

## Language Rights in the Supreme Court of Canada: The Perspective of Chief Justice Dickson

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### I. THE ORIGIN OF CONSTITUTIONALLY-PROTECTED LANGUAGE RIGHTS IN CANADA<sup>1</sup>

THE HISTORY OF SECTION 133 of the *Constitution Act, 1867*<sup>2</sup> can be traced back to the capitulation of Montreal on September 8, 1760. The capitulation documents provided for the maintenance of the "Coutume de Paris" and all laws then in use. In practice this meant that the population would continue to receive services through its traditional French institutions and have access to the laws in French.

All this would change with the Treaty of Paris of 1763. This treaty did not mention languages, but introduced English justice and laws into the colony. The efforts to achieve religious and cultural assimilation which followed were doomed to failure and, as early as 1774, the *Quebec Act* abrogated the provisions of the Treaty of Paris and, except in criminal affairs, re-established the old French law.

In 1788, the Colonial Court of Appeal officially adopted bilingualism in its proceedings. Lawyers were given the right to plead their cases in either French or English, both languages being compulsory in written pleadings.

In 1791, Canada was divided into two provinces. The *Constitution Act* did not deal with language issues. Bilingualism was retained in Lower Canada only. In 1840 the two Canadas were reunited. The *Act of Union* provided that the language of the Legislature would be English. Troubles followed. In 1848 London abrogated the rule providing for unilingualism and established bilingualism in the legislative process. In the courts the rules varied. In 1785 the language of the defendant had priority. In 1801 this rule was

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<sup>1</sup> For a detailed account of this historical development, see P. Annis, "Le bilinguisme judiciaire en Ontario" in *Association des parents d'expression française de l'Ontario, la Clef* (Ottawa: 1985) 31.

<sup>2</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

abolished and then replaced in 1841 by that of bilingualism, based on the choice of the speaker. Mandatory bilingualism was reestablished in 1843 and then abolished again in 1846.

In 1864 the fathers of Confederation looked for a compromise during the Conference of Quebec. They adopted legislative and judicial bilingualism, but did not make it mandatory. This political compromise was abandoned during the London Conference, where compulsory bilingualism was retained for the legislative process. At that time, the most important debate with regard to the relationship between the French and the English was focused on section 93 of the *Constitution Act, 1867* which provided for the guarantee of *religious rights* for minorities in the school system. We all know, however, that the Privy Council decided in 1916<sup>3</sup> that section 93 did not guarantee instruction in the *language* of the minority in Catholic schools of Ontario. This left section 133 of the *Constitution Act, 1867* as the only constitutional provision dealing with language rights.

The wording of section 133 was used *mutatis mutandis* in s. 23 of the *Manitoba Act*, the constitution of Manitoba, when Manitoba was established in 1870. Some 20 years later, the Legislature of Manitoba abolished the use of French in the courts, Legislative Assembly and in the schools, adopting an *Act to provide that the English language shall be the official language of the province of Manitoba* as well as a revised *Public Schools Act*. Two important court challenges were launched almost immediately thereafter. The *Brophy v. A.G. Manitoba*<sup>4</sup> and *Barrett v. City of Winnipeg*<sup>5</sup> cases did not deal directly with language rights, but rather with the obligation of Manitoba to support Catholic schools. Language and religion were then one basic reality, the denial of one right being equivalent to the denial of the other. There were also challenges to the *Official Language Act* of 1890 which led to declarations of unconstitutionality (*Pelland v. Hebert*<sup>6</sup> and *Bertrand v. Dussaud*<sup>7</sup>), but these declarations were ignored.

Francophones in New Brunswick, Ontario, and Prince Edward Island soon became victims of the same type of intolerance. Political compromise was sought to relieve social tensions. The Laurier-Greenway Pact of 1897 in Manitoba led to a more gentle assimilation

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<sup>3</sup> *Ottawa Separate Schools Trustees v. MacKell*, [1917] A.C. 62.

<sup>4</sup> [1894] 22 S.C.R. 577; [1895] A.C. 202.

<sup>5</sup> [1891] 19 S.C.R. 374; [1892] A.C. 445.

<sup>6</sup> (1892), reproduced in (1981) R.G.D. 242.

<sup>7</sup> Reproduced in *Forest v. Reg. of Manitoba Court of Appeal* [1977] 5 W.W.R. 361.

of Francophones in that province. The same was true of the political compromise following the adoption of the *Common Schools Act of 1871* in New Brunswick.

