Systemic Discrimination: What is normal?

The Normalisation of Exclusion via Institutional Cultural Norms and Neutral Policies.

Presented to the OCPM– Consultation of Racism and Systemic Discrimination–

by

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Discrimination— direct and indirect— has been addressed by the Supreme Court of Canada (SCC) and other Courts and tribunals numerous times. The SCC has developed a test for the determination of discrimination; and whether it is direct or indirect.

1. Equality

In *Andrews* v. *Law Society of British Columbia*, [1989] 1 SCR 143 http://canlii.ca/t/1ft8q; regarding s. 15(1) *Charter* and the concept of "Equality", McIntyre J., speaking in dissent and on behalf of Lamer JJ., writes:

> "Section 15(1) of the *Charter* provides for every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination. This is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law.
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> It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises. It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.
> …
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> In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause

inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law -- and in human affairs an approach is all that can be expected -- the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

…

Thus, mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights. For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions." (Underlining Added)

In relation to the applicability of the test of "equal protection and equal benefit", as expressed by McLachlin J.A., in *Andrews* v. *Law Society of British Columbia*, 1986 CanLII 1287 (BC CA) http://canlii.ca/t/22wl1, McIntyre J. writes in disagreement in *Andrews* (SCC), *supra*:

"For the reasons outlined above, the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the *Charter*. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula.

It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the *Charter*. It is, of course, obvious that legislatures may -- and to govern effectively -- must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions."

2. Definition of Discrimination

In *CN* v. *Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 http://canlii.ca/t/1lpg8, Dickson C.J., speaking for the unanimous Court cites the *Report of the Commission on Equality in Employment (1984)*, written by Abella J. to explain discrimination and systemic discrimination:

"Although Judge Abella chose not to offer a precise definition of systemic discrimination, the essentials may be gleaned from the following comments, found at p. 2 of the Abella Report:

> Discrimination … means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ….
>
> *[Page 1139]*
>
> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the

> barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory."

Following upon the definition of discrimination and systemic discrimination provided by Abella J., Dickson C.J. writes in *CN, supra*, that discrimination is "reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces, for example, that women 'just can't do the job' …".

At page 1143 in *CN, supra*, the Chief Justice re-iterates:

> "… systemic discrimination is often unintentional. It results from the application of established practices and policies that, in effect, have a negative impact upon the hiring and advancement prospects of a particular group. It is compounded by the attitudes of managers and co-workers who accept stereotyped visions of the skills and "proper role" of the affected group, visions which lead to the firmly held conviction that members of that group are incapable of doing a particular job, even when that conclusion is objectively false."

1. Finding of "Discrimination"

In *Eaton* v. *Brant County Board of Education*, [1997] 1 SCR 241 http://canlii.ca/t/1fr3z; speaking for the majority, Sopinka J. writes, generally, regarding discrimination, stereotypes; and, specifically, the integration disabled persons into mainstream society:

> "Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the

disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them."

Citing McIntyre J. in *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143, at p. 169, McIntyre J., who wrote in his dissent regarding the application of s. 1 Charter, that the "accommodation of differences . . . is the true essence of equality"; Sopinka J. continues in *Eaton, supra*:

"This emphasizes that the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.

The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex.

…

It follows that disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. However, with respect to disability, this ground means vastly different things depending upon the individual and the context. This produces, among other things, the "difference dilemma" referred to by the interveners whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability."

Mentioning *Forget v. Quebec (Attorney General)*, 1988 CanLII 51 (SCC), *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), *Devine v. Quebec (Attorney General)*, 1988 CanLII 20 (SCC) and, generally, *Brossard (Town) v. Quebec (Commission des droits de*

la personne), 1988 CanLII 7 (SCC), Cory J. writes for the majority in *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 SCR 525 http://canlii.ca/t/1frsc; outlining the elements required to establish an allegation of discrimination:

> "It has been held by this Court that to demonstrate that there has been discrimination, a plaintiff must establish that the following three elements exist:
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> (1) that there is a 'distinction, exclusion or preference';
>
> (2) that the 'distinction, exclusion or preference' is based on one of the grounds listed in the first paragraph of s. 10 of the Quebec *Charter*; and
>
> (3) that the 'distinction, exclusion or preference has the effect of nullifying or impairing" the "right to full and equal recognition and exercise of a human right or freedom'."

Speaking for the majority in *Forget, supra*, Lamer J. cites Daniel Proulx and his definition of a ground of discrimination:

> *"'Égalité et discrimination dans la Charte des droits et libertés de la personne: étude comparative'* (1980), 10 *R.D.U.S.* 381, Mr. Daniel Proulx defines the prohibited grounds of discrimination in the following way (at pp. 451-52):
>
> [TRANSLATION] 'To begin with . . . it can be said that a ground of discrimination means in the first place simply a particular characteristic of an individual. Contrary to what is sometimes said, therefore, it is not an unchanging, permanent or inborn characteristic. It would be hard to argue that political beliefs, religion, language or civil status, for example, can *never* be subject to change.

However, and this is our second observation, the ground of discrimination is here an "essential characteristic or manifestation" of the human being. It must strongly affect the personality of an individual, either inherently (e.g. race or sex) or as the result of the free or compulsory exercise of a fundamental choice (e.g. religion or political beliefs).'" (Underlining Added)

2. Discrimination and Equality Under s. 15 *Charter*

In *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 SCR 295 http://canlii.ca/t/1fv2b, Dickson J. writes for the unanimous Court; citing *Hunter et al.* v. *Southam Inc.*, [1984] 2 SCR 145 http://canlii.ca/t/1mgc1, and referring to the "proper approach to the definition of the rights and freedoms guaranteed by the *Charter*" as a "purposive one.":

"The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view **this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be**, as the judgment in *Southam* emphasizes, a **generous rather than a legalistic one**, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall 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 CanLII 3 (SCC), [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts." (Bolding Added)

Speaking for the majority, Wilson J. writes in *Andrews, supra*, on the rights of citizenship; regarding the distinction between this group and non-citizens; and whether such a distinction is discriminatory:

> "Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending": see J. H. Ely, *Democracy and Distrust* (1980), at p. 151. Non-citizens, to take only the most obvious example, do not have the right to vote. Their vulnerability to becoming a disadvantaged group in our society is captured by John Stuart Mill's observation in Book III of *Considerations on Representative Government* that "in the absence of its natural defenders, the interests of the excluded is always in danger of being overlooked . . . ." I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15. I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others."

In *Smith, Kline & French Laboratories* v. *Canada (Attorney-General)*, [1987] 2 FC 359 http://canlii.ca/t/gb268, Hugesson J, speaking for the unanimous Court regarding an approach to determining discrimination through a s. 15 *Charter* enquiry based upon enumerated and analogous grounds, writes:

> "The rights which it (s. 15) guarantees are not based on any concept of strict, numerical equality amongst all human beings. If they were, virtually all legislation, whose function it is, after all, to define, distinguish and make categories, would

be in *prima facie* breach of s. 15 and would require justification under s. 1. This would be to turn the exception into the rule. Since courts would be obliged to look for and find s. 1 justification for most legislation, the alternative being anarchy, there is a real risk of paradox: the broader the reach given to s. 15 the more likely it is that it will be deprived of any real content.

[14] The answer, in my view, is that the text of the section itself contains its own limitations. It only proscribes discrimination amongst the members of categories which are themselves similar. Thus the issue, for each case, will be to know which categories are permissible in determining similarity of situation and which are not. It is only in those cases where the categories themselves are not permissible, where equals are not treated equally, that there will be a breach of equality rights.

…

As far as the text of s. 15 itself is concerned, one may look to whether or not there is "discrimination", in the pejorative sense of that word, and as to whether the categories are based upon the grounds enumerated or grounds analogous to them. The inquiry, in effect, concentrates upon the personal characteristics of those who claim to have been unequally treated. Questions of stereotyping, of historical disadvantagement, in a word, of prejudice, are the focus and there may even be a recognition that for some people equality has a different meaning than for others."

Citing *Smith, Kline & French Laboratories, supra*; and dissenting in part, McIntyre J. writes in *Andrews, supra*:

"The analysis of discrimination in this approach must take place within the context of the enumerated grounds and those analogous to them. The words "without discrimination" require more than a mere finding of distinction between the treatment of groups or individuals. Those words are a form of qualifier built into s.

15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage.

…

The third or "enumerated and analogous grounds" approach most closely accords with the purposes of s. 15 and the definition of discrimination outlined above and leaves questions of justification to s. 1. However, in assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.

Where discrimination is found a breach of s. 15(1) has occurred and -- where s. 15(2) is not applicable -- any justification, any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1. This approach would conform with the directions of this Court in earlier decisions concerning the application of s. 1 and at the same time would allow for the screening out of the obviously trivial and vexatious claim. In this, it would provide a workable approach to the problem."

3. Oakes test

In . v. *Oakes*, [1986] 1 SCR 103 http://canlii.ca/t/1ftv6, Dickson C.J. outlines the function of s. 1 *Charter*; writing:

"It is important to observe at the outset that s. 1 has two functions:

first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and,

second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured."

On the premise of a s. 1 *Charter* enquiry; Dickson C.J. writes in *Oakes, supra*:

"Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms--rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in *Singh v. Minister of Employment and Immigration*, *supra*, at p. 218: '... it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*.'"

"Demonstrably Justified in a Free and Democratic Society"; Dickson C.J. writes in *Oakes, supra*:

"A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the

participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

65. The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the *Charter*. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society."

On the onus of proving that a limit on a right or freedom is reasonable and demonstrably justified; and on the presumption of the guarantee of rights in the *Charter*, Dickson C.J. writes in *Oakes, supra*:

"66. The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit: *Hunter v. Southam Inc.*, *supra*.

On the requisite standard of proof; Dickson C.J. writes in *Oakes, supra*:

> "67. The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as "reasonableness", "justifiability" and "free and democratic society" are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase 'demonstrably justified' in s. 1 of the *Charter* supports this conclusion."

Regarding the purpose of justifying a violation of the constitutional rights and freedoms in the Charter; Dickson C.J. writes in *Oakes, supra*:

> "Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. See: *Law Society of Upper Canada v. Skapinker*, *supra*, at p. 384; *Singh v. Minister of Employment and Immigration*, *supra*, at p. 217. A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

On the criteria for "reasonable and demonstrably justified"; Dickson C.J. writes in *Oakes, supra*:

69. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.

> First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom': *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> 70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test': *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.

On the components of the Proportionality test; Dickson C.J. writes in *Oakes, supra*:

> "There are, in my view, three important components of a proportionality test.
>
> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.

> Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352.
>
> Third, there must be a proportionality between the **effects** of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'."

