Language Rights in Québec Education:

Sources of Law

by

T. L. Peszle

Department of Educational Studies
Faculty of Education
McGill University, Montreal

A Thesis Submitted to the Faculty of
Graduate Studies and Research in
partial fulfilment of the requirements
for the degree of Master of Arts

August 1996

National Library of Canada
Acquisitions and Bibliographic Services
395 Wellington Street
Ottawa ON K1A 0N4
Canada

Bibliothèque nationale du Canada
Acquisitions et services bibliographiques
395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre reference

Our file Notre référence

0-612-29561-3

Canada

ABSTRACT

This study first provides general background on the public education system of Québec, and the Canadian and Québec legal systems. Legal background information includes: the classification of Canadian laws; the Common Law and Civil Law traditions of law, and the definitions of sources of law of each tradition; Québec's bijurisdictional legal system; the court system of Québec; Constitutional sources of law; and, the role of the Judiciary in Canadian education.

This thesis is a documentary study of the sources of law which establish language of instruction rights in Québec. Its purpose is to assist educators, students of education, and other lay persons of law to gain understanding of the legal bases upon which the Judiciary formulate decisions in matters of language of instruction. Common Law and Civil Law legislative and case law sources, which are applicable to Québec, are identified and examined, and relevant sources presented.

In addition to providing a summary for Common Law sources, and for Civil Law sources, a chronological summary is given, which reveals six main periods in the development of language of instruction provisions in Québec.

The conclusion is that the primary sources of law for language of instruction in Québec are: s. 93 of the *Constitution Act, 1867*, and case law thereunder; and, the judicial interpretation and provisions of s. 23 of the *Constitution Act, 1982*. Future case law in Québec may reveal s. 23 of the *Canadian Charter of Rights and Freedoms, 1982* to be the most significant source of law for the preservation of minority English language instruction, institutions, and rights of management and control.

RÉSUMÉ

La présente étude fournit des éléments de base au sujet du système d'éducation publique du Québec et des systèmes de droit canadien et québécois. Les données de base englobent: la classification des lois canadiennes; les traditions en matière de "Common Law" et du droit civil et les définitions des sources du droit s'y rattachant; le système de droit bijuridictionnel du Québec; le système juridique du Québec; les sources du droit constitutionnel; et enfin, le rôle de la magistrature en matière d'éducation au Canada.

Cette thèse constitue une étude documentaire des sources du droit établissant les droits quant à la langue d'instruction au Québec. L'objectif est d'aider les éducateurs, les étudiants, et autres personnes oeuvrant dans le domaine juridique à mieux comprendre les bases légales selon lesquelles les tribunaux formulent les décisions en matière de langue d'instruction. Les sources du "Common Law" et du droit civil et la jurisprudence relative qui sont applicables au Québec sont identifiées et examinées. Les sources significatives sont présentées.

Un résumé chronologique est presenté en plus du sommaire des sources du "Common Law" et du droit civil. Ce résumé révèle six périodes importantes dans le développement des dispositions quant à la langue d'instruction au Québec.

La conclusion est que les sources principales du droit quant à la langue d'instruction au Québec sont: l'article 93 de la *Charte canadienne des droits et libertés de 1867* et la jurisprudence relative; et, l'interprétation judiciaire et les dispositions de l'article 23 de la *Loi constitutionnelle de 1982*. Au Québec, la jurisprudence future révèlera peut-être que l'article 23 de la *Charte canadienne des droits et libertés de 1982* constitue la source principale du droit quant à la préservation de l'instruction dans la langue de la minorité anglophone, des institutions et des droits de gestion et de contrôle.

ACKNOWLEDGEMENTS

I would like to thank Dr. Donald Burgess, for his supervision of this thesis, for his example as an educator, his kind encouragement and guidance, and his exacting editorial assistance.

I would also like to thank Renée Robichaud for her translation of the Abstract into French, and for her support in the last days; and Pierrette Pretty, for her much-needed telephone calls of encouragement from Cape Breton throughout the summer of '96.

I would also like to thank the following people, without whom I would never have ever made it thus far: first and foremost, my sisters Barbara Peszle and Brenda Peszle, whom I can never thank enough; my parents Mickey and Theresa, for their love and encouragement; David Martin, who first thought there might be a teacher in me; and John and Susan MacLennan, who along with David, conspired to get me to McGill.

Thanks also to the faculty and many friends in Duggan House and the Faculty of Law at McGill University, who have afforded me opportunities which I had always thought were closed to me.

And last, but not least, I thank my husband Claude Lacoursière for his love, patience, and his sharing of resources over the last four years.

TABLE OF CONTENTS

I Introduction

Historically, Canada is seen as a nation which "care[s] more about order than liberty",[1] and whose justice system is "more judicially conservative than their American counterparts."[2] There is evidence that in recent years, however, Canada may be moving toward an approximation of the American model of civil rights litigation; more frequently choosing the judiciary as the ultimate authority over issues of social concern.[3] This increased reliance on judicial decision-making is most notable when fundamental rights are implicated and/or the policies of basic democratic institutions are involved.[4,5,6] Both of these aspects apply in matters of education.

At the same time, the Canadian judiciary has developed a broad view of its own decision-making power.[7] Educators and citizens, therefore, must inform themselves about the bases upon which the judiciary makes decisions on their behalves; decisions which, when implicating educational rights, have the potential to transform educational institutions.

The focus of this thesis is to investigate the bases upon which the courts make decisions with respect to language of instruction in the province of Québec. That language is a societal issue in Québec education is evidenced by the amount of legislation and subsequent court cases which have dealt with this matter since the early 1960s. How the courts deal with the issue is of far-reaching social concern, since their decisions implicate two of Canada's basic democratic institutions: education and the *Constitution of Canada*.

---

[1] S. Arons, "Constitutional Litigation and Educational Reform: Canada's Opportunity" in M. E. Manley-Casimir & T.A. Sussel, *Courts in the Classroom, Education and the Charter of Rights and Freedoms* (Calgary: Detselig, 1986) 133.

[2] *Ibid.* at 168.

[3] G.M. Dickinson & A.W. MacKay, eds., *Rights, Freedoms and the Education System in Canada: Cases and Materials* (Toronto: Emond Montgomery, 1989) at 1.

[4] See L. Fisher, "When Courts Play School Board: Judicial Activism in Education" (1989) 51 (3) West's Education Law Reporter 693.

[5] See J. Habermas, *Legitimation Crisis* (Boston: Beacon Press, 1975).

[6] See K. Baynes, *The Normative Grounds of Social Criticism: Kant, Rawls and Habermas* (Albany: State University of New York Press, 1992).

[7] T.A. Sussel & M.E. Manley-Casimir, "The Supreme Court of Canada as a 'National School Board': The *Charter* and Educational Change" (1986) 11 Canadian J. of Education 313 at 315-17.

It is the goal of this thesis to assist educators, students of education, and other lay persons of law to gain some understanding of the legal bases for judicial decision-making in matters of language of instruction in Québec, by addressing and providing appropriate background to the question: What are the sources of law which establish linguistic rights in Québec education? This study endeavours, through documentary research, to identify and present these legal sources.

II The Judiciary and Education

Canadians increasingly look to the courts as the ultimate authority for resolving conflict in matters of educational policy and practice.[8] Several factors contribute to this trend. One is a product of the legislature. In his survey of recent Supreme Court cases, Schotten found that elected representatives often abdicate their legislative power to the courts in order to placate interest groups, when political decisions are unpopular.[9] Since education is an issue of critical importance in most every society, it provides an obvious forum in which struggles over fundamental societal values come to the fore.[10] As a result, it is understandable perhaps that elected officials may see large-scale conflict over educational matters as political anathema, and therefore prefer to pass these matters to another decision-making institution.

A second contributing factor is the Canadian *Constitution*. As was predicted by many Canadian and American legal scholars, the constitutional entrenchment of the *Canadian Charter of Rights and Freedoms*[11] in 1982 has evoked significant activity in the courts to both realize and define its proscribed rights. Fisher's examination of judicial activism established that judicial involvement in school policy occurs when explicit constitutional rights are implicated.[12] Further, the Federal government has

---

[8] *Supra* note 4 at 693.

[9] P. M. Schotten, "The Perverse Case for Judicial Activism" (1990) 19 (4) Perspectives on Political Science 197.

[10] *Supra* note 4. Fisher concludes that judicial involvement in school policy occurs when explicit rights are implicated.

[11] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[12] *Supra* note 4.

promoted litigation under the *Charter*.[13] The substantive provisions of the *Charter* itself have also evoked increased judicial activism. No part of the *Charter* provides constitutional guidelines for the role and responsibility of the courts to exercise judicial review,[14] and so it is left to them to define this role. According to Sussel and Manley-Casimir, the Supreme Court has set out to take an activist approach:

> ... recent judicial statements and decisions offer increasing evidence that the Supreme court intends, while taking an essentially gradual and evolving approach to constitutional interpretation, to adopt a more activist view regarding judicial decisionmaking.[15]

In its first major consideration of the *Charter*, for example, the Supreme Court of Canada went so far as to cite a U.S. Supreme Court decision,[16] which in that country has been held up as a signpost of the American court's modern activist tendencies.[17] In Canada, as in the United States, the trend toward an expanded judicial role continues.[18]

III Québec Education

The Québec education system is unique in Canada, as is the education system of each of the nation's provinces and territories. This is because the Preamble or opening clause of Section 93 of the *Constitution Act, 1867*[19] declares education to be a provincial, not a federal responsibility:

> In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

---

[13] See Canadian Council on Social Development, *A Guide to the Charter for Equality-Seeking Groups / Court Challenges Program* (Ottawa: Canadian Council on Social Development, 1987). See also R. Goreham, *Language Rights and the Court Challenges Program A Review of Its Accomplishments and Impact of Its Abolition* (Ottawa: Office of the Commissioner of Official Languages, 1992).

[14] *Supra* note 7 at 313.

[15] *Ibid.* at 316.

[16] *The Law Society of Upper Canada* v. *Skapinker* [1984] 1 S.C.R. 357.

[17] *Supra* note 7 at 317.

[18] See *Schacter* v. *Canada* [1990] 66 D.L.R. (4th) 635, [1992] 2 S.C.R. 679.

[19] *Infra* note 109.

Consequently, in the act of joining Confederation, each of the provinces and territories effectively entrenched whatever system of education had existed in law prior to the joining. It is understandable then that these systems are different, since each emerged out of the very different historical, social, economic and political circumstances which existed in each province prior to Confederation.[20] Significantly, the province of Québec is responsible for the inclusion of the Preamble in Section 93, as Québec would not enter into Confederation unless education was made a provincial responsibility.[21]

Québec's education system is structured along religious lines. It is the result of successful conflict resolution over the issue of public education between the two non-native resident groups of Lower Canada during the nineteenth century, namely the French and the English. The education system which developed is dual-denominational, and provides legal "rights" in education for Catholics and Protestants. These rights are protected in Section 93(1) of the *Constitution of Canada*:

> (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at Union;

Again, Québec is responsible for the inclusion of denominational education rights in the *BNA Act*. Knowing that they would constitute a minority within Québec as a province of Canada, the Protestants of Canada East pressed their Cabinet representative Alexander Galt from Sherbrooke to push for their inclusion.[22] The denominational rights referred to in Section 93(1) are those which were conferred by educational legislation enacted after the *Act of Union* of Upper and Lower Canadas in 1841, and subsequently included in the *Act Respecting the Consolidated Statutes for*

---

[20] D. MacKeracher, *An Overview of the Educational System in Canada. Canadian Education Series* (Toronto: TV Ontario Office of Development Research, 1984).

[21] R. Magnuson, *A Brief History of Québec Education from New France to Parti Québecois* (Montréal: Harvest House, 1980) at 38. See also J. Magnet, "Minority-Language Education Rights" (1982) 4 Supreme Court L.R. 195 at 195.

[22] R. Magnuson, *ibid.*

Lower Canada, 1861.[23] Specifically, the *Education Act, 1841*,[24] together with the *Education Act, 1845*,[25] as revised by the *Education Act, 1846*,[26] together established the legal structures of Québec's current public education system. This system consists of two types of *de jure* Denominational school boards and schools: Catholic and Protestant Confessional school boards in Montréal and Québec City;[27] and Catholic and Protestant Dissentient school boards. Dissentient school boards exist where minority groups, either Catholic or Protestant, living outside of Montréal and Québec City amongst majority populations of the other denomination, exercised their legal right to "dissent" against that majority, to establish their own denominational school boards.[28] Dissentient schools are expressly protected in Section 93(3):

> (3) Where in any Province a system of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education;

In addition to the system of Denominational schools, Québec also has a system of Common schools throughout the province which are *de facto*, but not *de jure*, denominational.[29] Today there are more than one hundred Common,[30] and only five

---

[23] *Consolidated Statutes for Lower Canada*, 1861, c. 11.

[24] *An Act to repeal certain Acts therein mentioned, and to make further provisions for the establishment and maintenance of Common Schools throughout the Province*, 1841 (U.K.), 8 Vict., c. 40, S.C. 1841, c. 18 [hereinafter *Education Act, 1841*].

[25] *An Act to Make Better Provision for Elementary Instruction in Lower Canada*, 1845 (U.K.), 8 Vict., c. 41[hereinafter *Education Act, 1845*].

[26] *Act to repeal certain Enactments therein mentioned, and to make better provision for elementary Instruction in Lower Canada*, 1846 (U.K.), 9 Vict., c. 27, S.C. 1846, c. 27 [hereinafter *Education Act, 1846*].

[27] The *Education Act, 1846* established four Confessional school boards, one Catholic and one Protestant, in each of Montréal and Québec City.

[28] *Supra* note 24, art. 11.

[29] The *Education Act, 1841*, also known as the *Common School Act, 1841*, established a system of Common schools throughout the United Provinces, under a single Superintendent of Public Instruction. Between the second and third Parliamentary readings, the Catholic church succeeded in its effort to include an amendment to introduce the "right to dissent", in Article 11. See R. Magnuson, *supra* note 21 at 28-31.

Dissentient[31] school boards in the province of Québec, as well as the original four Confessional school boards; one Catholic and one Protestant for each of the cities of Montreal and Québec.[32]

In addition to the public school system above, Québec has a unique system of private schools. The tradition of private schooling, which began in 1635 with the establishment of a private Jesuit college[33] is protected by law. With identical wording, both the *Preambles* of the *Education Department Act, 1964,* and the *Superior Council of Education Act, 1964,* jointly referred to as Bill 60,[34] proscribe the right for Québec citizens to establish private schools. The *Québec Charter of Human Rights and Freedoms*,[35] provides a right to parents to send their children to either private or public schools; and, the *Private Education Act, 1968*[36] provides for the public funding of private schools. Most private schools in Québec are publicly funded. Those which are not are called Independent Schools. Despite the fact that most private schools in Québec receive public funding, this enquiry is limited to consideration of the public education system only.

---

[30](...continued)

[30] R. Magnuson, "Constitutionalism and the Plight of English Education in Quebec" (1989) 2(2) Education and Law Journal 119 at 120.

[31] The five dissentient school boards which remain in Québec are: the dissentient Catholic school boards of Portage-du-Fort and Greenfield-Park, and the Protestant dissentient school boards of Baie-Comeau, Rouyn, and Laurentienne.

[32] The four Confessional school boards are: the Commission des écoles catholiques de Montréal; the Protestant School Board of Greater Montreal, the Commission des écoles catholiques de Québec, and the School Board of Greater Québec.

[33] This is one year prior to the establishment of Harvard College in the British Massachusetts Bay Colony. The Jesuit College later became Laval University. See N. Henchey & D. Burgess, *infra* note 139 at 22, and A. Martel, *infra* note 162 at 134.

[34] *Education Act*, R.S.Q. 1964, c. 235, R.S.Q. 1993, c. I-14; *Education Department Act*, R.S.Q. 1964, c. 233, R.S.Q. 1992, c. M-15; *Superior Council of Education Act*, R.S.Q. 1964, c. 234, R.S.Q. 1992, c. C-60.

[35] *Infra* notes 151 and 152.

[36] *The Act respecting private education*, S.Q. 1964, R.S.Q. 1994, c. E-9.

IV Legal Background

i) Classification of Laws

A simple classification of Formal or Positive[37] Law divides laws into four main categories: International and National, and as sub-categories of each of these, Substantive and Procedural. Here were are concerned with Substantive National Law. Substantive Law is the substance of the law, or written law; the actual proscription of a person's rights and obligations under various areas of the law. Procedural Law comprises the rules for *how* the law will be applied. National Law refers to the laws of a Nation.

In Canada, National Law is further divided into Federal Law and Provincial Law. Federal Law, passed by the Parliament of Canada,[38] is generally applicable to all provinces of Canada. In Québec, Provincial Law includes laws which are passed by the Assemblée Nationale du Québec[39] and therefore applicable to the whole province, and Municipal laws which are passed by the Municipal Councils[40] of cities, towns and municipalities, and are applicable there.

National law may also be divided into Public Law and Private or Civil Law. Public law is the law which governs the relationships between citizens and the government. Included under Public Law are Criminal Law, Administrative Law, Constitutional Law and Taxation Law. This study excludes all of the areas of Public Law just mentioned, other than Constitutional Law, which is Federal Law. Private or Civil Law is that body of law which governs the relationships between persons.[41] It deals with such areas as Contracts, Property, Torts, The Law of Agency, and Family Law. Private or Civil Law under this definition, at the Federal level is not included in

---

[37] Positive law is law set out in the various legal sources of law as compared with other conceptions and notions of binding law such as natural law, morality, religion, and others.

[38] Sections 17 to 57 of the *BNA Act, 1867* (to be discussed below), establish and limit the legislative powers of the Parliament of Canada.

[39] The "Legislative Council" and the "Legislative Assembly" of Québec are established in ss. 71 to 87 of the *BNA Act, 1867*. Provincial legislative authority is set out in ss. 92 to 95.

[40] These are provided for by *The Municipal Code of Québec*, R.S.Q. 1988, c. C-27.1.

[41] "Persons" here includes individual people, bodies politic and corporate persons.

this study. However, Civil Law, under a second definition which is specific to Québec, must be included. In addition to the definition above, Civil Law is the name given to the *type* of legal system which Québec uses to govern the relationships between persons.[42] Québec is the only province in Canada where private law is founded on principles of a "Civil Law" tradition of law. The Private law of the other nine provinces, and Federal law which applies to Québec, follow a "Common Law" tradition of private law. The reasons for this difference are historical, and are discussed below.

Laws which are passed by the Federal and Provincial Legislatures, above, are known as Primary legislation. Primary legislation is enacted through a detailed legislative process. First, the government introduces a proposed bill into the legislature, where it is given a first reading, and passed without debate. Reintroduced to the legislature by the minister responsible for the subject of the proposed legislation, the bill is then given a second reading, and debated fully. If the bill passes the second reading with a successful majority vote, then the legislature has approved the bill in principle, and passes it to the appropriate standing committee for any hearings and/or further considerations. The bill is then re-introduced to the legislature, including any amendments arising from the standing committee, for a third reading and full debate. At this point, the bill may be passed, subject only to any detailed amendments. If enacted, Provincial legislation is considered enacted, subject only to formal approval by the Lieutenant Governor. For Federal legislation however, the whole process repeats itself in the Senate, after which the enacted law goes to the Governor General for formal approval. If the Senate makes any changes in the proposed legislation however, the amended bill is referred back to the House of Commons for approval. It is also possible that proposed legislation initiate with the Senate, and then proceed through the House of Commons according to the above procedure.

In addition to their powers to enact Primary legislation, both the Federal and Provincial Legislatures have the power to delegate legislative authority for the

---

[42] *Ibid.*

enactment of Subordinate legislation.[43] By enacting "governing" or "enabling" legislation, the legislatures empower inferior legislative authorities such as cabinet, ministers of cabinet, various administrative tribunals and municipal councils, to pass statutory instruments such as orders in council, regulations and by-laws. Subordinate legislation does not require debate and approval by the Legislative Assembly, but only the approval of the Lieutenant Governor in Council. As such, subordinate legislation, like education regulations enacted by the Ministry of Education of Québec, exists as a potentially powerful tool of the executive branch of government over domains such as education.[44]

ii) The Common Law Tradition

The origins of Common Law began with the Norman Conquest of England in 1066. The basic principles of Common Law as we know them, were fully developed by the early 13th century.[45] This type of law was brought to Québec and all of North America from Britain. Fundamentally, the Common Law tradition views law as a set of procedural rules, rather than as substantive.[46] Its focus is precedent, or the decisions of previous cases, from which the court extracts existing principles of law which are then applied to the particular case at hand. This focus on precedent gives both an oral and adversarial character to the law. In the Common Law, lawyers must inform the court on all precedent relevant to a given case. The judge hears the lawyers plead the law and the facts, and then is bound to make judgment following precedent cases, given that a similar fact pattern exists between the precedent cases and the case at hand.[47] In this respect, the Common Law tradition is said to "find law, rather than to make law".[48] The judge must then write down the judgment, with justification based

---

[43] This legislative power is set out in ss. 134-35 of the *BNA Act*.

[44] *Supra* note 3 at 3.

[45] R. van Caenegem, *The Birth of the English Common Law*, 2d ed. (Cambridge: Cambridge Univ. Press, 1973) at 104-5.

[46] "Law secretes from the interstices of procedure" is a famous Common Law maxim. *Ibid.*

[47] This is referred to as the principle of "Stare decisis".

[48] G. Strauss, *Law, Resistance and the State: The Opposition to Roman Law in Reformation Germany* (Princeton: Princeton Univ. Press, 1986) at 24-5 and 48-9.

on the facts and precedent. Often these judgements are very long. Judges are appointed from the legal community, and as such have also been trained as lawyers.

The Common Law derives its content in large measure from reflection on broader social phenomena, and is therefore articulated in social terms, taking the social context of a case into consideration.[49] Inherent to Common Law also, is the notion that law has a limited role as a normative force; that law is not adequate to provide certain answers.[50] As a consequence, the principle of "Judicial non-response"exists in the Common Law. Judges may elect to not pronounce a judgement, finding the cause of a case "outside of the law".

The traditional structure of court systems in the Common Law tradition consists of two types of courts: courts of first instance, where cases are first heard and where the facts of a case are established, and courts of appeal. Courts of first instance are differentiated according to the type of case which is being heard, whether it be a governmental, criminal, commercial, property, or civil matter. Courts of appeal are not differentiated in this way. All courts of first instance appeal to a common or general court of appeal. In some cases there is a vertical hierarchy of courts of appeal.

iii) The Civil Law Tradition

Though legal scholars debate whether Civil Law crystallized as a tradition during the 12th or 18th centuries, it is more or less agreed that its roots exist in the *ius civilis*, or Roman Law.[51] Civil Law is substantive law: it starts with an accepted set of legal principles which are codified, or written down. These codified principles, not cases, are supreme. Lawyers do not present the law of precedent to the Judge. In fact, the civil tradition of law actually prohibits precedent as a source of law. The French civil code, for example, declares that all other sources of law beyond the civil code are abolished by it.[52] In this context, the role of Judges is to identify those

---

[49] B. Slattery, "The Independence of Canada" (1983) 5 Supreme Court L. R. 369.

[50] A. Helmholz, *Roman Canon Law in Reformation England* (Cambridge: Cambridge University Press) at 19.