The second major confrontation between the minority and the majority on the issue of language rights did not occur before the 1960s and 1970s. This is the time when George Forest, a real estate agent from St. Boniface, Manitoba, asked the Supreme Court of Canada to declare unconstitutional the *Manitoba Act* of 1890, which had made English the only official language of Manitoba. His case was heard with that of Peter Blaikie, of Montreal,<sup>8</sup> who was asking the Court to declare unconstitutional certain provisions of Bill 101, which had been adopted by the newly-elected Parti Québécois in the province of Quebec and which clearly violated section 133 of the *Constitution Act, 1867*. Both judgments had tremendous political repercussions, provincially and nationally. After the decision in *A.G. Manitoba v. Forest*,<sup>9</sup> the provincial legislature of Manitoba adopted an *Act respecting the operation of section 23 of the Manitoba Act*<sup>10</sup> and proceeded to adopt new acts in the English language only in the belief that subsequent translation was all that was required. The validity of this procedure was challenged in *Bilodeau v. A.G. Manitoba* in 1981.<sup>11</sup> Paradoxically the Court of Appeal of Manitoba decided that despite its palpably imperative language the provisions of section 23 of the *Manitoba Act* were not *de jure* imperative. That decision was appealed to the Supreme Court of Canada.

However, before this case was to be heard, a newly elected Manitoba government decided to settle the long standing problem by way of a constitutional amendment to the *Manitoba Act* which would have, *inter alia*, required the use of both languages in government services where numbers warranted. This approach gave rise to very strong political opposition and a stalemate in the Legislature blocked the constitutional process. The federal government therefore decided to bring the whole question before the Supreme Court of Canada in a reference. The reference gave rise to one of the most important

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<sup>8</sup> *A.G. v. Blaikie; A.G. Quebec v. Laurier*, [1979] 2 S.C.R. 1016.

<sup>9</sup> [1979] 2 S.C.R. 1032.

<sup>10</sup> S.M. 1980, c. 3, C.C.S.M. S207.

<sup>11</sup> [1981] 5 W.W.R. 393.

decisions in Canadian constitutional history.<sup>12</sup> Not only did the Supreme Court affirm the fundamental nature of language rights in the Canadian constitution, it expounded on the duties of the courts with regard to the protection of official language minorities, and in the course of doing so held that the imperative wording of section 23 of the *Manitoba Act* was to be fully applied, especially because it was part of fundamental, i.e. constitutional, law.

## II. THE FUNDAMENTAL NATURE OF LANGUAGE RIGHTS

THE NATURE OF LANGUAGE RIGHTS has given rise to a great deal of discussion, principally because there are two aspects to this notion. On one hand language rights can be seen as individual rights the object of which is to protect a basic human value. These types of rights are universal in scope and are habitually protected in declarations and constitutional charters. On the other hand, language rights can be seen as rights of a minority group which needs special protection. These rights are granted to individuals as members of a community and their nature is truly political.

Language rights, in the Canadian context, must not be seen only as the right of individuals to use their particular languages, but, as a group right to use the particular languages in public (political, judicial) communications. This is why they were first established. Dickson says of Parliament's intent with regard to section 133 of the *Constitution Act, 1867* and section 23 of the *Manitoba Act* that their purpose "was to ensure full and equal access to the legislatures, the laws and the courts for Francophones and Anglophones alike."<sup>13</sup> The extension of the right to make use of a particular language will, of course, bring together the notion of language rights and that of freedom of expression. In the *Manitoba Language Reference*, Dickson said:

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap

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<sup>12</sup> *Reference Re Language Rights under section 23 of the Manitoba Act 1870 and section 133 of the Constitution Act 1867*, [1985] 1 S.C.R. 721 [hereinafter *Manitoba Language Reference*].

<sup>13</sup> *Ibid.* at 739.

between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.<sup>14</sup>

If language rights are truly fundamental, as I believe can be determined following an analysis of the human condition and of societal needs, then, truly, constitutionally protected freedom of expression must encompass the freedom to choose the language of that expression. The Supreme Court affirmed this in *Ford v. A.G. Quebec*<sup>15</sup> and *Singer and Devine v. A.G. Quebec*.<sup>16</sup>

The essence of language rights in the Canadian Constitution is, arguably, based at least in part on the need to preserve the dignity and freedom of French and English speaking people in Canada. Social, political, economic, historical facts would seem to explain only the limited scope of the language rights recognized in the Constitution. In 1984, in *A.G. Quebec v. Quebec Association of Protestant School Boards*,<sup>17</sup> the Supreme Court of Canada reaffirmed its willingness to protect minority language rights by stating that section 23 of the *Canadian Charter of Rights and Freedoms*<sup>18</sup> must be given priority over contrary provisions in section 73 of *La Charte de la langue française du Québec*.