On the third component of the Proportionality test and the necessity of the infringement; Dickson C.J. writes in *Oakes, supra*:

> 71. With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

4. Applying the *Oakes* test to *Andrews*

Regarding upon whom lies the onus of justifying the infringement of a guaranteed *Charter* right; and whether the phrase “pressing and substantial” should apply in all cases, McIntyre J., citing Dickson C.J., above, in *Edwards Books, supra,* writes in *Andrews, supra*:

> “The onus of justifying the infringement of a guaranteed *Charter* right must, of course, rest upon the parties seeking to uphold the limitation, in this case, the Attorney General of British Columbia and the Law Society of British Columbia. As is evident from the decisions of this Court, there are two steps involved in the s. 1 inquiry. First, the importance of the objective underlying the impugned law must be assessed. In *Oakes*, it was held that to override a *Charter* guaranteed right the objective must relate to concerns which are "pressing and substantial" in a free and democratic society. However, given the broad ambit of legislation which must be enacted to cover various aspects of the civil law dealing largely with administrative and regulatory matters and the necessity for the Legislature to make many distinctions between individuals and groups for such purposes, the standard of "pressing and substantial" may be too stringent for application in all cases. To hold otherwise would frequently deny the community-at-large the benefits associated with sound social and economic legislation. “

Regarding whether the citizenship requirement for admission to the practice of law meets the goals set out in s. 42 ***Barristers and Solicitors Act*** McLachlin J.A. writes in *Andrews (BC CA), supra*:

> I consider first the purposes which the requirement of citizenship in s. 42 may serve. The respondents submit that the requirement of citizenship achieves the following goals:
>
> 1. Citizenship ensures a familiarity with Canadian institutions and customs;
> 2. Citizenship implies a commitment to Canadian society;

3. Lawyers play a fundamental role in the Canadian system of democratic government and as such should be citizens.

[37] The trial judge, in concluding that the requirement of citizenship was not discriminatory, relied particularly on the second and third of these grounds.

[38] I am not satisfied that the first ground bears close scrutiny. Citizenship does not ensure familiarity with Canadian institutions and customs. Only citizens who are not natural-born Canadians are required to have resided in Canada for a period of time. Natural-born Canadians may reside in whatever country they wish and still retain their citizenship. In short, citizenship offers no assurance that a person is conscious of the fundamental traditions and rights of our society. The requirement of citizenship is not an effective means of ensuring that the persons admitted to the bar are familiar with this country's institutions and customs: see *Re Dickenson and Law Society of Alberta* (1978), 1978 CanLII 638 (AB QB), 84 D.L.R. (3d) 189 at p. 195, 5 Aita. L.R. (2d) 136, 10 A.R. 120.

[39] The second reason for the distinction — that citizenship implies a commitment to Canadian society — fares little better upon close examination. Only those citizens who are not natural-born Canadians can be said to have made a conscious choice to establish themselves here permanently and to opt for full participation in the Canadian social process, including the right to vote and run for public office. While no doubt most citizens, natural-born or otherwise, are committed to Canadian society, citizenship does not ensure that that is the case. Conversely, non-citizens may be deeply commited to our country. Moreover, the requirement of commitment to our country is arguably satisfied by the oath of allegiance which lawyers are required to take. An alien may swear that oath. In any event an alien may owe allegiance to the Crown if he is resident within this country, even if he does not take the oath of allegiance: *Re Dickenson and Law Society of Alberta.*

[40] I turn then to the third basis upon which the requirement of citizenship was sought to be justified and the one which was most strenuously urged upon us — the contention that lawyers must be citizens because they play a

fundamental role in the Canadian system of democratic government. The thrust of this argument is not that non-citizens lack the capacity to be lawyers, but that, because of the role lawyers play, they must be citizens.

[41] This argument starts from the premise that citizenship is a special status which identifies members of the Canadian polity and signifies that that person is entitled to play an important role in the structure and process of government, broadly defined. The respondents propose the following syllogism:

> (a) persons who are involved in the processes or structures of government, broadly defined, should be citizens;
>
> (b) lawyers are involved in the processes or structure of government;
>
> (c) lawyers, therefore, should be citizens.

…

In short, the respondents submit the lawyer plays a vital role in the administration of law and justice and is therefore just as much a part of the governmental structures or processes as are judges, legislators, civil servants and policemen.

[45] In my opinion, that conclusion is invalid.

…

The Supreme Court of the United States has rejected the notion that lawyers are participants in the processes of government and therefore must be citizens. In *Re Griffiths* (1973), 37 L. Ed. 2d 910 at p. 919, Mr. Justice Powell, delivering the opinion of the court, stated;

Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country. Yet, they are not officials of government by virtue of being lawyers. Nor does the status of

> holding a licence to practise law place one so close to the core of the political process as to make him a formulator of government policy.
>
> I find this statement to be as applicable In British Columbia as in the United States, and I adopt it."

Expressing agreement with McLachlin J.A. in *Andrews (BC CA), supra*; Wilson J. writes in *Andrews (SCC), supra*:

> "I appreciate the desirability of lawyers being familiar with Canadian institutions and customs but I agree with McLachlin J.A. that the requirement of citizenship is not carefully tailored to achieve that objective and may not even be rationally connected to it. McDonald J. pointed out in *Re Dickenson and Law Society of Alberta* (1978), 1978 CanLII 638 (AB QB), 84 D.L.R. (3d) 189, at p. 195 that such a requirement affords no assurance that citizens who want to become lawyers are sufficiently familiar with Canadian institutions and 'it could be better achieved by an examination of the particular qualifications of the applicant, whether he is a Canadian citizen, a British subject, or something else'".

Whether the citizenship requirement is justified under s. 1 *Charter*; and citing *Oakes*, *supra*, McLachlin J.A., writes in *Andrews (BC CA), supra*:

> "For the reasons already discussed, it cannot be said that the objective to be served by the requirement that a member of the British Columbia bar be a citizen, is sufficiently important to warrant overriding the appellant's constitutionally protected right. The apparent objectives of the requirement, whatever validity they may have, cannot be said to relate to societal concerns which are pressing and substantial in a free and democratic society. Alternatively, assuming that the Legislature's objective in enacting the requirement was to ensure that persons admitted to the bar are familiar with Canadian institutions and rights and have a

> commitment to our society and that these concerns are pressing and substantial, it cannot be said that the means chosen — the requirement of citizenship — is reasonable and demonstrably justified. It does not appear to relate clearly to those ends, much less to have been carefully designed to achieve them with minimum impairment of individual rights."

While agreeing, generally, with McLachlin J.A., Wilson J., writes in *Andrews (SCC), supra*:

> Although I am in general agreement with her characterization of the role of lawyers *qua* lawyers in our society, my problem with this basis of justification is more fundamental. To my mind, even if lawyers do perform a governmental function, I do not think the requirement that they be citizens provides any guarantee that they will honourably and conscientiously carry out their public duties. They will carry them out, I believe, because they are good lawyers and not because they are Canadian citizens.
>
> In my view, the reasoning advanced in support of the citizenship requirement simply does not meet the tests in *Oakes* for overriding a constitutional right particularly, as in this case, a right designed to protect "discrete and insular minorities" in our society. I would respectfully concur in the view expressed by McLachlin J.A. at p. 617 that the citizenship requirement does not 'appear to relate closely to those ends, much less to have been carefully designed to achieve them with minimum impairment of individual rights'."

5. Test of Discrimination: Rationality v. Reasonableness

Regarding the "test of discrimination" and whether it should be based upon "rationality" or "fairness and reasonableness"; McLachlin J.A. writes in *Andrews (BC CA), supra*:

> "I would prefer the concepts of unfairness and unreasonableness to irrationality as a test of discrimination. In fact, the trial judge in this case, after propounding the so-called rationality test, appears to have equated rationality with reasonableness. He went on to inquire whether the distinction made against the appellant on the basis of his lack of citizenship was reasonable having regard to the purpose served by the distinction and its effect on the appellant. That test with its element of fairness and reasonableness, and not a pure rationality test, was the test urged on us by the appellants and the Attorney-General as I understood their submissions. I would accept that approach."

6. Requirements to Establish that a Limit is Reasonable and Demonstrably Justifiable

Regarding the "two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society"; Dickson C.J., writes for the majority in *R.* v. *Edwards Books and Art Ltd.*, [1986] 2 SCR 713 http://canlii.ca/t/1ftpt:

> "Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective 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. The Court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards."

7. Citizenship as Grounds of Discrimination Under s. 15 Charter

Applying the above approach, McIntyre J. concludes in *Andrews, supra*, regarding whether the citizenship requirement was discriminatory:

> "It would seem to me apparent that a legislative distinction has been made by s. 42 of the *Barristers and Solicitors Act* between citizens and non-citizens with respect to the practice of law. The distinction would deny admission to the practice of law to non-citizens who in all other respects are qualified. Have the respondents, because of s. 42 of the Act, been denied equality before and under the law or the equal protection of the law? In practical terms it should be noted that the citizenship requirement affects only those non-citizens who are permanent residents. The permanent resident must wait for a minimum of three years from the date of establishing permanent residence status before citizenship may be acquired. The distinction therefore imposes a burden in the form of some delay on permanent residents who have acquired all or some of their legal training abroad and is, therefore, discriminatory.
>
> The rights guaranteed in s. 15(1) apply to all persons whether citizens or not. A rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would, in my view, infringe s. 15 equality rights. Non-citizens, lawfully permanent residents of Canada, are -- in the words of the U.S. Supreme Court in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), at pp. 152-53, n. 4, subsequently affirmed in *Graham v. Richardson*, 403 U.S. 365 (1971), at p. 372 -- a good example of a "discrete and insular minority" who come within the protection of s. 15."

8. Language as Analogous Grounds of Discrimination under s. 15 *Charter*

Distinguishing between "mother tongue" and "language of use or habitual communication", Lamer J. continues in *Forget, supra*:

> "Accordingly, the word 'language means the language of the person. As such the concept of language is not limited to the mother tongue but also includes the language of use or habitual communication. I do not see why the scope of the word "language" has to be limited to the language of origin, since this often differs from the language used by a person every day. As the grounds of discrimination mentioned in s. 10 are not unchanging characteristics of the person, there is no reason to adopt a narrow interpretation which does not take into account the possibility that the mother tongue and the language of use may differ." (Underlining Added)

Lamer J. goes on in *Forget, supra*, to point out:

> "**A professional candidate is exempt from the test so long as he has taken at least three years of instruction in French** from the secondary level onwards, regardless of whether he is a francophone, an anglophone or an allophone (that is, his mother tongue or language of use is French, English or some other language).
> …
> In light of the foregoing, **I feel that the distinction created by the subject Regulations is based on language within the meaning of s. 10 of the *Charter*. The two groups of candidates** that result from this distinction **are divided along language lines--the fact that in general their mother tongue or language of use is, or is not, French.** In other words, most candidates who benefit from the presumption will be francophones, while those who take the test will be for the most part non-francophones.

18. Of course the groups resulting from application of the Regulations are not entirely homogeneous, since as we have seen non-francophones may sometimes do their studies in French and vice versa. Thus not all francophones will be exempt from the test, and not all non-francophones will have to take it. The fact remains, however, that as a rule the majority in each group consists of francophones on the one hand and non-francophones on the other, whatever limited exceptions may occur. **As the groups of candidates affected by the distinction are identified along language lines, to say that the distinction is not based on language would in my opinion be adopting too narrow a construction.**" (Bolding Added)

Speaking of the purpose of the regulations and the Act, Lamer J. writes in *Forget, supra*:

"It must be remembered that the purpose of the presumption and test at issue here is to demonstrate that a professional candidate has an appropriate knowledge of French, as required by s. 35 of the *Charter of the French language*. It is only logical that the means used to establish a candidate's linguistic aptitudes will of necessity have something to do with language, otherwise the Regulations would not achieve the purpose of the Act.

…

As the distinction created by the Regulations is based on language, we must now turn to the third criterion for determining whether discrimination exists, namely whether this distinction "has the effect of nullifying or impairing" the right of candidates to full equality in admission to a professional corporation. It is important to mention and to emphasize that the validity of s. 35 of the *Charter of the French language*, by which any professional candidate must have a knowledge of French appropriate to the practice of his profession, is not being challenged. Candidates must therefore prove they have such knowledge.

