



SUPREME COURT OF CANADA

CITATION: Gosselin (Tutor of) v. Quebec (Attorney General),
[2005] 1 S.C.R. 238, 2005 SCC 15

DATE: 20050331
DOCKET: 29298

BETWEEN:

**Roger Gosselin, Guylaine Fillion, Daniel Trépanier, Claudette Gosselin,
Guy Boulianne, Johanne Labbé, Alain Chénard, Rachel Guay,
Gilles Maltais, Guylaine Potvin, Jean-Marie Martineau,
Mance Bourassa, Marc Joyal, Marie-Irma Cadet, René Giguère
and Lucille Giordano**

Appellants

v.

Attorney General of Québec and Minister of Education

Respondents

- and -

Commissioner of Official Languages for Canada

Intervener

CORAM: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

REASONS FOR JUDGMENT: The Court
(paras. 1 to 36)

Gosselin (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 238, 2005 SCC 15

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Neutral citation: 2005 SCC 15.

File No.: 29298.

2004: March 22; 2005: March 31.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

on appeal from the court of appeal for quebec

Civil rights — Equality rights — Language of instruction — Members of French language majority in Quebec not entitled to instruction in English except under certain circumstances — Whether legislation on English instruction in Quebec violating equality rights — Whether equality requires that all children in Quebec be given access to publicly funded English language education — Whether right to equality opposable to s. 23 of Canadian Charter of Rights and Freedoms — Charter of the French language, R.S.Q., c. C-11, s. 73 — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 10, 12.

Schools — Language of instruction — Instruction in English in Quebec — Members of French language majority in Quebec not entitled to instruction in English except under certain circumstances — Whether legislation on English instruction in Quebec violating equality rights — Charter of the French language, R.S.Q., c. C-11, s. 73 — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 10, 12 — Canadian Charter of Rights and Freedoms, s. 23.

Section 73 of the *Charter of the French language* provides access to English language schools in Quebec only to children who have received or are receiving English language instruction in Canada or whose parents studied in English in Canada at the primary level. The appellant parents, who do not qualify as rights holders under s. 73 or under s. 23 of the *Canadian Charter of Rights and Freedoms*, claim that s. 73 discriminates between children who qualify and the majority of French-speaking Quebec children who do not, and violates the right to equality guaranteed at ss. 10 and 12 of the *Quebec Charter of Human Rights and Freedoms*. Equality requires, the appellants argue, that all children in Quebec be given access to publicly funded English language education. Both the Superior Court and the Court of Appeal dismissed their claims.

Held: The appeal should be dismissed.

Since the appellants are members of the French language majority in Quebec, their objective in having their children educated in English simply does not fall within the purpose of s. 23 of the *Canadian Charter*. The appellants have no claim to publicly funded English language instruction in Quebec and, if adopted, the practical effect of their equality argument would be to read out of the Constitution the compromise contained in s. 23. [2] [30]

There is no hierarchy amongst constitutional provisions. Equality guarantees cannot therefore be used to invalidate other rights expressly conferred by the Constitution. All parts of the Constitution must be read together. It cannot be said that in implementing s. 23, the Quebec legislature has violated the equality rights contained in either s. 15(1) of the *Canadian Charter* or ss. 10 and 12 of the *Quebec Charter*. [2]

The purpose of s. 73 is not to “exclude” entire categories of children from a public service, but rather to implement the positive constitutional responsibility incumbent upon all provinces to offer minority language instruction to its minority language community. In seeking to use the right to equality to access a right guaranteed in Quebec only to the English language minority, the appellants put aside the linkage between s. 73 of the *Charter of the French language* and s. 23 of the *Canadian Charter*, and attempt to modify the categories of rights holders under s. 23. This is not permissible. Section 23 provides a comprehensive code for minority language education rights and achieves its purpose of protecting and promoting the minority language community in each province by helping to bring about the conditions under which the

English community in Quebec and the French communities of the other provinces can flourish. [10-16] [22] [28-29]

Cases Cited

Applied: *Adler v. Ontario*, [1996] 3 S.C.R. 609; *Mahe v. Alberta*, [1990] 1 S.C.R. 342; **referred to:** *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 201, 2005 SCC 14; *Reference re Use of French in Criminal Proceedings in Saskatchewan* (1987), 36 C.C.C. (3d) 353; *Québec (Procureure générale) v. Entreprises W.F.H. Ltée*, [2000] R.J.Q. 1222; *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3, 2000 SCC 1; *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66; *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505; *Abbey v. Essex County Board of Education* (1999), 42 O.R. (3d) 481; *Lavoie v. Nova Scotia (Attorney-General)* (1989), 58 D.L.R. (4th) 293.