A shocking reversal in the reasoning of the Court occurred however in 1986 in the *McDonald v. Ville de Montreal*<sup>19</sup> and *Société des Acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education*<sup>20</sup> decisions. In the majority decisions delivered by Mr. Justice Beetz, the Court declared that section 16(1) of the *Charter* does not establish a right to equality of official languages, but rather provides for a goal which is to be reached through the provisions of sections 17 to 20 of the *Charter* and especially through new language rights to be introduced by provincial legislatures. It is true that the Court did not deal in a definitive way with the scope of section 16(1) in these cases. It did, nevertheless, refuse to make use of section 16(1) to further the rights described in section 19(3), which deals with the

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<sup>14</sup> *Ibid.* at 744.

<sup>15</sup> [1988] 2 S.C.R. 712.

<sup>16</sup> [1988] 2 S.C.R. 790.

<sup>17</sup> [1984] 2 S.C.R. 66.

<sup>18</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter *Charter*].

<sup>19</sup> [1986] 1 S.C.R. 460.

<sup>20</sup> [1986] 1 S.C.R. 549.

right to use the language of one's choice before the courts of New Brunswick. Mr. Justice Beetz held that the right to use the French or the English language in all proceedings which is based on section 19(2) is identical to that found in section 133 of the *Constitution Act, 1867*, and that it is a right which belongs to the individual but creates no corresponding obligation on the state or anyone else to whom these proceedings are addressed. This it seems to me is contrary to the finding in *Blaikie* (#2) that rules of Court must be bilingual to ensure equal access to the Courts in both French and English.<sup>21</sup>

There is therefore, it would seem, no obligation on a court or a judge to draft a legal document in the language of the accused. There is no obligation for the court to be able to understand without translation a person appearing before it in the official language of his choice. The right to be understood is only governed by the right to a fair trial guaranteed by the common law. Mr. Justice Beetz challenged the "equal access to the courts" concept developed in the *Manitoba Reference* when he proposed, in *Société des Acadiens*, a new definition of the nature of language rights:

Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in s. 7 of the Charter, are so broad as to call for frequent judicial determination. Language rights, on the other hand, although some of them have been enlarged and incorporated in the Charter, remain nonetheless founded on political compromise. This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights.<sup>22</sup>

Justices Wilson and Dickson refused to follow this narrow approach. Wilson said in *MacDonald*:

The purpose of the constitutional guarantee was not to ensure that French and English would be the only two languages used in the province's courts and make it constitutionally impossible for a third language to achieve this status; its purpose, rather, would appear to be to put the two languages on an equal footing and afford protection to each of the two founding linguistic groups from the intrusion and ultimate dominance of the other: for a contrary view, see Bayda C.J. in *Mercure v. A.G. Saskatchewan*.<sup>23</sup>

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<sup>21</sup> *A.G. Quebec v. Blaikie*, [1981] 1 S.C.R. 312 at 332.

<sup>22</sup> *Supra*, note 20 at 578.

<sup>23</sup> *Supra*, note 19 at 538.

Dickson, in turn, declared in *Société des Acadiens*:

The jurisprudence of this Court under S. 133 of the *Constitution Act, 1867* and S. 23 of the *Manitoba Act, 1870* reveals for the most part a willingness to give constitutional language guarantees a liberal construction, while retaining an acceptance of certain limits on the scope of the protection when required by the text of the provisions.<sup>24</sup>

In his opinion, sections 16 to 22 of the *Charter* provide for the equality of official languages in Canada and must be interpreted as such. He argued that the officers of the Court must respect those who choose to use the French language or the English language and give them equal access to the court. Section 19 of the *Charter* must be interpreted with regard to its true object. He said:

What good is a right to use one's language if those to whom one speaks cannot understand? Though couched in individualistic terms, language rights, by their very nature, are intimately and profoundly social. We speak and write to communicate with others. In the courtroom, we speak to communicate to the judge or judges.<sup>25</sup>

In the *Manitoba Reference*, the Supreme Court affirmed the true value of constitutional protection for minority language rights. In the *Blaikie* decisions, the Court affirmed the intangible character of those rights and the scope of their application. Now, it would seem that language rights are designed to protect languages *per se* and not those who speak an official minority language and seek the protection of the courts, an unexpected and, I would suggest, a regressive development.

