

European Legal Culture

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**The case-law of the supreme court
of Canada on minority linguistic rights:
an attempt to disseminate charter
patriotism, and its inconveniences**

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Abstract

IT *Prevalentemente in risposta alla crisi del debito pubblico, il processo di integrazione politica europea sembra in procinto di raggiungere nuovi traguardi. Ciò pone a propria volta la necessità di riflettere sulla nascita di una cultura giuridica comune a molti ordinamenti che si stanno progressivamente avvicinando l'un l'altro sotto molteplici aspetti. Un aspetto importante di questa riflessione attiene al "problema linguistico": infatti, più quote di sovranità vengono trasferite dagli Stati Membri alle istituzioni di Bruxelles, più diviene fondamentale che tali istituzioni parlino nella lingua che i popoli europei comprendono meglio, il che significa normalmente la loro lingua nazionale.*

Ciò pone una sfida notevole per l'UE: se vuole realmente assicurare il rispetto della "diversità linguistica" (ora riconosciuta dall'art. 22 della Carta dei Diritti Fondamentali dell'Unione Europea e, dopo il Trattato di Lisbona, dall'art. 3(3) del TEU), deve consentire ad ogni cittadino europeo di parlare in una qualunque delle ventitré lingue ufficiali, e allo stesso tempo deve imporgli i propri comandi nella sua lingua lui.

Lo studio del caso canadese è particolarmente utile a comprendere questa sfida: con le sue due lingue ufficiali, l'inglese e il francese, il Canada ne ha infatti conosciuta a lungo una simile. In questo Paese, riconoscere a ciascuna comunità, quella anglofona e quella francofona, il diritto di avere tutti i documenti ufficiali scritti nella propria lingua è stato un modo per proteggere le rispettive identità. In particolare, l'opzione bilingue adottata dalla federazione canadese ha tradizionalmente consentito alla minoranza francofona di salvaguardare un elemento essenziale del proprio patrimonio culturale. Tuttavia, quest'opzione scelta a livello federale fa spazio a un modello di regolamentazione improntato a un forte separatismo all'interno della Provincia del Quebec, dove la popolazione di lingua francese è largamente predominante.

La coesistenza delle due comunità solleva diverse questioni per i giuristi. In questo lavoro, l'attenzione è rivolta principalmente sul classico problema costituzionale di quali diritti sono riconosciuti alla minoranza linguistica: vengono passate in rassegna le principali pronunce della Corte Suprema del Canada in tema di diritti linguistici. Dopo un'introduzione (§ 1), e un breve resoconto delle disposizioni costituzionali rilevanti (§ 2), della controversia sui poteri delle province in materia di modifiche costituzionali incidenti sulla loro competenza (§ 3), e delle regole principali nell'applicazione quotidiana del bilinguismo canadese (§ 4), l'articolo segue un ordine cronologico, esaminando le sentenze e analizzando le questioni principali che esse rispettivamente hanno sollevati (§ 5); nel paragrafo conclusivo, vengono svolte alcune considerazioni (prevalentemente critiche) sul modo in cui i diritti linguistici sono stati declinati nell'esperienza costituzionale canadese (§ 6).

EN *Principally in response to the public debt crisis, the process of European political integration appears about to make further advances. This, in turn, brings a need to reflect on the emergence of a new legal culture shared by many legal systems that are gradually moving closer to each other in many ways. The language issue is an important aspect of this: the greater the sovereignty transferred by the Member States to the Brussels institutions, the more essential it becomes that these institutions speak the languages that Europeans know best, generally their national language.*

This poses a considerable challenge to the EU, where language diversity is now recognised under Article 22 of the Charter of Fundamental Rights of the European Union, and, after the Lisbon Treaty, under Article 3 (3) of the TEU. If the EU truly intends to guarantee that language diversity is respected, it must allow every EU citizen to speak any of the 23 official languages and, at the same time, issue its rules in every citizen's own language.

A useful key to understanding the EU situation is provided by Canada, which, with its two official languages, French and English, has long faced a similar challenge. It has been possible to protect the identities of both the English-speaking and the French-speaking communities by recognising that both communities are entitled to have all written documents drafted in their own language. However, this federal-level decision has led to a model of regulation that is marked by strong separatism in the Province of Quebec, where the French-speaking population constitutes a significant majority.

The co-existence of the two communities raises several issues for legal scholars. This paper looks primarily at the classic constitutional problem of the rights that the linguistic minority are entitled to, and a review is provided of the main rulings issued by the Supreme Court of Canada. After the introduction (§ 1), and a short survey of relevant constitutional provisions (§ 2), an account is provided of the debate over the Provinces' powers when constitutional amendments impinge on their sphere of activity (§ 3), and the key regulations relating to the day-to-day administration of Canadian bilingualism are described (§ 4). The article then examines cases and key issues arising from them, in chronological order (§ 5). The last chapter provides a critical evaluation of the way in which language rights have been shaped in Canadian constitutional jurisprudence (§ 6).

Keywords: *Charter of Fundamental Rights of the European Union - language diversity - Supreme Court of Canada*

THE CASE-LAW OF THE SUPREME COURT OF CANADA ON MINORITY LINGUISTIC RIGHTS: AN ATTEMPT TO DISSEMINATE CHARTER PATRIOTISM, AND ITS INCONVENIENCES

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1. Introduction: studying Canada, with an eye on the EU

While new, major steps are being made towards the political integration of Europe,¹ the "linguistic problem" becomes all the more crucial: the more sovereignty is transferred to Brussels institutions, the more important it is, in order to comply with the principle of respect for "linguistic diversity,"² that

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¹ The latest milestone in this process was the agreement reached by all the EU Members, except for the UK, at the European Council in Brussels of 8-9 December 2011: see the conclusive *Statement by the Euro Area Heads of State or Government*, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/126658.pdf (last accessed 31 Jan 2012).

² Such principle is now enshrined in art. 22 of the *Charter of Fundamental Rights of the European Union* and, after the Lisbon Treaty, in art. 3(3) of the TEU, but was already part of the *acquis communautaire*: see the 2007 study by G Rolla and E Ceccherini, 'Il riconoscimento delle diversità culturali e linguistiche nell'ordinamento costituzionale europeo' [2007] 9(2) *DPCE* 660, and in particular § 6, 669-678, by E Ceccherini. See now Xabier Arzoz, 'The protection of linguistic diversity through Article 22 of the Charter of Fundamental Rights' in X Arzoz (ed), *Respecting Linguistic Diversity in the European Union* (John Benjamins 2008), p.

such institutions speak in the language that the European peoples better understand,³ which normally means their own respective languages.⁴

Therefore, the EU legal system faces the great challenge of telling the same thing in 23 different ways, as many as the number of the European official languages:⁵ such task is all but simple, as was shown in several cases argued before the European courts, where the question arose of some pieces of legislation which had different meanings in different linguistic versions;⁶

145, but *also* Bruno de Witte, 'The protection of linguistic diversity through provisions of the EU Charter other than Article 22', *ibidem*, p. 175. In the European context, the picture is completed by the *European Charter for Regional or Minority Languages*, promoted by the Council of Europe, adopted in 1992, in force since 1998, and currently ratified by twenty-five states (as explained in the dedicated page on the Council of Europe's website, http://www.coe.int/t/dg4/education/minlang/aboutcharter/default_en.asp, last accessed 20 Feb 2012).

³ Broadly on this issue, see R Sacco and L Castellani (eds), *Les multiples langues du droit européen uniforme* (L'Harmattan Italia 1999).

⁴ This relates to any EU official act, not limited to what is provided in articles 20(2)(d) and 24 TFEU, which respectively state: 'Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*: [...] (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language;' 'Every citizen of the Union may write to any of the institutions, bodies, offices or agencies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language.' Similarly, art. 41(4) of the *Charter of Fundamental Rights of the European Union* stipulates that '[e]very person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.'

⁵ As provided for by Council of the European Economic Community Regulation (EEC) No 1/58 *determining the languages to be used by the European Economic Community* [1958] OJ L17, as repeatedly amended.

⁶ The most recent example to our knowledge is Case C-567/10 *Inter-Environnement Bruxelles ASBL and Others* (17 November 2011), Opinion of AG Kokott, *available* (in French and German only) at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CC0567:FR:HTML> (last accessed 31 Jan 2012), para 17: *see also* the cases mentioned therein, in footnotes 4 and 5. Another interesting judgment was the one issued by the ECJ in the Case C-385/02, *Commission v. Italy* (14 September 2004): even though the Italian version of art. 7(3)(e) of the *Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts* (OJ 1993 L 199, p. 54) could have justified the Italian authorities' behaviour under scrutiny, the Danish, English, Spanish and Portuguese versions clearly outlawed it, thus leading to conclude that the Italian government had not made an "excusable error" (in the Italian scholarship, *see* the case-note by Fabrizio Cassella, 'La comparazione delle versioni linguistiche è indispensabile per l'interpretazione delle disposizioni comunitarie' [2005] 7(1) *DPCE* 361. But at least also a ruling by the Court of First Instance (now General Court) deserves to be mentioned: in the Case T-143/89, *Ferriere Nord v. Commission* (6 April 1995), the Court explicitly ruled that a linguistic version of a EC Treaty provision had to give way to other versions, even though clearly expressed (*see* Richard Wainwright, 'Drafting and

also, the EU faces two almost opposite needs, i.e. promoting unity while at the same time safeguarding diversity,⁷ and it is very hard to find an adequate balance between the two.⁸

interpretation of multilingual texts of the European Community' in R Sacco (ed), *L'interprétation des textes juridiques rédigés dans plus d'une langue* (L'Harmattan 2002), p. 320, 321-2). More deeply, *see also* the ECJ case-law analysis by Mario Comba, 'Divergenze nei testi giuridici multilingui dell'Unione Europea' in R Raus (ed), *Multilinguismo e terminologia nell'Unione Europea. Problematiche e prospettive* (Hoepli 2010), p. 13, 38-46, from which it emerges that the ECJ has consistently held that, in case of doubts arising in the interpretation of a EU law provision, the interpretation must be conducted by looking at other linguistic versions).

The studies in English on the EU linguistic policies and on the principles applied by the EU courts in interpreting multilingual legislation, are extremely numerous: *inter alia*, *see* A L Kjær and S Adamo (eds), *Linguistic Diversity and European Democracy* (Ashgate 2011); Elina Paunio and Susanna Lindroos-Hovinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law' [2010] 16(4) *Eur. L. J.* 395; Mattias Derlén, *Multilingual interpretation of European Union law* (Kluwer Law International 2009); Lawrence M. Solan, 'The Interpretation of Multilingual Statutes by the European Court of Justice' [2009] 34(2) *Brook. J. Int'l L.* 277; Bruno de Witte, 'Language Law of the European Union: Protecting or Eroding Linguistic Diversity?' in R C Smith (ed), *Culture and European Union Law* (Oxford University Press 2004), p. 221; in the already mentioned work by R Sacco (ed), *L'interprétation des textes juridiques rédigés dans plus d'une langue*, the works by the same Rodolfo Sacco, 'L'interprète et la règle de droit européenne,' p. 226, Susan Šarčević, 'Problems of interpretation in an enlarged European Union,' p. 239, and Richard Wainwright, 'Drafting and interpretation of multilingual texts of the European Community,' p. 320 (already mentioned); Arzoz (ed) *Respecting Linguistic Diversity in the European Union*; Marie-Pascale Heusse, 'Le multilinguisme ou le défi caché de l'Union européenne' [1999] *Rev. Marché Comm. Un. Eur.* No. 426, 202; Geert Van Calster, 'The EU's Tower of Babel—The Interpretation by the European Court of Justice of Equally Authentic Texts Drafted in more than one Official Language' [1997] 17(1) *Yearbook Eur. L.* 363; Nial Fennelly, 'Legal Interpretation at the European Court of Justice' [1996] 20(3) *Fordham Int'l L. J.* 656. Among the most recent studies in Italian, *see*, on top of Mario Comba's already mentioned article, the various articles in issue no. 3 of 2011 of the law review *Diritto Pubblico Comparato ed Europeo*, in the section edited by Lucio Pegoraro e Maria Paola Viviani Schlein, 'Sfide traduttive nel diritto comparato. Alcune questioni aperte': *see* in particular the introducing article by Viviani Schlein ('Premessa,' p. 647), and the following ones: Barbara Pozzo, 'La traduzione dall'inglese come lingua giuridica nel contesto del multilinguismo europeo: problemi e prospettive,' p. 651; Valentina Jacometti, 'La redazione di testi giuridici multilingui nelle organizzazioni internazionali e nell'Unione europea,' p. 693; Sergio Gerotto, 'Lost (and Found) in Translation, ovvero l'esperienza della traduzione dei testi normativi in Svizzera e Canada,' p. 714.

⁷ The European motto "united in diversity," chosen in 2000, was included among the "symbols of the Union" in art. I-8 of the *Treaty establishing a Constitution for Europe*: the failure of such enterprise stands as a very good example of how hard it actually is to achieve "unity in diversity;" for a reflection in the same vein in the Italian literature, in light of the economic and financial crisis that the EU has been experiencing in the recent years, *see* Riccardo de Caria, *Post-Crisis Perspectives in Europe on State Intervention in the Economy: So Long to "United in Diversity"?*, in M Rogoff (ed), *The Financial Crisis of 2008: French and American Responses* (University of Maine School of Law 2011) p. 325; on the history and meaning of this motto,

Studying the Canadian example is quite useful from this perspective.⁹ Indeed, with its two official languages, English and French, Canada has long experienced a similar challenge.¹⁰

Affording each community, the English-speaking and the French-speaking, the right to have all the official documents written in their respective language has been a way to protect their identities. In particular, the bilingual option adopted by the Canadian federation has allowed the French-speaking minority to safeguard a key feature of its cultural heritage. However, the bilingual option chosen at the federal level makes way to a strongly separatist model of regulation within the Province of Quebec, where the French-speaking population is by far the majority.¹¹

see also Elisabetta Palici di Suni, 'I simboli dell'Unione Europea. Come rappresentare unità e diversità' in R Mazzola and I Zuanazzi, *Aequitas sive Deus. Studi in onore di Rinaldo Bertolino* (Giappichelli 2011), volume II, p. 1463, 1465.

⁸ The tension between these the two poles is touched on for instance, in the Italian scholarship, by Elena Ioriatti Ferrari, 'Lingua e diritto in Europa: multilinguismo, pluralismo linguistico e terminologia giuridica uniforme nel diritto europeo dei contratti' [2005] 7(4) *DPCE* 1549; *see also* Gianmaria Ajani and Piercarlo Rossi, 'Coerenza del diritto privato europeo e multilinguismo', in V Jacometti and B Pozzo (eds), *Le politiche linguistiche delle istituzioni comunitarie dopo l'allargamento: redazione, traduzione e interpretazione degli atti giuridici comunitari e il loro impatto sull'armonizzazione del diritto europeo* (Giuffrè 2006), p. 119, 126-7 and following, where the authors raise the problem of how the unitary but multilingual EU law can coexist in its day-to-day enforcement with the law of the various Member States, each of them having their own respective languages.

⁹ It is what is done for instance by the already mentioned articles by Gerotto, 'Lost (and Found) in Translation, ovvero l'esperienza della traduzione dei testi normativi in Svizzera e Canada,' and by Comba, 'Divergenze nei testi giuridici multilingui dell'Unione Europea,' pp. 19-21. In the scholarship in English, interesting comparisons between Canada and the EU are drawn for instance by Aileen Doetsch, *Rendre le droit avec justesse. Les méthodes de production de textes législatifs plurilingues. Une comparaison Union européenne - Canada* (P.U. Strasbourg 2008) (focusing on the drafting phase), and more generally in the articles in issue no. 1-2 of 2000 of the *Revue de la common law en français*, with a foreword by Nicholas Kasirer and Gérard Snow, 'Harmonisation et Dissonance : Langues et Droit au Canada et en Europe,' p. 1.

¹⁰ For a historical background, see for example Michael MacMillan, 'Federal Language Policy in Canada and the Quebec Challenge' in P Larrivée (ed), *Linguistic Conflict and Language Laws. Understanding the Quebec Question* (Palgrave MacMillan 2003), p. 87, 88; Frank M. Lowrey, IV, 'Through the Looking Glass: Linguistic Separatism and National Unity' [1992] 41 *Emory L. J.* 223, 224-8; Michel Bastarache, 'Language Rights in the Supreme Court of Canada: The Perspective of Chief Justice Dickson' [1991] 20 *Man. L.J.* 392, 392-5; in Italian, *see also*, among many: Tania Groppi, 'La difficile nascita della nazione in Canada: l'integrazione (o la disgregazione?) attraverso i diritti' [2001] 13(3) *DPCE* 1130, 1130-9; Elisabetta Palici di Suni, *Intorno alle minoranze* (2nd edn, Giappichelli 2002), pp. 148-50; Marie Claude Barbier, 'La legislazione sul bilinguismo in Canada' in G Rolla (ed) *Lo sviluppo dei diritti fondamentali in Canada. Tra universalità e diversità culturale* (Giuffrè 2000), p. 267, 267-73.

¹¹ Palici di Suni, *Intorno alle minoranze*, pp. 160-1.

Thus, the coexistence of the two communities raises at least two orders of questions for lawyers: on the one hand, the classic constitutional issue of what rights are afforded to the linguistic minority, and on the other, the problems of "traductology,"¹² namely the difficulties faced in the drafting and enforcement of official legislation in two different languages, and the principles elaborated by the courts to cope with them.

In Canada, such issues have a rather distinctive feature, namely that bilingualism is coupled with the co-existence of two different legal systems (something often referred to as *bijuralism*¹³), and this raises several questions

¹² Generally on this subject, see the work by Rodolfo Sacco and others, *The new Ambitions of Legal Science: Legal Anthropology and legal Traductology* (Accademia Nazionale dei Lincei 2009) and, by the same author, R Sacco (ed), *L'interprétation des textes juridiques rédigés dans plus d'une langue* (L'Harmattan Italia 2002) (specifically on Canada within this work, see Pierre-André Côté, 'L'interprétation des textes législatifs bilingues au Canada,' p. 7, but see also some hints to the Canadian situation in the contribution by Jean-Claude Gémard, 'L'interprétation du texte juridique ou le dilemme du traducteur,' p. 103); see also Gerhard Dannemann, Silvia Ferreri and Michele Graziadei, 'Language and terminology,' in C Twigg-Flessner (ed), *The Cambridge Companion to European Union Private Law* (Cambridge University Press 2010), p. 70; F Olsen, A Lorz and D Stein (eds), *Translation Issues in Language and Law* (Palgrave MacMillan 2009); Deborah Cao, 'Inter-lingual uncertainty in bilingual and multilingual law' [2007] 39(1) *Journal of Pragmatics* 69; Antonio Gambaro, 'Interpretation of Multilingual Legislative Texts', in K Boele-Woelki and S van Erp (eds), *General Reports of the 17. Congress of the International Academy of Comparative Law* (Eleven International 2007); J-C Gémard and N Kasirer (eds), *Jurilinguistics: Between Law and Language* (Thémis-Bruylant 2005). Specifically on multilingualism within the EU context, see, among many: Theodor Schilling, 'Beyond Multilingualism: On Different Approaches to the Handling of Diverging Language Versions of a Community Law' [2010] 16(1) *Eur. Law J.* 47; G Ajani, G Peruginelli, G Sartor and D Tiscornia (eds), *The Multilanguage Complexity of European Law* (European Press 2007); Richard Creech, *Law and Language in the European Union: The Paradox of a Babel "United in Diversity"* (Europa Law Publishing 2005); Kaisa Koskinen, *Translating Institutions. An Ethnographic Study of EU Translation* (St Jerome Publishing 2008); B Pozzo and V Jacometti (eds), *Multilingualism and the Harmonisation of European Law* (Kluwer Law International 2006); Nikolaus Urban, 'One Legal Language and the Maintenance of Cultural and Linguistic Diversity' [2000] 8(1) *Eur. Rev. Priv. Law* 51. In Italian, see also J Visconti (ed), *Lingua e diritto: livelli di analisi* (LED 2010), and in particular the works by Gianmaria Ajani, 'Il problema del multilinguismo,' p. 21, and Silvia Ferreri, 'La lingua del legislatore europeo,' p. 247; but see also, for a general theoretical inquiry on the hurdles faced in the task of translating any type of text from a language into another one, Umberto Eco, *Dire quasi la stessa cosa. Esperienze di traduzione* (Bompiani 2003). In French, see François Ost, *Traduire. Défense et illustration du multilinguisme* (Fayard 2009).

¹³ On the Canadian bijuralism, see, *inter alia*, Marie-Claude Gaudreault, 'Canadian Legislative Bijuralism: An Expression of Legal Duality' [2006] 32(2) *Commonwealth Law Bulletin* 205; Berverly McLachlin, 'Canadian Bijuralism: A Conversation of Cultures' [2006] 19(2) *British J. of Can. Studies* 151; Ruth Sullivan, 'The Challenges of Interpreting Multilingual, Multijural Legislation' [2004] 29 *Brooklyn J. Int'l L.* 985, 1022-54; Claire L'Heureux-Dubé, *Bijuralism: A Supreme Court of Canada Justice's Perspective* [2002] 62(2) *La. L. Rev.* 449; see also the booklets on the website of the Department of Justice of Canada, in the series *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, available at

when it comes to the enforcement of substantive civil law in English, and *vice versa*, substantive common law in French.¹⁴

The present article predominantly addresses the former order of problems, reviewing the most important rulings of the Supreme Court of Canada in the matter of linguistic rights,¹⁵ (limiting our investigation to the relationship between the anglophone and the francophone communities, and thus leaving aside the details of the aboriginal peoples of Canada's question and the broader discourse on multiculturalism, that will be anyway touched on briefly in the last paragraph):¹⁶ after a brief survey of the relevant constitutional provisions (§ 2), of the controversy on the powers of provinces over constitutional amendments affecting their competence (§ 3), and of the most important rules guiding the day-to-day administration of Canadian bilingualism (§ 4), the article follows a chronological order, going over the cases and analysing for each of them the key issues that they respectively raised (§ 5); in the last paragraph, some conclusive (mostly critical) remarks are offered (§ 6).¹⁷

<http://www.justice.gc.ca/eng/dept-min/pub/hfl-hlf/index.html> (last accessed 26 Feb 2012); finally, let us recall Doetsch, *Rendre le droit avec justesse. Les méthodes de production de textes législatifs plurilingues. Une comparaison Union européenne - Canada*, pp. 41-50, according to whom Canadian law provides in fact four possible linguistic combinations: civil-law in French or in English, common-law in French or in English.

¹⁴ Such questions are hinted at very clearly by Rodolfo Sacco, 'Lingua e diritto' [2000] 5 *Ars interpretandi* 117, 127-32. See also, *inter alia*, Claude Pardons, 'Élaboration d'une terminologie française de common law. Réflexions sur les travaux du PAJLO au cours des dix dernières années' in G Snow and J Vanderlinden (eds), *Français juridique et science du droit* (Bruylant 1995), p. 279. The case of substantive civil-law to be applied in English can typically arise in Quebec, while the opposite situation is typical for instance of New Brunswick (on which see *infra*, §§ 2.1 and 2.3).

¹⁵ Indeed, as explained by Marie-Ève Hudon, 'The Role of the Courts in the Recognition of Language Rights' (Library of Parliament, Ottawa 2011), Publication No. 2011-68-E, available at http://www.parl.gc.ca/Content/LOP/Research_Publications/2011-68-e.pdf (last accessed 31 Jan 2012), p. 13, '[t]he courts have contributed much to the recognition of language rights in Canada.' See also the reflection by Roger Bilodeau, 'La judiciarisation des conflits linguistiques au Canada' [1986] 27 *C. de D.* 215, 222-5 (the author explains here how he brought litigation using a unilingual traffic summons he received in Manitoba to further the French-speaking community's linguistic rights: the case is considered *infra*, at § 5.4).

¹⁶ Multiculturalism and protection of minority languages are not easily made coherent with the two-official languages policy: on the relationship between the two sometimes opposite poles, see for instance Jean-Claude Corbeil, 'L'embarras des langues: origine, conception et évolution de la politique linguistique québécoise' (Québec Amérique 2007), in particular pp. 217-21; in the Italian scholarship, see e.g. Carlo Amirante, 'Sistema federale e tutela dei diritti delle minoranze linguistiche ed etniche. Il caso canadese tra bilinguismo e multiculturalismo' in S Gambino and G Fabbrini (eds), *Regione e governo locale fra decentramento istituzionale e riforme. Esperienze e culture a confronto* (Rimini 1997), p. 199.

¹⁷ We will quote extensively from the Supreme Court opinions, deeming it useful in most cases to provide the reader with the original words chosen by the Supreme Court justices,

2. Constitutional and legislative background

2.1 Relevant provisions in the Canadian constitutional documents

The *Constitution Act, 1867*, formerly known as the *British North America Act, 1867*,¹⁸ already contained a provision on linguistic rights, namely section 133. It reads:

Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.¹⁹

More recently, the *Canadian Charter of Rights and Freedoms*, namely Part I of the *Constitution Act, 1982*, drew upon the example of s. 133 of the *Constitution Act, 1867* and included several provisions on linguistic rights (under the heading *Official languages of Canada*), which have been in force ever since.²⁰

rather than trying to paraphrase them; as for the legal scholarship, we will rely on works written in English, French or Italian. Two very detailed works, that are not mentioned hereinafter but that should always be considered when studying our topic, are: A Braën, P Foucher and Y Le Bouthillier (eds), *Languages, Constitutionalism and Minorities* (LexisNexis Canada 2006), a reprinting of volumes 31 and 32 of the *Supreme Court Law Review, 2nd series*, containing a great number of articles on all sorts of aspects of linguistic policies, with predominant focus on the situation in Canada; and the classic, monumental study by M Bastarache (ed), *Language Rights in Canada* (2nd edn, Éditions Yvon Blais 2004).

¹⁸ 30 & 31 Victoria, c. 3. (U.K.).

¹⁹ As pointed out by the *Consolidated version of Constitution Acts, 1867 to 1982*, '[a] similar provision was enacted for Manitoba by section 23 of the Manitoba Act, 1870, 33 Vict., c. 3 (Canada), (confirmed by the Constitution Act, 1871).'

²⁰ According to a convincing interpretation, such provisions would be "doubly entrenched:" as explained by Justice Wilson in his dissent in *MacDonald* [1986] 1 S.C.R. 460, § 192 (a case analysed *infra*, at § 5.5), '[i]t was clearly established in *Blaikie No. 1* that the linguistic rights contained in s. 133 are entrenched rights in the sense that they cannot be diminished by the unilateral action of any of the legislative bodies to which they apply. This entrenched status is now reinforced through the amending procedures in the Constitution Act, 1982. Indeed, it has been suggested that linguistic rights because of the amending procedures are now at the peak of the constitutional pyramid coming ahead of the "fundamental" freedoms set out in s. 2 of the Canadian Charter of Rights and Freedoms. They are in this sense "doubly entrenched"' (Justice Wilson references for this expression to André Tremblay, *The Language Rights (Ss. 16 to 23)*, in W S Tarnopolsky and G A Beaudoin (eds), *The Canadian Charter of*

In particular, s. 16(1) (*Official languages of Canada*) establishes English and French as the official languages of Canada, granting them 'equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada'; s. 17(1) (*Proceedings of Parliament*) stipulates that '[e]veryone has the right to use English or French in any debates and other proceedings of Parliament,' while according to s. 18(1) (*Parliamentary statutes and records*), '[t]he statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.'

