

IN THE SUPREME COURT OF CANADA  
(APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF QUEBEC)

BETWEEN:

Edwidge Casimir

Appellant  
(Intervener)

and

The Attorney General of Quebec

Respondent  
(Appellant)

and

The Attorney General of Canada,  
Commissioner of Official Languages for Canada,  
Fédération nationale des conseils scolaires francophones and  
Commission nationale des parents francophones,  
Association franco-ontarienne des conseils scolaires catholiques and  
Association des conseillers (ères) des écoles publiques de l'Ontario,  
Fédération des communautés francophones et  
acadienne du Canada and Fédération des associations de  
juristes d'expression française de common law inc.

Interveners

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FACTUM OF THE INTERVENER,  
COMMISSIONER OF OFFICIAL LANGUAGES FOR CANADA  
(Rule 42)

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**PART I - THE FACTS**

1. The Intervener, the Commissioner of Official Languages, takes no position with respect to the facts of this case.
2. The Commissioner of Official Languages is the federal official languages ombudsman. Her mandate, pursuant to s.56 of the *Official Languages Act*, R.S.C. 1985, c.31 (4th Supp.) (hereinafter “OLA”), requires her to take “all actions and measures... with a view to ensuring recognition of the status of each of the official languages... including... the advancement of English and French in Canadian society.” The purpose of the OLA, as stated at s.2(b), is to “support the development of English and French linguistic minority communities” and, generally, to advance the equality of status and use of the English and French languages within Canadian society. It is in light of her mandate and the purpose of the OLA that the Commissioner intervenes in the appeal before this Court.
3. It should be noted that in intervening the Commissioner does not question the principles underlying the *Charter of the French Language*, R.S.Q., c.C-11, or the efforts of the Quebec National Assembly to promote the advancement and the development of the French language in the province of Quebec. In that respect, the Intervener endorses the finding of this Court in *Ford*:

[T]he aim of the language policy underlying the *Charter of the French Language* was a serious and legitimate one. [The evidence indicates] the concern about the survival of the French language and the perceived need for an adequate legislative response to the problem.

*Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 at p.778.

4. The Commissioner intervenes in the present appeal because the answers of this Court to questions raised by the parties, specifically regarding the means chosen by the province to achieve the above-mentioned objectives (particularly the “the major part” criterion at s.73(2) of the *Charter of the French Language*), could significantly affect the implementation of the rights to instruction in the language of the minority.

**PART II - POINTS IN ISSUE**

5. The constitutional questions in issue, as determined by order of the Chief Justice, are as follows:

ISSUE I      Do ss. 72 and 73(2) of the *Charter of the French Language*, R.S.Q. c. C-11, and, in particular, the words “provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada” in s.73(2), infringe s.23(2) of the *Canadian Charter of Rights and Freedoms*?

ISSUE II      If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

### **PART III - STATEMENT OF ARGUMENT**

#### **I SUMMARY OF THE INTERVENER'S POSITION**

6. The rights conferred by s.23 of the *Canadian Charter of Rights and Freedoms* (hereinafter *Charter*) must be interpreted uniformly across the country in a manner consistent with the preservation and development of official languages communities.
7. Provinces must be accorded some latitude to adopt standards that will assist the decision-maker in the implementation of s.23(2) rights. It is the role of the courts to determine whether such criteria or standards are compatible with the principles underlying s.23(2) as well as with the object and spirit of section 23.
8. The uniform principles of interpretation of s.23(2) discussed above require that a criterion adopted by a province, with respect to the notion of “instruction received,” must take into account:
  - the need for a child to have developed a significant link to the minority language of instruction; and
  - the interests of the child, family and the minority official language community sought to be preserved and developed by the section 23 rights.
9. The Intervener submits that the “the major part” standard adopted by the province of Quebec is incompatible with subsection 23(2) of the *Charter* because its mathematical and inflexible application leaves no room to consider the interests of the child, the family and the minority language community.
10. The Intervener recognizes that, in certain circumstances, limitations to s.23 rights may be justifiable in a free and democratic society pursuant to section 1 of the *Charter*. It is within the

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context of a section 1 analysis that considerations of the socio-political reality of the province may become relevant.