In my view, the right to equality set forth in s. 10 of the *Charter* does not mean that all candidates for a professional corporation have to be treated in the same way. Indeed, discrimination will sometimes result from equal treatment, because special features that distinguish each group will then be disregarded. Respondent moreover admitted that the mere existence of distinctions does not infringe the right to equality, so long as people having similar relevant attributes are treated in the same way. Since she is arguing that the disputed distinction is discriminatory, she must feel that all professional candidates have the same relevant attributes. Respondent's position in this regard is paradoxical, since on the one hand she seems to be saying that all candidates have the same relevant attributes, while, on the other hand, by recognizing the existence of two language groups (francophones and anglophones) she implicitly admits that they do not all have such attributes. It seems clear to me that candidates do not all have the same language skills. In view of the undisputed requirement that candidates have a knowledge of French, Regulations that make distinctions to take account of the language skills of individuals do not *prima facie* compromise the right to equality."

Section 35*, Charter of the French Language*, CQLR c C-11 http://canlii.ca/t/52lls reads:

"**35.** The professional orders shall not issue permits except to persons whose knowledge of the official language is **appropriate to the practice of their profession**.

A person is deemed to have the **appropriate knowledge** if

(1) he has received, **full time**, no less than three years of secondary or post-secondary instruction provided in French;

(2) he has passed the fourth or fifth year secondary level examinations in **French as the first language**;

(3) from and after the school year 1985-86, he obtains a **secondary school certificate in Québec**.

In all other cases, a person must obtain a certificate issued by the Office québécois de la langue française or hold a certificate defined as equivalent by regulation of the Government.

The Government, by regulation, may determine the procedures and conditions of issue of certificates by the Office, establish the rules governing composition of an examining committee to be formed by the Office, provide for the mode of operation of that committee, and determine criteria for evaluating the appropriate knowledge of French for the practice of a profession or a category of professions and a mode of evaluating such knowledge." (Underlining and Bolding Added)

Regulation respecting the issue of certificates of knowledge of the official language for the purpose of admission to professional orders and certain equivalents to those certificates, CQLR c C-11, r 4 http://canlii.ca/t/htj8

1. An examining committee shall be responsible for evaluating the appropriate knowledge of the official language for the practice of a profession or a category of professions by preparing **an examination** to measure

(1) oral French comprehension;
(2) written French comprehension;
(3) oral French expression;
(4) written French expression.

There shall be a part of the examination corresponding to each of those criteria; a candidate must pass all 4 parts of the examination.

…

9. The following are considered to be equivalent to the certificate issued by the Office québécois de la langue française under section 5:

(1) a certificate issued by the Régie de la langue française in accordance with the Regulation respecting a working knowledge of the French language necessary to obtain a permit from a professional corporation (O.C. 2050-76, 76-06-09);

(2) a document issued before 7 September 1977 certifying that a person possessed a working knowledge of the French language, issued in accordance with the Regulation concerning standards for evaluating the working knowledge of French of an immigrant wishing to be admitted to the study or the practice of a profession in Québec (O.C. 936-71, 71-03-10).

Citing the *Abella report, supra*, Lamer J. writes in *Forget, supra*:

> "In the instant case non-francophones are not prohibited from joining a professional corporation on grounds that are arbitrary and have nothing to do with the required aptitudes. On the contrary, the Regulations enacted by the Office allow them to show that they possess the necessary skills, namely an appropriate knowledge of French, to be admitted to a professional corporation. It should be borne in mind that this requirement is imposed by s. 35 of the *Charter of the French language*, and this provision is not being challenged. The impugned Regulations do not reject non-francophones outright, they offer them a means of establishing that they meet this requirement. What is more, under s. 11 of the Regulations, candidates may retake the test as many times as they have to in order to pass it. Far from being an arbitrary obstacle for a professional candidate, the Regulations facilitate admission to the corporation while remaining consistent with the requirements of the Act.
>
> 25. It is true, as we have seen, that a majority of those who benefit from the presumption exempting certain candidates from taking the test will be francophones. In creating this presumption the Office thus took account of the linguistic characteristics of those governed by the Act, since there is no reason to require a test of persons who in theory should pass it easily. In any case, the fact of having taken three years' instruction in French is in itself a kind of test which candidates covered by the presumption have passed." (Underlining Added)

9. Equality of Use of the English and French Languages; particularly in the Courts.

The Constitution Act, 1867, 30 & 31 Vict, c 3 http://canlii.ca/t/ldsw

Use of English and French	**133.**	Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and

Languages 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.

Charter of the French Language, CQLR c C-11 http://canlii.ca/t/52lls

CHAPTER III

THE LANGUAGE OF THE LEGISLATURE AND THE COURTS

7. French is the language of the legislature and the courts in Québec, subject to the following:

(1) legislative bills shall be printed, published, passed and assented to in French and in English, and the statutes shall be printed and published in both languages;

(2) the regulations and other similar acts to which section 133 of the Constitution Act, 1867 applies shall be made, passed or issued, and printed and published in French and in English;

(3) the French and English versions of the texts referred to in paragraphs 1 and 2 are equally authoritative;

(4) either French or English may be used by any person in, or in any pleading in or process issuing from, any court of Québec.

1977, c. 5, s. 7; 1993, c. 40, s. 1.

8. Where an English version exists of a regulation or other similar act to which section 133 of the Constitution Act, 1867 does not apply, the French text shall prevail in case of discrepancy.

1977, c. 5, s. 8; 1993, c. 40, s. 1.

9. Every judgment rendered by a court of justice and every decision rendered by a body discharging quasi-judicial functions shall, at the request of one of the parties, be translated into French or English, as the case may be, by the civil administration bound to bear the cost of operating such court or body.

In *Att. Gen. of Quebec* v. *Blaikie et al.*, [1979] 2 SCR 1016 http://canlii.ca/t/1mkvb; referring to *Jones* v. *A.G. of New Brunswick*, [1975] 2 SCR 182 http://canlii.ca/t/1z197, the Court writes unanimously:

> "What the *Jones* case decided was that Parliament could enlarge the protection afforded to the use of French and English in agencies and institutions and programmes falling within federal legislative authority. There was no suggestion that it could unilaterally contract the guarantees or requirements of s. 133. Yet it is contraction not enlargement that is the object and subject of Chapter III, Title I of the *Charter of the French language. But s.* 133 *is* an entrenched provision, not only forbidding modification by unilateral action of Parliament or of the Quebec Legislature
>
> [Page 1027]
>
> but also providing a guarantee to members of Parliament or of the Quebec Legislature and to litigants in the Courts of Canada or of Quebec that they are entitled to use either French or English in parliamentary or legislative assembly debates or in pleading (including oral argument) in the Courts of Canada or of Quebec.
>
> …

There is, however, a more compelling answer not only to the question of the language of delegated legislation but also to the question of the language of Court pleading, Court processes, oral argument before the Courts and Court judgments, and it is to be found in s. 7 of Chapter III of Title I of the *Charter of the French language.* The generality of s. 7, "French is the language of the legislature and the courts in Quebec" sweeps in the particulars spelled out in the succeeding ss. 8 to 13. It encompasses in its few and direct words what the succeeding sections say by way of detail. Indeed, as already pointed out, Chapter III of Title I, and especially s. 7 thereof, is a particular projection of Title I, Chapter I of the *Charter of the French language,* saying that "French is the

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official language of Quebec". Although as a matter of construction, the particular in a statute may modify or limit the general, nothing in ss. 8 to 13 indicates any modification or limitation of s. 7. If anything, there is an extension of the term "Courts" as it appears in s. 7 to include "bodies discharging judicial or quasi-judicial functions": see ss. 11 and 12. In s. 13, the reference is to "judgments ... by courts and by bodies discharging judicial or quasi-judicial functions" in making only the French text of such judgments official. Again, this appears to envisage an enlarged appreciation of the meaning of "Courts of Quebec", as that term appears in s. 133.

Even if this not be the view of the Quebec Legislature in enacting ss. 11, 12 and 13 above-mentioned, the reference in s. 133 to "any of the Courts of Quebec" ought to be considered broadly as including not only so-called s. 96 Courts but also Courts established by the Province and administered by provincially-appointed Judges. It is not a long distance from this latter class of tribunal to those which exercise judicial power, although they are not courts in the traditional sense. If they are statutory agencies which are adjudicative, applying legal principles to the assertion of claims under their constituent legislation, rather than settling issues on grounds of expediency or administrative policy,

they are judicial bodies, however some of their procedures may differ not only from those of Courts but also from those of other adjudicative bodies. In the rudimentary state of administrative law in 1867, it is not surprising that there was no reference to non-curial adjudicative agencies. Today, they play a significant role in the control of a wide range of individual and corporate activities, subjecting them to various norms of conduct which are at the same time limitations on the jurisdiction of the agencies and on the legal position of those caught by them. The guarantee given for the use of French or English in Court proceedings should not be liable to curtailment by provincial substitution of adjudicative agencies for Courts to such extent

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as it compatible with s. 96 of the *British North America Act*.

Two judgments of the Privy Council, which wrestled with similar questions of principle in the construction of the *British North America Act,* are, to some degree, apposite here. In *Edwards v. Attorney General of Canada**[8]**,* the "persons" case (respecting the qualification of women for appointment to the Senate under s. 24), there are observations by Lord Sankey of the need to give the *British North America Act* a broad interpretation attuned to changing circumstances: 'The British North America Act', he said, at p. 136, 'planted in Canada a living tree capable of growth and expansion within its natural limits'. Dealing, at this Court is here, with a constitutional guarantee, it would be overly-technical to ignore the modern development of non-curial adjudicative agencies which play so important a role in our society, and to refuse to extend to proceedings before them the guarantee of the right to use either French and English by those subject to their jurisdiction.

In *Attorney General of Ontario v. Attorney General of Canada**[9]**,* (the Privy Council Appeals Reference), Viscount Jowitt said in the course of his discussion of the issues, that "it is, as their Lordships think, irrelevant that the question is

one that might have seemed unreal at the date of the *British North America Act. To* such an organic statute the flexible interpretation must be given which changing circumstances require" (at p. 154).

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Although there are clear points of distinction between these two cases and the issue of the scope of s. 133, in its reference to the Courts of Quebec, they nonetheless lend support to what is to us the proper approach to an entrenched provision, that is, to make it effective through the range of institutions which exercise judicial power, be they called courts or adjudicative agencies. In our opinion, therefore, the guarantee and requirements of s. 133 extend to both.

It follows that the guarantee in s. 133 of the use of either French or English 'by any person or in any pleading or process in or issuing from ... all or any of the Courts of Quebec' applies to both ordinary Courts and other adjudicative tribunals. Hence, not only is the option to use either language given to any person involved in proceedings before the Courts of Quebec or its other adjudicative tribunals (and this covers both written and oral submissions) but documents emanating from such bodies or issued in their name or under their authority may be in either language, and this option extends to the issuing and publication of judgments or other orders."

In *Jones*, *supra*, Laskin C.J., speaking for the unanimous Court, writes regarding language rights and s. 133 *BNA Act, 1867*:

"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

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and French, if done in relation to matters within the competence of the enacting Legislature.