[51] *Ibid.*

[52] Code civil des Français (1804), provision préliminaire.

principles of law in the civil code which pertain to a given case. They must then apply the facts of the case to these principles. If the code is silent on a given matter, the judge must then attempt to apply general principles contained in the code to the specific fact pattern of the case. Theoretically therefore, Judges are not bound by previous decisions, and may differ in their interpretations of the civil code. Judicial decision-making in the civil law tradition is based on direct interpretation of the law by the Judge, and on his or her interpretation of professional and academic writings or doctrine. As a consequence, the profession of Justice requires many years of theoretical study in the civil law tradition, and is seen as a completely separate function and profession from that of lawyer. Judges do not graduate from law schools, but from schools for magistrates. They do not train to become lawyers first. Written judgements in the civil law tradition are short, citing both doctrine and the pertinent articles of the civil code, with little or no reference to previous cases. Judgements given in cases where the bench is formed of several judges do not include dissenting opinions or minority judgements.[53]

The Civil Law tradition has been referred to as "Platonic reason applied to law". In this tradition codified law is seen as a collection of norms, each statement of which seeks the highest level of universality in its expression. Inherent in the notion of universality is the concept of law as the ultimate normative force, reaching into almost every conceivable area of human activity, thereby driving out other forms of social organization.

Civil law courts are more highly differentiated than Common Law courts. The court system comprises a multiplicity of courts, each of which has its particular function. The court where a case is heard is specific to the type of matter which is being heard. Each of these courts in turn has its own court of appeal, separate from other courts of appeal. A court of higher appeal may exist, as it does in France and Italy. In France La Cour de cassation, is a court of last resort. Its role is to uphold or quash the decision of the lower court, and to then return the case to another court of

---

[53] G.L. Gall, *The Canadian Legal System*, 3d ed. (Toronto: Carswell, 1990) at 177.

the same level, so that a new decision may be rendered.[54,55]

iv) Québec's Bijurisdictional System of Law

As mentioned above, two legal traditions prevail in Québec: the Common Law tradition of Public National Law, which includes Constitutional Law and other Federal Legislation, and the Civil Law tradition of Private Law, which includes Commercial Law and other Provincial Legislation. This situation, referred to as legal pluralism, does not exist in any other province of Canada. It does however, exist on a global scale. In fact, legal pluralism as a phenomenon is increasing globally, and of increasing interest to jurists and legal theorists.[56] Similar to the situation of International Law between nations of different legal traditions, within Québec there is a potential problem of knowing which tradition of law should prevail in any one instance.[57] Although the theoretical underpinnings and origins of these two legal systems are very different, within the jurisdiction of Québec each system has accommodated the other to the point that over time, the resultant legal system is somewhat of a melange of both traditions. As a consequence, the bijurisdictionality of Québec does not in practice present a major domestic legal problem.[58]

In Québec, civil law is codified. This substantive law, however, is paired with a common law adversarial legal system.[59] Lawyers are trained procedurally, and so too are judges, since they are appointed from amongst practising lawyers.[60] Also,

---

[54] *Ibid.* at 176.

[55] For more detailed investigation see J. Carbonnier, *Droit civil -- Introduction*, 21st ed. (Paris: Presses universitaires de France, 1992) at 119; R. David & J.E.C. Brierley, *Major Legal Systems in the World Today*, 3d ed. (London: Stevens, 1985) at 36-62; J.H. Merryman, *The Civil Law Tradition*, 2d ed. (Stanford: Stanford Univ. Press, 1985) at 6; and G. Strauss, *infra* note 45 at 28-31.

[56] H.P. Glenn, "Harmonization of private law rules between civil and common law jurisdictions" (Address to the XIIIth International Congress of Comparative Law, Montreal, 1990) (Faculty of Law, McGill University, 1990) [unpublished].

[57] A. MacIntyre, *Whose Justice, Which Rationality?* (Notre Dame, Ind.: Univ. of Notre Dame Press, 1988) at 6, 7, 12.

[58] H.P. Glenn, *Foundations of Canadian law: Selected readings* (Faculty of Law, McGill University, 1982) [unpublished] at 131.

[59] J.E.C. Brierley & R.A. Macdonald, *Québec Civil Law* (Toronto: Emond Montgomery, 1993) at 51.

[60] See the *Judges Act*, R.S.C. 1970, c. J-1, s. 30.

Québec's civil code does not expressly prohibit other sources of law, or declare the code to be the exclusive source of law, stating in the Disposition Préliminaire that: "... the Code is the foundation of all other law, although other laws may complement the Code or make exceptions to it." Consequently there is no abolition of judicial sources of law. This, in combination with the training of the judiciary, makes precedent very important to Québec law.[61] Acknowledging this fact,and making use of it in a famous 1977 case, Justice J. Deschênes of the Court of Appeal went so far as to plead for sources of law, by stating that avocats have an ethical obligation to inform the court on case law which bares on a case.[62] True to the civil tradition however, Québec Judges cannot be silent on a matter, as provided in Article 11 of the Civil Code. Article 12 specifies how a judge must proceed when the Code is silent on a given matter. Both of these provisions derive from the common law tradition:

> **Art. 11.** A judge cannot refuse to adjudicate under pretext of the silence, obscurity or insufficiency of the law.
>
> **Art. 12.** When a law is doubtful or ambiguous, it is to be interpreted so as to fulfil the intention of the legislature, and to attain the object for which it was passed. The preamble, which forms part of the act, assists in explaining it.

Québec's legal system has also come to incorporate other aspects of the common law tradition, such as the way court judgements are written, and the structure of the court system. The Québec Code of Civil Procedure[63] proscribes that judicial decisions "must moreover set out reasons for judgment...".[64] As we will see in more detail below, Québec's court system utilizes a common court of appeal system. The civil code also contains private law provisions which do not appear in the civil code of France, but are derived from the common law, such as trusts, marriage, the separation

---

[61] *H.P. Glenn, Legal Traditions: Selected readings* (Faculty of Law, McGill University, 1990) [unpublished] at 5.

[62] *Commission du transport de la C.U.M.* v. *Syndicat du transport*, [1974] C.S. 227, [1977] C.A. 476.

[63] *Infra* note 149.

[64] *Ibid.* at s. 519.

of property, freedom of will and consentualism in sale.[65] Beyond the code itself, some provincial legislation does not follow the civil law tradition. For example, all administrative law in the province of Québec is derived from the common law.[66]

The accommodation and incorporation of another legal tradition over time by the civil law of Québec is not unique within Canada. In the repatriation of the *Canadian Constitution* in 1982, reliance on custom, a civil tradition, was given tremendous importance.[67] There has also been an increased effort in the Federal Courts of Canada to accommodate the civil law tradition over the last twenty-five years.[68]

v) The Civil Law of Québec

The civilian tradition of law was introduced to Québec during the period of the French Regime, 1608-1759. The law of France of the time, La Coutûme de Paris,[69] was officially adopted in Nouvelle France in 1664,[70] and was the source of both public and private law for almost one hundred years. At the British conquest of Nouvelle France in 1759, civil law was abolished and replaced by English common law. This lasted for fifteen years. In 1774, in response to civil unrest in Lower Canada, and the threat of war to the south in New England, Britain passed the *Quebec Act*,[71] which amongst other concessions,[72] re-established the French civil law and civil procedure which had been in force before the colony was ceded to Britain. In 1866, the body of

---

[65] *Supra* note 59 at 173.

[66] *Ibid.* at 9 and 51.

[67] *Patriation Reference, infra* note 106.

[68] *Supra* note 56.

[69] *La coutûme de la prévôte et vicomté de Paris, 1680.*

[70] J-L. Baudouin et Y. Renaud, eds., *Codes Civils (Bas-Canada et Québec)* (Montréal: Wilson & Lafleur, 1993) at Introduction and art. 34.

[71] *An Act for making more effectual Provision for the Government of the Province of Quebec in North America, 1774* (U.K.), 14 Geo. III, c. 83; *The Quebec Act, 1774* (U.K.), R.S.C. 1970, Appendix II, No. 2.

[72] *The Quebec Act* also guaranteed freedom of religion to Roman Catholics; made English and French the two official languages of Québec; allowed the Catholic clergy to collect tithes; and, maintained the social hierarchy based on the seigniorial land system of New France. See *supra* note 53 at 169.

Québec law was reduced to one code of law, both commercial and civil, entitled the *Civil Code of Lower Canada*.[73] This code was patterned after the French *Napoleonic Code* of 1804.[74] Commissioned by Napoleon Bonaparte, the *Napoleonic Code* consolidated the old Roman law, French law and customs, and the new law of the French revolution, which abolished special privileges and established equality of persons. Many articles of the *Civil Code of Lower Canada* followed very closely, if not identically, those of the French code.[75]

In 1981, a new book on family law came into effect which replaced the family law provisions of the *Civil Code of Lower Canada*. The *Civil Code of Lower Canada*, plus the 1981 family law provisions together are known as the *Code Civil du Québec, 1981*.[76] In 1993, after a revision process of 38 years, Québec passed a completely revised civil code into law. The *Code Civil du Québec, 1994*[77] came into effect on January 1, 1994.

vi) The Court System of Québec

Sections 96 to 101, inclusive, of the *Constitution of Canada*, confer upon Québec the same court system which it confers to all provinces of Canada. The court system of Québec is hierarchical, and includes Federal Courts and Superior Provincial Courts, where judges are appointed Federally, and Inferior Provincial Courts, where judges are Provincially appointed.

The Inferior Provincial Courts include the Courts of Justices of the Peace, Municipal Courts, the Small Claims Courts of Trois-Rivières, Montréal and Québec City, which are a division of the Provincial Court of Québec, and the Court of Québec, which is in Québec City. Municipal Courts deal with cases of traffic offenses; violations of local laws such a health, building codes, pollution, licences,

---

[73] *Act Respecting the Civil Code of Lower Canada, 1866* (U.K.), 29 Vict., c.41.

[74] Code civil français (1804)[hereinafter C.N.].

[75] M. Franklin & D. Franklin, *Introduction to Quebec Law* (Toronto: Copp Clark Pitman, 1984) at 8.

[76] *Act to Establish a New Civil Code and to Reform Family Law*, S.Q. 1980, c. 39.

[77] Code civil du Québec, 1994 [hereinafter C.C.Q.].

taxes and minor criminal offenses. Small Claims Courts deal with civil cases involving damages of up to one thousand dollars. In both of these Inferior courts, there is no legal representation. The Provincial Court of Québec has five divisions: the Small Claims Court mentioned above; the Civil Division, which hears cases where damages do not exceed an amount of fifteen thousand dollars; the Criminal and Penal Division, which hears penal matters and criminal matters not requiring a jury; the Youth Division which deals with cases involving young offender, adoption and youth protection matters; and, the Expropriation Division. There may be legal representation in the latter four divisions of the Provincial Court of Québec. Generally, there is no appeal in these cases, but some appeals are heard in the Québec Court of Appeal.

There are two Superior Provincial Courts in Québec, the Superior Court of Québec (Cour supérieure du Québec), and the Québec Court of Appeal (Cour d'appel du Québec), which are both located in Québec City. The Superior Court of Québec deals with civil cases where damages are greater than fifteen thousand dollars; criminal jury trials; and, domestic matters including legal separation, divorce, alimony, custody and bankruptcy. Cases here involve legal representation. The Québec Court of Appeal is a court of general appeal which hears cases on appeal from the Provincial Court and the Superior Court. Three to five judges preside over this court, and decisions are made by majority. Only lawyers plead before the bench, the facts having been established in the court of first instance.

The Federal Courts which have jurisdiction in Québec include the Federal Court, located in Montréal, the Federal Court of Appeal in Ottawa, and the Supreme Court of Canada, which is also in Ottawa. The Federal Court is not part of the hierarchy of the other courts which we mention here. It deals with disputes between the Federal government and individuals, and between governments and corporations; accidents on Federal property; taxation; and, appeals from Administrative Tribunals.[78] The Federal Court of Appeal is the general court of appeal for all of the provincially-

---

[78] These are organizations which have a quasi-judicial function such as the Atomic Energy Control Board, the Canada Labour Relations Board, the Canadian Human Rights Commission and the Canadian Radio-Television and Telecommunications Commission (CRTC), to name a few.

located Federal Courts. The Supreme Court of Canada presides over cases of national importance which implicate the *Constitution of Canada*. This court is also the final court of appeal for the Provincial Courts of Appeal. Nine judges preside over this court, six from common law provinces, and three civil law judges from Québec. Decisions are by majority. Again, only lawyers present cases here.

vii) Sources of Law in Québec

In this thesis, sources of law are taken to include only those sources of substantive or written law. Each law or rule which is written, and to which societies ascribe in order to govern social behaviour, requires a law-giver. As mentioned earlier, there are many normative orders within a society, such as those of religion, natural law and formal law, and Law-givers from each of these areas are amongst the greatest contributors to the body of substantive law which has developed throughout history. The Code of Hammurabi (20th century B.C.), the Ten Commandments (13th century B.C.), the Koran (7th century), and the Magna Carta (13th century), are but a few examples.[79] Documentary research in this study however, is limited only to the domestic sources of positive or formal substantive law which have jurisdiction in Québec. It is through examination of these written sources, that the various rights, duties, powers and privileges attached to language of instruction in the province of Québec may be clarified. All referrals to "rights" in this thesis, mean *explicit* rights; those which are expressly stated. "Sources" of Law are taken to include only those sources which both the common and civil law traditions themselves declare are legitimate.

In general, the Common law has come to see the following as legitimate sources of law: Legislation, Case Law or Jurisprudence, "Quasi-Legislative" sources

---

[79] For a greater list of law-givers and legal documentation throughout history, see World Peace Through Law Center, *Renowned Law Givers and Great Law Documents of Humankind* (Washington: Word Peace Through Law Center, 1975). See also A. Watson, "The Evolution of Law: Continued" (1987) 5 Law and History Rev. 537.

such as Custom and Convention, and Doctrine.[80] Although Common law scholars more or less agree on what should be included as legal sources, they do not always agree on the relative importance of each source to the other. Nonetheless, there is consensus that Legislation and Case Law are respectively, the first and second most important sources of law.[81] Establishing the relative rankings of Custom and Convention or Doctrine as Common Law sources is relatively unimportant to this study, since it may be argued that in legal practice, these sources have already been considered and incorporated into legislation and judicial decisions. It may also be argued that this issue is relatively unimportant to the tradition of common law itself, which characteristically gives much less importance to classification and hierarchy than does the civil tradition. In this study, common law sources include common law legislation and case law which is relevant to language of instruction in Québec.

That common law which has jurisdiction in Québec stems from Canadian Federal law. This study therefore considers relevant Federal legislation, and cases thereunder. Federal legislation includes the *Constitution of Canada*, which is sovereign over all other national and provincial legislation, and other Federal statutes. Federal case law includes decisions from the Supreme Court of Canada, which are inalienable, and provincial court of appeal cases which the Supreme Court has cited as authority.

It is characteristic of the civil law that it expressly states, and hierarchically orders those sources of law which are legitimate. The classical ordering, as put down in the Civil Code of France is: the Civil Code; Legislation; Doctrine; Jurisprudence; and, Custom.[82] The Civil Code of Québec, however, which reflects the accommodation over time of common law principles, lists in its hierarchy of legitimate

---

[80] P.J. Fitzgerald, ed., *Salmond on Jurisprudence*, 12th ed. (London: Street & Maxwell, 1966) at 113.

[81] See R. David & J.E.C. Brierley, *supra* note 55 at 309-33; R. van Caenegem, *supra* note 45 *at* 104-05; and, B. Laskin, *The British Tradition in Canadian Law* (London: Stevens & Sons, 1969).

[82] Provision Préliminaire. C.N.

sources: the Civil Code; Legislation; Jurisprudence; Doctrine; and Custom.[83] The sources of Québec civil law under consideration of this study therefore, are the Civil Code of Québec, other Provincial Legislation, and cases from the Superior Court of Québec, the Québec Court of Appeal, and Supreme Court cases on appeal from Québec. For the same argument given above per common law sources, Doctrinal or Customary sources of law need not be included.

Parts V and VI which follow, provide first the common law, then the civil law legislative sources for language of instruction in Québec. In consideration of each legislative source, general provisions which might provide essential knowledge and an appropriate legal context for the interpretation of cases were identified first. The legislation was then searched for any general language provisions, since general provisions are often interpreted by the courts when specific language of instruction provisions are not provided. Finally, the legislation was searched for any explicit language of instruction provisions. Part VII provides the case law arising under Federal legislation introduced in Part V; and, Part VIII provides case law under the Provincial legislation identified and described in Part VI.

---

[83] Commentaire. C.C.Q. See also J. Ghestin & G. Goubeaux, *Traité de droit civil*, vol. 1, 3d ed. (Paris: L.G.D.J., 1990) at 191-96.

V Language of Instruction: Common Law Sources

i) The Constitution of Canada

Background

Constitutional law is a highly specialized area of law, mainly because the process of defining and interpreting substantive sources of constitutional law is more complex than for regular legislation. Two of the most important sources of constitutional law are Constitutional Convention and Constitutional Practice.[84] The latter involves an ongoing process by constitutional jurists, of interpreting constitutional documents, including the structure of the *Constitution* as a whole, and the relationship between that structure and the society in general.[85] In this study, however, we will narrow our definition of constitutional sources to the letter of the *Constitution of Canada* and to court cases which implicate its provisions. In so doing, we do not lose the pith of Convention and Practice, as these are both implicit and explicit in Supreme Court judgments.

In constitutional democracies such as Canada, the *Constitution* is the highest law of state. As such, constitutional law is sovereign over all other laws. The purpose of a constitution is to proscribe the distribution of powers between the legislative, executive and judicial branches of government. Fundamental rights or civil liberties are therefore also included in constitutions, since civil liberties limit the exercise of governmental powers over individuals.[86] Constitutions establish the basic structures, and reflect the fundamental values of a nation. In most constitutional democracies, the bulk of this law is contained in a single constitutional document, which usually comes into being after a nation gains independence from a colonial master, or after a revolution or war. It is intended to symbolize and to legitimate the

---

[84] For a discussion of sources of Canadian Constitutional Law, see *Patriation Reference*, *infra* note 106.

[85] J.H. Webber, *Constitutional Law: Selected Readings* (Faculty of Law, McGill University, 1990) [unpublished].

[86] P.W. Hogg, *infra* note 105 at 3.

new regime of law. Like the U.K., but unlike the U.S., Canada does not have a singular constitutional document. The *Constitution of Canada* comprises a large body of written law, and even constitutional scholars do not always agree on where the *Constitution* begins and where it ends.[87]

Canadian constitutional laws may be subdivided into the following categories: British statutes; pre-Confederation colonial statutes; post-Confederation British statutes; post-Confederation Canadian statutes; and quasi-constitutional statutes. The British statutes include: the *Charter of the Hudson's Bay Company, 1670*;[88,89] the *Royal Proclamation, 1763*;[90] The *Quebec Act, 1774*;[91] The *Constitutional Act, 1791*;[92] The *Union Act, 1840*;[93] and the *Colonial Laws Validity Act, 1865*.[94] Pre-Confederation colonial statutes include the *Quebec Resolutions, 1864*[95] and the *London Resolutions, 1866*.[96] Post-Confederation British statutes include The *British North America Act,*

---

[87] H.M. Clokie, "Basic Problems of the Canadian Constitution" (1942) 8 Canadian Journal of Economics and Political Science 1 at 1.

[88] *The Royal Charter for incorporation The Hudson's Bay Company, A.D. 1670.*

[89] It is interesting to note here that the Hudson's Bay Company, established in 1670, held sole proprietorship over its Charter territory, which comprised most of present-day Canada, until 1868. In this year, the company sold the territory to England, which subsequently transferred it to Canada in 1870 by order of s. 146 of the *British North America Act, 1867, infra*, note 102.

[90] *The Royal Proclamation, 1763* (U.K.), R.S.C. 197-, Appendix II, No. 1.

[91] *The Quebec Act, 1774* (U.K.), R.S.C. 1970, Appendix II, No. 2.

[92] *An Act to repeal certain Parts of an Act, passed in the fourteenth Year of his Majesty's Reign, intituled, An Act for making more effectual Provision for the Government of the Province of Quebec, in North America; and to make further Provision for the Government of the said Province, 1791* (U.K.), 31 Geo. III, c. 31.

[93] *An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada, 1840* (U.K.), 3 & 4 Vict., c. 35; *The Union Act, 1840* (U.K.), R.S.C. 1985, Appendix II, No. 4 [hereinafter *The Union Act*, 1840].

[94] *An Act to remove Doubts as to the Validity of Colonial Laws, 1865* (U.K.), 28 & 29 Vict., c. 63.

[95] *Report of Resolutions adopted at a Conference of Delegates from the Provinces of Canada, Nova Scotia, and New Brunswick, and the Colonies of Newfoundland and Prince Edward Island, held at the city of Quebec, October 10, 1864, as the Basis of a proposed Confederation of those Provinces and Colonies, 1864.*

[96] *Resolutions adopted at a Conference of Delegates from the Provinces of Canada, Nova Scotia, and New Brunswick, held at the Westminster Palace Hotel, London, December 4, 1866.*

1867[97] and subsequent amendments, and The *Constitution Act, 1982* and its amendments. Post-Confederation Canadian statutes include those constitutional amendments which the Canadian Parliament had authority to enact after 1867, for the establishment of new provinces or territories,[98] the definition of provincial boundaries or other land title provisions,[99]or which dealt with the representation or retirement of Members of Parliament.[100] There are other sources of substantive law which also hold constitutional significance and weight of law, such as letters of instruction to Governors General and letters patent.[101]

This study adopts the narrowest definition of constitutional sources, as laid out in s. 52(2) of the *Constitution Act, 1982*. In short, Canada has two primary constitutional documents: *The British North America Act, 1867*[102] and amendments, and the *Constitution Act, 1982*[103] and amendments. *The BNA Act*, a regular statute of Great Britain, created the Dominion of Canada by uniting three colonies of British North America: the united Provinces of Canada, Canada West and Canada East (therein named Ontario and Québec, respectively), which had previously been united in the *Union Act, 1840*;[104] Nova Scotia; and, New Brunswick. *The BNA Act* also provided a framework for the admission of all other British North American colonies and territories.[105] Until 1981, the *Constitution of Canada* comprised *The BNA Act*,

---

[97] *An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith, 1867* (U.K.), 30 & 31 Vict. c. 3; *The BNA Act, infra* note 102.

[98] *Manitoba Act, 1870*; *The Alberta Act, 1905*; *The Saskatchewan Act, 1905*; *The Quebec Boundaries Extension Act, 1912*; the *Northwest Territories Act, 1985*; the *Yukon Act, 1985*; the *Newfoundland Act, 1987*; and, the *Nunavut Act, 1993*.

[99] *The Manitoba Boundaries Extension Act, 1912*; *The Ontario Boundaries Extension Act, 1912*; and, the *Manitoba Supplementary Provisions Act, 1927*.

[100] The *British North America Act, 1952*; the *Constitution Acts, 1965, 1974, 1975 and 1985 (Representation)*; and, the *Parliament of Canada Act, 1985*.

[101] *Letters Patent Constituting the Office of Governor General of Canada*, 1947; *Governor General's Act*, R.S.C. 1985, c. G-9; See G.L. Gall, *supra* note 53 at 43.

[102] *The British North America Act, 1867* (U.K.), 30 & 31 Vict., c. 3 [hereinafter the *BNA Act*].

[103] *Infra* note 108.

[104] *Supra* note 93.

[105] P.W. Hogg, *Constitutional Law of Canada*, 3d. ed. (Toronto: Carswell, 1992) at 4.

