IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for Quebec)

BETWEEN:

ALLAN SINGER LTD.

Appellant
(Plaintiff)

-and-

THE ATTORNEY GENERAL OF QUEBEC

Respondent
(Defendant)

-and-

THE ATTORNEY GENERAL OF CANADA

Intervenor

-and-

THE ATTORNEY GENERAL OF NEW BRUNSWICK

Intervenor

-and-

THE ATTORNEY GENERAL OF ONTARIO

Intervenor

FACTUM OF ALLAN SINGER

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IN THE SUPREME COURT OF CANADA

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PART I

STATEMENT OF FACTS

1. The appellant, Allan Singer Ltd., carries on business as a printer and stationer on Sherbrooke St. in Montreal under a provincial charter. Appellant's business is of long standing. Appellant services principally an anglophone clientele. Appellant desires to service that clientele in the English language. Appellant makes its business known by means of an English language sign above its entryway, posted thirty years ago.

Case, p. 7

2. Section 58 of the Charter of the French Language [Bill 101] R.S.Q. c. C-11, as amended, requires that "signs and posters and commercial advertising shall be solely in the official language" [The official language is French by s. 1 of Bill 101]. Sections 59-61 of Bill 101 provide for certain exceptions to the rigour of unilingualism required by s. 58. Further exceptions are made by the Regulation respecting the language of commerce and business O.C. 1847-79, 27 June, 1979, R.R.Q. c. C-11, r. 9. Sections 52 (formerly s. 53) and 57 of Bill 101 require that certain commercial documents be in French, although under s. 89 French may be used concurrent with another language (unlike s. 58).

3. By an action in nullity commenced in September, 1978, and twice amended, most recently on November 26, 1981, appellant attacked the constitutionality of sections 53 and 57-61 of Bill 101 and the Regulation respecting the language of commerce and business.

Case, p. 22

4. By judgment rendered on March 28, 1982 the Superior Court dismissed the action in nullity. An appeal to the Quebec Court of Appeal produced sharp divisions in that Court, provoking each of the judges on the special panel of five to write separate reasons. By a 3-2 majority, the appeal was dismissed.

PART II

POINTS IN ISSUE AND APPELLANT'S POSITION WITH RESPECT THERETO

By order of this Court on May 11, 1987 the following constitutional questions were stated:

1. To the extent that sections 58 and 59 of the Charter of the French language, R.S.Q., c. C-ll, prescribe the exclusive use of French, are the said sections within the legislative competence of Québec?

2. To the extent that sections 53, 57, 60 and 61 of the Charter of the French Language, R.S.Q., c. C-11, require the joint use of French, are the said sections within the legislative competence of Québec?

3. Is section 214 of the Charter of the French Language, R.S.Q., c. C-ll, as brought into force by S.Q. 1982, c. 2l s. 1, inconsistent with subsection 33(1) of the Constitution Act, 1982 and thereby to the extent of the inconsistency of no force or effect pursuant to subsection 52(1) of the latter Act?

4. If the reply to question 3 is in the affirmative, are sections 53, 57, 58, 59, 60 and 61 of the Charter of the French Language, R.S.Q., c. C-ll, and the Regulation respecting the language of commerce and business, R.R.Q., c. C-11, r. 9, inconsistent with the guarantees of freedom of expression and non-discrimination provided in paragraph 2(b) and section 15 of the Canadian Charter of Rights and Freedoms and if so in what particulars and to what extent?

5. If the reply to question 4 is in the affirmative in whole or in part, are the said sections of the Charter of the French Language and the said Regulation thereunder justified by the application of section 1 of the Canadian Charter of Rights and Freedoms and thereby consistent with the Constitution Act, 1982?

Appellant respectfully submits that questions 1, 2 and 5 should be answered in the negative; questions 3 and 4 should be answered in the affirmative.

PART III
ARGUMENT

Principles of Interpretation

1. The intent of the Fathers of Confederation is an important aid to interpretation of legislative competence relating to language rights. In the Aeronautics Reference Lord Sankey, L.C. observed:

> Inasmuch as the [Constitution] Act embodies a compromise under which the Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or whittle down the provisions of the origina1 contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.
> Re the Regulation and Control of Aeronautics, [1932] A.C. 54, 70

2. At Confederation, French and English communities cohabited harmoniously in Quebec. The Confederation Debates reveal confidence that the proposed Constitution successfully regulated the language issue, such that neither side had cause to fear suppression or diminution of the status of its language.

> The Confederation Debates in the Province of Canada (ed. Waite, 1963), pp. 22-4

3. The Fathers of Confederation intended to "perpetuate" both languages" in Quebec.

> Betrand v. Dussault, Co. Ct. St-Boniface, Jan. 30, 1909. Cited with approval by Deschenes, C.J. in Blaikie v. A.G. Quebec (1978), 85

> D.L.R. (3d) 252, 279, in reasons specifically adopted by this Court "on matters of detail and of history": [1979] 2 S.C.R. 1016, 1027

Part of the machinery for accomplishing the perpetuation of both languages in Quebec was entrenchment of s. 133 of the Constitution Act, 1867. Section 133 guaranteed to francophones certain rights which they had previously lacked, such as the right to be summoned before the criminal courts in the French language (MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, 491). While s. 133 added to French language rights in Quebec, nothing there took away from English language rights, including the right to conduct business in the English language, as had been the case since 1763. The Confederation Debates reveal the intent that all such rights would remain intact.

> Parliamentary Debates on the Confederation of the British North American Provinces, 3d sess., Provincial Parliament of Canada, Quebec, 1865 (repr. King's Printer, 1951), p. 944

It is submitted that it is inconsistent with the spirit of s. 133 and with the confederation compromise on language rights which it reflects to interpret other provisions of the Constitution Act, 1867 as entitling the Legislature of Quebec to prohibit the use of English, or to require the English community to use the French language in private business matters.

It is submitted that it is inconsistent with the intent to perpetuate the use of English in Quebec to interpret s. 92 of the Constitution Act, 1867 as vesting power in Quebec to prohibit the use of English, or to require, concurrent with English usage, the use of French.

4. It is submitted that Mr. Justice Montgomery was correct in stating in the Court of Appeal below:

> I would look at the presumed intention of the Parliament of the

> United Kingdom in enacting the B.N.A. Act. I find it utterly inconceivable that Parliament, sitting in England, had the slightest intention of giving to any province the right to ban under penalty the use of the English language, now one of the two official languages of Canada. I seriously question the right of any province to ban its use except under the most exceptional circumstances.
>
> Case, p. 85

Question 1

5. Art. 58 of the Charter of the French Language requires that "...signs and posters and commercial advertising shall be solely in [French]," and thereby prohibits the use of English and other languages. The prohibition is sanctioned by fines of up to $5000.00 (Charter, s. 205), seizure of property (Charter, s. 208) and imprisonment for three months (Summary Convictions Act, R.S.Q. 1977, c. P-15, s. 55).

6. The jurisprudence of the Privy Council and of this Court invites intense scrutiny of provincial prohibitory legislation that entails penal consequences, particularly where the prohibition is only loosely or tenuously connected to a provincial regulatory scheme. The jurisprudence establishes that provincial prohibitions cannot stand on their own, in the sense of criminalizing conduct without some further regulatory objective. Provincial prohibitions must be anchored in the catalogue of provincial legislative powers and serve valid provincial regulatory purposes.

> Without the existence of the prerequisite provincial authority independent of the offence creating provisions, [provincial] legislation would be invalid as trenching upon the exclusive federal jurisdiction in criminal law.

Schneider v. The Queen, [1982] 2 S.C.R. 112, 142-3

See also:

Westendorp v. The Queen, [1983] 1 S.C.R. 4

Goldwax v. City of Montreal, [1984] 2 S.C.R. 525

> Hogg, Constitutional Law of Canada (2nd, 1985), p 420-1: ("In all the decisions in which provincial laws were upheld, the penalties were imposed in respect of matters over which the provinces ordinarily have legislative jurisdiction, such as property, streets, parks, corporate securities. ...Where, as the Court held in Westendorp, the provincial offence cannot be safely anchored in property and civil rights or some other head of provincial power, then it will be invalid.")

