THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)

BETWEEN:

THE ATTORNEY GENERAL OF QUEBEC

APPELLANT

AND:

LA CHAUSSURE BROWN'S INC
VALÉRIE FORD
McKENNA INC
NETTOYEUR ET TAILLEUR MASSON INC
LA COMPAGNIE DE FROMAGE NATIONALE LIMITÉE

RESPONDENTS

AND:

THE ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL OF ONTARIO
THE ATTORNEY GENERAL OF ALBERTA
THE ATTORNEY GENERAL OF NEW BRUNSWICK

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PART I

FACTS

1. The Attorney General of Canada accepts the Statement of Facts presented by the Appellant.

2. In an order of May 11, 1987, Lamer J formulated the constitutional questions raised in this appeal as follows:

a. Are section 214 of the Charter of the French Language, RSQ 1977, c C-11, as enacted by SQ 1982, c 21, s 1, and section 52 of the Act to amend the Charter of the French Language, SQ 1983, c 56, inconsistent with section 33(1) of the Constitution Act, 1982 and therefore inoperative and of no force or effect under section 52(1) of the Act?

b. If the answer to question 1 is affirmative, to the extent that they require the exclusive use of the French language, are sections 58 and 69, and sections 205 to 208 to the extent they apply thereto, of the Charter of the French Language, RSQ 1977, c C-11, as amended by SQ 1983, c 56, inconsistent with the guarantee of freedom of expression under section 2(b) of the Canadian Charter of Rights and Freedoms?

c. If the answer to question 2 is affirmative in whole or in part, are sections 58 and 69, and sections 205 to 208 to the extent they apply thereto,

of the Charter of the French Language, RSQ 1977, c C-11, as amended by SQ 1983, c 56, justified by the application of section 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?

3. The Attorney General of Canada intervened on the constitutional questions, on June 4, 1987. As was the case in the Quebec Court of Appeal, the Attorney General of Canada's intervention pertains only to the validity of section 58 of the Charter of the French Language. Section 58 of the Charter of the French Language read as follows prior to its amendment in 1983:

> "Except as may be provided under this act or the regulations of the Office de la langue française, signs and posters and commercial advertising shall be solely in the official language."

and has read as follows since February 1, 1984:

> "Public signs and posters and commercial advertising shall be solely in the official language. Notwithstanding the foregoing, in the cases and under the conditions or circumstances prescribed by regulation of the Office de la langue française, public signs and posters and commercial advertising may be both in French and in another language or solely in another language."

The proclamation of the Act to amend the Charter of the French Language was published at (1984) 116 GO II, p 1204.

PART II

POINTS IN ISSUE

4. With respect to the first question, the Attorney General of Canada maintains that section 214 of the Charter of the French Language and section 52 of the Act to amend the Charter of the French Language ceased to have effect on April 17, 1982. Furthermore, they violate the letter and spirit of the Constitution Act, 1982 and are therefore inoperative and of no force or effect under section 52(1) of the Act. Consequently the answer to the first question should be in the affirmative.

5. For the reasons given in this factum, the Attorney General of Canada maintains with respect to section 58 of the Charter of the French Language, as he did in the Quebec Court of Appeal, that the second question must be answered in the affirmative and the third question, to the extent it arises in the present case, in the negative.

PART III

ARGUMENT

6. The first part of this factum will deal with the second question formulated by Lamer J, the third and fourth parts with the third question and the fourth and fifth parts with the first question.

(A) SECTION 58 OF THE CHARTER OF THE FRENCH LANGUAGE INFRINGES SECTION 2(b) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS IN THAT IT PROHIBITS THE EXERCISE OF FREEDOM OF EXPRESSION

7. In the opinion of the Attorney General of Canada, the purpose of section 58 of the Charter of the French Language is not to regulate commercial expression as such but to prohibit the use of a language other than French.

8. In Big M Drug Mart Ltd, [1985] 1 SCR 295, at 344 et seq, this Court set out the main principles which should govern the interpretation of the freedoms guaranteed in section 2 of the Canadian Charter:

- the interpretation must be sought by reference to the character and objects of the Charter and the interests a guaranteed freedom was meant to protect;

- the interpretation must be detertmined by reference to the language chosen to articulate the specific freedom, having regard, however, to the historical origins of the enshrined concepts.