1867, and its subsequent British legislative amendments: *The Rupert's Land Act, 1868*; *The BNA Acts* of 1871, 1886, 1907, 1915, 1916, 1930, 1940, 1943, 1946, 1949 (Nos. 1 & 2), 1951, 1960, 1964; the *Statute Law Revision Acts* of 1893, 1927, 1950; and *The Statute of Westminster, 1931*.[106] It is due to the absence of an amending clause in *The BNA Act*, that these amendments were legislated by the imperial Parliament. In 1982, however, the Canadian *Constitution* was repatriated. The *Canada Act 1982*[107] terminated the authority of the U.K. Parliament over Canada, and Schedule B of the *Act* provided a new constitution of Canada, the *Constitution Act, 1982*.[108] The *Constitution Act, 1982* does not replace the *BNA Act, 1867*, but renames it the *Constitution Act, 1867*,[109] and adds to it an amending formula,[110] and the *Canadian Charter of Rights and Freedoms, 1982*.[111] The *BNA Act* and its provisions remain intact. To facilitate this enquiry, rather than refer to each subsequent amendment of the *Constitution Acts 1867* and *1982*, reference is made to a consolidated version of both.[112] Not included in the consolidation, but identified as constitutional documents by virtue of their inclusion in the *Schedule* of the *Constitution Act, 1982*,[113] the *Terms of Union*, and *The Statute of Westminster, 1931* are also included in this study. It is important to note that there is a common misconception in Québec that the province is exempt from provisions of the *Charter*, because it did not sign the *Constitutional*

---

[106] *Reference Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753 [hereinafter the *Patriation Reference*]. The Supreme Court of Canada identifies all of the British statutes above as Canadian constitutional documents in this reference, at 776-77.

[107] *Canada Act 1982* (U.K.), 1982, c. 11.

[108] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, R.S.C. 1985, Appendix II, No. 44.

[109] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 [hereinafter in historical reference, the *BNA Act*].

[110] *Part V of the Constitution Act, 1982* (U.K.), c. 11.

[111] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter* or Canadian *Charter*].

[112] Department of Justice, Canada, *A Consolidation of The Constitution Acts 1867 to 1982* (Ottawa: Supply & Services Canada, 1993).

[113] The *Schedule* to *The Constitution Act, 1982*, entitled "Modernization of the Constitution", is an appended list of all statutes which, in addition to the constitution itself, comprise the body of Canadian constitutional law.

Accord of 1981.[114] This is not the case. As long as Québec remains a part of the Union of Canada, it is bound by the *Constitution of Canada*, as are all the provinces and territories.

The Terms of Union

Section XLI of *The Union Act, 1840*[115] only makes reference to language in general, proclaiming that all Writs, Proclamations, Public Instruments and Legislation "shall be in the *English* Language only". This section was repealed in 1848.[116]

The Constitution Act, 1867

a) General Provisions

Sections 91, 92 and 93: Distribution of Legislative Powers

> Section 91 bestows legislative authority to the Parliament of Canada,
>
> ...to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces;

This section lists those matters over which the Federal Parliament has exclusive jurisdiction. Section 92 similarly lists matters over which the Provincial Legislatures have exclusive jurisdiction. The provincial jurisdiction of Education is not included under s. 92, but is set out separately in s. 93, which is discussed below.

Section 129: Juridical Continuance

Section 129 provides for the continuance of the Laws, Courts, Legal Commissions, Powers and Authorities, and all Judicial, Administrative and Ministerial Officers which existed in each of the founding provinces at union except as otherwise

---

[114] D.A. Burgess, "Denominational and Linguistic Guarantees in the Canadian Constitution: Implications for Québec Education" (1991) 26(2) McGill Journal of Education 175 at 183.

[115] *Supra* note 93.

[116] *The Union Act, 1848* (U.K.), 11-12 Vict., c. 56.

provided by the *BNA Act*,

> ...as if the Union had not been made; subject nevertheless...to be repealed, abolished, or altered by the Parliament of Canada or by the Legislature of the respective Province according to the Authority of the Parliament or of that Legislature under this Act.

b) Rights Provisions

Section 93: Education

Part III on "Québec Education" above, provides adequate discussion on this section. The denominational rights provisions of s. 93 make no explicit reference to language of instruction or governance of Protestant and Catholic schools. Since these schools were *de facto* English and French respectively in 1867, it is necessary to look to the jurisprudence under s. 93, to see if the court interprets this customary practice as a "Right or Privilege with respect to Denominational Schools" under section 93(1).

c) Language Provisions

Section 133: General

Only section 133 of the *BNA Act* mentions language. This section provides that either French or English may be used in Debates of the Houses of the Federal Parliament or the Québec Legislature, and that both languages must be used in all records of these two legislative bodies. Further, either language may be used in or from any Court of Canada or Québec.[117] There is no provision which deals with language of instruction.

The Statute of Westminster, 1931

The Statute of Westminster, 1931[118] repealed *The Colonial Laws Validity Act*,

---

[117] The key Québec cases which enforced this requirement are: *Societé Asbestos Limitée* v. *Societé Nationale de l'amiante et al.* [1980] 31 C.S.; [1981] C.A. 43; and, *Québec (P.G.)* v. *Blaikie et al.* (1978) 37 C. S., 85 D.L.R. (ed) 252; [1979] 2 S.C.R. 1016.

[118] *Statute of Westminster, 1931* (U.K.), R.S.C. 1970, Appendix II, No. 27.

1865,[119] which proscribed rules to deal with situations where British law would override conflicting colonial law. *The Statute of Westminster* gave full domestic legislative power to the Parliaments of each of the Dominions of Australia, New Zealand, South Africa, the Irish Free State, Newfoundland, and Canada. There is no mention of any civil right in the *Statute*.

The Canadian Charter of Rights and Freedoms, 1982

a) General Provisions

Section 52: The Constitution of Canada

Section 52(1) establishes the primacy of the *Constitution of Canada*, and gives power to courts of jurisdiction over *Charter* issues, to strike down all or any part of any law which violates the *Charter*:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Courts of first instance do not have jurisdiction to invoke the remedial powers of s. 52.[120] Section 52(2) names the primary documents which comprise the *Constitution*, and 52(3) provides that amendments can only be made on authority of the *Constitution*.

Section 24: Enforcement

Section 14(1) establishes the right to enforcement of the *Charter of Rights and Freedoms*:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

---

[119] *Supra* note 94.

[120] R. v. *Seaboyer*, [1991] 2 S.C.R. 577, 7 C.R. (4th) 117, 66 C.C.C. (3d) 321; *R.* v. *Moore* (1989), 51 C.C.C. (3d) 566, aff'd (1990), 60 C.C.C. (3d) 286, aff'd [1992] 1 S.C.R. 619, 70 C.C.C. (3d) 127).

The *Charter* itself does not confer jurisdiction to courts. The jurisdiction of a court must: be found in a statute; be of competent jurisdiction; and, extend to the subject-matter, parties and remedy sought.[121]

Section 1: Guarantee of Rights and Freedoms

Section 1 constitutionally guarantees the rights and freedoms set out in the *Charter*, and provides for limitations on these rights:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This section explicitly states three criteria which must be met in order to limit proscribed rights. A limit must be reasonable, prescribed by law, and must be shown to be justifiable in a free and democratic society. Section 1 is only considered by courts when an individual's or group's rights or freedoms under the *Charter* are found to be infringed by a legislative Act.

The Supreme Court of Canada has established a test, referred to as the "Oakes Test",[122] to determine whether a proscribed limit meets the above criteria. First, the objective of the limiting legislation must be sufficiently important to warrant overriding a constitutional provision. In general, the Court recognizes limitations on fundamental rights or freedoms as being sufficiently important if they entail the protection of other basic civil liberties. The court does not accept traditional practice of the majority population as a justifying purpose, however.[123] The objective is determined by reference to the intentions of the legislature at the time of the enactment,[124] and must be *intra vires* the level of government prescribing the limit.[125] Secondly, a three-step proportionality test must be met: the legislative measures must

---

[121] *Canada (A.G.)* v. *Vincer*, [1988] 1 F.C. 714.
[122] *R.* v. *Oakes*, [1986] 26 D.L.R. (4th) 200, 1 S.C.R. 103.
[123] *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295.
[124] *R.* v. *Zundel*, [1992] 2 S.C.R. 731.
[125] *Supra* note 123.

be rationally connected to the objective; the legislation must impair the right or freedom as little as possible;[126] and, the effects of the limit must not be disproportionate to the importance of the objective.[127]

Section 29: Rights Respecting Certain Schools Preserved

As mentioned above, the *Constitution Act, 1982* does not replace the *BNA Act*. Section 93 is expressly upheld in Section 29 of the *Charter*:

> Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

b) Rights Provisions

Section 2: Fundamental Freedoms

Section 2 is included here, since it is possible that subsections (a), (b) or (d) could be implicated in respect of either s. 93 of the *BNA Act* or s. 23 of the *Charter*. It provides that:

> Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

The courts have interpreted s. 2(a) to mean that no one may be forced to act in a way which is contrary to his or her beliefs or conscience, subject to limitations which are necessary to protect public safety, order, health, moral behaviour, or the fundamental rights and freedoms of others. Indirect coercion by the state may be

---

[126] *R.* v. *Chaulk*, [1990] 3 S.C.R. 1303.

[127] For more detail see J. Hiebert, "The Evolution of the Limitation Clause" (1990) 28:1 Osgoode Hall L.J. 103, and L. E. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 Supreme Court L.R. 469.

included here.[128] However, freedom of conscience and religion are not absolute values, and other competing interests in society must be considered.[129]

The Supreme Court has outlined a procedural test for determining whether a violation has occurred under s. 2(b).[130] The first step is to determine whether the activity being pursued can be characterized as falling under "freedom of expression". It does if it attempts to convey meaning. The "forms" of expression are varied, and may include the written or spoken word or physical gestures or acts. Violence as a form of expression receives no protection under s. 2. The second step is to determine whether the purpose or effect of the government legislation under question was to control attempts to convey meaning. The analysis focuses on the purpose and effect of the legislation being considered. If the purpose was to restrict attempts to convey meaning, then there has been a limitation by law of s. 2(b), and s. 1 analysis is required. Whether or not the purpose of the legislation was to restrict free expression, the plaintiff may still claim that this was the effect. The burden of proof is then placed with the plaintiff. Such a claim can be made by reference to the principles and values which underlie the freedom of expression, as stated by the Court: the pursuits of truth, participation in the community, individual self-fulfilment, or human flourishing.

Section 15: Equality Rights

> Section 15, entitled "Equality Rights" states in subsection (1) that:
>
> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15(1) does not mention discrimination based on language. However, subsection (2) may describe a positive right toward the protection of language, under

---

[128] *Supra* note 123.

[129] *Young* v. *Young*, [1993] 4 S.C.R. 3.

[130] This test is given in detail in: *Irwin Toy* v. *Québec* (P.G.), [1989] 1 S.C.R. 927.

the protection of groups disadvantaged by virtue of national or ethnic origin :

> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In general terms, the Supreme Court of Canada has held that the primary purpose of s. 15(1) is to ensure equality in both the formulation and the application of law, and to protect against any oppression which is the outcome of discriminatory measures which have the force of law. The measure of "equality before the law", as defined by the Supreme Court, is that no individual may be treated more harshly than another under the law[131] (unless of course, to do so is demonstrably justifiable under s. 1). Subsection 15(2) is specifically designed to protect affirmative action programmes from challenge under s. 15(1). Subsection 15(2) eliminates the need to submit affirmative action programmes to analysis under s. 1.

Section 27: Multicultural Heritage

Section 27, does not proscribe any specific rights. It deals with judicial interpretation of the *Charter*, and reads as follows:

> This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

This section has rarely been considered by the courts, but has been relied on in s. 1 analyses, to guide consideration of the balancing of societal interests against the freedom of expression of the individual, in cases of the wilful promotion of hatred.[132]

---

[131] See *Stoffman* v. *Vancouver General Hospital* (1990), 91 C.L.L.C. 17,003, 118 N.R. 241.

[132] See especially *R.* v. *Keegstra*, [1990] 3 S.C.R. 697, 1 C.R. (4th) 129, 61 C.C.C. (3d) 1.

c) Language Provisions

Sections 56 and 57: General

Sections 57 and 56 provide that the English and French versions of the *Constitution Act, 1982* are equally authoritative, regardless of which version was enacted first. This may lead to difficulties when different interpretations of parallel provisions are possible. These ambiguities are heightened by the fact that *Charter* provisions are not literal translations from the language in which they were drafted.[133] In cases where the courts are forced to resolve ambiguities, they generally adopt the version giving the more lenient interpretation.[134] The courts have also adopted the approach of examining both versions, to determine the interpretation which best accords with the object of the provision.[135] This approach has played a significant role in case law under s. 23, "Minority Language Educational Rights", discussed below.

Sections 16 to 22: Official Languages of Canada

Sections 17 to 19 of the *Charter* restate the language rights set out in s. 133 of the *BNA Act*, with additions in respect of the legislature and courts of New Brunswick. Sections 16, 20, 21 and 23 proscribe additional language rights in respect of the English and French languages. Subsections 16 (1) and (3) state that:

> (1) 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.
>
> (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

Subsection (2) pertains to New Brunswick only. In general, the courts have

---

[133] D. Gibson, *The Law of the Charter: General Principles* (Carswell: Toronto, 1986) at 62-64.

[134] *R.* v. *Dixon* (1983), 11 W.C.B. 401.

[135] See *Kodellas* v. *Saskatchewan (Human Rights Comm.)*, [1989] 5 W.W.R. 1 (Sask. C.A.); *Lavers* v. *British Columbia (Minister of Finance)*, (1988), 74 C.R. (ed) 21, 41 B.C.L.R. (2d) (C.A.); and, *QASPB* Case, *infra* note 213.

interpreted s. 16 to the letter,[136] without judicial opinion as to its the scope.[137]

Section 17 provides the right to use English or French in any debates or proceedings of Parliament. Sections 18 and 19, respectively provide for the equal authority of published records of Parliament, and for the right to use either English or French in any pleading or issuing from any court established by Parliament. There is no essential difference between s. 133 of the *BNA Act* and s. 18 of the *Charter*. If a law or regulation offends either, it offends both. Judicial interpretation of s. 19 is a little surprising. The Supreme Court has been reluctant to interpret language rights provided in s. 19 broadly. In general, the language rights provided in section 19 are vested with speakers to speak and make written submissions in their language of choice, but the speaker is not guaranteed the right to be heard or understood in that language. The courts do derive this entitlement, however, from principles of natural justice and from other legislation, rather than from the *Constitution*.[138]

Section 20 provides the right of Citizens to communicate with Federal institutions in English or French where there is sufficient demand, or where the nature of the institution makes it reasonable. Section 21 states that:

> Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

Section 22, which proscribes linguistic rights for languages other than French or English is presented here by contrast to s. 21.

> Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

---

[136] *Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings* (1987), 36 C.C.C. (3d) 353, 44 D.L.R. (4th) 16.

[137] See the *Manitoba Reference, 1993, infra* note 234 at 49 .

[138] *Acadians of New Brunswick* case, *infra* note 207.

Note that the "legal or customary" qualifier to rights and privileges of section 22, is not included in s. 21. Section 22 therefore implies that no legal or customary right or privilege with respect to the English and French languages, other than is expressly stated in the *Charter*, or provided by reference to the *BNA Act*, may form the basis of any obligation with respect to these languages. This exclusion also defers to judicial interpretation of French and English language rights and privileges.

d) Language of Instruction Provisions:

Sections 23, (59), (33): Minority Language Educational Rights

Section 23, entitled "Minority Language Educational Rights" is the only express provision of language of instruction rights in the *Constitution of Canada*. Section 23 reads as follows:

> *Minority Language Educational Rights*
> (1) Citizens of Canada
> (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
> (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.
>
> (2) Citizens of Canada, of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.
>
> (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province
> (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
> (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Section 23 adds to the rights and privileges afforded to religious minorities in section 93, and is considered to be a direct outgrowth of the Federal *Official Languages Act*, 1970, discussed below.[139] Inclusion of s. 23 in the *Charter*, in particular served to remedy the situation in some majority anglophone provinces, such as Newfoundland and British Columbia, which had no legislation at all dealing with language of instruction.[140] The case for inclusion of s. 23 with respect to Québec, may be somewhat different. As a constitutional provision, s. 23 has the effect of overriding the provisions of provincial statutes. In Québec, s. 23 has the effect of extending the access to English language schools provided in Québec's *Charter of the French Language*, discussed below. The similarities between s. 23 of the Canadian *Charter* and Chapter VIII (sections 72 and 73) of the provincial language Bill, suggest that s. 23 may have been constructed as a direct Federal attack on the Bill 107.[141]

Section 59(1) of the Canadian *Charter* provides that s. 23(1)(a) will come into force in Québec by proclamation of the Governor General of Canada, and in 59(2), where the proclamation is authorized by the legislative assembly or government of Québec. Since no proclamation has yet been issued, s. 23(1)(a) is not yet in force in Québec.

Section 23(1)(b) is largely responsible for the recent expansion of French-language instruction throughout Canada, since it applies to Canadian citizens, primarily from Québec, whose first language learned and still understood is French, and to Francophone immigrants, once they have satisfied citizenship requirements.

Section 23(2), the "Mobility or Canada clause", provides for the continuation of a child's language of instruction from another province of Canada, and for the continuity of language of instruction between the siblings of a family. The inclusion of this clause may have been influenced by the "sufficient knowledge" language tests

---

[139] N. Henchey & D. Burgess, *Between Past and Future, Quebec Education in Transition* (Calgary: Detselig, 1987) at 184.

[140] A. Monin, "L'égalité juridique des langues et l'enseignement: les écoles françaises hors Québec" (1983) 24(1) C.d.D. at 157.

[141] See *Manitoba Reference, 1990*, *infra* note 196 and the *Ontario Reference*, *infra* note 190.

of Québec's Bill 22, discussed below, by which some of the children in a given family would qualify for English-language instruction, and others would not.[142]

Section 33 of the *Charter* is also known as the "notwithstanding clause". It provides that a province may make an express declaration by Act of provincial parliament, that certain clauses of a provincial law will operate within the province, notwithstanding the *Charter* under s. 33. Declarations under s. 33 expire after five years, or less if expressly provided, and may be re-enacted every five years. Section 33 applies only to s. 2 and s. 7 through s. 15 of the *Charter*. It does not apply to the language of instruction provisions of s. 23.[143]

ii) Federal Legislation

The Official Languages Act, 1970

According to Beaudoin and Ratushny, s. 2 of the *Official Languages Act, 1970*[144] was the inspiration for s. 16(1) of the *Charter*, the text of which was almost identical.[145] In the most recent amendment of this statute, the *Official Languages Act, 1988*,[146] the text of s. 2, which now appears in the Preamble defers to the *Charter*, which supersedes all Federal statutes:

> WHEREAS the Constitution of Canada provides that 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.

Going beyond mere reiteration of the *Charter*, the *Preamble* of the *Official Languages Act, 1988* makes explicit reference to language of instruction:

---

[142] *Supra* note 114.

[143] For more discussion see L.E. Weinrib, "Learning to Live with the Override" (1990) 35 McGill L.J. 541.

[144] *Official Languages Act*, R.S.C. 1970, c. O-2; R.S.C. 1970, c. 10 (2nd supp.) 65 Annexe II, item 27.

[145] G.A. Beaudoin & E. Ratushny, *The Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Carswell, 1989) at 658.

[146] *Official Languages Act*, R.S.C. 1988, c. 0-3.01.

> AND WHEREAS the Government of Canada is committed to cooperating with provincial governments and their institutions to support the development of English and French linguistic minority communities, to provide services in both English and French, to respect the constitutional guarantees of minority language educational rights and to enhance opportunities for all to learn both English and French.

Subsection 2(b) states that one of the three purposes of this *Act* is to support the development of English and French linguistic minority communities, and to advance the equality status and use of both languages in Canadian society. Subsection 41(a) states the Federal Government policy of "enhancing the vitality" of both linguistic communities by supporting and assisting their development, as in 2(b). The power to do so is given in section 43 to the Secretary of State of Canada. Subsection 43(d) empowers the Secretary of State:

> ...[to] take measures to
> (d) encourage and assist provincial governments to support the development of English and French linguistic minority communities generally, and, in particular, to offer provincial and municipal services in both English and French to provide opportunities for members of English or French linguistic minority communities to be educated in their own language;

Section 22, which provides for the right to use either official language, if required, when communicating with Federal offices, is almost identical to the subsequent s. 20(1)(a) of the Canadian *Charter*. As a result, the Federal Court of Appeal has stated that s. 22 should be interpreted in the same way as *Charter* provisions.[147] Mentioned before, s. 23 of the *Charter* is considered to be the direct outgrowth of the *Official Languages Act, 1977*.[148]

Critically important to all of these clauses is of what constitutes an "English or French linguistic minority population". Subsection 32(1)(e) vests discretionary power to the Governor in Council to make regulations which define that phrase.

---

[147] *St-Onge* v. *Canada (Commissioner of Official Languages)*, [1992] 3 f.C. 287.

[148] *Supra* note 139.

VI Language of Instruction: Civil Law Sources

i) The Civil Code of Québec

The *Civil Code of Québec* is comprised of 3168 Articles organized into ten "Livres", forty-three "Titres" and one hundred and forty-seven "Chapitres". Supplementary to the Civil Code is the *Droit Transitoire*, the seven hundred and nineteen articles of which are set out to assist the transition from the *Civil Code of Québec, 1981*, to the revised *Civil Code of Québec, 1994*. Also supplementary to the Code are the 1052 article *Code of Civil Procedure*,[149] the seventy-two article *Rules of Practice*[150] and the 1118 article *Dispositions Relatives Aux Autres Lois*. In over five thousand articles of codified law, there is not a mention of language or of language of instruction. The *Civil Code of Québec* is entirely silent on this matter.

ii) Provincial Legislation

The Québec Charter of Human Rights and Freedoms, 1975

The Québec *Charter of Human Rights and Freedoms* was originally enacted in 1975.[151] It has been amended seven times, the most recent amendment being the *Charter of Rights and Freedoms, 1993*.[152]

The Québec *Charter*, like the Canadian *Charter* holds supreme over all legislation under its jurisdiction. Section 55 provides that "The Charter affects those matters that come under the legislative authority of Québec", and begins, "WHEREAS every human being possesses intrinsic rights and freedoms designed to ensure his protection and development;...". Section 3 lists the intrinsic rights and freedoms: freedom of conscience, religion, opinion and expression, and freedom of peaceful assembly and association. The full and equal recognition and exercise of these freedoms exists, as long as, per s. 9.1, they,

---

[149] *Code de procedure civile du Québec*, R.S.Q. 1996, c. C-25 [C.C.P.].

[150] *Règles de pratique*, L.R.Q. 1996, c. C-25.

[151] *Charter of Human Rights and Freedoms*, R.S.Q. 1975, c. 6 [hereinafter the Québec *Charter*].

[152] *Charter of Human Rights and Freedoms*, R.S.Q. 1993, c. 30 [hereinafter the Québec *Charter*].

> ... maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

A person may not suffer discrimination based on, per s. 10, religion, political convictions, language or ethnic or national origin. Discrimination is defined in s. 10 as "where distinction, exclusion or preference has the effect of nullifying or impairing such a right."

Section 13 provides that any discriminatory clause stipulated by a juridical act is deemed without effect. A single legislative clause found to be discriminatory is struck down by s. 13, but an entire legislative *Act* may discriminate notwithstanding the Québec *Charter* under the provisions of s. 52, if it so states. Section 52 provides that:

> No provision of any Act, even subseuquent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

Since Freedom of language is provided in s. 10, legislative provisions which contravene the Freedom of language provision, may be in force, notwithstanding the Québec *Charter* under s. 52.

