

SUPREME COURT OF CANADA
(ON APPEAL FROM A JUDGMENT OF THE NEW BRUNSWICK COURT OF APPEAL)

BETWEEN:

Mario Charlebois

Appellant
(appellant)

-and-

City of St. John

Respondent
(respondent)

AND BETWEEN:

Association des juristes d'expression française du Nouveau-Brunswick

Appellant
(*amicus curiae*)

-and-

City of St. John

Respondent
(respondent)

- et -

Attorney General of Canada, Attorney General of New Brunswick,
Union des municipalités du Nouveau-Brunswick, Commissioner of Official Languages of
Canada, Fédération des associations de juristes d'expression française de
common law Inc.,

Interveners

FACTUM OF THE INTERVENER
COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA
(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I. FACTS

1. The Commissioner relies on the facts set out in the factum of the appellant Association des juristes d'expression française du Nouveau-Brunswick ("AJEFNB").

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PART II. ISSUES

2. The issues in this appeal relate to the proper interpretation of section 22 of the *Official Languages Act* of New Brunswick ("NB OLA") in terms of the scope of that Act and its application to municipalities as institutions and the extent of the rights that it grants to individuals before the courts.

3. The Commissioner will submit argument solely on the first question stated in the factum of the appellant AJEFNB:

20

Is the City of St. John an "institution" subject to section 22 of the NB OLA?

4. To dispose of this question, the Court will have to determine the scope of the language rights guaranteed by section 19 of the *Canadian Charter of Rights and Freedoms* (the "Charter") and the nature of the duties imposed on institutions of the Government of New Brunswick in order to ensure that those rights are given full effect.

PART III. ARGUMENT

1. Interpretive Approach to be Applied to Language Rights

5. In its judgment, the Court of Appeal attempted to define the extent of the language duties imposed on institutions of the province of New Brunswick in relation to bilingualism in the courts, applying the modern approach to statutory interpretation. That approach involves examining the purpose of the impugned provision, and the purpose of the Act itself, the history of the particular provision, the general scheme of the Act and the ordinary and grammatical sense of the provision, and the intention of the Legislature. In adopting that approach, the Court of Appeal did not apply *Beaulac*, in which this Court further elaborated on the application of the modern approach to language rights.

Charlebois v. St. John (City), (2004) 275 N.B.R. (2d) 203 (C.A.), at paras. 17-19.

6. In the Commissioner's submission, the New Brunswick Court of Appeal should have ensured that its interpretation of section 22 of the NB OLA, by which it does not apply to municipalities, was consistent with the purpose of rights in relation to bilingualism in the courts and compatible with the protection and development of the official language minority communities of Canada. The Court of Appeal did refer to the principles of interpretation adopted by this honourable Court in *Beaulac*, but applied them incorrectly.

Charlebois v. St. John (City), *supra*, at para. 36.
R. v. Beaulac, [1999] 1 S.C.R. 768.

7. Although in considering the purpose of the NB OLA, the Court of Appeal referred to *Beaulac* and acknowledged the importance of an interpretation that emphasizes "the protection and development of official language communities", we submit that it relegated the purpose of language rights to the second tier. Instead, it relied on other "indicators" of legislative intent, including the overall scheme of the Act and the principle

of the statutory coherency, which, in our submission, became the determining factors in its analysis.

8. Accordingly, we submit that the Court of Appeal incorrectly applied the decision in *Lavigne* and the rules of constitutional interpretation that apply to language rights as they are set out in *Beaulac*. There is nothing in the context of this case that would justify the Court of Appeal disregarding the settled principles of interpretation that apply to language rights.

10 *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773.

9. As the appellant AJEFNB correct said in its factum, *Lavigne* raised the question of the relationship between the provisions of the *Official Languages Act* of Canada that relate to the confidential nature of investigations carried out by the Office of the Commissioner of Official Languages and the provisions of the *Privacy Act* that relate to the disclosure of personal information held by a federal institution. The Court had to determine whether, under paragraph 22(1)(b) of the *Privacy Act*, the disclosure of personal information sought by the respondent could reasonably be expected to be injurious to the conduct of lawful investigations by the Commissioner of Official Languages. In fact, this honourable Court was asked to identify the rules of interpretation that apply when there is an apparent conflict between the provisions of two quasi-constitutional statutes. That case did not in any way relate to the interpretation of the language rights guaranteed by the *Official Languages Act*.

