SUPREME COURT OF CANADA

CITATION: Nguyen *v.* Quebec (Education, Recreation and Sports), 2009 SCC 47

DATE: 20091022
DOCKET: 32229, 32319

BETWEEN:

Minister of Education, Recreation and Sports and Attorney General of Quebec
Appellants / Respondents on cross-appeal
and
Hong Ha Nguyen, Audrey Smith, Parthasarothi Dey, Kazal Das, Dipinkar Dhar, Abu Taher, Sashitharan Nadarajah, Rajendra Carpanen, Ginette Bégin, Mohan Shikder, Thi Thu Hang Nguyen, Iqbal Khan, Yuk-Kwong Tiu, Shafik Ayad, Mumtaz Hussain Khan, Kim Sreang Lech, Keav Jennifer Taing, Parminder Kaur Miranpuri, Fucheng Ye, Lian Ye, Annie Laurin, Talwinder Bindra, Virender Singh Jamwal, Gilberte Dorméus, Rafed Mustafa and Danny Lok
Respondents / Appellants on cross-appeal
- and -
Attorney General of Canada, Administrative Tribunal of Québec, Quebec Association of Independent Schools, Commission scolaire francophone, Territoires du Nord-Ouest, Quebec English School Boards Association, Quebec Provincial Association of Teachers, Association franco-ontarienne des conseils scolaires catholiques and Commissioner of Official Languages for Canada
Interveners

AND BETWEEN:

Minister of Education, Recreation and Sports and Attorney General of Quebec
Appellants / Respondents on cross-appeal
and
Talwinder Bindra
Respondent / Appellant on cross-appeal
- and -
Attorney General of Canada, Administrative Tribunal of Québec, Quebec English School Boards Association, Commissioner of Official Languages for Canada and Quebec Association of Independent Schools
Interveners

OFFICIAL ENGLISH TRANSLATION

CORAM: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 51) LeBel J. (McLachlin C.J. and Binnie, Fish, Abella, Charron and Rothstein JJ. concurring)

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Minister of Education, Recreation and Sports and
Attorney General of Quebec *Appellants/Respondents on cross-appeal*

v.

Hong Ha Nguyen, Audrey Smith, Parthasarothi Dey,
Kazal Das, Dipinkar Dhar, Abu Taher,
Sashitharan Nadarajah, Rajendra Carpanen, Ginette Bégin,
Mohan Shikder, Thi Thu Hang Nguyen, Iqbal Khan,
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Annie Laurin, Talwinder Bindra, Virender Singh Jamwal,
Gilberte Dorméus, Rafed Mustafa and
Danny Lok *Respondents/Appellants on cross-appeal*

and

Attorney General of Canada, Administrative Tribunal of Québec,
Quebec Association of Independent Schools, Commission scolaire francophone, Territoires du Nord-Ouest, Quebec English School Boards Association,
Quebec Provincial Association of Teachers,
Association franco-ontarienne des conseils scolaires catholiques and
Commissioner of Official Languages for Canada *Interveners*

- and -

Minister of Education, Recreation and Sports and
Attorney General of Quebec *Appellants/Respondents on cross-appeal*

v.

Talwinder Bindra *Respondent/Appellant on cross-appeal*

and

**Attorney General of Canada, Administrative Tribunal of Québec,
Quebec English School Boards Association,
Commissioner of Official Languages for Canada and
Quebec Association of Independent Schools** *Interveners*

Indexed as: Nguyen *v.* Quebec (Education, Recreation and Sports)

Neutral citation: 2009 SCC 47.

File Nos.: 32229, 32319.

2008: December 15; 2009: October 22.

Present: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Minority language educational rights —

Periods of attendance at unsubsidized English-language private schools and instruction in English received pursuant to special authorization disregarded when determining whether child eligible to receive instruction in publicly funded English-language school system — Whether paras. 2 and 3 of s. 73 of Charter of the French language limit rights guaranteed by s. 23 of Canadian Charter of Rights and Freedoms — If so, whether those limits justified under s. 1 of Canadian Charter.

Schools — Language of instruction — Instruction in English in Quebec — Periods of attendance at unsubsidized English-language private schools and instruction in English received pursuant to special authorization disregarded when determining whether child eligible to receive instruction in publicly funded English-language school system — Whether paras. 2 and 3 of s. 73 of Charter of the French language limit rights guaranteed by s. 23 of Canadian Charter of Rights and Freedoms — If so, whether those limits justified under s. 1 of Canadian Charter.

Under s. 23(2) of the *Canadian Charter of Rights and Freedoms*, citizens of Canada of whom any child is receiving or has received instruction in the language of the linguistic minority may have all their children receive primary and secondary school instruction in that same language. The *Charter of the French language* ("CFL") establishes that, in principle, French is the common official language of instruction in elementary and secondary schools in Quebec, but the first paragraph of s. 73 provides that children who have received or are receiving the major part of their elementary or secondary instruction in English in Canada may receive instruction in English in a public or subsidized private school in Quebec. In 2002, paras. 2 and 3 were added to s. 73 CFL in response to concerns about the growing phenomenon of "bridging schools" (*écoles passerelles*) by which parents whose children were not entitled to instruction in the minority language in Quebec were enrolling their

children in unsubsidized private schools ("UPSs") for short periods so that they would be eligible to attend publicly funded English schools. Paragraph 2 of s. 73 provides that periods of attendance at UPSs are to be disregarded when determining whether a child is eligible to receive instruction in the publicly funded English-language school system. Paragraph 3 establishes the same rule with respect to instruction received pursuant to a special authorization granted by the province under s. 81, 85 or 85.1 CFL in a case involving a serious learning disability, temporary residence in Quebec, or a serious family or humanitarian situation.

In the N case, the parents enrolled their children for short periods in UPSs offering instruction in English and then requested that their children be declared eligible for instruction in English in public or subsidized private schools. The Ministère de l'Éducation du Québec denied all the requests on the basis of para. 2 of s. 73 CFL. In the B case, B's daughter was declared to be eligible for instruction in the minority language public school system pursuant to a special authorization. B then invoked s. 23(2) of the *Canadian Charter* in order to obtain a certificate of eligibility for minority-language instruction in a public or subsidized private school for his son S on the basis of the instruction being received by S's sister, but he was unsuccessful because of para. 3 of s. 73 CFL. The Administrative Tribunal of Québec and the Superior Court dismissed proceedings in which the parents asked that the 2002 amendments to the CFL be declared unconstitutional. The Court of Appeal reversed the decisions and held that paras. 2 and 3 of s. 73 CFL infringed the rights guaranteed by s. 23 of the *Canadian Charter* and that the infringements were not justified under s. 1 of the *Charter*.

Held: The appeals and the cross-appeals should be dismissed. Paragraphs 2 and 3 of

s. 73 CFL are unconstitutional.

Paragraphs 2 and 3 of s. 73 CFL infringe s. 23(2) of the *Canadian Charter*. Whereas in the protection afforded by the *Canadian Charter*, no distinction is drawn as regards the type of instruction received by the child, as to whether the educational institution is public or private, or regarding the origin of the authorization pursuant to which instruction is provided in a given language, paras. 2 and 3 of s. 73 CFL provide that instruction received in a UPS or pursuant to a special authorization under s. 82, 85 or 85.1 CFL must be disregarded. Such periods of instruction are, in a manner of speaking, struck from the child's educational pathway as if they had never occurred. Since *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, however, it is settled that the requirement of the "major part" of the instruction, provided for in s. 73 CFL, must be interpreted as giving rise to an obligation to conduct a global qualitative assessment of a child's educational pathway. That assessment is based on factors that include time spent in different programs of study, at what stage of the child's education the choice of language of instruction was made, what programs are or were available, and whether learning disabilities or other difficulties exist. The inability to assess a child's educational pathway in its entirety in determining the extent of his or her educational language rights has the effect of truncating the child's reality by creating a fictitious educational pathway that cannot serve as a basis for a proper application of the constitutional guarantees. [21] [28-33]

The objectives of the measures adopted by the Quebec legislature are sufficiently important and legitimate to justify the limit on the guaranteed rights, but the means chosen are not proportional to the objectives. The purpose of the measures is to protect and promote the French

language in Quebec. Although there is a rational causal connection between the objectives and the 2002 amendments to the CFL, the means chosen by the legislature do not constitute a minimal impairment of the constitutional rights guaranteed by s. 23(2) of the *Canadian Charter*. [37-41]

