



Edmonton, le 30 octobre 2009

Honorable David Hancock
Ministre d'Éducation
224 Legislature Building
10800 - 97 Avenue
Edmonton AB T5K 2B6

Objet : discussion sur la loi scolaire

Honorable ministre Hancock,

Nous sommes heureux de vous faire parvenir un mémoire de la part de la Fédération des conseils scolaires francophones de l'Alberta pour votre considération.

Nous apprécions avoir été invités à vous communiquer nos perspectives dans ce projet de consultation et nous voulons vous assurer de notre plein engagement à continuer de travailler avec vous et votre ministère dans ce dossier très important qu'est l'éducation de tous les jeunes Albertains.

Veillez recevoir, Monsieur le ministre Hancock, l'expression de nos sentiments les meilleurs.

Le président,
Fred Kreiner

c. c. Membres du CA de la FCSFA :

Chantal Monfette, Conseil scolaire du Nord-Ouest N° 1
Claude Duret, Conseil scolaire Centre-Nord N° 2
Réginald Roy, Conseil scolaire Centre-Est N° 3
Diane Boutin, Conseil scolaire catholique et francophone du Sud de l'Alberta N° 4
Anne-Marie Boucher, Conseil scolaire du Sud de l'Alberta N° 4

FRANCOPHONE EDUCATION IN ALBERTA

**A Brief presented to
the Honourable David Hancock,
Minister of Education**

by:

La Fédération des conseils scolaires francophones de l'Alberta

Autorité régionale francophone du Nord-Ouest N° 1

Autorité régionale francophone du Centre-Nord N° 2

Autorité régionale francophone du Centre-Est N° 3

Autorité régionale francophone catholique du Sud No 4

Autorité régionale francophone publique du Sud No 4

October 30th, 2009

A. Introduction

The Fédération des conseils scolaires francophones de l'Alberta (FCSFA) is the association which represents Alberta's five francophone regional authorities: Autorité régionale francophone du Nord-Ouest No 1, Autorité régionale francophone du Centre-Nord No 2, Autorité régionale francophone du Centre-Est No 3, Autorité régionale francophone catholique du Sud No 4 and Autorité régionale francophone publique du Sud No 4. Throughout this Brief they shall be referred to as "Regional authorities" which is the term used in the *School Act*.

This association represents the entire Francophone minority in Alberta having education rights protected by Section 23 of the Canadian Charter of Rights and Freedoms (referred to in this Brief as the Charter).

The existence of five Regional authorities and of 34 schools currently serving over 5,500 students may give the impression that the Francophone educational system is now well established in Alberta. Such numbers do reveal an impression only. Undoubtedly, there have been considerable achievements since the opening of the first two francophone schools in 1984 and the establishment of the first Regional authorities in 1994. However, fifteen years of francophone governance pale in comparison to over one hundred years of Alberta's English language educational system.

Indeed, the work has only just begun. There are still many schools to be opened. There are still more grade levels to be added to the schools that have recently been established. There remains a lot of work to be done in the area of marketing and promotion of Francophone education. Our existing 34 schools serve approximately 15% of the eligible francophone students of our province. Our goal is to reach the goal established by Canada's Action Plan for Official Languages and to ultimately serve 80 % of the eligible francophone students.

The Regional authorities face the challenges of finding or building suitable school facilities, of enhancing educational programs now offered and of implementing new programs and services to meet the legitimate educational needs of the students we are called upon to serve.

We applaud the effort of the Minister to include as a foundation to the School Act (or Education Act) elements which will ensure and promote the following foundational values :

- Opportunity –the availability of opportunity for all students to achieve their highest potential

- Fairness – equity of opportunity recognizing that advantages and disadvantages vary widely amongst Alberta’s students
- Citizenship – preparing students for full active participation in the economy, society and democracy at the level of their local communities, the province, the country, and the world
- Diversity – recognizes the diversity in learning styles and needs within the student population, the breadth of cultural diversity in the province, and the strengths that diversity provides to our society
- Choice – recognizes that citizens expect more than a “one-size fits all” approach to the delivery of public services.

Each of these foundational values has been at the forefront of many of our initiatives to date and will continue to be so in the future. The existence of the Francophone system is a manifestation of the foundational values of Opportunity, Diversity and Choice. Research indicates that, for Francophone students, schooling in French leads to better outcomes. We have strived to ensure that the services, programs and facilities offered our students meet the Fairness and Citizenship values, so that we form citizens not only prepared for active participation in the economy, society and democracy, but grounded in their culture and heritage.

Our Regional authorities will be working closely with the other School Boards of the Province with respect to the other issues being reviewed at this time and our views on these matters will form part of submissions by the ASBA, the ACSTA among others.

We felt, however, that it was appropriate to present a separate Brief on issues of particular interest to the FCSFA, issues which stem from *Section 23 of the Charter*. This section of the *Charter* is the cornerstone of Canada’s commitment to the foundational values of bilingualism and biculturalism. *Section 23 of the Charter* represents the constitutional recognition of the importance of education in the preservation of the linguistic and cultural vitality of Canada’s two official languages, and gives constitutional effect to the concept of “equal partnership” of the two languages in the context of education.