Lavigne v. Canada (Office of the Commissioner of Official Languages), *supra*.

10. We acknowledge that the quasi-constitutional status of the *Official Languages Act* of Canada and the NB OLA does not alter the modern approach to statutory interpretation as defined by E. A. Driedger, cited by the Court of Appeal and adopted by this Court for many years. We would note, however, that this interpretive approach has been more fully developed in the context of the interpretation of language rights, as a result of the judgment in *Beaulac*.

Charlebois v. St. John (City), *supra*, at page 216.

11. It is important to note that *Beaulac*, which also involved an issue of statutory interpretation, gave this honourable Court an opportunity to dispel the uncertainty that then prevailed in the case law in respect of the interpretation of language rights. That judgment shed new light on the purpose of language rights (the first of the factors to be considered in the modern method of statutory interpretation) by both clarifying the nature of language rights and delineating the scope of the principle of the equality of English and French and the impact of that principle on the implementation of the language rights guaranteed in sections 17 to 23 of the Charter.

12. On the question of the ***nature of language rights***, the Court stated:

The objective of protecting official language minorities, as set out in s. 2 of the Official Languages Act, is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. **Language rights are not negative rights, or passive rights**; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a **duty of the State to take positive steps to implement language guarantees**. [Emphasis added]

R. v. Beaulac, *supra*, para. 20

13. Clarifying the ***purpose and scope of the principle of the equality*** of the official languages, which is enshrined in subsections 16(1) and 16(2) of the Charter, this honourable Court held that substantive equality is the correct norm to apply:

This Court has recognized that substantive equality is the correct norm to apply in Canadian law. **Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada**.

...

This principle of substantive equality has meaning. It provides in particular that **language rights that are institutionally based require **government action** for their implementation and therefore create **obligations for the State****; It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation. [Emphasis added]

- *R. v. Beaulac*, *supra*, paras. 22 and 24.

14. The Court also noted the need to interpret language rights as an essential tool for the preservation and protection of official language communities, and thus stated the interpretive rule as follows:

Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada
R. v. Beaulac, *supra*, para. 25.

15. As the New Brunswick Court of Appeal acknowledged in *Charlebois v. Moncton (City)*, “Charter language guarantees must be construed with an emphasis on the protection and flourishing of official language communities; they should also be
10 construed remedially for the purpose of redressing past inequalities.”

Charlebois v. Moncton (City), [2001] 242 N.B.R. (2d) 259 (C.A.), at para. 53.

16. *Beaulac* therefore represented a real turning point in the interpretation of the language rights guaranteed by the Charter, by laying down the organizing principles that are to guide the courts in applying the modern approach to interpretation. These fundamental rights must in all cases be interpreted having regard to their purpose, that purpose being threefold in that the aim of those rights is:

- a. to ensure that minority communities are protected and developed;
- 20 b. to ensure substantive equality between English and French;
- c. to redress past wrongs.

17. We submit that *Lavigne* does not have the effect of precluding the application of the organizing principles stated in *Beaulac*, which must guide the courts when they interpret language rights.

18. In this case, therefore, the Court of Appeal, in applying the modern approach to interpretation, should have ensured that its interpretation of the expression “institution” in sections 1 and 22 of the NB OLA took into account the purpose of language rights in
30 relation to bilingualism in the courts and was compatible with the protection and development of the official language communities.

19. The Court of Appeal did not do that analysis, on the ground that it was not required to determine the constitutionality of section 22 of the NB OLA. This was an error. The courts must look to those principles whenever there is a question involving the interpretation of language rights because the application of those principles is not limited to constitutional questions.

20. On this point, we would adopt this passage from Sullivan and Driedger:

10 While there is obviously a significant overlap between complying with jurisdictional limits and complying with entrenched constitutional norms, the presumptions associated with these two forms of compliance are grounded in different assumptions and concerns. The point made in *Zundel*, and in numerous other judgments, is that constitutional documents like the Charter set out the norms that are most highly valued in our culture and therefore perform a legitimising role. For this reason, quite apart from questions of validity or showing deference to the legislature, it is appropriate for courts to prefer interpretations that tend to promote those principles and norms over interpretations that do not. For this reason, too, the presumption of compliance with constitutional values may be relied on even though the validity of the legislation is not as [*sic*] issue.

