500-09-029550-217

COURT OF APPEAL OF QUÉBEC

(Montréal)

On appeal from a judgment of the Superior Court, District of Montréal, rendered on April 20, 2021 by the Honourable Justice Marc-André Blanchard.

Nos. 500-17-109983-190 S.C.M. – 500-17-108353-197 S.C.M.
500-17-109731-193 S.C.M. – 500-17-107204-193 S.C.M.

PROCUREUR GÉNÉRAL DU QUÉBEC

JEAN-FRANÇOIS ROBERGE, en sa qualité de ministre de l'Éducation

SIMON JOLIN-BARRETTE, en sa qualité de ministre de l'Immigration, de la Diversité et de l'Inclusion

APPELLANTS /
INCIDENTAL RESPONDENTS
(Defendants)

v.

ICHRAK NOUREL HAK

NATIONAL COUNCIL OF CANADIAN MUSLINS (NCCM)

CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT

ANDRÉA LAUZON

HAKIMA DADOUCHE

BOUCHERA CHELBI

COMITÉ JURIDIQUE DE LA COALITION INCLUSION QUÉBEC

RESPONDENTS
(Plaintiffs)

(Style of cause continues next page)

IMPLEADED PARTY / INCIDENTAL APPELLANT QUEBEC COMMUNITY GROUPS NETWORK'S BRIEF

Dated December 2, 2021

LAFORTUNE
LEGAL

Montréal 514 374-0400 | Québec 418 641-0101 | lafortune.ca

- and -

ENGLISH MONTREAL SCHOOL BOARD
MUBEENAH MUGHAL
PIETRO MERCURI

RESPONDENTS /
INCIDENTAL APPELLANTS
(Plaintiffs)

- and -

QUEBEC COMMUNITY GROUPS NETWORK

IMPLEADED PARTY /
INCIDENTAL APPELLANT
(Intervener)

- and -

COMMISSION CANADIENNE DES DROITS DE LA PERSONNE
MOUVEMENT LAÏQUE QUÉBÉCOIS
L'ASSOCIATION DE DROIT LORD READING

IMPLEADED PARTIES
(Interveners)

- and -

FRANÇOIS PARADIS, en sa qualité de président de l'Assemblée nationale du Québec
ASSOCIATION DES COMMISSIONS SCOLAIRES ANGLOPHONES DU QUÉBEC
FÉDÉRATION DES FEMMES DU QUÉBEC
FONDS D'ACTION ET D'ÉDUCATION JURIDIQUE POUR LES FEMMES

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IMPLEADED PARTY / INCIDENTAL APPELLANT
QUEBEC COMMUNITY GROUPS NETWORK'S ARGUMENT

OVERVIEW

1. The Incidental Appellant Quebec Community Groups Networks (referred to herein as the "**QCGN**") partially appeals the judgment rendered by the Honourable Marc-André Blanchard J.S.C. on April 20, 2021 (the ''Judgement");[1]

2. The QCGN is a not-for-profit organization linking more than 44 English-language community organizations across Quebec. As a centre of evidence-based expertise and collective action its mission is to support the English-speaking minority in Quebec, particularly in the areas of access to justice, social, health and education services, the integration of newcomers and the social involvement of youth and seniors;[2]

3. In this Incidental Appeal, the QCGN maintains that the trial judge correctly concluded that several provisions of the *Act respecting the laicity of the State, SQ 2019, c 12* ("*Bill 21*") violate Sec. 23 of the *Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11,* (hereafter the "*Canadian Charter*") and are of no force or effect with respects to physical and legal persons who benefit from the guarantees provided by Sec. 23, pursuant to Sec. 52 of the *Canadian Charter*;

4. The QCGN submits that the trial judge erred in law by severing those entitled to Sec. 23 protection instead of invalidating *Bill 21* as it affected all teachers and school personnel;

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[1] **Annexes conjointes (hereinafter "A.C."), Vol. 1 at pp. 1ff.**

[2] *Id.* at paras 36-37, **A.C., Vol. 1 at p. 12**; Acte d'intervention par Québec Community Groups Network at para. 5, **A.C., Vol. 4 at p. 730**; Affidavit Geoffrey Chambers at para. 3, **A.C., Vol. 4 at pp. 735-736.**

5. It is to be noted that the QCGN, in its role as impleaded party, supports the arguments put forward by the parties contesting the law, particularly the English Montreal School Board (EMSB), as appellants, respondents and/or impleaded parties in the files 500-09-029537-214,[3] 500-09-029539-210,[4] 500-09-029541-216,[5] 500-09-029544-210,[6] 500-09-029545-217,[7] 500-09-029546-215,[8] 500-09-029549-219,[9] 500-09-029550-217;[10]

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[3] Déclaration d'appel de la World Sikh Organization of Canada et autre, **A.C., Vol. 2 at pp. 241ff.**

