Language Rights Remedies in the Supreme Court of Canada: Invisible, Gentle, or Stern Hand?

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*The Supreme Court of Canada has used the context of language rights to establish significant contours of constitutional remedies. Language rights cases, both pre- and post-*Charter, *have engaged the full range of judicial intervention, from an invisible to a stern hand. Initially, the Supreme Court of Canada took a very passive stance in the context of bilingual language obligations of legislatures and courts. Despite lack of express remedial direction from the Court, Quebec pulled out all the stops in its efforts to comply with the ruling with breakneck speed. In contrast, Manitoba adopted a leisurely pace in a half-hearted attempt to respond. As a consequence, the Supreme Court of Canada resorted to a stern hand. As minority language education issues under section 23 of the* Charter *came before it, the Supreme Court of Canada felt its way forward, mostly applying a gentle hand. Throughout, the Court has attempted to identify the minimum needed to uphold constitutional supremacy. Whether expressly or by implication, assumptions about whether good faith compliance could be expected have shaped the remedial response. Ultimately, push from the Court has not led to push back from governments.*

La Cour suprême du Canada a utilisé le contexte des droits linguistiques afin de dresser des contours significatifs relativement aux réparations constitutionnelles. Les cas liés aux droits linguistiques, à la fois antérieurs et postérieurs à la Charte, *ont engagé la gamme complète des interventions judiciaires, de la main invisible à la main sévère. La Cour suprême prit d'abord une position très passive dans le contexte des obligations linguistiques bilingues des législatures et des tribunaux. En dépit de l'absence d'une direction délibérée concernant la réparation de la part de la Cour, le Québec remua ciel et terre dans ses efforts pour observer le jugement à une allure folle. En revanche, le Manitoba adopta un rythme tranquille dans sa tentative timide de répondre. Par conséquent, la Cour suprême eut recours à une main sévère. Au fur et à mesure que des questions d'éducation dans la langue de la minorité en vertu de l'art. 23 de la* Charte *sont venues devant la Cour, elle avança à tâtons, appliquant en général une main douce. Tout le temps, la Cour a tenté d'identifier le minimum nécessaire pour maintenir la suprématie constitutionnelle. Soit explicitement soit par sous-entendu, les hypothèses à savoir si on pouvait s'attendre à l'observation de bonne foi ont influencé la réponse touchant la réparation. En fin de compte, la poussée de la Cour suprême n'a pas été repoussée par les gouvernements.*

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Introduction

It is only in the last thirty years that constitutional remedies have occupied a central place among developments in Canadian constitutional law. The entrenchment of the *Canadian Charter of Rights and Freedoms*[1] is only part of the explanation. The larger context involves issues of the extent to which legislatures and governments need to be pushed to comply with the Constitution, and the willingness of courts to push to ensure compliance. Language rights cases, both pre and post *Charter*, have engaged the full range of judicial intervention, from an invisible to a stern hand. The Supreme Court of Canada has used the context of language rights to establish significant contours of constitutional remedies.

In the early years after Confederation in 1867, the powers of reservation and disallowance were used as a means of enforcing the division of powers set out in the then-named *British North America Act*.[2] However, reliance on such a political means of enforcement soon gave way to judicial enforcement, with the Judicial Committee of the Privy Council (JCPC) serving as the final court of appeal until 1949.[3] During the time of the JCPC, and for the first few decades of the Supreme Court of Canada as the final court of appeal, the only significant remedial issue was that of severance. Enforcing the Constitution meant declaring legislation inconsistent with it to be *ultra vires*, with the severance question addressing the issue of the extent of that determination.

> Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible. Generally speaking, when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are. This concern is reflected in the classic statement of the test for severance in *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, at p. 518:
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> > The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it

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

2 (UK), 1867, 30 & 31 Vict, c 3, now *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, renamed by *Constitution Act, 1982, ibid.*, s 53 and Schedule.

3 *British North America (No. 2) Act, 1949* (UK), 13 Geo VI, c 81.

> has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all.[4]

The usual corollary to the notion of courts interfering with the legislature as little as possible is the implicit assumption that legislatures and governments will abide by *ultra vires* rulings of courts. It was in the context of language rights that that assumption was first, and repeatedly, put to the test, both before and after the *Charter*. Accordingly, language rights are an important site for the development of remedial principles.

Initially, the Supreme Court of Canada took a passive stance in the context of language obligations of legislatures and courts. In relation to Quebec, the implicit message sent by the invisible hand of the law was readily appreciated. However, the absence of explicit remedies produced tremendous foot-dragging in Manitoba. In response, the Supreme Court of Canada resorted to a stern hand. As minority language education issues under section 23 of the *Charter* came before it, the Supreme Court of Canada felt its way forward, mostly applying a gentle hand. Throughout, the Court has attempted to identify the minimum needed to uphold constitutional supremacy. For the most part, it has been able to speak with one voice. This is important, given the often volatile politics of language rights.

> It is not surprising that the history of Canada is marked by a number of conflicts over language, considering the presence of two dominant languages in this country. As A. Braën explained, language is a cultural benchmark that may be the source of conflicts ("Language Rights," in M. Bastarache, ed., Language Rights in Canada (1987), 1, at pp. 15-16.)[5]

Although the Court's decisions dealt only with the legalities of the situation, the judges were undoubtedly acutely aware of the political context in which they were operating.[6]

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4 *Schachter v Canada*, [1992] 2 SCR 679 at 697 [*Schachter*].

5 *Lavigne v Canada (Office of the Commissioner of Official Languages)*, [2002] 2 SCR 773 at 814. This case involved the interrelationship between two federal statutes, the *Official Languages Act*, RSC 1985, c 31 (4th Supp) and the *Privacy Act*, RSC 1985, c P-21.

6 Language rights litigation has been facilitated by partial state funding. A detailed description is beyond the scope of this article, but the following highlights are worth noting. The federal government established the first Court Challenges Program (CCP) in the late 1970s, to provide, on a selected basis, funding for constitutional challenges to provincial legislation based on language rights. With the entrenchment of the *Charter* in 1982, the CCP was extended to cover federal and provincial challenges based on the language rights in ss 16-23 of the *Charter*. With the coming into force of s 15 of the *Charter* in 1985, the CCP was extended to cover equality claims, but only against the federal government. Lobbying to have provincial equality cases covered has never been heeded.

Language obligations of legislatures and courts

Blaikie (No. 1) and Forest

In the initial confederation bargain of 1867, limited language rights at the federal level and in relation to Quebec were constitutionally entrenched in section 133 of the *British North America Act, 1867.*

> 133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Court of Quebec.
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> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.[7]

When Manitoba became a province in 1870, at a time when the proportions of English and French-speaking residents were roughly equal,[8] a virtually identical provision was entrenched in section 23 of the *Manitoba Act, 1870.*[9]

> 23. Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the *British North America Act, 1867* [now *Constitution Act, 1867*] or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

Within twenty years of Manitoba becoming a province, by which time Anglophones far outnumbered Francophones, the Manitoba Legislature purported to abrogate section 23 of the *Manitoba Act, 1870* in enacting *An Act to*

Thus the federal authorities have been willing to step on provincial toes in language rights cases but not elsewise. The CCP was cancelled in 1992, but there was sufficient political pressure to have it reinstated in 1993. However, it was cancelled again in 2006, except for cases already in process. A court challenge to the cancellation of funding for language rights cases led to a settlement involving the creation in 2008 of the Language Rights Support Program. See Canada, Library of Parliament, "The Role of the Courts in the Recognition of Language Rights," by Marie-Ève Hudon, Publication No 2011-68-E (Ottawa: Library of Parliament, Revised 23 January 2013).

See note 96, *infra*, for a discussion of a language rights case involving court-ordered interim costs.

7 *Supra* note 2.

8 *Manitoba Language Reference*, [1985] 1 SCR 721 at 731.

9 1870, 33 Vict, c 3, confirmed by *Constitution Act, 1871* (UK), 34 & 35 Vict, c 28.

Provide that the English Language shall be the Official Language of the Province of Manitoba, 1890:

> 1) Any statute or law to the contrary notwithstanding, the English language only shall be used in the records and journals of the House of Assembly for the Province of Manitoba, and in any pleadings or process in or issuing from any court in the Province of Manitoba. The Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language.
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> 2) This Act shall only apply so far as this Legislature has jurisdiction so to enact, and shall come into force on the day it is assented to.[10]

Soon after the enactment of *The Official Language Act, 1890*, two county court judges from St. Boniface, Manitoba each ruled that the statute was unconstitutional,[11] but both judgments were ignored with impunity for decades.[12] The assumption of good faith compliance was contradicted, but without any consequences. These judgments effectively flew under the radar for a long time.[13] It was not until the 1970s that the issue became rejoined, with developments in Manitoba parallel to those in Quebec in the wake of the election of the Parti Québécois (PQ) in 1976.

The Manitoba litigation was initiated by Georges Forest, upon his conviction on August 18, 1976 for a parking offence, for which he received a $5.00 fine and an order of costs. On September 9, 1976[14] Forest filed an appeal in French, the validity of which was contested by the Attorney General of Manitoba on the basis of Manitoba's *Official Language Act, 1890*.[15] The Manitoba Court of Appeal reversed a lower court judgment denying standing to Forest to challenge the constitutional validity of the *Official Language Act, 1890*, and in substance found the challenge meritorious in relation to the language of Forest's appeal. The issue of the language of statutes, however, was thought to be murkier.

> Counsel for Mr. Forest suggested, though he did not press the point, that Section 23 requires bills to be passed in French in order to result in valid statutes. Counsel for the Attorney General of Canada said that, on instructions from the Attorney

10 SM 1890, c 14 [*The Official Language Act, 1890*].

11 *Pellant v Hebert* (1892), reported at (1981), 12 RGD 242; (1909) *Bertrand v Dussault* (1909), unreported, both cited in *Manitoba Language Reference*, *supra* note 8 at 732–33.

12 *Manitoba Language Reference*, *ibid* at 733.

13 In Manitoba, Legislative Assembly, *Hansard*, 31st Leg, 4th Sess, (7 April 1980) at 2003, Premier Lyon claimed erroneously that the validity of the 1890 *Act* had not been directly questioned in the courts until the previous decade.

14 More than two months before the election of the Parti Québécois on November 15, 1976.

15 *Forest v Manitoba (Attorney General)* (1979), 98 DLR (3d) 405 at para 4 (Man CA).

> General, he wanted to put forward that view. It is indeed the view expressed by the Quebec Court of Appeal in the *Blaikie* case. For my part, however, I would not be prepared, [*sic*] to declare that all the statutes of Manitoba since 1890 are constitutionally invalid. Indeed an agreed statement of facts suggests that, so far as can be ascertained, statutes were not adopted in French in Manitoba even before 1890. Since this court was established by a statute enacted wholly in English after 1890, it could hardly be that we could make any declaration at all if the statute providing for our existence were not valid. It may be that the Quebec Court of Appeal is right in saying that a requirement that records and journals be in both languages involves the proposition that bills and statutes should also be in both languages; and that Section 133 and Section 23 both require that there be official versions of the statutes in both languages. It does not follow, however, that a failure to comply with the provisions of Section 133 or Section 23 has the effect of rendering the statutes invalid. British law draws a clear distinction between directory and mandatory statutes, and a further distinction between those mandatory statutes that result in nullities and those mandatory statutes that result in irregularities.
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> ...
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> In our earlier encounter with this matter I indicated our awareness of the practical problems that would arise from a judgment holding *The Official Language Act* to be inoperative. Our judicial duty, however, is to give the judgment that we feel should be given. I do not think I go beyond my judicial function to suggest to all concerned that constitutions can be made to work only if the spirit of them is observed as well as the black letters they contain, and if there is a disposition on the part of all concerned to make them work in a practical and reasonable way without, on the one hand, intransigent assertion of abstract rights and without, on the other hand, a cutting down and chipping away of those rights.
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> In the result, I would allow the appeal and make a declaration that *The Official Language Act* is inoperative in so far as it abrogates the right to use the French language in the Courts of Manitoba, as conferred by Section 23 of the *Manitoba Act, 1870*, confirmed by the *British North America Act, 1871*. As stated earlier it may be necessary for the Province of Manitoba to make regulations for the purpose of bringing about the implementation of the provisions of Section 23 in a reasonable and practical way.[16]

16 *Ibid* at paras 39, 41–42. The use of the term "inoperative" rather than "*ultra vires*" is not consistent with current usage. As a term of art, "inoperative" has come to be used in the context of federal paramountcy, which renders inoperative an *intra vires* provincial statute to the extent of its conflict with a valid federal statute. See *Law Society of British Columbia v Mangat*, [2001] 3 SCR 113. However, at the time of the Manitoba Court of Appeal's writing, the phrase "absolutely void and inoperative" was incorporated into the then applicable s 2 of *The Colonial Laws Validity Act, 1865* (UK), 28 & 29 Vict, c 63. Thus, at the time, "inoperative" could be considered synonymous with "*ultra vires*."

