

IN THE SUPREME COURT OF ONTARIO
COURT OF APPEAL

IN THE MATTER of a reference to the Court of Appeal pursuant to the Constitutional Questions Act, R.S.O. 1980, Chapter 86 by Order-in-Council 2154/83, respecting the Education Act, R.S.O. 1980, Chapter 129 and Minority Language Educational Rights.

STATEMENT OF FACT AND LAW SUBMITTED BY
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PART I

STATEMENT OF FACTS

1. Alliance Quebec is incorporated under the laws of Quebec. Under its constitution, the principal objective of Alliance Quebec is to preserve "the language, culture and vitality of Quebec's English speaking peoples, communities and institutions". Alliance Quebec is recognized by the Federal Department of the Secretary of State and by the Federal Office of the Official Languages Commissioner as the authoritative spokesman for Quebec's one million English speaking people. The membership of Alliance Quebec comes from the English linguistic minority in Quebec. Many members have school age children entitled to minority language instruction and educational facilities under the Canadian Charter of Rights and Freedoms.
2. By Order-in-Council 2154/83 dated August 4, 1983 the Lieutenant Governor referred to this Court four questions respecting minority language education rights.
3. On December 19, 1983 the Honourable Mr. Justice Robins, by order, extended the time to December 30, 1983 within which Alliance Quebec may file its statement in this reference.

4. Reference will be made to documents filed in two supplementary volumes by counsel for Association Canadienne-Française de l'Ontario, hereinafter referred to as "ACFO Documents".

PART II

5. The issues arise from O.C. 2154/83:
 1. Are sections 258 and 261 of the Education Act inconsistent with the Canadian Charter of Rights and Freedoms and, if so, in what particular or particulars and to what extent?
 2. Is the Education Act inconsistent with the Canadian Charter of Rights and Freedoms in that members of the French linguistic minority in Ontario entitled to have their children receive instruction in the French language are not accorded the right to manage and control their own French language classes of instruction and French language educational facilities?
 3. Do minority language educational rights in the Canadian Charter of Rights and Freedoms apply with equal force and effect to minority language instruction and educational facilities provided for denominational education under Parts IV and V of the Education Act and to minority language instruction and educational facilities provided for public education under the Education Act?
 4. Is it within the legislative authority of the Legislative Assembly of Ontario to amend the Education Act as contemplated in the White Paper of March 23, 1983 in relation to boards of education, to provide for the election of minority-language trustees to Roman Catholic separate school boards to exercise certain exclusive responsibilities as minority-language sections of such school boards?

PART III
SUBMISSIONS

QUESTION 1

6. Section 23 of the Canadian Charter of Rights and Freedoms entitles certain Canadian citizens to "the right to have their children receive primary and secondary school instruction" in the minority language and to "the right to have them receive that instruction in minority language educational facilities provided out of public funds".
7. Charter "rights" are "guaranteed" by sec. 1. The guarantee is pitched at an ultra-stringent level. Charter rights are "subject only" to "limits prescribed by law". Under sec. 1, limits to Charter rights must be made by statute or a sufficiently precise rule of the common law. Charter rights may never be limited by administrative discretion. As the Ontario Divisional Court held:

"The Charter requires reasonable limits that are prescribed by law, it is not enough to authorize a Board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal for it depends on the discretion of an administrative tribunal. However dedicated, competent and well-meaning the Board may be, that kind of regulation cannot be considered as 'law'... Any limits placed on (Charter Rights) cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law".

Ontario Film & Video Appreciation Society v. Ontario Board of Censors, Ont. Div. Ct., March 25, 1983, p. 14-16.

Sunday Times v. United Kingdom (1979), 2 E.H.R.R. 245, paras.47-9 (European Court of Human Rights).

Malone v. United Kingdom (1982), 5 E.H.R.R. 385, 405 ff. (European Commission of Human Rights).

8. Section 258(1) of the Education Act provides:

"A Board of Education, Public School Board or Separate School Board may establish and maintain elementary schools or classes in elementary schools ... for the purpose of providing for the use of the French language in instruction of French speaking pupils."

This provision creates administrative discretion. Under sec. 258(1), Boards have uncontrolled power to refuse to establish French schools and classes, even where numbers warrant. This stands in stark contrast to sec. 23 of the Charter which is imperative that French language instruction and educational facilities be provided where numbers of entitled children warrant. As was said by Lord Buckmaster, in considering the creation of a power to interfere with rights protected under section 93 of the Constitution Act, 1867:

"Their Lordships have no doubt that the powers so given would be exercised with wisdom and moderation, but it is the creation of the power and not its exercise that is subject to objection, and the objection would not be removed even though the powers conferred were never exercised at all."

Ottawa Separate School Trustees v. Ottawa
[1917] A.C. 76, 82 (P.C.)

9. It is submitted that the creation of an uncontrolled, administrative discretion to interfere with sec. 23 rights is bad in itself. The vice of sec. 258(1) is compounded because it

is a broad, uncontrolled, undefined and unreviewable administrative discretion. This flies in the teeth of section one's guarantee that Charter rights be subject only to limits "prescribed by law".