Although we know that the Minister of Education and the Department of Justice are well aware of the jurisprudence relating to *Section 23 of the Charter*, we thought it useful to repeat certain highlights in this Brief. They are appended as Appendix 1.

The conclusions that can be drawn from some of the jurisprudence relating to *Section 23 of the Charter* are:

1. The minority francophone system must have school facilities that are equivalent to those available to the majority in the English language system.

2. The point of comparison for school facilities is not to be taken from a provincial perspective but rather at the community level since it is from that perspective that parents and students must make choices.
3. The standard for school facilities is established by the Province in the sense that the Province controls the schools constructed for and governed by the majority in the English language system. However, once a school and specialized facilities become available to the majority in the English language system in a region, this becomes the standard for the francophone minority of that region.
4. The Province has a constitutional obligation to finance francophone educational facilities (including all specialized facilities) in each region according to the standard established for the majority in the English language system, and this without delay.
5. The decision to open a school rests with the Regional authority and once opened must be financed by the Province.

These constitutional obligations are clear to those who have reviewed the jurisprudence, but not always clear to the civil servants who deal with Regional authorities on a regular basis, nor to the elected officials who are called upon to set policy. It is our view that these basic constitutional imperatives should be present in the legislation in order to guide elected officials and civil servants in their dealing with Regional authorities.

In our relatively brief existence (since 1994), we have faced issues and challenges which, in our view, required amendments to the *School Act*. On the issue of governance and the protection of denominational rights afforded separate schools, these were reflected by an amendment of the *School Act* in November of 2001. In respect of many other issues, however, we have always been asked to await an overall review of the *School Act*. That time is now. The amendments we are proposing are amendments that reflect the obligations set forth by *Section 23* of the Charter and reflect internal stated policy by the Minister of Education on certain issues.

We are aware of the Minister's goal of creating an *Education Act* which is broad and encompassing in nature, focused on the learner and learner outcomes and which will leave to Regulations many areas which are administrative in nature. Some of the suggestions contained in this brief may be more appropriate for the Act and others more appropriate for Regulations.

B. PROVISIONS TO BE RETAINED, AMENDED OR REMOVED

Preamble

The third and sixth preambles of the School Act provide that there is one publicly funded system and its two dimensions.

These preamble paragraphs should be retained but modified as follows so that there is a reference to the Francophone system as well.

WHEREAS there is one publicly funded system of education in Alberta whose primary mandate is to provide education programs to students through its two denominational dimensions, the public schools and the separate schools, and its two linguistic dimensions, the majority English language schools and the minority Francophone schools, in such a way that the rights guaranteed under the Constitution of Canada ~~of separate school electors~~ are preserved and maintained; ...

WHEREAS the Government of Alberta affirms its commitment to the preservation and continuation of its one publicly funded system of education through its ~~two~~ three dimensions: the public schools, ~~and~~ the separate schools and the Francophone schools;

The fifth preamble to the Act provides that a Regional authority has a unique responsibility to ensure that both minority language educational rights and the rights and privileges with respect to separate schools guaranteed under the Constitution of Canada are protected in the Region, such that the principles of francophone educational governance are distinct from, not transferrable to nor a precedent for, the English language educational system.

This preamble paragraph should be retained.

Section 4 Interpretation

The provisions of Section 4 of the *School Act* set out those sections of the *School Act* which are applicable to Regional authorities as if they were boards, and to Regions as if they were a districts. These provisions as well as those of Section 5, which relate to Regional divisions should probably form part of the Interpretation section.

On a substantive basis, there are provisions of Section 10, 11 and 21 which should be removed from the list in order to avoid circularity. In these sections, a precise distinction is being drawn between "boards" and "Regional authorities".

This section should be retained, but with the amendment set out below.

4(1) The following apply to a Francophone Education Region and its Regional authority, if any, as if the Region were a district and the Regional authority were a board:

sections 1 to 4;

Part 1; **except sections 10 and 11**

Part 2 except sections **21 and 28**;....

Section 6

This section provides for the right of a student who is the child of a Francophone (as defined in the *School Act*) to be enrolled in a school operated by a Regional authority. This section also provides that when a student is enrolled in a school operated by a Regional authority, that student continues to be a resident student of a board or a district, but provides that Section 45 does not apply to the board or district in respect of that student.

This section should be retained.

Section 7(b)

This subsection provides that the Minister may make regulations “respecting the amount of fees or costs payable and by whom the fees or costs are payable in respect of a student who is the child of a Francophone and who is enrolled in a francophone program operated by a board”.

Now that Regions and Regional authorities have a mandate which covers the entire Province, there should no longer be any need to contemplate a francophone program operated by a “board” (which in the context of the definitions is not a Regional authority).

This section 7 (b) should be removed.