S. 19(1) (*Proceedings in courts established by Parliament*) adds that '[e]ither English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament,' while s. 20(1) deals with *Communications by public with federal institutions*: 'Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where (a) there is a significant demand for communications with and services from that office in such language; or (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.'

All the sections, from 16 to 20, also contain specific provisions for New Brunswick, that perfectly match the ones dictated for the federal level: New Brunswick is thus the only province that has agreed on a constitutional obligation to become officially bilingual.²¹

Two final provisions clarify then that '[n]othing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada' (s. 21), and that '[n]othing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French' (s. 22).

Finally, s. 23 is devoted to the issue of *Minority Language Educational Rights*. It is a quite long provision, which stipulates that:

Rights and Freedoms: Commentary (The Carswell Company Limited 1982), at pp. 445-6 (*Blaikie No. 1* is dealt with *infra*, at § 5.1).

²¹ Section 16(1), added by the *Constitution Amendment, 1993 (New Brunswick)*, is also specifically devoted to this province (for a case involving a rule dictated for New Brunswick, see *Société des Acadiens, infra*, § 5.6). Section 16 also contains a third paragraph, that reads: «Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French». For a study of linguistic rights in New Brunswick, see for instance Gaétan Migneault, 'La progression des droits linguistiques au Nouveau-Brunswick dans une perspective globale' [2007] 52 *McGill L. J.* 83.

(1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

However, it has to be added that, according to s. 59 of the *Constitution Act, 1982*, '(1) Paragraph 23(1)(a) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada. (2) A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec. (3) This section may be repealed on the day paragraph 23(1)(a) comes into force in respect of Quebec and this Act amended and renumbered, consequentially upon the repeal of this section, by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.' As the official annotations explain, no proclamation has ever been issued under this section, and therefore paragraph 23(1)(a) is not in force in respect of Quebec.

Also, s. 23 must be read in connection with s. 24(1), providing the remedies to violations of the *Charter*: 'Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.'

Finally, two landmark provisions in the *Canadian Charter* are sections 1, establishing the proportionality test, and 33, the so called "notwithstanding provision."

Section 1 states that '[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

As explained in one of the cases analysed below, *Ford*, '[t]he test under s. 1 of the *Canadian Charter* was laid down by this Court in *R. v. Oakes*, and restated by the Chief Justice in *R. v. Edwards Books and Art Ltd.*, as follows:

Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights. The Court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards.²²

Moving to section 33, it provides:

- (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes

²² [1988] 2 S.C.R. 712, § 62. The cases mentioned are *R. v. Oakes*, [1986] 1 S.C.R. 103, and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 (the passage quoted is at pp. 768-9).

into force or on such earlier date as may be specified in the declaration. (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

As Hogg and Bushell (now Thornton) explained in their leading 1997 article, '[s]ection 33 of the *Charter* is commonly referred to as the power of legislative override. Under section 33, Parliament or a legislature need only insert an express notwithstanding clause into a statute and this will liberate the statute from the provisions of section 2 and sections 7-15 of the *Charter*. The legislative override is the most obvious and direct way of overcoming a judicial decision striking down a law for an infringement of *Charter* rights. Section 33 allows the competent legislative body to re-enact the original law without interference from the courts.'²³

It is important to point out that subsection (1) explicitly exempts sections 16 to 23 from the realm of this clause, therefore the above-mentioned provisions on the *Official Languages of Canada* and on *Minority Language Educational Rights*, which are the most relevant to our purposes, cannot be derogated by an ordinary law by means of a "notwithstanding provision."

Also, '[a] restriction on the use of section 33 is that, by virtue of subsection (3), the effect of a notwithstanding clause expires at the end of five years, and has to be re-enacted in order to be continued in force. This

²³ Peter W. Hogg and Allison Bushell, 'The *Charter* Dialogue Between Courts And Legislators (Or Perhaps The *Charter Of Rights* Isn't Such A Bad Thing After All)' [1997] 35 *Osgoode Hall Law Journal* 75, 83. See also, more broadly, David Johansen and Philip Rosen, 'The Notwithstanding Clause of the Charter' [2008] *Parliamentary Information and Research Service* BP-194E, available at http://www.parl.gc.ca/Content/LOP/researchpublications/_bp194-e.pdf (last accessed 23 Dec 2011); Peter W. Hogg, *Constitutional Law of Canada* (5th edn, Thomson Carswell 2007), vol. 2, chapter 39 (*Override of Rights*), 163-74; Sonja Grover, 'Democracy and the Canadian charter notwithstanding clause: Are they compatible?' [2005] 9(4) *Int'l J. Hum. R.* 479. In the Italian scholarship, see for example Maria Rosaria Radiciotti, 'Protezione dei diritti fondamentali, *judicial review* e *notwithstanding clause* in Canada', in G. Rolla (ed), *L'apporto della Corte suprema alla determinazione dei caratteri dell'ordinamento costituzionale canadese* (Giuffrè 2008), p. 195; Cesare Pinelli, *Forme di Stato e forme di governo: corso di diritto costituzionale comparato* (1st edn, Jovene 2006), p. 241; Lisa Lanzoni, 'Problemi e tecniche della sospensione dei diritti fondamentali: recenti tendenze in prospettiva comparata' [2005] 7(3) *DPCE* 1083, and in particular 1095-1099; Francesca Rosa, 'Limiti ai diritti e clausole orizzontali: Canada, Nuova Zelanda, Israele e Sudafrica a confronto, [2002] 4(2) *DPCE* 633, 635-642; Antonella Benazzo, 'Il federalismo canadese. *Notwithstanding clause* e federalismo' [2002] 32(1-2) *Amministrare* 23; Giampaolo Gerbasi, 'Problematiche costituzionali sulla clausola *nonobstant* di cui all'art. 33 della *Canadian Charter of rights and freedoms*' in S. Gambino and C. Amirante (eds), *Il Canada: un laboratorio costituzionale. Federalismo, Diritti, Corti* (CEDAM 2000), p. 241; Id., 'La clausola *nonobstant* quale strumento per la tutela dei valori delle comunità provinciali' in Rolla (ed), *Lo sviluppo dei diritti fondamentali in Canada. Tra universalità e diversità culturale*, p. 135.

restriction forces a periodic review of the use of section 33. The five-year period will always include an election, and will often yield a change of government.²⁴

One final remark is that we should always keep in mind that the federal legislator has always 'had to take into account that many of subjects that are more directly connected to linguistic rights, such as typically education, fall into the jurisdiction of the provinces: the federal government therefore could only indirectly pursue linguistic minorities protection, for instance by funding bilingual education schemes.'²⁵

2.2 Quebec legislation

Given our special focus on Quebec, we shall also review the main pieces of legislation of this province concerning our topic: the *Charter of the French Language*, and the *Charter of Human Rights and Freedoms*.

The *Charter of the French Language*, also known as *Bill 101*,²⁶ is a Quebec statute of 1977, containing that province's policy on linguistic rights and on the protection of the French language, referred to in the first paragraph of the preamble as 'the distinctive language of a people that is in the majority French-speaking, [...] the instrument by which that people has articulated its identity.'

Bill 101 is a very articulated piece of legislation, overall designed to grant French a special level of protection²⁷ (though a necessary caveat is that, as was shown in the previous paragraph, s. 133 of the *Constitution Act, 1867* mandates a certain degree of bilingualism in Quebec too). After proclaiming, in s. 1, that (only) 'French is the official language of Québec,' it deals in Title I with all the aspects connected to the *Status of the French language*, from the *Fundamental language rights* to the use of French in the legislature, in the courts, in the civil administration, in semipublic agencies, in labour relations, in commerce and business, and in the education field; then, the law also covers *Linguistic officialization, Toponymy and Francization*, and it establishes the *Office Québécois de la langue française* and the *Conseil supérieur de la langue française*.

Moving to the *Charter of Human Rights and Freedoms*,²⁸ also of 1977, the most important provisions are the following: on the one hand, s. 3, protecting - among others - the freedom of expression ('Every person is the possessor of the fundamental freedoms, including [...] freedom of expression'), s. 9.1, on

²⁴ Hogg and Bushell, *The Charter Dialogue Between Courts And Legislators (Or Perhaps The Charter Of Rights Isn't Such A Bad Thing After All)*, p. 84.

²⁵ Giovanni Poggeschi, *I diritti linguistici. Un'analisi comparata* (Carocci 2010), pp. 71-2 (our translation).

²⁶ R.S.Q. 1977, c. C-11.

²⁷ As writes Poggeschi, *I diritti linguistici. Un'analisi comparata*, pp. 72-3, its provisions show a clear intention to give the French language a sharp supremacy, and to "francesize" the economic life.

²⁸ R.S.Q. 1977, c. C-12.

the limits that can be lawfully imposed on fundamental freedoms and rights ('In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law'), and s. 10, prohibiting discriminations on several grounds, including language ('Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on [...] language. Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right'); on the other hand, the notwithstanding clause in s. 52: 'No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.'

Many of the cases we will discuss elaborate on some provisions in the pieces of legislation just mentioned.

2.3 Other provinces

We will consider the relevant laws of provinces other than Quebec when discussing the single cases in which they are involved; let us just recall that, as explained in § 2.1, under the *Canadian Charter of Rights and Freedoms*, New Brunswick is the only officially bilingual province upon constitutional obligation.

3. The "Quebec veto" controversy

Before going into the details of the cases, and in order to better understand them - especially the ones involving Quebec - it is necessary to go over the early stages of the existing tension between this province and the rest of Canada, which date back to the so called "*Quebec veto*" controversy.

The historical context was that of "patriation," namely the process of coming back of the constitution from the UK to Canada.²⁹ The Canadian Parliament proposed a Resolution to the UK Queen, providing for such

²⁹ On which see for example the work by Edward McWhinney, *Canada and the constitution 1979-1982: Patriation and the Charter of Rights* (University of Toronto Press 1982); in the Italian scholarship, see for example Nino Olivetti Rason, 'Manutenzione costituzionale: l'esperienza canadese,' in S Gambino and G D'Ignazio (eds), *La revisione costituzionale e i suoi limiti. Fra teoria costituzionale, diritto interno, esperienze straniere* (Giuffrè 2007) p. 339 (now in F Palermo (ed), *La 'manutenzione' costituzionale* (CEDAM 2007) p. 87); Francesca Rosa, 'La Corte suprema di fronte alla patriation della Costituzione' in Rolla (ed), *L'apporto della Corte suprema alla determinazione dei caratteri dell'ordinamento costituzionale canadese*, p. 51; Fulco Lanchester, 'La "Patriation" della Costituzione canadese: verso un nuovo federalismo?' [1983] 32(1) *Riv. Trim. Dir. Pub.* 337.

"patriation" and including the *Charter of Rights and Freedoms*. Eight provinces, including Quebec, opposed such proposed Resolution, based 'on their assertion that both conventionally and legally the consent of all the provinces was required for the address to be forwarded to Her Majesty,'³⁰ while only two had approved it.

In a first ruling on the case, called *Patriation Reference* or *First Reference (Re: Resolution to amend the Constitution)*,³¹ the Supreme Court of Canada held that the Houses of Parliament had not violated any 'legal principles of federalism proceeding without the concurrence of the provinces: the requirement of provincial consent had not crystallized into law,'³² however, a different majority also ruled that 'a substantial degree of provincial consent—to be determined by the politicians and not the courts—was conventionally required for the amendment of the Canadian Constitution.'³³

Following-up to this *First Reference*, 'the Government of Canada and the governments of the ten provinces held a Constitutional Conference, on November 2 to 5, 1981, to seek agreement on the patriation of the Constitution together with a charter of rights and an amending formula. On November 5, 1981 Canada and nine of the ten provinces signed an agreement to this effect. Quebec was the dissenting province.'³⁴

The province of Quebec therefore vetoed the resolution of the Canadian Parliament, adopted to conform to such agreement, and submitted 'the following question [...] to the Court of Appeal for hearing and consideration: Is the consent of the Province of Quebec constitutionally required, by convention, for the adoption by the Senate and the House of Commons of Canada of a resolution the purpose of which is to cause the Canadian Constitution to be amended in such a manner as to affect: i) the legislative competence of the Legislature of the Province of Quebec in virtue of the Canadian Constitution; ii) the status or role of the Legislature or Government of the Province of Quebec within the Canadian federation; and, does the objection of the Province of Quebec render the adoption of such resolution unconstitutional in the conventional sense?'³⁵

The question was answered in the negative by the Court of Appeal³⁶ on the 7th of April, 1982, and then the case, *Quebec Veto Reference (Re: Objection by Quebec to a Resolution to amend the Constitution)*,³⁷ reached the Supreme Court,

³⁰ [1981] 1 S.C.R. 753, 755.

³¹ [1981] 1 S.C.R. 753.

³² [1981] 1 S.C.R. 753, 758, emphasis added.

³³ [1981] 1 S.C.R. 753, 759.

³⁴ [1982] 2 S.C.R. 793, 795.

³⁵ [1982] 2 S.C.R. 793, 798.

³⁶ [1982] C.A. 33, 134 D.L.R. (3d) 719.

³⁷ [1982] 2 S.C.R. 793. For a comment on this case, see for example Gail C. Brandt, 'The Quebec Veto Reference: A Constitutional Postscript' [1983] 21 *U. W. Ontario L. Rev.* 163.

which delivered its judgment in December of 1982. The Court held that 'Quebec has no conventional power of veto over constitutional amendments affecting the legislative competence of the Province. Appellant failed to demonstrate compliance with the most important requirement for establishing a convention, that is, acceptance or recognition of such a convention by the actors in the precedents. This recognition is not only an essential element of conventions: it is the normative one, the formal one which enables us unmistakably to distinguish a constitutional rule from a rule of convenience or from political expediency. As for the conventional rule of unanimity, it has already been unanimously rejected by this Court in *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753. Appellant advanced no compelling reason why this opinion should be modified.'³⁸

Meanwhile, in accordance with the agreement of November 1981, only ten days after the ruling by the Court of Appeal, the *Constitution Act, 1982*, including as its Part I the *Canadian Charter of Rights and Freedoms*, had been signed into law in April of 1982. Quebec also immediately reacted to this, by passing *An Act respecting the constitution Act, 1982*³⁹ in June 1982, with the goal of 'immunizing' the whole legislation of Quebec from the *Canadian Charter*: indeed such 'omnibus statute [...] added a standard-form notwithstanding clause to all of that province's statutes.'⁴⁰ The Quebec government also included 'a notwithstanding clause in every piece of legislation put before the National Assembly between 1982 and 1985. [...]. [Anyway] this practice largely ceased after 1985,⁴¹ and 'when the blanket override came to the end of its five-year life, no attempt was made to re-enact it for another five-year term.'⁴²

Such controversy - which was reignited, as we shall see in §§ 5.9 and 5.11, by the judgment of the Supreme Court in *Ford* - was the result of the existing animosity of Quebec towards the Canadian federation,⁴³ and at the

³⁸ [1982] 2 S.C.R. 793, 794.

³⁹ R.S.Q. 1982, c. L-4.2.

⁴⁰ Hogg and Bushell, *The Charter Dialogue Between Courts And Legislators (Or Perhaps The Charter Of Rights Isn't Such A Bad Thing After All)*, p. 83, footnote 26.

⁴¹ Johansen and Rosen, *The Notwithstanding Clause of the Charter*, p. 10.

⁴² Hogg and Bushell, *The Charter Dialogue Between Courts And Legislators (Or Perhaps The Charter Of Rights Isn't Such A Bad Thing After All)*, p. 83, footnote 26.

⁴³ Among the most recent accounts of "Canada's perennial constitutional crisis" with regard to Quebec, see David R. Cameron, Jacqueline D. Krikorian, 'Recognizing Quebec in the Constitution of Canada: Using the Bilateral Constitutional Amendment Process' [2008] 58(4) *U. Toronto Law J.* 389, in particular 389-403; for earlier studies, see L. Kinvin Wroth, 'Quebec, Canada and the First Nations: The Problem of Secession' [1999] 23 *Vt. L. Rev.* 709; Patrick J. Monahan, 'The Law and Politics of Quebec Secession' [1995] 33 *Osgoode Hall L. J.* 1; Charles Taylor, 'Can Canada Survive the *Charter*?' [1992] 30 *Alta. L. Rev.* 427; in the Italian scholarship, see also Dario E. Tosi, *Secessione e Costituzione tra prassi e teoria* (Jovene 2007), pp. 159-67; Tania Groppi, 'Il Canada tra riforma della Costituzione e secessione' in Rolla (ed), *Lo sviluppo dei diritti fondamentali in Canada. Tra universalità e diversità culturale*, p. 19 (also in Gambino

same time it contributed to increase the distance between the two sides: this animosity also led up to the two referendums of 1980 and 1995 for the secession of Quebec, the latter falling short of reaching the necessary quorum only by a very few votes.⁴⁴

4. The essential rules of Canadian bilingualism

In considering the main features of Canadian bilingualism,⁴⁵ we need to go as back as 1866:⁴⁶ indeed that year, what was then the Province of Canada enacted the *Civil Code of Lower Canada*, which included 'a provision to guide interpreters in the resolution of problems caused by differences in the French and English versions of the Code.'⁴⁷ Such provision was § 2615 and stated:

If in any article of this code founded on the laws existing at the time of its promulgation, there be a difference between the English and French texts, that version shall prevail which is the most consistent with the provisions of the existing laws on which the article is founded; and if there be any such difference in an article changing the existing laws, that version shall prevail which is the

and Amirante (eds), *Il Canada: un laboratorio costituzionale. Federalismo, Diritti, Corti*, p. 337); Susanna Mancini, *Minoranze autoctone e Stato. Tra composizione dei conflitti e secessione* (Giuffrè 1996), pp. 91-113. The famous Quebec-born writer Mordecai Richler almost epitomized the existing tensions among the various linguistic and religious communities existing in Canada, often publishing some controversial pieces that were very polemically welcomed across the board.

⁴⁴ A fundamental step in this ongoing controversy was the Supreme Court of Canada's 1998 judgment in *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, where the Court denied Quebec a right to secede under national or international law; we will not consider this ruling, because it is not directly related to our topic, but it always has to be kept in mind: suffice it to say here that in this judgment, 'the Court determined that respect for minority rights was one of the five fundamental structural principles of the Constitution, the others being federalism, democracy, the rule of law and constitutionalism,' explained by Robert B. Asselin, 'Section 41 of the *Official Languages Act*: scope, evolution and implementation framework' [Library of Parliament 2001] PRB 01-9E, available at <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb019-e.pdf> (last accessed 10 February 2012); among the extremely vast literature on the subject, let us just mention, on the links between this reference and linguistic policies, Marc Cousineau, 'Le renvoi sur la sécession du Québec: La résurrection des droits linguistiques au Canada' [1999] 11 Rev. nat. droit const. 147.

⁴⁵ For a deep analysis in the Italian scholarship, see Valeria Piergigli, 'Minoranza anglofona in Québec versus minoranze francofone del Rest of Canada' [2002] 32(1-2) *Amministrare* 229; see also Ead., 'Le minoranze linguistiche anglofona e francofona nelle province canadesi: aspetti problematici' in G Dotoli (ed), *Il Canada del nuovo secolo. Gli archivi della memoria, Atti del Convegno internazionale, Monopoli, 30 maggio-3 giugno 2001* (Schena 2002), p. 863.

⁴⁶ Deborah Cao, *Translating Law* (Multilingual Matters 2007), p. 123.

⁴⁷ Pierre-André Côté, 'Bilingual Interpretation of Enactments in Canada: Principles v. Practice' [2004] 29 *Brooklyn J. Int'l L.* 1067, 1067. See also John E.C. Brierley, 'Quebec's Civil Law Codification: Viewed and Reviewed' [1968] 14 *McGill L.J.* 521, 535-8.

most consistent with the intention of the article, and the ordinary rules of legal interpretation shall apply in determining such intention.⁴⁸

The following year, as we already know, the *Constitution Act, 1867* was enacted, whose s. 133 mandated, *inter alia*, the printing and publication of '[t]he Acts of the Parliament of Canada and of the Legislature of Quebec' (thus not of the other Provinces' legislatures) in both English and French. The case-law has elaborated two main rules guiding the application of s. 133: the "equal authenticity rule" and the "shared meaning rule."⁴⁹

The former was established (even though it was not yet called this way) by the Supreme Court of Canada in *Canadian Pacific Railway v. Robinson*,⁵⁰ where it stated, in a very famous passage:

I take it that whether the article was first written in French or in English is immaterial. [...] In the case of ambiguity, where there is any possibility to reconcile the two, one must be interpreted by the other. The English version cannot be read out of the law. It was submitted to the legislature, enacted and sanctioned simultaneously with the French one, and is law just as much as the French one is.⁵¹

In other words, 'both language versions of a bilingual statute are the official, original and authoritative expressions of the law; [...] it means that neither the English nor the French version has the status of a copy or translation, and neither enjoys priority or paramountcy over the other.'⁵²

Anyway, since *CPR v. Robinson* concerned the *Civil Code of Quebec*, this rule formally only applied to Quebec legislation. But since s. 133 also imposes bilingualism for the Canadian statutes, the "equal authenticity rule" had to be extended to the Acts of the Canadian Parliament: the Supreme Court did that in the case *The King v. Dubois*.⁵³

⁴⁸ Civil Code of Lower Canada (1866), § 2615.

⁴⁹ Cao, *Translating Law*, p. 123. See also Ruth Sullivan, 'The Challenges of Interpreting Multilingual, Multijural Legislation' [2003] 29 *Brook. J. Int'l L.* 985, and in particular 1005-22; Ead., 'Statutory Interpretation in the Supreme Court of Canada' [1999] 30 *Ottawa L. Rev.* 175, and in particular 187-215; Michel Bastarache, Naomi Metallic, Regan Morris & Chris Essert, *The Law of Bilingual Interpretation* (LexisNexis Canada 2008), chapter 2, 'The Fundamental Rules of Interpretation Applicable to Bilingual Statutes in Canada'; Susan Šarčević, *New approach to legal translation* (Kluwer Law International 2000 (1997)), pp. 75-7.

⁵⁰ [1891] 19 S.C.R. 292.

⁵¹ [1891] 19 S.C.R. 292, 325.

⁵² Cao, *Translating Law*, p. 123.

⁵³ [1935] S.C.R. 378.

The rule was later codified too, in the *Official Languages Act, 1969* and in the *Constitution Act, 1982*:⁵⁴ 'S18(1) of the Constitution Act provides that the statutes of Parliament of Canada shall be printed and published in both English and French, and both language versions are equally authoritative. S8(1) of the Official Languages Act stipulates that in constructing an enactment, both its versions in the official languages are equally authentic. Furthermore, for the construction of an enactment where there is difference between the two versions, regard must be had to both versions (S8(2) of the Official Languages Act). This means that where there are discrepancies between the versions, the court must read both versions with care and both must be considered in resolving interpretative issues, to determine the intention of the legislature and both versions should be attributed the same importance or weight.'⁵⁵

⁵⁴ Between the two, the Supreme Court issued its milestone judgment in *Jones v. A.G. of New Brunswick* [1975] 2 S.C.R. 182, upholding the validity of the provisions of the *Official Languages Act* (R.S.C. 1970, c. O-2) establishing both French and English as official languages. The appellant had challenged them on the grounds that they allegedly did not fall under the jurisdiction of the federal government, but the Court, in a unanimous decision, rejected this claim, deeming the challenged provision to be 'within the legislative competence of the Parliament of Canada under s. 91 of the *British North America Act, 1867*, which provides that Parliament can "make Laws for the Peace, Order, and good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces"' (the quote is from the syllabus, at pp. 182-3). The co-official character of the two languages (a feature that Canada shares with many countries in the world, such as - in Europe - Belgium, Finland, and Ireland) was then confirmed by the *Constitution Act, 1982*, and then a few years later the *Official Languages Act* underwent substantial changes, become necessary in order to conform to the changes brought by the *Constitution Act, 1982* itself (the amending act was the *Official Languages Act* (R.S.C., 1985, c. 31 (4th Supp.))).

⁵⁵ Cao, *Translating Law*, p. 124. We should anyway always be aware of Rodolfo Sacco's insightful warning that the declamations of one legal system's jurists about the equal authenticity of two official languages may not correspond to the actual interpretative practice they follow, even though they would never admit it: 'D'abord, il faut faire une distinction entre les systèmes où un texte est privilégié par rapport aux autres, et les systèmes où tous les textes ont une égale autorité. Nous devons, en effet, nous poser la question. Que font les Suisses qui adoptent des lois multilingues? Que font les Belges. qui font des lois multilingues? Que faisaient les Soviétiques lorsqu'ils rédigeaient des lois multilingues? Que font les Québécois? Que fait la Vallée d'Aoste? Le Suisse nous répondra que les quatre langues de la fédération, au moment de l'interprétation d'une loi, n'ont pas toutes la même importance, car la loi même établit une différence entre le français et l'allemand d'un côté, et les autres langues de l'autre côté. Mais le problème se présente au moment de choisir de lire la loi en français, ou de la lire en allemand. Et quelqu'un de nous pourrait avoir l'impression que le texte qui compte est le texte allemand, parce qu'il est rédigé avec plus de soin, et que la langue allemande permet de formuler l'idée avec plus de précision. Pour avoir une réponse, il ne suffira pas toujours d'interroger le juriste du pays donné. Celui-ci sera tenté de nous répéter la vérité officielle, et nous dira que l'importance des deux ou dix textes est identiques. Mais s'il n'a pas fait une enquête bien analytique il court le danger de croire a priori que le réel

As for the "shared or common meaning rule," it has been quite clearly explained in the following way: 'where the two versions of bilingual legislation do not say the same thing, the meaning that is shared by both ought to be adopted unless that meaning is for some reasons unacceptable.'⁵⁶

In other words, '[t]he attempt to discover or construct a shared meaning is the first step in the interpretation of bilingual legislation. The shared meaning is not always decisive, however, and other indicators of meaning must also be taken into account. Indeed, where these other indicators suggest the shared meaning is inappropriate, the court is entitled to reject it in favour of a more appropriate version, which is plausible in one language version but not in the other.'⁵⁷

The rule was recently summarized by Justice Bastarache in *R. v. Daoust*, along with a description of the steps to be followed in the interpretation of bilingual legislation:

26. The Court has on several occasions discussed how a bilingual statute should be interpreted in cases where there is a discrepancy between the two versions of the same text. For example, in *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269, 2002 SCC 62, at para. 56, LeBel J. wrote:

A principle of bilingual statutory interpretation holds that where one version is ambiguous and the other is clear and unequivocal, the common meaning of the two versions would *a priori* be preferred [...]. Furthermore, where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning [...].

corresponde aussi bien dans l'ensemble que dans les détails à la règle légale axée sur l'égalité des langues. L'on peut même croire que le juriste étranger partirait avantagé dans une telle enquête, car il serait moins influencé par la présomption que peut créer la sacralité du principe d'égalité' (R. Sacco, 'L'interprète et la règle de droit européenne', in the already mentioned work, edited by the same Sacco, *L'interprétation des textes juridiques rédigés dans plus d'une langue*, p. 226, 227-8).

