# LANGUAGE LAWS AND THE *CHARTER*

**ABSTRACT**

In the 25 years of its existence, building on a conversation that began with the Royal Commission on Bilingualism and Biculturalism, the *Charter* has set off a chain of events that have started the process of restoring language rights, changing the behaviour of governments, and creating a new dynamic for linguistic minorities in Canada. The inclusion of language rights in the *Charter*, the *Official Languages Act* and its subsequent amendment are recognition of the intrinsic value of the English and French communities that have helped shaped Canada's identity. English and French are Canadian languages that belong to all Canadians; the *Charter* has accelerated a process to make this claim a reality.

The heyday of the *Charter* was the 1980s and the 1990s, when Canadian courts applied it to many disparate areas of law. Since approximately 2000, the *Charter* has been under siege by conservatives who have portrayed it as undemocratic and protective of vested interests and lobbies.[1]

While the attacks on the *Charter* appear unfair in that it would be very difficult to demonstrate that Canada is a tyranny of "judges", it is true that the *Charter* is not and should not be an instrument of daily administration.[2] Rather, it is an exceptional remedy particularly suitable for righting injustice toward individuals. It is far less effective in imposing social measures or in performing social engineering.[3] Courts do not have the means, the army of researchers, or the know-how needed to govern. They do, however, constitute an excellent bulwark against abuse of power and the *Charter* is particularly useful in this respect.

The history of the language provisions in the *Charter* and of the application of other parts of the *Charter* to language matters provides an excellent illustration of where the *Charter* can help and where it usually does not.

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## The *Charter*

The provisions of the *Charter* were intended to apply in the same way to Quebec and to the rest of Canada. The one exception was s.23 1(a), which remained unproclaimed in Quebec, as recognition of the particularly precarious position of French in North America. Not only have the specific language provisions been invoked by litigants, but also freedom of expression and equality.[4] In addition, a number of special laws were adopted by the federal government, guaranteeing various services and especially trials in both official languages. Those laws acquired "quasi-constitutional status"[5] and were given a generous, "purposive interpretation". In *R. v. Beaulac*[6], Bastarache J. said at p. 791-93:

> 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 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.

This principle was reiterated by the Supreme Court in *Arsenault-Cameron v. P.E.I.*[7]

In Solski[8], the court said at par. 21:

> En raison du caractère national de l'art. 23, la Cour a interprété les droits qu'il confère de façon uniforme pour toutes les provinces : Quebec *Association of Protestant School Boards; Mahe; renvoi relatif à la Loi sur les écoles publiques (Man.); Arsenault-Cameron; Doucet-Boudreau;*

Yet, despite this uniformity, slightly and appropriately tilted in favour of protecting the French language, the *Charter* and the related laws have been totally successful in protecting the rights to use English in Quebec. Their success with respect to French in the rest of the country[9] is far more mitigated.

In today's Quebec, English schools continue to flourish[10], and English theatre and cinema are highly successful, attracting the interest of many francophones as well as anglophones. The irritants of *Bill 101* have been corrected through litigation, while the law itself remains as an essential and virtually universally accepted guarantee for the survival of French. The tensions and volatility of the 1970s and 1980s have all but disappeared.[11]

In the rest of the country, some improvements with respect to French schools have occurred[12]; laws now have a French version in several provinces, and a trial in French is easier to obtain. It is nevertheless true that the status of French in the Anglophone provinces has in no way caught up to that of English in Quebec and remains a threatened language. There is little of the cultural and academic vibrancy of English in Quebec[13] and, while the law has generally been interpreted as generously as in Quebec[14], the results are not as impressive.

The reason for this is not found in the good faith or bad faith of anyone but rather in the nature of the challenges faced by English in Quebec as compared to those faced by French in the rest of the country.

## The problems of French and English

In Quebec, English had long been the dominant language. Universities, hospitals and schools in English had been established before the days of massive government financing which would have favoured French.

After 1960, the Quiet Revolution adopted francization as one of its goals. As a social goal, this was perfectly legitimate. However, on various occasions, individual rights to expression and to employment to the use of English or to education in English were infringed. These problems were ideally suited to solution through the use of the *Charter* and rules of natural justice and fairness.

