (QL) (CA). The controversial aspect of the decision is that the Court permitted the Quebec government to rely on the factual findings of the trial Court in *Ford*, instead of requiring it to adduce new evidence.

IV. PROPOSALS FOR CONSTITUTIONAL AMENDMENT

As discussed in Chapter 26, Amending the Constitution, there have been two major efforts to amend the Constitution since 1982. Neither constitutional round included explicit provisions dealing with language. However, both the Meech Lake Accord (the 1987-90 round) and the Charlottetown Accord (the 1991-92 round) proposed amendments to recognize Quebec as a distinct society. These clauses proved controversial politically, which contributed to the demise of both proposals.

The Charlottetown Accord's distinct society clause was part of the "Canada clause" that was to be added to the *Constitution Act, 1867*:

2(1) The Constitution of Canada, including the *Canadian Charter of Rights and Freedoms*, shall be interpreted in a manner consistent with the following fundamental characteristics:

(a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;

(b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of the three orders of government in Canada;

(c) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition;

(d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;

(e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;

(f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;

(g) Canadians are committed to the equality of female and male persons; and

(h) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.

(2) The role of the legislature and Government of Quebec to preserve and promote the distinct society of Quebec is affirmed.

(3) Nothing in this section derogates from the powers, rights or privileges of the Parliament or the Government of Canada, or of the legislatures or governments of the provinces, or of the legislative bodies or governments of the Aboriginal peoples of Canada, including any powers, rights or privileges relating to language and, for greater certainty, nothing in this section derogates from the aboriginal and treaty rights of the Aboriginal peoples of Canada.

Opinion on the possible legal effect of the distinct society clauses was divided. Proponents variously indicated that the clauses would have only, or mainly, symbolic effect. Some argued that the clause did no more than affirm what the Supreme Court had said in *Ford*,

above—that Quebec, with a French-speaking majority constituting a minority in North America, might take special steps to protect its distinctive language and culture.

Critics viewed the clauses as designed to undermine the commitment to individual rights, including freedom of choice in the use of language, embodied in the Charter. Some critics were apprehensive that the clauses would create a hierarchy of more favoured rights at the expense of other rights and freedoms. For discussion of the history of constitutional amendments, including these controversial provisions, see Peter Russell, *Constitutional Odyssey*, 3rd ed (Toronto: University of Toronto Press, 2004).

Following the narrow defeat of the sovereignty proposal in the October 1995 Quebec referendum, the federal Parliament, on December 6, 1995 (*House of Commons Debates*, 35-1 at 17288), passed a resolution on the distinct society in the following terms:

That whereas the people of Quebec have expressed the desire for recognition of Quebec's distinct society:

- The House recognize that Quebec's is a distinct society within Canada;
- The House recognize that Quebec's distinct society includes its French-speaking majority, unique culture and civil law tradition;
- The House undertake to be guided by this reality;
- The House encourage all components of the legislative and executive branches of government to take note of this recognition and be guided in their conduct accordingly.

NOTE AND QUESTION

In 2019, Quebec enacted the *Act respecting the laicity of the State*, SQ 2019, c 12, initially known as Bill 21. The law bans the wearing of religious dress or symbols by persons performing certain public service functions where they are deemed to occupy a position of authority, such as police officers, government lawyers, and public school teachers. Widely viewed as a reaction to widespread disapproval of face-covering by Muslim women, the law has been criticized as impinging on religious freedom. When it enacted the law, however, the Quebec legislature invoked s 33 of the Charter—the notwithstanding clause—which appeared to eliminate the possibility of a constitutional challenge based on s 2 or ss 7-15 of the Charter. In 2021, a Quebec Superior Court judge confirmed this effect of the notwithstanding clause, although he was highly critical of the law's impact on minority groups. However, the judge went on to find that the law's application to teachers employed by anglophone school boards was contrary to the Charter's s 23. In his view, s 23 protects the autonomy of those school boards with respect to hiring decisions and, thus, was engaged by the ban. As s 33 does not apply to s 23, and the ban was not a "reasonable limit" under s 1, that portion of the law was declared unconstitutional. What do you think of this result?