The Hidden Ally: How the Canadian Supreme Court Has Advanced the Vitality of the Francophone Québec Community

DISSertation

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By
Douglas S. Roberts, B.A., J.D., M.A.
Graduate Program in French and Italian

The Ohio State University
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Dissertation Committee:
Professor Wynne Wong, Advisor
Professor Danielle Marx-Scouras, Advisor
Professor Jennifer Willging
Abstract

Since the adoption of the Charter of Rights and Freedoms in 1982, the Canadian Supreme Court has become a much more powerful and influential player in the Canadian political and social landscape. As such, the Court has struck down certain sections of the Charter of the French Language (Bill 101) as contrary to the Constitution, 1867 and the Charter of Rights and Freedoms. In *Ford v. Québec*, [1988] 2 S.C.R. 712, for instance, the Court found unconstitutional that portion of Bill 101 that required commercial signage to be in French only. After the decision was announced, public riots broke out in Montreal. As a result of this decision, one could conclude that the Court has, in fact, resisted Québec’s attempts to protect and promote its own language and culture. In this dissertation, however, I argue that this perception is not justified, primarily because it fails to recognize how Canadian federalism protects diversity within the Confederation. Contrary to the initial public reaction to the *Ford* case, my contention is that the Court has, in fact, advanced and protected the vitality of Francophone Québec by developing three fundamental principles. The first principle is **institutional integrity**. Under this principle, the Court has advanced the rule of law in Canada by protecting the integrity of the process by which members of the Court and Senate are chosen. This is important because both institutions are particularly important to the balance of power and the protection of minority groups within the Confederation, including minority language communities. The second principle is **Canadian federalism**.
Under this principle the Court has developed a jurisprudence in which the provinces retain sufficient legislative power to manage their own internal affairs, and in the case of Québec, particularly those relating to language and education. The third principle is constitutional dialogue. Under this principle, the Court encourages a constitutional dialogue between the political actors, after the Court has struck down a law as unconstitutional, that maximizes the democratic process and Québec’s ability to protect and advance the Francophone culture. As a result of these principles, the Court has created the legal framework that not only has enabled Québec to protect and promote its language and culture, but also developed those overreaching constitutional principles that strengthen the Canadian Confederation.
Dedication

This dissertation is dedicated to my wife, Mary Ellen Coleman.
Acknowledgments

I am certainly grateful for the help, guidance, and encouragement of those OSU professors who served on my committee, including Jean Francois Fourny, Wynne Wong, Danielle Marx-Scouras, and Jennifer Willging.

But there are also others. It is challenging to write about a legal system in a foreign country. While I have practiced law for many years in the United States, the Canada legal system is different, and I found that I had to be very careful that I did not let my American experience as a lawyer cause me to make inaccurate assumptions and statements about the Canadian political and legal system. I have practiced law for 35 years in Ohio, and through the course of the practice, I was quick to learn that whenever a lawyer tried to handle a case outside his or her area of expertise, bad things often happened. I did not want to make that mistake here. Reading articles and books about the Canadian legal system can only take you so far. In order to test our your ideas, there comes a time when you simply need to dialogue not only with your American colleagues, but also with Canadian lawyers, law students, teachers, and law professors. And that is what I have done here. To that end, I want to acknowledge the assistance of a number of people who guided me on this journey, including Denis Fourny, Jean-Daniel Vieilleux, Inés Negrete, Sarah-Emmanuelle Duchesne, Stéphane Lewis-White, Kevin P. Hidas, Roman Ivanov, Professors Morgan Liu, Stéphane Spoiden, Stéphane Beaulac, Daniel
Turp, and Jarrett Rudy; and Attorneys Mark C. Power, Keiran Gibbs, and Lisa Moncalieri. I always found my exchanges with these people, either in person or by email, extremely helpful. Professor Beaulac, Keiran, and Roman, in particular, provided me with wonderful feedback throughout this rather challenging task. And above all, I am grateful for the encouragement, love, and support of my incredible wife, Mary Ellen. With the help of all of these persons, this dissertation went through countless drafts, and I hopefully got it right. I am grateful for their expertise, kindness, patience, and steadfast encouragement. Any and all errors are of my own creation.
Vita

April 30, 1951 ...........................................Born – Columbus, Ohio

1973..........................................................B.A., Philosophy, Ohio University

1976..........................................................J.D., Law, The Ohio State University

1976-1977 ...............................................Clerk to C. William O’Neill,
            Chief Justice of the Ohio Supreme Court

1977-1978 ...............................................Clerk to Robert M. Duncan,
            Judge of the United States District Court,
            Southern District of Ohio

1984..........................................................Adjunct Professor, College of Law
            The Ohio State University

2002-2004 ...............................................Instructor, Legal Nurse Consultant Program
            Capital University Law School

2011..........................................................M.A., French, The Ohio State University

Publications


Co-author. "Consumerism Comes of Age: Treble Damages and Attorney Fees in
Consumer Transactions - the Ohio Consumer Sales Practices Act." Ohio State Law
Journal42.927: 1981.

Associate editor. Couse’s Ohio Form Book, 6th edition. Howard A. Couse and Glen

Contributing author. Handling Automobile Warranty and Repossession Cases. Roger D.

Fields of Study

Major Field: French and Italian
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Introduction

In the summer of 2013, an internet news service published an article about a city councilman in Montreal who wanted to pass an ordinance that required that dogs respond to commands in both English and French.¹ The councilman told a story of his taking his dog out on a walk in a nearby park. While there, another dog—apparently owned by a Francophone—leaped on him, wanting to play. The councilman yelled “Stop, stop!” in an effort to settle the dog down. The dog did not respond to this command. The councilman accordingly concluded that he would have been more successful had he yelled, “Arrête, arrête!” Unknown to many, the article was actually a spoof pulled off by two comedians on their radio show.² However, it went viral over the internet, sparking more than 29,000 facebook and blog posts, expressing both disbelief and laughter about Québec’s mandatory language laws. The striking fact is that there were some who took it seriously.³ Obviously, language in Québec is a sensitive issue that ignites deep feelings.⁴


³ As a practical matter, it is not hard to find true stories concerning Québec’s language policy that prompts the same sort of lampoon as the one concerning bilingual dogs. By way of example, some of the cases that have attracted the interest of the Office Québécois de la langue française (OQLF) (the language police, often referred to as the “tongue troopers”) for “… people seeking to protect the French language include the following: 1996: A woman warns the owner of a Québec pet store she might get in touch with language authorities because Peekaboo, the parrot she wanted to buy, didn’t speak French; 1999: The Old
During the nationalistic wave of the Quiet Revolution in the 1960s, Québec entered into the world of modernity and completely overhauled its industrial, educational, Navy chain is asked to rename its stores "La Vieille Rivière." 2000: The owner of an Indian restaurant is told he is breaking the law by having coasters for "Double Diamond," a British beer; 2001: Some people express disappointment that race-car driver Jacques Villeneuve calls his restaurant "Newtown;" 2005: Language authorities say they will investigate complaints that Montreal Mayor Gérald Tremblay's party used the word "Go" on its campaign posters and pamphlets, as in "Go Montreal;" 2007: Imperial Oil says it will keep its Québec-only "Marché Express" name for its Esso gas stations after protests against a proposal to change the name to "On the Run," as the stations are known elsewhere in North America; 2007: Language activists decry that callers to many Québec government offices are told to "press nine" for English before instructions are delivered in French. Some of the departments have since changed the message to put English at the end."See “Speaking out: Québec's Debate Over Language Laws."CBC, October 22, 2009. <http://www.cbc.ca/news/canada/speaking-out-Québec-s-debate-over-language-laws-1.860189>. Retrieved October 26, 2014.


Figure 1: Language Conflict in Québec

and health systems. Concerned for the future of the French language, Québec passed in 1977 the Charter of the French Language (“Bill 101”) that made French the official language of Québec, requiring that it be used in public institutions and many large businesses. Bill 101 also restricted access to English schools and prohibited the use of English on commercial signs.

The effects of this piece of legislation have been studied and evaluated many times over, most recently by Richard Bourhis at the Université du Québec à Montréal. Using current Canadian census data, Bourhis points out that Bill 101 has played a critical role in establishing Francophones as the dominant majority in Québec linguistically, culturally, sociologically, and economically. In reaching this conclusion, he uses the “Group Vitality Index,” otherwise known as the “GVI,” that is a linguistic theoretical model used to evaluate the strength of language communities within multilingual settings. The GVI organizes the objective variables into three broad groups: demography, institutional support, and status. The law and the court system are considered institutional support for the vitality of the Francophone community.