On the substantive merits (the challenge to Forest's standing having been abandoned) the case ultimately ended up in the Supreme Court of Canada, heard together with the *Blaikie (No. 1)* case from Quebec. The constitutional question stated by the Chief Justice of Canada in *Forest* did not draw any distinction between the language used in courts and the language of statutes.

> Are the provisions of "An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba" enacted by S.M. 1890, c. 14 (now R.S.M. 1970, c. 010) or any of those provisions, ultra vires or inoperative in so far as they abrogate the provisions of section 23 of the Manitoba Act, 1870, 33 Vict., c. 3 (Can.) validated by the British North America Act, 1871, 34-35 Vict., c. 28 (U.K.)?[17]

Nor did the top Court's analysis draw any such distinction. That Court's judgment focused on rejecting the contention that the power to amend provincial constitutions, then contained in section 92(1) of the *British North America Act*,[18] enabled the Manitoba Legislature to amend section 23 of the *Manitoba Act, 1870*. The unconstitutionality of the 1890 *Official Language Act* was approached in global terms. It is noteworthy that the Supreme Court of Canada saw no need to say anything at all about the remedial consequences of finding the 1890 Manitoba statute unconstitutional.

The Supreme Court of Canada's judgment in *Forest* was issued the same day as its much higher profile decision in *Blaikie v Quebec (Attorney General)*.[19] Its decision in *Forest* relied on its analysis in *Blaikie (No. 1)*.[20] The *Blaikie (No. 1)* decision was the result of developments following the election on November 15, 1976 of a Quebec government committed to Quebec sovereignty. Language policy was a top priority for the PQ, leading to the adoption by the Quebec National Assembly of Bill 101, the *Charter of the French Language*.[21] Among many other things, the *Charter of the French Language*, in Title I, Chapter III, went headlong against section 133 of the *British North America Act*.

> 7. French is the language of the legislature and the courts in Quebec.
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> 8. Legislative bills shall be drafted in the official language. They shall also be tabled in the Assemblée nationale, passed and assented to in that language.
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> 9. Only the French text of the statutes and regulations is official.

17 *Forest v Manitoba (Attorney General)*, [1979] 2 SCR 1032 at 1035 [*Forest*].

18 Now s 45 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

19 [1979] 2 SCR 1016 [*Blaikie (No. 1)*].

20 *Supra* note 17 at 1036.

21 SQ 1977, c 5.

> 10. An English version of every legislative bill, statute and regulation shall be printed and published by the civil administration.
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> 11. Artificial persons addressing themselves to the courts and to bodies discharging judicial or quasi-judicial functions shall do so in the official language, and shall use the official language in pleading before them unless all the parties to the action agree to their pleading in English.
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> 12. Procedural documents issued by bodies discharging judicial or quasi-judicial functions or drawn up and sent by the advocates practising before them shall be drawn up in the official language. Such documents may, however, be drawn up in another language if the natural person for whose intention they are issued expressly consents thereto.
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> 13. The judgments rendered in Quebec by the courts and by bodies discharging judicial or quasi-judicial functions must be drawn up in French or be accompanied with a duly authenticated French version. Only the French version of the judgment is official.

Blaikie (No. 1) contains more extensive reasons than *Forest* for finding these provisions contrary to section 133, and for holding that section 133 is not capable of unilateral amendment by the province under section 92(1). *Blaikie (No. 1)* likewise says absolutely nothing about the remedial consequences.

As I am about to explain, the contrast between the Quebec and Manitoba reactions to the Supreme Court of Canada judgments could not have been more stark. One province pulled out all the stops in its efforts to comply with the ruling with breakneck speed. The other province adopted a leisurely pace in a half-hearted attempt to respond to the implications of the ruling. It is rather ironic that the former is the province then governed by a party committed to breaking up the country.

The Quebec response to Blaikie (No. 1)

The *Blaikie (No. 1)* and *Forest* decisions were issued by the Supreme Court of Canada on the morning of December 13, 1979. The Quebec National Assembly was in session, and before noon, during Question Period, Claude Ryan, Liberal Opposition Leader, asked Premier René Lévesque about the *Blaikie (No. 1)* decision. The Premier answered that they had received a telex about the decision, and would respond quickly.[22] Following Question Period, debate resumed on various matters until 1:00 p.m. The National Assembly

22 Quebec, Assemblée nationale, *Journal des débats*, 31st Leg, 4th Sess, Vol 21, No 80 (13 December 1979) at 4419–20 [Débats du Québec].

returned after lunch, just after 3 p.m., to resume a pre-scheduled second reading debate on a bill that had been tabled in French only, as per the *Charter of the French Language*. A Cabinet meeting was still in progress, so the Premier and most Ministers were not present.[23] The Liberal House Leader, Gérard D. Levesque, on a point of order, wondered whether that afternoon's National Assembly proceedings were valid in light of the Court's decision. The Speaker relied on the technicality that he had not yet been officially advised of the Court's decision to rule that there was no basis to stop normal proceedings.[24] The Liberal House Leader asked for a brief adjournment to enable the House Leaders and Speaker to meet, which was granted on consent.[25]

After the adjournment the Parti Québécois House Leader, Claude Charron, said the government was committed "de respecter la décision d'un tribunal."[26] Minister of Energy and Resources, Yves Bérubé, said, in English, regarding debates in the National Assembly, that "we do not really know if we have the right to speak our own language"[27] in spite of the clear recognition in section 133 of the right to speak French in the Quebec legislature. These comments typified the dual tracks of the PQ government reaction, simultaneously heaping derision on section 133, while agreeing to abide by the Supreme Court of Canada's decision. When the National Assembly adjourned for the supper break just after 6 p.m., Charron indicated there would be urgent business when the National Assembly came back at 8 p.m. that evening.[28]

The National Assembly actually resumed at 8:26 p.m., with Claude Charron asking to suspend regular proceedings to deal urgently with the Supreme Court of Canada's decision, sitting until the legislation in response was passed.[29] He was clearly worried that, in the absence of such a response, the legislative work of the National Assembly risked being nullified.[30] Charron acknowledged that Quebec was part of Canadian federalism, although the government wished that this was not so; yet, as long as it *was* so, Quebec needed to submit.[31] Charron made a point of highlighting the irony that the National Assembly's choice of French as the only official language had been found contrary to a more than 100-year-old English-only statute passed in

23 *Ibid* at 4433.
24 *Ibid* at 4433–37.
25 *Ibid* at 4439.
26 *Ibid.*
27 *Ibid* at 4440.
28 *Ibid* at 4460.
29 *Ibid* at 4462.
30 *Ibid* at 4460.
31 *Ibid* at 4462.

Great Britain.[32] At the request of the Liberal House Leader, there was an adjournment, scheduled from 9:00 p.m. to 10:30 p.m., to enable the Opposition to study the Bill.[33] They actually came back at 10:49 p.m., and sat through the night.[34] By a strange twist of fate, during that brief adjournment there was high drama in Ottawa. The Joe Clark Progressive Conservative government fell on a confidence vote respecting John Crosbie's budget.[35] While Quebec City was preoccupied with the reaction to *Blaikie (No. 1)*, Ottawa's attention was consumed by an upcoming general election. The federal government played no part in Quebec's initial response to *Blaikie (No. 1)*.[36]

In tabling Bill 82, in two languages, "An Act respecting a judgment of the Supreme Court of Canada on 13 December 1979 on the legislature and courts of Quebec" at 10:49 p.m. on December 13, 1979, Camille Laurin, Quebec's Minister of State for Cultural Development, painted as bleak a picture as possible. He described the situation as "oppressive," as a "moment tragique," and as a "humiliation."[37] Yet what the Bill did in relation to statutes was actually quite simple. The unofficial English versions of statutes originally provided for in section 10 of the *Charter of the French Language* were retroactively given official status alongside the French, which were both reenacted simultaneously.[38] There was authorization to do the same for regulations.[39] A further provision, stipulating "In case of discrepancy between the French text and English text, the French text prevails"[40] was clearly invalid,[41] but in the main the legislation provided a quick fix to the Supreme Court of Canada's ruling

32 *Ibid* at 4460–61.

33 *Ibid* at 4464.

34 *Ibid* at 4465–4538.

35 House of Commons, *Journals*, 31st Parl, 1st Sess, Vol 125, No 48 (13 December 1979) at 344–46.

36 The federal Attorney General did later intervene in *Blaikie (No. 2)*, *infra* note 46, re Quebec's application for a rehearing on aspects of *Blaikie (No. 1)*.

37 Débats du Québec, *supra* note 22 at 4465.

38 SQ 1979, c 61, s 1.

39 *Ibid*, s 2.

40 *Ibid*, s 5.

41 *Manitoba Language Reference*, *supra* note 8 at 776. During second reading debate on the bill in response to *Blaikie (No. 1)*, Union Nationale Leader Rodrique Biron questioned the validity of this provision. He noted that, during the Duplessis years, legislation had been passed to say that the French prevailed in case of conflict, but its validity had never been tested in court, and it had been repealed; Débats du Québec, *supra* note 20 at 4481.

In a 1993 amendment to the *Charter of the French Language, Act to amend the Charter of the French language*, SQ 1993, c 40, s 1 amending RSQ, c C-11 [*1993* Amendment], the National Assembly incorporated the "equally authoritative" nature of enactments to which section 133 applies (new s 7(3)), but stipulates (new s 8) that where there is an English version of anything to which section 133 does not apply, "the French text shall prevail in case of discrepancy." See *infra* note 46, re the scope of what is covered by s 133.

of invalidity. Liberal Leader Claude Ryan, during third reading debate in the wee hours of the morning, expressed concern about passing approximately 250 English versions of legislation that members of the National Assembly had obviously not read since the tabling of Bill 82.[42] Nonetheless, the Bill was passed just before 6:30 a.m. on December 14, 1979,[43] and went immediately to the lieutenant-governor for royal assent,[44] bringing it into force.[45] Within less than 24 hours of the Supreme Court of Canada's *Blaikie (No. 1)* decision, section 133 was again being observed in Quebec.[46]

At the start of the evening session on December 13, 1979, PQ House Leader Claude Charron claimed that the *Charter of the French Language* had been passed in good faith.[47] In contrast, Liberal Leader Claude Ryan characterized the provisions challenged in *Blaikie (No. 1)* in the following terms: "il a cherché délibérément à provoquer un affrontment politique."[48] Ryan is surely right. The PQ government must have known from the start that Title I of Chapter III of the *Charter of the French Language* was invalid for its lack of conformity to section 133. At the close of the second reading debate on the Bill to respond to *Blaikie (No. 1)*, Camille Laurin acknowledged that the PQ government was not surprised by the Supreme Court of Canada's decision.[49] And it is not plausible that the legislative drafters were starting from scratch on December 13, 1979 in responding to *Blaikie (No. 1)*. The timing was too quick for that. Moreover section 10 of the original *Charter of the French Language* shows readiness for an ultimate ruling of invalidity. The inclusion of this provision, providing for unofficial English versions of statutes and regulations, may have been in part to try to somewhat placate the Anglophone population. But I suspect it had much more to do with anticipating an eventual ruling of invalidity from Canada's top Court. The instant availability of

42 Débats du Québec, *supra* note 22, December 14, 1979, at 4536.

43 *Ibid* at 4537.

44 *Ibid* at 4538.

45 *Supra* note 38, s 7.

46 There was a dispute about exactly how far the Supreme Court of Canada's ruling went. During the December 13-14, 1979 debate the government contended that the bilingualism requirement extended to municipalities and school boards; Débats du Québec, *supra* note 22, at 4515. The PQ was apparently then trying to make Canadian federalism seem as unacceptable and as unreasonable as possible. Later, in an application by the Quebec government for a rehearing of *Blaikie (No. 1)*, Quebec's contention was to limit the scope of *Blaikie (No. 1)*. The Supreme Court of Canada ruled in *Blaikie v Quebec (Attorney General)*, [1981] 1 SCR 312 [*Blaikie (No. 2)*] that s 133 did not apply to school boards or municipalities.

47 Débats du Québec, *supra* note 22, 13 December, 1979, at 4461.

48 *Ibid* at 4471.

49 *Ibid* at 4503.