[4] Déclaration d'appel modifiée de l'Association de droit Lord Reading, **A.C., Vol. 2 at pp. 371ff.**

[5] Déclaration d'appel du Mouvement Laïque québécois, **A.C., Vol. 2 at pp. 252ff.**

[6] Déclaration d'appel de la Fédération autonome de l'enseignement, **A.C., Vol. 2 at pp. 271ff.**

[7] Déclaration d'appel de Andréa Lauzon et autres, **A.C., Vol. 2 at pp. 288ff.**

[8] Déclaration d'appel de Ichrak Nourel Hak et autres, **A.C., Vol. 2 at pp. 313ff.**

[9] Déclaration d'appel de PDF Québec, **A.C., Vol. 2 at pp. 328ff.**

[10] Déclaration d'appel du Procureur général du Québec., **A.C., Vol. 2 at pp. 350ff.**; Notice of Incidental Appeal of English Montreal School Board, Mubeenah Mughal and Pietro Mercuri, **A.C., Vol. 2 at pp. 388.1ff.**

PART I – FACTS

6. The QCGN invites the court to refer to the trial judge's presentation of the facts of the case found at paragraphs 5 to 71 of the Judgement and brings the Court's attention to the following;

7. *Bill 21* was adopted on June 16, 2019;

8. Its content, as described by paragraphs 52-63 of the Judgement, explicitly set out to regulate the relationship between the State and religions in Quebec and invoked the notwithstanding clause in sections 33 and 34 of *Bill 21* to ensure that it would stand notwithstanding sections 1 through 38 of the *Charter of Human Rights and Freedoms,* CQLR c C-12,(hereafter "*Quebec Charter*") and notwithstanding sections 2 and 7 o 15 of the *Canadian Charter*;

9. Multiple parties challenged *Bill 21*,[11] claiming that it violates freedom of religion and discriminates against religious minorities by asking them to choose between their right to work and participate in provincial public institutions and their faith, identity, and self-expression;[12]

10. The four main applications - file 5000-17-1083530197 (known as the *Hak* file), file 500-17-109731-193 (known as the *Lauzon* file), file 500-17-109983-190 (known as the *English Montreal School Board (EMSB)* file) and file 500-17-107204-193 (known as the *Fédération autonome de l'enseignement* (*FAE*) file) were joined on November 15, 2019;[13]

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[11] Judgement at paras 1-2, **A.C., Vol. 1 at p. 5** and section 1.1 – Les parties : Les demanderesses et les intervenantes en demande, **A.C., Vol. 1 at pp. 7-13.**

[12] *Id.,* section 4.1 – Résumé de la position des parties : Les parties demanderesses, **A.C., Vol. 1 at pp. 38-41.**

[13] Jugement de la Cour supérieure accueillant la Demande d'intervention de la Commission canadienne des droits de la personne et de Québec Community Groups Network (Judgement by Justice Mainville of the Superior Court), **A.C., Vol. 4 at pp. 742ff.**

11. After 33 days of trial, the Honourable Marc-André Blanchard J.S.C. rendered his decision on April 20, 2021;

12. He concluded that the discriminatory nature of the impugned provisions of *Bill 21* was saved by the use of the notwithstanding clause and that Sec. 28 could not serve to invalidate the law with respect to the underlying rights guaranteed equally to men and women[14] even though the *Bill 21* disproportionately affects women, especially Muslim women;[15]

13. With regards to the *EMSB* file in which the plaintiffs argued that *Bill 21* violated Sec. 23 and Sec. 28 of the *Canadian Charter* in a manner not justified by Sec. 1, the trial judge concluded:

> [1137] **ACCUEILLE** en partie la demande;
>
> [1138] **DÉCLARE** que le premier alinéa de l'article 4, les articles 6, 7, 8, 10, le premier et le deuxième alinéa de l'article 12, les articles 13, 14 et 16, lus en conjonction avec le paragraphe 7 de l'annexe I, le paragraphe 10 de l'annexe II et le paragraphe 4 de l'annexe III de la *Loi sur la laïcité de l'État*, RLRQ c. L-0.3, violent l'article 23 de la *Charte canadienne des droits et libertés*;
>
> [1139] **DÉCLARE** que ces violations ne peuvent se justifier aux termes de l'article 1 de la *Charte canadienne des droits et libertés*;
>
> [1140] **DÉCLARE** inopérants le premier alinéa de l'article 4, les articles 6, 7, 8, 10, le premier et le deuxième alinéa de l'article 12, les articles 13, 14 et 16, lus en conjonction avec le paragraphe 7 de l'annexe I, le paragraphe 10 de l'annexe II et le paragraphe 4 de l'annexe III de la *Loi sur la laïcité de l'État*, RLRQ c. L-0.3, en vertu de l'article 52 de la *Charte canadienne des droits et libertés* pour toute personne, tant physique que morale, qui peut bénéficier des garanties prévues à l'article 23 de cette même Charte;