The issue of free expression was settled by *R. v. Ford*.[15] That of municipal law and English services was largely solved by *Alliance for English Communities v. A.G. Quebec.*[16]

The generous attitude of the Courts toward English-speaking employees was clear from *Ville de Lachine v. A.G. Quebec*[17], as well as *Chiasson v. A.G. Quebec*.[18]

The education issue was probably the most controversial and it was not solved entirely by the courts, but by the promulgation of the Charter which, in s.23 replaced the "Quebec clause". The courts gave a "purposive" and broad interpretation of 23(2) despite strong resistance from Quebec.

In *Mak v. Minister of Education*[19], 500-05-008960-823, Deschênes C.J.Q. applied section 23 to all education lawfully obtained in Quebec, even if it did not qualify under *Bill 101*, and the Supreme Court upheld this as one of the cases in the umbrella known as *Quebec Association of Protestant School Boards*.[20]

The purposive interpretation of the education provision continued in *Colin v. Commission d'Appel*[21] and *Smith v. Marois.*[22] Although the Quebec Court of Appeal moved back from this position in *A.G. Que. v. Solski*[23], it was reversed by the Supreme Court in *Solski*[24]. In *Fedida v. La Ministre de l'Éducation*[25], Quebec's Tribunal Administratif also applied the "generous interpretation" doctrine. In short, the challenges were largely successful.

It must be remembered that all of the Quebec cases dealt with the right of an individual set of parents to education their children in English. The English school system was clearly in existence and this was not in issue, only the application to the families which sued for the right.[26] Therefore, success before the Courts was usually an entirely effective remedy.

In English Canada the individual had a right, so long as "numbers permitted" and the school existed. The litigation therefore dealt with more collective areas of control and finances. While the jurisprudence was positive,[27] it was obviously not possible for courts to make up for centuries of neglect and discouragement. The judicial cases improved the school situation[28] somewhat by providing for administration by the minority. However, most of the problems which existed in 1982 are still with us. Outside Ottawa and Moncton, French is not generally visible and remains in peril.

We can thus see that litigation and especially *Charter* litigation is effective in dealing with individual claims to freedom and rights; it is much more problematic when it comes to distributing goods and services between groups and lobbies.[29]

Almost from the start, many Quebec authorities believed that language rights were collective in nature.[30] In *Quebec Association of School Boards*, the government raised this issue in the Superior Court before Deschênes J.,[31] who opted for an "individual" right and the Supreme Court implicitly agreed.[32] The matter was again considered by Mme Justice Duval-Hessler in *Colin*[33] supra when she concluded at p. 1489-90:

> Il faut donc, pour déterminer l'admissibilité à l'enseignement en anglais au Québec, s'attarder uniquement à la question de savoir si la personne concernée satisfait aux conditions imposées par les dispositions pertinentes, et non à la question de savoir à quelle communauté linguistique cette personne se rattache de plus près par ses origines, d'autant plus que la loi est tout à fait muette sur les critères qui feraient en sorte qu'on puisse déterminer qu'une personne appartient réellement à tel groupe plutôt qu'à tel autre.

The one case which appeared to favour the collective solution and which negated all of the other jurisprudence was *Société des Acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education.*[34] That case appeared to draw a distinction between "real" Acadians and other parents who desired a French education for their children. Moreover, it made language rights less fundamental, more a product of political compromise than other rights. This case was an anomaly and was fortunately disapproved in *Beaulac*.[35] However, its lure was such that the Quebec Court of Appeal attempted to rehabilitate it in *Solski*[36], only to be reversed again by the Supreme Court[37] which concluded on the collective individual question at par. 22 and 23:

