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The Protection of Rights and Freedoms, in Particular Minority Rights, in a Sovereign Québec*

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INTRODUCTION

Would rights and freedoms, in particular minority rights, be properly protected in a sovereign Québec? From a legal point of view, the answer to this question obviously depends on the statutory or constitutional norms that Québec would adopt – or keep in force – after a possible secession.

At the present time, the rights and freedoms of people living in Québec are primarily guaranteed, on the one hand, by the Québec *Charter of Human Rights and Freedoms*[1], and, on the other, by certain clauses of the Canadian Constitution, chiefly the *Canadian Charter of Rights and Freedoms*[2]. The Canadian Charter would of course not apply any longer in a sovereign Québec; however, the Québec Charter would most certainly remain in force and be entrenched in a new Québec Constitution. In the following study, we propose an examination of two major issues : first, we will see what the main differences between the Canadian and the Québec Charters are; second, we shall identify the main changes to the Québec Charter that are necessary to avoid any reduction in the

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1 *Charter of Human Rights and Freedoms*, L.R.Q., c.C-12 (hereinafter the Québec Charter). The Supreme Court of Canada, in *Ford* v. *Quebec (A.G.)*, (1988) 2 S.C.R. 712, has ruled that the Québec Charter, like the other provincial Human Rights Acts, has a "quasi constitutional" character and therefore renders inoperative any incompatible law in which the legislature has not clearly indicated its intent to derogate from the Charter.

2 The *Canadian Charter of Rights and Freedoms* (hereinafter the Canadian Charter) is Part I, sections 1 to 34, of the *Constitution Act, 1982*, Annex B of the *Canada Act, 1982*, 1982, U.K., c. 11; R.S.C. (1985), App. II, no. 44. For a general description of the Canadian Constitution, see : Jacques-Yvan Morin and José Woehrling, *Les Constitutions du Canada et du Québec - Du Régime français à nos jours*, Montréal, Éditions Thémis, 1994 (2 volumes).

protection of rights and freedoms that could otherwise result from Québec's secession. We will deal mainly with minority rights, since it is largely because of the protection of minorities that some people seem apprehensive of the consequences from a possible secession.

We will begin by examining both the Canadian and Québec Charters, to establish what rights not guaranteed in the latter must be added in a sovereign Québec. As we will see, compared to the Canadian Charter, the Québec Charter presents certain lacunae in the protection of anglophone minority rights[3]. We will then analyze the present constitutional status of the two Charters, that is the primacy that they possess in relation to ordinary laws, and the extent to which the legislature can derogate from them. This will lead us to suggest certain modifications to the constitutional status of the Québec Charter in the case of a separation of Québec from Canada. We should stress that these issues or primacy and derogation are of paramount importance for the effectiveness of both Charters, be it for minority rights or any other rights and freedoms, be it in a sovereign Québec or in the present constitutional state.

I. THE INCLUSION OF NEW RIGHTS FOR LINGUISTIC AND CULTURAL MINORITIES IN THE QUÉBEC CHARTER

Except for the rights of certain minorities, the Québec Charter presently guarantees the same rights and freedoms as the Canadian Charter; it protects the fundamental freedoms, the political rights, the right to equality and the legal rights in terms closely similar to those used in the Canadian Charter. On the other hand, the Québec Charter also contains additional rights and freedoms that do not exist in the Canadian Charter.

For instance, section 2 guarantees the "right to assistance" to anyone whose life is in peril; the obligation to help is not imposed only on government, but also on "every person". Sections 4 and 5 protect the right of every person to the safeguard of his dignity, honour and reputation, and the right to respect for one's private life. Section 9 assures the right to professional secrecy and forbids "every person" bound to professional secrecy from disclosing confidential information that was revealed to him or her by reason of his or her position or profession.

More generally, sections 39 to 48 (in Chapter IV) of the Québec Charter contain certain economic and social rights that are not found in the Canadian Charter. These include the protection of the child; the right to free public education; the right to religious or moral education in the public educational system and the right to choose private education; the right of persons belonging to ethnic minorities to maintain and develop their own cultural life; the right to information; the right to financial assistance and to social measures for people in need; the right to fair and safe work conditions; the equality of spouses; and the protection of the elderly. However, these economic and social rights have no supremacy over ordinary legislation, since section 52 of the Québec Charter (the supremacy clause) applies only to sections 1 to 38. As a consequence, the economic and social rights are not enforceable by the courts against the legislature and its statutes. Moreover, a good number of these rights are only guaranteed "to the extent provided by law." Such a restriction is explained by the fact that these rights are "positive rights", which have as their counterpart, the obligation of the government to put the means necessary for the effective enjoyment of such rights at the disposal of individuals (or groups) that are deprived of them. Thus, they are difficult to enforce by way of the courts because they demand political, administrative and budgetary measures, and because the courts are reluctant to force the government and the legislature to adopt such decisions.

If the Québec Charter guarantees rights that are not found in the federal Constitution, the opposite is also true. First, section 6 of the Canadian Charter contains certain international and interprovincial mobility rights, which do not have an equivalent in the Québec Charter. The international mobility right, which allows every citizen of Canada to freely enter, remain in and leave Canada, is an accessory of Canadian citizenship and comes under the exclusive jurisdiction of the federal Parliament. As long as Québec remains a Canadian province, it is neither possible nor necessary to protect this right in the Québec Charter. However, should Québec separate from Canada, a clause guaranteeing such a right for Québec citizens will have to be added to the Québec Charter.

Second, section 6 of the Canadian Charter also guarantees interprovincial mobility. This allows Canadian citizens and permanent residents to move to and take up residence, as well as "pursue the gaining of a livelihood", in any province. It must be noted that interprovincial mobility of persons is not only an individual right, but serves also as one of the four principles that form the basis of the Canadian economic union (with the mobility of goods, capital and services)[4]. Should Québec become sovereign, interprovincial mobility will obviously have no place in its Charter, but the Québec government would certainly try to create an economic union with Canada, which would recognize the rights of citizens of each State to freely move, take up residence in and work on the territory of the other.

