

The Constitution and The English Language in Quebec: Education; The Primacy of the French Language; Collective Rights

**RESEARCH PAPER PREPARED FOR THE QUEBEC COMMUNITY
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INTRODUCTION

Soon after its Spring 2014 election victory, the new government announced a series of austerity measures designed to meet an election promise of a balanced budget by the end of the following fiscal year. Institution by institution was hit with news of budget cuts over the course of the following months, and in November 2014, the Education Minister announced his plan to “slash 50 per cent of school boards,” as one media outlet reported it.¹ According to the government, centralization of school boards would put “millions” back into provincial coffers without affecting the quality of education offered by the school boards; the Education Minister would see the number of French school boards drop from 60 to 36, and the number of English ones drop from 9 to 7.²

School board reform and abolishment are not new topics in Quebec. Two major political parties have actively advocated for the abolishment of school boards. In response to the Minister of Education’s announcement, one opposition party leader argued that the Minister had not gone far enough in his reform plans. He called for the abolishment of school board elections, seemingly ignoring the fact that voter turnout for the most recent English school board elections actually spiked to 21%.³

In response to these recent political developments, the first part of this paper will determine whether the Minister of Education’s plan to amalgamate the Riverside, New Frontiers and Eastern Townships school boards,⁴ as well as the call for the abolishment of school board elections, violate the Constitutional protections of minority language groups under section 23 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”). In order to make this determination, this paper will first analyze section 23 language rights generally, looking at both the legislative and judicial histories of the section: the section’s legislative history will illuminate justifications for, and goals of, section 23, while its judicial history will highlight how the Supreme Court has consistently interpreted the right in light of its legislative history. Next, current statistical data will be presented in order to see whether the goals of section 23 as interpreted by the Supreme Court are being met. Part I will conclude with a closer examination the rights of the English school boards at risk and the right to elected school board officials in light of both current Supreme Court jurisprudence and current statistical data.

¹ Caroline Plante, “Quebec may slash 50 per cent of school boards”, *Global News* (19 November 2014), online: <globalnews.ca/news/1681421/quebec-may-slash-50-per-cent-of-school-boards/>.

² *Ibid.*

³ *Ibid.*

⁴ Note that these have been identified by the media but not yet confirmed.

The second part of this paper will examine whether legislation dictating the supremacy of the French language over all other rights – should such legislation ever come into existence – could pass constitutional muster. In particular, this section will determine if and how the unwritten constitutional principle of “respect for minorities”⁵ might lead the Supreme Court to declare such a law unconstitutional, finally providing minority-language speakers in Quebec with a legal tool to prevent the National Assembly from encroaching on individual rights in order to protect the French language.

Finally, the third part of this paper will discuss the concept of “Anglophone collective rights”. Despite the fact that the Anglophone minority in Quebec is a culturally diverse group, can the group nonetheless argue that it has “collective rights,” thereby reinforcing language rights?

PART I – SCHOOL BOARD RIGHTS

1. INTRODUCTION

In order to understand the breadth of powers afforded to minority language schools by Section 23 of the *Charter*, it is important to undertake an in-depth analysis of the purported section. Section 23, the provision on “Minority Language Education Rights,” is a non-exception clause, which, by definition, prohibits any provincial or territorial government from opting out of its positive duty to protect this right.

Since the coming-into-force of the *Charter*, the Supreme Court of Canada has heard multiple cases dealing with Section 23 language rights. In a majority of the cases, the Court looks back at the legislative history of the article, highlighting the framers’ intent and the remedial nature of the provision. In large part, this examination seems to guide the Court towards its ultimate disposition on the matter. For example, the historical disadvantage of the Francophone minority outside of Quebec often seems to be a major justification for the extension of Section 23 rights. Indeed, the majority of Section 23 claims by the Francophone minority outside of Quebec has led to the Court extending Section 23 rights in favour of Franco-minorities, granting them infrastructure, human resources, pedagogical and material resources, and management of their school systems.⁶ By contrast, the Supreme Court often highlights the continued struggle to maintain the vitality of the

⁵ *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference*].

⁶ Serge Rousselle, *La diversité culturelle et le droit des minorités* (Cowansville, QC: Yvon Blais, 2006) at 89.

French language in Quebec given the widespread use of English on the continent.⁷ In consequence the Supreme Court usually acknowledges that Quebec's language laws do encroach on the rights of the Anglophone minority, but that this encroachment is permissible as long as it is proportionate to the objectives of preserving and promoting the French language and culture in Quebec. Corollary to this attitude is the notion that there must be a remediation of Francophone grievances whether inside Quebec, preserving and promoting the French language and culture, or outside Quebec, assuring adequate and basic French language services. The logical deduction from this notion of remediation is that there seems to be a difference between the definition and compositional characteristics of the Francophone minority outside Quebec and the Anglophone minority inside Quebec when spotlighted by the courts.

Given the importance that the Supreme Court places on legislative history when faced with a Section 23 case, a full understanding of the history behind the provision is required. However, throughout this section, one should keep in mind the concept of the Constitution as a "living tree," that is, that the Constitution should grow and develop as society evolves. The living tree concept is one we will come back to throughout this paper.

2. APPLICABLE LEGISLATION

Section 23 of the *Charter*⁸ reads as follows:

23.(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.

⁷ See e.g. *Solski (Tutor of) v Quebec (Attorney General)*, 2005 SCC 14 at para 44, [2005] 1 SCR 201 [*Solski*]; *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15 at para 31, [2005] 1 SCR 238 [*Gosselin*].

⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*].

(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 must be read in concert with Section 29 of the *Constitution Act, 1982*, which holds that Section 23(1)(a) does not apply in Quebec until such time as the Quebec National Assembly opts to accept the provision. To date, no government of Quebec has expressed any intention of signing onto Section 23(1)(a).

3. LEGISLATIVE HISTORY

Interestingly, the first recommendation in Canadian history for a constitutional guarantee concerning language of education sought to promote equality of opportunity, and not protection of minorities. This recommendation, stemming from the *Report of the Royal Commission on Bilingualism and Biculturalism* (*Laurendeau-Dunton* report), purported to offer choice of language instruction.⁹ Even more interesting, is that the drafters of the report were in fact inspired by Quebec's approach to education, and encouraged choice of language instruction across the country specifically to allow French-speaking minorities outside Quebec the same opportunities that the Anglophone minority already had in Quebec at the time of the Commission.¹⁰

At the time the report was commissioned, two separate school systems existed in Quebec: a school system for the French Catholics, and one for the English Protestants. According to the report, the right of the Anglophone minority to develop "a separate system according to its own values [... had] never been seriously questioned by the French Catholic majority".¹¹ In fact, despite the reform of the education system happening at the time the report was completed, the drafters of the report remained convinced that little would change: "This respect for the language and religious beliefs of the minority is so firmly rooted that even today, when the educational system is being so radically transformed, *few suggest that*

⁹ Rousselle, *supra* note 6 at 69.

¹⁰ Canada, *Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen's Printer and Controller of Stationary, 1967) book I at para 389.

¹¹ Canada, *Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen's Printer and Controller of Stationary, 1967) book II at para 60.

French should be the normal language of instruction and nobody suggests that Roman Catholic attitudes should predominate in all provincial schools.”¹²

By contrast, nearly all of the English-speaking provinces insisted on secular, central control over education, leading to single school systems which effectively denied equal opportunity for Francophones.¹³ Requests for reform or additional rights for the Francophone minority with regards to education “fell for the most part on deaf ears”.¹⁴ In exceptional situations, French rights were granted; however, this did not entail a provision of resources by the provincial government to ensure quality education.¹⁵ As a result, the Francophone minority outside Quebec was often poorly educated, and many simply dropped out of school.¹⁶ For the most part a policy of assimilation was carried out: “The French-language minority was excepted to adjust to an English-language system of education, and ultimately to the language itself”.¹⁷

Aside from standards of education, the *Laurendeau-Dunton* report created a broader distinction between the Anglophone minority in Quebec and the Francophone minority outside Quebec in holding that Anglophones in Quebec did not constitute a true “minority”. According to the drafters, “[i]n many aspects of provincial life, [...] English-speaking Quebecers cannot be considered a minority. There are corporations, institutions, and residential districts where they are in the majority, and many have found it possible to spend a lifetime in Quebec without ever using the language of the provincial majority.”¹⁸ For the drafters, the educational régime of English Quebecers was also part of what they called an “almost paradoxical minority situation”.¹⁹

The situation in Quebec was soon to change, however, and by the time the report was published, nationalist sentiments were already starting to flow through Quebec. By 1971, choice of language education as proposed by the *Laurendeau-Dunton* report was completely absent from the proposed charter of rights under the failed Victoria conference due to Quebec’s concern that creating a legal right would lead too many Quebecers to choose English as their language of education.²⁰ Indeed statistics clearly showed that immigrants to Quebec were by and large choosing to enter the English public school system.²¹ Armed with these worrisome statistics, and propelled by a new sovereign sentiment in Quebec, Bill 101 and the

¹² *Ibid* [emphasis added].

¹³ *Ibid* at para 96.

¹⁴ *Ibid* at para 97.

¹⁵ *Ibid* at para 133.

¹⁶ *Ibid*.

¹⁷ *Ibid* at para 132.

¹⁸ *Ibid* at para 74.

¹⁹ *Ibid*.

²⁰ Rousselle, *supra* note 6 at 70-71.

²¹ *Ibid* at 72.

Quebec clause were passed, and choice of language education was abandoned in Quebec.

Bill 101's article 73 – otherwise known as the controversial Quebec clause – is important not only because, as the Supreme Court identifies in *Protestant School Board*, it was perceived as a “defect[ive] regime” requiring remedy through section 23's “corrective measures”,²² but because it directly influenced the construction of and criteria in Section 23 of the *Charter*.²³ Largely a result of Quebec lobbying, the federal government eventually moved from its “choice” position, promoted by the *Laurendeau-Dunton* report, to a position of protecting minority rights and preventing assimilation.²⁴ In doing so, and in accepting to grant rights to minority language groups, the state not only admitted to a linguistic disequilibrium between the rights of majority and minority language groups, but also created the only constitutional section which explicitly imposes on the government a positive obligation to act.²⁵ There is a significant difference between a positive obligation to do something and a negative obligation not to do something. Positive obligations, constitutionally imposed on governments, require concrete action. Further, positive obligations are justiciable and actionable – rights holders can enforce these obligations.

The shift in position by the federal government necessarily entails a shift in goals. Whereas the prior goal of the federal government was to provide equal opportunity for parents to choose their child's language of education, the goal of the provision as it was finally drafted was to give equal rights across Canada to official language minority groups only,²⁶ allowing for their mobility without compromising this right.²⁷ In this respect, the Quebec clause, which only recognized English language education received in Quebec as a prerequisite for access to English language education, was deemed unconstitutional in *Quebec Protestant School Boards*.²⁸

Despite the goal of providing equal rights in relation to minority language education across Canada, a political compromise was made in favour of Quebec. Recognizing the threat to the French language due to its minority status in Canada and North America, section 59(1) of the *Constitution Act, 1982* was added, effectively preventing the children of English-speaking immigrants to continue their education

²² *Attorney General of Quebec v Quebec Association of Protestant School Boards*, [1984] 2 SCR 66 at 79, 10 DLR (4th) 321 [*Quebec Protestant School Boards*].

²³ Rousselle, *supra* note 6 at 73.

²⁴ *Ibid*.

²⁵ Mark Power, “Les droits linguistiques en matière d'éducation” in Michel Bastarache & Michel Doucet, eds, *Les droits linguistiques au Canada*, 3rd ed (Cowansville, QC: Yvon Blais, 2014) 657 at 663.

²⁶ Rousselle, *supra* note 6 at 75.

²⁷ *Ibid* at 74.

²⁸ *Ibid* at 74.

in the English school system.²⁹ The fact that Quebec was given, through section 59, the right to be exempt from section 23(1)(a) so long as it wishes suggests that the federal government saw the threat to the French language to be a near-permanent if not permanent concern. Indirectly, section 59(1) also recognizes the *Laurendeau-Dunton* Report's claim that the Anglophone minority in Quebec does not constitute a true minority, but it also goes further: by suggesting that the French language will always need to be protected, section 59(1) conversely suggests that the Anglophone minority in Quebec will never be a true minority. This in turn has impacted the judicial history of section 23.

4. JUDICIAL HISTORY

The judicial history of section 23 reflects the legislative history as described above in many ways. First, the types of claims brought by the Francophone minority outside Quebec are entirely different from those brought by the Anglophone minority in Quebec: while claims outside Quebec normally deal with the availability of section 23 schools and the right to manage those schools, claims in Quebec usually deal with protection of these existing rights from expropriation or disappearance.³⁰ This highlights the different starting points of the two minority language groups when the *Charter* was enacted. Next, the many successful claims for section 23 institutions and management rights by Francophone minority groups outside Quebec suggest that the courts are serious about remedying the historic disadvantage of the Francophone minority outside Quebec. By contrast, the limited success of Anglophone minority groups in curbing attempts to limit access to section 23 schools suggests that the courts still accept the justification behind section 59(1) of the *Charter*.³¹ Before delving into this, the courts' interpretation of section 23 rights should first be examined. Since section 23(1)(a) does not apply in Quebec, the focus will be on the remainder of the section.

Defining the rights: who qualifies?

Nguyen v Quebec explains that section 23(1)(b) establishes “the categories of rights holders who may demand instruction [for their children] in the minority language.”³² The explicit terms of 23(1)(b) limit this category to “citizens 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 linguistic minority.”³³ For its part, section 23(2) “concerns the continuity of a child’s language of instruction and family unity. Under it, citizens of Canada of whom any child is receiving or has received instruction in the language of

²⁹ *Ibid* at 75.

³⁰ Power, *supra* note 25 at 764.

³¹ See e.g. *Gosselin supra* note 7 at para 31.

³² *Nguyen v Quebec (Education, Recreation and Sports)*, 2009 SCC 47 at para 24, [2009] 3 SCR 208 [*Nguyen*].