⁵⁶ *Ibidem*. This approach resembles the one followed by the ECJ: as explained by Wainwright, 'Drafting and interpretation of multilingual texts of the European Community,' at p. 321, 'First, the Court will try and avoid coming to the conclusion that one or more versions are significantly different. This is for obvious reasons of legal certainty and equality before the law. An effort will therefore be made to give a common interpretation which best reflects the sense in all the languages (Case 80/76, *Kerry Milk*).'

⁵⁷ *Dáithí Mac Cárthaigh*, 'Interpretation and Construction of Bilingual Laws: A Canadian Lamp to Light the Way?' [2007] 7(2) *Judicial Studies Institute Journal* 211, 217 (the Author recalls, for this conclusion, the example of the case *Food Machinery Corp. v. Canada (Registrar of Trade Marks)*, [1946] 2 D.L.R. 258 (Ex.Ct)).

As well, in *R. v. Mac*, [2002] 1 S.C.R. 856, 2002 SCC 24, at para. 5, I stated the following:

The *Criminal Code* is a bilingual statute of which both the English and French versions are equally authoritative. In his *Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 327, Pierre-André Côté reminds us that statutory interpretation of bilingual enactments begins with a search for the shared meaning between the two versions.

I would also draw attention to the two-step analysis proposed by Professor Côté in *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 324, for resolving discordances resulting from divergences between the two versions of a statute:

Unless otherwise provided, differences between two official versions of the same enactment are reconciled by educing the meaning common to both. Should this prove to be impossible, or if the common meaning seems incompatible with the intention of the legislature as indicated by the ordinary rules of interpretation, the meaning arrived at by the ordinary rules should be retained.

27. There is, therefore, a specific procedure to be followed when interpreting bilingual statutes. The first step is to determine whether there is discordance. If the two versions are irreconcilable, we must rely on other principles [...]. A purposive and contextual approach is favoured [...].

28. We must determine whether there is an ambiguity, that is, whether one or both versions of the statute are “reasonably capable of more than one meaning” [...]. If there is an ambiguity in one version but not the other, the two versions must be reconciled, that is, we must look for the meaning that is common to both versions [...]. The common meaning is the version that is plain and not ambiguous [...].

29. If neither version is ambiguous, or if they both are, the common meaning is normally the narrower version [...]. Professor Côté illustrates this point as follows [...]:

There is a third possibility: one version may have a broader meaning than another, in which case the shared meaning is the more narrow of the two.

30. The second step is to determine whether the common or dominant meaning is, according to the ordinary rules of statutory interpretation, consistent with Parliament's intent [...]. At this stage, the words of Lamer J. in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1071, are instructive:

First of all, therefore, these two versions have to be reconciled if possible. To do this, an attempt must be made to get from the two versions of the provision the meaning common to them both and ascertain whether this appears to be consistent with the purpose and general scheme of the Code.

31. Finally, we must also bear in mind that some principles of interpretation may only be applied in cases where there is an ambiguity in an enactment. As Iacobucci J. wrote in *Bell ExpressVu, supra*, at para. 28: "Other principles of interpretation — such as the strict construction of penal statutes and the 'Charter values' presumption — only receive application where there is ambiguity as to the meaning of a provision."⁵⁸

⁵⁸ *R. v. Daoust*, [2004] 1 S.C.R. 217, §§ 26-31. As for the shared meaning rule, it has also been criticized by some scholars, particularly as it emerges from *Daoust*: see Ruth Sullivan, 'Some problems with the shared meaning rule as formulated in *R. v. Daoust* and *The Law of Bilingual Interpretation*' [2010] 42(1) *Ottawa L. Rev.* 71 (the book referred to is the one mentioned *supra*, at footnote 49); but see also Paul Salembier, 'Rethinking the Interpretation of Bilingual Legislation: the Demise of the Shared Meaning Rule,' [2003] 35 *Ottawa L. Rev.* 75.

5. The case-law on minority linguistic rights

5.1 *Blaikie No. 1* and *No. 2* (1979 and 1981): the Constitution prevents Quebec from making French the only language of its legislature, courts, and administrative bodies

Moving on to consider the most important cases related to the linguistic policy in Canada, the first ones in line are *Att. Gen. of Quebec v. Blaikie et al.*⁵⁹ of 1979 and the two-years later's follow-up *Attorney General of Quebec v. Blaikie et al.*⁶⁰

Blaikie No. 1 concerned two appeals from the Court of Appeal for Quebec, which had struck down the whole Chapter III (ss. 7 to 13) of Title I of the *Charter of the French language*.

In their original version, in force at the time, ss. 7 to 13 read as follows:

7. French is the language of the legislature and the courts in Quebec.

8. Legislative bills shall be drafted in the official language. They shall also be tabled in the *Assemblée nationale*, passed and assented to in that language.

9. Only the French text of the statutes and regulations is official.

10. An English version of every legislative bill, statute and regulation shall be printed and published by the civil administration.

11. Artificial persons addressing themselves to the courts and to bodies discharging judicial or quasi-judicial functions shall do so in the official language, and shall use the official language in pleading before them unless all the parties to the action agree to their pleading in English.

12. Procedural documents issued by bodies discharging judicial or quasi-judicial functions or drawn up and sent by the advocates practising before them shall be drawn up in the official language. Such documents may, however, be drawn up in another language if the natural person for whose intention they are issued expressly consents thereto.

⁵⁹ [1979] 2 S.C.R. 1016. For a comment in French, see for example 'L'Arrêt Blaikie et la Langue des Municipalités et des Commissions Scolaires' [1980] 11 *Rev. Gen. Droit* 325; two articles in English commented on *Blaikie* together with *Forest*, a case mentioned *infra* in § 5.3 as the one that led to *Manitoba Language Rights*: Edward A. Sellers, 'Constitutionally Entrenched Linguistic Minority Rights: The *Forest* and *Blaikie* Decisions' [1986] 15 *Man. L. J.* 257; Robert W. Kerr, 'Blaikie and Forest: The Declaratory Action as a Remedy against Unconstitutional Legislation' [1981] 26 *McGill L. J.* 97.

⁶⁰ [1981] 1 S.C.R. 312.

13. The judgments rendered in Quebec by the courts and by bodies discharging judicial or quasi-judicial functions must be drawn up in French or be accompanied with a duly authenticated French version. Only the French version of the judgment is official.

The Supreme Court confirmed the holding of the Court of Appeal, finding such provisions in breach of s. 133 of the *Constitution Act, 1867*, which had to be considered 'an entrenched provision, [...] forbidding modification by unilateral action of Parliament or of the Quebec Legislature.'⁶¹ S. 133 was 'correctly described as giving a constitutionally based right to any person to use English or French in legislative debates in the federal and Quebec Houses and in any pleading or process in or issuing from any federally established Court or any Court of Quebec, and as imposing an obligation of the use of English and French in the records and journals of the federal and Quebec legislative Houses and in the printing and publication of federal and Quebec legislation.'⁶²

In other words, in this case the Court established that 'the National Assembly could not declare French the only language of legislation and the courts. The Constitution that underlay the creation of Canada in 1867 bound Québec to comply with bilingualism in enacting laws and for judicial proceedings.'⁶³ Two years later, *Blaikie No. 2* further specified that 'this obligation extended beyond legislation as such to all normative texts emanating from the government.'⁶⁴

The holding in *Blaikie No. 1* has remained on the books (and was even broadened by *Blaikie No. 2*), and the *Charter of the French language* had to be amended in accordance, even though Chapter III was eventually replaced only in 1993, by *Bill 86*.⁶⁵ Anyway, long before that, the very 'day after the decision of this Court in *Blaikie No. 1*, the Legislature of Quebec re-enacted in both languages all those Quebec statutes that had been enacted in French only.'⁶⁶

⁶¹ [1979] 2 S.C.R. 1016, 1017.

⁶² [1979] 2 S.C.R. 1016, 1026.

⁶³ M. Chevrier, 'Laws and Language in Québec: The Principles and Means of Québec's Language Policy' [1997], available at http://english.republiquelibre.org/The_principles_and_means_of_Qu%C3%A9bec's_language_policy (last accessed 31 Jan 2012).

⁶⁴ Ibidem.

⁶⁵ S.Q. 1993, c. 40, s. 1. See Leigh Oakes, 'Language planning and policy in Québec,' in D Ayoun (ed), *Studies in French applied linguistics* (John Benjamins 2008), 345-86, 358.

⁶⁶ [1985] 1 S.C.R. 721, § 19. The statute referred to is An Act respecting a judgment rendered in the Supreme Court of Canada on 13 December 1979 on the language of the legislature and the courts in Québec, 1979 (Que.), c. 61.

5.2 *Protestant School Boards* (1984): Quebec could not restrict the rights that the Constitution granted to English-speaking parents with regard to the language of education of their children

A few years after the two *Blaikie* cases, the Court decided *Attorney General of Quebec v. Quebec Association of Protestant School Boards et al.*,⁶⁷ a case involving the provisions of Title I, Chapter VIII (*The language of instruction*) of the *Charter of the French language* - and in particular its key provisions, ss. 72 and 73 -, which were challenged by the respondent association only a few weeks after the *Canadian Charter of Rights and Freedoms* entered into force.⁶⁸

Inter alia, ss. 72 and 73 respectively stated that, as a general rule, 'instruction in the kindergarten classes and in the elementary and secondary schools' should be given in French, and that an exception could be made, and thus education could be given in English, upon request of the parents, for the following children: '(a) a child whose father or mother received his or her elementary instruction in English, in Québec; (b) a child whose father or mother domiciled in Québec on 26 August 1977, received his or her elementary instruction in English outside Québec; (c) a child who, in his last year of school in Québec before 26 August 1977, was lawfully receiving his instruction in English, in a public kindergarten class or in an elementary or secondary school; (d) the younger brothers and sisters of a child described in paragraph c.'

The Court found indeed a contrast between ss. 72 and 73 of *Bill 101* and the above-mentioned section 23 of the *Charter of Rights and Freedoms*: this latter provision was arguably passed with the precise aim of overriding more restrictive regulations such as typically the ones in the Quebec statute. But even if this was not the intent of the constitutional framers, anyway 'the provisions of s. 73 of *Bill 101* collide directly with those of s. 23 of the *Charter*, and are not limits which can be legitimized by s. 1 of the *Charter*. Such limits cannot be exceptions to the rights and freedoms guaranteed by the *Charter* nor amount to amendments to the *Charter*.'⁶⁹

On these grounds, sections 72 and 73 were therefore declared of no force or effect, pursuant to paragraphs 52(1) and (2)(a) of the *Constitution Act, 1982*.

A few aspects of the ruling deserve more careful consideration. First of all, from the point of view of the use by courts of comparative materials (an issue that has gained more attention since, also raising significant

⁶⁷ [1984] 2 S.C.R. 66. For a comment on this case, see Daniel Proulx, 'La Loi 101, la clause-Québec et la Charte canadienne devant la Court suprême : un cas d'espèce?' [1995] 16(1) *Rev. Gen. Droit* 167.

⁶⁸ [1984] 2 S.C.R. 66, 71.

⁶⁹ [1984] 2 S.C.R. 66, 88.

controversies⁷⁰), the appellants in this case (*i.e.* the government of Quebec) remarkably tried to encourage the Court to rely on the experience of 'other free and democratic societies such as Switzerland and Belgium, which have socio-linguistic situations comparable to that in Quebec, have adopted stricter linguistic measures than Bill 101, and these measures have been held to be reasonable and justified by the Swiss and European courts.'⁷¹ The Court does not involve in such arguments, deeming other ones alone 'fatal to appellant's position,'⁷² but the custom of looking beyond national borders to some foreign experiences will become common in the Canadian Supreme Court, which thus demonstrates much more openness towards the use of comparative experiences for deciding its cases, than its American counterpart.⁷³

Another important passage of the opinion, for the purposes of the interpretation of s. 23 of the *Charter*, is the one stating that this provision 'is not, like other provisions in that constitutional document, of the kind generally found in such charters and declarations of fundamental rights. It is not a codification of essential, pre-existing and more or less universal rights that are being confirmed and perhaps clarified, extended or amended, and which, most importantly, are being given a new primacy and inviolability by their entrenchment in the supreme law of the land. *The special provisions of s. 23 of the Charter make it a unique set of constitutional provisions, quite peculiar to Canada.*'⁷⁴

S. 23 is therefore looked at from the beginning as a rule in some way unique, from comparative perspective, which was drafted in order to take into account the specific situation of coexistence of the two communities, the Anglophone being the majority in Canada but the minority in Quebec, and the Francophone *vice versa*.

Looking at such situation in historical perspective is essential: it allows to understand the origins of s. 23 and thus to interpret it in the most appropriate way, but also - and it is the third passage we want to underline - it dispels some possible misconceptions. In particular, it has not always been the case that Quebec legislators felt so passionately the urge to protect the use of French language, even to the detriment of the rights of the Anglophone minority: to the contrary, in the past 'the fate reserved to the English language as a language of instruction had generally been more advantageous in Quebec than the fate reserved to the French language in the other provinces.'⁷⁵

⁷⁰ See some references below, at the end of § 5.9 on the *Ford* judgment.

⁷¹ [1984] 2 S.C.R. 66, 78.

⁷² *Ibidem*.

⁷³ Let us direct again *below*, to § 5.9.

⁷⁴ [1984] 2 S.C.R. 66, 79, emphasis added.

⁷⁵ [1984] 2 S.C.R. 66, 81.

However, at some point in the last half-century things changed in Quebec: this province began to pass legislation meant 'to give preferred treatment to French as the language of instruction, and correspondingly to lessen the benefits hitherto given to English, in fact if not in law.' *Bill 101* was 'the culmination of this legislation.'⁷⁶ This trend was typical of Quebec: it has indeed 'been the only province where there was then this tendency to limit the benefits conferred on the language of the minority.'⁷⁷

We are here confronted with an important feature of what could be described as the "Quebec exception": while in the other provinces of Canada, or in European countries, the typical trend has been towards an increased protection of linguistic minorities, Quebec has experienced a different movement, towards protecting the language of the majority, even if this sometimes meant sacrificing the needs of the Anglophone minority.

On some occasions, such as in *Protestant School Boards*, the Supreme Court has reacted, but this has led to tensions, culminated in the already mentioned referendums for the secession of Quebec from the rest of Canada, the second of which did not pass only for a few votes.⁷⁸

5.3 *Manitoba Language Rights* (1985), aka the mirror image of *Blaikie*: it is unconstitutional for the provinces to make English the only language of their legislature and courts (even though the *de facto doctrine* can temporarily save unilingual legislation until it is re-enacted in both official languages)

The next case to consider is *Re Manitoba Language Rights*,⁷⁹ a case in the progeny of the two *Blaikie* rulings. It concerned Manitoba's language legislation, and in particular the *Official language Act, 1890*,⁸⁰ which provided:

⁷⁶ Ibidem.

⁷⁷ Ibidem.

⁷⁸ See *supra*, § 3.

⁷⁹ [1985] 1 S.C.R. 721. For some reflections on this case, see Warren Newman, 'Understanding the Rule of Law in Canada', in Stephen Tierney (ed), *Accommodating Cultural Diversity* (Ashgate 2007), pp. 199-238, and in particular the paragraph titled 'The Practice of the Rule of Law in Canada: The *Manitoba Language Rights Reference*', 212-5; see also Sydney B. Horton, 'The Manitoba Language Rights Reference and the Doctrine of Mandatory and Directory Provisions' [1987] 10 *Dalbousie L.J.* 195; S.J. Whitley, 'The Manitoba Language Reference: Judicial Consideration of "Language Charged with Meaning"' [1985] 15 *Man. L.J.* 295; and, in French, Michel Bastarache, 'Commentaire sur la décision de la Cour suprême du Canada dans le renvoi au sujet des droits linguistiques au Manitoba, jugement rendu le 13 juin 1985' [1985] *McGill L.J.* 93.

⁸⁰ An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba, 1890 (Man.), c. 14. There had already been a previous, minor case concerning the same statute: *Attorney General of Manitoba v. Forest* [1979] 2 S.C.R. 1032: here, the Court had struck down some restrictions on the use of French that the Official language Act, 1890 had introduced, thereby violating s. 23 of the Manitoba Act, 1870 (in

'1 Any statute or law to the contrary notwithstanding, the English language only shall be used in the records and journals of the House of Assembly for the Province of Manitoba, and in any pleadings or process in or issuing from any court in the Province of Manitoba. The Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language. 2 This Act shall only apply so far as this Legislature has jurisdiction so to enact, and shall come into force on the day it is assented to.'

As the Court points out, 'upon enactment of the *Official Language Act, 1890* the Province of Manitoba ceased publication of the French version of Legislative Records, Journals and Acts,⁸¹ with the result that 'the Manitoba Legislature has, since 1890, enacted nearly all of its laws in English only'⁸² (and had gone on like that until at least 1981⁸³).

However, this seemed in striking contrast with s. 133 of the *Constitution Act, 1867* and s. 23 of the *Manitoba Act, 1870*,⁸⁴ which - very similarly to s. 133 of the *Constitution Act, 1867* - provided that 'both English and French "shall be used in the ... Records and Journals" of the Manitoba Legislature. It further provide[d] that "[t]he Acts of the Legislature shall be printed and published in both those languages."⁸⁵ And it was beyond doubt, from *Blaikie No. 1* and *Blaikie No. 2*, that 'all references to "Acts of the Legislature" [...] [had to be] intended to encompass all statutes, regulations and delegated legislation of the Manitoba Legislature, enacted since 1890;⁸⁶ to put it differently, '*Blaikie No. 1* stands for the proposition that s. 133 of the *Constitution Act, 1867* requires (i) simultaneous enactment of legislation in both English and French, and (ii) equal authority and status for both the English and the French versions.'⁸⁷

To be sure, the *Official language Act, 1890* had been already challenged three times before lower courts, and each time declared unconstitutional, but each time the judgments were not followed; a fourth challenge had reached the Supreme Court in 1979: 'on December 13, 1979, in *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032, this Court, in unanimous reasons, held that the provisions of Manitoba's *Official Language Act, 1890* were in conflict with s. 23 of the *Manitoba Act, 1870* and unconstitutional.'⁸⁸

particular, the 1890 Act had abrogated some rights, including the right to use the French language before the courts of Manitoba, that were instead protected by the Manitoba Act, 1870, on its turn confirmed by the Constitution Act, 1867).

⁸¹ [1985] 1 S.C.R. 721, § 9.

⁸² [1985] 1 S.C.R. 721, § 55.

⁸³ [1985] 1 S.C.R. 721, §§ 15-6.

⁸⁴ R.S.C. 1970, App. II.

⁸⁵ [1985] 1 S.C.R. 721, § 26.

⁸⁶ [1985] 1 S.C.R. 721, § 44.

⁸⁷ [1985] 1 S.C.R. 721, § 130.

⁸⁸ [1985] 1 S.C.R. 721, §§ 10-3. The Court adds that 'on July 9, 1980, after the decision of this Court in *Forest*, the Legislature of Manitoba enacted *An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes*, 1980 (Man.), c. 3': also this *Act* was challenged, and

But after the Legislature of Manitoba enacted a law in response to *Forest*, the question was raised again before the Supreme Court in the case at bar, with regard to this latter law. First of all, this reference by the Governor General in Council asked the Court to determine whether 'the requirements of s. 133 of the *Constitution Act, 1867* and of s. 23 of the *Manitoba Act, 1870* respecting the use of both the English and French languages in (a) the Records and Journals of the Houses of the Parliament of Canada and of the Legislatures of Quebec and Manitoba, and (b) the Acts of the Parliament of Canada and of the Legislatures of Quebec and Manitoba'⁸⁹ were mandatory, or just directory.

The Court answered very clearly that 'there is no authority in Canada for applying the mandatory/directory doctrine to constitutional provisions,'⁹⁰ and that even 'more important than the lack of authority to support the application of the mandatory/directory distinction to constitutional provisions, [...] is the harm that would be done to the supremacy of Canada's Constitution if such a vague and expedient principle were used to interpret it. It would do great violence to our Constitution to hold that a provision on its face mandatory, should be labelled directory on the ground that to hold otherwise would lead to inconvenience or even chaos. Where there is no textual indication that a constitutional provision is directory and where the words clearly indicate that the provision is mandatory, there is no room for interpreting the provision as directory.'⁹¹ Therefore s. 133 and s. 23 were to be considered mandatory.

As the Court explains in a later passage, worth quoting:

Section 23 of the *Manitoba Act, 1870* is a specific manifestation of the general right of Franco-Manitobans to use their own language. The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

Of course, if the Court had just stopped there, it would have meant that all the legislation enacted in Manitoba since 1890 was invalid and thus of no force and effect, with the huge chaos the Court hinted at: indeed 'the positive

its validity was the subject of question 4 in the case we are reviewing, which we will not consider as it is less relevant for our purposes.

⁸⁹ [1985] 1 S.C.R. 721, § 1.

⁹⁰ [1985] 1 S.C.R. 721, § 37.

⁹¹ [1985] 1 S.C.R. 721, § 39.

legal order which has purportedly regulated the affairs of the citizens of Manitoba since 1890 [...] [would be] destroyed and the rights, obligations and any other effects arising under these laws [...] [would be] invalid and unenforceable.⁹²

The Court took that into account in answering Questions 2 ('Are those statutes and regulations of the Province of Manitoba that were not printed and published in both the English and French languages invalid by reason of s. 23 of the *Manitoba Act, 1870*?') and 3 ('If the answer to question 2 is affirmative, do those enactments that were not printed and published in English and French have any legal force and effect, and if so, to what extent and under what conditions?').

It drew the inevitable consequence of its answer to question 1, and declared that all 'the unilingual enactments of the Manitoba Legislature [we]re inconsistent with s. 23 of the *Manitoba Act, 1870* since the constitutionally required manner and form for their enactment ha[d] not been followed,⁹³ and therefore they were invalid and of no force or effect.

However, it resorted to the "*de facto* doctrine," according to which the official acts carried on by someone who irregularly or illegally occupied a public position, "under color of right or authority," are allowed to maintain their validity, until the mischief is remedied or indefinitely. By applying such doctrine to the case at bar, the Court concluded that all the unilingual statutes and regulations of the Province of Manitoba were invalid, but 'the invalid current Acts of the Legislature will be deemed temporarily valid for the minimum period of time necessary for their translation, re-enactment, printing and publication'⁹⁴ (answer to question 2); as a consequence, '[t]he Acts of the Legislature that were not enacted, printed and published in English and French have no legal force and effect because they are invalid, but [...] the current Acts of the Legislature will be deemed to have temporary force and effect for the minimum period of time necessary for their translation, re-enactment, printing and publication'⁹⁵ (answer to question 3). It was the first instance of a delayed declaration of invalidity by the Canadian Supreme Court, a remedy then become common practice.⁹⁶

⁹² [1985] 1 S.C.R. 721, § 61.

⁹³ [1985] 1 S.C.R. 721, § 54.

⁹⁴ [1985] 1 S.C.R. 721, § 157.

⁹⁵ [1985] 1 S.C.R. 721, § 159.

⁹⁶ On delayed declarations of invalidity, *see* for example Kent Roach, 'Constitutional, Remedial, and International Dialogues about Rights: The Canadian Experience' [2005] 40 *Tex Int'l L.J.* 537, and in particular 546-8; *Id.*, 'Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed Declarations of Invalidity' [2002] 35(2) *U. Brit. Colum. L. Rev.* 211. Among the cases considered here, *see* for instance *Nguyen*, *below* at § 5.19.

5.4 *Bilodeau* (1986): *Manitoba Language Rights* reloaded: all Manitoba's legislation published in only one official language is unconstitutional (even though the effects of the declaration of invalidity shall again be delayed under the *de facto doctrine*)

In 1986, on the same day, the Supreme Court of Canada released its judgment in three cases involving the linguistic rights of minorities in a proceeding before a court: *Bilodeau*, *MacDonald*, and *Société des Acadiens*.⁹⁷

*Bilodeau v. A.G. (Man.)*⁹⁸ concerned a trivial speed violation, because of which Mr Bilodeau had been summoned to appear in court. He applied for the dismissal of the charge, on the grounds that both the statute providing the violation, and the one regulating the summons, had been printed and published in English only, thus violating s. 23 of *The Manitoba Act, 1870*, a provision we already met in *Manitoba Language Rights*.

Indeed, the Court referred to this precedent and quickly dismissed Mr Bilodeau's appeal: it explained that, under *Manitoba Language Rights*, the statutes under review were actually to be considered invalid, but that the *de facto doctrine* allowed to maintain their effects until they were re-enacted also in French. Specifically on the summons statute, the Court followed *MacDonald* (on which *see* the next paragraph) and simply explained that in that case 'the majority holds that a unilingual summons and charge does not contravene s. 133. The same conclusion applies in respect of s. 23 of the Manitoba Act, 1870:⁹⁹ so the summons was not invalid only because it was issued under an invalid statute.

It is though worth mentioning also the very short dissent by Justice Wilson, who agreed on this latter point, but nonetheless deemed the summons contrary to s. 23: 'just as a person living in the Province of Quebec whose language is English is entitled under s. 133 of the *Constitution Act, 1867* to an accommodation of his or her linguistic rights in the issuance of a French summons, so also is a person who is living in the Province of Manitoba whose language is French entitled under s. 23 of the *Manitoba Act, 1870* to a similar accommodation in the issuance of an English summons. As I stated in *MacDonald* the state's obligation can be discharged by an addendum to the summons in the other official language notifying the recipient of the nature

⁹⁷ For a comment on the case-law up to that point, in light of these three judgments, *see* McPierre Foucher, 'L'interprétation des droits linguistiques constitutionnels par la Cour Suprême du Canada' [1987] 19 *Ottawa L. Rev.* 381; *see also* the already mentioned first-person account by Professor Bilodeau himself, in his article 'La judiciarisation des conflits linguistiques au Canada.'

⁹⁸ [1986] 1 S.C.R. 449. For an account of the "intense political controversy generated" by this case and *Manitoba Language Rights*, *see* Gordon H.A. Mackintosh, 'Heading Off *Bilodeau*: Attempting Constitutional Amendment' [1986] 15 *Man. L.J.* 271.

⁹⁹ [1986] 1 S.C.R. 449, § 11.

and importance of the document and directing him or her to obtain a translation from court officials.¹⁰⁰

Justice Wilson's line of thought seems quite reasonable and avoids the majority's formalistic and "utilitarian" construction, already adopted in *Manitoba Language Rights*. The symmetry he invokes between the treatment of anglophones in Quebec and francophones outside Quebec is also an interesting perspective, although the Court has adopted, on the whole, a different approach.¹⁰¹

5.5 *MacDonald* (1986): summons issued only in one language are not in breach of s. 133 of the *Constitution Act, 1867*

As we have already anticipated, the relevant question for our purposes in *MacDonald v. City of Montreal*¹⁰² was whether the linguistic rights of an English speaker under s. 133 of the *Constitution Act, 1867* had been violated by a summons (to answer a charge of violating a municipal by-law) issued only in French. It was again a case of a speed violation, and it was the opposite situation than *Bilodeau*: in *Bilodeau*, it was a francophone in a predominantly English province being summoned in English, here it was an anglophone in Quebec being summoned in French.