The prohibition under para. 2 of s. 73 CFL against taking a child's pathway in a UPS into account is total and absolute, and it seems excessive in relation to the seriousness of the problem of bridging schools being used to make obtaining access to minority language schools almost automatic. When schools are established primarily to bring about the transfer of ineligible students to the publicly funded English-language system, and the instruction they give in fact serves that end, it cannot be said that the resulting educational pathway is genuine. However, it is necessary to review the situation of each institution, as well as the nature of its clientele and the conduct of individual clients. A short period of attendance at a minority language school is not indicative of a genuine commitment and cannot on its own be enough for a child's parent to obtain the status of a rights holder under the *Canadian Charter*. This approach makes it possible to avert a return to the principle of freedom of choice of the language of instruction in Quebec, involves a more limited impairment of the guaranteed rights and can more readily be reconciled with the concrete contextual approach recommended in *Solski*. [29] [36] [38] [42]

As for para. 3 of s. 73 CFL, it is inconsistent with the principle of preserving family unity provided for in s. 23(2) of the *Canadian Charter*, as it makes it impossible for children of a family to receive instruction in the same school system. The special authorizations mechanism falls within the authority of the Quebec government, which can grant authorizations that exceed what it is constitutionally obligated to grant, but cannot, after doing so, deny any rights flowing from the

authorizations in question that are guaranteed by the *Canadian Charter*. [45]

The Court of Appeal's declaration that paras. 2 and 3 of s. 73 CFL are invalid is upheld, but its effects are suspended for one year. However, the files of the claimants in the N case are returned to the Ministère de l'Éducation, and if necessary to the Administrative Tribunal of Québec, to be reviewed in light of the criteria established in *Solski* and in this judgment. As for S, his file is returned to the person designated by the Minister of Education to immediately issue a certificate of eligibility for instruction in English. [46-47] [51]

The respondents' request for special fees of $100,000 under s. 15 of the *Tariff of judicial fees of advocates* is denied. The record contains little explanation as to the amount of the requested fee or as to why it should be granted. [48-49]

Cases Cited

Applied: *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, rev'g [2002] R.J.Q. 1285; **referred to:** *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66; *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839; *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Banque canadienne impériale de commerce v. Aztec Iron Corp.*, [1978] R.P. 385; *JTI MacDonald Corp. v. Canada (Procureur général)*, 2009 QCCA 110, [2009] R.J.Q. 261.

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Canadian Charter of Rights and Freedoms, ss. 1, 23.

Charter of the French language, R.S.Q., c. C-11, ss. 72, 73, 81, 85, 85.1.

Constitution Act, 1982, s. 59.

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

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APPEAL and CROSS-APPEAL from a judgment of the Quebec Court of Appeal (Dalphond, Hilton and Giroux JJ.A.), 2007 QCCA 1111, [2007] R.J.Q. 2097, SOQUIJ AZ-50447557, [2007] J.Q. nº 9410 (QL), 2007 CarswellQue 13774, setting aside a decision of Mass J., [2004] Q.J. No. 91812 (QL), SOQUIJ AZ-50264496, 2004 CarswellQue 7186. Appeal and cross-appeal dismissed.

APPEAL and CROSS-APPEAL from a judgment of the Quebec Court of Appeal (Dalphond, Hilton and Giroux JJ.A.), 2007 QCCA 1112, [2007] R.J.Q. 2150, SOQUIJ AZ-50447558, [2007] J.Q. nº 9482 (QL), 2007 CarswellQue 13773, setting aside a decision of Monast J., [2005] R.J.Q. 1039, SOQUIJ AZ-50288298, [2004] J.Q. nº 13857 (QL), 2004 CarswellQue 12348. Appeal and cross-appeal dismissed.

Benoît Belleau, *Francis Demers*, *Dominique A. Jobin* and *Françoise Saint-Martin*, for

the appellants/respondents on cross-appeals.

Brent D. Tyler and *Marie-France Major*, for the respondents/appellants on cross-appeals.

Claude Joyal and *Bernard Letarte*, for the intervener the Attorney General of Canada.

No one appeared for the intervener the Administrative Tribunal of Québec.

Ronald F. Caza and *Mark C. Power*, for the intervener the Quebec Association of Independent Schools.

Roger J. F. Lepage, for the intervener Commission scolaire francophone, Territoires du Nord-Ouest.

Michael N. Bergman, for the intervener the Quebec English School Boards Association.

Guy Dufort, *Thomas Brady* and *Sacha Liben*, for the intervener the Quebec Provincial Association of Teachers.

Claire Vachon, *Mark C. Power* and *Christian F. Paquette*, for the intervener Association franco-ontarienne des conseils scolaires catholiques.

Pascale Giguère and *Kevin Shaar*, for the intervener the Commissioner of Official

Languages for Canada.

English version of the judgment of the Court delivered by

LeBel J. —

I. Introduction

[1] In these appeals, the Court must consider the constitutionality of recent amendments to the *Charter of the French language*, R.S.Q., c. C-11 ("*CFL*"), regarding the eligibility of particular categories of students to attend English-language public schools and subsidized private institutions in Quebec. These amendments apply solely to people who have attended unsubsidized private schools and members of families with children who have received instruction in minority language schools pursuant to a special authorization. The impugned provisions, paras. 2 and 3 of s. 73, were added to the *CFL* in 2002 by the *Act to amend the Charter of the French language*, S.Q. 2002, c. 28, s. 3 ("Bill 104").

[2] The first of these amendments provides that periods of attendance at unsubsidized English-language private schools are to be disregarded when determining whether a child is eligible to receive instruction in the publicly funded English-language school system. The second amendment establishes the same rule with respect to instruction received pursuant to a special authorization granted by the province under s. 81, 85 or 85.1 *CFL* in a case involving a serious learning disability, temporary residence in Quebec, or a serious family or humanitarian situation. For the reasons that

follow, I conclude that the amendments in issue limit the rights guaranteed by s. 23 of the *Canadian Charter of Rights and Freedoms*, that these limits have not been justified under s. 1 of the *Charter*, and that paras. 2 and 3 of s. 73 *CFL*, which were added by Bill 104, are therefore unconstitutional. I would therefore dismiss the appeals. I would also dismiss the respondents' cross-appeals, which relate to incidental issues.

II. Origins of the Cases

A. *Evolution of the Problem of Eligibility to Attend English-Language Public and Private Schools*

[3] These two appeals concern the relationship between the *CFL* and the *Canadian Charter*. The relevant provisions of the two statutes are reproduced in the Appendix. It is important to briefly review the origins and role of the *CFL*, and in particular to consider questions relating to the choice of the language of instruction in Quebec. The *CFL* is legislation of major importance in Quebec. Under it, French has the status of the official language of Quebec, and it contains a body of rules that apply to the use of French and of English in areas under the legislative authority of Quebec's National Assembly. The *CFL* therefore provides the general framework for access to public education in English in Quebec. In principle, French is recognized, in s. 72 *CFL*, as the common official language of instruction in elementary and secondary schools in Quebec. In the *CFL*, the provisions authorizing instruction in English are treated as an exception to this general principle. Section 73, in particular, provides that a child whose father or mother is a Canadian citizen and received the major part of his or her elementary instruction in English in Canada may receive instruction in English in a public or subsidized private school in Quebec (para. 1). This same possibility is recognized when it is the children themselves who have received or are receiving the major part of their elementary or

secondary instruction in English in Canada (para. 2). Section 73 also refers to a few other — rarer — situations in which children are allowed to receive instruction in English.