To put the research of Professor Bourhis in context, it is helpful to know the social context in which Québec enacted the Charter of the French Language (“Bill 101”).

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In the 1970s four factors undermined the future of the Francophone community in the province: (1) the decline of Francophone minorities outside of Québec, (2) the drop in the Québec birthrate, (3) the choice of immigrants to educate their children in English as opposed to French schools, and (4) the Anglophone domination of the Québec economy (Bourhis, *English-Speaking* 128). Throughout the 1960s and 1970s, the Québec government adopted a number of language laws to address these concerns. In 1969 Bertrand’s National Union government introduced Bill 63 that gave parents the freedom to choose between French and English schools for their children, while offering incentives to promote the use of French in Québec. In 1972, the Commission of Inquiry on the Position of the French Language and on Language Rights in Québec issued a recommendation that French become the common language of Québec in schools and in the workplace. In 1974, the Bourassa government accordingly passed Bill 22 that made French the official language of Québec. Under this law, parents were allowed to send their children to English speaking schools only if the children could pass certain tests in English. The Anglophones protested strongly to Bill 22, and the language tests became the symbol, at least to the Anglophone community, of Francophone oppression. When René Lévesque and the Parti *Québécois* came to power in 1977, they passed Bill 101 that went much further than any other previous legislation concerning the use of French in government, work, and education. As such, it serves as the cornerstone of Québec’s language legislation. Bill 101 enacts certain fundamental language rights:

“Every person has a right to have the civil administration, the health services and social services, the public utility enterprises, the professorial orders, the associations of employees and all
enterprises doing business in Québec communicate with him in French.

In deliberative assembly, every person has a right to speak in French.

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

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

Every person eligible for instruction in Québec has a right to receive that instruction in French.”

Under the Bill every Québécois further had the right to work in French and could not be demoted or fired if he or she could not speak English. Business firms, moreover, were required to obtain certificates that certified that they were using French as the language of work within their company. Subject to certain narrow exceptions, Bill 101 also made it clear that immigrant parents were required to send their children to French public schools. They could, however, send their children to a private English school as

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7 Under Section 73 of Bill 101, “The following children, at the request of their parents, could receive instruction in English: (1) a child whose father or mother is a Canadian citizen and received elementary instruction in English in Canada, provided that that instruction constitutes the major part of the elementary instruction he or she received in Canada; (2) a child whose father or mother is a Canadian citizen and who has received or is receiving elementary or secondary instruction in English in Canada, and the brothers and sisters of that child, provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada; (3) a child whose father and mother are not Canadian citizens, but whose father or mother received elementary instruction in English in Québec, provided that that instruction constitutes the major part of the elementary instruction he or she received in Québec; (4) a child who, in his last year in school in Québec before 26 August 1977, was receiving instruction in English in a public kindergarten class or in an elementary or secondary school, and the brothers and sisters of that child; and (5) a child whose father or mother was residing in Québec on 26 August 1977 and had received elementary instruction in English outside Québec, provided that that instruction constitutes the major part of the elementary instruction he or she received outside Québec.” Charter of the French Language, Chapter 2, Fundamental Language Rights http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_11/C11_A.html Retrieved 12-6-2014.
long as the school received no state funding. Bill 101 also did not apply to post high school institutions; hence, a student could attend either a French or English CEGEP or university, depending upon his or her choice. Finally, Bill 101 required that all road, government, and commercial signs be exclusively in French. Certain religious and humanitarian messages could be written in English as long as they were not intended to make a profit (Bourhis, English-Speaking 128).

To analyze the impact of Bill 101, Bourhis relied on language census data collected up through 2006 to document the increased vitality of the Francophone community. Over the last thirty years, for instance, he notes that the number of French mother tongue speakers has increased by more than a million speakers while the number of English speakers has decreased by more than 180,000. As of 2006 over 80% of Québec residents spoke French as their mother tongue, and the overwhelming majority of Québécois, including Allophones (immigrants who are neither Francophone nor Anglophone), spoke French at home. He observes that the great success of Bill 101 has been its role in ensuring that those living in Québec know French: 93.6% of the population in 1991 and 94.5% in 2006 (Bourhis and Foucher, Decline 27). Without question, he concludes, French is currently the most shared language of the province.

Using the Group Vitality Index, Bourhis also examines the number of persons using French at work. The figures are again striking. According to the 2006 census, the proportion of Francophones who declared using mostly French at work increased from 52% in 1971 to 95.8% in 2006. In that same period, the proportion of Anglophones

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8 CEGEP is an acronym for “Collège d'enseignement général et professionnel,” known officially in English as a "General and Vocational College". CEGEPs offer two year college (pre-university) programs and are unique to Québec in Canada.
using mostly French at work increased from 2% in 1971 to 31.6%. The figures of Allophones using French at work are even more dramatic: 17% in 1971 and 59.3% in 2006 (Bourhis and Foucher, Decline 27). Bourhis finds these percentages significant in light of the fact that English is the lingua franca of work and commerce in Canada and the USA, where daily trading activity is worth 2 billion dollars a day (Bourhis and Foucher, Decline 27). 9

Regarding schooling over the last thirty-five years, Bourhis demonstrates that Bill 101 has also diminished enrollment in the English school system when compared to the French school system. The decline in enrollment in the English school system was 1.7 times the drop experienced in the French system during the 1972 to 2007 period (Bourhis and Foucher, Decline 33). In that same period, the number of Allophones dropped by 61% in the English school system and increased by 66.9% in the French school system (Bourhis and Foucher, Decline 36). At the same time, Bill 101 effectively kept French-

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9 The 2011 census data also supports the conclusion that the French are the secure and dominant majority in Québec, “…with four out of five people speaking it regularly at home, despite a rising rate of bilingualism. The data also revealed that 94.4 percent of the Québec population—7.38 million people—reported that they could carry on a conversation in French, an increase from about 7.03 million people in 2006.” While the use of the French language was steady, “…the proportion of Québec residents who are bilingual in both official languages grew to 3.33 million in 2011, which represented an increase in the proportion of bilingual residents from 40.6 to 42.6 percent, lead by teenagers and young adults.” De Souza observes that “…Québec residents aged 20 to 24 were the most bilingual group in the country in English and French at a rate of 60.5 per cent in 2011.” Finally, the “…data also revealed that a growing number of immigrants who didn't speak English were becoming bilingual by learning French. In fact, the fastest-growing language group in the province was made up of Québécares that spoke French and another language that was not English, rising from 3.8 per cent of the population in 2006 up to 5.0 per cent in 2011.” “Arabic was the top immigrant language in Montreal, spoken by 108,000 people, followed by Spanish with 95,000 people and Italian with 50,500 people.” See, Mike De Souza, “Census: Despite immigration, French remains dominant in Québec,” Postmedia News October 24, 2012. http://www.canada.com/life/Census+Despite+immigration+French+remains+dominant+Québec/7438728/story.html Retrieved 12-21-2014.
speaking students within the French school system, with 97.4% of all French students attending French schools.

No doubt, the transformational effect of Bill 101 on the linguistic landscape of Québec is a good illustration of the significance of institutional support in maintaining and increasing the vitality of the Francophone community in the province. Institutional support, however, may manifest itself in different ways. Legislation may be the most obvious way but no less important is how legislation is interpreted and applied by the courts. Given the enormous impact that the courts have on the social, political, and economic developments within our society, it is only fair to ask: What role, if any, did the Supreme Court of Canada play in Québec’s astounding political, social, and economic turnabout in the wake of the enactment of Bill 101? Did the Court favor or oppose Francophone Québec’s effort to protect and enhance its language and culture? Discussion of these questions are conspicuously absent from Bourhis’ work.

It was no surprise that Anglophones reacted negatively to the passage of Bill 101. They experienced a profound sense of shock in their symbolic passage from being a part of the Canadian majority to having a minority status. Stripped of their traditional implicit prestige and unchallenged position of power, they successfully challenged the constitutionality of Bill 101 in five different lawsuits.\(^\text{10}\) In *Attorney General of Québec v. Blaikie et al.*, [1981] 1 S.C.R. 312, for instance, the Court held that Bill 101’s requirement that provincial laws be enacted in French violated section 133 of the Constitution Act, 1867.