See also Hogg, Constitutional Law of Canada (2nd ed), 1985, p 659.

9. In the opinion of the Attorney General of Canada, section 2(b) of the Canadian Charter is a clear provision which does not require interpretation. Interpretation of the Charter should not artificially reduce or increase the scope of the freedoms enshrined. In certain cases a non-literal interpretation of a provision respecting

fundamental freedoms can only distort its spirit. It is true, as this Court stated in Big M Drug Mart Ltd, that "the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v Skapinker, [1984] 1 SCR 357, illustrates, be placed in its proper linguistic, philosophic and historical context" (p 344). This Court did not then say that in all cases there must be a linguistic, philosophic and historical interpretation, particularly where a clear provision, like section 2(b) of the Charter in the present case, already makes it possible to ensure "the unremitting protection of individual rights and liberties".

- Hunter v Southam Inc, [1984] 2 SCR 145, at 155 and 156.

10. The effort the Appellant is making to restrict freedom of expression to the political realm is clearly inconsistent with the philosophical notion of freedom, to say nothing of the values that freedom of information seeks to protect in a free society.

11. In a free and democratic society, freedom of expression promotes maintenance of our political system, discussion of the social, artistic and even economic values of our society as well as individual development. It thus plays as important a role as freedom of religion and freedom of association, which are also entrenched in our Constitution, even though they do not fall within the political realm.

In RWDSU v Dolphin Delivery Ltd, [1986] 2 SCR 573, McIntyre J wrote the following at p 583:

> [T]he only basis on which the picketing in question was defended by the appellant was under the provisions of s 2(b) of the Charter which guarantees the freedom of expression as a fundamental freedom. Freedom of expression is not, however, a creature of the Charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends on its maintenance and protection.

Further on, at p 585, he quoted what Rand J had written in Switzman v Elbling, [1957] SCR 285, at 306-7, thirty years earlier:

> Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government, the freedom of discussion in Canada, as a subject-matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is ipso facto excluded from head 16 as a local matter.
>
> This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence. As such an inherence in the individual it is embodied in his status of citizenship. (Emphasis added.)

12. In the Canadian legal tradition, fundamental freedoms were not defined by reference to restrictions which Parliament might impose on individual freedoms, but by restrictions in fact imposed. With regard to freedom of expression, as Dicey wrote:

> "Freedom of discussion is then, in England, little else than the right to write or to say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written." (Introduction to the Study of the Law of the Constitution (10th ed), p 246).

See Finkelstein, Laskin's Four Classes of Liberties (1987), 66 CBR 227, at 232-3.

13. In RWDSU v Dolphin Delivery Ltd, [1986] 2 SCR 573, McIntyre J stated at p 588:

> "There is, as I have earlier said, always some element of expression in picketing. The union is making a statement to the general public that it is involved in a dispute, that it is seeking to impose its will on the object of the picketing, and that it solicits the assistance of the public in honouring the picket line. Action on the part of the picketers will, of course, always accompany the expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression. That freedom, of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct."

And at p 586:

> "It will be seen at once that Professor Peter W Hogg, at p 713 in his text, Constitutional Law of Canada (2nd ed 1985), is justified in his comment that:
>
> Canadian judges have always placed a high value on freedom of expression as an element of parliamentary democracy and have sought to protect it with the limited tools that were at their disposal before the adoption of the Charter of Rights.
>
> The Charter has now in s 2(b) declared freedom of expression to be a fundamental freedom and any questions as to its constitutional status have therefore been settled."
>
> (Emphasis added.)

14. The Canadian courts have not had to rule on the constitutional protection individual linguistic expression would have had before the enactment of the Charter. It is clear that with the means the courts now have with the enactment of the Charter, individual linguistic expression is, to use the above words of McIntyre J, like picketing, "a fundamental freedom and any questions as to its constitutional status have therefore been settled."

15. The Attorney General of Canada adopts what was said by Bisson J:

> "Is there a purer form of freedom of expression than the spoken language and the written language?
>
> In Société des Acadiens, Dickson CJC said, at p 416 DLR, p 566 SCR: "We speak and write to communicate ..."
>
> IN THE MATTER of Section 55 of the Supreme Court Act etc, more commonly known as Reference re Language Rights under Manitoba Act, 1870 (1985),

19 DLR (4th) 1 at p 19, [1985] 1 SCR 721 (sub nom Re Manitoba Language Rights) at p 744, the court said:

> The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society."