---

14 Judgement, section 12 – La violation du droit à l'égalité de garantie des droits pour les deux sexes prévu à l'article 28 de la Charte canadienne, **A.C., Vol. 1 at pp. 170-190.**

15 *Id.* at paras 67 and 802-807, **A.C., Vol. 1 at pp. 18 and 170-171.**

14. These conclusions were appealed by Mouvement laïque québécois (file number 500-09-029539-210),[16] Pour les femmes du Québec (file number 500-09-029549-219)[17] and the Attorney General of Québec (file number 500-09-029550-217)[18] on slightly differing grounds;

15. As an impleaded party in files 500-09-029539-210 and 500-09-029549-219, and an Incidental Appellant in file 500-09-029550-217, the QCGN makes the following submissions;

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16 Déclaration d'appel du Mouvement Laïque québécois, **A.C., Vol. 2 at pp. 252ff.**
17 Déclaration d'appel de PDF Québec, **A.C., Vol. 2 at pp. 328ff.**
18 Déclaration d'appel du Procureur général du Québec, **A.C., Vol. 2 at pp. 350ff.**

PART II – ISSUE IN DISPUTE

16. As noted in its Notice of Incidental Appeal,[19] the QCGN raises the following question:

9.5 Did the trial judge err in applying the remedy of severance in his conclusions regarding file 500-17-109983-190 rather than declaring that the impugned provisions of the Act should have been declared invalid and inoperative with respect to all teachers and school personnel, not just the schools for the beneficiaries of s.23 of the Canadian Charter?

17. The QCGN will demonstrate that **(a)** the trial judge's findings that the impugned provisions of the Act regard to the violation of Sec. 23 of the *Canadian Charter* were rooted in jurisprudence and should be maintained and **(b)** that the correct remedy in this case would be to declare the provisions invalid and inoperative with respect to all teachers;

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[19] Déclaration d'appel incident de Québec Community Groups Network (Notice of Incidental Appeal) at paras 13-23, **A.C., Vol. 2 at pp. 389ff.**

PART III – SUBMISSIONS

9.5 The trial judge erred in applying the remedy of severance in his conclusions regarding file 500-17-109983-190 rather than declaring that the impugned provisions of the Act should have been declared invalid and inoperative with respect to all teachers and school personnel, not just the schools for the beneficiaries of s.23 of the Canadian Charter

a. The violation of Sec. 23 and the trial judge's conclusions

18. Contrary to appellant Attorney General who maintains that the trial judge erred in law in his analysis of Sec. 23 rights, the QCGN maintains that the trial judge's analysis at section 13.3 of the Judgement and his conclusions are correct and should be maintained;

19. In section 13.3.1 of the decision, the trial judge turned to decisions rendered by the Supreme Court of Canada[20] and correctly concluded that one must reject the narrow interpretation of the language rights provision; and that the scope of Sec. 23 of the *Canadian Charter* is greater than simply the right of eligible parents who are part of linguistic minorities to have their children educated in their language; it includes protections of the individual and collective rights and must favour the flourishing of the minority official language communities and culture;[21]

---

[20] Particularly: *A.G. (Que.) v. Quebec Protestant School Boards,* [1984] 2 SCR 66 [*A.G. (Que.) v. Quebec Protestant School Boards*]; *Mahe v. Alberta,* [1990] 1 SCR 342; *R. v. Beaulac,* [1999] 1 SCR 768; *Arsenault-Cameron v. Prince Edward Island,* 2000 SCC 1; *Gosselin (Tutor of) v. Quebec (Attorney General),* 2005 SCC 15, [2005] 1 SCR 238; *Doucet-Boudreau v. Nova Scotia (Minister of Education),* [2003] 3 SCR 3, 2003 SCC 62; *Nguyen v. Quebec (Education, Recreation and Sports),* 2009 SCC 47; *Solski (Tutor of) v. Quebec (Attorney General),* 2005 SCC 14; *Association des parents de l'école Rose-des-vents v. British Columbia (Education),* 2015 SCC 21; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia,* [2013] 2 SCR 774.