Third, the Canadian Charter contains, in sections 8 to 13, an array of rights mainly pertaining to criminal procedure, which are not currently protected by the Québec Charter because this field is also under exclusive federal jurisdiction. Of course, such rights will have to be included in the Charter of a sovereign Québec.

Fourth, section 93 of the *Constitution Act, 1867* entrenches certain rights pertaining to denominational catholic and protestant schools that were legally recognized at Confederation. In the context of our modern, secular society, section 93 is really an anachronism and should be repealed. Furthermore, the Supreme Court of Canada, in an Ontario case[5], has found that this clause is difficult to reconcile with the freedom of religion and equality rights guaranteed in sections 2 and 15 of the Canadian Charter. However, the Court has also come to the conclusion that section 93, as it is itself contained in the Canadian Constitution, cannot be repealed or neutralized by the Canadian Charter. Only a formal constitutional amendment could change it[6]. In a sovereign Québec, the right to demand religious or moral education and that of choosing private education, already guaranteed in sections 41 and 42 of the Québec Charter, should be maintained. In addition, these two rights should receive primacy over ordinary laws, which, as we have seen, is not currently the case.

Finally, the Canadian Constitution also contains clauses that protect certain language rights of the anglophone minority in Québec and of the francophone minorities elsewhere in Canada. Some of these guarantees appear in the Canadian Charter and others in section 133 of the *Constitution Act, 1867*. Currently these guarantees do not have any equivalent in the Québec Charter. After dealing with the rights of the anglophone minority, we will also examine the situation of other linguistic and cultural minorities in Québec.

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3 This is also true for aboriginal rights, which are guaranteed in section 35 of the *Constitution Act, 1982*, but not in the Québec Charter. We will however not deal with this issue, which would require a separate study.

4 The free circulation of goods is stipulated in section 121 of the *Constitution Act, 1867*, 30 & 31 Victoria, U.K., c. 3; R.S.C. (1985). App. II, no. 5 (Originally the *British North America Act, 1867*).

5 *Re Bill 30* (Ontario Separate School Funding), [1987] 1 S.C.R. 1148.

6 For a comprehensive treatment of this subject, see: Jean-Pierre PROULX and José WOEHRLING, "La restructuration du système scolaire québécois et la modification de l'article 93 de la *Loi constitutionnelle de 1867*," *Revue Juridique Thémis*, vol. 31, 1997, 399-510.

However, to begin, it is necessary to clarify the distinction between the *private* use and the *official* use of languages and their respective legal status.

A. - The Distinction Between Official and Private Use of Languages

As far as *official* use is concerned, the Anglo-Québec minority and the francophone minorities outside Québec have specific rights, recognized by the Canadian Constitution, which do not exist for other minorities. As far as *private* use is concerned, we will see that all individuals, whether they belong to the majority or to a minority, benefit from the same "linguistic freedom" that flows implicitly from the fundamental freedoms and the right to equality. These rights and freedoms are guaranteed by the Québec Charter as well as by the Canadian Charter.

The *official* use of languages includes the exercise of State authority and relations of the government with private persons, individuals or corporations. It covers areas like the language of the courts, laws and regulations, public education and government services. Regarding official use, there is no right to the choice of language deriving from the fundamental freedoms or from the right to equality. On the contrary, people can be, and usually are, forced to use one or more predetermined languages, which are the official languages of the State (and many States have only one official language). If it were otherwise, it would mean that the State must offer services in all languages spoken on its territory, which would obviously be absurd. For individuals to be able to exercise a free linguistic choice in their relations with the State, bilingual or multilingual services must be made available. As is well known, fundamental freedoms and the right to equality are traditionally seen as "negative" rights, which only demand that the State refrain from creating inequalities or prohibit individuals from acting freely; such rights are not usually seen as forcing the State to create the means necessary for their enjoyment .

This does not at all rule out that a State can choose to specifically protect the right of some minorities to use their language in their relations with public authorities. However, such a specific "linguistic" right (as opposed to the implicit linguistic content of fundamental freedoms) must be guaranteed by an express clause of the Constitution, as is the case in Canada for the French and English languages. The freedom to choose the language of relations with the State (in *official* use) will not be considered as implicitly flowing from the fundamental freedoms or the right to equality; to exist at all, it must be expressly guaranteed.

The situation is different for the *private* use of languages, which covers mutual relations between individuals or private corporations. From a legal standpoint, as opposed to a sociological view, private use pertains to all cases where language is not officially used. The publication of books and newspapers, theatrical and cinematographic performances, political meetings, scientific or cultural conferences, and commercial and economic life make up in this perspective so many private uses of language. In this vast domain of private use, individuals must be free to use the language of their choice. This "linguistic freedom" flows implicitly from the fundamental freedoms – most notably the freedom of expression – and from the right to equality that are today recognized in all national or international charters of rights. Therefore, it is not necessary to specifically guarantee such a "linguistic freedom" in a particular clause. The free choice of language in private use is a necessary dimension of the fundamental freedoms and of the right to equality, an essential condition to their existence[7]. It should also be emphasized that, contrary to the official use of languages, the exercise of the linguistic freedom existing in the domain of private use does not require that the State adjust its services to reflect the linguistic choices made by individuals.

This linguistic dimension implicitly present in the fundamental freedoms and the equality rights is now increasingly recognized by the courts, as much domestically as internationally. In Canada, in the well-known *Ford* case[8], the Supreme Court rendered

inoperative sections 58 and 69 of the *French Language Charter* (Bill 101)[9], which prescribed French unilingualism on public signs and commercial advertising as well as for corporate names. The Court found this contrary to freedom of expression as guaranteed by the Canadian and Québec Charters, and incompatible with the equality rights guaranteed by the latter. The Québec government, then formed by the Liberal Party, passed a statute containing a double "notwithstanding clause" and expressly derogating from the two Charters in order to reverse the effects of this ruling and to restore validity to the clauses of Bill 101, in a slightly modified form[10].

The *Ford* case demonstrates that freedom of language for private use and, in particular, in economic life is protected through the fundamental freedoms and the right to equality. This "linguistic freedom" benefits everyone, as much the members of the majority as those of the minorities, not only the anglophone minority but also the other linguistic minorities of Québec. Obviously, in a sovereign Québec, protection of the fundamental freedoms and of the equality rights will continue.