10. Section 261(1) of the Education Act provides that a Board of Education

"may establish and maintain secondary schools or classes ... for the purpose of providing for the use of the French language in instruction of French speaking pupils".

This provision creates an uncontrolled, undefined and unreviewable administrative discretion to refuse to provide French language instruction and schools even where numbers warrant. For the reasons given in paras. 7-9 above, such a broad, unspecific, uncontrolled administrative discretion to interfere with s. 23 rights is inconsistent with the Charter.

11. Section 258(4) of the Education Act provides:

"where a Board referred to in subsection (1) provides or is required to provide for use of the French language in instruction and in the opinion of the Board the number of pupils who elect to be taught in the French language so warrants, the Board shall provide a French language elementary school".

The words "in the opinion of the Board" create administrative discretion. The board has unreviewable power to refuse to provide a French language elementary school, even where, objectively determined, numbers warrant. This stands in stark contrast to section 23(3)(b) of the Charter which requires, where numbers warrant, that entitled children receive instruction "in minority language educational facilities provided out of public funds". The right to receive instruction in minority language educational facilities may be enforced by application to a court of competent jurisdiction under s. 24(1). Provision for court review underlines that the numbers contemplated by s. 23(3)(b) are numbers objectively determined by a competent fact finding court, not by an unreviewable, subjective administrative discretion. It is submitted that in this respect sec. 258(4) is inconsistent with the Charter.

12. It is submitted, additionally, that s. 258(4) is inconsistent with the Charter in that sec. 258(4) creates a broad, imprecise administrative discretion to impinge upon s. 23 rights. For reasons stated in paras 7-9, it is submitted that administrative discretion is not a limit "prescribed by law" and thus may never competently interfere with s. 23 guarantees.

13. Section 261(4) of the Education Act provides:

"where a Board provides or is required to provide for the use of French language instruction in one or more classes in a secondary school and in the opinion of the Board the number of French speaking pupils who elect to be taught in the French language so warrants, the Board shall provide an appropriate unit of a secondary school, or, where practicable, a French language secondary school".

This section creates administrative discretion. The board is endowed with unreviewable power to refuse to provide a French language unit or secondary school, even where, objectively determined, numbers warrant. For reasons detailed in paras. 7-9 and 11-12, it is submitted that sec. 261(4) is inconsistent with the Charter.

14. Section 261(4) provides that school boards shall provide French language secondary schools only "where practicable". There is no such 'practicality' limitation found anywhere in the Charter. Under s. 23(3)(b) persons entitled to have their children receive minority language instruction are entitled to have their children "receive that instruction in minority language educational facilities provided out of public funds". The sole condition in s. 23(3)(b) is that the number of children "so warrants".

15. Section 261(4) superadds to the "numbers warrant" condition of s. 23(3)(b) a further requirement of 'practicality'. Persons entitled under the Charter will be denied their s. 23 rights unless this further legislative condition is satisfied. It is submitted that the practicality requirement found in s. 261(4) is inconsistent with the Charter on its face.

16. Counsel for the Attorney General submits that "the practical consideration of the cost of implementing the right is reflected in the requirement that numbers be sufficient to warrant or justify the provision of minority language instruction out of public funds" (A.G. Ont. Factum, para. 30). The submission of an implied 'practicality' requirement is bad for three reasons:

(a) The words "public funds" in s. 23 include Federal as well as Provincial funds. As Mr. Justice Schroeder said when interpreting the words "public funds":

"These words have a well recognized meaning in the public statutes of this Province and must be limited to money provided from the Treasuries of either the Federal or Provincial or Municipal Governments".

Soeurs de la Visitation d'Ottawa c. City of Ottawa, [1952] O.R. 61

In fact, Federal expenditures account for 50% of the public funds spent on Minority language education in Canada.

OECD, Financing, Organization and Governance of Education for Special Populations (1982):
Supplementary Materials submitted by the A.G. Canada, Tab M, p. 21

- (b) If provincial funds allocated to minority language instruction are insufficient, the Province would be required to divert funds from some other provincial priority where expenditures were not encumbered by constitutional obligation. Constitutional obligation is obviously superior to executive or legislative discretion in allocating priorities and funds.
- (c) The Courts have ruled that the absence of funds is an insufficient answer to the legal obligation to provide educational facilities. The British Columbia Court of Appeal replied to this plea from a school board as follows:

"It seems to me that because of a failure of the Board to give a complete explanation of the manner in which the funds allocated by the arbitration award were exhausted before the end of the year, it would be creating a dangerous precedent under these circumstances to relieve the School Board from the absolute and imperative duty imposed upon it by Statute to provide school accommodation for the children within its jurisdiction".

McLeod v. Salmon Arm School Board,
[1952] 2 D.L.R. 562,563

17. Section 258(2) provides:

"where ... a number of French speaking pupils resident in the school section or separate school zone have elected to be taught in the French language, the Board shall forthwith determine whether French speaking pupils can be assembled for this purpose in one or more classes or groups of twenty five or more and, where the Board determines that such pupils can be so assembled, it shall provide for the use of the French language in instruction ..."

Section 261(2) is in similar terms with respect to secondary schools, except that the relevant number is twenty.