The Court found no violation also in this case: in the Court's words, the appellant's main submission was 'that s. 133 of the *Constitution Act, 1867* gives to any person, anglophone or francophone, the right to be summoned before any court of Canada and any court of Quebec by a process issued in his own language, at least where the "State" is a party to the proceedings, such as penal or criminal proceedings.'¹⁰³

The Court found such submission 'contrary to the plain meaning of s. 133 as construed'¹⁰⁴ in the two *Blaike* cases, and therefore ruled that s. 133 does not confer to the appellant a positive right to be summoned in his own language. As Justice Beetz put it, "The only positive duty that I can read in s.

¹⁰⁰ [1986] 1 S.C.R. 449, § 22. On the notion of 'reasonable accommodation' in the Canadian Supreme Court's case-law, although with reference to religious minorities, see Emmanuelle Bribosia, Julie Ringelheim and Isabella Rorive, 'Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?' [2010] 17(2) *Maastricht J. Eur. & Comp. L.* 137, 144-50; for the application of the notion of accommodation to language rights, see instead Xavier Arzoz, 'Accommodating Linguistic Difference: Five Normative Models of Language Rights' [2010] 6 *Eur. Const. L. Rev.* 102; in the Italian scholarship, see for example Donatella Loprieno and Silvio Gambino, 'L'obbligo di "accomodamento ragionevole" nel sistema multiculturale canadese' in Rolla (ed) *L'apporto della Corte suprema alla determinazione dei caratteri dell'ordinamento costituzionale canadese*, p. 217.

¹⁰¹ See our conclusive remarks in § 6.

¹⁰² [1986] 1 S.C.R. 460.

¹⁰³ [1986] 1 S.C.R. 460, § 58.

¹⁰⁴ [1986] 1 S.C.R. 460, § 59.

133 is the one imposed on the Houses of Parliament of Canada and the Legislature of Quebec to use both the English and the French languages in the respective Records and Journals of those Houses, as well as the duty to legislate in both languages. [...] A negative duty is also imposed by s. 133 on everyone not to infringe language rights conferred by the section with respect to the language of Parliamentary debates and court proceedings. These are constitutionally protected rights and it would be unlawful for instance to expel a member of the House of Commons or of the Quebec National Assembly on the ground that he uses either French or English in debates, or for a judge of a Quebec or a federal court to prevent the use of either language in his court. But this duty is not the positive one which the appellant invokes. [...] One sure and practical way, and probably the only way for the issuer to discharge his alleged duty to accommodate the recipient of a summons would be to issue the summons in both the English and French languages, as was suggested in *Walsh*. This would certainly be permissible and might well be desirable but to impose it as a duty flowing from s. 133 is to make a mockery of the text of this section.¹⁰⁵

The opinion also considers what - *de lege ferenda* - would seem a very reasonable compromise, namely the interpretation suggested by the Société franco-manitobaine: their idea was to distinguish 'between civil proceedings on the one hand, and criminal or penal ones on the other. According to this suggestion, the initiator of civil processes or proceedings would retain the option to choose the language, as was the practice prior to Confederation, but in criminal or penal proceedings, the accused would have the right to be summoned before courts of criminal or penal jurisdiction in the language of his choice. [...] [However,] [i]n my view, this distinction is in no way warranted by the language of s. 133 of the Constitution Act, 1867 [...] [and would therefore amount] to a constitutional amendment beyond the reach of ordinary legislators and far outside the province of any court.'¹⁰⁶

However, in this way the opinion arguably considers only the right - of the public authorities! - to "speak" and "write" in either official language, but downplays the even more important "due process" right of the individual to be charged and tried in a language he understands. Justice Beetz is aware of the tension between these two poles, but disposes of it, in some way avoiding to answer: 'It is axiomatic that everyone has a common law right to a fair hearing, including the right to be informed of the case one has to meet and the right to make full answer and defence. Where the defendant cannot understand the proceedings because he is unable to understand the language in which they are being conducted, or because he is deaf, the effective exercise of these rights may well impose a consequential duty upon the court to provide

¹⁰⁵ [1986] 1 S.C.R. 460, § 67-69.

¹⁰⁶ [1986] 1 S.C.R. 460, § 82-85.

adequate translation. But the right of the defendant to understand what is going on in court and to be understood is not a separate right, nor a language right, but an aspect of the right to a fair hearing.¹⁰⁷

It sounds wise: however, the consequence to draw would seem that it is necessary to balance fair trial rights (of the individual) with language rights (of the authorities); but the opinion does not do that, and simply concludes that '[a]t no point did the appellant allege he did not understand the charge or the case he had to meet; by his own account, he secured a translation of the summons. There is nothing to show that he asked the court for a translation and we need not decide whether he would have been entitled to one.'¹⁰⁸

As was anticipated, Justice Wilson dissented, like he did in *Bilodeau*: relying on the legislative history of s. 133, and also on a different reading of the two judgments in *Blaikie*, he argues that s. 133 actually does 'confer a right on a litigant to use his or her language in court [...] [and therefore] there is a correlative duty on the state to respect and accommodate that right.'¹⁰⁹ Therefore the correct interpretation of s. 133 is that in such provision '[t]wo parts are addressed to the state and two parts to the citizen. The parts addressed to the state are mandatory; they impose an obligation on the state; you must keep bilingual records and journals of both Houses and you must print and publish your statutes in both languages. Clearly this is mandatory on the state so that the citizens speaking either language can understand them. The parts addressed to the citizen, on the other hand, confer rights on the citizen; you may use your own language, English or French, in parliamentary debates and in court proceedings.'¹¹⁰

It still remains to understand whether the right to use one's language in court proceedings also implies the right to be summoned in that language, and here Justice Wilson has a very pragmatic conclusion, that we deem quite sound:

In my view the initiating documents emanating from the court must as a minimum recognize and accommodate the litigant's right to understand and be understood. The ideal form of compliance with the state's constitutional obligation would obviously be the issuance of bilingual documents. However, it is clear from the legislative history of s. 133 that something less than this has historically been considered adequate and the legislature did not see fit, when it enacted s. 133 and gave constitutional status to the litigant's linguistic right, to require the issuance of bilingual

¹⁰⁷ [1986] 1 S.C.R. 460, § 114.

¹⁰⁸ [1986] 1 S.C.R. 460, § 122.

¹⁰⁹ [1986] 1 S.C.R. 460, § 159.

¹¹⁰ [1986] 1 S.C.R. 460, § 161.

documents. I believe, therefore, that the state's obligation would be discharged by an addendum to the initiating document in the official language not used in the body of the document to put the recipient on notice that this is a directive from the Court commanding his or her appearance before it to respond to a charge and that translation into the other official language should be obtained by application to the appropriate court officials. I think this is consistent both with a purposive, as opposed to a literal, interpretation of s. 133 and with the legislative background from which the section sprang. Nor does it seem too onerous a duty to place upon the state.¹¹¹

5.6 *Société des Acadiens* (1986): the right to use either official language before a court does not imply the right to be judged by a court whose members understands that language

*Société des Acadiens v. Association of Parents*¹¹² was on a different matter than the previous two cases. It was a relatively minor case from New Brunswick brought by the *Société des Acadiens* and an association, involving s. 19(2) of the *Canadian Charter*, which stipulates that '[e]ither English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.'

The appellants alleged that their "constitutional language rights" were infringed because an application for leave to appeal they had previously brought had been heard by a panel of three judges, among which sat one whose comprehension of French they contested.

The constitutional issue raised in the case (the only one that concerns us here) was therefore whether 's. 19(2) of the *Canadian Charter of Rights and Freedoms* entitle[s] a party pleading in a court of New Brunswick to be heard by a court, the member or members of which are capable of understanding the proceedings, the evidence and the arguments, written and oral, regardless of the official language used by the parties.'¹¹³

There were three opinions: all agreed on dismissing the appeal on factual grounds (deeming there was no proof of an insufficient qualification of the judge involved). However, the dissents by the Chief Justice Dickson and by Justice Wilson would have answered the constitutional question in the affirmative, while the majority opinion - written by Justice Beetz - found the

¹¹¹ [1986] 1 S.C.R. 460, § 190.

¹¹² [1986] 1 S.C.R. 549. For a (critical) comment in French on this case, see Roger Bilodeau, 'Une analyse critique de l'affaire *Société Des Acadiens Du Nouveau-Brunswick* et l'avenir précaire du bilinguisme judiciaire Au Canada' [1987] 32 *McGill L. J.* 232.

¹¹³ [1986] 1 S.C.R. 549, § 2.

right claimed by the appellants only in s. 13(1) of the *Official Languages of New Brunswick Act*, and not in s. 19(2) of the *Canadian Charter*.

Indeed s. 13(1) of the New Brunswick statute clearly read: '13 (1) Subject to section 15, in any proceeding before a court, any person appearing or giving evidence may be heard in the official language of his choice and such choice is not to place that person at any disadvantage.' S. 19(2) of the *Canadian Charter* had a different wording, and thus it could not be equated to it.

The most important aspect of the judgment lies precisely on the difference, drawn by Justice Beetz, between language rights like those provided by s. 19(2) of the *Charter* and s. 133 of the *Constitution Act, 1867*, on the one side, and due process rights, like the ones in s. 13(1) of the *New Brunswick Act*, on the other:

It is my view that the rights guaranteed by s. 19(2) of the *Charter* are of the same nature and scope as those guaranteed by s. 133 of the *Constitution Act, 1867* with respect to the courts of Canada and the courts of Quebec. As was held by the majority at pp. 498 to 501 in *MacDonald*, these are essentially language rights unrelated to and not to be confused with the requirements of natural justice. These language rights are the same as those which are guaranteed by s. 17 of the *Charter* with respect to parliamentary debates. They vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice. And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice.¹¹⁴

The common law right of the parties to be heard and understood by a court and the right to understand what is going on in court is not a language right but an aspect of the right to a fair hearing. It is a broader and more universal right than language rights. It extends to everyone including those who speak or understand neither official language. It belongs to the category of rights which in the *Charter* are designated as legal rights and indeed it is protected at least in part by provisions such as those of ss. 7 and 14 of the *Charter*.¹¹⁵

¹¹⁴ [1986] 1 S.C.R. 549, § 53.

¹¹⁵ [1986] 1 S.C.R. 549, § 60.

And finally, in a passage very often quoted in later judgments (in spite of the fact that, as we shall see, the main holding of this case will be reversed):

Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in s. 7 of the Charter, are so broad as to call for frequent judicial determination. Language rights, on the other hand, although some of them have been enlarged and incorporated into the Charter, remain nonetheless founded on political compromise.

This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights.¹¹⁶

This premiss leads the majority to conclude that s. 19(2) should not be interpreted in the way advocated for by the appellants, a conclusion not shared by Chief Justice Dickson or by Justice Wilson. In particular, the former objected that 'the Charter was designed primarily to recognize the rights and freedoms of individuals vis-à-vis the State. When acting in their official capacities on behalf of the State, therefore, judges and court officials do not enjoy unconstrained language liberties. Rather, they are invested with certain duties and responsibilities in their service to the community. This extends to the duty to give a meaningful language choice to litigants appearing before them.'¹¹⁷

To conclude on this case with a comparative note, for the record the recently enacted *Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings*,¹¹⁸ set to be transposed by Member States by October 2013, also did not go as far as providing for a right to be heard by a judge who understands the language of the accused (to be sure, such requirement was in fact imposed in Canada in the later case that - as anticipated - essentially reversed the holding of *Société des Acadiens*, and that will be considered at length in § 5.14).

¹¹⁶ [1986] 1 S.C.R. 549, § 63-5.

¹¹⁷ [1986] 1 S.C.R. 549, § 23.

¹¹⁸ OJ L 280 of 26.10.2010.

5.7 *R. v. Mercure* (1988): an accused person has a right to enter a plea in the official language of his choice

Two years after *MacDonald*, *Société des Acadiens* and *Bilodeau*, the Court applied the principles established in those three cases in *R. v. Mercure*.¹¹⁹ Mr Mercure also exploited a speed ticket to bring an application with much broader consequences, this time in the competent court in Saskatchewan. His application was 'to enter a plea in the French language, to have the trial proceeded with in that language, and to have the hearing delayed until the relevant statutes were produced in the French language.'¹²⁰

The majority opinion by Justice La Forest dismissed the second and third claim, on the grounds of its recent precedents: 'It seems to me that many of the issues surrounding the second issue have already been dealt with in the *Société des Acadiens* case. The appellant was entitled only to use French, not to require others to do so. As to the request that a French version of the statutes be produced, this appears to be covered by the similar case of *Bilodeau* [...] in relation to s. 23 of the *Manitoba Act, 1870*. The majority of the Court there held that the principle of the rule of law would preserve the enforceability of the conviction of the appellant there, and if that were all I would be prepared to follow a similar course here.'¹²¹

However, the majority found that the appellant did have a right to enter a plea in French: the fact that he was not granted such right vitiated the whole trial, therefore the appeal was allowed. What is more relevant are anyway some of the statements made by the Court in relation to this first claim. They are worth quoting extensively:

[I]t is settled by *Société des Acadiens* that while a person is constitutionally entitled to speak French in court in New Brunswick under s. 19(2) of the *Charter*, he has no right to be understood in that language. The judge and all court officials may use English or French as they wish both in oral and in written communication; see also *MacDonald v. City of Montreal*, *supra*, at pp. 483 and 497. As I read Beetz J.'s judgment in *Société des Acadiens*, the appellant has no right to a translator, except as required for a fair trial either at common law or under ss. 7 and 14 of the *Charter* (p. 577). The right to be understood is not a language right but one arising out of the requirements of due process. Beetz J. in *Société des Acadiens* carefully employs the word "power" to describe the

¹¹⁹ [1988] 1 S.C.R. 234. Two years later, there was a further follow-up in *R. v. Paquette* [1990] 2 S.C.R. 1103, a judgment delivered orally by the Court, that simply stated that *Mercure* thoroughly disposed of the question at bar.

¹²⁰ 1988] 1 S.C.R. 234, 281.

¹²¹ *Ibidem*.

language rights accorded an individual. He says, at p. 574: "They vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice" (emphasis added). At page 575, he contrasts this power to language provisions that provide for the right to communicate (s. 20 of the *Charter*) or to be heard (s. 13(1) of the *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. O-1).

Applying these principles to the present case, it seems to me that the trial judge could, subject to what I shall have to say later about records, proceed with the trial in English. There is no evidence to indicate that the appellant needed the services of a translator to understand the proceedings, so a fair trial could be conducted without making a translation available from English to French. At all events, what the appellant sought throughout these proceedings was to vindicate his language rights, not the right to a fair hearing.¹²²

So the issue is raised again of the relationship between language and fair trial rights, and this case is particularly helpful in order to clarify the difference between the two categories.

Mercurie also explored an issue not raised in *Société des Acadiens*: in that case, 'the issue was whether the judge understood the appellant (which it was held he did). Beetz J., however, left to another day the issues regarding the reasonable means necessary to ensure that the members of the courts understand the proceedings. He also did not deal with the issue, which has some relation to the matters just mentioned, whether when proceedings are required by law to be recorded, a person using one or the other official language has the right to have his remarks recorded in that language. Nor did that issue arise in *MacDonald* or *Bilodeau* [...]. These cases were essentially addressed to whether processes validly made in one only of the official languages were required to be translated in the other. As already mentioned, however, it does arise in the present case, both as regards the making of a plea and the giving of evidence by the appellant. In my view, the appellant's right or power to use French would be seriously truncated if recorded in another language. For his use of the language goes beyond the immediate forum. The proceedings, for example, may continue in the Court of Appeal where the judges may quite properly wish to refer to the exact words used by a person at trial, words that person has a right to use. Absent valid legislation requiring the recording of the appellant's statements in one language only, and none was brought to our attention, the appellant would seem to me to have a right to

¹²² [1988] 1 S.C.R. 234, 273-4.

have his statements recorded in the French language. His situation, of course, differs from that of a person who uses a language other than English or French whose rights to translation derive solely from the requirements of due process.¹²³

Justice La Forest here is touching on a by no means minor aspect, in fact a critical one to a full protection of language rights in the courtroom set. Quite surprisingly, though, the already mentioned *Directive 2010/64/EU* did not provide for a right to record-keeping in the language chosen by the accused.

5.8 *Forget* (1988): the exemption of French-educated persons from the French knowledge test required for admission to Quebec professional corporations did not discriminate against non-francophones

But in 1988 the Court also decided another round of three important cases, all from Quebec: *Forget*, *Ford* and *Devine*.¹²⁴

*Forget v. Quebec (Attorney General)*¹²⁵ was brought by a nursing assistant to challenge, *inter alia*, section 2(a) of the *Regulation respecting the knowledge of the official language necessary to obtain a permit from a professional corporation*. The Regulation had been enacted in accordance with s. 35 of the *Charter of the French language*, which requires professional orders to issue permits only 'to persons whose knowledge of the official language is appropriate to the practice of their profession.'

Ms Forget needed a permit from the *Corporation professionnelle des infirmiers et infirmières auxiliaires du Québec*, in order to be allowed to practice her job: under s. 2(a) of the *Regulation*, those who have 'taken at least three years of full time instruction given in French, at the secondary level or later' are presumed to have enough knowledge of French to meet the appropriateness level required, whereas those who have not, need to prove their knowledge of French by passing a specific examination.

Ms Forget did not satisfy the former condition, so she had to take the test, but she failed, and then challenged its very legitimacy, alleging that it amounted to a discrimination against her on the basis of language, contrary to s. 10 of the Quebec *Charter of Human Rights and Freedoms*.

Drawing on what the Court of Appeal for Quebec had stated in *Johnson v. Commission des affaires sociales*,¹²⁶ the majority in *Forget* outlined the three necessary conditions for a finding of discrimination under s. 10, which have always been applied since: '(1) a "distinction, exclusion or preference", (2)

¹²³ [1988] 1 S.C.R. 234, 275-6.

¹²⁴ For a comment covering all three, see Daniel Proulx, *La norme québécoise d'égalité dérape en Cour suprême: commentaire des arrêts Forget, Devine et Ford* [1990] 24 R.J.T. n.s. 375.

¹²⁵ [1988] 2 S.C.R. 90.

¹²⁶ [1984] C.A. 61.

based on one of the grounds listed in the first paragraph, and (3) which "has the effect of nullifying or impairing" the right to full and equal recognition and exercise of a human right or freedom.¹²⁷

In the case at bar, the Court found that the first two conditions were met, but the third one was not: 'the distinction created by the subject Regulations is based on language within the meaning of s. 10 of the Charter. The two groups of candidates that result from this distinction are divided along language lines--the fact that in general their mother tongue or language of use is, or is not, French. In other words, most candidates who benefit from the presumption will be francophones, while those who take the test will be for the most part non-francophones.'¹²⁸

However - and with the *caveat* that s. 35 itself had not being challenged by Ms Forget - 'the right to equality set forth in s. 10 of the Charter does not mean that all candidates for a professional corporation have to be treated in the same way. [...] In view of the undisputed requirement that candidates have a knowledge of French, Regulations that make distinctions to take account of the language skills of individuals do not *prima facie* compromise the right to equality.'¹²⁹

In short, 'in the instant case non-francophones are not prohibited from joining a professional corporation on grounds that are arbitrary and have nothing to do with the required aptitudes. On the contrary, the Regulations enacted by the Office allow them to show that they possess the necessary skills, namely an appropriate knowledge of French, to be admitted to a professional corporation. It should be borne in mind that this requirement is imposed by s. 35 of the Charter of the French language, and this provision is not being challenged. The impugned Regulations do not reject non-francophones outright, they offer them a means of establishing that they meet this requirement. [...]. Far from being an arbitrary obstacle for a professional candidate, the Regulations facilitate admission to the corporation while remaining consistent with the requirements of the Act.'¹³⁰

As a result, the presumption laid out in the *Regulation* was 'reasonable [...] and justified in the context of the objective sought by s. 35 of the Act,¹³¹ therefore the challenged provision could not be considered discriminatory on any ground.

¹²⁷ [1988] 2 S.C.R. 90, § 10.

¹²⁸ [1988] 2 S.C.R. 90, § 17.

¹²⁹ [1988] 2 S.C.R. 90, § 21.

¹³⁰ [1988] 2 S.C.R. 90, § 24.

¹³¹ [1988] 2 S.C.R. 90, § 33.

5.9 *Ford* (1988): Quebec's rules requiring the use of French only in public signs and company names were not proportionate to the goal of protecting the French language, and unlawfully discriminatory against the English-speaking minority

A few months after *Forget*, the Supreme Court of Canada issued its judgment in *Ford v. Quebec (Attorney General)*,¹³² a landmark case among the ones we are considering.

Ford focussed on two provisions (and the relevant penalties for infringing them) in Quebec's *Charter of the French Language*, ss. 58 and 69, respectively requiring 'public signs and posters and commercial advertising' to 'be solely in the official language' (i.e. in French), and allowing to use 'only the French version of a firm name' in Quebec. The question raised, for that matter, was whether such provision violated 'the freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms* and s. 3 of the *Quebec Charter of Human Rights and Freedoms*,¹³³ on the one hand, and the prohibition to discriminate on the basis of language, on the other.

As far as the former is concerned, *Ford* first clarified that, 'in so far as this issue is concerned, the words "freedom of expression" in s. 2(b) of the *Canadian Charter* and s. 3 of the *Quebec Charter* should be given the same meaning.'¹³⁴

Then, the Court made a very important statement, affirming what had already been said by the lower courts: the 'freedom of expression includes the freedom to express oneself in the language of one's choice.'¹³⁵ Indeed:

Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality.¹³⁶

¹³² [1988] 2 S.C.R. 712. For a comment, see John D. McAlphine and Allan C. Donovan, 'Case comments: *Ford v. Quebec (Attorney General)*. *Irwin Toy v. Quebec (Attorney General)*' [1988] 23 *U. Brit. Colum. L. Rev.* 615.

¹³³ [1988] 2 S.C.R. 712, § 1.

¹³⁴ [1988] 2 S.C.R. 712, § 39.

¹³⁵ *Ibidem*.

¹³⁶ [1988] 2 S.C.R. 712, § 40. On the link between language and cultural identity (an issue often raised in the following cases), see broadly, in the Italian scholarship, Valeria Piergigli, *Lingue minoritarie e identità culturali* (Giuffrè 2001).

The Court was making a very important point: it was including linguistic rights within the realm of freedom of expression, therefore it was ascribing them to the typically individualistic dimension of civil rights, rather than to the collective dimension of social rights. This dual nature of language rights runs underneath any discourse on them,¹³⁷ and emerges in the Canadian Supreme Court's case-law as well: here, the issue involved was that of some shop owners resisting the duty to use only French in the signs and advertising for their businesses, therefore it was a typical example of commercial speech, by all means an individualistic right; but in later cases, just like in the preamble to the *Quebec Charter*, also the collective dimension of linguistic rights was at stake, providing clear evidence of such "dual nature" feature of linguistic rights.¹³⁸

The Court then moved on to the proportionality analysis, so typical of Canadian constitutional adjudication,¹³⁹ considering 'whether the limit imposed on freedom of expression by ss. 58 and 69 of the *Charter of the French Language* [wa]s justified under s. 9.1 of the *Quebec Charter of Human Rights and Freedoms* and s. 1 of the *Canadian Charter of Rights and Freedoms*.'¹⁴⁰

The Court first explained that, in spite of its different wording, s. 9.1 of the *Quebec Charter* was 'a justificatory provision corresponding to s. 1 of the *Canadian Charter* [...] subject, in its application, to a similar test of rational connection and proportionality,'¹⁴¹ therefore the analysis to be conducted is the same for the two provisions. As for the merits, the justices held that the materials brought about by the respondents to uphold the legitimacy of the challenged provisions 'establish that the aim of the language policy underlying

¹³⁷ See for example the analysis and the literature referred to in Leigh Oakes, 'Promoting language rights as fundamental individual rights: France as a model?' [2011] 9 *French Politics* 50, 52-55.

¹³⁸ On which see, *inter alia*, Lauri Mälksoo, 'Language Rights in International Law: Why the Phoenix is Still in the Ashes' [2000] 12 *Fla. J. Int'l Law* 431, and in particular 432-48; for a specific focus on the Canadian situation, see Gordon S. Campbell, 'Language, Equality and the Charter: collective versus individual rights in Canada and beyond' [1993] 4 *NJCL* 29; Maxwell Yalden, 'Collective claims on the human rights landscape: a Canadian view' [1993] 1 *Int'l J. Group Rts.* 17; for a look at this issue in European law, see Robert F. Weber, 'Individual Rights and Group Rights in the European Union's Approach to Minority Languages' [2007] 17(2) *Duke J. of Comp. & Int'l L.* 361; in the Italian scholarship, see for instance Donatella Loprieno, 'La politica linguistica del Québec tra diritti individuali e diritti collettivi' in Gambino and (eds), *Il Canada: un laboratorio costituzionale. Federalismo, Diritti, Corti*, p. 305; Palici di Suni, *Intorno alle minoranze*, 201-5.

¹³⁹ The most important contributions, in the recent scholarship on Canadian proportionality, are the ones by Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' [2007] 57 *U. Toronto L.J.* 383, and by Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' [2008] 47 *Colum. J. Transnat'l L.* 72, 113-124.

¹⁴⁰ [1988] 2 S.C.R. 712, §§ 61-73.

¹⁴¹ [1988] 2 S.C.R. 712, § 63.

the *Charter of the French Language* was a serious and legitimate one. They indicate the concern about the survival of the French language and the perceived need for an adequate legislative response to the problem. Moreover, they indicate a rational connection between protecting the French language and assuring that the reality of Quebec society is communicated through the "*visage linguistique*." The section 1 and s. 9.1 materials do not, however, demonstrate that the requirement of the use of French only is either necessary for the achievement of the legislative objective or proportionate to it.¹⁴²

In other words, the Court deemed it excessive to impose the use of French only in order to pursue the legitimate goal of safeguarding this language. Interestingly, the Court did not just anyway limit itself to the *pars destruens*, but rather it suggested some possible, less restrictive alternatives. Typically, instead of prohibiting the use of languages different than French, on public signs and posters, in commercial advertising and in names, Quebec could have legitimately 'requir[ed] the predominant display of the French language, even its marked predominance [...]. French could be required in addition to any other language or it could be required to have greater visibility than that accorded to other languages. [...] But exclusivity for the French language has not survived the scrutiny of proportionality test and does not reflect the reality of Quebec society,'¹⁴³ that also includes an English-speaking minority which cannot be overlooked.

The other challenge moved to ss. 58 and 69 in *Ford* was about s. 10 of the Quebec *Charter*, prohibiting discriminations based on several grounds, including language: even though it would not have been necessary to decide this issue, in view of the conclusions already reached on freedom of expression grounds, the Court decided to consider it as well, also because the same issue had also been raised in *Devine*, a case that had proceeded in parallel to *Ford* (see the following paragraph).

Applying the three-prong test of *Forget*, the Court concluded that ss. 58 and 69 infringed s. 10 of the Quebec *Charter*: such provisions had the effect 'of impinging differentially on different classes of persons according to their language of use. Francophones are permitted to use their language of use while anglophones and other non-francophones are prohibited from doing so,' and this amounted to 'nullifying the right to full and equal recognition and exercise' of the 'freedom to express oneself in the language of one's choice, which has been held to be recognized by s. 3 of the Quebec *Charter*.'¹⁴⁴

To conclude, one last remark on *Ford* concerns its discussion of a series of cases from the European Commission of Human Rights and the European Court of Human Rights. The Attorney General of Quebec had indeed relied

¹⁴² [1988] 2 S.C.R. 712, § 73.