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Constitution Act, 1867. In *Attorney General of Québec v. Québec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, the Court further struck down Chapter VIII of Bill 101 finding it inconsistent with section 23 of the Canadian Charter of Rights and Freedoms (“Constitution Act, 1982”) that guaranteed Canadian citizens who received an English education in Canada the right to educate their children in English. In *Devine v. Québec*, [1988] 2 S.C.R. 790 and *Ford v. Québec*, [1988] 2 S.C.R. 712, the Court held that Bill 101’s requirement that public signage be in French violated both the Canadian and Québec Charters of Rights. These decisions were extremely unpopular among certain parts of the Francophone community, and, when some of them were announced, public riots broke out in Montreal. Subsequent court decisions showed the Court striking down additional provisions of Bill 101.

Anyone reading these cases would be tempted to conclude that the Canadian Supreme Court appears to have restricted, not enhanced, the vitality of the Francophone community in Québec. This perception seems particularly true among Québec sovereignists who have a tendency to voice their opposition to the Court whenever it

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11 The Canadian constitution is actually a collection of written and unwritten parts, including the British North American Act, 1867 (BNAA) and the Canadian Charter of Rights and Freedoms (Charter), 1982. After the Constitution was amended in 1982, the BNAA was renamed the “Constitution Act, 1867” and the Charter the “Constitution Act, 1982.” I shall refer to these documents under these names. Copies of the relevant parts of these Acts are included in Appendix A and B.


strikes down a section of Bill 101. After all, they argue, the federal government appoints and pays these judges to serve on the Supreme Court until age 75, without the consent of the provinces. Six of the nine judges are Anglophone and, in fact, do not even have to be bilingual to serve on the bench. In further support of this perception, it bears repeating that Canada adopted the Constitution, 1982 over the objection of Québec, with the Supreme Court holding that Québec’s consent was not legally necessary. Given this, it is interesting to note a 1999 survey in which Gibson, Caldeira and Baird asked Québécois if the Supreme Court should be abolished altogether, if it started to make decisions that consistently ran afoul of public opinion. Only 31.2 per cent of Canadians outside Québec agreed with this statement, compared to 52.5 per cent of Québécois. Consistent with this, Québec’s political leaders have sometimes compared the Court to the leaning tower of Pisa, as it always leaned one way, namely, in the direction of the federal government (Sauvageau 106). In *Reference re Secession of

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16 Given this response, it appears that Québécois are more susceptible than other Canadians to the proposition that the Supreme Court should be abolished if its decisions are contrary to public opinion. It is not clear why this is so, although Russell postulates that many Québécois likely oppose the Supreme Court not because it strikes down duly enacted legislation as unconstitutional, but because they reject federal authority (Frederick Russell, *Judicial Power and Canadian Democracy*). Joseph F. Fletcher and Paul Howe, “Public Opinion and Canada’s Courts, 255-269, Montreal: McGill-Queen's UP: 2001. See also, James L. Gibson, Gregory A. Caldeira and Vanessa A Baird, “On the Legitimacy of National High Court, “American Political Science Review, Vol. 92, no. 2 (June 1998), pp. 343-59.

17 As noted by Sauvageau, the suspicion that the Court learns in favor of the federal government continues to linger in Québec politics, a suspicion that the sovereignists often seek to exploit when they wish to criticize the Court (97). Indeed, Sauvageau notes that more than a few federal politicians, including
Québec, [1998] 2 S.C.R. 217, for instance, the Québécois daily newspaper, Le Devoir, displayed the following cartoon of the Supreme Court justices:

Figure 2: Photo Officielle des juges de la Cour Suprême…Le Devoir (February 17, 1998).

The question as to why the Court is sometimes perceived as hindering Québec’s efforts to advance and protect its own language and culture is a complicated one to answer. Sauvageau suggests that it may be the result of the media reporting decisions through a political lens that focuses on who has “won” or “lost” a case, an approach that tends to accentuate those principles that divide as opposed to unite us. In Reference re Secession of Québec, [1998] 2 S.C.R. 217, for instance, he notes that over half of the articles about the case focused “…on words of war and conflict between federalists and sovereignists, rather than on the cool and detached discourse of law. The case pitted, in

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a number of prime ministers, have rallied against “separatist” reporters who paint Ottawa with an evil brush (230).
stark terms, Québec versus the rest of Canada. This kind of coverage, [he contends] might have heightened tensions in readers because it played on the conflict angle, setting speakers against each other often as the expense of thoughtful, reasoned debate” (92). Perhaps this perception of the Court is a vestige of the “garrison mentality” through which some Québécois see Anglophone groups as a threat to the vitality of the Québec Francophone community (Marcel Martel and Martin Pâquet 26). Regarding media coverage of language issues, Bourhis suggests that Québec nationalists have a vested interest in nurturing feelings of threat from the presence of Anglophone groups or institutions, as such sentiment (1) reinforces “feelings of in-group solidarity, (2) fosters the demonization of out-groups, (3) boosts loyalty to the in-group cause and (4) mobilizes action against out-groups perceived as diluting or contaminating the linguistic and cultural authenticity of the in-group” (Bourhis, Decline 50). Or, perhaps this particular paradigm of looking at the Anglophone world is a remnant of a post-colonial mentality critical of Anglophone hegemony. Within Québec literature, it is certainly not hard to find such anti-Anglophone themes. 18

Whatever its source, I argue that this negative perception of the Court is at best superficial, and, at worst, downright wrong. Contrary to what some might claim, a thoughtful review of the Court’s decisions since the adoption of the Constitution, 1982 suggests that the Court has, in fact, advanced the community vitality of Francophone

Québec by advancing the following three principles: (1) the principle of institutional integrity, (2) the principle of federalism, and (3) the principle of constitutional dialogue.

In order to understand how these principles operate, however, it is necessary to review the framework of Canada’s constitutional government. In what follows I will survey the relevant provisions of the Constitution Act, 1867 and examine the role of the Supreme Court of Canada. With this groundwork in place, I will then explain how these principles advance the Québec Francophone community. In order to grasp the true impact of these principles, it is necessary to look past the immediate results of the Supreme Court’s decisions and focus on the underlying principles that drive the reasoning of the Court. An examination of these principles shows, I contend, that the Court operates as a powerful ally in advancing the culture and language of Francophone Québec.

The Constitutional Framework of the British North America Act, 1867

The Constitution Act, 1867 created the Parliament of Canada, including the House of Commons (Lower House) and the Senate (Upper House). House members are elected by popular vote. On the advice of the Prime Minister, the Governor General appoints the members of the Senate that approves legislation passed by the House of Commons. The Senate can also introduce bills as long as they do not deal with taxes or cost money. Its approval is necessary for government bills to become law. Because Senators are appointed, the Senate lacks, as a practical matter, the legitimacy of the elected House of Commons. For most of the 20th century, the Senate has accordingly
tended to approve automatically bills that had been passed by the House of Commons (Monahan, *Constitutional* 83). The Senate was originally conceived by the drafters of the Constitution Act, 1867 as performing a role similar to that of the House of Lords in England, namely, providing a “sober second thought” and a technical review of legislation approved by the House. I will give several examples of this in Chapter 2.

Sections 91-93 of the Constitution Act, 1867 specify how the legislative power is divided between the federal and provincial governments. In drafting the Constitution Act, 1867, the founding fathers of the Canadian Confederation generally followed the principle of subsidiarity, which requires that decisions affecting individuals should, as far as reasonably possible, be made by the level of government closest to the individual affected (Hogg 120). Consistent with the principle of subsidiarity, the Constitution Act, 1867 invests the provincial legislatures with exclusive authority to enact legislation over such matters as property and civil rights, the courts and the police, municipal institutions, hospitals, and education. Furthermore, the Constitution Act, 1867 gives the federal government the power to legislate in areas of public debt, trade and commerce, transportation, communication, the military, currency and coinage, banking, and insolvency. Under the Constitution Act, 1867 the federal government is also given the power to disallow (invalidate) provincial statutes (section 90), to appoint the Lieutenant

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19 This principle has been adopted, for instance, in the European community as a guideline for the division of responsibilities between the Community institution in Brussels and the national institutions of the member states.

20 While the federal disallowance power was used extensively in the late 19th century, the federal government has not used it for over fifty years. Where the federal government wants to challenge the constitutional validity of a particular provincial statute, it now proceeds through the courts rather than resorting to its power of disallowance. In *Reference re Secession of Québec*, [1998] 2 S.C.R. 217 the
Governor for each province (section 58), to appoint all of the judges of the district and
county courts (section 96), to determine appeals from provincial decisions affecting
minority education rights (section 93), to legislate laws “for the peace, order, and good
government of Canada” in all matters not assigned exclusively to the provinces (section
91), and to force a decision on appeal by the enactment of “remedial laws” (section 93).
Under sections 91(29) and 92(10) (c), the federal Parliament also has the unilateral power
to bring local works within exclusive federal legislative jurisdiction by declaring them to
be “for the general advantage of Canada.”