18. Assuming, without conceding, that the numbers twenty-five for elementary and twenty for secondary are consistent with the Charter's numbers test, it is nevertheless submitted that secs. 258(2) and 261(2) are inconsistent with the Charter. S. 23(1) and (2) of the Charter provide:

"Droits à l'instruction dans la langue de la minorité.

23(1) Les citoyens canadiens:

- (a) dont la première langue apprise et encore comprise est celle de la minorité francophone ou anglophone de la province où ils résident,
- (b) qui ont reçu leur instruction, au niveau primaire, en français ou en anglais au Canada et qui résident dans une province où la langue dans laquelle ils ont reçu cette instruction est celle de la minorité francophone ou anglophone de la province,

ont, dans l'un ou l'autre cas, le droit d'y faire instruire leurs enfants, aux niveaux primaire et secondaire, dans cette langue.

- (2) Les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction.

Minority Language Educational Rights

23(1) Citizens of Canada

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

have the right to have their children receive primary and secondary school instruction in that language in that province.

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

19. The inconsistency between section 258(2) and 261(2) of the Education Act, and s. 23 of the Charter arises because the Education Act fastens on "French speaking pupils" whereas s. 23 rights fasten on Canadian citizens whose maternal language is French, or who attended French primary school in Canada, or who have or had at least one child in French primary or secondary school in Canada. The inconsistency may be illustrated by examples.

(a) Twenty five Canadian citizens whose first language learned and still understood is French are entitled to French minority instruction for their children, even if some or a all these children are not "French speaking". Sections 258(2) and 261(2) of the Education Act withhold French instruction in this situation. The inconsistency with the Charter is manifest.

(b) Twenty-five Canadian citizens who attended French primary school in Canada are entitled to French minority instruction for their children, even if these children are not French speaking. Sections 258(2) and 261(2) of the Education Act withhold French instruction in this situation. The inconsistency with the Charter is manifest.

(c) Twenty five Canadian citizens, each of whom has or had at least one child in French primary or secondary school in Canada are entitled to French instruction for all their

children even if some or all of the children are not French speaking. The Education Act withholds French instruction in this situation. The inconsistency with the Charter is manifest.

20. The Education Act establishes the numbers twenty-five (elementary) and twenty (secondary) as Province-wide requirements for Francophones to receive French language instruction. The sole justification for these numbers offered by Counsel for the Attorney General is that the Charter entrenches the status quo. Thus, at para. 36, Counsel for the Attorney General submits that "s. 23(3) of the Charter was intended to reflect the existing pattern of School administration in the provinces". [Similar submissions that the Charter entrenches the status quo appear in respect of financing (para. 31) and territorial divisions (para. 29)].
21. These submissions are tantamount to saying that the Charter applies prospectively only; that it does not disturb the existing status quo. This is untenable in light of s. 52 of the Constitution Act, 1982. Under s. 52(1) "any law that is inconsistent with the provisions of the Constitution" must be voided. The Charter applies retrospectively as well as prospectively in the field of minority language educational rights.

Quebec Assn. of Protestant School Boards v. A.G. Quebec (1982), 140 D.L.R. (3d) 33, affd. Que. C.A., June 9, 1983.

22. It is submitted that s. 23 intends to ameliorate conflict between French and English communities over schools. The intent is not to entrench our historical failings by entrenching the status quo. The intent is remedial.

23. Among the provinces which have stipulated a numbers requirement for French language instruction, Ontario's numbers are the most severe.

Monin, L'égalité juridique des langues et l'enseignement (1983), 24 Cahier 157.

24. This court is not required to say what numbers are or might be sufficient to satisfy the numbers test at s. 23. It is required to say only that the Attorney-General has justified or has failed to justify the numbers twenty-five and twenty in this case. It is submitted that the Attorney General has failed to justify the numbers twenty-five and twenty in this case.

25. Section 258(2) provides that "where ... a number of French speaking pupils resident in the school section or separate school zone have elected to be taught in French" the Board has certain duties which may result in the provision of French language instruction. Section 258(4) provides that "where

... in the opinion of the Board the number of pupils who elect to be taught in the French language so warrants, the Board shall provide a French language elementary school". Sections 261(2) and 261(4) provide that French pupils must "elect" prior to being entitled to French language instruction or schools. These sections create an "active request" requirement for the provision of minority language instruction.

26. Section 23 of the Charter contains no such "active request" exigency. Sec. 23(3)(a) grants language instruction where "the number of children of citizens who have such a right is sufficient". Section 23(3)(b) grants that instruction be provided in minority language educational facilities "where the number of those children so warrants". These Charter provisions require only sufficiency of numbers; they do not require an active request on behalf of the minority language pupils.

27. The lack of an active request requirement in s. 23(3) is deliberate. This appears if s. 23(3) is contrasted with s. 20(1) of the Charter. Section 20(1) entitles members of the public to communicate with and receive services from

certain Federal Government offices where "there is a significant demand for communication with and services from that office in such language". By referring to "significant demand" s. 20(1) imposes a requirement of active request, which is absent from s. 23.

28. The concept of "active offer of service" by the civil service as contrasted with "active demand for service" by the client is a well known Federal Government concept. The Commissioner of Official Languages has recommended that there be a requirement that bilingual offices actively offer services. The reason is that many francophones fail to demand for French services. This is especially true in Ontario where large numbers of Franco-Ontarians are bilingual, and where indirect obstacles, attitudes and suspicions frequently deter and delay the delivery of services in French.