¹⁴³ *Ibidem*.

¹⁴⁴ [1988] 2 S.C.R. 712, § 82.

on such cases in advocating for the legitimacy of the challenged provisions. In § 44, the Court distinguishes the cases - that are even included in the list of cases cited at the beginning of the judgment - and reaches a different conclusion, but nonetheless, by extensively discussing them, it shows a remarkable openness towards the use of foreign and comparative materials, which is shared by all the justices: quite to the opposite, their American colleagues are sharply divided on this issue, with Scalia famously advocating against reliance on foreign law to decide cases before an American court.¹⁴⁵

5.10 *Devine* (1988): Quebec's requirement that leaflets, order forms, invoices and the like were written in French was legitimate because the contextual use of English was not disallowed

As we already anticipated in the previous paragraph, *Devine v. Quebec (Attorney General)*¹⁴⁶ proceeded in parallel to *Ford*, and was decided on the same day, immediately after it. The case was brought by some local businesses and business owners in Montreal, to challenge - in the Court's syllabus words - 'the validity of ss. 52, 57, 58, 59, 60 and 61 of the *Charter of the French Language*, R.S.Q., c. C-11, and the *Regulation respecting the language of commerce and business*. Sections 52 and 57 require that certain items be drawn up in French. These sections, read with s. 89 of the *Charter of the French Language*, permit the use of another language together with the French. Section 58 requires that "Public signs and posters and commercial advertising shall be solely in" French. Sections 59, 60 and 61 create exceptions to s. 58.'

First, for that matter, the Court denied that the challenged provisions requiring the "joint use" of French amounted to 'an unconstitutional barrier to the mobility which is a protected feature of the Canadian Constitution, reflected in s. 121 of the *Constitution Act, 1867*, inhering in Canadian citizenship and now guaranteed by s. 6 of the *Canadian Charter of Rights and Freedoms*. [...] [T]he challenged provisions do not impose conditions which present an unacceptable obstacle to mobility. They are conditions with which anyone may comply [...]. The challenged provisions are not designed to prevent people from entering the province. They are simply conditions of doing business in the province with which anyone may comply.'¹⁴⁷

However, moving on with the analysis, the Court pointed out that 'sections 59, 60 and 61 as well as ss. 8, 9, 12, 13, 14, 15, 16 and 19 of the *Regulation respecting the language of commerce and business* create[d] exceptions to

¹⁴⁵ See Norman Dorsen, 'The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer' [2005] 3(4) *Int. J. Comparative Law* 519; see also Jeremy Waldron, 'Foreign Law and the Modern *Ius Gentium*' [2005] 119 *Harv. L. Rev.* 129.

¹⁴⁶ [1988] 2 S.C.R. 790.

¹⁴⁷ [1988] 2 S.C.R. 790, § 19.

s. 58', but since s. 58 had been struck down in *Ford*, they could not survive 'in isolation,'¹⁴⁸ and consequently had to be declared of no force or effect as well.

As for '[t]he remaining sections, 52 and 57, if they are preserved, neither cause unintended results in the overall legislative scheme, nor conflict with s. 2(b) of the *Canadian Charter* or s. 3 of the *Quebec Charter* as interpreted in *Ford*. Their subsistence does not cause unintended results because they are not dependent on s. 58 for their meaning, as were ss. 59, 60 and 61. Similarly, their continued existence does not infringe either *Charter* because, while ss. 52 and 57 provide for the publication of such items as catalogues, brochures, order forms and invoices in French, they do not require the exclusive use of French. Section 89 makes it clear that where exclusive use of French is not explicitly required by the Act, the official language and another language may be used together. Following the reasons in *Ford*, permitting joint use passes the scrutiny required by s. 1 of the *Canadian Charter* and s. 9.1 of the *Quebec Charter*. The rational connection between protecting the French language and assuring that the reality of Quebec is communicated through the "*visage linguistique*" by requiring signs to be in French was there established. The same logic applies to communication through such items as brochures, catalogues, order forms and invoices, and the rational connection is again demonstrated. Sections 52 and 57 are therefore sustainable under s. 9.1 of the *Quebec Charter*, and s. 57--the only one of the two subject to the *Canadian Charter*--is sustainable thereunder by virtue of s. 1.¹⁴⁹

Finally, the Court also considered a few other issues: in particular, the most relevant for our analysis is 'whether ss. 52 and 57 [we]re [nonetheless] contrary to s. 10 of the *Quebec Charter*,'¹⁵⁰ to which it was answered that 'sections 52 and 57 do create a distinction based on language of use but do not have the effect of impairing or nullifying rights guaranteed under s. 3. They thus conform to the *Quebec Charter*.'¹⁵¹

5.11 Quebec government's reaction to *Ford* and *Devine* and the current legislation

The government of Quebec immediately reacted to the holdings in *Devine* and most of all *Ford*, by 'introduc[ing] an amendment to the language law that would maintain unilingual French signs outside premises while permitting the use of bilingual signs inside. To ensure that the amendment would not become the object of another legal challenge, the amending legislation invoked the legislative override authority of section 33 and the similar provision in the *Quebec Charter of Human Rights and Freedoms*. This

¹⁴⁸ [1988] 2 S.C.R. 790, § 25.

¹⁴⁹ [1988] 2 S.C.R. 790, § 27.

¹⁵⁰ *Ibidem*.

¹⁵¹ [1988] 2 S.C.R. 790, § 30.

marked the first time that the override had been used in direct response to a Supreme Court of Canada decision, rather than in anticipation of litigation. [...] In 1993, when the notwithstanding clause reached the end of its five-year life, the Quebec National Assembly lifted the ban on English language signs and amended the law to require only that French be “markedly predominant.” The amended legislation was not protected by a notwithstanding clause.¹⁵²

The laws referred to in the previous quote were both titled *An Act to amend the Charter of the French Language: the former*¹⁵³ was also called *Bill 178*, the latter¹⁵⁴ *Bill 86*.

After the amendment by s. 1 of *Bill 178*, s. 58 read:

58. Public signs and posters and commercial advertising, outside or intended for the public outside, shall be solely in French. Similarly, public signs and posters and commercial advertising shall be solely in French, 1. Inside commercial centres and their access ways, except inside the establishments located there; 2. Inside any public means of transport and its access ways; 3. Inside the establishments of business firms contemplated in Section 136; 4. Inside the establishments of business firms employing fewer than fifty but more than five persons, where such firms share, with two or more other business firms, the use of a trademark, a firm name or an appellation by which they are known to the public. The Government may, however, by regulation, prescribe the terms and conditions according to which public signs and posters and public advertising may be both in French and in another language, under the conditions set forth in the second paragraph of Section 58.1, inside the establishments of business firms contemplated in subparagraphs 3 and 4 of the second paragraph. The Government may, in such regulation, establish categories of business firms, prescribe terms and conditions which vary according to the category and reinforce the conditions set forth in the second paragraph of Section 58.1.¹⁵⁵

S. 18 of *Bill 86* again amended the formula of s. 58, and it has not changed any more. In its current version, it reads:

¹⁵² Johansen and Rosen, *The Notwithstanding Clause of the Charter*, pp. 10-1: as explained by Hogg and Bushell, *The Charter Dialogue Between Courts And Legislators (Or Perhaps The Charter Of Rights Isn't Such A Bad Thing After All)*, p. 84, 'the passions that supported Quebec's draconian French-language policies had [indeed] died down enough that the government felt able to abandon the notwithstanding clause.'

¹⁵³ R.S.Q. 1988, c. 54.

¹⁵⁴ R.S.Q. 1993, c. 40.

¹⁵⁵ The notwithstanding clause was in s. 10.

58. Public signs and posters and commercial advertising must be in French. They may also be both in French and in another language provided that French is markedly predominant. However, the Government may determine, by regulation, the places, cases, conditions or circumstances where public signs and posters and commercial advertising must be in French only, where French need not be predominant or where such signs, posters and advertising may be in another language only.

Let us just clarify that the use of the notwithstanding clause by the Province of Quebec in reaction to *Ford* was possible because, even though the controversy concerned linguistic rights, in fact the challenge had been brought on freedom of expression (and prohibition of discrimination) grounds, and not on the specific linguistic rights protected by sections 16-23 of the *Canadian Charter*, the only ones that cannot be derogated by a notwithstanding clause under s. 33.

5.12 *Mahe* (1990): linguistic education rights in the *Canadian Charter* must be granted according to a "sliding scale" of requirement, the more demanding the more the number of eligible students warrants

Mahe v. Alberta,¹⁵⁶ together with *Arsenault-Cameron*, is the key case for determining the principles applicable to linguistic minority rights in the field of education, one of the most important areas of any pro-minority policy; both cases dealt essentially with the interpretation of s. 23 of the *Canadian Charter* (*Minority Language Educational Rights*).

Mahe was the first case where the Court was faced with the task of determining the scope of such provision.¹⁵⁷ It was brought by some "s. 23 parents", *i.e.* people who were educated in French, lived in a province (specifically, it was Edmonton area in Alberta) where French was a minority language, and had school age children ("s. 23 students"): due to these qualifications, these parents had the right, under s. 23 of the *Canadian Charter*, 'to have their children receive primary and secondary school instruction' in French in their province.

However, they deemed their s. 23 rights had not been 'satisfied by the existing educational system in Edmonton nor by the legislation under which it operate[d, allegedly] resulting in an erosion of their cultural heritage, contrary to the spirit and intent of the *Charter*. In particular, the appellants argue[d] that s. 23 guarantees the right, in Edmonton, to the "management and control" of

¹⁵⁶ [1990] 1 S.C.R. 342. For a comment on this case, see Robert G. Richards, '*Mahe v. Alberta: Management and Control of Minority Language Education*' [1990] 36 *McGill L. J.* 216.

¹⁵⁷ [1990] 1 S.C.R. 342, p. 22 of the pdf version on <http://scc.lexum.org/en/>.

a minority-language school -- that is, to a Francophone school run by a Francophone school board.¹⁵⁸ In order to answer, the Court had to 'determine the meaning of s. 23 of the *Charter*.'¹⁵⁹

The Court thus explained that:

The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada. My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.¹⁶⁰

Therefore the appellants were 'fully justified in submitting that "history reveals that s. 23 was designed to correct, on a national scale, the progressive erosion of minority official language groups and to give effect to the concept of the 'equal partnership' of the two official language groups in the context of education." [...] Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures.'¹⁶¹

The linguistic rights at issue in this case were therefore group rights, not rights of the individual like in *Ford*: here the appellants claimed - in their position of members of a group - that the government afforded them enough money to run a French-only school, they did not demand freedom from government interference as in *Ford*.

The right to have one's children educated in French implies indeed a cost, paid out of public funds: this is why subsections (3)(a) and (3)(b) limit such right to the cases where the number of children in the area concerned is large enough. But when is such number large enough?

¹⁵⁸ [1990] 1 S.C.R. 342, p. 11 of the pdf version on <http://scc.lexum.org/en/>.

¹⁵⁹ Ibidem.

¹⁶⁰ [1990] 1 S.C.R. 342, p. 23 of the pdf version on <http://scc.lexum.org/en/>. The Court refers here to *Ford*, that had recognized 'the cultural importance of language' at [1988] 2 S.C.R. 712, 748-9.

¹⁶¹ [1990] 1 S.C.R. 342, pp. 25-6 of the pdf version on <http://scc.lexum.org/en/>.

Mabe answers this question, establishing the interpretation of s. 23(3) that is still followed by the Court: 's. 23 should be viewed as encompassing a "sliding scale" of requirement, with subs. (3)(b) indicating the upper level of this range and the term "instruction" in subs. (3)(a) indicating the lower level. The idea of a sliding scale is simply that s. 23 guarantees whatever type and level of rights and services is appropriate in order to provide minority language instruction for the particular number of students involved.'¹⁶²

This means that, as the appellants claimed, 's. 23 mandates, where the numbers warrant, a measure of management and control:'¹⁶³ but what is such measure? Here comes the "sliding scale": 'In some circumstances an independent Francophone school board is necessary to meet the purpose of s. 23. However, where the number of students enrolled in minority schools is relatively small, the ability of an independent board to fulfill this purpose may be reduced and other approaches may be appropriate:'¹⁶⁴ indeed 'completely separate school boards are not necessarily the best means of fulfilling the purpose of s. 23. What is essential, however, to satisfy that purpose is that the minority language group have control over those aspects of education which pertain to or have an effect upon their language and culture. This degree of control can be achieved to a substantial extent by guaranteeing representation of the minority on a shared school board and by giving these representatives exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns.'¹⁶⁵ To conclude, 'the relevant figure for s. 23 purposes is the number of persons who will eventually take advantage of the contemplated programme or facility. [...] The numbers warrant provision requires, in general, that two factors be taken into account in determining what s. 23 demands: (1) the services appropriate, in pedagogical terms, for the numbers of students involved; and (2) the cost of the contemplated services,'¹⁶⁶ even though 'the remedial nature of s. 23 suggests that pedagogical considerations will have more weight than financial requirements in determining whether numbers warrant.'¹⁶⁷

Applying all these principles to the specific situation in Edmonton under review, the Court concludes that 'requiring a Francophone school, together with a degree of management and control to the parents, is [...] a reasonable requirement,' while the 'numbers of students likely to attend Francophone schools in Edmonton [we]re [not] sufficient to mandate under s. 23 the

¹⁶² [1990] 1 S.C.R. 342, p. 27 of the pdf version on <http://scc.lexum.org/en/>.

¹⁶³ [1990] 1 S.C.R. 342, p. 31 of the pdf version on <http://scc.lexum.org/en/>. For a reflection on the "numbers warrant" requirement, see Leslie Green, 'Are Language Rights Fundamental?' [1987] 25 *Osgoode Hall L.J.* 639, 666-9.

¹⁶⁴ [1990] 1 S.C.R. 342, p. 35 of the pdf version on <http://scc.lexum.org/en/>.

¹⁶⁵ [1990] 1 S.C.R. 342, p. 37 of the pdf version on <http://scc.lexum.org/en/>.

¹⁶⁶ [1990] 1 S.C.R. 342, p. 46 of the pdf version on <http://scc.lexum.org/en/>.

¹⁶⁷ [1990] 1 S.C.R. 342, p. 47 of the pdf version on <http://scc.lexum.org/en/>.

establishment of an independent Francophone school board.¹⁶⁸ 'Since such rights were not provided at the time, the Court mandated the Province to 'enact legislation (and regulations, if necessary), that [we]re in all respects consistent with the provisions of s. 23 of the *Charter*.¹⁶⁹

Finally, one last aspect of the decision deserves mentioning, connected to the issues of traductology and of interpretation of bilingual legal documents, that we hinted at in § 1: it is the fact that the Court, facing a possible objection to its interpretation of subs. (3)(b), replies to it by relying on the French version of this provision:

I recognize that the English text of subs. (3)(b) is perhaps ambiguous: the phrase "minority language educational facilities" could either mean the facilities of the minority, or the facilities for the minority. The French text, however, is clearer. It has been stated on several occasions by this Court, that where there is an ambiguity in one version of the *Charter*, and the other version is less ambiguous, then the meaning of the less ambiguous version should be adopted.¹⁷⁰

The Court thus reaffirms what it indicates as a consolidated rule of interpretation, namely that, in case of some ambiguity in one version of the *Charter*, resort must be made to the version in the other language. As easily predictable, the European Court of Justice has reached similar conclusions when faced with the same problem of some piece of EU legislation that has not the same meaning in all the linguistic versions: the straightforward difference is that the EU has not just two but 23 official languages, which can sometimes make it

¹⁶⁸ [1990] 1 S.C.R. 342, p. 50 of the pdf version on <http://scc.lexum.org/en/>.

¹⁶⁹ [1990] 1 S.C.R. 342, p. 51 of the pdf version on <http://scc.lexum.org/en/>.

¹⁷⁰ [1990] 1 S.C.R. 342, pp. 31-2 of the pdf version on <http://scc.lexum.org/en/>.

very easy to spot the "outcast" version,¹⁷¹ but some other times can make things fairly complicated.¹⁷²

5.13 Reference re Public Schools Act (1993), or the application of Mahe

*Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*¹⁷³ came a few years after *Mahe* and thoroughly applied the principles laid down in that case. It originated as a statement of claim filed by the *Fédération provinciale des comités de Parents Inc.* and by some individual co-plaintiffs, in order to request relief under s. 23 of the *Canadian Charter*. The case proceeded then by way of reference, and in front of the Supreme Court it concerned two of the originally three constitutional questions, that is to say:

1. What does the right to have one's children receive instruction "in minority language educational facilities" guaranteed by section 23(3)(b) of the *Charter* mean? In particular, does it include the right to have one's children receive instruction in a distinct physical setting?

¹⁷¹ A notorious example of "outcast" version is the case of art. 3 of the **Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts**: while the other languages are unequivocal in declaring a contractual clause unfair if it was included "contrary to the requirement of good faith" (the French version reads "*en dépit de l'exigence de bonne foi*", the German one "*entgegen dem Gebot von Treu und Glauben*", the Spanish one "pese a las exigencias de la buena fe"), the Italian equivalent says something very different. Indeed the Italian version considers a contractual term unfair if it was adopted "*malgrado* il requisito della buona fede" (emphasis added), which literally means "*in spite of* the requirement of good faith" (the thesis of a mistake in the Italian translation is shared for example by Giorgio Cian, 'Il nuovo capo XIV-bis (titolo II, libro IV) del codice civile, sulla disciplina dei contratti con i consumatori' [1996] 2 *Studim Iuris* 411, 415; Giorgio De Nova, *Le clausole vessatorie: art. 25, Legge 6 febbraio 1996, n. 52* (IPSOA 1996), p. 16; Enzo Roppo, *Clausole vessatorie (nuova normativa)*, in *Enc. Giur. Treccani* (Ed. Enc. It. 1996), vol. VI, p. 5).

¹⁷² Some very good examples are provided by the already mentioned law review article by Solan, 'The Interpretation of Multilingual Statutes by the European Court of Justice': see in particular Case 29/69, *Erich Stauder v. City of Ulm* (12 November 1969); Case 90/83, **Michael Paterson and others v W. Weddel & Company Limited and others** (22 March 1984); Case 100/84, *Commission v. United Kingdom* (28 March 1985); Case 228-87, *Pretura unificata di Torino v. X* (22 September 1988); Case C-484/04, *Commission v. United Kingdom* (7 September 2006) (as can be easily understood, the issue is particularly sensitive when the interpretation has some influence on a criminal proceeding, such as in *Pretura unificata di Torino and Paterson v Weddel*). Other important cases include Case C-361/01, *P Christina Kik v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM) (9 September 2003), and Case 283/81, **Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health** (6 October 1982). See also the cases and the literature mentioned *supra*, at footnote 6.

¹⁷³ [1993] 1 S.C.R. 839. For a comment on this case, see Benoît Pelletier, 'Le Renvoi Relatif a la Loi Sur Les Ecoles Publiques du Manitoba' [1993] 25 *Ottawa L. Rev.* 81.

2. (i) Do section 23 and section 15 of the *Charter* grant any right of management or control in connection with section 23's guarantees of French language instruction and facilities?
- (ii) If so, do the provisions in Part I, II, and III of *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 meet Manitoba's constitutional obligations with reference to such a right of management and control? If not, in what essential elements do the provisions fail to do so?¹⁷⁴

As mentioned, to decide the case the Court extensively relied on *Mabe*, which had not yet been released when the case was filed before the Supreme Court: as for the former question, it stated that "[w]hile this Court in *Mabe* did not explicitly refer to distinct physical settings in its discussion on schools as cultural centres, it seems reasonable to infer that some distinctiveness in the physical setting is required to successfully fulfil this role,¹⁷⁵ therefore the answer given had to be in the affirmative, with the *caveat* that 'the concept of a right to "distinct physical setting" does not automatically translate into a right to facilities that are entirely separate,¹⁷⁶ depending on the circumstances of any specific case, and as a consequence 'the assessment of what will constitute appropriate facilities should only be undertaken on the basis of a distinct geographic unit within the province.'¹⁷⁷

As for the second question, it was also mostly disposed by *Mabe*: the Court clarified that the numbers relative to the province of Manitoba warrant, at least in some areas, 'the establishment of a separate Francophone school board,¹⁷⁸ and that the legislation then in force in that province¹⁷⁹ did 'not provide for the parents of French-language students to have management and control over French-language education as required under s. 23 of the *Charter*.¹⁸⁰

Reference re Public Schools Act (Man.), s. 79(3), (4) and (7) deserves one last remark: when explaining that Manitoba's legislation falls short of affording French parents the "management and control over French-language education for their children,"¹⁸¹ and that "[t]he participation of minority language parents or their representatives in the assessment of educational needs and the setting

¹⁷⁴ [1993] 1 S.C.R. 839, p. 12 of the pdf version on <http://scc.lexum.org/en/>.

¹⁷⁵ [1993] 1 S.C.R. 839, p. 20 of the pdf version on <http://scc.lexum.org/en/>.

¹⁷⁶ [1993] 1 S.C.R. 839, p. 21 of the pdf version on <http://scc.lexum.org/en/>.

¹⁷⁷ [1993] 1 S.C.R. 839, p. 22 of the pdf version on <http://scc.lexum.org/en/>.

¹⁷⁸ [1993] 1 S.C.R. 839, p. 25 of the pdf version on <http://scc.lexum.org/en/>.

¹⁷⁹ Manitoba's *Public Schools Act*, R.S.M. 1987, c. P250.

¹⁸⁰ [1993] 1 S.C.R. 839, p. 26 of the pdf version on <http://scc.lexum.org/en/>.

¹⁸¹ [1993] 1 S.C.R. 839, p. 27 of the pdf version on <http://scc.lexum.org/en/>.

up of structures and services which best respond to them is most important,' the Court also adds that:

The rights provided by s. 23, it must be remembered, are granted to minority language parents individually. Their entitlement is not subject to the will of the minority group to which they belong, be it that of a majority of that group, but only to the "numbers warrant" condition.¹⁸²

We have described the dichotomy between linguistic rights as individual rights of group rights; we have seen that some rights are typically individualistic, as in the case of commercial speech (*Ford*), while others are typically collective rights, like educational rights: they only have meaning if certain numeric thresholds are triggered, but it goes without saying that such numeric threshold imply by definition the existence of a group.

Here, though, Chief Justice Lamer reminded us that, to be sure, also group rights like educational rights are, at the end of the day, rights conferred upon and exercised by individuals. The difference is that, while in order to exercise individual rights like commercial speech rights, the individual does not need co-operation from his fellows in the minority group, group rights cannot really be exercised by the individual alone. Admittedly, their "*entitlement*" does not depend on the will of the majority of his group, like Chief Justice Lamer rightly points out; but it does depend on the very existence of a group, and on its numbers: the larger the group, the greater the rights.

5.14 Beaulac (1999): Société des Acadiens should not be followed: courts handling criminal cases must be "institutionally bilingual" and able to understand either official language that the accused chooses to use

Except for the already mentioned *Reference re Secession of Quebec*, we do not meet other important cases until 1999, when *R. v. Beaulac*¹⁸³ was decided. *Beaulac* is the major case for determining the interpretation principles applicable to the linguistic rights in Canada.

¹⁸² [1993] 1 S.C.R. 839, p. 29 of the pdf version on <http://scc.lexum.org/en/>.

¹⁸³ [1999] 1 S.C.R. 768. For a comment on this case, André Braën, 'L'interprétation judiciaire des droits linguistiques au Canada et l'affaire *Beaulac*' [1998] 29 *Rev. Gen. Droit* 379; more broadly on *Beaulac* as well as on *Arsenault-Cameron* (*infra*, § 5.15), *Reference re Secession of Quebec* and another minor ruling of the Ontario Superior Court, see Marc Cousineau, 'Survivance Des Droits Linguistiques: Enfin de Vrais Droits Linguistiques Au Canada' [2000] 32 *Ottawa L. Rev.* 117; similarly, *Beaulac*, *Arsenault-Cameron* and *Reference re Secession of Quebec* are collectively the subject of the article by Michel Doucet, 'Les droits linguistiques: une nouvelle trilogie' [2000] 49 *U.N.B.L.J.* 3.

The case was quite straightforward: Mr Beaulac had been charged in the Province of British Columbia with first degree murder; a first trial had to be repeated, he was convicted in a second trial but his conviction was overturned, and before his third trial he reapplied for having a judge and jury who spoke both English and French. He relied on s. 530(4) of the *Criminal Code*,¹⁸⁴ according to which, where the court 'is satisfied that it is in the best interests of justice that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or, if the language of the accused is not one of the official languages of Canada, the official language of Canada in which the accused, in the opinion of the court, can best give testimony, the court may, if it does not speak that language, by order remand the accused to be tried by a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak that language or, if the circumstances warrant, who speak both official languages of Canada.'

Mr Beaulac's s. 530(4) application was dismissed, he was then tried in English only and convicted (by a different judge), and the Court of Appeal upheld the conviction on the grounds that he was able to speak English. Mr Beaulac brought his s. 530(4) application to the Supreme Court, which allowed his appeal, and eventually ordered that he be tried in a new trial before a judge and jury who spoke both English and French.

Writing for the majority, Justice Bastarache first made an extremely important point:

Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; see *Reference re Public Schools Act (Man.)*, at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick*, at pp. 579-80, stands for a restrictive interpretation of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply. It is also useful to re-affirm here that language rights are a particular kind of right, distinct from the principles of fundamental justice. They have a different purpose and a different origin.¹⁸⁵

¹⁸⁴ R.S.C. 1985, c. C-46.

¹⁸⁵ [1999] 1 S.C.R. 768, § 25.

The Court thus partly revisits *Société des Acadiens*,¹⁸⁶ and clarifies that language rights must be interpreted "purposively", *i.e.* in a way to let them fulfill their goal to promote the linguistic and cultural identity of a person, as part of a community.

S. 530(4) is then considered together with s. 530(1) (the general provision on the right to be tried by a bilingual judge, while s. 530(4) concerns the cases when the application under s. 530(1) has not been timely): the Court rules that such provisions create 'an absolute right of the accused to equal access to designated courts in the official language that he or she considers to be his or her own,' and therefore 'the courts called upon to deal with criminal matters are [...] required to be institutionally bilingual in order to provide for the equal use of the two official languages of Canada.'¹⁸⁷

Justice Bastarache then moved on to explain that '[t]he language of the accused is very personal in nature; it is an important part of his or her cultural identity. The accused must therefore be afforded the right to make a choice between the two official languages based on his or her subjective ties with the language itself. The principles upon which the language right is founded, the fact that the basic right is absolute, the requirement of equality with regard to the provision of services in both official languages of Canada and the substantive nature of the right all point to the freedom of Canadians to freely assert which official language is their own language. [...] An accused's own language, for the purposes of s. 530(1) and (4), is [thus] either official language to which that person has a sufficient connection. It does not have to be the dominant language. If the accused has sufficient knowledge of an official language to instruct counsel, he or she will be able to assert that that language is his or her language, regardless of his or her ability to speak the other official language. The Crown may challenge the assertion made, but it will have the onus of showing that the assertion is unfounded. The court, in such a case, will not inquire into specific criteria to determine a dominant cultural identity, nor into the personal language preferences of the accused. It will only satisfy itself that the accused is able to instruct counsel and follow the proceedings in the chosen language.'¹⁸⁸

Finally, the Court further clarified something not immediately evident, namely that language rights, when related to court proceedings such as in this

¹⁸⁶ In their concurring opinion, C.J. Lamer and J. Binnie disagree on this point, stating that this was not a constitutional case, but merely one of statutory interpretation, therefore there was no need to reverse *Société des Acadiens*, which in fact had to be deemed a sound precedent, when it said that language rights reflect a political compromise, a point of view allegedly shared by *Reference re Secession of Quebec*, *Mabe* and *Reference re Public Schools Act (Man.)*. Anyway, the two concurring justices agreed with the other seven's analysis on the statutory interpretation issue.