[21] Judgement at paras 940-952, **A.C., Vol. 1 at pp. 200-203.**

20. In particular, the following paragraphs are pertinent:

> [941] Puis en 1990, dans une décision fondatrice pour la compréhension de la portée de l'article 23, *Mahe* c. *Alberta*, elle en enseigne toute l'importance, notant le rôle primordial que joue l'instruction dans le maintien et le développement de la vitalité linguistique et culturelle. En effet, puisque la langue fait partie intégrante de l'identité et de la culture du peuple qui la parle, cette dernière se trouve véhiculée par la première. Ce disant, elle renvoie avec approbation aux travaux de la Commission Laurendeau-Dunton quant à l'importance de dispenser un enseignement qui convienne particulièrement à l'identité linguistique et culturelle.
>
> [942] La Cour y souligne aussi la fonction réparatrice de l'article 23. Bien qu'à priori il peut sembler que cet aspect de la portée de cette garantie apparaît moins pertinent au présent débat, il n'en demeure pas moins que la bataille constante contre la discrimination des minorités, peu importe leur nature, permet d'envisager un certain rôle de réparation dans le contexte de l'instance.
>
> [943] Rappelant que l'histoire canadienne montre que la majorité ne tient pas toujours compte des préoccupations linguistiques et culturelles des minorités linguistiques, la haute instance en conclut que ces dernières doivent détenir une certaine mesure de contrôle sur leurs établissements d'instruction et le programme éducatif et plus particulièrement :
>
> > […]
> >
> > (3) Les représentants de la minorité linguistique doivent avoir le pouvoir exclusif de prendre des décisions concernant l'instruction dans sa langue et les établissements où elle est dispensée s'y rapportant, notamment :
> >
> > > a) les dépenses de fonds prévus pour cette instruction et ces établissements;
> > >
> > > b) <u>la nomination et la direction des personnes chargées de l'administration de cette instruction et de ces établissements</u>;

> c) l'établissement de programmes scolaires;
>
> d) le recrutement et l'affectation du personnel, notamment des professeurs; et
>
> e) la conclusion d'accords pour l'enseignement et les services dispensés aux élèves de la minorité linguistique.
>
> (Le Tribunal souligne)
>
> [944] À ce sujet, elle souligne qu'il s'agit là du niveau minimum de gestion et de contrôle puisque les autorités provinciales et locales peuvent, bien sûr, en accorder plus. Autre conclusion importante pour l'instance, la Cour suprême affirme qu'évidemment ce pouvoir de gestion et de contrôle n'exclut pas la règlementation provinciale, mais ce, uniquement dans la mesure où celle-ci ne s'avère pas incompatible avec les préoccupations linguistiques et culturelles de la minorité.
>
> [945] Notons qu'en 1999, dans *R.* c. *Beaulac*, elle enseigne que, dans tous les cas, les droits linguistiques doivent recevoir une interprétation libérale en fonction de leur objet, qui vise le maintien et l'épanouissement des collectivités de langue officielle au Canada.
>
> [Footnotes omitted]

21. As the trial judge put it simply, ''Il ne fait aucun doute que ces énoncés lient le Tribunal";[22]

22. Additionally, the trial judge was correct in noting that precedent holds that the protections of Sec. 23 must be interpreted purposively with regards to the preservation and development of language communities and cultures and that Sec. 23 includes "la bataille constante contre la discrimination des minorités, peu importe leur nature";[23]

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[22] *Id.* at para. 952, **A.C., Vol. 1 at p. 203.**
[23] *Id.* at para. 942, **A.C., Vol. 1 at p. 200.**

23. The trial judge also correctly concluded that the *Bill 21* violated the protected power of management and control of English school boards by limiting their ability to recruit teachers and staff and promote individuals who wear religious symbols;

24. As the judge pointed out, the English community appears unconvinced by the notion of ''laicité'' as promoted by the government,[24] and therefore, exemption from it would be fundamental in its ability to maintain its culture and its attitudes;

25. The QCGN draws the Courts attention to following paragraphs:

> [983] Sans nier ni diminuer le fait que la reconnaissance de la diversité culturelle et religieuse existe et se trouve valorisée dans le système d'éducation public francophone, le Tribunal doit constater que la preuve non contredite permet de conclure que les commissions scolaires anglophones et leurs enseignants.es ou directeurs.trices accordent une importance particulière à la reconnaissance et célébration de la diversité ethnique et religieuse.
>
> …
>
> [989] Pour le Tribunal, il ne fait aucun doute que la diversité des appartenances culturelles et religieuses participe à l'élaboration de programmes didactiques qui visent à bonifier l'éducation interculturelle et que la participation réelle de personnes représentant ces différentes appartenances constitue un atout, non seulement pour l'élève, mais également pour le corps professoral.
>
> …
>
> [993] Dans la mesure ou une ou plusieurs commissions scolaires anglophones décident que leurs institutions d'enseignement désirent engager et promouvoir des personnes portant des signes religieux parce qu'elles considèrent que cela participe à promouvoir et à refléter la diversité culturelle de

[24] *Id.,* section 13.3.2. – La violation des droits non visés par la clause de dérogation prévue à l'article 33 de la Charte canadienne : La preuve relative à l'article 23, **A.C., Vol. 1 at pp. 208-214.**