We will now turn to the linguistic rights pertaining to the *official* use of languages as guaranteed by the Canadian Constitution, to see in what way these rights should be maintained in a sovereign Québec. As previously indicated, the situation of the anglophone minority will be distinguished from that of other linguistic and cultural minorities.

B. - The Rights of Québec's Anglophone Minority

1) The Rights Currently Recognized by the Constitution of Canada for Québec's Anglophone Minority

There are two sets of linguistic rights recognized in the Canadian Constitution for the anglophone minority of Québec : on the one hand, rights relating to the language of legislation, regulations and the justice system, contained in section 133 of the *Constitution Act, 1867*; on the other hand, rights relating to education, contained in section 23 of the Canadian Charter.

a) Rights Relating to the Language of Legislation, Regulations and the Justice System

Section 133 of the *Constitution Act, 1867*, which only applies to Québec and Ottawa, *permits* English and French to be used, at will, in the debates of the federal Parliament and the Québec legislature[11]. It also *permits* the two languages to be used, again at will, "in any pleading or process in or issuing from" any federal or Québec court. In addition, section 133 *mandates* the use of French and English in the records, journals and acts of Parliament and the Québec legislature. Therefore, section 133 appears to guarantee a certain measure of *official bilingualism*, which, it must be stressed, does not extend to administrative services nor education.

The Supreme Court of Canada has given section 133 divergent interpretations, very

7 It is quite clear that "linguistic freedom" in private use, if wide-ranging, is not absolute. Like other rights and freedoms, it can be limited in reasonable and justifiable ways.

8 See note 1.

9 R.S.Q., c. C-11.

10 The new law required that public signs and commercial advertising *outside* of commercial establishments be only in French, but allowed *internal* signs and advertising in other languages as well, on the condition that French was predominant. In 1993, the United Nations Human Rights Committee declared these new clauses contrary to the provisions protecting freedom of expression in the *International Covenant on Civil and Political Rights*. Fearing international condemnation, the Government of Mr. Robert Bourassa, then Premier of Québec, again modified Bill 101. From now on, it was permitted to use other languages than French on commercial signs, outside as well as inside of establisments, provided that French remained the "predominant" language.

11 The Supreme Court ruled that this clause, even if it authorizes members of the federal Parliament and the Québec legislature to speak in English or French, does not require establishing an interpreter service : *MacDonald* c. *Ville de Montréal* [1986], 1 R.C.S. 460, 486.

broad in some cases and quite restrictive in others. The same is true for related sections, contained in other parts of the Canadian Constitution, that apply to Manitoba and New Brunswick and are similar to section 133[12].

In the two *Blaikie* cases[13], the Supreme Court held that section 133 extends not only to acts of Parliament or the legislature, but also to most regulations (acts of a regulatory nature or "delegated legislation"); not only to judicial courts, but also to administrative tribunals. To support this conclusion, the Court applied the principle of liberal construction of the Constitution (a "large and generous" interpretation, apt to permit the evolution of the Constitution over time). In the same spirit, the Court also held that the "rules of practice" of courts, even if not mentioned in section 133, must be adopted in English and French. Moreover, although section 133 only expressly requires the printing and publication of laws in the two languages, the Court came to the conclusion that it implicitly requires that French and English be used at each step of the legislative process.

However, one also finds in the first *Blaikie* case the beginning of a more restrictive approach regarding certain aspects of *judicial* bilingualism. The Supreme Court interpreted section 133 as meaning that the right to choose between English and French benefits not only litigants, their lawyers, and witnesses, but also officers of the court and judges themselves. Consequently, the latter are not held to respect the linguistic choice of parties and can address, answer them and write their judgments in the other official language.

Moreover, the Court held, in other cases, that documents issued by the courts or under their authority, including judgments and rulings, need not be written in the language of the litigants. Hence, a judge in Québec could render a judgment in English only, even if the parties and their lawyers had chosen to plead in French. This restrictive construction was confirmed in various subsequent decisions. For example, in the *Societé des Acadiens* case[14], a majority of the Court held that the right of every litigant to choose between English and French does not give him or her the right to be understood by the court in the language chosen. Mr. Justice Beetz justified this bizarre ruling by a narrow construction of the constitutional provision considered in the case. He also held that the linguistic rights entrenched in the Constitution are founded on a "political compromise"; the courts must therefore be more cautious in giving them a generous construction as for fundamental freedoms or legal rights, which "tend to be seminal in nature because they are rooted in principle"[15].

b) Rights Relating to the Language of Education

Section 23 of the Canadian Charter guarantees the right of members of francophone minorities outside Québec and of the anglophone minority of Québec to have their children receive primary and secondary school instruction in the minority language, where numbers warrant.

Section 23(1)(a) grants this right to all Canadian citizens whose "first language learned and still understood" is English or French. This clause is sometimes called the "universal clause" insofar as it benefits people coming from anywhere in the world, as soon as they have acquired Canadian citizenship (usually three years after having landed as immigrants). The universal clause applies in the nine anglophone provinces since the coming into force of the Canadian Charter in 1982, but will only apply to Québec after an authorization of the Québec legislative assembly or government[16].

Section 23(1)(b), often called the "Canada Clause", recognizes the same right to education in the minority language (thus, to education in English in Québec) for children where one parent received their primary education in this language *in Canada*. It thus allows Canadians from other provinces who settle in Québec to send their children to English public schools. In this measure, section 23 of the Canadian Charter came into conflict with section 73 of the *French Language Charter* (the "Québec Clause"), which

reserved to parents having received their primary education in English *in Québec*, the right to send their children to an English public school. In 1984, the "Québec Clause" of Bill 101 was invalidated by the Supreme Court in the *Quebec Protestant School Boards* case[17].