> Devant notre Cour, on a proposé diverses façons d'interpréter l'art. 23. Des parties qui avaient des perceptions différentes de la réalité actuelle ont analysé la nature et la portée mêmes des droits à l'enseignement dans la langue de la minorité. Pour le procureur général du Québec, l'art. 23 est une disposition régissant l'application de droits collectifs; pour l'appelante, cet article concerne des droits individuels que les personnes admissibles peuvent exercer partout au Canada.
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> Comme c'est souvent le cas, ni l'une ni l'autre des interprétations n'est totalement dénuée de fondement (C. Ryan, "L'impact de la Charte canadienne des droits et libertés sur les droits linguistiques au Québec", Numéro spécial de la *Revue du Barreau* en marge du vingtième anniversaire de l'adoption de la *Charte canadienne des droits et libertés,* mars 2003, 543, p. 551). L'article 23 vise clairement à protéger et à préserver, partout au Canada, les deux langues officielles et les cultures qui s'y rattachent; son application touche forcément l'avenir des communautés linguistiques minoritaires. Les droits garantis par l'art. 23 sont, dans ce sens, des droits collectifs, ce que reflètent d'ailleurs les conditions assortissant leur exercice (Doucet-Boudreau, par. 28). Leur application dépend du nombre d'élèves admissibles (*Mahe*, p. 366-367; Renvoi relatif à la Loi sur les écoles publiques (Man), p. 850; *Arsenault-Cameron*, par. 32). Néanmoins, bien

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> qu'ils présupposent l'existence d'une communauté linguistique susceptible d'en bénéficier, ces droits ne se définissent pas avant tout comme des droits collectifs. Un examen attentif de la formulation de l'art. 23 révèle qu'il s'agit de droits individuels en faveur de personnes appartenant à des catégories particulières de titulaires de droits.

With this matter settled, we can now understand the relative success of litigation in Quebec and the very mixed result elsewhere.

The lesson can be applied to other areas of law. Efforts to advance the cause of a collectivity called "women" or "homosexuals" or "visible minorities" will succeed only if accompanied by sufficient funds to change social structures.[38] On the other hand, our courts are very well equipped to end legal barriers and to sanction affronts to individual dignity and equality of members of all these groups.[39]

## The future and language law

The impossibility of enforcing equality of French litigation should not make us despair. French can be promoted through legislation and through the providing of adequate funding for education, health care and culture in French. When French institutions in the rest of Canada approach the status of the bilingual institutions of Quebec, true equality will not be far behind.[40]

It is important not to insist that the French language is the particular property or characteristic of a minority; rather it is an essential quality of Canada and a source of cultural enrichment for all Canadians. In Quebec, it is now widely recognized that English culture belongs to everyone and there is a strong francophone presence at English cultural events.

If we are to preserve French, it is crucial that funds be spent on teaching French to all, not only those identifying themselves as francophones. While English Canada will never become totally bilingual, a partial bilingualism will certainly bode well for the fate of French institutions in difficult times. Moreover, in days of considerable and completely desirable prevalence of mixed marriage[41], the preservation of French at home will depend on the partial francization of the English or allophone party. All of this however, is not, for the most part, a matter for the courts, but for the legislator with the ministers of finance of all the provinces and of the federal government as major players.

## The future of Quebec's language law

Although most of Quebec's initial language problems have been solved, the present situation may soon become unsustainable. With the present law, which excludes many persons of English background from English schools and which gives an increasing number of francophones that right, through mixed marriage or through sojourns outside Quebec, *Bill 101* will in several decades appear a little absurd. The right to English will be the equivalent of a winning lottery ticket rather than a true measure of personal identity.

The solution to this may well[42] be the creation of a third system, open to everyone regardless of background and functioning, mostly in French, but to a considerable degree[43] also in English. This will be consistent with the fact that anglophones and francophones are no longer divided from each other and that both groups have a stake in each of the languages. However, a predominance of French is necessary in the North American context, to make certain that it remains the principal common language of Quebec. An attempt to return to complete bilingualism or freedom of choice is simply unthinkable and there exists no significant support for it.

### Notes

1 This has not prevented conservatives from trying to use it for their ends: *Lavigne v. Ontario Public Service Employees Union,* [1991] 2 S.C.R. 211 *Harper v. Canada (A.G.),* [2004] SCC 33, *Chaouilli v. Quebec (A.G.)*, [2005] SCC 35. Except in the *Chaouilli* case, they have been unsuccessful and this writer doubts the soundness of *Chaouilli*. A recent case, *Health Services and Support Facilities Subsection Bargaining Association v. British Columbia*, 2007 SCC 27 shows that the *Charter* may yet have considerable vigor.

2 See Grey, Julius H., "Equality Rights Versus the Right to Marriage – Toward the Path of Canadian Compromise", in *Policy Options Politiques*, October 2003, Vol. 24, No. 09.