³³ *Ibid*.

the linguistic minority may have all their children receive primary and secondary school instruction in that same language.”³⁴ Finally, section 23(3) explains that the guaranteed rights to minority language education in section 23 only apply “where the number of children who can benefit from them is sufficient.”³⁵

Extent of the rights: Mahe³⁶, Reference Re Public Schools Act³⁷, Arsenault-Cameron³⁸

The Supreme Court has found that section 23 provides a “comprehensive code of minority language education rights,” recognizing that the status granted to minority language communities necessarily creates “inequalities between linguistic groups”.³⁹ As a result of the comprehensiveness of section 23, the Supreme Court in *Doucet-Boudreau* suggested that the “general content of s.23” was “now largely settled” through just three leading cases, notably: *Mahe v Alberta*, *Reference Re Public Schools Act*, and *Arseneault-Cameron v Prince Edward Island*.⁴⁰ Each of these cases and the lessons drawn from them with regards to the extent of section 23 rights will be discussed in turn.

*Mahe (1990)*⁴¹

It is clear that nothing in the written text of the Constitution explicitly gives rights to school *boards*. Rather, rights are given to individual parents, and, in order to enforce these rights, minority language *instruction OR educational facilities* must be provided where the numbers warrant. However, this is far from the end of the story, and, as we come to learn from *Mahe*, minority language school boards appear to be constitutionally protected.

In *Ford v Quebec*, the Supreme Court held that language is necessarily associated with one’s cultural identity.⁴² This connection led the Supreme Court in *Mahe* to understand the justification behind section 23 as being not only the protection and promotion of minority language but also the protection and promotion of minority *culture*, since “[l]anguage is [...] part and parcel of the

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Mahe v Alberta*, [1990] 1 SCR 342, 68 DLR (4th) 69 [*Mahe*].

³⁷ *Reference re Public Schools Act (Man), s 79(3), (4) and (7)*, [1993] 1 SCR 839, 100 DLR (4th) 723 [*Reference Re Public Schools Act*].

³⁸ *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1, [2000] 1 SCR 3 [*Arsenault-Cameron*].

³⁹ *Solski*, *supra* note 7 at para 20.

⁴⁰ *Doucet-Boudreau v Nova Scotia*, 2003 SCC 62 at para 63, [2003] 3 SCR 3 [*Doucet-Boudreau*].

⁴¹ *Mahe*, *supra* note 36.

⁴² *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at 749, 54 DLR (4th) 577.

identity and culture of the people speaking it.”⁴³ Citing the *Laurendeau-Dunton* Report, the Court submitted: “[Minority language schools] are essential for the development of both official languages and cultures; ... the aim must be to provide for members of the minority an education appropriate to their linguistic and cultural identity...”⁴⁴ Finally, the Court recognized the remedial nature of section 23, which was designed to remedy the historical and present-day inadequacies of the education system with respect to official language minority groups.⁴⁵

With these justifications in mind, the Court in *Mahe* engaged in a closer examination of the extent of the rights granted under section 23, the focus of the case. According to the Court, two possible approaches existed: the “separate rights approach”, and the “sliding scale approach”.

Under the “separate rights approach”, section 23 contains only two rights: one dealing with instruction, and the other with facilities. Each provides a certain level of rights and services when a numerical threshold is reached. The theory is thus based on the existence of a formula equating the amount of rights and services to the number of minority language students. According to the approach, where “X” number of students ensures a right to full management and control, “X-1” would not, and might not even ensure the right to a school building.⁴⁶ The Court argues that this result would be completely unacceptable

“[g]iven the variety of possible means of fulfilling the purpose of s.23 [...] Moreover, the separate rights approach places parties like the appellants in the paradoxical position of forwarding an argument which, if accepted, might ultimately harm the overall position of minority language students in Canada. If, for instance, the appellants succeeded in persuading this Court that s.23 mandates a completely separate school board [...] then other groups of s.23 parents with slightly fewer numbers might find themselves without a right to any degree of management and control – even though their numbers might justify granting them some degree of management and control.”⁴⁷

As a result, the Supreme Court rejected this approach.

The sliding scale approach and “where the numbers warrant”

⁴³ *Mahe*, *supra* note 36 at 362.

⁴⁴ *Ibid* at 362-63 [emphasis in original].

⁴⁵ *Ibid* at 363.

⁴⁶ *Ibid*.

⁴⁷ *Ibid* at 366-67.

Instead, the Court held that section 23 should be understood as a “general right to minority language instruction” qualified by the two paragraphs under subsection 3: (a) the right is only guaranteed where “the number of children” warrants it, and (b) a right to “minority language educational facilities” will also exist where the numbers warrant.⁴⁸ In other words, section 23 guarantees only the legal rights and services deemed appropriate in order to achieve the proper minority language instruction necessary for the given number of students involved. The Court labels this the “sliding scale approach,” with subs. (3)(b) indicating the upper level of this range and the term ‘instruction’ in subs. (3)(a) indicating the lower level”.⁴⁹

In order to determine what rights and services can be deemed appropriate, two factors are taken into consideration: “(1) the services appropriate, in pedagogical terms, for the numbers of students involved; and (2) the cost of the contemplated services.”⁵⁰ The first criterion recognizes that “a threshold number of students is required before certain programmes or facilities can operate effectively,” whereas the second requires that funding allocated be representative of the “number of students involved”.⁵¹ Given the remedial nature of section 23, the first criterion generally carries more weight.⁵²

For its part, the “number of students involved” is determined by an estimate of “the number of persons who will eventually take advantage of the contemplated programme or facility.”⁵³ There is no magic number to hit, however, as the objectives of section 23 cannot be met by providing a cut-off number, and indeed the Court suggests that the numbers would be quite different for rural versus urban cases, for example.⁵⁴ Similarly, the Court finds that the calculation of “relevant numbers” need not follow existing school boundaries; referencing *Reference Re Education Act of Ontario*, the Court holds that the numbers fixed are not immutable and can be modified according to region and the type of education to be provided.⁵⁵

Thus, the rights granted to each minority language group are determined on the basis of a qualitative analysis that considers the degree of rights allocation that would best fulfill the purpose of section 23 against the number of students who would be affected, allowing section 23 to adapt to differing local contexts and circumstances.⁵⁶

⁴⁸ *Ibid.*

⁴⁹ *Ibid* at 366.

⁵⁰ *Ibid* at 384.

⁵¹ *Ibid* at 385.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid* at 356.

⁵⁵ *Ibid* at 386; Patrice Garant, *Droit scolaire* (Cowansville, QC: Yvon Blais, 1992) at 123.

⁵⁶ Power, *supra* note 25 at 677.

How much management and control can minority groups be awarded?

At issue in *Mahe* was the possible range of rights and services that fell under the “upper level” of section 23. In its attempt to define the upper range of rights under section 23(3)(b), the Court in *Mahe* held that a *degree of management and control* was required over minority language educational facilities.⁵⁷ First, common sense dictates that the word “instruction” in subsection (3)(b) necessarily entails a right to be instructed in facilities; as a result, the term “minority language educational facilities” must include something more than simply physical space or the term would be meaningless.⁵⁸ Additionally, the French version of the text suggests that the facilities must belong to the minority language group, and not simply exist for its use.⁵⁹ Next, the purpose of section 23 – “to preserve and promote minority language and culture through Canada” – also supports the idea that “minority language parents [should] possess a measure of management and control over the educational facilities in which their children are taught.”⁶⁰ Indeed, management and control from within the community is seen as “vital” in ensuring that a minority language and culture flourish, especially since various management issues in education, including curricula, hiring, and expenditures, can affect linguistic and cultural concerns and hence the health and survival of the minority language group in question.⁶¹ Finally, the Court turns to history, noting that “minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns,” as was certainly the case leading up to the B&B Commission as well as the debates on section 23.

Although “management and control” is an “imprecise” power, precision can be achieved by determining “what type of management and control is needed in order to fulfill the purpose of s.23” with regards to the minority community in question.⁶² According to the Court in *Mahe*, the maximum level of management and control is the school board, an institution which the minority “can consider its own with all this entails in terms of opportunity of working in its own language and of sharing a common culture, interests and understanding and *being afforded the fullest measure of representation and control.*”⁶³ It logically follows that the largest minority populations would have a constitutionally guaranteed entitlement to independent school boards in order to meet the purpose of section 23.

The Court notes however that where the minority population is small, an independent school board may in fact be detrimental to the purpose of section 23. Small numbers suggest fewer resources, which in turn negatively impacts the

⁵⁷ *Mahe*, *supra* note 36 at 370.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid* at 371-72.

⁶¹ *Ibid* at 372.

⁶² *Ibid* at 373.

⁶³ *Ibid.*

quality of education of the minority population. Where the number of students is insufficient to warrant an independent school board, the Court suggests “guaranteeing representation of the minority on a shared school board and [...] giving these representatives exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns.”⁶⁴ While it is impossible and self-defeating to give “an exact description” of what is required in order to ensure exclusive control over these areas and thus meet the goals of section 23, the Court suggests that the following conditions be met where the numbers do require linguistic minority representation on an existing school board:⁶⁵

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

The Court stresses that these are mere examples and not an exhaustive list of the extent of the rights allocated by section 23 when the numbers fall just short of requiring an independent school board.⁶⁶ However, later the Court goes on to say that these rights should necessarily follow “whenever the number of students justifies creating a minority language school”.⁶⁷ The Court notes as well that other degrees of management and control may also be required depending on the circumstances and what the numbers warrant.⁶⁸

⁶⁴ *Ibid* at 375-76.

⁶⁵ *Ibid* at 377.

⁶⁶ *Ibid* at 378.

⁶⁷ *Ibid* at 387.

⁶⁸ *Ibid* at 380.

Finally, the Court notes that full management and control does not preclude provincial legislation enacted under the provincial powers over education. As the Court holds, “[t]he province has an interest both in the content and the qualitative standards of educational programmes.”⁶⁹ So long as these programs do not infringe on section 23, the school board will have a duty to implement them, as the school board is simply a creation of province with delegated authority.⁷⁰

Having canvassed the degrees of management and control which section 23 might require, the Court turns to the specific situation of Edmonton in order to determine what rights the numbers there warrant. In doing so, the Court necessarily takes into account the unique situation of the Francophone minority in Edmonton, and considers the following statistics: the Francophone population in Edmonton, the number of school-aged children forming part of the group, the number of students enrolled in the current school and whether the school was at capacity (or how much space was available), whether the school suffered from financial or pedagogical problems, the size of each school system in Alberta and of each of the nine school jurisdictions in Edmonton. No mention was made of any historical discrimination of the Francophone minority in Edmonton. Ultimately, the Court found that, within *this context*, a group of 242 students was insufficient to mandate the establishment of a school board, and that the existence of a school along with the rights that follow sufficiently promoted the purposes behind section 23.

The *Mahe* decision is thus important for a number of reasons. First, the Court recognizes that language is integral to one’s identity and culture. Second, the Court acknowledges section 23 rights as entailing a positive obligation by the state to act in such a way as to maintain and promote the language and culture of a minority group. Third, the Court affirms the need for provinces to apply a “sliding scale” approach in the determination of the type and level of section 23 rights and services appropriate for a particular number of students in a particular minority language community. While each community’s unique characteristics must be considered on its own merits, *Mahe* importantly provides an example of how to apply the “sliding scale” approach. Fourth, the Court acknowledges that school boards may be required to meet section 23 language obligations “where the numbers warrant”. Finally, the fact that the Court in *Mahe* gives an inexhaustive list of the rights bestowed unto communities that are ineligible for school boards suggests that those communities that are eligible are, at the very least, entitled to those same managerial rights.

*Reference Re Public Schools Act (1993)*⁷¹

At issue in *Reference Re Public Schools Act* was the constitutionality of ss. 79(3), 79(4), and 79(7) of *The Public Schools Act* of Manitoba in light of, in

⁶⁹ *Ibid.*

⁷⁰ Garant, *supra* note 55 at 158-59.

⁷¹ *Reference Re Public Schools Act*, *supra* note 37.

particular, section 23 of the *Charter* and the recent decision in *Mahe*. The questions remaining in appeal were:

- 1) Whether the right to receive instruction “in the minority language educational facilities” guaranteed by section 23(3)(b) included the right to receive instruction in a distinct physical setting;
- 2) Whether section 23 granted the minority group a right of management or control over minority language instruction and facilities; and
- 3) Whether the provisions in *The Public Schools Act* concerning the formation of school divisions and districts, the election of school boards, and the powers and duties of school boards, were constitutional.

While many of the Constitutional questions were easily settled by *Mahe*, it is worth briefly examining the Court’s application of *Mahe* to the facts in question in this case.

Based primarily on *Mahe* and its understanding of the justification behind section 23, the Court concluded that the general right of minority language instruction conferred by section 23 of the *Charter* necessarily includes the right to receive said instruction in a facility *belonging to* the linguistic minority group. However, in applying the sliding scale approach, the Court noted that “[p]edagogical and financial considerations” might play a role in determining exactly how one might meet this goal in a particular situation.⁷² The Court held that the assessment of what constitutes an appropriate facility can only be undertaken on the basis of a “distinct geographic unit within the province,” since the financial impact of the provision of specific facilities would necessarily vary from region to region.⁷³

The questions of management and control were also easily settled by *Mahe*, and the Court simply reiterated that the “degree of management and control under [the] sliding scale approach [...] depends on the number of children, which is determined by reference to both actual and potential numbers.”⁷⁴ In contrast to the Francophone population of Edmonton, however, the Manitoba numbers “clearly” fell “on the high end of the ‘sliding scale’”.⁷⁵ While of course the Manitoba case is on a province-wide scale and the *Mahe* case dealt only with a city population, the numbers of (potential) students is useful for comparison sake⁷⁶: whereas only 242 students were at issue in the *Mahe* case, the number of students who might be eligible for the French school system in Manitoba ranged anywhere from 5,617 to

⁷² *Ibid* at 856.

⁷³ *Ibid*.

⁷⁴ *Ibid* at 858.

⁷⁵ *Ibid* at 859.

⁷⁶ Acknowledging, however, the limited use of comparison given that the rights granted to each minority language group are determined on the basis of a qualitative analysis that allows section 23 to adapt to differing local contexts and circumstances.