Proceedings of the Special Joint Committee of the Senate and the House of Commons on Official Languages, Report to Parliament (8/7/81), First sess., 32nd Parl. at 22:9.

29. It is submitted that the imposition of an active request requirement in s. 258(2) and (4), and 261(2) and (4) is inconsistent with the Charter. Section 23 of the Charter imposes an onus on the School Board to determine if the number

"is sufficient" or "so warrants". It is submitted that the Education Act is inconsistent with the Charter because it throws that onus onto the shoulders of francophones entitled to s. 23 rights by requiring them actively to demand minority language instruction. The 'active demand' obstacle requires a degree of community organization which the Charter imposes on the Government, not on the francophone community.

QUESTION 2

Principles of Interpretation

30. It is submitted that the following principles of construction are relevant to interpreting s. 23 of the Charter.

(a) Official language rights "ought to be considered broadly". They contain a principle "of growth". "The proper approach to an entrenched [language right]" is "to make it effective through the range of institutions [to which it applies]".

A.G. Quebec v. Blaikie (1979), 30 N.R. 225, 234-6 (S.C.C.).

(b) Even where a specific right, like public accessibility to the Courts, is not express, it may nevertheless be implicit in Charter guarantees "having regard to its

historic origin and necessary purpose". Courts should not stultify the Charter "by narrow technical literal interpretations without regard to its background and purpose".

Re. Southam Inc. and the Queen (no. 1) (1983), 41 O.R. (2d) 113, 123 (C.A.).

- (c) Minority language educational rights are a uniquely Canadian response to a longstanding Canadian dilemma. They should be interpreted as remedial of specific Canadian problems.

Interpretation Act, R.S.C. (1970), c. I-23, s. 11.

Interpretation Act, R.S.O. (1980), c. 219, s. 10.

- (d) "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians".

Canadian Charter of Rights and Freedoms, s. 27.

31. A well-understood principle of construction holds that statutes are to be interpreted as far as possible consistently with Canada's international obligations.

Reference Re Foreign Legations, [1943] 2 D.L.R. 481, 502 (S.C.C.).

The Ship "North" v. The King (1906), 37 S.C.R. 385, 398.

This presumption applies in interpreting the Charter.

Cohen and Bayefsky, The Canadian Charter of Rights and Freedoms and Public International Law (1983), 61 Can. Bar Rev. 265, 281.

32. With the unanimous consent of all provinces, Canada ratified the International Covenant on Civil and Political Rights, and thereby incurred obligations under international law. Article 26 of the Covenant states:

"All persons are equal before the law, and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as... language...".

33. It is submitted that in construing the Charter, this Court should shun any interpretation that subjects persons entitled to exercise s. 23 rights to inequality. A proper interpretation of s. 23 requires that entitled persons receive equal protection and equal benefit of the law. Distinctions resulting from governmental or legislative action, based on language, should be subjected to the strictest standards of judicial scrutiny.

Tarnopolsky, Equality Rights in the Canadian Charter of Rights and Freedoms (1982), 61 Can. Bar Rev. 242, 253-5.

Historical Background: Linguistic Equality

34. A central theme saturating the historical record out of which section 23 emerged is the overriding need to equalize the position of francophones and anglophones at the institutional level, particularly with regard to schools. This theme was explored seriously in the Report of the Royal Commission on Bilingualism and Biculturalism (I, p. 13), the first forerunner of section 23:

"...we have insisted on the right of parents to have their children educated in the official language of their choice...we are convinced that it is important for Canada to maintain strong and vigorous links in the chain of French language and culture across the whole country. We believe firmly furthermore 'equal partnership' for francophones necessitates a change of policy, from offering the minimum of education in their mother tongue to offering the maximum".

In Book II, under the heading "Linguistic Equality in Education", the Commission concluded (p. 8-9):

"Living in a milieu where the other language and the other cultural group are omnipresent, those in the minority group face serious difficulties in retaining the vocabulary, the ease of expression, and the modes of thought of their own tongue. These difficulties are compounded for their children, who are often exposed to the majority language from the time they are able to play outside. The gradual loss of the mother tongue is inevitable without some institution to give formal instruction in the language and to enhance its prestige by according it some social recognition. At the same time, minority language schools can adapt the curriculum to stress the cultural heritage of the minority group. The importance of such schools can scarcely be exaggerated..."

35. The Final Report of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (1972) recognized that "the language question is one of the most important to be settled in a new Constitution". The Committee continued:

"[the language question] is also of great practical importance, since it is a question of equal opportunity before the law... "

Molgat - MacGuigan Report (1972), p. 25: ACFO Documents, no. 6.

36. In 1978, the Federal Government identified linguistic equality as a basic principle underlying its initiative for Constitutional reform. Under the heading "The Full Development of the Two Linguistic Majorities", the Federal Government stated:

"the renewal of the Federation must guarantee the linguistic equality of its two major communities, the English-speaking and the French-speaking, and assure that Canadian institutions exist to help each group to prosper".

