

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

BETWEEN:

Roger Gosselin
Guylaine Filion

Daniel Trépanier
Claudette Gosselin

Guy Boulianne
Johanne Labbé

Alain Chénard
Rachel Guay

Gilles Maltais
Guylaine Potvin

Jean-Marie Martineau
Mance Bourassa

Marc Joyal
Marie-Irma Cadet

René Giguère
Lucille Giordano

Appellants
(Appellants)

and

The Attorney General of Quebec
Minister of Education

Respondents
(Respondents)

and

Commissioner of Official Languages for Canada

Intervener

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

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PART I – STATEMENT OF FACTS

1. The Intervener, the Commissioner of Official Languages for Canada (hereinafter “the Commissioner”), is the federal ombudsman for official languages. Her mandate, specified in s. 56 of the *Official Languages Act*, R.S.C. 1985 (4th Supp.), c. 31 (hereinafter “the OLA”), indicates that it is the duty of the Commissioner “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.” Section 2(b) of the OLA also indicates that the purpose of the OLA is to support the development of English and French linguistic minority communities. It is with this in mind that the Commissioner is intervening in the present case.

2. The Intervener, the Commissioner, is relying on the statement of facts contained in the appellants’ memorandum and on the summary of proceedings at paras. 8 to 13 of the judgment of the Quebec Court of Appeal.

3. However, the Commissioner wishes to emphasize that none of the parties to this proceeding can rely on s. 23 of the *Canadian Charter of Rights and Freedoms* since the appellant parents have not received primary education in English in Canada.

PART II – POINTS IN ISSUE

(A) Are ss. 72 and 73 of the *Charter of the French Language* inconsistent with ss. 10 and 12 of the *Charter of Human Rights and Freedoms*?

4. The Commissioner maintains that, in light of Canadian case law, it is not discriminatory for the *Charter of the French Language* (hereinafter the “CFL”) to give “Anglophone” parents, contrary to “Francophone” and “allophone” parents, the freedom to choose the language in which their children will be educated in Quebec public schools.

(B) Alternatively, if the Court were to find that discrimination exists, what obligations would the Quebec legislature have, given the obligations set out in s. 23 of the *Canadian Charter of Rights and Freedoms*?

5. Whatever steps the Quebec legislature may be required to take in order to comply with the *Charter of Human Rights and Freedoms* (hereinafter “the Quebec Charter”), the Commissioner maintains that the concept of equality must not jeopardize the rights set out in s. 23 of the *Canadian Charter of Rights and Freedoms* (hereinafter “the Charter”).

PART III – STATEMENT OF ARGUMENT

I - Distinction between the s.23 Charter right and the right of access to education in the language of the minority

6. As an *amicus curiae*, the Commissioner maintains that the appellants' position, if approved, would have the effect of distorting s. 23 of the *Charter* by granting parents the choice of sending their children to minority language schools, including those not entitled to do so pursuant to the *Charter*.
7. The appellants argue that English language education in Quebec is a public service to which children would be entitled were it not for the exclusion based on their civil status, in view of ss. 72 and 73 of the CFL.

The proper definition of the 'public' for the service of English language instruction in Quebec is the class of all school-age children in the province. *All school-age children would be eligible were it not for the restrictions in ss. 72 and 73 CFL.* To hold otherwise, i.e., to define the 'public' only as the class of school-age children that are 'ordinarily' eligible for English language instruction under the provisions of the CFL, as the trial judge did, is circuitous." [Emphasis added].

Para. 39, appellants' memorandum
See also para. 44, appellants' memorandum

8. The appellants make a direct connection between the rights set out in s. 23 of the *Charter* and access to education in Quebec English language schools. The Commissioner maintains that it is fundamentally important to distinguish the right mentioned in s. 23 from access to education under a provincial statute.
9. Section 23 of the *Charter* is one of a body of constitutional rules that seeks to protect and promote the development of linguistic minorities in Canada. The CFL, for its part, is intended to protect and promote French in Quebec which is a minority language in Canada but a majority language in Quebec. Accordingly, it is necessary, for a proper understanding of the interactions

between these two legal documents, to examine the basis of minority rights and to briefly describe the principal legal means for ensuring that those rights are observed in Canada.