English versions of statutes and regulations made a quick remedy possible, by simply changing the status of these English versions from unofficial to official.

It was in the PQ's political interest to challenge the dictates of section 133, even when they knew they would ultimately lose. The inability to have French as the only official language of the legislature and the courts without qualification was thought to be a powerful argument for why Quebec needed to leave Canada. Yet it is important to emphasize that, so long as Quebec was still part of Canada, the Lévesque government was prepared to play by the Canadian rules. They were ready to challenge those rules, but ultimately to comply with them. They drafted the affront to section 133 in a way that enabled an easy resolution once the final ruling of unconstitutionality was made. The Quebec National Assembly responded to the *Blaikie (No. 1)* decision as quickly as humanly possible. Although the Supreme Court of Canada had said nothing explicit about the remedy required, the PQ government understood and accepted what needed to be done — comply with section 133.

Thus the Lévesque government showed a strong commitment to the rule of law. This was in contrast to a later Parti Québécois government which declined to participate in the *Quebec Secession Reference*[50] on the basis that Quebec sovereignty depended on political considerations only, with the legalities being immaterial.[51] But in 1979, in advance of the first Quebec sovereignty referendum, the Lévesque government was prepared to accept the authority of the Supreme Court of Canada, and fulfill its implicit expectations of good faith compliance.

The Supreme Court of Canada's absence of comment on remedies in *Blaikie (No. 1)* and *Forest* presumably reflected their assumption that the remedial implications of a ruling of invalidity were obvious. Quebec proved them right on this point. However, Manitoba proved them wrong.

The Manitoba response to Forest

In Manitoba, in contrast to Quebec, there was no sense of urgency in responding to *Forest* from the government led by Progressive Conservative Premier Sterling Lyon. The remedial implications of *Forest* were admittedly more complex than those of *Blaikie (No. 1)*. The former arose in the context of almost a hundred years of non-compliance compared to just over two years in the

50 [1998] 2 SCR 217 [*Secession Reference*].

51 Anne Bayefsky, *Self-determination in International Law: Quebec and Lessons Learned* (Cambridge, Mass: Kluwer Law International, 2000) at 12–14.

latter. Moreover, there was no stock of unofficial French versions of Manitoba statutes or regulations to rely on. The context of choice of language in the courts had prompted Justin Freeman, of the Manitoba Court of Appeal, in *Forest* to invoke the spirit of the Constitution, "to make them [black letters of the Constitution] work in a practical and reasonable way without, on the one hand, intransigent assertion of abstract rights and without, on the other hand, a cutting down and chipping away of those rights."[52] The Lyon government did not do much to heed this advice.

The Manitoba Legislative Assembly was not sitting on December 13, 1979 when the Supreme Court of Canada's judgment in *Forest* was released. There was passing reference (in French) to the judgment at the start of the February 21, 1980 Speech from the Throne opening the 4th Session of the 31st Legislature, as giving rise to administrative decisions to translate laws and regulations.[53] Without elaboration, the Throne speech promised legislation to respond to the Supreme Court of Canada's decision.

> Nous vous demanderons d'adopter la législation requise pour la mise en vigueur du jugement de la Cour Suprême dans l'administration provinciale.[54]

Almost a month later, on March 17, 1980, first reading was given to Bill 2, tabled by Premier Lyon;[55] the index reference was in two languages. However, when the second reading debate proceeded on April 7, 11, 16, 23, 30, and May 7,[56] and when Bill 2 was given second reading on May 7, 1980, the headings were in English only. When third reading was moved on July 4, 1980,[57] the title was in two languages. A motion to hoist the bill for six months was defeated on July 8, 1980, and third reading was given the same day.[58] Royal assent was given on July 9, 1980; the journals recorded this in English only.[59] In its decision in the *Manitoba Language Reference*, the Supreme Court

52 *Supra* note 15 at para 41.

53 Manitoba, Legislative Assembly, *Hansard*, 31st Leg, 4th Sess (21 February 1980) at 1.

54 *Ibid.*

55 Manitoba, Legislative Assembly, *Hansard*, 31st Leg, 4th Sess (17 March 1980) at 1029.

56 *Ibid*; *supra* note 13 at 2002–05; Manitoba, Legislative Assembly, *Hansard*, 31st Leg, 4th Sess (11 April 1980) at 2325–35; Manitoba, Legislative Assembly, *Hansard*, 31st Leg, 4th Sess (16 April 1980) at 2572–77; Manitoba, Legislative Assembly, *Hansard*, 31st Leg, 4th Sess (23 April 1980) at 2839–43 (comments in French missing any letters with accents; corrected version reprinted on Manitoba, Legislative Assembly, *Hansard*, 31st Leg, 4th Sess (5 May 1980) at 3255–56); Manitoba, Legislative Assembly, *Hansard*, 31st Leg, 4th Sess (30 April 1980) at 3103–05; Manitoba, Legislative Assembly, *Hansard*, 31st Leg, 4th Sess (7 May 1980) at 3372–73.

57 Manitoba, Legislative Assembly, *Hansard*, 31st Leg, 4th Sess (4 July 1980) at 5340.

58 Manitoba, Legislative Assembly, *Hansard*, 31st Leg, 4th Sess (8 July 1980) at 5400–09.

59 Manitoba, Legislative Assembly, *Hansard*, 31st Leg, 4th Sess (9 July 1980) at 5493.

of Canada was unable to say whether Bill 2 went through the Manitoba Legislature in two languages.[60]

Although there were six days of debate on second reading, the amount of time spent on each of those days was quite short. The third reading debate was very short. Little of the second or third reading debate actually related to the substance of the Bill; much of the debate was about the extent of French services and French schooling in Manitoba, neither of which is dealt with in section 23 of the *Manitoba Act, 1870* or in Bill 2.

At the start of second reading debate on Bill 2, Manitoba Premier Sterling Lyon invoked the following context:

> Under the rule of law which has been observed in Manitoba since its beginnings a judgment of the senior court in our country must be accepted and given effect within reasonable time.[61]

To do otherwise, Lyon said, would "court anarchy."[62] Yet actions speak louder than words. Not only did the 1890 Manitoba statute belie Lyon's claim, but so did his own government's response to the Supreme Court of Canada's decision in *Forest.*

In contrast to the less than 24 hours it took the Quebec National Assembly to respond to *Blaikie (No. 1)*, it took over six months for the Manitoba Legislative Assembly to pass Bill 2. The timing of the Quebec sovereignty referendum on May 20, 1980 may have contributed to the dragging out of the Manitoba debates. If, as at some points seemed possible, the sovereignty referendum had attained a majority vote,[63] would the Manitoba Legislature have lost interest in Bill 2? Whatever the answer to that question, it is hard to accept the description of Minister of Government Services Enns that the Manitoba government was acting with "extreme dispatch."[64]

More telling than the leisurely pace in adopting Bill 2 was its substance, which fell far short of compliance with section 23 of the *Manitoba Act, 1870.* Bill 2 made both English and French versions of legislation official,

60 *Supra* note 8 at 773.

61 *Supra* note 13 at 2003.

62 *Ibid.*

63 The actual result was 59.56 percent "no"; 40.44 percent "yes." The support of the Franco-Manitoban Society for the "yes" side in the Quebec referendum did not go over well in the Manitoba Legislature, nor with Georges Forrest; Manitoba Debates, *supra* note 13 at 2005, and 16 April 1982, *supra* note 56 at 2576.

64 Manitoba Debates, 11 April 1980, *supra* note 56 at 2333.

but contemplated introduction of legislation in one language only, with production in the other language being optional. Moreover, if the translation became available after the original language version had already been passed by the legislature, the certification of the translation was under the office of the Speaker, not actually passed by the legislature. Furthermore, in case of conflict between the two language versions, if the statute was initially tabled in only one language, that language version was to prevail. Thus Bill 2 fell afoul of the requirements of section 23 for: "(i) simultaneous enactment of legislation in both English and French, and (ii) equal authority and status for both the English and the French versions," according to the Supreme Court of Canada's summary in the 1985 *Manitoba Language Reference* of the teaching of *Blaikie (No. 1)*.[65] Neither Premier Lyon nor then NDP Opposition Leader Howard Pawley commented on these facets of Bill 2,[66] nor did the lack of serious attention to complying with section 23 get any more than passing reference throughout the debate.[67]

After the release of *Forest*, the vast majority of legislation passed in the fourth and fifth sessions of the 31st Legislature was in English only.[68] During the 32nd Legislature, after the 1982 election of an NDP government under Howard Pawley as Premier, new public acts were in both English and French, but amending acts and private acts were in English only.[69] It was not until after the release of the Supreme Court of Canada's decision in the 1985 *Manitoba Language Reference* that the Journals of the Manitoba Legislature started to appear in both English and French.[70] In 1983, NDP Attorney General of Manitoba Roland Penner had claimed that *Forest* "did not, however, raise the issue of the validity of our statutes."[71] In the result, that could have been said after the Court of Appeal's decision in *Forest*, but Penner was ignoring the combined effect of *Forest* and *Blaikie (No. 1)* in the Supreme Court of Canada. As described above, the Quebec government understood the Supreme Court of Canada very differently; it would take much more to get serious attention from the Manitoba government.

The weak response to the Supreme Court of Canada's decision in *Forest* prompted further litigation by Roger Bilodeau. The Manitoba Court of

65 *Manitoba Language Reference, supra* note 8 at 776.

66 Manitoba Debates, *supra* note 12 at 2004.

67 *Ibid* at 2005.

68 *Manitoba Language Reference, supra* note 8 at 733.

69 *Ibid* at 734.

70 Journals of the Manitoba Legislature, 1985-86, Vol. 128. <http://www.gov.mb.ca/legislature/business/journals_index.html>.

71 Manitoba, Legislative Assembly, *Hansard*, 32nd Leg, 2nd Sess (4 July 1983) at 4058.

Appeal ruled against Bilodeau's challenge to an English-only speeding ticket; the majority did so on the basis that section 23 of the *Manitoba Act, 1870* was directory, not mandatory, with no consequences for non-compliance.[72] The case went on appeal to the Supreme Court of Canada. *Bilodeau* was recognized by the Manitoba government as raising the issue of the validity of Manitoba statutes.[73] The hearing of the *Bilodeau* case in the Supreme Court of Canada was postponed on more than one occasion when it seemed that a constitutional amendment might settle the legal issues.

On July 4, 1983 Manitoba Attorney General Roland Penner tabled in the Manitoba Legislative Assembly a resolution for a bilateral (Canada/Manitoba) amendment to the Canadian Constitution under section 43 of the *Constitution Act, 1982*.[74] The proposed amendment would have forgiven past unilingual Manitoba statutes and regulations, but required bilingual statutes and regulations for subsisting and future laws. In addition, it provided for French services in Manitoba somewhat parallel to what section 20 of the *Charter* provides respecting French and English services from the federal and New Brunswick governments. The political context was that Franco-Manitobans cared more about on-going French services from the provincial government than retroactively producing French statutes and regulations; however, only a constitutional amendment could guarantee government services in French. Federal and Franco-Manitoban negotiators hoped that relief from translating almost a hundred years of spent English-only statutes and regulations would prompt Manitoba to agree to constitutionally guaranteed French services in Manitoba.[75] Ultimately, though, Manitoba was not prepared to proceed with this constitutional amendment.

This failure of constitutional amendment negotiations prompted the federal executive to submit a reference to the Supreme Court of Canada dated April 5, 1984. The 4th question concerned the validity of Bill 2, as a response to *Forest*.[76] The Supreme Court of Canada's reasons for finding Bill 2 unconstitutional have already been dealt with. The more fundamental matters addressed in the first three questions raised the remedial issues not expressly dealt with by the Supreme Court of Canada in *Forest*.

72 [1981] 5 WWR 393 (Man CA) at paras 14, 23.
73 *Supra* note 71.
74 *Ibid* at 4056–57.
75 *Ibid* at 4057–66.
76 *Manitoba Language Reference*, supra note 8 at 729.

The Manitoba language reference

The first question in the federal reference asked whether section 133 of the *Constitution Act 1867* and section 23 of the *Manitoba Act, 1870* were mandatory. The second and third questions asked whether English-only Manitoba statutes and regulations were invalid and, if so, whether they had force and effect.[77]

The Attorney General of Manitoba submitted that the obligations of section 23 of the *Manitoba Act* were legally directory rather than mandatory. In other words, although there was an obligation to comply, there were not necessarily consequences for not doing so.[78] It was a variation on the "too big to fail" theory. Manitoba was counting on a rejection of the mandatory characterization in order to avoid the legal chaos of almost a century of invalid laws. It was effectively putting forth the proposition that if a government behaved unconstitutionally in a massive enough way, it could do so with impunity. Good faith compliance was completely absent from this picture.

