Document of jurisprudence concerning language rights protected by the Canadian Charter of Rights and Freedom

LRSP – Language Rights Support Program

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Document of Reported Decisions - LRSP

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Document of Reported Decisions

Introduction

This document of reported decisions was created to help lawyers to answer legal questions affecting the language rights guaranteed by the *Canadian Charter of Rights and Freedoms* ("*Charter*"). You will find in this document a brief summary and the relevant paragraphs of the reported decisions that are interpreting and applying the provisions of the Charter concerning language rights and the principle of the protection of minorities which is the fourth constitutional principle recognized in *Reference re Secession of Quebec*.

It is important to note that this document does not constitute a legal opinion and that test cases eligible for Language Rights Support Program (LRSP) funding are determined by the LRSP Expert Panel.

1 – The fourth constitutional principal: The protection of minorities

In the jurisprudence, the relevant cases dealing with language rights and the fourth constitutional principle of the protection of minorities are:

Lalonde v Ontario (Commission de restructuration des services de santé) (2001), 56 OR (3d) 505, *[2001] OJ No 4768 (Ont CA)* *Facta : The Commissionner of Official Languages*

Summary: Montfort is an Ontario francophone hospital. Its medical services and training are essentially francophone, and it is the only hospital in Ontario to provide a wide range of medical services and training in a truly francophone setting. The Health Services Restructuring Commission issued its first report and a notice of intention to close Montfort in 1997. In response to a storm of protest, the final report of the Commission reversed the initial proposal to close Montfort and instead issued directions which would substantially reduce Montfort's services to the point where Montfort would no longer function as a community hospital. Montfort and the respondents brought an application to set aside the directions of the Commission. The application was allowed. The Divisional Court found that Commission's directions would have the following effects: reduce the availability of health care services in French to the francophone population in the Ottawa-Carleton region, a region designated as bilingual under the French Language Services Act, R.S.O. 1990, c. F.32; jeopardize the training of French language health care professionals; and impair Montfort's broader role as an important linguistic, cultural and educational institution, vital to the minority francophone population of Ontario. The court held that the directions did not violate s. 15 of the Canadian Charter of Rights and Freedoms, as any differential treatment was not based upon an enumerated or analogous ground. Montfort appealed that portion of the judgment. The court held that the directions should be set aside because they violated one of the fundamental organizing principles of the Constitution, the principle of respect for and protection of minorities. Ontario appealed that portion of the judgment.

Relevant paragraphs:

Issue 4: What is the relevance to Montfort of the unwritten constitutional principle of respect for and protection of minorities?

103. The most definitive and complete consideration of the unwritten or structural principles, and the authority most pertinent to the respondents' submissions before this court, is the Supreme Court of Canada's 1998 decision in the Secession Reference, supra. There, at p. 240 S.C.R., the Supreme Court affirmed the existence of unwritten constitutional rules "not expressly dealt with by the text of the Constitution" but which nonetheless have normative force as operative instruments of our constitutional order. The court identified at p. 240 S.C.R. "four fundamental and organizing principles of the Constitution" that bear upon the question of the possibility of provincial secession, namely, federalism, democracy, constitutionalism and the rule of law, and respect for minorities.

104. These unwritten principles, said the court at p. 247 S.C.R., "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based". The court held at p. 248 S.C.R. that the unwritten principles represent the Constitution's "internal architecture" and "infuse our Constitution and breathe life into it". Further, "[t]he principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood."

[…]

The application of the principle to Montfort

115. This appeal calls for careful consideration of the appropriate weight, value and effect to be accorded to the respect for and protection of minorities as one of the fundamental principles of our Constitution. Ontario submits that, in the face of the very specific and detailed minority language guarantees in the text of the Constitution, the Divisional Court erred by in effect adding to the list of protected rights. The text of the Constitution's specific language rights gives the Franco-Ontarian minority no right to a French language hospital and, says the appellant, the courts have no role in adding to the list of protected rights. The respondents submit, on the other hand, that the absence of a specific right in the text of the Constitution is not fatal to their case. They say that in view of the importance of Montfort as a cultural, social and educational institution in the Franco-Ontarian minority's struggle for survival, the Constitution's fundamental principle of respect for and protection of minorities properly may be invoked as a basis for reviewing the legality of the Commission's directions.

116. The unwritten principles of the Constitution do have normative force. In Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island ("Provincial Judges Reference"), [1997] 3 S.C.R. 3 at p. 75, 150 D.L.R. (4th) 577, Lamer C.J.C. made it clear that, in his view, the preamble to the Constitution "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text". This point was reinforced in the Secession Reference at p. 249 S.C.R.:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the Patriation Reference [Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753], which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.

117. In the Provincial Judges Reference, the court considered the "unwritten constitutional principle" of judicial independence. The court held, at p. 67 S.C.R., that implicit in s. 11(d) of the Charter, which deals with the right to trial by "an independent and impartial tribunal", and ss. 96-100 of the Constitution Act, 1867, which deals with the appointment, tenure and remuneration of superior court judges, is "a deeper set of unwritten understandings which are not found on the face of the document itself" (emphasis in original). There are, the court held at p. 69 S.C.R., "organizing principles" that may be used "to fill out gaps in the express terms of the constitutional scheme" to ensure the protection of all of the necessary and essential attributes of this vital structural feature of the Constitution. The court found, at p. 75 S.C.R., that the preamble to the Constitution Act, 1867 "identifies the organizing principles of the Constitution Act, 1867, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text".

118. In his very helpful discussion of the unwritten or organizing principles of the Constitution, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can. Bar Rev. 67 at pp. 83-86, Professor Robin Elliot draws an important distinction between the use of unwritten or structural principles "as independent bases upon which to impugn the validity of legislation" and their use "as aids to interpretation or otherwise to assist in the resolution of constitutional issues". Professor Elliot suggests that when

used to impugn the validity of legislation or government action, the unwritten principles "can fairly be said to be generated by necessary implication from the text of the Constitution" (emphasis in original). On this theory, when the organizing principles give rise to rights capable of impugning the validity of legislation, they are grounded in the text of the Constitution. Although not expressly stated by the Constitution's text, such r ights are immanent in the text when it is understood and interpreted in a proper and complete legal, historical and political context. When used in this way, the unwritten or organizing principles allow the courts to unlock the full meaning of the Constitution and to flesh out its terms, as explained by Lamer C.J.C. in the Provincial Court Judges Reference at p. 69 S.C.R., even to the extent of allowing the courts "to fill out gaps in the express terms of the constitutional scheme".

119. Professor Patrick Monahan draws a similar distinction in "The Public Policy Role of the Supreme Court of Canada and the Secession Reference" (1999) 11 N.J.C.L. 65 at pp. 75-77. He observes that when following the interpretive theory:

> [T]he court should attempt to fill in that gap by adopting an interpretation that is most consistent with the underlying logic of the existing text, and then to rely upon that logic in order to 'complete' the constitutional text.

120. This is to be contrasted with what Professor Monahan describes at p. 77 as an unacceptable conception of judges "as akin to constitutional drafters. On this view, the court should fill in the gap by relying upon its own conception as to the best or most appropriate set of constitutional norms that should be added to the existing text."

121. The unwritten principles of the Constitution do not confer on the judiciary a mandate to rewrite the Constitution's text. In the Secession Reference at p. 249 S.C.R., the Supreme Court confirmed that recognition of these unwritten structural principles:

> . . . could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary . . . there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.

122. Similarly, in the Provincial Court Judges Reference at p. 68 S.C.R., the court stated: "There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review." Again, in Re Eurig Estate, [1998] 2 S.C.R. 565 at p. 594, 165 D.L.R. (4th) 1, Binnie J. stated that "implicit principles can and should be used to expound the Constitution, but they cannot alter the thrust of its explicit text."

123. Against the background of these general principles we turn to the precise issue that confronts us in this appeal. As the Divisional Court observed, we are not concerned here with the validity of legislation that impinges upon the rights of a linguistic minority: compare Baie d'Urfé (Ville) v. Québec, supra. Nor are we confronted with a situation where a minority group is insisting on the establishment of an institution that is not already in existence. We are asked to review the validity of a discretionary decision with respect to the role and function of an existing institution, made by a statutory authority with a mandate to act in the public interest.

124. In its submissions, Ontario has chosen to characterize the decision of the Divisional Court as recognizing or creating a specific constitutional right capable of impugning the validity of an act of the legislature or sufficient to require the province to act in some specific manner. We do not accept that as a proper or necessary reading of the judgment. The Divisional Court at pp. 83-84 O.R. quashed the Commission's directions on the ground that given the constitutional principle of respect for and protection of minorities, "it was not open to the Commission to proceed on a 'restructured health services' mandate only, and to ignore the broader institutional role played by . . . Montfort as a truly francophone centre, necessary to promote and enhance the Franco-Ontarian identity as a cultural/linguistic minority in Ontario, and to protect that culture from assimilation." The Divisional Court, at p. 68 O.R., explicitly recognized that "the constitutional validity or invalidity of a piece of legislation is not at

issue." The Divisional Court added: "What is at issue is whether certain conduct of a government agency falls within the parameters of what is permitted by the Constitution . . . . [T]here is a difference between the validity of legislation and the possibility of unconstitutional behaviour under legislation." We agree with the Divisional Court's characterization of the constitutional issue.

125. For the reasons that follow, we have concluded that the Constitution's structural principle of respect for and protection of minorities is a bedrock principle that has a direct bearing on the interpretation to be accorded the F.L.S.A. and on the legality of the Commission's directions affecting Montfort. This bedrock principle also informs our discussion below of the reviewability of the Commission's directions.

Decision: The appeals should be dismissed.

Baie d'Urfé (Ville) v Québec (Procureur général) (2001), [2001] JQ No 4821, (Qc CA) [Reported decision only available in French].

Summary: The National Assembly assented to *An Act to reform the municipal territorial organization of the metropolitan regions of Montréal, Québec and the Outaouais* ("Bill 170") on December 20, 2000. Bill 170 provides for the constitution of five new local municipalities. This Bill abolishes certain cities and merges them together in order to create new cities. These cities come into being on January 1, 2002. Bill 170 divides the territory of four of the new cities into several districts, which are in fact the abolished cities.

An Act to amend the Charter of the French language ("Bill 171") was also assented to. It substitutes a condition of "English as their mother tongue" for the condition of "speak a language other than French" with regard to teaching.

The plaintiff cities, which were some of the cities abolished by Bill 170, brought applications for a permanent injunction requesting that Bill 170 be declared unconstitutional, null and inapplicable, as it violated fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and by the Quebec *Charter of Human Rights and Freedoms*. One of the cities, as well as the Commissioner of Official Languages, attacked s. 6 of Bill 171 on the basis that it violated language rights provided for by s. 16(3) of the Canadian *Charter*.

The Superior Court dismissed all of the plaintiffs' arguments and, therefore, dismissed their applications. The Commissioner of Official Languages and some cities appealed. The province's conference of municipal judges was granted leave to intervene in the appeal and it claimed that Bill 170 infringed the municipal judges' judicial independence.

Relevant paragraphs [Reported decision available only in French] :
1] Le contexte et les enseignements du Renvoi
a) Le contexte

80. Ce Renvoi a été demandé afin qu'on réponde aux questions constitutionnelles suivantes: la sécession unilatérale du Québec était-elle possible en vertu de la Constitution ou en vertu du droit international, et lequel du droit interne ou du droit international prévaudrait dans une telle situation?

81. C'est donc ce contexte précis que la Cour suprême fut conduite à énoncer les quatre principes structurels:

> [...]
>
> À notre avis, quatre principes constitutionnels directeurs fondamentaux sont pertinents pour répondre à la question posée (cette énumération n'étant pas exhaustive): le fédéralisme, la démocratie, le constitutionnalisme et la primauté du droit, et le respect des minorités. Nous traitons du fondement et de la substance de ces principes dans les prochains paragraphes. Nous examinons ensuite leur application particulière à la première question du renvoi. (par. 32)
>
> Puisque le renvoi porte sur des questions fondamentales pour la nature du Canada, il n'est pas étonnant qu'il faille s'arrêter au contexte dans lequel l'union canadienne a évolué. À cette fin,

> nous décrirons brièvement l'évolution juridique de la Constitution et les principes fondamentaux qui régissent les modifications constitutionnelles. Notre but n'est pas d'en faire un examen exhaustif, mais simplement de souligner les caractéristiques les plus pertinentes dans le contexte du présent renvoi. (par. 34)

b) Les enseignements

82. Il est clair que la Cour suprême a énoncé ces principes afin de répondre aux questions précises soulevées par le pourvoi et parce qu'aucune réponse explicite n'existait dans la Constitution écrite. On doit donc constater que c'est uniquement parce qu'il y avait silence de la Constitution écrite au sujet du droit à une sécession unilatérale que la Cour a dû se référer à des principes non écrits pour être en mesure de donner une réponse à la première question[FN43]. Ces principes ne s'appliquent donc que dans un contexte constitutionnel très particulier.

83. Les auteurs sont également de cet avis. Pour eux, ces quatre principes ont été édictés dans le seul et unique but de répondre à la question posée par le problème de la sécession du Québec[FN44]. Un auteur ajoute que ces règles sont difficilement transposables, singulièrement en ce qui concerne l'obligation constitutionnelle de négocier[FN45].

84. En outre, la Cour suprême elle-même a fait une importante réserve et mise en garde quant à l'utilisation de ces principes en rappelant avec insistance la primauté de la Constitution écrite[FN46].

85. Cette réserve est clairement exprimée à plus d'une reprise dans le Renvoi et dans d'autres arrêts de la Cour suprême. La Cour s'exprime ainsi:

> [...] ils [les principes] font nécessairement partie de notre Constitution, parce qu'il peut survenir des problèmes ou des situations qui ne sont pas expressément prévus dans le texte de la Constitution. (par. 32)

86. Elle précise également la façon dont ils doivent être utilisés:

> Étant donné l'existence de ces principes constitutionnels sous-jacents, de quelle façon notre Cour peut-elle les utiliser? Dans le Renvoi relatif aux juges de la Cour provinciale, précité, aux par. 93 et 104, nous avons apporté la réserve que la reconnaissance de ces principes constitutionnels [...] n'est pas une invitation à négliger le texte écrit de la Constitution. Bien au contraire, nous avons réaffirmé qu'il existe des raisons impératives d'insister sur la primauté de notre Constitution écrite. Une constitution écrite favorise la certitude et la prévisibilité juridiques, et fournit les fondements et la pierre de touche du contrôle judiciaire en matière constitutionnelle. [...] Dans le Renvoi relatif aux juges de la Cour provinciale, au par. 104, nous avons statué que le préambule « invite les tribunaux à transformer ces principes en prémisses d'une thèse constitutionnelle qui amène à combler les vides des dispositions expresses du texte constitutionnel. (par. 53) (Nous soulignons.)

87. Au surplus, dans ce dernier arrêt, le R. v. Campbell[FN47], la Cour, en identifiant dans le préambule de la Loi constitutionnelle de 1867 l'existence du principe non écrit de l'indépendance judiciaire, énonce clairement que la Constitution écrite prime ces principes et que ceux-ci ne peuvent servir qu'à combler les lacunes des termes exprès du texte constitutionnel (par. 93-95).

88. La question est alors de savoir ce que constitue un vide de la Constitution écrite. Une conception élargie de cette notion amènerait une réécriture de celle-ci et un tel résultat ne serait pas souhaitable puisque la Constitution prévoit un cadre général et certaines dispositions précises sur une entente politique fondamentale. On doit donc maintenir une distinction claire entre faire et interpréter la Constitution[FN48].

89. Les auteurs s'entendent également sur la portée exacte de ces quatre principes. Ils ne peuvent être utilisés que

pour combler les vides des dispositions expresses du texte et non pour les mettre de côté[FN49]; ce qui signifie, selon ELLIOT, qu'ils peuvent [...] « only be used to fill in gaps » [...] et [...] « only as aids to interpretation » [...][FN50].

90. Il est intéressant de noter que d'autres cours d'appel[FN51] ont subséquemment refusé d'interpréter le Renvoi de la manière que les appelants préconisent et ont tenu compte de l'importante réserve énoncée par la Cour.

91. Les appelants font donc, à notre avis, une utilisation du Renvoi et des arrêts de la Cour suprême non conforme à ce que la Cour a énoncé, en omettant d'une part de tenir compte du contexte dans lequel l'arrêt a été rendu et, d'autre part, de la réserve importante que la Cour a formulée à plus d'une reprise. Les appelants nous semblent totalement ignorer l'importance de celle-ci.

92. En réalité, ils invoquent ces principes, non pour combler des vides, mais bien pour mettre de côté la compétence des provinces et enchâsser dans la Constitution de nouvelles obligations linguistiques en matière municipale. Ils ignorent l'importance de la réserve formulée par la Cour suprême qui prévoit que la reconnaissance des principes non écrits ne peut être interprétée comme constituant une invitation à négliger le texte écrit de la Constitution[FN52].

93. Or, la jurisprudence de la Cour suprême est claire: ces principes non écrits ne peuvent pas être opposés à un texte constitutionnel écrit pour le contredire ou le vider complètement de sa substance.

94. En outre, le principe de protection des minorités n'a pas pour effet de conférer un droit à des institutions pour la protection des minorités, lorsque ce droit n'est pas protégé, par ailleurs, dans la Constitution. Il ne peut non plus être interprété comme conférant à une minorité linguistique le droit à des structures municipales figées dans le temps, qui constituerait, à toutes fins pratiques, un droit de veto sur toute réforme municipale.

2] Les prétentions des appelants sur la portée de chaque principe

95. Il convient donc maintenant de reprendre les arguments des appelants qui s'appuient sur le Renvoi, lesquels sont principalement plaidés par Ville de Hampstead et Ville de Baie-d'Urfé.

a) La Constitution protège les droits des minorités

96. En tout premier lieu, les appelants invoquent le par. 96 du Renvoi dans lequel la Cour suprême énonce que les minorités linguistiques et culturelles, dont les peuples autochtones, comptent sur la Constitution pour protéger leurs droits.

97. Cet énoncé doit être resitué dans son contexte, soit celui des négociations entre le Québec et le reste du Canada advenant le cas d'une éventuelle sécession et à titre d'exemple de questions qui pourraient être soulevées par de telles négociations. On ne peut donc l'isoler et lui conférer la portée générale que lui donnent les appelants.

b) La force des principes non écrits

98. Les appelants plaident ensuite que le Renvoi a confirmé que ces principes non écrits sont des principes fondamentaux qui inspirent et nourrissent le texte de la Constitution et qu'ils donnent naissance à des obligations juridiques substantielles, puisqu'ils sont investis d'une force normative puissante liant tribunaux et gouvernements (par. 54 Renvoi).

99. Là encore, s'il est exact que la Cour suprême a fait un tel énoncé, celui-ci doit être pris et lu dans son contexte qui énonce clairement (par. 53) l'importante réserve, que nous avons déjà soulignée, faite par la Cour quant à l'utilisation de ces principes.

Decision: The appeals should be dismissed

Reference re Secession of Quebec, [1998] 2 SCR 217.

Summary: As part of the reference, the Supreme Court has addressed issues related to unilateral secession of Quebec.

Relevant paragraphs:

79. The fourth underlying constitutional principle we address here concerns the protection of minorities. There are a number of specific constitutional provisions protecting minority language, religion and education rights. Some of those provisions are, as we have recognized on a number of occasions, the product of historical compromises. As this Court observed in *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at p. 1173, and in *Reference re Education Act (Que.)*, [1993] 2 S.C.R. 511, at pp. 529-30, the protection of minority religious education rights was a central consideration in the negotiations leading to Confederation. In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated. See also *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377, at pp. 401-2, and *Adler v. Ontario*, [1996] 3 S.C.R. 609. Similar concerns animated the provisions protecting minority language rights, as noted in *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, at p. 564.

80. However, we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the *Charter*'s provisions for the protection of minority rights. See, e.g., *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, and *Mahe v. Alberta*, [1990] 1 S.C.R. 342.

81. The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the *Charter*. Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: *Senate Reference*, *supra*, at p. 71. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

2 - Section 16 of the *Charter* – Official Languages of Canada

A. Subsection 16(1): Official Languages of Canada

Subsection 16(1) of the *Charter* provides:

> **Official languages of Canada**
> 16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

In the jurisprudence, the relevant decisions that address the constitutional protection of language rights and Article 16 (1) of the Charter are:

R v Schneider (2004), 2004 NSCA 151.

Summary:

1. On July 14, 2000 there was an scuffle between Annie Schneider and sheriff's officers in a courtroom of the Provincial Court in Halifax. As a result, Ms. Schneider was charged with assaulting Scott Conrad and causing a disturbance. After several appearances in Provincial Court, Ms. Schneider was tried in French before Judge Robert Prince, commencing on May 17, 2001. She was convicted of both counts. The sentences imposed were fines of $300 and court costs.

2. Ms. Schneider appealed the convictions to the Supreme Court of Nova Scotia. The appeal was heard on February 24, 2003. In decisions dated October 27, 2003, Justice Arthur LeBlanc, acting as a summary conviction appeal court, allowed the appeal, quashed the convictions and ordered a new trial. Justice LeBlanc concluded that Ms. Schneider's language rights pursuant to s. 530 of the *Criminal Code* and s. 16 of the *Charter* had been infringed because her application on May 14, 2001 to adjourn the trial was not heard by a judge able to hear the matter in French. Justice LeBlanc's decision and supplementary reasons in 2003 NSSCE 209 (N.S. S.C.) are reported as [2003] N.S.J. No. 446 (N.S. S.C.) and [2003] N.S.J. No. 517 (N.S. S.C.) and in French as [2003] N.S.J. No. 497 (N.S. S.C.).

3. Both Ms. Schneider and the Crown appealed the decisions of Justice LeBlanc to this Court and the appeals were heard together. Both parties filed their factums and addressed the Court mainly in French. There was simultaneous translation of the hearing from each language to the other.

4. On its appeal the Crown submits that Justice LeBlanc erred in finding a breach of Ms. Schneider's language rights, arguing that the adjournment application was not part of the trial. Ms. Schneider submits on her appeal that the summary conviction appeal court judge erred by not dealing with all the issues she raised and by ordering a new trial instead of entering an acquittal or a stay.

Relevant paragraphs:

18. In paragraph 34 of the decision under appeal, quoted above, the summary conviction appeal court judge found that Ms. Schneider's constitutional language rights were violated. With respect, in my opinion he erred in coming to that conclusion. This issue was clearly determined by this Court in a decision released a few months after the date of the decision under appeal. In *R. v. MacKenzie*, 2004 NSCA 10, [2004] N.S.J. No. 23 (N.S. C.A.), Justice Fichaud for the Court thoroughly analyzed s. 530 of the *Code* and s.16 of the *Charter* and their implications in the context of summary conviction matters in the Provincial Court.

19. The conclusion reached in *MacKenzie* was that a breach of s. 530 of the *Code* did not violate either s. 15 or s. 16 of the *Charter*. Language is neither a listed category nor an analogous ground of discrimination in Section 15. Section 16 only applies to "institutions of the Parliament and government of Canada" which does not include the Provincial Court of Nova Scotia. The language guarantees of s. 16(1) of the *Charter* do not apply to proceedings in the Provincial Court and s. 16(3) has not constitutionalized s. 530 of the *Code*. It is not necessary to repeat the analysis here. For the reasons given in *MacKenzie*, this ground of the Crown's appeal is allowed. There was no breach of Ms. Schneider's constitutional rights.

Decision:

43. To summarize, I would:

1. allow the Crown's appeal, having found that there was no breach of Ms. Schneider's language rights pursuant to either s. 16 of the Charter or s. 530 of the Criminal Code;

[…]

R v MacKenzie (2004), 2004 NSCA 10.

Summary:

1. Nicole MacKenzie was charged with speeding. She appeared unrepresented by counsel for arraignment in Provincial Court. Contrary to s. 530(3) of the Criminal Code which applies here by s. 7(1) of the Summary

Proceedings Act, R.S.N.S. 1989 c. 450, the Provincial Court judge did not inform her of her right to apply for a French trial. The Provincial Court tried Ms. MacKenzie in English, convicted and fined her.

2. Ms. MacKenzie appealed to the Nova Scotia Supreme Court as Summary Conviction Appeal Court ("SCAC"). Justice Edwards ruled that the violation of s. 530(3) contravened ss. 15, 16 and 19 of the Charter of Rights and, noting the "serious Charter breach", decided that the appropriate remedy was a stay of proceedings rather than a new trial.

3. The Crown applies for leave and, if granted, appeals based on error of law under s. 839(1) of the Criminal Code and s. 7(1) of the Summary Proceedings Act. The Crown acknowledges the contravention of s. 530(3) but says that the appropriate remedy was a new trial instead of a stay.

Relevant paragraphs:

42. It was s. 16(1) upon which counsel for Ms. MacKenzie focused at the hearing of this appeal.

43. Section 16(1) applies only to "institutions of the Parliament and government of Canada."

44. The Provincial Court of Nova Scotia is not an institution of Parliament. It is established by the Nova Scotia Legislature as discussed above. That the Provincial Court applies the *Criminal Code* does not change this conclusion. The Provincial Court also applies legislation creating provincial offences.

45. The Provincial Court is not an institution of government or the executive. This is clear from *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) at paras. 126-9 where Chief Justice Lamer stated:

> 126. What follows as a consequence of the link between institutional independence and the separation of powers I will turn to shortly. The point I want to make first is that the institutional role demanded of the judiciary under our Constitution is a role which we now expect of provincial court judges. I am well aware that provincial courts are creatures of statute, and that their existence is not required by the Constitution. However, there is no doubt that these statutory courts play a critical role in enforcing the provisions and protecting the values of the Constitution. Inasmuch as that role has grown over the last few years, it is clear therefore that provincial courts must be granted some institutional independence.
>
> 127. This role is most evident when we examine the remedial powers of provincial courts with respect to the enforcement of the Constitution. Notwithstanding that provincial courts are statutory bodies, this Court has held that they can enforce the supremacy clause, s. 52 of the *Constitution Act*, 1982. A celebrated example of the use of s. 52 by provincial courts is *R. v. Big M Drug Mart Ltd.* (1983), 25 Alta. L.R. (2d) 195 (Prov. Ct.) (upheld by this Court in [1985] 1 S.C.R. 295), which became one of the seminal cases in *Charter* jurisprudence. Provincial courts, moreover, frequently employ the remedial powers conferred by ss. 24(1) and 24(2) of the *Charter*, because they are courts of competent jurisdiction for the purposes of those provisions: *Mills v. The Queen*, [1986] 1 S.C.R. 863. Thus, provincial courts have the power to order stays of proceedings: e.g., *R. v. Askov*, [1990] 2 S.C.R. 1199. As well, provincial courts can exclude evidence obtained in violation of a *Charter* right: e.g., *R. v. Collins*, [1987] 1 S.C.R. 265. They use ss. 24(1) and 24(2) because of their dominant role in the adjudication of criminal cases, where the need to resort to those remedial provisions most often arises.
>
> 128. In addition to enforcing the rights in ss. 7-14 of the *Charte*r, which predominantly operate in the criminal justice system, provincial courts also enforce the fundamental freedoms found in s. 2 of the *Charter*, such as freedom of religion (*Big M*) and freedom of expression (*Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084). As well, they police the federal division of powers, by interpreting the heads of jurisdiction found in ss. 91 and 92 of the *Constitution Act*, 1867: e.g., *Big M* and *R. v. Morgentaler*, [1993] 3 S.C.R. 463. Finally, many decisions on the rights of

> Canada's aboriginal peoples, which are protected by s. 35(1) of the *Constitution Act*, 1982, are made by provincial courts: e.g., *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
>
> 129. It is worth noting that the increased role of provincial courts in enforcing the provisions and protecting the values of the Constitution is in part a function of a legislative policy of granting greater jurisdiction to these courts. Often, legislation of this nature denies litigants the choice of whether they must appear before a provincial court or a superior court. As I explain below, the constitutional response to the shifting jurisdictional boundaries of the courts is to guarantee that certain fundamental aspects of judicial independence be enjoyed not only by superior courts but by provincial courts as well. In other words, not only must provincial courts be guaranteed institutional independence, they must enjoy a certain level of institutional independence.

46. In *R. v. Simard*, above, Justice Lacourcière for the Ontario Court of Appeal stated p. 126:

I agree with Macdonald, J. in *R. v. Rodrigue*, [cited above p. 468], that ss. 16(1) to 20(1) of the *Charter* pertain to the general principle of equality of status of the official languages applicable to federal institutions and non judicial communications. These sections cover distinct and water-tight compartments of parliamentary, judicial and governmental activities of the federal state.

The judiciary is discussed in s. 19, not s. 16(1).

47. The express reference to the institutions of New Brunswick in s. 16(2) confirms that "institutions of the Parliament and Government of Canada" in s. 16(1) excludes provincial institutions: see *Charlebois c. Mowat*, [2001] N.B.J. No. 480 (N.B. C.A.) at para 59. There is no constitutional reference to Nova Scotia institutions equivalent to s. 16(2).