AG Quebec v Chaussure Brown's Inc (1986), 36 DLR (4th) 374, at 391-92.

16. There is no doubt that individual freedom of linguistic expression existed in Quebec prior to the enactment of the Charter of the French Language.

See Chevrette and Marx, Droit constitutionnel (1984) p 1583;

AG Quebec v Blaikie, [1981] 1 SCR 312.

17. Freedom of expression presumes the existence not only of a message but also of a possibility of transmitting that message. There must be a way of conveying thoughts to the public. The Charter did not seek to restrict to the press the freedom to express a message; it enshrined this freedom for all "media of communication". Boudreault J had already noted in the Superior Court the speciousness of the distinction between the medium and the message in this context:

> "The court agrees that it would be convenient if French linguistics made a distinction between the

> message and the medium or between the message, the distribution channel and the code into which the message is translated, in other words, in the latter case, the language, the drawing or the image. However, one wonders whether this is possible in the context of a statute the preamble of which states that language allows a people to express its identity." Ford v AG Quebec (1984), 18 DLR (4th) 711, at 724, approved by the Court of Appeal at 36 DLR (4th) 374, at 391, per Bisson JA.

See also

- Association des Gens de l'air du Québec Inc v Lang, [1978] 2 FC 371, at 374-5;

- AG Canada and Dupond v Montreal, [1978] 2 SCR 770, at 797;

18. From the Appellant's interpretation of the European language decisions in paragraphs 48 et seq of his factum one could logically conclude that section 23 of the Canadian Charter had abolished the freedom of all Canadians to express themselves in the language of their choice in all sectors of activity not expressly referred to in the section. As we know, the provinces have exclusive legislative jurisdiction over education (section 93 of the Constitution Act, 1867 and section 29 of the Constitution Act, 1982).

19. The scope the Appellant wishes to give linguistic freedom under the European Human Rights Convention is based on an incorrect interpretation of the decisions of the European Court of Human Rights, which dealt with access to

government services and not with individual freedom of linguistic expression. This position is incompatible with the provisions of Article 10 of the European Human Rights Convention, which reads as follows:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This right shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

Pasteur X and The Church of Scientology v Sweden (1979), 22 Ann Commission Eur Dr H 244, at 254-5;

Barthold v Germany, 7 EHRR 383.

20. This Court seems to refer to the special Canadian situation in this area when it writes the following in Attorney General of Canada v Quebec Association of Protestant School Boards, [1984] 2 SCR 66, at 79:

> "Section 23 of the Charter is not, like other provisions in that constitutional document, of the kind generally found in such charters and declarations of fundamental rights. It is not a codification of essential, pre-existing and more or less universal rights that are being confirmed and perhaps clarified, extended or amended, and which, more importantly, are being given a new primacy and inviolability by their entrenchment in the supreme law of the land. The special provisions of s 23 of the Charter make it a unique set of constitutional provisions, quite peculiar to Canada."

21. If freedom of education in a given language were part of freedom of expression within the meaning of section 2(b), section 23 of the Canadian Charter would merely constitute a special constitutional provision with respect to freedom of expression in the field of education. This constitutional arrangement would simply have relieved the Court from having to further examine the issue of freedom of expression from the viewpoint of section 1. Section 23 cannot constitute, per se, a denial of the existence of the fundamental freedom of expression in other sectors (see section 29 of Constitution Act, 1982).

- Attorney General of Canada v Quebec Association of Protestant School Boards, [1984] 2 SCR 66;
- Reference re Bill 30, judgment rendered by this Court on June 25, 1987.

22. Any doubt remaining about whether individual linguistic expression is covered by the concept of freedom of expression is quickly dispelled by reference to section 27 of the Charter, which provides that any interpretation of the Charter must be "consistent with the preservation and enhancement of the multicultural heritage of Canadians."

- The Queen v Big M Drug Mart Ltd, [1985] 1 SCR 295, at 302.

23. The Attorney General of Canada submits that, even if section 58 of the Charter of the French Language covered only commercial expression, section 2(b) of the Canadian Charter should nevertheless apply.