Recognizing Québec as one of the founding nations, the drafters of the
Constitution Act, 1867 made a special effort to adopt a form of federalism in which
Québec had the powers necessary for cultural preservation. Under such powers Québec
had the ability to maintain its civil law (as opposed to English common law) system
(section 92(13)) and its denominational (religious) schools (Catholic/Protestant) (section
93). Under section 92(13), for instance, Québec retained the power to legislate within the
areas of property and civil rights that entailed their use of civil law, based on the Québec
Civil Code. Prior to Confederation, the phrase “property and civil rights” included a vast
collection of laws relating to property, contracts, and torts. Since that time, the Court has

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21 Supreme Court noted at para. 55 that “many constitutional scholars contend that the federal power of
disallowance has been abandoned” (Patrick J. Monahan, Constitutional 100).

To place matters in context, the distribution of powers under the Constitution Act, 1867 is more
centralized than the distribution of powers in the United States. First, in Canada, the federal government
was given the power to regulate “trade and commerce” without restriction. In the United States, Congress
was given the more limited power to regulate “commerce with foreign nations and among the several states
and with the Indian tribes.” Second, in Canada, the list of federal powers includes several topics that the
United States Constitution left to the states, including banking (section 91(15), marriage and divorce
(section 91(26)), and penitentiaries (section 91(28)). Finally, in Canada, the Constitution gave the
provincial legislatures only certain enumerated powers to make laws, leaving the residue of power with the
federal parliament. In the United States, the residuary power is left with the states (Hogg Constitutional 4).
interpreted the meaning of these terms to include most of commercial law, consumer law, environmental law, labor law, health law, and social services law (Hogg 121). Under section 92(16) Québec has the exclusive power to make laws concerning “generally all matters of a merely local or private nature.”

Notwithstanding sections 91 and 92 regarding the allocation of legislative power, however, it is often not clear who has the legislative power to handle a particular situation. How one interprets the interplay of Sections 91 and 92 is often a matter of opinion. As a general rule, Canadians outside of Québec are in favor of a centralizing evolution of the Canadian federation and symmetry in provincial legislative powers. Québécers, on the other hand, support a greater decentralization of powers and the establishment of asymmetrical federalism (Brouillet 23). As a result, the Supreme Court has been called upon, again and again, to decide the question of how power should be allocated between the federal and provincial governments. Needless to say, this has been no small task for a country with a huge land-mass, two official languages, two judicial systems, three founding peoples (English-Canadians, French-Canadians, and the Aboriginal peoples of Canada), and a multi-cultural citizenry.22

22 “According to the 2001 census by Statistics Canada, Canada has 34 ethnic groups with at least one hundred thousand members each, of which 10 have over 1,000,000 people and numerous others represented in smaller amounts. 16.2% of the population belonged to visible minorities: most numerous among these are South Asian (4.0% of the population), Chinese (3.9%), Black descent (2.5%), and Filipino (1.3%). Other than Canadians of British, Irish, or French descent there are more members of Ethnic groups not classified as visible minorities than this 16.2%; the largest are: German (10.18%), and Italian (4.63%), with 3.87% being Ukrainian, 3.87% being Dutch, and 3.15% being Polish. Other minority ethnic origins include Russian (1.60%), Norwegian (1.38%), Portuguese (1.32%), and Swedish (1.07%). ("North American Indians", a group which may include migrants of indigenous origin from the United States and Mexico but which for the most part are not considered immigrants, comprise 4.01% of the national population.” 2006 Census: Ethnic origin, visible minorities, place of work and mode of transportation’. The Daily. Statistics Canada. 2008-04-02. Retrieved 11-29-2014.
The Supreme Court of Canada

The Supreme Court of Canada is the highest court in Canada and has final jurisdiction over all matters of Canadian law, both federal and provincial. While Parliament had the power to create a Supreme Court in section 101 of the Constitution, 1867, it did not do so until 1875, primarily because parties could appeal their cases to the Judicial Committee of the Privy Council in England. Parliament abolished criminal appeals to the Privy Council in 1933 and civil appeals in 1949. At that time, the Canadian Supreme Court became the appellate court of last appeal in the country.

The Canadian court system is significantly different from the court system in the United States and can be outlined as follows:

Figure 3: Canadian Court System

In the United States, there are state trial courts, appellate courts, and state supreme courts. Unless a federal question is involved, a decision by one state supreme court will not control the outcome of an identical dispute in another state.  
there are also federal trial courts, appellate courts, and a Supreme Court. The federal courts are courts of limited jurisdiction, which means that they can only entertain certain types of questions or disputes, most of which are federal in nature. In Canada, however, there are no such parallel court systems. There are provincial superior courts of first instance (trial courts) and provincial appeal courts (provincial supreme courts) that decide questions of both provincial and federal law. Although there exists one federal court, it only entertains cases involving national security, the administrative review of federal agencies, claims involving the federal crown, intellectual property, and maritime and admiralty disputes. For both the provincial and federal systems, there is one Supreme Court. Unlike the Supreme Court in the United States, the Canadian Supreme Court is a court of general jurisdiction, which means that the Court may decide all questions that come before it, whether they be provincial or federal law questions. Under such a system the Canadian Supreme Court is the ultimate court to decide a question of Québec law.

The Supreme Court Act of 1875 provides that the Governor General of Canada appoints the members of the Court. As a practical matter, however, the Primary Minister makes the appointments because the Governor General is bound to follow the Prime Minister’s recommendations. Under the Act, three of the judges must come from Québec. The drafters believed that this requirement would adequately protect Québec’s civil law system. There is no constitutional requirement that the prime minister consult either of the legislative houses before making an appointment. As a result of this nomination process, the Court has been criticized as being partisan. As a result, the prime minister has recently made the appointment process much more responsive to
public input. In 2011, when Justice Andromache Karakatsanis and Justice Michael Moldaver were announced as nominees for the Court, they appeared before an *ad hoc* legislative committee in a televised hearing to answer questions concerning their qualifications for sitting on the Court.\textsuperscript{23} Such a process was initiated with the design to enhance the social and democratic legitimacy of the Court. In order to be effective, a Court must be legitimate in the eyes of the public (Brouillet 10-11). The Court must also be able to guarantee its neutrality with respect to deciding disputes between the federal and provincial levels of government. The Supreme Court has played a critical role as a referee between the federal government and Québec.

In addition to hearing appeals from provincial courts and the federal court of appeal, the Supreme Court can also answer questions referred to it by the federal government. Since the first reference in 1892, the federal government has made 77 references to the Court, some of which included the cases that are discussed in Chapters 2, 3, and 4, including *Reference re Supreme Court Act*, ss. 5 and 6, 2014 SCC 21, [2014] 1 S.C.R. 433, *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, and *Reference re Secession of Québec*, [1998] 2 S.C.R. 217.

Under section 96 of the Constitution Act, 1867, the Governor General (effectively the federal Cabinet) has the power to appoint judges of the superior, district, county and federal courts. Concerning the provincial court, this appointing power is

important since such courts have the authority to interpret all questions of provincial and local law. Thus the federal government has the power to appoint those persons who decide how provincial laws are to be applied.24

The Court is a creature of statute, although it gained the constitutional status as a separate and independent branch of government after the adoption of the Constitution, 1982. The independence of the courts is protected by sections 96-101 of the Constitution Act, 1867 that guarantee judicial tenure and salaries. Professor Monahan summarizes the importance of judicial independence in the following remarks:

The rule of law requires, among other things, that government must be conducted according to law, including the law of the constitution. Because the government will often be a party to litigation, it has long been recognized that judges can only uphold the rule of law if they are independent of the government and other agencies of the state. Only an independent judiciary can render decisions that might be unfavourable to a sitting government or that might limit the power of the state.

(Monahan, Constitutional 134).