48. Counsel for Ms. MacKenzie refers to *Beaulac*, above, where Justice Bastarache for the majority referred to the "equality of status" guaranteed by s. 16(1). Justice Bastarache stated:

> 22 ... The principle of advancement does not however exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada. It does not limit the scope of s. 2 of the *Official Languages Act*. Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada. ...
>
> 24 ... The idea that s. 16(3) of the *Charter*, which has formalized the notion of advancement of the objective of equality of the official languages of Canada in the *Jones* case, *supra*, limits the scope of s. 16(1) must also be rejected. This subsection affirms the substantive equality of those constitutional language rights that are in existence at a given time. ... [emphasis added]

49. Justice Bastarache stated that s. 16(1) affirms the substantive equality of "constitutional language rights". The constitutional language rights guaranteed by s. 16(1) apply to "institutions of Parliament and Government of Canada". The Provincial Court of Nova Scotia is not such an institution.

50. In my view, the language guarantees of s. 16(1) did not apply to the Provincial Court's arraignment and trial of Ms. MacKenzie. There was no breach of s. 16(1).

Decision:

97. I would grant leave to appeal, allow the appeal, set aside the stay and order a new trial.

Poulin v Canada (Attorney General), 2004 CF 1132.

Summary:

1. This is an application for judicial review of a decision by the Assistant Commissioner of the Correctional Service of Canada following a grievance filed by the applicant, an inmate in a Federal penitentiary. In her decision, the Assistant Commissioner confirmed that the applicant must complete an intensive program for violent offenders and confirmed this requirement in the applicant's correctional plan.

2. The applicant is an inmate in a Federal penitentiary, the Mission Institution, in British Columbia. His case management team required that he complete a program to learn to manage his propensity for violence. The Correctional Service offered the program only in English in British Columbia but the applicant, who is francophone, wanted to take it in French. He refused to be transferred to a penitentiary where the institution offered that program because he feared for his safety.

Relevant paragraphs:

Subsection 16(1) of the Charter
14. Subsection 16(1) of the Charter provides that: "English and French are the official languages of Canada" and that these two languages "have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada". The Assistant Commissioner's decision does not breach subsection 16(1) of the Charter. The applicant argues that the decision deprives him of receiving French services from the Federal government. Subsection 16(1) only applies to the use of the official languages inside institutions of Parliament and the government of Canada, which is not the case here.

Décision : The application for judicial review is dismissed.

R v Beaulac, [1999] 1 SCR 768.

Summary: The accused was charged with first degree murder. His first trial resulted in a mistrial and his conviction at the second trial was overturned by the Court of Appeal and a new trial was ordered. Despite unsuccessful applications in the earlier proceedings, the accused applied again, during a hearing prior to his third trial, for a trial before a judge and jury who speak both official languages of Canada pursuant to s. 530 of the Criminal Code. The judge, who was not the judge before whom the accused would be tried, dismissed the s. 530(4) application. The trial proceeded in English and the accused was convicted. On appeal, the Court of Appeal dismissed the appeal from conviction, upholding the decision of the judge at the pre-trial hearing on the language issue. This appeal deals solely with the question of the violation of the accused's language rights.

7. This is the first time this Court has been called upon to interpret the language rights afforded by s. 530 of the *Criminal Code*, R.S.C., 1985, c. C-46. This case concerns the right to be heard by a judge or a judge and jury who speak the official language of Canada that is the language of the accused, or both official languages of Canada.

Relevant paragraphs:

16. In 1986, three decisions dealing with language rights in the courts appeared to have reversed the tendency to adopt a liberal approach to the interpretation of constitutional language guarantees: *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, and *Bilodeau v. Attorney General of Manitoba*, [1986] 1 S.C.R. 449. In those cases, the majority of the Court held that s. 133 of the *Constitution Act, 1867* guarantees a limited and precise group of rights resulting from a political compromise, and that, contrary to legal rights incorporated in ss. 7 to 14 of the *Charter*, they should be interpreted with "restraint" (*Société des Acadiens du Nouveau-Brunswick*, at p. 580). The majority judgments went on to say that progression towards equality of official languages is a goal to be pursued through the legislative process. The Court held that the right to use one's language in s. 133 does not impose a corresponding obligation on the State or any other individual to use the language so chosen, other than the obligation not to prevent those who wish to do so from exercising those rights; see *Société des Acadiens du Nouveau-Brunswick*, at pp. 574-75. In dissent on the constitutional question, Dickson C.J. wrote, at p. 560: "In interpreting *Charter* provisions, this Court has firmly endorsed a purposive

approach." Noting the willingness of the Court to expand the definition of the words "Acts" and "Courts" in *Blaikie No. 1* and *Blaikie No. 2*, Dickson C.J. re-affirmed, at p. 563, that the purpose of s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867* was based on equality. He then quoted from the *Reference re Manitoba Language Rights, supra*, at p. 744:

> 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.

17. Immediately after the trilogy, the Court seemed to depart from its restrictive position. While this more liberal approach to language rights was not always directed at s. 133 of the *Constitution Act, 1867* or the similar provisions of s. 23 of the *Manitoba Act, 1870*, the new language cases are significant because they re-affirm the importance of language rights as supporting official language communities and their culture. In *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 748-49, the Court wrote:

> 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.

18. Again, in *Mahe v. Alberta*, [1990] 1 S.C.R. 342, Dickson C.J. stated, at p. 365, after noting the caution of Beetz J. in *Société des Acadiens du Nouveau-Brunswick, supra*:

> . . . however, this does not mean that courts should not "breathe life" into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose.

19. This approach was confirmed subsequently in *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212, at p. 222, where s. 23 of the *Manitoba Act, 1870* was interpreted to apply to a large category of decrees and delegated legislation. Another reference, with regard to education this time, *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, reinforced the cultural purpose of language guarantees. At p. 850, the Court said:

> Several interpretative guidelines are endorsed in *Mahe* for the purposes of defining s. 23 rights. Firstly, courts should take a purposive approach to interpreting the rights. Therefore, in accordance with the purpose of the right as defined in *Mahe*, the answers to the questions should ideally be guided by that which will most effectively encourage the flourishing and preservation of the French-language minority in the province. Secondly, the right should be construed remedially, in recognition of previous injustices that have gone unredressed and which have required the entrenchment of protection for minority language rights.

20. These pronouncements are a reflection of the fact that there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of official language communities. The objective of protecting official language minorities, as set out in s. 2 of the *Official Languages Act*, is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take

positive steps to implement language guarantees; see J. E. Oestreich, "Liberal Theory and Minority Group Rights" (1999), 21 *Hum. Rts. Q.* 108, at p. 112; P. Jones, "Human Rights, Group Rights, and Peoples' Rights" (1999), 21 *Hum. Rts. Q.* 80, at p. 83: "[A] right . . . is conceptually tied to a duty"; and R. Cholewinski, "State Duty Towards Ethnic Minorities: Positive or Negative?" (1988), 10 *Hum. Rts. Q.* 344.

21. This interpretative framework is important to a true understanding of language rights and the determination of the scope of s. 530 of the *Code*. It is relevant in this appeal because the conflicting messages of the 1986 trilogy and following cases have permeated the interpretation of language provisions that are incorporated in various statutes, including the *Code*; see B. Pelletier, "Bilan des droits linguistiques au Canada" (1995), 55 *R. du B.* 611, at pp. 620-27. I have found evidence of this, for instance, in *R. v. Simard* (1995), 27 O.R. (3d) 116 (Ont. C.A.), at pp. 129-30, and *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373, at pp. 386-87, where the Federal Court of Appeal relates the 1986 trilogy to language rights created by statute:

> The 1988 *Official Languages Act* is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the *Canadian Charter of Rights and Freedoms*, it follows the rules of interpretation of that Charter as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the Charter, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it". To the extent, finally, that it is legislation regarding language rights, which have assumed the position of fundamental rights in Canada but are nonetheless the result of a delicate social and political compromise, it requires the courts to exercise caution and to "pause before they decide to act as instruments of change", as Beetz J. observed in *Société des Acadiens du Nouveau-Brunswick Inc. et al. v. Association of Parents for Fairness in Education et al.* . . . [Emphasis added.]

22. The *Official Languages Act* of 1988 and s. 530.1 of the *Criminal Code*, which was adopted as a related amendment by s. 94 of the same *Official Languages Act*, constitute an example of the advancement of language rights through legislative means provided for in s. 16(3) of the *Charter*; see *Simard*, *supra*, at pp. 124-25. The principle of advancement does not however exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada. It does not limit the scope of s. 2 of the *Official Languages Act*. Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada. Parliament and the provincial legislatures were well aware of this when they reacted to the trilogy (*House of Commons Debates*, vol. IX, 1st sess., 33rd Parl., May 6, 1986, at p. 12999) and accepted that the 1988 provisions would be promulgated through transitional mechanisms and accompanied by financial assistance directed at providing the required institutional services.

23. When s. 530 was promulgated in British Columbia, on January 1, 1990, the scope of the language rights of the accused was not meant to be determined restrictively. The amendments were remedial (see *Interpretation Act*, R.S.C., 1985, c. I-21, s. 12), and meant to form part of the unfinished edifice of fundamental language rights (*House of Commons Debates*, vol. XIV, 2nd sess., 33rd Parl., July 7, 1988, at p. 17220). There was nothing new in this regard. In the House of Commons, the Minister of Justice had clearly articulated the purpose of the original language of the provisions when he introduced amendments to the *Criminal Code* on May 2, 1978, to add Part XIV.1 (*An Act to amend the Criminal Code*, S.C. 1977-78, c. 36, s. 1). He said:

> It seems to me that all persons living in a country which recognizes two official languages must have the right to use and be understood in either of those languages when on trial before courts

> of criminal jurisdiction. I repeat that a trial before a judge or jury who understand the accused's language should be a fundamental right and not a privilege. The right to be heard in a criminal proceeding by a judge or a judge and jury who speak the accused's own official language, even if it is the minority official language in a given province, surely is a right that is a bare minimum in terms of serving the interests of both justice and Canadian unity. It is essentially a question of fairness that is involved. [Emphasis added.] (*House of Commons Debates*, vol. V, 3rd sess., 30th Parl., at p. 5087.)

24. Though constitutional language rights result from a political compromise, this is not a characteristic that uniquely applies to such rights. A. Riddell, in "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, at p. 846, underlines that a political compromise also led to the adoption of ss. 7 and 15 of the *Charter* and argues, at p. 848, that there is no basis in the constitutional history of Canada for holding that any such political compromises require a restrictive interpretation of constitutional guarantees. I agree that the existence of a political compromise is without consequence with regard to the scope of language rights. The idea that s. 16(3) of the *Charter*, which has formalized the notion of advancement of the objective of equality of the official languages of Canada in the *Jones* case, *supra*, limits the scope of s. 16(1) must also be rejected. This subsection affirms the substantive equality of those constitutional language rights that are in existence at a given time. Section 2 of the *Official Languages Act* has the same effect with regard to rights recognized under that Act. This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State; see *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 412; *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1038; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 73; *Mahe*, *supra*, at p. 365. It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation. This being said, I note that this case is not concerned with the possibility that constitutionally based language rights may conflict with some specific statutory rights.

25. 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.)*, *supra*, at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick*, *supra*, 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. I will return to this point later.

Dissenting on section 16:

1. THE CHIEF JUSTICE AND BINNIE J. -- We agree with the conclusion and with the analysis of s. 530 of the *Criminal Code*, R.S.C., 1985, c. C-46, set out in the reasons of Bastarache J. However, with respect, we do not consider this to be an appropriate case to revisit the Court's constitutional interpretation of the language guarantees contained in s. 16 of the *Canadian Charter of Rights and Freedoms*. It is a well-established rule of prudence that courts ought not to pronounce on constitutional issues unless they are squarely raised for decision. This is not a constitutional case. It is a case of statutory construction. Section 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21, deems s. 530 to be remedial and requires it to be given such "fair, large and liberal construction and interpretation as best ensures the attainment of its objects". This principle of interpretation is sufficient to dispose of this appeal.

2. At paragraph 25, our colleague Bastarache J. undertakes an examination of constitutional language rights and proposes that "[t]o the extent that *Société des Acadiens du Nouveau-Brunswick* [*Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549], at pp. 579-80, stands for a restrictive interpretation of language rights, it is to be rejected." The reference is to that portion of the judgment of Beetz J. where he discussed s. 16

of the *Charter* and highlighted the political and historic origins of language rights in our Constitution and observed that:

> The legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise.
>
> . . .
>
> If however the provinces were told that the scheme provided by ss. 16 to 22 of the *Charter* was inherently dynamic and progressive, apart from legislation and constitutional amendment, and that the speed of progress of this scheme was to be controlled mainly by the courts, they would have no means to know with relative precision what it was that they were opting into. This would certainly increase their hesitation in so doing and would run contrary to the principle of advancement contained in s. 16(3).
>
> In my opinion, s. 16 of the *Charter* confirms the rule that the courts should exercise restraint in their interpretation of language rights provisions. [Emphasis added.]

3. The foundation of Beetz J.'s caution, i.e., that language rights reflect a political compromise, was recently spelled out by this Court in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 79:

> There are a number of specific constitutional provisions protecting minority language, religion and education rights. Some of those provisions are, as we have recognized on a number of occasions, the product of historical compromises.... [T]he protection of minority religious education rights was a central consideration in the negotiations leading to Confederation. In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated.... Similar concerns animated the provisions protecting minority language rights.... [Citations omitted.]

4. In *Mahe v. Alberta*, [1990] 1 S.C.R. 342, Dickson C.J., for a unanimous Court, stated at p. 365 that "Beetz J.'s warning that courts should be careful in interpreting language rights is a sound one", a point of view that was reiterated by the Court in *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, at pp. 851-52.

5. This is not to say that language rights are not to be given a purposive approach. On the contrary, it is clearly open to the Court, as Wilson J. put it in *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at p. 1176, "to breathe life into a compromise that is clearly expressed". In fact, the process envisaged by Beetz J. and the majority in *Société des Acadiens*, *supra*, is illustrated by the enactment of s. 530 itself, which addresses a particular aspect of language rights and develops a comprehensive statutory procedure to vindicate those rights in the context of a balanced recognition of the various interests at stake. A re-assessment of the Court's approach to *Charter* language rights developed in *Société des Acadiens* and reiterated in subsequent cases is not necessary or desirable in this appeal which can and should be resolved according to the ordinary principles of statutory interpretation mentioned above.

Decision: The appeal should be allowed and a new trial to be held before a judge and jury who speak both official languages ordered.

B. Subsection 16(2): Official Languages of New Brunswick

Subsection 16(2) of the *Charter* provides:

> **Official languages of New Brunswick**
> (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

In the jurisprudence, the relevant decisions that address the constitutional protection of language rights and Article 16 (2) of the Charter are:

Charlebois v. Saint John (City), [2005] 3 SCR 563, 2005 SCC 74

Summary: Charlebois brought an application, in French, against the City of Saint John. The City and the Attorney General of New Brunswick moved to have the application struck. The City's pleadings were presented in English only. The Attorney General's pleadings were in French, but some citations were in English. Charlebois objected to receiving pleadings in English on the basis that s. 22 of the *Official Languages Act* ("*OLA*") of New Brunswick enacted in 2002 applied to the City and required it to adopt the language of proceedings chosen by him. Both the Court of Queen's Bench and the Court of Appeal found that s. 22 of the *OLA* does not apply to municipalities and cities because that interpretation would create internal incoherence within the *OLA*.

Relevant paragraphs:

14. In *Charlebois v. Moncton*, Mr. Charlebois, the same litigant as in this case, challenged the validity of a municipal by-law which was enacted only in English. The specific question before the New Brunswick Court of Appeal was whether s. 18(2) of the *Charter* included municipal by-laws. On a remedial and purposive reading of the *Charter* language guarantees, the court held that it was appropriate to include municipal by-laws in the province of New Brunswick's constitutional obligation to enact its statutes in both English and French. In the course of its analysis on this question, the court also expressed its opinion that municipalities are "institutions of the legislature and government of New Brunswick" within the meaning of s. 16(2) of the *Charter*. By way of remedy, the court declared the unilingual by-laws invalid but suspended the effect of the declaration of invalidity for one year to enable the City of Moncton and the Government of New Brunswick to comply with the constitutional obligations set out in the court's reasons. The court also provided some guidance on how the province may choose to meet its obligations. It stated as follows, at paras. 127-28:

> In the context of this case, I believe that a declaration of invalidity subject to a temporary suspension of the effect of the declaration provides the City of Moncton and the provincial government with the flexibility necessary to develop an appropriate solution that will ensure that the appellant's rights under subsection 18(2) are realized. In this regard, this Court would be loathe to interfere with and impose standards on the legislature. It is obvious that the government has a choice in the institutional means by which its obligations can be met. For example, the exhaustive inquiry of the task force on official languages in New Brunswick (*Towards Equality of Official Languages in New Brunswick*, at pages 337-84) dealt with the linguistic composition of the population of New Brunswick municipalities. The report acknowledged that a possible approach that would meet the constitutional obligation of the principle of equality of official languages might be to implement a language policy whereby municipal services would be available in both official languages only where numbers warrant. This is a quantitative approach in which certain municipalities might be declared bilingual on the basis of a percentage of the population representing an official language minority. The percentage would have to be determined by the legislature.
>
> In this connection, it should be remembered that section 1 of the *Charter* allows restrictions of *Charter* rights only by such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Under this general limitation, the legislature can strike a balance or achieve a compromise between the exercise of a guaranteed right and the safeguarding of society's best interests. However, while certain limits imposed on the exercise of the right guaranteed under subsection 18(2) may be justifiable, this provision creates a requirement of legislative bilingualism that cannot be reduced to unilingualism or a bilingualism that is left to the discretion of municipal councils. This would amount to a denial of the constitutional language right guaranteed by subsection 18(2). Moreover, by implication, the bilingualism requirement in regard to municipal by-laws extends to the process of enactment.

15. Bastarache J. finds that it would have been more appropriate for the New Brunswick Court of Appeal in this case "to take a positive stance and see whether it was necessary to limit the scope of the newly defined term in light of the difficulties posed by the drafting of the *OLA*" (para. 32 (emphasis added)). I disagree. First, it is noteworthy that *Charlebois v. Moncton* dealt with s. 18(2) of the *Charter*; hence, the court's finding that municipalities are "institutions" for the purpose of s. 16(2) is *obiter dictum*. The question as to whether municipalities are institutions within the meaning of s. 16(2) has never been determined by this Court, it is not before us on this appeal, and I express no opinion on whether or not this interpretation is correct. Second, it is also noteworthy that the province's constitutional obligations, even as defined in *Charlebois v. Moncton*, do not mandate a single specific solution. As aptly noted by the court in the above-noted excerpt, there is room for flexibility. The current *OLA* is the province's legislative response to its constitutional obligations. It would be inappropriate to pre-empt the analysis with a blanket presumption of *Charter* consistency. Daigle J.A. therefore was quite correct in pursuing the analysis. This brings us back to the question of statutory interpretation that occupies us: what approach did the province of New Brunswick adopt in respect of its municipalities to meet its constitutional obligations?

[…]

23. In my respectful view, the approach advocated by Mr. Charlebois and the AJEFNB, and adopted by Bastarache J., exceeds the scope of this Court's decision in *R. v. Beaulac*, [1999] 1 S.C.R. 768. This Court in *Beaulac* held that a liberal and purposive approach to the interpretation of constitutional language guarantees and statutory language rights should be adopted in all cases. I take no issue with this principle; however, as Bastarache J. acknowledges (at para. 40), this does not mean that the ordinary rules of statutory interpretation have no place. In this case, it is particularly important to keep in mind the proper limits of *Charter* values as an interpretative tool. In *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, Iacobucci J., writing for a unanimous court, firmly reiterated that

> to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can *only* receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations. [Emphasis in original; para. 62.]

Dissenting judgement – Relevant paragraphs:

3.1 *The Internal Inconsistencies in the OLA*

34. The main inconsistency noted by the Court of Appeal is that between ss. 27 and 36. Section 27 provides for the right of any member of the public to communicate with any institution and to receive its services in the official language of their choice. The corresponding obligations of the public institutions are defined in ss. 28 and 28.1, i.e. to ensure that members of the public are able to communicate and to receive its services in the language requested, and to make it known that its services are available in the official language of choice. By contrast, s. 36 provides that all municipalities whose official language minority population represents at least 20 percent of its total population, and all cities, shall offer the services and communications *prescribed by law* in both official languages.

35. In *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, Beetz J., for the majority, contrasted the right to use a language in court proceedings under s. 19(2) of the *Charter* and the right to communicate with offices of the government under s. 20 of the *Charter*. This last right "postulates the right to be heard or understood in either language" (p. 575). Wilson J., who concurred in the result, noted that there is an apparent inconsistency between the right to equality in s. 16(1) of the *Charter* and the right to limited services in s. 20(1) of the *Charter*. The solution was not, in her view, to limit the scope of s. 16(1) to eliminate the inconsistency, but to read s. 16(1) as "constitutionalizing a societal commitment to growth" (p. 620). Both ss. 16(1) and 20(1) were to be read generously and purposively (p. 621). Wilson J. also dealt with another apparent inconsistency between s. 27 of the *Charter* (the interpretation clause favouring multiculturalism) and s. 16(3) of the *Charter* (the interpretative clause favouring the progression of the official languages of Canada). Here again, the solution was not to negate the principle of growth in s. 16(3),

but to interpret both sections in the context of the special status of official languages. The approach to interpretation of Wilson J. must be contrasted with the one adopted by Beetz J. who reasoned that language rights were politically motivated and had to be read restrictively. This latter approach was formally rejected in *Beaulac* where the Court insisted on the importance of s. 16 of the *Charter* in interpreting language laws:

> 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.)*, *supra*, at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick*, *supra*, 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. . . . [Emphasis in original; para. 25.]

Like Wilson J., the Court of Appeal of Ontario has noted that s. 16(3) of the *Charter* is an important factor in determining the proper rules of interpretation for quasi-constitutional rights (see *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505, at paras. 129-30).

36. This approach is not new. It is now a template for the interpretation of language rights, specially, as just demonstrated, where there is apparent conflict and ambiguity. Under it, the first step is not to read down the protections to eliminate inconsistencies, but to make sense of the overall regime in light of the constitutional imperative of approaching language rights purposefully, with a view to advancing the principles of equality and protection of minorities. Institutional bilingualism is achieved when rights are granted to the public and corresponding obligations are imposed on institutions (see *Beaulac*, at paras. 20-22). No rights are given as such to institutions. Any interpretation of the *OLA* must take this into account. The real issue here is whether the apparent inconsistency between ss. 27 and 36 is such that the institutional obligations recognized *a priori* in s. 22 must *of necessity* be read down.

Decision: The appeal should be dismissed.

Charlebois v Mowat and The City of Moncton (2001), 2001 NBCA 117.

Summary:

16. As we have seen, the appellant challenges the validity of City of Moncton by-law Z-4 on the ground that the City Council did not meet its constitutional obligation under subsection 18(2) of the *Charter* to enact, print and publish its by-laws in the two official languages of the province. He relies on subsections 16(2) and 18(2) as well as section 16.1 of the *Charter* and submits that the City of Moncton's failure to comply with its constitutional obligation can only result in the invalidity of city by-law Z-4.

17. This is the first case in which this Court is called upon to construe language rights set out in subsections 16(2) and 18(2) and section 16.1 of the *Charter*. With the exception of minority language educational rights guaranteed under section 23 of the *Charter*, the courts have rarely had to interpret language rights. The issue of invalidity raised by the appellant in this case requires a review of the content and scope of the language rights invoked, in particular, the meaning that should be given to subsection 18(2) and the determination of the larger objects of the rights which stem from subsection 16(2) and section 16.1 of the *Charter*.

Relevant paragraphs:

The Scope of Subsection 16(2) and Section 16.1 of the Charter

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

63. Indeed, subsection 16(2) constitutionalizes the principle of the equality of status of English and French and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick. Subsection 16(3) states that nothing in the *Charter* limits the authority of the Parliament of Canada or a provincial legislature to adopt measures to advance the equality of status or use of English and French. Even though this provision does not impose a positive obligation on the Parliament of Canada or the provinces, it nonetheless recognizes the possibility for the lawmaker to create language rights other than those entrenched in the *Charter*. Finally, subsection 16.1(1) declares, on the one hand, that the English linguistic community and the French linguistic community have equality of status and equal rights and privileges and, on the other hand, that they have the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities. Subsection 16.1(2) recognizes the role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection 16.1(1). In short, this section constitutionalizes the principles of *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, *supra*. The equality provided under section 16.1 is based, not on the equality of the languages as provided for in subsection 16(2), but on the equality of New Brunswick's English linguistic community and French linguistic community. Unlike subsection 16(2), this provision therefore includes collective rights whose holders are the linguistic communities themselves.

64. Before a further exploration of the content and scope of these provisions, it is useful to review how previous Supreme Court cases have interpreted the principle of the equality of official languages under section 16 of the *Charter*. It is important to remember that in this case the appellant invokes the principle of the equality of official languages provided for in subsection 16(2) not only to advocate a broad and generous interpretation of the expression "statutes of the legislature" used in subsection 18(2), but also to impose on the provincial government an obligation to legislate to give full force and effect to the obligation of municipalities to enact and publish their by-laws in the two official languages.

65. We have already noted that the Supreme Court adopted a restrictive interpretation of language rights in *Société des Acadiens*. That case dealt with the interpretation of subsection 19(2) of the *Charter* which recognizes the right of everyone to use either English or French before any court of New Brunswick. The specific issue raised by the facts of the case was whether the right of a litigant to choose which official language to use guaranteed the right to be understood by the court in that language. Writing for the majority, Beetz, J. answered "no" to the question, holding that the rights guaranteed by subsection 19(2) of the *Charter* are of the same nature and scope as those guaranteed by section 133 of the *Constitution Act, 1867* and should be similarly construed. In his reasons, he reiterated the distinction that had been established in *MacDonald v. Montreal (City)*, *supra*, between legal rights (sections 7 to 14 of the *Charter*) which are rooted in principle and language rights which are based on political compromise. He concluded that the courts should approach the interpretation of language rights with more restraint than they would in construing legal rights given that language rights are founded on political compromise.

66. With respect to section 16 of the *Charter* , Beetz, J. began by observing in *Société des Acadiens* that the attitude of restraint advocated is compatible with section 16. Thus, at page 578, he specifically stated that subsection 19(2) being the provision which governed the case at bar, he did not need to "concern [himself] with the substantive content of s. 16, whatever it may be". He thought nonetheless that something had to be said about the interpretative effect of section 16 as well as the question of the equality of the two official languages. On that point, he stated, at page 579:

> I think it is accurate to say that s. 16 of the *Charter* does contain a principle of advancement or progress in the equality of status or use of the two official languages. I find it highly significant however that this principle of advancement is linked with the legislative process referred to in s. 16(3), which is a codification of the rule in *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182. The legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise.

67. Consequently, according to the approach adopted by Beetz, J., who nevertheless recognized that language rights are not cast in stone and are not immune from judicial interpretation, the political process rather than the judicial process should be used for the attainment of the equality of official languages as declared in section 16, based as it is on political compromise. This interpretation was followed in several subsequent decisions. (See *R. v. Paré* (1986), 31 C.C.C. (3d) 260 (B.C. S.C.) ; *Canada (Attorney General) v. Viola* (1990), [1991] 1 F.C. 373 (Fed. C.A.) ; and *R. v. S. (H.)* (1995), 27 O.R. (3d) 97 (Fr.) (Ont. C.A.) .)

68. Dissenting on the constitutional question raised in *Société des Acadiens* , Dickson, C.J. acknowledged the significance of section 16 as an interpretive principle of the purpose of the language guarantees in the *Charter* in the following passage, at page 565:

> ... Despite academic debate about the precise significance of s. 16, at the very least it provides a strong indicator of the purpose of the language guarantees in the *Charter*. By adopting the special constitutional language protections in the *Charter*, the federal government of Canada and New Brunswick have demonstrated their commitment to official bilingualism within their respective jurisdictions. Whether s. 16 is visionary, declaratory or substantive in nature, it is an important interpretive aid in construing the other language provisions of the *Charter*, including s. 19(2) . [Emphasis added]

69. As can be seen, prior to *Beaulac*, the members of the Supreme Court mainly attempted to articulate the principles of interpretation applicable to section 16 of the *Charter* and its purpose, but did not really discuss to any extent its content and scope. However, it must be acknowledged that these same issues relating, first, to the equality of official languages declared in section 2 of the *Official Languages Act* (Canada), R.S.C. 1970, c. O-2, which would be the forerunner of section 16, and then, to the scope of section 16 itself, have been hotly debated in several books and law reviews. Two main theories have been debated: Are the provisions of section 16 declaratory or mandatory? Do they have an independent content that by itself would give rise to a remedy on the ground that equality has not been attained and do they impose obligations on governments? Given the significant new direction in the jurisprudence set out in *Beaulac*, I do not think it is necessary to revisit the debate. (See B. Pelletier, "Bilan des droits linguistiques au Canada" (1995) 55: 4 *R. du B.* 611; Tremblay, "Language Rights" in Beaudoin and Tarnopolsky (ed.), *Canadian Charter of Rights and Freedoms* (1982), Montreal, Wilson & Lafleur, 559; A. Braën, "Language Rights" in M. Bastarache (ed.), *Language Rights in Canada*, Yvon Blais, Montreal, 1986; and M. Bastarache, "The Principle of Equality of the Official Languages" in M. Bastarache (ed.) *Language Rights in Canada*, Yvon Blais, Montreal, 1986, page 519, particularly at page 524.) In my opinion, the Supreme Court has answered most of these questions by fleshing out the content of the principle of equality provided for in section 16 setting substantive equality as the applicable constitutional norm, and by recognizing the binding effect of this provision according to which language rights that are institutionally based require government action for their implementation and therefore create obligations for the State.