The Supreme Court of Canada, in a unanimous judgment from "The Court," was unwilling to accept such an affront to constitutional supremacy, now codified in section 52 of the *Constitution Act, 1982*.[79] It rejected the application of the mandatory/directory distinction to constitutional provisions.[80]

> It would do great violence to our Constitution to hold that a provision on its face mandatory, should be labelled directory on the ground that to hold otherwise would lead to inconvenience or even chaos.[81]

The Court affirmed the role of the judiciary as the guardians of the Constitution.[82]

> The judiciary is the institution charged with the duty of ensuring that the government complies with the Constitution. We must protect those whose constitutional rights have been violated, whomever they may be, and whatever the reasons for the violation.

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77 *Ibid.*

78 *Ibid* at 740.

79 *Ibid* at 744–7. Section 52(1) of the *Constitution Act, 1982* reads as follows:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

80 *Ibid* at 742–3.

81 *Ibid* at 742.

82 Claude Ryan had invoked that principle during the debate on Bill 82 in the Quebec National Assembly; Débats du Québec, *supra* note 22 at 4471.

> The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as section 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.[83]

Thus, in answer to the second question, unilingual Manitoba statutes and regulations were invalid.[84] At the same time, however, the Court was not willing to ignore the legal chaos of simply declaring invalid almost a century's worth of laws. That would undermine the rule of law,[85] given the impossibility of instantaneous rectification.[86] Earlier in its judgment the Court had noted that the Quebec response to *Blaikie (No. 1)* was instantaneous.[87] The Court drew no explicit link between the Quebec response to *Blaikie (No. 1)* and the Manitoba non-response to *Forest*, but I would surmise that the Court understood the bad optics of letting Manitoba off the hook while Quebec was complying with the Constitution. It needed to find some way to compel Manitoba to comply.

The Supreme Court of Canada concluded that some doctrines, such as the *de facto* doctrine, could render some legal actions valid, but that this was only a "partial solution."[88] The Court rejected reliance on a constitutional amendment to cure the problem, because that inappropriately depended on "a future and uncertain event."[89] The Court also rejected the options of relying on the lieutenant-governor to withhold assent to bills, or on the powers of reservation and disallowance, because these would insulate Manitoba's laws from *judicial* review[90] in a manner that is "entirely inconsistent with the judiciary's duty to uphold the Constitution"[91] and that inappropriately asks "the Court to abdicate its responsibility to enforce the dictates of the Constitution."[92]

The solution adopted by the Court was a *suspended* declaration of invalidity, with the period of the suspension used to translate, re-enact and publish

83 *Manitoba Language Reference*, *supra* note 8 at 745.
84 *Ibid* at 747.
85 *Ibid* at 748–50, 752–53.
86 *Ibid* at 749.
87 *Ibid* at 734–35.
88 *Ibid* at 757.
89 *Ibid* at 753.
90 *Ibid* at 754.
91 *Ibid.*
92 *Ibid.*

all repealed, spent, and current acts and regulations,[93] with unilingual acts and regulations deemed valid during the period of the suspension.[94] On a prospective basis, unilingual acts and regulations would simply be invalid.[95]

This first use of a suspended declaration of invalidity was the Court's vehicle to uphold the supremacy of the Constitution,[96] and to craft an ultimately retroactive remedy. However, later uses of a suspended

93 The period of suspension was left to the agreement of the parties, i.e. both the government and those challenging the violation were found to be in breach of the Constitution.

The parties and interveners arrived at a consent agreement with respect to this minimum period which was given effect by this Court on November 4, 1985 in *Ref Re Manitoba Language Rights*, [1985] 2 SCR 347 at 349. The Order issued dictated that the period would continue to December 31, 1988, for "the Continuing Consolidation of the Statutes of Manitoba ... and [the] Regulations of Manitoba" and to December 31, 1990 for "all other laws of Manitoba"; rehearing decision, *Reference Re Manitoba Language Rights*, [1992] 1 SCR 212 at 216.

The rehearing was occasioned by a dispute as to exactly what was required to be in two languages.

> That time period, arrived at by consent of the parties, was to extend to December 31, 1990 with respect to the kinds of instruments we are concerned with here. That date was subsequently extended until the handing down of this judgment. We are convinced that, in light of the genuine dispute which arose here as to the scope of this Court's previous judgment, a further extension of the time period is warranted for the same reasons a period of temporary validity was granted originally.
>
> The duration of that time period should once again be left to an agreement between the parties. If the parties are unable to agree, they can return to this Court for guidance. To ensure that the instruments in question do not lose their force in the interim, we grant an extension of three months from the date this judgment is handed down within which the parties must arrive at an agreement with respect to the full duration of the extension, or return to this Court for a determination. *Reference Re Manitoba Language Rights*, [1992] 1 SCR 212 at 232.

94 This and the *de facto* doctrine resulted in Roger Bilodeau's speeding ticket being deemed valid, notwithstanding its reliance on an English-only statute. The Supreme Court of Canada in *Bilodeau v Manitoba (Attorney General)*, [1986] 1 SCR 449 at para 16 also ruled that s 23 of the *Manitoba Act, 1870* did not require a bilingual summons. The same conclusion was reached in respect of s 133 in a decision issued concurrently; *MacDonald v City of Montreal*, [1986] 1 SCR 460 at 476

95 *Manitoba Language Reference*, *supra* note 8 at 769.

96 In *R v Mercure*, [1988] 1 SCR 234 [*Mercure*] parallel language rights issues arose in relation to Saskatchewan, respecting s 110 of the *North-West Territories Act*, RSC 1886, c 50. The substance of s 110 is essentially the same as s 133 of the *British North America Act*, *supra* note 2 and s 23 of the *Manitoba Act*, *supra* note 9. However, the Supreme Court of Canada in *Mercure* found its status to be crucially different. As a regular statute, not a constitutional provision, s 110 was subject to amendment by a regular (bilingual) statute of the successor provinces of Saskatchewan and Alberta that could retroactively cure past non-compliance with s 110 and validate future English-only statutes. That was done in Alberta in the *Languages Act*, RSA 2000, c L-6. However, the issue of language rights in Alberta is currently being revisited. In *R v Caron*, [2011] 1 SCR 78 [*Caron*], the Supreme Court of Canada upheld interim costs orders in relation to the prosecution of a minor traffic offence. Caron's defence is solely based on language rights, contending that *Mercure* is not determinative because its analysis did not deal with the *Royal Proclamation* of 1869 admitting the North-West Territories into Canada. Caron's contention is that the *Royal Proclamation*'s protection of "all your civil ... rights" includes language rights, and has constitutional status. For the purposes

declaration of invalidity[97] have facilitated the avoidance of retroactive remedies.[98]

Almost a century's worth of defiance of the Constitution prior to the *Forest* decision, and a large measure of continued non-compliance after the decision, forced the Supreme Court of Canada to take a hard look at constitutional remedies, and apply a stern hand. Its 1985 *Manitoba Language Reference* decision ranks as the Supreme Court of Canada's strongest affirmation of the supremacy of the Constitution, and of the role of the courts as the guardian of the Constitution.

Quebec and Manitoba reactions contrasted

What ultimately explains the stark contrast between the Quebec and Manitoba reactions to *Blaikie (No. 1)* and *Forest*? As already noted, the Manitoba situation was much more complex given the length of non-compliance with the Constitution, and the unavailability of French versions of statutes. However, Manitoba did not react in a way that was responsive to that complexity, but instead sought to bury its head in the sand. What else was at play?

It is undoubtedly true that Anglophones had more political clout in Quebec than Francophones in Manitoba, and there was a deeper history of minority linguistic rights in Quebec compared to Manitoba. It was diminished political clout of Franco-Manitobans that had given rise to the 1890 *Language Act* initially, and that clout had eroded further in the next century. Moreover, most Franco-Manitobans would not have found the language of statutes to be something that affected their daily lives. So it seems clear that the Manitoba government felt little political pressure to act comprehensively and with urgency. Yet, Anglophones in Quebec had been antagonized by Bill 101 from the outset, and were not the PQ's political base.[99] It is hard to conclude that Anglophone political clout made the difference in Quebec.

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of deciding the issue of interim costs, this argument was held to be *prima facie* meritorious, and of sufficiently special impact on the public interest.

> What is "sufficiently special" about this case is that it constitutes an attack of *prima facie* merit (as that term is used in *Okanagan*) on the validity of the entire corpus of Alberta's unilingual statute books. The impact on Alberta legislation, if Mr. Caron were to succeed, could be extremely serious and the resulting problems ought, if it becomes necessary to do so, be addressed as quickly as possible. (*Caron* at 103).

97 For a general discussion of suspended declaration of invalidity, see *Schachter, supra*, note 4 at 715–7.

98 For a general discussion of retroactive remedies, see *Canada (Attorney General) v Hislop*, [2007] 1 SCR 429 [*Hislop*].

99 See Graham Fraser, *René Lévesque and the Parti Québécois in Power*, 2nd ed (Montreal: McGill-Queen's University Press, 2001) at 91–112.

What was really at stake in both jurisdictions were abstract principles of constitutional law that matter to constitutional lawyers and political scientists, but generally do not excite voters. In the Manitoba context, there was nothing to displace this normal assumption. Manitoba's status in the federation was not hanging in the balance, and there was no serious cost to pay in giving affront to principles of constitutionalism. Ironically, I think the fact that there was a sovereignist government in Quebec is what did displace the normal assumption there. The PQ had successfully distanced itself from the FLQ.[100] In that respect it was a critical foundation of its platform, and electoral success, that it would achieve sovereignty by lawful means. It was important not to give its opponents any cause to challenge its commitment to that principle. This was part of the strategy to win the sovereignty referendum. It would also deny ammunition to the rest of Canada to refuse to negotiate, should the referendum be successful.[101] Things obviously did not work out as the PQ hoped, but the looming 1980 referendum focused the minds of members of the government in 1979. The loss of the referendum in 1980, and the patriation of the Constitution with an entrenched *Canadian Charter* despite Quebec's strenuous objections, changed the attitudes of Quebec governments toward the rules of the Canadian constitutional game.

Language rights in the *Canadian Charter of Rights and Freedoms*

The 1982 *Canadian Charter of Rights and Freedoms* introduced further French/English language rights guarantees in sections 16 to 23. For federal jurisdiction and New Brunswick, sections 16 to 20 constitutionalized language rights already previously recognized. Section 23 (to be discussed in the next section of the article) gives constitutional protection to minority language education rights for the first time.[102] It is important to note that *Canadian Charter* language rights (along with democratic and mobility rights) are not subject to the notwithstanding clause of section 33 of the *Canadian Charter.*

100 John Saywell, *The Rise of the Parti Québécois, 1967-1976* (Toronto: University of Toronto Press, 1977) at 171.

101 During the 1976 election Quebec campaign, in an interview with the *Montreal Star*, René Lévesque was quoted as saying:

> 'If we win, no one in Canada or Quebec will be able to say that we don't have a mandate to negotiate out of Canada.' The referendum was 'a bet we are making on Canada's integrity,' he said. 'It has a lot to lose by not respecting the will of the French Canadian people.' *(Ibid* at 147).

102 S 21 stipulates that ss 16-20 do not abrogate or derogate from other constitutional French/English language rights. S 22 stipulates that ss 16-20 do not abrogate or derogate from any legal or customary right or privilege of any language other than English or French. *Supra* note 1.

Sections 16 to 20 give constitutional underpinnings to the federal *Official Languages Act*,[103] and the New Brunswick *Official Languages Act*.[104] Section 16(1) makes French and English the official languages of Canada, and gives both languages equality of status and equal rights and privileges in all institutions of the Parliament and government of Canada. Section 16(2) enacts parallel provisions for New Brunswick. Section 16(3) expressly protects the authority to advance language rights beyond constitutional minima.[105] Section 16.1, added in 1993, protects the equality of French and English linguistic communities in New Brunswick.[106] Sections 17 to 19 replicate section 133 in relation to federal jurisdiction, and apply the same to New Brunswick.[107] Section 20 provides constitutional guarantees for government

103 First version enacted in 1969, RSC 1970, c O-2; current version RSC 1985, c 31 (4th Supp).

104 First version enacted in 1969, *Official Language of New Brunswick Act*, RSNB 1973, c O-1; current version, *Official Languages Act*, SNB 2002, c O-0.5.