Finally, section 23(2) provides that Canadian citizens of whom one child "received or is receiving" instruction at the primary or secondary level in French or English, have the right to have all their children educated in that language. This clause is intended to ensure that all children of the same family can receive their education in the same language. It is probably inspired by section 73 of the *French Language Charter*. However, although section 73(c) and (d) of Bill 101 had a transitory character, section 23(2) of the Canadian Charter is of permanent application. Moreover, the use of the present indicative "receives" in this clause could have striking consequences. In interpreting section 23(2) literally, it is possible to imagine a naturalized immigrant, whatever his or her mother tongue, deciding to temporarily send one child to school in one of the English provinces (or, in Québec, to a private English school, which is excluded from the application of the *French Language Charter*) to so obtain the right to permanently send all his or her children to an English public school in Québec. Though consistent with the letter of section 23(2), such an interpretation would, in our view, be inconsistent with the spirit of the "Canada Clause" in section 23(1)(b).

The meaning of section 23 raises many problems, which the Supreme Court has begun to elucidate. In the *Mahe* case[18], the Court ruled that section 23 guarantees rights whose content varies with the number of eligible children. At the very least, it is the right for parents to have their children educated in their language; at best, the right to benefit from a separate and autonomous school board, controlled by the minority. An intermediate right could consist in the minority parents being represented within a majority school board. The Court also added that education offered to the minority must be of the same quality than that offered to the majority.

2) Possible Rights for the Anglophone Minority in a Sovereign Québec

The Québec Charter does not currently recognize any specific linguistic right for the anglophone minority, which is explained by the fact that these rights are already contained in the Canadian Constitution. Should Québec become sovereign, the Canadian Constitution would cease to apply and we must therefore ask if equivalent linguistic rights for the anglophone minority should then be added to a new Québec Constitution.

To answer this question, two principal elements must be considered. First, the rights that traditionally benefitted the anglophone minority should ideally be maintained. This consideration is justified for ethical and

12 Clauses similar to section 133 of the *Constitution Act, 1867* also apply to Manitoba, since 1870, because of section 23 of the *Manitoba Act, 1870*, 33 Victoria, Canada, c. 3; L.R.C. (1985), app. II, no. 8, and to New Brunswick, since 1982, because of sections 17(2) to 19(2) of the Canadian Charter. Furthermore, section 20 of the Canadian Charter, which applies only to the Canadian Government and the province of New Brunswick, also prescribes a certain bilingualism for government and administrative services.

13 *A.G. Quebec* v. *Blaikie* [1979], 2 S.C.R. 1016 (the first *Blaikie* case); *A.G. Quebec* v. *Blaikie* [1981], 1 S.C.R. 312 (the second *Blaikie* case).

14 *Societé des Acadiens du Nouveau-Brunswick* c. *Association of Parents* [1986], 1 S.C.R. 549.

15 Mr. Justice Beetz nevertheless considered that the right to a fair trial, which besides being guaranteed by the Canadian Charter exists also in common law, includes the right of litigants, whatever their language, to understand the proceedings in any court and to be understood by the court (by means of an interpreter). This right obviously benefits anyone, whether their language be French, English or any other language.

16 *Constitution Act, 1982*, art. 59. This particularity results from an unsuccessful attempt by the government of Mr. Trudeau, in 1982, to satisfy some of the grievances of the Québec government of the time against the patriation of the Constitution and the adoption of the Canadian Charter.

17 *A.G. Quebec* v. *Quebec Protestant School Boards* [1984], 2 S.C.R. 66.

18 *Mahe* v. *Alberta* [1990], 1 S.C.R. 342.

political reasons. The ethical reason appears obvious : rights recognized for a long period should not be abolished or diminished without very good reasons. As for the political reason, it must be realized that Québec would provoke much resentment in English Canada and tarnish its reputation in international public opinion if it decided to limit the rights of its anglophone minority without substantial justification.

However, this first consideration must be combined with a second one. The linguistic rights granted to the anglophone minority in a sovereign Québec should be compatible with the policy seeking to preserve and enhance the status of the French language. To achieve these objectives, Québec's linguistic laws sometimes restrict the traditional rights or privileges of Anglophones. This is considered necessary because the two languages are in a situation of competition. Therefore, in order to strengthen the French language, the use of English must be curtailed to a certain extent. Since the attractive force, prestige and economic utility of English are superior to those of French, one must confer on the French language a certain "comparative advantage", by granting it a preponderant – sometimes exclusive – role in certain areas of use. These sociolinguistic principles form the foundation of Québec's linguistic policy.

One of the consequences of recognizing certain rights for the anglophone minority could be to hinder the objectives of Québec's language policy. If English has a legal status more or less comparable to that of French, considering also that its economic utility and prestige will always be superior in the global context, it will be very difficult to persuade immigrants to integrate into the French language and culture rather than into the English. Conversely, the predominant legal status of French – or even its exclusive use in certain areas – should convey to the immigrants that such an integration is in their best interest.

In assessing to what extent it is possible to maintain the traditional linguistic rights of the anglophone minority without impeding Québec's language policy, the experience of past years must be taken into account. But we must also keep in mind that the sociolinguistic situation would probably improve on its own in favour of French if Québec became sovereign. Immigrants would see the Francophones as a true majority, rather than as a minority at the pan-Canadian level, as is now the case. Therefore, they would probably consider it necessary to learn French in order to achieve economic and social success. In other words, the prestige and socio-economic utility of French would increase in a sovereign Québec and, thus, it would perhaps become less necessary to restrict the status of English.

a) The Language of Legislation and Regulations

Adopting a clause with a similar content as section 133 of the *Constitution Act of 1867* in a sovereign Québec, would maintain rights that the anglophone minority has benefitted from for a very long time. Furthermore, maintaining the current legislative and regulatory bilingualism would probably be an incentive for English Canada to do the same, at the federal level and in the provinces where such a system now exists. Insofar as Québec sovereigntists want independence to be accompanied by an economic and monetary union with the rest of Canada, it would be beneficial for Quebeckers that Canadian federal laws and regulations continue to be enacted in French as well as in English. Obviously, bilingual laws and regulations at the federal level and in certain provinces would be even more desirable for the francophone minorities outside Québec. Moreover, since legislative and regulatory bilingualism has been in force in Québec for a long time, it would not entail new complications nor supplementary costs.