Sections 10, 11 and 21 Exclusivity:

Section 10 is the section of the *School Act* which defines the right under the *Charter* and provides for “the right to receive instruction in accordance with those rights wherever in the Province those rights apply”. In addition the section provides for

- the preparation of regulations by the Lieutenant Governor in council;
[Section 10(2)]

- the right of a student enrolled in a school operated by a Regional authority to receive instruction in French; [Section 10(3)]
- the obligation of the Regional authority to provide an educational program consistent with the Act and regulations. [Section 10(4)]

This particular provision [Section 10(4)] is set out for other boards and districts in Section 45 (7) but Section 45 does not apply to Regional authorities. It is probably an oversight that Section 45 (8), which provides for the fostering of safe and caring environments, does not apply to Regional authorities. We think it should.

Sections 11 and 21 of the *School Act* deal with other languages of instruction (including French) and with alternative programs.

We are proposing changes to these sections in order to clarify that Regional authorities have the exclusive authority to offer education programs intended for the French language minority, and that boards and districts cannot purport to do so. The amendments we are suggesting have been discussed *ad nauseum*, have been the object of directives by the Minister of Education (Minister of Learning) and were to be reflected in regulations since at least 2005. The existing wording is not as clear as it should be and has led to friction in some historical Francophone communities where, prior to the new governance models (1994), the existing School Boards had taken significant steps to offer “alternative French language programs” to address the needs of the population.

These Sections should be retained but amended to correct the oversights and provide clarification.

The text below shows proposed amendments to the existing wording of Sections 10, 11 and 21 of the *School Act*:

New definitions:

“Francophone school” means a structured learning environment consisting of a class, groups of classes, on-line classes through which an education program is offered intended for children of individuals who have rights pursuant to Section 23 of the Canadian Charter of Rights and Freedoms.

“Regional authority” includes where appropriate a Public Regional authority and a Separate Regional authority.

Language of instruction - French

10(1) If an individual has rights under section 23 of the Canadian Charter of Rights and Freedoms to have the individual's children receive school instruction in French, the individual's children are entitled to receive that instruction in accordance with those rights wherever in the Province those rights apply.

(2) The Lieutenant Governor in Council may make regulations

(a) respecting the education generally of students whose parents are Francophones;

(b) repealed 2001 c27 s4;

(c) notwithstanding any other provision of this Act, respecting any matter required to give effect to subsection (1).

(3) A student who is enrolled in a school operated by a Regional authority is entitled to receive school instruction in French.

(4) A Regional authority shall provide to each student enrolled in a school operated by it an education program consistent with the requirements of this Act and the regulations.

(5) A Regional authority shall ensure that each student enrolled in a school operated the Regional authority is provided with a safe and caring environment that fosters and maintains respectful and responsible behaviours.

(6) Only a Regional authority shall operate a Francophone school.

(7) A board shall not offer educational programs intended for children of individuals who have rights pursuant to Section 23 of the Canadian Charter of Rights and Freedoms. A board shall only offer French language programs which are identified as Core French or French Immersion.

(8) If a board contravenes the provisions of section 10(7), upon the request of the appropriate Regional authority, the Minister shall transfer the educational program to the Regional authority.)

(9) Every authority given by this Act, including but not limited to every authority to make a regulation, decision or order and every authority to issue a directive or guideline, shall be exercised in a manner consistent with and respectful of the rights and privileges guaranteed by section 23 of the Canadian Charter of Rights and Freedoms.

Other languages of instruction

11(1) A board may authorize the use of ~~French or~~ any other language as a language of instruction.

(2) The Minister may make regulations governing the provision of instruction in any language authorized under subsection (1).

Alternative Programs

21(1) In this section, "alternative program" means an education program that

- (a) emphasizes a particular language, culture, religion or subject-matter, or
- (b) uses a particular teaching philosophy,

but that is not a special education program, ~~a program referred to in section 10~~ or a program of religious education offered by a separate school board.

(2) Subject to the provisions of Section 10 and Section 11 of the Act, if a board determines that there is sufficient demand for a particular alternative program, the board may offer that program to those students whose parents enroll them in the program.

(3) A board that offers an alternative program shall continue to offer the regular education program to those students whose parents do not enroll them in the alternative program.

(4) If a parent enrolls a student in an alternative program, the board may charge that parent fees for the purpose of defraying all or a portion of any non-instructional costs that

- (a) may be incurred by the board in offering the alternative program, and
- (b) are in addition to the costs incurred by the board in providing its regular education program.

Disposition of Property by boards

This is a very complicated area of the legislation and involves not only the *School Act* and its regulations but also the provisions of the *Municipal Government Act* and its regulations and on occasion, the provisions of the *Expropriation Act*. For the most part, Regional authorities have inherited schools and properties which were previously owned by boards or districts and for which they no longer had any use. Quite often, the transfer from a board to a Regional authority requires the previous consent of the Municipality. This requirement may be as a result of the regulations or as a result of Joint Use Agreements entered into by the municipalities and boards.