The Principles Set Out in Beaulac Dealing with the Principle of Equality

70. The main argument advanced by the appellant is based on the principles and conclusions set out in *Beaulac*. A full discussion of that case is therefore required. In a majority decision written by Bastarache, J., the Supreme Court, on the one hand, re-examined certain pronouncements made in *Société des Acadiens* dealing with the principles of interpretation of language rights and, on the other hand, discussed the nature of language rights and defined the principle of the equality of official languages before clearly setting out the rule of construction that should be applied to language rights.

71. First, regarding the first pronouncement that language rights should be interpreted with restraint because they result from a political compromise, and that the progression towards equality of official languages provided for in subsection 16(3) should be pursued through the legislative process rather than through the judicial process, the Supreme Court stated, at paragraphs 22 and 24:

> ... The principle of advancement does not however exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada. It does not limit the scope of s. 2

of the *Official Languages Act*.

> ... I agree that the existence of a political compromise is without consequence with regard to the scope of language rights. The idea that s. 16(3) of the *Charter* , which has formalized the notion of advancement of the objective of equality of the official languages of Canada in the *Jones* case, *supra* , limits the scope of s. 16(1) must also be rejected. ...

72. As for the nature of language rights, the Supreme Court stressed, at paragraph 20:

> ... that there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of official language communities. The objective of protecting official language minorities, as set out in s. 2 of the *Official Languages Act* , is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. ...

At paragraph 41, it added:

> ... 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. ...

73. In addition, the Supreme Court dwelt upon the purpose and scope of the principle of equality of official languages entrenched in section 16 of the *Charter* in the following excerpts. First, at paragraph 22, it held that substantive equality is the correct norm to apply in Canadian law:

> ... Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada. ...

74. Then, at paragraph 24, it clarified the meaning and scope of substantive equality:

> This subsection [16(1)] affirms the substantive equality of those constitutional language rights that are in existence at a given time. Section 2 of the *Official Languages Act* has the same effect with regard to rights recognized under that Act. This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State; [...] It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation. ...

75. Finally, the Supreme Court unequivocally stated at paragraph 25: "... To the extent that *Société des Acadiens du Nouveau-Brunswick* [...] stands for a restrictive interpretation of language rights, it is to be rejected. ..." Then it clearly stated that courts should adopt a broad and generous approach to the interpretation of language rights, and worded the rule of construction as follows:

> Language rights must <u>in all cases</u> be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; ... . [Emphasis in original]

76. Based on the foregoing analysis of *Beaulac* and its impact on some of the conclusions set out in the majority judgment in *Société des Acadiens* , we can make the following main observations. First, equality does not have a lesser meaning in matters of language. The principle of equality entrenched in subsection 16(2) must be

interpreted according to its true meaning, i.e., substantive equality is the applicable norm. Substantive equality means that language rights that are institutionally based require government action for their implementation and therefore create obligations for the government.

77. Secondly, in re-examining certain conclusions set out in *Société des Acadiens* , the Supreme Court significantly watered down the principle that judicial restraint should be exercised due solely to the fact that language rights may result from political compromise by asserting that the existence of such political compromises is without consequence with regard to the scope of language rights. In addition, the Court flatly disavowed and rejected the idea that subsection 16(3) limits the scope of subsection 16(2) equality rights because it contemplates the advancement towards equality of official languages through the legislative process. Finally, the Supreme Court expressly rejected the notion that language rights must be interpreted restrictively if *Société des Acadiens* stands for such a proposition. On the contrary, the Court established as a rule of construction that language rights must *in all cases* be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada.

[…]

(iii) The Language Chosen to Articulate the Right in Subsection 18(2) of the Charter

[…]

95. Municipal governments play a very significant role in the lives of the citizens of this province. Given the stated objective of the language right provided for in subsection 18(2), the requirement of substantive equality of status of the official languages and of the two official language communities, and the remedial character of this provision, excluding municipal by-laws from the expression "statutes of the legislature" used in subsection 18(2) would, in my view, be incompatible with the preservation and development of official language communities. Depriving members of the minority language community of equal access would impede the attainment of the objective of substantive equality. In addition, this conclusion is supported by the governing principle of the respect for minority rights stated in *Reference re Secession of Quebec, supra*. The Supreme Court stated that this principle underlies our constitutional order and continues to exercise influence in the operation and interpretation of our Constitution.

[…]

VIII. Provincial Government's Obligation to Legislate

111. Based on the foregoing analysis of the principles set out in *Beaulac* and the provisions of subsection 16(2) and section 16.1 of the *Charter*, there can be no doubt that the government of New Brunswick has a duty to ensure by positive action that municipal governments comply with the constitutional obligation provided for in subsection 18(2) of the *Charter*.

112. This question is obviously related to the issue of the remedy that will be granted in this case. However, I think it is useful to clarify, without intending to trench upon the role of the legislature, the constitutional obligation which flows from the nature of the language rights in question and from the commitment of the legislature and government of New Brunswick to preserve and promote the equality of status and equal rights and privileges of the two official language communities.

113. In this regard, it is sufficient to restate that Beaulac clearly establishes the principle that the standard of substantive equality means that language rights of an institutional nature require government action for their implementation and therefore create obligations for the State. In my view, this principle embodies a coercive power and imposes on governments a constitutional obligation to ensure that English and French have equality of status and equal rights and privileges.

Decision:

134. For the foregoing reasons, I would allow the appeal and set aside the decision of the trial judge. I declare the by-laws of the City of Moncton, including by-law Z-4, to be invalid and of no force and effect under subsection 52(1) of the *Constitution Act, 1982*. However, the effectiveness of the declaration of invalidity would be suspended for a period of one year from the date of this judgment to enable the City of Moncton and the government of New Brunswick to comply with their constitutional obligations.

C. Subsection 16(3): Advancement of status and use

Subsection 16(3) of the *Charter* provides:

> **Advancement of status and use**
> (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

In the jurisprudence, the relevant decisions that address the constitutional protection of language rights and Article 16 (3) of the Charter are:

R v Kapp, [2008] 2 SCR 483, 2008 SCC 41

Summary: The federal government's decision to enhance aboriginal involvement in the commercial fishery led to the Aboriginal Fisheries Strategy. A significant part of the Strategy was the introduction of three pilot sales programs, one of which resulted in the issuance of a communal fishing licence to three aboriginal bands, permitting fishers designated by the bands to fish for salmon in the mouth of the Fraser River for a period of 24 hours and to sell their catch. The appellants, who are all commercial fishers, mainly non-aboriginal, excluded from the fishery during this 24-hour period, participated in a protest fishery and were charged with fishing at a prohibited time. At their trial, they argued that the communal fishing licence discriminated against them on the basis of race. The trial judge found that the licence granted to the three bands was a breach of the appellants' equality rights under s. 15(1) of the Canadian Charter of Rights and Freedoms that was not justified under s. 1 of the Charter. Proceedings on all the charges were stayed. A summary convictions appeal by the Crown was allowed. The stay of proceedings was lifted and convictions were entered against the appellants. The Court of Appeal upheld that decision.

Relevant Paragraphs:

107. William Pentney raises the concern that if the phrase "other rights or freedoms" is construed broadly to include legislated or common law rights, this will result in the "undesirable and anomalous result" that the scope of a Charter-protected provision can be modified by ordinary legislation: "The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982: Part I — The Interpretive Prism of Section 25" (1988), 22 U.B.C. L. Rev. 21, at p. 57. Another concern often raised is that allowing statutory rights to be protected by s. 25 would elevate them to constitutional rights: see, e.g., Hutchinson, at p. 186. Similar concerns have been raised with respect to s. 16(3) of the Charter, the principle of advancement for language rights. In Lalonde v. Ontario (Commission de restructuration des services de santé) (2001), 56 O.R. (3d) 505, at para. 92, the Ontario Court of Appeal addressed these concerns as follows:

> We are not persuaded that s. 16(3) includes a "ratchet" principle that clothes measures taken to advance linguistic equality with constitutional protection. Section 16(3) builds on the principle established in Jones v. New Brunswick (Attorney General) (1974), [1975] 2 S.C.R. 182, 45 D.L.R. (3d) 583 that the Constitution's language guarantees are a "floor" and not a "ceiling" and reflects an aspirational element of advancement toward substantive equality. The aspirational element of s. 16(3) is not without significance when it comes to interpreting legislation. However, it seems to us undeniable that the effect of this provision is to protect, not constitutionalize, measures to advance linguistic equality. The operative legal effect of s. 16(3) is determined and limited by its opening words: "Nothing in this Charter limits the authority of Parliament or a legislature." Section 16(3) is not a rights-conferring provision. It is, rather, a provision designed to shield from attack government action that would otherwise contravene s.

15 or exceed legislative authority. [Emphasis in original.]

In my view, the same principles apply to legislative measures protected by s. 25.

Decision: The appeal is dismissed.

Charlebois v. Saint John (City), [2005] 3 SCR 563, 2005 SCC 74

Summary: Charlebois brought an application, in French, against the City of Saint John. The City and the Attorney General of New Brunswick moved to have the application struck. The City's pleadings were presented in English only. The Attorney General's pleadings were in French, but some citations were in English. Charlebois objected to receiving pleadings in English on the basis that s. 22 of the *Official Languages Act* ("*OLA*") of New Brunswick enacted in 2002 applied to the City and required it to adopt the language of proceedings chosen by him. Both the Court of Queen's Bench and the Court of Appeal found that s. 22 of the *OLA* does not apply to municipalities and cities because that interpretation would create internal incoherence within the *OLA*.

Dissenting judgement – Relevant paragraphs:

3.1 *The Internal Inconsistencies in the OLA*
[…]

35. In *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, Beetz J., for the majority, contrasted the right to use a language in court proceedings under s. 19(2) of the *Charter* and the right to communicate with offices of the government under s. 20 of the *Charter*. This last right "postulates the right to be heard or understood in either language" (p. 575). Wilson J., who concurred in the result, noted that there is an apparent inconsistency between the right to equality in s. 16(1) of the *Charter* and the right to limited services in s. 20(1) of the *Charter*. The solution was not, in her view, to limit the scope of s. 16(1) to eliminate the inconsistency, but to read s. 16(1) as "constitutionalizing a societal commitment to growth" (p. 620). Both ss. 16(1) and 20(1) were to be read generously and purposively (p. 621). Wilson J. also dealt with another apparent inconsistency between s. 27 of the *Charter* (the interpretation clause favouring multiculturalism) and s. 16(3) of the *Charter* (the interpretative clause favouring the progression of the official languages of Canada). Here again, the solution was not to negate the principle of growth in s. 16(3), but to interpret both sections in the context of the special status of official languages. The approach to interpretation of Wilson J. must be contrasted with the one adopted by Beetz J. who reasoned that language rights were politically motivated and had to be read restrictively. This latter approach was formally rejected in *Beaulac* where the Court insisted on the importance of s. 16 of the *Charter* in interpreting language laws:

> 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.)*, *supra*, at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick*, *supra*, 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. . . . [Emphasis in original; para. 25.]

Like Wilson J., the Court of Appeal of Ontario has noted that s. 16(3) of the *Charter* is an important factor in determining the proper rules of interpretation for quasi-constitutional rights (see *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505, at paras. 129-30).

36. This approach is not new. It is now a template for the interpretation of language rights, specially, as just demonstrated, where there is apparent conflict and ambiguity. Under it, the first step is not to read down the protections to eliminate inconsistencies, but to make sense of the overall regime in light of the constitutional imperative of approaching language rights purposefully, with a view to advancing the principles of equality and

protection of minorities. Institutional bilingualism is achieved when rights are granted to the public and corresponding obligations are imposed on institutions (see *Beaulac*, at paras. 20-22). No rights are given as such to institutions. Any interpretation of the *OLA* must take this into account. The real issue here is whether the apparent inconsistency between ss. 27 and 36 is such that the institutional obligations recognized *a priori* in s. 22 must *of necessity* be read down.

Decision: The appeal should be dismissed.

Charlebois v Mowat and The City of Moncton (2001), 2001 NBCA 117.

Summary:

16. As we have seen, the appellant challenges the validity of City of Moncton by-law Z-4 on the ground that the City Council did not meet its constitutional obligation under subsection 18(2) of the *Charter* to enact, print and publish its by-laws in the two official languages of the province. He relies on subsections 16(2) and 18(2) as well as section 16.1 of the *Charter* and submits that the City of Moncton's failure to comply with its constitutional obligation can only result in the invalidity of city by-law Z-4.

17. This is the first case in which this Court is called upon to construe language rights set out in subsections 16(2) and 18(2) and section 16.1 of the *Charter*. With the exception of minority language educational rights guaranteed under section 23 of the *Charter*, the courts have rarely had to interpret language rights. The issue of invalidity raised by the appellant in this case requires a review of the content and scope of the language rights invoked, in particular, the meaning that should be given to subsection 18(2) and the determination of the larger objects of the rights which stem from subsection 16(2) and section 16.1 of the *Charter*.

Relevant paragraphs:

The Scope of Subsection 16(2) and Section 16.1 of the Charter
62. One cannot understand the scope of the language guarantees afforded by the *Charter* without taking into account the fundamental principle which embodies both the language policy implemented in New Brunswick and the commitment of the government to bilingualism and biculturalism. The constitutional principle of the equality of official languages and the equality of the two official linguistic communities and of their right to distinct institutions is the linchpin of New Brunswick's language guarantees regime.

63. Indeed, subsection 16(2) constitutionalizes the principle of the equality of status of English and French and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick. Subsection 16(3) states that nothing in the *Charter* limits the authority of the Parliament of Canada or a provincial legislature to adopt measures to advance the equality of status or use of English and French. Even though this provision does not impose a positive obligation on the Parliament of Canada or the provinces, it nonetheless recognizes the possibility for the lawmaker to create language rights other than those entrenched in the *Charter*. Finally, subsection 16.1(1) declares, on the one hand, that the English linguistic community and the French linguistic community have equality of status and equal rights and privileges and, on the other hand, that they have the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities. Subsection 16.1(2) recognizes the role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection 16.1(1). In short, this section constitutionalizes the principles of *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, *supra*. The equality provided under section 16.1 is based, not on the equality of the languages as provided for in subsection 16(2), but on the equality of New Brunswick's English linguistic community and French linguistic community. Unlike subsection 16(2), this provision therefore includes collective rights whose holders are the linguistic communities themselves.

Decision:

134. For the foregoing reasons, I would allow the appeal and set aside the decision of the trial judge. I declare the by-laws of the City of Moncton, including by-law Z-4, to be invalid and of no force and effect under subsection 52(1) of the *Constitution Act, 1982*. However, the effectiveness of the declaration of invalidity would be suspended for a period of one year from the date of this judgment to enable the City of Moncton and the

government of New Brunswick to comply with their constitutional obligations.

Lalonde v Ontario (Commission de restructuration des services de santé) (2001), 56 OR (3d) 505, *[2001] OJ No 4768 (Ont CA)* *Facta : The Commissionner of Official Languages*

Summary: Montfort is an Ontario francophone hospital. Its medical services and training are essentially francophone, and it is the only hospital in Ontario to provide a wide range of medical services and training in a truly francophone setting. The Health Services Restructuring Commission issued its first report and a notice of intention to close Montfort in 1997. In response to a storm of protest, the final report of the Commission reversed the initial proposal to close Montfort and instead issued directions which would substantially reduce Montfort's services to the point where Montfort would no longer function as a community hospital. Montfort and the respondents brought an application to set aside the directions of the Commission. The application was allowed. The Divisional Court found that Commission's directions would have the following effects: reduce the availability of health care services in French to the francophone population in the Ottawa-Carleton region, a region designated as bilingual under the French Language Services Act, R.S.O. 1990, c. F.32; jeopardize the training of French language health care professionals; and impair Montfort's broader role as an important linguistic, cultural and educational institution, vital to the minority francophone population of Ontario. The court held that the directions did not violate s. 15 of the Canadian Charter of Rights and Freedoms, as any differential treatment was not based upon an enumerated or analogous ground. Montfort appealed that portion of the judgment. The court held that the directions should be set aside because they violated one of the fundamental organizing principles of the Constitution, the principle of respect for and protection of minorities. Ontario appealed that portion of the judgment.

Relevant paragraphs:

Issue 2: Does s. 16(3) of the Charter protect the status of Montfort as a francophone institution?

90. Montfort adopts an argument based on s. 16(3) of the Charter advanced by two of the intervenors, the Commissioner of Official Languages of Canada and La Fédération des communautés francophones et acadienne du Canada. They submit that once the province established Montfort as a homogeneous francophone institution, s. 16(3) provided a constitutional shield, limiting the right of Ontario to affect or reduce that status. Section 16(3) embodies the constitutional objective of advancing toward the substantive equality of Canada's two official languages. This objective, it is submitted, is to be achieved by means of a "ratchet" principle. It is argued that once Ontario takes a step in the direction of advancing the substantive equality of French, s. 16(3) "ratchets" that step to the level of a constitutional right, limiting any retreat from that advance. Although not constitutionally required, provincial measures advancing linguistic equality are responsive to a constitutional aspiration. Once taken, steps towards substantive linguistic equality gain constitutional protection, and advances can only be withdrawn if properly justified. It is submitted that this interpretation of s. 16(3) is supported by the principle, elaborated below, that language rights are to be given a large and liberal interpretation. Reliance is also placed upon the unwritten constitutional principle of respect for and protection of minorities as an interpretive aid.

91. The respondents particularly rely on the following passage from the dissenting judgment of Wilson J. in Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch, [1986] 1 S.C.R. 549 at pp. 618-19, 27 D.L.R. (4th) 406:

> In my view, the difficulty in characterizing s. 16 of the Charter stems in large part from the problems of construction inherent in s. 16(1). I would read the opening statement "English and French are the official languages of Canada" as declaratory and the balance of the section as identifying the main consequence in the federal context of the official status which has been declared, namely that the two languages have equality of status and have the same rights and privileges as to their use in all institutions of the Parliament and government of Canada. Subsection (3) of s. 16 makes it clear, however, that these consequences represent the goal rather than the present reality; they are something that has to be "advanced" by Parliament and the legislatures. This would seem to be in the spirit of Jones v. Attorney General of New Brunswick, [1975] 2 S.C.R. 182, namely that legislatures cannot derogate from already declared

> rights but they may add to them. Provided their legislation "advances" the cause of equality of status of the two official languages it will survive judicial scrutiny; otherwise not. I do not believe, however, that any falling short of the goal at any given point of time necessarily gives a right to relief. I agree with those who see a principle of growth or development in s. 16, a progression towards an ultimate goal. Accordingly the question, in my view, will always be -- where are we currently on the road to bilingualism and is the impugned conduct in keeping with that stage of development? If it is, then even if it does not represent full equality of status and equal rights of usage, it will not be contrary to the spirit of s. 16.

92. We are not persuaded that s. 16(3) includes a "ratchet" principle that clothes measures taken to advance linguistic equality with constitutional protection. Section 16(3) builds on the principle established in Jones v. New Brunswick (Attorney General) (1974), [1975] 2 S.C.R. 182, 45 D.L.R. (3d) 583 that the Constitution's language guarantees are a "floor" and not a "ceiling" and reflects an aspirational element of advancement toward substantive equality. The aspirational element of s. 16(3) is not without significance when it comes to interpreting legislation. However, it seems to us undeniable that the effect of this provision is to protect, not constitutionalize, measures to advance linguistic equality. The operative legal effect of s. 16(3) is determined and limited by its opening words: "Nothing in this Charter limits the authority of Parliament or a legislature." Section 16(3) is not a rights-conferring provision. It is, rather, a provision designed to shield from attack government action that would otherwise contravene s. 15 or exceed legislative authority. See André Tremblay and Michel Bastarache, "Language Rights", in Gérald-A. Beaudoin and Ed Ratushny, eds., The Canadian Charter of Rights and Freedoms: A Commentary, 2nd ed. (Toronto: Carswell, 1989), at p. 675:

> What was actually desired with this provision [s. 16(3)] was to assure that the power to provide a privileged status for French and English in a statute could not be challenged by virtue of the rights forbidding discrimination contained in section 15 of the Charter. Section 16(3) could thus prevent the measures designed to promote equal access to both official languages from being struck down.

93. Nor do we find any support for the "ratchet" principle in the case law. The passage relied on from Société des Acadiens is found in a dissenting judgment that focuses on s. 19(2) and the specific obligations that ss. 16-20 of the Charter impose on New Brunswick.

94. This argument is made on the assumption that government was under no obligation to create Montfort. This court has held in another context that in the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance Charter values. In Ferrell v. Ontario (Attorney General) (1998), 42 O.R. (3d) 97, 168 D.L.R. (4th) 1 (C.A.), a case dealing with the repeal of a statute intended to combat systemic discrimination in employment, Morden A.C.J.O. stated as follows at p. 110 O.R.:

> If there is no constitutional obligation to enact the 1993 Act in the first place I think it is implicit, as far as the requirements of the constitution are concerned, that the legislature is free to return the state of the statute book to what it was before the 1993 Act, without being obligated to justify the repealing statute under s. 1 of the Charter.
>
> . . . . .
>
> It would be ironic, in my view, if legislative initiatives such as the 1993 Act with its costs and administrative structure should, once enacted, become frozen into provincial law and susceptible only of augmentation and immune from curtailing amendment or outright appeal without s. 1 justification.

95. To summarize, Montfort is a public hospital that provides services in French. Section 16(3) of the Charter does not constitutionally enshrine Montfort because it is not a rights-conferring provision. Because Montfort is

not constitutionally protected by s. 16(3), Ontario can, subject to what follows, alter the status of Montfort as a community hospital without offending s. 16(3).

Decision: The appeals should be dismissed.

Baie d'Urfé (Ville) v Québec (Procureur général) (2001), [2001] JQ No 4821, (Qc CA) [Reported decision only available in French].

Summary: The National Assembly assented to *An Act to reform the municipal territorial organization of the metropolitan regions of Montréal, Québec and the Outaouais* ("Bill 170") on December 20, 2000. Bill 170 provides for the constitution of five new local municipalities. This Bill abolishes certain cities and merges them together in order to create new cities. These cities come into being on January 1, 2002. Bill 170 divides the territory of four of the new cities into several districts, which are in fact the abolished cities.

An Act to amend the Charter of the French language ("Bill 171") was also assented to. It substitutes a condition of "English as their mother tongue" for the condition of "speak a language other than French" with regard to teaching.

The plaintiff cities, which were some of the cities abolished by Bill 170, brought applications for a permanent injunction requesting that Bill 170 be declared unconstitutional, null and inapplicable, as it violated fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and by the Quebec *Charter of Human Rights and Freedoms*. One of the cities, as well as the Commissioner of Official Languages, attacked s. 6 of Bill 171 on the basis that it violated language rights provided for by s. 16(3) of the Canadian *Charter*.

The Superior Court dismissed all of the plaintiffs' arguments and, therefore, dismissed their applications. The Commissioner of Official Languages and some cities appealed. The province's conference of municipal judges was granted leave to intervene in the appeal and it claimed that Bill 170 infringed the municipal judges' judicial independence.

Relevant paragraphs [Reported decision available only in French]:

11.1.2 Les articles 16 à 22 de la Charte canadienne

134. À l'instar de la *Loi Constitutionnelle de 1867,* les dispositions de la Charte canadienne créent une certaine forme de bilinguisme dans les institutions fédérales et celles du Nouveau-Brunswick. Pareille obligation de bilinguisme ne s'applique pas au Québec.

135. « *Le français et l'anglais sont les langues officielles du Canada* » constitue une déclaration de principe rappelant aux Législatures leur rôle dans « *une progression vers un objectif ultime: l'égalité de statut ou d'usage des deux langues officielles* » [FN124].

136. Une telle interprétation ne crée aucun droit ou obligation linguistique en soi, mais seulement une invitation d'améliorer le bilinguisme institutionnel dans les provinces autres que le Nouveau-Brunswick[FN125]. D'ailleurs la Commissaire aux langues officielles du Canada reconnaît dans son mémoire ce principe politique d'avancement des deux langues officielles.

137. Cependant la Commissaire aux langues pousse son raisonnement plus loin. Elle affirme que la protection linguistique de l'article 16 de la Charte canadienne est un minimum auquel on ne peut diminuer sans enfreindre le droit des minorités linguistiques.

138. Partant de cette prémisse, elle soutient que l'article 6 de la *Loi 171*[FN126], auquel nous reviendrons plus loin, amoindrirait les droits de la minorité anglophone du Québec, en ce que moins de personnes pourront se classer comme citoyens de langue maternelle anglaise que celles utilisant l'anglais comme langue parlée[FN127].

139. Le durcissement du critère de reconnaissance en vertu de la *Charte de la langue française* viole, selon la Commissaire, les droits de la minorité anglophone tels que protégés par l'article 16(3) de la Charte canadienne.

140. La Cour ne partage cependant pas cette position pour les raisons suivantes.

141. D'une part, cette disposition ne confère aucun droit linguistique et ne peut servir à invalider une disposition législative, telle la *Loi 171*, adoptée par le législateur québécois dans les limites de son champ de compétence.

142. D'autre part, l'interprétation de la Commissaire donne un caractère constitutionnel à l'actuel article 29.1 de la *Charte de la langue française*. Et ce, alors qu'une modification de la Constitution doit nécessairement résulter d'un processus politique et passer par la voie d'un amendement constitutionnel et non par celle du judiciaire[FN128].

143. Le Constituant a prévu dans le texte écrit de l'article 16 de la Charte canadienne un « *code* » défini de droits de sorte que seul un amendement constitutionnel tel celui de 1993[FN129], peut y ajouter.

144. Sur ce dernier point, l'article 16.1(2) de la Charte canadienne constitue une disposition unique qui élève au rang de droit constitutionnel le bilinguisme institutionnel au Nouveau-Brunswick. Son cadre d'application bien délimité ne peut servir d'appui aux prétentions des demandeurs.

Note de bas de page:

FN124. *Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch v. Société des Acadiens du Nouveau-Brunswick Inc.*, note 119, p. 619, juge Wilson:

FN125. Voir l'opinion du professeur André Tremblay dans: André TREMBLAY, « Les droits linguistiques, articles 16 à 22 », dans Gérald A. Beaudoin et E. MENDEZ (dir.), *Charte canadienne des droits et libertés*, 3e éd., Montréal, Wilson & Lafleur, 1996, p. 928.

FN126. Cette nouvelle disposition modifie le critère de reconnaissance d'une municipalité ou d'un arrondissement bilingue prévu à l'article 29.1 de la *Charte de la langue française*. Le nouveau critère utilisé devient celui de la « langue maternelle », autre que le français, plutôt que celui de la « langue parlée ».

FN127. À titre d'exemple, la Commissaire cite les avantages conférés par la *Charte de la langue française* à un municipalité reconnue comme « bilingue ».

FN128. *Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch v. Société des Acadiens du Nouveau-Brunswick Inc.*, note 119, p. 579:

FN129. Voir note 115. [FN115. L'art. 16.1 a été ajouté aux termes de la Modification constitutionnelle de 1993 (Nouveau-Brunswick) (TR/93-54).]

Decision: The appeals are dismissed.

R v Entreprises WFH ltée, [2001] RJQ 2557, [2001] JQ no 5021 (Qc CA) *[Judgement only available in French]*.

Summary:

4. L'appelante a été déclarée coupable d'avoir enfreint l'art. 58 de la Charte de la langue française du Québec, L.R.Q., chap. C-11, qui exige la nette prédominance du français dans l'affichage commercial bilingue, et condamnée à payer l'amende minimale prévue par l'art. 205 de la même loi. Elle demande à la Cour de déclarer ces articles invalides et inopérants, au motif que l'art. 58 enfreint son droit à la liberté d'expression garanti par les art. 2b) de la Charte canadienne des droits et libertés et par l'art. 3 de la Charte des droits et libertés de la personne du Québec, L.R.Q., chap. C-12, ainsi que son droit à l'égalité garanti par l'art. 15 de la Charte canadienne et par l'art. 10 de la Charte québécoise.

Relevant paragraphs:

2. Le Multiculturalisme

100. L'appelante invoque l'art. 27 de la *Charte canadienne* qui se lit ainsi:

> 27. Toute interprétation de la présente *Charte* doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens.

101. L'appelante plaide que le principe du multiculturalisme implique nécessairement la liberté de choisir la langue du message commercial apparaissant sur les enseignes extérieures. Elle prétend qu'y imposer la nette prédominance du français enfreint le principe du multiculturalisme.