> **73.** The following children, at the request of one of their parents, may receive instruction in English:
>
> (1) a child whose father or mother is a Canadian citizen and received elementary instruction in English in Canada, provided that that instruction constitutes the major part of the elementary instruction he or she received in Canada;
>
> (2) a child whose father or mother is a Canadian citizen and who has received or is receiving elementary or secondary instruction in English in Canada, and the brothers and sisters of that child, provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada;
>
> (3) a child whose father and mother are not Canadian citizens, but whose father or mother received elementary instruction in English in Québec, provided that that instruction constitutes the major part of the elementary instruction he or she received in Québec;
>
> (4) a child who, in his last year in school in Québec before 26 August 1977, was receiving instruction in English in a public kindergarten class or in an elementary or secondary school, and the brothers and sisters of that child;
>
> (5) a child whose father or mother was residing in Québec on 26 August 1977 and had received elementary instruction in English outside Québec, provided that that instruction constitutes the major part of the elementary instruction he or she received outside Québec.
>
> However, instruction in English received in Québec in a private educational institution not accredited for the purposes of subsidies by the child for whom the request is made, or by a brother or sister of the child, shall be disregarded. The same applies to instruction in English received in Québec in such an institution after 1 October 2002 by the father or mother of the child.
>
> Instruction in English received pursuant to a special authorization under section 81, 85 or 85.1 shall also be disregarded.

[4] The current provisions of the *CFL* on the language of instruction resulted from a long series of political debates and legal challenges. In 1969, the Quebec legislature enacted the *Act to*

promote the French language in Québec, S.Q. 1969, c. 9, in which the primacy of French as the language of instruction was affirmed, although parents were left free to choose the language of instruction of their children. In 1974, Quebec revised its freedom of choice policy and limited access to instruction in English to children capable of demonstrating sufficient knowledge of the English language in tests administered by the province (*Official Language Act*, S.Q. 1974, c. 6). But difficulties encountered in the administration of those tests prompted the legislature to once again rethink its policy on the language of instruction. It enacted the *CFL* in 1977. At that time, the legislature reaffirmed the general principle that instruction in Quebec was given in French and established four situations in which, as exceptions to the general rule, parents could send their children to English schools (s. 73). Following the enactment of the *Canadian Charter* in 1982, the provisions of the *CFL* on instruction in the minority language were the subject of a major constitutional challenge (*Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66). This Court held at that time that the *Charter of the French language* violated s. 23 of the *Canadian Charter* because it defined the classes of persons entitled to instruction in the minority language too narrowly. In particular, under the version of s. 73 then in force, instruction received in English in Quebec was recognized, but instruction received elsewhere in Canada was not. The categories established in s. 73 *CFL* were therefore too restrictive in relation to those provided for in and protected by s. 23 of the *Canadian Charter*, and the Court declared the provisions in issue to be unconstitutional.

[5] In 1993, the Quebec legislature amended ss. 72 and 73 *CFL* to comply with this Court's decision. As a result of those amendments, in accordance with s. 23 of the *Canadian Charter*, credit would now be given for instruction received in English elsewhere in Canada. However, one condition

was imposed in this respect: instruction received in the minority language had to constitute the major part of the instruction received in Canada. A series of special cases were provided for to permit provincial authorities to grant special authorizations in specific situations (ss. 81, 85 and 85.1 *CFL*).

[6] At that time, no concern was shown in the *CFL* for unsubsidized private schools ("UPSs"). However, such schools have played an increasingly significant role in Quebec's education system. They are not subject to the province's rules respecting the language of instruction (s. 72, para. 2 *CFL*). Any child can therefore enrol in one and receive elementary and secondary instruction in English there. Before Bill 104's amendments to the *CFL* in 2002, the administrative practice of the Ministère de l'Éducation du Québec was to consider periods of instruction received in a UPS in determining whether a child was eligible for English-language instruction in public schools and subsidized private schools.

[7] The 2002 amendments to the *CFL* were a response to the concerns of the Quebec government and of a portion of Quebec public opinion regarding the growing phenomenon of [TRANSLATION] "bridging schools" (*écoles passerelles*). According to the government, more and more parents whose children were not entitled to instruction in the minority language were enrolling their children in UPSs for short periods so that they would be eligible — on a literal reading of s. 73 *CFL* and in light of the administrative practice of the Ministère de l'Éducation — to attend publicly funded English schools. In the government's view, parents who did so were circumventing all the rules relating to the language of instruction, and the result was to enlarge the categories of rights holders under s. 23 of the *Canadian Charter*. Thus, it was in response to concerns about the extent of this practice that the National Assembly enacted Bill 104 in 2002.

[8] The respondents submit that these amendments violate the rights guaranteed by s. 23 of the *Canadian Charter*, and they accordingly ask this Court to declare that paras. 2 and 3 of s. 73 *CFL* are unconstitutional. The Nguyen case relates specifically to the UPS issue, while the Bindra case relates to the granting of special authorizations by the province.

B. *The Situations of the Respondents in the Nguyen and Bindra Cases*

[9] The respondents in the Nguyen case are Canadian citizens who received no primary school instruction in English in Canada. As a result, they do not meet the criteria of s. 23(1)(*b*) of the *Canadian Charter* and their children are not eligible for instruction in publicly funded English-language schools in Quebec on that basis. To qualify their children for such instruction, they enrolled them in UPSs offering instruction in English. On the basis of the instruction received in those institutions, they then requested that their children be declared eligible for instruction in English in public or subsidized private schools. According to the appellant, the periods of attendance at the UPSs lasted no more than a few weeks or months in most cases, and were usually at the elementary level (A.F., at p. 2). The same is not true of the children of the respondent Bindra, however, as they went to school in English for several years. The Ministère de l'Éducation du Québec denied all these requests for certificates of eligibility on the basis of the Bill 104 amendments.

[10] The situation is different in the Bindra case. It involves one of the children of the respondent, Talwinder Bindra, who is also participating in the proceedings in the Nguyen case. After immigrating to Canada, Mr. Bindra became a Canadian citizen in 1990. He is the father of two

children, Jessica and Satbir, who were born in Montréal and have always lived in that city. He had enrolled his children in a UPS. After extensive discussions about Jessica's eligibility for the minority language public school system, the Minister of Education granted her a special authorization under s. 85.1 *CFL*. The respondent then tried, relying on s. 23(2) of the *Canadian Charter*, to obtain a certificate of eligibility for minority-language instruction in a public or subsidized private school for Satbir on the basis of the instruction being received by his sister. His request was denied pursuant to the Bill 104 amendments.

[11] In both cases, the respondents appealed to the Administrative Tribunal of Québec ("ATQ"), arguing that paras. 2 and 3 of s. 73 *CFL* were unconstitutional. That set in motion the proceedings now before this Court.

[12] The ATQ heard the two appeals before this Court rendered its decision in *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201. In that case, the Court had to determine the meaning of the words "major part" in s. 73 *CFL* in order to identify the educational pathway (*parcours scolaire*) needed for a child to be eligible for instruction in the English-language public school system. It held that, in order to be consistent with the objectives of s. 23 of the *Canadian Charter*, the "major part" requirement had to entail a qualitative, rather than a strictly quantitative, assessment of the child's educational pathway. I will return to *Solski* below because of its importance to the outcome of the appeals.

III. Judicial History

A. *Nguyen*

(1) Administrative Tribunal of Québec, [2003] T.A.Q. 975

[13] The proceeding the Nguyens brought before the ATQ was heard jointly with 131 others; the applicants sought a declaration that the Bill 104 amendment to the *CFL* with respect to instruction received in English in a UPS was invalid, and a certificate of eligibility to attend an English-language public school for each applicant's child or children. First of all, the tribunal did not accept the literal interpretation of s. 23 of the *Canadian Charter* advanced by the applicants. It considered that interpretation to be inconsistent with the principles established by this Court. Also, in its view, the intention of the framers did not support a literal interpretation. The ATQ held that s. 73 *CFL* met the requirements of s. 23 of the *Canadian Charter*. According to the tribunal, it was instead the applicants' proposed interpretation that was inconsistent with s. 23, as their interpretation would have the following results: parents would once again have freedom of choice as regards the language of instruction, s. 23(1)(*a*) of the *Canadian Charter* would come into force without the consent of the Quebec legislature, and it would become possible to purchase status as a rights holder. The tribunal therefore dismissed the proceeding and the conclusions in which the applicants asked that the impugned statutory provision be declared invalid.