20 Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., Butterworths, 2002, at p. 368.

21. In addition, that is in fact the analysis applied by this honourable Court in *Beaulac*, which, like this case, raised an issue of statutory interpretation and not a constitutional issue.

22. To conclude on this point, Sullivan and Driedger also refer to the fact that it is presumed that Canadian legislation is enacted in compliance with the values of the Charter and the Canadian constitution:

30 It is presumed that legislation is enacted in compliance with the norms embodied in Canada's entrenched constitution. These obviously include the rights and freedoms protected by the Charter. They also include norms implicit in other parts of the Constitution Acts, such as federalism, the preservation of language and cultural heritage, [Emphasis added]

Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, *supra*, at page 367.

23. Having regard to the principles enshrined in the Charter, including the principle of the equality of the two official languages as set out in subsection 16(2), the principles of

interpretation laid down by this honourable Court in *Beaulac* and its own decision in *Charlebois v. Moncton (City)*, the New Brunswick Court of Appeal should have interpreted section 11 of the NB OLA and the expression “institution” in a manner that is compatible with the actualization of those principles, rather than opting for a restrictive interpretation.

24. The Court of Appeal also erred when it characterized the interpretive approach advocated by the AJEFNB as “the use of ‘*Charter* values’ as interpretive tools” or the “presumption of *Charter* consistency”, citing *Bell ExpressVu* in concluding that it could not adopt that approach.

Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559.

25. In that case, which involved the interpretation of the *Radiocommunication Act*, the Court did a contextual and purposive analysis of the Act in order to determine whether the provision in issue was ambiguous. It concluded that it is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the legislative intention, that the courts need to resort to the subsidiary principles of interpretation, such as the “*Charter* values” presumption.

Charlebois v. St. John (City), *supra*, at paras. 54 to 57, inclusive.

26. We submit that the Court of Appeal erred in law when it relied on the principles set out in *Bell ExpressVu*. Unlike the situation in *Bell ExpressVu*, there is no ambiguity in this case in respect of the intent of the provincial legislature, which is clearly stated in the preamble to the Act:

AND WHEREAS New Brunswick is committed to enacting an *Official Languages Act* that respects the rights conferred by the *Canadian Charter of Rights and Freedoms* and allows the Legislature and the Government to fulfill their obligations under the *Charter*, ...
NB OLA, S.N.B. 2002, c. O-0.5, preamble.

27. Because the NB OLA represents the implementation of the language guarantees enshrined in the *Charter*, to which it gives effect, as stated in its Preamble, the fact that

the Legislature intended to comply with the Charter is not simply presumed, it is clearly stated.

28. By relying on the principles stated in *Bell ExpressVu*, the Court of Appeal relegated the principle of the substantive equality of the two official languages to the status of a subsidiary principle for the interpretation of language rights which could be considered only in cases of genuine ambiguity in the NB OLA. That approach is plainly contrary to the interpretive framework established in *Beaulac*, which provides that substantive equality is the correct norm to apply in Canadian law.

10 *R. v. Beaulac*, *supra*, para. 20.

29. The respondent's references to passages from the reasons of Lamer C.J. in *Mossop* serve no purpose, because it is in fact clear that the NB OLA [TRANSLATION] "is intended as the province's legislative response to its obligations in respect of language under the Charter as they relate to institutional bilingualism in New Brunswick".

Respondent's Factum, at para. 129.

20 30. Accordingly, the Court of Appeal was required to determine whether the restrictive interpretation advocated by the respondent was compatible with its language obligations, in particular under subsection 19(2) of the Charter.

Charlebois v. St. John (City), *supra*, at para. 32.

2. Nature of the Charter Rights in Relation to Bilingualism in the Courts

30 31. The NB OLA comprises a fundamental component of the legislative response to constitutional guarantees of institutional bilingualism. It is therefore essential to examine the nature of the rights guaranteed by section 19 of the Charter, first, before considering the scope of those language obligations.

32. In its factum, the respondent submits that subsection 19(2) of the Charter does not impose any language obligations on the courts or on Crown prosecutors. Citing *Mercure*, it submits that the language rights guaranteed in subsection 19(2) have the same scope as the rights guaranteed by section 133 of the *Constitution Act, 1867*.