The words of s. 133 themselves point to its limited concern with language rights; and it is, in my view, correctly described as giving a constitutionally based right to any person to use English or French in legislative debates in the federal and Quebec Houses and in any pleading or process in or issuing from any federally established Court or any Court of Quebec, and as imposing an obligation of the use of English and French in the records and journals of the federal and Quebec legislative Houses and in the printing and publication of federal and Quebec legislation. There is no warrant for reading this provision, so limited to the federal and Quebec legislative chambers and their legislation, and to federal and Quebec Courts, as being in effect a final and legislatively unalterable determination for Canada, for Quebec and for all other Provinces, of the limits of the privileged or obligatory use of English and French in public proceedings, in public institutions and in public communications. On its face, s. 133 provides special protection in the use of English and French; there is no other provision of the *British North America Act* referable to the Parliament of Canada (apart from s. 91(1)) which deals with language as a legislative matter or otherwise. I am unable to appreciate the submission that to extend by legislation the privileged or required public use of English and French would be violative of s. 133 when there has been no interference with the special protection which it prescribes. I refer in this respect particularly to s. 11(4) of the *Official Languages Act,* already quoted."

a. Definition of "Adverse Effect" or "Systemic" Discrimination

In *Ont. Human Rights Comm.* v. *Simpsons-Sears*, [1985] 2 SCR 536 http://canlii.ca/t/1ftxz; speaking for the unanimous court regarding "adverse effect discrimination"; and distinguishing it from "direct discrimination", McIntyre J. writes:

> "Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, 'No Catholics or no women or no blacks employed here.' There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the Code I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the Code. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply."

b. "Intent" not a Precondition

In *Canada (human Rights Commission)* v. *Taylor*, [1990] 3 SCR 892 http://canlii.ca/t/1fsp1; and reflecting the views of the Court in *Ont. Human Rights Comm.* v. *Simpsons-Sears*, [1985] 2 SCR 536 http://canlii.ca/t/1ftxz, and *Bhinder* v. *CN*, [1985] 2 SCR 561, 1985 CanLII 19 (SCC) http://canlii.ca/t/1ftwt, Dickson, C.J., writes for the majority:

"An intent to discriminate is not a precondition of a finding of discrimination under human rights codes …. The preoccupation with effects, and not with intent, is readily explicable when one considers that systemic discrimination is much more widespread in our society than is intentional discrimination. **To import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects, would thus defeat one of the primary goals of anti-discrimination statutes.** At the same time, however, it cannot be denied that to ignore intent in determining whether a discriminatory practice has taken place according to s. 13(1) increases the degree of restriction upon the constitutionally protected freedom of expression." (Underlining Added)

c. The Absence of "Intent" and Its Impact "Minimal Impairment" or the "Proportionality" Test

Dickson C.J., writes further in *Taylor, supra:*

"… the absence of an intent component in s. 13(1) raises no problem of minimal impairment when one considers that the objective of the section requires an emphasis upon discriminatory effects. Moreover, and this is where I am perhaps jumping ahead to the "effects" component of the proportionality test, the purpose and impact of human rights codes is to prevent discriminatory effects rather than to stigmatize and punish those who discriminate. Consequently, in this context the absence of intent in s. 13(1) does not impinge so deleteriously upon the s. 2(*b*) freedom of expression so as to make intolerable the challenged provision's existence in a free and democratic society." (Underlining Added)

In *Simpsons-Sears, supra*, McIntyre J., cites the dissent of Laskin, C.J., in *Gay Alliance Toward Equality* v. *Vancouver Sun*, [1979] 2 SCR 435 http://canlii.ca/t/1z785, regarding "motive" versus "intent" and whether intent is a pre-condition in s. 3 *Human Rights Code*:

"I take first that Court's preoccupation with the term "motivation", a matter also emphasized in

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this Court by counsel for the Vancouver Sun. The term was used in para. 12 of the stated case as a disjunctive with the word "cause". It would, I am sure, have been less confusing if the Legislature had used the phrase "reasonable grounds" rather than "reasonable cause", but in context there is no doubt that the exonerating principle is that of reasonable grounds. "Cause" in any sense of causation is not involved in the operation of the *Human Rights Code.* The board was using a word which in *Black's Law Dictionary* (1968, revised 4th ed.), for example, is defined as "cause or reason that moves the will and induces action". *The Oxford English Dictionary* (1970, vol. 6) at p. 698 defines "motive" as, *inter alia,* "that which moves or induces a person to act in a certain way". *Wigmore on Evidence* (1940, 3rd ed. vol. 1), at p. 561, s. 119 recites various uses of the word "motive" as a *fact in issue* and one of such uses is as follows:

"(3) motive may be in issue in the sense of reason or ground for conduct."

Again, *Chadman's Dictionary of Law* (1909) at p. 74 defines "*causa*" to mean, *inter alia,* "motive, ground, reason or consideration".

I refer to the foregoing to show that the board, a lay group, could properly use the word motive as a synonym for reason or ground. Certainly, its meaning, as does the meaning of "reasonable cause", depends on the context in which it is used. **What appears to me to have occurred in this case is a concern with "motive" as if it was being differentiated from "intent" for criminal law purposes. Intent is not, however, an issue under s. 3 of the *Human Rights Code."*** (Underlining and Bolding Added)

d. Interpretation and Scope of Human Rights Legislation

McIntyre J. writes in *Simpsons-Sears, supra*, the following regarding the interpretation of human rights legislation; this passage was cited by Dickson, C.J., in his dissent in *Bhinder, supra*:

"It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest

interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment...and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary--and it is for the courts to seek out its purpose and give it effect."

McIntyre J., writes in *Simpsons-Sears, supra*, regarding "intent":

"To take the narrower view and hold that intent is a required element of discrimination under the Code would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create, as in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), injustice and discrimination by the equal treatment of those who are unequal (*Dennis v. United States*, 339 U.S. 162 (1950), at p. 184). Furthermore, as I have endeavoured to show, we are dealing here with consequences of conduct rather than with punishment for misbehaviour. In other words, we are considering what are essentially civil remedies. The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination. It is my view that the courts below were in error in finding an intent to discriminate to be a necessary element of proof."

McIntyre J., writes further in *Simpsons-Sears, supra*:

"The Code must be construed and flexibly applied to protect the right of the employee who is subject to discrimination and also to protect the right of the employer to proceed with the lawful conduct of his business. The Code was not intended to accord rights to one to the exclusion of the rights of the other."

In his dissent in *Bhinder supra*, the Chief Justice concurred with the majority opinion of McIntyre J., regarding the extent of the coverage of ss. 7 and 10 *Canadian Human Rights*

Act, RSC 1985, c H-6 http://canlii.ca/t/52zkk, to include "unintentional and adverse effect discrimination" (a.k.a., "systemic discrimination").

Writing for the unanimous Court in *CN, supra*, Dickson C.J., speaks of the matter of "intent" and its implementation in the purpose of human-rights legislation:

> "However, as the second problem with a fault-based approach was revealed—that moral blame was too limited a concept to deal effectively with the problem of discrimination—an attempt was made by legislatures and courts to cleanse the word "intent" of its moral component. The emphasis upon formal causality was restored and the intent required to prove discrimination became the intent to cause a discriminatory result. The judgment of the Federal Court of Appeal in *Canadian National Railway Co. v. Canadian Human Rights Commission and Bhinder,* 1983 CanLII 2850 (FCA), [1983] 2 F.C. 531, is an example of this approach (aff'd on different grounds in *Bhinder v. Canadian National Railway Co.,* 1985 CanLII 19 (SCC), [1985] 2 S.C.R. 561). The difficulty with this development was that "intent" had become so encrusted with the moral overtones of "malice" that it was often difficult to separate the two concepts. Moreover, the imputation of a requirement of "intent", even if unrelated to moral fault, failed to respond adequately to the many instances where the effect of policies and practices is discriminatory even if that effect is unintended and unforeseen. The stated purpose of human rights legislation (in the case of the Canadian Act, to prevent "discriminatory practices") was not fully implemented."

e. The Special Nature of Human Rights Legislation

Cited in *CN*, *supra*, by Dickson, C.J.; McIntyre J. writes for the unanimous Court in *Winnipeg School Division No. 1* v. *Craton*, [1985] 2 SCR 150 http://canlii.ca/t/1ftzq, regarding the special nature of human-rights legislation:

> "I am in agreement with Monnin C.J.M. where he said:
>
> 'Human rights legislation is public and fundamental law of general application. If there is a conflict between this fundamental law and other specific legislation, unless an exception is created, the human rights legislation must govern.'

This is in accordance with the views expressed by Lamer J. in *Insurance Corporation of British Columbia v. Heerspink*, 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145. Human rights legislation is of a special nature and declares public policy regarding matters of general concern. Is is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims."

2. *Bona Fide* Occupational Requirement

In his opinion for the majority in *Bhinder supra*, McIntyre J., citing *Ontario Human Rights Commission* v. *Etobicoke*, [1982] 1 SCR 202 http://canlii.ca/t/1lpbq, re-states the "*bona fide* occupational requirements" (BFOR) test:

> "To be a *bona fide* occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public." (Underlining Added)

a. Re: Occupational Requirement; Minority Opinion in *Bhinder*

In his dissent in *Bhinder, supra*, Dickson C.J., explains the term "occupational requirement" and applies the BFOR rule; writing:

"The words "occupational requirement" mean that the requirement must be manifestly related to the occupation in which the individual complainant is engaged. Once it is established that a requirement is "occupational", however, it must further be established that it is "*bona fide*". A requirement which is *prima facie* discriminatory against an individual, even if it is in fact "occupational", is not *bona fide* for the purpose of s. 14(*a*) if its application to the individual is not reasonably necessary in the sense that undue hardship on the part of the employer would result if an exception or substitution for the requirement were allowed in the case of the individual. In short, while it is true the words "occupational requirement" refer to a requirement manifest to the occupation as a whole, the qualifying words "*bona fide*" require an employer to justify the imposition of an occupational requirement on a particular individual when such imposition has discriminatory effects on the individual."

b. BFOR rule in *Etobicoke* qualified in *Brossard*

The BFOR rule outlined in *Etobicoke, supra,* was qualified by Beetz J., in *Brossard (Town)* v. *Quebec (Commission des droits de la personne)*, [1988] 2 SCR 279 http://canlii.ca/t/1ftbz:

"The respondent must also demonstrate that the aptitude or qualification is related in an objective sense to the performance of the employment concerned. McIntyre J. suggested in *Etobicoke* that the purpose of the objective test is to determine whether the employment requirement is "reasonably necessary" to assure the performance of the job. In the case at bar, I believe that this "reasonable necessity" can be examined on the basis of the following two questions:

(1) Is the aptitude or qualification rationally connected to the employment concerned? This allows us to determine whether the employer's purpose in establishing the requirement is appropriate in an objective sense to the job in question. In *Etobicoke*, for example, physical strength evaluated as a function of age was rationally connected to the work of being a fireman.

(2) Is the rule properly designed to ensure that the aptitude or qualification is met without placing an undue burden on those to whom the rule applies? This allows us to inquire as to the reasonableness of the means the employer chooses to test for the presence of the requirement for the employment in question. The sixty-year mandatory requirement age in *Etobicoke* was disproportionately stringent, for example, in respect of its objective which was to ensure that all firemen have the necessary physical strength for the job."

