IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for Quebec)

B E T W E E N:

ALLAN SINGER LTD.

APPELLANT

A N D:

THE ATTORNEY GENERAL OF QUEBEC

RESPONDENT

A N D:

THE ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL OF ONTARIO, and
THE ATTORNEY GENERAL OF NEW BRUNSWICK

INTERVENERS

FACTUM OF THE ATTORNEY GENERAL OF NEW BRUNSWICK INTERVENER

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I N D E X

PART I

STATEMENT OF FACTS

1. The Attorney General for the Province of New Brunswick accepts the statement of facts as set out in the Reasons for Decision of the Court of Appeal for the Province of Quebec.

2. Notice of Intention to Intervene on behalf of the Attorney General for the Province of New Brunswick dated the 3rd day of July, 1987 was filed with the Court.

PART II

POINTS IN ISSUE - THIS INTERVENER'S POSITION

3. The Attorney General for the Province of New Brunswick submits that the answer to the constitutional questions stated by this Honourable Court are as follows:

1. Yes

> To the extent that sections 58 and 59 of the Charter of the French Language, R.S.Q., c. C-11, prescribe the exclusive use of French, the said sections are within the legislative competence of Québec.

2. Yes

> To the extent that sections 53, 57, 60 and 61 of the Charter of the French Language, R.S.Q., c. C-11, require the joint use of French, the said sections are within the legislative competence of Québec.

3. This Intervener takes no position in respect of the question as to whether

> section 214 of the Charter of the French Language, R.S.Q., c. C-11, as brought into force by S.Q. 1982, c. 21, s.1, is inconsistent with subsection 33(1) of the Constitution Act, 1982, and thereby to the extent of the inconsistency of no force or effect pursuant to subsection 52(1) of the latter Act.

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4. Yes

If the reply to question 3 is in the affirmative, sections 53, 57, 58, 59, 60 and 61 of the Charter of the French Language, R.S.Q. c. C-11, and the Regulation respecting the language of commerce and business, R.R.Q. c. C-11, r.9, are inconsistent with the guarantee of freedom of expression provided in subsection 2(b) of the Canadian Charter of Rights and Freedoms to the extent that they prescribe the exclusive use of the French language.

No

If the reply to question 3 is in the affirmative, sections 53, 57, 58, 59, 60 and 61 of the Charter of the French Language, R.S.Q., c. C-11, and the Regulation respecting the language of commerce and business, R.R.Q., c. C-11, r.9 are not inconsistent with the guarantee of non-discrimination provided in section 15 of the Canadian Charter of Rights and Freedoms.

5. This Intervener takes no position in respect of the question as to whether

If the reply to question 4 is in the affirmative in whole or in part, the said sections of the Charter of the French Language and the said Regulation thereunder are justified by the application of section 1 of the Canadian Charter of Rights and Freedoms and thereby consistent with the Constitution Act, 1982.

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Questions 1 and 2

4. The first two questions raise the issue of whether, from a division of powers perspective, there is any restraint imposed on the Province of Quebec to legislate in respect of either exclusive or joint use of a particular language.

Section 133 of the Constitution Act, 1867

5. The impugned legislation in this instance does not touch upon the explicit guarantee of language rights contained in s.133 of the Constitution Act, 1867, which provides as follows:

> 133. Either the English or the French language may be used by any person in the debates of the Houses of Parliament of Canada and of the Houses of the Legislature of Quebec; and both those languages shall be used in the respective records and journals of those Houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec. The Acts of the Parliament of Canada and of the legislature of Quebec shall be printed and published in both those languages.

6. The scope of s.133 has been litigated in the following recent cases:

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Attorney General of Manitoba v. Forest,
[1979] 2 S.C.R. 1032

Attorney General of Quebec v. Blaikie,
[1979] 2 S.C.R. 1016

Attorney General of Quebec v. Blaikie,
[1981] 1 S.C.R. 312

Reference Re Manitoba Language Rights,
[1985] 1 S.C.R. 721

MacDonald v. City of Montreal,
[1986] 1 S.C.R. 460

Bilodeau v. Attorney General of Manitoba,
[1986] 1 S.C.R. 449

Société des Acadiens v. Association of Parents,
[1986] 1 S.C.R. 549

The Principle of Exhaustiveness

7. Section 133 of the Constitution Act, 1867 does not exhaust legislative jurisdiction in respect of language. As noted by Laskin, C.J.C. in Jones v. Attorney General of New Brunswick et al., [1975] 2 S.C.R. 182 at 195:

> I am unable to agree that an implicit constitutional limitation must be read into the **British North America Act** as a deduction from the enactment of s.133. This is the burden of the appellant's submission and, in my opinion, it runs counter to the principle of exhaustiveness which the Courts have ascribed to the distribution of legislative power under the **British North America Act**.
>
> That principle was stated by the late Mr. Justice Rand in **Murphy v. C.P.R.**, at p.643, as follows:

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> It has become a truism that the totality of effective legislative power is conferred by the Act of 1867, subject always to the express or necessarily implied limitations of the Act itself.