The Québec *Charter* includes two education provisions, but no language of instruction provisions *per se*. Section 40 provides the right to free public education. Section 86 provides that affirmative action programmes are non-discriminatory if they are established in conformity with the Québec *Charter*. The objective of these programmes is to remedy the situation of groups which are discriminated against in employment, or in the education, health services, or other public services sectors. Section 87, which is not yet in force, provides that every affirmative action program must be approved by the Québec Human Rights Commission, established under ss. 57 to 84 of the *Charter*.

Note that as a Provincial statute, the Québec *Charter* is superseded by the Canadian *Charter*. Positive discrimination provisions of the Québec *Charter* or of

legislation notwithstanding it are subject in the Courts to the Oakes test under s. 1.

The Charter of the French Language, 1977 (Bill 101)

a) Background: Bill 85, Bill 63 and Bill 22

The *Charter of the French Language*,[153] commonly referred to as Bill 101, was first enacted in 1977. Amended ten times, the most recent amendment is the *Charter of the French Language, 1994*.[154] Bill 101 is a comprehensive language law which makes French the official language of Québec society in general, of the legislatures and courts, and of education, business and the civil administration.

This law represents the ultimate resolution of prior unsuccessful attempts by the Québec government, to promote and protect the French language in Québec, through legislation. An understanding of the legislative history behind Bill 101 is important, since much of the social conflict which ultimately produced this law revolved around education. This history provides the context for the discussion of cases below.

Throughout the 1960s, Québec underwent a major social and economic transformation which is referred to as the Quiet Revolution.[155] During this time, the French Québecois, prompted by an intellectual elite, threw off the suppressive influences of English elitism and of the Church. With renewed "Maîtres Chez Nous" nationalism, Québec society replaced the institutional leadership of the Church with a State determined to right past wrongs. Amongst the many social changes which were implemented, the education system was completely reformed, with the goal of levelling the educational playing field for the French population. Further, awareness that the French language and growth of the Francophone population were in jeopardy, and that immigrants to Québec who were few, were choosing to speak English, not French, spurred the government to expand and promote French in every sector of society, including education.

---

[153] *Charter of the French Language*, R.S.Q. 1977, c.5; R.S.Q. 1977 c. 11 [hereinafter Bill 101].

[154] *Charter of the French Language*, R.S.Q. 1994, c. C-11[hereinafter Bill 101].

[155] For more information about the Quiet Revolution see Magnuson, *supra* note 21 at 102-23.

The first language law in Québec was Bill 85, introduced in 1968. This Bill provided for the establishment of a Linguistic Committee to assist the Minister of Education in designating schools as either French or English language institutions. It also delegated authority to the Ministers of Education and Immigration to ensure that Québec immigrants acquire working knowledge of French, and that their children attend French schools. This Bill evoked overwhelmingly negative response from anglophones, Québec nationalists and minority groups alike. With Bill 85, the Minister had inadvertently intensified conflict between Anglophones and Francophones in the Province, and incurred their disapproval of the Ministry.[156] The Bill was consequently withdrawn within months, and a Royal Commission of Inquiry, the Gendron Commission, was set up to make recommendations as to how French could successfully be made predominant in all public sectors, including education.

Before the Gendron Commission Report was complete, Bill 63 was enacted in 1969.[157] It provided that all primary and secondary students would receive instruction in French, unless parents explicitly chose English as the language of instruction. These children were nonetheless required to attain a practical knowledge of French. Response to Bill 63 resulted in mass demonstrations against the government by the Francophone community, who perceived that anglophones and immigrants had been given a legal right to English education which up to this point had been only a privilege. The government was now under increased pressure for legislation which would more securely establish French as the language of Québec.

Bill 63 was repealed and replaced in 1974 with Bill 22, known officially as *The Official Language Act, 1974*.[158] Bill 22, Québec's first major language act, effectively abolished the province's traditional policy of bilingualism, making Québec officially unilingual francophone. In education, it replaced the principle of parental choice of language of instruction, with a provision to restrict enrolment in English-

---

[156] M. Magor, The Language of Education in Quebec: A Study of Bill 101, in terms of Constitutional and Natural Law (M.A. Thesis, McGill University, 1982) at 14.

[157] *An Act to Promote the French Language in Québec*, R.S.Q. 1969, c. 9 [hereinafter Bill 63].

[158] *The Official Language Act*, R.S.Q. 1974, c. 6 [hereinafter Bill 22].

language schools to students with "sufficient knowledge" of English. "Sufficient knowledge" was determined by English-language proficiency tests administered to students by the school boards. This eligibility criterion resulted in a proliferation of underground after school classes given to immigrant children by Catholic school board teachers, to "cram" for the English test. The test results often resulted in dividing siblings along linguistic lines.[159] For these reasons, Bill 22 was opposed by the anglophone and immigrant communities on pedagogical and humanitarian grounds. The language of instruction provisions of Bill 22 are believed to have contributed to the electoral defeat of Bourassa and the Liberal government in 1976.[160]

In education, Bill 101 established French as the language of instruction for all public and publicly funded private school students, with the exception of some clearly-defined groups. In general, Bill 101, 1977 provided that only children who have a family background of English-language elementary education in Québec were entitled to receive instruction in English. Compared to the responses to its legislative predecessors, Bill 101, as since amended, has succeeded in bringing some measure of linguistic peace to the province.[161]

b) General Provisions

The Preamble of Bill 101 first states that the French language is the instrument by which the majority population, which is French-speaking, articulates its identity, and that this population desires to assure the quality and influence of the French language. The Government of Québec recognizes this desire, and is resolved to make French the language of all public matters. The Preamble also states:

> Whereas the National Assembly intends to pursue this objective in a spirit of fairness and open-mindedness, respectful of the institutions of the English-speaking community of Québec, and respectful of the ethnic minorities, whose valuable contribution to the development of Québec it readily acknowledges;

---

[159] *Supra* note 156 at 18.

[160] *Supra* note 139 at 29.

[161] *Ibid.* at 184.

Section 1 declares that "French is the official language of Québec." Each of the five "Titres" of the *Act* deals with a particular domain of the official language. Section 100, under Title II, establishes the Office de la langue française, an enforcement and investigative tribunal for Bill 101. Any legal prosecutions or recourse is vested with the Attorney General of the Province or person authorized by that office, under s. 207.

c) Language of Instruction Provisions

Section 6 provides that "Every person eligible for instruction in Québec has a right to receive that instruction in French." In Chapter VIII, s. 72 re-iterates this point, but adds, "except where this chapter allows otherwise." In 1977, s. 73 proscribed the exceptions as follows:

> The following children, at the request of one of their parents, may receive instruction in English:
> (a) a child whose father or mother received his or her elementary instruction in English, in Québec;
> (b) a child whose father or mother, domiciled in Québec on the date of the coming into force of this Act, received his or her elementary instruction in English outside Québec;
> (c) a child who, in his last year of school in Québec before the coming into force of this act, was lawfully receiving his instruction in English, in a public kindergarten class or in an elementary or secondary school;
> (d) the younger brothers and sisters of a child described in paragraph (c).

The bases of eligibility for enrolment in English-language schools per s. 73, have been amended since 1977. The criteria given in s. 73 in 1977, influenced the wording of s. 23 of the *Charter* three years later, in subsections (1)(b) and (2).[162] Subsequent case law on the constitutionality of s. 73 with respect to s. 23 of the *Charter*, which is discussed below, resulted in the broadening of the eligibility requirements under s. 74, as follows:

---

[162] A. Martel, *Official Language Minority Education Rights in Canada: From Instruction to Management* (Ottawa: Office of the Commissioner of Official Languages, 1991) at 137.

> The following children, at the request of one of their parents, may receive instruction in English:
>
> (1) a child whose father or mother is a Canadian citizen and received elementary instruction in English in Canada, provided that that instruction constitutes the major part of the elementary instruction he or she received in Canada;
> (2) a child whose father or mother is a Canadian citizen and who has received or is receiving elementary or secondary instruction in English in Canada, and the brothers and sisters of that child, provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada;
> (3) a child whose father and mother are not Canadian citizens, but whose father or mother received elementary instruction in English in Québec, provided that that instruction constitutes the major part of the elementary or secondary instruction he or she received in Québec;
> (4) a child who, in his last year in school in Québec before 26 August 1977, was receiving instruction in English in a public kindergarten class or in an elementary or secondary school, and the brother and sisters of that child;
> (5) a child whose father or mother was residing in Québec on 26 August 1977 and had received elementary instruction in English outside Québec, provided that that instruction constitutes the major part of the elementary instruction he or she received outside Québec.

Section 76 also provided in 1977, and continues to do so, that children of elementary school age, who were receiving their instruction in French, but qualified under s. 73 for English instruction, would be considered to be receiving their instruction in English. This provided that eligibility for English language instruction under s. 74 would not be lost to descendants of these children.

Other exemptions which have existed since 1977 include children with serious learning disabilities and their siblings, under s. 81, and children who live in Québec temporarily, under ss. 81 and 85, respectively. Section 86.1, included by amendment in 1983, provides exemption for a child whose parent received the majority of his or her elementary instruction in English elsewhere in Canada, and who, before moving to Québec, lived in a province or territory where French language instructional services were comparable to the English language instructional services available in Québec. There is no requirement of Canadian citizenship attached to this exemption. Section 86.1 further provides exemptions, where the criteria of the right is attached to the

child, rather than the parent: subsection 86.1(b) provides exemption to a child who has moved to Québec from another province or territory during his or her last school year, or from the beginning of the current school year; and, 86.1(c) provides the exemption to siblings of children qualifying under (a) and (b).

Section 88 provides for the use of Cree and Inutituut in the Cree and Kativik School Boards, respectively, but places on these boards a requirement to use French also. Section 87 provides for the use of native American languages in the public education of native peoples, however, under s. 97, Indian reserves are not subject to Bill 101. Since 1977, Section 79 has provided:

> However, every school body shall, where necessary, avail itself of section 213 of the Education Act (chapter I-13.3) to arrange for the instruction in English of any child declared eligible therefor.

Section 79 also stipulates that:

> A school body not already giving instruction in English in its schools is not required to introduce it and shall not introduce it without express and prior authorization of the Minister of Education.

The Education Act, 1988 (Bill 107)

a) Background: Bill 40 and Bill 3

The *Education Act, 1988*, more commonly referred to as Bill 107, was enacted in 1988.[163] Most of the provisions of this comprehensive, seven hundred and twenty-eight section school law came into force July 1, 1989, except for forty-eight sections, which deal with the establishment of linguistic school boards. The implementation was withheld by the Québec government, pending judicial opinion, on reference, regarding the constitutionality of the provisions.[164] The purpose of this Act is to completely reform the distribution of powers of governance over schools, and the way that school boards are organized throughout the province. This reform is of particular

---

[163] *Education Act*, R.S.Q. 1988, c. 84, R.S.Q. 1993, c. I-13.3 [hereinafter Bill 107].

[164] *Bill 107 Reference*, *infra* notes 249 and 252.

interest to this inquiry, since it involves the transformation of Québec's denomination-based education system into one which is structured along linguistic lines. Since, as discussed above, Denominational schools are *de facto*, not *de jure* French or English schools, there is serious concern about the impact that eliminating denominationalism might have on minority English language educational institutions. Confessional schools and Dissentient schools are constitutionally protected under s. 93. Minority language instruction is also constitutionally protected under s. 23. However, it is the concern of many groups in Québec, that if *de facto* constitutional protection is effectively removed, that language school boards and schools, provided by statute alone, could eventually be amended out of existence.[165]

Bill 107, like Bill 101, entails a legislative history. Amongst the many recommendations of the Parent Commission in 1966,[166] one was that Québec's denominational educational structure was outmoded. The Commission recommended that it be replaced by a secular, language-based structure, which would allow schools to be either French or English. Not favourably received,[167] the Parti Québécois government made no move toward this model for sixteen years. In 1982, it brought forward a draft paper entitled, *The Québec school: a responsible force in the community*,[168] which proposed to replace confessional school boards and the election to boards by universal suffrage, with unified boards, elected and managed by parents. After a year of intense debate, *An Act Respecting Public Elementary and Secondary Education*, 1983,[169] known as Bill 40, was introduced in the National Assembly.

Bill 40 provided for the replacement of confessional school boards with linguistic boards on the Island of Montreal, and for the establishment of a unified system of public, common schools throughout the rest of the province. Governance of

---

[165] *Supra* note 139 at 189.

[166] Québec, *Report of the Royal Commission of Inquiry on Education in the Province of Québec*, vol. 1 (Québec: Québec Official Publisher, 1963).

[167] *Supra* note 139 at 56.

[168] Québec, *The Québec School: A Responsible Force in the Community* (Québec: Ministère de l'Éducation, 1982).

[169] *Bill 40, An Act to amend the Education Act*, Québec, 1983 [hereinafter Bill 40].

the off-island schools would rest with the schools themselves, not with schools boards. During Parliamentary hearings on Bill 40 in early 1984, it became apparent to the public that there was little consensus amongst educators about the reform.[170] According to Henchey and Burgess, the Minister of Education and his government suffered serious political damage as a result. When the hearings had ended, the Premier announced a cabinet shuffle in which the Minister was re-assigned. Bill 40 was withdrawn shortly afterward.[171]

Several months later, *An Act respecting public elementary and secondary education*, 1984,[172] known as Bill 3, was passed. A comprehensive *Education Act*, Bill 3 modified Bill 40's proposals. With respect to establishing a linguistic system, it provided that all common school board territories throughout the province, not just on the Island of Montreal, would be designated French or English, and that these school boards would hold powers of governance. The four Confessional school boards in Montreal and Québec City would continue to exist, but would be reduced to the territories they occupied in 1867. They, and the five Dissentient school boards would continue to function under the previous *Education Act*.[173] In 1985, Bill 3 was found to contravene s. 93(1) of the *BNA Act*, as we will discuss below, and was declared *ultra vires* by the Superior Court of Québec.

b) General Provisions

Sections 111 to 121 of Bill 107 provide for the division of the province of Québec into French language and English language school board territories, and for the establishment of school boards and schools in these territories. The establishment of linguistic boards entails the dissolution of the existing *de facto* Catholic and Protestant common school boards after the linguistic boards are established. Neither

---

[170] *Supra* note 139 at 58.

[171] *Ibid.*

[172] *An Act respecting public elementary and secondary education*, S.Q. 1984, c. 39, R.S.Q. 1984, c. E-8.1 [hereinafter Bill 3].

[173] *Education Act*, R.S.Q. 1964, c. 235, R.S.Q. 1993, c. I-14.

the five existing Dissentient school boards, per s. 125, nor the four Confessional school boards of Montreal and Québec, provided in s. 122 will be dissolved. These will be preserved in their own territories and under their own names. Per s. 139 however, the Government reserves the right to dissolve any Dissentient school board if it becomes inactive. Section 123 provides that the territories of the Confessional school board may be altered. Section 205 provides that English school boards will only be accessible to persons who are eligible to receive instruction in English and who elect to come under the jurisdiction of an English school board. Similarly, enrolment in the Catholic or Protestant schools of the Confessional or Dissentient school boards is limited in s. 206 to those who are actually Catholic or Protestant, and who elect to come under the jurisdiction of the appropriate school board. In general, election to come under the jurisdiction of any school board is done by application to the educational services of the school board.

All of the property, rights, assets and staff of the common school boards will be transferred to the linguistic boards per s.120. Sections 354 to 371 make special provisions for the possible need to establish linguistic regional school boards.

Once the new educational structures are in place, Bill 107 provides a procedure by which Catholic or Protestant denominational minority groups may exercise their right to dissent, in ss. 126 to 131. These sections provide that any Catholic or Protestant resident outside the jurisdiction of a Confessional school board, but under the jurisdiction of a linguistic board, may serve notice to that school board that they wish to establish a Dissentient board. The board then confirms the denomination of the resident, and by reference to its electoral lists, whether that denomination constitutes a minority in the territory of the school board, and how many electors belong to that minority. Having established this, the Dissentient school board is established on the date that notice is served to all of the linguistic school boards in that territory. Under s. 134, the Minister is responsible for ruling on conflicts over the transfer of staff and material resources between the Dissentient and Linguistic school boards, ensuring that the Dissentient board has those assets it requires to operate. Section 124 provides that the Minister has a similar obligation to resolve conflicts

which arise due to the alteration of Confessional school board territories.

Bill 107 sets out a principle of proportional access to public funds for Confessional or Dissentient school boards. It also preserves the Conseil supérieur de l'éducation and its Catholic and Protestant subcommittees, as well as the Conseil scolaire de l'ile de Montréal. The latter, a public corporation, is empowered to administrate borrowing and property taxes of the school boards on the island of Montreal, as per ss. 399-407. Sections 447-458 and ss. 459-179, provide broad regulatory powers to the Government and the Minister, respectively.

Schools may be recognized as Catholic or Protestant in accordance with an educational plan which will follow Bill 107. Linguistic school boards must offer religious and moral instruction, Catholic or Protestant, to those who request it.

Bill 107 does not apply to the Cree or Kativik School Boards, or the Naskapi Education Committee, which will remain under the previous *Education Act.*[174]

c) Language of Instruction Provisions

In its provisions for entitlement to attend English schools, Section 205 states that:

> Only those persons who, according to law, are entitled to receive instruction in the English language and who elect to come under the jurisdiction of an English language school board come under the jurisdiction of that school board.

There is no similar section for entitlement to French language schools, as enrolment into these school is the default enrolment, under the provisions of Bill 101.

Section 210 is the only part of Bill 107 which addresses language of instruction directly. It is also the only section which specifically defines what is meant by the descriptors English and French for the English or French language school boards referred to throughout the *Act.* It reads:

> A French language school board shall provide educational services in French or, where it provides educational services to persons under the jurisdiction of

---

[174] *Ibid.*

> another school board pursuant to section 213, 467 or 468, in French or in English according to law.
>
> An English language school board, a confessional school board or a dissentient school board shall provide educational services in French or in English according to law.
>
> Nothing in this section shall prevent the teaching of a second language in that language.

Section 213, referred to in s. 210 above, is interesting in that it provides a right to school boards to enter into agreements with other school boards or private schools to provide all or part of the developmental, cognitive or instructional services provided under Bill 107. This could include the provision of vocational or adult education services, under s. 467, or the establishment of schools which would be open to students from certain regions or from the whole province. There are no provisions which preclude any other aspect of instructional services from falling under s. 213, including language of instruction.

VII Federal Case Law

i) The Constitution of Canada

The Constitution Act, 1867

a) Section 93 Cases

The *Mackell* Case, 1917 (Privy Council, United Kingdom)

The Ontario *Mackell case* of 1917,[175] was the first case in which the Privy Council rendered interpretation of the s. 93(1) phrase "Right or Privilege". In this case, a Regulation limiting the use of French in Ontario's Roman Catholic separate schools was contested as contravening the right or privilege clause. The judgment upheld and cited the Manitoba *Barrett* case of 1892,[176] in which "Right or Privilege" had been narrowly interpreted to include only those express provisions of law which were already in existence by 1867, regardless of practice or custom.[177] In other words, it was the opinion of the Court that if a "Right or Privilege" is not expressly stated in the *Act Respecting the Consolidated Statutes for Lower Canada, 1861*, then it is not constitutionally protected.

The court further clarified the meaning of the phrase "class of persons":

> Further, the class of persons to whom the right or privilege is reserved must, in their Lordships' opinion, be a class of persons determined according to religious belief, and not according to race or language.[178]

The highest Court of Appeal of Canada had ruled that "class of persons" included those who held religious rights, and that the "religion" category of right could not be subdivided into a "language" category. Further, the Court went on to say that schools must be governed in accordance with regulations; that there is no abrogation of

---

[175] *Mackell* v. *Ottawa Roman Catholic Separate School Trustees*, [1917] A.C. 62 [hereinafter *Mackell*].

[176] *City of Winnipeg* v. *Barrett*, [1892] A.C. 445 [hereinafter *Barrett* case].

[177] *Mackell*, *supra* note 175 at 67.

[178] *Ibid.* at 69.

authority of the Council of Public Instruction to regulate language of instruction "... provided that it does not interfere with ... a right or privilege attached to denominational teaching."[179]

The *St. Léonard* Affair, 1970 (Québec Court of Appeal)

In June, 1968, the school commission in St. Léonard-de-Port-Maurice, a suburb of Montreal with a large Italian minority, adopted a resolution to phase out its English-language schools. As a result, two of five commissioners dissented, and appealed to the Québec Superior Court to disallow the resolution.[180] They submitted that the school commission had a legal obligation to provide education in both official languages of Canada. The Court refused to intervene, however, on the grounds that educational rights[181] for the English-language minority served by the commission were based primarily on tradition, by virtue of the constitutional rights afforded to Protestants in section 93, and that it made no mention of linguistic rights. The court stated that to offer education in both languages was discretionary, not obligatory, on the part of school boards and commissioners. The Québec Court of Appeal decision in 1970 upheld the lower court decision.[182]

The *Greater Montreal Protestant School Board* Case, 1989 (Supreme Court of Canada)

In the *Greater Montreal Protestant School Board* Case of 1989,[183] on appeal

---

[179] *Ibid.* at 71.

[180] *Léo Pérusse* and *Jean Papa* v. *Les Commissaires d'écoles de St-Léonard-De-Port-Maurice* (25 September 1968), Montreal (S.C.Q.)[Non-published], in J. Deschênes, *Ainsi parlèrent les tribunaux ... Conflits linguistiques au Canada*, vol. I (Montreal: Wilson & Lafleur, 1985) at 68.

[181] See Québec, *Report of the Legal Committee on Constitutional Rights in the Field of Education in Quebec*, vols. 1,2,3 by T. P. Howard, Q.C., J. Martineau, Q.C., P. Laing, Q.C., F. Scott, Q.C. (Faculty of Law, McGill University, 1990) [unpublished].

[182] *Léo Pérusse* and *Jean Papa* v. *Les Commissaires d'écoles de St-Léonard-De-Port-Maurice* [1970] C.A. 324 [hereinafter the *St. Léonard Affair*].

[183] *Greater Montreal Protestant School Board* v. *Québec (A.G.)*,[1989] 1 S.C.R. 377 [hereinafter *GMPSB* case].

from the Québec Court of Appeal, the two Confessional and one Dissentient Protestant school boards in the province sought a declaration that s. 16(7) of the *Education Act, 1988* and regulations adopted thereunder be declared *ultra vires* under s. 93(1) and (2) of the *Constitution Act*, 1867. This section deals with the establishment of a uniform curriculum for all non-denominational subjects, save for religious and moral instruction. These areas of instruction were to be determined by the Catholic or Protestant committees of the Conseil supérieur de l'éducation, by regulation.[184] The claim was that s. 16(7) violated a right under s. 93(1), enabling the Protestant minority to manage and control its own schools and to regulate the course of study in these schools. As an alternative, they argued that s. 93(2) extended the power or privilege to determine the exact content of curriculum that had been given to trustees of Quebec Protestants in Upper Canada. The Supreme Court dismissed the appeal on both claims.

The prime importance of this case to our study, is that the Supreme Court provided a broad interpretation of the denominational guarantees provided in s. 93. It stated that:

> Section 93(1) protects not only the denominational aspects of denominational schools, but also the non-denominational aspects which are necessary to give effect to denominational guarantees.[185]

and,

> The power to set curriculum extended to Quebec Protestants has, by the application of s. 93(1), only been entrenched in so far as it is necessary to give effect to the denominational guarantee in Quebec.[186]

At the same time, the Court states that although s. 93 provisions are entrenched, they should not be given the same status as other more universal Constitutional provisions:

---

[184] These are: the *Regulation respecting the basis of elementary school and preschool organization*, (1981) 115 O.G. II 1213, and the *Regulation respecting the basis for secondary school organization*, (1981) 115 O.G. II 1223.