(2) Quebec Superior Court, [2004] Q.J. No. 9812 (QL)

[14] The case was then brought before the Quebec Superior Court in the form of an application for judicial review of the ATQ's decision. The Superior Court dismissed the application before this Court rendered its decision in *Solski*. Mass J. began by noting that the principles set out by the Quebec Court of Appeal in its decision in *Solski* ([2002] R.J.Q. 1285) continued to be authoritative as long as the Supreme Court of Canada had not decided the case. He added that the arguments raised before him were the same ones the ATQ had already considered and rejected. In his view, the ATQ's decision was consistent with the applicable law and contained no reversible errors. The respondents then appealed to the Quebec Court of Appeal, which heard their appeal together with the appeal in the Bindra case.

(3) Quebec Court of Appeal, 2007 QCCA 1111, [2007] R.J.Q. 2097

[15] The majority of the Court of Appeal allowed the appeal in the Nguyen case. The judges of the majority, Hilton and Dalphond JJ.A., wrote separate reasons. Hilton J.A., relying on the decision this Court had just rendered in *Solski*, found s. 72 *CFL* to be constitutional but held that s. 73 *CFL* infringed the rights guaranteed by s. 23 of the *Canadian Charter* in that it did not allow for a global qualitative assessment of the educational pathways of the children in question. He then stated that this infringement could not be justified under s. 1 of the *Canadian Charter* because of the significance of the limit on the guaranteed right and the failure to meet the minimal impairment criterion. Hilton J.A. therefore returned all the files to the designated person under the *CFL* to be assessed in light of the qualitative factors established by this Court in *Solski*. Dalphond J.A. agreed that the absolute prohibition on considering instruction received in English in Quebec in a UPS was invalid because its effect, in violation of the rights guaranteed by s. 23 of the *Canadian Charter*, was to deny children

their constitutional right to continue on their educational pathways in English in a public school or a subsidized private school (para. 169). He explained that the protection afforded by s. 23(2) relates to the child's objective educational reality and not necessarily the parents' membership in a protected linguistic minority community (para. 205). According to Dalphond J.A., the impugned measure could not be justified under s. 1 of the *Canadian Charter*, because the absolute prohibition on considering instruction received in a UPS was neither reasonable nor proportional to the objective being pursued (para. 232). Giroux J.A., in dissent, would have dismissed the appeal. He stated that the application of s. 23 must take into account the real disparities that exist between the situations of Quebec's linguistic minority community and the linguistic minority communities elsewhere in Canada (para. 250). He added that s. 23 affords its protection only to the English- and French-speaking groups (para. 270). Giroux J.A. accordingly considered the impugned paragraph of s. 73 *CFL* to be consistent with s. 23 of the *Canadian Charter*.

B. *Bindra*

(1) Administrative Tribunal of Québec, [2004] T.A.Q. 198

[16] The tribunal's decision in the Bindra case concerned five different files. Two of these administrative appeals were dismissed for procedural or factual reasons (Bindra and Pitre). Regarding the case of Talwinder Bindra, the tribunal held that it was fully resolved by the decision in the Nguyen case. A more substantial analysis on the issue of the constitutionality of the final paragraph of s. 73 *CFL* was conducted in respect of the other three files. The tribunal asserted that it was necessary, in interpreting s. 23 of the *Canadian Charter*, to identify the true purpose of the constitutional protection and not to conduct a literal analysis without considering the relevant statutory provisions as a whole. It then noted that the applicants had no ties to Quebec's English-speaking minority and could not therefore claim to have the status of rights holders under s. 23(2) of the *Canadian Charter*. People to whom the province has granted additional rights cannot, on that basis alone, become rights holders from a constitutional standpoint. The interpretation of s. 23(2) of the *Canadian Charter* proposed by the applicants would lead to the freedom to choose the language of instruction. The tribunal accordingly held that the final paragraph of s. 73 *CFL* was consistent with s. 23 of the *Canadian Charter*, and dismissed the applications. The case was then brought before the Quebec Superior Court by means of an application for judicial review.

(2) Quebec Superior Court, [2005] R.J.Q. 1039

[17] Monast J. dismissed the applications for judicial review of Mr. Pitre and Mr. Bindra and held that the reasons given by the ATQ for dismissing the administrative appeals were sound. Even though her conclusion on this point was sufficient to dispose of the applications, Monast J. also considered whether the final paragraph of s. 73 *CFL* was constitutional. She accepted the argument of the Minister of Education and the Attorney General of Quebec that if a provincial legislature grants language rights to a minority that are greater than those guaranteed by the *Canadian Charter*, constitutional protection is not extended to the rights in question. The enactment of ss. 81, 85 and 85.1 *CFL* meant that some people might be exempted from the application of s. 72 *CFL* and hence given access to publicly funded instruction in English. However, that did not turn them into rights holders under s. 23 of the *Canadian Charter*. Monast J. accordingly found that there was no inconsistency between the final paragraph of s. 73 *CFL* and the purpose of s. 23 of the *Canadian Charter*.

(3) Quebec Court of Appeal, 2007 QCCA 1112, [2007] Q.J. No. 9482 (QL)

[18] Dalphond J.A., who wrote reasons in which Hilton J.A. concurred, stated that the ATQ had erred in holding that the decision in the Nguyen case had fully resolved the case of Talwinder Bindra. In his opinion, the appellant was entitled to a complete decision on whether his son was eligible for instruction in English in a public school, either because he had attended a UPS or because his sister has been admitted to an English-language educational institution pursuant to a special authorization. Dalphond J.A. noted, on the merits of the case, that s. 23(2) of the *Canadian Charter* must be interpreted broadly and in conformity with the constitutional objective of protecting linguistic minority communities in Canada. In his opinion, all children who receive instruction in English, regardless of whether the school is a public school or a subsidized private school and regardless of the nature of the exception to s. 72 *CFL* under which they qualify for certificates of eligibility, have the same de facto learning experience and are entitled under s. 23(2) of the *Canadian Charter* to continue to receive instruction in English. Section 23(2) also preserves family unity by providing that the brothers and sisters of a child admitted to instruction in English may also have access to instruction in that language in the public system or the subsidized private system.

[19] Thus, the refusal to consider the instruction received by a child pursuant to a special authorization (s. 81, 85 or 85.1 *CFL*) in determining whether the child and his or her brothers and sisters are eligible for instruction in English has the effect of truncating the child's actual objective reality and infringes s. 23 of the *Canadian Charter*. According to this Court's decision in *Solski*, it is important, in applying s. 73 *CFL*, to assess the educational pathway of a child in qualitative rather than strictly quantitative terms. After reviewing statistics on the number of authorizations issued in Quebec under ss. 81, 85 and 85.1 *CFL*, Dalphond J.A. found that the Attorney General of Quebec had not discharged his burden of demonstrating that there was a real threat to the survival of the

French language in Quebec that could justify the infringement of constitutional rights resulting from the final paragraph of s. 73 *CFL*. In his view, the infringement of the rights protected by s. 23 was therefore not justified under s. 1 of the *Canadian Charter*, and the final paragraph of s. 73 *CFL* had to be declared to be of no force or effect. Dalphond J.A. accordingly returned the file to the person designated by the Minister of Education to immediately issue a certificate of eligibility for Satbir Bindra. Giroux J.A. wrote separate reasons, but stated that he essentially agreed with Dalphond J.A.'s reasons.

C. *Effect of the Court of Appeal's Decisions*

[20] In its judgments, the Quebec Court of Appeal declared that the second and third paragraphs of s. 73 *CFL* were unconstitutional because they were inconsistent with the language rights guaranteed by s. 23 of the *Canadian Charter*. In the Nguyen case, the court ordered that the claimants' files be returned to the person designated by the Minister of Education to reassess each one in light of its judgment and this Court's decision in *Solski*. In the Bindra case, the Court ordered that the file be returned to the Ministère de l'Éducation for immediate issuance of a certificate of eligibility for Satbir Bindra. However, execution of the judgments was stayed for the duration of the appellants' appeals to this Court. This stay also applied to the reassessment of the individual files of the children of the respondents in the Nguyen case and to the issuance of the certificate of eligibility in the Bindra case. The Quebec government is now asking this Court to find that the impugned provisions are constitutional. In the Nguyen case, the respondents have cross-appealed and are asking this Court to declare that their children are immediately eligible for publicly funded instruction in English. They are also asking that this Court's findings in their case apply to Satbir Bindra, even though his situation is already being reviewed in the Bindra case. In the latter case, the respondent is asking this Court to declare that the third paragraph of s. 73 *CFL* is invalid.