McIntyre J., goes on to write in *Bhinder, supra*:

"We must consider then whether such an individual application of a *bona fide* occupational requirement is permissible or possible. The words of the Statute speak of an "occupational requirement". This must refer to a requirement for the occupation, not a requirement limited to an individual. It must apply to all members of the employee group concerned because it is a requirement of general application concerning the safety of employees. The employee must meet the requirement in order to hold the employment. It is, by its nature, not susceptible to individual application. … A condition of employment does not lose its character as a *bona fide* occupational requirement because it may be discriminatory. Rather, if a working condition is established as a *bona fide* occupational requirement, the consequential discrimination, if any, is permitted--or, probably more accurately--is not considered under s. 14(*a*) as being discriminatory." (Underlining Added)

c. The Duty to Accommodate and the Bona Fide Occupational Requirement

McIntyre J., goes on to write in *Bhinder, supra*:

"As I have already said, no exercise in construction can get around the intractable words of s. 14(*a*) and Bhinder's appeal must accordingly fail. It follows as well from the foregoing that there cannot be any consideration in this case of the duty to accommodate referred to in *O'Malley* (a.k.a., *Simpsons-Sears, supra*) and contended for by the appellants. The duty to accommodate will arise in such a

case as *O'Malley*, where there is adverse effect discrimination on the basis of religion and where there is no *bona fide* occupational requirement defence. The duty to accommodate is a duty imposed on the employer to take reasonable steps short of undue hardship to accommodate the religious practices of the employee when the employee has suffered or will suffer discrimination from a working rule or condition. The *bona fide* occupational requirement defence set out in s. 14(*a*) leaves no room for any such duty for, by its clear terms where the *bona fide* occupational requirement exists, no discriminatory practice has occurred. As framed in the *Canadian Human Rights Act*, the *bona fide* occupational requirement defence when established forecloses any duty to accommodate." (Underlining Added)

d. Whether Occupational Requirement is Related to a Job; or to an Employee: *Dairy Pool*.

In *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)*, [1990] 2 SCR 489 http://canlii.ca/t/1fsv9; citing *Simpson-Sears* and *Bhinder, supra*, and expressing her support for the position of McIntyre J., in dissent, in *Etobicoke, supra*, that an "occupational requirement is by definition job related, not employee related", Wilson J. writes:

"It seems to me in retrospect that the majority of this Court may indeed have erred in concluding that the hard hat rule was a BFOR. I say that not because I disagree with the test set out in *Etobicoke* nor because I accept the proposition advanced by those in dissent that accommodation is a necessary component of a BFOR, but for two other reasons.

First, the rule was not, to use the terminology of *Etobicoke*, "reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public". The Tribunal found as a fact that the failure of Mr. Bhinder to wear a hard hat would not affect his ability to work as a maintenance electrician or pose any threat to the safety of his co-workers or to the public at large. The Tribunal did find that not

wearing a hard hat would increase the risk to Mr. Bhinder himself, but only marginally. In light of the findings of fact by the Tribunal, I think it is difficult to support the conclusion of the majority of the Court that the hard hat rule was reasonably necessary for the safety of Mr. Bhinder, his fellow employees and the general public.

My second reason for questioning the correctness of *Bhinder* concerns the assumption that underlies both the majority and minority judgments, namely that a BFOR defence applies to cases of adverse effect discrimination. Upon reflection, I think we may have erred in failing to critically examine this assumption. As McIntyre J. notes in *O'Malley*, the BFOQ test in *Etobicoke* was formulated in the context of a case of direct discrimination on the basis of age. The essence of direct discrimination in employment is the making of a rule that generalizes about a person's ability to perform a job based on membership in a group sharing a common personal attribute such as age, sex, religion, etc. The ideal of human rights legislation is that each person be accorded equal treatment as an individual taking into account those attributes. Thus, justification of a rule manifesting a group stereotype depends on the validity of the generalization and/or the impossibility of making individualized assessments.

In *Etobicoke* this Court found that the employer had not adduced sufficient evidence to support its generalization with respect to the abilities of fire fighters over the age of sixty. In the recent case of *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, 1989 CanLII 18 (SCC), [1989] 2 S.C.R. 1297, this Court revisited the rule of mandatory retirement considered by it in *Etobicoke*. In *Saskatoon Fire Fighters* the Tribunal had persuasive evidence before it as to the relationship between advancing age and declining ability. It was also satisfied that there was no reliable method of individualized testing, the availability of which would have obviated the need for a uniform age-based rule. In sum, the Court accepted that the evidence adduced by the employer

supported both the generalization about the effect of age on ability and the inadequacy of individualized assessments. Thus the Court affirmed the Tribunal's decision that under the circumstances a BFOQ had been established.

Another example from this Court's jurisprudence is *Caldwell v. Stuart*, 1984 CanLII 128 (SCC), [1984] 2 S.C.R. 603, in which adherence to the tenets of the Roman Catholic faith was held to constitute a BFOQ for a Roman Catholic teacher in a Roman Catholic school. In effect, this Court validated the generalization that the creation of an appropriate spiritual atmosphere in a Roman Catholic school required of all Catholic teachers that they demonstrate religious conformance themselves.

Where a rule discriminates on its face on a prohibited ground of discrimination, it follows that it must rely for its justification on the validity of its application to all members of the group affected by it. There can be no duty to accommodate individual members of that group within the justificatory test because, as McIntyre J. pointed out, that would undermine the rationale of the defence. Either it is valid to make a rule that generalizes about members of a group or it is not. By their very nature rules that discriminate directly impose a burden on all persons who fall within them. If they can be justified at all, they must be justified in their general application. That is why the rule must be struck down if the employer fails to establish the BFOQ. This is distinguishable from a rule that is neutral on its face but has an adverse effect on certain members of the group to whom it applies. In such a case the group of people who are adversely affected by it is always smaller than the group to which the rule applies. On the facts of many cases the "group" adversely affected may comprise a minority of one, namely the complainant. In these situations the rule is upheld so that it will apply to everyone except persons on whom it has a discriminatory impact, provided the employer can accommodate them without undue hardship."

3 Systemic Discrimination; a New, Unified Approach: *BCGSEU*

Citing the Honourable Chief Justice in *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, [1999] 3 SCR 3 http://canlii.ca/t/1fqk1, Maclachlin, J., proposes a new approach to evaluating discrimination; arguing that the legitimacy of a standard qualified as "neutral" is "never questioned"; thus, it "remains intact". The "substantive norms underlying the standard" are never addressed.

a. Mainstream Cultural Paradigm and Systemic Discrimination

Shelagh Day and Gwen Brodsky argue in Shelagh Day and Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?", 1996 75-3 *Canadian Bar Review* 433, 1996 CanLIIDocs 85 http://www.canlii.org/t/2djn that the current paradigm "does not challenge the imbalances of power, or the discourses of dominance, such as racism, ablebodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves 'normal' to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are 'accommodated' … Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those who do not quite fit. We make some concessions to those who are "different", rather than abandoning the idea of "normal" and working for genuine inclusiveness.". (Underlining added)

b. *BCGSEU*: SCC's Incorporation of the Day and Brodsky definition into Systemic Discrimination Analysis.

Citing *Day and Brodsky*; and referring to their assessment that the conventional analysis distinguishes between the "accepted neutral standard and the duty to accommodate those who are adversely affected by it", the Court writes in *BCGSEU* "Although the Government may have a duty to accommodate an individual claimant, the practical result of the conventional analysis is that the complex web of seemingly neutral, systemic barriers to traditionally male-dominated occupations remains beyond the direct reach of the law. The right to be free from discrimination is reduced to a question of whether the "mainstream" can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination receives the law's approval. This cannot be right." (Underlining added)

c. *BCGSEU*: A New Unified Discrimination and BFOR.

In *BCGSEU*, the Court outlined the following three-step test for determining whether a "*prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:

(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;

(3) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and

(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer." (Underlining Added)

The Court writes conclusively in *BCGSEU* "Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards."

10. Rule of Law

Regarding the rule of law; the Court writes unanimously in *Re Manitoba Language Rights*, [1985] 1 SCR 721 http://canlii.ca/t/1ftz1:

"The rule of law, a fundamental principle of our Constitution, must mean at least two things.

First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. Indeed, it

is because of the supremacy of law over the government, as established in s. 23 of the *Manitoba Act, 1870* and s. 52 of the *Constitution Act, 1982*, that this Court must find the unconstitutional laws of Manitoba to be invalid and of no force and effect.

60. Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life. 'The rule of law in this sense implies ... simply the existence of public order.' (W. I. Jennings, *The Law and the Constitution* (5th ed. 1959), at p. 43). As John Locke once said, 'A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society' (quoted by Lord Wilberforce in *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. (No. 2)*, [1966] 2 All E.R. 536 (H.L.), at p. 577). According to Wade and Phillips, *Constitutional and Administrative Law* (9th ed. 1977), at p. 89: '... the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife. In this sense, the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions'."

In *Roncarelli* v. *Duplessis*, [1959] SCR 121 http://canlii.ca/t/22wmw; speaking on behalf of Judson J., Rand J. writes on the rule of law:

"The injury done by him was a, fault engaging liability within the principles of the underlying public law of Quebec: *Mostyn v. Fabrigas**[10]*, and under art. 1053 of the *Civil Code.* That, in the presence of expanding administrative regulation of economic activities, such ,a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure. An administration of licences on the highest level of **fair**

and impartial treatment to all may be forced to follow the practice of "first come, first served", which makes the strictest observance of **equal responsibility** to all of even greater importance; at this stage of developing government it would be a danger of high consequence to tolerate such a departure from **good faith in executing the legislative purpose**. It should be added, however, that that principle is not, by this language, intended to be extended to ordinary governmental employment: with that we are not here concerned."

On the rule of law, democratic principles, "sovereign will" and "majority rule";

"The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.

…

Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is

necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled."

11. "State Necessity" Doctrine

On the "State Necessity" doctrine; the Court cites the definition formulated by Lord Pearce, in dissent, in *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645 (P.C.) at p. 732:

> "I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognized as valid or acted upon by the courts, with certain limitations namely
>
> (*a*) so far as they are directed to and reasonably required for ordinary orderly running of the State, and
>
> (*b*) so far as they do not impair the rights of citizens under the lawful (1961) Constitution, and
>
> (*c*) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign. This last, *i.e.*, (*c*), is tantamount to a test of public policy."

Regarding the applicability of the "State Necessity" doctrine; the Court writes in *Re Manitoba Language Rights, supra*:

"All of these cases are concerned with insurrectionary governments, the present case is not. But even more fundamental than this distinction is the fact that all of these cases require that the laws saved by the application of the doctrine not impair the rights of the citizens guaranteed by the Constitution. In the present case, the laws in question *do* impair these rights. Nonetheless, the necessity cases on insurrectionary governments illustrate the more general proposition that temporary effect can be given to invalid laws where this is necessary to preserve the rule of law.

The doctrine of state necessity has also been used to uphold laws enacted by a lawful government in contravention of express constitutional provisions under extraordinary circumstances which render it impossible for the government to comply with the Constitution."