### III. LANGUAGE RIGHTS AND MINORITY LANGUAGE GROUPS

THE HISTORY OF LANGUAGE CONFLICTS IN CANADA shows very convincingly that all language legislation was meant to provide for conditions under which minority language groups would be able to make use of their own language in dealing with legislatures and the courts. From this, it would seem obvious that language communities are the true beneficiaries of language rights and that it is as members of those communities that individuals will generally seek a declaration with regard to their particular language rights.

In Western Canada language rights were first recognized in a resolution adopted following a rebellion against the recorder of the courts, Adam Tom, in 1849. The content of the resolution found its

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<sup>24</sup> *Supra*, note 20 at 564.

<sup>25</sup> *Ibid.* at 566.

way into the list of rights which was to be presented to Prime Minister John A. Macdonald by Louis Riel in December of 1869. In New Brunswick language rights first resulted from the adoption of the *Official Languages Act* in 1969. The Act itself was adopted following a long controversy with regard to the right to obtain a French trial in New Brunswick. Even after the adoption of the *Official Languages Act*, acts of civil disobedience by students at the University of Moncton were required before promulgation of certain sections of the act would occur in 1974.

In Ontario it was a political uproar in 1977 which led to the first amendments to the *Judicature Act*. In introducing the new legislation, the Attorney General of Ontario stated, in 1978:

Nothing can be of greater fundamental importance than the capacity of the courts to hear and understand a litigant and accused person in his own language, as will be included in the proposed amendments to the Criminal Code.<sup>26</sup>

The Attorney-General of Canada said, on this occasion:

I repeat that a trial before a judge or a jury who understand the accused's language should be a fundamental right and not a privilege. The right to be heard in the criminal proceeding by a judge or a judge and jury who speak the accused's own official language, even if this is the minority official language in a given province, surely is a right that is a bare minimum in terms of serving the interests of both justice and Canadian unity. It is essentially a question of fairness that is involved.<sup>27</sup>

For official language minorities, it is obvious that language plays an important role in achieving fundamental justice or due process. Any violation of fundamental rights of the accused to use his own language and to understand directly the proceedings against him means that fundamental rights and the right to equality are threatened. This is why minority language groups do not recognize as meaningful the limited right to have access to the courts through an interpreter. The right they require is that of equal access to justice. The right to an interpreter is not the right to equality. They see the right to an interpreter as establishing the minority language as an inferior language, while section 16 of the *Charter* establishes French and English as having equality of status.

But there is a more fundamental reason for wanting minority language rights to be interpreted according to the philosophy first

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<sup>26</sup> Quoted in Annis, *supra*, note 1 at 104.

<sup>27</sup> *Ibid.*



expounded by Dickson in the *Manitoba Reference*. Language rights are seen by the minority as a fundamental tool to fight the forces of assimilation. Assimilation is both linguistic and cultural. It is a process under which the minority will lose control of its language and fundamental cultural values and substitute for these those of the dominant linguistic group. Fighting assimilation, therefore, requires a degree of linguistic institutional completeness which, I submit, can only be achieved through meaningful constitutional protection.

Institutions that reflect the true equality of the French and English language groups are those that will respect the character, values and objectives of each language group, those that will be founded on a true recognition of the history, origins, traditions of each language group.

Even though cultural isolation is not possible, official language minorities have long considered that legal and educational institutions must reflect their values and culture. This is why they wish to appear before judges and juries who speak their language and understand their culture and values. This is why they wish the establishment of a separate school system for the minority.

#### IV. THE SCOPE OF LANGUAGE RIGHTS IN CANADIAN CONSTITUTIONAL LAW

THE SCOPE OF LANGUAGE RIGHTS in Canadian constitutional law must be determined according to various principles which have now been developed by the Supreme Court. The first principle is that of political compromise. The full meaning of political compromise with regard to the interpretation of official language rights is not yet known. Obviously, the court will not hesitate to look at history, constitutional conventions and even political speeches to determine the scope of rights existing under the *Charter* and constitution. This was the case, more recently, with regard to the cruise missile<sup>28</sup> and abortion<sup>29</sup> cases. There are, of course, political factors to be considered in determining the scope of constitutional rights, but can these political considerations effectively derogate from fundamental rights?