Statutes and Regulations Cited

Act to promote the French language in Québec, S.Q. 1969, c. 9.

Canadian Charter of Rights and Freedoms, ss. 15(1), 23, 25, 27, 29.

Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 10, 12.

Charter of the French language, R.S.Q., c. C-11, ss. 72, 73, 75.

Constitution Act, 1867, ss. 91(24), 93.

Constitution Act, 1982, s. 35.

Official Language Act, S.Q. 1974, c. 6, s. 41.

Authors Cited

Canada. Parliament. Special Joint Committee on the Constitution of Canada. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 48, January 29, 1981, p. 108.

APPEAL from a judgment of the Quebec Court of Appeal (Gendreau, Mailhot and Forget JJ.A.), [2002] R.J.Q. 1298, [2002] Q.J. No. 1126 (QL), affirming a decision of Laramée J., [2000] R.J.Q. 2973, [2000] Q.J. No. 4688 (QL). Appeal dismissed.

Brent D. Tyler and Walter C. Elmore, for the appellants.

Benoît Belleau and Dominique A. Jobin, for the respondents.

François Boileau and Amélie Lavictoire, for the intervener.

The following is the judgment delivered by

1 THE COURT — In this appeal, the Court is asked to measure the constitutional right to minority language education against the right to equality. The appellants claim that the *Charter of the French language*, R.S.Q., c. C-11, which provides access to English language schools in Quebec only to children who have received or are receiving English language instruction in Canada or whose parents

studied in English in Canada at the primary level, discriminates between children who qualify and the majority of French-speaking Quebec children, who do not. The result, the appellants argue, violates the right to equality guaranteed at ss. 10 and 12 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. Equality requires, the appellants argue, that all children in Quebec be given access to publicly funded English language education.

2 If adopted, the practical effect of the appellants' equality argument would be to read out of the Constitution the carefully crafted compromise contained in s. 23 of the *Canadian Charter of Rights and Freedoms*. This is impermissible. As the Court has stated on numerous occasions, there is no hierarchy amongst constitutional provisions, and equality guarantees cannot therefore be used to invalidate other rights expressly conferred by the Constitution. All parts of the Constitution must be read together. It cannot be said, therefore, that in implementing s. 23, the Quebec legislature has violated either s. 15(1) of the *Canadian Charter* or ss. 10 and 12 of the Quebec *Charter*. The appeal should therefore be dismissed.

I. The Factual Background

3 The appellants are all parents who reside with their school-age children in the province of Quebec. With the exception of Lucille Giordano, they are all Canadian citizens. Furthermore, with the exception of Lucille Giordano and Marie-Irma Cadet, the appellants were all born in Quebec and received their instruction in French in Quebec.

4 Four of the families sought admission for their children to English language schools through the administrative remedies provided under the statute but without success. The other four families acknowledged that their children were not eligible. All eight families initiated proceedings in the Superior Court of Quebec.

II. Judicial History

A. *Quebec Superior Court*, [2000] R.J.Q. 2973

5 The various proceedings were joined and heard before Laramée J. who concluded that s. 73 of the *Charter of the French language* does not contravene s. 10 of the Quebec *Charter*. He reasoned that:

[TRANSLATION] In the case at bar, using the right to equality under section 10 of the Quebec *Charter of human rights and freedoms* to interpret section 73 of the *Charter of the French language* would distort the meaning and scope of the education guarantees provided to Quebec's Anglophone minority in the *Canadian Charter of Rights and Freedoms*. [para. 207]

6 He therefore dismissed all eight actions.

B. *Quebec Court of Appeal*, [2002] R.J.Q. 1298

7 In a unanimous judgment, the Court of Appeal (Gendreau, Mailhot and Forget JJ.A.) dismissed the claims. Relying on *Adler v. Ontario*, [1996] 3 S.C.R. 609, the court said it is not discriminatory under the *Charter of the French language* to implement s. 23 of the *Canadian Charter*: [TRANSLATION] "How could the Quebec legislature's actions be discriminatory if they are consistent with the *Canadian*

Charter?” (para. 27). The Court of Appeal also considered s. 10 of the Quebec *Charter* and found that on that basis, too, s. 73 of the *Charter of the French language* was not discriminatory.