24. As the Ontario Divisional Court stated in Re Ontario Film and Video Appreciation and Ontario Board of Censors (1983), 147 DLR (3d) 58, at 66:

> "Moreover, the profit motive cannot be a valid reason to prevent a film-maker from showing his work, for one who shows film for profit can have no less freedom of expression that one who does not for profit. The extent of freedom of expression cannot depend on that, for there is nothing wrong with making a profit from one's art or one's ideas."

The Ontario Divisional Court's judgment was upheld by the Ontario Court of Appeal at (1984) 5 DLR (4th) 766. Leave to appeal was granted by the Supreme Court, but as Finkelstein supra said, "the Government of Ontario withdrew its appeal to the Supreme Court of Canada in that case in December 1985 after amending its regulatory scheme" (p 234).

25. It is clear from the various Canadian decisions and authors that section 2(b) in fact covers commercial speech.

- Hogg, Constitutional Law of Canada (2nd ed) 1985, p 719;
- Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, supra;
- Jabour v Law Society of British Columbia, [1982] 2 SCR 307, at 363, per Estey J;
- RWDSU v Dolphin Delivery Ltd, [1986] 2 SCR 573;
- Irwin Toy Ltd v AG Quebec (1986), 32 DLR (4th) 641;

- AG Quebec v Chaussure Brown's Inc (1986), 36 DLR (4th) 374.

26. The American case law, which is based on a narrower text than the Canadian Charter (and the Bill of Rights does not include a section equivalent to section 1 of the Charter either), and the European case law, which is based on a text substantialy identical to the Canadian Charter, recognized protection of commercial expression even before the Charter was enacted. In Gay Alliance v Vancouver Sun, [1979] 2 SCR 435, Dickson J, after describing the development of the American case law with respect to freedom of commercial expression, noted that it had (just like section 2(b) of the Canadian Charter now has) "a strong ... constitutional underpinning" (pp 465 to 467). It is difficult to argue that the framers of the Constitution were not aware of the major trends in American and European case law. If the intention of the framers had been to give freedom of expression less extensive protection than already existed in other free and democratic societies, they would not have used the present wording of section 2(b) of the Charter.

(B) THE PROHIBITION IN SECTION 58 OF THE CHARTER OF THE FRENCH LANGUAGE IS NOT A LIMIT WITHIN THE MEANING OF SECTION 1 OF THE CANADIAN CHARTER BUT A NEGATION OF INDIVIDUAL FREEDOMS

27. There is no longer any doubt that the burden of proof is on the party claiming that a restriction of a guaranteed freedom constitutes a reasonable limit and that this burden will only be discharged on a proponderance of the evidence.

- R v Edwards Books, [1986] 2 SCR 713;
- R v Oakes, [1986] 1 SCR 103;
- AG Quebec v Chaussure Brown's Inc, supra, at p 94, per Bisson JA.

28. The Attorney General of Canada maintains the position he had maintained in the Quebec Court of Appeal to the effect that the absolute prohibition on a form of expression in section 58 of the Charter of the French Language does not constitute a limit within the meaning of section 1 of the Canadian Charter, but a denial of individual freedoms.

29. Bisson JA accepts the validity of this argument by the Attorney General of Canada when he writes:

> "In truth, one might ask oneself whether this is even a case where the legislation could be legitimized by s 1.
>
> In effect, we have here a pure and simple negation of freedom of expression because s 58 prohibits the use of any language other than the official language. I would be tempted to apply what the Supreme Court of Canada said in AG

Quebec v Quebec Association of Protestant School Boards:

An Act of Parliament or of a legislature which, for example, proported to impose the beliefs of a State religion would be in direct conflict with s 2(a) of the Charter, which guarantees freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s 1. The same applies to chap VIII of Bill 101 in respect of s 23 of the Charter.

I am in agreement with the appellant that proof will not always be necessary for a court to conclude that a legislative limitation on fundamental rights and freedoms is justified, but it must also be apparent that the limitation is free from any irrational or arbitrary characteristics, where, as is the case with s 58 of Bill 101, the denial of a fundamental freedom is in issue." (1986) 36 DLR (4th) 374, at 395-97 (emphasis added).

(C) THE EVIDENCE THE APPELLANT INTENDS TO SUBMIT, TO THE EXTENT IT IS ADMISSIBLE AND RELEVANT, DOES NOT MEET THE CRITERIA SET OUT IN SECTION 1 OF THE CANADIAN CHARTER.