¹⁸⁷ [1999] 1 S.C.R. 768, § 28.

¹⁸⁸ [1999] 1 S.C.R. 768, § 34.

case, should not be confused with fair trial rights: 'Another important consideration with regard to the interpretation of the "best interests of justice" is the complete distinctiveness of language rights and trial fairness. [...] The right to full answer and defence is linked with linguistic abilities only in the sense that the accused must be able to understand and must be understood at his trial. But this is already guaranteed by s. 14 of the *Charter*, a section providing for the right to an interpreter. The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English. [...] Fairness of the trial is not to be considered at this stage and is certainly not a threshold that, if satisfied, can be used to deny the accused his language rights under s. 530.'¹⁸⁹ To sum up, 'the best interests of justice will be served by accepting the application of the accused to be tried in his official language. Therefore, it is the denial of the application that is exceptional and that needs to be justified. The burden of this demonstration should fall on the Crown.'¹⁹⁰

The conclusion is that '[i]n the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity. It would indeed be surprising if Parliament intended that the right of bilingual Canadians should be restricted when in fact official language minorities, who have the highest incidence of bilingualism (84 percent for francophones living outside Quebec compared to 7 percent for anglophones according to Statistics Canada 1996 Census), are the first persons that the section was designed to assist.'¹⁹¹

5.15 *Arsenault-Cameron* (2000): when numbers warrant, the government cannot just offer minority students transportation to an already existing school, but has to provide for the establishment of an educational facility in the area where the minority students reside

The year after *Beaulac*, the Court released its judgment in a new case, coming this time from the Prince Edward Island, *Arsenault-Cameron v. Prince Edward Island*:¹⁹² as anticipated, it stands with *Mabe* as one of the major

¹⁸⁹ [1999] 1 S.C.R. 768, § 41.

¹⁹⁰ [1999] 1 S.C.R. 768, § 42.

¹⁹¹ [1999] 1 S.C.R. 768, § 42.

¹⁹² [2000] 1 S.C.R. 3. For a comment on this case, see Gaétan Migneault, '*Arsenault-Cameron* : une occasion manquée' [2000] 45 *McGill L. J.* 1023; in the Italian scholarship, see the case-

precedents in the area of educational rights and for establishing the principles applicable in the interpretation of s. 23 of the *Canadian Charter*.

The appellants in this case, relying on s. 23 of the *Canadian Charter*, had requested the French Language Board to establish a French school for grades one to six in their area; the Board made a conditional offer of French first language instruction in such area, but the Minister of Education refused to approve it, offering instead to keep paying for the transportation of the appellants' children to an already existing, but more distant (almost an hour by bus) French language school, a solution however not accepted by the parents.

The parents therefore sought 'a declaration to the effect that they have the right to have their children receive French language instruction at the primary level in a facility situated'¹⁹³ in their area. Their request was granted by the Prince Edward Island Supreme Court, but then an appeal against its decision was allowed.

Writing for a unanimous Court, Justices Major and Bastarache restored the first decision.

Relying on *Mabe* and *Reference re Public Schools Act (Man.)*, the Court began by stating that s. 23 'mandates that provincial governments do whatever is practically possible to preserve and promote minority language education.'¹⁹⁴ Indeed, as pointed out especially in *Mabe*, 'language rights cannot be separated from a concern for the culture associated with the language and that s. 23 was designed to correct, on a national scale, the historically progressive erosion of official language groups and to give effect to the equal partnership of the two official language groups in the context of education,'¹⁹⁵ and it is therefore 'necessary to take into account the importance of language and culture in the context of instruction as well as the importance of official language minority schools to the development of the official language community when examining the actions of the government in dealing with the request for services'¹⁹⁶ by the linguistic minority parents.

This is connected to the "purposive interpretation" mandated in *Beaulac* with reference to language rights: '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.'¹⁹⁷

note by Elisabetta Palici di Suni, 'Il diritto all'insegnamento del francese in Canada' [2000] 2 DPCE 553.

¹⁹³ [2000] 1 S.C.R. 3, § 3.

¹⁹⁴ [2000] 1 S.C.R. 3, § 26.

¹⁹⁵ *Ibidem*.

¹⁹⁶ [2000] 1 S.C.R. 3, § 27.

¹⁹⁷ [2000] 1 S.C.R. 3, § 28.

Such a reference to an "equal access", as a right of the "language minority", is a key aspect of *Arsenault-Cameron*, and connects it to some of recurring themes we have already highlighted when considering previous judgments. Indeed the opinion here explains that the Minister had erred in 'insisting on the *individual* right to instruction,'¹⁹⁸ thus 'ignor[ing] the linguistic and cultural assimilation of the Francophone community in [the relevant area], thereby restricting the collective rights of the parents of the school children:'¹⁹⁹ in other words, educational rights are here viewed as collective rights of the parents, and as a paramount means to protect the cultural identity of the minority community, as outlined in *Mabe*.²⁰⁰

The Court then goes into more details on the issue of equality:²⁰¹ the point made is that s. 23 cannot be reconciled with a '*formal vision of equality* that would focus on treating the majority and minority official language groups alike,'²⁰² because '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.'²⁰³ In other words, when it comes to linguistic minorities, s. 23 imposes to adopt a substantive equality approach, positively taking steps to ensure equal treatment, and not just affording majority and minority groups the same treatment.

Moving to apply these principles, and the "sliding scale" approach outlined in *Mabe*, to the case at bar, the Court emphasizes that every case has

¹⁹⁸ [2000] 1 S.C.R. 3, § 29, emphasis added.

¹⁹⁹ *Ibidem*.

²⁰⁰ Education rights are therefore rights given to the parents to benefit (themselves but also) their children. Quite the opposite happened, in a very different setting, with the *Chen* case, decided by the European Court of Justice in 2004 (C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*): on that occasion, the right to reside for an indefinite period in a foreign EU Member State was given to a baby in order to benefit (the child but also) his/her parents.

²⁰¹ On which *see* for instance Yves LeBouthillier, 'Le concept d'égalité dans les dispositions linguistiques et à l'article 15 de la Charte: y a-t-il des liens?', in Sheila McIntyre and Sanda Rodgers (eds), *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (LexisNexis Canada 2006), p. 152; Michel Bastarache, 'L'égalité réelle des communautés de langue officielle du Canada' [2005] 7 *Rev. C.L. Français* 7; David Leitch, 'Méconnaissance de la langue d'instruction: l'article 15 peut-il combler le vide laissé par l'article 23?' [2002] 21 *Windsor Y.B. Access Just.* 185; Victor C. Goldbloom, 'Language Equality in Canada: A Delicate Balance' [1998] 47 *U.N.B.L.J.* 177; several years earlier, José Woehrling, 'Minority Cultural and Linguistic Rights and Equality Rights in the *Canadian Charter of Rights and Freedoms*' [1986] 31 *McGill L. J.* 50; finally, let us recall, for a careful study of the relationship between equality and minority rights, Georg Jellinek, *Das Recht der Minoritäten* (Hölder 1898), pp. 27 and following.

²⁰² [2000] 1 S.C.R. 3, § 31, emphasis added.

²⁰³ *Ibidem*, emphasis added.

to be considered according to its peculiarities, in order to determine what specifically the "numbers warrant" on each occasion. It is then impossible to devise strict rules applicable in every context, though '[i]t is however important to note that the s. 23 standard is not neutral but favours community development.'²⁰⁴

In any case, '[t]he 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.'²⁰⁵ it follows that '[t]he travel considerations should have been applied differently [by the Appeal Division] for minority language children for at least two reasons. First, unlike majority language children, s. 23 children were faced with a choice between a locally accessible school in the majority language and a less accessible school in the minority language. The decision of the Minister fostered an environment in which many of the s. 23 children were discouraged from attending the minority language school because of the long travel times. A similar disincentive would not arise in the circumstances of the majority. Second, the choice of travel would have an impact on the assimilation of the minority language children while travel arrangements had no cultural impact on majority language children. For the minority, travel arrangements were in large measure a cultural and linguistic issue; they involved not only travel times but also a consideration of distances because of the impact of having children sent outside their community and of not having an educational institution within the community itself.'²⁰⁶

As a consequence, it derives that 'the Appeal Division erred in deciding that the sliding scale approach was governed by the "reasonable accessibility" of services without considering which services would best encourage the flourishing and preservation of the French language minority.'²⁰⁷ in other words, the priority is to ensure that the minority language is protected, and accessibility, or economic considerations cannot stand in the way of a thorough fulfillment of such goal. As again clarified by *Mabe*, the government enjoys discretion in choosing how to fulfill its obligations under s. 23, but '[t]his discretion is however subject to the positive obligation on government to alter or develop "major institutional structures" to effectively ensure the provision of minority language instruction and facilities and parental control on the scale warranted by the relevant number of children of the minority.'²⁰⁸

In conclusion, '[t]he duty to promote French language and culture in Prince Edward Island cannot mean that the government can impose the

²⁰⁴ [2000] 1 S.C.R. 3, § 57

²⁰⁵ [2000] 1 S.C.R. 3, § 38.

²⁰⁶ [2000] 1 S.C.R. 3, § 50.

²⁰⁷ [2000] 1 S.C.R. 3, § 51.

²⁰⁸ [2000] 1 S.C.R. 3, § 52.

concentration of all minority language students in one predominantly French region. Both a textual and purposive analysis of s. 23(3) of the *Charter* indicate that when the numbers of s. 23 children in a specific area warrant the provision of minority language instruction, that instruction should take place in facilities located in the community where those children reside. Section 23(3)(a) states that the right to minority language instruction applies “wherever in the province” (emphasis added) 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.²⁰⁹

In summary, transportation in this case was not sufficient, buses cannot be considered an educational facility, and government was thereby obliged to allow an educational scheme more consistent with the goal of promoting the "linguistic and cultural development" of the French language community.

5.16 *Doucet-Boudreau* (2003): a restatement of the case-law thus far in the area of educational linguistic rights

Three years after *Arsenault-Cameron*, another case in the field of education came up, *Doucet-Boudreau v. Nova Scotia (Minister of Education)*.²¹⁰ To be sure, the issue involved was that of remedies to s. 23 violations, and in particular the interpretation of s. 24(1) of the *Canadian Charter*.

The appellants, some Francophone parents from Nova Scotia, had requested an order directing their Province to set up, out of public funds, French-language facilities and programs for their children in secondary school. The trial judge had found a delay in the fulfillment by the government of its obligations under s. 23, and thereby ordered the institution of school facilities and programs before a certain deadline, retaining jurisdiction to assess the progress in the enforcement.

This latter part of the order was appealed by the Province of Nova Scotia, and the appeal was allowed by the Court of Appeal: the case before the Supreme Court was on this specific jurisdictional issue, on which the 5-4 judgment by the Court held that the trial judge had rightly retained jurisdiction

²⁰⁹ [2000] 1 S.C.R. 3, § 56.

²¹⁰ [2003] 3 S.C.R. 3. See the comments by Brendan Brammal, 'A Comment on *Doucet-Boudreau v. Nova Scotia (Minister of Education)* and *R. v. Demers*' [2006] 64 *U. Toronto Fac. L. Rev.* 113; Michel Doucet, '*Glenda Doucet-Boudreau et al. c. Attorney General of Nova Scotia*' [2004] 6 *Rev. C.L. Français* 313; Debra M. McAllister, '*Doucet-Boudreau* and the Development of Effective Section 24(1) Remedies: Confrontation or Cooperation?' [2004] 16(1) *Nat. J. Const. L.* 153; and, eight years down the road, Paul S. Rouleau and Linsey Sherman, '*Doucet-Boudreau*, dialogue and judicial activism: tempest in a teapot?' [2010] 41(2) *Ottawa L. Rev.* 171; in the Italian scholarship, see Nino Olivetti Rason, 'La giurisprudenza della Corte Suprema del Canada nel 2003' [2004] 49 (5) *Giur. cost.* 3591, 3595-9 (§ 2, *Le lingue ufficiali del Canada e la loro tutela*).

to hear reports, and thereby restored his order in the part struck down by the Court of Appeal.

But what is important in this case are some of the statements the Court made, as *obiter dicta*, in the first part of the majority opinion, which have broader implications. The Court here summarized its past case-law on s. 23 (in particular *Mabe*, *Reference re Public Schools Act*, *Beaulac*, *Arsenault-Cameron*), and presented it coherently.

First, it recalled the link, very clear in *Mabe* and *Reference re Public Schools Act*, between language education rights and the goal of preserving and promoting the culture of the minority. Then, it reaffirmed the remedial nature of s. 3, namely its aim 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 (*Mabe*, *supra*, at p. 363; *Schools Reference*, *supra*, at p. 850).'²¹¹

More importantly, it added:

The minority language education rights protected under s. 23 of the *Charter* are unique. They are distinctively Canadian, representing “a linchpin in this nation’s commitment to the values of bilingualism and biculturalism” (*Mabe*, *supra*, at p. 350). Section 23 places positive obligations on governments to mobilize resources and enact legislation for the development of major institutional structures (*Mabe*, at p. 389). While the rights are granted to individuals (*Schools Reference*, at p. 865), they apply only if the “numbers warrant”, and the specific programs or facilities that the government is required to provide varies depending on the number of students who can potentially be expected to participate (*Mabe*, *supra*, at p. 366; *Schools Reference*, *supra*, at p. 850; *Arsenault-Cameron*, *supra*, at para. 38). This requirement gives the exercise of minority language education rights a unique collective aspect even though the rights are granted to individuals.²¹²

So we are again confronted with the double nature of language education rights: formally, it is individuals who are entitled to them, but they have nonetheless a strong collective dimension, that recurrently pops out in the cases.

Finally, the Court made another important point: 'the “numbers warrant” requirement leaves minority language education rights particularly vulnerable to government delay or inaction.'²¹³ the more time goes by without

²¹¹ [2003] 3 S.C.R. 3, § 27.

²¹² [2003] 3 S.C.R. 3, § 28.

²¹³ [2003] 3 S.C.R. 3, § 29.

s. 23 rights being truly respected, the more the "likelihood of assimilation" increases, carrying 'the risk that numbers might cease to "warrant."' ²¹⁴ In other words, minority rights are special from this point of view: timely enforcement is particularly relevant, because if such enforcement is too much delayed, the minority group could happen to disappear in the meanwhile.

Thus, particular entitlements afforded under s. 23 can be suspended, for so long as the numbers cease to warrant, by the very cultural erosion against which s. 23 was designed to guard. In practical, though not legal, terms, such suspensions may well be permanent. If delay is tolerated, governments could potentially avoid the duties imposed upon them by s. 23 through their own failure to implement the rights vigilantly. The affirmative promise contained in s. 23 of the *Charter* and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected. ²¹⁵

Therefore, budget considerations cannot be an obstacle to a prompt enforcement of linguistic rights: these are typically "judgments that bear a cost," to translate from their Italian definition, ²¹⁶ *i.e.* judgments that impose an expense on the government, out of the public budget. But not only cannot a lack of resources justify a lack of enforcement (as already clarified in *Arsenault-Cameron*): from *Doucet-Boudreau*, we derive that it cannot justify even just a delay in the enforcement.

5.17 *Solski* (2005): the "major part" requirement in s. 23(2) of the *Canadian Charter* must be interpreted in a qualitative way, and not with a too rigid quantitative approach

After another two years, on the same day the Court released two other important judgments, both unanimous, both from Quebec, and both revolving

²¹⁴ Ibidem.

²¹⁵ Ibidem.

²¹⁶ In the Italian scholarship, *see inter alia* Andrea Giorgis, 'La Corte Costituzionale riserva al legislatore la tutela dei diritti che costano?' [1995] 147 *Giur. it.* 529; AA.VV., *Le sentenze della Corte Costituzionale e l'art. 81, u.c., della Costituzione* (Giuffrè 1993); E. Grosso, *Sentenze costituzionali di spesa "che non costano"* (Giappichelli 1991); Costantino Mortati, 'Appunti per uno studio sui rimedi giurisdizionali contro comportamenti omissivi del Legislatore' [1970] 93(5) *Foro it.* 153. In English, *see for example* Mark Tushnet, 'Social Welfare Rights and the Forms of Judicial Review' [2004] 82 *Tex. L. Rev.* 1895; Martha Jackman, 'From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees through Charter of Rights Review' [1999] 14 *J.L. & Soc. Pol'y* 69; Albie Sachs, 'Enforcement of Social and Economic Rights' [2007] 22 *Am. U. Int'l L. Rev.* 673.

around the construction of s. 73 of the *Charter of the French language*, therefore again involving educational rights.²¹⁷ Indeed this provision makes an exception to the rule in s. 72, according to which 'instruction in the kindergarten classes and in the elementary and secondary schools shall be in French, except where this chapter allows otherwise,' and *inter alia* stipulates: 'The following children, at the request of one of their parents, may receive instruction in English: (1) a child whose father or mother is a Canadian citizen and received elementary instruction in English in Canada, provided that that instruction constitutes the major part of the elementary instruction he or she received in Canada; (2) a child whose father or mother is a Canadian citizen and who has received or is receiving elementary or secondary instruction in English in Canada, and the brothers and sisters of that child, provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada.'

The first of the two cases we are referring to is *Solski (Tutor of) v. Quebec (Attorney General)*.²¹⁸ Three families had requested admission for their children to public English-language schools under s. 73(2) of the Charter of the French language, but their requests had been denied because their children did not meet the "major part" requirement in that provision, not having received the "major part" of their education in English. The question was then whether the s. 73(2) requirement was constitutional, or whether it violated s. 23(2) of the Canadian Charter, affording the right to continuity of language of instruction.

The Court held that s. 73(2), provided that it was properly interpreted, i.e. that the word "major" in it was given a qualitative rather than quantitative meaning, was constitutional.

In order to reach this conclusion, it went over its previous case-law, and gave a comprehensive account of the principles to be applied in the interpretation of s. 23 and of language rights in general. The Court made it immediately clear that:

The protection of minority language rights by s. 23 of the Canadian Charter is an integral part of the broader protection of minority rights, a principle recognized as foundational to Canada's

²¹⁷ For a comment, see André Braën, 'La Cour suprême et l'accès à l'école anglaise au Québec' [2005] 35 *Rev. Gen. Droit* 363 (the article also comments on *Okwuobi v. Lester B. Pearson School Board*; *Casimir v. Quebec (Attorney General)*; *Zorrilla v. Quebec (Attorney General)*, [2005] 1 S.C.R. 257, that we have not included in our analysis because it only deals with administrative law issues); for a comment on the right to minority language education in Canada in light of *Solski*, see Michael Aquilino, 'Qui suis-je?: Identité Linguistique et Exclusion des non-ayants Droit par l'article 23 de la Charte' [2006] 38(1) *Ottawa L. Rev.* 67. In the Italian scholarship, see Nino Olivetti Rason, 'La giurisprudenza della Corte Suprema del Canada nel biennio 2004-2005' [2006] 51(5) *Giur. Cost.* 3643, 3656-8 (§ 6, *Eguaglianza e diritti linguistici*).

²¹⁸ [2005] 1 S.C.R. 201.

Constitution in Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 79. Minority language rights are fundamental because “[l]anguage is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it”: *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 362; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 748-49. The constitutional protection of minority language rights is necessary for the promotion of robust and vital minority language communities which are essential for Canada to flourish as a bilingual country.²¹⁹

Education rights play a fundamental role in promoting and preserving minority language communities. Indeed, “[m]inority language education rights are the means by which the goals of linguistic and cultural preservation are achieved”: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62, at para. 26; see also *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3, 2000 SCC 1, at para. 26; *Mabe*, at pp. 363-64. Minority language education is a requisite tool to encourage linguistic and cultural vitality. Not only do minority schools provide basic language education, they also act as community centres where the members of the minority can meet to express their culture. Thus, the education rights provided by s. 23 form the cornerstone of minority language rights protection.²²⁰

Going over the legislative history of ss. 16 to 23, the Court observed that such provisions, just like the previous s. 133 of the *Constitution Act, 1867* or similar provisions in provincial legislation, addressed 'situations in which not only individual rights, but also the existence of language communities and the manner in which those communities perceive their future, are in issue.'²²¹ The dichotomy individual v. collective rights is then explored again, even more deeply than in previous cases:

First, the members of the minority communities and their families, in every province and territory, must be given the opportunity to achieve their personal aspirations. Second, on the collective level, these language issues are related to the development and existence of the English-speaking minority in Quebec and the French-speaking minorities elsewhere in Canada. They also inevitably have

²¹⁹ [2005]1 S.C.R. 201, § 2.

²²⁰ [2005]1 S.C.R. 201, § 3.

²²¹ [2005]1 S.C.R. 201, § 4.

an impact on how Quebec's French-speaking community perceives its future in Canada, since that community, which is in the majority in Quebec, is in the minority in Canada, and even more so in North America as a whole. To this picture must be added the serious difficulties resulting from the rate of assimilation of French-speaking minority groups outside Quebec, whose current language rights were acquired only recently, at considerable expense and with great difficulty. Thus, in interpreting these rights, the courts have a responsibility to reconcile sometimes divergent interests and priorities, and to be sensitive to the future of each language community. Our country's social context, demographics and history will therefore necessarily comprise the backdrop for the analysis of language rights. Language rights cannot be analysed in the abstract, without regard for the historical context of the recognition thereof or for the concerns that the manner in which they are currently applied is meant to address.

As stated in *Lavigne*, a minor case we have not included in our analysis, 'the promotion of both official languages is essential to Canada's development':²²² it follows that arguably

[s]ection 23, which is linked to the broader principle of protection of minority rights that was recognized by this Court in *Reference re Secession of Quebec* as one of the fundamental principles of the Canadian Constitution, reflects a common desire to protect Canada's English- and French-speaking minorities, and to promote their development. Any broad guarantee of language rights attests to a fundamental respect for and interest in the cultures that are expressed by the protected languages (*Mabe*, at p. 362). Thus, the recognition of rights to minority language instruction contributes to the preservation of the minority language and culture, as well as of the minority group itself (*Doucet-Boudreau*, at para. 26). With this in mind, this Court has been sensitive to the concerns, and the language dynamics, of Quebec, where a majority of the members of Canada's French-speaking minority is concentrated (see, for example: *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 82; *Ford*, at pp. 777-78; *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, at p. 851).

²²² *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, § 22.

All this considered, the Court moved to tackle another recurring issue in its case-law on minority rights, namely that of the tension between protection of minority rights and the principle of equality, and of how to reconcile them. Here, the Court provides the thus far most detailed answer to such question:

Section 23 provides a comprehensive code of minority language education rights which afford special status to minority English- or French-language communities. The Court in *Mabe*, at p. 369, recognized that this special status would create inequalities between linguistic groups. [...] Specifically, English speakers living in Quebec and French speakers living in the territories and other provinces would enjoy rights denied to other linguistic groups. Section 23 has been described as an exception to ss. 15 and 27 of the *Canadian Charter*; it is rather an example of the means to achieve substantive equality in the specific context of minority language communities. While this entrenched inequality may be the product of political compromise and negotiation, this does not mean that s. 23 rights are to be construed narrowly. The Court has confirmed on several occasions that language rights must be interpreted in a broad and purposive manner consistent with the preservation and promotion of both official language communities in Canada: *R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 25; *Reference re Public Schools Act (Man.)*, at p. 850; *Reference re Secession of Quebec*, at para. 80; *Arsenault-Cameron*, at para. 27.²²³

Which brings the Court back to the dual nature (individual v. collective) of linguistic rights: 'For the Attorney General of Quebec, s. 23 is a provision for the implementation of community rights; for the appellant, it is about individual rights that can be exercised by qualified persons throughout Canada. As is often the case, these two approaches are not entirely devoid of merit [...]. 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. The conditions for their application reflect this (*Doncet-Boudreau*, at para. 28): implementation depends on numbers of qualified pupils (*Mabe*, at pp. 366-67; *Reference re Public Schools Act (Man.)*, at p. 850; *Arsenault-Cameron*, at para. 32). 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

²²³ [2005]1 S.C.R. 201, § 20.

to the formulation of s. 23 reveals individual rights in favour of persons belonging to specific categories of rights holders.²²⁴

All this leads the Court to clarify that the purpose of s. 23(2) is three-fold: 'to provide continuity of minority language education rights, to accommodate mobility and to ensure family unity,'²²⁵ and then to derive that the right approach in constructing s. 23(2) and its "major part" requirement is qualitative, and not quantitative: "The strict mathematical approach lacks flexibility and may even exclude a child from education vital to maintaining his or her connection with the minority community and culture."²²⁶ Several factors should be taken into account in the analysis: "How Much Time Was Spent in Each Program?," "At What Stage of Education Was the Choice of Language of Instruction Made?," "What Programs Are or Were Available?," "Do Learning Disabilities or Other Difficulties Exist?"

The conclusion is therefore the following:

A "major part" requirement, defined qualitatively, i.e., as meaning a "significant part", as described in para. 28 is a valid qualifier for "*parcours scolaire*" or "educational experience". The "major part" requirement must make room for the nuances and subjectivity required to determine whether the admission of a particular child, considering his or her personal circumstances, is consistent with the objectives of s. 23 and the specific need to protect and reinforce the minority language community.²²⁷

The purpose of the s. 23(2) criteria is to guarantee continuity of minority language education rights and mobility to children being educated in one of the official languages. If children are in a recognized education program regularly and legally, they will in most instances be able to continue their education in the same language. This is consistent with the wording of s. 23(2) and the purposes of protecting and preserving the minority-language community, as well as with the reality that children properly enrolled in minority-language schools are entitled to a continuous learning experience and should not be uprooted and sent to majority-language schools. Uprooting would not be in the interest of the minority language community or of the child. Nevertheless, a qualitative assessment of the situation to determine whether there is evidence of a genuine commitment to a minority language educational experience is warranted, with each province exercising its discretion in light of its particular circumstances, obligation to respect the objectives

²²⁴ [2005]1 S.C.R. 201, §§ 22-23.

²²⁵ [2005]1 S.C.R. 201, § 30.

²²⁶ [2005]1 S.C.R. 201, § 37.

²²⁷ [2005]1 S.C.R. 201, § 46.

of s. 23, and educational policies.²²⁸

The approach will be both subjective and objective. This does not imply an artificial “snapshot” approach. Provincial governments are entitled to verify that registration and overall attendance in the program, the past and present educational experience of the child, are consistent with participation in the class of beneficiaries defined in s. 23(2).²²⁹

5.18 *Gosselin* (2005): the exclusion of Francophone parents' children from publicly funded English language education in Quebec is not discriminatory

The other 2005 case, released on the same day as *Solski*, is *Gosselin (Tutor of) v. Quebec (Attorney General)*,²³⁰ brought by several francophone parents residing with their school-age children in Quebec, and - a bit unusually - seeking access for them to publicly funded English language education, under s. 73 of the Charter of the French language.