> la population qu'elles desservent, l'article 23 de la Charte empêche le législateur d'obvier directement ou indirectement à un tel objectif.
>
> [994] Sans crainte de se tromper, le Tribunal peut affirmer que le bon sens, qui fait partie de l'attirail judiciaire, permet de conclure que l'absence systématique dans un espace social de personnes auxquelles une autre, partageant les mêmes caractéristiques, peut s'identifier constitue à la fois un obstacle dans la reconnaissance sociale de la valeur de ces caractéristiques, tout autant qu'un facteur de marginalisation pour tout individu qui visa à obtenir cette reconnaissance.
>
> ….
>
> [997] Ainsi la preuve démontre clairement, d'une part, que les commissions scolaires anglophones désirent intégrer les minorités culturelles qui portent des signes religieux afin, d'autre part, faciliter cette même intégration et la réussite scolaire de ses élèves issues de groupes religieux minoritaires qui portent des signes religieux, en assurant une représentativité de ces minorités dans le corps enseignant et les dirigeants d'établissement scolaire.
>
> …
>
> [1003] Le Tribunal conclut donc qu'il ne fait aucun doute que le premier alinéa de l'article 4, les articles 6, 7, 8, 10, le premier et le deuxième alinéa de l'article 12, les articles 13, 14 et 16 lus en conjonction avec le paragraphe 7 de l'annexe I, le paragraphe 10 de l'annexe II et le paragraphe 4 de l'annexe III de la Loi 21, violent l'article 23 de la Charte.
>
> [Emphasis added; Footnote omitted]

26. It is submitted that he correctly found that the impugned provisions of *Bill 21* violate Sec. 23 of the *Canadian Charter* and are not justified by Sec. 1; allowing the Attorney General's Appeal would constitute a setback for decades of Charter jurisprudence and for the protection of anglophones in Quebec and francophones in other provinces;

27. During the trial, the Attorney General did not produce any specific evidence or argument of a justification under section 1 of the *Canadian Charter*,[25] while the judge did consider Sec. 1 and the evidence produced by *Mouvement laïque québécois* and *Pour les femmes du Québec,* he found the breach of Sec. 23 could not be justified;[26]

28. It would indeed be very difficult to demonstrate that limiting Sec. 23 of the *Canadian Charter* is <u>necessary</u> in a free and democratic society; the difficulty of applying Sec. 1 to Sec. 23 is well illustrated by *A.G. (Que.) v. Quebec Protestant School Boards*;

b. <u>The correct remedy would be to declare the provisions invalid and inoperative with respect to all teachers and school personnel</u>

29. The QCGN submits that the trial judge erred in law by severing those entitled to Sec. 23 protection instead of invalidating the impugned provisions of *Bill 21* as it affected teachers and personnel in all schools; it submits that the judgment should be modified in order to remove the application of *Bill 21* to all schools and not only the English ones;

30. While this position may seem paradoxical given that Sec. 23 protected minority language rights only, the QCGN maintains that it is the result of the application of the rules of severance as reaffirmed recently by the Supreme Court of Canada;

31. In *Ontario (Attorney General) v. G*,[27] the majority of the Supreme Court dealt as follows with severance:

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[25] See multiple references to this in Judgement, such as paras 1008 and 1039, **A.C., Vol. 1 at pp. 215 and 221.**

[26] *Id.* at para. 1110, **A.C., Vol. 1 at p. 234.**

[27] 2020 SCC 38 [*Ontario (Attorney General) v. G*].

> [116] In sum, consistent with the principle of constitutional supremacy embodied in s. 52(1) and the importance of safeguarding rights, courts must identify and remedy the full extent of the unconstitutionality by looking at the precise nature and scope of the Charter violation. To ensure the public retains the benefit of legislation enacted in accordance with our democratic system, remedies of reading down, reading in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved (Schachter, at p. 700; Vriend, at paras. 149-50). To respect the differing roles of courts and legislatures foundational to our constitutional architecture, determining whether to strike down legislation in its entirety or to instead grant a tailored remedy of reading in, reading down, or severance, depends on whether the legislature's intention was such that a court can fairly conclude it would have enacted the law as modified by the court. This requires the court to determine whether the law's overall purpose can be achieved without violating rights. If a tailored remedy can be granted without the court intruding on the role of the legislature, such a remedy will preserve a law's constitutionally compliant effects along with the benefit that law provides to the public. The rule of law is thus served both by ensuring that legislation complies with the Constitution and by securing the public benefits of laws where possible.
>
> [Emphasis added]

32. This is essentially a reiteration of *Ford v. Quebec (Attorney General)* and *Devine v. Quebec (Attorney General)*[28] where the Supreme Court invalidated the prohibition of the use of English, even in unilingual commercial signs, which the Court found were not constitutionally protected; it was for the government to decide on its course of action following the decision and, as a matter of fact, the government re-enacted the prohibition of unilingual English language commercial signs;

28 [1988] 2 SCR 712 [*Ford v. Quebec (Attorney General)*]; *Devine v. Quebec (Attorney General),* [1988] 2 SCR 790 [*Devine v. Quebec (Attorney General)*].