7. This Court has recognized that defining the boundary between prohibitions in pursuit of provincial regulatory objectives and criminal law is difficult (Edwards Books v. The Queen, [1986] 2 S.C.R. 713, 741). It is submitted that the true principle delineating this boundary is as follows: Where provincial prohibitory legislation exhibits a sufficient nexus or connection to provincial regulatory powers, such legislation will not offend exclusive federal jurisdiction in relation to the criminal law. Where, however, the nexus between the prohibition and provincial regulatory power is tenuous, or absent, provincial prohibitions are ultra vires.

A.G. Canada v. Dupond, [1978] 2 S.C.R. 770, 781

McNeil v. Bd. of Censors, [l978] 2 S.C.R. 662, 685

8. The presence or absence of a sufficient nexus is the issue that has divided opinion in this Court. It is submitted that the following indicators suggest a sufficient nexus to support provincial prohibitions in aid of regulatory objectives:

(a) The prohibition enforces standards created as part of a comprehensive provincial regulatory scheme. The standards

must be reasonably related to provincial regulatory purposes, such as business ethics, rather than moral objectives in and of themselves, such as eliminating prostitution or pornography.

> Rio Hotel v. Liquor Licensing Board, S.C.C. July 29, 1987, per Dickson, C.J.C., at p. 5
>
> McNeil v. Bd. of Censors, supra., p. 691, 693
>
> Edwards Books v. The Queen, [1986] 2 S.C.R. 713, 741

(b) The provincial legislation, in pith and substance, relates to provincial legislative powers such as highway control, zoning or health, the prohibition being but a means of enforcement.

> O'Grady v. Sparling, [1960] S.C.R. 804
>
> Bedard v. Dawson, [1923] S.C.R. 681

(c) The prohibition is an enforcement mechanism in aid of a scheme that aims at regulatory control of provincial property, such as zoning; as contrasted with prohibition of offensive conduct which may happen to occur on provincial property.

> Rio Hotel v. Liquor Licensing Board, S.C.C. July 29, 1987 (per Estey J: "The second situation occurs where a province purports to append penalties to a valid provincial undertaking such as the regulation of streets in a municipality.... In the second category the problem is rendered more difficult by the fact that the provincial regulation reaches outside premises owned or controlled by a provincial licensee. In that circumstance, the province again must find a valid provincial regulatory program and must confine the offences created in support of that program to those which are reasonably necessary for that purpose.")

(d) The regulatory scheme is occasioned by some compelling, temporary local circumstance or emergency, requiring stern control at the local level, either in anticipation of crisis, or to deal effectively with the crisis. In these circumstances, a concurrent jurisdiction to prohibit temporarily will be recognized in the Province, where necessary to maintain

order in the face of exigent circumstances.

A.G. Canada v. Montreal, supra.

9. Conversely, certain factors indicate the absence of a sufficient nexus to provincial regulatory power to support a provincial prohibition.

(a) The prohibition is an end in itself, the purpose of which is to enforce compliance with the legislature's view of morality or sanctity.

Henry Birks v. Montreal, [1955] S.C.R. 799, 810-11

Lieberman v. The Queen, [1963] S.C.R. 643

Westendorp v. The Queen, [1983] 1 S.C.R. 43_

(b) The prohibition is directed to standards of public order or safety through the criminalizing of activity perceived as a public wrong. The prohibition in object and purpose aims at maintenance of public order, as contrasted with protecting the safety or rights of individuals from the consequences of harmful conduct.

Russell v. The Queen (1881-2), 7 A.C. 829, 839

In re McNutt (1912), 47 S.C.R. 256, 266-7

Switzman v. Elbling, [1957] S.C.R. 285

10. Additionally, provincial prohibitions become suspect when they intrude into areas traditionally associated with federal criminal jurisdiction.

> The terms of s. 91(27) of the Constitution must be read as assigning to Parliament exclusive jurisdiction over criminal law in the widest sense of the term. Provincial legislation which in pith and substance falls inside the perimeter of that term broadly defined is ultra vires. Parliament's legislative jurisdiction properly founded on s. 91(27) may have a destructive force on encroaching legislation from provincial legislatures, but such is the nature of the allocation procedure in ss. 91 and 92 of the Constitution.

Scowby v. Glendinning, [1986] 2 S.C.R. 226, 238

> Rio Hotel v. Liquor Licensing Board, S.C.C. July 29, 1987 (per Estey, J.: "The longer the penalty and the closer the terminology comes to describing conduct traditionally criminal, the more doubtful the validity of the provincial enactment.")

Provincial legislation that unduly interferes with fundamental freedoms of religion, speech, expression, assembly or association requires extraordinary justification in local circumstance in order to be upheld as a concurrent exercise of provincial regulatory power.

A.G. Canada v. Dupond, supra., p. 791

Henry Birks v. City of Montreal, [1955] S.C.R. 799

Switzman v. Elbling, [1957} S.C.R. 285

11. Para. 4 enumerates a 1ist of indicators which suggest a sufficient nexus between provincial prohibitions and provincial regulatory powers. The prohibition enacted by Art. 58 of the Charter of the French Language fails to exhibit each and every one of these indicators.

(a) Art. 58, which prohibits the use of English and other languages, is not part of a comprehensive regulatory scheme. Although exceptions to the prohibition are made by the following sections and the Regulation, the aim and intent of art. 58 is to prevent other languages from appearing in public signs, posters and commercial advertising. Art. 58 does not regulate in the sense contemplated by A.G. Canada v. Montreal, supra., p. 792.

Nor is the prohibition on using English essential to any of the purposes stated in the preamble to the Charter. It is impossible to see why it is essential to prohibit English "to see the quality and influence of the French language assured", or to make French "the normal and everyday language of ... communication, commerce and business." The prohibition of English in pursuit of these regulatory objectives is over broad and tenuous. It is equivalent to promoting wage control by

prohibiting work.

(b) It is submitted that the dissenting judges in the Court of Appeal were correct in characterizing the pith and substance of the prohibition in art. 58 as falling wholly outside the subjects in s. 92 of the Constitution Act, 1867 (Montqomery, JA, Case, pp. 84-5; Pare, JA, Case, p. 89). The prohibition on use of English and other languages is not a means of enforcing a valid regulatory scheme. Any regime seeking to assure to francophones adequate participation in the retail economy in French could have obtained this object by requiring use of French in signs and commercial advertising, while leaving open the option of using other languages as well, and might even have gone so far as to require that the French text be predominantly displayed. The prohibition of English is unnecessary, and for that reason, only tenuously (if at all) connected to provincial regulatory objectives. In object and purpose, pith and substance, art. 58 enacts that the use of English, in the situations there embraced, is illegal -- is a crime.

(c) There is nothing in the prohibition enacted by Art. 58 that purports to be a regulation of provincial property.

(d) There is nothing in the local circumstances in Quebec that requires prohibiting the use of English in order to promote the security of French. In Quebec Assn. of Protestant School Bds. v. A.G. Quebec (no. 2) (1982), 140 D.L.R. (3d) 33 (Que. S.C.) Chief Justice Deschenes exhaustively reviewed the demographic evidence respecting the English and French linguistic communities in Quebec. Chief Justice Deschenes found a recent sharp decline in the relative proportion of the English speaking community which, moreover, would be subject to "inevitable reduction [in] relative size ... from now to the end of the century" (p. 89). Chief Justice Deschenes stated: "Fears for the future security of French-speakinq people in Quebec are exaggerated ...” (p. 81).

Even were this Court to conclude that some exigent

circumstances justified exceptional measures like art. 58 at the local level, A.G. Canada v. Montreal, supra, especially as explained in Westendorp v. The Queen, supra, p. 52 requires provincial prohibitions enacted under this aspect to be temporary. Art. 58 is not temporary.

12. All factors indicating the absence of a sufficient nexus to provincial regulatory power inhere in the prohibition enacted by art. 58.