8. Language is not one of the heads of legislative power under either s.91 or s.92 of the Constitution Act, 1867. Hogg, P. in Constitutional Law of Canada, 2nd ed. (1985), summarizes the situation as follows at 804:

> The case law ... suggests that language is not an independent matter of legislation (or constitutional value); that there is therefore no single plenary power to enact laws in relation to language; and that the power to enact a law affecting language is divided between the two levels of government by reference to criteria other than the impact of law upon language. On this basis, a law prescribing that a particular language or languages must or may be used in certain situations will be classified for constitutional purposes not as a law in relation to language, but as a law in relation to the institutions or activities that the provision covers.

9. The Court below, in the majority judgments, supports the impugned legislation as being a law in relation to local trade and commerce under s.92(13) of the Constitution Act, 1867. Bisson, J.A. however, addresses the problem of characterization of matters not specifically enumerated within either head of power at p.65:

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> En terminant sur ce point, je conviens aisément que l'ensemble de la loi 101 est une législation sur la langue mais dans la mesure où le chapitre VII régit un domaine de compétence provinciale, le commerce à l'intérieur de la province, on ne saurait en conclure à l'**ultra vires.**
>
> (emphasis added)
>
> Victor H. Devine et Autres v. P. G. du Québec, [1987] R.J.Q. 50 at 65

10. Although, for division of powers analysis, the legislation might be classified as local trade and commerce, an equally compelling case can be made for classification under s.92(16) of the Constitution Act, 1867 as a matter of local and private nature in the Province. In this respect this Intervener adopts the analysis of Duff, C.J. in Reference Re An Act to Amend the Supreme Court Act, [1940] S.C.R. 49 quoted with approval by Ritchie, J. in Nova Scotia Board of Censors v. McNeill, [1978] 2 S.C.R. 692 at 699 - 700.

The second passage to which the Chief Justice referred reads as follows:

> It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorized by one or by the other of these heads. It cannot, in their Lordships' opinion, be logically held to fall within both of them. In s. 92, No. 16 appears to them to have the same office which the general enactment with respect to matters concerning

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> the peace, order and good government of Canada, so far as supplementary of the enumerated subject, fulfills in s.91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated.
>
> (emphasis added)

11. The utilization of s.92(16) to validate the legislation would solve the dilemma of Paré, J. in the Court below who, in a very compelling analysis of both the purpose and effect of the legislation, comes to the conclusion that aspects of the legislation not in relation to local trade commerce fall outside provincial jurisdiction.

> La seule fin que vise alors cette forclusion expresse d'une autre langue ne peut être, comme le mentionne d'ailleurs le préambule même de la loi, que de permettre «au peuple québécois d'exprimer son identité» en assurant la qualité et le rayonnement de la langue française. Pour certains, ce but peut paraître fort louable. Mais, si on le considère isolément, il ne peut s'inscrire que dans une législation purement linguistique sur laquelle une provine ne peut avoir de juridiction si ce n'est par voie ancillaire. Or, la législation en litige cesse de servir le commerce de quelque façon que ce soit quand elle prohibe une autre langue que la langue française et il devient alors impossible d'affirmer que cette

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> prohibition est ancillaire au commerce ou à une autre matière relevant des pouvoirs de la législature.
>
> N'ayant plus le support d'une matière que l'**Acte Constitutionnel de 1867** attribute à la juridiction des législatures, les articles attaqués, en autant qu'ils excluent l'usage de l'anglais ou d'une autre langue que le français, deviennent **ultra vires.**
>
> Victor H. Devine et Autres v. P. G. du Québec, supra at 78.

12. It is the submission of this Intervener that all aspects of the impugned legislation can be supported as being within provincial jurisdiction. Either local trade and commerce under s.92(13) of the Constitution Act, 1867 will carry the legislation in all its aspects for division of powers analysis or, if, as determined by Paré, J. there is a limit on the extent of that power, language as an aspect of cultural activity, will be included within the scope of s.92(16).

13. That the use of language as a mode of communication bears the characteristics of cultural expression is self-evident. As noted by the Court in Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721 at 744 and quoted with approval in MacDonald v. City of Montreal, supra, by Wilson, J.:

> ...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 between isolation and community, allowing humans to delineate the rights and duties

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they hold in respect of one another, and thus to live in society.