105 That had already been affirmed, prior to the *Constitution Act, 1982*, by the Supreme Court of Canada in *Jones v Attorney General of New Brunswick*, [1975] 2 SCR 182.

106 Added by *Constitution Amendment, 1993 (New Brunswick)*, SI 93-54 via a bilateral amendment (federal/New Brunswick) pursuant to s 43 of the *Constitution Act, 1982, supra* note 18. This was the only part of the Charlottetown Accord to be implemented. Although the Accord was defeated nationally in the referendum, a majority of New Brunswickers voted for it, which was taken as justification to implement section 16.1.

107 The right pursuant to s 19(2) to use English or French in any court proceeding in New Brunswick gave rise to a question of whether that includes a right to be understood. In *Société des Acadiens du Nouveau-Brunswick v Association of Parents for Fairness in Education*, [1986] 1 SCR 549, the majority of the Supreme Court of Canada concluded that it did not, on the basis that being understood through translation could not satisfy a language right. In *R v Beaulac*, [1999] 1 SCR 768 [*Beaulac*], the Supreme Court of Canada drew a clear distinction between a *fair hearing right*, which depends on comprehension (and which may invoke a right to translation in any language under section 14 of the *Charter*) and a French/English *language right*, which may be invoked irrespective of any comprehension difficulty. *Beaulac* involved statutory changes to enhance language rights.

> This is the first time this Court has been called upon to interpret the language rights afforded by section 530 of the Criminal Code, R.S.C., 1985, c. C-46. This case concerns the right to be heard by a judge or a judge and jury who speak the official language of Canada that is the language of the accused, or both official languages of Canada (at para 7) ... an example of the advancement of language rights through legislative means provided for in section 16(3) of the *Charter* (at para 22).
>
> Beaulac, accused with murder, had made an application for a trial before a judge and jury who speak both official languages. His application had been denied. The Supreme Court of Canada concluded this violated his statutory language rights, and ordered a new trial, concluding that denial of language rights gave rise to a "*substantial wrong* and not a procedural irregularity" (at para 54). The Court noted that criminal courts were required to be "institutionally bilingual," (at para 28) meaning able to conduct French, English, or bilingual trials. Individual judges (or jurors) can still be unilingual because no individual will sit on all cases.
>
> By virtue of 2002 amendments, SC 2002, c 8, s 255, under s 16 of the *Official Languages Act*, in federal courts other than the Supreme Court of Canada, there is a duty to ensure that: if [English/French/both] is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand [English /French/both] without the assistance of an interpreter. Again, since no person will sit on all cases, this can be met even though there are numerous

services in English and French at the federal level (subsection (1)), and in New Brunswick (subsection (2)).[108]

The most significant remedial developments involving *Canadian Charter* language rights have arisen in the context of minority language education rights.

Minority language education rights

The most far-reaching of *Canadian Charter* language rights is section 23, respecting minority language education. Section 23 rights holders are Canadian citizens accorded rights in relation to publicly funded primary and secondary education of their children in English or French, as the case may be.

Section 23(1)(a) covers those parents whose mother tongue is the minority language in the province in which they reside. The application of this provision was made conditional on provincial consent. All the provinces except Quebec accepted the application of section 23 in the November 5, 1980 accord agreeing to the patriation of the Constitution, including the entrenchment of the *Canadian Charter*. Quebec was not a party to this agreement, and section 59 of the *Constitution Act, 1982* stipulates that s 23(1)(a) is not in force in Quebec unless and until the Quebec legislature or government agrees to bring it into force.[109]

Section 23(1)(b) and section 23(2), however, like all other provisions of the *Canadian Charter*, are applicable across Canada, in spite of Quebec's opposition to the *Constitution Act, 1982*. Moreover, as already noted, section 23

unilingual personnel. This explains the exclusion of the Supreme Court of Canada, since in that Court the general rule is that all the justices sit on a case. Several instances of proposed legislation to require future SCC judges to be able to meet this stipulation have failed. The most recent was Bill C-208, introduced by NDP MP Yvon Godin, which was defeated in the House of Commons on second reading on May 7, 2014.

108 In *DesRochers v Canada (Industry)*, [2009] 1 SCR 194 at para 51 the Supreme Court of Canada gave a robust interpretation to linguistic equality in s 20 of the *Charter*:

> [I]t is not entirely accurate to say that linguistic equality in the provision of services cannot include access to services with distinct content. Depending on the nature of the service in question, it is possible that substantive equality will not result from the development and implementation of identical services for each language community. The content of the principle of linguistic equality in government services is not necessarily uniform. It must be defined in light of the nature and purpose of the service in question.

109 Neither Liberal nor PQ governments have shown any interest in so doing.

is not subject to the notwithstanding clause contained in section 33 of the *Canadian Charter*.[110]

The Canada clause versus the Quebec clause

Section 23 set up an early *Canadian Charter* dispute about another provision of Quebec's *Charter of the French Language*. Section 72 of Quebec's *Charter of the French Language* generally requires publicly funded primary and secondary education to be in French.[111] One of the exceptions was the "Quebec clause" in section 73, authorizing publicly funded English education for children whose parent (not restricted to Canadian citizens) had received *elementary education in Quebec* in English.[112] Section 23(1)(b) of the *Canadian Charter* entrenches instead the "Canada clause," whereby a parent who had received their *primary education anywhere in Canada* in the language that is the minority language in their province of current residence is entitled to have their child receive publicly funded primary and secondary education in that language.[113] Section 23(2) of the *Canadian Charter* also guarantees parents with one child receiving, or having received, education in English or French in Canada to have all their children educated in the same language. In contrast, the Quebec language Charter's sibling provision in section 73 was limited to siblings of students being educated in Quebec in English effective August 26, 1977, who were grandfathered in as of the coming into force of the *Charter of the French Language*.

A challenge to section 73's Quebec clause, in *Quebec (Attorney General) v Quebec Assn of Protestant School Boards*,[114] was one of the first *Canadian*

110 Thus the use of a standard s 33 override in all Quebec legislation from June 23, 1982 until the defeat of the PQ in 1985 (see discussion in *Ford et al v Quebec (Attorney General)*, [1988] 2 SCR 712) had no impact on s 23 litigation.

111 RSQ, c C-11, s 72.

112 *Ibid*, s 73.

113 Quebec's Language Charter did have a Canada clause for those domiciled in Quebec as of August 26, 1977, the date of coming into force of the *Charter of the French Language*. Those affected by the absence of coverage in Quebec under s 23(1)(a), relating to mother tongue, are primarily immigrants from outside Canada who have acquired Canadian citizenship, but are unlikely to be able to meet the Canada clause stipulations. Whatever the mother tongue of the parents, including those whose mother tongue is neither English nor French, their children may be able to qualify under the sibling provision of section 23(2) of the *Canadian Charter*.

114 [1984] 2 SCR 66 [*Protestant School Boards*]. Amendments to s 73 adopted by SQ 1983, c 56, s 15 were not dealt with by the Supreme Court of Canada in the *Protestant School Boards* case. Those amendments incorporated a "major part" qualification to the educational history in English that would later be considered by the Supreme Court of Canada in a slightly different context; see *Solski*, *infra* note 156. The 1983 amendment, in s 20, also added a new s 86.1 which authorized orders permitting publicly funded English education in Quebec in conjunction with a history of education elsewhere in Canada in a jurisdiction where "it considers that the services of instruction

Charter challenges to reach the Supreme Court of Canada. It was not contested that the Quebec clause in section 73 was inconsistent with the Canada clause of section 23 of the *Canadian Charter*. The Supreme Court of Canada had no difficulty concluding that section 73 could not be saved by section 1 of the *Canadian Charter*.[115] It gave no elaboration on remedy beyond the affirmative answer to the constitutional question, indicating that the statutory provisions and regulations were, to the extent of the inconsistency, of no force or effect.[116] There was no discussion of, for example, reading in "Canada" in substitution for "Quebec" in section 73. Such "reading in" possibilities were not addressed by the Supreme Court of Canada until its 1992 decision in *Schachter*.[117] The absence of discussion of remedies was akin to the Court's approach in *Blaikie (No. 1)* and *Forest*, before remedies were identified as a serious issue in the 1985 *Manitoba Language Reference*.

In contrast to 1979, the Quebec National Assembly did not immediately react to the Supreme Court of Canada's decision. It was not until 1993,[118] near the end of the second Liberal government following the 1985 defeat of the PQ, that the Quebec National Assembly actually inserted a Canada clause into section 73. Prior to 1993, admission to English schools in Quebec in accordance with the Canada clause of section 23 depended on direct enforcement of the *Canadian Charter*, rather than compliance with Quebec legislation.[119] This did not, however, create serious problems of constitutional enforcement. English school boards in Quebec were quite happy to accept students in accordance with the Supreme Court of Canada's ruling, and presumably used their best efforts to publicize the decision to those affected. Although, for almost a decade, they were not in compliance with what was still written in the Quebec statute, Quebec authorities were powerless to enforce the Quebec statute against the school boards, since the provisions had been declared of no force and effect.

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in French offered to French-speaking persons are comparable to services offered in English to English-speaking persons in Quebec." It is not at all clear that, in 1983, any jurisdiction in Canada could have met this reciprocity standard. It was a political statement rather than a practical benefit. It also harkened back to unsuccessful efforts by René Lévesque, in advance of the passage of Bill 101, to negotiate with the other provinces to provide reciprocity in education rights of linguistic minorities. See Fraser, *supra* note 99 at 109–10.

115 Section 1 of the *Canadian Charter* reads as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

116 *Protestant School Boards*, *supra* note 114 at 88.

117 *Supra* note 4.

118 1993 Amendment, *supra* note 41, s 24.

119 *Gosselin (Tutor of) v Quebec (Attorney General)*, [2005] 1 SCR 238 at para 20 [*Gosselin*].

The *Protestant School Board* case is an instance of how "a declaration of invalidity under section 52(1) is self-executing."[120] The *Manitoba Language Reference* shows that this is not universally true, but reliance on a "self-executing" remedy is often required because there is no effective mechanism to ensure that legislatures will follow up on a section 52 declaration of invalidity. The *Protestant School Board* case context is by no means unique in the long-time legislative non-response to a declaration of invalidity of a particular statute.[121] Although the Constitution may still be enforceable and enforced by a section 52 declaration of no force and effect, it is less than ideal when the public statutes cannot be counted on to be an accurate reflection of the state of the law.

Section 23 challenges outside Quebec

Although the nine provinces other than Quebec had consented to the constitutional entrenchment of minority language education rights in 1982, they had a lot of work to do to being themselves into compliance. It was in the context of French minority language education in Edmonton that the Supreme Court of Canada first took a serious look at remedies in relation to section 23 of the *Canadian Charter*. In *Mahé v Alberta*[122] there was no dispute that the claimants were section 23 rights holders. The issue was the degree of management and control the parents were entitled to assert pursuant to the "numbers warrant" provisions of section 23(3). The Supreme Court of Canada concluded that the "minority language instruction" in section 23(3)(a) and "minority language educational facilities" in section 23(3)(b) provided for a sliding scale of management and control, increasing as the numbers of students increased. The Court concluded that the degree of management and control that had been accorded in Edmonton was less than what section 23 demanded, but that the legislation was not the source of the unconstitutionality.[123]

120 Paul S Rouleau & Linsey Sherman, "*Doucet-Boudreau*, Dialogue and Judicial Activism: Tempest in a Teapot?" in Robert J Sharpe and Kent Roach, eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) 323 at 360.

121 For example, it took more than a decade after *Vriend v Alberta*, [1998] 1 SCR 493 before Alberta human rights legislation reflected the reading in of sexual orientation as a prohibited ground of discrimination; SA 2009, c 26, s 4. And, although it has been a quarter of a century since the anti-abortion provisions of the *Criminal Code* were invalidated in *R v Morgentaler*, [1988] 1 SCR 30, if one checks the official federal statutes, those provisions are still there as s 287 of the *Criminal Code*, RSC 1985, c C-46. Indeed, they have even been amended on more than one occasion since, with routine amendments to the definition of "Minister of Health"; *Nunavut Act*, SC 1993, c 28, s 78; *Department of Health Act*, SC 1996, c 8, s 32; *Yukon Act*, SC 2002, c 7, s 141.

122 [1990] 1 SCR 342 [*Mahé*].

123 The one exception was the requirement in regulation 490/82 of a minimum of 20 percent of English instruction in French schools, which was held not to have been shown to be saved by section 1 of

> The real obstacle is the inaction of the public authorities. The government could implement a scheme within the existing legislation to ensure that these section 23 parents and other section 23 parents in the province receive what is due to them. The problem is that they have not done so.[124]

Because the legislation itself was not unconstitutional, the Court did not adopt in relation to it a remedy under section 52 of the *Constitution Act, 1982*. Instead it issued a declaration setting out the general parameters of the type of management and control section 23 accords parents.