(a) Art. 58 enacts a prohibition which is an end in itself, criminalizing the use of English. As explained in para. 11, art. 58 serves no regulatory objective. At its highest, art. 58 underlines the legislature's view of the primacy or sanctity of French in Quebec -- a view which has an apparent moral quality.

(b) There is nothing in the prohibition enacted by art. 58 directed to safeguarding private rights or the safety of individuals. Art. 58 is a means of promoting public objectives (assuring "the quality and influence of the French language", Charter, preamble) which have no connection with private rights. Art. 58 effectively establishes the commercial use of English as a public wrong, an injury to society.

For these reasons, it is submitted that art. 58 of the Charter of the French Language is ultra vires Quebec.

Question 2

13. "[O]ne of the main purposes of Confederation, evidenced by the catalogue of federal powers and by s. 121 [is] to form an economic unit of the whole of Canada."

> A.G. Manitoba v. Manitoba Egg and Poultry Assn., [1971] S.C.R. 689, 717
>
> Lawson v. Interior Tree Fruit and Vegetable Committee, [1931] S.C.R. 357, 373

14. It is submitted that a central feature of the Canadian economic union, protected by the division of powers, is mobility of the factors of production -- goods, labour and capital.

A.G. Canada v. C.N. Tpt. Ltd., [1983] 2 S.C.R. 206, 278 (per Dickson, J.: "Given the free flow of trade across provincial borders guaranteed by s. 121 of the Constitution Act, 1867, Canada is, for economic purposes, a single huge marketplace.")

15. It is submitted that mobility of the factors of production is guaranteed by several constitutional precepts.

(a) Provinces may not legislate so as to seal their borders against the entry of the factors of production circulating in the larger Canadian economic unit.

Murphy v. C.P.R. [1958] S.C.R. 626, 642 (per Rand J.: "I take s. 121 ... to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist.... What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary."

A.G. Manitoba v. Manitoba Egg and Poultry Assn., supra, p. 717 ("...to permit each province to seek its own advantage ... through a figurative sealing of its borders to entry of goods from others would be to deny one of the objects of Confederation...")

(b) An essential attribute inhering in the status of Canadian citizenship, beyond provincial power to abridge, is the right of citizens to enter and remain in each and every province. Provinces may not prohibit entry or residence directly. Nor may any province create substantial indirect barriers to entry or residence, as by prohibiting citizens from working or using provincial highways.

Union Colliery Co. of B.C. v. Bryden, [1899] A.C. 580

Cunningham v. Tomey Homma, [1903] A.C. 151

Winner v. S.M.T. (Eastern) Ltd., [1951] S.C.R. 887, 919-20 (per Rand, J.: "...a province cannot, by depriving a Canadian of the means of working, force him to leave it:

> it cannot divest him of his right or capacity to remain and to engage in work there: that capacity inhering as a constituent element of his citizenship status is beyond nullification by provincial action....It follows, a fortiori, that a province cannot prevent a Canadian from entering it except, conceivably, in temporary circumstances, for some local reason as, for example, health. With such a prohibitory power, the country could be converted into a number of enclaves and the 'union' which the original provinces sought and obtained disrupted.") [This point was not discussed in the appeal to the Privy Council, 1954 A.C. 775.]
>
> Laskin's Canadian Constitutional Law (5th, 1986), p. 967 ("Federal power in relation to national status, and to aliens and immigration, clearly enables the Dominion to make freedom of movement throughout Canada an attribute not only of citizenship but of lawful presence in Canada...")

(c) Canadian Charter of Rights and Freedoms, secs. 6(2)(a) and (b) guarantees the right of citizens and permanent residents to move to and take up residence in any province and to pursue the gaining of a livelihood in any province free from provincial laws that discriminate on the basis of province of present or previous residence. As interpreted by this Court in L.S.U.C. v. Skapinker, [1984] 1 S.C.R. 357, 380-1, citing with approval from the reasons of Arnup, J.A. below:

> ... the right is a right not to have provincial barriers thrown up against one who wants to work ... He is not faced with a provincial barrier preventing him ... from moving freely within Canada to pursue the gaining of a livelihood.

16. It is submitted that secs. 53, 57, 60, and 61 of the Charter of the French Language throw up serious, significant barriers to anglophone Canadians who desire to move to Quebec from the other provinces, and to work or establish businesses in Quebec.

17. As stated in the Preamble, the intention of the Charter of the French Language is to make French "the normal and everyday

language of work ... commerce and business". Secs. 53 and 57 require the concurrent use of French in a wide variety of commercial documents, and require, moreover, that these documents be "drawn up" ("rediges") in French. Secs. 60 and 61 require the concurrent use of French in internal signs and posters.

18. These requirements impose substantial, direct barriers to anglophones from other provinces desiring to move to Quebec and establish businesses there. The stipulation that a wide range of commercial documents be "drawn up" in French appears to require a facility in French that most anglophones coming to Quebec from the other provinces do not have. The Charter of the French Language imposes bilingualism on those entrepreneurs desiring to move to Quebec and establish businesses there. It requires an ability to conceptualize in French. It places anglophone businesses at a competitive disadvantage viz a viz those francophone businesses entitled under the Charter to operate unilingually. It is submitted that these significant barriers to establishment of new businesses by anglophones resident outside of Quebec infringe the mobility guarantees referred to in paras. 10-11.

Question 3

19. Section 214 of the Charter of the French Language was enacted by An Act Respecting the Constitution Act, 1982 [Bill 62], S.Q. 1982, c. 21. Bill 62 was assented to on June 23, 1982, and by the terms of s. 7 thereof, came "into force on the day of its sanction".

20. Section 33(3) of the Canadian Charter of Rights provides that a non obstante declaration, like s. 214, "shall cease to have effect five years after it comes into force." Assuming (what is here denied) that Bill 62 validly allows the Charter of the French Language to operate notwithstanding the Canadian Charter of Rights, s. 214 ceased to have effect, at the latest, on June 23, 1987. Thus, it is submitted, s. 214 cannot deflect the action of nullity pursued in this appeal.

21. The Charter of the French Language was amended by S.Q. 1983, c. 56, which came into force by Proclamation on February 1, 1984.

S.Q. 1983, c. 56, s. 53
G.O. 1984, Part 2, p. 1087

Section 11 of S.Q. 1983, c. 56 replaced secs. 52 and 53 of Bill 101 with substantially identical texts, except that provision was made for derogating from the rigour of s. 52 by regulation. Section 12 replaced s. 58 of Bill 101 by a substantially identical text, except that provision was made for derogating from the rigour of s. 58 by regulation.

22. Section 52 of S.Q. 1983, c. 56 contains a clause overriding the Canadian Charter of Rights in terms identical to s. 214 of Bill 101.

23. It is submitted that s. 52 of S.Q. 1983, c. 56 does not change June 23, 1987 as the date on which s. 214 of Bill 101 ceases to have effect in overriding the Canadian Charter of Rights for the following reasons:

(a) The non-obstante clause at s. 52 of S.Q. 1983, c. 56 only applies to the framework sections of the Act -- i.e. the sections which state: "11. Sections 52 and 53 of the said Charter are replaced by the following sections:... " The non-obstante clause at s. 52 does not apply to the substantive provisions following which are inserted into Bill 101. These are subject to s. 214 of Bill 101. If it were otherwise some sections of Bill 101 would be subject to the discipline of the Canadian Charter of Rights while others would not be so subject. In this litigation, for example, secs. 52, 53 and 58 of Bill 101 would be subject to the Canadian Charter of Rights, while secs. 57, 59, 60 and 61 would not be so subject. The Legislature of Quebec cannot be assumed to have intended this absurd result.

(b) When one statutory provision is replaced by another which is substantially identical, the substitution "is not deemed to be new law; it must be construed as a new expression of existing law". The previous enactment is not deemed repealed. It is

deemed to remain in force without interruption. Thus, secs. 52-3, 58 and 214 of Bill 101 continue in force as from their effective dates. They do not newly come into force from the effective date of S.Q. 1983, c. 56.