A Time for Action: Toward the Renewal of the Canadian Federation (1978), p. 9: ACFO Documents, no. 11.

37. The Constitutional Record offers strong inducement to conclude that s. 23 contains an intention to equalize the position of Francophones outside of Quebec with that of Anglophones within Quebec. When introducing the proposed resolution in Parliament, the responsible Minister, Mr. Chretien, said this:

"I also indicated a while ago that we would provide Francophones outside of Quebec with a Constitutional right to set up French schools in all Canadian provinces, and that the price to pay for this right which has not been recognized for the past one hundred fourteen years in Canada would be to grant Anglophones in Quebec the same Education rights as those being granted to Francophones outside Quebec".

Hansard, 32nd Parliament, 1st sess.
February 17, 1981, 7: 73-75.

Earlier the Minister had said:

"We are seeking to protect, once and for all, the education rights of Francophones outside of Quebec. The aim of this initiative is to provide Francophones outside of Quebec with approximately the same rights as the Anglophones inside Quebec enjoy, or once enjoyed".

Proceedings of the Special Joint Committee on the Constitution of Canada, 4: 21.

The Minister noted that Anglophones in Quebec, through the Protestant School System, "have an entirely autonomous system guaranteed to them by the Constitution".

Proceedings of the Special Joint Committee on the Constitution of Canada, 38: 111.

38. It is submitted that s. 23 is imbued with the spirit of linguistic equality. For this reason, minority language educational rights necessarily imply a degree of management and control over minority language instruction and educational facilities in the minority language community. If it were otherwise, the minority language community would be overwhelmed with a sense of inferiority, of constantly battling against overwhelming political odds, since every time a school board took a decision, the minority would have to mobilize its forces just to survive.

"The implementation of [Franco-Ontarian] rights is left in large measure to the discretion of local School Boards. Since Franco-Ontarians constitute a minority - sometimes even small - in most areas, they must win their rights again by vocal political action every time a significant decision is taken by a School Board. Consequently, many Francophones regard their rights as temporary".

Churchill, Educational Rights for Franco-Ontarians, p. 62: ACFO Documents, no. 12.

39. It is submitted that to make the rights guaranteed by section 23 effective through the range of institutions to which they apply, to treat the rights as remedial, and to equalize the position of Francophones and Anglophones at the institutional level, s. 23 implies a degree of management and control vested in the minority language community. It is submitted that the Education Act is inconsistent with the Charter in failing to stipulate for such management and control.

Structures of Linguistic Equality: Homogeneous School Boards

40. All responsible commentators who have studied the problem of school governance in Ontario agree that homogeneous linguistic school boards are the best, if not the only way Franco-Ontarians can achieve linguistic equality. Thus:

(A) The Ministerial Commission on French Language Secondary

Education [The Symons Report] (1972), p. 17 stated:

"central to the Commission's argument is that the educational rights and opportunities extended to the English-speaking and French-speaking populations of the Province must be the same".

Within the context of linguistic equality, the Commission emphasized that:

"the decision in regard to the language of instruction...must properly rest with the French language community that it serves... Each area and each school must decide for itself what its needs are in this regard. For the French-speaking community, the key element in a French language school is that the language of communication and of administration, and hence the total ambiance of the school, should be French" (p. 14).

Implicit and explicit in the Commission's recommendations is that the French community exercise a degree of management and control over school boards.

The Symons Report: ACFO Documents,
no. 5.

- (B) The Report of the Ottawa-Carleton Review Commission [The Mayo Report] (1976) found that "School Boards are comprised mainly of the English speaking". This fact implies that "recommendations by the French population are studied by an English-speaking majority" (p. 132). To redress this inequality, the Commission recommended establishment of a French language school board for the Ottawa-Carleton Region, to serve as a model for other parts of Ontario (p. 135). The Board explained why such a homogeneous linguistic Board was necessary:

"the chief reason which leads us to think of a French speaking School Board in the ROMC lies in the survival of the French minority in Ottawa-Carleton".

The Mayo Report; ACFO Documents,
no. 7, p. 133.

- (C) Stacey Churchill, Educational Rights for Franco-Ontarians (1978-9) reviewed the structure of school governance in Ontario. He concluded that Franco-Ontarians were not treated equally.

"The Franco-Ontarians are an underprivileged group whose needs are not adequately met by any public service. The educational system

goes farther towards meeting their needs than any other public services, but it is still far from giving them equal treatment" (p. 61).

Churchill identified the reason for Franco-Ontarian inequality:

"implementation of (Franco-Ontarian) rights is left in large measure to the discretion of local School Boards" (p. 62).

Churchill, Educational Rights for Franco-Ontarians: ACFO Documents, no. 12.

(D) The Commission on Declining Enrolments, Working Paper no. 22 (1978) concluded that:

"The Francophone Communities have always encountered problems in their attempt to obtain equal opportunities in education in Ontario, even in 1978" (p. 37).

The Commission identified political and administrative structures as the reasons for the lack of equality.

"Unlike the Anglophone majority, the Francophone minority has not been favoured by the various political and administrative structures at all levels" (p. 37).