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

(i) Basis of minority rights and their interaction with equality rights

10. Equality has to be considered in a substantive sense, not a purely formal one. This means that, in order to achieve equality, it is permissible for certain persons to be granted a different treatment when justified by the different situation or needs of such persons.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, at para. 24.

11. Accordingly, the granting of rights to members of minorities can be explained by the principle of substantive equality. It is generally more difficult for the members of a minority culture or language group to develop and pass on their language or culture to their children than it is for members of the majority.
12. A minority group might be a victim of substantive inequality even though, in purely formal terms, all individuals have been treated in the same way, which is to say that members of the minority have the same rights as members of the majority.

See in general C. Taylor, *Multiculturalisme : Difference et démocratie*, Paris, Aubier, 1994, at pp. 42 to 99; W. Kymlicka, *La citoyenneté multiculturelle*, Montréal, Boréal, 2001, at pp. 226 to 230.

13. It is with a view to correcting this substantive inequality that many countries have introduced a legislative scheme benefiting their cultural, linguistic or religious minorities. This movement in favour of minority rights has also led to the adoption of international treaties to the same effect.

International Covenant on Civil and Political Rights (1976), 999 U.N.T.S. 107, art. 27 ; *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, U.N. Resol. 47/135 (December 18, 1992, 32 I.L.M. 911) ; *Framework Convention for the Protection of National Minorities* (Council of Europe, February 1, 1995, 34 I.L.M. 351).

14. The Supreme Court of Canada recognized the connection between the right to equality, in its substantive (or real) sense, and the rights of minorities in *Arsenault-Cameron*, which dealt with s. 23 of the *Charter*. Major and Bastarache JJ. stated the following:

Section 23 is premised on the fact that substantive equality requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language minority.

Arsenault-Cameron v. Prince Edward Island, [2000] 1 S.C.R. 3, at para. 31.

15. This connection between substantive equality and the rights of minorities implies that the granting of special rights to a minority is not discrimination *per se*.
16. In *Law*, the Supreme Court held that the fact that the purpose of a legislative provision is to improve the situation of a minority or a disadvantaged group is a factor that tends to demonstrate that the provision in question is not substantively discriminatory.

Law, *supra* note at para.10 at paras. 72 and 73.

17. Finally, the Commissioner agrees with the analysis of the Court of Appeal when it refers to *Adler*, in which the Supreme Court of Canada noted that the granting of certain rights to Roman Catholics did not give rise to a duty to grant the same rights to other religious communities.

Gosselin et al. v. Quebec (Procureur general), [2002] J.Q. no. 1126 at para. 26.

Adler v. Ontario, [1996] 3 S.C.R. 609, at 641.

(ii) Principle of the protection of minorities in Canada

18. Canadian society is ethnically, linguistically and religiously diverse. This diversity stems from the existence of minorities. Some of these minorities are part and parcel of the historical process that gave rise to Canada and are, so to speak, integral parts of Canada. It should surprise no one that Canada's constitutional structure grants an important place to the rights of those minorities,

so much so that the Supreme Court has held that the protection of minorities is one of the fundamental principles of the Constitution.

Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at paras. 79 to 82.

19. In linguistic terms, Canada distinguishes itself by the existence of an Anglophone majority and a Francophone minority located primarily in Quebec but existing, in varying degrees, in each province and territory. In 1867, when the present federal structure was created, the province of Quebec was created to allow Francophones, concentrated in that province, to govern themselves in a number of areas that had significance for their language and culture.

20. Accordingly, when the National Assembly adopts statutes to protect the French language and culture, those statutes constitute one of the most important means of protection available to the largest Francophone minority in Canada. In *Ford*, the Supreme Court recognized the legitimacy of such legislation when it held that preserving the “visage linguistique français” of Quebec was an objective sufficiently important to justify the predominance of French on bilingual signs in that province. This legitimacy was also recognized by the Court in *Reference re Secession of Quebec*:

The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867 ... The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture.

Reference re Secession of Quebec, *supra* note at para. 18, at para. 59.

Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, at pages 777-779.

21. However, federalism by itself does not provide complete protection for linguistic minorities. There is a significant Anglophone minority in Quebec and a significant Francophone minority in the other provinces. This is why legal means have been taken to protect the linguistic minorities in each province.
22. Certain language rights have been granted only to members of the official language linguistic minority in certain provinces. Section 93 of the *Constitution Act, 1867*, in so far as its concrete effect is to guarantee rights with a linguistic component, falls within this category. The same is true of s. 23 of the *Charter*, the provision at issue here, although that section obviously applies in all provinces and territories.