33. In *Devine v. Quebec (Attorney General)*,[29] the court said:

> 24. It remains to be considered whether the limit imposed on freedom of expression by the challenged provisions of the *Charter of the French Language*, which require the use of French while at the same time permitting the use of another language, is justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and s. 9.1 of the Quebec *Charter*. The section 1 and s. 9.1 materials submitted by the Attorney General of Quebec in justification of the challenged provisions were considered in *Ford.* For the reasons there stated, legislation requiring the exclusive as opposed to the predominant use of French is not justified under s. 1 or s. 9.1. Section 58 of the *Charter of the French Language*, as was shown in *Ford*, does require exclusive use of French and therefore does not survive s. 9.1 scrutiny. For the reasons given in that case, the requirement of either joint or predominant use is justified under s. 9.1 and s. 1.
>
> 25. However, s. 58 cannot be struck down in isolation; if it is found *ultra vires*, so too are several of its companion provisions at issue in the instant case. Sections 59, 60 and 61 as well as ss. 8, 9, 12, 13, 14, 15, 16 and 19 of the *Regulation respecting the language of commerce and business* create exceptions to s. 58. By leaving these exceptions standing, exceptions which on their own would withstand s. 9.1 or s. 1 scrutiny, the Court would be effecting an inversion of legislative intention. Clearly the sections were enacted in order to provide some relief from the stringent requirement of exclusivity mandated by s. 58. Section 59 simply has no meaning independent of s. 58; it cannot be an explicit exception to a rule that no longer exists. The exception contained in s. 60 is of an implicit nature. It provides that firms employing fewer than four persons are exempted from the requirement of exclusive use of French found in s. 58. Section 60 further provides that the French language must be given "at least as prominent display" as any inscription in any other language. This requirement is even less demanding than what Quebec could impose consistent with the Court's reasons in *Ford.* But if the general rule, s. 58, is struck down while the exception, s. 60, is allowed to stand, firms employing fewer than four persons--which had been subject to

[29] *Devine v. Quebec (Attorney General), supra,* note 28 at pp. 814-816.

a less stringent regime than other firms--would suddenly be subject to a more stringent regime. Such a reversal of legislative intent can only be avoided if this Court now renders s. 60 of no force or effect. Similarly, once s. 58 is struck down, s. 61 and ss. 8, 9, 12, 13, 14, 15, 16 and 19 of the *Regulation respecting the language of commerce and business* must be struck down as well. Furthermore, because s. 69 of the *Charter of the French Language* has been struck down in *Ford*, the exceptions to s. 69 prescribed by ss. 17 and 18 of the *Regulation respecting the language of commerce and business* are also struck down. Had the appellant contested the validity of s. 62, which also creates an exception to s. 58, it too would have been struck down.

26. To strike down both s. 58 and its exceptions is consistent with the reasons of Dickson C.J. in *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30, at p. 80. Discussing the *Criminal Code*provisions respecting abortion which were struck down in that case, the Chief Justice noted that counsel for the Crown and for the Attorney General of Canada had both conceded that "the whole of s. 251 should fall if it infringed s. 7":

> This was a wise approach, for in *Morgentaler (1975)*, at p. 676, the Court held that "s. 251 contains a comprehensive code on the subject of abortions, unitary and complete within itself". Having found that this "comprehensive code" infringes the *Charter*, it is not the role of the Court to pick and choose among the various aspects of s. 251 so as effectively to re-draft the section.
>
> Although in the present case several sections are in issue, and not a single one as in *Morgentaler*, the same principle applies. A single scheme is being dealt with, and once the parent section which institutes that scheme has been found unconstitutional, the Court must proceed to strike down those exceptions which are necessarily connected to the general rule. In that way, distortions and inconsistencies of legislative intention do not result from finding the major component of a comprehensive legislative regime contrary to the Constitution.

34. Severance is the exception, not the rule;

35. The question which must be asked is whether the government would have legislated had it known that the *Bill 21* would not apply equally to the French and English schools;

36. The Attorney General presents a narrow interpretation of Sec. 23 limited fundamentally to the language of instruction;

37. It is clear that he considers that, apart from language, the schools should be the same and that this equality is an important principle;

38. In paragraph 18 of its Notice of Appeal, the Attorney General states:

> 18. Le juge de première instance ne s'en est pas tenu à l'objet de l'article 23 qui est de protéger le droit des parents de la minorité linguistique de faire instruire leurs enfants dans leur langue et de leur assurer un niveau de services éducatifs équivalent à celui de la majorité linguistique, dans leurs établissements d'enseignement financés par les fonds publics. <u>Il s'agit d'une disposition qui vise une égalité dans la dispense des services éducatifs</u>.
>
> [Emphasis added]

39. It follows that the legislature viewed both secularism and equality between the two education systems as significant values and sought to legislate both;

40. It is therefore impossible to say with certainty that, had it known that Sec. 23 would protect those entitled to minority language rights from the application of the *Bill 21*, the legislature would necessarily have legislated solely for the French school system;

41. It is plausible to believe that, in view of its desire for relative uniformity and narrow interpretation of the scope of Sec. 23, the government would rather have abstained from legislating regarding schools than create two different systems;