In virtually all of the cases, these transfers are a win, win, win situation. The Regional authority gets a much needed property, the transferring board is relieved of the Debenture, if any on the property and is permitted to build elsewhere, the local community gets the continued benefit of a school in the neighbourhood and continued access to the green space, and the Government has an efficient and cost effective way of satisfying its constitutional obligation of financing Francophone learning establishments.

In order to effectively provide a mechanism to make such properties available to Regional authorities before the balance of the disposition provisions are triggered, amendments are required to a number of Regulations. There should in effect be a form of right of first refusal afforded to Regional authorities. For the purpose of illustrating the concept we are proposing an amendment to Section 200(3). Ironically, this is one

subsection, which by virtue of Section 4, does not apply to the disposition of property by a Regional authority.

Section 200(3)

200(1) Subject to the regulations, a board may sell, lease, rent or otherwise dispose of any of its personal property or any interest in it.

(2) Subject to this section, the regulations, Part 17 of the Municipal Government Act and the Public Lands Act, a board may, with the written approval of the Minister, sell, lease, rent or otherwise dispose of any of its real property, **provided that in respect of its real property it shall first be offered to the appropriate Regional authority.**

(3) Where a board no longer has a use for a school building, **and the Regional authority having jurisdiction where that school building is located has indicated that it would not have use for the Building,** the Minister may in writing direct the board to dispose of that property subject to those terms or conditions that the Minister prescribes.

(4) The Registrar of Land Titles shall not accept an instrument that has the effect of transferring from a board any real property of the board unless the instrument is accompanied with

- (a) the approval, or a certified copy of it, given under subsection (2), or
- (b) the direction, or a certified copy of it, given under subsection (3).

Regulations

201 The Minister may make regulations respecting the disposition of property by a board.

Part 9 Establishment and dissolution of Francophone Education Regions (Sections 252.1 –to 257

These provisions provide generally *inter alia* for

- the establishment of Francophone Education regions;
- the establishment of the special governance model alluded to the fifth paragraph of the preamble;
- the provision for Regional authorities to become Public or Separate Regional authorities;
- the responsibility and authority to protect constitutional rights relating to the minority linguistic and relating to separate schools in the Region;
- the elections of members of Regional authorities;

- the designation of those entitled to be electors;
- the designation of those entitled to run for election as members of Regional authorities; and
- the dissolution of Regional authorities

These provisions should for the most part be retained, although we are suggesting certain amendments.

Section 256(3)

Section 256(3) sets out the eligibility of an individual to be elected as a member of a Regional authority. We are of the view that this Act or the Local Authorities Act, or their regulations should require that the individual be willing and able to conduct the business of the Regional authority in the French language.

We have provided some suggested wording.

Section 256 (3)

(3) For the purposes of this Act and the Local Authorities Election Act, an individual is eligible to be elected as a member of a Regional authority if the individual

- (a) is 18 years of age or older,
- (b) is a Canadian citizen,
- (c) has been a resident of Alberta for the 6 consecutive months immediately preceding nomination day,
- (d) **declares that the individual, if elected, will be willing and able to conduct the business of the Regional authority in the French language; and**
- (e) is not otherwise ineligible under the Local Authorities Election Act.

Section 257

This section provides for the dissolution of Regional authorities. We do not think that it is appropriate or constitutional for the Minister to dissolve a Regional authority unless the dissolution is pursuant to Section 255.1 or pursuant to a resolution of the Regional authority, which could only be adopted if there were another Regional authority to assume the responsibility of operating in the Region.

We suggest the following amendments to Section 257.

Dissolution of Regional authority

257(1) A Regional authority may pass a resolution requesting the Minister to dissolve the Regional authority, **provided one or more successor Regional authorities are in place to assume the jurisdiction of the dissolved Regional authority.**

~~(2) The Minister, subject to any terms or conditions the Minister imposes, may dissolve a Regional authority whether or not the Minister receives a resolution requesting the dissolution.~~

~~(3)~~ (2) If on the dissolution of a Regional authority the Minister considers an adjustment of assets or liabilities to be necessary, the Minister shall, by order, give directions with respect to the assets or liabilities of the Regional authority.

C. Matters which could be dealt with by regulation and perhaps a regulation pertaining specifically to Regional authorities.

It has become clear while preparing this Brief that it may be appropriate to have a Regulation dealing specifically with Regional authorities. Section 10(2) provides for regulations generally relating to the education of Francophones. In addition, Section 4(8) provides for the flexibility to exempt a Region or a Regional authority from the provision of the *School Act* or any other Act.

(8) Notwithstanding subsections (1) and (6), the Minister may exempt a Region or a Regional authority from the application of a provision of this or any other Act.

In our view it would be beneficial to have a comprehensive Regulation which can cover a number of disparate issues. Some of these issues include the following matters.

Financing Higher costs

Francophone education costs more proportionally than English-language education. Lower numbers of students, widely dispersed communities and schools, substandard facilities in some instances, a lack of economies of scale and the need for specialized French-speaking personnel, professional development and materials not locally available, all these factors contribute to the higher costs associated with Francophone education.