> For these reasons I think it best if the Court restricts itself in this appeal to making a declaration in respect of the concrete rights which are due to the minority language parents in Edmonton under section 23. Such a declaration will ensure that the appellants' rights are realized while, at the same time, leaving the government with the flexibility necessary to fashion a response which is suited to the circumstances. As the Attorney General for Ontario submits, the government should have the widest possible discretion in selecting the institutional means by which its section 23 obligations are to be met; the courts should be loath to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right. Once the Court has declared what is required in Edmonton, then the government can and must do whatever is necessary to ensure that these appellants, and other parents in their situation, receive what they are due under section 23. Section 23 of the *Charter* imposes on provincial legislatures the positive obligation of enacting precise legislative schemes providing for minority language instruction and educational facilities where numbers warrant. To date, the legislature of Alberta has failed to discharge that obligation. It must delay no longer in putting into place the appropriate minority language education scheme.[125]

Although the Court did not expressly identify section 24(1) of the *Charter* as the source of its remedy, that is what it was using.[126] In later cases, the Supreme Court of Canada has developed and elaborated on the distinction between section 52(1) and section 24(1) remedies, as summarized in *R v Ferguson*:

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the *Charter*; *ibid* at 393–94.

124 *Ibid* at 392.

125 *Ibid* at 392–93.

126 Section 24(1) of the *Charter* reads as follows:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The assumption that the Court was relying on s 24(1) of the *Charter* is also made by Mark Power & André Braën, "The Enforcement of Language Rights" in Michel Bastarache, ed, *Language Rights in Canada*, 2nd ed (Cowansville, Quebec: Éditions Yvon Blais, 2004) 527 at 548.

> It thus becomes apparent that sections 52(1) and 24(1) serve different remedial purposes. Section 52(1) provides a remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights. It provides a personal remedy against unconstitutional government action. ... [T]his Court has repeatedly affirmed that the validity of laws is determined by section 52 of the *Constitution Act, 1982*, while the validity of government action falls to be determined under section 24 of the *Charter*.[127]

Although the Supreme Court of Canada had found Alberta in breach of its constitutional obligations in *Mahé*, it clearly assumed that the directions from the Court would cause the province to change its ways. In other words, it assumed good faith compliance, leaving flexibility as to the exact means of implementation. A gentle hand was deemed an adequate remedial response from a Court looking for the least intrusive means of upholding constitutional supremacy.

The Supreme Court of Canada elaborated on the nature of management and control mandated by section 23 in the context of school location in *Arsenault-Cameron v Prince Edward Island*, noting that "Although the Minister is responsible for making educational policy, his discretion is subordinate to the *Charter*."[128] The Court did not specifically discuss remedies, but endorsed the trial judge's order of solicitor and client costs, and applied it throughout.[129] The costs award conveyed the message that the Minister of Education had not been taking section 23 rights seriously, but there was no hint of concern that future compliance was in jeopardy.

It was in *Doucet-Boudreau v Nova Scotia (Minister of Education)*[130] that the assumption of good faith compliance with section 23 was seriously questioned. *Doucet-Boudreau* involved a claim relating to the construction of French high schools where the dictates of section 23 were not seriously contested.[131] Justice LeBlanc of the Nova Scotia Supreme Court, the judge of first instance, after issuing an order that the province use its best efforts to construct the educational facilities by particular dates, retained jurisdiction to hear progress reports. This was the first instance of an order of this type, and the details of what was expected in the progress reports were sketchy. It was clear enough, however, that Justice LeBlanc was hoping to prod the province into action, on the assumption that provincial officials would be too embarrassed to say

127 [2008] 1 SCR 96 at para 61 [emphasis in original].

128 [2000] 1 SCR 3 at para 40 [*Arsenault-Cameron*].

129 *Ibid* at para 63.

130 [2003] 3 SCR 3 [*Doucet-Boudreau*].

131 *Ibid* at para 64, but see contrary assumption by the dissent at para 140.

in a progress report that nothing had happened. In a five to four decision, the majority of the Supreme Court of Canada upheld the reporting order as "appropriate and just" within the meaning of section 24(1) of the *Charter*. The majority, in a joint decision by Justices Iacobucci and Arbour, cited the old maxim that "where there is a right, there must be a remedy,"[132] and adopted an approach to remedies that encompassed both "responsive" and "effective" remedies[133] to vindicate rights.[134]

The majority's analysis started from the premise of good faith compliance.

> Fortunately, Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government. That history of compliance has become a fundamentally cherished value of our constitutional democracy; we must never take it for granted but always be careful to respect and protect its importance, otherwise the seeds of tyranny can take root.[135]

However, the majority accepted Justice LeBlanc's conclusion that that there was serious reason to doubt good faith compliance with his best efforts order.[136] The Supreme Court of Canada majority was thus willing to recognize considerable latitude of an inherent jurisdiction court in relation to a novel remedy.[137] The fact that the majority made an order of solicitor and client costs against the province[138] was symptomatic of how badly they thought the province had behaved.

The dissent, in a joint decision by Justices LeBel and Deschamps, had a very different perspective on the case.

> Indeed, we dissent because we believe that constitutional remedies should be designed keeping in mind the canons of good legal drafting, the fundamental importance of procedural fairness, and a proper awareness of the nature of the role of courts in our democratic political regime, a key principle of which remains the separation of powers. This principle protects the independence of courts. It also flexibly delineates the domain of court action, particularly in the relationship of courts not only with legislatures but also with the executive branch of government or public administration.[139]

132 *Ibid* at para 25.
133 *Ibid.*
134 *Ibid* at paras 55–59.
135 *Ibid* at para 32.
136 *Ibid* at paras 64–66.
137 *Ibid* at para 85.
138 *Ibid* at para 90.
139 *Ibid* at para 94.

The dissenting Justices concluded that the reporting order was unclear and therefore unfair.[140] They believed that Justice LeBlanc's reporting order was inconsistent with the principles of the separation of powers,[141] and violated the *functus officio* principle.[142]

> The dissent was particularly concerned about the proper domain of courts.
>
> > Courts should not unduly encroach on areas which should remain the responsibility of public administration and should avoid turning themselves into managers of the public service.
> >
> > ...
> >
> > By purporting to be able to make subsequent orders, the trial judge would have assumed a supervisory role which included administrative functions that properly lie in the sphere of the executive. These functions are beyond the capacities of courts. The judiciary is ill equipped to make polycentric choices or to evaluate the wide-ranging consequences that flow from policy implementation. This Court has recognized that courts possess neither the expertise nor the resources to undertake public administration.[143]

While the capacity of courts is a critical consideration in crafting constitutional remedies, I think the majority in *Doucet-Boudreau* was right to conclude there was no serious such issue arising out of Justice LeBlanc's reporting order. He was not trying to become the general contractor of a construction project; instead he was looking for a mechanism to make the province accountable for compliance with its constitutional obligations. The dissent, however, also found that to be objectionable.

> Moreover, it resulted in activity that can be characterized as political. According to the appellants' characterization, a primary purpose of the hearings was to put public pressure on the government to act. This kind of pressure is paradigmatically associated with political actors.[144]

This concern is also, in my view, exaggerated. Any court decision or order arising out of constitutional litigation is inherently political. The role of the courts as the guardians of the Constitution will bring them into conflict with the legislature and/or executive if the latter are resistant to being told what they need to do to conform to the Constitution.

140 *Ibid* at paras 98–104.
141 *Ibid* at paras 106–112.
142 *Ibid* at paras 113–117.
143 *Ibid* at paras 91, 120.
144 *Ibid* at para 128.

In my assessment, the fundamental difference between the majority and the dissent in *Doucet-Boudreau* was their different estimation as to whether the presumption of good faith compliance was in question. The dissent saw no reason to doubt the province's good will.[145] In other words, the Court split on the basic question of whether the judiciary needed to push to enforce the Constitution. The Supreme Court of Canada was unanimous in assuming there was such a need in the *Manitoba Language Reference*, but only a bare majority[146] was so persuaded in *Doucet-Boudreau*. Given the history of foot dragging in Nova Scotia's compliance with section 23, my assessment is that the dissent missed the mark. The majority properly concluded that the Court's role as the guardian of the Constitution needed a stern hand in this case.

In contrast, two lawyers working for the Ontario Ministry of the Attorney General contend that there was "no reason to expect non-compliance"[147] in *Doucet-Boudreau*. Their starting premise is that "Canadian governments have always complied with court orders."[148] Even assuming that is accurate, as noted above, constitutional enforcement in Canada did not traditionally involve actual court orders, as opposed to *ultra vires* rulings. Accordingly there is not much history to test the proposition about compliance with court orders, whereas the Manitoba language saga discussed above did entail an extreme lack of good faith compliance with the Constitution. Minor and Wilson also argue against the contention that "a government's recalcitrance prior to litigation should imply that a government will not comply with a court order."[149] I agree there is a conceptual distinction between pre and post-court order (as seemed to be assumed in *Arsenault-Cameron*). However the assumption that the recalcitrance will not necessarily continue post-court order does not mean it never will. Debra McAllister defends the Supreme Court of Canada's decision in *Doucet-Boudreau* on the basis that the reporting order "worked"[150] — the schools were built. I agree with Minor and Wilson,[151] as well as the dissent

145 *Ibid* at paras 135, 140.

146 From the majority, only Chief Justice McLachlin remains on the Court; Justices Gonthier, Iacobucci, Bastarache, and Arbour have since retired. All of the dissenters (Justices Major, Deschamps, Binnie, and LeBel) have since retired.

147 Janet E Minor & James SF Wilson, "Reflections of a Supervisory Order Sceptic: Ten Years after *Doucet-Boudreau*" in Robert J Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Montreal: Institute for the Administration of Justice, 2010) 303 at 309.

148 *Ibid* at 305.

149 *Ibid* at 318.

150 Debra McAllister, "Case Comment – *Doucet-Boudreau* and the Development of Effective Section 24(1) Remedies: Confrontation or Cooperation?" (2004/2005) 16:1 NJCL153 at 169.

151 *Supra* note 147 at 314.

in the Supreme Court of Canada[152] that it is impossible to say for sure what would have happened in the absence of the reporting order. However, Justice LeBlanc, as the judge of first instance, was in a position to assess the risk of non-compliance, and design a remedy accordingly.[153]

Section 23(2) challenges in Quebec

The more recent Supreme Court of Canada considerations of section 23 of the *Canadian Charter* have related to Quebec, in the context of the sibling provisions of section 23(2). When, in 1993,[154] Quebec incorporated a Canada clause into section 73 of the *Charter of the French Language* to comply with section 23 of the *Canadian Charter*, it carried over from the 1983 amendments[155] the qualification of "major part" in reference to education in English by either parents or current students. Three companion cases decided by the Supreme Court of Canada in 2005[156] raised issues of both the forum for initially determining, and the substance of, section 23(2) rights.

The educational provisions of the *Charter of the French Language* are administered by the Administrative Tribunal of Quebec (ATQ), which is granted exclusive jurisdiction by statute. Nonetheless, several applicants bypassed the ATQ, and went straight to the superior court. In *Okwuobi* the Supreme Court of Canada concluded that it was not proper to have by-passed the ATQ. The conclusion that the ATQ has jurisdiction to consider constitutional challenges to section 73 was unexceptional; the ATQ clearly meets the stipulation of having authority to decide questions of law, with nothing to rebut the presumption of jurisdiction to apply the *Canadian Charter*.[157]

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152 *Supra* note 130 at para 139.

153 Kent Roach & Geoff Budlender, "Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?" (2005) 5:1 SALJ 325 at 349 comment as follows:

> The trial judge exercised supervisory jurisdiction not so much because he believed that the government was intransigent, but because he recognized that it would be difficult for the government to comply with the deadlines and he believed that supervisory jurisdiction and reporting requirements could assist the government in achieving the difficult goal.

Roach and Budlender cite nothing from Justice LeBlanc's decision to support this claim. In any event, I am not persuaded that they are describing something different from intransigence. The goal was difficult only because the provincial government had not been committed to implementing s 23. Roach and Budlender put an unwarranted, charitable spin on Justice LeBlanc's assessment of the province's conduct.

154 1993 Amendment, *supra* note 41, s 24.

155 See *supra* note 114.

156 *Solski (Tutor of) v Quebec (Attorney General)*, [2005] 1 SCR 201 [*Solski*]; *Gosselin*, *supra* note 119; *Okwuobi v Lester B Pearson School Board*, [2005] 1 SCR 257 [*Okwuobi*].