Preserving the current legislative and regulatory bilingualism will not rule out the status of French as the *only* official language (section 1 of the *French Language Charter*, which states that "French is the official language of Québec", is still in force).

Another solution, much less desirable for the anglophone minority, but which may be

considered necessary to improve the sociolinguistic status of French even in a sovereign Québec, would be to reenact the original sections 7 to 10 of the *French Language Charter*, which were invalidated by the Supreme Court in the *Blaikie* case. Laws and regulations would then be enacted in French only, with publication of an English translation without legal force or effect[19]. To justify such a solution, precedents can be found in comparative law, notably in the former constitution of the bilingual canton of Fribourg (Freiburg) and in the linguistic laws of the trilingual canton of Grisons (Graubünden), in Switzerland.

b) The Language of the Justice System

The most generous solution for the anglophone minority would consist in maintaining the current right of all persons – legal persons as well as natural – to use English or French in any pleading or process in any Québec court, while *adding* the right to be understood by the court in the chosen language, as well as the right to receive, in this same language, documents of the proceedings and rulings issued by the court, including judgments. Since the various parties would not necessarily choose the same language, this would in many cases entail that these documents and rulings be issued in both languages. Such a system would require bilingual judges (or at least a certain proportion of them), in order to be able to adjust to the linguistic choice made by litigants. Also, without it being a legal obligation, lawyers would find it necessary to practise in the two languages in geographical areas with a significant anglophone population.

Another possibility, less generous for the anglophone minority, would be to reenact sections 11 to 13 of the *French Language Charter*, invalidated by the Supreme Court in the first *Blaikie* case. This would mean that the written proceedings issued by the courts or expedited by lawyers *must* be in French and *could* be in English, if the natural person to whom they are destined expressly consents. As for legal persons, they could only plead in English if all parties at the proceedings consented. Also, judgments rendered in a Québec Court should be written in French or be accompanied by a French version duly authenticated, with only the French version being official.

Several intermediate solutions could be devised, like conferring only on *natural* persons the right to address the courts in English or in French and to receive, in the language thus chosen or in the two languages, the rulings and the documents issued by them, including judgments. Another more restrictive possibility would be to recognize such a right to natural persons in *penal and criminal* matters only, and to reenact, in *civil* matters, the original clauses of the *French Language Charter.*

Finally, whatever the solution chosen, rights related to the use of the English language in judicial matters could be "territorialized", that is, they would only apply before courts located in those areas of Québec where the English minority constitutes a certain percentage of the population. It would thus be a solution analogous to that which exists in certain Swiss cantons and in Belgium, for the region of Greater-Brussels.

c) The Language of Government and Administrative Services

As noted previously, the Canadian Constitution does not currently confer on the anglophone minority of Québec any linguistic rights in their dealings with Québec's public service, since section 20 of the Canadian Charter, which governs this issue, applies only to the federal government and the province of New Brunswick.

In the current Québec legal system, the only rights guaranteed to Anglophones regarding government services derive from

19 In 1993, the Québec Goverment, then formed by the Liberal Party, modified sections 7 to 10 of the *Charter of the French Language* to conform to the ruling of the Supreme Court in the two *Blaikie* cases, note 13; see : *An Act to Amend the Charter of the French Language*, S.Q. 1993, c. 40.

the *Act Respecting Health Services and Social Services*[20], which contains the right to receive such services in the English language in establishments designated by the government. As for the *French Language Charter*, it provides that the public administration *can* provide such services in a language other than French, where the majority of users speak that language, while *having* to provide them in French. Thus, *no right* exists for individuals who benefit from these services to obtain them in a language other than French.

In a sovereign Québec, the most generous solution for the anglophone minority would consist in guaranteeing rights equal to those currently provided by section 20(2) of the Canadian Charter to the francophone minority of New Brunswick, that is the right to "communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French." Obviously, such a system would require either that civil servants and other public agents who enter into contact with citizens be bilingual, or that for each service there are two separate groups of public servants, one for each language, as is the case in Greater-Brussels.

As is the case for judicial bilingualism, such a right could be "territorialized", in that it only would be recognized in areas where the minority constitutes a certain percentage of the population. This is the solution adopted in certain Swiss cantons and in Belgium, for the region of Greater-Brussels, as well as for certain townships located on the border between the francophone region and the Dutch-speaking region.

A more restrictive system would consist in limiting the right to be served in English to certain government services only, as is currently the case. It would be possible to modify the applicable clauses of the *French Language Charter* so that municipal bodies that provide their services to a majority of English-speaking users, have the *obligation*, rather than the simple *option*, to provide them in English as well as in French. An even more generous answer for the minority would be to impose the same obligation to those institutions, municipal, social or healthcare providers, whose anglophone public, without being a majority, make up a significant percentage of the total users.

d) The Language of Education

Considering the clauses of the *French Language Charter* relating to education and other Québec statutes governing the education system, it can be seen that Québec's anglophone minority currently has rights that are at least equivalent to those guaranteed by section 23 of the Canadian Charter. Anglophones benefit from a complete educational network, stretching from kindergarten to university, where all subjects are taught in English, which is financed in whole or in part by the provincial government and is administered by the anglophone community itself through its elected or designated representatives.

Should Québec become sovereign, it would have to be decided whether it is advisable to keep the "Canada Clause" in force, to return to the original "Québec Clause" of Bill 101, or to institute the "universal clause" contained in the Canadian Charter but not yet applicable to Québec. However, a return to a "free choice" situation, such as that which existed prior to 1974 and which is called for by certain representatives of Québec's anglophone minority, seems ruled out. Indeed, the *Commission on Bilingualism and Biculturalism*, the Gendron Commission as well as recent statistics show that such a solution would cause the minoritization of francophones in the Montréal region. These same statistics show that the application of the "Canada Clause", instead of the "Québec Clause", has only caused a 10 % reduction in the number of immigrant children attending French schools (and a corresponding increase of the number attending English schools). It should also be noted that recent studies tend to indicate that if the "universal clause" was applied

to Québec, there would be a slight increase in the number of immigrant children attending English schools (between 1 % and 2 %)[21]. Therefore, one is allowed to conclude that neither the application of the "Canada Clause" nor even that of the "universal clause" would seriously threaten the effectiveness of Québec's language policy.