III. Relevant Legislative and Constitutional Provisions

8 See Appendix.

IV. Analysis

9 At the outset, we emphasize that the appellant parents do not qualify as rights holders under s. 23 of the *Canadian Charter* or s. 73 of the *Charter of the French language*. They did not receive their primary school instruction in Canada in English and their children are receiving or have received all of their instruction in French in Quebec. Their situation, therefore, is fundamentally and constitutionally different from that of the appellants in the companion case, *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 201, 2005 SCC 14 (*sub nom. Casimir v. Quebec (Attorney General)*) (hereinafter *Casimir*).

10 The appellants are in a position no different from the majority of Quebec residents who receive or have received their primary and secondary instruction in French. Nonetheless, they claim that the categories of rights holders implemented by the *Charter of the French language* are discriminatory and should be reformed to permit them to enrol their children in English language instruction in Quebec. As members of the French language majority in Quebec, they seek to use the right to equality to access a right guaranteed in Quebec only to the English language minority.

11 In this respect, the appellants rely in particular on s. 10 of the Quebec
Charter which expressly includes language as a prohibited ground of discrimination:

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

12 Section 15(1) of the *Canadian Charter* does not expressly enumerate language as a prohibited ground of discrimination. However, we agree with the observations of the Saskatchewan Court of Appeal in *Reference re Use of French in Criminal Proceedings in Saskatchewan* (1987), 36 C.C.C. (3d) 353, at p. 373, that:

Nor, in our view, does the presence in the Charter of the language provisions of ss. 16 to 20, or the deletion from an earlier draft of s. 15(1) of the word “language”, have the effect necessarily of excluding from the reach of s. 15 the form of distinction at issue in this case.

In *Québec (Procureure générale) v. Entreprises W.F.H. Ltée*, [2000] R.J.Q. 1222, at p. 1250, the Quebec Superior Court held that [TRANSLATION] “maternal language” was an analogous ground. It is not necessary to explore this point further on this appeal because the principal issue is not the content of the equality rights under the *Canadian Charter* but, assuming the appellants have an arguable case to bring themselves within s. 15(1) of the *Canadian Charter*, the issue at the root of this appeal is the relationship of equality rights in both the *Canadian Charter* and the *Quebec Charter* to the positive language

guarantees given to minorities under the Constitution of Canada and the *Charter of the French language*.

A. *Section 73 of the Charter of the French Language*

13 In advancing their claim, the appellants put aside the linkage between s. 73 of the *Charter of the French language* and s. 23 of the *Canadian Charter*. Section 23 may be part of the Constitution, they argue, but s. 73 is not, and like any other statute must comply with equality guarantees. At the oral hearing, counsel for the appellants argued that:

. . . implementing legislation of a constitutional obligation under 23 does not immunize from judicial review an argument based on the *Quebec Charter of Rights* [for] an equal access to existing public institutions when that is interpreted in the way that we propose.

(Mr. Tyler's response, oral transcript, at p. 95)

14 We do not agree. The linkage is fundamental to an understanding of the constitutional issue. Otherwise, for example, any legislation under s. 91(24) of the *Constitution Act, 1867* ("Indians, and Lands reserved for the Indians") would be vulnerable to attack as race-based inequality, and denominational school legislation could be pried loose from its constitutional base and attacked on the ground of religious discrimination. Such an approach would, in effect, nullify any exercise of the constitutional power: *Adler*, at para. 39; *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at pp. 1197 and 1206.

15 In the context of minority language education, equality in substance as opposed to mere formal equality may require differential treatment as the Court noted

in *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3, 2000 SCC 1, at para. 31:

Section 23 is premised on the fact that substantive equality requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language majority.

16 The appellants misconceive the objective of s. 73 of the *Charter of the French language* when they submit that “[t]he stated purpose and effect of the provisions of the CFL is to first distinguish and then exclude entire categories of children from a public service” (appellants’ factum, at para. 48 (emphasis in original)). The purpose of s. 73 is not to “exclude” but rather to implement the positive constitutional responsibility incumbent upon all provinces to offer minority language instruction to its minority language community. It is from this perspective that the present appeal must be considered.

B. *Legislative Background to the Charter of the French Language*

17 There was a time in Quebec’s history when parents had “free access” (in law, although not always in practice) to either French or English language instruction for their children. Such access was, of course, subject to availability. In 1969, the Quebec legislature adopted the *Act to promote the French language in Québec*, S.Q. 1969, c. 9 (Bill 63), which affirmed French as the primary language of instruction and obliged school boards to offer courses in French. However, it also reaffirmed that parents could continue to select the language of instruction of their children.