157 *Okwuobi*, *ibid* at paras 28–37. However, the Court gave short shrift to the issue of whether this jurisdiction was exclusive or concurrent with that of the superior court. Although the ATQ is given *exclusive* jurisdiction by statute, the real question is whether it is constitutionally permissible to do

Regarding the remedial jurisdiction of the ATQ, the Supreme Court of Canada acknowledged the inability of an administrative tribunal to issue a formal declaration of constitutional invalidity, but concluded that was not a reason to by-pass the ATQ. Non-application of an invalid provision by an administrative tribunal, coupled with the availability of judicial review on a correctness standard, was considered to be an adequate remedy against an unconstitutional statute.[158] The Court also interpreted the statutory authority of the ATQ as a basis for remedial authority over school boards who were not parties to proceedings before the ATQ.[159] In so doing, it expressly invoked the assumption of good faith compliance with legal rulings:

> As for the question of the binding effect of a ruling by the ATQ on the English school boards, we would reiterate that the Quebec legislature has chosen to grant the ATQ exclusive jurisdiction to hear appeals concerning access to minority language education. On appeal, the ATQ will decide whether the claimant's child should be admitted to an English school board. That decision is binding on the school board even if it is not a party to the appeal. The appellants raise the hypothetical possibility that a school board not directly involved as a party to an appeal before the ATQ might refuse to obey an order of the ATQ. This is a hypothetical situation, and this Court must operate on the assumption that citizens, including those on school boards, are law-abiding and will comply with the order of a properly constituted administrative tribunal that has jurisdiction over entitlement to minority language education.[160]

The Supreme Court of Canada's interpretation of the remedial authority of the ATQ is an expansive one, geared to enabling effective *Canadian Charter* remedies, as contemplated in *Doucet-Boudreau*.[161] This interpretation is a new development, however, in that it was applied to an administrative tribunal exercising only statutory jurisdiction, not to a court with inherent jurisdiction, as in *Doucet-Boudreau*. The Court invoked the statutory authority of the ATQ to deal with any resistance from school boards,[162] and the residual

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so. The Court essentially skipped over that question. After concluding the ATQ had jurisdiction, it held "therefore" (at para 38) that there was no right to by-pass it and go straight to the superior court. Although the Supreme Court of Canada recognized some residual original jurisdiction in the superior courts to fill a remedial vacuum, such a situation was held, without elaboration, not to be applicable in the cases at issue (paras 50–55). There was no mention of earlier cases in which there was recognition of a general guaranteed role of superior courts to entertain challenges to the constitutional validity or applicability of statutes: *Canada Labour Relations Board et al v Paul L'Anglais Inc et al*, [1983] 1 SCR 147; *A-G Can et al v Law Society of British Columbia et al; Jabour v Law Society of British Columbia et al*, [1982] 2 SCR 307.

158 *Okwuobi*, *ibid* at paras 44–45.

159 *Ibid* at paras 47–48.

160 *Ibid* at para 47.

161 *Supra* note 130 at para 24.

162 *Okwuobi*, *supra* note 156 at para 48.

authority of the superior courts to deal with urgent situations.[163] Nonetheless, the Court presumably understood that the political context was that English school boards would be eager to accept students authorized by the ATQ, such that these hypothetical problems were not realistic. This was not close to the situation in *Doucet-Boudreau*.

On the merits of the interpretation of section 23(2), the Supreme Court of Canada concluded that the "major part" qualification in section 73 of the Quebec statute was constitutionally valid, as long as interpreted in a nuanced way. There was thus no finding of unconstitutionality, and accordingly no constitutional remedy. Yet the interpretative exercise enabled statutory remedies for individual claimants to vindicate section 23(2) *Canadian Charter* rights.[164] By finding the statute, properly interpreted, to be constitutionally valid, the Supreme Court of Canada was presumably trying to mute political criticisms. Given the political volatility of language policy in Quebec, and given that the "major part" qualification had been introduced by both PQ and Liberal administrations, a frontal assault on the "major part" could have made the Supreme Court of Canada a significant target. The case by case assessment mandated by the Court made it harder to attack. But it did set up a future challenge to 2002 amendments that had not been assessed in *Solski* because they post-dated the factual context of the decision.

The 2002 amendments,[165] introduced by a PQ government, but passed unanimously in the National Assembly, added two paragraphs to section 73 stipulating that time spent in a private English school, and time in English instruction pursuant to a special authorization, "shall be disregarded" when considering eligibility for publicly funded English schools. Such an absolute bar was bound to run into problems with the case-by-case approach mandated by the Supreme Court of Canada in *Solski*. The main catalyst for the 2002 amendments was the phenomenon of "bridging schools," i.e. private English schools marketed on the basis that brief attendance in the school would be sufficient to give rise to a section 23 right to attend publicly funded English schools, not only for the child attending the private school, but also the child's siblings and descendants. Thus both Francophones and Allophones could acquire section 23 rights to publicly funded English education. When these amendments came up for consideration by the Supreme Court of Canada in *Quebec (Education, Recreation and Sports) v Nguyen*; *Bindra v Quebec*,[166] the

163 *Ibid* at para 49.

164 *Solski*, *supra* note 156 at paras 59–60.

165 *An Act to amend the Charter of the French Language*, SQ 2002, c 28, s 3, amending RSQ, c C-11.

166 [2009] 3 SCR 208 [*Nguyen*].

Court was not unsympathetic to the Quebec government's concern that bridging schools were a backhanded way of creating a freedom to choose English schools that neither the *Charter of the French Language* nor section 23 of the *Canadian Charter* contemplated.[167] But the Court, speaking through Justice LeBel, rejected an absolute bar on counting private English school education as a means of dealing with what it recognized as a legitimate problem.

> The "bridging" schools appear in some instances to be institutions created for the sole purpose of artificially qualifying children for admission to the publicly funded English-language school system. When schools are established primarily to bring about the transfer of ineligible students to the publicly funded English-language system, and the instruction they give in fact serves that end, it cannot be said that the resulting educational pathway is genuine. However, it is necessary to review the situation of each institution, as well as the nature of its clientele and the conduct of individual clients. As delicate as this task may be, this is the only approach that will make it possible to comply with the framers' objectives while averting, especially in Quebec, a return to the principle of freedom of choice of the language of instruction that the framers did not intend to impose (*Gosselin*, at paras 2, 30 and 31).[168]

Thus the Court found a *prima facie* breach of section 23, and carried over the point about the absolute bar in finding the legislation failed the minimum impairment element of section 1.[169] This was not, as in *Solski*, an interpretation to conform to the Constitution but an actual finding of unconstitutionality, calling for a constitutional remedy. However, the Court's discussion of remedies was brief:

> I must therefore find that the limit on the respondents' constitutional rights was not justified under section 1 of the *Canadian Charter*. I would therefore uphold the Quebec Court of Appeal's declaration that paras. 2 and 3 of section 73 *CFL* are invalid. Because of the difficulties this declaration of invalidity may entail, I would suspend its effects for one year to enable Quebec's National Assembly to review the legislation. However, it is also necessary to consider the situations of the claimants concerned in the two appeals.[170]

167 *Gosselin*, *supra* note 119 affirms that s 23 does not encompass general freedom of choice. It provides rights (which are optional as to whether they are exercised) to specified classes of persons. Those specifications are not vulnerable to an equality challenge under section 15 of the *Canadian Charter*, since one section of the *Charter* cannot be used to trump another section of the Constitution.

168 *Nguyen*, *supra* note 166 at para 36.

169 *Ibid* at paras 41–45.

170 *Ibid* at para 46.

The Court went on to hold that the claimants in *Nguyen* should have their cases reassessed and the claimant in *Bindra* was entitled to a certificate of eligibility.[171] The Court declined to order a special fee regarding costs.[172]

Thus, without any elaboration, the Court combined a section 52 and a section 24 remedy. In general, the declaration of invalidity was suspended,[173] but the individual claimants got relief. The Supreme Court of Canada has given mixed messages as to whether this combination is appropriate. In *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*,[174] after finding a section 15 breach in the very limited coverage respecting chronic pain under workers' compensation, and after suspending the declaration of unconstitutionality for six months, the Court awarded Martin the standard statutory benefits since "the challenged provisions stood as the only obstacle to his claims."[175] In neither *Martin* nor in *Nguyen* was there any suggestion that the circumstances were exceptional. However, in both *Schachter*[176] and *Hislop* the Court had said that, ordinarily, a suspended declaration of invalidity should not be combined with a personal section 24 remedy because "to allow the claimants to recover concurrent retroactive relief would be at cross-purposes with the Court's decision to grant a suspended declaration of invalidity:"[177] *Nguyen* illustrates why that need not be assumed to be so. Giving the legislature an opportunity to redesign the overall scheme does not mean that constitutional principles do not point to an individual remedy for those who have undertaken the burden of constitutional litigation. Especially where the constitutional failing is the lack of attention to particular circumstances, as in both *Martin* and *Nguyen*, a constitutionally valid scheme can take a variety of forms. There can be case-by-case assessment, with unstructured discretion, something that can be accomplished with an individual section 24 remedy. In the alternative, the legislature can set up a scheme with structured discretion, which a suspended declaration provides time to design. In *Nguyen*, given that the lost period in a given school system cannot be recouped, the Court was trying to provide as effective a remedy as possible, even if the individual section 24 remedy would look quite different from a later

171 *Ibid* at para 47.

172 *Ibid* at para 48.

173 Although *Schachter*, *supra* note 4 had approached suspended declarations of invalidity with caution, by the time of *Nguyen* they had become fairly routine, with minimal explanation. This aspect of *Nguyen* is fully consistent with prior cases.

174 [2003] 2 SCR 504 [*Martin*].

175 *Ibid* at para 120.

176 *Supra* note 4 at 720.

177 *Hislop*, *supra* note 98 at para 92, citing *Schachter*.

designed structured discretion. Nonetheless, the Constitution does not make prospective structured discretion imperative.

The suspended declaration of invalidity in *Nguyen* put pressure on the Quebec government to act. Doing nothing would mean the attempt to counter bridging schools would be completely thwarted a year hence. The National Assembly responded, in Bill 115, principally by enacting two new provisions of the *Charter of the French Language*, section 73.1 and section 78.2:

> 73.1. The Government may determine by regulation the analytical framework that a person designated under section 75 must use in assessing the major part of the instruction received, invoked in support of an eligibility request under section 73. The analytical framework may, among other things, establish rules, assessment criteria, a weighting system, a cutoff or a passing score and interpretive principles.
>
> The regulation may specify in which cases and under which conditions a child is presumed or deemed to have satisfied the requirement of having received the major part of his instruction in English within the meaning of section 73.
>
> The regulation is adopted by the Government on the joint recommendation of the Minister of Education, Recreation and Sports and the Minister responsible for the administration of this Act.[178]
>
> 78.2. No person may set up or operate a private educational institution or change how instructional services are organized, priced or dispensed in order to circumvent section 72 or other provisions of this chapter governing eligibility to receive instruction in English.
>
> It is prohibited, in particular, to operate a private educational institution principally for the purpose of making children eligible for instruction in English who would otherwise not be admitted to a school of an English school board or to a private English language educational institution accredited for the purposes of subsidies under the Act respecting private education (chapter E-9.1).[179]

The enforcement of section 78.2 is by fine and/or refusal of, or limitation on, a school permit.[180]

The new section 73.1 replaces the provisions found invalid in *Nguyen*, and so removes the blanket exclusion of counting time in private English schools, but provides no statutory structuring of discretion. All is left to be determined

178 *An Act to Amend the Charter of the French Language and other Legislative provisions*, SQ 2010, c 23, s 2, assented to and in force October 19, 2010 (per s 23), just before the end of the suspension, amending RSQ, c C-11.

179 *Ibid* s 5.

180 *Ibid* ss 9, 12.

by regulation.[181] This not only facilitates adjustments, but would seem to immunize the statutory provision from successful contestation, since the statute enables the attention to particular circumstances that the Supreme Court of Canada required. The regulations are still subject to challenge, and their application must still conform to the *Canadian Charter*, but that would entail a more focused challenge.