In the *Mahé* decision, the Supreme Court of Canada set down the standard that the quality of education provided to the minority was to be equal to that of the majority. The Court recognized that this would entail increased per pupil expenditures for Francophone education, particularly in the early years when a substantial “catch-up” would be required to meet the level of education of the majority. The Francophone community has consistently asserted the right to public funding on the basis of equality of educational opportunity (“equivalency”), recognizing that, in special circumstances, additional funding could be required to achieve the appropriate level of education.

There are a number of factors which contribute to additional costs and these are set out in Appendix C.

The current funding formulas which recognize “equivalency funding” should be enshrined in Regulations. In addition, those regulations which affect the planning and construction of school buildings should take into account that Francophone schools have a “community school” purpose, as is the case for all francophone schools, a role explicitly set out in the jurisprudence.

School Opening.

The decision to open a Francophone school rests with the Regional authority. We are suggesting that there be a regulation along the following lines in respect of school openings. This regulation confirms the authority of a Regional authority to open a Francophone school (as defined in our proposed definition), but provides some lead time to put in place funding and other operational matters.

School Openings

(1) In the event a Regional authority decides to open a Francophone school, it shall provide notice to the Minister on or before February 1 of the calendar year in which the Francophone school is to open of its intention to open the Francophone school.

(2) If the Regional authority is a Public Regional authority or a separate Regional authority, the notice referred to in Section (1) shall also be given to the other Regional authority in the Francophone education region.

(3) Upon receipt of such notice the Minister(s) shall take all appropriate steps to ensure that the Regional authority receives the support necessary to ensure that the students enrolled in the francophone school receive an education of a quality equivalent to that offered to students enrolled in schools operated by boards in the particular Francophone education region.

Student Record Regulations

Since at least 1999, the Student Record Regulation required boards to obtain information about whether the parent of the student is eligible to have the student taught in the French language pursuant to section 23 of the Canadian Charter of Rights and Freedoms, and to provide a notation to indicate whether the parent wishes to exercise that right.

In 2006, the Student Record Regulation was amended to require boards to provide that information to Regional authorities.

(5) A board shall, at the written request of a Regional authority for a Francophone Education Region, disclose

(a) the name, address, date of birth, sex and school of a student whose parent has been noted under section 2(1)(s) as being eligible to have the student taught in the French language pursuant to section 23 of the Canadian Charter of Rights and Freedoms, and

(b) the name, address and telephone number of the student's parent to the superintendent or to a person designated by the superintendent for the purpose of contacting the parent of the student and advocating for minority language education rights.

We are the view that Boards should have an active obligation to forward this information to the Minister electronically and for the Minister to forward this information to the Regional authority electronically yearly.

Required consultation prior to the adoption of Regulations generally

Although there is a review process which is initiated prior to the adoption of Regulations, we think it is appropriate to have a specific consultation process in place. We have reproduced by way of example a portion of similar provisions from the Ontario Education Act, modified for Alberta.

Regulations

(1) The Lieutenant Governor in Council may make regulations prescribing, respecting and governing the duties of boards and Regional authorities so as to further and promote the provincial interest in education.

Consultation

(2) Before the Lieutenant Governor in Council makes a regulation under subsection (1), the Minister shall consult with,

(a) the Alberta School Boards Association;

(b) the Alberta Catholic School Trustees' Association;

(c) the Public School Boards' Association of Alberta;

(d) la Fédération des conseils scolaires francophones de l'Alberta; and

(e) any other persons and entities that, in the Minister's opinion, have an interest in the proposed regulation.

Notice

(3) The Minister shall give the persons and entities listed in subsection (2) and members of the public notice of the proposed regulation, in the manner he or she considers appropriate, at least 60 days before the regulation is filed with the Registrar of Regulations.

(4) The notice need not contain a draft of the proposed regulation, but shall summarize its content and intended effect.

Exception

(5) Subsections (2), (3) and (4) do not apply if the regulation, in the Minister's opinion,

(a) is needed to deal with an urgent situation;

(b) is needed only to clarify the intent or operation of this Act or the regulations; or

(c) is of a minor or technical nature.

Appendix A

The Charter of Rights and Freedoms and Minority French-language education

1. Section 23 of the Charter

A key purpose of this brief is to bring to the attention of the Minister certain basic principles underlying Francophone education in Alberta, principles that must be respected in all decisions related to the education of Alberta's francophone children.

In 1982, two significant events occurred that would have a profound effect on Francophone education across Canada: the patriation of the Canadian Constitution and the enactment of the Charter. The Charter included the right of parents belonging to Canada's two official language groups to have their children educated in their language wherever they constitute the linguistic minority. This right is affirmed in *Section 23*:

23. (1) Citizens of Canada

(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

(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,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(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

(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

(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

(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.

In Alberta, *Section 23* confers constitutional rights upon members of the French-language minority.¹

This document often refers to legal decisions. Indeed, it has been the experience of the Francophone minority in Canada that it is necessary, too often, to resort to the Courts. It is our hope that the need for legal action in the future will diminish once a proper understanding of Francophone education in minority settings has been reached.