18 For a variety of reasons related to the protection of the French language and culture, the Quebec legislature, in 1974, revised its policy on access to English language instruction. The *Official Language Act*, S.Q. 1974, c. 6 (Bill 22), affirmed French as the language of instruction in Quebec. To access English language instruction, a child had to demonstrate “a sufficient knowledge” of the English language (s. 41), which was assessed by language tests administered by the Ministry of Education. Difficulties encountered in the administration of language tests prompted the Quebec legislature again to rethink its policy.

19 In 1977, the *Charter of the French language* was adopted. At the time of its inception, ss. 72 and 73 read as follows:

72. Instruction in the kindergarten classes and in the elementary and secondary schools shall be in French, except where this chapter allows otherwise.

...

73. In derogation of section 72, the following children, at the request of their father and mother, may receive their instruction in English:

(a) a child whose father or mother received his or her elementary instruction in English, in Québec;

(b) a child whose father or mother, domiciled in Québec on the date of the coming into force of this act, received his or her elementary instruction in English outside Québec;

(c) a child who, in his last year of school in Québec before the coming into force of this act, was lawfully receiving his instruction in English, in a public kindergarten class or in an elementary or secondary school;

(d) the younger brothers and sisters of a child described in paragraph c.

After adoption of the *Canadian Charter* in 1982, a constitutional challenge was launched against the 1977 legislation. In *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, our Court concluded that the categories

set out in s. 73 of the *Charter of the French language* were underinclusive with reference to s. 23 of the *Canadian Charter*, and adopted the view that:

[TRANSLATION] Section 73 of the *Charter of the French language* does not limit the right conferred by s. 23: rather, it constitutes a permanent alteration of the classes of citizens who are entitled to the protection afforded by that section. By laying down conditions of access which run directly counter to those expressly stated in s. 23, and which by their very nature have the effect of permanently depriving an entire class of individuals of the right conferred by s. 23, s. 73 alters the very content of that right. . . . [p. 87]

The constitutional deficiency resulted precisely from the absence of a provincial geographical limitation from s. 23 of the *Canadian Charter*.

20 Following the successful court challenge to the 1977 Act, s. 23 of the *Canadian Charter* directly governed access to English instruction in Quebec from 1984 to 1993. However, in 1993, the Quebec legislature re-enacted ss. 72 and 73 of the *Charter of the French language* in light of this Court's decision in *Quebec Association of Protestant School Boards*. In the companion appeal of *Casimir*, we consider the constitutional challenge to the amended s. 73 of the *Charter of the French language*.

C. *The Right to Equality Is Not Opposable to Section 23 of the Canadian Charter*

21 In *Mahe v. Alberta*, [1990] 1 S.C.R. 342, this Court explained that any analysis of minority language instruction must take as its starting point the guarantees provided in s. 23 in the *Canadian Charter*. The reasoning found at p. 369 of the reasons of the Chief Justice in *Mahe* apply here with equal force:

Section 23 provides a comprehensive code for minority language educational rights; it has its own internal qualifications and its own method

of internal balancing. A notion of equality between Canada's official language groups is obviously present in s. 23. Beyond this, however, the section is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada. . . . [I]t would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to "every individual". [Emphasis added.]

As noted earlier, s. 23 could also be viewed not as an "exception" to equality guarantees but as their fulfilment in the case of linguistic minorities to make available an education according to their particular circumstances and needs equivalent to the education provided to the majority (*Arsenault-Cameron*, at para. 31).

22 The appellants in this case are attempting to accomplish precisely that which *Mahe* said was prohibited, namely the use of equality guarantees to modify the categories of rights holders under s. 23. The attempt was rejected in *Mahe*, albeit in different circumstances, and should be rejected again in this appeal.

D. *There Is No Hierarchy of Constitutional Rights*

23 On a number of occasions, this Court has been called upon to evaluate the impact of s. 15 of the *Canadian Charter* on other sections of the Constitution. In *Adler*, the right to equality was measured against the guarantees with respect to denominational schools provided for by s. 93 of the *Constitution Act, 1867*:

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions: —

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

...