Cote, The Interpretation of Legislation (1984), p. 80-1
Trans-Canada Ins. Co. v. Winter, [1935] S.C.R. 184
Interpretation Act, R.S.C. 1970, c. I-23, s. 36(f)

(c) An amending enactment must be construed as part of the enactment that it amends. There is thus no new date of coming into force of s. 214.

Cote, supra, p. 73
Interpretation Act, R.S.C. 1970, s. 34(3)

24. Section 33 Of the Canadian Charter of Rights is an extraordinary provision, permitting wholesale encroachment on individual rights and freedoms. "Laws which encroach on the rights and freedoms of the citizen are interpreted restrictively by the courts...they should be interpreted, if possible, so as to respect such rights, and if there is any ambiguity the construction which is in favour of the freedom of the individual should be adopted."

Cote, supra, p. 372 ff, and cases therein cited

It is submitted that this Court should read s. 33 restrictively, with jealous determination to protect the fundamental values of Canadians enshrined in the Charter.

25. As noted by Professors Hogg (Constitutiona1 Law of Canada (2d 1985), p. 691) and Gibson (The Law of the Charter (1986), p. 126), Bill 62 "certainly contravenes the spirit of s. 33." It is submitted that the Quebec Court of Appeal were correct in holding that Bill 62 is void and ineffective to insert s. 214 into the Charter of the French Language because it contravenes the express requirements of s. 33.

Alliance des Professeurs v. A.G. Que. (1986), 21 D.L.R. (4th) 354

26. Section 33(1) allows for a declaration that an act shall

operate notwithstanding "a" ("une") provision of the Charter. Mr. Justice Jacques held, correctly, it is submitted, that this language required that “the override declaration must indicate which provision of the Charter is to be disregarded,” and that Bill 62 was fatally flawed in failing to meet this requirement.

Alliance des Professeurs, supra, p. 361

> Arbess, Limitations on Legislative Override (1983), 21 O.H.L.J. 113, 140-1 (“The language [of s. 33(1)] seems clear enough to require that the legislature insert, into each act which purports to override a provision of the Charter, a clause specifying precisely which provision is sought to be overridden.... The province ... must, in a separate override clause, specify a provision included in a section of the Charter which is to be overridden.”

All three Justices in the Court of Appeal, as well as the commentators, explained why the language of s. 33(1) requires specification of the Charter provisions to be disregarded. The reason is that s. 33 is meant to be subject to political resistance before being invoked. Specification of the section to be overridden furthers this purpose by “encourag[ing] an enlightened and serious examination of the proposed derogation” (Mayrand, J.A.. Alliance des Professeurs, p. 356); it "allow[s] citizens to understand clearly what guarantees Parliament or the Legislature is depriving them of so that they may then consider and discuss the matter in an informed way, etc., in other words, so that they may use the means available in a democratic society" (Vallerand, J.A., p. 366). Specification "brings into sharp focus the effect of the overriding provisions and the rights deprived" allowing citizens intelligently to exercise "political recourse" (Jacques, J.A., p. 361, 365).

See also, Arbess, supra, pp. 140-1

Specification of the section to be overridden requires the

legislature to think deliberately, and for the voters to judge carefully, whether it is truly necessary to trample on fundamental values enshrined in the Charter. It requires legislatures to take the Charter seriously. If it were otherwise s. 33 could be used by all legislatures to make the Charter a dead letter by wholesale opt-outs like Bill 62.

28. It is submitted that the ruling and reasoning of the Quebec Court of Appeal in Alliance des Professeurs, supra, is correct in seeing in the language of s. 33(1) a requirement for specification of the Charter right to be overridden in order to enhance political accountability of legislatures resorting to the extraordinary device of derogating from the Charter. It is submitted that Bi11 62 is void for want of considering and specifying which Charter right is overridden. It is submitted that s. 33 does not allow the legislatures "to make it ... as difficult as we can for some aspects of that bloody Charter to be applied..." (Per Premier Levesque, see Gibson, supra, p. 126).

Question 4

Free expression

29. Section 2(b) of the Canadian Charter of Rights and Freedoms provides:

> Everyone has the following fundamental freedoms:
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Section 3 of the Charter of Human Rights and Freedoms, R.S.Q. c. c-12 provides:

> Every person is the possessor of the fundamental freedoms, including... freedom of opinion, freedom of expression...

The expansive phraseology of s. 2(b) is plainly broader than mere protection for "freedom of speech" found in the first amendment to the United States Constitution. Constitutional protection for the content of speech --its ideational import-- flows from the

words "freedom of thought, belief, opinion...". It is submitted that the words "freedom of ... expression" carry the ambit of s. 2(b) beyond content, protecting the manner or mode in which speech is communicated. It is submitted that the guarantee for freedom of expression in the Quebec Charter should receive substantially the same construction as that in the Canadian Charter.

30. According to the Oxford English Dictionary, the term "expression" includes the following meanings:

-the action of expressing or representing (a meaning, thought, state of things) in words or symbols
-an utterance, declaration, representation
-an action, state, or fact whereby some quality, feeling, etc. is manifested; a sign, token
-manner or means of representation in language; wording, diction, phraseology
-a word, phrase or form of speech

31. Under s. 2(b) this Court has protected the choice to express oneself through various vehicles of thought. In R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 this court considered whether picketing could be considered protected expression within the meaning of s. 2(b). The Court held:

> "[t]here is ... always some element of expression in picketing. The union is making a statement to the general public that it is involved in a dispute..." (p. 588).

It is submitted that Dolphin Delivery stands for the proposition that freedom of expression under s. 2(b) extends to the means by which thought is manifested. Logically, this would include choice of language.

32. This proposition is buttressed by this Court's opinion in R. v. Big M. Drug Mart, [1985] l S.C.R. 295. In Big M., the Court commented on the meaning of the word "freedom" in s. 2, as follows:

> Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to

> manifest beliefs and practices (p. 337).

So too with s. 2(b). The freedom to which s. 2(b) refers includes the right to manifest expression through practice. In Dolphin Delivery, the right to manifest expression through practice included the right to express through picketing. In the case at bar the right to manifest expression through practice includes the right to express through the medium of a particular language.

33. Language is not merely a network of signs and symbols that meticulously and mechanically translates thoughts into communicable messages. Language is also a reservoir of experience and culture, a mode of being in the world, a means of expression that links the individual to community. As noted by this Court in the Manitoba Language Rights Reference:

> 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.
>
> Manitoba Language Rights Reference, [1985] 1 S.C.R. 721,744

34. Language is the means by which a people articulates its identity, nurtures its culture, and maintains its experience. The choice of expression by means of a particular language is a choice to connect oneself to a particular community and to express oneself with reference to the culture and history of that community. Choice of language is therefore a clear instance of expression. As is well expressed in the Preamble to the Charter of the French Language:

> the French language ... is the instrument by which [the French-

> speaking people] has articulated its identity

35. Sociolinguistics well understands the intimate relationship between culture and expression in a particular language. Choice of language is itself expression. Choice of language in many cases dictates the content of what is expressed. “The world appears different to a person using one vocabulary than it would to a person using another."

> P. Henle, Language, Thought and Culture (1966), p. 7, cited in [1986] 23 Houston L. Rev. 857, 895.

See also:

> Edward Sapir, as quoted in B.L. Whorf, Language, Thought and Reality (M.I.T. Press, 1964), p. 134 ("Human beings...are very much at the mercy of the particular language which has become the medium of expression for their society. It is quite an illusion to imagine that one adjusts to reality essentially without the use of language and that language is merely an incidental means of solving specific problems of communication or reflection. The fact of the matter is that the 'real world' is to a large extent unconsciously built up on the language habits of the group....We see and hear and otherwise experience very largely as we do because the language habits of our community predispose certain choices of interpretation.”)