The apparently more forceful response to the decision in *Nguyen* is the new section 78.2. Previously, under the 2002 amendments, bridging schools were lawful,[182] but time spent in them, as in all private English schools, did not count in relation to eligibility for publicly funded English schools. This was presumably considered in 2002 to be a sufficient deterrent. The invalidation in *Nguyen* of the blanket exclusion of counting time in private schools prompted, on the face of it, an even harder line against bridging schools, outlawing them entirely in section 78.2. However, this necessitates a statutory definition (without the bridging school label) that will likely be difficult to apply and enforce. Nevertheless, since there is no constitutional right to bridging schools, a ban should not run afoul of section 23 of the *Canadian Charter.*

In the National Assembly debate on Bill 115 the PQ Opposition was strongly opposed. They contended that, in spite of the statutory language prohibiting bridging schools, the difficulty of enforcement meant they were actually being facilitated;[183] "on dit le contraire de ce qu'on fait."[184] Another MNA commented as follows:

> Qu'évidemment j'imagine mal quelqu'un qui exploite une école privée non subventionnée dire dans sa charte: Mon but est de permettre de contourner la loi 101. C'est assez improbable.[185]

The PQ argued that the effect of Bill 115 was to enable the purchase of language rights, if enough time were spent in a private English school.[186]

181 By virtue of *ibid* at s 25, "The regulation applies to requests for eligibility pending on the date the regulation comes into force."

182 In the debate on Bill 115 in response to *Nguyen*, PQ Opposition Leader Pauline Marois claimed, erroneously, that the 2002 amendments had outlawed bridging schools, Assemblée Nationale, "Période de questions et réponses orales (séance extraordinaire)" (18 October 2010), between 00h:09m:10sand 00h:09m:20s.

183 PQ Leader Pauline Marois, *ibid*, between 00h:17m:40s and 00h:17m:50s.

184 MNA Stéphane Bédard, *Débata*, *ibid*, between 00h:16m:00s and 00h:16m:10s.

185 MNA Yves-François Blanchet, *ibid*, between 00h:15m:40s and 00h:15m:50s.

186 PQ Leader Pauline Marois, *ibid*, between 00h:17m:40s and 00h:17m:50s.

> Ce qui me choque, ce n'est pas que des citoyens s'achètent un droit, c'est qu'un gouvernement en vende.[187]

The PQ challenged the legitimacy of both the Supreme Court of Canada and the *Constitution Act, 1982.*

> Il est attristant de voir que ce gouvernement se met à genoux devant une cour suprême qui n'a aucune légitimité au Québec.[188]
>
> ...
>
> Il va se plier au diktat d'une cour suprême, un tribunal contrôlé exclusivement par une autre nation, lequel applique un texte constitutionnel que le gouvernement du Québec ne reconnaît toujours pas, faut-il le rappeler, M. le Président. C'est bien la preuve que le Québec ne pourra pas protéger sa langue, d'ailleurs, tant et aussi longtemps qu'il ne pourra décider par lui-même et pour lui-même. C'est pour ça, d'ailleurs, qu'au Parti québécois on croit qu'il est temps de se donner un pays pour pouvoir décider par nous-mêmes et pour nous-mêmes. ... A la volonté unanime de l'Assemblée nationale, le premier ministre du Québec préfère les décisions de la Cour suprême. À la démocratie québécoise, il préfère l'illégitimité canadienne.[189]

The PQ's proposed solution was to make all private schools subject to the *Charter of the French Language,* Bill 101.[190] From its inception, Bill 101 had not sought to cover access to completely private schools. Those parents willing to pay private school tuition — whether for religious or non-religious schools, whether the parents were Anglophones, Francophones, or Allophones — were at liberty to do so; Bill 101 regulated access only to publicly funded schools. During the debate on Bill 115, the PQ advocated application of Bill 101 to private schools, and was ready to use a notwithstanding clause to avoid deprivation of liberty arguments under either the Quebec or Canadian charters.[191] The Liberal government defended Bill 115 as respecting the liberty of choice of those willing to spend their own money for private school English education, while assessing authenticity in relation to later access to publicly

187 MNA Yves-François Blanchet, *ibid*, between 00h:15m:40s and 00h:15m:50s.

188 MNA Benoit Charette, *ibid*, between 00h:09m:10s and 00h:09m:20s.

189 PQ Leader Pauline Marois, *ibid*, between 00h:17m:40s and 00h:17m:50s.

190 MNA Pierre Curzi, *ibid* between 00h:14m:20s and 00h:14m:30s, and amendments tabled during clause by clause consideration in Committee of the Whole, between 00h:23m:00s and 00h:23m:10s; amendment defeated between 00h:00m:10s and 00h:00m:20s, 19 October 2010.

191 *Ibid*, between 00h:22m:00s and 00h:22m:10s. The liberty arguments under the Quebec charter would be even stronger than under the *Canadian Charter*, since s 7 of the *Canadian Charter* has a "principles of fundamental justice" component that s 3 of the Quebec charter does not. See *Chaoulli v. Quebec (Attorney General),* [2005] 1 SCR 791 re: the successful challenge to the prohibition against private insurance for services covered by Medicare.

funded English schools.[192] The Liberals strongly objected to the use of the notwithstanding clause, under either the Canadian or Quebec charters, and also invoked international law ramifications.[193] They noted that even an independent Quebec, with a charter of human rights and freedoms that had been introduced by a PQ government, would face the same objections to precluding free choice in relation to private schools.[194]

Bill 115 was passed by the Quebec National Assembly, given the Liberal government's majority status. However, the continuing tension over Quebec's lack of support for the *Constitution Act, 1982* gives rise to challenges to the legitimacy of the Supreme Court of Canada that do not come up elsewhere. The Supreme Court of Canada's suspended declaration of invalidity in *Nguyen* was accepted by the Quebec government as calling for good faith compliance, but not without controversy. Yet while the PQ opposition challenged the legitimacy of both the Supreme Court of Canada and the *Constitution Act, 1982*, they did not, as an act of constitutional defiance, suggest any attempt to revive the "Quebec clause" of the original Bill 101 that had been invalidated in the *Quebec Assn of Protestant School Boards* case.[195] Nor did anyone in the National Assembly debate draw attention to the inability to use the notwithstanding clause of the *Canadian Charter* in relation to section 23. Despite its rhetoric, the PQ's alternative solution fell within the bounds of what the Canadian Constitution would allow. A frontal attack on the *Canadian Charter* seemed not to be politically palatable for the PQ.

Such a conclusion is reinforced by what happened when the PQ formed a minority government from 2012-2014. The PQ tabled Bill 14,[196] with extensive and controversial changes to the *Charter of the French Language*. However, *Canadian Charter* section 23 access to English schools was not the focus of Bill 14. Given their minority status, the PQ was unable to get Bill 14 passed,[197] but it is worth noting that there was no effort to undo Bill 115, nor to pursue the issue of making private schools subject to Bill 101. The main provisions of Bill 14 relevant to access to English schools dealt only with illegality and related matters:

192 Minister responsible for the Charter of the French Language, Christine St-Pierre, *ibid*, between 00h:22m:00s and 00h:22m:10s.

193 *Ibid*, between 00h:21m:40s and 00h:21m:50s.

194 MNA Robert Dutil, *ibid* between 00h:19m:30s and 00h:19m:40s.

195 *Supra* note 114.

196 Quebec, National Assembly, 40th Leg, 1st Sess, online: < http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-14-40-1.html>.

197 *An Act to amend the Charter of the French language, the Charter of human rights and freedoms and other legislative provisions*, SQ 2007, c 7 amending SQ, c C-11 [Bill 14] became part of the PQ

> 25. The Charter is amended by inserting the following section after section 73:
>
> "73.0.1. For the purposes of section 73, no account shall be taken of instruction in English received in the context of the illegal attendance of a school. The same rule applies to instruction in English received as a result of trickery, deception or a temporary artificial situation the sole purpose of which is to circumvent the provisions of this Act."
>
> 26. Section 73.1 of the Charter is amended by adding the following paragraph at the end: "Despite any provision to the contrary in a regulation enacted under this section, no points may be given, in applying that regulation, for instruction received in any context of illegality or circumvention referred to in section 73.0.1."[198]

One would be hard pressed to argue that section 23 of the *Canadian Charter* protects a foundation of illegality.

The defeat of the PQ, and election of a Liberal majority government on April 7, 2014 means that Bill 14 is now off the table. But even in PQ circles, the resentment against the Supreme Court of Canada's decision in *Nguyen* seems to have dissipated with the passage of time. Section 23 of the *Canadian Charter* is not currently a preoccupation of Quebec language policy debates.

Conclusion

Language rights have prompted a wide range of remedial considerations from the Supreme Court of Canada. With the exception of *Doucet-Boudreau*, where the Court was badly divided, the decisions have been unanimous.

Initially, in *Blaikie (No. 1)* and *Forest*, remedies were not seen as warranting express comment. Six years later, in the *Manitoba Language Reference*, the Court found it necessary to employ a stern hand. The remedial implications of constitutional supremacy, enshrined in section 52 of the *Constitution Act, 1982*, were explored, and the technique of a suspended declaration of invalidity was employed for the first time. Other language rights cases have involved

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platform for the 2014 election. References to English schools are conspicuous in their absence in the description in the platform:

> Nous sommes déterminés à:
>
> adopter une nouvelle charte de la langue française afin de valoriser le français au sein de l'administration publique, des entreprises et des municipalités, et renforcer le français dans les milieux de travail et dans les services.

"Platforme du Parti Québécois 2014-2018" Political Platform at 7, online: CBC <http://www.cbc.ca/elections/quebecvotes2014/features/view/election-platform-navigator>.

198 Bill 14, *supra* note 197, s 25–26. Other amendments relevant to admission to English schools were more technical, replacing s 76 of the *Charter of the French Language* (s 27).

interpretation to avoid a finding of unconstitutionality (*Solski*); section 52 declarations of invalidity with immediate effect (*Quebec Assn of Protestant School Boards*); suspended declarations (*Nguyen*); section 52 remedies in conjunction with section 24(1) remedies (*Nguyen*), and stand-alone section 24(1) remedies (*Mahé* and *Doucet-Boudreau*).

Whether expressly or by implication, assumptions about whether good faith compliance could be expected have shaped the remedial response. At first, the possibility of non-compliance did not seem to even be contemplated by the Supreme Court of Canada. But Manitoba's resistance forced the Court to take remedies seriously, and to acknowledge their complexity. The Court has discovered that a sometimes gentle, sometimes stern, push from the judiciary is necessary to uphold constitutional supremacy. At the same time, the Supreme Court of Canada has taken care not to go out of its way to provoke a challenge to its legitimacy.

The political volatility of language rights has created some tension between courts and legislators/governments in Canada. But there has been no constitutional crisis of sustained defiance. There has not been anything like the American experience of "massive resistance to desegregation that occurred first in the South and later in the North"[199] in the wake of *Brown v Board of Education*.[200]

The election of Quebec governments committed to sovereignty, starting in 1976, has made the legitimacy of the Canadian Constitution a front burner issue. But there has been a stark difference between the politics of advocating sovereignty, and actual challenges to the legitimacy of courts, and especially the Supreme Court of Canada, as the guardians of the Canadian Constitution. Although there has been court and constitution bashing rhetoric from Quebec, push has not actually come to shove. No Quebec government, whether PQ or Liberal, has adopted a stance of constitutional defiance. While they have been quite willing to test the constitutional limits, they have not ultimately contested the supremacy of the Constitution. The PQ government's boycott of the *Secession Reference*,[201] and some significant hostility to the federal *Clarity Act*[202] in the aftermath of it, may suggest all bets would be off if Quebec ever voted to leave Canada. But another sovereignty refer-

199 Jack M Balkin, Preface, in Jack M Balkin, ed, *What Brown v. Board of Education Should Have Said* (New York: New York University Press, 2001) ix at x.

200 347 US 483 (USSC 1954).

201 *Supra* note 50.

202 SC 2000, c 26.

endum is not on the short- or medium-term horizon. In the absence of such a dramatic turn of events, history supports an on-going assumption of good faith compliance from Quebec. So long as Quebec is an acknowledged part of Canada, it has consistently shown a readiness to submit to the Canadian Constitution.

Outside Quebec, there has been no rhetoric of constitutional defiance, but defiant actions have occurred in the short term. It was Manitoba, not Quebec, that had to be pulled, kicking and screaming, into compliance with the constitutional requirement of bilingual enactment of statutes and regulations. It was with Prince Edward Island and Nova Scotia that the Supreme Court of Canada felt compelled to make orders of solicitor and client costs to convey disapproval of provincial governments not taking *Canadian Charter* entrenched minority language education rights seriously. In the end, however, these pushes from the Court have not, overtly at least, led to push back from governments.

Even if there is no pattern of sustained defiance of constitutional remedies, it does not necessarily follow that there is effective enforcement of constitutional remedies. That, however, is another paper.