18,975.⁷⁷ Consequently, the Court determined that the numbers in some areas of Manitoba did warrant the establishment of a separate Francophone school board, and held that this positive obligation should be discharged “without delay” by amending *The Public Schools Act* to bring it in line with the requirements set out in *Mahe*.⁷⁸

*Arseneault-Cameron v Prince Edward Island (2000)*⁷⁹

Arseneault-Cameron provides the first strong example of the Court’s focus on the remedial nature of section 23 in determining the outcome of the case. Indeed, the Court takes this opportunity to reaffirm *Beaulac* and its conclusion that the historical compromise at the heart of section 23 should no longer be considered⁸⁰; instead, all language rights are to be interpreted at all times as a function of their object as determined in *Mahe*, that is, the protection and promotion of official minority languages. The main issue in the case was the “delineation of the right of management and control exercised by the French Language School Board with regard to the location of minority language schools and the discretion of the Minister to approve of the decision of the Board in that regard.”⁸¹ However, in order to resolve the issue, the Court spends a significant amount of energy analyzing the historical and contextual background of French language rights in Prince Edward Island.

From the start of its analysis, the Court emphasizes the remedial purpose of section 23. Citing *Beaulac*, the Court holds: “[l]anguage rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada”.⁸² The Court arguably goes further, insisting that a “purposive interpretation of s. 23 rights is based on the *true purpose of redressing past injustices* and providing the official language minority with *equal access to high quality education in its own language*, in circumstances where community development will be enhanced.”⁸³ Accordingly, in order to determine whether the government has failed to meet its section 23 obligations, a judge should “understand the historical and social context of the situation to be redressed, including the reasons why the system of education was not responsive to the actual needs of the official language minority in 1982 and why it may still not be responsive today.”⁸⁴ The judge should also begin his or her reasons by explaining this historical background.⁸⁵

⁷⁷ *Reference Re Public Schools Act*, *supra* note 37 at 858-59.

⁷⁸ *Ibid* at 859.

⁷⁹ *Arseneault-Cameron*, *supra* note 38.

⁸⁰ *R v Beaulac*, [1999] 1 SCR 768 at para 24, 173 DLR (4th) 193 [*Beaulac*].

⁸¹ *Arseneault-Cameron*, *supra* note 38 at para 6.

⁸² *Ibid* at para 27 [emphasis in original], citing *Beaulac*, *supra* note 80 at para 25.

⁸³ *Ibid* [emphasis added].

⁸⁴ *Ibid* at para 27.

⁸⁵ *Ibid* at para 28.

It should be observed that this process of judicial reasoning may be counterproductive for the Anglophone community in Quebec, since contrary to the historical context of Francophones outside Quebec, the historical context of Anglophones inside Quebec started with the highest level of the panoply of educational services which has significantly and progressively declined predominantly because of Quebec's language law legislation.

Of particular concern to the Court in *Arseneault-Cameron* was the "linguistic and cultural assimilation of the Francophone community in Summerside," which went ignored by the Minister when he recommended that the Francophone children of Summerside be educated in a homogeneous school located in another community.⁸⁶ The Minister's failure in this respect, along with his broader failure to "give proper weight to the promotion and preservation of minority language culture and to the role of the French Language Board in balancing the pedagogical and cultural considerations" necessarily entailed a failure in his duty to exercise his discretion in accordance with the *Charter*, increasing the likelihood that his decision would be overturned on judicial review.⁸⁷

Where the numbers warrant

Arseneault-Cameron also provides a strong example of the importance and effect of adopting the sliding scale approach. The population of Summerside is small, and the population of its Francophone minority, smaller. Indeed, the Court found that only between 49 and 155 students would likely take advantage of French language instruction in Summerside,⁸⁸ a number far below the numbers in either *Mahe* or *Reference Re Manitoba School Act*. Nevertheless, the Court found, in applying the two-part test from *Mahe*, that the numbers did warrant a local Francophone school.

In addressing the determination of appropriate pedagogical terms for the number of students involved, the Court held that it was "important to consider the value of linguistic minority education" and that any "pedagogical requirements established to address the needs of the majority language students cannot be used to trump cultural and linguistic concerns appropriate for the minority language students".⁸⁹ Despite the Minister's claim that a minimum of 100 students was required for a school to be viable, the Court found no evidence to maintain that submission, and held that the number proposed by the Minister was, in any event, "unrelated to the specific circumstances and needs of the official language minority in the Summerside area".⁹⁰ For its part, costs were not considered to be an issue in the case.

⁸⁶ *Ibid* at para 29.

⁸⁷ *Ibid* at para 30.

⁸⁸ *Ibid* at para 33.

⁸⁹ *Ibid* at para 38.

⁹⁰ *Ibid* at para 40.

The Role of the Minority Language Board & questions of substantive equality

As was held in *Mahe*, minority language groups cannot rely upon the majority to take into consideration the full range of linguistic and cultural concerns held by the minority. As a result, when a minority language school board has been established, it is for the school board, in its capacity as representative of the minority language community, to decide what is in the best interest of the minority group it represents when faced with a matter that directly pertains to the “preservation and flourishing of the linguistic minority community”.⁹¹ This is part of the school board’s rights of management and control.

The question in *Arsenault-Cameron* was whether location of minority language instruction facilities should be considered an aspect of education that pertains to linguistic and cultural concerns, such that the minority group should be given management and control over the decision rather than the Minister. The concern was that such a decision could involve “financial and pedagogical considerations that may have been adopted by the department of education independently of any cultural or linguistic considerations,” such as the Minister’s findings regarding the low pedagogical benefit of small majority language schools and travel arrangement concerns.⁹²

The Court resolved this issue by highlighting the need for substantive equality. Citing *Mahe*, the Court held: “the specific form of educational system provided to the minority need not be identical to that provided to the majority. The different circumstances under which various schools find themselves, as well as the demands of a minority language education itself, make such a requirement impractical and undesirable.”⁹³ Indeed, fulfilling the remedial purpose of section 23 often requires creating inequality between the majority and minority language groups: “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 majority.”⁹⁴ Section 23 is thus not about equating the rights or services given to the majority and minority language communities, but rather focuses on ensuring that the minority language community can thrive and fend off assimilation by insulating themselves within their own distinct schools and school boards.

In this case, the Minister erred in failing to recognize that in denying small sized facilities to the minority language community in Summerside, he was “depriving French language students of equal access to quality education in their own language,” regardless of the fact that he found equivalent sized majority

⁹¹ *Ibid* at paras 43, 47.

⁹² *Ibid* at para 47.

⁹³ *Ibid* at para 48, citing *Mahe*, *supra* note 36 at 378.

⁹⁴ *Ibid* at para 31.

language schools to be lacking in pedagogical benefit.⁹⁵ Additionally, he failed in applying a uniform standard for travel considerations for both majority and minority students. This was inappropriate in this case because while choice of travel necessarily impacted the possibility of assimilation for minority language children, it had no cultural impact on majority language children.⁹⁶ In any event, travel considerations lie “at the core of the management and control conferred on the minority language rights holders and their legitimate representatives by [virtue of] s.23,” and therefore it was for the school board to make these decisions and the Minister to simply accept them.⁹⁷

The Role of the Minister of Education

In the exercise of discretionary authority, the Minister had to give sufficient importance to the promotion and preservation of the French language. Under the *School Act* and its regulations, the French Language Board had an obligation to offer French language instruction where the numbers warrant, and had the exclusive right to determine the location of said classes or facilities, subject to the Minister’s approval.⁹⁸ In this case, while the Minister acknowledged that the numbers warranted instruction, he refused to offer it in the location where it was needed. This decision was unconstitutional, because the offer of classes or a facility falls under the exclusive jurisdiction of the school board, which complied with all provincial and constitutional requirements.⁹⁹ Additionally, the Minister’s discretion was limited to simply verifying that the school board had met all the requirements of the provincial regulations.¹⁰⁰

The Court notes, however, that had the province enacted regulations authorizing the Minister to intervene and enforce provincial norms, the outcome of this case could have potentially been different.¹⁰¹ The text of the Regulations associated with the *School Act* thus play an important role in this decision.

The requirement for local facilities

The fact that a 40-50 minute commute was found to be an unreasonable demand on the minority population in this case carries important implications. In this case, the Court found that the duty to promote the minority language could not entail simply concentrating all minority language students in one predominantly French region.¹⁰² The Court emphasizes: “Section 23(3)(a) states that the right to

⁹⁵ *Ibid* at para 48.

⁹⁶ *Ibid* at para 50.

⁹⁷ *Ibid* at para 51.

⁹⁸ *Ibid* at para 55.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid* at para 58.

¹⁰² *Ibid* at para 56.

minority language instruction applies ‘wherever in the province’ [...] the number of children is sufficient to warrant such instruction. The words ‘wherever in the province’ link the right to instruction to the geographic place where the conditions for the exercise of that right are present.”¹⁰³

Still, there is no formula in determining where a school should be opened; this determination must be decided on a case-by-case basis. Once again the court highlights that “complex historical, social and geographic factors” should be taken into consideration¹⁰⁴ in such a way as to favour community development and meet the purpose of section 23.

5. Role of Comparative Statistical Data

In *Charlebois*¹⁰⁵, the New Brunswick Court of Appeal interprets section 18(2) of the *Charter* differently than courts to date had interpreted section 133 of the *Constitution Act 1867*. Despite the fact that article 18(2) was clearly inspired by section 133 and that one would have expected the Court to be bound by its previous interpretations, the Court importantly held that linguistic rights cannot be fixed to a historic point in time.

This echoes the Supreme Court’s demand, in *Arseneault-Cameron*, that a judge faced with a section 23 case “understand the historical and social context of the situation to be redressed, including the reasons why the system of education was not responsive to the actual needs of the official language minority in 1982 and why it may still not be responsive today.”¹⁰⁶ Because language rights necessarily evolve differently in particular situations and contexts, the social and demographic history of Canada or the province concerned must be the backdrop of any rights analysis; as Doucet, Bastarache and Rioux argue, a language rights analysis simply cannot be conducted in the abstract.¹⁰⁷ To this end, statistics present the judge with a picture of the (in)effectiveness of a province’s education program over time with respect to minority language rights. It is to this extent that they are useful.

Minority French language schools (section 23 schools outside Quebec)

The legislative history of section 23 of the *Charter* as described above suggests that Francophone minorities outside Quebec were the main targets of the remedial legislation, Anglophones in Quebec prior to the enactment of the *Charter of*

¹⁰³ *Ibid* at para 56 [emphasis in original].

¹⁰⁴ *Ibid* at para 57.

¹⁰⁵ *Charlebois v Mowat et ville de Moncton*, 2001 NBCA 117, 242 NBR (2d) 259 [Charlebois].

¹⁰⁶ *Ibid* at para 27.

¹⁰⁷ Michel Doucet, Michel Bastarache & Martin Rioux, “Les droits linguistiques: Fondements et interprétation” in Michel Bastarache & Michel Doucet, eds, *Les droits linguistiques au Canada*, 3rd ed (Cowansville, QC: Yvon Blais, 2014) 1 at 76.

the French language being perceived as either an extension of English Canada or a minority group within Quebec having no need of specific protection. Prior to 1982, few provinces provided for minority language education for Francophones, resulting in high levels of assimilation. The story since 1982, and particularly since the *Mahe* decision, has been substantially different in many provinces, according to the statistics. Power and Foucher argue that section 23 and the Courts' interpretation of it are the principal reasons for the "growing and strengthening network of publicly funded minority language schools in all Canadian jurisdictions, managed and controlled by members of the minority".¹⁰⁸

The following statistics show the percentage change and overall enrolment in Francophone minority (section 23) language programs offered in elementary and secondary schools across Canada between 1997 and 2013:¹⁰⁹

- In 1997/1998, just over 150,000 Canadians attended a Francophone minority language school. That number increased to over 152,000 by 2012/2013, representing a slight increase of 1%.
- In 1997/1998, 246 Newfoundlanders attended a Francophone minority language school. That number increased to 348 by 2012/2013, representing an increase of over 41%. A steady increase has been visible throughout this time, with a significant peak over the last two years of the study.
- In 1997/1998, 624 Prince Edward Islanders attended a Francophone minority language school. That number increased to 828 by 2012/2013, representing an increase of 32%. A steady increase was visible throughout this time, with a jump in 2010/2011 that has since been maintained.
- In 1997/1998, 4182 Nova Scotians attended a Francophone minority language school. That number increased to 4917 by 2012/2013, representing an increase of 17.5%. Again, the increase has been steady throughout this period, with a slight jump over the past 3 years of the study.
- In 1997/1998, 42,189 students in New Brunswick attended a Francophone minority language school. That number decreased sharply to 29,124 by 2012/2013, representing a steep drop of nearly 31%. This decreasing trend is visible throughout the period of the study.

¹⁰⁸ Michael Power & Pierre Foucher, "Language Rights and Education" in Michel Bastarache J, ed, *Language Rights in Canada*, 2nd ed (Cowansville, QC: Yvon Blais, 2004) 369 at 436.

¹⁰⁹ Statistics Canada, "Enrolments in minority and second language programs offered in public elementary and secondary schools, by type of program, grade and sex, Canada, provinces and territories", CANSIM (database) table 477-0027, online: < www5.statcan.gc.ca/cansim/ > [Statistics Canada, "Enrolments"].

- In 1997/1998, 93,585 Ontarians attended a Francophone minority language school. That number increased to 98,697 by 2012/2013, representing a slight increase of 5%. A steady decrease was visible from 1997/1998 through 2004/2005, which then steadily reversed between 2004/2005 and 2012/2013.
- In 1997/1998, 5427 Manitobans attended a Francophone minority language school. That number decreased slightly to 5397 by 2012/2013. Fluctuations were been minor throughout the period of the study.
- In 1997/1998, 1083 students in Saskatchewan attended a Francophone minority language school. That number increased to 1770 by 2012/2013, representing a sharp increase of 63%. The numbers have been increasing steadily particularly since 2004/2005.
- In 1998/1999, 3591 Albertans attended a Francophone minority language school. That number increased to 6306 by 2012/2013, representing a giant leap of 75%. This upward trend has been consistent since 2002.
- In 1997/1998, 2859 British Columbians attended a Francophone minority language school. That number increased to 4743 by 2012/2013, representing another large increase of 66%. This upward trend has been consistent since 2001.
- In 2002/2003, 282 students living in the combined Territories attended a Francophone minority language school. That number increased to 492 by 2012/2013, representing another significant leap of 75%.