> Benjamin Lee Whorf, Language, Thought and Reality, supra. (p. 55: “..language first of all is a classification and arrangement of the stream of sensory experience which results in a certain world-order, a certain segment of the world that is easily expressible by the type of symbolic means that language employs;"... p. 58: "the Hopi language and culture conceals

> a metaphysics...In order to describe the structure of the universe according to the Hopi, it is necessary to attempt -- insofar as it is possible -- to make explicit this metaphysics, properly describable only in the Hopi language, by means of an approximation expressed in our own language, somewhat inadequately it is true, yet by availing ourselves of such concepts as we have worked up into relative consonance with the system underlying the Hopi view of the universe;" ... p. 247: "Every language and every well-knit technical sublanguage incorporates certain points of view and certain patterned resistances to widely divergent points of view;"...p. 252: "every language is a vast pattern-system, different from others, in which are culturally ordained the forms and categories by which the personality not only communicates, but also analyzes nature, notices or neglects types of relationship and phenomena, channels his reasoning, and builds the house of his consciousness.")
>
> J. Fishman, The Sociology of Language (1972) (p. 4: [L]anguage is not merely a means of interpersonal communication and influence. It is not merely a carrier of content, whether latent or manifest. Language itself is content, a referent for loyalties and animosities, an indicator of social statuses and personal relationships, a marker of situations and topics as well as of the societal goals and the large-scale value-laden arenas of interaction that typify every speech community.")

36. The United States Supreme Court has held consistently that prohibiting the use of a language, in commercial and other

situations, is unconstitutional.

> Yu Cong Eng v. Trinidad, 271 U.S. 500 (1925) (statute prohibiting the keeping of "account books in any language other than English, Spanish or any local dialect" held invalid for equal protection and due process violations. Per Taft, C.J.: "[[T]he law ... deprives Chinese persons situated as they are, with their extensive and important business long established" of their ability to keep their accounting records in Chinese.)

See also:

> Meyer v. Nebraska, 262 U.S. 390 (1923)
> Bartels v. Iowa, 262 U.S. 404 (1923)
> Farrington v. Tokushige, 273 U.S. 284 (1927)

37. Section 2(b) of the Canadian Charter must be interpreted in light of s. 27 which requires that

> This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Language is a (if not the) fundamental, intimate component of cultural heritage. It would be difficult to imagine a more direct attack on the cultural heritage of an ethnic group than a prohibition directing that group to refrain from speaking its own language. For this reason, s. 27 compels an interpretation of "freedom of expression" guaranteed by s. 2(b) which protects the right of an ethnic group to express itself through the medium of its own language.

38. This Court has applied s. 27 to s. 2 fundamental freedoms in two senses. First, the Court has established that s. 27 prohibits legislative bodies from preferring one culture over another with respect to the freedoms protected by s. 2. In R. v. Big M. Drug Mart, [1985] 1 S.C.R. 295 the Court invalidated a federal statute which imposed Sunday as a day of rest for avowedly religious

reasons. Chief Justice Dickson maintained that "to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians;" (p. 337-8). The Chief Justice elaborated as follows:

> [A]s I read the Charter, it mandates that the legislative preservation of the Sunday day of rest should be secular, the diversity of belief and non-belief, the diverse socio-cultural backgrounds of Canadians make it constitutionally incompetent for the federal Parliament to provide legislative preference for any one religion at the expense of those of another religious persuasion;" (p. 351).

See also:

> R. v. Edwards Books, [1986] 2 S.C.R. 713, 808, per Wilson, J.

In a second sense, the Court has held that s. 27 impacts on s. 2 so as to prevent the state from burdening protected fundamental freedoms by direct or indirect coercion.

> ...any more restrictive interpretation would, in my opinion, be inconsistent with the Court's obligation under s. 27 to preserve and enhance the multicultural heritage of Canadians.
>
> R. v. Edwards Books, supra., p. 758, per Dickson, C.J.C.

39. It is submitted that s. 2(b) of the Canadian Charter, read in light of s. 27, must include protection against state prohibitions on using one's own language, particularly where that language is common to a well defined cultural group, as in the case of anglophone Quebec.

40. It is submitted that s. 2(b), read in light of s. 27, must include protection against direct or indirect coercion to use a

language other than one's own language, particularly where the speaker's language is common to a well defined cultural group, as in the case of anglophone Quebec.

41. For these reasons, it is submitted that the guarantee of freedom of expression in s. 2(b) includes the freedom to choose the language of expression. It is submitted that to the extent arts. 58 and 59 of the Charter of the French Language prohibit choosing English as a language of expression they violate s. 2(b).

42. It is submitted that this conclusion cannot be avoided by reliance on some hypothetical doctrine of commercial expression. The Respondent would have the Court draw a distinction between "commercial speech" and other forms of expression in order to establish that commercial speech enjoys no constitutional protection. There is no textual basis for such a distinction in either the Canadian or Quebec Charters. These documents state clearly that "expression", without qualification, is protected. So too, the structure of the Charters suggest that all forms of expression, commercial or otherwise, are protected. Limits to freedom of expression must be justified, if at all, under the strict conditions of secs. 1 or 33 of the Canadian Charter or s. 9.1 of the Quebec Charter. This is the approach taken by the Ontario Divisional Court, upheld by the Ontario Court of Appeal, in Ont. Film and Video Appreciation Society v. Ontario Bd. of Censors (1983), 41 O.R. (2d) 583, affd. (1984), 45 O.R. (2d) 80:

> It is clear to us that all forms of expression, whether they are oral, written, pictorial, sculpture, music, dance or film, are equally protected by the Charter.

43. The Respondent's submission may be tested against other constitutional systems. The Constitution of the United States of America has narrower textual guarantees ("speech" as contrasted with "expression"). There is no sec. 1 or 9.1. The structure of the U.S. Constitution thus invites judicial narrowing, as

contrasted with the Canadian and Quebec Charters which require justification of limits under secs. l or 9.1. Even under these circumstances, the U.S. Supreme Court accords constitutional protection to commercial expression and non-deceptive commercial advertising. The trial judge in Ford v. A.G. Quebec, [1985] C.S. 147, affd. [1987] R.J.Q. 80 carefully reviewed the commercial speech cases to reach this conclusion. In cases decided since that opinion the United States Supreme Court summarized its jurisprudence as follows:

> There is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment ... Our general approach to restrictions on commercial speech is also by now well-settled. The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading or that proposes an illegal transaction. Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest; (cites omitted).
>
> Zauderer v. Office of Disciplinary Counsel, 85 L Ed 2d 652, 663-4 (1985)

See also:

> Posadas de Puerto Rico Assoc. v. Tourism Co., 92 L Ed 2d 266, 280 (1986)

44. Sec. 89 of the Charter of the French Language provides that where the Charter "does not require the use of [French] exclusively, [French] and another language may be used together." Secs. 53 and 57 of the Charter require that certain commercial documents must be "drawn up" ["redige"] in French. Sections 58-

61 and the Regulation Respecting the Language of Commerce and Business make the use of French mandatory, but not exclusive, in certain signs, posters and commercial advertising. In effect, these provisions require a person choosing to use English or another language for expressive purposes also to use French in the range of situations embraced by the Charter of the French Language.

45. This Court has consistently held that the fundamental freedoms of religion, belief, opinion, expression, etc. guaranteed by section 2 of the Canadian Charter include reciprocal rights to be free from forced religious worship, forced affirmation of belief, or forced expression. In National Bank of Canada v. Retail Clerks' Union, [1984] 1 S.C.R. 269 Mr. Justice Beetz (Estey, McIntyre, Lamer and Wilson JJ., concurring) stated:

> [These] freedoms of thought, belief, opinion and expression ... guarantee to every person the right to express the opinions he may have: a fortiori they must prohibit compelling anyone to utter opinions that are not his own. (p. 296)

Chief Justice Dickson underlined the same point in R. v. Big M. Drug Mart, [1985] 1 S.C.R. 295, 336-7:

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain

> of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to other. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

In Re Lavigne and O.P.S.E.U. (1986), 55 O.R.(2d) 449, 495 (H.C.J.) the Court held that associational rights protected by s. 2(d) of the Charter include reciprocal rights not to associate.

> the recognition of a right not to associate would appear to flow from the word 'freedom' ... Thus a right to freedom of association which did not include a right not to associate would not really ensure freedom.

46. Section 27 strengthens the conclusion that s. 2(b) includes protection against direct or indirect coercion from speaking a language other than one's own: see paras. 37 and 38, supra.