102. L'art. 58 ne prohibe l'utilisation d'aucune langue en particulier et je ne vois pas en quoi il enfreint l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens. Comme l'a affirmé le juge de la Cour supérieure, la *Charte de la langue française* est une loi dite de renforcement positif pour permettre à la langue française de retrouver et garder une place d'importance dans une communauté interculturelle mais à majorité francophone. L'article 27 de la *Charte canadienne* ne saurait s'interpréter sans égard à l'art. 16(3) de la même *Charte* qui se lit:

> 16.(3) La présente *Charte* ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais.

103. À mon avis, vu l'état constaté de vulnérabilité de la langue française, lors de l'adoption de l'art. 58, le législateur québécois a exercé le pouvoir conféré par l'art. 16(3).

Decision : La Cour rejette le pourvoi.

Société des Acadiens v Association of Parents, [1986] 1 SCR 549

Summary: Appellants brought an action seeking declaratory and injunctive relief against the mis en cause to prevent it from offering immersion programs to French-speaking students in its English schools. The New Brunswick Court of Queen's Bench delivered a judgment--later clarified in two subsequent decisions--in favour of the appellants but refused to issue the injunction. The mis en cause, despite pressure from parents of the students who would have enrolled in the program, decided not to appeal the judgment as clarified. The parents created the respondent Association and made applications for leave to appeal the judgment and for an extension of the appeal period. Prior to the hearing before Stratton J.A. in the Court of Appeal, the appellants requested that the matter be heard by a bilingual judge as some of the presentations were to be made in French. Stratton J.A. acceded to the request and referred the matter to another judge who decided that the matter had to be dealt with by a panel of the Court. A panel of three, Stratton J.A. presiding, granted respondent's applications. Hence this appeal to determine (1) whether the New Brunswick Court of Appeal had inherent jurisdiction to grant leave to appeal when the person seeking leave was not a party to the original action and was applying out of time, and if so, whether it exercised its discretion properly; and (2) whether s. 19(2) of the Canadian Charter of Rights and Freedoms entitles a party 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.

Relevant Paragraphs:

68. I think it is accurate to say that s. 16 of the *Charter* does contain a principle of advancement or progress in the equality of status or use of the two official languages. I find it highly significant however that this principle of advancement is linked with the legislative process referred to in s. 16(3), which is a codification of the rule in *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182.

Decision: The appeal should be dismissed.

Jones v. A.G. of New Brunswick, [1975] 2 SCR 182

Summary: A Reference was made by the Lieutenant Governor of New Brunswick, in Council, to the Supreme Court of New Brunswick, Appeal Division, of five questions of law dealing with the validity and effect of official languages legislation enacted by the Parliament of Canada and by the provincial Legislature. Leonard C. Jones was declared to be a person entitled to be heard on the Reference and was joined as a party. The matter comes to this Court by way of appeal by Jones and cross appeal by the Attorney General of New Brunswick. The Attorneys General of Canada and Quebec intervened in support of the respondent.

Relevant Paragraphs:

I come now to the submissions on ss. 133 and 91(1) of the *British North America Act.* The submission as to s. 133 by counsel for the appellant is that that provision is exhaustive of constitutional authority in relation to the use of English and French, and that a constitutional amendment is necessary to support any legislation which,

like the *Official Languages Act*, would go beyond it. I do not accept that submission which, in my opinion, is unsupportable under the language of s. 133, unsupportable as a matter of such history thereof as is available, and unsupportable under the scheme of distribution of *legislative* power as established by the *British North America Act* and as construed by the Courts over a long period of time.

I do not think that any assistance on the scope or effect of s. 133 can be obtained from such governmental documents as "A Canadian Charter of Human Rights" published in 1968, or "Federalism for the Future", also published in 1968, or the Final Report of the Royal Commission on Bilingualism and Biculturalism Volume 1, "The Official Languages", published in 1967. What those documents recommend, in relation to what I may term linguistic rights and going beyond the specifications of s. 133, is constitution entrenchment, but that is hardly a support for the contention that there can be no advance upon s. 133 without constitutional amendment. Certainly, what s. 133 itself gives may not be diminished by the Parliament of Canada, but if its provisions are respected there is nothing in it or in any other parts of the *British North America Act* (reserving for later consideration s. 91(1)) that precludes the conferring of additional rights or privileges or the imposing of additional obligations respecting the use of English

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and French, if done in relation to matters within the competence of the enacting Legislature.

The words of s. 133 themselves point to its limited concern with language rights; and it is, in my view, 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. There is no warrant for reading this provision, so limited to the federal and Quebec legislative chambers and their legislation, and to federal and Quebec Courts, as being in effect a final and legislatively unalterable determination for Canada, for Quebec and for all other Provinces, of the limits of the privileged or obligatory use of English and French in public proceedings, in public institutions and in public communications. On its face, s. 133 provides special protection in the use of English and French; there is no other provision of the *British North America Act* referable to the Parliament of Canada (apart from s. 91(1)) which deals with language as a legislative matter or otherwise. I am unable to appreciate the submission that to extend by legislation the privileged or required public use of English and French would be violative of s. 133 when there has been no interference with the special protection which it prescribes. I refer in this respect particularly to s. 11(4) of the *Official Languages Act*, already quoted.

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History does not support the appellant's contention. I need go back no farther than s. 41 of the *Act of Union*, 1840 (U.K.), c. 35 which reads as follows:

> And be it enacted that from and after the said Re-union of the said Two Provinces, all Writs, Proclamations, Instruments for summoning and calling together the Legislative Council and Legislative Assembly of the Province of Canada and for proroguing and dissolving the same, and all Writs of Summons and Election, and all Writs and public Instruments whatsoever relating to the said Legislative Council and Legislative Assembly or either of them, and all Returns to such Writs and Instruments, and all Journals, entries, and written or printed Proceedings of what Nature soever of the said Legislative Council and Legislative Assembly and each of them respectively, and all written or printed Proceedings and Reports of Committees of the said Legislative Council and Legislative Assembly respectively, shall be in the English language only: Provided always, that this Enactment shall not be construed to prevent translated copies of any such Documents being made, but no such Copy shall be kept among the Records of the Legislative Council or Legislative Assembly, or be deemed in any

> Case to have the Force of an original Record.

This provision for the use of English only was repealed by 1848 (U.K.), c. 56, and judicial notice may be taken of the fact that following that repeal statutes of the Province of Canada were enacted in both English and French. Among the Quebec Resolutions that were approved at the Conference in 1864, which was a prelude to Confederation in 1867, was Resolution 46, which became Resolution 45 at the London (Westminster Palace Hotel) Conference in 1866. It was as follows:

> Both the English and French Languages may be employed in the general Parliament and in its proceedings and in the local Legislature of Lower Canada, and also in the Federal courts and in the courts of Lower Canada.
> As it emerged in s. 133, this Resolution had an obligatory aspect added to its provision for the

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> use of English or French. In establishing equality of use of the two languages, s. 133 did so in relation to certain proceedings of a public character in specified legislative operations and in specified Courts, but it went no farther.

I am unable to agree that an implicit constitutional limitation must be read into the *British North America Act* as a deduction from the enactment of s. 133. This is the burden of the appellant's submission and, in my opinion, it runs counter to the principle of exhaustiveness which the Courts have ascribed to the distribution of legislative power under the *British North America Act.*

That principle was stated by the late Mr. Justice Rand in *Murphy v. C.P.R.*[4], at p. 643, as follows:

> It has become a truism that the totality of effective legislative power is conferred by the Act of 1867, subject always to the express or necessarily implied limitations of the Act itself.

Section 91(1) aside, there are no express limitations on federal legislative authority to add to the range of privileged or obligatory use of English and French in institutions or activities that are subject to federal legislative control. Necessary implication of a limitation is likewise absent because there would be nothing inconsistent or incompatible with s. 133, as it relates to the Parliament of Canada and to federal Courts, if the position of the two languages was enhanced beyond their privileged and obligatory use under s. 133. It is one thing for Parliament to lessen the protection given by s. 133; that would require a constitutional amendment. It is a different thing to extend that protection beyond its present limits.

Heavy reliance was placed by the appellant upon the canon of interpretation expressed in the maxim *expressio unius est exclusio alterius.* This maxim provides at the most merely a guide

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to interpretation; it does not pre-ordain conclusions. I find it inapt as a measure of what s. 133 embraces; indeed, it serves no purpose to that end. There is no attempt in the present case to bring something within s. 133 which is not expressly there; there is no attempt here to add to the constitutional reach of s. 133. It stands unimpeached, and it is rather outside of it, and under the grants of legislative power which leave it untouched, that Parliament has acted. Lord Dunedin's statement in *Whiteman v. Sadler*[5], at p. 527 (which the appellant invoked) that "it seems to me that express enactment shuts the door to further implication. *'Expressio unius est exclusio alterius'"* is a conclusion upon his construction of a particular section of a statute. It does not assist in the present case.

It remains to consider the effect of s. 91(1) of the *British North America Act* which confers legislative power upon Parliament in relation to "the amendment from time to time of the Constitution of Canada" except, *inter alia*, "as regards the use of the English or French language". The contention of the appellant is that this

exception was designed not only to maintain the integrity of s. 133 but went beyond it to enlarge the limitations thereof by embracing any use of the English or French language beyond what s. 133 itself prescribed. This contention would turn the exception from a grant of a new power under s. 91(1) into a general substantive limitation unrelated to that power, and it is untenable. I am not called upon here to state exhaustively what is comprehended within the phrase in s. 91(1) "the Constitution of Canada". It certainly includes the *British North America Act*, 1867 and its amendments, and hence includes s. 133. What is excepted from Parliament's amending power under s. 91(1) includes an exception as regards the use of the English or French language. Parliament is forbidden to amend the Constitution of Canada as regards

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the use of either of the languages, and s. 91(1) therefore points to the provisions of the Constitition dealing therewith, and thus to s. 133. See Scott, *"The British North America (No. 2) Act, 1949"* (1950), 8 Univ. of Tor. LJ. 201, at p. 205.

Decision: The appeal is dismissed and the cross appeal is allowed.

3 - Section 17 of the *Charter* – Official Languages of Canada

A. Subsection 17(1): Proceedings of Parliament

Subsection 17(1) of the *Charter* provides:

> **Proceedings of Parliament**
> 17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

In the jurisprudence, the relevant decisions that address the constitutional protection of language rights and Article 17(1) of the Charter are:

Knopf v Canada (Speaker of the House of Commons), 2007 FCA 308, [2007] F.C.J. No. 1474

Summary:

2. On April 20, 2004, the appellant appeared before the House of Commons Standing Committee on Canadian Heritage to testify as a specialized lawyer on matters relating to copyright reform, World Intellectual Property Organization treaty ratification, and private copying.

3. Prior to his appearance, he sent four documents to the Committee's clerk requesting their distribution to its members. The clerk accepted the documents and made copies of them. However, the Committee members decided not to allow for their distribution because the documents were in English only.

4. This decision gave effect to a rule of procedure previously adopted by the Committee, which provides for the distribution of documents to its members only when they are available in both official languages (minutes of proceedings of the Committee, February 24, 2004). The Committee reaffirmed the same rule at its organizational meeting for the First Session of the 38th Parliament on October 18, 2004.

5. The appellant opines that a witness before a parliamentary committee has the right to submit documents in either official language for contemporaneous distribution to committee members as part of his or her testimony. When appearing in front of the Committee, the appellant states:

> ... I think it's more important that the committee be informed than that everything be bilingual....

6. November 11, 2004, the appellant filed a complaint with the Commissioner of Official Languages pursuant to section 58 of the Act. He repeated his previous statement: "I have a right to ask the members to read my material

in the language of my choice. I would rather that it not be read by one or more members than it be inadequately or inaccurately translated". By letter dated March 1, 2005, the Commissioner dismissed his complaint.

7. Therefore, the appellant brought an Application pursuant to the provisions of Part X of the Act and claimed a violation of his language rights under the Act, the Charter of Rights and Freedoms ("Charter"), and the Constitution Act, 1867.

Relevant paragraphs:

38. Subsection 4(1) of the Act reiterates the right first recognized by section 133 of the *Constitution Act* and reaffirmed by subsection 17(1) of the Charter. These three sections recognize the right of any person participating in parliamentary proceedings "to use" ("d'employer") English or French. Subsection 4(1) of the Act, as well as subsection 17(1) of the Charter create a scheme of unilinguism at the option of the speaker or writer, who cannot be compelled by Parliament to express himself or herself in another language than the one he or she chooses (See *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460 at para.60).

39. However, in some other language rights provisions, such as subsection 20(1) of the Charter and section 25 of the Act, the legislator chose the term "to communicate" ("communiquer"). In my opinion, this is not accidental.

40. To "communicate" presupposes interactions, bilateral actions between the parties. The verb "to use" does not encompass such interaction. The right is unilateral: one has the right to address the House of Commons in the official language of his choice. In the case at bar, Mr. Knopf made his opinion known on particular topics of interest to the Committee and filed his documents. There stops his right under subsection 4(1) of the Act.

41. I do not read into subsection 4(1) of the Act any requirement for a Committee to distribute documents to its members in one official language. Subsection 4(1) of the Act provides the appellant with a right to address the Committee in the language of his choice only. Once this right has been exercised, subsection 4(1) of the Act does not compel the Committee to act in a certain way with the oral or written information provided to it.

42. Justice Layden-Stevenson was right in finding that the distribution of documents does not fall within the scope of subsection 4(1) of the Act. The right to use an official language of choice does not include the right to impose upon the Committee the immediate distribution and reading of documents filed to support one's testimony. The decision on how and when to treat the information received from a witness clearly belongs to the Committee. I find, therefore, that the appellant's language rights were not infringed upon.

Décision : The appeal is dismissed.

New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly), [1993] 1 SCR 319

Summary:

The respondent made an application to the Nova Scotia Supreme Court, Trial Division for an order allowing it "to film the proceedings of the House of Assembly with its own cameras". The application was based on s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of expression, including freedom of the press. The media have regular access to the public gallery in the House where they may witness the proceedings and they also have access to Hansard, but the House of Assembly, in the exercise of its parliamentary privileges, has prohibited the use of television cameras in the House, except on special occasions. The respondent claimed that it was possible to film the proceedings from the public gallery with modern hand‑held cameras which were both silent and required no special lighting or electrical equipment. In his evidence, the Speaker indicated that the respondent's proposal would interfere with the decorum and orderly proceedings of the House. Apart from controlling decorum, the House would have no control over the production and use of the film. The trial judge granted the respondent's claim and the Appeal Division confirmed its right of access, pursuant to s. 2(*b*) of the *Charter*, to televise the proceedings of the House from the gallery with its own unobtrusive cameras. The question as to whether any limits could be placed on this right of access was left open.

Since the judgment of the Appeal Division, the House of Assembly's proceedings have been televised through a

system approved and controlled by the House. The cameras of the "electronic Hansard" record only the member recognized by the Speaker as having the floor. A direct feed of the "electronic Hansard" is available to the media who are able to broadcast the proceedings live or tape them.

The constitutional questions stated here queried (1) whether the *Charter* applies to the members of the House of Assembly when exercising their privileges as members; (2) if so, whether exercising a privilege so as to refuse access to the media to the public gallery to record and relay to the public proceedings of the House of Assembly by means of their cameras contravenes s. 2(*b*) of the *Charter*; and (3) if so, whether such refusal is justifiable under s. 1 of the *Charter*.

Relevant Paragraphs:

To sum up the argument thus far, there are strong literal and textual reasons to conclude that the term "legislature" used in s. 32 of the *Charter* refers in general only to the body exercising legislative power, in this case the House of Assembly with the Lieutenant Governor, and not to its constituent parts individually.

There are at least three sections of the *Charter* that, at first blush, cast some doubt on this interpretation. McLachlin J. refers to s. 5 of the *Charter*, which provides that "[t]here shall be a sitting of Parliament and of each legislature at least once every twelve months". She points out that the legislature is called to sit by the Speaker giving notice to the members, that the action is purely internal to the legislative body, and that the Queen's representative has no role to play. Thus, she concludes the word "legislature" refers to actions which are exclusively those of the House alone and to which this section of the *Charter* must apply.

The same may be said of ss. 17 and 18 of the *Charter*. Section 17, referring to the right to use English or French in debate, uses the word Parliament and s. 17(2), referring to the same right in the legislative assembly of New Brunswick, uses the term "legislature of New Brunswick". Section 18 uses the same language to refer to the "statutes, records and journals" of Parliament and the legislature of New Brunswick. Section 17 uses the term "legislature" to refer to the Assembly, while s. 18 uses the word "legislature" to refer to both the legislature proper (i.e., the body that enacts statutes) and the Assembly (i.e., the body that keeps a "journal").

While these examples show that usage is not completely consistent, they by no means take away from the general rule that "legislature" in s. 32 means the body that enacts legislation. It must be observed that there is no single meaning of the term "legislature" which can be applied to both s. 33 on the one hand, and ss. 5, 17 and 18 on the other. Indeed, there is no single interpretation of the word "legislature" that can be used with complete precision within s. 18 itself. In s. 33, "legislature" clearly means the body capable of enacting legislation, whereas in ss. 5 and 17, the context makes it clear that it is the House itself that is intended. Section 18 refers to the "statutes, records and journals" of the legislature. But, strictly speaking, the "legislature" enacts "statutes" whereas the "Assembly" keeps a "journal". This lack of perfectly consistent usage is not surprising given the nature of these documents and particularly their attempt to set out in relatively few words concepts which are historically charged with meaning. It also underlines the point that, in interpreting these provisions, very careful attention must be paid to the contextual and purposive considerations outlined earlier in these reasons.

In this regard, there are particular historical and structural considerations that must be borne in mind with respect to ss. 5, 17 and 18 of the *Charter*. These sections are extensions of provisions originally found in the *British North America Act, 1867*. In the case of s. 5, it is modeled on the now repealed s. 20 of the *British North America Act, 1867*. That section referred to there being a session of the Parliament of Canada, and of course, the use of the term Parliament of Canada was convenient given the requirement to include both the Senate and the House of Commons. The use of the words "session" and "sitting" in that section also made the intention to refer only to the House and the Senate quite clear even though the word used, i.e., "Parliament" was not strictly correct.

With respect to ss. 17 and 18, they are modeled on the original s. 133, which rather interestingly, provided: "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 further that "[t]he Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both Languages". The

original section clearly distinguished between "proceedings before the House" and "enactments of the legislature", but this clarity was lost in the updated versions.

Sections 5, 17 and 18 are found in areas of the *Charter* which are excluded from the override provisions of s. 33 of the *Charter*. This suggests that they are in a different category than the rights contained in ss. 2 and 7 through 15, and may explain, if not entirely excuse, the inconsistency in the use of language between these sections and other places in the *Charter* and the *Constitution Act* generally.

To summarize, the language, structure and history of the constitutional text are strongly suggestive of the conclusion that the word "legislature" in s. 32 in general means the body capable of enacting legislation and not its component parts taken individually. There are certain provisions in the *Charter*, notably ss. 5, 17 and 18, in relation to which the specific context requires a different meaning. However, this case concerns whether the rights guaranteed by s. 2 of the *Charter* apply to the House of Assembly and I conclude that s. 32, properly interpreted, makes it clear that they do not.

Decision: The appeal should be allowed.

Société des Acadiens v Association of Parents, [1986] 1 SCR 549

Summary: Appellants brought an action seeking declaratory and injunctive relief against the mis en cause to prevent it from offering immersion programs to French-speaking students in its English schools. The New Brunswick Court of Queen's Bench delivered a judgment--later clarified in two subsequent decisions--in favour of the appellants but refused to issue the injunction. The mis en cause, despite pressure from parents of the students who would have enrolled in the program, decided not to appeal the judgment as clarified. The parents created the respondent Association and made applications for leave to appeal the judgment and for an extension of the appeal period. Prior to the hearing before Stratton J.A. in the Court of Appeal, the appellants requested that the matter be heard by a bilingual judge as some of the presentations were to be made in French. Stratton J.A. acceded to the request and referred the matter to another judge who decided that the matter had to be dealt with by a panel of the Court. A panel of three, Stratton J.A. presiding, granted respondent's applications. Hence this appeal to determine (1) whether the New Brunswick Court of Appeal had inherent jurisdiction to grant leave to appeal when the person seeking leave was not a party to the original action and was applying out of time, and if so, whether it exercised its discretion properly; and (2) whether s. 19(2) of the Canadian Charter of Rights and Freedoms entitles a party 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.

Relevant Paragraphs:

51. The somewhat compressed and complicated statutory drafting exemplified in s. 133 has been shortened and simplified in ss. 17 to 19 of the *Charter*, as befits the style of a true constitutional instrument. The wording of the relevant part of s. 133 ("may be used by any Person or in any Pleading or Process in or issuing from ... all or any of the Courts of") has been changed to "may be used by any person in, or in any pleading in or process issuing from, any court of". I do not think that anything turns on this change, which is one of form only.

52. Furthermore, in my opinion, s. 19(2) of the *Charter* does not, anymore than s. 133 of the *Constitution Act, 1867*, provide two separate rules, one for the languages that may be used by any person with respect to in-court proceedings and the languages that may be used in any pleading or process. A proceeding as well as a process have to emanate from someone, that is from a person, whose language rights are thus protected in the same manner and to the same extent, as the right of a litigant or any other participant to speak the official language of his choice in court. Under both constitutional provisions, there is but one substantive rule for court processes and in-court proceedings and I am here simply paraphrasing what has been said on this point in the *MacDonald* case, in the reasons of the majority, at p. 484.

53. 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.

54. I am reinforced in this view by the contrasting wording of s. 20 of the *Charter*. Here, the *Charter* has expressly provided for the right to communicate in either official language with some offices of an institution of the Parliament or Government of Canada and with any office of an institution of the Legislature or Government of New Brunswick. The right to communicate in either language pos-tulates the right to be heard or understood in either language.

55. I am further reinforced in this view by the fact that those who drafted the *Charter* had another explicit model they could have used had they been so inclined, namely s. 13(1) of the *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. O-1:

> 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.

56. Here again, s. 13(1) of the Act, unlike the *Charter*, has expressly provided for the right to be heard in the official language of one's choice. Those who drafted s. 19(2) of the *Charter* and agreed to it could easily have followed the language of s. 13(1) of the *Official Languages of New Brunswick Act* instead of that of s. 133 of the *Constitution Act, 1867*. That they did not do so is a clear signal that they wanted to provide for a different effect, namely the effect of s. 133. If the people of the Province of New Brunswick were agreeable to have a provision like s. 13(1) of the *Official Languages of New Brunswick Act* as part of their law, they did not agree to see it entrenched in the Constitution. I do not think it should be forced upon them under the guise of constitutional interpretation.

Decision: The appeal should be dismissed.

MacDonald v City of Montreal, [1986] 1 SCR 460

Summary: Appearing before the Municipal Court of the City of Montréal to answer a charge of violating a municipal by-law, appellant, an English-speaking person, unsuccessfully challenged the jurisdiction of the court to proceed against him on the ground that the unilingual French summons issued by the court violated his fundamental rights as an English speaker under s. 133 of the *Constitution Act, 1867*. In a trial *de novo* in the Superior Court, appellant was again convicted. The court concluded that documents such as summonses emanating from the province's courts must be considered constitutionally valid so long as they are issued in one or other of the French or English languages. The Court of Appeal refused to grant leave to appeal from the judgment of the Superior Court. This appeal raises two issues: (1) whether the Supreme Court has jurisdiction to hear a case for which leave to appeal to a provincial court of appeal was denied by the provincial court of appeal and (2) if so, whether the summons, being expressed in the French language only, and not in the language of the English-speaking accused, offends the provisions of s. 133 of the *Constitution Act, 1867*, resulting in a total absence of jurisdiction of the court to proceed against him.

Relevant Paragraphs:

60. Hugessen A.C.J. correctly observed in *Walsh* that the essential words of s. 133 are the same with respect to the language of Parliamentary debates and to the language of court proceedings and should receive the same construction. It is clear that the rights preserved in Parliamentary debates are those of the speaker only. Those who listen to the speaker cannot have a right to be addressed in the language of their choice without defeating the speaker's own right to use the language of his choice and making the constitutional provisions nonsensical.

Also, the speaker might be unilingual and find it impossible to address his listeners in the language of their choice. Furthermore, the choice of the listeners might vary, making it impossible to accommodate each of them. The use of interpreters or simultaneous translation which, in any event, has nothing to do with s. 133, would not meet the essential thrust of appellant's submission that he has the right to be addressed in the language of his choice by the very person or body who is purporting to address him.

[…]

66. Since s. 133 confers no language right to the appellant as the recipient of a summons, it imposes no correlative duty on the State or anyone else.

67. The only positive duty that I can read in s. 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, that is to enact, print and publish federal and provincial acts in both languages: *Blaikie No. 1* at p. 1022. In *Forest v. Registrar of Court of Appeal of Manitoba*, [1977] 5 W.W.R. 347 at p. 355, it seems to have been suggested by Freedman C.J.M. that s. 23 of the *Manitoba Act, 1870*, imposed a duty to provide the legislature with simultaneous translation for the purposes of parliamentary debate but, with respect for the contrary view, I fail to see the imposition of any such duty in either provision.

68. 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.

Decision: The appeal should be dismissed.

B. Subsection 17(2): Proceedings of New Brunswick legislature

Subsection 17(2) of the *Charter* provides:

> **Proceedings of New Brunswick legislature**
> (2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

In the jurisprudence, the relevant decisions that address the constitutional protection of language rights and Article 17(2) of the Charter are:

Charlebois v Mowat and The City of Moncton (2001), 2001 NBCA 117.

Summary:

16. As we have seen, the appellant challenges the validity of City of Moncton by-law Z-4 on the ground that the City Council did not meet its constitutional obligation under subsection 18(2) of the *Charter* to enact, print and publish its by-laws in the two official languages of the province. He relies on subsections 16(2) and 18(2) as well as section 16.1 of the *Charter* and submits that the City of Moncton's failure to comply with its constitutional obligation can only result in the invalidity of city by-law Z-4.

17. This is the first case in which this Court is called upon to construe language rights set out in subsections 16(2) and 18(2) and section 16.1 of the *Charter*. With the exception of minority language educational rights guaranteed under section 23 of the *Charter*, the courts have rarely had to interpret language rights. The issue of invalidity raised by the appellant in this case requires a review of the content and scope of the language rights invoked, in particular, the meaning that should be given to subsection 18(2) and the determination of the larger

objects of the rights which stem from subsection 16(2) and section 16.1 of the *Charter*.

Relevant paragraphs:

40. Several decisions of the Supreme Court of Canada have expressly acknowledged, subject to minor variations of style, the similarity between the constitutional provisions in section 133 of the *Constitution Act, 1867,* section 23 of the *Manitoba Act, 1870* and in sections 17, 18 and 19 of the *Charter*. In *Société des Acadiens*, Beetz, J. noted that sections 17, 18 and 19 of the *Charter* were borrowed from the English version of section 133. And he concluded at page 573: "It would accordingly be incorrect in my view to decide this case without considering the interpretation of s. 133. ..." With respect to the similarity between sections 23 and 133, see *Manitoba Reference No. 1*, at pages 743-44, and *Manitoba Reference No. 2*, at page 220.

41. As I have already indicated, the respondents and the intervener, the Province of New Brunswick, have based the case they made before this Court, on the one hand, on the conclusion set out in *Blaikie No. 2* that municipal by-laws are not included in the expression "statutes of the legislature" and, on the other hand, on the principle articulated in *Société des Acadiens* that because of the similarity between subsection 18(2) (in this case) and section 133, this case which deals with these provisions cannot be properly decided without taking into account the interpretation of section 133, i.e., the interpretation given in *Blaikie No. 2*.

42. This is clearly the position adopted by the trial judge at paragraphs 12, 14 and 17 of his reasons for judgment. After quoting several relevant passages from *Société des Acadiens* and *Blaikie No. 2*, he concluded that he had to take into account the interpretation already given in *Blaikie No. 2*. According to him, this interpretation was determinative and sealed the outcome of the case before him with respect to subsection 18(2) of the *Charter*.

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

44. In this regard, it is important to remember the words of Dickson, C.J. who, dissenting on the constitutional issue, stated in *Société des Acadiens*, at page 561 that despite the similarity between section 133 and subsection 19(2) "we are dealing with different constitutional provisions enacted in different contexts. In my view, the interpretation of s. 133 of the *Constitution Act, 1867* is not determinative of the interpretation of the *Charter"*.

45. Equally important are the following comments made by Dickson, J. who expressed the same point of view in *R. v. Big M Drug Mart Ltd*., at page 343:

> ... it is certain that the *Canadian Charter of Rights and Freedoms* does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the *Charter*'s entrenchment. The language of the *Charter* is imperative. It avoids any reference to existing or continuing rights ... .

46. Finally, in *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613, the Supreme Court held, at page 638, that notwithstanding the similarity in the wording of paragraph 2(*c*) of the *Canadian Bill of Rights* and section 10 of the *Charter*, the premise that the framers of the *Charter* must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the *Charter* was enacted "is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts".