Montreal's institutional identity, as expressed in the preamble and s. 1 of its Charter—*Charter of Ville de Montréal, metropolis of Québec*, CQLR c C-11.4 http://canlii.ca/t/542k3— is firmly established:

> "AS Ville de Montréal, as a cosmopolitan metropolis and crucible of intercultural relations, faces unique challenges in Québec with respect to the reception, integration and **francization** of the immigrant population; …
>
> **1.** A city is hereby constituted under the name "Ville de Montréal".
>
> Montréal is a French-speaking city.
>
> Montréal is the metropolis of Québec and one of its key actors as regards economic development." (Underlining Added)

In s. 13 of the "Principles and Values" section of its MONTRÉAL CHARTER OF RIGHTS AND RESPONSIBILITIES (MCRR) (http://ville.montreal.qc.ca/pls/portal/docs/page/charte_mtl_fr/media/documents/charte_montrealaise_english.pdf):

> "ARTICLE 13 | Montréal is a French-speaking city that, according to the law, **also** provides services to its citizens in English." (Underlining and Bolding Added)

And, in s. 28 of the MCRR, it is written:

> "ARTICLE 28 | Commitments
> To foster the enjoyment by citizens of their right to a high quality municipal services, Montréal is committed to: a) Providing competent municipal services in a respectful and non-discriminatory manner;"

The OCPM states on its website (http://ocpm.qc.ca/fr/english) that, in compliance with the language policy of the city of Montreal:

> "The Charter of the City of Montreal states that Montreal is a French-speaking city and, under the Charter of the French Language, the City of Montreal and its affiliated organizations are required to write all their texts and documents in French, in addition to addressing its citizens in this language first. **An exception to this rule** is when a citizen addresses the City in English directly, the **City can answer** or correspond with said citizen **in English**. However, **it is not obliged to do so**. In fact, **as a matter of courtesy**, the City of Montreal translates some of its documents for the citizens.
>
> In order to promote citizen participation of Anglophones, the Office de consultation publique de Montréal offers a number of general documents and educational resources in English. We also provide translations of certain participatory tools to facilitate the contribution of Anglophones when public consultations touch on sectors or topics where their presence is important. Please note that while all consultations are lead in French, participants are invited to express themselves and submit opinions in both English or French." (Underlining and Bolding Added)

The above explanation is prescribed the following laws and policies, to which the city of Montreal is subject:

Charter of the French Language, CQLR c C-11

> **CHAPTER I**
>
> THE OFFICIAL LANGUAGE OF QUÉBEC

1. French is the official language of Québec.

CHAPTER II

FUNDAMENTAL LANGUAGE RIGHTS

4. Workers have a right to carry on their activities in French.

5. Consumers of goods and services have a right to be informed and served in French.

15. The civil administration shall draw up and publish its texts and documents in the official language.

This section does not apply to relations with persons outside Québec, to publicity and communiqués carried by news media that publish in a language other than French or to correspondence between the civil administration and natural persons when the latter address it in a language other than French.

20. In order to be appointed, transferred or promoted to an office in the civil administration, a knowledge of the official language appropriate to the office applied for is required.

For the application of the preceding paragraph, each agency of the civil administration shall establish criteria and procedures of verification and submit them to the Office québécois de la langue française for approval, failing which the Office may establish them itself. If the Office considers the criteria and procedures unsatisfactory, it may either request the agency concerned to modify them or establish them itself.

This section does not apply to bodies or institutions recognized under section 29.1 which implement the measures approved by the Office according to the third paragraph of section 23.

22. The civil administration shall use only French in signs and posters, except where reasons of health or public safety require the use of another language as well.

In the case of traffic signs, the French inscription may be complemented or replaced by symbols or pictographs, and another language may be used where no symbol or pictograph exists that satisfies the requirements of health or public safety.

The Government may, however, determine by regulation the cases, conditions or circumstances in which the civil administration may use French and another language in signs and posters.

(Underlining and Bolding Added)

The City of Montreal and the OCPM are subject, also, to the following Acts:

Act respecting administrative justice, CQLR c J-3

1. The purpose of this Act is to affirm the specific character of administrative justice, to ensure its quality, promptness and accessibility and to **safeguard the fundamental rights of citizens**.

This Act establishes the general rules of procedure applicable to individual decisions made in respect of a citizen. Such rules of procedure differ according to whether a decision is made in the exercise of an administrative or adjudicative function, and are, if necessary, supplemented by special rules established by law or under its authority.

This Act also institutes the Administrative Tribunal of Québec and the Conseil de la justice administrative.

TITLE I

GENERAL RULES GOVERNING INDIVIDUAL DECISIONS MADE IN RESPECT OF A CITIZEN

CHAPTER I

RULES SPECIFIC TO DECISIONS MADE IN THE EXERCISE OF AN ADMINISTRATIVE FUNCTION

2. The procedures leading to an individual decision to be made by the Administration, pursuant to norms or standards prescribed by law, in respect of a citizen shall be conducted in keeping with the **duty to act fairly**.

4. The Administration shall take appropriate measures to ensure

(1) that procedures are conducted in accordance with legislative and administrative norms or standards and with other applicable rules of law, according to simple and flexible rules devoid of formalism, with respect, prudence and promptness, in accordance with the norms and standards of ethics and discipline governing its agents and with the requirements of good faith;

(2) that the citizen is given the opportunity to provide any information useful for the making of the decision and, where necessary, to complete his file;

(3) that decisions are made with diligence, are communicated to the person concerned in clear and concise terms and contain the information required to enable the person to communicate with the Administration;

(4) that the directives governing agents charged with making a decision are in keeping with the principles and obligations under this chapter and are available for consultation by the citizen.

Charter of Human Rights and Freedoms, CQLR c C-12

PART I

HUMAN RIGHTS AND FREEDOMS

CHAPTER I

FUNDAMENTAL FREEDOMS AND RIGHTS

1. Every human being has a right to life, and to personal security, inviolability and freedom.

He also possesses juridical personality.

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

4. Every person has a right to the safeguard of his dignity, honour and reputation.

CHAPTER I.1

RIGHT TO EQUAL RECOGNITION AND EXERCISE OF RIGHTS AND FREEDOMS

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political

convictions, **language**, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

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

16. No one may practise discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment.

22. Every person legally capable and qualified has the right to be a candidate and to vote at an election.

(Underlining and Bolding Added)

In *Westmount (Ville de)* c. *Québec (Procureur Général du)*, 2001 CanLII 13655 (QC CA) http://canlii.ca/t/1fchv, the Court of Appeal echoed the sentiments of the Superior Court in *Baie d'Urfé (Ville)* c. *Québec (Procureur général)*, 2001 CanLII 24845 (QC CS) http://canlii.ca/t/1lf69; writing:

> « La situation juridique des villes appelantes demeure donc inchangée au chapitre des droits linguistiques, puisque la *Charte de la langue française* continue de régir l'usage de la langue française et de la langue anglaise dans les institutions municipales. On nous permettra ici d'ouvrir une parenthèse pour rappeler qu'il en est de même de l'article 1 de la *Loi 170* qui a fait l'objet de vives critiques de la part des appelants. Cet article déclare que Montréal est une ville de langue française. Or, ce texte purement déclaratoire n'ajoute, ni ne retranche rien aux règles déjà établies par la *Charte de la langue française*, ce qui a d'ailleurs fait écrire au premier juge qu'il était superflu et inutilement «provocateur». Quoi qu'il en soit, on ne saurait en conclure, comme le plaident certains des appelants, que cet article démontre que le gouvernement ne recherche pas vraiment la réforme des structures municipales, mais poursuit un

but inavoué, celui de priver la communauté anglophone de ses institutions. » (Underlining Added)

In *Baie d'Urfé (Ville), supra,* the Superior Court was more explicit; as Le Bel J.C.S.C writes:

« D'une part, les demandeurs invoquent le droit à des services bilingues respectant la langue de la minorité anglophone, services qu'ils prédisent quasi inexistants dans la nouvelle Ville de Montréal.

152 À l'opposé, le Procureur général du Québec rétorque que l'actuelle Ville de Montréal offre déjà des services bilingues que la nouvelle ville maintiendra, mais tout en concédant qu'il y a place à amélioration.

153 Le débat est émotif ...., la preuve au soutien de l'argumentation l'est tout autant[130]. À coup d'affidavits et d'expertises, les demandeurs tentent de convaincre la Cour de l'effet «*pervers*» des *Lois 170* et *171* envers la minorité anglophone de l'Île de Montréal.

154 Cette partie du litige découle de l'article 1 de l'annexe I de la *Loi 170* qui édicte que «*Montréal est une ville de langue française*». Cette assertion, non supportée par la preuve démographique versée au dossier, provoque en effet un sentiment de rejet parmi l'importante communauté anglophone qui depuis plusieurs décennies occupe l'île de Montréal et contribue à son enrichissement social, culturel et économique.

…

Pendant que la communauté anglophone s'agite et s'inquiète de tels changements linguistiques, le Procureur général du Québec, au nom du gouvernement, tente sans trop de succès de se faire rassurant.

163 Tenant compte du contexte mis en preuve, la Cour peut comprendre l'inquiétude exprimée par la minorité anglophone de l'île de Montréal. Cependant, elle lui rendrait un mauvais service et susciterait parmi celle-ci de faux espoirs si elle devait appuyer sa décision sur des motifs non juridiques.

164 *Quelques questions incontournables cependant*: pourquoi le législateur n'a-t-il pas soumis ses *Projets de lois 170 et 171*, dans leur forme actuelle, à une «*vraie discussion préalable*» à leur adoption et tenté, en temps plus utile, de rassurer la minorité anglophone? Pourquoi attendre l'audition des recours pour expliquer son point de vue? Et si l'on voulait vraiment rassurer la minorité anglophone, sur le véritable but de la restructuration municipale, pourquoi ne pas avoir maintenu le statu quo actuel? Pourquoi aussi, introduire de façon concomitante et *SANS NÉCESSITÉ* immédiate, un amendement de nature à provoquer un débat additionnel, émotif et inutile sur une question aussi sensible que la langue ... débat beaucoup moins rationnel que celui d'une simple restructuration municipale?

165 La Cour n'a pas à répondre, il est vrai, à des questions qui relèvent du domaine politique. Par ailleurs, comment peut-elle demeurer insensible aux plaidoiries entendues et à certains dérapages qui témoignent d'une profonde inquiétude et méfiance de la minorité anglophone envers un législateur qui ne lui a pas donné pleine occasion de se faire entendre sur l'ensemble de la question?

166 Aussi, de l'avis de la Cour, et tenant compte du contexte, ces nouvelles dispositions linguistiques introduites dans la *Loi 170* («*Montréal ville de langue française*») et la *Loi 171* s'avèrent inutiles et ne servent qu'à alimenter le débat linguistique au Québec sans faire avancer la cause de la restructuration municipale sur l'île de Montréal. Chose certaine, le moment choisi pour introduire ces dispositions est inopportun.

167 Comment peut-on de plus affirmer que la nouvelle Ville de Montréal sera une municipalité de «*langue française*», alors que la réalité linguistique et démographique mise en preuve démontre le contraire[137]? Se faire croire que Montréal est une «*ville de langue française*» ne modifie pas la réalité démographique et n'aide pas à la paix sociale avec la minorité anglophone.

168 La preuve démographique révèle en effet que le temps est bien révolu où le visage de Montréal se composait presque exclusivement d'anglophones, à

l'ouest du boulevard Saint-Laurent, et de Canadiens français, dans l'est. L'immigration a façonné la Métropole: les communautés culturelles se sont installées, ont grandi et se sont développées pour devenir une facette intégrante de la gent montréalaise.

169 La réalité sociale n'est plus la même. Si on veut vraiment donner une langue à Montréal pourquoi pas une langue BILINGUE ou MULTICULTURELLE? Mais ne cachons surtout pas la réalité au point d'écrire inutilement dans une loi que Montréal est une «*ville de langue française*». À moins que l'on ne cherche à faire «*injure*», comme le plaident certains demandeurs, à la minorité dont la langue est autre que le français.