Under the doctrine of judicial independence, judges must be (1) independent from the legislative and executive branches of government and (2) protected from the legal consequences of their judicial decisions. (Monahan, Constitutional 134). These guarantees are incorporated into sections 96-100 of the Constitution Act, 1867. Under section 99, judges of the superior courts remain on the bench “during good behavior” and can only be removed by the “Governor General on address of the Senate and the House of Commons.” Under section 100 Parliament fixes the salaries of the judges of all superior, district, and county courts of the provinces. Under English common law, these

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24 This system is quite different from the court system in the United States where states are given the power to appoint judges charged with the responsibility of interpreting local laws (Patrick J. Monahan, Constitutional 131).
two sections have been construed to mean that no judge can be removed through an order or decision of the government and that judicial salaries cannot be reduced once a judge has taken the bench for the reason that the state should not be able to indirectly influence a judge by threatening to reduce or eliminate his or her salary (Monahan, *Constitutional* 134 and 206). While these two sections do not apply, at least directly to the Supreme Court justices, the Canadian Supreme Court has held that the guarantees of provincial courts are constitutionally required for all members of the judiciary.\textsuperscript{25}

The Canadian Supreme Court has confirmed that the principle of the rule of law guarantees an individual’s ability to challenge the constitutionality of a provincial or federal law.\textsuperscript{26} A constitutional challenge can take place in two different forms. Under constitutional judicial review, a court may strike down a statute that is inconsistent with a provision of the Constitution of Canada. Under non-constitutional or administrative judicial review, a court may strike down a statute if the enacting legislative body did not have the legislative authority to enact it, even though the statute itself may be validly enacted (Monahan, *Constitutional* 137-141).

Concerning the power of judicial review, however, there are some limitations. Section 33 of the Charter permits the federal Parliament and provincial legislatures to include clauses in their legislation that, for five years at a time, insulate the legislation from Charter challenge. The override can be applied to the political freedoms in section


\textsuperscript{26} As originally recognized in the *Magna Carta* in 1215, the “rule of law” is the doctrine which requires that (1) all state power must be exercised in accordance with the law as recognized by the courts and (2) laws be known to the citizen, be understandable, and control the exercise of discretion by state officials. Monahan, *Constitutional* 495.
2 of the Charter, the legal rights in sections 7 to 14, and the equality rights in section 15. Although this override clause (or the “notwithstanding clause” as it is called) has rarely been used, the fact that it exists enables elected governments to overturn decisions they believe are detrimental to their people’s interests (Howe and Russell 2). As so understood, section 33 preserves the principle of parliamentary sovereignty and encourages a national debate on important or sensitive issues (Johansen and Rosen 1-8). In Chapter 3, I will analyze how Québec used this clause to protect its language and culture.

The Principles adopted to advance the Francophone community vitality

Given the above preliminary information concerning the Constitution Act, 1867, sections 91-93 regarding federal and legislative power, the Senate, and the Canadian Supreme Court, I can now discuss how the Court has used the principles of institutional integrity, federalism, and constitutional dialogue to advance Francophone culture in Québec, notwithstanding the fact that the Court has found certain parts of Bill 101 unconstitutional. For each principle, I have chosen several landmark cases decided after the adoption of the Constitution, 1982 to demonstrate how the principle works. As I discuss in Chapter 1, the adoption of the 1982 Canadian Charter of Rights and Freedoms significantly increased the power of the Court and the range of questions it can be asked to decide, both of which enhanced the role of the Court in important political and social issues (Songer 7). Illustrating my principles with post-Charter cases is accordingly appropriate.
The principle of institutional integrity concerns the Court’s effort to advance the rule of law in Canada by protecting the integrity and composition of the Senate and the Canadian Supreme Court as originally created in the Constitution Act, 1867 and the Supreme Court Act of 1875. As mentioned above, both of these institutions are particularly important to the balance of power between the legislative and judicial branches of government as well as to the ability of the Senate to protect minority groups from the inappropriate domination of the majority. As presently constituted, both are important to the protection of Québec’s language, religion, and culture.

The principle of federalism concerns the Court’s efforts to construe the provisions of the Constitution Act, 1867 in such a manner that provinces retain sufficient legislative power to manage their own internal affairs, and in the case of Québec, particularly those relating to language and education. The Court considers this principle one of the dominant principles of Canadian constitutional law because it recognizes “...the diversity and autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction.”\(^{27}\)

The Court has also acknowledged the importance of this principle because it facilitates democratic participation by giving power to the government thought to be most suited to achieving the particular social or political objective. Under the principle of federalism, the Court recognizes that the Constitution Act, 1867 represented a “negotiated deal” between East and West Canada (Québec and Ontario) that “…included guarantees to protect the French language and culture, both directly, by making French an official language in Québec and Canada as a

whole, and indirectly, by allocating jurisdiction over education and civil and property rights to the provinces.” As the referee between federal and provincial power, the Court has often exercised its authority with considerable humility, acknowledging that the best way to solve a problem is simply to refer it to those who are most affected by it in the first place. In such a manner, the Court has not only affirmed the legislative purpose of Bill 101, but has also recognized that the issues of language policy are best decided, not by the Court, but by Québec.

The principle of constitutional dialogue concerns the role that the Court plays when it strikes down a provincial law as unconstitutional. Some perceive the Canadian Supreme Court as the “top dog” of the political system, essentially dictating the answers to certain issues to the other legislative bodies, regardless of political pressures and majority opinion. Under this view, such critics claim that the Court has usurped key policy functions that belong to other political actors, a move that undermines the democratic process (Kelly and Murphy Governing 217-18). A closer examination of the Court’s role shows, however, that this perception is not accurate. “One of the chief responsibilities of the Supreme Court is to interpret and apply the constitution as a framework of rules that balances a regard for the unity and integrity of the federation as a whole with a concern for the diversity of its constituent units” (Kelly and Murphy, Governing 220). When the Court is called upon to decide the constitutionality of a statute, “…its primary role is to articulate an understanding of the broad principles governing the distribution of rights and authority among the actors in question, while leaving political actors as free as possible to negotiate or legislate specific solutions to

these disputes that are consistent with the constitutional principles at hand” (Kelly and Murphy, *Governing* 220). A dialogue is started when a judicial decision striking down a law on Charter grounds is followed by some action by the competent legislative body which was intended to respond, in some fashion, to the Court decision (Hogg and Bushell, *Charter* 81). Kelly describes this process as “meta-political,” by which he means that the Supreme Court’s federalism jurisprudence “supplements rather than subverts the constitutional role of political actors” (Kelly, *Governing* 218). When the Court strikes down a statute as unconstitutional, it rarely blocks the legislative objective, but rather facilitates a dialogue between the courts and legislative bodies as to how to solve the problem that the statute was intended to address in the first place.\(^{29}\) In most instances, the legislative body is able to achieve its purported goal with rather modest amendments to the offending statute. On this point, it is interesting to note that Hogg and Bushell surveyed sixty-five statutes that the Court struck down as unconstitutional. In two-thirds of these, they found that only a minor legislative response was needed to ensure the constitutionality of the offending provision (Kelly and Murphy, *Governing* 221).

In this role, the Court does not offer any comprehensive solutions but simply articulates the constitutional boundaries within which political actors must operate. The Court’s key concepts are those of rationality and proportionality, and within the scope of these principles the appropriate “…parliamentary body is free to craft a legislative

\(^{29}\) See, Hogg, Peter W. and Allison A. Bushell. "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)." Osgoode Hall Law Journal 35.1 (spring 1997) at page 79. Some scholars have been critical of the dialogue theory, and I cite a number of their articles in footnote 115.
response “that is properly respectful of the Charter values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded” (Hogg 79-80). In such a manner, the Court advances a strategy that not only respects the democratic process, but also facilitates the protection of cultural differences.

Applying the principle of constitutional dialogue, one gets a very different perception of how the Court operates within the Canadian federation. Under this principle, the Court performs a role much more deferential to those legislative and democratic processes that shape and control Québec’s internal affairs. As far as the Court is concerned, the question is never “Who won?” but rather, “Did we get the people talking about how to solve the problem at hand?” Using the idea of subsidiarity, the Court encourages political actors to solve social, legal, and economic problems within the constitutional framework of the Constitution Act, 1867. The Court merely steps in to provide constitutional guidelines, if and when the political processes either fail or break down. In such a manner, the Court’s decisions have played a critical role in Québec’s ability to protect its language and culture, all within certain constitutional parameters.

**How the Canadian Supreme Court has advanced and protected the language and culture of Québec**

In light of the above, my argument is that the Canadian Supreme Court has operated as a hidden ally in advancing the language, laws, and culture of the Québec Francophone community. My dissertation consists of four chapters. In Chapter 1, I discuss the history of Québec’s Francophone community, starting from the 1960s, and
focus on the themes of identity, nationalism, and language. I also explain how generally the Canadian government works, and specifically, how the Canadian Supreme Court operates within the Confederation. One must have a working understanding of these subjects in order to appreciate how the Court has advanced and protected Québec’s community vitality.