30. In R v Edwards Books, [1986] 2 SCR 713, the Chief Justice of this Court explained the methodology of section 1 of the Charter as follows:

> "The reasons of the majority of this Court in R v Oakes, [1986] 1 SCR 103, summarized and expanded upon the earlier cases (Law Society of Upper Canada v Shapinker, [1984] 1 SCR 357, Hunter v Southam Inc, [1984] 2 SCR 145, Singh v Minister of Employment and Immigration, [1985] 1 SCR 177, R v Big M Drug Mart Ltd, [1985] 1 SCR 295) in respect of the criteria which must be addressed by the proponent of a limitation on a right or freedom guaranteed by the Charter. ...
>
> Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative ojective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights." (p 768)

31. In an appendix to his factum to this Court, the appellant reproduces a few of the studies already submitted

to the Court of Appeal, which the latter did not consider, as well as additional studies. Certain studies were omitted.

32. In the opinion of the Attorney General of Canada, the evidence which the appellant is now introducing in this Court should not be considered unless the other parties have had an opportunity to submit it to cross-examination and adduce rebuttal evidence where appropriate.

33. Since they essentially purport only to demonstrate that the Quebec government considered the French language to be in peril and that the provincial legislature had constitutional jurisdiction to rectify this, the conclusions drawn by the appellant cannot establish a reasonable limit within the meaning of section 1 of the Canadian Charter. Even if Bisson JA recognized the legitimacy of the basic objectives of the Charter of French Language in writing:

> "The essential part of the preamble of Bill 101 reads as follows:
>
> "Whereas the Assemblée Nationale du Québec recognizes that Québecers wish to see the quality and influence of the French language assured, and is resolved therefore to make of French the language of Government and the Law, as well as the normal and everyday language of work, instruction, communication, commerce and business;"
>
> The respondents are in agreement that the French language should be obligatory in public signs and commercial advertising in Quebec.

> For my part, I agree that it is not only desirable but also legitimate that in these same areas, the usage of French be required to be predominant."

he nevertheless concluded:

> "But I cannot accept that the prohibition set out in s 58 is compatible with one of the elements of the preamble of Bill 101 which immediately follows the one which I have cited:
>
> "Whereas the Assemblée Nationale du Québec intends in this pursuit to deal fairly and openly with the ethnic minorities, whose valuable contribution to the development of Québec it readily acknowledges." [(1986) 36 DLR (4th) at p. 396]

34. The Appellant must do more than demonstrate some rationality in the pursuit of a government objective or take refuge behind the presumption of constitutionality. He must, to use the words of Bisson JA of the Quebec Court of Appeal, who had relied on the criteria set out by this Court in Oakes, [1986] 1 SCR 103:

> "show that the means chosen were reasonable and that in order to achieve this objective, it was necessary to suppress (or, if you will, after April 17, 1982, to continue to suppress) the freedom of expression henceforth recognized as being a constitutional guarantee. This is where the appellant fails because thereafter there is no reasonable proportionality between the objective sought and the means employed."[(1986) 36 DOR (4th) 374, at 398]

Furthermore, the Attorney General of Quebec did not cite in the Quebec Superior Court or the Court of Appeal

(D) DID SECTION 52 OF THE ACT TO AMEND THE CHARTER OF THE FRENCH LANGUAGE CEASE TO HAVE EFFECT ON APRIL 17, 1987?

35. By the enactment of section 52 of the Act to amend the Charter of the French Language, did the Quebec legislature wish to extend the period of application of the notwithstanding clause as applicable to section 58 of the Charter of the French Language and the few other sections of the Charter referred to in the Act to amend the Charter of the French Language beyond the maximum five-year period provided for in section 33 of the Constitution Act, 1982 by a new express declaration or did it rather wish to ensure, through the enactment of this section, that section 58 of the Charter, despite the minor amendments it underwent on February 1, 1984, would nevertheless continue to be exempt from the application of the Canadian Charter, at least for the period initially provided for in section 58 (original) of the Charter of the French Language, in other words, until April 17, 1987?