47. In light of these statements dealing with the principles of interpretation of constitutional rights and in light of recent decisions of the Supreme Court in *Beaulac* and *Arsenault-Cameron, supra*, I think that the principle set

out by Beetz, J. in *Société des Acadiens* according to which the interpretation of language guarantees under section 133 must be taken into account cannot mean that the purposive analysis of rights established by the cases already cited can be ignored. As stated by the Supreme Court, "the focus on the historical context of language and culture indicates that different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province." (See *Reference re Public Schools Act (Man.), supra*, at page 851.) Accordingly, I believe that the decision in *Blaikie No. 2*, while serving as a guide for the interpretation of subsections 17(2), 18(2) and 19(2) of the *Charter*, must be viewed with prudence by the courts of this province.

Analysis of Subsection 18(2) According to the Broad and Purposive Interpretation Sanctioned in Beaulac

[…]

61. As I have already observed, subsection 18(2) creates a regime of compulsory bilingualism applicable to statutes enacted by the legislature, regulations made by the government and court rules of practice. Moreover, the combined effect of part of subsection 18(2) and subsection 17(2) is to create a form of parliamentary bilingualism applicable to the New Brunswick legislature made up of two separate components. On the one hand, subsection 18(2) provides that the records and journals must be published in both official languages and, on the other hand, subsection 17(2) establishes a form of optional bilingualism applicable to the debates and other proceedings of the legislature during which everyone has the right to use English or French. These two aspects of parliamentary bilingualism are not at issue in this case.

Decision:

134. For the foregoing reasons, I would allow the appeal and set aside the decision of the trial judge. I declare the by-laws of the City of Moncton, including by-law Z-4, to be invalid and of no force and effect under subsection 52(1) of the *Constitution Act, 1982*. However, the effectiveness of the declaration of invalidity would be suspended for a period of one year from the date of this judgment to enable the City of Moncton and the government of New Brunswick to comply with their constitutional obligations.

4 - Section 18 of the *Charter* – Official Languages of Canada

A. Subsection 18(1): Parliamentary statutes and records

Subsection 18(1) of the *Charter* provides:

> **Parliamentary statutes and records**
> 18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

In the jurisprudence, the relevant decisions that address the constitutional protection of language rights and Article 18(1) of the Charter are:

R v Gibbs, 2001 BCPC 361

Summary:
77. THE COURT: Sandra Gibbs is charged individually on an Information with two counts, Counts 1 and 2 with failing to file a completed personal income tax return for 1996 and 1997; Counts 3 and 4 as a director of an incorporated company failing to provide corporate income tax returns for that company for the same two years, 1996 and 1997.

85. […] [Sandra Gibbs] argues that her rights pursuant to s. 18(1) and s. 20(1) [of the *Charter*] have been infringed by virtue of the fact that she is unable on her assertion to obtain an authenticated certified copy of the *Income Tax Act* which would allow her to know the extent of her rights and obligations.

Relevant paragraphs:
105. Finally, there is the issue of the s. 18(1) and s. 20(1) of the *Charter of Rights*. That went to the application by the accused for an order by the court directing that an authentic and verified copy in English of the *Income Tax Act* be produced. The defendant says that she requires it in order to make full answer and defence and that failure to make such an *Act* available to her after she has made numerous efforts to obtain such an *Act* amount to a breach of her rights. That is an argument that I had not seen raised before and I have referred back to the *Charter*. Section 18 of the *Charter*, having read it, in my view does not go to the issue of a direction that she is to be provided with a printed copy in English; rather, it's a direction that the statute's, records and journals of the Parliament of Canada are to be printed and published in English and French and both language versions are equally authoritative. In my view, there's nothing that is shown that that has been infringed or denied. The fact that she has been unable to in essence obtain a compilation which does not have some sort of a disclaimer attached to it does not, in my view, amount to an infringement of that. The focus of that section goes to the bilingual requirement for legislation being produced in English and French.

Decision :
107. Accordingly, I am satisfied that for the reasons stated the legislation is [*Intra*] *vires* and is not invalid because it infringes or denies any of the provisions of the *Charter of Rights* which have been cited. All right.

New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly), [1993] 1 SCR 319

Summary:

The respondent made an application to the Nova Scotia Supreme Court, Trial Division for an order allowing it "to film the proceedings of the House of Assembly with its own cameras". The application was based on s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of expression, including freedom of the press. The media have regular access to the public gallery in the House where they may witness the proceedings and they also have access to Hansard, but the House of Assembly, in the exercise of its parliamentary privileges, has prohibited the use of television cameras in the House, except on special occasions. The respondent claimed that it was possible to film the proceedings from the public gallery with modern hand‑held cameras which were both silent and required no special lighting or electrical equipment. In his evidence, the Speaker indicated that the respondent's proposal would interfere with the decorum and orderly proceedings of the House. Apart from controlling decorum, the House would have no control over the production and use of the film. The trial judge granted the respondent's claim and the Appeal Division confirmed its right of access, pursuant to s. 2(*b*) of the *Charter*, to televise the proceedings of the House from the gallery with its own unobtrusive cameras. The question as to whether any limits could be placed on this right of access was left open.

Since the judgment of the Appeal Division, the House of Assembly's proceedings have been televised through a system approved and controlled by the House. The cameras of the "electronic Hansard" record only the member recognized by the Speaker as having the floor. A direct feed of the "electronic Hansard" is available to the media who are able to broadcast the proceedings live or tape them.

The constitutional questions stated here queried (1) whether the *Charter* applies to the members of the House of Assembly when exercising their privileges as members; (2) if so, whether exercising a privilege so as to refuse access to the media to the public gallery to record and relay to the public proceedings of the House of Assembly by means of their cameras contravenes s. 2(*b*) of the *Charter*; and (3) if so, whether such refusal is justifiable under s. 1 of the *Charter*.

Relevant Paragraphs:
To sum up the argument thus far, there are strong literal and textual reasons to conclude that the term "legislature" used in s. 32 of the *Charter* refers in general only to the body exercising legislative power, in this case the House of Assembly with the Lieutenant Governor, and not to its constituent parts individually.

There are at least three sections of the *Charter* that, at first blush, cast some doubt on this interpretation. McLachlin J. refers to s. 5 of the *Charter*, which provides that "[t]here shall be a sitting of Parliament and of each legislature at least once every twelve months". She points out that the legislature is

called to sit by the Speaker giving notice to the members, that the action is purely internal to the legislative body, and that the Queen's representative has no role to play. Thus, she concludes the word "legislature" refers to actions which are exclusively those of the House alone and to which this section of the *Charter* must apply.

The same may be said of ss. 17 and 18 of the *Charter*. Section 17, referring to the right to use English or French in debate, uses the word Parliament and s. 17(2), referring to the same right in the legislative assembly of New Brunswick, uses the term "legislature of New Brunswick". Section 18 uses the same language to refer to the "statutes, records and journals" of Parliament and the legislature of New Brunswick. Section 17 uses the term "legislature" to refer to the Assembly, while s. 18 uses the word "legislature" to refer to both the legislature proper (i.e., the body that enacts statutes) and the Assembly (i.e., the body that keeps a "journal").

While these examples show that usage is not completely consistent, they by no means take away from the general rule that "legislature" in s. 32 means the body that enacts legislation. It must be observed that there is no single meaning of the term "legislature" which can be applied to both s. 33 on the one hand, and ss. 5, 17 and 18 on the other. Indeed, there is no single interpretation of the word "legislature" that can be used with complete precision within s. 18 itself. In s. 33, "legislature" clearly means the body capable of enacting legislation, whereas in ss. 5 and 17, the context makes it clear that it is the House itself that is intended. Section 18 refers to the "statutes, records and journals" of the legislature. But, strictly speaking, the "legislature" enacts "statutes" whereas the "Assembly" keeps a "journal". This lack of perfectly consistent usage is not surprising given the nature of these documents and particularly their attempt to set out in relatively few words concepts which are historically charged with meaning. It also underlines the point that, in interpreting these provisions, very careful attention must be paid to the contextual and purposive considerations outlined earlier in these reasons.

In this regard, there are particular historical and structural considerations that must be borne in mind with respect to ss. 5, 17 and 18 of the *Charter*. These sections are extensions of provisions originally found in the *British North America Act, 1867*. In the case of s. 5, it is modeled on the now repealed s. 20 of the *British North America Act, 1867*. That section referred to there being a session of the Parliament of Canada, and of course, the use of the term Parliament of Canada was convenient given the requirement to include both the Senate and the House of Commons. The use of the words "session" and "sitting" in that section also made the intention to refer only to the House and the Senate quite clear even though the word used, i.e., "Parliament" was not strictly correct.

With respect to ss. 17 and 18, they are modeled on the original s. 133, which rather interestingly, provided: "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 further that "[t]he Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both Languages". The original section clearly distinguished between "proceedings before the House" and "enactments of the legislature", but this clarity was lost in the updated versions.

Sections 5, 17 and 18 are found in areas of the *Charter* which are excluded from the override provisions of s. 33 of the *Charter*. This suggests that they are in a different category than the rights contained in ss. 2 and 7 through 15, and may explain, if not entirely excuse, the inconsistency in the use of language between these sections and other places in the *Charter* and the *Constitution Act* generally.

To summarize, the language, structure and history of the constitutional text are strongly suggestive of the conclusion that the word "legislature" in s. 32 in general means the body capable of enacting legislation and not its component parts taken individually. There are certain provisions in the *Charter*, notably ss. 5, 17 and 18, in relation to which the specific context requires a different meaning. However, this case concerns whether the rights guaranteed by s. 2 of the *Charter* apply to the House of Assembly and I conclude that s. 32, properly interpreted, makes it clear that they do not.

Decision: The appeal should be allowed.

Société des Acadiens v Association of Parents, [1986] 1 SCR 549

Summary: Appellants brought an action seeking declaratory and injunctive relief against the mis en cause to prevent it from offering immersion programs to French-speaking students in its English schools. The New Brunswick Court of Queen's Bench delivered a judgment--later clarified in two subsequent decisions--in favour of the appellants but refused to issue the injunction. The mis en cause, despite pressure from parents of the students who would have enrolled in the program, decided not to appeal the judgment as clarified. The parents created the respondent Association and made applications for leave to appeal the judgment and for an extension of the appeal period. Prior to the hearing before Stratton J.A. in the Court of Appeal, the appellants requested that the matter be heard by a bilingual judge as some of the presentations were to be made in French. Stratton J.A. acceded to the request and referred the matter to another judge who decided that the matter had to be dealt with by a panel of the Court. A panel of three, Stratton J.A. presiding, granted respondent's applications. Hence this appeal to determine (1) whether the New Brunswick Court of Appeal had inherent jurisdiction to grant leave to appeal when the person seeking leave was not a party to the original action and was applying out of time, and if so, whether it exercised its discretion properly; and (2) whether s. 19(2) of the Canadian Charter of Rights and Freedoms entitles a party 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.

Relevant Paragraphs:

50. Subject to minor variations of style, the language of ss. 17, 18 and 19 of the *Charter* has clearly and deliberately been borrowed from that of the English version of s. 133 of the *Constitution Act, 1867* of which no French version has yet been proclaimed pursuant to s. 55 of the *Constitution Act, 1982*. It would accordingly be incorrect in my view to decide this case without considering the interpretation of s. 133 which provides:

> **133.** 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.

57. The only other provision, apart from s. 20, in that part of the *Charter* entitled "Official Languages of Canada", which ensures communication or understanding in both official languages is that of s. 18. It provides for bilingualism at the legislative level. In *MacDonald* one can read the following passage, in the reasons of the majority, at p. 496:

> Section 133 has not introduced a comprehensive scheme or system of official bilingualism, even potentially, but a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism at the option of the speaker in Parliamentary debates and at the option of the speaker, writer or issuer in judicial proceedings or processes. Such a limited scheme can perhaps be said to facilitate communication and understanding, up to a point, but only as far as it goes and it does not guarantee that the speaker, writer or issuer of proceedings or processes will be understood in the language of his choice by those he is addressing.

Decision: The appeal should be dismissed.

B. Subsection 18(2): New Brunswick statutes and records

Subsection 18(2) of the *Charter* provides:

New Brunswick statutes and records
(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

In the jurisprudence, the relevant decisions that address the constitutional protection of language rights and Article 18(2) of the Charter are:

Charlebois v Mowat and The City of Moncton (2001), 2001 NBCA 117.

Summary:

16. As we have seen, the appellant challenges the validity of City of Moncton by-law Z-4 on the ground that the City Council did not meet its constitutional obligation under subsection 18(2) of the *Charter* to enact, print and publish its by-laws in the two official languages of the province. He relies on subsections 16(2) and 18(2) as well as section 16.1 of the *Charter* and submits that the City of Moncton's failure to comply with its constitutional obligation can only result in the invalidity of city by-law Z-4.

17. This is the first case in which this Court is called upon to construe language rights set out in subsections 16(2) and 18(2) and section 16.1 of the *Charter*. With the exception of minority language educational rights guaranteed under section 23 of the *Charter*, the courts have rarely had to interpret language rights. The issue of invalidity raised by the appellant in this case requires a review of the content and scope of the language rights invoked, in particular, the meaning that should be given to subsection 18(2) and the determination of the larger objects of the rights which stem from subsection 16(2) and section 16.1 of the *Charter*.

Relevant paragraphs:

40. Several decisions of the Supreme Court of Canada have expressly acknowledged, subject to minor variations of style, the similarity between the constitutional provisions in section 133 of the *Constitution Act, 1867*, section 23 of the *Manitoba Act, 1870* and in sections 17, 18 and 19 of the *Charter*. In *Société des Acadiens*, Beetz, J. noted that sections 17, 18 and 19 of the *Charter* were borrowed from the English version of section 133. And he concluded at page 573: "It would accordingly be incorrect in my view to decide this case without considering the interpretation of s. 133. ..." With respect to the similarity between sections 23 and 133, see *Manitoba Reference No. 1*, at pages 743-44, and *Manitoba Reference No. 2*, at page 220.

41. As I have already indicated, the respondents and the intervener, the Province of New Brunswick, have based the case they made before this Court, on the one hand, on the conclusion set out in *Blaikie No. 2* that municipal by-laws are not included in the expression "statutes of the legislature" and, on the other hand, on the principle articulated in *Société des Acadiens* that because of the similarity between subsection 18(2) (in this case) and section 133, this case which deals with these provisions cannot be properly decided without taking into account the interpretation of section 133, i.e., the interpretation given in *Blaikie No. 2*.

42. This is clearly the position adopted by the trial judge at paragraphs 12, 14 and 17 of his reasons for judgment. After quoting several relevant passages from *Société des Acadiens* and *Blaikie No. 2*, he concluded that he had to take into account the interpretation already given in *Blaikie No. 2*. According to him, this interpretation was determinative and sealed the outcome of the case before him with respect to subsection 18(2) of the *Charter*.

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

44. In this regard, it is important to remember the words of Dickson, C.J. who, dissenting on the constitutional issue, stated in *Société des Acadiens*, at page 561 that despite the similarity between section 133 and subsection 19(2) "we are dealing with different constitutional provisions enacted in different contexts. In my view, the

interpretation of s. 133 of the *Constitution Act, 1867* is not determinative of the interpretation of the *Charter"*.

45. Equally important are the following comments made by Dickson, J. who expressed the same point of view in *R. v. Big M Drug Mart Ltd*., at page 343:

> ... it is certain that the *Canadian Charter of Rights and Freedoms* does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the *Charter*'s entrenchment. The language of the *Charter* is imperative. It avoids any reference to existing or continuing rights ... .

46. Finally, in *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613, the Supreme Court held, at page 638, that notwithstanding the similarity in the wording of paragraph 2(*c*) of the *Canadian Bill of Rights* and section 10 of the *Charter*, the premise that the framers of the *Charter* must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the *Charter* was enacted "is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts".

47. In light of these statements dealing with the principles of interpretation of constitutional rights and in light of recent decisions of the Supreme Court in *Beaulac* and *Arsenault-Cameron*, *supra*, I think that the principle set out by Beetz, J. in *Société des Acadiens* according to which the interpretation of language guarantees under section 133 must be taken into account cannot mean that the purposive analysis of rights established by the cases already cited can be ignored. As stated by the Supreme Court, "the focus on the historical context of language and culture indicates that different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province." (See *Reference re Public Schools Act (Man.)*, *supra*, at page 851.) Accordingly, I believe that the decision in *Blaikie No. 2*, while serving as a guide for the interpretation of subsections 17(2), 18(2) and 19(2) of the *Charter*, must be viewed with prudence by the courts of this province.

Analysis of Subsection 18(2) According to the Broad and Purposive Interpretation Sanctioned in Beaulac

49. I have already quoted the relevant passage in *R. v. Big M Drug Mart Ltd.* which sets out the various elements of a purposive analysis of *Charter* rights. In short, the interests they were meant to protect must be ascertained by reference:

> (a) to the character and the larger objects of the *Charter* itself;
> (b) to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*; and
> (c) to the language chosen to articulate the specific right taking into account the historical origins of the concepts enshrined.

(i) The larger objects of the Charter

50. Having clarified the effect of the language guarantee under subsection 18(2), its scope must now be determined based on a large, dynamic and purposive interpretation of this guarantee. First, we have to examine the larger objects of the *Charter* itself. In *Manitoba Reference No. 1*, the Supreme Court held that because of non-compliance with the provisions of section 23 of the *Manitoba Act, 1870* by the Manitoba government, the statutes and regulations of Manitoba that were not printed and published in English and French were invalid. In considering the consequences of this failure, the Court, at page 744, emphasized the importance of language for the French-speaking minority in these terms:

> Section 23 of the *Manitoba Act, 1870* is a specific manifestation of the general right of Franco-Manitobans to use their own language. <u>The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity</u>. 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. [Emphasis added] (With respect to the importance of language and culture, see also *Mahe v. Alberta*, at page 362, and *Ford v. Quebec*, at pages 748-49.)

51. In view of the significance of language and culture for the official language minority, the majority of the Court in *Beaulac* clearly articulated the objectives of language rights by recalling "the importance of language rights as supporting official language communities and their culture" and by emphasizing "the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply". (*Beaulac*, paragraphs 17 and 25.)

52. Another objective of language rights that has often been underlined by the Supreme Court is the remedial nature of these rights. Already, in *Société des Acadiens*, at page 567, Dickson, C.J. had stated that frustrating "the broad remedial purposes of the language protections provided in the Charter […] [would] be inconsistent with a liberal construction of language rights". Subsequently, the Supreme Court referred to the same objective in the interpretation of *Charter* language guarantees in several cases by confirming the cultural objective of language rights and by reiterating that a purposive interpretation of a *Charter* language provision requires that the content of the right "should ideally be guided by that which will most effectively encourage the flourishing and preservation of the French-language minority in the province". The Court also emphasized the remedial nature of language rights holding that the "right should be construed remedially, in recognition of previous injustices that have gone unredressed and which have required the entrenchment of protection for minority language rights". (See *Reference re Public Schools Act (Man.)* at pages 850-51.) Finally, in *Arsenault-Cameron*, at paragraph 27, Major and Bastarache, JJ., on behalf of a unanimous Court, re-affirmed the larger objects of language rights that I have just described:

... 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.

53. In short, *Charter* language guarantees must be construed with an emphasis on the protection and flourishing of official language communities; they should also be construed remedially for the purpose of redressing past inequalities.

54. Recently, the Supreme Court of Canada very clearly reaffirmed this approach to language rights and their larger objects in its opinion in *Reference re Secession of Quebec*, *supra*. In short, the Supreme Court started by identifying four underlying and organizing principles of the Constitution that it considered relevant to the question submitted in the reference: federalism, democracy, constitutionalism and the rule of law, and respect for minorities. For the purposes of this appeal, it is the respect for the rights of minorities that is most germane to us. The Supreme Court stated that these are unwritten principles underlying the Canadian Constitution that have dictated major elements of the Canadian constitutional architecture and are, as such, its lifeblood. These principles assist in the interpretation of the constitutional text and the scope of rights and obligations and the role of our political institutions. At paragraph 52, the Court added, with respect to interpretation: "Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution…". At paragraph 74, the Supreme Court acknowledged that "a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority". Finally, at paragraphs 79 to 81, the Court mentions the fact that a number of constitutional provisions protecting language rights specifically are the product of historical compromise, but that "the protection of minority rights is itself an independent principle underlying our constitutional order". It this sense, these provisions "reflect a broader principle related to the protection of minority rights". The Supreme Court also underscored the fact that the protection of minorities was one of the key considerations motivating the enactment of the *Charter* and the process of constitutional judicial review that it entails and that this "principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution".

55. In short, we can draw from this decision of the Supreme Court the following conclusions which are useful for the interpretation of language rights: respect for minority rights is an unwritten principle which underlies the Canadian Constitution; it may be used to clarify the written text of the Constitution; and it promotes the ongoing evolution of the constitutional process.

56. I think that it is important to spell out how this Court is going to use the organizing principles set out in *Reference re Secession of Quebec* in this case, including the principle of the respect for minority rights. Some of the interveners supporting the position of the appellant that unilingual by-laws of the City of Moncton are invalid relied on the passage from the above-mentioned case (paragraph 54) which states: "Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force" ...), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments." The same interveners also cited *Lalonde v. Ontario (Commission de restructuration des services de santé)* reflex, (1999), 181 D.L.R. (4th) 263 (Ont.S.C.); [2001] O.J. No. 4768 (C.A.), online: QL (OJ), to support the argument that the courts must intervene, where necessary, to grant protection against government action which fails to recognize this underlying principle of minority rights protection. In short, the unconstitutionality is based solely on the claim that government action violates the principle of minority protection.

57. In *Eurig Estate (Re)*, 1998 CanLII 801 (SCC), [1998] 2 S.C.R. 565, at paragraph 66, the Supreme Court explained that "implicit principles can and should be used to expound the Constitution, but they cannot alter the thrust of its explicit text". In my opinion, this statement confirms the oft-repeated Canadian constitutional law principle of the primacy of the written constitutional text which provides a foundation for the legitimacy of the exercise of constitutional judicial review.

58. In the aforementioned reference case, the Supreme Court expressly acknowledged that these underlying constitutional principles may be used to fill gaps in the express terms of the constitutional text. In this case, the arguments of the appellant and the interveners clearly indicate that they are invoking the underlying principle of minority protection articulated in the aforementioned reference case to expound the expression "statutes of the legislature" used in subsection 18(2) and to favour a broad and generous interpretation. As I understand the effect of the statements made by the Supreme Court concerning the use of these principles, I think that the argument that this unwritten and underlying principle can also be used independently of any constitutional text, as a basis of an application for judicial review to strike down government action is not very convincing. I believe that the "powerful normative force" referred to by the Supreme Court concerns the interpretation of constitutional texts and not the creation of rights outside of the constitutional texts. (See Robin Elliott, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution", *The Canadian Bar Review*, Vol. 80 (March - June 2001) 67, at pages 117-18 and 141; *Bacon v. Saskatchewan Crop Insurance Corp.*, [1999] S.J. No. 302, online: QL (SJ); and *Hogan v. Newfoundland (Attorney General)* 2000 NFCA 12 (CanLII), (2000), 183 D.L.R. (4th) 225.)

(ii) The Meaning and Purpose of the Other Charter Rights

59. The second branch of the analysis of the language rights provided for in subsection 18(2) concerns the meaning and purpose of the other related specific *Charter* rights and freedoms. Subsection 18(2) is part of a series of provisions in the *Charter* which, since 1982, have entrenched in the Constitution the concept of linguistic duality and the notion of equality of official languages for Canada and New Brunswick. Indeed, the effect of subsections 16(2) to 20(2), which specifically apply to New Brunswick institutions, whereas subsections 16(1) to 20(1) apply to federal institutions, is to ensure the protection of language rights in a number of public institutions such as legislative institutions, courts and offices of the institutions of the legislature and government. These provisions therefore entrench the language guarantees of citizens vis-à-vis the government of New Brunswick. They are individual language rights guaranteed to Francophones and Anglophones alike. The establishment of official bilingualism which results from the combined effect of these provisions is in fact

complemented in this province by section 23 of the *Charter* which, at the national level, guarantees the right to instruction in the language of the minority.

60. According to the principles of interpretation discussed previously, the provisions of the *Charter* that I have just referred to which establish a scheme of language guarantees applicable in New Brunswick must be read together to determine the meaning and purpose of subsection 18(2) of the *Charter*. Consequently, this provision does not operate in a vacuum, and it would be useful to review its interaction with other related provisions.

61. As I have already observed, subsection 18(2) creates a regime of compulsory bilingualism applicable to statutes enacted by the legislature, regulations made by the government and court rules of practice. Moreover, the combined effect of part of subsection 18(2) and subsection 17(2) is to create a form of parliamentary bilingualism applicable to the New Brunswick legislature made up of two separate components. On the one hand, subsection 18(2) provides that the records and journals must be published in both official languages and, on the other hand, subsection 17(2) establishes a form of optional bilingualism applicable to the debates and other proceedings of the legislature during which everyone has the right to use English or French. These two aspects of parliamentary bilingualism are not at issue in this case.

Decision:

134. For the foregoing reasons, I would allow the appeal and set aside the decision of the trial judge. I declare the by-laws of the City of Moncton, including by-law Z-4, to be invalid and of no force and effect under subsection 52(1) of the *Constitution Act, 1982*. However, the effectiveness of the declaration of invalidity would be suspended for a period of one year from the date of this judgment to enable the City of Moncton and the government of New Brunswick to comply with their constitutional obligations.

5 - Section 19 of the *Charter* – Official Languages of Canada

A. Subsection 19(1): Proceedings in courts established by Parliament

Subsection 19(1) of the *Charter* provides:

> **Proceedings in courts established by Parliament**
> 19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

There is no relevant case law interpreting Article 19 (1) specifically. However, see *Société des Acadiens* dealing with subsection 19(2).

B. Subsection 19(2): Proceedings in New Brunswick courts

Subsection 19(2) of the *Charter* provides:

> **Proceedings in New Brunswick courts**
> (2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

In the jurisprudence, the relevant decision that addresses the constitutional protection of language rights and Article 19(2) of the Charter is:

Société des Acadiens v Association of Parents, [1986] 1 SCR 549

Summary: Appellants brought an action seeking declaratory and injunctive relief against the mis en cause to prevent it from offering immersion programs to French-speaking students in its English schools. The New Brunswick Court of Queen's Bench delivered a judgment--later clarified in two subsequent decisions--in

favour of the appellants but refused to issue the injunction. The mis en cause, despite pressure from parents of the students who would have enrolled in the program, decided not to appeal the judgment as clarified. The parents created the respondent Association and made applications for leave to appeal the judgment and for an extension of the appeal period. Prior to the hearing before Stratton J.A. in the Court of Appeal, the appellants requested that the matter be heard by a bilingual judge as some of the presentations were to be made in French. Stratton J.A. acceded to the request and referred the matter to another judge who decided that the matter had to be dealt with by a panel of the Court. A panel of three, Stratton J.A. presiding, granted respondent's applications. Hence this appeal to determine (1) whether the New Brunswick Court of Appeal had inherent jurisdiction to grant leave to appeal when the person seeking leave was not a party to the original action and was applying out of time, and if so, whether it exercised its discretion properly; and (2) whether s. 19(2) of the Canadian Charter of Rights and Freedoms entitles a party 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.

*It should be noted that part of the judgment of the majority in *Société des Acadiens* was ousted by the reported decision *Beaulac*.

Relevant Paragraphs:

50. Subject to minor variations of style, the language of ss. 17, 18 and 19 of the *Charter* has clearly and deliberately been borrowed from that of the English version of s. 133 of the *Constitution Act, 1867* of which no French version has yet been proclaimed pursuant to s. 55 of the *Constitution Act, 1982*. It would accordingly be incorrect in my view to decide this case without considering the interpretation of s. 133 which provides:

> **133.** 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.

51. The somewhat compressed and complicated statutory drafting exemplified in s. 133 has been shortened and simplified in ss. 17 to 19 of the *Charter*, as befits the style of a true constitutional instrument. The wording of the relevant part of s. 133 ("may be used by any Person or in any Pleading or Process in or issuing from ... all or any of the Courts of") has been changed to "may be used by any person in, or in any pleading in or process issuing from, any court of". I do not think that anything turns on this change, which is one of form only.

52. Furthermore, in my opinion, s. 19(2) of the *Charter* does not, anymore than s. 133 of the *Constitution Act, 1867*, provide two separate rules, one for the languages that may be used by any person with respect to in-court proceedings and the languages that may be used in any pleading or process. A proceeding as well as a process have to emanate from someone, that is from a person, whose language rights are thus protected in the same manner and to the same extent, as the right of a litigant or any other participant to speak the official language of his choice in court. Under both constitutional provisions, there is but one substantive rule for court processes and in-court proceedings and I am here simply paraphrasing what has been said on this point in the *MacDonald* case, in the reasons of the majority, at p. 484.

53. 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.

54. I am reinforced in this view by the contrasting wording of s. 20 of the *Charter*. Here, the *Charter* has expressly provided for the right to communicate in either official language with some offices of an institution of the Parliament or Government of Canada and with any office of an institution of the Legislature or Government of New Brunswick. The right to communicate in either language pos-tulates the right to be heard or understood in either language.