24 In *Adler*, the Court held that s. 93(1) had the effect of constitutionally entrenching “a special status for such classes of persons, granting them rights which are denied to others” (para. 25). Section 93 provided a “comprehensive code” of denominational school rights. The equality claim failed “because the funding of Roman Catholic separate schools and public schools is within the contemplation of the terms of s. 93 and is, therefore, immune from *Charter* scrutiny” (para. 27). Drawing an analogy with s. 23 of the *Canadian Charter* and the reasoning of the Court in *Mahe*, Iacobucci J. concluded that “both sections grant special status to particular classes of people” (para. 32).

25 Counsel supporting the appellants attempted to distinguish the denominational schools question at issue in *Adler* from the minority language education rights at issue in the present case on the basis that in this case there is no precise equivalent to s. 29 of the *Canadian Charter*, which provides:

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

The argument is that to the extent s. 29 was the foundation of the decision in *Adler*, and since there is no equivalent clause for minority language instruction, the equality guarantee of the Quebec *Charter* is to be given paramountcy.

26 We disagree. The attempt to give equality guarantees a superior status in a “hierarchy” of rights must be rejected. It will be recalled that in *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, the Court held that s. 29 was included in the *Canadian Charter* “only for greater certainty”. Wilson J. stated, at pp. 1197-98:

I have indicated that the rights or privileges protected by s. 93(1) are immune from *Charter* review under s. 29 of the *Charter*. I think this is clear. What is less clear is whether s. 29 of the *Charter* was required in order to achieve that result. In my view, it was not. I believe it was put there simply to emphasize that the special treatment guaranteed by the constitution to denominational, separate or dissentient schools, even if it sits uncomfortably with the concept of equality embodied in the *Charter* because not available to other schools, is nevertheless not impaired by the *Charter*. It was never intended, in my opinion, that the *Charter* could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise. Section 29, in my view, is present in the *Charter* only for greater certainty, at least in so far as the Province of Ontario is concerned. [Emphasis added.]

See also *Ontario Home Builders’ Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, at paras. 76-77.

27 The absence of a provision similar to s. 29 for minority language instruction therefore does not assist the appellants. Equality rights, while of immense importance, constitute just part of our constitutional fabric. In *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, the protection of minorities was also identified as a key principle, manifested in part in minority language education rights (s. 23 of the *Canadian Charter*), denominational school rights (s. 93 of the *Constitution Act, 1867*) and aboriginal and treaty rights (ss. 25 of the *Canadian Charter* and 35 of the *Constitution Act, 1982*). The Court stated:

. . . even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such

a concern reflects a broader principle related to the protection of minority rights. [para. 80]

See also *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505 (C.A.), at para. 101.

E. *Implementation of Minority Language Instruction in Quebec*

28 The purpose of s. 23 is the protection and promotion of the minority language community in each province. Section 23 is of prime importance given “the vital role of education in preserving and encouraging linguistic and cultural vitality. It thus represents a linchpin in this nation’s commitment to the values of bilingualism and biculturalism” (*Mahe*, at p. 350).

29 Section 23 achieves its purpose by ensuring that the English community in Quebec and the French communities of the other provinces can flourish. As this Court said in *Mahe*, at p. 362, “[t]he section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada” (emphasis added). This goal is quite distinct from the offering of minority language instruction to the majority, as was made clear during the constitutional debates when the then Minister of Justice, Jean Chrétien, addressed the Special Joint Committee hearings:

We are not determining education for the majority, but for the minorities.

The fact that many anglophones now take advantage of immersion courses which have become very popular in Manitoba, Alberta, Saskatchewan, British Columbia etc., pleases me immensely; and it is the provinces that run these programs. Here, in the charter, we aim to protect the rights of the minority. [Emphasis added.]

(Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Issue No. 48, January 29, 1981, at p. 108)

30 The appellants are members of the French language majority in Quebec and, as such, their objective in having their children educated in English simply does not fall within the purpose of s. 23. The Ontario Court of Appeal in *Abbey v. Essex County Board of Education* (1999), 42 O.R. (3d) 481, at pp. 488-89, said, with respect to Ontario, that “[a]nglophone parents in Ontario do not have a constitutional right to have their children educated in French as a matter of choice. Their children cannot be admitted to a French language school unless an admissions committee, controlled by members of the minority group, grants them access.” See also *Lavoie v. Nova Scotia (Attorney-General)* (1989), 58 D.L.R. (4th) 293 (N.S.S.C. (App. Div.)), at pp. 313-15. And so it is with the parents who belong to the majority language community in Quebec.