In the remaining chapters, I contend that the Court has promoted a principled jurisprudence that has protected and advanced Québec culture and language. Specifically, I argue that the Court has enhanced the community vitality of Francophone Québec through principles of institutional integrity, federalism, and constitutional dialogue. As a result of the way Supreme Court decisions are reported by the public media, I contend that such principles are often lost in the adversarial political rhetoric of who has “won” or “lost” a particular case. For example, in Devine v. Québec (Attorney General), [1988] 2 S.C.R. 790 and Ford v. Québec, [1988] 2 S.C.R. 712, the Court struck down Bill 101’s requirement that commercial signs be exclusively in French. The media reported the decision as a “loss” for Québec, which incited public riots in Montreal.30 Regarding the holding of the case, the Court simply said that the Attorney General for Québec had produced no evidence that bilingual signs would threaten the French language. In light of this, it certainly was not surprising that the Court struck down the unilingual requirement. A close reading of other parts of the decision reveals that the Court advanced the vitality of the Québec Francophone community by acknowledging Québec’s distinct status within the Confederation as well as the legitimacy of the policy.

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underpinning Bill 101, two significant concessions long requested and fought for by Québec. The Court further made it clear that Bill 101 was in response to a pressing and substantial need to protect the French language, which justified limiting Canadian Charter rights. As I discuss in Chapter 3, such an admission not only validated Québec as a distinct and separate nation, but it also acknowledged Québec’s efforts to protect the language as a legitimate exercise of provincial power. After the Ford case, the Québec National Assembly was able to amend Bill 101 such that it protected the French language with a minimal impairment of Charter rights.

In Chapter 2, I contend that the Court has advanced Québec’s Francophone culture by promoting the principle of institutional integrity. Under this principle, the Court has honored the constitutional bargain negotiated by Québec as reflected in the Constitution Act, 1867 and the Supreme Court Act of 1875 by resisting legislative attempts to control or change the composition of the Supreme Court and the Senate. In Reference re Supreme Court 2014 SCC 21 (2014), the Court held that a judicial candidate for a Québec seat on the Supreme Court must be an existing member of the Québec bar. In so holding, the Court protected Québec’s civil law tradition and ensured Québec’s confidence in the integrity and judicial independence of the Court. Although the Court is a creation of statute, the Court nonetheless held that Parliament could change the composition of the Court only by constitutional amendment, thus protecting the Court from political interference and influence. In Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21, [2014] 1 S.C.R. 433, the Court rejected the federal government’s efforts to reform the Senate by unilaterally imposing term limits for Senators and by holding
non-binding “consultative elections” for the selection of future senators. In so doing, the Court honored the intentions of the founding fathers that the Senate was never intended to be a body with democratic legitimacy. The Court further held that such legislation subjected the Senate to political pressures that could potentially compromise its independence in reviewing House legislation, a possibility that could limit its role as a legitimate protector of the constitutional rights of individuals or minorities.

In Chapter 3, I argue that the Court has promoted the Francophone culture of Québec through the principle of federalism in which Québec has the legislative authority to protect and manage its own affairs. To demonstrate this, I discuss *Ford v. Québec*, [1988] 2 S.C.R. 712, *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, and *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837. In *Ford v. Québec*, the Court considered the constitutionality of certain sections of Bill 101. In *Re Reference re Secession of Québec*, the Supreme Court ruled that neither the Canadian constitution nor international law allowed Québec to secede unilaterally from Canada without a constitutional amendment. The Court held, however, that if a clear majority of Québécois unambiguously opted for secession, there existed a constitutional duty that required the federal government to negotiate with Québec on the issue. This obligation, according to the Court, was implicit in four principles that inform and sustain the constitutional text: federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Under these, neither Québec nor the federal government could dictate the terms of secession. Finally, *In re Reference re Securities Act*, 2011 SCC 66 (2011) the Court struck down an effort by the federal government to create a Canadian
Securities Commission to regulate the sale and purchase of stocks and securities. Under all of these decisions, the Court construed the Constitution Act, 1867 in such a manner as to give significant legislative power to the provinces, a result that facilitates the protection of their own culture and language.

In Chapter 4, I argue that the Court advances Québec Francophone culture by developing a principle of constitutional dialogue in which the Québec National Assembly is ultimately given the freedom to protect its culture and language, all within certain Charter guidelines. Here, I challenge the perception of the Court as the “top dog” in the political system that dictates what other political players may or may not do. Rather, I argue that the Court plays the part of a mediator who announces the rules of the debate, letting the political players work out the particular solution within certain constitutional guidelines. As such, the Court facilitates the process in which the legislative body can remedy the constitutional defect and yet still solve the problem the offending statute was originally designed to solve. Such an approach respects the democratic process and usually allows a province to take the necessary measures to protect its particular language and culture. In such a role, the Court does not provide the answers. Rather, it initiates “…a dialogue between courts and legislatures in which Charter values play a more prominent role than they would if there had been no judicial decision” (Hogg, Charter 79). To demonstrate this dialogue principle, I discuss Ford v. Québec, [1988] 2 S.C.R. 712, Solski (Tutor of) v. Québec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14, Reference re Secession of Québec, [1998] 2 S.C.R. 217, and Reference re Securities Act, 2011 SCC 66, [2011] 3 S.C.R. 837.
To demonstrate my three principles, I chose cases with five different criteria in mind. First, for obvious reasons, I limit my choices to those cases decided by the Canadian Supreme Court, although constitutional issues can be (and are) considered by the Québec provincial courts as well. I accordingly disregarded certain decisions from the Québec Court of Appeal that addressed some of the issues that I have discussed herein.\(^\text{31}\) On questions of both federal and provincial law, the Canadian Supreme Court has the final word.

Second, I focus on cases that, for the most part, have been decided within the last ten years.\(^\text{32}\) These cases are the most relevant to my argument because they reflect the current state of the law. As of the date of this dissertation, they have not been limited or overruled. They are all good law.

Third, I focus on cases in which the Court sought to protect certain parts of the Constitution, 1867 that Québec had negotiated in order to protect its language, law, and

\(^{31}\) For example, the Canadian Supreme Court was not the first court to consider the constitutionality of the proposed legislation concerning the Senate. When Parliament introduced Bill C-7, the Government of Québec asked the Québec Court of Appeal to advise whether Parliament could unilaterally change the terms for Senators or introduce consultative elections for the appointment of Senators. The Québec Court held that it could not. See *Projet de loi federal relative au Sénat, (Re)*, 2013 QCCA 1807 (CanLII)(the “Québec Senate Reference”). Rather, it found that that these changes required the consent of the legislative assemblies of at least two-thirds of the provinces that represent, in the aggregate, at least half of the populations o all the provinces. In the view of the Court, the framers of the Constitutional Act, 1867 intended to constitutionally entrench the status quo with response to the Senate until the respective federal and provincial governments could reach a broad consensus on the matter of Senate Reform. (*Reference re Senate Reform* at para. 11).

culture. These cases are important because they preserve Québec’s confidence in the integrity of the Court. In Reference re Securities Act, the Court protected provincial legislative power (section 92), in Reference re Supreme Court the Court protected the composition and integrity of the Supreme Court, and in Reference re Senate the Court protected the Senate’s role to check, when necessary, the power of the Lower House, particularly in connection with minority rights.

Fourth, I focus on cases in which the Court considered the constitutionality of Bill 101. As mentioned by Bourhis, Bill 101 has had a dramatic impact on the language issues in Québec, particularly in the area of education. Since the adoption of the Canadian Charter of Rights and Freedoms, Anglophone groups have successfully challenged the constitutionality of Bill 101 in five different cases. I chose three of these to demonstrate how the Court advanced the Québec Francophone community through the principles of federalism and constitutional dialogue, notwithstanding the Court finding a section of Bill 101 to be unconstitutional.

Finally, I focus on cases in which the Court advanced those constitutional principles that promoted diversity within the Confederation. I believe these cases are important because they suggest that the federal-provincial duality is often an artificial distinction that does not accurately describe how the federal and provincial governments currently operate. As a matter of fact, the Court has made it clear that the Constitution, 1982 can promote both unity as well as diversity. It is not a zero-sum game in which there is always a winner and always a loser. To demonstrate this, I discuss Reference re 

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Secession of Québec in which the Court identifies those principles that sustain and inform the Constitution, 1982: federalism, democracy, rule of law, and protection of minority rights. I argue that all of these protect and promote Québec’s desire to promote its own culture.