Overall, these statistics show that section 23 schools outside of Quebec, New Brunswick, and Manitoba are increasing in popularity, sometimes dramatically. Of course, additional data regarding the percentage of minority members opting to attend section 23 schools would help situate these statistics further.¹¹⁰ Nevertheless, the clear trend is an important indication of the future of the vitality of the French language and culture outside Quebec given the importance of school in the protection and promotion of minority language and culture. As the Court held in *Arsenault-Cameron*, schools are “the single most important institution for the survival of the linguistic minority”.¹¹¹

¹¹⁰ A 2006 study shows that 52% of children with at least one French-speaking “rights holder” parent will attend French minority school. However, I have no equivalent statistics for any other period. See: Statistics Canada, “Minorities Speak Up: Results of the Survey on the Vitality of Official-Language Minorities”, by Jean-Pierre Corbeil, Claude Grenier & Sylvie Lafrenière, Catalogue No 91-548-X (Ottawa: Statistics Canada, 2006) at 51.

¹¹¹ *Supra* note 38 at para 29.

Additionally, it should be noted that enrolment in second-language immersion schools, which are not available in Quebec, has also increased over time: in 2008/2009 approximately 317,000 students were enrolled in French-immersion schools, an increase of 14% over the 2000/2001 school year.¹¹² The fact that an increasing number of Anglophone students are choosing to study in French despite the fact that neither of their parents are native French speakers suggests that the future of the French language outside of Quebec is not as dire as some suggest.

Minority English language schools (section 23 schools within Quebec)

As was noted above, the legislative history of section 23 suggests that, at least prior to the enactment of the *Charter of the French language*, Quebec's education system was considered a model to follow. In part due to the separation between the English and French school systems in Quebec prior to the education reform, the Anglophone minority in Quebec was not seen as a true minority. This label has followed Quebec Anglophones, despite their population's sharp and generally steady decrease between 1971 (788,833)¹¹³ and 2011 (599,230)¹¹⁴. Attendance in minority-language (section 23) schools has also decreased over time.¹¹⁵ In 1997/1998, 101,280 Quebeckers attended an English minority language school. By 2012/2013, that number was just 87,852, representing a decrease of over 13%, and this, after the "great migration" of Anglophone Quebeckers towards English-speaking provinces in the 1970s-1980s.¹¹⁶ Additionally, intentions of members of the Anglophone minority to leave Quebec are also high, especially amongst 18-to-24 year olds – the very generation capable of renewing the Quebec Anglophone community. According to the 2006 census, nearly one quarter of all

¹¹² Statistics Canada, "Public School Indicators for Canada, the Provinces and Territories, 2000/2001 to 2008/2009", by Kathryn McMullen & Riley Brockington, online: <www.statcan.gc.ca/pub/81-004-x/2011001/article/11433-eng.htm>.

¹¹³ Statistics Canada, "Portrait of Official-Language Minorities in Canada – Anglophones in Quebec", by Jean-Pierre Corbeil, Brigitte Chavez & Daniel Pereira, Catalogue No 89-642-X (Ottawa: Statistics Canada, 2010) at 11 [Statistics Canada, "Portrait of Official-Language Minorities"].

¹¹⁴ Statistics Canada, *Focus on Geography Series, 2011 Census*, Catalogue No 98-310-XWE2011004 (Ottawa: Statistics Canada, 2012), online: <www12.statcan.gc.ca/census-recensement/2011/as-sa/fogs-spg/Facts-pr-eng.cfm?LANG=Eng&GK=PR&GC=24>.

¹¹⁵ Statistics Canada, "Enrolments", *supra* note 109.

¹¹⁶ Between 1976/1977 and 1981/1982, the number of students enrolled in English-language public schools decreased from 236,588 to 155,585, a decrease of 34%. See: Michel Paillé, *Diagnostic démographique de l'état de la francisation au Québec: Rapport à la Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles* (29 November 2007) at table E.1.

Anglophone adults in that age group intended to leave Quebec within the next five years.¹¹⁷

A relative high rate of exogamy amongst Anglophones in Quebec is also being seen as threatening the future vitality of the culture, as the risk of losing section 23 status necessarily increases. According to the 2011 census,¹¹⁸ out of 122,275 Anglophones who were married or living with a common-law partner, 38,785 (32%) married a Francophone. By contrast, Francophones were much less likely to marry outside their language group: out of nearly 1.45 million Francophones married or living in a common-law relationship, not even 3% married an Anglophone.

The statistics here are crucial in that they show the underlying goals of section 23 are seemingly being defeated in Quebec as Anglophones become assimilated or simply leave the province. Focusing too much on the historical context before the enactment of the *Charter of the French language* leads one to believe that there was little to “redress” in Quebec prior to 1982 because the education system was, for so long, responsive to the needs of English-speaking Quebeckers. Courts should instead recognize that laws such as Bill 101 and Bill 104 have been “specifically designed to reduce access to English schooling”;¹¹⁹ section 23, as a *Charter* right, cannot be read as “stuck-in-time” and must respond to these changes.

The current statistics make it clear that Anglophones are a “true minority” in Quebec. While Bourhis and Foucher find that the English *language* is not threatened in Quebec, they do conclude that the *demographic vitality* of English-speaking communities in Quebec has been eroded.¹²⁰ With virtually no means to grow or increase school enrolment figures, financial resources to these institutions are also diminishing, leading to a school closings and a decline in physical facilities and personnel resources. This suggests that the government is currently failing in its

¹¹⁷ Statistics Canada, “Portrait of Official-Language Minorities”, *supra* note 113 at 54.

¹¹⁸ Statistics Canada, “2011 Census of Canada: Topic-based tabulations, Mother Tongue of Married Spouse or Common-law Partner and Mother Tongue of Other Married Spouse of Common-law Partner for Couples in Private Households of Canada, Provinces, Territories, Census Metropolitan Areas and Census Agglomerations, 2011 Census”, *2011 Census of Population*, Catalogue No 98-314-XCB2011018 (Ottawa: Statistics Canada, 2012), online: <www12.statcan.gc.ca/census-recensement/2011/dp-pd/tbt-tt/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=0&PID=102929&PRID=0&PTYPE=101955&S=0&SHOWALL=0&SUB=0&Temporal=2011&THEME=90&VID=0&VNAMEE=&VNAMEF=>>.

¹¹⁹ Richard Y Bourhis & Pierre Foucher, *The Decline of the English School System in Quebec*, (Moncton, NB: Canadian Institute for Research on Linguistic Minorities, 2012) at 29.

¹²⁰ *Ibid* at 23.

section 23 obligation – according to the Court held in *Doucet-Boudreau*, “This section is designed to correct past injustices not only by halting the progressive erosion of minority official language cultures across Canada, but also by *actively promoting their flourishing*”.¹²¹ The demographic figures presented above appear to represent the very antithesis of a flourishing culture.

6. Summary: What are the rights and privileges of English language school boards in Quebec?

a. Current Supreme Court Approach

It appears clear from *Mahe* that English language school boards in Quebec should be impervious to government intervention and attempts at *complete* dissolution. In accordance with the sliding scale approach adopted in *Mahe* and followed in all subsequent section 23 cases, the largest minority populations are subject to the maximum level of rights determined under section 23 of the *Charter*. Given that the English language minority in Quebec is Canada’s largest official language minority, it should be awarded maximum rights to control and management over its educational facilities.

According to *Mahe*, “this maximum level of management and control” is available to minorities through the provision of an independent school board.¹²² The Court describes the school board as an institution which the minority “can consider its own with all this entails in terms of opportunity of working in its own language and of sharing a common culture, interests and understanding and *being afforded the fullest measure of representation and control*.”¹²³ While “the fullest measure of representation and control” is not defined in *Mahe*, the Court does identify a series of decisions that minority language representatives sitting on local school boards or other public authorities which administer minority language instruction or facilities “should have exclusive authority to make” in relation to minority language instruction and facilities. These areas of exclusive include, but are not limited to¹²⁴:

- (a) expenditures of funds provided for such instruction and facilities;
- (b) appointment and direction of those responsible for the administration of such instruction and facilities;
- (c) establishment of programs of instruction;
- (d) recruitment and assignment of teachers and other personnel; and
- (e) making of agreements for education and services for minority language pupils.

¹²¹ *Supra* note 40 at para 27 [emphasis added].

¹²² *Mahe, supra* note 36 at 377. At 377, the Court identifies what rights are available to minority language groups where “this maximum level of management and control” (referring to an independent school board) is not warranted.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

It logically flows that these exclusive management rights should also be available to minority groups who do have their own school boards.

Professor Mark Power expands on some of these exclusive areas of power.¹²⁵ Drawing on *Mahe* and the Court's declaration that a minority language community must exercise control over educational aspects relating to or touching on that community's language or culture, he argues that essentially everything related to language and culture, as well as anything capable of influencing language and culture, fall under the exclusive management and control of the minority:

« Il s'agit notamment des dépenses, du recrutement des responsables administratifs et pédagogiques, de la conception et de la mise en œuvre des programmes d'instruction, du recrutement et de l'affectation des enseignants et des agents ainsi que de la conclusion d'accords en matière de services et d'enseignement dans la langue de la minorité. L'argent ou les fonds fédéraux destinés à appuyer l'instruction dans la langue de la minorité influent nécessairement sur la capacité des commissions scolaires de réaliser leurs mandats. La décision d'admettre ou non un enfant à un enseignement dans la langue de la minorité représente un autre aspect de l'instruction lié à la langue et à la culture. Pour la même raison [...] le pouvoir exclusif de gestion et de contrôle comprend nécessairement, par exemple, le pouvoir de choisir la langue des communications écrites et orales avec les parents ayant des droits en vertu de l'article 23, mais ne s'exprimant pas en français, la configuration des programmes primaires et secondaires, là où le nombre le justifie, en écoles distinctes ou sous un même toit [...], ou encore le choix de réserver des espaces scolaires pour des programmes de garderie ou autres programmes préscolaires ou parascolaires. Cette liste n'est certes pas exhaustive...»¹²⁶

Finally, Professor Power also highlights the addition of « l'implantation, la taille des établissements de langue minoritaire ainsi que la durée des trajets en autobus » (stemming from *Arsenault-Cameron*) as other considerations that influence language and culture and which relate to the powers of management and control over minority language education.¹²⁷

The remedial nature of section 23 also suggests that, even if Quebec's French language school boards were amalgamated or dissolved completely, Quebec's English language school boards would be protected. Recall that under the theory of

¹²⁵ Power, *supra* note 25 at 728.

¹²⁶ *Ibid* at 728-29.

¹²⁷ *Ibid* at 729.

substantive equality, the rights granted to both the majority and minority school boards need not necessarily be equal, as was explicitly stated in *Arsenault-Cameron*: “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 majority.”¹²⁸ The ultimate goal of section 23 as identified by the Court in *Mahe* is the furtherance of both official languages, even if it comes at the expense of equality between minority and majority language communities.

Minority language school boards cannot be dissolved simply because the government decides to dissolve all school boards within a province. Measures taken that touch on minority language rights must be based “sur les besoins particuliers de la communauté tout en étant respectueuses de la culture de la minorité, de ses vulnérabilités et de son contexte.”¹²⁹ Absent a greater degree of rights for the minority, the majority would overpower the minority, effectively quelling the ability of minority language communities to flourish and fully defeating the purpose of section 23. According to the Supreme Court in *Mahe*, where the numbers warrant, minority language school boards are mandated under section 23 of the *Charter*. Consequently, even if majority French language school boards in Quebec were dissolved, minority English school boards should be protected. This would likely give rise to an inequality argument under section 15 of the *Charter*, but, according to *Mahe*, the right to equality is not opposable to section 23:

“A notion of equality between Canada’s official language groups is obviously present in s. 23. Beyond this, however, the section is, if anything, an exception to the provisions of ss.15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada. ... [I]t would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to ‘every individual’.”¹³⁰

Indeed, the Court has regularly rejected claims based in section 15(1) that seek to recognize or reinforce language rights.¹³¹

¹²⁸ *Supra* note 38 at para 31.

¹²⁹ Doucet, Bastarache & Rioux, *supra* note 107 at 74.

¹³⁰ *Supra* note 36 at 369.

¹³¹ See e.g. *Westmount (Ville de) c Québec (Procureur Général du)*, [2001] RJQ 2520, 2001 CanLII 13655 (QC CA) [*Westmount*]; *Lalonde v Ontario (Commission de restructuration des services de santé)*, [2001] 56 OR (3d) 505, 208 DLR (4th) 577 [*Lalonde*]; *Gosselin*, *supra* note 7 at para 21.

Potential for defeat

Despite what appears to be an indirect constitutional protection of minority language school boards particularly in Quebec and in other communities with large minority populations (i.e., where the numbers clearly warrant), there is reason to believe that school boards can in fact be eliminated by the state. As the Supreme Court held in *Public School Boards' Assn of Alberta*:

“School boards [...] represent the vehicles through which the constitutionally entrenched [...] rights of individuals are realized. Yet that is not to say that the institutions themselves are entrenched or must remain mired in their historical form to fulfill these constitutional guarantees.

The proposition that educational institutions are malleable and subject to legislative reform is sound. The introductory language of s.93 has been found to confer upon the provinces a plenary jurisdiction over education.”¹³²

While the case did not deal with section 23 schools in particular, the same conclusion can, technically, be drawn. Indeed the Court has on multiple occasions reaffirmed that the constitutionally protected right lies with the rights-holding parent (suggesting perhaps that no right lies with the school board).

The fact that provinces have the “widest possible discretion in selecting the institutional means by which its s.23 obligations are to be met” was also raised in *Mahe*, with the caveat that the government must do “whatever is necessary to ensure that [s.23 rights holders] receive what they are due”.¹³³ While the Court have granted various institutions and rights to minority language groups¹³⁴, Professor Power suggests that it would be unreasonable for section 23 to constitutionally protect all forms of management and control identified in the jurisprudence. As a result, Professor Power suggests that a court would likely accept any reasonable proposal by a provincial government to manage its education system differently, so long as some minimal level of effective representation is granted to the minority.¹³⁵ For example, school boards were entirely dissolved in New Brunswick in 1996, and

¹³² *Public School Boards' Assn of Alberta v Alberta (Attorney General)*, 2000 SCC 45 at paras 34-35, [2000] 2 SCR 409 [*Public School Boards' Assn of Alberta*].