47. The Canadian jurisprudence which holds that free expression rights include reciprocal freedoms not to express is consistent with a similar line of cases in the United States Supreme Court which address first amendment freedoms. In Wooley v. Maynard, 430 U.S. 705 (1977) a New Hampshire motorist obscured the state motto, "Live Free or Die" from his license plate. In quashing a conviction under a state statute, the Supreme Court stated:

> We begin with the proposition that the right of freedom of thought protected by the first amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the

> right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complimentary components of the broader concept of 'individual freedom of mind'. (p. 714)

See also:

Oklahoma Tax Commission v. U.S., 319 U.S. 598 (1942)

48. In para. 41 it was submitted that freedom of expression guaranteed by s. 2(b) includes the freedom to choose to express in a particular language. It is submitted that s. 2(b) necessarily implies the obverse freedom, the right not to be required to express in a particular language.

49. Sections 53 and 57-61 of the Charter of the French Language and the Regulation require expression in French. It is submitted that to this extent, they offend s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter.

Equality and Non-Discrimination

50. Section 15 of the Canadian Charter of Rights and Freedoms provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 10 of the Quebec Charter of Human Rights and Freedoms provides:

> Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as

> provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate the handicap.
>
> Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

Principles of Interpretation

51. In its Charter jurisprudence, this Court made clear that Charter guarantees like s. 15 are to receive a broad, purposive interpretation. L.C.B.C. v. Heerspink, [l982] 2 S.C.R. 145 and Winnipeg School Division v. Craton, [1985] 2 S.C.R. 150 extend this approach to human rights provisions such as s. 10. It is submitted that, in addition to the broad, purposive approach, two further principles of interpretation apply.

Multiculturalism.

52. Section 27 of the Charter orients interpretation of s. 15 by specifying that "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." In R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 351 Chief Justice Dickson considered religiously motivated pause day legislation in light of secs. 2(a) and 27 of the Charter. He stated:

> ...the diversity of belief and non-belief, the diverse socio-cultural backgrounds of Canadians make it constitutionally incompetent for the federal Parliament to provide legislative preference for any one religion at the expense of those of another religious persuasion.

53. It is submitted that s. 27 invites an interpretation of s. 15 which prohibits legislative preference of one linguistic group over another.

54. Canada ratified art. 27 of the International Covenant on Civil and Political Rights, 1966 in 1976. Art. 27 of the Covenant provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. (my emphasis)

In Lovelace v. Canada, [1983] Can H. R. Ybk. 306, 312 the U. N. Human Rights Committee considered under art. 27 the complaint of an Indian woman, Sandra Lovelace. Ms. Lovelace had married a non-Indian and by reason of s. 12(1)(b) of the Indian Act consequently had lost her right to live on a reserve. The Human Rights Committee found violation of art. 27, relying in part on language deprivation.

> ... in the opinion of the Committee the right of Sandra Lovelace to access to her native culture and language 'in community with the other members' of her group, has in fact been, and continues to be interfered with, because there is no place outside of the Tobique reserve where such a community exists.

Art. 27 of the Covenant is a modern emanation of the International Protection of Minorities System, a scheme of multi-lateral treaties established in the post-World War I period, and supervised by the League of Nations: see generally Y. Dinstein, Collective Human Rights of Peoples and Minorities (1976), 25 Intn'l. & Comp. L. Q. 102, 114. In Minority Schools in Albania (1934) Series A-B, Fasc. no. 63, Judgments, Orders and Opinions of the Permanent Court of International Justice, p. 17 the Permanent Court explained the central thrust of the international system for the protection of minorities:

> ...there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were

> consequently compelled to renounce that which constitutes the very essence of its being a minority.

55. The distinctive essence of the anglophone linguistic minority in Quebec is the English language. Section 27 of the Charter orients the interpretation of s. 15. A useful guide to s. 27 of the Charter is s. 27 of the Covenant and its precursors, including the Minorities protection system and associated jurisprudence. These materials largely inspired s. 27 of the Charter.

56. It is submitted that s. 27 of the Charter invites an interpretation of s. 15 that forbids the Legislature of Quebec from depriving the English linguistic minority of that which constitutes the essence of its being a minority, the use of the English language.

International Law.

57. "The various sources of international human rights law ... must ... be relevant and persuasive sources for interpretation of the Charter's provisions."

> Reference re Public Service Employees Relations Act, S.C.C. Apr. 9, 1987, p. 26

58. It is submitted that international human rights law is equally persuasive as a source of interpretation for the Quebec Charter of Human Rights for the same reasons that it is relevant to interpretation of the Canadian Charter.

59. International human rights law, binding on Canada, precludes discrimination on the basis of language and, more particularly, debars States from prohibiting linguistic minorities from using their own language in private discourse.

> International Covenant on Civil and Political Rights, 1966, arts. 2(1) and 27 (Art. 27 guarantees the right of "linguistic minorities ... to use their own language"; art. 2(1) requires States party to the Covenant to ensure Covenant rights to individuals "without distinction

of any kind, such as ... language")

Universal Declaration of Human Rights, arts. 2 and 19 (see J. Ladore-Lederer, International Group Protection (1968), p. 25: "The right of any group to use its own language is anchored in art. 19 of the Universal Declaration.")

U.N. Charter, arts. 1 para 3, 13 para 1(b), 55(c), 76(c) (a purpose of the U.N. organization is to promote respect for human rights and fundamental freedoms "without distinction as to ... language")

60. It is submitted that Canada's international human rights obligations orient the interpretation given to s. 15 of the Canadian Charter and s. 10 of the Quebec Charter, and therefore invite a construction of secs. 15 and 10 that debars Quebec from prohibiting the anglophone linguistic minority from using its own language in private, commercial discourse.

61. It is submitted that secs. 15 and 10 include reciprocal protections just as do the fundamental freedoms (see paras. 45-47 above). Therefore, it is submitted that secs. 15 and 10 forbid the Legislature of Quebec from compelling the anglophone linguistic minority to use a language other than its mother tongue (French) against its will in private, commercial discourse.

Language Based C1assifications are Inherently Suspect

62. For reasons which follow, it is submitted that language based classifications are inherently suspect, and thus constitute prima facie infringements of secs. 15 and 10.

(a) Section 10 of the Quebec Charter of Human Rights and Freedoms forbids language-based discrimination in express terms. It is submitted that for the purposes of s. 15 of the Canadian Charter of Rights, language-based classification is included under the heading of national or ethnic origin discrimination,

and is therefore prohibited in express terms.

> Cousens v. Canadian Nurses Assn. (1981), 2 C.H.R.R. D/365
>
> McDougal, Lasswell, Chen, Freedom From Discrimination in Choice of Language and International Human Rights (1976), So. Ill. U. L. J. 151, 152 note 2
>
> Olagues v. Russoniello, 797 F. 2d 1511, 1520 {9th Cir. 1986) (...an individual's primary language skill generally flows from his or her national origin.) See citations therein.
>
> EEOC Decisions 72-0281 and 71-446, (1972), CCH Employment Practices Guide, pp. 4520, 4291 ("To prohibit Respondents' Spanish Surnamed American employees from speaking their native tongue during work hours operates to deny them a privilege of employment enjoyed by Anglos and thus discriminates against Spanish Surnamed Americans as a class because of their national origin..." (decision 72-0281 at p. 4521). "Respondents' foreman and lead girl restricted Respondents' Spanish surnamed American employees from speaking Spanish on the premises, both at their work stations and during lunch...We find that Respondent discriminates against its Spanish surnamed American employees with respect to their terms, conditions, or privileges of employment because of their national origin in violation of Section 703(a)(1) of Title VII [of the Civil Rights Act, 1964]. Decision 71-446, at p. 4291)
>
> Note: Official English: Federal Limits on Efforts to Curtail Bilingual Services in the States (1987), 100 Harv. L. Rev. 1345, 1355.

Classification on any of the qrounds specifically enumerated in s. 15 of the Canadian Charter (national or ethnic origin) or s. 10 of the Quebec Charter (language) is inherently suspect, inviting the strictest judicial scrutiny.