[185] *Supra* note 183 at 378.

[186] *Ibid.* at 381.

> As a constitutional text, s. 93(1) may deserve a "purposive" interpretation but, in so doing, courts must not improperly amplify the provision's purpose. ... s. 93(1) is not a blanket affirmation of freedom of religion or freedom of conscience. "The entrenched right of specified classes of persons in a province to enjoy publicly-sponsored denominational schools based on a fixed statutory bench-mark should not be construed as a *Charter* human right or freedom.[187]

The Canadian Charter of Human Rights and Freedoms, 1982

a) Section 15 Cases

Section 15 does not have retroactive effect. The section did not come into effect until April 17, 1985, and has no application to legislation which was enacted prior to this date, nor to causes of action arising prior to this date.[188]

The *McDonnel* Case, 1986
(British Columbia Court of Appeal)

In the *McDonnel* Case,[189] the appellant appealed the deputy registrar's refusal to file a statement of defence in British Columbia in French. The appeal was dismissed by the Court, which stated that s. 15 provides guarantees against discrimination and is a legal right, but that while discrimination based on language may fall under s. 15, the concept of "official language" does not.

The *Ontario Reference*, 1987
(Supreme Court of Canada)

This Reference[190] was submitted before the Supreme Court of Canada to determine whether the Ontario *Education Act, 1987*[191] contravened s. 15 of the

---

[187] *Ibid.* at 379.

[188] *Reference re Workers' Compensation Act, 1983 Nfld.*, ss. 32, 34, [1989] 2 S.C.R. 335, 56 D.L.R. (4th) 765.

[189] *McDonnel v. Fédération des Franco-Collumbiens; British Columbia (A.G.), Intervenor* (1986), 31 D.L.R. (4th) 296.

[190] *Reference re an Act to amend the Education Act* (Ontario) (1987), 40 D. L. R. (4th) 18, 36 C.R.R. 305 [hereinafter *Ontario Reference*].

[191] Bill 30, *An Act to amend the Education Act*, Ontario, 1987.

Charter. The *Education Act*, known as Bill 30, provided full funding for Roman Catholic (Separate) secondary schools but, not for other secondary schools, denominational or non-denominational, in the Province. The Court concluded that the *Act* did not contravene s. 15, because by virtue of s. 29 of the *Charter*, Bill 30 is insulated from *Charter* review. Similar to the *Mackell* case, the *Education Act* had made a provision which affected a situation with respect to non-Separate schools in Ontario (with respect to funding), which had existed only by practice, not by law in 1867. With respect to Separate Roman Catholic secondary schools, the *Act* served to restore rights and privileges with respect to funding, which had been provided by law and were therefore constitutionally guaranteed under s. 93(1). The *Act* therefore did not derogate from any right or privilege guaranteed by the *Constitution*.

In its judgment, the Supreme Court clearly established the relationship between s. 15 of the *Charter* and s. 93 of the *BNA Act*, along with s. 29 of the *Charter*. The bench restated s. 52(2) of the *Charter*, that the *Charter*, the *Constitution Acts, 1867* to *1965* and all other *Acts* mentioned in the *Schedule* of the *Charter* form part of the *Constitution of Canada*, and added that no part of the *Constitution* is paramount over another. Section 15, with respect to Denominational, Separate or Dissentient schools must therefore be read in the context of s. 29 of the *Charter*, which upholds s. 93 of the *BNA Act*.

The *Singer* Case, 1988
(Supreme Court of Canada)

In this case,[192] Singer claimed that s. 57 of Bill 101 was a *prima facie* breach of s. 15. Section 57 requires the use of French, but permits the use of another language at the same time. The Supreme Court found that s. 57 violates s. 2(b) of the *Charter* and therefore consideration under s. 15 was not required. The Court found, however, that the violation of s. 2(b) is justified under s. 1. By ensuring that non-francophones could fill out application forms for employment as well as other

[192] *Singer* v. *Québec* (P.G.) (1988), 90 N.R. 48

types of forms, in any language of choice along with French, the Court stated that s. 57 creates at most, a minimum impairment of equality rights. Since the case was raised under s. 15, it was then necessary to determine that if there had been a *prime facie* breach of s. 15, whether it too would be justifiable under a s. 1 analysis. The Court held that it would not, since this would not therefore constitute a minimum impairment of equality rights.

The *Gauthier* Case, 1989
(Québec Court of Appeal)

We include the *Gauthier* Case, 1989[193] in order to illustrate that apparent inconsistencies on the part of tribunal judgements are not necessarily considered to be so by the Courts. In particular, the reader will recall that the Office de la langue française, the Provisional Council for the establishment of Linguistic school boards, and the Council of Commissioners, as provided by Bills 101 and 107, respectively, are tribunals. The acceptance of an application or petition of one child to attend an English Language educational institution may not guarantee the same to another child with a seemingly similar application.

In this case, M. Gauthier argued that a tribunal, the Commission de protection de territoire agricole acted in a discriminatory manner towards him by denying his application after they had previously allowed similar applications. The claim was struck down, with clarification by the Court that decisions made by tribunals are based on a diversity of facts and circumstances which must be considered. This complicated process of decision-making leads tribunals to authorize some applications and to deny others. In this judgement, the Court has showed a tendency to give tribunals full discretionary power. Note here also that the Conseil scolaire de l'île de Montréal is not a tribunal, but a public corporation.

---

[193] *Gauthier* v. *Québec* (Comm. de protection de territoire agricole) (1989), 44 M.P.L.R. 117.

The *Magder* Case, 1989 and
The *Wholesale Travel Group* Case, 1991
(Supreme Court of Canada)

In the *Magder* Case of 1989,[194] Paul Magder claimed that a municipal by-law prohibiting store opening on Sundays was discriminatory to stores of Jewish proprietors. The claim was dismissed by the Ontario Court of Appeal, and leave to appeal to the Supreme Court refused. In the case note, the Supreme Court stated that the word "individual" in s. 15(1) does not include corporations. As such, s. 15 of the *Charter* has no application to a corporate accused. However, the same court decided in the *Wholesale Travel Group* Case of 1991,[195] that a corporation, though not directly enjoying *Charter* rights, may challenge the validity of a provision that violates the rights of an individual. The Court specified that such a provision could therefore be declared of no force or effect under s. 52(1). It also stated that such actions are beneficial to corporations, as a means to avoid prosecution under the law. These cases are included as relevant to potential claims under s. 15, which might involve the Conseil scolaire de l'île de Montréal, which is a public corporation; and by way drawing attention to the possible suggestion by the court of an effective approach to future clarifications of constitutional provisions.

The *Manitoba Reference*, 1990
(Manitoba Court of Appeal)

The Manitoba Reference[196] was first brought before the Manitoba Court of Appeal by the province, concerning the constitutional validity of certain provisions of the recent *Public Schools Act*.[197] The province sought judicial interpretation of what is meant in practice, by the provision of s. 23(3)(b) to have one's children receive

---

[194] *R.* v. *Paul Magder Furs* (1989), 33 O.A.C. 81 (Ont. Dist. Ct.), 37 O.A.C. 159 (note)(S.C.C.) [hereinafter *Magder* case].

[195] *R.* v. *Wholesale Travel Group*, [1991] 3 S.C.R. 154 [hereinafter *Wholesale Travel Group* case].

[196] *Reference re ss. 79(3), (4) & (7) of the Public Schools Act (Manitoba)*, [1990] 2 W.W.R. 289 [hereinafter *Manitoba Reference, 1990*]. See the S.C.C. appeal, *infra* note 234.

[197] *The Public Schools Act*, R.S.M. 1987, c. P250.

instruction "in minority language educational facilities". In particular, it asked whether this provision includes the right to a distinct physical setting. The Court was also asked whether sections 23 and 15 of the *Charter* grant any right of management or control of minority language of instruction and facilities to the minority population.

Four of the five judges found that the rights guaranteed by s. 23(3)(b) include a right to a distinct setting for the provision of minority language education, but that neither s. 23 nor s. 25 conferred any right of management and control on the linguistic minority population. The Court recognized that the rights of Franco-Manitobans had been violated under s. 15, and that there clearly was discrimination, since certain Manitobans had been totally deprived of the right to instruction in French for years. However, the Court stated that the transfer of governance to Franco-Manitobans was not a necessary consequence of the discrimination under s. 15, because s. 15 "does not include language as a particularized basis on which discrimination has been banned."[198]

This judgement was later reversed on appeal to the Supreme Court,[199] based on its interpretation of s. 16 in another case which the court heard shortly after this Appeal case.[200]

The *Lavoie* Case, 1989
(Nova Scotia Court of Appeal)

In the *Lavoie* Case,[201] the plaintiff claimed that the *Acadian Schools Amendment*[202] of Nova Scotia created a distinction in society toward a particular group of citizens, by treating Acadian children differently from those of the anglophone majority, thereby contravening s. 15. The court found that the school *Act* did afford special treatment to certain people of Nova Scotia, but that under s. 1 analysis, the distinction served to remedy past inequality. Under these circumstances, the Court

---

[198] *Supra* note 196 at 293.
[199] *Manitoba Reference, 1993, infra* note 234.
[200] See *Mahé* case, *infra* note 223 and *Manitoba Reference*, 1993, *infra* note 234.
[201] *Lavoie case, infra* note 221.
[202] *Infra* note 222.

stated, such a distinction is surely acceptable to Canadian society.

b) Section 27 Cases

The *Manitoba Reference*, 1993
(Supreme Court of Canada)

In 1993 the Supreme Court of Canada rendered its judgment in this Reference,[203] on appeal from the Manitoba Court of Appeal Reference discussed above under "Section 15 Cases". The facts of this case are discussed in greater detail under "Section 23 Cases", below. In its written judgment, however, the Supreme Court clearly established the relation between ss. 23 and 27. It stated that it is not the intention of the *Charter* to eliminate all distinctions in society. In fact, the inclusion of sections like s. 27 establish and preserve distinctions, and preserve them as fundamental Canadian values. The provisions of s. 23 must therefore be interpreted in light of s. 27.[204]

c) Sections 24 and 57 Cases

The *Quebec Association of Protestant School Boards* Case, 1984
(Supreme Court of Canada)

The summary of the *Quebec Association of Protestant School Boards* case of 1984[205] is given below, under "Section 23 Cases". The importance of this case here, is that the Supreme Court reversed the interpretation given to s. 24(2) of the *Charter* in a landmark decision of the British Columbia Court of Appeal the year before.[206] Section 57, as discussed above, gives equal authority to the French and English versions of the *Charter*. The B.C. Court of Appeal had directed the use of the French version of s. 24(2), rather than the English version, since the English version proscribes the exclusion of evidence which *would*, rather than in the French version *could* bring the

---

[203] *Infra* note 234.
[204] *Ibid.* at 857.
[205] *Infra* note 220.
[206] *Supra* note 134.

administration of justice into disrepute. The Supreme Court in this case, however, proscribed the use of the English version, since s. 24(1) to which it refers, extends the remedy sought to past violations of protected rights and freedoms, to which the French does not. Permitting the exclusion of evidence under s. 24(2) in past cases where there has been a violation of protected rights and freedoms, is an important and potentially far-reaching decision. With respect to whether the court chooses to interpret French or English *Charter* provisions, in both of these cases the Court shows a tendency to refer to the version which provides the broadest possible interpretation.

d) Sections 16 to 22 Cases

The *Acadians of New Brunswick* Case, 1986 (Supreme Court of Canada)

The *Acadians of New Brunswick* Case of 1986,[207] deals with ss. 14, 16, 19, 20 and 27 of the *Charter*. In both the New Brunswick Court of Queen's Bench and the New Brunswick Court of Appeal cases of 1984, the Société des Acadiens and the Association des conseillers scolaires francophones sought both a declaration and an injunction to prevent the Minority Language School Board No. 50 from offering English immersion programmes to Francophone students in its English schools. The court of first instance ruled in favour of the plaintiffs, but refused to issue an injunction. They did not appeal. Parents of the francophone students wishing to attend the immersion programmes did.[208] The matter before the Supreme Court was not the same as before the lower courts. The case dealt with the jurisdictionality of the Court of Appeal with respect to procedural matters, and to issues of which language was used before the courts. These points are of little concern to language of instruction in Québec. Of strategic importance however, is the differentiation made by

---

[207] *Association of Parents for Fairness in Education, Grand Falls District 50 Branch* v. Société des Acadiens du Nouveau-Brunswick, [1986] 1 S.C.R. 549 [hereinafter *Acadians of New Brunswick* case].

[208] They did so after forming the "Association of Parents for Fairness in Education, Grand Falls District 50 Branch".

court between "legal" rights and rights which are "based on political compromise"; the interpretation of how these two types of rights should be dealt with by the Courts; and, the identification of language rights as belonging to the second type:

> Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. ...
>
> 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.[209]

The statement above, by Beetz J., is fundamental to the issue of language and the Canadian *Constitution*, and has provided grist for the judicial mill in important language cases over the last ten years, including *Lavoie*, *Mahé* and the *Manitoba Reference* Cases.

The *Manitoba Reference*, 1993
(Supreme Court of Canada)

The French and English language provisions given in s. 16 to s.22 were used by the Court to argue that all rights which result from political compromise, such as language rights should be interpreted with the same generous and liberal attitude as are other rights proscribed in the *Charter*. The Court recognized that language is inextricably linked to culture, and that the constitutional entrenchment of French and English language rights in the Canadian *Constitution* is a recognition of "previous injustices which have gone unredressed".[210] The Court stated that the provisions of s. 16 to s. 22 therefore codify the use of English and French as a fundamental constitutional value. Therefore, these provisions should be interpreted in a manner

---

[209] *Supra* note 207 at 578.

[210] *Manitoba Reference, 1993*, *infra* note 234 at 850.

which "most effectively encourage[s] the flourishing and preservation" of either linguistic minority.[211] Because language rights are the result of political compromise, the courts should approach judicial interpretation of their scope with more restraint than they would other types of rights.

e) Section 23 Cases

Due to the ambiguity of certain phrases in s. 23, in particular, those of "sufficient numbers", "facilities", or "public funds", minority language groups in Canada must rely on judicial interpretation to understand how the provisions of s. 23 apply in practice. Case law on s. 23 includes sixteen court judgements rendered since 1982: six from lower courts; six from provincial courts of appeal, including three constitutional references; and four from the Supreme Court.

These cases demonstrate that the scope of application of s. 23, as interpreted by the courts, has broadened beyond the protection of language of instruction, to include the protection of all aspects of schooling which deal with the preservation of language, and therefore of culture. The position of the court in matters which implicate s. 23, embodies the challenge as to how the court can balance judicial activism for the preservation of official language minority populations, and respect for the jurisdiction of the provinces over education. In the cases rendered to date, the courts first recommended a "broad and liberal" interpretation of s. 23 rights, then later favoured "narrow" constructionist interpretation, limited to provincial contexts.[212] The latest two Supreme Court decisions of 1990 and 1993, reflect a broad and liberal approach once again, but have gone beyond the scope of earlier interpretations.

---

[211] *Ibid.*

[212] *Supra* note 162 at 39.

The *Québec Association of Protestant School Boards Case*, 1984 (Supreme Court of Canada)

The *Québec Association of Protestant School Boards* Case of 1984,[213] was submitted before the Supreme Court on appeal, appeal having been dismissed by the Québec Court of Appeal the year before.[214] The appeal to the Supreme Court was also dismissed. Both appellate courts unanimously upheld the decision of Chief Justice Deschênes of the Québec Superior Court in 1982.[215] In this case, the plaintiff sought a declaratory judgment that ss. 72 and 73 in Chapter VIII of Bill 101, concerning language of instruction were inconsistent with s. 23 of the Canadian *Charter*, and therefore of no force or effect to the extent of the inconsistency. The court concurred. For the details of the inconsistencies, see the discussion below under "The Charter of the French Language, 1977 (Bill 101) Cases".

The prime significance of the QAPSB case here, is the clear acknowledgement by the Supreme Court of the remedial nature of s. 23. The Court stated that s. 23 is unique to Canada. Generally, non-universalizing domains such as that of s. 23, are most often matters for legislation, not for state constitutions. Further, the Court provided a rationale for the entrenchment of language of instruction rights in Canada:

> Rightly or wrongly, -- and it is not for the courts to decide, -- the framers of the Constitution manifestly regarded as inadequate some -- and perhaps all -- of the regimes in force at the time the Charter was enacted, and their intention was to remedy the perceived defects of these regimes by uniform corrective measure, namely those contained in s. 23 of the Charter, which were at the same time given the status of a constitutional guarantee.[216]

Earlier in the judgement, the Supreme Court clarified the meaning of "regimes" as meaning provincial legislation. The "perceived defects" referring to the inadequacies

---

[213] *Québec (A.G.)* v. *Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66 [hereinafter QAPSB case].

[214] *Quebec Association of Protestant School Boards et al.* v. *Québec (A.G.) et al. (No. 2)* (1983) 1 D.L.R. (4th) 573.

[215] *Quebec Association of Protestant School Boards et al.* v. *Québec (A.G.) et al. (No. 1)* (1982) 140 D.L.R. (3d) 33, 3 C.R.R. 114.

[216] *Supra* note 213 at 79.

of this legislation in governing the anglophone and francophone linguistic minorities of Canada, with respect to language of instruction. In this discussion, the Court specifically referred to Bill 101 and its predecessors in Québec, as examples of inadequate provincial legislation.

The *Ontario Reference*, 1987
(Supreme Court of Canada)

The facts of this case[217] have already been presented in the discussion under "Section 15 Cases", above. Only one year after the *Acadians of New Brunswick* Case in 1986,[218] the Supreme Court took the opportunity to both confirm and soften its interpretation of Constitutional provisions such as language, which arise from political compromise:

> While due regard must be made not to give a provision which reflects a political compromise too wide an interpretation, it must still be open to the court to *breathe life* into a compromise that is clearly expressed [emphasis added].[219]

The *P.E.I. Reference*, 1988
(Prince Edward Island Court of Appeal)

The P.E.I. Reference[220] is included here, since the court was asked to render opinion regarding the constitutionality of sections of the 1980 *P.E.I. School Act*, the provisions of which may be relevant to Québec's Bill 107. The Court recognized that the purpose of s. 23 is to secure and to guarantee to individuals the full benefit of protection afforded by the *Charter*, as it applies to minority language education. It stated that the intention of s. 23 is to provide remediation when the language of instruction rights of the minority language population have been denied or infringed.

---

[217] *Supra* note 190.

[218] *Supra* note 207.

[219] *Supra* note 190 at 1176.

[220] *Reference re Minority Language Educational Rights (Prince Edward Island)* (1988), 49 D.L.R. (4th) 499 [hereinafter *P.E.I. Reference*].

Further, it stated that whether the legislation being considered was enacted prior to or after the enactment of the *Charter* is irrelevant. Its constitutionality may still be legitimately considered by the courts.

Two of the inconsistencies found by the Court between s. 23 and the *School Act* are of particular interest: (1) that strict geographical boundaries of School Boards have no bearing on *Charter* obligations to provide minority language instruction wherever in the Province numbers warrant; and, (2) that the legislation in this case provides that minority language education rights are to be made available only by the request of a group of parents, whereas these rights under the *Charter* are not contingent upon such group request.

The *Lavoie* Case, 1989
(Nova Scotia Court of Appeal)

The *Lavoie* Case[221] began the judicial process of determining how the provisions of s. 23 should be applied in practice. A group of francophone parents in Cape Breton sought a declaration against the Attorney-General of the province for not providing for the French primary and secondary instruction for their children in the *Education Act*[222] which is proscribed in s. 23. The parents sought French-language education which would be equivalent to that provided to anglophones in their residential area. The trial judge concluded that there were 300 to 400 elementary and pre-school aged children eligible for this provision. The judge ordered that an actual registration be held, and that in the meantime, the government prepare a suitable educational facility and programme of French language instruction. When the actual registration number was determined to be 50, the Ministry of Education refused to provide either minority language instruction or a separate facility. The trial judge therefore denied the claim under s 23. The plaintiffs appealed.

The Court of Appeal stated that the provisions of s. 23 should be given a broad

---

[221] *Lavoie* v. *Nova Scotia (A.G.)* (1989), 58 D.L.R. (4th) 293.
[222] *Education Act*, R.S.N.S. 1967, c. 81.

and liberal interpretation. It stated that the reasonableness of the trial judge's decision was not in question, but rather the determination of what provision the numbers warranted. The court decided that looked at objectively, 50 qualifying students warranted the provision of minority language instruction, but was not sufficient for the provision of a separate educational facility. Most importantly, the Court in this case formulated a two-step process for determining the application of s. 23.

The first step is to determine whether the number of children who have the right to minority language education under s. 23(1) and (2) is sufficient to warrant that provision. If so, then it is incumbent on the Province to provide the appropriate structural environment, under s. 93 of the *BNA Act*, for the provision of that right. The second step is to determine whether the number determined in step one is sufficient to provide minority language educational facilities out of public funds. The Court stated that the second test must be more stringent than the first, and the result of either determination must be based on the number of children, the cost, and related factors.

The Court went on to say that it is not the role of the court to specify in exact detail how and where instruction should be provided, nor to tell the provincial legislatures how these measures should be provided. The Minister of Education and the Attorney-General are, respectively, the parties for resolution of these matters.

The *Mahé* Case, 1990
(Supreme Court of Canada)

In its March, 1990 judgment in the *Mahé* Case,[223] the Supreme Court laid out a general framework for the interpretation of s. 23, and expressly conferred to minority language parents a right to manage and control the educational facilities in which their children are taught. This landmark case was on appeal from the Alberta Court of Appeal.

The appellants were a group of parents of french-language minority students in

[223] *Mahé* v. *Alberta*, [1990] 1 S.C.R. 342 [hereinafter *Mahé*].

Edmonton. Their claim was that under s. 23, they had the right to have their children educated in a publicly-funded French-language educational facility, which was equivalent to existing English-language facilities. They also claimed that as parents, per s. 23, they had the right to manage and control the educational facility in which their children were taught. The Alberta Court of Appeal had granted the right to open a publicly-funded school, but did not find the numbers sufficient for the provision of a separate school board. The Supreme Court upheld the lower court decision, and also proscribed the means by which parents would have governance and control over the new elementary and secondary schools, without a new school board.

The Supreme Court first undertook to clarify the general purpose of s. 23, and to further judicial reasoning on the "numbers warrant" tests of *Lavoie*. The Court stated that:

> The general purpose of s. 23 of the Charter 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. ... [It] is also designed to correct, on a national scale, the progressive erosion of minority official language groups and *to give effect to the concept of 'equal partnership' of the two official language groups in the context of education* [emphasis added].[224]

C.J. Dickson also stated that the rationale behind specific guarantees of educational rights founded on language is based on the link between the presence of minority language schools and the preservation of minority culture:

> 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.[225]

With specific reference to the cultural role of schools *per se*, he continued:

> In addition, it is worth noting that minority schools themselves provide community centres where the promotion and preservation of minority language

---

[224] *Ibid.* at 344.
[225] *Ibid.* at 362.