¹³³ *Supra* note 36 at 393.

¹³⁴ These include rights that the drafters specifically rejected. In 1981 during the drafting negotiations, the right to manage schools and educational facilities was explicitly rejected by Parliamentarians, and by the time the *Charter* was adopted, it was unclear whether management rights would be considered a section 23 right. See: Power, *supra* note 25 at 721, fn 212.

¹³⁵ Power, *supra* note 25 at 732-33.

replaced with parent councils, although no constitutional challenge was ever made in this case.¹³⁶

The current at-risk school boards

Finally, we come to the question of the three school boards that currently risk being amalgamated: Riverside, New Frontiers and Eastern Townships. Based on *Mahe* and *Reference Re Public Schools Act*, each community should be evaluated independently to see whether the numbers warrant an independent school board. Currently, nearly 10,500 students are registered in Riverside Board elementary, secondary, adult and career education programs,¹³⁷ nearly 5000 students are registered at the New Frontiers School Board,¹³⁸ and approximately 6000 students are enrolled in Eastern Townships School Board schools.¹³⁹ Despite the fact that these numbers include adult education that necessarily falls outside the ambit of section 23, it is safe to conclude that the minority populations in the territories covered by the school boards are sufficient to warrant independent school boards under the current Supreme Court standards, particularly when one compares these figures to *Reference Re Public Schools Act*.

The size of each school board's territory is also relevant, as the territories must be manageable for the school boards to run effectively and promote the goals of section 23. The Court in *Reference Re Public Schools Act* notes that the types of "facilities" appropriate will depend on the specific "geographic unit within the province" where the numbers warrant.¹⁴⁰ First, this implies the existence of more than one geographic unit per province, assuming that the numbers warrant. Second, we should recall here that "facility" includes not just the physical structure where the minority language instruction will take place, but also implies management and control, the upper end of which the Supreme Court in *Mahe* determined to be a school board. Thus specific geographic areas may require multiple school boards, depending on the nature of the area and whether the numbers warrant.

The large territories covered along with the very different make up of the three geographic zones at risk suggest that they cannot be amalgamated. The Riverside School Board territory covers over 7,500 square kilometres, and includes large suburban municipalities as well as smaller regional areas. The New Frontiers School Board covers the Eastern half of Montérégie, including Chateauguay and the Chateauguay valley; it takes over an hour and a half to get from one side of their

¹³⁶ *Ibid* at 733 [see: footnote 251].

¹³⁷ Riverside School Board, 2010-2015 Strategic Plan (18 January 2011), online: <www.rsb.qc.ca/>.

¹³⁸ New Frontiers School Board, "Our territory", online: <nfsb.qc.ca/our-territory/>.

¹³⁹ Eastern Townships School Board, Annual Report 2012-2013, online: <public.etsb.qc.ca/pub/PER-6840/ETSB_2012-13_annual%20report_eng_FINAL.pdf>.

¹⁴⁰ *Supra* note 37 at 856.

territory to the other because of the poor network of roads. Finally, the Eastern Townships School Board covers a geographic area roughly the size of Belgium and contains eight regional county municipalities.¹⁴¹ The amalgamation of these schools would create a school territory roughly the size of the Netherlands that would be charged in managing schools as small as 20 students to schools with thousands of students.

The government first created these school board boundaries because they believed that the numbers and specific requirements of the geographic area warranted these facilities, and that this was the best way to fulfill their section 23 obligations. While it is open to the government to redraw school board territorial lines,¹⁴² this must be done with the best interest of minority groups in mind in order to meet the objectives of section 23, and must always be wary of “‘wherever in the province’ the ‘numbers warrant’”.¹⁴³ The government must therefore have some demographic statistics to justify any changes to the minority language facilities.

Justifying a breach

Assuming that the amalgamation of the English school boards would amount to a violation of the section 23 rights, the question arises as to how the government might seek to justify this breach. According to *Nguyen*, section 1 of the *Charter* does apply to language rights;¹⁴⁴ thus section 23 rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹⁴⁵ The right of the province to legislate in matters dealing with education stems from s.93 of the *Constitution Act, 1867* and therefore any proposal regarding the amalgamation will necessarily be “prescribed by law”. The real question is thus whether the amalgamation will satisfy the *Oakes* test, which is used to determine whether the purpose of the legislation is demonstrably justifiable in a free and democratic society.¹⁴⁶

The *Oakes* test demands that (1) the objective behind the amalgamation be “pressing and substantial”; (2) the means be rationally connected to the objective; (3) there be minimal impairment of rights; and (4) there be proportionality between the infringement and objective. It is currently unclear what the objective of amalgamation would be. The remedial nature of section 23 demands that financial concerns be given only secondary consideration.¹⁴⁷ As a result, the objective behind amalgamation will likely have to be something more than simply financial for a

¹⁴¹ Eastern Townships School Board, 2013-2018 Strategic Plan, online: <www.etsb.qc.ca/strategic-plan/>.

¹⁴² See *Mahe*, *supra* note 36 at 386.

¹⁴³ *Ibid* at 386.

¹⁴⁴ *Nguyen*, *supra* note 32 at para 37.

¹⁴⁵ *Charter*, *supra* note 8.

¹⁴⁶ *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

¹⁴⁷ *Mahe*, *supra* note 36 at 385.

court to find it “pressing and substantial”. Additionally, it is unclear whether the government has considered the effect of amalgamation on the rights of section 23 rights holders or whether they have considered other options that would resolve the financial difficulties while better protecting minority language rights.

b. Potential Future Approach: what the statistics suggest

How will the courts respond to the closing of a section 23 minority language facility? This situation has not yet arisen in front of the courts, however we believe that the courts will still follow *Mahe* to determine whether each geographic zone in question has the population required to justify the provision of the minority language facilities that the government seeks to remove. While the Supreme Court warns against simply comparing population sizes of each geographic area, the numbers involved in these three cases are so superior to the numbers seen in the other section 23 cases where facilities were granted, that it seems safe to believe that the numbers would warrant in each case. As a result, it would be for the government to justify the breach.

The statistics show that the Anglophone minority in Quebec is struggling. Far from the section 23 obligations imposed on the government of Quebec to protect and develop the minority language community, the statistics indicate that Anglophones in Quebec are being assimilated at high rates, and that fewer Anglophones than ever before are attending minority language schools. Closing school boards may cause further damage. The statistics above show that since New Brunswick closed their school boards and replaced them with what the government at the time considered an equivalent but more efficient and economical structure, the percentage of students with at least one French-speaking parent who attend a minority French school has decreased by over 30%. While there is no clear evidence of any causation between the closing of school boards and the drop in the number of students who attend minority language schools, the correlation is startling.

With these statistics in mind, it is difficult to see how a court will find that elimination of these school boards minimally impairs the rights of minority Anglophones in Quebec. Arguably, the status quo – increasingly high levels of assimilation and significantly lower levels of enrolment in English minority schools – already suggests that the government is not living up to its section 23 obligations. Eliminating school boards and in this way limiting the constitutionally protected management rights of minority Anglophones to run their own minority education facilities (including school boards) can only serve to maximize the current impairment of rights. Given that financial objectives are not likely to be considered particularly pressing or substantial due to the remedial nature of section 23, there is a low likelihood that a court would find proportionality between the objective of cost-savings and the infringement of the rights described above.

7. Summary: What are the rights to community-elected school trustees/commissioners?

The right to community-elected school trustees and commissioners seems to flow naturally from the management and control rights identified by the Supreme Court in *Mahe*. Indeed, school board elections are common across Canada. They particularly make sense in the case of minority language schools. Section 23 grants management rights to the minority language community in order for the community to be able to make key decisions affecting their language and culture. Since the Board of Directors is the school board's primary decision-maker¹⁴⁸, the minority community should be able to select the school board representatives it feels will best be able to promote their community interests. However, despite the claimants' request in *Mahe* that the right to elect school trustees be recognized, at no point in the decision does the Court include a power to "elect" their school board representatives.

In *Public School Boards' Association (Alberta)*, the Supreme Court rejected a claim that a constitutional requirement to democratically elected school boards and other municipal institutions existed.¹⁴⁹ One of the bases for the decision was that the provincial legislature has complete jurisdiction and authority over education by virtue of section 93. However, the ratio of that case is limited in scope: it only applies to public schools,¹⁵⁰ which are distinguished throughout the decision from constitutionally protected "separate schools". Indeed, the Court states that the province's ability to exercise its powers over education "in whatever way it sees fit" is limited by the constitutional restrictions relating to separate schools.

By analogy, where the Court repeats that provinces are free to fulfill their section 23 obligations relating to minority education as they see fit, they are limited by the constitutional restrictions within the provision, including those powers of management and control that are inherent in the phrase "minority language educational facilities". Some these restrictions were identified by the Court in *Mahe* but the list of rights remains open. For ease, they are replicated here¹⁵¹:

- (1) The representation of the linguistic minority on local boards or other public authorities which administer minority language instruction or facilities should be guaranteed;
- (2) The number of minority language representatives on the board should be, at a minimum, proportional to the number of minority language students in the school district, i.e., the number of minority language students for whom the board is responsible;

¹⁴⁸ Garant, *supra* note 55 at 166.

¹⁴⁹ *Supra* note 36.

¹⁵⁰ *Ibid* at para 36.

¹⁵¹ *Mahe*, *supra* note 36 at 377.

- (3) The minority language representatives should have exclusive authority to make decisions relating to the minority language instruction and facilities, including:
- (a) expenditures of funds provided for such instruction and facilities;
 - (b) appointment and direction of those responsible for the administration of such instruction and facilities;
 - (c) establishment of programs of instruction;
 - (d) recruitment and assignment of teachers and other personnel; and
 - (e) making of agreements for education and services for minority language pupils.

Recall that while these rights are identified as rights that arise where the numbers of the community do *not* warrant an independent school board, the sliding scale approach suggests that these rights will necessarily be included where a school board *is* warranted: management rights increase as required by the number of potential users and the school board represents the “maximum level of management”.¹⁵²

While the list of rights does not mention the right to elect representatives, it does give minority language representatives the *exclusive* authority to “make decisions” relating to appointment of school administrators, again, where the numbers do *not* warrant an independent school board. Where the numbers *do* warrant an independent school board, this provision *might* be interpreted as granting minority language representatives the *exclusive authority to make decisions relating to appointment of school board administrators*, where school boards are now the “facilities” in question.

Additionally, the Court in *Mahe* clearly intends that only members of the minority language community or individuals selected by the community can represent it: “the persons who will exercise the measure of management and control [...] are “s. 23 parents” or persons such parents designate as their representatives”.¹⁵³ This once again ties into the fear behind section 23; left to the majority, minority language rights would be ignored and seriously compromised.

PART II – Challenging legislation that affirms the supremacy of the French language in Quebec

During the last provincial election, the current Premier promised to table a more moderate “Charter of Values” to contrast the previous government’s *Chartre de la laïcité*. While tabling the new Charter has been stalled again and the exact

¹⁵² *Ibid.*

¹⁵³ *Ibid* at 379.

provisions of the proposed Charter remain unknown,¹⁵⁴ an October 2014 speech at the Canada 2020 Conference by the Intergovernmental Affairs Minister¹⁵⁵ may have served to reinforce the common belief that protection of the French language might find itself at the top of a hierarchy of rights; that is, that the new Charter would affirm the supremacy of the French language over all other individual or collective rights in the province.

According to Doucet, Bastarache and Rioux, affirming the supremacy of the majority language is the natural result of a policy of assimilation; it is an act of linguistic hegemony that can only produce conflicts between majority and minority language groups.¹⁵⁶ In order to prevent such conflicts and to right past wrongs, the right not to be assimilated has long been recognized as a fundamental collective right, and is reflected in various international instruments.¹⁵⁷ For example, Article 29 of the *Convention of the Rights of the Child*, which Canada ratified in 1991, requires states to agree that a child's education should allow the child to develop respect for his parents' as well as his own cultural identity, languages, and values.¹⁵⁸ Article 27 of the *International Covenant on Civil and Political Rights*, which Canada ratified in 1976, states that where linguistic minorities exist, "persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture [...] or to use their own language."¹⁵⁹

While international law is sometimes used to reinforce the obligations of the state and is commonly brought up at the Supreme Court level, it cannot be used alone to strike down a law – particularly a law that falls within a province's jurisdiction. The remainder of Part II will thus be devoted to evaluating the constitutionality of legislation affirming the supremacy of the French language against a) *Charter* rights and b) the unwritten constitutional principle of respect for minorities.

¹⁵⁴ Philip Authier, "Quebec premier Philippe Couillard seems 'imbued' by Saudi values, PQ leader says", *National Power* (22 January 2015), online: <news.nationalpost.com/2015/01/22/quebec-premier-philippe-couillard-seems-imbued-by-saudi-values-pq-leader-says/>.

¹⁵⁵ "Jean-Marc Fournier at #Can2020" (3 October 2014) (video), online: <vimeo.com/108587758>.

¹⁵⁶ *Supra* note 107 at 10.

¹⁵⁷ Robert Dunbar, "Minority Language Rights in International Law" (2001) 50 ICLQ 90 at 103.

¹⁵⁸ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, art 29(c).

¹⁵⁹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 27.

a) *Charter* rights vs the supremacy of the French language

Question: How can individual *Charter* rights be used in order to invalidate or temper a law affirming the supremacy of the French language?

It is clear from the jurisprudence on the *Charter of the French Language (CFL)* that such an act would necessarily fly in the face of *Charter* rights, particularly freedom of expression, which, according to the still-as-yet hypothetical law, would fall subordinate to the duty to protect the French language. Since the *CFL* was amended following the expiry of the notwithstanding provision in 1993¹⁶⁰, only section 23 rights have been able to limit the scope and application of *CFL* provisions or indeed invalidate a provision. A brief history of *CFL* cases is in order.