The Commission made this recommendation in order to redress Franco-Ontarian inequality:

"To provide equal opportunity to Francophone students the Ministry of Education consider adopting the distinct francophone school board concept, kindergarten - to - grade 13, supported by taxpayers, corporate revenue, and appropriate government grants" (p. 36).

Commission on Declining Enrolments, Working Paper no. 22, (1978): ACFO Documents, no. 13.

Structures of Inferiority: Mixed Schools

41. Courts, legislatures and opinion surveys have concluded that linguistic mixing in school instruction and administration is harmful to the linguistic minority child and the linguistic minority community.

(A) The New Brunswick Court of Queen's Bench, in a carefully reasoned judgment, found as a fact upon extensive expert evidence:

"que le groupement des élèves francophones et anglophones, sous un même toit et dans un même système, conduit par l'interférence linguistique, à l'appauvrissement de la langue première et seconde et par conséquent par l'assimilation".

S.A.N.B. v. Minority Language School Bd. No. 50,
N.B.Q.B., June 24, 1983, no. E/C/23/82, p. 40
(Richard, J.).

(B) The Legislature of New Brunswick studied mixed schools in depth. The Legislature concluded that linguistic mixing in instruction and administration is harmful to the minority child and to the minority community. Accordingly, the Legislature amended provincial legislation to prohibit linguistic mixing. School boards are now organized along homogeneous linguistic lines.

Finn-Elliott Report: ACFO Documents, no. 14

School Act, R.S.N.B. 1973, ch. S-5, as amended,
secs. 3.1-3.3, 18.1.

An Act Recognizing the Equality of the Two
Official Linguistic Communities of New Brunswick,
S.N.B. 1981, c. 0-1.1, s. 2.

- (C) After extensive review, the Commissioner of Official Languages concluded that mixed schools are "little better than instruments of assimilation".

Report of the Official Languages Commissioner
(1978), p. 35: ACFO Documents, no. 20.

The Commissioner decided that this dangerous situation could be remedied only by creating for the French minority:

"the opportunity to maintain their own schools, administer them in their own language, and support them as appropriate with their own school boards".

Report of the Official Languages Commissioner
(1979), p. 32: ACFO Documents, no. 20.

- (D) A poll of French language School Commissioners revealed that the Commissioners were unanimous in finding mixed schools harmful. The Commissioners indicated that linguistic boards were the answer to this perplexing problem.

"Les commissaires d'école sont unanimes pour déplorer que les écoles mixtes sont des foyers d'assimilation. ...Privés du climat culturel français qui avait marqué leurs années d'école élémentaire ils voient de moins en moins les raisons d'une allégeance à une culture qui n'est pas seule de la majorité des citoyens de leur province".

Sondage sur les Besoins des Commissaires d'Ecoles de Langue Française du Canada (1981), p. 35:
Documents, no. 17

42. It is submitted that the Charter confers on francophones entitled to minority language instruction and education facilities the

right to exercise these entitlements on the basis of equality. It is submitted that the Education Act deprives francophones of equality by excluding them de jure and de facto from management and control of minority language instruction and educational facilities, and is, in this respect, inconsistent with the Charter. It is submitted that the conclusion of inequality is warranted when reached independently by all scholars and Commissions which have studied the problem; and when Courts, Legislatures and opinion surveys independently conclude that denying francophones separate governing structures is harmful to the francophone child and community.

Multiculturalism

43. Schools are a critical institution in the cultural life of Franco-Ontarians. The Mayo Commission concluded:

"...with the decline of the parishes, the schools are now becoming the centre of cultural life for the French-speaking".

And the Symonds Report found:

"The French language school provides a setting within which the Francophone student will have a better opportunity to come to know and to understand and to strengthen and develop their own culture and heritage...the school occupies a central role in the cultural life of the linguistic community... the French language schools must truly be community schools and easily accessible to the general population of the linguistic group they exist to serve...this Commission shares the belief, which is widely held by Franco-Ontarians, that the establishment of French language schools in which the language of both communication and administration is

French best meets this...need to preserve the language, customs and culture of the Francophone student..."

The Mayo Report, p. 133: ACFO Documents, no. 7.

The Symonds Report, p. 13-15: ACFO Documents, no. 5.

44. The Charter is to be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians (Charter, s. 27). The historical and socio-political background makes clear that Franco-Ontarian culture is threatened by assimilation. Schools are the critical institution. Mixed schools attack Franco-Ontarian culture and speed up assimilation; homogeneous schools reinforce Franco-Ontarian culture and counter-balance assimilationist pressure. Mixed boards place Franco-Ontarians in a position of inferiority and sap the community's resources; homogeneous boards are thought to increase Community participation and development, and thus to reinforce Franco-Ontario culture.
45. It is submitted that s. 23 of the Charter should be interpreted as implying a degree of management and control vested in the Franco-Ontarian Community through homogeneous linguistic school boards as is consistent with the preservation and enhancement of Franco-Ontarian culture, and thus of the multicultural heritage of Canadians.