IV. Constitutional Questions

[21] In orders dated May 20, 2008, the Chief Justice stated the following constitutional questions:

In the Nguyen case:

> (1) Does the second paragraph of s. 73 of the *Charter of the French language,* R.S.Q., c. C-11, infringe s. 23(2) of the *Canadian Charter of Rights and Freedoms*?
>
> (2) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

In the Bindra case:

> (1) Does the third paragraph of s. 73 of the *Charter of the French language*, R.S.Q., c. C-11, infringe s. 23(2) of the *Canadian Charter of Rights and Freedoms*?
>
> (2) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

V. Analysis

A. *Issues*

[22] This Court must decide whether the second and third paragraphs of s. 73 of the *CFL* are constitutional. To do so, it must first decide whether the provisions in issue infringe the language rights guaranteed by s. 23 of the *Canadian Charter* and, if so, whether the infringement is reasonable and whether it is justified in a free and democratic society under s. 1 of the *Canadian Charter*. The Court must then decide on the appropriate remedy and on costs.

B. *Solski and the Interpretation of Section 23(2) of the Canadian Charter*

[23] Section 23 of the *Canadian Charter* establishes the general framework for the minority language educational rights of Canadian citizens. This provision is unlike those generally found in charters and declarations of fundamental rights (*Quebec Association of Protestant School Boards*, at p. 79). Although it has a collective scope, it confers individual rights. A codification of basic language rights, it reflects a fundamental political compromise in Canada in this area (*Quebec Association of Protestant School Boards*, at p. 82; *Solski*, at paras. 5-10; M. Bastarache, ed., *Language Rights in Canada* (2nd ed. 2004), at pp. 6-7; M. Power and P. Foucher, "Language Rights and Education", in G.-A. Beaudoin and E. A. Mendes, *Canadian Charter of Rights and Freedoms* (4th ed. 2005), 1095, at pp. 1102-3).

[24] Section 23(1)(*a*) of the *Canadian Charter* provides that citizens whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside have the right to have their children receive instruction in that language in that province. However, this provision does not apply in Quebec for now. Section 59 of the *Constitution Act, 1982* provides that it will not come into force in that province until it has been authorized by the legislative assembly or government of Quebec, and no such authorization has ever been given. Only s. 23(1)(*b*) regarding the parents' language of instruction applies. It establishes in this regard the categories of rights holders who may demand instruction in the minority language. According to s. 23(1)(*b*), only citizens who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the linguistic minority have the right to have their children receive

instruction in that language in that province. As for s. 23(2) of the *Canadian Charter*, it concerns the continuity of a child's language of instruction and family unity. Under it, citizens of Canada of whom any child is receiving or has received instruction in the language of the linguistic minority may have all their children receive primary and secondary school instruction in that same language. This provision is central to these appeals. As can be seen, s. 23(2) relates to the language of instruction of the child rather than that of the parents, although it is in actual fact the parents who are the holders of the guaranteed rights. Finally, s. 23(3) provides that the guaranteed rights apply where the number of children who can benefit from them is sufficient.

[25] This Court has considered s. 23 several times since the *Canadian Charter* came into force in 1982. This provision lays down a comprehensive code that establishes the nature and scope of the minority language educational rights of an English or French linguistic minority. Section 23 applies in particular to minority language communities throughout Canada. Moreover, it was not enacted in a vacuum. Well aware of the situations of linguistic minorities and the existing legislative schemes with respect to the language of instruction in Canada, the framers wanted to remedy the most serious defects in the legal rules being applied to such minorities and to implement uniform corrective measures for past injustices (*Quebec Association of Protestant School Boards*, at p. 79; *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at pp. 363-64; *Solski*, at para. 21). Section 23 was thus conceived as a tool for achieving equality between Canada's two official language groups (*Mahe v. Alberta*, at p. 369; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, at para. 26).

[26] Since *Quebec Association of Protestant School Boards*, this Court has consistently held that in interpreting s. 23, it is necessary to take a purposive approach aimed at identifying the framers'

objective at the time of its enactment. The Court has stated on a number of occasions that the purpose of this section is to protect the official languages and their respective cultures, and promote their development, in the provinces where they are spoken by a minority (*Mahe*, at p. 364; *Reference re Public Schools Act (Man.), S. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, at p. 849; *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238, at para. 28; *Solski*, at para. 7). Moreover, even if the guaranteed language rights are the embodiment of a political compromise, they must, like the other rights entrenched in the *Charter*, be given a generous and expansive interpretation that is consistent with the identified purpose (*Mahe*, at pp. 364-65; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 23-24; *Solski*, at para. 20). However, the social, demographic and historical context of the recognition of the rights guaranteed by s. 23 remains the backdrop for the analysis of language rights and assists in identifying the concerns that led to their being given constitutional recognition (*Solski*, at para. 5). In analysing and interpreting language rights, it is also necessary to consider the official languages dynamics in each province (*Reference re Public Schools Act (Man.)*, at p. 851; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 777-78; *Solski*, at para. 7). These principles form the framework for interpreting s. 23 of the *Canadian Charter*.

[27] As the Court observed in *Solski*, the specific purpose of s. 23(2) of the *Canadian Charter* is to provide continuity of minority language education rights, to ensure family unity and to accommodate mobility within Canada (para. 30). Although the purpose of s. 23 is to protect and promote both the English-speaking and French-speaking minority language communities, the rights provided for in s. 23(2) apply regardless of whether the parents or the eligible children are members of one of these minority communities or speak one of these languages in the home, or even have a

working knowledge of the protected minority language. As this Court stated in *Solski*, "[t]he conditions for qualification under s. 23 reflect the fact that new Canadians in particular will decide to adopt one or the other official languages, or both, as participants in the Canadian language regime" (para. 31). Change of residence from one province to another is not among the conditions for exercising the guaranteed rights either. Finally, in the very words of s. 23(2) — which refers to instruction that the child has received or is receiving for the purpose of determining whether the child has a right to receive instruction in the minority language — no distinction is made between instruction that is public and instruction that is private, whether subsidized or unsubsidized.

C. *Solski and the Identification of a Genuine Educational Pathway as a Condition of Eligibility for Instruction in the Minority Language*

[28] *Solski* is determinative in the analysis of the rights provided for in s. 23(2) of the *Canadian Charter*. In that case, the Court had to decide whether the requirement established in s. 73 *CFL* — that, for a child to have access to public and subsidized private schools in the minority language, the "major part" of the instruction the child has received be in that language — was consistent with the rights provided for in s. 23(2) of the *Canadian Charter*. The Court found this "major part" requirement to be consistent with s. 23(2) provided that it was interpreted properly (*Solski*, at paras. 28 and 35), that is, as giving rise to an obligation to conduct a global qualitative assessment of a child's educational pathway. Conducting a strictly mathematical analysis of this pathway based solely on time spent in minority language schools, which had been the approach of the Ministère de l'Éducation du Québec up to that time, was to be avoided.

[29] The global assessment of the child`s educational pathway, which focusses on quality, is then based on a set of factors that are of varying importance depending on the specific facts of each case. These factors include time spent in different programs of study, at what stage of the child's education the choice of language of instruction was made, what programs are or were available, and whether learning disabilities or other difficulties exist (*Solski*, at para. 33). The qualitative assessment of the child's situation thus makes it possible to determine whether the claimant meets the requirements of s. 23(2) and belongs to one of the recognized categories of rights holders. In this connection, the Court noted that this provision does not specify a minimum amount of time a child would have to spend in a minority language education program in order to benefit from the constitutional rights (*Solski*, at para. 41). However, a short period of attendance at a minority language school is not indicative of a genuine commitment and cannot on its own be enough for a child's parent to obtain the status of a rights holder under the *Canadian Charter*. In this regard, the Court warned against artificial educational pathways designed to circumvent the purposes of s. 23 and create new categories of rights holders at the sole discretion of the parents:

> It cannot be enough, in light of the objectives of s. 23, for a child to be registered for a few weeks or a few months in a given program to conclude that he or she qualifies for admission, with his or her siblings, in the minority language programs of Quebec [*Solski*, at para. 39]

D. *Infringement of the Constitutional Rights of the Claimants in the Two Appeals*

[30] The purpose of s. 73 *CFL* is to implement the constitutional guarantees provided for in s. 23 of the *Canadian Charter* with respect to minority language educational rights. The first

paragraph of s. 73 *CFL* lists five situations in which children, at the request of their parents, may receive publicly funded instruction in English in Quebec. These situations constitute exceptions to the general rule — established in s. 72 *CFL* — that instruction in Quebec is provided in French to all students, in kindergarten and in elementary and secondary schools. Under s. 73 *CFL*, the children of a Canadian citizen have a right to receive instruction in the language of the English-speaking minority if, *inter alia*, at least one of the children has received or is receiving instruction in English anywhere in Canada, provided that the instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada.