Respondent's factum, at para. 24.

33. We submit that the respondent's submission is untenable, having regard to the organizing principles laid down by this Court in *Beaulac*, which must guide this Court in determining how subsection 19(2) is to be interpreted, and which include, in particular:

- 10
- the purpose of subsection 19(2);
 - the principle of substantive equality;
 - the unwritten principle of protection of minorities; and
 - in the alternative, the principle of equality of communities enshrined in section 16.1 of the Charter.

34. Before examining each of those principles and how they apply in this case, we believe that it is worthwhile to briefly review the 1986 trilogy that included the decision in *Mercure*. In that case, the Supreme Court adopted a restrictive approach to the interpretation of the right to use either English or French in the courts in Quebec,
20 Manitoba and New Brunswick. The Court found that that right had been formulated in the form of an optional requirement only and imposed no express requirement in respect of the obligations that the State had to meet to implement that right.

R. v. Mercure, [1988] 1 S.C.R. 234.

35. More specifically, in *Société des acadiens du Nouveau-Brunswick*, which related to the interpretation of section 19 of the Charter, Beetz J. held that the rights protected by sections 17 to 19 of the Charter are "of the same nature and scope" as those guaranteed by section 133 of the *Constitution Act, 1867*. Applying that interpretation, the right to use English and French in pleadings in the courts vests in the person who
30 authors those pleadings, and imposes no duty on the State. In other words, under the

position adopted by Beetz J. and as submitted by the respondent, section 19 of the Charter does guarantee positive rights.

Société des acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education, [1986] 1 S.C.R. 549, at para. 53.

36. The manner in which the Supreme Court circumscribed the scope of language rights in the 1986 trilogy is not a matter on which opinion is unanimous. For instance, the individualistic approach adopted by the Court, which operated to reduce the principle of the equality of the two official languages, has sometimes been criticized, as it was by Dickson C.J. and Wilson J. in their dissenting opinions in *Société des Acadiens du Nouveau-Brunswick* and *MacDonald v. City of Montreal*:

What good is a right to use one's language if those to whom one speaks cannot understand? Though couched in individualistic terms, language rights, by their very nature, are intimately and profoundly social. (Dickson, *Société des Acadiens du Nouveau-Brunswick c. Association of Parents for Fairness in Education*, supra p. 564)

20 With all due respect to those who think differently, I cannot read s. 133 as merely permitting the litigant to use the language he or she understands but allowing those dealing with him or her to use the language he or she does not understand. What kind of linguistic protection would that be? (Wilson, *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, page 540)

37. We agree with those criticisms, and with the criticism expressed by Prof. André Braën, who has said that the Supreme Court, [TRANSLATION] “in the final analysis, has placed the use of a minority official language in the courts and the use of any other language on the same footing”. In other words, a person who speaks the official language that is not the language of the courts would merely be entitled to the services of an interpreter.

30 Braën, “L’interprétation judiciaire des droits linguistiques au Canada et l’affaire Beaulac” (1998), 29 R.G.D. 379, p. 394

38. With all due respect for the contrary opinion, the views of this honourable Court have changed in its decisions over the years. For one thing, the *References re Secession of Quebec* unanimously notes that the Constitution of Canada has the protection of minorities as one of its unwritten principles. We have also referred to

Beaulac, in which the Court rejected the narrow and restrictive interpretation that underpinned the decisions in the 1986 trilogy. Since then, the Court has frequently reiterated that in interpreting language rights, any interpretation applied must comply with the purpose of the right.

Arsenault-Cameron v. P.E.I., [2000] 1 S.C.R. 3.

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

Gosselin (Tutor of) v. Quebec (Attorney General), 2005 SCC 15.

Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

Solski (Tutor of) v. Quebec (Attorney General), 2005 SCC 14.

10

39. As we know, *Beaulac* rejected the basis of the restrictive interpretation that had been applied in the 1986 trilogy, but without specifying whether section 19 of the Charter guarantees a broader set of rights than does section 133 of the *Constitution Act, 1867*.