The problem in *Gosselin* was that s. 73 only affords this right to children having received or receiving education in English in Canada, or whose parents received primary education in English in Canada. However, the children did not meet such requirement, nor had the parents received their primary education in Canada in English, thus they did not qualify under s. 73 (or under s. 23 of the Canadian Charter): '[t]heir situation, therefore, [wa]s fundamentally and constitutionally different from that of the appellants in the companion case *Solski*.'²³¹

The appellants argued then that s. 73 was unconstitutional, because it allegedly discriminated against the majority of French-speaking Quebec children, in violation of the principle of equality. The issue was then again how to reconcile the constitutional right to minority language education and the right to equality.

The Court rejected the appellants' claim, observing that 'the practical effect of the[ir] [...] equality argument would be to read out of the Constitution the carefully drafted compromise contained in s. 23 of the Canadian Charter of Rights and Freedoms. This is impermissible. As the Court has stated on numerous occasions, there is no hierarchy amongst constitutional provisions, and equality guarantees cannot therefore be used to invalidate other rights expressly conferred by the Constitution. All parts of

²²⁸ [2005]1 S.C.R. 201, § 47.

²²⁹ [2005]1 S.C.R. 201, § 48.

²³⁰ [2005]1 S.C.R. 238. For a comment, see Sonja Grover, 'The right to minority language public school education as a function of the equality guarantee: a reanalysis of the *Gosselin* Supreme Court of Canada Charter case' [2006] 18(4) *Education and the Law* 283.

²³¹ [2005]1 S.C.R. 238, § 9.

the Constitution must be read together. It cannot be said, therefore, that in implementing s. 23, the Quebec legislature has violated either s. 15(1) of the Canadian Charter or ss. 10 and 12 of the Quebec Charter.²³²

The judgment explains that what the appellants were seeking was simply to exploit 'the right to equality to access a right guaranteed in Quebec only to the English language minority,'²³³ whereas they belonged to the French language majority of Quebec. In particular, they were relying on the prohibition of discrimination on the basis on language in s. 10 of the Quebec Charter (and in s. 15(1) of the *Canadian Charter*: although such provision did not include language among the grounds of discrimination explicitly forbidden, the case-law of the Court was consistent in including it as well).

But the Court objected that '[i]n the context of minority language education, equality in substance as opposed to mere formal equality may require differential treatment as the Court noted in *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3, 2000 SCC 1, at para. 31,²³⁴ and that '[t]he purpose of s. 73 is not to "exclude" but rather to implement the positive constitutional responsibility incumbent upon all provinces to offer minority language instruction to its minority language community.'²³⁵

In other words, 'the attempt to give equality guarantees a superior status in a "hierarchy" of rights must be rejected,'²³⁶ therefore minority language rights were not to be considered subordinated to it: '[t]he appellants are members of the French language majority in Quebec and, as such, their objective in having their children educated in English simply does not fall within the purpose of s. 23:²³⁷ their attempt to "abuse" of a minority right, cunningly relying on the prohibition of discrimination in order to claim access to a financial benefit only provided for minority members, was therefore rejected, and rightly so.

5.19 *Nguyen* (2009): Quebec's rules squarely disqualifying certain categories of parents from s. 23(2) rights in order to react to some abuses were disproportionate to the (legitimate) goal of remedying such abuses

After another two cases, which we will not take into account because they deal with relatively marginal issues,²³⁸ in 2009 the Court issued its latest

²³² [2005] 1 S.C.R. 238, § 2.

²³³ [2005] 1 S.C.R. 238, § 10.

²³⁴ [2005] 1 S.C.R. 238, § 15.

²³⁵ [2005] 1 S.C.R. 238, § 16.

²³⁶ [2005] 1 S.C.R. 238, § 26.

²³⁷ [2005] 1 S.C.R. 238, § 30.

²³⁸ The first one, *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada* [2008] 1 S.C.R. 383, simply extended to a federal institution, acting as a provincial police force in New Brunswick, the language obligations imposed on New Brunswick institutions by s. 20(2) of

judgment on minority rights, in a case that was a follow-up to *Solski* and *Gosselin*, and that also arose from Quebec: *Nguyen v. Quebec (Education, Recreation and Sports)*.²³⁹

The case concerned the constitutionality of two provisions added in 2002 to the *Charter of the French language*, aimed at contrasting what the Quebec government felt as abuses of the rights afforded by s. 23(2) of the *Canadian Charter*. In particular, such new rules disqualified from s. 23(2) parents whose children had enrolled in unsubsidized private schools for short periods (just in order to become eligible for s. 23(2) benefits), or had received instruction in English only due to a special authorization (that was meant to be limited just to the case considered in the authorization, and not to indirectly trigger the application of s. 23(2)).

The Court ruled both restrictions unconstitutional, acknowledging that they pursued sufficiently important and legitimate goals (*i.e.* protecting and promoting the French language in Quebec), and that there was a rational causal link between the restrictions and the goals, but holding that the rules at bar did not pass the proportionality test, going illegitimately beyond a minimal impairment of s. 23(2) rights.

The conclusion was based on *Solski*, that had clarified that the "major part" requirement had to be interpreted 'as giving rise to an obligation to conduct a global qualitative assessment of a child's educational pathway.'²⁴⁰ The new rules amounted instead to an only partial assessment of a child's educational pathway, thus having to be struck down as unconstitutional, even though the Court suspended for one year the effects of the declaration of invalidity.

6. A constructive *dialogue* (with occasional fights), as a means to build the Canadian identity: the dangers of an instrumental approach to language rights

In their already mentioned 1997 article, Hogg and Bushell (now Thornton) 'respond[ed] to the argument that the Canadian Charter was illegitimate because it was almost always undemocratic, [by] [...] suggest[ing] that where a judicial decision is open to judicial reversal, modification or

the *Canadian Charter of Rights and Freedoms*. The second case, *DesRochers v. Canada (Industry)* [2009] 1 S.C.R. 194 dealt instead with the interpretation of s. 20(1) of the *Canadian Charter* and Part IV of the *Official Languages Act*, and on the scope of the obligation, imposed on public bodies by such provisions, to offer services of "equal quality" in both English and French. For a comment to both these cases, as well as to *Nguyen* (the case we are about to consider), *see*, in the Italian scholarship, Eleonora Ceccherini, 'La giurisprudenza della Corte Suprema del Canada 2008-2009', [2010] 55(5) *Giur. Cost.* 4245, 4262-6 (§ 4, I diritti linguistici).

²³⁹ [2009] 3 S.C.R. 208.

²⁴⁰ [2009] 3 S.C.R. 208, § 28.

avoidance, then it is meaningful to regard the relationship between court and the legislative body as a dialogue. In such a case the judicial decision causes a public debate in which Charter values play a more prominent role than they would if there were no judicial decision. The legislative body is in a position to devise a response which is properly respectful of the Charter values that have been identified by the court, but which accomplish the social or economic objectives that the judicial decision has impeded.²⁴¹

The case-law we have reviewed is arguably a fairly good example of that dialogue in action: we have seen the Court strike down legislation on some important occasions, but also give legislators some advice on how to reform laws that were being declared unconstitutional, like in *Mabe*, *Arsenault-Cameron*, and especially *Ford*; but also the choice to recur to the *de facto* doctrine and delayed declarations of invalidity, in *Manitoba Language Rights* and in *Bilodeau*, provides evidence of the Court's leaning towards dialogue: the justices are aware that a plain declaration of invalidity in cases like the two just mentioned would have devastating consequences for the provinces involved, and choose to avoid creating such a scenario, thus preferring to maintain an acceptable relationship even to the cost of sacrificing individuals' rights on the altar of *Realpolitik*.

But big cases like *Ford* itself, or the *Quebec Veto controversy*, or the just hinted at *Reference re Secession of Quebec* also show that dialogue can often give way to an open fight between judges and politics. To be sure, the major clashes between courts and legislators happened with regard to Quebec,

²⁴¹ Richard Clayton, 'Judicial deference and "democratic dialogue": the legitimacy of judicial intervention under the Human Rights Act 1998' [2004] *Pub. L.* 33, 42. Hogg's and Bushell (now Thornton)'s article sparked a very large deal of comments in legal scholarship: on the same journal, see in particular Christopher P. Manfredi and James B. Kelly, 'Six Degrees of Dialogue: A Response to Hogg and Bushell' [1999] 37 *Osgoode Hall L. J.* 513, and the authors' *Reply* on page 529; the numerous articles in the Spring 2007 **Special Issue Charter Dialogue Revisited (Volume 45, Number 1)**; Rosalind Dixon, 'The Supreme Court of Canada, Charter Dialogue, and Deference' [2009] 47 *Osgoode Hall L.J.* 235. But see also, *inter alia*, Grant Huscroft 'Rationalizing Judicial Power: The Mischief of Dialogue Theory' in J B Kelly and C P Manfredi (Eds), *Contested Constitutionalism. Reflections on the Canadian Charter of Rights and Freedoms* (UBC Press 2009), p. 50; Mary T. Moreau, 'La Charte canadienne des droits et libertés comme instrument de dialogue entre le tribunal et le législateur' [2007] 36 *Int'l J. Can. Studies* 319; Kent Roach, 'A Dialogue About Principle and a Principled Dialogue: Justice Iacobucci's Substantive Approach to Dialogue' [2007] 57 *U. Toronto L.J.* 459; Id., 'Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States' [2006] 4(2) *Int'l J. Const. L.* 347. In the Italian scholarship, the original Hogg's and Bushell (now Thornton)'s contribution is extensively discussed by Sergio Gerotto, 'Il dialogo tra Corti e legislativi in Canada: una soluzione ai problemi di non democraticità del *judicial review*?' [2005] 7(2) *DPCE* 995; see also Anna Margherita Russo, 'La Carta dei diritti e delle libertà nel "comparative dialogue" della Corte suprema: flessibilità e *cross fertilization* giurisprudenziale, in Rolla (ed), *L'apporto della Corte suprema alla determinazione dei caratteri dell'ordinamento costituzionale canadese*, p. 269.

reflecting and at the same time reinforcing the tension in the relationship between this province and the Canadian federation,²⁴² the most recent example of which was a bill, introduced during the past legislature by the Quebec government before that province's National Assembly, that would have amended the Quebec *Charter of Rights and freedoms* and *Charter of the French language* in order to limit education rights of non-francophones.²⁴³

Elsewhere, the *dialogue* seems to prevail, while in Quebec the case-law seems to show that adversarial tones are still quite strong. However, we registered significant instances of *dialogue* in Quebec too: even when the Court ruled that that Province could not lawfully make French its only official language, like it did in *Blaikie No. 1*, the Quebec Legislature immediately re-enacted also in English all its French-only laws (as we saw in § 5.1). Less politically sensitive cases than *Ford*, the *Quebec Veto controversy* or the *Reference re Secession* case, like *Solski*, *Gosselin* and *Nguyen*, provide further evidence that the *dialogue* paradigm is working with Quebec as well, presumably also thanks to the effect of the institutional choice of appointing three out of the nine judges of the Supreme Court 'from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.'²⁴⁴

This leads us to one of the possible keys to a categorization of the cases we have reviewed: indeed, a first criterion can be the province where the case

²⁴² On top of the literature already recalled *supra*, at footnote 43, see also, *inter alia*, Peter H. Russell, 'The *Patriation* and *Quebec Veto References*: The Supreme Court Wrestles with the Political Part of the Constitution' [2011] 54 *S.C.L.R.* (2d) 69; Jocelyn Maclure, *Québec Identity, The Challenge Pluralism* (McGill-Queen's University Press 2003); M F Labouz (ed) *Intégrations et identités nord-américaines vues de Montréal* (Bruylant 2001); Nathalie Des Rosiers, 'From Quebec Veto to Quebec Secession: The Evolution of the Supreme Court of Canada on Quebec-Canada Disputes' [2000] 13 *Can. J. L. & Jurisprudence* 171; José Woehrling, 'La Constitution canadienne et l'évolution des rapports entre le Québec et le Canada anglais de 1867 à nos jours' [1992] 10 *Rev. fr. droit const.* 195; in the Italian scholarship, see for instance Marco Olivetti, 'La crisi costituzionale canadese del dicembre 2008' [2009] 11(1) *DPCE* 261; Giuseppe Passaniti, 'Approvata la mozione che qualifica il Québec una "nazione"' [2007] 9(1) *DPCE* 70; Larrivée (ed), *Linguistic Conflict and Language Laws. Understanding the Quebec Question*; Nicola Vizioli, 'Il Québec tra Costituzione e prassi', [2002] 32(1-2) *Amministrare* 251, and in particular 259-261.

²⁴³ For a critical comment on this bill, that never became law, see Richard Y. Bourhis and Pierre Foucher, 'Bill103: Collective Rights and the declining vitality of the English-speaking communities of Quebec' (17 Sep 2010), available on the website of the Quebec Community Groups Network, <http://www.qcgn.ca/> (last accessed 20 Feb 2012).

²⁴⁴ Thus provides indeed s. 6 of the Supreme Court Act, R.S.C., 1985, c. S-26: see, in the Italian scholarship, Tania Groppi, 'La Corte suprema del Canada come "giudice dei diritti"', in Rolla (ed), *Lo sviluppo dei diritti fondamentali in Canada. Tra universalità e diversità culturale*, p. 63, 72; but also, Tania Groppi and Lorenzo Luatti, 'La Corte Suprema del Canada, «custode della Costituzione»: alcune considerazioni sulla sua composizione e sulla procedura di controllo di costituzionalità' [1997] 28(2) *Polit. Dir.* 215.

arose. We will then distinguish cases from Quebec, on the one hand (the *Quebec Veto* case, *Blaikie No. 1 and No. 2, Protestant School Boards, MacDonald, Forget, Ford, Devine, Solski, Gosselin and Nguyen*), and cases from other provinces (all the remaining ones). The picture seems to be that 'the case law of the Supreme Court [...] on several occasions has showed to favour the use of French more by minorities living in anglophone provinces than within Quebec.'²⁴⁵ This seems a way by the Court to counter the tendency by Quebec to regulate language issues according to the principle of separatism and territoriality, while (as was pointed out in § 1) the anglophone provinces tend to privilege the principle of bilingualism.²⁴⁶

But our cases could as well be divided along a different line, namely the topic involved:²⁴⁷ we will therefore have several cases about education rights²⁴⁸ (*Protestant School Boards, Mabe, Reference re Public Schools Act, Arsenault-*

²⁴⁵ Palici di Suni, *Intorno alle minoranze*, 161 (the translation is ours); see also Piergigli, 'Minoranza anglofona in Québec versus minoranze francofone del Rest of Canada,' in particular 229-31 and 241-5, where the author speaks of "asymmetry" to describe the very structure of Canadian federalism, and the way the relationship between linguistic communities has been shaped in that country.

²⁴⁶ Broadly on these issues, see José Woehrling, 'La Constitution du Canada, la législation linguistique du Québec et les droits de la minorité angli-québécoise', in N Levrat (ed), *Minorités et organisation de l'État* (Bruylant 1998), p. 561; Id., 'La Constitution canadienne et la protection des minorités ethniques' [1986] 27(1) *Les Cahiers de Droit* 171; for a theoretical analysis, in the Italian scholarship, of the differences between the separatist and the bilingual approaches, see Palici di Suni, *Intorno alle minoranze*, 23-7.

²⁴⁷ This approach was followed for instance by Pierre Foucher, 'L'interprétation des droits linguistiques constitutionnels par la Cour Suprême du Canada' [1987] 19(2) *Ottawa Law Review* 381.

²⁴⁸ On this issue, see for example Cork Maeve Conrick, 'Language choice and education rights in Quebec: *Bill 101* passes the Supreme Court test?' [2005] 26(97) *Fr. Stud. Bull.* 9; François Boileau, 'Les communautés francophones et acadiennes et le droit à la gestion des institutions éducatives' [1999] 12 *Rev. Queb. Droit Int'l* 185; Sarah Dougherty and Richard A. Goreham, *School Governance: the Implementation of Section 23 of the Charter* (Office of the Commissioner of Official languages 1999); Angéline Martel, 'Les droits constitutionnels des minorités linguistiques en matière d'éducation sont-ils solides?' [1995] 27(1) *Ottawa L. Rev.* 59; Anwar N. Khan, 'Minority Language Education Rights in Canada' [1994] 23 *J.L. & Educ.* 399; Denise Réaume and Leslie Green, 'Education and Linguistic Security in the Charter' [1989] 34 *McGill L. J.* 777; back in the years of patriation and immediately after, see also the works by Eric Apps, 'Minority Language Education Rights' [1985] 43 *U. Toronto Fac. L. Rev.* 45; by Roger Bilodeau, 'La Langue, l'Éducation et les Minorités: Avant et Depuis la Charte Canadienne des Droits et Libertés' [1983] 13 *Man. L.J.* 371; by Daniel Proulx, 'La précarité des droits linguistiques scolaires ou les singulières difficultés de mise en œuvre de l'article 23 de la Charte canadienne des droits et libertés' [1983] 14 *Rev. Gen. Droit* 335; and by William Tetley, 'Language and Education Rights in Quebec and Canada (A Legislative History and Personal Political Diary)' [1982] 45 *Law & Contemp. Probs.* 177; in the Italian scholarship, see, *inter alia*, Marco Gaggero, 'Il diritto all'educazione nelle lingue dei "padri fondatori": verso un'uguaglianza realmente sostanziale?' in Rolla (ed) *L'apporto della Corte suprema alla determinazione dei caratteri dell'ordinamento costituzionale canadese*, p. 393; Valeria Piergigli, 'I diritti

Cameron, Doucet-Boudreau, Solski, Gosselin, and Nguyen), but also others about linguistic rights before courts and in general public bodies, and the language of official acts (*Blaikie No. 1 and No. 2, Manitoba Language Rights, Bilodeau, MacDonald, Société des Acadiens, Mercure, and Beaulac*),²⁴⁹ others about the language of signs, company names, leaflets and paperwork (*Ford and Devine*),²⁵⁰ others on more typically political controversies (the *Quebec veto* controversy and the case, here not considered at length, of the *Reference re secession of Quebec*), and one too on language as a professional requirement (*Forget*) (interestingly, no cases involved election rights, unlike for example in the U.S., where election law litigation has always been a very significant tool to advance minority rights protection²⁵¹).

Anyway, overall the Court seems to apply a similar approach to all the different subjects, even though it elaborates principles specific to each one: for instance, the "sliding scale" of requirement is typical of the case-law on language education rights, while in the cases about rights before courts, the

linguistici nell'educazione: il contributo della Corte Suprema canadese alla tutela della francofonia minoritaria', in S Gambino (ed), *La protezione dei diritti fondamentali. Europa e Canada a confronto* (Giuffrè 2004), p. 141; Ead. 'Sistema educativo pubblico e tutela delle minoranze francofone in Canada: spunti per un cauto ottimismo' [2002] 4(2) *DPCE* 613, offering a comment to all the important cases up to that point, and extensively referencing to Italian and Canadian literature.

²⁴⁹ A case concerning bilingualism before courts was also *Charlebois v. Saint John (City)* [2005] 3 S.C.R. 563: we did not include it because it was actually more a statutory construction case than a language rights case: the 5-4 holding was that 'the City was not obliged to adopt in its pleadings the official language chosen by [Mr] C[harlebois] because the word "institution" in s. 22, as defined in s. 1 of the *OLA* [*Official Languages Act*], does not include municipalities.' Mr Charlebois had instead been successful in a previous application that had not reached the Supreme Court: the New Brunswick Court of Appeal had ruled that the statutes of the municipalities in that province had to be adopted in both official languages, under s. 18(2) of the *Canadian Charter*: for a comment on this latter case, see Serge Rousselle, 'L'Arrêt Charlebois: Une Décision Sans Faille En Matière De Droits Linguistiques' [2002] 51 *U.N.B.L.J.* 15. Specifically on language rights in federal courts, and on the statutory framework resulting from the Supreme Court's case-law, see Marie-Ève Hudon, 'Bilingualism in the Federal Courts' (Library of Parliament, Ottawa 2011), Publication No. 2011-40-F, available at <http://parl.gc.ca/Content/LOP/ResearchPublications/2011-40-e.pdf> (last accessed 11 Feb 2012); several years earlier, see John D. Richard, 'Le bilinguisme judiciaire au Canada' [2001] 42 *C. de D.* 389; Renée Soublière, 'Les perpétuels tiraillements des tribunaux dans l'interprétation des droits linguistiques' [2001] 4 *Rev. C.L. Fr.* 1, 45-104.

²⁵⁰ See on this topic Claude J. Galipeau, 'National Minorities, Rights and Signs: The Supreme Court and Language Legislation in Quebec' in A G Gagnon and A B Tanguay (eds), *Democracy with Justice: Essays in Honour of Khayyam Zev Paltiel* (Carleton University Press 1992), p. 66.

²⁵¹ The most recent example of the high sensitivity of the issue is the U.S. Supreme Court's judgment of 20 January 2012 in *Perry v. Perez*, 565 U.S. ____ (2012), where the Court rejected elections maps that in this case were deemed to bring an unfair advantage to the Democratic Party.

structure of the constitutional questions usually does not lend itself to a "sliding scale" approach, rather requiring more clear-cut, black-or-white answers. Except for *Ford* and *Nguyen*, the proportionality analysis seems to have lesser relevance in the case-law on linguistic rights, compared to what can be observed in many other areas of the Supreme Court's case-law.

A still different criterion would try to measure how effective the dialogue has actually been in the area considered: from this point of view, attention shall be paid to whether the laws and administrative measures reviewed complied by the Court were deemed to comply with the constitutional obligations, or in fact they fell short of them. The most striking example of the latter cases is *Ford*, while the opposite end of the spectrum would arguably be *Gosselin*.

Also, we did not include much information on that, but a way to deepen the analysis would be to look at the level of agreement among justices, and a further step would be to investigate whether the dissenting justices tend to be the same, and maybe if the justices from Quebec tend to cast similar votes. In this vein, the ruling that formally saw the most divided court was *Doucet-Boudreau*, the only 5-4 decision, but as we saw in § 5.16, the disagreement did not concern the most relevant issue for our purposes. The most controversial cases can therefore be considered *Forget*, which was decided with a 6-3 majority, and *Mercure* (a 7-2 judgment), while in *Bilodeau* and *MacDonald* there was only one dissenter, namely Justice Wilson; *Beaulac* is a self-standing ruling in this categorization, because two of the nine justices (the Chief Justice Lamer and Justice Binnie) agreed only on the outcome, but found it necessary to re-assess *Société des Acadiens*: however, they agreed with the majority on the interpretation of s. 530 of the *Criminal Code*, and therefore concurred in the judgment.²⁵²

As for the geographic origin of the dissenting judges, they come almost exclusively from Ontario and Quebec: Justice Wilson (a dissenter in *Forget*, besides the already mentioned *Bilodeau* and *MacDonald*) was from Ontario, just like Justices Estey (dissenting in *Mercure*) and Binnie (dissenting in *Doucet-Boudreau* and only concurring in judgment in *Beaulac*, as mentioned); instead the dissenting judges from Quebec were Justice L'Heureux-Dubé in *Forget* and Justices Le Bel and Deschamps in *Doucet-Boudreau* (to which it has to be added the concurring opinion by C.J. Lamer in *Beaulac*). The other dissenting votes were cast by Justice McIntyre from British Columbia in *Mercure*, by Justice Dickson from Manitoba in *Forget*, and by Justice Major from Alberta in *Doucet-Boudreau*. The remaining cases were decided unanimously.²⁵³ The overall

²⁵² As recalled *supra*, at footnote 186.

²⁵³ Also the reference *Re: Objection by Quebec to a Resolution to amend the Constitution* (the second case in the Quebec veto controversy) was a unanimous decision, while the reference *Re: Resolution to amend the Constitution* (the first stage of the controversy) had

picture does not seem to convey any evidence of a particularly marked tendency of judges from any province to have a pattern of voting consistently different from that of the judges from the other provinces.

A further criterion is finally the one we have followed in our analysis, which is also the most common,²⁵⁴ namely the chronological one. What is usually derived is the finding of a first phase - until *Manitoba Language Rights* - when the Court adopted quite a liberal interpretation of linguistic rights, proving to be quite open to their enhancement; a second phase, when the Court was much more restrictive, as was clear especially in the three 1986 cases (*Bilodeau*, *MacDonald* and *Société des Acadiens*); a third phase, already anticipated by judgments like *Ford* and *Mabe*, but definitely inaugurated by *Beaulac*, the case overturning *Société des Acadiens*, where the Court has returned to a purposive and wide-open interpretation of linguistic rights, an approach so far confirmed, up to the latest case on linguistic rights, *Nguyen*.

To conclude, we will not go back to each of the topics analysed over the course of § 5: in particular, the questions regarding the nature of language rights (whether they are individual or collective, civil or social rights, whether their exercise can be exclusive or is necessarily joint, whether it makes sense to include the public authorities among the holders of these rights,²⁵⁵ whether language rights before courts are actual linguistic rights or simply due process rights, whether education rights are rights of the parents or of the children); the issue of language rights as an essential feature of the protection of an identity and a culture,²⁵⁶ and as necessarily the fruit of some form of political compromise;²⁵⁷ the problem of what actually makes a minority; the topic of the relationship between the minority protection policies and the institutional structure of a state;²⁵⁸ the contrast between francophones protection by the

seen several dissenting votes by different justices on the different issues at bar.

²⁵⁴ See for instance the already mentioned article by Soublière, 'Les perpétuels tiraillements des tribunaux dans l'interprétation des droits linguistiques'; more recently, see Warren J. Newman, 'La progression vers l'égalité des droits linguistiques par voie législative et judiciaire' [2004] *Rev. C.L. Français* 19, 22-47 (also considering some important cases not from the Supreme Court of Canada); back at the end of the 1980s, see also Alan Riddell, 'À la recherche du temps perdu: la Cour suprême et l'interprétation des droits linguistiques constitutionnels dans les années 80' [1988] 29 *C. de D.* 829. In the Italian scholarship, see for instance Valeria Piergigli, 'I diritti linguistici nella giurisprudenza della Corte Suprema: oscillazioni interpretative e linee di tendenza' in Rolla (ed), *L'apporto della Corte suprema alla determinazione dei caratteri dell'ordinamento costituzionale canadese*, p. 149.

²⁵⁵ As does *MacDonald*, see *supra*, § 5.5.

²⁵⁶ See especially *Mabe* and *Ford*.

²⁵⁷ As stated in *Société des Acadiens* (§§ 63-4), and reaffirmed by several cases after it.

²⁵⁸ On which see, for instance, various contributions in the already mentioned work by Levrat (ed), *Minorités et organisation de l'état*, and the reflection on what would have changed for minority rights in a supposedly independent Quebec, by José Woehrling, 'The Protection of Rights and Freedoms, in Particular Minority Rights, in a Sovereign Québec' [1997] *Cahiers du Pég* 3 (but see also what was observed by Beverley McLachlin, 'Democracy and Rights: A

Supreme Court outside and inside Quebec; the sometimes uneasy situation of anglophones in Quebec; the fact that French language in Canada falls in the category of weak national languages, in other words official languages needing to be protected, a situation by no means unknown in Europe;²⁵⁹ or the openness of the Supreme Court of Canada to the reliance and discussion on foreign legal materials. We have tried to cover each of these topics in due course, when considering the cases, and most of all there is already a huge amount of literature on them.