11. However the Commissioner takes no position with regards to whether the “the major part” criterion set out in subsection 73(2) of the *Charter of the French Language* is a reasonable limit pursuant to section 1 of the *Charter*.

## II APPROACH TO THE INTERPRETATION OF S.23 OF THE CHARTER

12. The general purpose of section 23 of the *Charter* was described as follows by this Court in *Mahe*:

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

*Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 362.

13. In *Beaulac*, this Court made it clear that language rights granted by the *Charter* were to be interpreted “purposively in a manner consistent with the preservation and development of official language communities in Canada” and formally disapproved of the restrictive approach to the interpretation of rights flowing from a political compromise earlier set out by this Court in *Société des Acadiens*.

*R. v. Beaulac*, [1999] 1 S.C.R. 768, at para 25.

*Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549.

14. The statements made in *Beaulac* with respect to the interpretation of the language rights granted by the *Charter* were recently reaffirmed by this Court in the specific context of s.23 rights.

*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras. 26-27.

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

15. Notwithstanding the judgment of this Court in *Beaulac, supra*, which advocated that language rights always be interpreted purposively in a manner consistent with the preservation and development of official language communities in Canada, the Court of Appeal based its approach to the interpretation of section 23 squarely on *Société des Acadiens, supra*. The Court of Appeal's judgment reveals that it neglected to take into account the Supreme Court's most recent pronouncements on the nature and interpretation of s.23 rights.
16. In addition, the Court of Appeal erred in taking into account the broader current and historical social context of the province of Quebec in its evaluation of whether subsection 73(2) of the *Charter of the French Language* violated s.23(2):

Or, en matière de droits linguistiques, on ne peut ni ignorer l'objet des dispositions législatives ni l'origine de celles-ci. L'objet véritable des droits linguistiques consacrés par la Charte canadienne traduit des valeurs et préoccupations propres à la réalité historique, sociologique et linguistique canadienne. Et il peut être nécessaire « d'adopter des méthodes d'interprétation différentes dans divers ressorts qui tiennent compte de la dynamique particulière à chaque province ».

*Solski v. Quebec (Procureure générale)*, [2002] J.Q. no. 1127 at para.32.

17. It is the Intervener's submission that, at the stage of evaluating whether the "the major part" criterion is in accordance with s.23(2) of the *Charter*, the socio-political and historical realities of a given province are not relevant. Only the object of s.23 and the principles guiding an interpretation of s.23(2) are relevant in determining whether s.23(2) has been breached.
18. The social and political context (past or present) of a particular province only becomes relevant in the context of a s.1 analysis.
19. In conducting a s.23(2) analysis, the Intervener Commissioner of Official Languages is of the opinion that this Court should recognize the continued application of the principles set out in *Beaulac*, as well as the irrelevance of the social and political reality of a province when undertaking a s.23(2) analysis.

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### III THE IMPLEMENTATION OF SUBSECTION 23(2) RIGHTS

20. Although the substantive rights to minority language education must be interpreted uniformly on a national scale, the provinces must be accorded some latitude to adopt standards that will assist the decision-maker in the implementation of those rights, provided that those standards are compatible with the principles of interpretation of s.23(2) of the *Charter* as well as the object and the spirit of that section.
21. The present appeal requires this Court to determine whether the “the major part” criterion found in s.73(2) of the *Charter of the French Language* (insofar as it circumscribes the notion of a right-holder), is compatible with the principles underlying s.23(2) of the *Charter*.
22. The proper starting point must necessarily be the language of subsection 23(2), read in light of the interpretive approach described in *Beaulac*.
23. It is the Commissioner’s position that, in establishing standards with respect to the “instruction received” in the application of s.23(2), provinces must ensure that these standards take into account:
- 1) the need for a child to have developed a significant link to the minority language of instruction, and
  - 2) the interests at play, namely, the interests of the children and families but also the interests of the official language minority community that are sought to be preserved and protected by the section 23.
24. One means of determining whether the “the major part” criterion found at subsection 73(2) of the *Charter of the French Language* is compatible with s.23(2) is for this Court to examine other criteria that could be used by a province to assist its decision-maker in the implementation of s.23(2) rights.
25. One criterion could require that a child have received the totality of his or her education in the language of the minority. Another criterion could require that a child have received a minimal degree of his or her education in the language of the minority. The province of Quebec, as seen

in the present case, opted for the “the major part” criterion. The Intervener suggests that all three of these criteria are incompatible with the spirit of s.23 because they fail to take into account the interests of the child, family and minority language community.