55. I am further reinforced in this view by the fact that those who drafted the *Charter* had another explicit model they could have used had they been so inclined, namely s. 13(1) of the *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. O- 1:

> **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.

56. Here again, s. 13(1) of the Act, unlike the *Charter*, has expressly provided for the right to be heard in the official language of one's choice. Those who drafted s. 19(2) of the *Charter* and agreed to it could easily have followed the language of s. 13(1) of the *Official Languages of New Brunswick Act* instead of that of s. 133 of the *Constitution Act, 1867*. That they did not do so is a clear signal that they wanted to provide for a different effect, namely the effect of s. 133. If the people of the Province of New Brunswick were agreeable to have a provision like s. 13(1) of the *Official Languages of New Brunswick Act* as part of their law, they did not agree to see it entrenched in the Constitution. I do not think it should be forced upon them under the guise of constitutional interpretation.

57. The only other provision, apart from s. 20, in that part of the *Charter* entitled "Official Languages of Canada", which ensures communication or understanding in both official languages is that of s. 18. It provides for bilingualism at the legislative level. In *MacDonald* one can read the following passage, in the reasons of the majority, at p. 496:

> Section 133 has not introduced a comprehensive scheme or system of official bilingualism, even potentially, but a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism at the option of the speaker in Parliamentary debates and at the option of the speaker, writer or issuer in judicial proceedings or processes. Such a limited scheme can perhaps be said to facilitate communication and understanding, up to a point, but only as far as it goes and it does not guarantee that the speaker, writer or issuer of proceedings or processes will be understood in the language of his choice by those he is addressing.

58. The scheme has now been made more comprehensive in the *Charter* with the addition of New Brunswick to Quebec- - and Manitoba- - and with new provisions such as s. 20. But where the scheme deliberately follows the model of s. 133 of the *Constitution Act, 1867*, as it does in s. 19(2), it should, in my opinion, be similarly construed.

59. I must again cite a passage of the reasons of the majority, at p. 500, in *MacDonald* relating to s. 133 of the *Constitution Act, 1867* but which is equally applicable, *a fortiori*, to the official languages provisions of the *Charter*:

> This is not to put the English and the French languages on the same footing as other languages. Not only are the English and the French languages placed in a position of equality, they are also

> given a preferential position over all other languages. And this equality as well as this preferential position are both constitutionally protected by s. 133 of the *Constitution Act, 1867*. Without the protection of this provision, one of the two official languages could, by simple legislative enactment, be given a degree of preference over the other as was attempted in Chapter III of Title 1 of the *Charter of the French Language*, invalidated in *Blaikie No. 1*. English unilingualism, French unilingualism and, for that matter, unilingualism in any other language could also be imposed by simple legislative enactment. Thus it can be seen that, if s. 133 guarantees but a minimum, this minimum is far from being insubstantial.

60. 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*:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **14.** A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

61. The fundamental nature of this common law right to a fair hearing was stressed in *MacDonald*, in the reasons of the majority, at pp. 499‑500:

> It should be absolutely clear however that this common law right to a fair hearing, including the right of the defendant to understand what is going on in court and to be understood is a fundamental right deeply and firmly embedded in the very fabric of the Canadian legal system. That is why certain aspects of this right are entrenched in general as well as specific provisions of the *Charter*, such as s. 7, relating to life, liberty and security of the person and s. 14, relating to the assistance of an interpreter. While Parliament or the legislature of a province may, pursuant to s. 33 of the *Charter*, expressly declare that an Act or a provision thereof shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the *Charter*, it is almost inconceivable that they would do away altogether with the fundamental common law right itself, assuming that they could do so.

62. While legal rights as well as language rights belong to the category of fundamental rights,

> [i]t would constitute an error either to import the requirements of natural justice into...language rights...or vice versa, or to relate one type of right to the other...Both types of rights are conceptually different...To link these two types of rights is to risk distorting both rather than re‑enforcing either. (*MacDonald v. City of Montréal*, reasons of the majority, at pp. 500‑501).

63. 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.

64. Language rights, on the other hand, although some of them have been enlarged and incorporated into the *Charter*, remain nonetheless founded on political compromise.

65. 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.

66. Such an attitude of judicial restraint is in my view compatible with s. 16 of the *Charter*, the introductory section of the part entitled "Official Languages of Canada".

67. Section 19(2) being the substantive provision which governs the case at bar, we need not concern ourselves with the substantive content of s. 16, whatever it may be. But something should be said about the interpretative effect of s. 16 as well as the question of the equality of the two official languages.

68. I think it is accurate to say that s. 16 of the *Charter* does contain a principle of advancement or progress in the equality of status or use of the two official languages. I find it highly significant however that this principle of advancement is linked with the legislative process referred to in s. 16(3), which is a codification of the rule in *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182. The legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise.

69. One should also take into consideration the constitutional amending formula with respect to the use of official languages. Under s. 41(*c*) of the *Constitution Act, 1982*, the unanimous consent of the Senate and House of Commons and of the legislative assembly of each province is required for that purpose but "subject to section 43". Section 43 provides for the constitutional amendment of provisions relating to some but not all provinces and requires the "resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies". It is public knowledge that some provinces other than New Brunswick- - and apart from Quebec and Manitoba- - were expected ultimately to opt into the constitutional scheme or part of the constitutional scheme prescribed by ss. 16 to 22 of the *Charter*, and a flexible form of constitutional amendment was provided to achieve such an advancement of language rights. But again, this is a form of advancement brought about through a political process, not a judicial one.

70. If however the provinces were told that the scheme provided by ss. 16 to 22 of the *Charter* was inherently dynamic and progressive, apart from legislation and constitutional amendment, and that the speed of progress of this scheme was to be controlled mainly by the courts, they would have no means to know with relative precision what it was that they were opting into. This would certainly increase their hesitation in so doing and would run contrary to the principle of advancement contained in s. 16(3).

71. In my opinion, s. 16 of the *Charter* confirms the rule that the courts should exercise restraint in their interpretation of language rights provisions.

72. I do not think the interpretation I adopt for s. 19(2) of the *Charter* offends the equality provision of s. 16. Either official language may be used by anyone in any court of New Brunswick or written by anyone in any pleading in or process issuing from any such court. The guarantee of language equality is not, however, a guarantee that the official language used will be understood by the person to whom the pleading or process is addressed.

73. Before I leave this question of equality however, I wish to indicate that if one should hold that the right to be understood in the official language used in court is a language right governed by the equality provision of s. 16, one would have gone a considerable distance towards the adoption of a constitutional requirement which could not be met except by a bilingual judiciary. Such a requirement would have far reaching consequences and would constitute a surprisingly roundabout and implicit way of amending the judicature provisions of the Constitution of Canada.

74. I have no difficulty in holding that the principles of natural justice as well as s. 13(1) of the *Official Languages of New Brunswick Act*

> entitle 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.

75. But in my respectful opinion, no such entitlement can be derived from s. 19(2) of the *Charter*.

76. I would answer the constitutional question as follows:

> A party pleading in a court of New Brunswick is entitled to be heard by a court, the member or members of which are capable by any reasonable means of understanding the proceedings, the evidence and the arguments, written and oral, regardless of the official language used by the parties; this entitlement is derived from the principles of natural justice and from s. 13(1) of the *Official Languages of New Brunswick Act* however, and not from s. 19(2) of the *Charter*.

Dissenting Judgment (Justice Dickson):

(a) *Pre - Charter Language Protections*

8. It has been suggested that because of the similarity of the language in s. 133 of the *Constitution Act, 1867* and s. 19(2) of the *Charter* the jurisprudence under the former will be influential in determining the outcome of *Charter* litigation. The actual wording of s. 19(2) parallels in part s. 133.

9. I wish to make three preliminary observations with respect to the usefulness of s. 133 case law in interpretation of the *Charter* language guarantees. First, the specific issue to be resolved in the case at bar has not been decided in the context of s. 133 and related provisions; there is considerable litigation in courts across Canada on this very question. See *Mercure v. Attorney General of Saskatchewan*, [1986] 2 W.W.R. 1 (Sask. C.A.), leave to appeal granted by this Court, January 27, 1986; *Robin v. Collège de Saint - Boniface* (1984), 30 Man. R. (2d) 50 (C.A.); *R. v. Tremblay* (1985), 20 C.C.C. (3d) 454 (Sask. Q.B.); *Paquette v. R. in Right of Canada*, [1985] 6 W.W.R. 594 (Alta. Q.B.) It is not within the scope of this case to give a definitive interpretation to s. 133 and related provisions *vis - à - vis* the language rights of litigants. I leave that debate to another day.

10. Secondly, despite the similarity between s. 133 and s. 19(2), we are dealing with different constitutional provisions enacted in different contexts. In my view, the interpretation of s. 133 of the *Constitution Act, 1867* is not determinative of the interpretation of *Charter* provisions.

11. Finally, although the specific issue raised in this appeal has not been decided in a s. 133 context, there is much to be learned about the general approach adopted by this Court to constitutional language protections from a review of the jurisprudence under s. 133 and related provisions. […]

(c) *The Right to Use the Official Language of One's Choice*

24. Section 19(2) provides to litigants the right to *use* the official language of their choice. The essence of this appeal, therefore, is whether this right to "use" French or English in the courts embraces the right to be understood by the court in the language of one's choice as well as the right to make oral and written submissions in that language.

25. There is no disagreement amongst the members of this Court that the right embodies at a minimum the right to speak and make written submissions in the language of one's choice. Must this right, to be meaningful, extend to the right to be understood, either directly or possibly with the aid of an interpreter or simultaneous translation? In my opinion, the answer must be in the affirmative. What good is a right to use one's language if those to whom one speaks cannot understand? Though couched in individualistic terms, language rights, by their very nature, are intimately and profoundly social. We speak and write to communicate to others. In the courtroom, we speak to communicate to the judge or judges. It is fundamental, therefore, to any effective and coherent guarantee of language rights in the courtroom that the judge or judges understand, either directly or through other means, the language chosen by the individual coming before the court.

26. Both parties and the intervenors agreed on this point. As stated by the appellants at p. 10 of their factum:

> [TRANSLATION] Appellants submit that the right to use French recognized in the *Charter* necessarily includes the right to be heard in French and to be understood by the Court.

The respondent replied, at p. 5:

> The Respondent affirms that on this point [the constitutional question], it is without doubt that parties to proceedings before any court in New Brunswick have the right to be heard and understood in the official language of their choice.

In a similar vein, the Attorney General of Canada stated at p. 3, "it is beyond doubt that the corollary of the right to use French in all cases in the New Brunswick courts is the right to be understood by the court". The Attorney General of New Brunswick agreed. To decide otherwise, in my view, would be to give a narrow reading to the constitutional and fundamental right to use the official language of one's choice in the courts. Such a result would frustrate the broad remedial purposes of the language protections provided in the *Charter* and be inconsistent with a liberal construction of language rights.

(d) *Language Rights versus Procedural Fairness*

27. Language rights in the courts are, in my opinion, conceptually distinct from fair hearing rights. While it is important to acknowledge this distinction, each category of rights does not occupy a watertight compartment. Just as fair hearing rights are, in part, intimately concerned with effective communication between adjudicator and litigant, so too are language rights in the court. There will therefore be a certain amount of overlap between the two. At the same time, each category of rights will continue to address concerns not touched by the other. For example, whether or not an individual is even entitled to an oral hearing comes under the exclusive rubric of natural justice, not language rights.

28. The existence of a certain amount of overlap between various rights and freedoms is not unusual. Rights and freedoms often relate to and supplement each other. For example, the freedom of religion in s. 2(*a*) of the *Charter* is closely related to the protection against discrimination on the basis of religion in s. 15 and the freedom of assembly and association of religious groups in subsections 2(*c*) and (*d*) respectively. In a similar vein, the protection afforded by common law natural justice requirements or by s. 7 of the *Charter* to be heard and understood by the adjudicator in an oral hearing does not undermine the importance of being understood by the adjudicator as an aspect of one's language rights in s. 19 of the *Charter*.

(e) *Conclusions Regarding S. 19(2)*

29. In my opinion, the right to use either French or English in court, guaranteed in s. 19(2), includes the right to be understood by the judge or judges hearing the case. I reiterate that the techniques or mechanisms which might aid in such understanding, such as the use of interpreters or simultaneous translation, are not before us in this appeal.

30. I would answer the constitutional question in the affirmative.

Decision: The appeal should be dismissed.

6 - Section 20 of the *Charter* – Official Languages of Canada

A. Subsection 20(1): Communications by public with federal institutions

Subsection 20(1) of the *Charter* provides:

> **Communications by public with federal institutions**
> 20. (1) 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.

In the jurisprudence, the relevant decisions that address the constitutional protection of language rights and Article 20(1) of the Charter are:

DesRochers v. Canada (Industry), 2009 SCC 8, [2009] 1 SCR 194 - *Facta : The Commissioner of Official Languages*

Summary: Section 20(1) of the *Canadian Charter of Rights and Freedoms* and Part IV of the *Official Languages Act* ("*OLA*") create a constitutional duty to make services of equal quality in both official languages available to the public. The Corporation de développement économique communautaire CALDECH, which was run by D, was created by Francophone community organizations to address shortcomings those organizations saw in the economic development services provided to the French-speaking population of Huronia by the North Simcoe Community Futures Development Corporation ("North Simcoe"), which was responsible for implementing Industry Canada's Community Futures Program in Huronia. In 2000, D filed a complaint with the Commissioner of Official Languages of Canada, alleging that North Simcoe was unable to provide its services in French. In 2001, the Commissioner concluded that Industry Canada had breached its duties under Parts IV and VII of the *OLA* and recommended that certain measures be taken. CALDECH received temporary funding to provide services in French and Industry Canada took various other measures, but the Commissioner concluded in two follow-up reports in 2003 and 2004 that Industry Canada was still not in full compliance with Parts IV and VII of the *OLA*. D and CALDECH then made an application to the Federal Court under s. 77(1) of the *OLA*, which at that time applied only to violations of Part IV of the *OLA*. The Federal Court acknowledged that at the time the complaint was filed Industry Canada had been in breach of its duty to provide equal services in both official languages, but it found that at the time of the application for a court remedy North Simcoe was providing equal services in both languages. The court dismissed the application without costs. The Federal Court of Appeal held that the Federal Court should have granted the application, because the relevant time for determining the merits of the application was the date the complaint was filed and because at that time North Simcoe was unable to communicate with its clients and provide services in French. However, no remedy other than costs was appropriate, since corrective measures had been taken and since the trial judge had determined that the principle of linguistic equality in communications and the provision of services implemented in the *OLA* was being adhered to at the time the application was heard. The court noted that the standard of substantive equality did not require North Simcoe to take account of the special needs of the French-speaking community in developing and implementing its programs.

Relevant Paragraphs:

31. Before considering the provisions at issue in the case at bar, it will be helpful to review the principles that govern the interpretation of language rights provisions. Courts are required to give language rights a liberal and purposive interpretation. This means that the relevant provisions must be construed in a manner that is consistent with the preservation and development of official language communities in Canada (*R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 25). Indeed, on several occasions this Court has reaffirmed that the concept of equality in language rights matters must be given true meaning (see, for example, *Beaulac*, at paras. 22, 24 and 25; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, at para. 31). Substantive equality, as opposed to formal equality, is to be the norm, and the exercise of language rights is not to be considered a request for accommodation. […]

[…]

5.4 *Arguments of the Parties*

45. As I stated in the introduction to these reasons, the parties agree that as a general rule, the principle — provided for in s. 20(1) of the *Charter* and implemented in Part IV of the *OLA* — that members of the public are entitled to linguistic equality when receiving services entails an obligation to make services "of equal quality in both official languages" available to the public. The parties disagree, however, on what is meant by "equal quality".

46. The appellants conceded before this Court that equality of rights and privileges as to the *use* of the two official languages has been achieved through the institutional infrastructure created by Industry Canada in response to the Commissioner's recommendations. They also acknowledged that in order to also achieve equality of *status*, it will in most cases suffice for the government to communicate and deliver the same service equally in both official languages. But, the appellants argue, depending on the nature of the service in question, it will sometimes be necessary to go further and take account of the special needs of the language community receiving the service. They assert that in the instant case, Industry Canada is required to provide — through a separate institution if necessary — economic development services that not only are delivered in the official language of the user's choice, but also are adapted to the special needs and cultural reality of the region's French-speaking community.

47. The appellants submit that a community economic development service that is tailored to the needs of the majority and is merely offered to the minority in its language amounts at best to accommodation. On this basis, they request an order declaring that Industry Canada, in developing its programs and providing its services, has a duty to consider the special needs and cultural reality of the French-speaking community regarding economic development.

48. The respondents contend that the order being sought should not be granted. Their view is that depending on the nature of the service, the government might, in order to fulfil its language duties, be required to change its *method* of providing the service, but not the *content* of the service itself. They argue that "[t]his would amount to giving official language minority communities, *via* subsection 20(1) of the *Charter* and Part IV of the *Act*, a right to participate in defining the content of programs, which even a generous reading of those provisions, having regard to subsection 16(1) of the *Charter*, does not authorize."

49. According to the respondents, what is being claimed here is not the equal provision of available services in both languages, but the provision of services other than those being offered that better reflect the socio-demographic characteristics of the linguistic minority community. They assert that the appellants are basically claiming a right to parallel services provided by a Francophone organization. In the respondents' view, linguistic equality does not have as broad a scope as this, but is instead achieved "by guaranteeing equal linguistic access to the services offered, not by access to distinct services". They therefore submit that the Federal Court of Appeal was correct to conclude that the rights being claimed in this case exceed the scope of Part IV of the *OLA*.

50. In reply to the respondents' arguments, the appellants stress that the purpose of this application is not to claim a right to parallel services managed by the linguistic minority community. In their opinion, there is ample evidence that the needs of the French-speaking minority community are indeed different from those of the English-speaking majority community and that North Simcoe, unlike CALDECH, has not succeeded in reaching the French-language business community. The appellants therefore request, in addition to the above-mentioned order, that the government be ordered to provide funding to CALDECH, at least until substantive equality is achieved in the services provided by North Simcoe both in terms of rights and privileges as to the *use* of the official languages and in terms of the *status* of those languages in the federal institution.

5.5 *Application to the Case at Bar*

51. It seems clear to me that the respondents are correct to say that the principle under s. 20(1) of the *Charter* and Part IV of the *OLA* of linguistic equality in the provision of government services involves a guarantee in relation to the services *provided* by the federal institution. However, it is not entirely accurate to say that linguistic equality in the provision of services cannot include access to services *with distinct content*. Depending on the nature of the service in question, it is possible that substantive equality will not result from the development and implementation of identical services for each language community. The content of the principle of linguistic equality in government services is not necessarily uniform. It must be defined in light of the nature and purpose of the service in question. Let us consider the community economic development program in the case at bar.

52. At the relevant time, Industry Canada described its community economic development program as follows:

> [TRANSLATION] Community economic development (CED) is a global approach to development under which communities take charge of their own economic futures and decide the direction they will take to attain their goals. The following CED principles guide community futures development corporations (CFDCs) in all the activities and services they offer:
>
> - ensuring development *of* the community, *by* the community and *for* the community;
> - taking local autonomy into account and promoting local skills;
> - incorporating economic, social and environmental concerns in a holistic approach to sustainable development;
> - making use of partnerships that bring together various interests and stakeholders;
> - taking a long-term strategic approach;
> - including the public and private sectors as well as volunteer organizations; and
> - supporting local entrepreneurs and small businesses.
>
> In addition to the business development and strategic planning services mentioned above, CFDCs may take part in all kinds of other CED activities and projects. These will vary greatly from one community to another, depending on priorities established in the local strategic planning process. The following are a few examples:
>
> - development of infrastructure in support of economic development;
> - sponsoring of entrepreneurial and business management training courses and workshops;
> - promotion of the community to stimulate tourism and investment;
> - creation of other partnerships to deal with issues related to telecommunications and foster the use of the information highway;
> - implementation of special initiatives to promote entrepreneurship among certain groups, such as women, young people, Aboriginal persons and Francophones;
> - provision of support to micro‑businesses and home-based businesses; and
> - promotion of sustainable development and adoption of measures in this respect. [Underlining added.]
>
> (As this text comes from a printout of an Industry Canada Web page (http://strategis.ic.gc.ca/SSGF/md17281f.html, September 29, 2003) that is no longer on line, an unofficial translation is provided.)

53. It is difficult to imagine how the federal institution could provide the community economic development services mentioned in this description without the participation of the targeted communities in both the development and the implementation of programs. That is the very nature of the service provided by the federal institution. It necessarily follows, as is expressly recognized in the above passage, that the communities could ultimately expect to have *distinct* content that varied "greatly from one community to another, depending on priorities established" by the communities themselves.

54. Given the nature of the services at issue here, I therefore disagree with Létourneau J.A.'s view that the principle of linguistic equality does not entail a right to "access to equal regional economic development services" (para. 33), or that the respondents did not have a duty under Part IV of the *OLA* to "take the necessary steps to ensure that Francophones are considered equal partners with Anglophones" (para. 38) in the definition and provision of economic development services. With respect, it seems to me that Létourneau J.A. did not fully consider the nature and objectives of the program in question in so defining the scope of the duties resulting from the guarantee of linguistic equality. What matters is that the services provided be of equal quality in both languages. The analysis is necessarily comparative. Thus, insofar as North Simcoe, in accordance with the programs' objectives, made efforts to reach the linguistic majority community and involve that community in program development and implementation, it had a duty to do the same for the linguistic minority community.

55. However, two points must be made regarding the scope of the principle of linguistic equality in the provision of services. First, the duties under Part IV of the *OLA* do not entail a requirement that government services achieve a minimum level of quality or actually meet the needs of each official language community. Services may be of equal quality in both languages but inadequate or even of poor quality, and they may meet the community economic development needs of neither language community. A deficiency in this regard might be due to a breach of the duties imposed by the *DIA*, as the Federal Court of Appeal pointed out in this case, or to a breach of the duties under Part VII, as the Commissioner seemed to believe. I will come back to this point.

56. Second, nor does the principle of linguistic equality in the provision of services mean that there must be equal results for each of the two language communities. Inequality of results may be a valid *indication* that the quality of the services provided to the language communities is unequal. However, the results of a community economic development program for either official language community may depend on a large number of factors that can be difficult to identify precisely.

Decision: The appeal should be dismissed.

Knopf v Canada (Speaker of the House of Commons), 2007 FCA 308, [2007] F.C.J. No. 1474

Summary:

2. On April 20, 2004, the appellant appeared before the House of Commons Standing Committee on Canadian Heritage to testify as a specialized lawyer on matters relating to copyright reform, World Intellectual Property Organization treaty ratification, and private copying.

3. Prior to his appearance, he sent four documents to the Committee's clerk requesting their distribution to its members. The clerk accepted the documents and made copies of them. However, the Committee members decided not to allow for their distribution because the documents were in English only.

4. This decision gave effect to a rule of procedure previously adopted by the Committee, which provides for the distribution of documents to its members only when they are available in both official languages (minutes of proceedings of the Committee, February 24, 2004). The Committee reaffirmed the same rule at its organizational meeting for the First Session of the 38th Parliament on October 18, 2004.

5. The appellant opines that a witness before a parliamentary committee has the right to submit documents in either official language for contemporaneous distribution to committee members as part of his or her testimony. When appearing in front of the Committee, the appellant states:

> ... I think it's more important that the committee be informed than that everything be bilingual....

6. November 11, 2004, the appellant filed a complaint with the Commissioner of Official Languages pursuant to section 58 of the Act. He repeated his previous statement: "I have a right to ask the members to read my material in the language of my choice. I would rather that it not be read by one or more members than it be inadequately or inaccurately translated". By letter dated March 1, 2005, the Commissioner dismissed his complaint.

7. Therefore, the appellant brought an Application pursuant to the provisions of Part X of the Act and claimed a violation of his language rights under the Act, the Charter of Rights and Freedoms ("Charter"), and the Constitution Act, 1867.

Relevant paragraphs:

38. Subsection 4(1) of the Act reiterates the right first recognized by section 133 of the *Constitution Act* and reaffirmed by subsection 17(1) of the Charter. These three sections recognize the right of any person participating in parliamentary proceedings "to use" ("d'employer") English or French. Subsection 4(1) of the Act, as well as subsection 17(1) of the Charter create a scheme of unilinguism at the option of the speaker or writer, who cannot be compelled by Parliament to express himself or herself in another language than the one he or she chooses (See *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460 at para.60).

39. However, in some other language rights provisions, such as subsection 20(1) of the Charter and section 25 of the Act, the legislator chose the term "to communicate" ("communiquer"). In my opinion, this is not accidental.

40. To "communicate" presupposes interactions, bilateral actions between the parties. The verb "to use" does not encompass such interaction. The right is unilateral: one has the right to address the House of Commons in the official language of his choice. In the case at bar, Mr. Knopf made his opinion known on particular topics of interest to the Committee and filed his documents. There stops his right under subsection 4(1) of the Act.

41. I do not read into subsection 4(1) of the Act any requirement for a Committee to distribute documents to its members in one official language. Subsection 4(1) of the Act provides the appellant with a right to address the Committee in the language of his choice only. Once this right has been exercised, subsection 4(1) of the Act does not compel the Committee to act in a certain way with the oral or written information provided to it.

42. Justice Layden-Stevenson was right in finding that the distribution of documents does not fall within the scope of subsection 4(1) of the Act. The right to use an official language of choice does not include the right to impose upon the Committee the immediate distribution and reading of documents filed to support one's testimony. The decision on how and when to treat the information received from a witness clearly belongs to the Committee. I find, therefore, that the appellant's language rights were not infringed upon.

Décision : The appeal is dismissed.

Charlebois v. Saint John (City), [2005] 3 SCR 563, 2005 SCC 74

Summary: Charlebois brought an application, in French, against the City of Saint John. The City and the Attorney General of New Brunswick moved to have the application struck. The City's pleadings were presented in English only. The Attorney General's pleadings were in French, but some citations were in English. Charlebois objected to receiving pleadings in English on the basis that s. 22 of the *Official Languages Act* ("*OLA*") of New Brunswick enacted in 2002 applied to the City and required it to adopt the language of proceedings chosen by him. Both the Court of Queen's Bench and the Court of Appeal found that s. 22 of the *OLA* does not apply to municipalities and cities because that interpretation would create internal incoherence within the *OLA*.

Dissenting judgement – Relevant paragraphs:

3.1 *The Internal Inconsistencies in the OLA*
[…]

35. In *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, Beetz J., for the majority, contrasted the right to use a language in court proceedings under s. 19(2) of the *Charter* and the right to communicate with offices of the government under s. 20 of the *Charter*. This last right "postulates the right to be heard or understood in either language" (p. 575). Wilson J., who concurred in the result, noted that there is an apparent inconsistency between the right to equality in s. 16(1) of the *Charter* and the right to limited services in s. 20(1) of the *Charter*. The solution was not, in her view, to limit the scope of s. 16(1) to eliminate the inconsistency, but to read s. 16(1) as "constitutionalizing a societal commitment to growth" (p. 620). Both ss. 16(1) and 20(1) were to be read generously and purposively (p. 621).
[…]

36. This approach is not new. It is now a template for the interpretation of language rights, specially, as just demonstrated, where there is apparent conflict and ambiguity. Under it, the first step is not to read down the protections to eliminate inconsistencies, but to make sense of the overall regime in light of the constitutional imperative of approaching language rights purposefully, with a view to advancing the principles of equality and protection of minorities. Institutional bilingualism is achieved when rights are granted to the public and corresponding obligations are imposed on institutions (see *Beaulac*, at paras. 20-22). No rights are given as such to institutions. Any interpretation of the *OLA* must take this into account. The real issue here is whether the apparent inconsistency between ss. 27 and 36 is such that the institutional obligations recognized *a priori* in s. 22 must *of necessity* be read down.

Decision: The appeal should be dismissed.

R v Doucet, 2004 FC 1444.

Summary:

1. The Plaintiff, Donnie Doucet, commenced an action by way of statement of claim alleging that his language rights had been infringed. He declared that he could not communicate in French with the Royal Canadian Mounted Police (RCMP) officer who stopped him for speeding on Highway 104 near Amherst, Nova Scotia.

2. The Plaintiff submits that the *Official Languages (Communications with and Services to the Public) Regulations* (SOR/92-48) (the Regulations), which determine the application of the law for services to linguistic minorities of the two official languages, contravene the rights guaranteed under the *Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the *Canada Act, 1982*, 1982, c. 11 (U.K.) (the Charter) and should therefore be declared inoperative pursuant to section 52 of the *Constitution Act, 1982*.

3. The Defendant submits that the Regulations do not infringe the linguistic rights guaranteed by the Charter. Should the Court conclude that there is violation of the linguistic rights, the Defendant then submits that the Regulations are justified pursuant to section 1 of the Charter.

4. For the reasons for judgment which follow, I conclude that the Regulations are incompatible with subsection 20(1) of the Charter in that they violate the right of any member of the public to communicate with a federal institution in either official language where there is a significant demand for the use of that language. I also conclude that the violation is not justified under section 1 of the Charter.