40. However, in *Charlebois v. Moncton (City)*, the New Brunswick Court of Appeal ruled as to the effect of subsection 18(2) by applying the organizing principles laid down in *Beaulac* and *Reference re Secession of Quebec*. This Court has stated the opinion that subsection 19(2), like subsection 18(2), must be interpreted more broadly than section 133 of the *Constitution Act, 1867*.

20

If the upshot of this position is that a court which is called upon to decide an issue dealing with the interpretation of sections 17, 18 and 19 of the *Charter* must adhere to the interpretation already given to section 133, it is obvious that such an approach would be inconsistent with the principles of interpretation of language rights set out in *Beaulac*,

... .

Charlebois v. Moncton (City), *supra*, at para. 43.

41. We share the view expressed by Vanessa Gruben when she wrote that section 19 must be interpreted differently from section 133 of the *Constitution Act, 1867*:

30

... *R. v. Charlebois* marks an important departure from the notion that the interpretation of section 133 and section 19 is identical. In our view, this is a welcome departure and one consistent with the general interpretive approach to the *Charter*.

Vanessa Gruben, "Bilingualism and the Judicial System", in Michel Bastarache, *Language Rights in Canada*, 2nd ed., Cowansville, Yvon Blais, 2004, at p. 173.

(a) Principle of the Substantive Equality of the Two Official Languages

42. In interpreting the rights guaranteed by section 19 of the Charter, regard must be had to the principle of the substantive equality of the two official languages. Since *Beaulac*, there has no longer been any doubt that the effect of the principle of substantive equality is to impose a duty on the Government of Canada and the Government of New Brunswick to take positive measures to implement institutional language rights. The Court has clearly held that the purpose of section 19 of the Charter, which establishes institutional bilingualism in the courts, is to ensure equal access to services of equal quality for members of both official language communities in Canada.

R. v. Beaulac, supra, para. 22.

(b) Scope and Nature of the Rights Guaranteed by Subsection 19(2) of the Charter

43. Since *Beaulac*, it has been settled that the rights guaranteed by sections 17 to 20 of the Charter, when interpreted in light of the principle of substantive equality set out in section 16 of the Charter, are **positive** institutional rights and impose duties to act on the government and its institutions, including the courts and other judicial bodies. This means that the language guaranteed set out subsection 19(2) is not merely a recognition of individual rights. It also imposes obligations and responsibilities on the government and institutions to enable individuals to exercise their right in the courts. This is the approach that was adopted by Dickson C.J. in his dissenting reasons in *Société des Acadiens du Nouveau-Brunswick*.

Société des acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education, supra, at page 565.

44. In determining the extent of the duties imposed on institutions of the Government of New Brunswick, including municipalities, it is therefore important to recall that the

purpose of subsection 19(2) of the Charter is to give individuals equal access to the courts of New Brunswick in the official language of their choice.

45. It is also important to have regard to the **historical and legislative context** in which subsection 19(2) of the Charter was enacted. That provision cannot be analysed in the abstract, without regard for the historical context of the recognition thereof or for the concerns that the manner in which they are currently applied is meant to address.

- *Solski (Tutor of) v. Quebec (Attorney General)*, *supra*, at para. 5.

10 46. The historical and legislative context in which subsection 19(2) of the Charter was enacted clearly demonstrates that this provision was not enacted in the abstract. The framers obviously had in mind the history of unilingualism in the courts that had prevailed in New Brunswick until 1969, which had been succeeded in 1972 by the rule allowing for the optional use of the official languages in the courts of the province. By enacting subsection 19(2), the framers were therefore seeking to remedy the lacunae in the language arrangements by constitutionalizing a scheme of mandatory bilingualism in the courts.

20 47. Having regard to the purpose of subsection 19(2) of the Charter, the historical and legislative context in which it was enacted, the requirements of the principle of the substantive equality of the two official languages, and also the unwritten principle of the protection of minority language groups, we submit that subsection 19(2) of the Charter may not be interpreted as being limited to allowing individuals to use the official language of their choice in the courts while still allowing the people who are communicating with the individual, the judges and the government's prosecutors and institutions, to use the language of their choice. That sort of result would be contrary to the remedial nature of subsection 19(2) of the Charter, in addition to being incompatible with the preservation and development of the two official language communities in Canada.