However, instead of unconditionally applying the "Canada clause" or the "universal clause", a sovereign Québec could make it conditional to the provinces of English Canada offering to their own francophone minority educational services comparable to those enjoyed by Québec's anglophone minority. Such a result could be attained by bilateral agreements reached with each Canadian province or could also be unilaterally implemented by Québec, as is already provided for in the *French Language Charter*[22]. This policy may allow Québec to influence the language policies of English Canada in a way favourable to the francophone minorities.

Truly, except for certain regions in Ontario and New Brunswick, the situation of Francophones is far from satisfactory. A large part of the French language instruction that already exists in English Canada is offered in "immersion" schools, which are not aimed at francophone children, but at anglophone children who wish to learn French as a second language. However, it is documented that attending such schools accelerates the linguistic assimilation of francophone children. Since 1982, Francophones have begun to rely on section 23 of the Canadian Charter to request the creation of true French schools, administered by representatives of the francophone community. Until now, they have made some notable gains but have also experienced numerous disappointments. Many provincial governments resist the demands of francophones and use every available political or legal tactic to delay the implementation of section 23. In his report for 1995, the federal Commissioner of Official Languages underlined that only half of the provinces fulfill their constitutional obligations under section 23 of the Canadian Charter.

In other respects, if a sovereign Québec wished to restore the original "Québec Clause" of Bill 101, one could justify such a solution by invoking comparative law arguments based mainly on the situation in Switzerland and Belgium, two liberal democratic countries with a good human rights record, as well as in Puerto Rico, an associate state of the United States of America. All these jurisdictions have adopted linguistic laws somewhat based on the "territorial" principle, as opposed to the "personal" principle. The territorial principle requires that people migrating to a given jurisdiction (be it a sovereign State, the member state of a federation or an autonomous region of a unitary State), adjust to the language of the majority population by using the majority language in their relations with public authorities and by sending their children to public schools where they are taught in the majority language. Of course, in a liberal democratic State, people are free to use any language in private matters and parents will be allowed to send their children to a private, not subsidized, school where they are taught in the language of their choice. Even if it limits individual liberty to some extent, such a territorial system will be retained in countries where there is a "conflict" between two languages of which one has a clear competitive advantage over the other. In such a situation, should linguistic competition be allowed without restraint, the more vulnerable language would be inexorably weakened and, in the end, disappear. When it comes to linguistic policies, as in the case of social and economic policies, restriction of the rights of certain individuals or groups can be justified when such limitations are

20 *An Act Respecting Health Services and Social Services*, R.S.Q. c. S-5.

21 *Le français langue commune. Enjeu de la société québécoise* (Bilan de la situation de la langue française au Québec en 1995), Rapport du comité interministériel sur la situation de la langue française, Québec, Éditeur officiel, 1996, pp. 137 et 221.

22 *Supra*, note 9, ss. 86 and 86.1.

necessary to protect the rights of other – more vulnerable – individuals or groups. Thus, because of its vulnerability, the protection of the French majority language may require some restrictions on the rights of members of the anglophone minority.

On the other hand, the "personal" principle in linguistic matters allows individuals to make free choices between competing languages in their communications with State authorities and for their children's education. This solution requires that the State and the public education system be bilingual. Applying the principle of personality maintains the contact between languages and allows for them to compete. As a result, the language with the most prestige and economic utility will be allowed to develop at the expense of the more vulnerable language. The principle of personality and the institutional bilingualism that necessarily accompanies it have been adopted by the Canadian Federal Government and, to some extent, by the provinces of Ontario and New Brunswick. Obviously, this poses no threat to the English language, which is predominant throughout North America.

One final point should be emphazised concerning the rights of the anglophone minority regarding the language of education. Some people may argue that, insofar as there exist English public schools in Québec, equality prohibits discrimination on the basis of language in the access to those schools. Such a claim is erroneous in the present constitutional context, as section 23 of the Canadian Charter itself limits the right to education in the minority language to people who satisfy one of the criteria which it contains. Neither do international instruments relating to human rights require that the majority be treated in the same way as the minority, nor that all minorities living within a State be treated identically. Since Aristotle, it is well known that only similarly situated people or groups must be treated in the same way; but, according to true equality, those who are in a different situation must be treated differently. This now leads us to examine the rights that a sovereign Québec may grant to linguistic and cultural minorities other than the anglophone minority.

C. The Rights of Québec's Other Linguistic and Cultural Minorities in a Sovereign Québec

As stated above, with respect to the *private* use of languages (between private individuals or corporations), all minorities, as well as the majority, already benefit from the linguistic freedom which implicitly flows from fundamental freedoms – such as the freedom of expression – and the right to equality. Those rights and freedoms will obviously continue to be recognized in a sovereign Québec.

Concerning the *official* use of languages (in the relations of individuals or corporations with government), the Canadian Constitution only gives rights to French and English language minorities. The only clause that could be invoked by other minorities is section 27 of the Canadian Charter, which states:

> *This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.*

This is only an interpretative clause, which does not directly confer any supplementary rights. However, by combining it with other, substantive, clauses of the Canadian Charter, the courts could hypothetically give it some role. Section 27 speaks only of culture, but language and culture are so deeply linked that courts surely will interpret it as protecting both.

Until now, the courts have only rarely made use of section 27. Moreover, they have mostly invoked it in conjunction with section 2 of the Canadian Charter, which guarantees the fundamental freedoms. In this context, section 27 has served to justify a broad and liberal interpretation of freedom of religion. It has been used by the courts to bolster the argument that restrictions to this freedom that are not compatible with the respect of

multiculturalism cannot be considered as "reasonable" under section 1 of the Charter (the limitation clause). For example, they have ruled that the obligation for all to observe Sunday, or the imposition of prayers at the beginning or at the end of classes in public schools, infringes freedom of religion in a way contrary to the multicultural heritage of Canadians. However, in these cases, section 27 has only served to rhetorically reinforce an argument – that of freedom of religion – which was already sufficient in its own right to invalidate the restrictions that were attacked.