The constitution of any country is always and everywhere the result of political compromise. Although sections 2 and 7 to 14 of the *Charter* provide for the recognition of rights that appear to be universal, it is obvious that there was political compromise in the drafting of these

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<sup>28</sup> *Operation Dismantle v. R.*, [1985] 1 S.C.R. 441.

<sup>29</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

sections. Sections 15, 25, 27 and 28 of the *Charter* more directly reflect political compromise. It would be difficult to argue, however, that these rights are not as fundamental as "true" legal rights. Even without reference to any political compromise having occurred in 1867, the Court could have referred to the political context surrounding the situations in New Brunswick and Manitoba in determining the scope of language rights applicable in those jurisdictions in its 1986 decisions. Dickson was right when he said, in the *Société des Acadiens* decision:

Secondly, despite the similarity between section 133 and section 19(2), we are dealing with different constitutional provisions enacted in different contexts. In my view, the interpretation of section 133 of the Constitution Act, 1867 is not determinative of the interpretation of the Charter provisions.<sup>30</sup>

The second important principle for the interpretation of language rights is the use of the notion of progression towards equality. In refusing to look at the clear meaning of section 16(1), the Court transformed section 16 in its entirety into a principle of *progression* towards equality rather than accepting that it formed the fixed basis for a constitutional right. Why would the framers of the *Charter* provide for the principle of equality separately from that of progression if one and the other were to mean the same thing? To leave the legislatures the duty to provide for the meaningful implementation of section 16 to 20 of the *Charter* is to refuse to look at reality; section 16 must have been meant to correct present inequalities with respect to which legislation had done little. To refuse any form of judicial activism in the area of language rights is to repeat the errors of the beginning of the century in the interpretation of section 93 of the *Constitution Act, 1867*.

The third principle to be considered is the very importance of language rights themselves. The Court has now affirmed that language rights are fundamental rights. The history of language rights in Canada must now require that the Court give sufficient attention to the *social* nature of these rights; it is the only way in which it will be able to establish the true object of these rights. This is particularly important with regard to section 20 of the *Charter*, which provides for the right to obtain public services in French and English from federal institutions and those of the province of New Brunswick. These rights are new and create the obligation for federal institutions and

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<sup>30</sup> *Supra*, note 20 at 561.

employees to provide certain services to the public. Can section 16 of the *Charter* be used to determine whether services available shall be of equal quality or will the notion of progression towards equality limit the rights of official language minorities to require a meaningful transformation of the public service to serve them?

To hand over any meaningful progression to the legislatures is to refuse to recognize that demographic realities make it impossible for official language minorities to exercise the type of political influence that is necessary to achieve this. The reaction to the *Mercurie v. A.G. Saskatchewan*<sup>31</sup> decision in Saskatchewan and Alberta, and the reaction to the *Ford* and *Devine* decisions in Quebec are sufficient evidence of the unacceptability of this approach.

It is also obvious that a great many legislatures are now turning to the courts to avoid taking on their true responsibilities. Whether we are dealing with abortions, Sunday store closing, or education rights, provincial governments prefer to turn to the Courts. Regrettable as that may be in political theory, it is happening and, therefore, requires a strong principled approach by the courts.

The *MacDonald* and *Société des Acadiens* decisions created a great deal of anguish for official language minorities in Canada. They worried that sections 16 and 20 of the *Charter* had become meaningless and that all their hopes of obtaining an effective system for minority language education would be jeopardized. Following the *Ford* and *Singer* cases in 1988, it seems however that the unduly restrictive approach of the Supreme Court in the *Société des Acadiens* case might be abandoned.

## V. HOPE FOR THE FUTURE: THE *MAHE* DECISION

AT THE VERY BEGINNING OF HIS DECISION in the *Mahé* case, Mr. Justice Dickson writes:

The general purpose of section 23 of the Charter is clear; it is to preserve and promote the two official languages of Canada, and their respective cultures, by insuring that each language flourishes as far as possible in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language education rights to minority language parents throughout Canada.<sup>32</sup>

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<sup>31</sup> [1988] 1 S.C.R. 234.

<sup>32</sup> *Mahe v. Alberta*, [1990] 1 S.C.R. 342 at 362.