> culture can occur; they provide needed locations where the minority community can meet and facilities which they can use to express their culture.[226]

The Court concluded that the method chosen to advance the goal of preservation of language and culture, namely, to confer upon minority language parents the right to have their children educated in their maternal official language, is embodied in s. 23. Further, the right to minority language instruction is guaranteed where "the number of persons who will *eventually* take advantage of the contemplated program or facility" warrants it [emphasis added].[227]

Section 23 encompasses a "sliding scale" of possible institutional requirements necessary to put its provisions into practice. The upper end of the scale, entailing the fullest interpretation of "educational facilities" in s. 23(3)(b), requires a separate school board, run by the parents of children attending a separate minority language school. The lower end of the scale entails providing minority language "instruction" as per s. 23(3)(a), in an already existing school, with representation by parents on the school board, with full rights of governance over all aspects of minority language instruction. It is for the Court to determine where along the scale each situation which comes before it should be placed. The determination is essentially based on the number of students involved. Factors to be considered include the pedagogical services appropriate for the number of students, and the cost of the services. The Court stated however, that pedagogical considerations must hold more weight than financial requirements in determining what numbers warrant. Once determined by the court, it is then incumbent on the province to enact appropriate legislation to provide for the institutional requirements specified by the Court.

With respect to the educational provisions being "equal" to that of majority language students, the Court stated that the "quality" of education "should in principle be of reasonable equality with the majority, although it need not be identical, and that

---

[226] *Ibid.* at 363.

[227] *Ibid.* at 345.

public funding adequate for this purpose must be provided."[228]

At trial, it was determined that there were 3,750 children in Edmonton, between 5 and 19 years of age, whose first language learned and still understood was French. At the time, a Francophone school already existed in Edmonton , with 315 students enrolled, and a capacity for 720. Based on this number, the Supreme Court directed the province of Alberta to provide out of public funds, a full guaranteed French-language elementary and secondary programme of education in the existing school, exclusively and fully controlled by the parents, who would hold a guaranteed number of seats on the governing school board.[229] The Court determined that this number of students did not warrant a separate school board, but it proscribed the full domain of minority parental decision-making authority in detail, and ordered that the funding provided per student must be at least equal to, if not greater than that for majority language students.

The *Commission des écoles fransaskoises* Case, 1991 (Saskatchewan Court of Appeal)

In this case,[230] the Commission des écoles fransaskoises, an incorporated group of two individuals and ten non-profit corporations with the goal to improve French language education in Saskatchewan, brought an action before the Courts to request declarations that provisions of *the Education Act*[231] and the *Education Regulations*[232] were inconsistent with ss. 15 and 23 of the *Charter*. Their claim was that the legislation provided for language of instruction, but not for parental management and control. The trial court agreed, and issued a declaration that s. 180 of the *Education Act*, and *Regulations* made thereunder, were of no force and effect, under s. 52 of the *Charter*, to the extent that they did not recognize that the rights guaranteed by s.

---

[228] *Ibid.*

[229] *Ibid.*

[230] *Commission des écoles fransaskoises et al.* v. *Saskatchewan* (1991), 81 D.L.R. (4th) 88 (Sask. C.A.), 97 Sask. R. 95 (note) (S.C.C.).

[231] *Education Act*, R.S.S. 1978, c. E-0.1 (Supp.).

[232] *Education Regulations*, 1986, R.R.S. c. E-0.1, Reg. 1.

23(3)(b) include the right to minority management and control, "... insofar as territorial limitations on the jurisdiction of boards of education might operate to limit or deny the rights guaranteed by s. 23;".[233]

The group subsequently applied for appeal on the basis that declaration under s. 52 was insufficient to their claim. They wanted the Court of Appeal to issue a mandatory order to the Province, under the remedial power of s. 24 of the *Charter*, to establish a homogeneous French Board of Education. This board would have jurisdiction over the entire province, and would employ local Boards of Trustees to manage and control minority language instruction and facilities. A provincial board was necessary, they explained, to facilitate greater efficiency in the delivery of services and costs, since the French language population is scattered throughout Saskatchewan. The proposed structure provided greater access to French minority education, but did so irrespective of established school board territories.

The application for appeal was dismissed by the Court on the basis that the remedy requested by the appellants under s. 24, went beyond the remedial powers vested in that section. Their only entitlement was a declaration of *ultra vires* under s. 52. Also, because the appellants had not asked for the mandatory order before the trial court, they had demanded an invocation of the Court's original, rather than its appellate jurisdiction. The Court stated that this action is taken only in exceptional situations, where expedience and justice strongly demand it. This case was not such a circumstance.

The *Manitoba Reference*, 1993
(Supreme Court of Canada)

As mentioned above, in the discussions under s. 15, ss. 16 to 22 and s. 27, this Reference[234] concerned the constitutionality of certain provisions of Manitoba's *Public*

---

[233] *Supra* note 230 at 93.

[234] *Reference re ss. 79(3), (4) & (7) of the Public Schools Act (Manitoba)*, [1990] 2 W.W.R. 289, rev'd [1993] 1 S.C.R. 839 [hereinafter *Manitoba Reference, 1993*].

Schools Act.[235] The government of Manitoba sought judicial clarification of the provisions of s. 23 with respect to the right of parents to manage and control minority language instruction. In particular, it sought opinion as to whether rights to minority language educational facilities include the right to a distinct physical setting. The Supreme Court judgement in this case followed very closely its judgment three years prior in *Mahé*. The Court held that the general right of instruction conferred by s. 23, read in the context of the section as a whole, requires that the educational facilities "be of" or "belong to" the linguistic minority group, with provision of a distinct physical facility representing the full complement of the right. How the right is exercised may be determined by the Court by applying the sliding-scale approach developed in *Mahé*.

The Court found that the *Public Schools Act* did not provide appropriate mechanisms for implementing the rights of the linguistic minority for management and control of its educational facilities. It was decided that in this case, the number of potential French-language students (5,617 enrolled in Français programmes in 1988) warranted the establishment of an independent French-Language School Board, under exclusive management and control of the Francophone minority parents. The Court therefore issued a mandatory order to the Manitoba government to immediately enact appropriate legislation and to provide a system by which the Francophone minority could exercise its rights effectively, as proscribed in *Mahé*.

ii) Federal Legislation

The Official Languages Act, 1970 Cases

The *Thorson* Case, 1975 (The Supreme Court of Canada)

The *Thorson* Case[236] was an appeal to the Supreme Court of Canada, from the Court of Appeal of Ontario. Mr. Thorson, suing the Government of Canada as a

---

[235] *Public Schools Act*, R.S.M. 1987, c. P250.

[236] *Thorson* v. *Canada (A.G.), The Secretary of State of Canada, The Receiver General of Canada, Keith Spicer, The Bilingual Districts Advisory Board, Roger Duhamel, Paul Fox and Roger St. Denis* [1975] 1 S.C.R. 138 [hereinafter *Thorson* case].

taxpayer in a class action suit for all taxpayers, claimed that the *Official Languages Act, 1968-69*[237] and the *Appropriation Acts* providing money to implement it were unconstitutional. The question of constitutionality of the Federal *Act* is not the significant contribution of this case, but rather the primary question of law which each of the three Courts first considered: whether the plaintiff, as an individual, had status to challenge the constitutional validity of an Act of Parliament if he was not specially affected or exceptionally prejudiced by it. The first two courts decided against Thoron on this point. The Supreme Court of Canada, however, by its own discretion allowed the appeal, on the basis that the citizenry has a right to constitutional behaviour which would support such an action. In effect, this ruling establishes a Constitutional principle that individual citizens may be empowered to vanguard a responsible legislature.

The Court found that the Federal Legislature was within its constitutionally provided powers to enact the *Official Languages Act*, and to support it. The *Act* itself was also found to be consistent with the basic principles and provisions of the *Constitution of Canada*.

The *Jones* Case, 1975
(The Supreme Court of Canada)

The *Jones* Case of 1975[238] began as a Reference by the Lieutenant Governor of New Brunswick to the Supreme Court of New Brunswick of five questions of law concerning the validity and effect of the *Official Languages Act, 1970*. The Appeal proceeded to the Supreme Court of Canada when a cross appeal was filed by the Attorney General of New Brunswick. In short, the Supreme Court of Canada unanimously declared that it was within the legislative competence of the Parliament of Canada to have provided in the *Official Languages Act, 1970*, provisions which proscribe behaviour, within the *Act*, of the provincial legislatures.

---

[237] c. 54, *supra* note 144.

[238] *Jones v. New Brunswick (A.G.); Canada (A.G.)* and *Québec (A.G.) Intervenants.* [1975] 2 S.C.R. 182 [hereinafter *Jones* case].

VIII Provincial Case Law

i) Provincial Legislation

Bill 22 Cases

The *Protestant School Board of Greater Montreal* Case, 1976 (Superior Court of Québec)

In this case,[239] The Protestant School Board of Greater Montreal, commonly known as the PSBGM, claimed that Bill 22 contravened s. 93 of the *BNA Act*, and so brought suit against the Minister of Education of Québec, for a declaration of *ultra vires* for a significant number of its articles. Chief Justice Deschênes' judgment, which concurred with *Mackell*, stated that although the rights conferred to Denominational school boards in the *Consolidated Statutes for Lower Canada, 1861* include authority to regulate the course of study in each school, they do not expressly provide for language of instruction. Therefore, language of instruction does not qualify for protection under Section 93.

A major contribution of this case is Deschênes C.J.'s consolidation of case law pertaining to whether school boards fall under the category of "a class of persons" who may claim a right under s. 93. Citing higher court judgments, the Chief Justice dismissed the Receiver General's claim that a school board or school boards as moral persons, not physical persons under the law, do not so qualify. A Privy Council judgment in 1917 stated that,

> ... the appellant board represent a section of the class of persons who are within the protection of provision 1. ... They are not the less within the provision than any other board similarly constituted would have similar rights or privileges.[240]

This view was upheld by the same Court in the *Hirsch* Case[241] of 1928, where the

---

[239] *Bureau métropolitain des écoles protestantes de Montréal* c. *Ministre de l'Éducation du Québec*, [1976] C.S. 430 [hereinafter *PSBGM* case].

[240] *Trustees of the Roman Catholic Separate Schools for Ottawa* v. *Ottawa*, [1917] A.C. 76.

[241] *Hirsch* v. *Protestant Board of School Commissioners of Montreal*, [1928] A.C. 200 [hereinafter *Hirsch* case].

judgment stated that:

> It is plain also that the dissentient supporters of such a school, who are bound together by a common religious faith, form a "class of persons" having special rights and privileges with respect to the school ...[242]

The Chief Justice cited the provision of Art. 55 of the Civil Code of Procedure in support of his argument, which states that, " "[c]elui qui forme une demande en justice ... doit y avoir un intérêt suffisant"... pour rechercher la sanction judiciaire de l'*ultra vires* législatif."[243] Also cited was the Supreme Court in the *Dasken* Affair[244] of 1974, which determined that even a corporation, with reason, has the faculty to exercise the rights shared by its members as a group.

The Charter of the French Language, 1977 (Bill 101) Cases

The *Ford* Case, 1988 (Supreme Court of Canada)

The *Ford* Case, commonly referred to as *Brown's Shoes*, is a landmark case. In February 1984, the plaintiffs claimed that ss. 58, 69 of Bill 101, which require that signs be solely in French, and that only the French version of a firm name may be used in Québec, infringed the freedom of expression guarantees under s. 2(b) of the Canadian *Charter* and s. 3 of the Québec *Charter*. They sought a declaration from the Superior Court of Québec that these sections, and ss. 205 to 208 to the extent that they applied, were therefore inoperative and of no force or effect. The Superior Court allowed the motion in part, and declared s. 58 to be inoperative. The A.G. appealed this decision, and the respondents entered an incidental appeal against the failure of the Court to declare ss. 69 and 205 to 208 inoperative. The Court of Appeal dismissed the appeal, but allowed the incidental appeal to determine: (1) whether ss. 58 and 69 infringed the freedom of expression guaranteed under s. 2(b) of the

---

[242] *Ibid.* at 209.

[243] *Supra* note 149 at 434.

[244] *Association of Proprietors of Taché Gardens* v. *Dasken Enterprises*, [1974] S.C.R. 2 [hereinafter *Dasken Affair*].

Canadian *Charter* and s. 3 of the Québec *Charter*; and (2) whether these sections infringed the guarantee against discrimination based on language in s. 10 of the Quebec *Charter*. The case was referred to the Supreme Court of Canada.[245]

The essential contribution to case law on language of instruction in Québec is the Supreme Court's unequivocal statement of the cultural importance of language:

> The "freedom of expression" guaranteed by s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter includes the freedom to express oneself in the language of one's choice. 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 colors 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.[246]

The Court stated that the recognition that freedom of expression includes the freedom to express oneself in one's language of choice does not run counter to the special guarantees of official language rights in the area of governmental jurisdiction or responsibility. As a result, the freedom of expression guarantees of s. 2(b) of the Canadian *Charter* and s. 3 of the Québec *Charter* include the freedom to express oneself in the language of one's choice.

The Court went on to say that the guarantee of freedom of expression cannot be confined to political expression, stating that there is no sound basis upon which commercial expression can be excluded from the protection of s. 2(b). Based on its view that commercial expression plays a significant role in enabling individuals to make informed economic choices, the Court rejected the view that commercial expression serves no individual or societal value in a free and democratic society. It is therefore deserving of constitutional protection.

The Supreme Court found that ss. 58 and 69 (and ss. 255 to 208, to the extent they apply) infringed s. 3 of the Québec *Charter*, which is not justifiable under s. 9.1

---

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

[246] *Ibid.* at 716.

of the Québec *Charter*, discussed above. They were also found to infringe s. 10 of the Québec *Charter*. In addition, s. 69 was found to infringe s.2 (b) of the Canadian *Charter*, the infringement of which was found to be not justifiable under s. 1.

The *Québec Association of Protestant School Boards* Case, 1984 (Supreme Court of Canada)

The Facts of this case[247] are discussed under "Section 23 Cases", above. The Supreme Court upheld the prior decisions of the lower courts, and the appeal was dismissed. Sections 72 and 73 of Bill 101 were found to be inconsistent with s. 23 of the *Charter*, and declared of no force or effect. Section 73, and s. 72, by virtue of being referred to in s. 73, discriminated against the children of Canadian citizens who may move to Québec from other provinces. Section 73 was subsequently amended. The original and amended versions of s. 73 are presented above, under "The Charter of the French Language, 1977 (Bill 101)". Entitlement to English-language instruction is still attached to the child, not to the parents as in s. 23, but the restriction that parents be Canadian Citizens, as in s. 23, has been added to the first two criteria of eligibility. The requirement that parent have received the majority of their elementary education in Québec, has been expanded to their having received this education anywhere in Canada.

The Education Act, 1988 (Bill 107) Cases

The *Bill 107 Reference*, 1993 (Supreme Court of Canada)

Following the bringing into force of the *Education Act, 1988*,[248] the Government of Québec submitted a reference,[249] on April 26, 1989, to the Québec Court of Appeal, with respect to the constitutionality of those provisions which had

---

[247] *Supra* note 213.

[248] *Supra* note 163.

[249] *Reference Re Education Act (Québec)*, [1990] R.J. Q. 2498, 32 Q.A.C. 1, 23 A.C.W.S. (3d) 351.

not been enacted. The Reference comprised five sets of questions concerning the constitutionality of particular provisions with respect to ss. 93(1) and (2) of the *Constitution Act, 1867*. Twice following the Court of Appeal hearing, the Québec Legislature passed statutes[250] amending certain provisions of Bill 107 which were at issue before the Court. After consulting the parties involved in the reference, the Court agreed to rule on Bill 107 as amended.

On September 21, 1990, the Court of Appeal gave its ruling, and by October 17, 1990, the intervenors in the reference filed notices of appeal to the Supreme Court. Two months later, the Québec Legislature passed an amendment[251] in accordance with the Court of Appeal judgment, which affected certain of the provisions under reference to the Court. Again, with consultation, the Supreme Court agreed to rule on Bill 107 as amended. The decision of this court was given June 17, 1993.[252]

The five questions put before both courts, paraphrased, are provided in Appendix A. The questions are particular and narrowly construed, dealing only with the constitutionality of Bill 107 under s. 93. The Court's instrumental interpretation of s. 93 provisions is consistent with the previous cases we have investigated. Within the narrow frame of the questions, there was no enquiry presented to the Court with respect to this study's focus on language of instruction. The Court stated that s. 93 represents political compromise between communities prior to 1867 which conflicted with respect to religion rather than language; that the Privy Council in the *Mackell* case excluded language from the provisions of s. 93; and, that this is the basis for the reason that the legislating of linguistic schools boards does not contravene s. 93.

The Court of Appeal's ruling on the *Act* as amended by S.Q. 1990, c. 28, answered yes to questions 2(a), 3(b) and 4(a). The Supreme Court judgment on Bill 107 as amended by S.Q. 1990, c. 78, answered no to all questions. In other words,

---

[250] These were the *Act to amend the Education Act and the Act respecting the Conseil supérieur de l'éducation*, S.Q. 1990, c. 28; and, the *Act to amend the Education Act and the Act respecting private education*, S.Q. 1990, c. 28.

[251] *Act to amend the Education Act and the Act respecting private education*, S.Q. 1990, c. 78.

[252] *Reference Re Education Act (Québec)*, [1993] 105 D.L.R. (4th) 266 [hereinafter *Bill 107 Reference*].

the Supreme Court ruled that the provisions of Bill 107 do not contravene ss. 93(1) and (2) of the *Constitution Act, 1867*, and are therefore constitutionally valid.

It is important to note that the provisions of s. 93(3) are not yet implicated under Bill 107, until the withheld provisions are implemented. Section 93(3) provides recourse to appeal to the Governor General in Council, should "any Act or Decision of any Provincial Authority" prejudicially affect Rights or Privileges of minority denomination populations with respect to Dissentient Schools which are "thereafter established by the Legislature of the Province", 'thereafter' referring to after 1867. This means that the procedure proscribed in Bill 107 for exercising the right to dissent would be constitutionally protected. The matter of the right to dissent is referred to in question 2(a) in this Reference. The Court found that the provisions of Bill 107 in this respect, as amended,[253] do not infringe the right to dissent, nor does the time period required to establish the dissentient denominational system.

It remains to be seen, however, whether implementation of the provisions of Bill 107 will in any way prejudicially affect the provisions of s. 23 of the Charter, especially in respect to the "where numbers warrant" provision of s. 23(3).

---

[253] *Supra* note 251.

IX Summary and Conclusions

The aim of this study was to uncover the sources of law which establish language of instruction rights in Québec. The purpose in so doing, was to gain appropriate background, and some understanding of the bases upon which the judiciary formulate decisions in cases dealing with language of instruction. The legal sources which were examined include relevant Québec legislation, Canadian legislation which applies to Québec, and case law. Case law has included Québec cases, Supreme Court of Canada cases, and cases from other provinces, which have been cited as authority in the Supreme Court decisions. Legislation and case law pertaining to language in general, were not excluded from this enquiry, since these sources serve to contextualize language of instruction sources for Québec, within the larger Canadian context.

Common Law Sources

Documentary research has revealed the primary common law sources to be s. 93 of the *Constitution Act, 1867* and case law thereunder, and the provisions and judicial interpretation of s. 23 of the *Constitution Act, 1982*. Secondary common law sources include the provisions and case law under various section of the Charter of Rights and Freedoms, namely, Fundamental Freedoms, Equality Rights, Multicultural Heritage and Official Languages of Canada; and, the *Official Languages Act* of Canada. Summarization of the secondary common law sources is subsumed by summarizing the primary sources, ss. 93 and 23.

Sections 93(1) and 93(3) respectively protect the rights and privileges which were provided by law to Denominational and Dissentient Schools, prior to 1867. The Privy Council in 1892[254] and in 1917,[255] looked to the *Consolidated Statutes for Lower Canada, 1861* as the source of these rights and privileges. The Court found that within the *Consolidated Statutes*, there is no express provision for language of

---

[254] *Barrett, supra* note 176.

[255] *Mackell, supra* note 175.

instruction. The languages used in public schools was simply a matter of custom or practice from 1841 until Confederation. Language of instruction therefore does not fall under protection of s. 93. The Privy Council's interpretation has been consistently upheld by the courts: the Superior Court of Québec in 1968[256] and 1976;[257] the Nova Scotia Court of Appeal in 1989;[258]and the Supreme Court of Canada in 1987,[259] 1989,[260] and 1993.[261]

The purposive interpretation given s. 93 by the Supreme Court in 1988,[262] recognized that the constitutional entrenchment of denominational education rights in 1867 was the result of political compromise- -the ultimate provision of a guarantee, for the purpose of resolving conflict over the issue of public education, between Catholics and Protestants in Lower Canada, prior to 1867. In 1989,[263] the same Court stated that these rights should also be taken to protect those non-denominational aspects which are necessary to give effect to denominational guarantees.

Case law on who may claim s. 93 rights has consistently excluded language as a determining characteristic. Religious denomination is the only determinant of persons comprising the "Class of Persons" holding this right. Stated by the Privy Council in 1917,[264] and 1928,[265] and upheld by subsequent courts as above, the religious category of persons cannot be subdivided according to language, even though in 1861, Catholics and Protestants were *de facto* French and English, respectively. In 1989,[266] the Supreme Court warned that s. 93 rights should not be construed in any way to have the same status as Canadian *Charter* human rights or freedoms.

---

[256] *St. Léonard Affair*, *supra* note 182.
[257] *PSBGM*, *supra* note 239.
[258] *Lavoie*, *supra* note 221.
[259] *Ontario Reference*, *supra* note 190.
[260] *GMPSB*, *supra* note 183.
[261] *Manitoba Reference*, *supra* note 234.
[262] *Bill 107 Reference*, *supra* note 252.
[263] *GMPSB*, *supra* note 183.
[264] *Mackell*, *supra* note 175.
[265] *Hirsch*, *supra* note 241.
[266] *GMPSB*, *supra* note 183.

Section 23 of the *Canadian Charter of Rights and Freedoms, 1982* entrenched the right of Canadian minority official language parents throughout Canada, to have their children receive instruction in their maternal minority official language. Similar to the Court's purposive interpretation of s. 93 rights, the Supreme Court of Canada has stated that the rights afforded by s. 23 came to be constitutionally entrenched as a result of political compromise.

In 1986,[267] the Supreme Court formally differentiated between legal rights and rights which are based on political compromise. It also issued a *caveat* to the judiciary to practise restraint in the interpretation of rights of the latter type. To interpret the provisions of rights based on political compromise too broadly, and thereby acting as agent of change with respect to these rights, the judiciary could jeopardize the often tenuous political balance which these provisions have achieved. This position of the Court has been stated in respect of s. 23 rights by the Nova Scotia Court of Appeal in 1989,[268] the Saskatchewan Court of Appeal in 1991,[269] and the Supreme Court in 1987,[270] 1990,[271] and 1993.[272] Nonetheless, the review of s. 23 cases in this study has revealed a progressive move by the courts over the last ten years, from playing a purely adjucative role, to one of judicial activism through broader interpretations and more aggressive measures with respect to the enforcement of s. 23 rights.

In the 1987 case, the Supreme Court advised judicial restraint, as above, but suggested that the courts had an obligation to "breathe life" into the political compromise so clearly expressed in s. 23. In 1989, the Nova Scotia Court of Appeal stated that s. 23 should be given a more broad and liberal interpretation, but warned that it was not the role of the courts to specify how and where s. 23 rights should be

---

[267] *Acadians of New Brunswick*, *supra* note 207.

[268] *Lavoie*, *supra* note 221.

[269] *Commission des écoles fransaskoises*, *supra* note 230.

[270] *Ontario Reference*, *supra* note 190.

[271] *Mahé*, *supra* note 223.