[…]

11. Under the *Official Languages* (*Communications with and Services to the Public*) *Regulations* (SOR/92-48) (the Regulations), adopted pursuant to section 32 of the OLA, to determine whether a "significant demand" exists for services in the minority official language in a rural area, the minority population must attain the level of 500 persons or 5% of the population in the service area. Consequently, the RCMP detachment at Amherst, Nova Scotia, as an office of a federal institution subject to the Charter and the OLA, does not have to offer bilingual services in the Amherst area because there is no "significant demand" in that area within the meaning of the Regulations. The 1991 census shows a francophone population of 255 persons living in the service area of the Amherst detachment, and this is 1.1% of the population in the detachment's service area. In Amherst itself, the francophone population makes up 2.1% of the population.

[…]

Issue

14. Do the *Official Languages* (*Communications with and Services to the Public*) *Regulations* comply with the *Canadian Charter of Rights and Freedoms*, more particularly subsection 20(1) of the Charter, and sections 22 and 23 of the OLA?

Relevant Paragraphs:

16. Section 16 of the Charter guarantees the equality of both official languages in Canada, and section 20 enshrines the right of members of the public to communicate with the central office of any federal institution in the official language of their choice. The same right exists in respect of any other office of the federal institution, wherever it is located in Canada, provided that there is a significant demand for the official language used by the minority or that its use is warranted by the nature of the office. The OLA adopted the wording of the Charter, which gives it special status, as noted by Décary J.A., speaking for a unanimous court in *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373 (C.A.), at page 386:

> The 1998 *Official Languages Act* is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections

> 16(1) and (3) of the *Canadian Charter of Rights and Freedoms*, it follows the rules of interpretation of that Charter as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the Charter, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it". [Footnotes omitted.]

17. This statement was also adopted by Bastarache J., speaking for the majority of the Supreme Court of Canada in *R. v. Beaulac*, [1999] 1 S.C.R. 768, at paragraph 21.

18. The OLA is, to a certain extent, the embodiment of an ideal, the right to which is entrenched in our Constitution. In section 32, the OLA provides that the Governor in Council may determine by regulations what constitutes a "significant demand" requiring bilingual services or the circumstances in which the "nature of the office" justifies the use of both official languages.

19. The Regulations, adopted pursuant to the OLA, set out in detail the various circumstances where there is a "significant demand" and specify what the "nature of the office" involves. Mr. Ricciardi, Senior Advisor, Policy Division, Official Languages Directorate (formerly part of the Treasury Board Secretariat and now part of the Public Service Human Resources Management Agency), testified in respect to the drafting of the Regulations, in which he participated. His testimony clearly shows the extent to which certain decisions are political. They cannot be described as arbitrary, because it is clear they were carefully thought out, and took a great many constraining factors into account.

20. For instance, the Regulations set the numbers necessary to establish a significant demand, depending on whether urban or rural areas are involved. Significant demand is deemed to be established, for airports, at a million passengers or more, annually; for ferry terminals, the level is set at 100,000 passengers. Further, the Regulations apply the concept of "national mandate" to certain offices, including national parks, which must offer bilingual services, notwithstanding their geographic location, demand or number of visitors.

21. It is not the Court's function to question these decisions, which reflect both the desire to comply with the provisions of the Charter and the OLA and the need to apply some rationality to offering bilingual services in a country where the two languages do not always coexist in the same area. However, if the implementation of these decisions, political though they may be, has the effect of infringing the rights guaranteed by the Charter, the Court has a duty to intervene (*Commissioner of Official Languages v. Her Majesty The Queen (Department of Justice of Canada)*, 2001 FCT 239. Accordingly, it must determine whether the Regulations as currently drafted infringe the rights guaranteed by the Charter and the OLA.

22. On various occasions, the courts have defined the scope of the language guarantees contained in the Charter and the OLA. The jurisprudence on language rights evolved, to some extent, in keeping with the principles of natural justice, the right to understand and the right to be heard.

23. In *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549, Beetz J. underscored the difference between language rights relating to the administration of justice, which essentially parallel section 133 of the *Constitution Act, 1867*, and the rights in section 20 of the Charter (adopted in Part IV of the OLA), which are indicative of a desire to make Canada a truly bilingual country:

> 54. I am reinforced in this view by the contrasting wording of s. 20 of the *Charter*. Here, the *Charter* has expressly provided for the right to communicate in either official language with some offices of an institution of the Parliament or Government of Canada and with any office of an institution of the Legislature or Government of New Brunswick. The right to

> communicate in either language postulates the right to be heard or understood in either language.

[…]

34. In the case at bar, both parties acknowledge that, when patrolling Nova Scotia highways or responding to calls from citizens, the RCMP is a federal institution offering services to the public. The parties further agree that, as such, the RCMP is bound by the provisions of the OLA and the Charter on the right of Canadians and the public in general to communicate with federal institutions and receive services in either of the two official languages, at their choice.

35. The fact that the RCMP performs policing duties in Nova Scotia under a contract entered into with the province does not in any way alter its status as a federal institution. Subsection 20(1) of the *Royal Canadian Mounted Police Act* provides for such contracts. On this issue, I agree with Boudreau J. of the Nova Scotia Supreme Court who, in his judgment on the appeal from the Plaintiff's conviction, wrote the following:

> [translation]
>
> In my opinion, the members of the RCMP do not lose their federal status when they act under contract with a province or implement provincial legislation. This is their mandate under the *RCMP Act* and they are only carrying it out. Accordingly, it is still a service by a federal institution ...
>
> In my opinion, a contract with a province does not change anything in the status of the RCMP. It continues to be a federal institution. Any other conclusion would allow the RCMP to avoid its language obligations to individuals, as guaranteed by the Charter. That certainly would not be consistent with the purpose of the constitutional language rights. [paras. 31 and 32]

36. The Plaintiff's main argument is that the Regulations, adopted pursuant to the OLA, which set out how the Act is to be applied for services to language minorities of both official languages, is inconsistent with the Charter guarantees and, in consequence, should be declared of no force or effect under section 52 of the *Constitution Act, 1982*.

37. The Defendant argues that the Regulations are entirely consistent with the spirit of the Act and do not infringe the language rights guaranteed by the Charter. Alternatively, the Defendant argues that, if the Court were to find that the Regulations infringe the language rights, the Regulations are justified under section 1 of the Charter since they are demonstrably justified in a free and democratic society.

38. Sections 5, 6 and 7 of the Regulations set out various situations that correspond to the concept of "significant demand". Sections 8, 9, 10 and 11 define what is meant by "national mandate". None of these definitions corresponds to the circumstances at issue in this case, namely the right of motorists driving on highways patrolled by the Amherst detachment to services and communications in French.

39. The Defendant argues that, under subparagraph 5(1)(*h*)(i) of the Regulations, the RCMP is not required to offer bilingual services since "significant demand" is defined in accordance with the demographics of the area. The parties agree that the French population in the Amherst area is well below the 500 persons or 5% threshold set out in the Regulations. Consequently, the Defendant argues, the RCMP does not have to offer bilingual services.

[…]

49. Thus, it is clear that there is a void in the Regulations. Notwithstanding a "significant demand", the Regulations do not provide for services to a linguistic minority travelling on a major highway. In my view, the

Regulations do not comply with subsection 20(1) of the Charter, because they infringe the right of individuals to communicate with a federal institution in the official language of their choice, although a significant demand exists. For this reason alone, the Regulations do not meet the requirements of sections 22 and 23 of the OLA, section 22 providing for the right of members of the public to communicate with the office of a federal institution in the official language of their choice where a "significant demand" exists, and section 23 providing for services to the travelling public in the official language of their choice, if there is a significant demand for the use of that language.

Decision:

80. I allow the Plaintiff's claim in part. I declare subparagraph 5(1)(*h*)(i) of the *Official Languages* (*Communications with and Services to the Public*) *Regulations*, SOR/92-48 (1992), adopted pursuant to section 32 of the OLA, inconsistent with paragraph 20(1)(*a*) of the Charter in that the right to use French or English to communicate with an institution of the Government of Canada should not solely depend on the percentage of francophones in the census district. Consideration must also be given to the number of francophones who use or might use the services of the institution, as illustrated by the circumstances in this case, along Highway 104 near Amherst, Nova Scotia. In my view, it is reasonable to give the Governor in Council eighteen months to correct the problem identified in the Regulations.

R v Gibbs, 2001 BCPC 361.

Summary:

77. THE COURT: Sandra Gibbs is charged individually on an Information with two counts, Counts 1 and 2 with failing to file a completed personal income tax return for 1996 and 1997; Counts 3 and 4 as a director of an incorporated company failing to provide corporate income tax returns for that company for the same two years, 1996 and 1997.

85. […] [Sandra Gibbs] argues that her rights pursuant to s. 18(1) and s. 20(1) [of the *Charter*] have been infringed by virtue of the fact that she is unable on her assertion to obtain an authenticated certified copy of the *Income Tax Act* which would allow her to know the extent of her rights and obligations.

Relevant paragraphs:

105. Finally, there is the issue of the s. 18(1) and s. 20(1) of the *Charter of Rights*. That went to the application by the accused for an order by the court directing that an authentic and verified copy in English of the *Income Tax Act* be produced. The defendant says that she requires it in order to make full answer and defence and that failure to make such an *Act* available to her after she has made numerous efforts to obtain such an *Act* amount to a breach of her rights. That is an argument that I had not seen raised before and I have referred back to the *Charter*. Section 18 of the *Charter*, having read it, in my view does not go to the issue of a direction that she is to be provided with a printed copy in English; rather, it's a direction that the statute's, records and journals of the Parliament of Canada are to be printed and published in English and French and both language versions are equally authoritative. In my view, there's nothing that is shown that that has been infringed or denied. The fact that she has been unable to in essence obtain a compilation which does not have some sort of a disclaimer attached to it does not, in my view, amount to an infringement of that. The focus of that section goes to the bilingual requirement for legislation being produced in English and French.

106. Similarly with respect to s. 20 of the *Charter of Rights* which deals with a member of the public having a right to communicate and receive services from any head or central office of an institution of Parliament or Government of Canada in English or French; that, in my view, does not address, or relate to the issue on which she submits it, and that is her apparent inability to find an authenticated copy of the *Act*. Again, that goes, in my view, to the issue of the ability of all Canadian citizens to be able to communicate with persons employed with the Federal government, to be able to communicate with such persons in English or French and if not with a specific person in English and French, nonetheless, someone else within that central office capable of communicating in those languages. So I do not read those provisions as providing authority for which the defendant urges on this court.

Decision:

107. Accordingly, I am satisfied that for the reasons stated the legislation is [*Intra*] *vires* and is not invalid because it infringes or denies any of the provisions of the *Charter of Rights* which have been cited. All right.

Société des Acadiens v Association of Parents, [1986] 1 SCR 549

Summary: Appellants brought an action seeking declaratory and injunctive relief against the mis en cause to prevent it from offering immersion programs to French-speaking students in its English schools. The New Brunswick Court of Queen's Bench delivered a judgment--later clarified in two subsequent decisions--in favour of the appellants but refused to issue the injunction. The mis en cause, despite pressure from parents of the students who would have enrolled in the program, decided not to appeal the judgment as clarified. The parents created the respondent Association and made applications for leave to appeal the judgment and for an extension of the appeal period. Prior to the hearing before Stratton J.A. in the Court of Appeal, the appellants requested that the matter be heard by a bilingual judge as some of the presentations were to be made in French. Stratton J.A. acceded to the request and referred the matter to another judge who decided that the matter had to be dealt with by a panel of the Court. A panel of three, Stratton J.A. presiding, granted respondent's applications. Hence this appeal to determine (1) whether the New Brunswick Court of Appeal had inherent jurisdiction to grant leave to appeal when the person seeking leave was not a party to the original action and was applying out of time, and if so, whether it exercised its discretion properly; and (2) whether s. 19(2) of the Canadian Charter of Rights and Freedoms entitles a party 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.

*It should be noted that part of the judgment of the majority in *Société des Acadiens* was ousted by the reported decision *Beaulac*.

Relevant Paragraphs:

54. I am reinforced in this view by the contrasting wording of s. 20 of the *Charter*. Here, the *Charter* has expressly provided for the right to communicate in either official language with some offices of an institution of the Parliament or Government of Canada and with any office of an institution of the Legislature or Government of New Brunswick. The right to communicate in either language pos-tulates the right to be heard or understood in either language.

55. I am further reinforced in this view by the fact that those who drafted the *Charter* had another explicit model they could have used had they been so inclined, namely s. 13(1) of the *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. O-1:

> **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.

56. Here again, s. 13(1) of the Act, unlike the *Charter*, has expressly provided for the right to be heard in the official language of one's choice. Those who drafted s. 19(2) of the *Charter* and agreed to it could easily have followed the language of s. 13(1) of the *Official Languages of New Brunswick Act* instead of that of s. 133 of the *Constitution Act, 1867*. That they did not do so is a clear signal that they wanted to provide for a different effect, namely the effect of s. 133. If the people of the Province of New Brunswick were agreeable to have a provision like s. 13(1) of the *Official Languages of New Brunswick Act* as part of their law, they did not agree to see it entrenched in the Constitution. I do not think it should be forced upon them under the guise of constitutional interpretation.

57. The only other provision, apart from s. 20, in that part of the *Charter* entitled "Official Languages of Canada", which ensures communication or understanding in both official languages is that of s. 18. It provides for bilingualism at the legislative level. In *MacDonald* one can read the following passage, in the reasons of the majority, at p. 496:

> Section 133 has not introduced a comprehensive scheme or system of official bilingualism, even potentially, but a limited form of compulsory bilingualism at the legislative level, combined

with an even more limited form of optional unilingualism at the option of the speaker in Parliamentary debates and at the option of the speaker, writer or issuer in judicial proceedings or processes. Such a limited scheme can perhaps be said to facilitate communication and understanding, up to a point, but only as far as it goes and it does not guarantee that the speaker, writer or issuer of proceedings or processes will be understood in the language of his choice by those he is addressing.

Decision: The appeal should be dismissed.

B. Subsection 20(2): Communications by public with New Brunswick institutions

Subsection 20(2) of the *Charter* provides:

> **Communications by public with New Brunswick institutions**
> (2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

In the jurisprudence, the relevant decisions that address the constitutional protection of language rights and Article 20(2) of the Charter are:

R v Losier, 2011 NBCA 102

Summary:

I. Introduction
1. This application for leave to appeal involves the decision of a judge of the Court of Queen's Bench to confirm the respondent's acquittal on two charges, one of operating a motor vehicle while his blood alcohol level exceeded the legal limit (s. 253(1)(b) of the *Criminal Code*), the other of operating a vehicle while his ability to do so was impaired by alcohol (s. 253(1)(a)): 2011 NBQB 177, [2011] N.B.J. No. 240 (N.B. Q.B.). These acquittals were entered following the exclusion, pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms*, of a qualified technician's certificate purporting to establish the blood alcohol level in question. According to the trial judge, exclusion was justified because the respondent's rights to be served in the official language of his choice and to be informed of this right had been violated. Again according to the trial judge, the right to this information, which is expressly recognized in s. 31(1) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5, arises by implication from s. 20(2) of the *Charter*.

II. Background
2. The decision under appeal gives a very useful overview of the background, both factual and procedural, that led to the verdicts of acquittal in Provincial Court:

> [TRANSLATION]
>
> The Attorney General appeals a decision of a Provincial Court judge (see: 2010 NBPC 24) who excluded from evidence the qualified technician's certificate in a case of impaired driving on the ground the language rights of the accused, Serge Alain Losier, had been violated.
>
> The trial judge found that the absence of an active offer of service in both official languages on the part of the peace officer and the violation of these language rights amounted not only to a violation of s. 31(1) of the *Official Languages Act*, but also to a violation of s. 20(2) of the *Canadian Charter of Rights and Freedoms*. As a result, this opened the way to remedial action under s. 24(2) of the *Charter*.

Relevant Paragraphs:

III. Analysis and decision

7. The grounds of appeal raise important questions of "law alone" within the meaning of s. 839(1) of the *Criminal Code*. Accordingly, the Attorney General is granted leave to appeal.

8. That being said, we are in substantial agreement with the reasons given by the judge of the Court of Queen's Bench (see paras. 14-49 in particular). In our opinion, those reasons reflect a sound appreciation of the pertinent principles of law, particularly with respect to the meaning and scope to be given to s. 20(2) of the *Charter*.

9. The police officer who stopped the respondent was under a duty to comply with the obligations imposed on institutions of the government of New Brunswick by s. 20(2) of the *Charter* (see *Société des Acadiens & Acadiennes du Nouveau-Brunswick Inc. c. R.*, 2008 SCC 15, [2008] 1 S.C.R. 383 (S.C.C.); *Gautreau c. Nouveau-Brunswick* (1989), 101 N.B.R. (2d) 1, [1989] N.B.J. No. 1005 (N.B. Q.B.), rev'd on other grounds (1990), 109 N.B.R. (2d) 54, [1990] N.B.J. No. 860 (N.B. C.A.), leave to appeal refused [1991] 3 S.C.R. viii (note), [1990] S.C.C.A. No. 444 (S.C.C.); and *R. c. Gaudet*, 2010 NBBR 27, [2010] N.B.J. No. 25 (N.B. Q.B.)).

10. As the majority pointed out in *R. v. Beaulac*, [1999] 1 S.C.R. 768, [1999] S.C.J. No. 25 (S.C.C.), it is incumbent upon courts to eschew a restrictive interpretation of legislative and constitutional provisions dealing with language rights. We draw additional guidance from that landmark decision. Indeed, among the interpretations that might reasonably be given to such provisions, courts must favour the one that is more likely to reflect the application of the following principles: (1) the right to use one or the other official language requires acknowledgement of a duty on the part of the state to take positive steps to promote the exercise of that right; and (2) the objective of the entrenchment of this right in the *Charter* was none other than to contribute to "the preservation and protection of official language communities":

> Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees; see J. E. Oestreich, "Liberal Theory and Minority Group Rights" (1999), 21 *Hum. Rts. Q.* 108, at p. 112; P. Jones, "Human Rights, Group Rights, and Peoples' Rights" (1999), 21 *Hum. Rts. Q.* 80, at p. 83: "[A] right ... is conceptually tied to a duty"; and R. Cholewinski, "State Duty Towards Ethnic Minorities: Positive or Negative?" (1988), 10 *Hum. Rts. Q.* 344.
>
> [...]
>
> 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.)*, *supra*, at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick*, *supra*, 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. I will return to this point later. [paras. 20, 25]
>
> [Emphasis added.]

We are of the opinion that the interpretation the Provincial Court, as well as the Court of Queen's Bench, gave to s. 20(2) is in synch with those instructions. We note that it echoes the interpretation adopted by the Court of Queen's Bench in *Gautreau c. Nouveau-Brunswick* (Richard C.J.Q.B) and *R. c. Gaudet* (LaVigne J.). At any rate, we reject the restrictive interpretation of s. 20(2) espoused in other decisions, notably *R. c. Robichaud*, 2009 NBCP 26, 350 N.B.R. (2d) 113 (N.B. Prov. Ct.).

11. Finally, while there is no question that language rights under the *Charter* are "infrangible" (see *R. v. McGraw*, 2007 NBCA 11, 312 N.B.R. (2d) 142 (N.B. C.A.) and *R. c. Bujold*, 2011 NBCA 24, 369 N.B.R. (2d) 262 (N.B. C.A.)) and that s. 24 must be interpreted in a way that upholds "*Charter* rights by providing effective remedies for their breach" (see *Ontario v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 (S.C.C.) at para. 19), it bears underscoring that exclusion of evidence essential to the prosecution is not necessarily the appropriate remedy for every violation of language rights, regardless of the circumstances. The analysis required under s. 24(2) must be carried out.

Reasons given by the judge of the Court of Queen's Bench: *R v Losier*, 2011 NBBR 177.

B - L'obligation d'informer au sujet d'un choix de langue au paragraphe 31(1) de la Loi sur la langue officielle existe-il également en vertu du paragraphe 20(2) de la Charte?

21. Il est admis par le Procureur Général que l'agent Jordan n'a pas informé M. Losier du droit de communiquer dans la langue de son choix tel que prescrit au paragraphe 31(1) de la *Loi sur les langues officielles*. Ce droit d'en être informé n'est pas spécifié au paragraphe 20(2) de la *Charte*. Le juge du procès a conclu en une violation de ce droit, non seulement en vertu de paragraphe 31(1) de la *Loi sur les langues officielles*, mais également en vertu du paragraphe 20(2) de la *Charte*.

[…]

23. *La Charte Canadienne des droits et libertés* a permis un développement important des droits linguistiques. Le paragraphe 16(1) de la *Charte* proclame le français et l'anglais comme langues officielles du Canada. L'article 16.1 ajouté en 1993 - confirme les mêmes statuts et droits au Nouveau-Brunswick.

24. Le paragraphe 16(3) de la *Charte* prévoit que non seulement le Parlement, mais aussi que les législatures provinciales peuvent favoriser la progression vers l'égalité de statut du français et de l'anglais. La *Loi sur les langues officielles du Nouveau-Brunswick* découle du pouvoir conféré par l'article 16(3) à la législature du Nouveau-Brunswick

25. Le préambule de la *Loi sur les langues officielles* fait référence à la Constitution Canadienne et reconnait le français et l'anglais comme langues officielles du Nouveau-Brunswick et confirme le droit du public à l'usage du français et l'anglais avec toutes les institutions de la législature et du gouvernement du Nouveau-Brunswick, l'accès aux lois de la province, à l'emploi de l'une ou l'autre langue officielle pour communiquer avec tout bureau des institutions de la Législature. Cette *Loi* confirme le pouvoir de la Législature et du gouvernement de favoriser la progression vers l'égalité du statut, des droits et des privilèges. Enfin, il est convenu que la *Loi sur les langues officielles* respecte les droits conférés par *la Charte Canadienne des droits et libertés* et réalise leurs obligations au sens de la *Charte*.

26. De part la nature de la *Charte* et la *Loi sur les langues officielles*, le Nouveau-Brunswick se distingue des autres provinces Canadienne en matière de langues et impose à la Province et ces institutions des obligations considérable afin de voir au respect des droits linguistiques. Dans l'arrêt *R. v. McGraw*, 2007 NBCA 11 (N.B. C.A.), le Juge en chef Drapeau a reconnu que la *Loi sur les langues officielles du Nouveau-Brunswick* sont des droits substantiels et non des droits procéduraux.

27. Pour souligner l'importance de ce droit de l'usage du français et de l'anglais l'article 31(1) prévoit que l'agent de police doit informer les membres du public de leur droit à l'emploi de la langue de leur choix.

28. À savoir si ce droit d'être informé de ce droit à l'emploi de la langue de leur choix est incorporé au paragraphe 20(2) de la *Charte*, je cite Lavigne J. dans *Gaudet*:

> 36 Le paragraphe 20(2) de la *Charte* comprend un droit libellé en termes très généraux. Vu l'évolution historique des droits de la minorité au Nouveau-Brunswick et des principes

énoncés par la Cour suprême du Canada en matière de droits linguistiques, il faut interpréter les droits linguistiques prévus au paragraphe 20(2) de la *Charte* de manière large, libérale, dynamique, réparatrice et fondée sur leur objet. L'égalité n'a pas en matière linguistique un sens plus restreint que dans d'autres domaines. Le sens d'un droit garanti dans la *Charte* doit être déterminé par l'examen de l'objet visé, c'est-à-dire en fonction des intérêts que ce droit vise à protéger. Il faut en ce domaine se montrer à la fois exigeant et respectueux de la lettre et de l'esprit de la Constitution.

37 L'interprétation des droits linguistiques doit être sensible au contexte. La démarche interprétative doit s'accorder avec la nécessité de prendre en compte le but de la garantie en question ainsi que le maintien et l'épanouissement des collectivités de langue officielle.

[...]

41 Le paragraphe 20(2) ne mentionne pas directement comme le fait le par. 31(1) de la *Loi sur les langues officielles*, le devoir de l'agent de la paix d'informer les membres du public du droit d'être servi dans la langue officielle de leur choix. Cependant, à mon avis, ce droit est implicitement reconnu au par. 20(2) de la *Charte*. En me fondant sur l'approche généreuse et libérale retenue par la Cour suprême du Canada en matière d'interprétation des droits linguistiques dans l'affaire *Beaulac* et en me fondant sur l'objet des dispositions en cause, je conclus que l'obligation de « l'offre active » est implicite au sens du par. 20(2) de la *Charte*. Afin de donner toute sa portée au droit de faire un choix, prévu au par. 20(2) de la *Charte*, il faut imposer une obligation correspondante aux agents de la paix d'informer le public de ce droit. Interpréter le par. 20(2) sans y inclure cette obligation aurait comme résultat évident de faire échec aux objets réparateurs de ce droit linguistique et serait donc incompatible avec une interprétation large et dynamique fondée sur l'objet de ce droit. Le par. 20(2) de la *Charte* comporte nécessairement l'offre active de service. La liberté de choisir, prévue au par. 20(2), est dénuée de sens en l'absence d'un devoir d'informer le citoyen de ce choix. Le paragraphe 20(2) de la *Charte* comporte nécessairement l'offre active de service et dans ce contexte un agent de la paix doit, au Nouveau-Brunswick, informer tout membre du public, avec qui il communique, du droit d'être servi dans la langue officielle de son choix.

42 Il s'agit de garantir aux personnes parlant une langue officielle minoritaire la sécurité linguistique. Ne dispenser des services dans la langue de la minorité que dans la mesure où le citoyen le réclame ne comporte aucune garantie sérieuse. Les minorités linguistiques ne revendiquent pas toujours les services auxquels elles peuvent prétendre. Un citoyen face à un agent de la paix qui l'arrête et qui lui parle dans une langue officielle qui n'est pas la langue de son choix, se résignerait à parler dans la langue de l'agent, craignant d'empirer son sort s'il réclame de l'agent qu'il lui parle dans l'autre langue officielle. La notion d'« offre active » revêt donc une grande importance comme facteur de progrès vers l'égalité de statut des deux langues officielles. Ceci s'adapte aussi bien avec l'idée que les droits linguistiques garantis dans la *Charte* ont un caractère réparateur par rapport aux situations antérieures.

43 Comme l'a dit la Cour suprême du Canada dans *Beaulac* au paragraphe 20:

[...] Les droits linguistiques ne sont pas des droits négatifs ni des droits passifs; ils ne peuvent être exercés que si les moyens en sont fournis. Cela concorde avec l'idée préconisée en droit international que la liberté de choisir est dénuée de sens en l'absence d'un devoir de l'état de prendre les mesures positives pour mettre en application des garanties linguistiques.

Et aussi au paragraphe 19:

[...] dans un cadre de bilinguisme institutionnel, une demande de services dans la langue de la

minorité de langues officielles ne doit pas être traitée comme s'il y avait une langue officielle principale et une obligation d'accommodements en ce qui concerne l'emploi de l'autre langue officielle. Le principe directeur est celui de l'égalité des deux langues officielles.

44 Le fait que le législateur provincial a adopté le paragraphe 31(1) de la *Loi sur les langues officielles* n'a pas pour effet d'écarter l'application de la *Charte*. Les droits que veut protéger le par. 31(1) de la *Loi sur les langues officielles* ne sont pas des droits nouveaux. Ces droits sont déjà protégés par la *Charte* en son par. 16(2) et surtout 20(2). La *Loi sur les langues officielles* ne fait qu'illustrer la progression des droits linguistiques par des moyens législatifs selon le par. 16(3) de la *Charte*. De fait, je dirais que l'article 31 est venu réparer la situation qui existait. Comme nous le savons, plusieurs décisions prononcées avant l'entrée en vigueur du par. 31(1) de la *Loi sur les langues officielles* arrivaient à la conclusion que l'absence d'une offre active ne violait pas automatiquement les droits linguistiques reconnus par la *Charte*.

29. Je conviens avec ma collègue Lavigne J. tout comme le juge du procès que le paragraphe 20(2) de la *Charte* inclut l'obligation de l'agent d'informer le prévenu de son choix d'usage de la langue tout comme le paragraphe 31(1) de la *Loi sur les langues officielles*.

Decision: The appeal is dismissed.

Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada, [2008] 1 SCR 383, 2008 SCC 15

Summary:
Under an agreement between Canada and New Brunswick, the RCMP, a federal institution, acts as a provincial police force in that province. The issue in this appeal is whether RCMP members are required, when performing their duties as provincial police officers, to fulfil the language obligations imposed on New Brunswick institutions by s. 20(2) of the *Canadian Charter of Rights and Freedoms*. The Federal Court held that serving as a provincial police force makes the RCMP a New Brunswick institution for the purposes of s. 20(2) and that the RCMP is therefore required to provide police services in accordance with the provincial language standards. The Federal Court of Appeal set aside that judgment.

Relevant Paragraphs:

1. BASTARACHE J. — Section 20(2) of the *Canadian Charter of Rights and Freedoms* provides that any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French, and, unlike in the case of services provided by federal institutions under s. 20(1) of the *Charter*, this right does not depend on the territorial concentration of the language group or the nature of the office in question. This is complete institutional bilingualism, as citizens have the right to use the language of their choice at all times when requesting a service from or communicating with the provincial government. […]

2. The question before the Court in this case is whether, by agreeing in a contract to provide police services in the province, the Royal Canadian Mounted Police ("RCMP"), a federal institution, is bound by the more generous rules respecting language in New Brunswick or is required to meet only the federal official languages standards.