30

48. As Wilson J. rightly said in *MacDonald v. City of Montreal*:

10 The constitution cannot properly be said to confer "rights" on a provincial government since the nature of governmental power is that it is unlimited except as limited by the constitution. Presumably therefore, in the absence of s. 133 the courts of Quebec could be administered in any language in the world. **The constitutional right of any individual appearing in such courts to be heard in either English or French effectively restricts the province's power to choose the language in which its judicial proceedings are to be conducted.** The proper analytic framework for this case, therefore, is to address the question of **the extent to which the individual's constitutional right dictates a correlative constitutional duty on the part of the province and not the question of the extent to which the constitutional "right" of the province is controlled by the constitutional right of the individual.**

As I stated earlier, my initial premise is that the essence of language is communication. Therefore at a minimum a linguistic right brings with it the notion of understanding and being understood. **In a society that has, in recognition of its history, extended constitutional protection to two languages in the context of court proceedings, the state cannot usurp the individual's right to be dealt with in the language he or she understands.** [Emphasis added]
MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, pp. 542-543.

20 49. We submit that the analytical approach advocated by Wilson J, and her interpretation of section 133 of the *Constitution Act, 1867*, fit within the interpretive approach outlined in *Beaulac*.

30 50. Accordingly, we submit that subsection 19(2) must be interpreted in such a way as to guarantee the individual's right to "**communicate**" with the judicial system and the government institutions that are parties to the proceedings in which he or she is involved. In order for individuals to have a genuine choice as to the official language in which the proceedings take place, that right must have as its corollary the duty on the part of the judges and the government's prosecutors and institutions to use the language chosen by the individual. Any other interpretation would defeat the remedial purposes of the language right itself, and would be incompatible both with the protection and development of the two official language communities and with the principle of substantive equality.

(c) Unwritten Principle of the Protection of Minorities

51. The final point is that the interpretation of the rights guaranteed in subsection 19 of the Charter must also have regard to the unwritten constitutional principle of the protection of minorities.

Reference re Secession of Quebec, supra, at para. 52.

52. Accordingly, while the individual's right to "communicate" and "be understood" in the official language of his or her choice is not expressly stated in the text of section 19 of the Charter, this Court may take the full meaning of that provision by applying the unwritten principle of the protection of the minority language, "even to the extent of allowing the courts 'to fill out gaps in the express terms of the constitutional scheme'."

Lalonde v. Ontario (Commission de restructuration des services de santé de l'Ontario) (2001), 56 O.R. (3d) 571, at para. 118.

(d) Principle of the Equality of the Two Official Language Communities

53. In addition to the principle of substantive equality, the courts must be guided by the principle of the equality of the communities, enshrined in section 16.1 of the Charter.

20 As the New Brunswick Court of Appeal correctly said in *Charlebois v. Moncton (City)*:

One cannot understand the scope of the language guarantees afforded by the Charter without taking into account the fundamental principle which embodies both the language policy implemented in New Brunswick and the commitment of the government to bilingualism and biculturalism. The constitutional principle of the equality of official languages and the equality of the two official linguistic communities and of their right to distinct institutions is the linchpin of New Brunswick's language guarantees regime. [Emphasis added]

Charlebois v. Moncton (City), supra, at para. 62.

30 54. The principle of the equality of communities enshrined in section 16.1 of the Charter also has obligatory effects for the Government of New Brunswick, as the New Brunswick Court of Appeal recognised in *Charlebois v. Moncton (City)*:

The purpose of this provision is to maintain the two official languages, as well as the cultures that they represent, and to encourage the flourishing and development of the two official language communities. It is remedial in nature and has concrete consequences. It imposes on the provincial government an obligation to take positive

measures to ensure that the minority official language community has equality of status and equal rights and privileges with the majority official language community.
Charlebois v. Moncton (City), *supra*, at para. 80.

55. Accordingly, when the framer enacted section 16.1 in its entirety in 1993, this represented, beyond any doubt, not only the clear desire for a major paradigm shift, in that language rights must also be seen as collective and not merely individual rights, but also an important step in the progress being made toward substantive equality. More specifically, the provincial legislature of New Brunswick associated its new OLA, including section 11 of that Act, with the Charter, as the preamble indicates. The NB OLA was enacted to embody the principle of progress that is also set out in subsection 16.1(2) of the Charter. This is the prism through which we must read and understand section 22 of the NB OLA. Any restrictive interpretation should therefore be rejected.