Regarding each principle of institutional integrity, federalism, and constitutional dialogue, I demonstrate the operation of the principle through several cases. Could one find older cases contrary to what I am arguing herein? I suppose that one could, particularly concerning the principle of federalism that has a long and diverse history. The role of government in modern society has changed drastically over the last fifty years, and the doctrine of federalism has changed with it.34 As a practical matter, the federal and provincial governments have moved beyond the “watertight compartments” of sections 91 and 92 and seek to accomplish what needs to be done through a spirit of cooperative federalism (Monahan 247-251). In short, concerning some governmental projects, they act more like partners in a joint enterprise rather than adversaries.35

The balance of my dissertation is devoted to showing how the Court has advanced and protected, sometimes in subtle ways, the community vitality of Francophone Québec. In so doing, the Court has done several things. First, it has affirmed an understanding of Canada as the joining of two different nations, with each nation negotiating the means to protect their own culture and language through the institutions of the Supreme Court and


Senate. Second, it has interpreted the Constitution Act, 1867 in such a way as to give Québec a significant amount of provincial power to manage its internal affairs. Finally, the Court has maximized the democratic dialogue between the courts and the legislative bodies, thus developing a jurisprudence that supplements rather than subverts the constitutional role of political actors.
Chapter 1: Québec’s Quiet Revolution

In order to appreciate and understand the decisions of the Canadian Supreme Court discussed in subsequent chapters, it is necessary to know how Québec has changed over the last fifty years and how the Canadian Confederation is designed to operate. A review of modern Québec history is also important to place my argument in context. Modern Québec history is marked by the assertion by the Québécois of their identity and a desire to regain a dominant position in Québec. This process has been a complicated one, the result of many social, economic, legal, and political factors. My argument is that the Court has played a significant part in this process—not the only part—but an important one. In this Chapter I discuss some of these other factors that have made Québec what it is today.

Bringing Québec into the modern age: The Quiet Revolution

As of 2006, the population of Québec was 7,651,000, or approximately 23% of the total population of Canada. French is the official language in Québec, and about 95% of the people of Québec speak French as either their first or second language, and for some, their third language.36 Because French most often exists with English in Montréal,

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36 Quebec is commonly divided into three components: the Capital (Québec City), the metropolis (Montreal), and the regions (essentially all the rest). Roughly half of the population lives in the Montréal area, the cultural and economic engine of the province. The island of Montreal is also the only area where French is not the native language of the majority, and where bilingualism or multilingualism is the norm.
the Québécois often perceive Montreal as the barometer of how French will survive in the years to come. For that reason, many of the disputes over language and identity that end up before the Supreme Court often have their origins in the streets and schools of Montreal. In this regard, it is interesting to note that the Québécois often talk of Montreal in military metaphors, referring to it as a “French outpost” or fortress. The sovereignists claim that if they lose Montreal, then the rest of Québec will inevitably follow suit.

Prior to the 1960s, the Roman Catholic Church provided educational, social, and health services in Québec and was the most powerful institutions in the society. In 1960, there were roughly 1500 confessional school boards, almost all of them Catholic. In rural Québec, education was a low priority, which explains why much of the Francophone population was poorly educated, at least in comparison with their Anglophone compatriots. In the countryside, it was the exception, rather than the rule, for a student to progress beyond the 6th grade. By the 1960s, the educational system, including the curriculum, was obsolete and produced one of the highest dropout rates in the country; half of all Québec students were leaving school by the age of fifteen. Given this, Francophones mostly worked in the factory lines, while Anglophones belonged to the professional and managerial class. Outside of the agricultural sector, the Anglophones controlled the Québec economy. As a result, English was the language of business in Québec, while French was only marginal and of little consequence to the functioning of


38 *ibid.*
the economy. Given its prestige and career-building potential, English was the language of choice for immigrants when they settled in the province.39

Prior to the 1960’s, French Canadian society was defined not only by its language, but also by its religion. The Church advocated those values that Louis Hémon pictured so lyrically in his 1913 novel Maria Chapdelaine: the importance of the parish, the patriarchal family, the virtues of the agrarian life, the mistrust of the outside world, a desire to resist change, and the redemptive comfort of the Catholic religion.

After 1960, however, all of this changed. Québec underwent what is called the “Quiet Revolution.” The term refers to the political, institutional, and social reforms that took place between 1960 and 1966 by the government of Premier Jean Lesage and more generally to the ascendency of liberalism and neo-nationalism in the period from 1960 all the way up into the 1990s (Linteau 307). The term is also related to developments occurring outside of Québec, including the wave of social and political reforms that swept Europe, China, the United States, and Africa where 32 countries gained independence between 1960 and 1968. In this period Québec government seized control over health, education, and local government from the Catholic Church. Many residents of Québec ceased to consider themselves as French Canadians, but rather residents of a nation within the Canadian Confederation (Jones 215). It was during this period that they began to refer to themselves as “Québécois.”

The Quiet Revolution was a period of social and political reforms, government intervention, and economic prosperity. As the baby boomers came of age, they

questioned traditional values of family, religion, morality, advocating a variety of different lifestyles. As was true in other parts of the western world, they organized their own student rebellion in 1968, creating a new counterculture of drugs, music, and sexual freedom. The availability of the contraceptive pill rocked the fabric of Québec society and allowed, for the first time, women to move more easily from the home into the job market and to get a better education. This transformation affected women’s education, their family and economic status, and employment.

When Jean Lesage and the Liberal Party came to power in 1960, “…two-thirds of young adults in Québec did not have a high school diploma. Although Francophones made up 80 per cent of Québec’s population, only 47 per cent of them were employed in francophone-owned businesses.” When Pierre Vallière called French Canadians the “white niggers of America” in 1968, he was complaining of the hegemony of the Anglophones over the Francophones in Québec, a state that Michele Lalonde decried in her 1968 poem “Speak White.” In 1960, Francophone men earned less when compared to Anglophone men in Québec (52 percent) than black men did relative to white men in the United States (54 percent) (Fortin 90). In Montréal, Anglophone and foreign capital

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Prior to the availability of the pill, the average number of children for married women living in Québec was roughly 8. Between 1959 and 1971, Québec moved from the position of having the highest birth rate in Canada to that of the lowest. In 1971, it had fallen below the critical threshold of 2.1 children, the minimum replacement level. The diminishing proportion of Francophone Québécois in Canada made them feel threatened, thus exacerbating the language issues within Québec and contributing to the rise of separatism.


Speak White is a French language poem composed by Québécois writer Michèle Lalonde in 1968. In the poem, she denounces the oppression of French-speakers in Québec and challenges the racist domination of all imperialists, including the Americans and English speaking Québécois. The term “speak white” is a racist insult used by Anglophones against those who speak other languages in public.
controlled the city’s major corporations, and Anglophones monopolized senior management positions.\textsuperscript{43}

During this period, the key word was “rattrapage” or “catching up.” This referred to an acceleration of the process of modernizing Québec society and a dramatic intervention of the government in areas that had previously been dominated by the Catholic Church, particularly in education, healthcare and social services. Successive governments did not limit themselves to simply taking over existing institutions, but they created a host of other programs that ushered in the age of the welfare state, implementing a social strategy on the foundation of unemployment insurance, family allowances (welfare payments), health care (Medicare) and old age pensions (social security). The government also became Québec’s largest and most important employer, creating a huge bureaucracy of educated and skilled technocrats.\textsuperscript{44}

The government made massive investments in the construction of government buildings, schools and the public roadways, with more than one-half of all government expenditures going to education and social affairs (Linteau 508). It also made efforts to modernize manufacturing facilities, encourage the development of new companies involved in the production of capital goods and high-technology, and improve the

\textsuperscript{43} In 1972, the Gendron Commission summarized the matter as follows:

[T]he French language is particularly characterized by inferior duties, small enterprises, low incomes, and low levels of education. The domain of the English language is the exact opposite, that of superior duties involved initiative and command, and large enterprises, and high levels of income and education.


\textsuperscript{44} In the area of civil service, for instance, the number of government employees in Québec City alone rose from 15,000 to 45,000 in twenty years (Linteau 404).
infrastructure of the province. In an effort to increase Francophone economic influence and participation in the management work force, the Québec government also began to buy up corporations in those sectors of the economy it considered vital: culture, natural resources, financial institutions, and utilities (Linteau 329). In the energy sector of the economy, the most prominent example of this strategy was the government’s nationalization of private electricity production and distribution outside Montreal, all of which were integrated into Hydro-Québec in 1963. This move allowed Québec to not only make rates uniform throughout Québec, but also to service remote areas. Farmhouses were no longer lit by candles. Significantly, the company created thousands of jobs for Francophones. The nationalization of electric companies therefore became the symbol of a new spirit of nationalism that had been dormant for many years (Linteau 308). All of these projects not only stimulated the economy, but also fired Québec’s public imagination and national pride: the Montreal metro, which became operational in 1966; the Expo 67, the 1967 world’s fair in Montreal; and the Manicouagan 5 dam, opened in 1968 (Linteau 309).