Établissements d'enseignement de la minorité linguistique

46. The right of Francophones to a degree of management and control over minority language instruction and educational facilities is supported by the French version of sec. 23. Where numbers are sufficient, the right to instruction includes the right to have that instruction "dans des établissements d'enseignement de la minorité linguistique". "De" in this phrase is a possessive. It suggests that the educational establishments are of, pertaining to, or belonging to the linguistic minority. This implies a degree of administrative control.
47. Nothing in the text of section 23 negates this interpretation. At para. 57 the Attorney-General submits that the words "educational facilities" refer to "something designed, built or installed to serve a specific function...; the physical means of doing something". However, the dictionary definitions cited by the Attorney-General do not really bear this out. Most of the definitions on pp. 28-9 of the Attorney-General's Factum include "services" within the definition of "facility" or "educational facilities". It is precisely the concept of services, in the sense of the "administrative services" of, pertaining to, or belonging to the linguistic minority, which suggests that the French linguistic minority is entitled to a degree of administrative control over French minority schools.

It is submitted that the Education Act is inconsistent with the Charter in not according to members of the French linguistic minority in Ontario the right to manage and control their own French language classes of instruction and French language educational facilities.

Question III

Section 23(3)(a) provides that the rights to minority language instruction "apply wherever in the province the number of children...is sufficient". There is no restriction to application in the Public or the Separate systems of education. In plain language s. 23 applies to both.

48. It is to be noted that the right applies wherever "the number ...is sufficient...to warrant the provision to them out of public funds of...instruction". Under various constitutional provisions separate schools are supported by public funds in Newfoundland, Quebec, Ontario, Saskatchewan and Alberta.

Constitution Act, 1867, s. 93.

Saskatchewan Act, s. 17.

Alberta Act, s. 17.

Newfoundland Act, s. 17.

49. In express terms, therefore, s. 23 applies equally to the Separate and Public education systems. The only relevant question is whether the exercise of s. 23 rights in Ontario's Separate system would interfere with denominational rights protected under s. 93 of the Constitution Act, 1867. S. 29 of the Constitution Act, 1982 provides that s. 23 rights may not derogate from denominational rights protected under s. 93.

50. It is clear law that protected denominational rights do not embrace the right to choose the language of educational instruction or administration. Lord Buckmaster held:

"the right to manage does not involve the right of determining the language to be used in the schools".

Ottawa Separate School Trustees v. MacKell,
[1917] A.C. 62, 74-5 (P.C.).

Protestant School Bd. of Greater Montreal v. Min. of Educ. (1976), 83 D.L.R. (3d) 634 C.S. (Qué.).

51. It is therefore submitted that to the extent s. 23 determines the language of instruction or administration of Separate Schools, there is no interference with denominational rights protected under s. 93 of the Constitution Act, 1867, as reinforced by s. 29 of the Charter.

Question IV

52. Question IV asks whether the Constitution inhibits Ontario from organizing school boards into panels of majority language trustees and minority language trustees. It is proposed that the panels exercise exclusive jurisdiction in linguistically organized instructional units in relation to planning and establishment; administration and closing; programs; recruitment and assignment of teachers and supervisory personnel; and agreements for educational programs and services.
53. By s. 93 of the Constitution Act, 1867, Ontario has full legislative power in relation to "Education". Ontario's power is subject to sec. 93(1), which protects rights enjoyed by Roman Catholics under the Scott Act, 26 Vict. 1863, c. 5. Under this Act, Roman Catholics had the right to establish Separate Schools (s. 2), to elect trustees to manage the Separate Schools (s. 3), to attend Separate Schools and to exclude non-Catholics (s. 2), to impose taxes for Separate School support (s. 7), to enjoy a corresponding exemption from common school taxes (s. 14), to share proportionally in legislative grants for the support of elementary education (s. 20), and to enjoy like management power as possessed by common school trustees under the Common Schools Act, 22 Vict. 1859, c. 64 (s. 7).

54. Denominational rights protected under s. 93(1) are subject to robust regulatory power flowing from provincial jurisdiction in relation to "Education". The Privy Council explained that the Province maintains:

"the power to mold the educational system in the interests of the public at large, as distinguished from any section of it, however important".

The Province possesses "a full power of regulation".

"Such expressions as 'organization', 'government', 'discipline' and 'classification' do, in their Lordships' interpretation of them, imply a real control of the Separate Schools".

The Province may "hamper the freedom of the Roman Catholics in their Denominational Schools". The significant limit on Provincial power is that it may not "abolish" Separate Schools.

Roman Catholic Separate School Trustees for
Tiny v. the King, [1928] A.C. 363, 386-9
(P.C.).

55. Although Separate School Trustees have the constitutionally protected right to choose separate school teachers, the Province has regulatory power to superadd conditions to those set by the Trustees. Ontario may competently require separate school teachers to possess a bachelor's degree, even if the trustees do not. While Ontario may not interfere with denominational qualifications required by Separate School Trustees, it may add further exigencies in the interests of the general welfare.

Re Ottawa Separate Schools (1917), 41 O.L.R.
259, 266-7 (C.A.).

56. Ontario may regulate the language of educational instruction and administration.

Ottawa Separate School Trustees v. MacKell,
[1917] A.C. 62 (P.C.).

P.S.B.G.M. v. Min. of Education (1976), 83
D.L.R. (3d) 645 (C.S. Qué.)