36. This question arises following certain statements by the Attorney General of Quebec. The Attorney General of Quebec maintains at page 15 of his factum that only the provisions of the Charter of the French Language amended in 1983 (including section 58) continued to be exempt from the application of the Canadian Charter. The Attorney General of Quebec implicitly recognizes that sections 69, 205, 206, 207 and 208 of the Charter of the French Language, the validity of which is also challenged in this appeal, are no longer exampt from the application of the Canadian Charter owing to the passage of time.

any examples of a free and democratic society which could have established an absolute prohibition on commercial advertising in a given language.

37. The Attorney General of Quebec had argued in the Quebec Court of Appeal, at page 13 of his factum, that upon reading both versions of section 58, we find the same rule of law and the same legislative intention. To quote the words of the Attorney General of Quebec at page 30 of his factum to the Court of Appeal:

> [Translation] "The legislative intention expressed in section 58 of the Charter of the French Language did not appear after October 1, 1983. It appeared in 1977, when the Charter of the French Language was enacted. After October 1, 1983 section 58 underwent only minor, formal amendments."

38. Section 33(3) of the Constitution Act, 1982 provides that an override clause may not exceed five years. Section 33(4) does not provide for automatic or implicit renewal, but obliges the legislature to re-enact an express declaration at the end of the maximum five-year period. The nature of the interests involved and the constitutional character of the Canadian Charter militate against the possibility of an implicit renewal of an override clause.

39. The National Assembly debates do not show any discussion of section 52 of the Act to amend the Charter of the French Language. Section 52 was not enacted within the framework of the Act respecting the Constitution Act, 1982, which made it clear that the National Assembly intended to rely on section 33 of the Constitution Act, 1982 (see heading of section 1 and section 1, paragraph 4). The intention of the Quebec legislature in the case of section 52 of the Act to amend the Charter of the French

Language can only be deduced from an interpretation of that section alone.

40. Either section 52 of the Act to amend the Charter of the French Language is merely a recasting of section 214 of the Charter of the French Language, in which case it ceased to have effect on April 17, 1987, or else section 52 is a new declaration, in which case it seems inconceivable that most of the provisions of the Charter of the French Language should have been subject to the Canadian Charter since April 17, 1987, while the provisions in the Act to amend the Charter of the French Language would not be subject thereto, until February 1, 1989. Section 58 of the Charter of the French Language would thus, according to this interpretation, be exempt from the Canadian Charter for a period greater than the five years provided for in the Charter.

41. When the Act to amend the Charter of the French Language was passed, the National Assembly could not have wished to renew an override clause that had not yet expired; otherwise it would have repealed or amended section 214 of the Charter of the French Language. In the case of section 58 of the Charter of the French Language, which the Court of Appeal held to be identical in substance to the original section 58, the Quebec legislature could only have wished to eliminate the possibility of a judicial interpretation that did not recognize that the Quebec legislature had intended section 58 (new) to be a consolidation. In the opinion of the Attorney General of Canada, section 52 of the Act to amend the Charter of the French Language ceased to be of effect on April 17, 1987,

at the same time as section 214 of the Charter of the French Language.

(E) SECTION 214 OF THE CHARTER OF THE FRENCH LANGUAGE AND SECTION 52 OF THE ACT TO AMEND THE CHARTER OF THE FRENCH LANGUAGE, TO THE EXTENT THEY ARE STILL IN FORCE AFTER APRIL 17, 1987, ARE INOPERATIVE

42. It was on the basis of section 33 of the Canadian Charter that the Quebec National Assembly enacted section 52 of the Act to amend the Charter of the French Language, which reads as follows:

> This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B of the Canada Act, chapter 11 of the 1982 volume of the Acts of the Parliament of the United Kingdom).

We should reiterate here that section 214 of the Charter of the French Language is worded in the same terms.

43. The Attorney General of Canada is of the view that section 214 of the Charter of the French Language violates section 33 of the Constitution Act, 1982. The same conclusion applies a fortiorari with respect to section 52 of the Act to amend the Charter of the French Language, in view of the special circumstances that surrounded the enactment of this section (lack of parliamentary debate; no express reference to section 33 of the Constitution Act, 1982).

44. It was possible to maintain that by the enactment of the Act respecting the Constitution Act, 1982 the National Assembly was indicating first that all Quebec statutes and any amendments to the Charter of the French Language contravened or could contravene the fundamental

freedoms guaranteed in section 2, the legal rights in sections 7 to 14 and the equality rights in section 15, even though this latter section was not yet in force when the Act respecting the Constitution Act, 1982 and the Act to amend the Charter of the French Language were passed.