26. Each of these standards shall be addressed in turn. A fourth standard will subsequently be proposed by the Intervener.

(i) *Totality*

27. Adopting a standard requiring that the totality of a child’s education be in the language of the minority would have the effect of disregarding the best interests of the children, families and communities targeted by s.23 by unduly restricting access to minority language education. Where only those who have received all of their instruction in the language of the minority would possess a s.23(2) right to pursue their instruction in that language, all those who have otherwise come to develop a significant link to the minority language would be without recourse and obliged to pursue their education in the language of the majority. Accordingly, the application of such a criterion would be contrary to the broad and generous interpretation of language rights advocated in *Beaulac*.

28. A criterion that would require that all instruction must have been in English (or in French outside Quebec) would be incompatible with the language and purpose of subsection 23(2), if not tantamount to a negation of the right to instruction in the language of the minority.

(ii) *Minimal amount*

29. To conclude that a “totality of instruction” criterion is incompatible with subsection 23(2) does not mean that any instruction, no matter how minimal, would suffice.

30. Adopting a standard whereby any education in the language of the minority, regardless of its duration, is sufficient to trigger minority language education rights would fail to properly address the best interests of the child, family and minority language community.

31. Like a “totality” standard, a “minimal amount” standard is contrary to a broad and generous interpretation of linguistic rights (*Beaulac*). It would denature s.23(2) rights and would be

contrary to the goal of preserving and developing the minority language communities if this Court were to qualify as right-holders children who have obtained a few months of instruction in the language of the minority. Such a short duration would be insufficient to permit most children to develop a significant link to the minority language. Furthermore, the interests of the minority language community may be best served by integrating into its schools children who are later likely to become members of that community.

(iii) “*The major part*”

32. The “the major part” criterion of the *Charter of the French Language* would appear, on its face, to allow for proper consideration of the interests of the child, family and minority language community. Arguably, a child who has received more than 50% of his or her education in the language of the minority will likely have developed a significant link to the language of the minority.
33. However, when the application of such a criterion is examined in closer detail, the Intervener submits that a s.23(2) *Charter* breach becomes apparent.
34. It is submitted that this apparently neutral and objective standard lacks any flexibility to permit that the educational profile of a child to be examined to determine whether that child has developed a significant link to the minority language.
35. The purely mathematical application of the standard, which seeks only to determine whether a child has received more than 50% of his or her instruction in the language of the minority leaves no room to consider and weigh the best interests of the child, the family or the minority language community.
36. A child who may have received less than 50% of his or her education in the language of the minority may nonetheless possess a significant link to the minority language such that he or she could likely come to be a member of the linguistic minority. Similarly, the criterion leaves no room to consider whether the best interests of the minority language community would be best served by granting a particular child access to minority language instruction, given his or her exposure to the language and/or community.

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37. The children of the Appellant Casimir illustrate the arbitrariness of “the major part” criterion.
38. Shanning Casimir completed two years of elementary schooling in a bilingual program run by an English-language school board in Ottawa, Ontario. Shanning’s instruction was apparently divided evenly between English and French. Upon moving to the province of Quebec, Mrs. Casimir sought to enrol her children (Shanning and a younger sibling) in a publicly funded English-language elementary school. Her application was denied on the basis that the major part of Shanning’s elementary education had not been in English.
39. The inflexibility of the “the major part” criterion is revealed by the fact that 50% of an education in the language of the minority was insufficient to qualify Shanning for the right to instruction in the language of the English-language minority, regardless of any significant link he may have developed to that language.