57. It is submitted that the proposed White Paper does not collide with s. 93 of the Constitution Act, 1867. The White Paper is a resort to provincial regulatory power to mold the management of all schools in the interest of the public at large. The effect will be beneficial. It will relieve pent-up pressure between French and English Trustees. Under the White Paper Roman Catholics are left unfettered in their right to elect trustees, to attend denominational schools, to manage the schools, to tax for their support, etc. At the outside, it may be said that Ontario proposes to superadd linguistic qualifications to the exercise of certain management rights in the interests of the provincial polity. These conditions are beneficial, or at least benign; they do not contradict constitutionally protected denominational qualifications.

Belleville Roman Catholic Separate School Trustees v. Grainger (1878), 25 Gr. 570.

58. If the Court is pleased to answer Question II in the affirmative, it is submitted that Question IV should be answered in the negative. For the reasons given in answer to Question II, the mere creation of a panel of minority language trustees does not vest sufficient powers of management and control in the linguistic minority. However, should the Court answer Question 2 "no", it is submitted that the answer to Question IV should be "yes". In the latter event there is obviously no infringement of s. 23, and for the reasons given in response to question IV, there would be no infringement of s. 93 either.

PART IV

ORDER SOUGHT

59. It is respectfully submitted that this Honourable Court should answer the questions posed as follows:

Question 1: Yes; sections 258 and 261 are inconsistent with the Charter in that:

(1) the sections create an uncontrolled administrative discretion to infringe the right to French language instruction and educational facilities.

(2) the sections do not provide French language instruction and educational facilities to those persons entitled under the Charter.

(3) the numbers of pupils required by s. 258 and 261 are unjustifiable in light of the requirement that instruction and educational facilities be provided wherever numbers warrant.

(4) the sections are inconsistent with the Charter in requiring that persons entitled to s. 23 rights make an active demand for those rights as a condition precedent to their satisfaction.

Question 2: Yes.

Question 3: Yes.

Question 4: If the answer to question 2 is "yes, the answer to question 4 is "no"; a panel of minority language trustees

infringes s. 23 of the Charter by vesting insufficient powers of management and control in the French linguistic minority. If the answer to question 2 is "no", the answer to question 4 is "yes"; there is no infringement of s. 93 of the Constitution Act, 1867.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Joseph Eliot Magnet
Counsel, Alliance Quebec

OTTAWA, ONTARIO
DECEMBER 28, 1983

LIST OF AUTHORITIES

1. Ontario Film and Video Appreciation Society v. Ontario Board of Censors, Ont. Div. Ct., March 25, 1983.
2. Sunday Times v. United Kingdom (1979), 2 E.H.R.R. 245 (European Court of Human Rights).
3. Malone v. United Kingdom (1979), 2 E.H.R.R. 385 (European Commission of Human Rights).
4. Ottawa Separate School Trustees v. Ottawa, [1917] A.C. 76 (P.C.).
5. Monnin, L'égalité juridiques des langues et d'enseignement (1983), 24 Cahier 157.
6. Soeurs de la visitation d'Ottawa c. City of Ottawa, [1952] O.R. 61.
7. O.E.C.D., Financing, Organization and Governance of Education for Special Populations (1982).
8. McLeod v. Salmon Arms School Board, [1952] 2 D.L.R. 562.
9. Quebec Association of Protestant School Boards v. A.G. Quebec (1982), 140 D.L.R. (3d) 33, affd. Que. C.A., June 9, 1983.
10. Proceedings of the Special Joint Committee of the Senate and the House of Commons on Official Languages, Report to Parliament (8/7/81), 1st sess., 32nd Parl.
11. A.G. Quebec v. Blaikie (1979), 30 N.R. 225 (S.C.C.).
12. Re Southam Inc. v. The Queen (No. 1) (1983), 41 O.R. (2d) 113 (C.A.).
13. Interpretation Act, R.S.C. 1970, c. I-23.
14. Interpretation Act, R.S.O. 1980, c. 219.
15. Reference Re Foreign Legations, [1943] 2 D.L.R. 481 (S.C.C.).
16. The Ship "North" v. The King (1906), 37 S.C.R. 385.
17. Cohen and Bayefsky, The Canadian Charter of Rights and Freedoms and Public International Law (1983), 61 Can. Bar Rev. 265.
18. Tarnopolsky, Equality Rights in the Canadian Charter of Rights and Freedoms (1982), 61 Can. Bar Rev. 242.
19. S.A.N.B. v. Minority Language School Board No. 50, N.B.Q.B., June 24, 1983 (Richard, J.).

20. School Act, R.S.N.B. 1973, ch. S-5, as amended.
21. An Act Recognizing the Equality of the Two Official Linguistic Communities of New Brunswick, S.N.B. 1981, c. 0-1.1.
22. Ottawa Separate School Trustees v. MacKell, [1917] A.C. 62 (P.C.).
23. Protestant School Board of Greater Montreal v. Minister of Education (1976), 83 D.L.R. (3d) 634 (C.S. Qué.).
24. Roman Catholic Separate School Trustees for Tiny v. the King, [1928] A.C. 363 (P.C.).
25. Re Ottawa Separate Schools (1917), 41 O.L.R. 259 (C.A.).
26. Belleville Roman Catholic Separate School Trustees v. Grainger (1878), 25 Gr. 570.