Instead, we would like to make a few final remarks on one particular aspect that was touched upon in our analysis (it emerged in particular in *Arsenault-Cameron* and *Doucet-Boudreau*), and that has earned less attention in the scholarship so far, namely the fact that several of these rights, and therefore several of these judgments, bear a cost for the public budget. This is not true for all of them: commercial speech cases like *Ford* are different, in that the language provisions they rely on, directly require expenditures from individuals

Canadian Perspective,' *Canadian Speeches, Issues of the Day*, 14:36-45, January/February 2001: 'Collective rights are the cornerstone on which Canada was built. Without the guarantees made to groups and minorities, it is unlikely that the peoples of Upper and Lower Canada, so different from one another, would have joined to form a country'). In the Italian scholarship, see *inter alia* the works by Francesco Palermo and Jens Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze* (Cedam 2008); by Carlo Casonato, *Minoranze etniche e rappresentanza politica: i modelli statunitense e cnaadese* (Università degli Studi di Trento 1998), specifically on Canada although focussing on ethnic minorities; but *also*, with specific reference to linguistic minorities, by Valeria Piergigli, 'Decentramento territoriale e minoranze linguistiche: un'analisi comparata' [2003] 1(5) *Federalismi.it*, available at <http://www.federalismi.it/document/08072003234526.pdf> (last accessed 20 Feb 2012). A crucial aspect from this point of view is also the set of remedies available to the minority individuals or groups to vindicate their rights. In particular, the way judicial review of legislation is organised in Canada has had an influence over how the case-law has developed, by even providing the occasion for bringing lawsuits that in other countries it would have been more difficult to push as part of a precise "court strategy" to promote linguistic rights: see the example of the *Bilodeau* case, analysed by the law professor who brought it in his already mentioned 1986 article on the 'Judiciarisation des Conflits Linguistiques au Canada.'

²⁵⁹ In this sense, the need to protect French in Quebec can from a certain point of view be contrasted to the need to protect national languages in countries where the national language is weak, and its survival is threatened by a much stronger non-national language (typically, it is the case of Maltese and Irish, both under stress for the competition coming from the English language; Luxembourgish, suffering from the competition with the much stronger French and German languages; or else Lithuanian, Latvian or Estonian, with reference to Russian) (this problem is studied in detail, in the Italian scholarship, by Elisabetta Palici di Suni, 'Il principio di eguaglianza' in Ead, *Diritto costituzionale dei Paesi dell'Unione Europea* [2nd edn, Giappichelli 2011], p. 279, 302-8). Clearly, there is a difference in the fact that Quebec is only a province of a broader country, and that English too is in fact a national language in Canada, but still the problems raised and the solutions adopted present several similar patterns with the countries just mentioned.

and businesses, and it is therefore easy to see such expenditures and arguably to be very sceptic on their advisability.

But when the cost is borne - through taxes - by the public budget, it tends to go unseen, and yet it is far from negligible (as documented recently, as far as provinces are concerned, by a very deep study by the Fraser Institute²⁶⁰). This raises some policy questions: is this money effectively spent? Does it meet the desired objectives? Could the same goals be achieved more efficiently? These are important questions, but they would require a self-standing analysis, which is by far outside our goals and competences. In fact, there is another, conceptually preliminary question, that we would like to briefly address here, by relying on the extremely stimulating studies of the American linguist Daniel W. Hieber:²⁶¹ are these expenses unavoidable?

The answer seems to be two-fold: *given the current organization of modern-type post-westphalian democracies*, it seems quite fair to provide some public funds to avoid impairing the rights of people who do not speak the *official* language of the state. Indeed, when the state is exercising its powers, by requiring a certain behaviour from its citizens, it'd better put them in the position to comply with such obligations.

In other words, when it establishes a system of mandatory education, it seems quite reasonable for it to afford its citizens the right to request that such system be in the language of their choice (as indeed acknowledged in *Protestant School Boards, Mabe, Reference re Public Schools Act, Arsenault-Cameron, Doucet-Boudreau*, and *Solskø*); when it is exercising its criminal jurisdiction, or anyway affirming its punitive powers also in administrative violations, the least is to require that it allow the accused to fully understand the law on which his/her charge is based (*Bilodeau*) and the exact terms of the charge (contrary to what stated in *Bilodeau* and *MacDonald*), to express him- or herself in the language of his/her choice (*Mercurie*), and to have a judge who fully understands him/her (*Beaulac*).

However, if we adopt a different paradigm, in particular a praxeological one,²⁶² in looking at language issues like the ones we have considered, things

²⁶⁰ François Vaillancourt, Olivier Coche, Marc Antoine Cadieux, and Jamie Lee Ronson, 'Official Language Policies of the Canadian Provinces Costs and Benefits in 2006' (Fraser Institute 2012), *available at* <http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/official-language-policies-of-canadian-provinces.pdf> (last accessed on 22 Feb 2012).

²⁶¹ *See in particular* two articles of his, published on the Mises Institute's website: 'Language and the Socialist-Calculation Problem' (7 Sep 2010), *available at* <http://mises.org/daily/4687>; and 'Why Do Languages Die?' (4 Jan 2012), *available at* <http://mises.org/daily/5846/Why-Do-Languages-Die> (both last accessed on 22 Feb 2012).

²⁶² It is the perspective adopted firstly by Ludwig von Mises in *Nation, State, and Economy* (Ludwig von Mises Institute 1983 [1919]): as Daniel Hieber explains, *see in particular*, on language issues, the first chapter of this work.

appear in a different light. We find indeed that the risk of death for a language comes in part from the voluntary choices of its individual speakers. When this is the case, we should arguably not worry too much, or anyway we could and should not do anything against it: after all, languages were not invented or planned by anyone, instead they developed spontaneously,²⁶³ and in the same way their users should be left free to use them until they wish, without being forced to abandon them by laws that require the use of a different one, or symmetrically to keep using them if they do not wish so.

In fact, a closer look shows that the greatest threat to the survival of many languages, and of the cultures with which they are associated, arguably comes from wrong state policies: indeed '[g]overnments necessarily adopt nonoptimal language policies. They are incentivized to violate the rights of minority language speakers and support fewer languages rather than more;²⁶⁴ after all, '[e]ach nation must at some point address the question, "What is the optimal number of languages for the state?" The answer that states tend to give is simply "one,"²⁶⁵ and this is due to the fact that "[m]inorities' are political outsiders who challenge the prevailing principle of legitimacy. [...] For at its core, the 'problem of minorities' is what Isaiah Berlin has termed a 'collision of values' between diversity and community to which there can be no permanent resolution.'²⁶⁶

In order to fulfil minorities' claims, several states, like indeed Canada, have started to adopt two (or more) official languages, something that apparently is also beneficial to their citizens' brains:²⁶⁷ but '[h]ow *does* the state determine the optimal number of languages to support? The answer, of course, is that it cannot,²⁶⁸ and thus it downplays other languages, like those of the aboriginal peoples of Canada, some of which have in fact official status

²⁶³ The notion of "spontaneous orders" was famously a key of Friedrich von Hayek's reflection in *Law, Legislation and Liberty* (1982), especially in volume I, *Rules and Order* (1973). Specifically on language, he wrote: '[a]lthough there was a time when men believed that even language and morals had been 'invented' by some genius of the past, everybody recognizes now that they are the outcome of a process of evolution whose results nobody foresaw or designed' (p. 37 of the 1983 edition of *Rules and Order* by The University of Chicago Press-Routledge & Kegan).

²⁶⁴ Hieber, 'Language and the Socialist-Calculation Problem', p. 1 of the pdf version.

²⁶⁵ Hieber, 'Language and the Socialist-Calculation Problem', p. 2 of the pdf version.

²⁶⁶ Jennifer Jackson Preece, *Minority Rights: Between Diversity and Community* (Cambridge University Press 2005), *passim* from the *preface*. Let us just think of the situation in the French region of Alsace, that between the 1870s and World War II moved several times from being under French sovereignty to German sovereignty and vice versa: each time the new government imposed its own language, with the result that today in some families the grandchildren cannot communicate with their grandparents, because they were educated in different languages.

²⁶⁷ As explains, citing to some scientific studies, Yudhijit Bhattacharjee, 'Why Bilinguals Are Smarter' in *New York Times*, 18 marzo 2012, p. SR12.

²⁶⁸ Hieber, 'Language and the Socialist-Calculation Problem', p. 3 of the pdf version.

in some territories, but that again are protected through government intervention, that leaves out even less fortunate dialects, in the medium-to-long run presumably sentencing them to death or anyway confining them in an extremely marginal place. It is not by coincidence, then, that language laws are 'often counterproductive to [their] [...] very ends.'²⁶⁹

Which brings us to the institutional dimension:²⁷⁰ '[s]tates do not cope well with diversity or decentralization.'²⁷¹ Arguably, in much smaller political communities than modern nation-states, and in particular in voluntary communities, languages would be able to thrive, or least to survive, much better than what happens within the context of our modern-times democracies. Presumably, some *lingua franca* would develop or spread, as it always has, for communications between different communities, but this could happen without displacing the several local languages: the *lingua franca* for business or anyway cross-border relationships would simply add to the existing languages, but it would not wipe them out, like official languages do with non-official ones in post-westphalian nation-states.²⁷²

A fascinating metaphor to describe such ideal condition of minority groups is the one that we owe to the Australian scholar Chandran Kukathas, Chair in Political Theory at the London School of Economics: a Jaffna Tamil born in Malaysia, Kukathas has experienced belonging to minorities throughout his whole life, and - as he himself acknowledges - this has significantly influenced his research interests and shaped his way of thinking. His metaphor is the one that characterizes society 'as an archipelago of different communities operating in a sea of mutual toleration. Unlike its more famous twentieth-century namesake, the gulag archipelago, the liberal archipelago is a society of societies which is neither the creation nor the object of control of any single authority, though it is a form of order in which authorities function under laws which are themselves beyond the reach of any singular power. Implicit in this is a rejection of nationalism, and of the idea that we should start with the assumption that the nation-state is the 'society'

²⁶⁹ Hieber, 'Language and the Socialist-Calculation Problem', p. 4 of the pdf version.

²⁷⁰ *Per se* not directly connected to minority issues, according to Pier Carlo Begotti, 'Incontri e conflitti di lingue e culture' in C. Lottieri (ed), *Dalle vicinie al federalismo. Autogoverno e responsabilità* (Associazione Culturale Carlo Cattaneo 2010) p. 127, 150-1, but anyway important. For a thorough account of such links in the Canadian case, see L. Cardinal (ed), *Le fédéralisme asymétrique et les minorités linguistiques et nationales* (Éditions Prise de Parole 2008).

²⁷¹ *Ibidem*.

²⁷² After all, it is arguably not by coincidence that Switzerland, that is to say the best example in the world of decentralized political order, and strong small political communities that come together in the confederation but preserve an extremely high autonomy, was described as a "paradise for languages" (*Sprachenparadies*) (by Karl H. Neumayer, 'Über den Schutz bedrängter Sprachminderheiten' in H. Kipp, F. Meyer, and A. Steinkamm (eds), *Um Recht und Freiheit. Festschrift für Friedrich August Freiherr von der Heydte zur Vollendung des 70. Lebensjahres* (Duncker & Humblot 1977), volume I, p. 395, 421).

which is properly the object of concern when we ask what is a free society. The liberalism presented, and defended here is not the liberal nationalism that is standard in contemporary political theory. It is a liberalism built on different foundations, and issuing in different conclusions.²⁷³

From this point of view, minority policies to which we are used to, including the ones we have reviewed in this article, are often an expensive though unsatisfactory way by governments to cope with problems they themselves have created, in order to satisfy their need for homogeneity and uniformity: 'the state is not highly incentivized to recognize minority languages. Running a multilingual government is a logistical nightmare (just ask India), and multilingualism is a direct affront to the ideas of national identity and standard education.'²⁷⁴

This has not always been the world's scenario, but is directly connected to the rise of modern nation-states and nationalisms, whose ideologies could not but trump minorities with their cultures and languages: '[t]he very existence of a modern nation-state, and the ideology it encompasses, is antithetical to linguistic diversity. It is predicated on the idea of one state, one nation, one people. In *Nation, State, and Economy*, Mises points out that, prior to the rise of nationalism in the 17th and 18th centuries, the concept of a *nation* did not refer to a political unit like *state* or *country* as we think of it today. A "nation" instead referred to a collection of individuals who share a common history, religion, cultural customs and — most importantly — language. Mises even went so far as to claim that "the essence of nationality lies in language." The "state" was a thing apart, referring to the nobility or princely state, not a community of people [...] In that era, a state might consist of many nations, and a nation might subsume many states. The rise of nationalism changed all this.'²⁷⁵

Nationalism, *i.e.* the fervent glorification of a nation and of its supposed collective virtues, sees linguistic diversity as a threat to the unity of the state. One of the most famous examples of such view is represented by Carl Schmitt's works. In his *Constitutional Theory*, he wrote that '[a] democratic state that finds the underlying conditions of its democracy in the national similarity of its citizens corresponds to the so-called nationality principle, according to

²⁷³ Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford University Press 2003), pp. 8-9. The author goes on by contrasting his views with the ones of Will Kymlicka, a Canadian philosopher that Kukathas ends up describing as 'essentially, a liberal nationalist' (p. 15).

²⁷⁴ Hieber, 'Language and the Socialist-Calculation Problem', p. 4 of the pdf version.

²⁷⁵ Hieber, 'Why Do Languages Die?', pp. 3-4 of the pdf version. The reference from Mises's *Nation, State, and Economy* is from p. 37 of the already cited edition. The heavy "russification" policies pursued in the Soviet Union when nationalist drives prevailed in that country are a paradigmatic example of how severely nationalism threatens the survival of minorities: *see* broadly in Lenore A. Grenoble, *Language Policy in the Soviet Union* (Kluwer 2003).

which a nation forms a state, and a state incorporates a nation. A nationally homogeneous state appears then as something normal. A state lacking this homogeneity has an abnormal quality that is a threat to peace.²⁷⁶

However, nationalism sometimes has to come to terms with a strong resistance to unity: in this case, nation-states tend to prefer conceding to bilingualism, rather than having to afford independence to a minority nation under their power, which is reluctant to adhere to the (majority's) nationalist story (this will eventually translate into the nation-state enacting the usual set of measures meant to safeguard the minority language, which was made official, but which is not strong enough to compete on a par with the predominant one²⁷⁷).

This claim is reinforced by the words of Professor Kukathas (whose case against nationalism we already mentioned), who makes a very compelling point when dealing with language rights in his enquiry into the "liberal archipelago" and its "enemies," shall we say by paraphrasing Popper's masterpiece:

Even if governments take steps to ensure that minorities can preserve their languages, there are limits to the benefits this can bring. Small groups are simply going to be disadvantaged to the extent that their numbers cannot support the variety of activities in which people engage without going beyond the linguistic group. There may not be enough people to supply the writers, newspaper editors, television journalists, radio show hosts, and teachers in the vernacular to sustain the language. In the modern world the division of labour is not equally hospitable to all forms of diversity.

To the extent that language policy does succeed in allowing some groups to see their languages in use, however, it will not do so equally. Larger linguistic groups will have the advantage over smaller ones; and policies aiming at linguistic equality may benefit large minorities at the expense of small ones. For example, in a society in which three languages are spoken, one (say English) may be dominant or nearly universally spoken, another (say French) may be spoken by a significant minority primarily in a particular region, and a third may be spoken by a small minority. Linguistic 'equality' may in fact impose the heaviest burden on the smallest minority. The English speakers may be able to get away with learning only one language, as may the French; but the smallest minority, especially if it is located within the French region,

²⁷⁶ Carl Schmitt, *Constitutional Theory* (Duke University Press 2008 [1928]), p. 262. For an example of this attitude referred to the Italian case, see Begotti, 'Incontri e conflitti di lingue e culture' in Lottieri (ed), *Dalle vicinie al federalismo. Autogoverno e responsabilità*, p. 150.

²⁷⁷ From this point of view, French in Canada would be in a very similar position towards English as Flemish towards French in Belgium, as pointed out by Woehrling, 'La Constitution du Canada, la législation linguistique du Québec et les droits de la minorité angli-québécoise,' p. 580.

may have to learn two or three languages if it is to survive. It may be better off if there were only one other dominant language to learn since that would leave the members with more resources to devote to preserving their own.²⁷⁸

Even though Canada is not mentioned explicitly in this passage, it really does sound like a very insightful description of the Canadian case. The author goes on to explain very clearly that his 'argument here [...] is not an argument against policies accommodating linguistic diversity; it is only an argument to suggest that they may not serve equality.'²⁷⁹ Nonetheless, Kukathas here captures extremely well the point we have been trying to make in this final paragraph, *i.e.* that most of the linguistic policies adopted, with striking similarities, all over the world, appear to be, at a closer look, an attempt by nation-states to remedy the consequences of its nationalist ideology, grounded as it is on a *unitary* apparatus of symbols and legitimation.²⁸⁰

Such policies may be useful for this purpose, and indeed in Canada they may be effective in pursuing the federal government's goal of counteracting Quebec's inclination to independence and secession (how effective and for how long, only time will tell), but in fact they end up creating on their turn other "second-level" problems, first of all for those that we could term "second-class" minorities, a category that in Canada includes the whole, diverse group of the aboriginal peoples.²⁸¹ The real extent of such problems

²⁷⁸ Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom*, pp. 233-4.

²⁷⁹ *Ibidem*.

²⁸⁰ Broadly on the meaning and function of such apparatus, *see* in the Italian scholarship Carlo Lottieri, *Credere nello Stato? Teologia politica e dissimulazione da Filippo il Bello a WikiLeaks* (Rubbettino 2011)

²⁸¹ A typical example of this situation is that of what the Italian scholar Elisabetta Palici di Suni has described as "restricted minorities" (*minoranze ristrette*) (in her work *Intorno alle minoranze*, pp. 40-1), *i.e.* minority groups who are located in an area where there are other major minority groups, like typically the germanophone community in Belgium or, in Italy, the Walser in Valle d'Aosta or the Ladin in Trentino-Alto Adige. As for Canada, Poggeschi, *I diritti linguistici. Un'analisi comparata*, p. 82 evaluates instead quite positively Quebec's overall experience: 'Quebec seems to be one of the few places in the world where there is a good combination between linguistic rights of first, second and (partially) third species, the latter being present in the whole country so that Canada can be considered a fortunate constitutional model whose multiculturalism is not just a slogan, but a policy enforced by all levels of government' (our translation); Poggeschi (p. 83) anyway acknowledges that 'Canadian federalism, based (also) on the bi-national principle, more than towards a bilingualism spread across the whole Federation idealized by Trudeau, has moved towards a partial bilingualism regime (in federal institutions and in some provincial spheres), inclined to territorial monolingualism, particularly in anglophone provinces and only partially in Quebec, where there exists a French monolingualism tempered by the anglophone minorities' rights' (our translation). For some interesting data, *see* the *Statistics* section in the website of the *Office of the Commissioner of Official Languages*, at http://www.ocol-clo.gc.ca/html/stats_e.php: for instance, according to the most recent figures available, only 17% of Canadians possess knowledge of both official languages.

tends to go unseen, and anyway they tend to be left without satisfactory remedies (the whole discourse on multiculturalism emphasizes the need to take them duly into account, but generally without questioning the nation-state paradigm, which is in our view the key aspect to rethink). From this point of view, multilingualism is a happy exception to the predominance of single nationalist ideologies, but when it is framed, as it is, in the context of modern nation-states, it is not able to remove the threat that nation-states, with their regular recourse to the majority principle, pose to the survival of minority languages and cultures.²⁸² In fact, like Kukathas points out, it may even increase such threat.

Indeed, this seems to have been Canada's story too, a story where the Charter was conceived as instrumental to national unification and the so called Charter patriotism was the underpinning ideology of this process, and where the granting of language rights was first of all a compromise²⁸³ to avoid the break-up of the country, a concession meant to soothe requests for greater independence. In the words of two other scholars:

Unifiers see the Charter, and the judicial power it fosters, as helping to solve Canada's national unity crisis. Former Prime Minister Pierre Trudeau, the "father" of the Charter, most prominently represents this wing of the Court Party. From the beginning, Trudeau saw the Charter as much more than a rights-

²⁸² Such threat was already identified very clearly by Georg Jellinek, in his already mentioned work *Das Recht der Minoritäten*, pp. 43 and following. Jellinek's idea was to fight it by promoting pluralism, and the rise of a multilevel linguistic identity, a suggestion in many ways similar to the *Proposals from the Group of Intellectuals for Intercultural Dialogue set up at the initiative of the European Commission*, published in Brussels in 2008, with the title *A rewarding challenge: How the multiplicity of languages could strengthen Europe*, available at http://ec.europa.eu/education/policies/lang/doc/maalouf/report_en.pdf (last accessed 19 Mar 2012). Independent of the concrete solutions proposed and of the ways to achieve them, the call for pluralism and for a multi-level linguistic identity still seems to be very fruitful today: as we ourselves have pointed out earlier in the text, languages should arguably be looked at not as mutually exclusive, but as possibly co-existing on different levels, for different purposes, and for different types of communication. For some reflections in the Italian literature along these lines, building on Jellinek's reflection, see Elisabetta Palici di Suni, 'La lingua tra globalizzazione, identità nazionale e identità minoritarie' in M Papa, G M Piccinelli and D Scolart (eds), *Il Libro e la bilancia. Studi in memoria di Francesco Castro*, (Edizioni Scientifiche Italiane 2011), volume II, p. 451 (also, in a slightly shorter version, in [2008] 1(2/3) *Percorsi Costituzionali* 101); see also, by the same author, the article 'Unitarietà della Repubblica e gruppi identitari: il caso delle minoranze linguistiche', in S Labriola (ed), *Valori e principi del regime repubblicano* (Laterza 2006), volume II, p. 635, where Palici di Suni considers how to reconcile the principle of protection of linguistic minorities with the one of unity of the Republic (the focus is on the Italian constitution, but extensive references are made to comparative experiences, including Canada).

²⁸³ See the famous passage from *Société des Acadiens* we have quoted *supra*, at § 5.6.

protecting document. Indeed, he saw it mainly as a counterweight to the forces of decentralizing regionalism and provincialism. The Charter, he hoped, would lead Canadians to define themselves more in terms of rights they held in common and less in terms of geographical communities that divided them. As early as 1967, Trudeau described his Charter project as "essentially testing, and hopefully establishing, the unity of Canada." Fifteen years later, in debating the Charter in parliament, Trudeau described it as defining "the common thread that binds us together," overcoming "the forces of self-interest [that threaten to] tear us apart." Peter Russell has described this position as "Charter patriotism." For Trudeau and the unifiers, the centerpiece of the Charter is language rights. Entrenching language rights in the constitution culminated Trudeau's long-standing strategy to use bilingualism to undercut the appeal of Quebec nationalism and preserve Canadian unity.²⁸⁴

From this perspective, Canadian nationalism would have been a means to counter Quebec nationalism. The latter is indeed a source of concern, at the least for the serious threats it poses on its turn for the anglophones' (and other minorities') rights, to which the Supreme Court may not always be in the position to react like it did for example in *Ford* (to be sure, the situation of Quebec anglophones would probably be worse were Quebec to become eventually independent: it would still be a modern-type nation-state, with its inevitable inclination to disregard minority rights, and in particular it is very hard to imagine that language minority rights would be on the top of its agenda. And things would presumably be even worse for other, much smaller minorities, as is typical of separatist models such as Belgium, Region Trentino-Alto Adige in Italy and to a certain extent Spain, while legal systems more inclined to the bilingual model, such as India, Finland, or Switzerland are if anything more sensitive to the needs of smaller minorities).

Anyway, what the advocates of Canadian nationalism seem to overlook is that it should concern us as well, or actually even more. As far as the scope

²⁸⁴ Frederick L. Morton and Rainer Knopff, *The Charter revolution & the Court Party* (Broadview Press 2000), pp. 59-60. The phrase "Charter patriotism" was used by Peter H. Russell, 'The Political Purposes of the Charter: Have they Been Fulfilled? An Agnostic's Report Card', in P. Bryden, S. Davis, and J. Russell (eds.), *Protecting Rights and Freedoms* (University of Toronto Press 1994), p. 33, 42. The title of this study rightly catches the function of holy text of a "civil religion" that is vested with the constitutions of modern democracies (for a reflection on these issues in the Italian scholarship, see Lottieri, *Credere nello Stato? Teologia politica e dissimulazione da Filippo il Bello a WikiLeaks*; on the difficult historical process of creation of the "Canadian nation," see also Groppi, 'La difficile nascita della nazione in Canada: l'integrazione (o la disgregazione?) attraverso i diritti').

of this work is concerned, the main problem is that the Court itself seems to have lent itself to feed such Canadian nationalism, under the guise of *Charter* patriotism: the dialogue on fundamental rights, of which we have reviewed some of the most significant examples by looking at the case-law in the field of language rights, can be seen as instrumental for the Court to the encouragement of the civic religion of the *Charter*, that ultimately had the goal of creating a new unitary identity for all Canadians, irrespective of their language, and rather based on their passport.

Today's result of this instrumental use of language rights is that nation-states end up sending misaligned incentives to their citizens, who are thus led to lay some contradictory claims: indeed they often find themselves to want their cultural and linguistic heritage to be protected and passed along to their children, but they also fear this might come as a handicap for their children towards members of the nation-state's majority.

We saw clear evidence of this trend in *Gosselin*; another example was the recent decision by state schools in Quebec to start offering intensive English courses: as explained in an interesting article in the *Financial Times*, this is quite '[o]dd, because in the past half-century, much of the Quebecois identity has been built on resisting English. Authorities throw the book at people for doing things that would be normal elsewhere in Canada. [...] Now, school authorities in Quebec City are questioning whether the time is ripe for introducing those English classes after all. Their hesitation has left French-speaking parents angry.'²⁸⁵

Whatever the outcome of such debate, this recent story would seem to provide fresh evidence that the characterization of "linguistic duality" as 'both a blessing and a curse for Canada,' made by Marcel Côté, was very well conceived. As problematic as handling this double-edged "gift" may be, the words that the same same author added immediately thereafter arguably said it all: 'managing this duality is Canada's greatest challenge, [...] and whether or not Canadians like it, the language issue will fuel the Canadian constitutional debate forever.'²⁸⁶

²⁸⁵ Christopher Caldwell, 'The French are right to resist Global English', in *Financial Times*, 17 Feb 2012.

²⁸⁶ The quotes are from Marcel Côté, 'Language and Public Policy' in J Richards, F Vaillancourt and W G Watson (eds), *Survival: Official Language Rights in Canada* (C.D. Howe Institute 1992), pp. 7-8. This notion of linguistic diversity as a curse is extremely old, and traditionally it is traced back to the biblical episode of the Tower of Babel: things are anyway more complicated than what the traditional story tells us, as explained by Umberto Eco, *The Search for the Perfect Language* (English edn Wiley-Blackwell 1995), pp. 6-10. Several scholars have made use of this image of linguistic diversity as a potential curse: for instance, an original view, connected to the alleged negative impact of linguistic diversity on economic solidarity, was expressed by Philippe Van Parijs, 'Linguistic diversity as curse and as by-product' in Arzoz (ed), *Respecting Linguistic Diversity in the European Union*, p. 17.