45. The principle of the entrenchment in the Constitution of the rights enumerated in the Charter is subject to two qualifications. First, section 1 of the Charter allows the legislature to make rights "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The assessment of "reasonable limits" is left to the courts. Second, section 33 allows the legislature, without the intervention of the courts, to override the rights guaranteed by sections 2 and 7 to 15 of the Charter, but only in accordance with the formal requirements set out in the section. This, according to Hogg, is a "concession to Canada's long history of Parliamentary sovereignty" (Constitutional Law of Canada (2nd ed), p 692).

46. The Attorney General of Canada maintains that the rights and freedoms entrenched in the Canadian Charter, which applies pursuant to section 32 to the legislature and government of each province, have become supra-legislative in nature and that therefore neither level of government can amend them by an ordinary statute or override them except within the permitted limits provided for in the Charter itself. Since the Constitution is binding on Parliament and the legislatures, they can only amend it by the amendment formula provided for in section 38 of the Constitution Act, 1982.

47. Section 33 is an exception to the fundamental principles set out in sections 1 and 52 of the Constitution Act, 1982. The rule of law demands the respect of formal requirements so as to allow the particular purpose of section 33 to be met.

Re Manitoba Language Rights, [1985] 1 SCR 721.

48. By using the words "notwithstanding a provision", the framers of the Constitution intended a section 33 override to cover an Act or a provision of an Act that may be inconsistent with a right protected by section 2 or by one of sections 7 to 15 and to specify which right is to be overridden. The purpose of section 33 can only be to suspend temporarily the application of certain provisions of the Canadian Charter Charter to Acts which otherwise would or could be considered inconsistent with the Charter.

49. A comparison between the override formula in section 33 and the one in section 2 of the Canadian Bill of Rights reveals that the Canadian Parliament did not provide for any restrictions on the use of the override formula in the latter case. This is explained by the fact that the federal Parliament retained full legislative supremacy despite the enactment of the Canadian Bill of Rights. This is also the case with the Quebec Charter of Human Rights and Freedoms, which provides as follows in section 52:

> "No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter."

50. The distinction is obvious. If the framers of the Constitution had intended section 33 to be used as Quebec has used it, they would have adopted the wording of section 2 of the Canadian Bill of Rights or that of section 52 of the Quebec Charter. These two provisions do not require that the overriding Act specify the right to be overridden.

> "The Charter is more demanding than the Canadian Bill of Rights. Pursuant to s 2 of the latter, the Parliament of Canada can declare that one of these laws "shall operate notwithstanding the Canadian Bill of Rights"; the override clause can be all-encompassing and global and need not state the provision or provisions to be overridden. The same can be said of the Quebec Charter of Human Rights and Freedoms. It allows the Charter to be overridden without requiring the specification of the provisions with respect to which the override power is exercised.
>
> There is a reason for the additional requirement in s 33. To mention in the non obstante clause the provisions of the section which are to be overridden is to bring to light the rights and freedoms which one intends to remove from the protection of the Canadian Charter. This encourages an enlightened and serious examination of the proposed derogation." (Alliance des professeurs de Montréal v AG of Quebec (1985), 21 DLR (4th) 354, at 356, per Mayrand JA).

51. The wording of subsection 33(2) confirms our position. It reads as follows:

> "(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration." (Emphasis added.)

What would these words mean if the intention were not to cover Acts whose effect may be inconsistent with the rights overridden? What would these words mean if the framers of the Constitution were not trying to ensure that the rights in question should not explicitly set out? We submit that these words and in particular the words "the provision of this Charter referred to in the declaration" would otherwise be meaningless.

52. Since the formal requirements of section 33 were not respected, section 52 of the Act to amend the Charter of the French Language and section 214 of the Charter of the French Language are inoperative. To quote Jacques JA in Alliance des Professeurs de Montréal v Attorney General of Quebec (21 DLR (4th) 354, at 361) concerning the Act respecting the Constitution Act, 1982 (under appeal to this Court):

> "the fundamental freedoms and legal guarantees which may be disregarded by a statute by virtue of s 33 are so important that they should be expressly stated so as to bring into sharp focuss the effect of the overriding provisions and the rights deprived."