(iii) Purpose of s. 23 of the *Charter*

23. Section 23 of the *Charter* has to be read together with s. 59 of the *Constitution Act, 1982*, which provides that s. 23(1)(a) does not come into force in respect of Quebec until the Quebec government has given its consent. That consent has never been given.
24. Shortly after the *Charter* was adopted, the Supreme Court held, in *Hunter*, that the interpretation of *Charter* rights must be undertaken in accordance with their purpose. Specifically, a purposive interpretation is the proper method of giving meaning to the language rights guaranteed by the *Charter*, including s. 23.

Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at pages 155-157.

Mahe, *supra* note at para. 9 at pages 361-362; *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, at pages 850-852; *R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 25; *Arsenault-Cameron*, *supra* note at para. 14, at para. 27.

(iv) Background to the adoption of s. 23 of the *Charter*

25. From the outset, the Commissioner wishes to highlight the context in which this case arises. We are dealing with a provincial linguistic minority in Quebec (Anglophones) and a national

linguistic minority elsewhere in Canada (Francophones) whose interests must be reconciled. The combination of these two minorities does not exist in the other provinces, where the provincial linguistic majority is also the national majority.

26. In *Mahe*, the Supreme Court described the general purpose of s. 23 as follows:

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, *supra* note at para. 9, at p. 362.

27. The Court also echoed these comments in *Arsenault-Cameron*.

Arsenault-Cameron, *supra* note at para. 14, at para. 26.

28. In short, it is clear that, in 1982, the framers wanted to avoid entrenching free choice of the language of education. That choice was conferred only on the members of the official language minority in each province.

29. Ultimately, the Commissioner maintains that s. 23 of the *Charter* is essentially intended to guarantee constitutional protection for the right to education in the language of the minority provided by schools controlled by the minority.

Mahe, *supra* note at para. 9.

Arsenault-Cameron, *supra* note at para. 14.

(v) The minority language education right at s. 23 versus access, by the majority, to minority language education

30. The Commissioner submits that it is important not to do as the appellants and the respondents have done, in that they have confused the right to minority language education for the minority and access by the majority to education in English in Quebec and in French in the other Canadian provinces and territories.

Appellants' memorandum, at para. 31.
Respondents' memorandum, at para. 112.

31. It has been established that a fundamental difference exists between the constitutional right to receive education in the language of the minority, for recipients who meet the requirements of s. 23(1) and (2) of the *Charter*, and access for the majority to a school and education in the language of their choice.

Anglophone parents in Ontario do not have a constitutional right to have their children educated in French as a matter of choice. Their children cannot be admitted to a French language school unless an admissions committee, controlled by members of the minority group, grants them access : Michel Bastarache, André Braën, Emmanuel Didier and Pierre Foucher, *Language Rights in Canada*, Michel Bastarache ed. (Montréal, Yvon Blais Inc., 1989).

Abbey et al. v. Essex County Board of Education, [1999] 42 O.R. (3d) 490 (C.A.), at 488.

32. The Quebec Court of Appeal agreed with this proposition and has stated the following :

[TRANSLATION]

Additionally, as already noted, the Ontario Court of Appeal has indicated that s. 23 was not intended to give members of the Ontario majority the right to have their children educated in French in the language of the minority in publicly-funded schools.

Solski v. Quebec (Procureure générale), [2002] J.Q. no. 1127 at para. 71.

33. This is consistent with the approach taken by the Supreme Court of Canada with regards to the need to avoid dissociating schools from their community and with regards to the importance of maintaining and promoting education in the language and culture of the minority.

Arsenault-Cameron, *supra* note at para. 14, at para. 45.

34. What is actually at issue is whether members of the linguistic majority in Quebec can, by relying on their equality rights, claim access for their children the right to an English-language education.
35. To the extent that such a claim involves access to schools controlled and administered by the Anglophone minority of Quebec, the Commissioner believes that this question should be answered in the negative as such access would be contrary to the spirit and purpose of s. 23 of the *Charter*.