42. This is not unthinkable as other public institutions were not included in the prohibition of religious symbols (e.g. hospitals, universities); it is not legislative policy that religious symbols should be outlawed everywhere and had it known that there would be a difference between English and French schools the legislature might simply have excluded schools;

43. This is, of course, not a certain conclusion but a possible one; in such cases, the normal procedure is to invalidate the law leaving it to the legislature to decide after the initial judgements whether it wants to re-enact the law for those not protected by the *Canadian Charter*;

44. This is illustrated by paragraph 19 of the Attorney General's Notice of Appeal:

> En interprétant erronément ainsi l'alinéa 23 (3) b), le juge permet un traitement distinct pour les enfants des parents de la minorité linguistique de celui des enfants des parents de la majorité linguistique, et ce, autrement que pour une question relative au niveau des services éducatifs.

45. The distinction can be eliminated not only by applying *Bill 21* to English schools but also by exempting all schools;

46. It is also not clear that the purpose of *Bill 21* with respect to teachers and school employees would be attained if a significant percentage of the schools (i.e. the English ones) did not have to comply with it; while it is certain that the government's intention of creating equality between the two systems would be compromised;

47. In dealing with severance, it is not necessary to decide whether in the Court's view or in the government's view, the two systems should be treated in the same way; indeed, the Constitution itself treats minority and majority language schools differently; however, the consequences with respect to the part of the education system which is not covered by Sec. 23 must be decided by the National Assembly;

48. In these circumstances, the judge should have declared the law inoperative for all teachers and school personnel and, if the National Assembly then wanted a distinct regime for the French schools, it could so decide;

49. To recapitulate, it is contrary to the principles of statutory interpretation and severance for the courts to make that decision when one cannot be certain of which decision the legislator would have made, and when the result goes against an avowed goal of the government: the equality of treatment of English and French schools;

50. These principles are consistent with the texts in the field of interpretation of law, notably Pierre-André Côté, *Interprétation des lois* and Louis-Philippe Pigeon, *Drafting and Interpreting Legislation*;[30]

51. Once we agree, as courts always have, that the Charter must be read in a broad, generous and purposive way, one should not seek to diminish its force since an equal treatment of schools can be ensured by exempting all schools; in as seen in *CN v. Canada (Canadian Human Rights Commission)*,[31] where the Supreme Court said:

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[30] Pierre-André Côté, *Interprétation des lois,* 4th ed. (Montréal : Thémis, 2009) at para. 1116 and Louis-Philippe Pigeon, *Drafting and Interpreting Legislation* (Toronto: Carswell, 1988) at pp. 72-74.

[31] [1987] 1 SCR 1114 at p. 1334.

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such <u>fair, large and liberal interpretation as will best ensure that their objects are attained</u>. See s. 11 of the Interpretation Act, R.S.C. 1970, c. I-23, as amended. As Elmer A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87 has written:
>
> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> [Emphasis added]

52. It therefore follows that if equal treatment of both school systems is a crucial consideration, then this can be achieved without a violation of protected *Canadian Charter* rights and should;

53. The courts only sever or read in new sections when the part of the law which is unconstitutional is either minor or completely separate from the rest of the law, and does not violate the basic principles and purposes of law[32];

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[32] *Ontario (Attorney General) v. G, supra,* note 27 at paras 112 and 116 citing *Schachter v. Canada,* 1992 CanLII 74 (SCC), [1992] 2 SCR 679 at p. 700; *Vriend v. Alberta,* [1998] 1 SCR 493 at paras. 149-50; *R. v. Sharpe,* 2001 SCC 2, [2001] 1 SCR 45 at paras 122-125; *Ford v. Quebec (Attorney General), supra,* note 28; *Devine v. Quebec (Attorney General), supra,* note 28.

54. When there is a clash of fundamental values and protected rights, the courts should not impose a solution; in this case, the Court should not impose inequality in treatment of schools, which is contrary to one of the government's purposes in order to bolster secularism, which is another purpose;

55. It is clear that the impugned provisions of *Bill 21* do not apply to English schools in Quebec as they violate Sec. 23 and is this violation is not justified by Sec. 1, and therefore their application to other schools must be decided by the National Assembly once it knows that its original solution cannot stand;

56. In short, if there is no specific legislation creating a distinction, given that Quebec has a system of education in both English and French, and that, part of it is protected by Sec. 23 of the *Canadian Charter*, it should be for the National Assembly to decide the consequences of the invalidity towards all schools;

57. The QCGN maintains that the legislation should be declared inoperative for all teachers and school personnel not only those protected by Sec. 23 of the *Canadian Charter*;

58. The whole, subject to the QCGN's support for the appeals of the other parties contesting the constitutionality of *Bill 21;* if these appeals succeed, all the impugned provisions will fall.