[272] *Manitoba Reference*, *supra* note 234.

implemented, nor to tell the provincial legislatures how they should provide for such measures. In 1990, the Manitoba Court of Appeal went further, to undertake a negative proscription of rights under s. 23: that they do not confer any right of management and control of minority language instruction on the linguistic minority population. The Supreme Court decision in *Mahé* in 1990, however, was a major turning point with respect to judicial activism. The Court's judgment in this case flew in the face of prior decisions. Not only did the Supreme court state that s. 23 confers a right to minority language parents to management and control of minority language instruction, but it also stated that it is the role of the courts to specify the institutional requirements which are warranted. Furthermore, the Court in Mahé issued a mandatory order to the Province to immediately enact legislation which would put into effect detailed provisions proscribed in the Court's judgment. In 1993, the Supreme Court reiterated its 1990 position in the *Manitoba Reference*, again issuing a mandatory order to the provincial legislature to provide the detailed implementation provisions specified by the Court.

As already mentioned, the courts have broadened their purposive interpretations of s. 23. The Supreme Court's view in 1984 was that s. 23 rights were constitutionally entrenched in order to provide a uniform corrective measure over provincial minority official language of instruction legislation, in order to establish a conformity of rights across the country. By 1990, the same Court's view was that the provisions of s. 23 embodied the means by which the framers of the *Constitution* had chosen to preserve and promote the official languages of Canada, *and their respective cultures.* The Supreme Court stated that language rights guarantees cannot be separated from concern for the cultures associated with language, and that schools are important arbiters of culture. Section 23 was designed therefore, to correct the progressive erosion of minority official languages and cultures across the country, and to make these groups equal partners in the context of education. In 1993, the Supreme Court further expanded the interpretation, stating that since ss. 16 to 22 of the *Constitution Act, 1982* essentially entrench official language rights as fundamental Canadian constitutional values, s. 23 should therefore be interpreted in a way which "most

effectively encourage[s] the flourishing and preservation" of each official language minority.

The Supreme Court has stated its interpretation with sufficient frequency in recent years, that the purpose of the framers of the Constitution was to promote the "flourishing" of official language minority populations throughout Canada, that it may be taken as a guiding principle of the Court, for the interpretation of constitutional language provisions. It may be no coincidence that the Court has repeatedly chosen the same key words to express this guiding principle. These words recall the same Court's 1989 judgment in *Irwin Toy*, that legislation may be found to infringe freedom of expression under s. 2 (b) of the *Charter*, regardless of its intent, if it infringes, amongst other principles and values underlying freedom of expression, participation in the community and human flourishing.

Case law to date has determined that s. 23 minority language education rights include the provision of minority language instruction, and a separate educational facility "of" or "belonging to" the linguistic minority group, where numbers warrant. These numbers may warrant a separate school board, or if not, at least the parental right of full governance over minority language instruction, by means of a guaranteed number of seats on the governing school board. In Nova Scotia, 50 students have warranted minority language instruction, but not a separate facility;[273] in Alberta, 315 students have warranted a separate facility, but not a separate school board; and in Manitoba, 5,617 students have warranted both separate facilities and the establishment of an independent school board.

Although determinations made by the courts for one province cannot be applied directly to another,[274] certain common guidelines have been established. In each case, appropriate institutional provisions must be determined based on the number of students, which must include consideration of the projected number of students who

---

[273] *Lavoie*, *supra* note 221.

[274] *Manitoba Reference*, *supra* note 234.

may require minority language instruction;[275] the pedagogical services which are appropriate for that number; and the cost of services. Pedagogical considerations, however, must be the prime concern.[276] The public funding provided per students must be at least equal to, if not greater than that for majority language students.[277] Geographical boundaries of school boards have no bearing on the provision of s. 23 rights, and these rights are not contingent on group request.[278] The courts have also stated that legislation may be judicially considered under s. 23, regardless of whether it was enacted before or after 1982.[279]

Section 23 rights may be claimed by: individual and group minority language parents; corporations challenging the infringement of s. 23 rights shared by its members as a group;[280] corporations challenging the validity of legislative provisions which violate the rights of an individual;[281] and individuals challenging the constitutional validity of legislation, even if they are not specially affected or exceptionally prejudiced by it.[282] Provincial legislation may not be challenged under provisions of the Charter, including those of s. 23, by corporations in and of themselves.[283]

Both ss. 93 and 23 have been found by the courts to infringe the equality rights of s. 15 of the Canadian *Charter*. However, the infringements have been found to be justifiable under s. 1, since the provisions of these sections remediate past injustices which have existed over time. Remedial provisions of this kind are seen by the courts as acceptable in a free and democratic society. Similarly, both sections have been found to contravene s. 10 of the Québec *Charter*, but are justifiable under s. 9.1.

---

[275] *Mahé*, *supra* note 223.
[276] *Ibid.*
[277] *Ibid.*
[278] *P.E.I. Reference*, *supra* note 220.
[279] *Ibid.*
[280] *Dasken Affair*, *supra* note 244.
[281] *Wholesale Travel Group*, *supra* note 195.
[282] *Thorson*, *supra* note 236.
[283] *Magder*, *supra* note 194.

Civil Law Sources

The primary civil law sources, are the Québec *Charter of Human Rights and Freedoms*, *Bill 101* and *Bill 107*. The *Civil Code of Québec* is silent with respect to language.

The Québec *Charter*, enacted in 1975, provides that no person may be discriminated against based on religion, political convictions, ethnic or national origin, and language, which is not included under s. 15 of the Canadian *Charter*, unless the discrimination is provided by legislation which expressly states that it applies despite the Quebec *Charter*, under s. 52. Minority language of instruction provisions under s. 23 of the Canadian *Charter* by contrast, are excluded from similar exemption under s. 33. As provincial legislation, the Québec *Charter* is superseded in all respects by the Canadian *Charter*.

Bill 101, enacted in 1977, establishes Québec as a unilingual French-speaking province, in all public domains. In 1988, as mentioned above, the Supreme Court of Canada stated that it was the perceived inadequacies of provincial language legislation such as Bill 101 that formed the rationale for the inclusion of s. 23 as a corrective measure in the *Constitution Act, 1982*. Indeed, Chapter VIII of Bill 101 provided the template for s. 23. The present version of Bill 101, amended in accordance with the Supreme Court decisions of 1984[284] and 1988,[285] now falls within s. 23.

Bill 101 provides that the language of education in Québec is French, and that instruction in English is permitted, but only by exception. Eligibility for English language instruction is attached to the child in Bill 101, rather than to the parents, as in s. 23. Entitlement is permitted by virtue of at least one parent with Canadian citizenship having received their elementary instruction in English in Canada; or if a child or his or her sibling with Canadian parents, has received elementary or secondary education in English in Canada; or if at least one non-Canadian parent has received elementary education in English in Québec. As provincial legislation, Bill 101 is

---

[284] *QASPB*, *supra* note 213.

[285] *Ford*, *supra* note 245.

superseded by s. 23 of the Canadian *Charter*.

Bill 107, Québec's most recent *Education Act*, provides for the complete reorganization of the dual-denominational education system into one which is language-based. It is the culmination of several failed attempts by the Government to implement linguistic school boards. Bill 107 makes no special provision for English-language eligibility, deferring only to eligibility rights already provided for by law. However, parents of children who are eligible must formally elect to be placed under the jurisdiction of an English language school board. The determination of "where numbers warrant" under s. 23, will be based on the number of these requests. The sections of *Bill 107* which provide for changes in territories or eligibility for enrolment with respect to Confessional and Dissentient school boards, or for the establishment of French and English school boards, are not yet in force. In 1993, the Supreme Court ruled that these provisions, as amended since 1988,[286] do not contravene s. 93.

Québec and Language of Instruction

For the same rationale given at the outset of this study for the selection of documents to be researched, all of the legal sources which have been discussed apply to language of instruction in Québec. In addition to categorizing these sources as Common Law or Civil Law sources, examining them chronologically reveals six main periods of historical importance to language of instruction in Québec:

1. Formal education during the period of New France, 1608 to 1759, was private, scarce, and run by the religious teaching orders. Since the search for documents in this study was limited to public instruction, which did not exist until 1841, no effort was made to search for language of instruction sources during this period. All instruction provided to colonists in New France was evidently given in the French language. It is important to mention, however, that in searching the Civil Code of Québec, a revised version of the Civil Code of Lower Canada, which had incorporated many of the provisions of the Napoleonic Code from this period, no

---

[286] *Supra* note 250.

reference to language or language of instruction was found, whatsoever.

2. The question of language of instruction was introduced with the British conquest of New France in 1760, only in the sense that new colonists were English-speaking. From 1841, with the establishment of public Common Schools, until after the Quiet Revolution (1960-1970), no legislation existed which provided for language of instruction. By 1846, all public schools in Québec were either *de jure* or *de facto* Catholic or Protestant. Language of instruction was only a matter of practice or custom, since religious denominationalism was the social issue of that period, and in Lower Canada, Catholics were *de facto* francophone, and Protestants were anglophone. In 1774, with the enactment of the *Quebec Act*, and prior to establishment of the public school system, the French language, which had been deemed illegal at conquest, was officially re-instated as a language which could used in public matters. Because the anglophone population was much smaller than the francophone population, this *Act* had the effect of establishing English as the minority official language of Lower Canada.

3. At Confederation, the constitutional entrenchment of denominational education rights in s. 93 of the *British North America Act, 1867*, although consistently deemed by the courts to not include language rights, began a period of almost desperate reliance on the provisions of s. 93 by the English-language minority of Québec. Because there was no constitutional source of language of instruction rights *per se* until 1982, the anglophone minority held onto Protestant denominationalism as a proxy for the protection of English-language instruction and institutions. They were fearful that if denominationalism was removed from the education system in Québec, English-language education could one day be eliminated.

4. The period of the Quiet Revolution in Québec of the 1960s witnessed significant structural and curricular changes in Québec education. Of primary importance to the issue of language of instruction, was the move in education, as in all aspects of society, away from religion-based institutions, towards secularism. It was during this time that education became an instrument of national policy, as the result of a general belief that the promise of political, economic and social development of

Québecois society lay with schools. Denominationalism in education was seen to be old-fashioned, and a dangerous reminder of the suppressive means by which the Catholic church had blocked the French Canadian population from urbanism, commerce and higher learning.

5. The period of French linguistic nationalism in Québec of the 1970s, provided the first legislative provisions for language of instruction. Until 1982, the statutes of this period were the only source of language of instruction rights in the province. Throughout the decade several language laws were enacted, each more vigorously promoting and preserving the French language. After an abortive attempt to establish a linguistic sub-committee of the Superior Council of Education in Bill 85 in 1968, Bill 63 became the first language law of Québec in 1969. This law established French as the language of primary and secondary education, but allowed parental choice of English language instruction. Bill 22 in 1974 restricted eligibility for English-language instruction on the basis of sufficiency of English-language knowledge of students. Finally, the Charter of the French Language, Bill 101, clearly restricted eligibility on the basis of family background in English education in Québec. Prior to 1982, case law dealing with matters under the provisions of language legislation during this period, invoked either s. 93 or the *Québec Charter of Human Rights and Freedoms*, enacted in 1975.

6. In 1982, with the repatriation of the *Constitution of Canada*, the framer's provided Federal protection of minority official language instruction throughout Canada, in s. 23 of the *Constitution Act, 1982*. Section 23 overrides and uniformizes provincial minority language of instruction legislation, and proscribes eligibility based on the English-language educational background of Canadian minority official language parents. It was the framer's perceived inadequacies of Québec's Bill 101 in particular, amongst other provincial laws, which resulted in the entrenchment of s. 23 rights. As mentioned previously, Bill 101 provided the template for the structure of s.23. Case law under s. 23 has broadened the eligibility for English-language instruction in Québec provided by Bill 101, to include the Canadian, rather than just the Québec educational history of parents.

This documentary study has revealed that French language instruction is secure in Québec. Bill 101, which preserves and promotes French as the language of instruction in the province, in its amended, current form, is found by the courts to provided special privileges to the Francophone majority, but this special treatment is acceptable under s. 1 Canadian *Charter* analysis.

This study has also revealed that the primary sources of law pertaining to minority official language of instruction rights in Québec may be traced to the *Canadian Charter of Rights and Freedoms, 1982*. As part of the *Constitution of Canada*, the Canadian *Charter* supersedes the provisions of the *Québec Charter of Human Rights and Freedoms*, and the Québec *Charter of the French Language* (Bill 101). Section 29 of the Canadian *Charter* upholds the provisions of s. 93 of the *Constitution Act, 1867*, thereby confirming the provisions of this section to be inalienable, and therefore immune from *Charter* review. Section 23 provides constitutional rights for minority official language education, throughout Canada.

Reference to historical writings and to purposive interpretations by the courts has also revealed that Québec is in large measure responsible for the establishment of s. 93 and s. 23 rights, and for their entrenchment as Canadian constitutional values: deliberately responsible, in the case of s. 93 denominational education rights; and incidentally so, for the case of s. 23 minority language of instruction rights. Examination of the historical antecedents in Québec of both sections, overwhelmingly supports the court's identification of these rights as products of political compromise.

Until 1982, whenever legislation was perceived to threatened English-language instruction, schools or school boards, the anglophone community of Québec took recourse to the courts under s. 93, claiming under Protestant denominational rights, as a proxy for English education. The most recent court case discussed in this study, namely the *Bill 107 Reference* made by Québec Government to the Supreme Court in 1993, pleading the constitutionality under s. 93 of the 1988 *Education Act*, attests to the importance of s. 93 in matters which affect denominationalism and English schools in Québec. Of the three twentieth century cases implicating s. 93 in this study, three are from Québec. Two of these cases have gone before the Supreme Court of Canada.

Considering that it has only been fourteen years since the enactment of the *Constitution Act, 1982*, including the *Charter*, a significant amount of case law has been generated. Four of seven of the cases examined under s. 23 cases have gone to the Supreme Court of Canada. As mentioned above, the Court has shown increased judicial activism with respect to both the interpretation and implementation of s. 23 rights. In Alberta and Manitoba, the Court has issued very specific mandatory orders to the legislatures of these provinces to implement detailed legislation for the provision of s. 23 French minority language education rights. Whether the court would do the same in the context of Québec is yet to be seen however, since only one of the seven cases examined in this study was from Québec, and it was the earliest case in 1984. The decision in this case caused Bill 101 to be amended in its current form: the provision of, or governance and control over minority language instruction were not at issue in this case.

The constitutional entrenchment of s. 23 has essentially eliminated the fears of English rights groups in Québec, like Alliance Quebec, that English language instruction in the province might be eliminated if the Protestant denominational proxy were in any way altered. However, out of concern for English language educational institutions, these groups have continued to urge the Québec government to proceed with the language-based structural reform of education by way of constitutional amendment of s. 93, rather than through the legislature.[287] After the reform proposed by Bill 3 was found to be unconstitutional in 1985, it became apparent that the government did not intend to pursue such a measure until stronger consensus was achieved.[288] Many believe that in the end, this may prove to be the only successful approach. In the Spring of 1996, the government announced plans to implement the withheld provisions of Bill 107 by 1998. However, on August 16th, days before completion of this study, and after a summer of renewed conflict over language in Montreal, the Minister of Education announced a withdrawal of the implementation

---

[287] *Supra* note 30 at 136.

[288] *Supra* note 139 at 189.

plan. The Minister voiced concerns that there may not currently be sufficient general consensus with respect to the implementation of the withheld provisions, and so to proceed with implementation too early could risk "dividing more than uniting". The government plans to submit the issue before the Estates General on Education this September, in order to seek its recommendations.[289] It remains to be seen therefore, whether the structural reform of Québec education takes place, or whether the reform takes place under the provisions of legislation or constitutional amendment.

The findings of this study, in respect of case law under s. 23, suggest that the English minority of Québec may be underestimating the protection which this section may provide English language educational institutions. The constitutionality of Bill 107 under s. 23 has not been asked of the Court. Based on the extent to which the Supreme Court has actively proscribed institutional provisions in education for Francophone minority groups in Alberta and Manitoba, however, constitutional amendment of s. 93 may no longer be the only recourse for protecting English language educational institutions in Québec. Section 93 may protect denominational rights which were particular to the province prior to 1861, but s. 23 protects minority language rights uniformly across the nation. The similarity with which the Court has decided in the two very different provincial jurisdictions of Alberta and Manitoba may therefore offer encouragement to the linguistic minority of Québec. However, although Supreme Court decisions made in one province provide sources of precedent for another, as the Court itself has stated, the determination of numbers and other factors specific to Québec would affect the Court's decision if the constitutionality of Bill 107 under s. 23 were in question. This situation has yet to be seen, and could provide an interesting focus for further study.

Language of instruction rights in Québec, and indeed in the whole nation, have been born of political compromise. How these rights are interpreted and applied is also a matter of political compromise, as much in 1996 as in 1841. Québec in large measure is responsible for the establishment of these rights, and for their entrenchment

---

[289] P. Authier & A. Noel, "School-board delay assailed" *The [Montreal] Gazette* (17 August) A1.

as Canadian constitutional values. And, as this study has shown by uncovering the sources of law for language of instruction in Québec, after more than 150 years, the elusive political compromise has not yet been reached.

APPENDIX A

The Bill 107 Reference, 1993 (Supreme Court of Canada)

The five questions put before the Manitoba Court of Appeal in 1990, and the Supreme Court of Canada in 1993, paraphrased, were as follows:

Does Bill 107 prejudicially affect ss. 93(1) and 93(2) of the *Constitution Act, 1867* by:

1. providing for the establishment of French and English language school boards which succeed to the rights and obligations of school boards for Catholics and Protestants?

2. (a) proscribing the manner in which the right to dissent will be exercised, and dissentient school boards will be established?
   (b) giving the government the power to change the legal structures of dissentient schools boards and to terminate those which are no longer active?
   (c) restricting access to these boards to persons who are actually Catholic or Protestant?

3. (a) continuing the existence of the confessional school boards in their territories?
   (b) allowing the government to change these territories?
   (c) providing for the transfer of part of their rights and obligations to linguistic boards?
   (d) restricting access to these boards to persons who are actually Catholic or Protestant?

4. (a) giving the Conseil scolaire the power to borrow money on behalf of all school boards on the island of Montreal?
   (b) authorizing the Conseil scolaire to establish rules for apportioning collected taxes?

5. giving the Catholic and Protestant committees of the Conseil supérieur de l'éducation the authority to:

   (a) establish rules respecting the confessional nature of confessional and dissentient school boards?
   (b) approve and manage religious instruction, care or guidance in such schools?

BIBLIOGRAPHY

Legislation:

Act to amend the Education Act and the Act respecting the Conseil supérieur de l'éducation, S.Q. 1990, c. 28.

Act to amend the Education Act and the Act respecting private education, S.Q. 1990, c. 28.

Act to amend the Education Act and the Act respecting private education, S.Q. 1990, c. 78.

Act to Establish a New Civil Code and to Reform Family Law, S.Q. 1980, c. 39.

An Act to Make Better Provision for Elementary Instruction in Lower Canada, 1845 (U.K.), 8 Vict., c. 41[*Education Act, 1845*].

An Act for making more effectual Provision for the Government of the Province of Quebec in North America, 1774 (U.K.), 14 Geo. III, c. 83.

An Act to Promote the French Language in Québec, R.S.Q. 1969, c. 9 [Bill 63].

An Act to remove Doubts as to the Validity of Colonial Laws, 1865 (U.K.), 28 & 29 Vict., c. 63.

An Act to repeal certain Acts therein mentioned, and to make further provisions for the establishment and maintenance of Common Schools throughout the Province, 1841 (U.K.), 8 Vict., c. 40, S.C. 1841, c. 18 [*Education Act, 1841*].

Act to repeal certain Enactments therein mentioned, and to make better provision for elementary Instruction in Lower Canada, 1846 (U.K.), 9 Vict., c. 27, S.C. 1846, c. 27 [*Education Act, 1846*].

An Act to repeal certain Parts of an Act, passed in the fourteenth Year of his Majesty's Reign, intituled, An Act for making more effectual Provision for the Government of the Province of Quebec, in North America; and to make further Provision for the Government of the said Province, 1791 (U.K.), 31 Geo. III, c. 31.

Act Respecting the Civil Code of Lower Canada, 1866 (U.K.), 29 Vict., c.41.

The Act respecting private education, S.Q. 1964, R.S.Q. 1994, c. E-9.

An Act respecting public elementary and secondary education, S.Q. 1984, c. 39, R.S.Q. 1984, c. E-8.1 [Bill 3].

An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada, 1840 (U.K.), 3 & 4 Vict., c. 35.

The Alberta Act, 1905.

Bill 30, *An Act to amend the Education Act*, Ontario, 1987.

Bill 40, *An Act to amend the Education Act*, Quebec, 1983 [Bill 40].

The *British North America Act, 1867* (U.K.), 30 & 31 Vict., c. 3 [*BNA Act*].

The *British North America Act, 1952.*

Canada Act 1982 (U.K.), 1982, c. 11.

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter* or Canadian *Charter*].

Charter of the French Language, R.S.Q. 1977, c.5; R.S.Q. 1977 c. 11 [Bill 101].

Charter of the French Language, R.S.Q. 1994, c. C-11[Bill 101].

Charter of Human Rights and Freedoms, R.S.Q. 1975, c. 6 [Québec *Charter*].

Charter of Human Rights and Freedoms, R.S.Q. 1993, c. 30 [Québec *Charter*].

Code civil des français (1804) [C.N.].

Code civil du Québec, 1994 [C.C.Q.].

Code de procedure civile du Quebec, R.S.Q. 1996, c. C-25 [C.C.P.].

Consolidated Statutes for Lower Canada, 1861, c. 11.

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3 [renaming the *BNA Act*].

Constitution Acts, 1965, 1974, 1975 and 1985 (Representation).

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, R.S.C. 1985, Appendix II, No. 44.

La coutûme de la prévôte et vicomté de Paris, 1680.

Education Act, R.S.N.S. 1967, c. 81.

Education Act, R.S.S. 1978, c. E-0.1 (Supp.).

Education Act, R.S.Q. 1964, c. 235, R.S.Q. 1993, c. I-14.

Education Act, R.S.Q. 1988, c. 84, R.S.Q. 1993, c. I-13.3 [Bill 107].

Education Department Act, R.S.Q. 1964, c. 233, R.S.Q. 1992, c. M-15.

Education Regulations, 1986, R.R.S. c. E-0.1, Reg. 1.

Governor General's Act, R.S.C. 1985, c. G-9.

Judges Act, R.S.C. 1970, c. J-1, s. 30.

Letters Patent Constituting the Office of Governor General of Canada, 1947.

Manitoba Act, 1870.

The Manitoba Boundaries Extension Act, 1912.

Manitoba Supplementary Provisions Act, 1927.

The Municipal Code of Quebec, R.S.Q. 1988, c. C-27.1.

Newfoundland Act, 1987.

Northwest Territories Act, 1985.

Nunavut Act, 1993.

Official Languages Act, R.S.C. 1970, c. O-2; R.S.C. 1970, c. 10 (2nd supp.).

Official Languages Act, R.S.C. 1988, c. 0-3.01.

The Official Language Act, R.S.Q. 1974, c. 6 [Bill 22].

The Ontario Boundaries Extension Act, 1912.

Parliament of Canada Act, 1985.

Public Schools Act, R.S.M. 1987, c. P250.

The Quebec Act, 1774 (U.K.), R.S.C. 1970, Appendix II, No. 2.

The Quebec Boundaries Extension Act, 1912.

Règles de pratique, L.R.Q. 1996, c. C-25.

Regulation respecting the basis of elementary school and preschool organization, (1981) 115 O.G. II 1213.

Regulation respecting the basis for secondary school organization, (1981) 115 O.G. II 1223.

Resolutions adopted at a Conference of Delegates from the Provinces of Canada, Nova Scotia, and New Brunswick, held at the Westminster Palace Hotel, London, December 4, 1866.

The Royal Charter for incorporation The Hudson's Bay Company, A.D. 1670.