II Non-discrimination within the meaning of ss. 10 and 12 of the Quebec Charter

36. The Commissioner of Official Languages supports the respondents' arguments and the conclusions of the Quebec Court of Appeal in this matter. However, she wishes to further clarify certain aspects, in the event that this Court analyzes arguments dealing strictly with the question of discrimination within the meaning of s. 10 of the Quebec Charter. The Commissioner adopts the arguments made by the respondents regarding the relevance of s. 12 of the Quebec Charter.
37. To determine whether a legislative provision is contrary to the equality right contained in s. 15 of the *Charter*, the courts have applied a tripartite analysis described by the Supreme Court in *Law, supra*. The Quebec Court of Appeal also applies this analytical grid to alleged infringements of s. 10 of the Quebec Charter. In *Law*, the Supreme Court described these three points as follows:

Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:

- (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
- (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

- (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration?

Law, *supra* note at para. 10, at para. 88.

See also, for application of case law on s. 15 of the *Charter* to s. 10 of the Quebec Charter, *Johnson v. Lester B. Pearson School Board*, [2000] R.J.Q. 1961 (C.A.); *Québec (Procureur général) v. Lambert*, [2002] R.J.Q. 599 (C.A.).

38. In the alternative, the Commissioner submits that, contrary to the reasons of the Court of Appeal, an affirmative answer should be given to the first question in the test suggested in *Law*, namely the questions dealing with differential treatment (A). However, the Commissioner contends that the question of whether the differential treatment is discriminatory (C) should be answered in the negative.

(i) Differential treatment

39. In its reasons, the Court of Appeal indicated that the first test, based on differential treatment, had not been met. It seems clear from reading ss. 72 and 73 of the CFL that there is differential treatment of children who do not fall within the exceptions mentioned in s. 73 of the CFL. Parents who are members of the majority are deprived of a benefit or advantage that the law grants to Anglophone parents, namely the ability to choose the language of education of their children.

(ii) Whether differential treatment is discriminatory

40. However, the Commissioner believes that the question of whether the differential treatment is discriminatory must be answered in the negative. In *Law*, the Supreme Court indicated that when a court is required to determine whether a legislative provision is actually discriminatory, it must examine four contextual factors that are suggestive of whether the provision is contrary to the

purpose of the right to equality, that is guaranteeing the dignity of all members of society. Those factors are: (1) the victim's association with a group that has historically been the object of stereotypes, been in a disadvantaged situation or has been deprived of political power; (2) the correspondence, or lack thereof, between the grounds on which the differential treatment is based and the actual need, capacity or circumstances of the victim; (3) the fact that the impugned legislative provision is intended to improve the position of a disadvantaged group; and (4) the nature and scope of the right or interest affected by the impugned provision.

41. The first factor is **association with a disadvantaged group**. The language policy in question was adopted by the National Assembly, a democratic institution in which Quebec Francophones constitute an overwhelming majority. In this respect, Quebec Francophones are not deprived of political power. The first factor therefore is not present.
42. The second factor is the **correspondence between the differential treatment established by the legislation and the actual requirements or circumstances of the group in question**. It is natural to assume that the members of a linguistic group have a much greater interest in receiving education in their language than do those who are not members of that group. Although the test used, namely the language of the primary education of one of the parents, is not perfect, it is a valid indicator of the linguistic community to which the child belongs. The Commissioner therefore believes that there is in fact a correspondence between the test in s. 73 of the CFL and the actual circumstances of those to whom it applies.
43. The third factor is the **purpose of the impugned measure**. In the case at bar, it is clear that the CFL seeks to improve the situation of Francophones in Quebec, considered a minority within Canada and North America, by taking measures necessary for the survival and the development of the French language. Although Quebec Francophones are a majority in Quebec and are not deprived of political power in areas that fall within the jurisdiction of the National Assembly, they are also a minority within Canada. Accordingly, as the Supreme Court recognized in *Ford* and in the *Reference re the Secession of Quebec*, it is legitimate for the National Assembly to adopt legislation to accomplish this purpose and make certain distinctions by means of legislation.

Ford, *supra* note at para.20, at p. 777.

Reference re Secession, supra note at para. 18, at para. 59.