170 Les procureurs du gouvernement ont longuement plaidé qu'une municipalité n'a «*ni sexe, ni langue, ni religion*» et que partant de là elle ne peut servir d'instrument de défense ou promotion à certains groupes de ses citoyens. Mais l'enchâssement dans la *Loi 170* de l'expression «*Montréal est une ville de langue française*» ne sert-il pas avant tout les intérêts de la communauté francophone?

171 Aussi, la proposition du Procureur général du Québec voulant que cette expression n'est qu'une disposition interprétative qui reprend les principes généraux de *la Charte de la langue française*, démontre l'inutilité d'un tel article. Si la disposition n'est que «*déclaratoire*», pourquoi l'inclure dans une loi d'une telle importance? On ne peut présupposer que le législateur parle ici pour ne rien dire. C'est pourtant ce que plaide le Procureur général du Québec.

172 Comment alors convaincre la minorité anglophone que «*l'adoption concomitante*» des *Lois 171* et *170* ne s'inscrit pas dans une politique générale de francisation de l'île de Montréal visant à marginaliser sa présence?

173 La promotion de la langue française constitue un objectif louable, mais le moyen utilisé ne peut être plus mal choisi et a pour effet de placer au rang secondaire le véritable but de la restructuration. Le résultat: un débat judiciaire sur les fusions municipales presque exclusivement axé sur la langue.

174 À l'égard de l'article 6 de la *Loi 171*, la Cour constate que malgré l'utilisation du critère de la «*langue maternelle anglaise*» à l'article 23 de la Charte canadienne, la preuve démographique démontre qu'une majorité de citoyens ne pourront plus se classer en vertu de ce nouveau critère.

175 Même si, comme le soutient le Procureur général du Québec, le critère de la langue maternelle ne s'applique pas aux arrondissements bilingues[138], le nouveau critère s'appliquera toutefois au moment d'une demande de retrait de l'accréditation. De plus, un tel retrait s'obtiendra désormais plus facilement bien que celui-ci fasse l'objet d'une demande de la municipalité ou de l'arrondissement lui-même.

176 Pour situer le contexte, les demandeurs rappellent que la minorité anglophone a dû faire appel à plusieurs reprises aux tribunaux pour faire respecter ses droits constitutionnels dans les matières suivantes: langue des tribunaux, langue de la législation, droit à l'instruction dans la langue de la minorité, langue d'affichage et réglementation de la langue en matière de commerce et des affaires[139].

177 Malgré ces décisions judiciaires, n'oublions pas que la bonne foi se présume toujours, même pour le Législateur. De sorte que la Cour ne peut baser son jugement sur un procès d'intention, comme certains le font, et prendre pour acquis que le législateur ne respectera pas la Constitution.

178 Le rôle de la Cour se limite à analyser la conformité des dispositions linguistiques des *Lois 170* et *Loi 171* avec les droits et libertés garantis par les Chartes, en conjugaison avec le preuve déposée au dossier.

179 Or, tel qu'indiqué ci-haut, la problématique soulevée par les demandeurs se limite presque exclusivement à l'obtention de services dans les deux langues. Il ne faut pas perdre de vue que la reconnaissance d'un statut linguistique en vertu de l'article 29.1 de la *Charte de la langue française* ne confère par le droit à des services bilingues[140].

180 La preuve confirme que l'actuelle Ville de Montréal offre des services en anglais bien que, il faut l'admettre, non parfaits. Mais l'obligation de la ville ne va pas jusqu'à offrir l'équivalence des deux services, mais seulement la possibilité de les obtenir dans les deux langues. **On ne peut donc présager[141], pour le moment, que la nouvelle Ville de Montréal sera unilingue française au niveau des services du simple fait qu'on la déclare «*Ville de langue française*».**

181 Laissons évoluer les choses. Le passé de Montréal est peut-être garant de l'avenir! »

In *Baie d'Urfé (Ville), supra,* the Superior Court addressed the issue of minority-language rights in the context of *Lalonde* v. *Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (ON CA) http://canlii.ca/t/1f1hv; distinguishing the two:

« Le principe non écrit de protection des minorités ne peut donc neutraliser le pouvoir illimité du législateur sur les institutions municipales ni servir de fondement constitutionnel à la création d'un troisième ordre de gouvernement pour la protection de droits linguistiques.

188 Les principes affirmés par la Cour divisionnaire de l'Ontario, dans *Montfort*, avec respect, ne peuvent servir d'autorité pour les demandeurs. Malgré certaines similitudes, le présent dossier diffère de celui de *Montfort*. Cette décision porte sur la validité d'une directive administrative édictée par un organisme administratif alors, qu'en l'espèce, l'objet du litige porte sur une loi adoptée par la Législature provinciale dans l'exercice d'un pouvoir constitutionnel.

189 En outre, dans *Montfort*, la Cour reconnaît que l'hôpital Montfort demeure une institution publique nécessaire à la défense et au maintien de la minorité francophone en Ontario. Tandis que dans le présent dossier les municipalités demeurent des «*institutions neutres*» dont la fonction essentielle ne vise pas la protection d'un groupe particulier[143].

> 190 Enfin, n'oublions pas que l'hôpital Montfort demeure le seul hôpital offrant des services médicaux en français en Ontario, alors qu'ici la communauté anglophone peut recevoir des services bilingues en dehors des villes demanderesses, notamment dans l'actuelle Ville de Montréal. C'est pourquoi, dans *Montfort*, la Cour s'appuie sur le principe de protection des minorités pour protéger le seul et dernier bastion de services médicaux en français.
>
> 191 En résumé, la Cour ne peut se rallier à la proposition voulant que la *Loi 170* soit contraire au principe structurel de protection des minorités. La preuve ne démontre pas l'existence d'une menace réelle ou présumée de ne pas recevoir des services municipaux dans la future Ville de Montréal. »

In *Lalonde, supra*, Weiler and Sharpe JJ.A., writing for the Court of Appeal , did dismiss the following questions in appeal:

(a) Reduction in availability of health care services in French;
(b) The training of health care professionals would be jeopardized; and,
(c) Montfort's broader institutional role.

On language rights as a basis for the *Lalonde* appeal; citing *Reference re Secession of Quebec*, [1998] 2 SCR 217 http://canlii.ca/t/1fqr3, *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 SCR 1148 http://canlii.ca/t/1ftms and Reference Re Authority to Perform Functions Vested by Adoption Act, *The Children of Unmarried Parents Act, The Deserted Wives' and Children's Maintenance Act of Ontario*, [1938] SCR 398 http://canlii.ca/t/1nmz9, the Court writes of the protection of religious minorities as a “major preoccupation” at the time of confederation.

Citing *Reference re: Education Act (Que.)*, [1993] 2 SCR 511 http://canlii.ca/t/1fs3c, the Court writes in *Lalonde, supra*:

> “While the text of the Constitution Act, 1867 focused on religious minorities, the minority Catholic community in Ontario at that time was, to a significant extent, also the minority francophone community and linguistic and denominational characteristics were typically twinned.”

Regarding the protection of minorities— religious and linguistic—; Court goes on to note in *Lalonde, supra*:

> "It should be mentioned as well that certain features of the Constitution Act, 1867 for the protection of minorities may have fallen into disuse, but they still may be taken as expressions of the fundamental constitutional importance attached to the protection of the French and Catholic minority outside Quebec. Linguistic and religious minorities were exposed to the risk that their interests might be ignored at the provincial level, but there is little doubt that it was implicit in the Confederation bargain that they could look to the federal government for constitutional protection. In the case of diminution of religious education rights by a provincial government, s. 93(3) gave the adherents of the religious minority a right of appeal to the federal cabinet, and by s. 93(4), Parliament had the right to enact remedial legislation. The federal power of disallowance (ss. 55-57, 90) was available where the legitimate interests of those minorities were imperiled by provincial action."

Regarding the application of the "ratchet" principle and language rights; the Court writes in *Lalonde, supra*:

> "We are not persuaded that s. 16(3) includes a "ratchet" principle that clothes measures taken to advance linguistic equality with constitutional protection. Section 16(3) builds on the principle established in *Jones* v. *New Brunswick (Attorney General)* (1974), 1974 CanLII 164 (SCC), [1975] 2 S.C.R. 182, 45 D.L.R. (3d) 583 that **the Constitution's language guarantees are a 'floor' and not a 'ceiling'** and reflects an aspirational element of advancement toward substantive equality. The aspirational element of s. 16(3) is not without significance when it comes to interpreting legislation. However, it seems to us undeniable that the effect of this provision is to protect, not constitutionalize, measures to advance linguistic equality. The operative legal effect of s. 16(3) is determined and limited by its opening words: "Nothing in this Charter limits the authority of Parliament or a legislature." Section 16(3) is not a rights-conferring provision. It is, rather, a provision designed to shield from attack

government action that would otherwise contravene s. 15 or exceed legislative authority. See Andre Tremblay and Michel Bastarache, "Language Rights", in Gerald-A. Beaudoin and Ed Ratushny, eds., The Canadian Charter of Rights and Freedoms: A Commentary, 2nd ed. (Toronto: Carswell, 1989), at p. 675:

> What was actually desired with this provision [s. 16(3)] was to assure that the power to provide a privileged status for French and English in a statute could not be challenged by virtue of the rights forbidding discrimination contained in section 15 of the Charter. Section 16(3) could thus prevent the measures designed to promote equal access to both official languages from being struck down.

[93] Nor do we find any support for the "ratchet" principle in the case law. The passage relied on from *Societe des Acadiens* is found in a dissenting judgment that focuses on s. 19(2) and the specific obligations that ss. 16-20 of the Charter impose on New Brunswick."

Regarding whether the government was obliged to create Montfort; the Court writes in *Lalonde, supra*:

> "[94] This argument is made on the assumption that government was under no obligation to create Montfort. This court has held in another context that in the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance Charter values. In *Ferrell* v. *Ontario (Attorney General) (1998)*, 1998 CanLII 6274 (ON CA), 42 O.R. (3d) 97, 168 D.L.R. (4th) 1 (C.A.), a case dealing with the repeal of a statute intended to combat systemic discrimination in employment, Morden A.C.J.O. stated as follows at p. 110 O.R.:

> If there is no constitutional obligation to enact the 1993 Act in the first place I think it is implicit, as far as the requirements of the constitution are concerned, that the legislature is free to return the state of the statute book to what it was before the 1993 Act, without being obligated to justify the repealing statute under s. 1 of the Charter.
>
> …
>
> It would be ironic, in my view, if legislative initiatives such as the 1993 Act with its costs and administrative structure should, once enacted, become frozen into provincial law and susceptible only of augmentation and immune from curtailing amendment or outright appeal without s. 1 justification.
>
> [95] To summarize, Montfort is a public hospital that provides services in French. Section 16(3) of the Charter does not constitutionally enshrine Montfort because it is not a rights-conferring provision. Because Montfort is not constitutionally protected by s. 16(3), Ontario can, subject to what follows, alter the status of Montfort as a community hospital without offending s. 16(3)." (Underlining Added)

Mentioning *Baie d'Urfe, supra*; the Court writes in *Lalonde, supra*:

> "[97] The argument advanced by the respondents has been consistently rejected in other cases: see *Baie d'Urfe (Ville)* v. *Qu,bec (Procureur general)*, [2001] J.Q. No. 4821 (C.A.). In the instant case, the Divisional Court referred to *Mahe* v. *Alberta*, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342 at p. 369, 68 D.L.R. (4th) 69, where Dickson C.J.C. stated:
>
> > [I]t would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to 'every individual'."