53. In the opinion of the Attorney General of Canada, section 214 of the Charter of the French Language and section 52 of the Act to amend the Charter of the French Language constitute indirect amendments to the Constitution Act, 1982.

54. To determine the validity of an Act passed pursuant to section 33 of the Constitution Act, 1982, it is

necessary to examine the pith and substance of the Act to ascertain its true purpose.

55. What was the intention of the Quebec National Assembly in enacting the Act respecting the Constitution Act, 1982? The National Assembly's only aim was to preserve its rights and powers. In so doing did it do indirectly what it could not do directly, namely amend the Constitution Act, 1982?

56. Deschênes J discussed the question of the intention of the Quebec legislature in Alliance des professeurs de Montréal v PG du Québec, [1985] CS 1272, at 1277, as follows:

> [Translation] "In tabling Bill 62, the Government did not hide its intentions, nor did the National Assembly in passing it. The explanatory notes in support of the bill state expressly:
>
> The first object of this bill is to include, in each of the Acts of Québec existing on 17 April, 1982, or adopted after that date but before the sanction of this bill, an express declaration of its full effect notwithstanding sections 2 and 7 to 15 of the Constitution Act, 1982; in this manner, in respect of fundamental freedoms, legal rights and equality rights, the rights and powers of the National Assembly of Québec will be fully preserved and its Acts will be subject only to the Québec Charter of Human Rights and Freedoms.
>
> The intention to exclude the application of the Canadian Charter of Rights and Freedoms could not be clearer. It is apparent as well from a reading of the Act itself; no other conclusion could be drawn."
>
> (Emphasis added.)

57. The intention of the Quebec legislature - namely to preserve the legislative rights and powers of the Quebec National Assembly, despite the enactment of the Constitution Act, 1982 - bears no relation to the content of the Canadian Charter or the Quebec Charter of Human Rights and Freedoms . The continued application of the Quebec Charter is confirmed by section 26 of the Constitution Act, 1982, without the necessity for any legislative intervention by the National Assembly.

58. In view of the importance the National Assembly seemed to attach to maintaining the guarantees provided by the Quebec Charter, its primary aim could not have been to deprive the citizens of Quebec of the additional protection of the fundamental rights and freedoms provided for in the Canadian Charter. Consequently, the only aim of the Act respecting the Constitution Act, 1982 must have been purely and simply to exempt Quebec from the Constitution Act, 1982 so that, to use the words of the explanatory note in support of the Act respecting the Constitution Act, 1982, "the rights and powers of the National Assembly of Québec will be fully preserved".

> "The experience in Quebec does not refute my basic assertion that in a society prepared to accept and live by constitutional rights, no legislature could exercise its non obstante clause without a powerful case on the merits of the issue. What actually happened in Quebec was that its ruling party, the Parti québécois (and much of the opposition as well), was not prepared to accept the Charter because they rejected the legitimacy of the entire Constitution Act - both some key features of its contents and also the method through which the new Constitution came to pass. Thus the Quebec government used the only

> lever available to it to disallow as much of that document as it could, treating it as, in effect, an alien regime imposed on the Quebecois by a "foreign" power." [Weiler P, The Evolution of the Charter: A View from the Outside, in Litigating the Values of a Nation; The Canadian Charter of Rights and Freedoms (1986),at pp 59-60].

59. The date on which the Quebec Act respecting the Constitution Act, 1982 came into force, namely April 17, 1982, which coincided to the hour and minute with the date of proclamation of the Constitution Act, 1982, confirms, if need be, that the Quebec legislation was intended to nullify the effect of section 58 of the Constitution Act, 1982, which reads as follows:

> Subject to section 59 [which deals with the coming into force of paragraph 23(1)(a) for Quebec with the latter's authorization], this Act shall come into force on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

60. To conclude, the Attorney General of Canada submits that section 214 of the Charter of the French Language and section 52 of the Act to amend the Charter of French Language are inoperative and of no force or effect under section 52 of the Constitution Act of 1982.

PART IV

ORDER SOUGHT

For all these reasons, the Attorney General of Canada asks the Court to answer the first question in the affirmative, the second question in the affirmative and the third question in the negative.

All of which is respectfully submitted.

Ottawa, October 14, 1987

Georges Emery, QC

André Bluteau

PART V

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