44. It should also be noted that the differential treatment of Anglophones and Francophones that is made in s. 73 of the CFL seeks to protect the Anglophone minority in Quebec by granting it special rights. This minority is to some extent deprived of political power in matters within provincial jurisdiction, such as education, even though such concerns have been echoed in certain aspects of s. 23 of the *Charter*. In short, the differential treatment at issue makes it possible to reconcile the interests of two minorities, Anglophones within Quebec and Quebec Francophones within Canada.
45. The fourth factor is the **nature of the interest affected**. This involves the right of parents to choose the language in which their children will be educated. Despite the importance some have sought to attribute to this right, it must be noted that neither in Canada nor abroad is this regarded as a fundamental right. The language of education is ordinarily determined by the country's language policies, not by the parents' choices. In Canada, s. 23 of the *Charter* does not, in general, recognize such freedom of choice. Other countries with more than one official language, such as Belgium and Switzerland, determine the language of education on a territorial basis, leaving parents no freedom of choice.

Jacques Leclerc, *Langue et société*, 2d ed., Montréal, Mondia, 1992, at pages 448-449 (Belgium) and pages 459-460 (Switzerland).

46. To conclude, the Commissioner believes that an analysis of the contextual factors mentioned by the Supreme Court in *Law* indicates that the fact that the CFL gives Anglophones, but not Francophones, the freedom to choose the language of education of their children is not substantively discriminatory against Francophones. Although they are a minority within Canada, Francophones are not, in Quebec and within areas of provincial jurisdiction, a minority deprived of political power, which is the archetype of groups protected by the equality guarantee. Minority rights are justified especially when a group is deprived of the political power by which it could defend its own interests. Intervention by the judiciary applying a charter of rights is then justified.

PART IV – SUBMISSIONS ON COSTS

47. The Intervener, the Commissioner of Official Languages, makes no submission regarding costs.

PART V – ORDER SOUGHT

48. The Intervener, the Commissioner for Official Languages, takes no position regarding the outcome of the present appeal.

RESPECTFULLY SUBMITTED ON FEBRUARY 10, 2004.

François Boileau
Counsel for the Intervener,
Commissioner of Official Languages for Canada

PART VI – CASE LAW AND AUTHORITIES

<u>Case Law</u>	Paragraph
<i>Abbey et al. v. Essex County Board of Education</i> , [1999] 42 O.R. (3d) 490 (C.A.)	31
<i>Adler v. Ontario</i> , [1996] 3 S.C.R. 609	17
<i>Arsenault-Cameron v. Prince Edward Island</i> , [2000] 1 S.C.R. 3	14, 24, 27, 29, and 33
<i>Ford v. Quebec (Attorney General)</i> , [1988] 2 S.C.R. 712	20 and 43
<i>Gosselin et al. v. Quebec (Procureur général)</i> , [2002] J.Q. no.1126(C.A.)	17
<i>Hunter v. Southam Inc.</i> , [1984] 2 S.C.R. 145	24
<i>Johnson v. Lester B. Pearson School Board</i> , [2000] R.J.Q. 1961 (C.A.)	37
<i>Law v. Alberta (Minister of Employment and Immigration)</i> , [1999] 1 S.C.R. 497	10,16, 37 and 40
<i>Mahe v. Alberta</i> , [1990] 1 S.C.R. 342	9, 24, 26 and 29
<i>Québec (Procureur général) v. Lambert</i> , [2002] R.J.Q. 599 (C.A.)	37
<i>R. v. Beaulac</i> , [1999] 1 S.C.R. 768	24
<i>Reference Re Public Schools Act (Man)</i> , s. 79(3), (4) and (7), [1993] 1 S.C.R. 839	24
<i>Reference re Secession of Quebec</i> , [1998] 2 S.C.R. 217	18, 20 and 43
<i>Solski v. Quebec (Procureure générale)</i> , [2002] J.Q. no.1127 (C.A.)	32

Authorities

- Leclerc, J., *Langue et société*, 2d ed., Montréal, Mondia, 1992 45
- Kymlicka, W., *La citoyenneté multiculturelle*, Montréal, Boréal, 2001 12
- Taylor, C., *Multiculturalisme : Différence et Démocratie*, Paris, Aubier, 1994 12

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

Charter of Human Rights and Freedoms, R.S.Q. c.C-12

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5

Constitution Act, 1982 being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, U.N. Resol. 47/135 (December 18, 1992, 32 I.L.M. 911)

Framework Convention for the Protection of National Minorities
(Council of Europe, February 1, 1995, 34 I.L.M. 351)

International Covenant on Civil and Political Rights (1976), 999 U.N.T.S 107

Official Languages Act, R.S.C. 1985 (4th Supp.), c.31