2. Purpose of Section 23 of the Charter of Rights and Freedoms

The Charter ushered in a new era. Its emphasis on individual autonomy and equality has perhaps tended to overshadow its important protections of group rights. Francophone educational minority rights in *Section 23* of the Charter are group rights.

Before describing the general purpose of *Section 23*, it is useful to consider the historical context in which *Section 23* was adopted. In the Supreme Court of Canada judgment of *Mahé v. Alberta* (1990) 1RCS-342 ("Mahé" decision), the court maintained that *Section 23* ensures the preservation and enhancement of Canada's two official languages by guaranteeing that the linguistic minority had the right to instruction offered in its language. According to the Court, "the general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population." The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.

Furthermore, the Court indicated that *Section 23* constitutes recognition of the important role of education and of schools in the preservation and enhancement of the language and culture of the linguistic minority. These schools are essential for the development of both official languages and cultures. The aim must be to provide members of the minority with an education appropriate to their linguistic and cultural identity. In addition, it is worth noting that minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed facilities where the minority community can meet to express their culture.

The purpose of *Section 23* is to resolve the inequality that exists between the education systems of the majority and those of the minority, including the inequality of educational facilities. *Section 23* creates brand new constitutional rights and constitutes a new code for establishing educational rights in educational facilities that belong to the linguistic minority of the province and require that these educational facilities be physically equivalent to those of the majority. There is, in fact, an important remedial provision in this section.

3. Positive obligations placed on the provincial government by the Charter

Since the adoption of the Charter in 1982, almost 20 court rulings have been handed down in eight provinces. One of the most significant was the landmark 1990 *Mahé v. Alberta* case. Other key decisions related to Francophone minority education include the *Reference re Public Schools Act (Manitoba)* in 1993 and *Arsenault-Cameron v. Prince Edward Island* in 2000.

The courts have interpreted *Section 23* so as to confer upon a group a right which places positive obligations on government to alter or develop major institutional structures as well as to ensure, 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.

Fundamentally, *Section 23* of the Charter imposes on provincial legislatures the positive obligation of enacting precise legislative schemes providing for minority language instruction and educational facilities where numbers warrant.

As a result of *Section 23* of the Canadian Charter of Rights and Freedoms (1982) and the Supreme Court judgment in the *Mahé* case (1990), provincial governments are mandated to respond expeditiously to the demands of the francophone community for creating Francophone school boards and schools in order to reverse the trend toward linguistic and cultural assimilation.

There are two key concepts central to the intent of *Section 23*: minority rights and remediation.

In the *Quebec Secession Reference*³, the Supreme Court of Canada identified “the accommodation of minorities” as a general, underlying or “defining” principle⁴. The Court referred specifically to minority language education rights when it stated:

*We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order.*⁵

The Court noted:

*Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations..., which constitute substantive limitations upon government action.*⁶

In addition to the protection of education minority rights, the Courts have recognized that *Section 23* of the Charter is intended to serve a remedial purpose, i.e. “It was designed to remedy an existing problem in Canada, and hence to alter the status quo”⁷. As the Supreme Court stated in the *Mahé* decision:

In my view, the appellants are fully justified in submitting that history reveals that s.23 was designed to correct, on a national scale, the progressive erosion of

minority official language groups and to give effect to the concept of equal partnership of the two official language groups in the context of education.”⁸

In *Arsenault-Cameron*⁹, the most recent Supreme Court of Canada decision to consider Section 23 of the Charter, the Court said:

[27] *As this Court recently explained in Beaulac, at para. 1⁹, “language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada”. A purposive interpretation of s. 23 rights is based on the true purpose of redressing past injustices and providing the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced.*

[29] *The historical and contextual analysis is important for courts in determining whether a government has failed to meet its s. 23 obligations. It should also guide government actors in reaching appropriate decisions to give effect to s. 23.*

[31] *As discussed above, the object of s. 23 is remedial. It is not meant to reinforce the status quo by adopting a formal vision of equality that would focus on treating the majority and minority language groups alike; see Mahé, at p. 378. The use of objective standards, which assess the needs of minority language children primarily by reference to the pedagogical needs of majority language children, does not take into account the special requirements of the s. 23 rights holders.*

Finally, the Francophone schools play a crucial role in the preservation and development of French culture in our province where French people are a minority. The Supreme Court of Canada has recognized this key role. In *Mahé*, the Court stated:

In addition, it is worth noting that minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where the minority community can meet and facilities which they can use to express their culture.¹⁰

In summary, Section 23 of the Charter is the cornerstone of Canada’s commitment to the values of bilingualism and biculturalism. It represents the constitutional recognition of the importance of education in the preservation of the linguistic and cultural vitality of Canada’s two official languages, and gives constitutional effect to the concept of “equal partnership” of the two languages in the context of education.