3 Hence the weakness of *Chaouilli*, supra.

4 *Ford v. A.G. Que*., [1988] 2 S.C.R. 712. Also, *the Universal Declaration of Human Rights* was invoked against Quebec's *Bill* 178, which invoked the notwithstanding clause to get around *Ford*.

5 A.G. *Canada v. Viola* (1990) [1991] 1 F.C. 373; *Air Canada v. Thibodeau,* [2007] C.A.F.

6 *R. v. Beaulac,* [1999] 1 S.C.R. 768.

7 *Archambault-Cameron v. P.E.I.,* [2000] 3 S.C.R.; See also *Solski v. Quebec,* 2005 SCC 14.

8 *Solski*, supra.

9 With the possible exception of portions of New Brunswick.

[10] Despite some closures for demographic reasons. See the discussion in *Solski*, supra.

[11] See Grey report to Larose Commission, 2001.

[12] *R. v. Mahe.*

[13] Although several excellent universities have been built.

[14] *Mahe* supra, *Beaulac*, supra, *Hospitals*, supra.

[15] *Ford*, supra.

[16] *Alliance for English Communities v. A.G. Quebec,* (1990) R.J.Q. 2622.

[17] *Ville de Lachine v. A.G. Quebec,* [1989] R.J.Q. 17.

[18] *Chiasson v. A.G. Quebec,* (2000) R.J.Q. 1836.

[19] *Mahe v. Minister of Education,* S.C. 500-05-008960-823.

[20] *A.G. Que. v. Quebec Association of Protestant School Boards,* (1984) 2 S.C.R. 66.

[21] *Colin v. Commission d'Appel,* (1995) R.J.Q. 1478.

[22] *Smith v. Marois,* (1998) R.J.Q. 161, applying the child's best interest. See also *Baker v. Canada,* (1999) 2 S.C.R. 817, and *Costandi v. Commission d'appel,* 500-05-013160-955.

[23] *A.G. Quebec v. Solski,* 500-09-010454-007.

[24] *Solski*, supra.

[25] *Fedida v. La Ministre de l'Éducation,* TALF 50007 (63-0002).

[26] Quebec in fact goes beyond the *Charter* in guaranteeing the right to eligible Quebecers even in areas when "members do not permit".

[27] *Mahe, supra, Arsenault-Comeau,* supra.

[28] As well, courts saved the French hospital near Ottawa. *Lalonde v. Ontario,* 2001 CanLII 211 64.

[29] For instance, U.S. law has been almost totally successful in removing vestiges of segregation such as separate facilities but much less effective in eliminating the social and economic problems faced by African Americans. In Canada, this distinction is clear in *Newfoundland Treasury Board v. NAPE,* (2004) 3 S.C.R. 381.

[30] See Carignan, *De les nature du droit collectif et du son application en matière scolaire au Québec,* (1984) 18 R.J.Q. 91-91.

[31] *QAPSB v. A.G. Quebec,* (1982) C.S. 673.

[32] *A.G. Quebec v. QAPSB*, supra.

[33] *Colin*, supra.

[34] *Société des Acadiens de Nouveau Brunswick v. Association of Parents for Fairness in Education,* (1986) 1 S.C.R. 549.

[35] *Beaulac*, supra.

[36] *Solski*, C.A. supra.

[37] *Solski*, SCC supra.

[38] For instance by creating day-cares and reducing poverty. See, however, *Health Services and Support Facilities Subsection Bargaining Association,* supra.

[39] E.g. by enforcing equal pay for equal work.

[40] For all practical purposes, equality has been achieved for individuals in Quebec, although complaints, at times legitimate, are heard from both sides.

[41] No society can succeed in the long run if there are barriers to marriage of an ethnic or religious type. See Grey, Julius H. "En Pays d'Immigration: Postions sur le multiculturalisme, le métissage et l'interculturalisme", in *Un Chez-Soi : Chez les Autres,* Perla Serfaty-Garzon (ed.) Montréal, Bayard Canada et Paris, Bayard Éditions, 2006.

[42] See Grey, Presentation to Larose Commission.

[43] Perhaps 20-25%; what is proposed is, at least at first, a high school system only.