Section 43 of the Québec Charter is somewhat similar to section 27 of the Canadian Charter. It states:

> *Persons belonging to ethnic minorities have a right to maintain and develop their own cultural interests with the other members of their group.*

Section 43 of the Québec Charter guarantees the rights of ethnic minorities in a more clear and positive way than section 27 of the Canadian Charter. However, insofar as section 43 is found in Chapter IV of the Québec Charter (sections 39 to 48), which contains the economic and social rights, it does not have primacy over ordinary legislation (i.e. any act adopted by the legislature). As such, it cannot render inoperative an incompatible statute. However, the social and economic rights must be considered to construct ordinary legislation, as stipulated in section 53 of the Québec Charter. But, faced with a clearly incompatible law, a court would be incapable to use section 43. Such a situation is obviously not satisfactory. Should Québec become independent, section 43 would have to be given primacy over ordinary legislation.

Is it possible to infer from section 43 of the Québec Charter any rights for minorities (other than the anglophone minority) to use their language in their relations with public authorities or in the field of public education? Such an argument would be quite difficult to make, since Bill 101 already regulates in a very precise and detailed way the official use of languages. It thus would not be easy to claim that the Québec Charter, which is a general law, can be used to supplement Bill 101, which is a specific act. However, in the area of the language of education, it would perhaps be possible to combine section 43 with section 10 of the Québec Charter, which guarantees the right to equality, to claim for the "other" minorities less elaborate rights than those guaranteed to the anglophone minority by Bill 101. For example, it could be the right to a bilingual and bicultural education, similar to the programs that exist in some parts of the United States and have been considered mandated by the *Civil Rights Act*. Similar programs already exist in Québec (the "Projet d'enseignement des langues d'origine" or PELO and the "Programme des langues ethniques" or PLE). Such claims could rely on the right of the minority children to a "meaningful" education, as ruled by the United States Supreme Court in the *Lau* case[23]. However, such a claim has not yet been tested in the Québec or Canadian courts.

23 In the United States, following the Supreme Court decision in *Lau* v. *Nichols*, 414 U.S. 563 (1974), bilingual and bicultural school programs directed at children belonging to certain ethnic minorities were set up.

24 Section 33 of the *Canadian Charter of Rights and Freedoms* authorizes provincial legislatures and the Canadian Parliament to derogate by express declaration from the rights and freedoms guaranteed by sections 2 and 7 to 15. Only democratic rights (sections 3, 4, and 5), mobility rights (section 6) and linguistic rights (sections 16 to 20 and 23) are immune from the power to derogate.

II. - THE CHANGES TO THE LEGAL STATUS OF THE QUÉBEC CHARTER THAT WOULD BE NECESSARY IN A SOVEREIGN QUÉBEC: THE QUESTION OF "ENTRENCHMENT" AND DEROGATION

The Canadian and Québec Charters both currently contain, the former in section 33[24], the latter in section 52[25], a clause allowing the legislature to derogate from the guaranteed rights and freedoms by way of an express declaration. Nevertheless, the "derogation clause" (or "nothwithstanding clause") plays a very different role for each of the two Charters. In the case of the Canadian Charter, which is "entrenched" by means of a special constitutional amending formula, the existence of the derogation clause obviously *weakens* the protection of rights and freedoms. Conversely, the Québec Charter is not entrenched and can be modified through the ordinary legislative procedure. As such, it would not have any primacy over other acts of the legislature, were it not for the derogation clause. Its primacy derives precisely from the fact that an *express* derogation is required, in any ordinary act, to contradict the Québec Charter. In the absence of this express derogation requirement, any subsequent act incompatible with the Québec Charter would *implicitly* modify it to the extent of their incompatibility. Consequently, as long as the Québec Charter can be modified like an ordinary law, the existence of a derogation clause will have the effect of *strengthening*, instead of weakening, the protection of the guaranteed rights and freedoms[26].

In a sovereign Québec, the question will be asked whether it is appropriate to retain the current status of the Québec Charter, or if it should be entrenched in the Constitution by way of a special procedure for its modification, for example, a two-thirds majority vote of the National Assembly, or the agreement of the voters through a referendum. Almost certainly, the Québec Charter would be entrenched in the Constitution of an independent Québec. This nevertheless does not mean that the power of the Québec National Assembly to derogate from the guaranteed rights, or from some of them, should completely disappear. As a matter of fact, entrenching a Charter and allowing the legislature to derogate from it are not necessarily incompatible, as the Canadian Charter itself clearly illustrates. Aside from political motives, the main underlying reason for the existence of a derogation clause in the Canadian Charter resides in an attempt to reconcile the traditional Anglo-Canadian model of parliamentary sovereignty with the American model of the supremacy of the Constitution and of the courts.

An important characteristic of judicial review is that there exists a certain contradiction between the democratic principle and the judicial control of acts of Parliament. The rules contained in the Constitution, especially those which bear upon rights and freedoms, are very often vague and open-ended. It thus is the responsibility of courts to clarify them and give them meaning. It then becomes inevitable that they infuse their own philosophical and moral values in such vague standards as, for example, "freedom of expression" or "equality". However, judges are neither elected nor representative of the population and cannot be held accountable for their decisions. Therefore, there is some difficulty in allowing them to overrule the choices made by the elected representatives of the people. Where the courts exercise the power of judicial review of legislation, there always lurks the danger of judicial activism or "government by judges".

For the above reasons, the framers of the Canadian Charter wanted the final say on social, moral and political issues to remain with the elected representatives of the people. Therefore, in section 33, they gave to Parliament and the provincial legislatures the power to derogate from sections 2 and 7 to 15 of the Charter. The control through the courts thus disappears, but a popular and

democratic control remains, since the derogation must be express, thus acting like an alarm for the opposition parties in Parliament, the media and public opinion. In a sovereign Québec, the situation would be the same and, consequently, the power of the Québec National Assembly to derogate from certain rights should be maintained[27].

However, if the power to derogate remains, its use should be rendered more difficult, in order to strike a finer balance between courts on the one hand and the elected representatives of the people on the other.