14. In Jones v. Attorney General of New Brunswick et al., (supra), provincial legislation respecting the languages in which proceedings in Courts established by that legislature might be conducted was held intra vires under s.92(14) of the Constitution Act, 1867. By analogy, provincial legislation respecting language as an aspect of cultural activity is valid under s.92(16) as a matter of local and private nature in the Province.

15. Finally, a claim cannot be made in the context of a division of powers analysis that because there has been a restriction placed on the fundamental freedom of speech that the subject matter is above the reach of competent legislation.

Attorney General of Canada and Dupond v. Montreal, [1978] 2 S.C.R. 770 at 796

Jabour v. Law Society of British Columbia, [1982] 2 S.C.R. 307 at 364

16. To hold otherwise would offend the principle of exhaustiveness referred to in paragraph 7 above.

Authority to Prohibit Use of a Language

17. Given the inapplicability of s.133 of the Constitution Act, 1867 to the impugned legislation, and given the absence of any other constitutional restraints (such as applied in A. G. Que. v. Quebec Protestant School Boards, [1984] 2 S.C.R. 66), the Province of Quebec is entitled to legislate even to the extent of

prohibition of use of a language. This submission is supported by the statement of Beetz, J. in Societé Des Acadiens v. Association of Parents, supra at 576-577:

> I must again cite a passage of the reasons of the majority, at p.500, in **MacDonald** relating to s.133 of the **Constitution Act, 1867** but which is equally applicable, a **fortiori**, to the official languages provisions of the **Charter**:
>
> > This is not to put the English and the French languages on the same footing as other languages. Not only are the English and the French languages placed in a position of equality, they are also given a preferential position over all other languages. And this equality as well as this preferential position are both constitutionally protected by s.133 of the **Constitution Act, 1867**. Without the protection of this provision, one of the two official languages could, by simple legislative enactment, be given a degree of preference over the other as was attempted in Chapter III of Title I of the **Charter of the French Language**, invalidated in **Blaikie No. 1**. English unilingualism, French unilingualism and, for that matter, unilingualism in any other language could also be imposed by simple legislative enactment. Thus it can be seen that, if s.133 guarantees but a minimum, this minimum is far from being insubstantial.
>
> (emphasis added)

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Absence of Federal Jurisdiction

18. Federal jurisdiction in respect of use of language is limited to matters within s.91 of the Constitution Act, 1867, even in the advancement of the minimum constitutional guarantee found in s.133. As noted by Laskin, C.J.C. in Jones v. Attorney General of New Brunswick et al., supra, at 192-193:

> ...Certainly, what s.133 itself gives may not be diminished by the Parliament of Canada, but if its provisions are respected there is nothing in it or in any other parts of the **British North America Act** (reserving for later consideration s.91(1) that precludes the conferring of additional rights or privileges or the imposing of additional obligations respecting the use of English and French, if done in relation to matters within the competence of the enacting Legislature.
> (emphasis added)

19. While the general power of the federal government was utilized by the Court in Jones, supra, to support the impugned sections of the Official Languages Act in respect of the operation and administration of the institutions and agencies of Parliament and the Government of Canada, it is noteworthy that additional support was garnered from s.91(27) and s.101 of the Constitution Act, 1867 in consideration of the situation respecting the use of language in institutions being outside the category mentioned above.

20. It is submitted that the general power does not extend the jurisdiction of the federal government beyond that expressed

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by the Court in Jones, supra, insofar as the subsequent decision of Reference Re Anti Inflation Act, [1976] 2 S.C.R. 373 at 457 - 458 has confined that power to subjects of legislation that are relatively narrow and specific.

Hogg, P. Constitutional Law, supra at 805

21. Nor can federal jurisdiction be found under s.91(27) of the Constitution Act, 1867, in the criminal law power. Firstly, there is no federal legislation in place to advance the notion of federal criminal jurisdiction in this matter, and secondly, as criminal law speaks in terms of prohibition, it is difficult to conceive of the form such federal legislation would take in light of s.16 of the Charter. As stated by Dickson, C.J.C. in Societé Des Acadiens v. Association of Parents, supra, at 565:

> In looking at the **Charter** it is worth observing that, unlike s.133, the provisions go beyond general principles to specific modalities for the achievement of equality of status in language, and expressly provide in s.16(3) for legislative measures to advance the equality of status of the two official languages. Undoubtedly the fact that the two languages are to be of equal status (s.16(1)) and (2)) encourages a generous application of such measures and of the **Charter** itself in achieving that goal.
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> (emphasis added)

Conclusion

22. In summary, the position of this Intervener is that in this instance, from a division of powers perspective there is no restraint imposed upon the Province of Québec to legislate in

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respect of either exclusive or joint use of a particular language.

Question 4

Freedom of Expression

23. The Attorney General of New Brunswick relies on the argument set out in his factum filed with the Court in the companion case of The Attorney General of Québec v. La Chassure Brown's Inc. et al. in respect of the freedom of expression issue raised in Question 4.