Regarding unwritten constitutional principles; the Court writes in *Lalonde, supra*:

"[123] Against the background of these general principles we turn to the precise issue that confronts us in this appeal. As the Divisional Court observed, we are not concerned here with the validity of legislation that impinges upon the rights of a linguistic minority: compare *Baie d'Urfe, (Ville)* v. *Quebec*, *supra*. Nor are we confronted with a situation where a minority group is insisting on the establishment of an institution that is not already in existence. We are asked to review the validity of a discretionary decision with respect to the role and function of an existing institution, made by a statutory authority with a mandate to act in the public interest." (Underlining Added)

In *Gatineau (Ville de)* c. *Syndicat des cols blancs de Gatineau inc.*, 2016 QCCA 1596 (CanLII), http://canlii.ca/t/gtzd6, the Court writes :

« Et de fait, la démonstration des deux affirmations que je viens de citer est probante. Se fondant sur l'examen de plusieurs décisions[12], ces auteurs tirent certaines conclusions que je paraphraserai ainsi :

— L'exigence de connaître une autre langue est nécessaire et donc justifiée si l'employeur satisfait un critère de rationalité, de pertinence ou de raisonnabilité. En d'autres termes, il y a nécessité si cette condition est raisonnable, non arbitraire, non discriminatoire et déterminée de bonne foi. On pourrait ajouter pour clore que l'exigence doit être « déterminée de bonne foi en fonction des contraintes réelles du service, dont la preuve incombe à l'employeur ».

— La faculté de communiquer dans une autre langue doit s'avérer importante pour le détenteur du poste assorti de cette exigence : selon les contraintes réelles du service, la compréhension et l'expression, orale, écrite, ou à la fois orale et écrite, dans la langue en question, doivent lui être nécessaires pour qu'il puisse bien s'acquitter de toutes les responsabilités qui lui incombent.

— Le contact du détenteur du poste, dans cette langue, avec une clientèle minoritaire, ou même très minoritaire, suffit à justifier l'exigence linguistique si desservir cette clientèle fait partie intégrante des responsabilités afférentes au poste.

— Le critère de nécessité tient compte aussi de l'accomplissement efficace de la mission de l'employeur : la connaissance d'une autre langue est nécessaire si elle seule permet de continuer à offrir le même niveau de services, voire de diversifier ces services et développer une nouvelle part de marché. »

Charter of the French Language, CQLR c C-11 http://canlii.ca/t/52lls

29.1. English language school boards and the Commission scolaire du Littoral are recognized school bodies.

The Office shall recognize, **at the request of** the municipality, body or institution,

(1) a municipality of which **more than half** the **residents** have **English** as their **mother tongue**;

(2) a body under the authority of one or more municipalities that participates in the administration of their territory, where each such municipality is **a recognized municipality**; or

(3) a health and social services institution listed in the Schedule, where it provides services to persons who, **in the majority**, speak a language other than French.

The Government may, at the request of a body or institution that no longer satisfies the condition which enabled it to obtain the recognition of the Office, withdraw such recognition if it considers it appropriate in the circumstances and after having consulted the Office. Such a request shall be made to the Office, which shall transmit it to the Government with a copy of the record. The Government shall inform the Office and the body or institution of its decision.

SCHEDULE

A. *The civil administration*

1. The Government and the Government departments.

2. The Government agencies:

Agencies to which the Government or a minister appoints the majority of the members, to which, by law, the officers or employees are appointed in accordance with the Public Service Act (chapter F-3.1.1), or at least half of whose capital stock is derived from the Consolidated Revenue Fund except, however, health services and social services, general and vocational colleges and the Université du Québec.

2.1 *(Paragraph repealed).*

3. The municipal and school bodies:

(*a*) the metropolitan communities and transit authorities:

The Communauté métropolitaine de Québec and the Communauté métropolitaine de Montréal, the Société de transport de Québec, the Société de transport de Montréal, the Société de transport de l'Outaouais, the Société de transport de Laval and the Société de transport de Longueuil ;

(*b*) the municipalities, municipal boroughs being regarded as municipalities;

(*b*.1) the bodies under the authority of a municipality and taking part in the administration of its territory;

I the school bodies:

The school boards and the Comité de gestion de la taxe scolaire de l'île de Montréal.

4. The health services and the social services:

Institutions within the meaning of the Act respecting health services and social services (chapter S-4.2) or within the meaning of the Act respecting health services and social services for Cree Native persons (chapter S-5).

B. *Semipublic agencies*

1. Public utility enterprises:

If they are not already Government agencies, the telephone, telegraph and cable-delivery enterprises, the air, ship, bus and rail transport enterprises, the enterprises which produce, transport, distribute or sell gas, water or electricity, and enterprises holding authorizations from the Commission des transports.

2. Professional orders:

The professional orders listed in Schedule I to the Professional Code (chapter C-26), or established in accordance with that Code.

(Underlining and Bolding Added)

Recommendations

1. That the city of Montreal advocate to the provincial government that s. 1 *Charter of Ville de Montréal*, metropolis of Québec, CQLR c C-11.4— in particular, reference to Montreal as a “French-speaking city”— be amended and replaced with “bilingual, multicultural city”;

2. That the city of Montreal, its boroughs, island-wide authorities and service providers apply to the OQLF for bilingual status under s. 29.1 *CFL*;

3. That the city of Montreal amend its language policy to reflect its true, bilingual identity;

    a. That the city of Montreal commit to providing essential public services in English and French;

    b. That the city of Montreal commits to ensuring that all its employees, employees of its boroughs, island-wide authorities and service providers, as well as third party service providers, who provide essential public services or interact with public, are fluently bilingual;

    c. That the city of Montreal commit to publish and provide all documents— including policies, reports and technical documents— to the public in English and French;

    d. That the city of Montreal commit to communicate unconditionally with the public, verbally and in writing, in English and French;

    e. That the city of Montreal designate as “bilingual” all posts that offer essential public services and require public interactions;

    f. That the city of Montreal commit to ensuring that “French Only”, “French Mastery” of “French Intermediate Advanced” language proficiency be a *bona fide* occupational requirement only when absolutely essential;

4. That the city of Montreal adopt an Affirmative Action plan applicable, also, to its boroughs, island-wide authorities and service providers, to hire Anglophones, Allophones and visible minorities in proportion to their populations in the city of Montreal and its boroughs;

5. That the city of Montreal review its policies and practices to ensure that they are free of systemic bias and discrimination.

Jurisprudence

Central Okanagan School District No. 23 v. *Renaud*, [1992] 2 SCR 970 http://canlii.ca/t/1fs7w

British Columbia (Superintendent of Motor Vehicles) v. *British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 http://canlii.ca/t/1fql1

Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. *Lafontaine (Village)*, [2004] 2 SCR 650 http://canlii.ca/t/1hddj

Discrimination

Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. *Boisbriand (City)*, [2000] 1 SCR 665 http://canlii.ca/t/526r

Systemic Discrimination

Andrews v. *Law Society of British Columbia*, [1989] 1 SCR 143 http://canlii.ca/t/1ft8q

Little Sisters Book and Art Emporium v. *Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38 http://canlii.ca/t/1q8m5

Little Sisters Book and Art Emporium v. *Canada (Minister of Justice)*, [2000] 2 SCR 1120 http://canlii.ca/t/5239

Bona Fide Occupational Requirement or Qualification (BFOR/Q)

The right to work in French versus access to bilingual public services: *Gatineau (Ville de)* c. *Syndicat des cols blancs de Gatineau inc.*, 2016 QCCA 1596 (CanLII), http://canlii.ca/t/gtzd6

Laws of General Application and Proportionality Under s. 1 *Charter*

R. v. *Oakes*, [1986] 1 SCR 103 http://canlii.ca/t/1ftv6

Forget v. *Quebec (Attorney General)*, [1988] 2 SCR 90, http://canlii.ca/t/1ftd9

Ford v. *Quebec (Attorney General)*, [1988] 2 SCR 712 http://canlii.ca/t/1ft9p

Devine v. *Quebec (Attorney General)*, [1988] 2 SCR 790 http://canlii.ca/t/1ft9r

Multani v. *Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256 http://canlii.ca/t/1mnj2

Alberta v. *Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567 http://canlii.ca/t/24rr4

Public Safety; Religious Belief; Reasonable Accommodation

Syndicat Northcrest v. *Amselem*, [2004] 2 SCR 551 http://canlii.ca/t/1hddh

Reasonable Accommodation in Work

Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. *Caron*, [2018] 1 SCR 35 http://canlii.ca/t/hq4jm

Stewart v. *Elk Valley Coal Corp.*, [2017] 1 SCR 591 http://canlii.ca/t/h49b1

BFOR and the Role of Reasonable Accommodation

Large v. *Stratford (City)*, [1995] 3 SCR 733 http://canlii.ca/t/1frhm

Reasonable Accomodation and the Provision of Public Services

Eldridge v. *British Columbia (Attorney General)*, [1997] 3 SCR 624 http://canlii.ca/t/1fqx5

Administrative Justice

Little Sisters Book and Art Emporium v. *Canada (Minister of Justice)*, [2000] 2 SCR 1120 http://canlii.ca/t/5239

Purpose

R. v. *Big M Drug Mart Ltd.*, [1985] 1 SCR 295 http://canlii.ca/t/1fv2b

Language Rights

Lalonde v. *Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (ON CA) http://canlii.ca/t/1f1hv

Westmount (Ville de) c. *Québec (Procureur Général du)*, 2001 CanLII 13655 (QC CA) http://canlii.ca/t/1fchv

Forget v. *Quebec (Attorney General)*, [1988] 2 SCR 90, http://canlii.ca/t/1ftd9

Criteria: Arbitrary or "Prescribed by Law"; or by "Common Law Rule"

Mckinney v. *University of Guelph*, [1990] 3 SCR 229 http://canlii.ca/t/1fsqk

Doctrine

Brian Etherington, "Central Alberta Dairy Pool: The Supreme Court of Canada's Latest Word on the Duty to Accommodate", M David Lepofsky et al, *Canadian Labour and Employment Law Journal*, 1993 1, 1993 CanLIIDocs 96, pp. 311- 33.

M David Lepofsky, "The Duty to Accommodate: A Purposive Approach.", in M David Lepofsky et al, *Canadian Labour and Employment Law Journal*, 1993 1, 1993 CanLIIDocs 96, pp. 1-23 http://www.canlii.org/t/2fcg.

M. C. Crane, "Human Rights, *Bona Fide* Occupational Requirements and the Duty to Accommodate: Semantics or Substance?" in Michel LeFrancois et al, *Canadian Labour and Employment Law Journal*, 1996 4, 1996 CanLIIDocs 104, pp. 209-32 http://www.canlii.org/t/2fcc.

«Non-indépendance et autonomie de la norme d'égalité québécoise : des concepts «fondateurs» qui méritent d'être mieux connus», 2005 CanLIIDocs 204 http://www.canlii.org/t/2s3s

Marc Gold, *Andrews* v. *Law Society of British Columbia*, 1989 34-4 *McGill Law Journal* 1063 http://www.canlii.org/t/2br6

Statutes and Regulations

Federal

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 http://canlii.ca/t/ldsx

Canadian Bill of Rights, SC 1960, c 44 http://canlii.ca/t/j05x

Interpretation Act, RSC 1985, c I-21 http://canlii.ca/t/52f1g

Provincial

Act respecting administrative justice, CQLR c J-3 http://canlii.ca/t/542lh

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