[31] As I mentioned above, paras. 2 and 3 of s. 73 *CFL* provide that instruction received in a UPS or pursuant to a special authorization under s. 82, 85 or 85.1 *CFL* must be disregarded. Thus, neither time spent by a child in an unsubsidized private educational institution that provides instruction in English nor instruction received by a child in English pursuant to a special authorization granted by the province is given any consideration whatsoever — in either qualitative or quantitative terms — in determining whether the major part of the instruction the child received was in English and whether the child is entitled to receive instruction in that language in Quebec. Such periods of instruction are, in a manner of speaking, struck from the child's educational pathway as if they had never occurred.

[32] In the protection afforded by the *Canadian Charter*, no distinction is drawn as regards the type of instruction received by the child, as to whether the educational institution is public or private, or regarding the origin of the authorization pursuant to which instruction is provided in a given language. Rather, s. 23(2) of the *Canadian Charter* reflects a factual reality in which language

rights are protected when, in light of the child's overall situation and of an analysis of the child's educational pathway that is both subjective and objective, it is determined that the child is receiving or has received instruction in one of Canada's two official languages. It is therefore the fact that a child has received instruction in a language that makes it possible to exercise the constitutional right. Moreover, this interpretation is compatible with the primary objective of s. 23(2): to promote continuity of language instruction.

[33] The inability to assess a child's educational pathway in its entirety in determining the extent of his or her educational language rights has the effect of truncating the child's reality by creating a fictitious educational pathway that cannot serve as a basis for a proper application of the constitutional guarantees. In *Solski*, this Court stated that the child's entire educational pathway must be taken into account in order to determine whether it meets the requirements of s. 23(2) of the *Canadian Charter*. If an entire portion of the educational pathway is omitted from the analysis because of the nature or origin of the instruction received, it is impossible to conduct the global analysis of the child's situation and educational pathway required by *Solski*.

[34] Where both UPSs and special authorizations issued by the province are concerned, the children are in fact receiving or have in fact received instruction in English and fall, in principle, within the categories of rights holders under s. 23(2). According to *Solski*, on a proper interpretation of this provision, it is necessary to conduct a comprehensive analysis of the educational pathways of children whose parents wish to avail themselves of the constitutional guarantees. I accordingly find that paras. 2 and 3 of s. 73 *CFL* limit the respondents' rights in both appeals. But it remains to be determined whether, as the appellants argue, this limit can be justified in a free and democratic society

pursuant to s. 1 of the *Canadian Charter*.

[35] Before discussing the application of s. 1, however, I consider it necessary at this point to add some comments about my conclusion that certain provisions of the *CFL* limit the respondents' constitutional rights. As this Court has previously noted, the framers did not intend, in enacting s. 23, to re-establish freedom of choice of the language of instruction in the provinces. However, a literal application of s. 23(2) could lead to this result and render the *CFL*'s provisions on the language of instruction meaningless. Moreover, it would be hard to reconcile a literal application with the concept of a genuine educational pathway, which is a fundamental consideration in determining whether someone belongs to the categories of rights holders. This Court also noted this problem in *Solski* (paras. 39 and 48).

[36] The "bridging" schools appear in some instances to be institutions created for the sole purpose of artificially qualifying children for admission to the publicly funded English-language school system. When schools are established primarily to bring about the transfer of ineligible students to the publicly funded English-language system, and the instruction they give in fact serves that end, it cannot be said that the resulting educational pathway is genuine. However, it is necessary to review the situation of each institution, as well as the nature of its clientele and the conduct of individual clients. As delicate as this task may be, this is the only approach that will make it possible to comply with the framers' objectives while averting, especially in Quebec, a return to the principle of freedom of choice of the language of instruction that the framers did not intend to impose (*Gosselin*, at paras. 2, 30 and 31).

E. *Justification Under Section 1*

[37] According to the respondents, the appellants cannot invoke s. 1 of the *Canadian Charter* to justify a limit on s. 23 rights. But it is now well established that s. 1 applies to language rights, and that the Court did not reach the conclusion the respondents say it did in *Quebec Association of Protestant School Boards* (see, for example: *Ford*, at pp. 771 and 774). Thus, in accordance with the approach established in *R. v. Oakes*, [1986] 1 S.C.R. 103, the Court must determine first whether the objective of the measures adopted by the Quebec legislature is sufficiently important to warrant the infringement of the guaranteed rights, and then whether the means chosen are proportional to the objective.

[38] Bill 104 had two principal objectives. The first was to resolve the problem of bridging schools and the expansion of the categories of rights holders that resulted from the enrolment of students in those institutions. The second, more general, objective was to protect and promote the French language in Quebec. Although the Quebec legislature is required to perform its constitutional obligations related to minority language educational rights within its territory, the fundamental rule concerning the language of instruction in Quebec remains. According to s. 72 *CFL*, instruction in Quebec must, with some exceptions, be provided in French to all students in kindergarten and in elementary and secondary schools. This rule is the expression of a valid political choice. Quebec's National Assembly may legitimately try to give effect to this choice by permitting no exceptions other than those required by the language rights provided for in s. 23 of the *Canadian Charter*. The legislature's intention in this respect would be compromised if these "springboard" schools could be used to make obtaining access to minority language schools almost automatic. Resolving this

problem is a serious and legitimate objective. Moreover, this Court has already held, in *Ford*, that the general objective of protecting the French language is a legitimate one within the meaning of *Oakes* in view of the unique linguistic and cultural situation of the province of Quebec:

> [T]he material amply establishes the importance of the legislative purpose reflected in the *Charter of the French Language* and that it is a response to a substantial and pressing need. . . . The vulnerable position of the French language in Quebec and Canada was described in a series of reports by commissions of inquiry beginning with the Report of the Royal Commission on Bilingualism and Biculturalism in 1969 and continuing with the Parent Commission and the Gendron Commission. . . . Thus, in the period prior to the enactment of the legislation at issue, the "*visage linguistique*" of Quebec often gave the impression that English had become as significant as French. This "*visage linguistique*" reinforced the concern among francophones that English was gaining in importance, that the French language was threatened and that it would ultimately disappear. It strongly suggested to young and ambitious francophones that the language of success was almost exclusively English. It confirmed to anglophones that there was no great need to learn the majority language. And it suggested to immigrants that the prudent course lay in joining the anglophone community. . . .
>
> The section 1 and s. 9.1 materials establish that the aim of the language policy underlying the *Charter of the French Language* was a serious and legitimate one. They indicate the concern about the survival of the French language and the perceived need for an adequate legislative response to the problem. . . . [pp. 777-79]

[39] More than twenty years after that decision, this concern is still present in Quebec, as can be seen in the report of the Office québécois de la langue française entitled *Rapport sur l'évolution de la situation linguistique au Québec, 2002-2007* (2008). In this report, great concern continues to be expressed about the situation of the French language in the Canadian and North American contexts:

> [TRANSLATION] In both the Canadian and North American contexts, French and

> English do not carry the same weight and are not subject to the same constraints in respect of the future. The durability of English in Canada and in North America is all but assured. That of French in Quebec, and particularly in the Montréal area, still depends to a large extent on its relationship with English and remains contingent upon various factors such as fecundity, the aging of the population, inter- and intraprovincial migration and language substitution. [p. 47]

[40] Since the legislative objective has been found to be valid, the next step is to determine whether the provisions introduced by Bill 104 constitute a proportionate response to the problems identified above. In my opinion, the appellants have established the existence of a rational causal connection between the objectives of Bill 104 and the measures taken by the province of Quebec. Moreover, this Court has commented several times on the importance of education and the organization of schools to the preservation and promotion of a language and its culture (*Mahe*, at pp. 362-63; *Reference re Public Schools Act (Man.)*, at p. 849; *Gosselin*, at para. 31). The purpose of Bill 104 is to protect and promote instruction in French as well as the use of the French language.