> Factum of Attorney General of New Brunswick, paragraphs 4-27

24. The position of this Intervener on the freedom of expression issue is that s.2(b) of the Charter is infringed only to the extent that the legislation requires the exclusive use of the French language.

Guarantee of Non-Discrimination

25. Section 15 of the Charter provides as follows:

> 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.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of

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> disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

26. A major obstacle in Charter analysis in respect of discrimination in this instance is the fact that the Appellant is a corporation. It has been held that because a corporation is not an individual and because a corporation has no race, national or ethnic origin, colour, religion, sex, age, mental or physical disability nor any other comparable quality, section 15 is not applicable to claim this particular constitutional guarantee.

> Milkboard v. Clearview Dairy Farm Inc., [1987] 4 W.W.R. 279 (B.C.C.A.)

27. In addition, as noted by Monet, J. in the Court below, the subject matter in the present case (use of language) does not ease the burden on the Appellant:

> ...Je soulignerai, en passant, que deux des trois appelants, Allan Singer Ltée et Le monde de musique discus Ltée peuvent difficilement soutenir avec une langue, les corporations n'ayant pas, en principe, une telle caractéristique.
>
> Victor H. Devine et Autres v. P. G. du Québec, supra, 50 at 68

28. In the event that the Appellant can claim the constitutional guarantee in s.15(1) of the Charter, it is to be noted that the subject matter covered by the legislation falls outside the enumerated categories. To include language as a

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basis for inclusion within the unenumerated category the Appellant must demonstrate that the impugned legislation has no rational basis, is capricious and arbitrary and for these reasons would offend s.15(1) of the Charter.

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29. Two premises are utilized to analyze the situation for purposes of s.15 of the Charter: (1) a distinction in the treatment of individuals does not per se amount to discrimination, and, (2) discrimination does not exist if individuals similarly situated are similarly treated.

20 Re Andrews and Law Society, B.C.,
27 D.L.R. (4th) 600 at 605-606 (B.C.C.A.)

30. It is respectfully submitted that the Appellant cannot establish a case for discrimination on either basis. While a distinction of preference in respect of the French language is a feature of the legislation, it is no more of a distinction than
30 can be claimed in respect of both English and French in s.16 to s.23 of the Charter or in s.133 of the Constitution Act, 1867. In any event, the distinction falls outside the scope of the claim which might be made by one who must comply with the legislation. Likewise, all individuals subject to the legislation (similarly situated) are similarly treated.

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31. This Intervener relies on the analysis by Pratte, J. of the Federal Court of Appeal of an analogous situation on a claim of discrimination under the Canadian Bill of Rights in Assoc. Des Gens De L'Air du Québec Inc. v. Hon. Otto Lang, [1978] 2 F.C. 371 at 378:

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Appellants' final argument, which they did not put forward at the trial, is that the Order is discriminatory and therefore contrary to the principle of "equality before the law" enshrined in section 2 of the **Canadian Bill of Rights.** The Order is discriminatory, in appellants' view, because it permits anglophones to use their mother tongue at all times while denying the same right to francophones.

I fail to understand this argument. A law is discriminatory and contrary to the principle of equality before the law if, without good cause, it provides that persons in identical situations shall receive different treatment. Nothing of this kind is involved here. The Order treats francophones and anglophones in the same way; in the cases specified by the Order, both are authorized to speak French, and the provision that apart from these cases only English is authorized applies to both groups.

In fact, appellants' objection to the Order is precisely that it gives identical treatment to persons who should be treated differently because they speak different languages. I am not required to decide whether or not this objection is a valid one, since even if it were the Order would not for that reason be discriminatory or contrary to the principle of equality before the law, which, it must not be forgotten, ensures equality of persons, not of languages.
(emphasis added)

32. In summary, the position of this Intervener is that while the legislation favours the French language even to the extent of prohibition of use of any other language (s.59 of the impugned legislation) it does not discriminate in respect of the Appellant.

PART IV
ORDER SOUGHT

33. The Attorney General for the Province of New Brunswick submits that the constitutional questions in this appeal should be answered as follows:

Question 1 - Should be answered in the affirmative.

Question 2 - Should be answered in the affirmative.

Question 3 - This Intervener takes no position in respect to this question.

Question 4 - Should be answered in the affirmative in respect of freedom of expression, to the extent that the legislation prescribes the exclusive use of the French language.

Should be answered in the negative in respect of discrimination.

Question 5 - This Intervener takes no position in respect of this question.

ALL OF WHICH is respectfully submitted this 30th day of September, 1987.

Grant S. Garneau
Of Counsel for the Attorney General
of New Brunswick, Intervener

LIST OF AUTHORITIES