> Tarnopolsky, "The Equality Rights", in Tarnopolsky and Beaudoin, Canadian Charter of Rights and

Freedoms: Commentary, at p. 422.

(b) Language is an easily identifiable, immutable characteristic "like skin color, sex or place of birth".

Garcia v. Gloor, 618 F. 2d 264, 270 (5th Cir. 1980)

"The immutability of a trait suggests that courts should guard vigilantly against that trait's becoming the basis of discriminatory state actions."

Note: Official English, supra., at 1354-5

(c) Choice of language is a fundamental freedom, within expression guarantees at s. 2(b) of the Charter (see para. 32 above). Classifications that burden fundamental rights are inherently suspect.

Olagues v. Russoniello, supra., at 1521

63. Sections 53 and 57-61 of the Charter of the French Language classify on the basis of language. In the circumstances covered by these provisions the Charter imposes on Quebec's linguistic minorities the burden of communicating in a foreign language where no similar obligation is imposed on Quebec's French linguistic majority. In the circumstances foreseen by s. 58, the Charter prohibits Quebec's linguistic minorities from using their own languages, where Quebec's French linguistic majority labours under no similar prohibition.

64. Under the principle stated in para. 61, the language based distinctions drawn by arts. 53, and 57-61 of Bill 101 are inherently suspect. To use terminology more familiar to jurisprudence under the Canadian Charter, language based distinctions are prima facie discriminatory within s. 15. It is submitted that once a language based classification is demonstrated, further inquiry as to whether the classification is discriminatory or benign is unnecessary. The analysis moves to s. 1, where the government bears the onus to justify the distinction under the Oakes criteria.

65. In any event it is submitted that secs. 53 and 57-61 of Bill

101 are discriminatory within the meaning of s. 15 of the Canadian Charter and s. 10 of the Quebec Charter for the following reasons:

(a) Section 58 of Bill 101 prohibits the anglophone linguistic minority from using its language while allowing the French linguistic majority free use of its own language in the situations contemplated. In this case plaintiff-appellant operates a stationary store, and for many years has served its anglophone clientele in the English language, particularly by attaching English signs to its store.

Case, p. 7

The challenged provisions of Bill 101 forbid plaintiff-appellant from continuing to service its anglophone clientele in this way, while permitting similarly situated francophone shopkeepers free rein to service their French clientele in the French language.

As noted by McDougall, Lasswell and Chen, Freedom From Discrimination in Choice of Language and International Human Rights (1976), 1 So. Ill. U. L. J. 151 152-3 denying the opportunity to employ the mother tongue is a classic case of language deprivation which has "deep historical roots and [is] more widespread than is commonly assumed." The authors continue:

> 'Suffocation of language has always been part of policies of domination' ... Deprivations in relation to language are, most importantly, deprivations of enlightenment and skill. When the processes of enlightenment (schools, other educational institutions, the mass media, etc.) are conducted exclusively in a language alien to significant numbers of the community members, the difficulties created for such members are pervasive and enduring....Another manifestation of language deprivation may be to deny individuals the opportunity to

> ... utilize one or more of the world languages. Measures of this kind, whatever their motivation ... may have profound, long-term deprivatory effects upon excluded individuals;" (pp. 153-5).
> ...
> A rational conception of shared respect will include freedom of choice in regard to language. Such freedom is essential to the maturing and exercising of an individual's capabilities both for self-development and for contribution to the aggregate common interest. As a key to enlightenment and skill, language not only transmits and expresses culture but also aids overwhelmingly in the development of latent human capabilities. The fact that language is an extraordinarily important index of identities makes it equally important that no discriminations be imposed upon individuals because of such identifications. Blanket differentiations of individuals in terms of language can only be invidious and arbitrary; (p. 158).

Yu Cong Eng v. Trinidad, 271 U.S. 500, 70 L Ed 1059 (1925) closely resembles this case. In Yu Cong Eng the United States Supreme Court considered a statute requiring the keeping of account books in designated languages, and forbidding Chinese merchants from keeping their books in Chinese. The Supreme Court was unanimous that the Act deprived the Chinese merchants

> of something indispensable to the carrying on of their business, and is obviously intended chiefly to affect them as distinguished from the rest of the community, [and therefore] is a denial to them of the equal protection of the laws. We hold the law in question to be invalid; (p. 528 U.S., 1071 L Ed).

(b) The stipulation that a foreign language (French) must

be used concurrently with the mother tongue in the situations covered by secs. 53 and 57-61 of Bill 101 imposes burdens on Quebec's linguistic minorities to which the French linguistic majority is not subject. Only linguistic minorities are required to use an additional language in the range of situations covered. In this case plaintiff-appellant has for many years affixed a unilingual English sign to its premises in order to service its anglophone clientele.

Case. p. 7

The challenged provisions, as construed by the Court of Appeal in Chassure Brown, require plaintiff to remove that sign and replace it with a bilingual sign, an obligation which does not fall on similarly situated French shopkeepers desiring to utilize unilingual French signs in order to service their French clientele.

(c) Free choice of language in private discourse and freedom from compelled use of particular languages are fundamental rights, within expression guarantees under the Canadian and Quebec Charters (see paras 41 and 48, above). Sections 53 and 57-61 of Bill 101 eliminate these rights for linguistic minorities -- and only for linguistic minorities -- throughout their range of application. Discrimination in the exercise of fundamental rights is particularly invidious.

Olagues v. Russoniello, supra., p. 1521

66. The analysis in para. 65 assumes a direct discrimination approach, described by McIntyre J. in Ontario Human Rights Commission v. Simpson Sears, [1985] 2 S.C.R. 536, 551 as a "rule which on its face discriminates on a prohibited ground." The conclusion that the challenged provisions are discriminatory equally follows if an adverse effects discrimination approach is employed. In Simpson-Sears, supra, p. 551 McIntyre J. explained this concept as

> a rule or standard which is on its face neutral, and which will apply

> equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.

67. In Action Travail des Femmes v. C.N.R. S.C.C. June 25, 1987, p. 21 a unanimous Court adopted this passage from Simpson Sears, p. 547 as to the purpose of the Ontario Human Rights Code:

> It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

68. It is submitted that this passage equally describes the purpose of the Quebec Charter of Human Rights and s. 15 of the Canadian Charter of Rights.

> See generally: W.W. Black, "Intent or Effects: Section 15 of the Charter" in Weiler and Eliot (eds.), Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms (1986), p. 120, esp. at p. 150: ("section 15 should extend beyond activity that purposefully causes disadvantage to a group and should encompass laws, programs and activities that have an unintended disparate impact.")

69. It is submitted that, from an adverse effects discrimination analysis, for the reasons given in para. 65, the challenged provisions are discriminatory. They impose on the anglophone linguistic minority obligations, restrictive conditions and penalties not imposed on the French linguistic majority, i.e. the

obligation to use a foreign language in addition to mother tongue in the situations embraced, and the prohibition from using mother tongue in the circumstances described in s. 58. Even if neutral on their face, the challenged provisions discriminate on the basis of language, in that they impose special obligations, penalties and restrictions on linguistic minorities.

Question 5

70. The onus to prove that the challenged provisions of Bill 101 are reasonable and demonstrably justified in a free and democratic society lies upon the Attorney General of Quebec as the party seeking to impose a limitation on free expression and equality rights. Section 1 requires a "stringent standard of justification", involving "proof by a preponderance of probability". "The preponderance of probability test must be rigorously applied."

> Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be ... 'commensurate with the occasion'. Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. A Court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions.
>
> R. v. Oakes, [1986] 1 S.C.R. 103

71. The Attorney General of Quebec has proved no facts in the record to establish s. 1 justification. Nor has the Attorney General utilized the procedure available under s. 67 of the Supreme Court Act to petition this Court to receive "evidence

upon any question of fact" relevant to the case, which would have been one appropriate means of establishing a s. 1 record. These failures to establish a factual record fly in the teeth of this Court's admonishment in Skapinker, [1984] 1 S.C.R. 357, 384, as re-emphasized in Singh [1985] 1 S.C.R. 177 and Reference re S. 94(2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486, 520 that the Court takes seriously the government's obligation to meet the stringent evidentiary standards for justifying infringements of Charter rights.