56. Having regard to the nature and effect of the rights guaranteed by subsection 19(2) of the Charter, we submit that it was the duty of the Government of New Brunswick to ensure, by taking positive measures, that the government's institutions respected individuals' language rights in the courts. That obligation, to act positively, derives from subsection 16.1(2) of the Charter, which provides legislative confirmation of the duty to act to ensure that the language guarantees are honoured and applied in reality.

This provision [16.1(2)] is the legislative confirmation of the obligation of the provincial government to act positively. By its legislative and constitutional commitments, New Brunswick has accepted that it has the responsibility to take all possible steps for the preservation and development of the two official language communities. By that, it recognizes that the two languages and the two cultures they transmit constitute the common heritage of all persons in New Brunswick, and they must be able to enjoy an atmosphere conducive to development. (See: Government of New Brunswick, *Towards Equality of Official Languages in New Brunswick*, *supra*, at page 413.)
Charlebois v. Moncton (City), *supra*, at para. 116.

3. Scope of the Language Obligations of Institutions under the NB OLA in Relation to Bilingualism in the Courts

57. The respondent submits that subsection 16(2) of the Charter, which establishes the principle of substantive equality in the Legislature and Government of New Brunswick, and section 16.1 of the Charter are vague provisions that leave open a host of possibilities in terms of the methods that may be used to implement them. The respondent submits, for example, that the Court must be conscious of the possibility that the legislature merely intended to provide for partial implementation of the language rights guaranteed in the Charter.

Respondent's factum, at para. 113.

58. The Commissioner of Official Languages of Canada cannot agree with that argument, which is inconsistent with the approach to interpreting language rights that has been adopted in *Beaulac* and *Arsenault-Cameron*. Because language rights must be regarded as having a remedial aspect, and must serve the purposes of the protection and development of the official language minority communities in Canada, it is no longer possible to regard subsection 16(2) and section 16.1 as if they were really no more than wishful thinking. The framers did not make this effort in order to achieve only vague and general considerations; rather, they intended to set the tone for a change that would lead to the achievement of substantive equality in the implementation of institutional language rights.

R. v. Beaulac, supra; Arsenault-Cameron, supra.

59. Accordingly, we submit that if the legislature had intended to limit the government's quasi-constitutional duties in respect of bilingualism in the courts by precluding the application of sections 16 to 26 of the NB OLA to municipalities, or to certain municipalities, it would have expressed its intent clearly. It has done so in other circumstances, in particular with respect to the duties of municipalities in relation to the provision of services and communication with the public.

60. Section 37 of the NB OLA can be of no assistance to the respondent, because the purpose of that section is **only** to allow municipalities that are not covered by section 35 to declare themselves, by by-law of their council, to be bound by the language obligations relating to service and communication. That provision is not intended to exempt municipalities from the express intention of the provincial legislature to comply with the Charter, in particular in respect of bilingualism in the courts, a matter that cannot be likened to general services to the public.

Respondent's factum, at para 69.

10 61. We would note, for example, that on the question of bilingualism in the courts, the provincial legislature has, by defining "institution" as it has, clearly exempted provincial educational institutions.

62. The final point that is submitted is that section 1 of the Charter allows the legislature to impose limits on the rights guaranteed in the Charter or to [TRANSLATION] "partially implement" language rights, to use the respondent's wording, where such limits are reasonable and may be justified in a free and democratic society. However, we submit that the intent to impose such limits must be clearly stated by the legislature, and this is not the case here. Section 22 of the NB OLA must be capable of
20 being given a large and liberal interpretation, and must therefore include municipalities. Otherwise, the substantive equality that is the aim in respect of bilingualism in the courts in New Brunswick cannot be achieved.

Charlebois v. Moncton (City), *supra*, at para. 107.
Respondent's factum, at para. 114.

PART IV. SUBMISSIONS AS TO COSTS

63. The intervener Commissioner of Official Languages of Canada makes no submission concerning costs.

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PART V. ORDER SOUGHT

64. The intervener Commissioner of Official Languages of Canada asks this honourable Court to allow this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED AT OTTAWA, THIS 23rd DAY OF AUGUST, 2005.

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Johane Tremblay
François Boileau
Solicitors for the intervener
The Commissioner of Official
Languages of Canada

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