The starting point of a *CFL* analysis is the famous *Ford* sign case, which challenged the constitutionality of the *CFL*.¹⁶¹ In *Ford*, the Supreme Court found that various sections of the *Charter of the French Language* dealing with signage requirements violated the right to freedom of expression, under both sections 2(b) of the *Charter* and 3 of the *Quebec Charter*,¹⁶² as well as the guarantee against discrimination under section 10 of the *Quebec Charter*. While the Court found that these violations could not be justified under either section 1 of the *Charter* or section 9.1 of the *Quebec Charter*, the Court did accept (1) the vulnerability of the French language as a “pressing and substantial concern” and (2) the legitimacy of provincial legislation aimed at promoting and protecting the French language.¹⁶³ According to the court, four causal factors threatened the position of the French language:

“(a) the declining birth rate of Quebec francophones resulting in a decline in the Quebec francophone proportion of the Canadian population as a whole; (b) the decline of the francophone population outside Quebec as a result of assimilation; (c) the greater rate of assimilation of immigrants to Quebec by the anglophone community of Quebec; and (d) the continuing dominance of English at the higher levels of the economic sector.”¹⁶⁴

In *Ford*, the means were simply disproportionate to the goals and the rights violated were not minimally impaired.

¹⁶⁰ See *An Act to Amend the Charter of the French Language*, SQ 1993, c 40, s 18.

¹⁶¹ *Ford*, *supra* note 42.

¹⁶² *Charter of human rights and freedoms*, CQLR c C-12 [*Quebec Charter*].

¹⁶³ *Ford*, *supra* note 42 at 778-79.

¹⁶⁴ *Ibid* at 778.

This accepted justification by the Court in *Ford* has followed language rights cases to this day, and has been consistently used by the Quebec government to justify infringement of individual rights, including language rights. In 2002, in response to the phenomenon of “bridging schools,” by which parents without section 23 rights would send their children to unsubsidized English private schools for short periods of time in order to render them eligible for minority language schools, the Quebec government adopted Bill 104, which added two problematic clauses to section 73 *CFL*. The first clause had the effect of eliminating this pathway towards eligibility and in this way restricting access to section 23 rights by disregarding any instruction obtained at a “bridging school”. The second clause required that any “instruction received pursuant to a special authorization granted by the province under s. 81, 85 or 85.1 *CFL* in a case involving a serious learning disability, temporary residence in Quebec, or a serious family or humanitarian situation” be disregarded when assessing eligibility for English language minority education.¹⁶⁵ The Court held that these instructions to disregard educational history had the “effect of truncating the child’s reality by creating a fictitious educational pathway”; such fiction, according to the Court, “cannot serve as a basis for a proper application of the constitutional guarantees”.¹⁶⁶

The goals of Bill 104 were twofold: first, the government wanted to prevent students from attending bridging schools in an attempt to enter public English minority schools; second, the government sought to, once again, protect and promote the French language.¹⁶⁷ Both goals were considered “serious and legitimate,”¹⁶⁸ and the means rationally connected to those goals.¹⁶⁹ It was only the disproportionality of these measures that ultimately led the Court to find that Bill 104 both violated section 23 and could not be saved under section 1. However, even though the provisions were struck down, the effects were suspended for one year in order to give the legislature time to present acceptable provisions. This remedy suggests that the Court believes so strongly in the right of the Quebec government to protect the French language and prevent increased access to section 23 that it was willing to continue to infringe on constitutionally protected language rights for 12 months.

Indeed, most recently, a lower court judge reaffirmed the justifications behind the *CFL*, having found a lack of new evidence showing that the French language is no longer in need of as much protection as it required in 1988. In *Boulangerie Maxie’s*, several Anglophone merchants argued that sections 51, 52, and 58 *CFL*, all dealing with commercial advertising, violated their freedom of

¹⁶⁵ *Nguyen, supra* note 32 at para 2.

¹⁶⁶ *Ibid* at para 33.

¹⁶⁷ *Ibid* at para 38.

¹⁶⁸ *Ibid*.

¹⁶⁹ *Ibid* at para 40.

expression, equality, and liberty rights.¹⁷⁰ Judge Mascia found no violation of either equality or liberty rights, but did find a violation of freedom of expression, to which the government also conceded. Having been presented with partially conflicting statistics from both sides, Judge Mascia ultimately found that the risk to the French language still remained. Some of the statistics highlighted in an expert report prepared for the petitioners include:

- In 2011, 52.8% of Allophones spoke French as a second language at home, compared to just 30.6% who spoke English. In two to three generations, these Allophones will be assimilated into the Francophone majority.¹⁷¹
- Between 1971 and 2011, the number of English speakers decreased by 28,205, and their relative weight decreased from 14.7% of the total population to 10.69%.¹⁷²

By contrast, the Attorney General presented the following statistics:

- Between 2006 and 2011, the number of linguistic transfers in favour of French grew by just 10,025 people, or just 2000 per year.¹⁷³
- The French language, which represents 81% of the population, attracts just 52% of Allophone linguistic transfers; the other 48% migrate towards English, despite the fact that just 11% of the population of Quebec is Anglophone.¹⁷⁴
- French as a language of primary use is “well on its way to minority status” in Montreal: 61.2% of the population of Montreal were French-speakers in 1971, compared with 56.3% in 2001 and 53% in 2011.¹⁷⁵

With these statistics in mind, the Court re-analysed the *Ford* factors, and found that the current situation in Quebec was not substantially different that it was 26 years prior. First, the birth rate of French-speaking women remained significantly lower than the replacement rate. Second, the relative weight of the Francophone population outside Quebec has decreased from 7.2% in 1931 to 5% in 1991 according to mother-tongue or 4.4% to 3.2% according to language of use.¹⁷⁶ Third, the Anglophone community is still getting a much higher rate of assimilation of immigrants than their numbers warrant, and linguistic transfers are very low considering the number of Allophones entering the province. Finally, there was a

¹⁷⁰ *Quebec (Attorney General) c 156158 Canada Inc (Boulangerie Maxie's)*, 2015 QCCQ 354 [*Maxie's*].

¹⁷¹ *Ibid* at para 24.

¹⁷² *Ibid* at para 27.

¹⁷³ *Ibid* at para 42.

¹⁷⁴ *Ibid* at para 43.

¹⁷⁵ *Ibid* at para 47.

¹⁷⁶ *Ibid* at paras 193-94.

lack of evidence regarding the dominance of English at the higher levels of the economic sector.¹⁷⁷ A previous attempt by the same lawyer to challenge these provisions failed for similar reasons in 2001.¹⁷⁸

Importantly, the Court held that the successes of the *CFL* in promoting the French language cannot be used “as fodder for its dismantling. The *CFL* cannot become a victim of its own success.”¹⁷⁹ This seems to suggest that the justification behind the *CFL* as identified by the Court in *Ford* will continue to support the *CFL*’s continued existence, even if the situation of the French language changes, as long as the *CFL* itself is acknowledged to be the root behind the success of the French language.

Freedom of expression thus seems to be trumped regularly in order to protect the legitimate interest of the Quebec government to protect the French language.

Other Charter rights

Two other *Charter* rights have been brought up – mostly unsuccessfully – in an attempt to limit the reach of the *CFL* or any other government action attempting to limit Anglophone rights: equality and liberty. In *Ford*, the Supreme Court accepted the equality argument under the *Quebec Charter*, which is actually phrased as a “guarantee against discrimination”. Although the impugned provisions in *Ford* (sections 58 and 69) applied to everyone regardless of language of use, the Court found that it had the “effect” of “impinging differentially on different classes of persons according to their language of use,” which amounted to a “distinction based on language within the meaning of s.10 of the *Quebec Charter*.”¹⁸⁰ This distinction in turn had the effect of “nullifying the right to full and equal recognition and exercise” of the freedom to express oneself in the language of one’s choice.¹⁸¹

This appears to be the only time where an equality right was granted, however:

¹⁷⁷ The importance of statistics in this case is remarkable. The Judge interpreted the statistics in a way that still showed French to be at high risk, but the focus on sign laws might have been a factor. No statistics about education or exogamy seem to have been presented. Additionally it should be noted that the use of the term “English-speaking” seems to refer to anyone who speaks English at home, as opposed to Anglophones. The terms seem to be used relatively inconsistently, causing confusion.

¹⁷⁸ *Entreprises WFH Ltée c Québec (Procureure Générale du)*, [2001] RJQ 2557, 2001 CanLII 17598 (QC CA) [WFH].

¹⁷⁹ *Maxie’s*, *supra* note 170 at para 199.

¹⁸⁰ *Ford*, *supra* note 42 at 787.

¹⁸¹ *Ibid.*

- In the accompanying case to *Ford, Devine v Quebec (Attorney General)*, the Court found that while a distinction based on language did exist, the right being sought – the right to speak exclusively in the language of one’s choice – was not a protected right.¹⁸² As a result, no section 10 violation was found.
- In *Lachine General Hospital*, the Court of Appeal overturned a lower court decision that had initially found a violation of section 10 of the *Quebec Charter*.¹⁸³ According to the Court of Appeal, section 10 requires that discrimination be intended, which was not proven in the case.
- In *Westmount*, the Court rejected a s.15(1) *Charter* argument by narrowly interpreting the amalgamation provisions.¹⁸⁴ According to the Court of Appeal, any differential treatment was based on location of residence – which is not an analogous ground – and *not* on language. No consideration was made at all of the indirect effect of the law on Anglophones, even though the evidence showed a disproportionately higher negative effect on Anglophone communities.¹⁸⁵
- Most recently in *Maxie’s*, the Court found no violation of either section 15 of the *Charter* or 10 section of the *Quebec Charter*. Drawing on *Devine*, the Court held that limitations on equality rights could be justified by virtue of the vulnerability of the French language.¹⁸⁶ As the Court had already established the continued vulnerability of the French language, the equality challenges necessarily fell. Additionally, upon a substantive analysis of the rights in question, the Court further found that the impugned *CFL* provisions did not perpetuate the necessary prejudice or stereotyping required for a section 15 violation to be found.

This lack of success has led Bastarache J to affirm that article 10 of the *Quebec Charter* can almost never be used to fight the *CFL*, especially where the issue relates to language at work or language aptitude at work, a distinction based on something superficially related to language, or indirect discrimination.¹⁸⁷

The claimants in *Maxie’s* also argued that the impugned sections of the *CFL* violated their liberty right under section 7 of the *Charter*; however, the Court quickly rejected the claim. The Court found that the constraints imposed by the *CFL* only affected the ways in which the petitioners conducted their businesses. Since

¹⁸² *Devine v Quebec (Attorney General)*, [1988] 2 SCR 790 at 818, 55 DLR (4th) 641.

¹⁸³ *Lachine General Hospital Corp c Québec (PG)*, [1996] RJQ 2804, 142 DLR (4th) 659 (CA).

¹⁸⁴ *Westmount*, *supra* note 131.

¹⁸⁵ Michel Bastarache, “Le principe d’égalité des langues officielles” in Michel Bastarache & Michel Doucet, eds, *Les droits linguistiques au Canada*, 3rd ed (Cowansville, QC: Yvon Blais, 2014) 89 at 131.

¹⁸⁶ *Maxie’s*, *supra* note 170 at para 220.

¹⁸⁷ *Supra* note 185 at 145.

these business concerns were by definition not “inherently or fundamentally personal,” they could not fall within the liberty interests guaranteed by section 7.¹⁸⁸

This brief examination of *CFL* challenges and other minority language rights cases all suggest that the justification behind protecting the French language, as laid out in *Ford*, is still valid. As a result, any *Charter*-based challenge to a law purporting to affirm the supremacy of the French language over all other rights will likely be unsuccessful unless, as in *Ford*, the provisions are so broad that they disproportionately impair *Charter* rights.

b) “Respect for minorities” vs the supremacy of the French language

Question: How can the unwritten constitutional principle of “respect for minorities” be used in order to invalidate or temper a law affirming the supremacy of the French language?

Unwritten constitutional principles: general considerations

Protection of minorities was first identified as one of four fundamental constitutional principles in the *Secession Reference*.¹⁸⁹ While not explicitly laid out in the Constitution, the Supreme Court nonetheless held that the four underlying principles should “inform and sustain the constitutional text” and be understood as “the vital unstated assumptions upon which [the Constitution] is based”.¹⁹⁰ Indeed, the Court went so far as to call the principles the “lifeblood” of the Constitution, without which it would be “impossible to conceive of our constitutional structure”.¹⁹¹

The principles thus impact not only our interpretation of the *Charter*, but the Constitution as a whole. Their contribution to constitutional interpretation is significant: “The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions.”¹⁹² The Court continues: “Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a “living tree””.¹⁹³

The Court takes it upon itself to “emphasize” that the protection of minority rights, while protected in various places throughout the Constitution through

¹⁸⁸ *Maxie’s*, *supra* note 170 at paras 287-88.

¹⁸⁹ *Secession Reference*, *supra* note 5 at para 32. The other principles are: federalism, democracy, and constitutionalism and the rule of law.

¹⁹⁰ *Ibid* at para 49.

¹⁹¹ *Ibid* at para 51.

¹⁹² *Ibid* at para 52.

¹⁹³ *Ibid*.

narrow rights, is, in and of itself, an “independent principle underlying our constitutional order”.¹⁹⁴ It underlies the *Charter’s* provisions for the protection of minority language rights and was also “one of the key considerations” motivating not only the enactment of the *Charter*, but also the structure of the Constitution at the time of Confederation.¹⁹⁵ For its part, constitutional entrenchment (i.e., the constitutionalism principle) provides an additional “safeguard” for protection of minority rights.¹⁹⁶

While these principles cannot be invoked to override the written Constitution, which the Court declares to be supreme,¹⁹⁷ the Court does find that they do carry significant normative power: the unwritten principles may *alone* give rise to both general and specific substantive legal obligations *which may in turn serve to limit government action*.¹⁹⁸ Additionally, the Court finds that the principles are binding upon not only the legislature, but also the judiciary.¹⁹⁹

Use of the principles: where a gap exists

Use of the principles is, however, limited. According to the Court, the principles should only be used where there is a gap in the express terms of the constitutional text.²⁰⁰ While Robin Elliott notes that the “gap” might appear to encompass “anything relating to the governance of the country for which no provision is made in the Constitution,”²⁰¹ the Supreme Court held in *Blaikie* that the silence of the Constitution does not necessarily constitute a gap.²⁰² A principled guideline on what “gaps” can be filled and how is thus useful to clarify the Court’s intent and to limit judicial activism.