The Royal Proclamation, 1763 (U.K.), R.S.C. 1977, Appendix II, No. 1.

The Saskatchewan Act, 1905.

Statute of Westminster, 1931 (U.K.), R.S.C. 1970, Appendix II, No. 27.

Superior Council of Education Act, R.S.Q. 1964, c. 234, R.S.Q. 1992, c. C-60.

The Union Act, 1848 (U.K.), 11-12 Vict., c. 56; R.S.C. 1985, Appendix II, No. 4.

Yukon Act, 1985.

Cases:

Association of Parents for Fairness in Education, Grand Falls District 50 Branch v. Société des Acadiens du Nouveau-Brunswick, [1986] 1 S.C.R. 549 [*Acadians of New Brunswick* case].

Association of Proprietors of Taché Gardens v. *Dasken Enterprises*, [1974] S.C.R. 2 [*Dasken Affair*].

Bureau métropolitain des écoles protestantes de Montréal c. *Ministre de l'Éducation du Québec*, [1976] C.S. 430 [*PSBGM* case].

Canada (A.G.) v. *Vincer*, [1988] 1 F.C. 714.

City of Winnipeg v. *Barrett*, [1892] A.C. 445 [*Barrett* case].

Commission des écoles fransaskoises et al. v. *Saskatchewan* (1991), 81 D.L.R. (4th) 88 (Sask. C.A.), 97 Sask. R. 95 (note) (S.C.C.).

Commission du transport de la C.U.M. v. *Syndicat du transport*, [1974] C.S. 227, [1977] C.A. 476.

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

Gauthier v. *Québec* (Comm. de protection de territoire agricole) (1989), 44 M.P.L.R. 117.

Greater Montreal Protestant School Board v. *Quebec (A.G.)*,[1989] 1 S.C.R. 377 [*GMPSB* case].

Hirsch v. *Protestant Board of School Commissioners of Montreal*, [1928] A.C. 200.

Irwin Toy v. *Québec* (P.G.), [1989] 1 S.C.R. 927.

Jones v. New Brunswick (A.G.); Canada (A.G.) and *Quebec (A.G.) Intervenants.* [1975] 2 S.C.R. 182.

Kodellas v. *Saskatchewan (Human Rights Comm.)*, [1989] 5 W.W.R. 1 (Sask. C.A.); *Lavers* v. *British Columbia (Minister of Finance)*, (1988), 74 C.R. (ed) 21, 41 B.C.L.R. (2d) (C.A.)

Lavoie v. *Nova Scotia (A.G.)* (1989), 58 D.L.R. (4th) 293.

The Law Society of Upper Canada v. *Skapinker* [1984] 1 S.C.R. 357.

Léo Pérusse and *Jean Papa* v. *Les Commissaires d'écoles de St-Léonard-De-Port-Maurice* (25 September 1968), Montreal (S.C.Q.)[Non-published]

Léo Pérusse and *Jean Papa* v. *Les Commissaires d'écoles de St-Léonard-De-Port-Maurice* [1970] C.A. 324 [*St. Léonard Affair*].

Mackell v. *Ottawa Roman Catholic Separate School Trustees*, [1917] A.C. 62.

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

McDonnel v. Fédération des Franco-Collumbiens; *British Columbia (A.G.), Intervenor* (1986), 31 D.L.R. (4th) 296.

Québec (P.G.) v. *Blaikie et al.* (1978) 37 C. S., 85 D.L.R. (ed) 252; [1979] 2 S.C.R. 1016.

Quebec (A.G.) v. *Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66 [QAPSB case].

Quebec Association of Protestant School Boards et al. v. *Quebec (A.G.) et al. (No. 2)* (1983) 1 D.L.R. (4th) 573.

Quebec Association of Protestant School Boards et al. v. *Quebec (A.G.) et al. (No. 1)* (1982) 140 D.L.R. (3d) 33, 3 C.R.R. 114.

R. v. *Big M Drug Mart*, [1985] 1 S.C.R. 295.

R. v. *Chaulk*, [1990] 3 S.C.R. 1303.

R. v. *Dixon* (1983), 11 W.C.B. 401.

R. v. *Keegstra*, [1990] 3 S.C.R. 697, 1 C.R. (4th) 129, 61 C.C.C. (3d) 1.

R. v. *Moore* (1989), 51 C.C.C. (3d) 566, aff'd (1990), 60 C.C.C. (3d) 286, aff'd [1992] 1 S.C.R. 619, 70 C.C.C. (3d) 127.

*R.*v. *Oakes*, [1986] 26 D.L.R. (4th) 200, 1 S.C.R. 103.

R. v. *Paul Magder Furs* (1989), 33 O.A.C. 81 (Ont. Dist. Ct.), 37 O.A.C. 159 (note)(S.C.C.) [*Magder* case].

R. v. *Seaboyer*, [1991] 2 S.C.R. 577, 7 C.R. (4th) 117, 66 C.C.C. (3d) 321.

R. v. *Wholesale Travel Group*, [1991] 3 S.C.R. 154 [*Wholesale Travel Group* case].

R. v. *Zundel*, [1992] 2 S.C.R. 731.

Reference re an Act to amend the Education Act (Ontario) (1987), 40 D. L. R. (4th) 18, 36 C.R.R. 305 [*Ontario Reference*].

Reference Re Education Act (Québec), [1990] R.J. Q. 2498, 32 Q.A.C. 1, 23 A.C.W.S. (3d) 351.

Reference Re Education Act (Québec), [1993] 105 D.L.R. (4th) 266 [*Bill 107 Reference*].

Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings (1987), 36 C.C.C. (3d) 353, 44 D.L.R. (4th) 16.

Reference Re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753 [*Patriation Reference*].

Reference re Minority Language Educational Rights (Prince Edward Island) (1988), 49 D.L.R. (4th) 499 [*P.E.I. Reference*].

Reference re ss. 79(3), (4) & (7) of the Public Schools Act (Manitoba), [1990] 2 W.W.R. 289 [*Manitoba Reference, 1990*].

Reference re ss. 79(3), (4) & (7) of the Public Schools Act (Manitoba), [1993] 1 S.C.R. 839 [*Manitoba Reference, 1993*].

Reference re Workers' Compensation Act, 1983 Nfld., ss. 32, 34, [1989] 2 S.C.R. 335, 56 D.L.R. (4th) 765.

St-Onge v. *Canada (Commissioner of Official Languages)*, [1992] 3 f.C. 287.

Schacter v. *Canada* [1990] 66 D.L.R. (4th) 635, [1992] 2 S.C.R. 679.

Singer v. *Québec* (P.G.) (1988), 90 N.R. 48.

Societé Asbestos Limitée v. *Societé Nationale de l'amiante et al.* [1980] 31 C.S., [1981] C.A. 43.

Stoffman v. *Vancouver General Hospital* (1990), 91 C.L.L.C. 17,003, 118 N.R. 241.

Thorson v. *Canada (A.G.), The Secretary of State of Canada, The Receiver General of Canada, Keith Spicer, The Bilingual Districts Advisory Board, Roger Duhamel, Paul Fox and Roger St. Denis* [1975] 1 S.C.R. 138.

Trustees of the Roman Catholic Separate Schools for Ottawa v. *Ottawa*, [1917] A.C. 76.

Young v. *Young*, [1993] 4 S.C.R. 3.

Books:

G. Anderson, Fundamentals of Educational Research (New York: The Falmer Press, 1990).

J. Balderson & J. Kolmes, eds., *Legal Issues in Canadian Education* (Edmonton: University of Alberta, 1983).

J-L. Baudouin et Y. Renaud, eds., *Codes Civils (Bas-Canada et Québec)* (Montréal: Wilson & Lafleur, 1993).

K. Baynes, *The Normative Grounds of Social Criticism: Kant, Rawls and Habermas* (Albany: State University of New York Press, 1992).

G.A. Beaudoin & E. Ratushny, *The Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Carswell, 1989).

J.E.C. Brierley & R.A. Macdonald, *Québec Civil Law* (Toronto: Emond Montgomery, 1993).

A. Cairns & C. Williams, eds., *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985).

G. Caldwell & E. Waddell, eds., *The English of Quebec: From Majority to Minority Status* (Quebec: Institut québécois de recherche sur la culture, 1982).

J. Carbonnier, *Droit civil -- Introduction*, 21st ed. (Paris: Presses universitaires de France, 1992).

R. David & J.E.C. Brierley, *Major Legal Systems in the World Today*, 3d ed. (London: Stevens, 1985).

J. Deschênes, *Ainsi parlèrent les tribunaux ... Conflits linguistiques au Canada*, vols. I-II (Montreal: Wilson & Lafleur, 1985).

G.M. Dickinson & A.W. MacKay, eds., *Rights, Freedoms and the Education System in Canada: Cases and Materials* (Toronto: Emond Montgomery, 1989).

P.J. Fitzgerald, ed., *Salmond on Jurisprudence*, 12th ed. (London: Street & Maxwell, 1966).

A. C. Fogarty, *Equality Rights and their Limitations in the Charter* (Toronto: Carswell, 1989).

M. Franklin & D. Franklin, *Introduction to Quebec Law* (Toronto: Copp Clark Pitman, 1984).

G.L. Gall, *The Canadian Legal System*, 3d ed. (Toronto: Carswell, 1990).

J. Ghestin & G. Goubeaux, *Traité de droit civil*, vol. 1, 3d ed. (Paris: L.G.D.J., 1990).

D. Gibson, *The Law of the Charter: General Principles* (Carswell: Toronto, 1986).

H.P. Glenn, *Culture, Justice & Law* (Montreal: Editions Thémis, 1994).

H.P. Glenn, *Foundations of Canadian law: Selected readings* (Faculty of Law, McGill University, 1982) [unpublished].

H.P. Glenn, "Harmonization of private law rules between civil and common law jurisdictions" (Address to the XIIIth International Congress of Comparative Law, Montreal, 1990) (Faculty of Law, McGill University, 1990) [unpublished].

H.P. Glenn, *Legal Traditions: Selected readings* (Faculty of Law, McGill University, 1990) [unpublished].

J. Habermas, *Legitimation Crisis* (Boston: Beacon Press, 1975).

A. Helmholz, *Roman Canon Law in Reformation England* (Cambridge: Cambridge University Press).

N. Henchey & D. Burgess, *Between Past and Future, Quebec Education in Transition* (Calgary: Detselig, 1987).

P.W. Hogg, *Constitutional Law of Canada*, 3d. ed. (Toronto: Carswell, 1992).

B. Laskin, *The British Tradition in Canadian Law* (London: Stevens & Sons, 1969).

A. MacIntyre, *Whose Justice, Which Rationality?* (Notre Dame, Ind.: Univ. of Notre Dame Press, 1988).

W. A. Mackay, *Education Law in Canada* (Toronto: Emond Montgomery, 1984).

D. MacKeracher, *An Overview of the Educational System in Canada. Canadian Education Series* (Toronto: TV Ontario Office of Development Research, 1984).

R. Magnuson, *A Brief History of Québec Education from New France to Parti Québecois* (Montréal: Harvest House, 1980).

M. Magor, *The Language of Education in Quebec: A Study of Bill 101, in terms of Constitutional and Natural Law* (M.A. Thesis, McGill University, 1982).

M. E. Manley-Casimir & T.A. Sussel, *Courts in the Classroom, Education and the Charter of Rights and Freedoms* (Calgary: Detselig, 1986).

McGill Law Journal, *Canadian Guide to Uniform Legal Citation*, 3d ed. (Toronto: Carswell, 1992).

J.H. Merryman, *The Civil Law Tradition*, 2d ed. (Stanford: Stanford Univ. Press, 1985).

R. St. J. Macdonald & J. P. Humphrey, eds., *The Practice of Freedom* (Butterworths: Toronto, 1979).

A. C. Nicholls & T. J. Wuester, *Charter Issues in Education* (Vancouver: EduServ Inc., 1989).

P.H. Russell, *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987).

G. Strauss, *Law, Resistance and the State: The Opposition to Roman Law in Reformation Germany* (Princeton: Princeton Univ. Press, 1986).

W. S. Tarnopolsky, *Discrimination and the Law: Including Equallity Rights under the Charter* (Toronto: R. DeBoo, 1985).

R. Tuck, *Natural Rights Theories; Their Origin and Development* (Cambridge: Cambridge Univ. Press, 1971).

P.E. Trudeau, *Federalism and the French Canadians* (New York: St. Martin's Press, 1968).

R. van Caenegem, *The Birth of the English Common Law*, 2d ed. (Cambridge: Cambridge Univ. Press, 1973).

G.E. Watson et al., *Canadian Civil Procedure*, 3d ed. (Toronto: Emond Montgomery, 1988).

J.H. Webber, *Constitutional Law: Selected Readings* (Faculty of Law, McGill University, 1990) [unpublished].

J.H. Webber, *Reimaging Canada: language, culture, community and the Canadian constitution* (Montreal: McGill-Queen's Univ. Press, 1994).

J.M. Weiler & R.M. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986).

G.J. Wheeler, *Confederation Law of Canada* (Landon: Eyre & Spottiswoode, 1986).

M. A. Zucker, *The Legal Context of Education* (Toronto: OISE Press, 1988).

Articles:

S. Arons, "Constitutional Litigation and Educational Reform: Canada's Opportunity" in M. E. Manley-Casimir & T.A. Sussel, *Courts in the Classroom, Education and the Charter of Rights and Freedoms* (Calgary: Detselig, 1986) 133.

P. Authier & A. Noel, "School-board delay assailed" *The [Montreal] Gazette* (17 August) A1.

D.A. Burgess, "Denominational and Linguistic Guarantees in the Canadian Constitution: Implications for Québec Education" (1991) 26(2) McGill Journal of Education 175.

D. A. Burgess, "Reorganizing the School System in Quebec" (1982) 22(4) Education Canada 12.

G. Caldwell, "Anglo-Quebec on the Verge of its History" (1982) 8 Language and Society 3.

P. Chapman, "The Politics of Judging: Section 1 of the Canadian Charter of Rights and Freedoms" (1986) 24 Osgoode Hall L.J. 867.

H.M. Clokie, "Basic Problems of the Canadian Constitution" (1942) 8 Canadian Journal of Economics and Political Science 1.

L. Fisher, "When Courts Play School Board: Judicial Activism in Education" (1989) 51 (3) West's Education Law Reporter 693.

P. Foucher, "L'article 23 de la Charte: un compromis audacieux" (1989) 23 R.J.T. 220.

R. L. Garcia, "Global Perspectives on Language Policy and Education" Paper presented at the *4th Annual Meeting of the Advocates for Language Learning*, (Washington: ALL, 1987).

J. Hiebert, "The Evolution of the Limitation Clause" (1990) 28:1 Osgoode Hall L.J. 103.

J. Magnet, "Minority-Language Education Rights" (1982) 4 Supreme Court L.R. 195.

R. Magnuson, "Constitutionalism and the Plight of English Education in Quebec" (1989) 2(2) Education and Law Journal 119.

R. Magnuson, "Quebec's Restructuring of Educational Governance Receives Approval of Court of Appeal" (1991) 4 Education and Law Journal 94.

M. Magor, "Constitutional Guarantees and Education in Quebec" (1980) XV(1) McGill J. of Education 5.

M. Manley-Casimir, "Canadian and U.S. legal traditions: Implications for administrative practice", in J. Balderson & J. Kolmes, eds., *Legal Issues in Canadian Education* (Edmonton: University of Alberta, 1983).

M. Manley-Casimir & P. Pitsula, "The Charter, Culture and the Public School Curriculum: Emerging Perspectives and Guidelines" (1988) 1 E.L.J. 37.

J. Menacker, "The Supreme Court Smorgasbord of Educational Policy Choices" (1982) 13(2) Planning and Changing 93.

A. Monin, "L'égalité juridique des langues et l'enseignement: les écoles françaises hors Québec" (1983) 24(1) C.d.D. 157.

P. M. Schotten, "The Perverse Case for Judicial Activism" (1990) 19 (4) Perspectives on Political Science 197.

B. Slattery, "The Independence of Canada" (1983) 5 Supreme Court L. R. 369.

R. L. Spaeth, "The Undisputed Significance of Justice" (1986) 72(4) Liberal Education 301.

T.A. Sussel & M.E. Manley-Casimir, "The Supreme Court of Canada as a 'National School Board': The *Charter* and Educational Change" (1986) 11 Canadian J. of Education 313.

W. S. Tarnopolsky, "Canada's New Charter of Rights and Freedoms" (1983) 6(2) Multiculturalism 11.

C. Taylor, "Participation and Rights" in A. Cairns & C. Williams, eds., *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985).

Wm. Tetley, "The English and Language Education: A Personal History" in G. Caldwell and E. Waddell, eds., *The English of Quebec: From Majority to Minority Status*, (Quebec: Institut québécois de recherche sur la culture, 1982).

A. Watson, "The Evolution of Law: Continued" (1987) 5 Law and History Rev. 537.

L.E. Weinrib, "Learning to Live with the Override" (1990) 35 McGill L.J. 541.

L. E. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 Supreme Court L.R. 469.

Government Publications:

Canada, *Report of Resolutions adopted at a Conference of Delegates from the Provinces of Canada, Nova Scotia, and New Brunswick, and the Colonies of Newfoundland and Prince Edward Island, held at the city of Quebec, October 10, 1864, as the Basis of a proposed Confederation of those Provinces and Colonies, 1864.*

Canada, Department of Justice, *A Consolidation of The Constitution Acts 1867 to 1982* (Ottawa: Supply & Services Canada, 1993).

Canada, Royal Commission on Bilingualism and Biculturalism, *Report of the Royal Commission on Bilingualism and Biculturalism, Book II (Education)* (Ottawa: Queen's Printer, 1968).

Canadian Council on Social Development, *A Guide to the Charter for Equality-Seeking Groups / Court Challenges Program* (Ottawa: Canadian Council on Social Development, 1987).

P. Foucher, *Constitutional language-rights of official language minorities in Canada: A study of the legislation of the provinces and territories respecting education rights of official-language minorities and compliance with section 23 of the Canadian Charter of Rights and Freedoms* (Ottawa: Canadian Law Information Council, 1985).

R. Goreham, *Language Rights and the Court Challenges Program A Review of Its Accomplishments and Impact of Its Abolition* (Ottawa: Office of the Commissioner of Official Languages, 1992).

A. Martel, *Official Language Minority Education Rights in Canada: From Instruction to Management* (Ottawa: Office of the Commisioner of Official Languages, 1991).

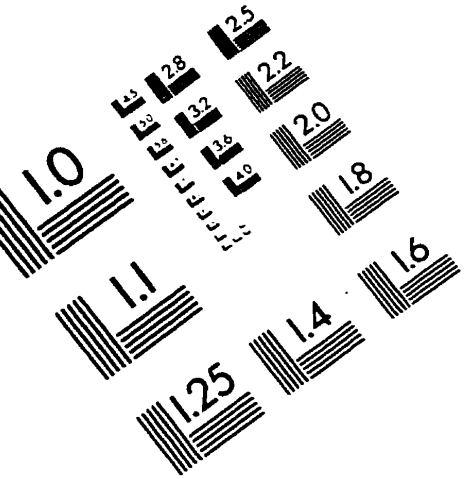
Québec, *The Québec School: A Responsible Force in the Community* (Québec: Ministère de l'Éducation, 1982).

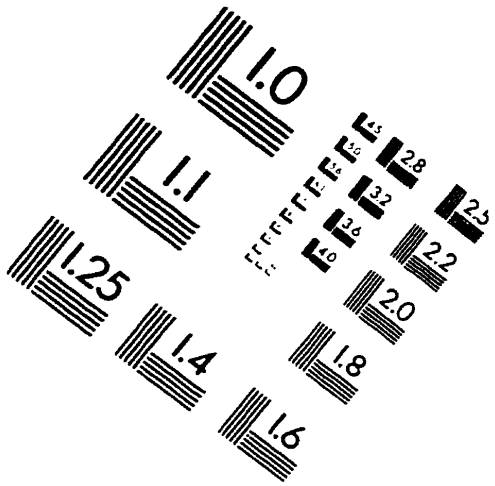
Québec, *Report of the Legal Committee on Constitutional Rights in the Field of Education in Quebec*, vols. 1,2,3 by T. P. Howard, Q.C., J. Martineau, Q.C., P. Laing, Q.C., F. Scott, Q.C. (Faculty of Law, McGill University, 1990) [unpublished].

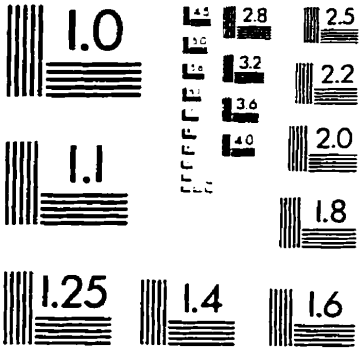
Québec, *Report of the Royal Commission of Inquiry on Education in the Province of Québec*, vol. 1 (Québec: Québec Official Publisher, 1963).

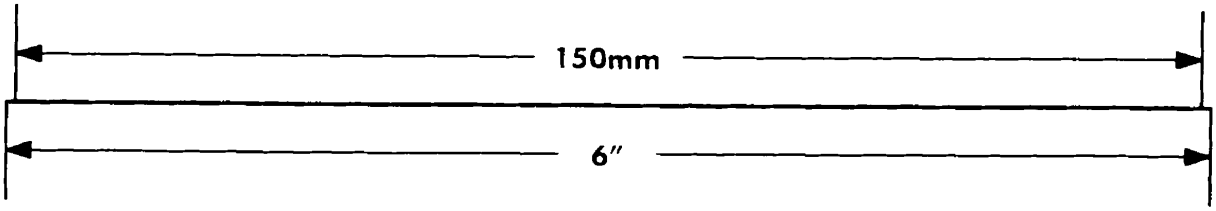
United States, World Peace Through Law Center, *Renowned Law Givers and Great Law Documents of Humankind* (Washington: Word Peace Through Law Center, 1975).

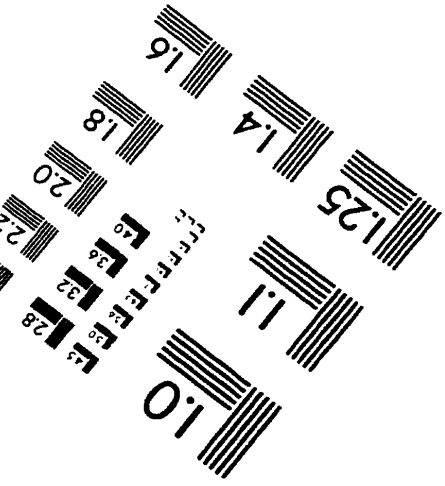
IMAGE EVALUATION TEST TARGET (QA-3)

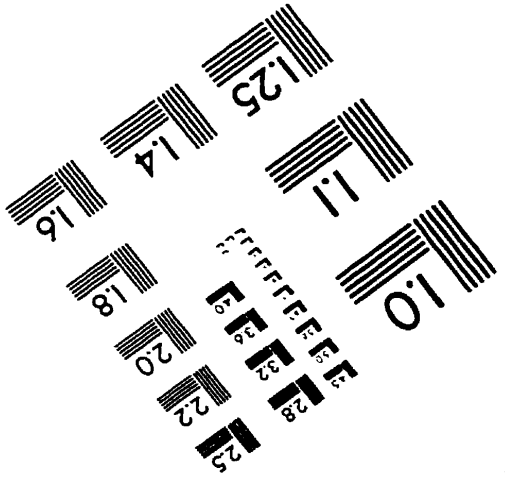












APPLIED IMAGE, Inc
1653 East Main Street
Rochester, NY 14609 USA
Phone: 716/482-0300
Fax: 716/288-5989