By these words, the Chief Justice of Canada had recognized that the true purpose of section 23 would never be met unless it was accepted that distinct institutions are required to permit official language minorities to maintain their language and culture effectively.

The Court therefore gave a wide and generous interpretation to the constitutional right to education in the minority language, despite the obvious political nature of the right.

Turning to the content of the rights recognized, the Court accepted that institutional frameworks are required to provide effective instruction and adopted the sliding scale of requirements suggested in the Alberta Court of Appeal decision, affirming that the upper level of the range of possible institutional requirements is mandated. This means that section 23 confers upon minority language parents a right to management and control over the educational facilities in which their children are taught because such management and control is vital to insure that their language and culture flourish.

Without referring to section 16 of the *Charter*, the Court affirmed that the quality of education provided to minority language groups must be on a basis of reasonable equality with the majority. In looking at the factors taken into account in determining what section 23 demands, the Court did not refer to the notion of progression towards equality; equality must be achieved as best as it can according to the sliding scale of rights described.

This decision is significant not only with regard to section 23 rights, but also with regard to language rights generally. Mr. Justice Dickson writes:

My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is a means by which individuals understand themselves and the world around them. The cultural importance of language was recognized by this Court in *Ford v. A.G. Québec* at pages 748, 749: Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the Charter of the French language itself indicates, a means by which a people may express its cultural identity.<sup>33</sup>

Speaking then of the purpose of section 23, Dickson affirmed that its objective is to alter the *status quo*. He says:

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<sup>33</sup> *Ibid.* at 362.

In my view, the appellants are fully justified in submitting that history reveals that section 23 was designed to correct on a national scale the progressive erosion of minority official language groups and to give effect to the concept of equal partnership of the two official language groups in the context of education.<sup>34</sup>

Referring to the very narrow interpretation of language rights given by Mr. Justice Beetz in *Société des Acadiens du Nouveau-Brunswick*, the Chief Justice said:

I do not believe that these words support the proposition that section 23 should be given a particularly narrow construction or that its remedial purpose should be ignored.<sup>35</sup>

He then cites Madam Justice Wilson in *Reference re: Bill 30, An Act to Amend the Education Act (Ont.)*,<sup>36</sup> where she said:

While due regard must be paid not to give a proposition which reflects a political compromise too wide an interpretation, it must still be open to the Court to breathe life into a compromise that is clearly expressed.<sup>37</sup>

Turning again to section 23, the Chief Justice argued that the provision provides for a novel form of legal rights, quite different from the type of legal rights which Courts have traditionally dealt with. He said:

Both its genesis and its form are evidence of the unusual nature of section 23. Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures. Careful interpretation of such a section is wise; however, this does not mean that the Court should not breathe life into the express purpose of the section or avoid implementing the possibly novel remedies needed to achieve that purpose.<sup>38</sup>

These words are very encouraging when one considers that the Supreme Court will soon have to deal with section 20 of the *Charter*.

In dealing with management and control of minority language schools, Chief Justice Dickson speaks of the reasons which led him to accept the argument of the appellant:

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<sup>34</sup> *Ibid.* at 364.

<sup>35</sup> *Ibid.*

<sup>36</sup> [1987] 1 S.C.R. 1148 at 1176.

<sup>37</sup> *Supra*, note 35 at 365.

<sup>38</sup> *Ibid.*

Furthermore, as the historical context in which section 23 was enacted suggests, minority language groups cannot always rely upon the majority to take account of all their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority.<sup>39</sup>

In finding an acceptable solution to the problem of the minority, the Court was concerned with the ability of legislatures and governments to administer their educational systems. The Chief Justice says:

Finally, it should be noted that the management and control accorded to section 23 parents does not preclude provincial regulation. The province has an interest both in the content and the qualitative standards of educational programs. Such programs can be imposed without infringing such section 23 insofar as they do not interfere with the linguistic and cultural concerns of the minority.<sup>40</sup>

## VI. CONCLUSION

IT IS CLEAR THEN that all those who have promoted minority rights and founded great expectations on the impact of the *Canadian Charter of Rights and Freedoms* owe a great debt of gratitude to Chief Justice Dickson. Canadians are very fortunate to have had the benefit of his service at a crucial time in Canadian history: he has brought to the plight of those seeking protection of minority rights true justice, legal protection and perhaps above all a humanitarian interpretation of *Charter* provisions.

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<sup>39</sup> *Ibid.* at 372.

<sup>40</sup> *Ibid.* at 380.