31 In rejecting “free access” as the governing principle in s. 23, the framers of the *Canadian Charter* were concerned about the consequences of permitting members of the majority language community to send their children to minority language schools. The concern at the time (which the intervener, the Commissioner of Official Languages for Canada, submitted is a continuing concern today) was that at least outside Quebec minority language schools would themselves become centres of assimilation if members of the majority language community swamped students from the minority language community. Within Quebec, the problem has the added dimension that what are intended as schools for the minority language community should not operate to undermine the desire of the majority to protect and enhance French as the majority language in Quebec, knowing that it will remain the minority language in the broader context of Canada as a whole. In the companion appeal *Casimir*, at paras. 49-50, we

examine some of the concerns that would arise if minority language schools become the functional equivalents of immersion programs for the majority language community in Quebec. We also took care in *Casimir* “to emphasize that the application of s. 23 must take into account the very real differences between the situation of the minority language community in Quebec and the minority language communities in the territories and other provinces” (para. 44). If the problems are different, the solutions will not necessarily be the same.

32 Practical concerns include the management and control of minority language schools. In *Mahe*, at p. 372, our Court explained the importance of retaining control in the hands of the minority:

Furthermore, as the historical context in which s. 23 was enacted suggests, minority language groups cannot always rely upon the majority to take account of all of 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.

A provincial government that provided equal access to all citizens to minority language schools would not be “do[ing] whatever is practically possible to preserve and promote minority language education” (*Arsenault-Cameron*, at para. 26).

33 In short, as Dickson C.J. observed in *Mahe*, at p. 369:

. . . it would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to “every individual”.

34 Practical reasons as well as legal principle support the conclusion that s. 23
minority language education rights cannot be subordinated to the equality rights
guarantees relied upon by the appellants.

V. Conclusion

35 For the reasons outlined above, the appellants have no claim to publicly
funded English language instruction in Quebec.

36 Their appeal is dismissed with costs (if demanded).

APPENDIX

Canadian Charter of Rights and Freedoms

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

...

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.

...

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

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

Charter of the French language, R.S.Q., c. C-11

72. Instruction in the kindergarten classes and in the elementary and secondary schools shall be in French, except where this chapter allows otherwise.

This rule obtains in school bodies within the meaning of the Schedule and in private educational institutions accredited for purposes of subsidies under the Act respecting private education (chapter E-9.1) with respect to the educational services covered by an accreditation.

Nothing in this section shall preclude instruction in English to foster the learning thereof, in accordance with the formalities and on the conditions prescribed in the basic school regulations established by the Government under section 447 of the Education Act (chapter I-13.3).

73. The following children, at the request of one of their parents, may receive instruction in English:

(1) a child whose father or mother is a Canadian citizen and received elementary instruction in English in Canada, provided that that instruction constitutes the major part of the elementary instruction he or she received in Canada;

(2) a child whose father or mother is a Canadian citizen and who has received or is receiving elementary or secondary instruction in English in Canada, and the brothers and sisters of that child, provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada;

(3) a child whose father and mother are not Canadian citizens, but whose father or mother received elementary instruction in English in Québec, provided that that instruction constitutes the major part of the elementary instruction he or she received in Québec;

(4) a child who, in his last year in school in Québec before 26 August 1977, was receiving instruction in English in a public kindergarten class or in an elementary or secondary school, and the brothers and sisters of that child;

(5) a child whose father or mother was residing in Québec on 26 August 1977 and had received elementary instruction in English outside Québec, provided that that instruction constitutes the major part of the elementary instruction he or she received outside Québec.

However, instruction in English received in Québec in a private educational institution not accredited for the purposes of subsidies by the child for whom the request is made, or by a brother or sister of the child, shall be disregarded. The same applies to instruction in English received in Québec in such an institution after 1 October 2002 by the father or mother of the child.

Instruction in English received pursuant to a special authorization under section 81, 85 or 85.1 shall also be disregarded.

75. The Minister of Education may empower such persons as he may designate to verify and decide on children's eligibility for instruction in English under any of sections 73, 81, 85 and 86.1.

Charter of Human Rights and Freedoms, R.S.Q., c. C-12

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

12. No one may, through discrimination, refuse to make a juridical act concerning goods or services ordinarily offered to the public.

Appeal dismissed with costs.

Solicitor for the appellants: Brent D. Tyler, Montréal.

*Solicitors for the respondents: Bernard, Roy & Associés, Montréal;
Department of Justice, Montréal.*

*Solicitor for the intervener: Office of the Commissioner of Official
Languages for Canada, Ottawa.*