[41] The main problem that arises in determining whether the impugned provisions are constitutional relates to the proportionality of the adopted measures. Even if a rational connection is found to exist between the impugned measures and the objective of the legislation, it is necessary to take the analysis further and ask whether the means chosen by the legislature constitute a minimal impairment, as defined in the case law, of the constitutional rights guaranteed by s. 23(2) of the *Canadian Charter*. In my opinion, the measures that are contested in the Nguyen and Bindra cases are excessive in relation to the objectives being pursued, and do not meet the standard of minimal

impairment.

[42] I will begin by discussing the Nguyen case, and therefore the case of unsubsidized private schools contemplated in the second paragraph of s. 73 *CFL*. As I mentioned above, Bill 104 rules out any consideration of a child's educational pathway in an unsubsidized English-language private school. No account whatsoever is to be taken of the duration and circumstances of that pathway or of the nature and history of the educational institution in which the child was enrolled. The prohibition against taking this into account is total and absolute. In light of the evidence presented in the Nguyen case, this legislative response seems excessive in relation to the seriousness of the identified problem and its impact on school clientele and, potentially, on the situation of the French language in Quebec. The evidence shows that the number of children who become eligible for admission to the English-language public school system after attending a UPS remains relatively low, although it does seem to be gradually increasing. For example, in the 2001-2 school year, according to statistics provided by the Ministère de l'Éducation for the entire province of Quebec, just over 2,100 students enrolled in English-language UPSs at the pre-school, elementary and secondary levels throughout Quebec did not have certificates of eligibility for instruction in English (A.R., at p. 1605). Thus, before Bill 104 came into force, the time they spent in these institutions could have qualified them for a transfer to the publicly funded English-language system. This represents just over 1.5 percent of the total number of students eligible for instruction in English that year (*Rapport sur l'évolution de la situation linguistique au Québec, 2002-2007*, at p. 82). This number has since increased. The number of students attending English-language UPSs who did not have certificates of eligibility exceeded 4,000 in the 2007-8 school year (A.R., at p. 1605). Despite this increase,

however, the number of students in question remains relatively low in relation to the numbers of students in the English- and French-language school systems. In view of this situation, although I do not deny the importance of the purpose of para. 2 of s. 73 *CFL*, the absolute prohibition on considering an educational pathway in a UPS seems overly drastic. What is happening is not a de facto return to freedom of choice with disruptive changes to the categories of rights holders. The legislature could have adopted different solutions that would involve a more limited impairment of the guaranteed rights and could more readily be reconciled with the concrete contextual approach recommended in *Solski*.

[43] However, I do not wish to deny the dangers that the unlimited expansion of UPSs could represent for the objectives of preserving and promoting the French language in Quebec. If no action were taken to control this expansion, the bridging schools could become a mechanism for almost automatically circumventing the *CFL*'s provisions on minority language educational rights, creating new categories of rights holders under the *Canadian Charter* and, indirectly, restoring the freedom to choose the language of instruction in Quebec.

[44] Some of the evidence on the use of bridging schools raises doubts regarding the genuineness of many educational pathways, and regarding the objectives underlying the establishment of certain institutions. In their advertising, some institutions suggested that after a brief period there, their students would be eligible for admission to publicly funded English-language schools (A.R., at pp. 1200-1202). An approach to reviewing files closer to the one established in *Solski* would make it possible to conduct a concrete review of each student's case and of the institutions in question. This review would relate to the duration of the relevant pathway, the nature and history of the institution

and the type of instruction given there. For example, it might be thought that an educational pathway of six months or one year spent at the start of elementary school in an institution established to serve as a bridge to the public education system would not be consistent with the purposes of s. 23(2) of the *Canadian Charter* and the interpretation given to that provision in *Solski*. Moreover, as I mentioned above, this Court expressed reservations in *Solski* about attempts to create language rights for expanded categories of rights holders by means of short periods of attendance at minority language schools (*Solski*, at para. 39).

[45] The situations in issue in the Bindra case also concern a relatively small number of children. According to the statistics provided by the appellants, it appears that between 1990 and 2002, an average of 7.1 percent of students eligible for English instruction were eligible owing to a special authorization issued by the province under ss. 81, 85 and 85.1 *CFL* (*Rapport sur l'évolution de la situation linguistique au Québec, 2002-2007*, at p. 90). Although it is impossible to determine with any accuracy what proportion of those students subsequently obtained certificates of eligibility under s. 73, para. 1(2) *CFL*, I note that a large majority of them were eligible because they were staying temporarily in Quebec and had obtained special authorizations on that basis under s. 85 *CFL*. Moreover, it must not be forgotten that the special authorizations mechanism remains wholly within the authority of the Quebec government, which can therefore grant authorizations that exceed what it is constitutionally obligated to grant, but cannot, after doing so, deny any rights flowing from the authorizations in question that are guaranteed by the *Canadian Charter*. The provisions added to the *CFL* by Bill 104 that apply to Mr. Bindra's case are not consistent with the principle of preserving family unity provided for in s. 23(2) of the *Canadian Charter*. In fact, they are likely to make it impossible for children of a family to receive instruction in the same school system.

F. *Remedies*

[46] I must therefore find that the limit on the respondents' constitutional rights was not justified under s. 1 of the *Canadian Charter*. I would therefore uphold the Quebec Court of Appeal's declaration that paras. 2 and 3 of s. 73 *CFL* are invalid. Because of the difficulties this declaration of invalidity may entail, I would suspend its effects for one year to enable Quebec's National Assembly to review the legislation. However, it is also necessary to consider the situations of the claimants concerned in the two appeals.

[47] Regarding the claimants in the Nguyen case, despite the suspension of the declaration of invalidity, I agree with the Quebec Court of Appeal that their files should be returned to the Ministère de l'Éducation, and if necessary to the ATQ, to be reviewed in light of the criteria established in *Solski* and in this judgment. The evidence currently in the files is insufficient for this Court to determine whether the children are or are not eligible for instruction in English in Quebec. I would accordingly dismiss the cross-appeal without costs. In the Bindra case, the evidence is clear. Satbir Bindra is entitled to be declared eligible immediately, and he must be granted a certificate to that effect forthwith. This Court must therefore uphold the order of the Quebec Court of Appeal that the file be returned to the person designated by the Minister of Education to immediately issue a certificate of eligibility for instruction in English for Satbir Bindra. However, I would dismiss the cross-appeal in this case, since, contrary to Mr. Bindra's submission, the Court of Appeal held clearly that the third paragraph of s. 73 *CFL* is unconstitutional and since returning the file to the designated person is determinative of Mr. Bindra's claim.

G. *Costs*

[48] The issue of costs, which, although incidental, is an important one for the respondents, remains to be resolved. The respondents ask to be granted special fees of $100,000, payable by the appellants, under s. 15 of the *Tariff of judicial fees of advocates*, R.R.Q. 1981, c. B-1, r. 13. This provision reads as follows:

> The Court may, upon request or *ex officio*, grant a special fee, in addition to all other fees, in an important case.

Quebec courts have ruled frequently on the application of this provision. In *Banque canadienne impériale de commerce v. Aztec Iron Corp.*, [1978] R.P. 385, the Superior Court exhaustively analysed the rules governing requests for special fees, as well as the 23 objective factors and criteria for assessing the importance of a case for the purposes of s. 15 of the Tariff. That decision has been quoted and consistently followed (D. Ferland and B. Emery, *Précis de procédure civile du Québec* (4th ed. 2003), vol. 1, at pp. 725-30). In *JTI MacDonald Corp. v. Canada (Procureur général)*, 2009 QCCA 110, [2009] R.J.Q. 261, a recent decision of the Quebec Court of Appeal, Forget J.A. once again confirmed the validity of the criteria applied by the Quebec courts to decide whether a special fee should be granted and the discretion the courts have in this respect.