According to Professor Patrick Monahan, “a gap may arise when, in order to give effect to the ‘underlying logic’ of what has been provided for, it becomes necessary to rely upon an unwritten norm”.²⁰³ The *Provincial Judges Reference* provides a clear example of such a gap arising.²⁰⁴ In that case, the Supreme Court was confronted with sections 96-100 of the *Constitution Act, 1867*, which provided

¹⁹⁴ *Ibid* at para 80.

¹⁹⁵ *Ibid* at para 81.

¹⁹⁶ *Ibid* at para 74.

¹⁹⁷ *Ibid* at para 53.

¹⁹⁸ *Ibid* at para 54.

¹⁹⁹ *Ibid* at para 54.

²⁰⁰ *Ibid* at para 53.

²⁰¹ Robin Elliott, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution” (2001) 80 Can Bar Rev 67 at 96.

²⁰² *Québec (Procureur général) v Blaikie*, [1981] 1 SCR 312, 123 DLR (3d) 15.

²⁰³ Patrick Monahan, “The Public Policy Role of the Supreme Court of Canada in the Secession Reference” (1999) 11 Nat J of Const Law 65, at 77.

²⁰⁴ *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3, 150 DLR (4th) 577.

explicit guarantees of tenure and financial security to federally appointed judges. No such guarantees were made for provincially appointed judges (the gap). In order to give effect to the “underlying logic” of these provisions, which the Court identified as judicial independence and rule of law, the gap had to be filled. Relying on the unwritten constitutional principle of rule of law, the Court determined that provincial court judges had to be afforded these same rights; to find otherwise would have meant undermining rule of law.

Without the actual text of the legislation, it is unclear whether a gap exists in the legislation. We can assume perhaps that a gap exists in relation to how the Act will apply to the Anglophone minority, who does have limited language rights constitutionally entrenched. The issue is whether this would be seen as a true gap under Professor Monahan’s test.

On the one hand, it is easy to argue that the “underlying logic” of this provision of the potential Charter of Values is necessarily incompatible with the minority rights principle as it seeks specifically to protect the majority language of Quebec. It follows that the minority rights principle could not be used to give effect to that underlying logic and therefore could not be the basis of a legal argument to combat the new Charter of Values.

On the other hand, one might also argue that minority rights are at the heart of the new Charter of Values’ first provision. As the Intergovernmental Affairs Minister noted in his speech at #Canada2020, the French language is a minority language in Canada, North America, and globally. The goal of the Quebec government can therefore be interpreted as protecting the rights of this minority language group. In this sense, if protection of minority rights is seen as the underlying value behind the new Charter, then the government could not have wanted to further limit minority Anglophone rights any more than they already are being limited.

Filling in the gap legitimately

Additionally, Professor Monahan distinguishes between legitimate and illegitimate gap-filling.²⁰⁵ Legitimate gap-filling occurs when the court fills a gap “by adopting an interpretation that is most consistent with the underlying logic of the existing text,” and then “rel[ies] upon that logic in order to ‘complete’ the constitutional text”.²⁰⁶ The *Provincial Judges Reference* discussed above provides a good example of this: the court determined that the rule of law was the logic underlying the constitutional provisions in question, and therefore relied on the rule of law principle to complete the constitutional text and extend financial and job security to provincially appointed judges. By contrast, illegitimate gap-filling occurs when the court acts “akin to constitutional drafters”, “fill[ing] in the gap by relying

²⁰⁵ Monahan, *supra* note 203 at 75-7 and 89.

²⁰⁶ *Ibid* at 75-7.

upon its own conception as to the best or most appropriate set of constitutional norms that should be added to the existing text.”²⁰⁷ Here, the judge is said to replace the legislature’s values for his or her own. This would be the case if, for example, a judge found that the purpose of the new Charter’s first provision was to entrench majority rights in Quebec, but then used the principle of minority rights protection to limit the new Charter’s reach.

Simply tools of interpretation?

Professor Monahan thus seems to suggest that unwritten constitutional principles can only be legitimately used as interpretive tools, and not as a means of striking down legislation. However, Professor Robin Elliott finds that where unwritten principles arise naturally out of the written constitutional text, they necessarily have “the same status as the text” and can therefore be used as an independent basis upon which to impugn the validity of legislation.²⁰⁸ This seems to be confirmed by the Supreme Court when it explains, as previously noted above, that the unwritten principles guide the definition of the spheres of competence of each level of government as well as the scope of rights and obligations:²⁰⁹ laws that overstep the sphere of competence of the enacting government will necessarily be found invalid, as will laws that unjustifiably violate *Charter* rights.

Still, the majority of the unwritten principles “cannot be said to be generated by necessary implication from the text of the Constitution” and therefore cannot be used as an independent basis for invalidating legislation.²¹⁰ Rather, these principles should only be used as interpretive tools, as described by Professor Monahan above, serving to help understand the purpose of a constitutional provision as “the furtherance of the broader constitutional principles underlying [it].”²¹¹ In his examination of the use of unwritten constitutional principles, Professor Elliott affirms that, out of the four principles highlighted by the Court in the *Secession Reference*, only the democracy principle (explicitly recognized in ss. 1, 3-5 of the *Charter*) and the principle of constitutionalism (now embodied in s.52(1) of the *Constitution Act, 1982*) can be used to impugn the validity of legislation.²¹² The others, including “respect for minorities”, can only be used as interpretive tools.

Respect for minorities: its limited application

²⁰⁷ *Ibid* at 77.

²⁰⁸ Elliot, *supra* note 201 at 84.

²⁰⁹ *Secession Reference*, *supra* note 5 at para 52.

²¹⁰ Elliot, *supra* note 201 at 84 [emphasis added].

²¹¹ *Ibid*.

²¹² *Ibid* at 112. A statement from the Supreme Court is clear on this point. In *OPSEU v Ontario*, Beetz J states: “I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic [democratic] constitutional structure” (at 57).

The Court of Appeal of Ontario in the *Hôpital Montfort* case, *Lalonde v Ontario*,²¹³ confirmed Professor Elliott's understanding of the limited use of the "respect for minorities" principle. In *Lalonde*, the Court held that protection of minorities "is a bedrock principle that has a direct bearing on the *interpretation* to be accorded [to the impugned law] and on the legality of the [Health Services Restructuring] Commission's directions."²¹⁴ At issue was a recommendation by the Health Services Restructuring Commission to reduce services offered by the Hôpital Montfort – the only unilingual Francophone hospital in Ontario – and transfer some services to another hospital offering bilingual services. The relevant legal questions were: 1) whether this directive violated the *French Language Services Act (FLSA)*, 2) whether the directives were reviewable pursuant to the unwritten constitutional principle of respect for minorities, and 3) "whether the fundamental constitutional principle of respect for and protection of minorities gives rise to a specific constitutional right capable of impugning the validity of an act of the legislature or sufficient to require the province to act in some specific manner".²¹⁵

In order to respond to the first question, the Court first explains that the provisions of the *FLSA* as well as the Commission's directions must be interpreted in light of "the principle of respect for and protection of the francophone minority in Ontario."²¹⁶ While not explicit on this point, such an interpretation is justified because the underlying rationale for the *FLSA* is minority language protection. Through this simple step, the Court extends the concept of purposive interpretation no only to constitutional guarantees, but to all language rights conferred in any legislative texts.²¹⁷ A clear example of the Court's application of the principle to further the goal of the *FLSA* occurs in its interpretation of the words "available services" in s.5 of the statute. In its analysis, the Court disagrees with Ontario's submission that the Act "only gives a person the right to receive whatever services Montfort offers,"²¹⁸ and instead holds that s.5 in fact refers to "all the healthcare services offered by Montfort at the time of designation;"²¹⁹ to hold otherwise, the Court suggests, "would result in seriously undermining the guarantee [of provision of services in French]".²²⁰

With regards to the second question, the Court finds abundant authority to justify the assertion that "[u]nwritten constitutional norms may, in certain circumstances, provide a basis for judicial review of discretionary decisions."²²¹

²¹³ *Lalonde*, *supra* note 131.

²¹⁴ *Ibid* at para 125 [emphasis added].

²¹⁵ *Ibid* at para 126.

²¹⁶ *Ibid* at para 140.

²¹⁷ Doucet, Bastarache & Rioux, *supra* note 107 at 68.

²¹⁸ *Lalonde*, *supra* note 131 at paras 159-60.

²¹⁹ *Ibid* at para 161.

²²⁰ *Ibid* at para 160.

²²¹ *Ibid* at para 176. See e.g. Bora Laskin, "An Inquiry Into the Diefenbaker Bill of Rights" (1959) 37 Can Bar Rev 77 at 81; David Mullan, *Administrative Law* (Toronto:

Analogizing with *Baker*, an immigration case, the Court finds that “[i]f the values of an international convention not adopted in statute form by Parliament” can be used to provide a basis for judicial review, then certainly a fundamental constitutional principle, even if unwritten, can be used for the same purpose.²²² With this in mind, the Court holds that, in determining public interest with regards to the Montfort directions, the Commission “was required to have regard to the fundamental constitutional principle of respect for and protection of minorities.”²²³

The Court also considers the “protection of minorities” principle when assessing the potential impact of the Commission’s directives: had the Commission succeeded in implementing its directives, “Montfort’s role as an important linguistic, cultural and educational institution, vital to the minority francophone population of Ontario” would have been negatively impacted in such a way as to contradict the “fundamental constitutional principle of respect for and protection of minorities.”²²⁴ As a result of this unjustified violation of fundamental constitutional values, the Court concludes that any deference normally owed to the administrative decision of the Commission cannot be extended in this case.²²⁵

While the Court uses the principle of respect for minorities to interpret the *FLSA* and to provide a basis for judicial review, the Court refuses to answer the final general question of whether respect for minorities could give rise to “a specific constitutional right capable of impugning the validity of an act of the legislature or sufficient to require the province to act in some specific manner”.²²⁶ However, the Quebec Court of Appeal does answer a slightly narrower version of that question in the negative in *Westmount c Quebec*.²²⁷

In *Westmount*, the Court rejected the claims by the various municipalities with significant Anglophone populations that laws can be found invalid for violating the constitutional principle of protection of minorities. In that case, the municipalities sought to prevent the amalgamation of Montreal’s municipalities into what was commonly referred to at the time as the “megacity”. Municipalities, according to the appellants, were essential for the maintenance and development of the minority Anglophone population in Quebec, and were in fact the only government level that a minority could possibly control. Additionally, the municipalities argued that the laws providing for amalgamation discriminated against Anglophones and thus violated the equality provisions of both the provincial and federal charters of rights. As a result, and in accordance with the principle of

Irwin Law, 2001) at 114; Sujit Choudhry, “Unwritten Constitutionalism in Canada: Where Do Things Stand?” (2001) 35 Can Bus LJ 113 at 115.

²²² *Lalonde, supra* note 131 at para 179.

²²³ *Ibid* at para 180.

²²⁴ *Ibid* at para 181.

²²⁵ *Ibid* at para 184.

²²⁶ *Ibid* at 126.

²²⁷ *Westmount, supra* note 131.

respect for minorities, the municipalities argued that laws providing for the amalgamation should be declared unconstitutional.

In finding against the municipalities, the Court found that the municipalities were asking the Court to provide a right that the Constitution specifically did not confer on municipalities, and in this sense, fill a gap that it was not allowed to fill. Drawing on Monahan, the Court stated: “le principe de protection des minorités n'a pas pour effet de conférer un droit à des institutions pour la protection des minorités, lorsque ce droit n'est pas protégé, par ailleurs, dans la Constitution.”²²⁸ Additionally, the Constitution gives full competency over cities to the provinces, which, according to the Court, authorizes the National Assembly to modify the structure of cities as it sees fit.²²⁹ The fact that no limitation is placed over this power in the way that we see with education, for example (where the framers of the Constitution specifically allotted protection for religious schools), further contributes to the Court's decision to find the amalgamation valid.²³⁰ Leave to appeal to the Supreme Court was denied.²³¹

Strangely and rather importantly, the Quebec Court of Appeal also finds that the unwritten principles have a much narrower application than what has been outlined so far. Despite the declarations of the Supreme Court itself in the *Secession Reference* regarding the significant normative power of the principles, the Court in *Westmount* finds that the principles discussed by the Court must be considered in light of the context of Quebec's potential separation from Canada.²³² Given that 1) the context of the case in *Westmount* does not relate to secession and 2) the Supreme Court never grants minorities the right to protect themselves through municipal institutions in its discussion of minority protection in the *Secession Reference*, protection of minorities is essentially largely overlooked as a potential basis for invalidating the amalgamation laws.

Distinction between Lalonde, Westmount

The *FLSA* finds its basis in part in Section 16(3) of the *Charter*, which grants provincial governments the right to create legislation that promotes bilingualism. Its purpose is thus necessarily based in the constitutional principle of respect for minorities, which, according to the Supreme Court, is the underlying theory for all

²²⁸ *Ibid* at para 94.

²²⁹ *Ibid* at para 120.

²³⁰ *Ibid*.

²³¹ 7 December 2001, 28869.

²³² *Ibid* at para 103. The exact text reads: “Tout d’abord, il est essentiel de rappeler le contexte dans lequel la Cour suprême a énoncé [le principe de la protection des minorités]. Elle l'a fait afin de circonscrire les obligations du Québec à l'égard de ses minorités dans le cadre d'un éventuelle sécession: la province ne pouvait faire sécession en écartant les droits des personnes et des minorités” [emphasis in original].

the minority language protections in the *Charter*. By contrast, the only provisions regarding cities in the *Constitution* relate to a province's complete jurisdiction over them. Arguably, we can conclude that the underlying theory behind the right to amalgamate is federalism and provincial autonomy. As the Court held in the *Secession Reference*: "The principle of federalism recognizes [...] the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction."²³³ In other words, the Constitution gives full competency to the province over municipalities. Given the lack of constitutional protection for municipalities, and that the theory behind the legislation was related to the unwritten principle of federalism rather than protection of minority rights, the decision of the Court in *Westmount* was to be expected.