[…]

7. This Court must therefore decide whether RCMP members designated as provincial peace officers under an agreement between Canada and the province of New Brunswick ("Agreement") are required, when performing their duties as provincial police officers, to fulfil the language obligations imposed on institutions of the New Brunswick government by s. 20(2) of the Charter. It is common ground that the RCMP is at all times subject to the minimum obligations imposed on it by s. 20(1) of the Charter and by the federal official languages legislation, regardless of whether it is acting as the federal police force or as a provincial or municipal force under an agreement.

3. Analysis

8. The appellants assert that s. 20(1) of the *Charter* applies to the RCMP when it serves as a provincial police force, as was indicated in *Doucet v. Canada*, [2005] 1 F.C.R. 671, 2004 FC 1444, but they add that it should not be concluded that s. 20(1) establishes a language threshold that cannot be raised when the province in question has greater obligations. If the RCMP takes responsibility for a function of the New Brunswick government, it must be equated with and must assume the same obligations as a provincial institution.

9. The appellants also point out that the powers exercised by the RCMP as a provincial police force derive from provincial statutes and that, pursuant to those statutes, RCMP members are peace officers for New Brunswick (*Police Act*, S.N.B. 1977, c. P- 9.2; *Motor Vehicle Act*, R.S.N.B. 1973, c. M- 17). As a result, they argue, the RCMP members are part of the provincial government. And all officers of the provincial government are required to comply with provincial statutes and with s. 20(2) of the *Charter*.

10. The respondent relies on the principle of constitutional accountability of governments and argues that New Brunswick remains constitutionally responsible for the administration of justice and for the actions of its delegates in this regard, be they from the private sector or members of another government. Relying on *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, the respondent submits that New Brunswick cannot evade its constitutional obligations by alleging that its delegate, the RCMP, has assumed them in its stead. The RCMP cannot be both a federal institution and a provincial institution. Its constitutional obligations are therefore limited to those applicable to the federal government, and any additional obligations can only be contractual, which means that an action might lie only for breach of contract. But the Agreement with New Brunswick includes no specific language obligations.

11. The interveners have proposed a different solution. In their opinion, s. 20(1) of the *Charter* does apply, but a contextual interpretation of that section allows its scope to be extended in this case because of New Brunswick's constitutional specificity. According to this approach, the words "significant demand" and "nature of the office" in s. 20(1) of the *Charter* should be interpreted broadly as requiring the RCMP to provide bilingual services everywhere in New Brunswick.

3.1 *Statutory Authority*

12. Before considering all these arguments in greater detail, I will briefly describe the existing legislative scheme.

13. The Agreement between New Brunswick and Canada is authorized by a provincial statute (s. 2 of the *Police Act*) and a federal statute (s. 20 of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R- 10 ("*RCMPA*")). The *RCMPA* authorizes the RCMP to enter into contracts to perform provincial policing duties. The counterpart of that federal statute in New Brunswick is the *Police Act*, s. 2(1) of which provides that the New Brunswick government may enter into such agreements with the RCMP. Section 2(2) of the *Police Act* gives an RCMP member all the attributes of a New Brunswick peace officer.

14. The RCMP, which is constituted under s. 3 of the *RCMPA*, is responsible for enforcing federal laws throughout Canada. There is no doubt that the RCMP remains a federal institution at all times. This principle was confirmed in *R. v. Doucet* (2003), 222 N.S.R. (2d) 1, 2003 NSSCF 256, and in *Doucet v. Canada*, in which it was held that the RCMP retains its status as a federal institution when it acts under a contract with a province. This means that the RCMP cannot avoid the language responsibilities flowing from s. 20(1) of the *Charter* when it acts as a provincial police force. The Federal Court and the Federal Court of Appeal recognized this in the instant case. But s. 20 of the RCMP's enabling statute provides that it may *also* be given responsibility for the administration of justice and law enforcement in provincial or municipal jurisdictions. As a result, the fact that, in light of its nature and by virtue of its constitution, the RCMP is and remains a federal institution does not answer the question before this Court.

3.2 *Institutional Obligation*

15. Section 20(1) of the *RCMPA* authorizes the RCMP to enter into agreements with the provinces and enforce the laws in force therein. This is not in dispute. Provincial laws must, of course, be enforced in a manner consistent with the Constitution; there is no reason to think that the legislature might have intended anything else in this case. Does this pose a problem because the RCMP is a federal institution? I do not think so.

16. Section 2(2) of the *Police Act* provides that "[e]very member of the Royal Canadian Mounted Police . . . has all the powers, authority, privileges, rights and immunities of a peace officer and constable in and for the Province of New Brunswick". Since each RCMP member is authorized by the New Brunswick legislature to administer justice in the province, he or she performs the role of an "institution of the legislature or government" of New Brunswick and must comply with s. 20(2) of the *Charter*. Although New Brunswick continues to be responsible for administering justice in accordance with its constitutional language obligations despite the Agreement, this in no way changes the fact that the RCMP may have its own language obligations to meet in fulfilling its mandate in New Brunswick.

17. In *Canada (Commissioner of Official Languages) v. Canada (Department of Justice)* (2001), 194 F.T.R. 181, 2001 FCT 239, the Federal Court—Trial Division held that a government may not adopt policies that would, as a result of agreements entered into, hinder the protection of guaranteed rights. In that case, the federal government had, by contract, effectively transferred the administration of certain criminal prosecutions to the province of Ontario. Under the agreement, the provincial language rights scheme, which provided less protection to francophones, became applicable to a federal matter. The court held that the federal government could not jettison its constitutional obligations in this way. However, it did not rule on the obligations of Ontario officers performing duties under the agreement with the federal government.

18. In the instant case, there is no transfer of responsibility for the administration of justice in the province. Under the Agreement between the RCMP and New Brunswick, the New Brunswick Minister of Justice is responsible for setting "the objectives, priorities and goals of the Provincial Police Service" (art. 3.3). The Minister determines the level of service to be provided. The respondent acknowledges, at para. 62 of her factum, that — as the Federal Court observed (para. 39) — New Brunswick retains control over the RCMP's policing activities. The RCMP remains responsible for internal management only (art. 3.1(a)). What must be concluded from this situation is that the institution in question is an institution of the New Brunswick government, that is, its Minister of Justice, and that the Minister discharges his or her constitutional obligations through the RCMP members designated as New Brunswick peace officers by the provincial legislation. The provision of services by the RCMP must therefore be consistent with the obligations arising under s. 20(2) of the *Charter*.

19. The RCMP does not act as a separate federal institution in administering justice in New Brunswick; it assumes, by way of contract, obligations related to the policing function. The content of this function is set out in provincial legislation. Thus, in New Brunswick, the RCMP exercises a statutory power — which flows not only from federal legislation but also from New Brunswick legislation — through its members, who work under the authority of the New Brunswick government.

20. Regard must also be had to the fact that the functions for which the RCMP is responsible in the instant case are government functions that are subject to specific constitutional obligations. The RCMP may not take on such functions without assuming the obligations associated with them. This principle was articulated by Lamer J. (dissenting on other grounds) in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at pp. 1077‑78:

> The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret

> legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. . . . Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. [Emphasis added; emphasis in original deleted.]

21. Professor Hogg added the following in *Constitutional Law of Canada* (5th ed. 2007), vol. 2, at pp. 86‑87:

> Where the Parliament or a Legislature has delegated a power of compulsion to a body or person, then the Charter will apply to the delegate.
>
> . . .
>
> . . . it is the exercise of a power of compulsion that makes the Charter applicable to bodies exercising statutory authority. [Emphasis added.]

22. These comments correspond to the view of Gauthier J., the trial judge in the case at bar, who stated the following on this point at paras. 39‑40 of her reasons:

> As Peter Hogg said in *Constitutional Law of Canada*, 4th edition, at page 514, the performance of provincial and municipal police services under a contract between the RCMP and a province is authorized by a statute of the province . . . and by a federal statute . . . and derives in part from the province's power to administer justice under subsection 92(14) of the *Constitution Act, 1867*. . . .
>
> When the RCMP member arrested Mrs. Paulin and gave her a ticket under the *Motor Vehicle Act* . . . he was performing a government function, more particularly a function of the Government of New Brunswick.

23. Richard C.J. of the Federal Court of Appeal stressed the fact that the RCMP's obligations are contractual and not constitutional. I do not think these two types of obligations are mutually exclusive. It is as a result of the Agreement that the RCMP, by participating in a function of the New Brunswick government, has constitutional obligations imposed on it under s. 20(2) of the *Charter*. As I explained above, the RCMP must fulfil that province's obligations when acting on its behalf. This reasoning is echoed in the Agreement itself, art. 2.2 of which provides as follows:

> Those Members who form part of the Provincial Police Service shall
>
> a) perform the duties of peace officers; and
> b) render such services as are necessary to
>
> . . .
>
> ii) execute all warrants and perform all duties and services in relation thereto that may, under the laws of Canada or the Province, be executed and performed by peace officers. [Emphasis added.]

Article 4.1 is also quite explicit:

> For the purposes of this Agreement, the Commanding Officer shall act under the direction of the Minister in aiding the administration of justice in the Province and in carrying into effect the laws in force therein. [Emphasis added.]

24. The parties have used the word “services” in the second paragraph of art. 2.2, in contrast with the word “duties” used in the preceding paragraph. It can be inferred from this that the concept of “services” as understood by the parties is similar to that found in s. 20(2) of the *Charter* and that the parties intended that the RCMP, in performing its mandate, also assume the language “duties” in relation thereto and, therefore, provide citizens with bilingual services. This seems all the more true given that “necessary” services are, by definition, services that are consistent with the law, including the Constitution. I see no need to expressly provide for the duty of bilingualism in the Agreement, since bilingualism is at any rate a constitutional requirement.

Decision:

26. For the reasons set out above, I would allow the appeal and declare that s. 20(2) of the Charter requires the RCMP to provide services in both official languages when acting as a provincial police force pursuant to the Agreement between the New Brunswick government and the Government of Canada dated April 1, 1992.

Gautreau v New Brunswick, 101 NBR (2d) 1.

Summary:

2. The argument in support of the motion to stay the proceedings is however of a constitutional nature and very important. The applicant asked for an appropriate and immediate remedy under s. 24(1) of the *Charter of Rights and Freedoms*, alleging that his rights under ss. 16(2) and 20(2) of the said *Charter* had been infringed.

The Facts

3. Robert W. Carson was a member of the New Brunswick Highway Patrol. On November 17, 1987, he issued to the applicant a summons "prescribed by regulations under the *Motor Vehicle Act*", ordering him to appear in Provincial Court on December 2, 1987, to answer to the charge of having violated s. 149(2)(b) of the *Motor Vehicle Act* on July 22, 1987. The summons is a form drafted in the two official languages of New Brunswick and officers are required to complete it by filling in the appropriate information in each of the boxes on the form. The first question on the summons to be answered is the "desired language" of the ticket recipient. Thereafter, the officer is required to complete the ticket in the desired language of the recipient. To enable unilingual English or French speaking officers to complete the summons in the other official language unfamiliar to them, the Departments of Justice and Transportation prepared a *Guide de la Patrouille/Uniform Traffic Ticket: A Guide* (the "*Guide*").

4. The part of the *Guide* that is relevant to the case at bar states:

> [Original]
> **A. Selection Of Language**
>
> The Ticket *Must* Be Completed In The Official Language Requested By The Ticket Recipient.
>
> 1. At the time of preparing the ticket, the Peace Officer *must* ask the violator the language of his choice for the completion of the ticket, and for all future proceedings as required. Indicate the language chosen by checking the box designated for that purpose.
>
> 2. The ticket should be completed in the requested language. *Chapter VII of the Guide contains the charge description in both official languages*. Select the proper section of the *Motor Vehicle Act* and copy the words in the appropriate area of the ticket in the language chosen.
>
> 3. *The issuing officer can complete the ticket in an official language other than his own by using the words and phrases contained in this Guide*. (Underlining is mine.)

5. In this case, officer Carson chose to ignore the *Guide* and the desired language of the applicant. He failed to

ask the ticket recipient his desired language and he wrote the summons in English although he had the *Guide* in his possession and consequently, had the capacity to write the summons in French, which we now know was the desired language of the recipient (applicant).

Relevant Paragraphs:

B. Section 16(2) And 20(2) of The Charter

26. Counsel all dwelt on the interpretation of ss. 16(2), 19(2) and 20(2) of the *Charter*. To solve the constitutional issue in this matter, s. 20(2) only need be applied. It provides:

> Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

27. It's worth remembering that "in construing legislative enactments, judges may resort to the literal approach, the contextual approach or the teleological approach". (*Language Rights in Canada*, edited by Michel Bastarache, p. 56 and P.-A. Côté, *The Interpretation of Legislation in Canada*, 1982, p. 196 et seq.)

28. Moreover, one must not forget that the case at bar deals not with an ordinary statute but with a constitutional enactment.

29. The importance of s. 20 of the *Charter* justifies full consideration according to each of these three methods.

1. The Grammatical Or Literal Method

[…]

33. It is therefore appropriate to analyze s. 20(2) of the *Charter* according to the literal method.

34. The word "public" does not cause any problems. Whether it be in English or French, the term has a clear meaning. Public understanding or dictionary meanings, all lead to the same result: the word "public" in s. 20(2) of the *Charter* necessarily includes any individual or group of people.

35. In *Cahiers de Droit* (1983), 24 C. de D. 81, P. Foucher and G. Snow state at page 85:

> We believe that the word *public* means any member of society who receives government services, including corporations, partnerships and associations having some sort of legal capacity.
>
> ...in its ordinary meaning, 'public' denotes an opposition between the obligee and the obligor, in this case, the citizen and government. Thirdly, the English version uses the wording 'any member of the public', an expression which clearly particularizes the owner of the right, distinguishing him or her from the general public. The right is thus given to every person, even a corporation, who does business in New Brunswick with the government of the province, without regard to the client's place of residence.

36. In *The Right to Receive Public Services in Both Official Languages, Language Rights in Canada*, supra, P. Foucher says at page 198:

> The beneficiary of the right is 'any member of the public'. Why choose this term rather than other available terms such as 'any person', 'Canadian citizens', or 'everyone', that Parliament had employed elsewhere, or other expressions previously suggested? The French version speaks of 'le public'. One fact seems clear: the 'public' has no independent legal existence and possesses no moral legal personality sufficient to effectively exercise these rights. The legislature must have contemplated individuals to whom one could attach the description 'any

member of the public'; this term must therefore be given its ordinary meaning.

> These rights must thus be conferred on all members of society who may have need for government services. Individuals are the primary beneficiaries, but the term clearly includes associations and groups, whether legally constituted or not.

37. I, thus, easily conclude that, in this case, the applicant is included in the term "public".

38. The "right to communicate with, and to receive available services from ... in English or French" should not be confusing either. It is a simple and explicit right. The only reasonable meaning that can be given to these words is that in New Brunswick, everyone has a constitutional right of communicating both verbally and in writing in one of the two official languages, English or French, with the government and its institutions. In addition, everyone has the right to receive government services in the language of his or her choice. Finally, the section specifies that it covers any communication with "any office of an institution of the legislature or government". In other words, the government of New Brunswick declares itself under s. 20(2) a bilingual entity and, moreover, confers equal status on each of the two chosen languages. This constitutional reality is also consistent with the *Official Languages of New Brunswick Act*, S.N.B. 1969, c. 14; R.S.N.B. 1973, c. 0-1, with *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, S.N.B. 1981, c. 0-1.1, with s. 462.1 of the *Criminal Code of Canada* and with s. 16(2) of the *Charter*, supra.

[…]

42. As indicated, not only are ss. 16(2) and 20(2) not mentioned in *MacDonald*, they could not be, since they do not apply to the Province of Quebec. These provisions apply in the only fully bilingual province of Canada, New Brunswick. Were the above-mentioned provisions of the *Motor Vehicle Act* to support the argument of counsel for the respondent, it must not be forgotten that the *Constitution Act*, 1982 is the supreme law of Canada (s. 52 of the *Constitution Act*, 1982) and takes precedence over all other statutes. To the extent that these provisions are inconsistent with ss. 16(2) and 20(2) of the *Charter*, they are of no force or effect.

43. Counsel for the respondent argued that issuing a summons is not a "communication or service or an institution of the legislature or government". He took the position that the New Brunswick Highway Patrol was not an institution of the government or of the legislature.

44. The French dictionary *Le Petit Robert* defines "institution" as being [Translation] "... instituted by man (as opposed to that which is established by nature), ... The thing instituted (corporation, group, system).... social forms and structures as a whole, as established by law ...".

45. In the case at bar, officer Carson was a member of the New Brunswick Highway Patrol. The Patrol was established in 1981 by an Act of the legislature of New Brunswick: *An Act to Amend the Police Act*, S.N.B. 1981, c. 59, s. 17.8(1). This subsection provides that "A police force to be known as the New Brunswick Highway Patrol is hereby established".

46. In *Le régime juridique des langues dans l'administration publique au Nouveau-Brunswick* (1983), 24 C. de D. 81, at pages 89 and 90, Foucher and Snow dealt with the tests applicable in determining whether an agency is an institution within the meaning of ss. 16(2) and 20(2) of the *Charter* and concluded:

> First, to be classified as an institution of the legislature or government, it would appear necessary that the agency *must be a creation of the state and must owe its very existence to a public Act* or to an integrated functional division of a Department.
> . . . . .
>
> The appointment of its directors, its funding, the degree of government control over its activities, the nature of its activities, can be relevant factors in categorizing an agency, *but the*

prime factor remains the legal source of its powers. (Underlining is mine.)

47. A simple reading of the *Police Act* (supra), is enough to satisfy that the New Brunswick Highway Patrol is a "creation of the state" established by a public Act of New Brunswick and that, moreover, it was under the control of a government department, the Department of Justice. It can also be said that under the *Police Act* (supra), the appointment of its commanding officers, its funding and the legal source of its powers all come exclusively from the state, that is, from the legislature and government (the Lieutenant Governor-in-Council) of New Brunswick.

48. Police forces are government institutions serving the public. Their work is not limited to simply issuing summonses but extends to several kinds of activities: emergency help, protection, traffic control, public education, to name only a few.

49. I am satisfied of the relevance and practical application of the above-mentioned criteria. The application of these criteria leads me to conclude that the issuing of a ticket by a member of a police force in New Brunswick to an individual in New Brunswick is a communication or a service as contemplated by s. 20(2) of the *Charter*. Consequently, the communication must be made by the police officer in the individual's desired language. I will return to the practical consequences of this conclusion.

2. The Contextual Method
[…]

71. With respect to the interpretation to be given to ss. 20(2) and 16(2), Foucher and Snow write:

> Our courts will have a large role to play in interpreting subsection 20(2). In solving these problems of interpretation, the very essence of language rights must be respected, as constitutional rights entrenched in the fundamental and supreme law of the land. We have strived to give a large and liberal interpretation to subsection 20(2), and we believe that the courts must also deal with this provision in a similar frame of mind to ensure that the *Charter* has a real impact on language rights.
>
> Besides, subsection 16(2) militates in favour of such an interpretation.

72. Writing about the origins of s. 20 of the *Charter* in *Language Rights in Canada*, c. 4, p. 178, Foucher reminds us of what the Royal Commission on Bilingualism and Biculturalism had to say on the matter in 1967:

> Attempting to define the obligations that the provinces must meet, the Commission stated:
>
> > We begin by rejecting a proposition that in our eyes is unacceptable - that is, the provision of services in the minority language only to the extent that the minority requests. A system of that kind would constitute no real guarantee; it would be at the mercy of more or less arbitrary interpretation by the authorities of the day. Moreover, we have noted earlier that in a province where services have never or rarely been offered in the official language of the minority, the minority may by force of habit have resigned themselves to the situation even when they considered it unjust. We need more objective criteria than this, criteria founded on something more tangible.

73. Not only do I agree with these opinions, I am also convinced that the interaction of the provisions of the *Charter*, just mentioned, does not allow any deviation, as suggested by counsel for the respondent, from the express intention of the legislator to confer on the two official languages of New Brunswick the same status, equality and full usage.

3. The Teleological Method

[…]

80. The political nature of ss. 16 to 20 of the *Charter* requires that the courts not interpret too breadly the objects of the enactment (*La Société*). However, as previously mentioned, the constitutional nature of ss. 16 to 20 must also be recognized even though the sections resulted from a political compromise. (See *Reference Re Roman Catholic High Schools Funding*, page 30 of this decision).

81. The analytical process to be followed by a judge when faced with the interpretation of a constitutional document is thus very complex. The Chief Justice of Canada, the Right Honourable Brian Dickson, commented on this subject in his remarks to the Canadian Bar Association Annual Meeting in Vancouver on August 23, 1989:

> Our decisions have always been important to the litigants, but today, for better or for worse, our judgments often seem to affect the lives, the spirit and aspirations of all Canadians.
>
> . . . . .
>
> Solving the complex issues that are brought before the courts is often facilitated by a broad perspective inspired by a more objective academic point of view.
>
> The abundance of works produced by academics in our law schools has partly resulted, I hope, from the eagerness of the bench to take these writings seriously.
>
> If we want to build on the foundations we have laid down for a specifically Canadian case law and jurisprudence, cooperation between the bench and academics is as vital as cooperation between the bar and the bench.

82. This is, in my opinion, an ideal opportunity to put into practice the opinion of the Chief Justice of Canada. The issue raised in this matter is complex and it specifically affects the lives, the spirit and aspirations of all the inhabitants of New Brunswick.

83. In *Language Rights in Canada*, Professor Braën, after dealing with the general scope of ss. 16 to 23 of the *Charter*, concluded at page 43:

> ...the adoption of the *Constitutional Act*, 1982 with its *Charter* raised expectations of considerable developments in the area of language rights. Not only do sections 16 to 23 of the *Charter* entrench language rights previously established by ordinary legislation, they also create new rights.
>
> The language rights provided for by sections 16 to 23 entrench in the constitution the concept of Canadian duality. These provisions are fundamental not only because they consolidate previous gains but also because they provide a well-defined direction for the interpretation of language guarantees. This new direction, in Canadian constitutional law, is indicated by the formal recognition of the principle of linguistic equality and of the 'constitutional goal of advancing the equality, of status or use of French'. These remarks apply both to the federal and the New Brunswick Governments.

84. In the same book, Professor Foucher added at pages 182, 191, 193, 196, 197, 198 and 199:

> The right granted in the proposal is limited to the right to communicate with the government, while section 20 of the *Charter* adds to it the right to 'receive services'. There must, therefore, be a distinction between the two concepts.

. . . . .

Sections 16 to 20 reflect the compromise arrived at by the protagonists: federal bilingualism, bilingualism in New Brunswick and unilingualism in the other provinces, subject to particular provisions or internal arrangements.

. . . . .

The principle of duality or linguistic equality requires an innovative approach to the analysis of section 20. The key position of the section in the *Charter* confirms this. Section 20 escapes the effect of the section 33 notwithstanding clause; neither the Federal legislature, nor the legislature of New Brunswick can exclude section 20.

. . . . .

We are of the view that as with section 16, section 20 must receive a liberal interpretation so as to give effect to its remedial character. The arguments favouring this approach seem to us the most convincing. In particular, it seems clear that the framers placed language rights in a privileged position and intended that they not be allowed to be emptied of content. Judicial interpretation, given the little that there is, must effectively give life to these provisions; perhaps more so than in the study of other *Charter* rights, judicial analysis of constitutional language rights will be of great importance. We do not believe that the courts must enshrine bilingualism in the public service as an absolute rule, but we are persuaded that they must be more demanding towards governments than they were in interpreting the *Official Languages Act*.

To the extent that there is a need to adapt language rights to social reality, it is our view that the *Charter* already contains the elements the courts require to appropriately achieve this objective, without requiring recourse to rules of interpretation that are incompatible with the constitutional status of the *Charter*, the intention of the framers and the central position of language rights in our law. In our more detailed study of the elements that make up sections 16 and 20, we will prefer those interpretations that enhance the efficacy of these sections and which suggest that the courts, and most particularly the Supreme Court of Canada, must approach these questions with an open mind. We stress that it would be inappropriate to create rigid and impractical rules; rather what is required is the recognition that sections 16 and 20 have a significant impact and that they imply correlative obligations which governments must respect.

. . . . .

Section 20 entrenches two distinct rights: the right to communicate with institutions and the right to receive services. The sources of this section indicate that one must distinguish between the two concepts and that their inclusion, in the particular form that they have, must be effective. There is, in our view, a difference of degree between communication and receipt of services.

85. Even though Professors Braën and Foucher made their comments before the Supreme Court decision in *La Société*, they are still relevant and they help us in understanding the scope of ss. 16 to 20 of the *Charter*. It's with this overall context in mind that s. 20(2) should be analyzed.

86. Before analyzing s. 20(2) according to the teleological method, the following comments by Dickson, C.J., in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 58 N.R. 81, 13 C.R.R. 64, 18 C.C.C. (3d) 385, 60 A.R. 161, 18 D.L.R. (4th) 321, 85 C.L.L.C. 14,023 at page 343, should be noted:

...it is certain that the *Canadian Charter of Rights and Freedoms* does not simply 'recognize

and declare' existing rights as they were circumscribed by legislation current at the time of the *Charter*'s entrenchment. The language of the *Charter* is imperative. It avoids any reference to existing or continuing rights but rather proclaims in the ringing terms of s. 2 that:

2. Everyone has the following fundamental freedoms:

(a) Freedom of conscience and religion;

I agree with the submission of the respondent that the *Charter* is intended to set a standard upon which *present as well as future* legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter*.

87. There is no reason why this principle concerning the freedom of conscience and religion cannot be applied in this case. Consequently, the right to communicate with any office of an institution of the legislature or government or the right to receive services must set a standard "upon which present as well as future legislation is to be tested".

88. In the instant case, the elements of this standard have been properly defined by Michel Bastarache and André Tremblay in *Language Rights, The Canadian Charter of Rights and Freedoms* (2nd Ed.), Beaudoin and Ratushny, editors, Carswell, 1989, at pages 683 and 684:

Obviously, the model for this section was section 9 of the *Official Languages Act*. Subsection 20(1) deals with the language of service or communication between citizens and federal institutions. This section imposes an obligation on federal institutions to be able to communicate in both official languages, but this same obligation is not imposed on citizens. As the public has a constitutionally-based right to be served in either French or English by federal institutions, these institutions will have a corresponding duty to hire a sufficient number of employees who are capable of communicating and rendering services in both official languages. Let us note the difference between sections 17 and 19 of the *Charter*, which provide the right to use French or English in the debates and proceedings of Parliament, in matters before the courts and, in all acts of procedure, and section 20, which confers the right to use both official languages to communicate with federal institutions. This difference in drafting has been noted in the majority decision in the *Société des Acadiens* case to justify a more limited scope of the guarantees of sections 17 and 19. According to the Supreme Court, the right to communicate in one or the other language presupposes the right to be heard and understood in these languages. Thus, the user must have the possibility of being understood directly by his interlocutor. Moreover, section 20 recognizes the right to use the two languages to receive services granted by the federal institutions.

This does not mean that federal institutions must become fully bilingual. We believe that, so long as central federal institutions and other offices of these institutions subject to section 20 have the necessary employees and documents to dispense services of equal quality to the public in both official languages, the constitutional obligation will have been satisfied. Services offered by these institutions should, therefore, be available in both languages.

Administrators will have to ensure that their personnel are recruited and employed according to constitutional norms. The head or central office of federal institutions will have to take special care, because in their case the principle of equality of the two languages as languages of service is obligatory and will have to be respected. As for the other offices of these institutions, they will have to conform to the same principle of equality of French and English as languages of service, where there is a large demand, or if the use of French and English is justified by the activities of the office. If the office meets either one of these criteria (the court

must ultimately come to a decision on this matter), it is generally bound by the same linguistic obligations as central federal institutions.

89. Section 20(2) confers to the New Brunswick public the right to communicate in French or English with the listed government institutions. This right to communicate must necessarily be accompanied by a right to be understood.

90. In the instant case, the respondent, an employee of the civil service, unilaterally decided not to ask the desired language of the applicant. The police officer voluntarily neglected to follow the steps on the form that included a box to guarantee an active offer to the public. By refusing to use the form prescribed by government authorities, the respondent violated the constitutional rights of the applicant.

Decision:

4. Conclusion

91. No matter what method of interpretation is used, the result is the same - the minimum rights of the applicant guaranteed by s. 20(2) of the *Charter* were violated. This violation of the *Charter* grants the applicant the right to an appropriate remedy under s. 24(1) of the *Charter*.

92. The interpretation of s. 20(2) of the *Charter* according to each of the three methods, leads to one and the same result, that is, that the applicant has the constitutional right to receive his ticket in his desired language and that the violation of this right by officer Carson gives the applicant the right to an appropriate remedy under s. 24(1) of the *Charter*. Before addressing the issue of remedy, I would like to comment on the practical consequence of this decision.