4. Overview of certain cases

Various provincial and Supreme Court judgments have imposed on provincial governments the explicit responsibility to provide adequate educational facilities that meet the needs of the francophone community. Where governments have not acted of their own accord to provide the minority with the educational facilities they require, the courts have demonstrated their readiness to compel governments to finance the schools requested by the minority. The following are examples to that effect:

In the case of *Arsenault-Cameron v. Prince Edward Island* (Supreme Court, January 13, 2000), the Supreme Court of Canada ordered the Government of Prince Edward Island to construct a school in Summerside. In this case, the minority had demonstrated that there were sufficient enrolments to open a program (15 students enrolled at two grade levels). The Court maintained that an identical treatment of the minority and the majority did not conform to *Section 23*. It stated that everything had to be considered through the eyes of the minority, and that the Government should act so as to attain the purposes of *Section 23*, to provide access to an equivalent education and to curb assimilation.

In the case of *Marchand v. Simcoe County Board of Education*, [1986] 55 O.R. (2e) 638, the Court dealt with the adequacy of minority educational facilities compared to those of the majority. In Ontario, the rules for financing schools were the same for francophone schools as for English language schools. The result was that the Anglophones of the community in question, because their numbers were greater, had schools not available to the minority. The Court ruled that the *Section 23* confers rights to “the same education as is given the majority but in the other official language. This is to be a full and complete education not a limited, partial or truncated one, which necessarily would be an inferior education, a second class one”.

The Court ordered the province to finance the construction of a double gymnasium, special industrial arts and other facilities (similar to those available to the majority) and issued a declaration that the schools of the minority must contain the specialized facilities necessary to enable the francophone school to offer programs equivalent to those available to the Anglophones of that community. Noteworthy in this decision is the fact that the comparison of facilities must be made in the community so that the choice made by the francophone student is not influenced by the inequality of school facilities. Such inequality would encourage rather than reduce assimilation, which is ravaging the linguistic minority community.

In the case of *Dufferin-Peel c. l'Ontario*, [1996] 30 O.R. (3e) 681, the school board trustees of the minority in the Mississauga region wanted to build a secondary francophone school. The secondary school had been established in temporary facilities and, after several years in these facilities, the board wanted to build a permanent school. A permanent school would afford the minority community access to all the specialized facilities available to the majority in the region and guarantee a permanent site, essential for the recruitment of students of the minority.

The provincial government, for reasons deemed legitimate, chose to impose a moratorium on all school construction in the province. This freeze on construction was motivated by financial constraints and applied to both anglophone and francophone schools. Despite the fact that the moratorium applied equally to both school systems, the Court ordered the province to immediately finance the construction of a secondary school in Mississauga. The reasoning of the Court was that *Section 23* foresees remedial provisions for the minority and that a freeze had a more detrimental impact on the minority. Since the minority did not have a network of schools equivalent to that already in place for the Anglophones, the province had to finance the construction and this without delay.

The conclusions that can be drawn from these cases relating to *Section 23* of the Charter are:

1. The minority francophone system must have school facilities that are equivalent to those available to the majority in the English language system.
2. The point of comparison for school facilities is not to be taken from a provincial perspective but rather at the community level since it is from that perspective that parents and students must make choices.
3. The standard for school facilities is established by the Province in the sense that the Province controls the schools constructed for and governed by the majority in the English language system. However, once a school and specialized facilities become available to the majority in the English language system in a region, this becomes the standard for the francophone minority of that region.
4. The Province has a constitutional obligation to finance francophone educational facilities (including all specialized facilities) in each region according to the standard established for the majority in the English language system, and this without delay.
5. The decision to open a school rests with the Regional authority and once opened must be financed by the Province.

References

1. The constitutional guarantee set out in *Section 23* of the *Charter* includes not only the right to instruction in the language of the minority, but also the right to have that instruction provided in facilities that are managed and controlled by members of the linguistic minority where numbers warrant and that are financed out of public funds. The right to “management and control” of the minority’s educational facilities pursuant to *Section 23* has been recognized as an integral part of the meaning of the word “facilities” in subsection 23(3)(b) of the *Charter: Reference re Education Act of Ontario and Minority Education Rights* (1984) O.R. (2d) 1 at 33 and 44 (C.A.).
2. The list includes the following:
 - Minority Language Education Rights Reference, supra*, note 1.
 - Marchand v. Simcoe County Board of Education* (1986), 55 O.R. (2d) 638 (H.C.J.).
 - Lavoie v. Nova Scotia (Attorney General)* (1989), 58 D.L.R. (4th)293 (N.S.C.A.).
 - Mahé v. Alberta* , [1990] 1 S.C.R. 342.
 - Reference re Public Schools Act (Man.)*, [1993] 1 S.C.R. 839.
 - British Columbia (Association des parents francophones) v. British Columbia* (1996), 27 B.C.L.R. 83 (B.C.S.C.).
 - Re Conseil des écoles séparées catholiques romaines de Dufferin et Peel v. Ontario (Ministère de l’éducation et de la formation)* (1996), 30 O.R. (3d) 681 (Div. Ct.) and 686 (C.A.).
 - Arsenault-Cameron v. Prince Edward Island* , [2000] 1 S.C.R. 3 (“*Arsenault-Cameron*”).
 - Doucet-Boudreau v. Nova Scotia (Department of Education)* (2001), 203 D.L.R. (4th) 128 (N.S.C.A.), under appeal to the Supreme Court of Canada.
3. *Reference re Secession of Quebec*, [1998] 2 R.C.S. 217 (“*Quebec Secession Reference*”).
4. *Supra*, note 21 at para. 48, 49 and 79.
5. *Supra*, note 21 at para. 80.
6. *Supra*, note 21 at para. 54.
7. *Mahe, supra*, note 2 at 363.
8. *Mahe, supra*, note 2 at 364.
9. *Arsenault-Cameron, supra*, note 2.
10. *Mahe, supra*, note 2 at 363.
11. *Mahe, supra*, note 2 at 378.