Note on amalgamation of municipalities versus school boards

A right to amalgamate municipalities is not a precedent for the right to amalgamate minority language schools. Section 23 of the *Charter* like section 16(3) is a language right that is by definition based in the constitutional principle of respect for minorities.²³⁴ As a result, while the education falls under the competency of the provincial government like municipalities do, the Minister's discretion is not unfettered. Unlike in the case of municipalities, where the province has a "compétence provinciale absolue" that allows the province to modify municipal structures as it sees fit, the province's competency over education is limited by the *Charter*.²³⁵ Any amendments to the education regime must respect the province's section 23 obligations, which are themselves based on the principle of respect for minority rights.

Additional uses for the respect for minorities principle

More recently, "respect for minorities" has also been used in order to *prevent the invalidation* of an Ottawa bylaw and policy promulgating bilingualism. In *Canadians for Language Fairness v Ottawa (City)*, the Ontario Superior Court of Justice held that, while Ontario is not a bilingual province, the preservation of minority rights has since Confederation been a concern in this country.²³⁶ This continued concern is reflected in the *FLSA*, which, in its proper interpretation – through the lens of the "respect for minorities" principle – exists in large part to protect minority francophone rights.²³⁷ A bilingualism bylaw enacted by virtue of section 14 of the *FLSA*²³⁸ should thus be considered valid to the extent that it seeks

²³³ *Supra* note 5 at para 58.

²³⁴ *Ibid* at para 80.

²³⁵ *Westmount*, *supra* note 131 at para 120.

²³⁶ *Canadians for Language Fairness v Ottawa (City)*, 146 CRR 2d (268), 2006 CanLII 33668 (ON SC) at para 81 [*Canadians for Language Fairness*].

²³⁷ *Ibid* at para 92.

²³⁸ Section 14 grants municipalities the power to pass "a by-law providing that the administration of the municipality shall be conducted in both English and French

to protect, rather than inhibit, minority francophone rights. The relative small size of the Francophone population of Ottawa (approximately 15% according to the statistic advanced by applicant) was found to be irrelevant²³⁹; “where numbers warrant” is a principle that applies only to minority language educational rights, and cannot be used to limit minority rights in any other context.

Conclusion: how to use “respect for minorities” should a new Charter of Values entrench the supremacy of the French language

While the “respect for minorities” principle has not been used – and likely cannot be used – independently to strike down legislation, its use as an interpretive tool in both *Lalonde* and *Canadians for Language Fairness* is helpful in structuring legal arguments should the National Assembly enact legislation affirming the preeminence of the French language over all other language rights.

First, as noted above, a legitimate “gap” needs to be identified in the legislation or its application. Recall that a gap exists when, “in order to give effect to the ‘underlying logic’ of what has been provided for, it becomes necessary to rely upon an unwritten norm”.²⁴⁰ We earlier suggested that the gap could be the application of the legislation to a group with select constitutional minority language protection (the Anglophone minority).

Next, the underlying logic must be identified and must necessarily be related to the unwritten constitutional principle of respect for minority rights in order to legitimize the use of the principle as a tool of interpretation. In this case, legislation must somehow be understood through the lens of minority rights protection. Thus, in *Canadians for Language Fairness*, the Court undertook a purposive analysis of the *FLSA* and held that the intention of the drafters was to promote bilingualism and to protect francophone minority rights in Ontario, given that Ontario had the largest francophone population in Canada outside of Quebec. In *Lalonde*, the Court implicitly accepted this analysis, and read particular provisions of the *FLSA* in such a way as to maximize francophone minority rights.

Here, the purpose of such a provision must be understood as an attempt to protect the Francophone minority within a larger global context. The threat against the French language is the current justification behind the *Charter of the French Language*, and therefore this interpretation should be legitimate. With the unwritten principle of “respect for minorities” as the basis behind the bill, Courts can interpret the intention of the drafters in such a way as to protect the “minority within the minority” – the Anglophone population in Quebec – and use this interpretation to fill in any “gaps” regarding the application of the provision to the

and that all or specified municipal services to the public shall be made available in both languages.”

²³⁹ *Canadians for Language Fairness*, *supra* note 236 at para 82.

²⁴⁰ Monahan, *supra* note 203 at 77.

Anglophone minority. If protection of minority rights is seen as the underlying value behind the new Charter, then the government could not have wanted to further limit minority Anglophone rights any more than they already are being limited.

Finally, an argument should be made as to the impact of the new Charter provision on the minority language community. In *Lalonde*, the Court was particularly concerned with the negative impact of the Minister's decision on the minority population. Where the impact is so negative that the "fundamental constitutional principle of respect for and protection of minorities" would be contradicted, any deference owed to an administrative decision cannot be extended.²⁴¹ Similarly, deference to the legislature might also be limited should the impact of the new Charter of Values provision compromise the fundamental principle of minority rights protection.

If purporting to use "respect for minorities" in a Constitutional debate, consider the following: First, while it appears possible to use the "respect for minorities" principle to limit the reach of a new Charter of Values purporting to entrench the supremacy of the French language, many assumptions had to be made throughout this section in order to come to this conclusion, particularly as there has been no leak of any such document. Second, while it is clear from the literature and jurisprudence that "respect for minorities" can only be used as a tool of interpretation, these purposive interpretations have led to the reaffirmation of minority language rights when legitimately applied.

PART III – The collective rights of the Anglophone minority in Quebec

While the Anglo-American rights model is based on individual rights, nothing in the theory of fundamental rights and freedoms prevents group or collective rights to be considered fundamental rights.²⁴² Indeed, many liberal thinkers agree that group rights are essential to the extent that they protect cultures and in this way help individuals who identify with those cultures to participate in society as equals.²⁴³ The shift away from "strict individual rights" is therefore especially important in multicultural states.²⁴⁴ The right not to be assimilated, noted above in Part II, is a fundamental group right recognized in various international instruments.²⁴⁵ Language rights, which act as a preventative tool against assimilation, are also generally conceived of as collective rights. Additionally, section 16.1 of the *Charter* grants "equality of status and equal rights and privileges"

²⁴¹ *Ibid* at para 181.

²⁴² Denise Réaume, "Individuals, Groups, and Rights to Public Goods" (1988) 38 UTLJ 1.

²⁴³ See: Dan Pfeffer, *Group Integration* (PhD Thesis, Queen's University, 2014) at 21 [unpublished] [Pfeffer, *Group Integration*].

²⁴⁴ *Ibid* at 209.

²⁴⁵ Dunbar, *supra* note 157 at 103.

to the “English and French linguistic communities” in New Brunswick.²⁴⁶ Similarly, minority language educational rights under s.23, which are critical for group survival, are granted to “citizens of Canada” who meet the criteria outlined in the provision.

Drawing on his examination of international and domestic laws relating to human rights and language, Fernand de Varennes explains that various fundamental rights include clear linguistic dimensions: freedom of expression, equality rights, and the right of members of a minority language group to communicate in their own language to other members within the same group.²⁴⁷ This last right – an individual right – is what allows language minorities to, for example, establish private schools, community centers, or even media institutions in the minority language, without fear of prejudice or negative intervention on the part of the government.²⁴⁸ In this way, individual language rights have clear collective effects.

Language rights: collective or individual?

The Supreme Court appears to be giving mixed messages regarding collective rights and language. In *Solski*, the Supreme Court stated: “Section 23 is clearly meant to protect and preserve both official languages and the cultures they embrace throughout Canada; its application will of necessity affect the future of minority language communities. Section 23 rights are in that sense collective rights.”²⁴⁹ However, immediately thereafter, the Court backtracks: “Nevertheless, these rights are not primarily described as collective rights, even though they presuppose that a language community is present to benefit from their exercise. A close attention to the formulation of s. 23 reveals individual rights in favour of persons belonging to specific categories of rights holders.”²⁵⁰

Different treatment in Quebec

While the first part of the statement seems to continue to apply to Francophone minorities outside Quebec, the latter seems to be the only part that has been maintained in cases dealing with the English minority in Quebec. Thus in *Nguyen*, the Court clearly states that *despite* section 23’s collective scope, it confers individual and not collective rights;²⁵¹ indeed, aside from this reference, the word “collective” appears nowhere in the decision. By contrast:

²⁴⁶ *Charter*, *supra* note 8.

²⁴⁷ Fernand de Varennes, *Language, Minorities and Human Rights* (Cambridge: Martinus Nijhoff Publishers, 1996) at 2.

²⁴⁸ *Ibid* at 173.

²⁴⁹ *Supra* note 7 at para 23.

²⁵⁰ *Ibid*.

²⁵¹ *Nguyen*, *supra* note 32 at para 23.

- the Court in *Doucet-Boudreau* refers to minority language education rights as having “a unique collective aspect”²⁵² and identifies a “collective right” held by the parents of the school children²⁵³; it also accepts the expert evidence of Professor Angéline Martel, who argues that “the official language minority [...] is itself a true beneficiary under s.23”²⁵⁴;
- the Court in *Arsenault-Cameron* explains that the Minister has restricted “the collective right of the parents of the school children” in refusing to grant Summerside its own school²⁵⁵;
- the Court in *Charlebois* notes that subsection 16.1(2) of the *Charter*, “like section 23 of the *Charter* [encompasses] a collective dimension”²⁵⁶; and
- in *Advance Cutting & Coring*, the Supreme Court notes that language rights under section 23 “benefit both individuals and groups linked together by the use of a language and a will to preserve it and develop its use”.²⁵⁷

It thus appears that the Supreme Court is intentionally avoiding granting “collective” language rights to the Anglophone minority in Quebec, but has no issue defining section 23 rights as “collective” when Quebec is not involved, and this, even though theoretical equality of each language community is one of the bases of section 23.²⁵⁸

Using collective arguments

Even if language rights are individual, the collective dimension cannot be ignored, since the objective behind section 23 is to protect and develop minority language cultures.²⁵⁹ Doucet, Bastarache & Rioux explain:

“Les droits linguistiques doivent servir avant tout à l’épanouissement et au développement, non simplement du locuteur d’une langue considérée isolément, mais bien de la communauté regroupant l’ensemble des locuteurs de cette langue. Si tel n’était pas le cas, nous pourrions nous interroger sérieusement sur la nécessité de reconnaître de tels droits.”²⁶⁰

²⁵² *Supra* note 40 at para 28.

²⁵³ *Ibid* at para 29.

²⁵⁴ *Ibid*.

²⁵⁵ *Supra* note 38 at para 29.

²⁵⁶ *Supra* note 105 at para 115.

²⁵⁷ *R v Advance Cutting & Coring Ltd*, 2001 SCC 70 at para 168, [2001] 3 S.C.R. 209.

²⁵⁸ *Power*, *supra* note 25 at 677.

²⁵⁹ *Doucet-Boudreau*, *supra* note 40 at para 27.

²⁶⁰ *Supra* note 107 at 86.

Individuals already have the freedom to express themselves in the language of their choice. Section 23 must necessarily do something to go beyond that. What it does, what all language rights do, is protect minority language communities.

Unlike section 2(b), section 23 is also, as previously noted, not subject to the legislative override. This suggests a real effort on the part of the constitutional drafters to provide for the protection of official language minority cultures, especially considering section 23 provides for some measure of self-management rights. According to Seymour, granting national minority groups the right to self-govern minority-built and run institutions is essential in order to ensure a properly functioning “multinational jurisdiction” that treats constituent nations fairly.²⁶¹

Pfeffer argues that Anglophones in Quebec form a quasi-national minority and therefore should be accorded these group rights,²⁶² specifically, the right to operate their municipalities, hospitals, and schools.²⁶³ Anglophones in Quebec are defined as a quasi-national minority because, while the group shares many features of true national minorities – most notably having its own institutions – unlike true national minorities, Anglophones in Quebec were never conquered or colonized.²⁶⁴ Pfeffer goes on to suggest that if Quebec were an independent state, the Anglophone minority in Quebec would easily be classified as a true national minority.²⁶⁵ With regards to the question of the multicultural make up of the Anglophone community in Quebec, Pfeffer suggests that there is “a sense of common interest that cuts across the different groups that compose the Quebec anglophone community,”²⁶⁶ and that therefore the Anglophone community can speak with a common voice and demand common group rights.

Seymour and Pfeffer both appear to advance arguments that the Constitution cannot fully support. As we saw in *Westmount*, the Court of Appeal refused to recognize the “respect for minority rights” principle as a basis for protecting municipalities with large Anglophone populations in part because it would not extend any protections to minority groups that the Constitution did not already grant.²⁶⁷ Additionally, the Court rejected a federalism-based argument put forward by the municipalities. The municipalities had attempted to argue that the principle of federalism has, as its mission “de faciliter la poursuite d’objectifs collectifs par des

²⁶¹ Michel Seymour, “Les peuples et le droit à l’autodétermination” in *Nations en quête de reconnaissance : Regards croisés Québec-Catalogne* (New York : Peter Lang, 2011) 51.

²⁶² Pfeffer, *Group Integration*, *supra* note 243 at 208.

²⁶³ *Ibid* at 228.

²⁶⁴ *Ibid* at 189.

²⁶⁵ Dan Pfeffer, “Theorising the Rights of Quebec Anglophones” (Paper delivered at the IPSA World Congress, Montreal, 2014) [unpublished] at 9.

²⁶⁶ Pfeffer, *Group Integration*, *supra* note 243 at 193.

²⁶⁷ *Westmount*, *supra* note 131.

minorités culturelles ou linguistiques”.²⁶⁸ In rejecting this argument, the Court held that this principle exists only to structure the fields of competency between federal and provincial levels; it did not give any other level of government or any other “group” any such exclusive rights. The Supreme Court, as noted above, refused to intervene, despite the fact that this decision had the effect of taking away the ability of some Anglophone minority groups to self-manage their own institutions.

By contrast, the Supreme Court regularly upholds the collective rights of Francophone Quebecers – a true national minority – when it comes to protecting their language rights. This stems, as noted in *Westmount*, from the federalism principle, which grants provinces certain exclusive rights to manage their society as they see fit. The focus on the collective rights of the Francophone population in Quebec has been particularly evident since *Ford*, when the Court first accepted the need to protect and preserve the French language as a justification for violating individual freedoms. The double standard with regards to the ability to use “collective rights” in legal arguments thus seems to rest on the principle of federalism.

²⁶⁸ *Ibid* at para 108.