PART IV – CONCLUSIONS

THE QCGN ASKS THE COURT OF APPEAL TO:

ALLOW the QCGN's Incidental Appeal;

DISMISS the Attorney General's appeal;

MAINTAIN the trial judge's conclusion in file 500-17-109983-190 with regards to the violation of Sec. 23 of the *Canadian Charter of Rights and Freedoms* and his conclusion that this violation is not justified by Sec. 1 of the *Canadian Charter of Rights and Freedoms*:

> [1137] **ACCUEILLE** en partie la demande;
>
> [1138] **DÉCLARE** que le premier alinéa de l'article 4, les articles 6, 7, 8, 10, le premier et le deuxième alinéa de l'article 12, les articles 13, 14 et 16, lus en conjonction avec le paragraphe 7 de l'annexe I, le paragraphe 10 de l'annexe II et le paragraphe 4 de l'annexe III de la *Loi sur la laïcité de l'État*, RLRQ c. L-0.3, violent l'article 23 de la *Charte canadienne des droits et libertés*;
>
> [1139] **DÉCLARE** que ces violations ne peuvent se justifier aux termes de l'article 1 de la *Charte canadienne des droits et libertés*;
>
> [1140] **DÉCLARE** inopérants le premier alinéa de l'article 4, les articles 6, 7, 8, 10, le premier et le deuxième alinéa de l'article 12, les articles 13, 14 et 16, lus en conjonction avec le paragraphe 7 de l'annexe I, le paragraphe 10 de l'annexe II et le paragraphe 4 de l'annexe III de la *Loi sur la laïcité de l'État*, RLRQ c. L-0.3, en vertu de l'article 52 de la *Charte canadienne des droits et libertés* pour toute personne, tant physique que morale, qui peut bénéficier des garanties prévues à l'article 23 de cette même Charte;

DECLARE that in view of the invalidity resulting from the violation of Sec. 23 of the *Canadian Charter* ss. 4 (first paragraph), 6,7,8,10. 12 (first and second paragraph), 13,14, 16 of the *Bill 21* read in conjunction with paragraph 7 of Annexe I, paragraph 10 of Annexe II and paragraph 4 of Annexe III, should be declared inoperative pursuant to Sec. 52 of the *Canadian Charter of Rights and Freedoms* for all teachers and school personnel;

THE WHOLE with costs in first instance and in appeal;

ALTERNATIVELY, should the incidental appeal be dismissed, the QCGN requests that no costs be awarded against them on appeal and that the finding of the trial judge to the same effect be confirmed with respect to costs at trial. The trial judge rightly made an exception to the general principle that the losing party should bear the costs of the proceedings, particularly in view of the fundamental nature of the issues raised and the public interest served by the debate undertaken.[33] The same reasons apply to this appeal.

Montréal, December 2, 2021

Grey Casgrain s.e.n.c.
(Me Julius Grey, Ad. E.)
(Me Arielle Corobow)
Lawyers for Quebec Community Groups Network

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[33] Judgement at paras 1124, 1135 and 1136, **A.C., Vol. 1 at pp. 236-237.**

PART V – AUTHORITIES

Jurisprudence **Paragraph(s)**

A.G. (Que.) v. Quebec Protestant School Boards, [1984] 2 SCR 66 19,28

Mahe v. Alberta, [1990] 1 SCR 342 19

R. v. Beaulac, [1999] 1 SCR 768 19

Arsenault-Cameron v. Prince Edward Island, 2000 SCC 1 19

Gosselin (Tutor of) v. Quebec (Attorney General), 2005 SCC 15, [2005] 1 SCR 238 19

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 SCR 3, 2003 SCC 62 19

Nguyen v. Quebec (Education, Recreation and Sports), 2009 SCC 47 19

Solski (Tutor of) v. Quebec (Attorney General), 2005 SCC 14 19

Association des parents de l'école Rose-des-vents v. British Columbia (Education), 2015 SCC 21 19

Conseil scolaire francophone de la Colombie-Britannique v. British Columbia, [2013] 2 SCR 774 19

Ontario (Attorney General) v. G, 2020 SCC 38 31,53

Ford v. Quebec (Attorney General), [1988] 2 SCR 712 32,53

Devine v. Quebec (Attorney General), [1988] 2 SCR 790 32,53

CN v. Canada (Canadian Human Rights Commission), [1987] 1 SCR 1114 51

Doctrine

Côté, P.-A., *Interprétation des lois,* 4th ed. (Montréal : Thémis, 2009) 50

Pigeon, L.-P., *Drafting and Interpreting Legislation* (Toronto: Carswell, 1988) 50

ATTESTATION

We undersigned, Grey Casgrain s.e.n.c., hereby attest that the above Impleaded Party / Incidental Appellant Quebec Community Groups Network's Brief is in compliance with the requirements of the *Civil Practice Regulation of the Court of Appeal*.

Time requested for the oral arguments: 30 minutes.

Montréal, December 2, 2021

Grey Casgrain s.e.n.c.
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