Currently, the power to derogate from the Canadian and Québec Charters can be exercised even before a particular statute is challenged, thus effectively preventing the courts from examining it. By adding a notwithstanding clause to an act, the government exempts itself from having to demonstrate its justification in a free and democratic society. In our opinion, the power to derogate should be restricted to situations where a law has already been found invalid. In this way, the possibility to have it checked by the courts would always remain.

Second, derogating from the Québec and Canadian Charters only requires a simple majority of votes. This is much too easy since the political party forming a majority government can thus impose a notwithstanding clause with the sole support of its own members, who are subject to a strict party discipline. In our view, derogation should demand a special majority vote of two-thirds of the members of Parliament. In most cases, this would mean the agreement of at least some of the opposition members. Another solution would be to ask for the acquiescence of the voters through a referendum. However, one must be aware that it may be very dangerous to use the referendum as a way to derogate from rights and liberties. The voters are much easier to manipulate through demagogic techniques than seasoned elected representatives.

Third, it must be stressed that section 52 of the Québec Charter does not contain, at the present time, any time limit for a nothwithstanding clause. Such a limit should be added, similar to that found in section 33 of the Canadian Charter, which limits the validity of a derogation clause to a term of five years (such a clause may however be renewed every five years without any cumulative maximum duration).

Finally, contrary to the present situation, it should be stipulated that some rights guaranteed by the Québec Charter cannot be subject to any derogation, as is currently the case with sections 3 to 6, 16 to 20, 23 and 28 of the Canadian Charter. The impossibility to derogate from certain rights is also found in most international conventions relating to human rights, for instance the *International Covenant on Civil and Political Rights*, which Québec ratified in 1976 as a Canadian province and which it would certainly ratify again as a sovereign State.

25 Section 52 of the Québec *Charter of Human Rights and Freedoms* states that "No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter."

26 The political effectiveness of the derogation clause depends on the political control on Parliament, internally (opposition parties) or externally (pressure groups, the electorate, the media, etc). Insofar as the parliamentary majority must announce expressly its intention to derogate from the Charter, it sets off an "alarm mechanism". The government introducing a bill derogating from the Charter runs the risk of being sanctioned at the next election. Finally, the necessity to derogate in a express manner prevents Parliament from limiting rights and freedoms involuntarily, a risk present when one applies the traditional principle of implicit derogation by any subsequent incompatible act.

27 The vast majority of English Canadian writers seem strongly opposed to the idea of permitting the derogation from guaranteed rights and freedoms. However, some distinguished scholars have expressed a more nuanced opinion; see for example Peter H. Russell, "Standing Up for Notwithstanding" (1991), 29 *Alberta Law Review*, 293; Paul C. WEILER, "Rights and Judges in a Democracy : A New Canadian Version", (1984) 18 *University of Michigan Journal of Law Reform* 51; Christopher P. MANFREDI, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, Toronto, McClelland & Stewart, 1993, at 199-211.

CONCLUSION

In conclusion, we must consider the broader question if there exists a relation between federalism and the protection of rights and freedoms. Is it true, as some people claim, that such a protection will always be better assured in a federal system than in a unitary State?

It is difficult to answer by relying on an empirical observation of current political systems, since the respect or disrespect of rights and freedoms in the world does not seem conditional upon the federal or unitary form of government in any given country. The form of governement is but one amongst many other factors on which the respect of rights and liberties depends.

On a more theoretical level, federalism could be considered more apt to *limit* power, insofar as it is a way to *divide* it between two levels of government. In addition, in a federation, as is the case in Canada, the federal Charter of Rights is often supplemented by a similar instrument at the level of each member state. However, if these two characteristics of federalism can enhance the protection of rights, they can also hinder it. First, as regards the limitation of State power, if it is true that such a limitation is necessary to protect the negative rights, which require an absence of State action, the contrary is true for positive rights, which ask for State intervention in order to provide the means necessary for their enjoyment. However, it is more difficult to move two governments to act than one. Second, a Charter of Rights is very often used by those who hold economic power, especially corporations, to attack laws and regulations that are seen as restricting their activities. The coexistence of several Charters, typical of a federal system, will thus multiply the possibility for private economic powers to contest state regulations that impose upon them certain restrictions or obligations in the public interest.

In addition, it should be stressed that a national Charter of Rights and Freedoms can, in the long run, threaten the distinctive character of each member state of a federation. The enforcement of rights and freedoms bears upon important issues of culture and values. In all federations, this enforcement is the responsibility of the federal supreme court, whose members are usually appointed by the central government and hold to national values and standards. The uniformity of constitutional case law can thus considerably limit the availability of alternative political choices open to the elected representatives at the provincial level. This is especially true in Canada, where the province of Québec may see its distinctive character threatened by the decisions of the Supreme Court whose members come in the majority from English Canada[28].

Finally, a great number of English-speaking Canadians seem to have less trust in their provincial government, that appears to them as small minded and preoccupied with petty matters, than in the federal government, which they see as having a larger scope and invested with a national legitimacy. This is mostly true for people living in the seven less populous provinces. From such a perspective, the enhanced value and almost mystical reverence for the Canadian Charter, as opposed to provincial Human Rights Acts, is easily understandable. Moreover, for English-speaking Canadians, the Canadian Charter functions as a powerful symbol of national identity and unity. However, Québec Francophones do not react in the same way. They primarily trust and give their loyalty to the provincial government. This is quite comprehensible since it is the only government that they democratically control. For this reason, many francophone Quebeckers put more emphasis on the Québec Charter than on its Canadian counterpart. Furthermore, since enforcing the Canadian Charter can reduce the powers of the Québec government by imposing on it values more appropriate for English Canada, it is easy to see why in

Québec the Canadian Charter is often seen not as a boon, but as a danger for the distinct character of the Québec society.

28 On this aspect, see: José WOEHRLING, "Le principe d'égalité, le système fédéral canadien et le caractère distinct du Québec", in Pierre Patenaude (ed.), *Québec – Communauté française du Belgique: Autonomie et specificité dans le cadre d'un système fédéral* (Actes du colloque tenu le 22 mars 1991, Faculté de droit, Université de Sherbrooke), Montréal, Wilson & Lafleur, 1991, 119-168.