[49] It is true that this is the first time the Court has been asked to rule on the constitutionality and interpretation of paras. 2 and 3 of s. 73 *CFL*, and that the case has given rise to intense and no

doubt difficult, legal proceedings. However, the record before this Court contains little explanation as to the amount of the requested fee or as to why it should be granted. I accordingly do not believe that this fee should be granted.

VI. Disposition

[50] The appeals are dismissed with costs. The cross-appeals are dismissed without costs. I will not grant the special fee requested by the respondents. I would answer the constitutional questions as follows:

In the Nguyen case:

> (1) Does the second paragraph of s. 73 of the *Charter of the French language*, R.S.Q., c. C-11, infringe s. 23(2) of the *Canadian Charter of Rights and Freedoms*?
>
> Yes.
>
> (2) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
>
> No.

In the Bindra case:

> (1) Does the third paragraph of s. 73 of the *Charter of the French language*, R.S.Q., c. C-11, infringe s. 23(2) of the *Canadian Charter of Rights and Freedoms*?
>
> Yes.
>
> (2) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
>
> No.

[51] I would suspend the effect of the declaration that paras. 2 and 3 of s. 73 *CFL* are invalid for one year from the date of this judgment, but, despite this suspension, I would return the files of the claimants in the Nguyen case to the Ministère de l'Éducation du Québec and, if appropriate, to the Administrative Tribunal of Québec to be reviewed in light of the principles established in *Solski* and in this judgment. In the Bindra case, I would order that the file be returned to the person designated by the Quebec Minister of Education to immediately issue a certificate of eligibility for instruction in English for Satbir Bindra.

APPENDIX

(1) *Canadian Charter of Rights and Freedoms*

Minority Language Educational Rights	*Droits à l'instruction dans la langue de la minorité*
23. (1) Citizens of Canada	**23.** (1) Les citoyens canadiens :
(*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or	*a*) dont la première langue apprise et encore comprise est celle de la minorité francophone ou anglophone de la province où ils résident,

(*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

b) qui ont reçu leur instruction, au niveau primaire, en français ou en anglais au Canada et qui résident dans une province où la langue dans laquelle ils ont reçu cette instruction est celle de la minorité francophone ou anglophone de la province,have the right to have their children receive primary and secondary school instruction in that language in that province.

ont, dans l'un ou l'autre cas, le droit d'y faire instruire leurs enfants, aux niveaux primaire et secondaire, dans cette langue.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(2) Les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(3) Le droit reconnu aux citoyens canadiens par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d'une province :

(*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

a) s'exerce partout dans la province où le nombre des enfants des citoyens qui ont ce droit est suffisant pour justifier à leur endroit la prestation, sur les fonds publics, de l'instruction dans la langue de la minorité;

(*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d'enseignement de la minorité linguistique financés sur les fonds publics.

(2) *Charter of the French language*, R.S.Q., c. C-11

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

72. L'enseignement se donne en français dans les classes maternelles, dans les écoles primaires et secondaires sous réserve des exceptions prévues au présent chapitre.**73.** The following children, at the request of one of their parents, may receive instruction in English:

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

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

(3) a child whose father and mother are not Canadian citizens, but whose father or mother received elementary instruction in English in Québec, provided that that instruction

73. Peuvent recevoir l'enseignement en anglais, à la demande de l'un de leurs parents :

1° les enfants dont le père ou la mère est citoyen canadien et a reçu un enseignement primaire en anglais au Canada, pourvu que cet enseignement constitue la majeure partie de l'enseignement primaire reçu au Canada;

2° les enfants dont le père ou la mère est citoyen canadien et qui ont reçu ou reçoivent un enseignement primaire ou secondaire en anglais au Canada, de même que leurs frères et sœurs, pourvu que cet enseignement constitue la majeure partie de l'enseignement primaire ou secondaire reçu au Canada;

3° les enfants dont le père et la mère ne sont pas citoyens canadiens mais dont l'un d'eux a reçu un enseignement primaire en anglais au Québec, pourvu que cet

constitutes the major part of the elementary instruction he or she received in Québec;

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

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

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

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

81. Children having serious learning disabilities may, at the request of one of their parents, receive instruction in English if required to facilitate the learning process. The brothers and sisters of children thus exempted from the application of the first paragraph of section 72 may also be exempted.

The Government, by regulation, may define the classes of children envisaged in the preceding paragraph and determine the

enseignement constitue la majeure partie de l'enseignement primaire reçu au Québec;

4° les enfants qui, lors de leur dernière année de scolarité au Québec avant le 26 août 1977, recevaient l'enseignement en anglais dans une classe maternelle publique ou à l'école primaire ou secondaire, de même que leurs frères et sœurs;

5° les enfants dont le père ou la mère résidait au Québec le 26 août 1977, et avait reçu un enseignement primaire en anglais hors du Québec, pourvu que cet enseignement constitue la majeure partie de l'enseignement primaire reçu hors du Québec.

Il n'est toutefois pas tenu compte de l'enseignement en anglais reçu au Québec dans un établissement d'enseignement privé non agréé aux fins de subventions par l'enfant pour qui la demande est faite ou par l'un de ses frères et sœurs. Il en est de même de l'enseignement en anglais reçu au Québec dans un tel établissement, après le 1er octobre 2002, par le père ou la mère de l'enfant.

Il n'est pas tenu compte non plus de l'enseignement en anglais reçu en application d'une autorisation particulière accordée en vertu des articles 81, 85 ou 85.1.

81. Les enfants qui présentent des difficultés graves d'apprentissage peuvent, à la demande de l'un de leurs parents, recevoir l'enseignement en anglais lorsqu'une telle mesure est requise pour favoriser leur apprentissage. Les frères et sœurs d'un enfant ainsi exempté de l'application du premier alinéa de l'article 72 peuvent aussi en être exemptés.

Le gouvernement peut, par règlement, définir les catégories d'enfants visés à l'alinéa précédent et déterminer la procédure à suivre

procedure to be followed in view of obtaining such an exemption.

en vue de l'obtention d'une telle exemption.

85. Children staying in Québec temporarily may, at the request of one of their parents, be exempted from the application of the first paragraph of section 72 and receive instruction in English in the cases or circumstances and on the conditions determined by regulation of the Government. The regulation shall also prescribe the period for which such an exemption may be granted and the procedure to be followed in order to obtain or renew it.

85. Les enfants qui séjournent au Québec de façon temporaire peuvent, à la demande de l'un de leurs parents, être exemptés de l'application du premier alinéa de l'article 72 et recevoir l'enseignement en anglais dans les cas ou les circonstances et selon les conditions que le gouvernement détermine par règlement. Ce règlement prévoit également la période pendant laquelle l'exemption peut être accordée, de même que la procédure à suivre en vue de l'obtention ou du renouvellement d'une telle exemption.

85.1. Where warranted by a serious family or humanitarian situation, the Minister of Education, Recreation and Sports may, upon a reasoned request and on the recommendation of the examining committee, declare eligible for instruction in English a child who has been declared non-eligible by a person designated by the Minister.

85.1. Lorsqu'une situation grave d'ordre familial ou humanitaire le justifie, le ministre de l'Éducation, du Loisir et du Sport peut, sur demande motivée et sur recommandation du comité d'examen, déclarer admissible à l'enseignement en anglais un enfant dont l'admissibilité a été refusée par une personne désignée par le ministre.

The request must be filed within 30 days of notification of the unfavourable decision.

La demande doit être produite dans les 30 jours de la notification de la décision défavorable.

The request shall be submitted to an examining committee composed of three members designated by the Minister. The committee shall report its observations and recommendation to the Minister.

Elle est soumise à l'examen d'un comité formé de trois membres désignés par le ministre. Le comité fait rapport au ministre de ses constatations et de sa recommandation.

The Minister shall specify, in the report referred to in section 4 of the Act respecting the Ministère de l'Éducation, du Loisir et du Sport (chapter M-15), the number of children declared eligible for instruction in English under this section and the grounds on which they were declared eligible.

Le ministre indique, dans le rapport prévu à l'article 4 de la Loi sur le ministère de l'Éducation, du Loisir et du Sport (chapitre M-15), le nombre d'enfants déclarés admissibles à recevoir l'enseignement en anglais en vertu du présent article et les motifs qu'il a retenus pour les déclarer admissibles.

Appeals dismissed with costs. Cross-appeals dismissed.

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