Appendix B

Overview of French-language education in Alberta

Until 1892 on the territory now known as Alberta, French was authorized as a language of instruction. From that year until 1968, the use of French as a language of instruction in Alberta schools was very limited. In 1968, the regulations of the Department of Education were amended to allow instruction in the French language for 50% of the school day from Grades 3 to Grade 12. In 1976, this percentage was increased to 80%. In Grades 1 and 2, French could be used for 100% of the instructional time.

This was the time when French immersion schools were being established at a rapid pace in many areas of the province. Some people thought that these schools were the answer to the Francophones' desire for a Francophone education. However it soon became evident that French immersion schools did not and could not meet the range of educational, linguistic and cultural needs of your francophone children. As a result, francophone parents lobbied energetically their local school board and the provincial government for the opening of francophone schools.

These efforts received a strong impetus with the enshrinement of the Charter in 1982. Such efforts were rewarded two years later in 1984 with the opening of the first two publicly funded francophone schools, one in Edmonton and one in Calgary. Today, there are 34 francophone schools serving over 5,500 students in 22 communities.

In 1994, following the adoption of the revised *School Act*, the province created three francophone school authorities and three coordinating councils. They also created 7 education regions and did not create a coordinating council for the Red Deer area. In February 2000, a fourth school authority was established in Southern Alberta.

Following the establishment of the fourth authority, it became apparent that additional amendments were required to the *School Act* to ensure that legislative framework in Alberta respect not only the constitutional imperative of *Section 23* of the Charter, but also of *Section 93* of the Constitution and *Section 10* of the Alberta Act in respect of denominational rights. The Province established the Ducharme Committee' on which there was input from the ASBA and others. Ultimately, Bill 16 was adopted in November of 2001 and certain portions of this bill addressed these issues. In the Southern Francophone Education region, there are two francophone authorities, one public and one separate Catholic. In the other three francophone regions, there are composite arrangements, which incorporate elections on the basis of denomination, a separate catholic entity within the Regional authority.

The five authorities are responsible for the planning, organization and delivery of Francophone education throughout Alberta, from Kindergarten to Grade 12. Their mandate is to meet the complete range of educational needs of its francophone students.

Appendix C

Factors contributing to Higher Costs.

The following are factors that contribute to additional costs:

- Our authorities cover a wide area. Additional travel costs result from visits to schools, meetings and teacher professional development activities.
- Our authorities are still getting established. Extra personnel are required to set up and maintain services equivalent to the English system. Our parents expect the same level of service even if we are competing with jurisdictions that have had much more time to implement programs and services.
- Of Alberta's 34 Francophone schools, one has fewer than 50 students, nine have between 50 and 100 students, 19 have between 100 and 250 students, and only five have more than 250 students.
- The extra costs related to the implementation and delivery of programs such as *francisation*, English as a second language and special needs.
- The number of multi-grade classes, many with a wide range of student language abilities be they in French or in English.
- The special initiatives that we have undertaken to integrate the young children of *Section 23* right holders who do not speak French such as pre-kindergarten programs and full-time kindergartens.
- The services and programs we have yet to implement to meet the full range of student needs especially at the senior high level.
- The organization of activities to involve the francophone community in fulfilling the purpose of *Section 23* of the *Charter*.
- The development of resources and mechanisms for the delivery of French distance education and online courses.
- The lack of a sufficient number of French-speaking specialists in all areas of the province to help us address the requirements of special needs students, including the gifted and talented.

- The translation of many documents such as policies, newsletters, letters to English speaking parents, as well as local, regional and provincial documents. It must be stressed that approximately 65% of our families have one parent who does not speak or read French. We must also translate materials that are to be shared with other school jurisdictions or sent to Alberta Learning.
- The planning, development and implementation of promotion and marketing strategies. Francophone education is still a new reality. Far too many holders of *Section 23* rights and members of the public are still not aware of the role francophone schools play, of the population it is intended to serve, of its differences with French immersion schools. In Alberta, barely 15% of *Section 23* students are enrolled in francophone schools.
- Books for the libraries are more expensive.
- Transportation is more expensive because students come from further afield.