72. Instead, the Attorney General asks the Court to take judicial notice of certain "facts" referred to in the Attorney General's factum (Appellant's factum, Chassure Brown, paras. 85, 87). It is crucial to examine closely the "facts" which the Attorney General asks to Court to assume. A principal "fact" justifying the challenged measures of Bill 101 on which the Attorney General seeks to rely is the assertion that the English language in Quebec retained demographic superiority over French in 1981 to the same extent as in 1971 (Appellant's factum, para 105). To support this "fact", the Attorney General relies on a self-serving study prepared by an entity of his own government (Conseil de la langue française). It is particularly obnoxious for the Attorney General to ask the Court to rely by judicial notice on the Castonguay study referred to in para 105 of the Attorney General's factum. Mr. Castonguay is well known to be highly partisan, and his views even more contentious, generating much contradiction.

Mr. Castonguay's study utilizes figures from the 1981 census, now six years out of date and taken only four years after enactment of Bill 101, before the effects of Bill 101 could have been known. His study reflects only the difference between mother tongue and home language. Mr. Castonguay neglects totally the fact that both in absolute numbers, and as a percentage of total population, the anglophone linguistic community of Quebec declined sharply between 1976 and 1981. This is so whether the

anglophone linguistic community is measured by mother tongue or by home language.

> Le Bureau de la Statistique du Québec, La situation démographique au Québec (1987), p. 82 (chart demonstrating that between 1971 and 1981 English went down from 887,875 to 809,145 measured by home language; and from 788,830 to 706,110 measured by mother tongue)

In further support of this "fact" of the demographic superiority of the English language in 1981 the Attorney General refers to the 1984 Report of the Commissioner of Official Languages. That Report states exactly the opposite of the point the Attorney General seeks to establish.

> La population québécoise de langue maternelle anglaise a de son côté diminué sensiblement entre 1961 et 1981, passant de 13,3 pour cent à 13,1 pour cent en 1971, puis à 11 pour cent en 1981 ... la proportion des Québécois qui disent utiliser surtout 1'anglais à la maison était de 14,7 pour cent en 1971 et de 12,7 pour cent en 1981. ... la communauté de langue anglaise a perdu 10 pour cent de ses effectifs entre 1971 et 1981.
>
> Commissioner of Official Languages, Rapport Annuel (1984), pp. 189-90

In para 106 of his factum the Attorney General refers to another study as establishing that the situation in several linguistic areas did not seem to be improving, and in para 107 that this consideration, having justified adoption of the challenged restrictive measures in 1977, justified maintaining them today. The "study" referred to is again self-serving, having been produced by an entity of the Attorney General's own government. The conclusion is hardly neutral, or free from contention. It is impossible to see how such a "fact" can be assumed.

The truth would appear to be the complete opposite of the "fact" the Attorney General would have the Court assume. A 1987 Report produced by Statistics Canada on the 1986 census demonstrates a sharp decline in the anglophone linguistic community of Quebec and conversely an increase of the French linguistic community of Quebec measured by mother tongue. The anglophone decline is most pronounced beginning in 1974, the date of Bill 22, and continues at an alarming rate throughout the period of Bill 101.

Statistic Canada Report, The Daily, July 9, 1987

73. The crucial "facts" that the Attorney General asks the Court to assume were the subject matter of extensive evidence and findings in Que. Assn. of Prot. Sch. Bds. v. A.G. Que (1982), 140 D.L.R. (3d) 33, affd. [1984] 2 S.C.R. 66. The findings in that litigation directly contradict the self-serving "facts" that the Attorney General here asks the Court to assume. Chief Justice Deschenes found the anglophone community of Quebec to be in a process of "ineluctable decline". This is accentuated by high emigration and low birth rates (1.3 per woman).

> Bureau de la statistique du Québec, La situation démographique au Québec (1987), p. 83 (number of births to francophone mothers in 1985 slightly above proportion of population; births to anglophone mothers well below proportion of population)
>
> J. Henripin, The English Speaking Population of Quebec: A Demolinguistic Projection (Alliance Québec, 1984), p. 19

74. To resort to judicial notice of facts in this litigation would contravene all judicial canons of fairness, accuracy, and proof. It would also offend the strict injunction this court has given to government litigators seeking to rely on s. 1 to establish their cases by complete and careful evidentiary records. Resort to judicial notice in these circumstances--when better, more complete, less contentious evidentiary

materials lie close to hand, which can be submitted to the rigours of cross examination and rebuttal -- would be unfair, inaccurate and improvident. As Professor K.C. Davis noted in his highly respected Administrative Law Treatise (2nd 1980), III, p. 166:

> Worse than assuming facts that have not been proved, worse than using inadequate facts, and worse than using facts that parties have had no pre-decision chance to challenge, is making a decision without needed facts.

Professor Davis goes on to criticize severely instances where the Supreme Court of the United States has fallen into the trap of deciding on an unfair, inadequate and inaccurate factual record. By ignoring this Court's requirement to build an adequate factual record for decision of the s. 1 issue, the Attorney General has laid just the same kind of trap for this Court.

75. It is submitted that as the Attorney General has failed to build an adequate factual record for litigation of the s. 1 issue, this Court should hold that he has failed to discharge the onus of proof cast on him to establish a s. 1 justification by affirmative evidence, and rule against him on the s. 1 issue.

76. In any event, it is submitted that the Attorney General has failed to satisfy any of the three elements of the proportionality test laid down by this Court in Oakes.

(a) **rationality**: It is not rational to prohibit the use of English in order to defend and promote the use of French, as does s. 58 of Bill 101. The Court of Appeal held -- correctly, it is submitted -- that there is "no reasonable proportionality between the objective sought and the means employed" (Chassure Brown, 1987, 36 D.L.R. 4th 374, 398). Prohibition of English is not "carefully designed to achieve the objective in question" (Oakes, p. 139). It is a blunt and symbolic attack on the anglo-Quebec linguistic minority.

(b) **least restrictive means**: Nor does the naked requirement

to utilize French in certain commercial documents (secs. 52, 57, 60, 61 of Bill 101) impair free expression and equality rights "as little as possible". Quebec could equally achieve its objective of defending and improving the use of French by a system of grants and incentives for businesses that provided bilingual forms or signs, or even, perhaps, Quebec could favour such businesses with preferences in contracting for goods and services with the provincial government. The naked command to use French, under penalty of fine and imprisonment, leaves no room for those businesses, like the appellant, which find it particularly difficult to adapt to the requirement.

(c) **effects**: The effects on the anglo-Quebec commercial community are profound. The challenged sections of Bill 101 totally denies them their fundamental freedom to speak their language and to communicate with their community in a wide range of situations. The anglo-Quebec community is forced to speak a foreign language against its will. There is a profound diminution of the cultural integrity of the anglo-Quebec community since its major media of communication -- the English language -- is brought under strict control and prohibition. In this regard, it should be remembered that s. 27 of the Charter equally impacts on interpretation of s. 1, and dictates how far justifications are reasonable in light of the deleterious effects on the multicultural heritage of Canadians. The attack on English has resulted in an exodus of anglo-Quebec businesses and persons from Quebec, diminished the size of the anglo-Quebec community, particularly among young persons, and threaten its survival. The scale of effects worked by Bill 101 is profound in terms of impact on fundamental freedoms, the security and survival of the anglo-Quebec community, and the integrity of its culture.

Que. Assn. of Prot. Schl. Bds. v.
A.G. Que., supra.

PART IV
ORDER SOUGHT

Appellant respectfully asks that this Honourable Court:

1. Allow the appeal
2. Answer the constitutional questions posed as follows:
   - Question 1: No
   - Question 2: No
   - Question 3: Yes
   - Question 4: Yes
   - Question 5: No
3. The whole with costs throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at OTTAWA, Ontario
this 06 day of October,
1987.

Joseph Eliot Magnet
Counsel, Allan Singer Ltd.

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