*(iv) More flexible subjective standard*

40. The Intervener submits that the adoption of a more flexible subjective standard to identify right-holders would be in accordance with the spirit and object of s.23(2) of the *Charter*.
41. A subjective criterion would permit the person or body charged with the application of provincial legislation to take into account the interests of the child, the family and the minority language community. In order for the above-mentioned interests to be taken into account, the standard adopted by a province cannot be a purely mathematical exercise. While duration of the education received in the language of the minority is a necessary factor, the standard must remain flexible.
42. The Attorney General of Quebec has expressed legitimate concern that an overbroad interpretation could open the floodgates. The Intervener does not feel that the adoption of a more subjective standard would lead to an avalanche of requests for access to education in the language of the minority by those not otherwise entitled to s.23(2) rights. Grenier J. herself dealt thoughtfully with that possibility in a passage which the Commissioner adopts:

Toutefois, les tribunaux ne sont pas sans ressource lorsqu’il est démontré qu’une personne a utilisé un expédient pour rendre son enfant admissible à l’instruction en anglais au Québec.

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*Solski v. Quebec (Procureure générale)*, [2000] J.Q. no.5789 (Sup. Ct.) at para. 146.

43. In summary, the Intervener submits that the “the major part” standard adopted by the province of Quebec is incompatible with subsection 23(2) as it constitutes a limitation of the rights of right-holders. A more flexible subjective standard is required in light of the spirit and object of s.23, particularly the need to recognize the best interests of the child, family and minority language community.

#### IV SECTION 1 OF THE CHARTER

44. The Commissioner submits that any standards adopted by a province that are not in conformity with s.23 will constitute a violation of that section. In certain circumstances, such guidelines may be upheld to the extent that they constitute a justifiable limit in a free and democratic society.
45. In the event that this Court concludes that provincial legislation or regulations establishing standards for the identification of right-holders is contrary to the object and spirit of subsection 23(2), this Court must examine whether, in light of the particular socio-political and historical realities of that province, the limitation imposed by those standards could be justified under section 1 of the *Charter*.

*R. v. Oakes*, [1986] 1 S.C.R. 103.

*Mahe*, *supra* note at para 12, at pp.393-394

46. The Intervener recognizes that, in certain circumstances, an infringement of s.23(2) of the *Charter* may be justifiable in a free and democratic society where that infringement does not constitute a negation of the s.23 right but rather imposes a limit on the ability of official language minority to access education in that official language.
47. In a section 1 analysis, consideration must be given to the broader socio-linguistic context. Particular considerations arise where the minority sought to be protected by s.23(2) is the English language minority of a province dominated by a French language majority and where the

language of that majority (French), on a national scale, constitutes a minority language clearly in need of safeguarding and promotion.

48. The Intervener the Commissioner of Official Languages takes no position as to whether an infringement of s.23(2) of the *Charter* by ss. 72 and 73(2) of the *Charter of the French Language* constitutes a reasonable limit as can be demonstrably justified in a free and democratic society.

**PART IV - SUBMISSIONS ON COSTS**

49. The Intervener, the Commissioner of Official Languages for Canada, makes no submissions as to costs.

**PART V - ORDER SOUGHT**

50. The Intervener, the Commissioner of Official Languages, takes no position as to the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS      th DAY OF FEBRUARY 2004.

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COUNSEL FOR THE INTERVENER,

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**PART VI - AUTHORITIES**

	Paragraph(s)
<i>Arsenault-Cameron v. Prince Edward Island</i> , [2000] 1 S.C.R. 3	14
<i>Doucet-Boudreau v. Nova Scotia (Minister of Education)</i> , 2003 SCC 62	14
<i>Ford v. Quebec (Attorney General)</i> , [1988] 2 S.C.R. 712	3
<i>Mahe v. Alberta</i> , [1990] 1 S.C.R. 342	12 and 45
<i>R. v. Beaulac</i> , [1999] 1 S.C.R. 768	13, 14, 15, 19, 22, 27 and 31
<i>R. v. Oakes</i> , [ 1986] 1 S.C.R. 103	45
<i>Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education</i> , [1986] 1 S.C.R. 549	13 and 15
<i>Solski v. Quebec (Procureure générale)</i> , [2002] J.Q. no.1127 (C.A.)	16
<i>Solski v. Quebec (Procureure générale)</i> , [2000] J.Q. no.5789 (Sup. Ct.)	42

**PART VII - STATUTES / REGULATIONS**

*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 of the French Language, R.S.Q. c. C-11*

*Official Languages Act, R.S.C. 1985, c.31 (4<sup>th</sup> Supp.)*