In an effort to accommodate the educational demands of the baby boomer generation, Québec built or expanded the network of secondary schools, CEGEPS, and universities. Major bills were introduced and passed in this period that required school boards to ensure that secondary education be offered through grade 11, required free textbooks, changed the compulsory education from 14 to 15, increased school grants and financial support, and facilitated access to the universities. Québec created a new Department of Education, which consolidated fifty-five regional Catholic and Protestant
school boards, to ensure that all young people could get a secondary education (Linteau 485).45

Unlike any other Canadian province, Québec created four stages of education for all children. The primary course is six years, followed by a five year secondary course. After that, there is an optional post-secondary educational program of 2 to 3 years (CEGEPs), depending upon whether or not the student wishes to get a vocational education or enter into the university system. The university program is then available and is itself divided into three levels, with undergraduate, master, and doctoral studies. All of the education up through the CEGEP is free. At the university level, students pay a small portion of the educational costs. During this period, Québec also created (or expanded) the universities throughout the province, including the University of Montreal, Laval University, and the Sir George Williams University (Linteau 494). Generally speaking, these efforts improved the educational level of the population. Almost all children below the age of 15 now attend school. In 1971, only 57.7 per cent of the population had completed 9th grade; by 1981, the figure had increased to 73.6 per cent, by 2010, the figure was 85.4 per cent (Linteau 493).46

The rapid increase of students within the public educational system was reflected in the government educational expenditures. In 1960-61, the Québec government spent $181 million, or 24.4 per cent of its budget, on education. In 1982-83, this had increased to more than $6 billion, or 27.4 per cent. This support was particularly dramatic with women. In 1960, only about 14 percent of university students were women; in 1983, it was 50.2 per cent. Because of government grants, the private school system in Québec also flourished. These grants amount to as much as 80 percent of the average cost of public education and represent the greatest public support to private education in Canada (Linteau 487).


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In the financial sector of the economy, this trend of government intervention continued. In 1968, Québec created the Department of Financial Institutions, Corporations and Cooperatives that was designed to regulate the rapidly expanding *les caisses populaires*, insurance companies, provincially incorporated trust companies, stock brokerage and real estate (Linteau 343). The government move that had the greatest impact was the creation in 1968 of the *Caisse de Dépôt* that administered and invested the money collected through the Québec Pension Plan. In a short time, the Caisse had acquired the largest stock portfolio in Canada and was investing huge amounts of money into Québec Francophone companies.47

Along with the increase in the level of education, the government took measures to expand Québec’s facilities for cultural dissemination and promotion, all of which resulted in an explosion of cultural output in literally every area, including literature, theatre, and music. As was true in many parts of the western world, ideas about the role of government and culture were changing. Instead of being seen as strictly decorative or as the monopoly of a privileged few, culture began to be seen as an essential part of the life of a society, reflecting solidarity among people, visions of the world, and values of concern to the society as a whole (Linteau 586). Québec’s expenditures on culture and

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47 One can also measure the degree to which the Francophones were beginning to gain more control over their economy by looking at Francophone corporate ownership in Québec. Starting in the 1960’s and continuing up through 1978, the French Canadian share of the economy increased from 47 percent to nearly 55 percent. The most dramatic increases in Francophone control were in construction and finance (Linteau 331). Continuing up through the 1980’s, the percentage of Francophone controlled establishments continued to increase in almost all sectors of the economy including agriculture, mining, manufacturing, construction, transportation, communication, financial institutions, and public administration. Although this trend was true to some extent for the large corporations, most Francophone business activity took place through small and medium-sized businesses. All of this caused a power shift from the Anglophone to Francophone communities.
recreation increased from $5.9 million in 1957-58 to more than $428.2 million in 1980-81 (Linteau 589). The library system was modernized and expanded. The number of book stores, museums, and exhibition centers increased dramatically. With increased government assistance, Montreal and other cities sponsored commercial and artistic events that became quite popular, including book fairs, festivals of all kinds, film, video, classical music, jazz, theatre and others. Private organizations also arose to support the development of Québec literature, theatre, visual arts, and music.48

While the growth of government intervention in Québec started well before the Quiet Revolution, its increase during this period was unprecedented. With the rapid growth of public spending, the government created a host of new, prestigious, and influential positions that were filled by a new Francophone bourgeois class of government technocrats, managers and executives, and intellectuals. This new class was well educated and exhibited a marked effort to revitalize and expand Francophone influence in Québec. The composition of the elite in the province began to change, becoming more and more Francophone. This change was also fueled by the post-war boom of prosperity. From 1961 to 1984, personal income rose from $7.8 billion to $87.8 billion. Disposable income increased by 866 percent over this period (Linteau 408-409, 457).

During the period of the Quiet Revolution, the issue of language became more important, both nationally and among the new immigrants. In 1969, the federal government passed the Law of Official Languages, making all federal institutions

48 An example of this is the ADISQ (Association Québécoise de l'industrie du disque, du spectacle et de la vidéo) which sponsors an annual award ceremony to reward Francophone musicians and singers. It is similar to the Grammy Awards in the United States.
bilingual. While French had survived in Québec for over two centuries, it had done so mainly in a world of isolated, rural parishes that were homogeneously French-Catholic and where contacts with English and the threat of Anglicization were limited. Outside Montreal, Québec’s population had always been overwhelmingly French-speaking. In Montreal, however, English was the language of upward mobility. Visible and powerful English-language institutions confronted Francophones every day, and Montreal was well integrated culturally and economically into the continental English-speaking world. In the 1960s, it also became apparent that Montreal immigrants were largely attending English as opposed to French schools because they thought (1) that English would give their children more mobility in Anglophone North America and (2) that English was the language of business and hence of economic success (Linteau 436). The Montreal Francophones perceived this as a threat to their language and culture.

The matter came to a head in 1967 when the school board in Saint-Leonard (Montreal) replaced bilingual classes in English with a unilingual Francophone education. An Italian parent objected, and the issue gained the attention of the entire province. The choices were clear: one side favored the right of the parents to choose the language of instruction for their children; the other side wanted to impose French language education on everyone. The rights of the individual were pitted against the rights of the collective community.

Because the language issue was tightly tied to rising nationalism, this controversy became highly divisive, resulting in demonstrations that degenerated into full-blown riots in the Italian neighborhood of Saint Leonard. Hundreds were arrested, imprisoned, and
injured. Order was eventually restored through curfews and the implementation of the Riot Act (Haque 48).49

The government attempted to stay the controversy by passing Bill 63, which favored the principle of freedom of choice and, at the same time, encouraged the promotion of French in Québec. The Québec nationalists were outraged that the Bill gave parents the choice to send their children to English schools. The government appointed a commission to study the issue and, in 1972, the Commission of Inquiry on the Position of the French Language and on Language Rights in Québec issued a recommendation that French become the common language of Québec in schools and in the workplace. On the basis of this recommendation, the Bourassa government passed Bill 22 in 1974 that made French the official language of Québec and sought to ensure its preeminence in the workplace and in other sectors of activity. Regarding the school issue, parents were allowed to send their children to English speaking schools only if the children could pass certain tests that demonstrated that they already knew English. The Anglophones protested strongly to Bill 22, and the language tests became the symbol, at least to the Anglophone community, of Francophone oppression. The Francophone nationalists thought that it did not assert French-language rights strongly enough. Both sides called for more legislative action.

In 1977 the Québec Assembly passed Bill 101 or the Charter of the French language, which was designed to increase the “francisation” of Québec. In the words of Camille Laurin, the principle architect of the Bill, the law’s aim was to "make Montreal

49 The “Riot Act” was an originally an Act of the Parliament of Great Britain that allowed police to order groups of twelve or more people to disburse or face criminal penalties. In Canada, the Act was incorporated into the Canadian Criminal Code. See, R.S., c. C-34, s. 63.
as French as Toronto is English." According to Laurin, Bill 101 was a form of “shock therapy” designed to free Québec from the Anglophone colonial yoke of conquest and domination (Levine 113). As mentioned in the introduction, Bill 101 declared French the official language of Québec, making it the language of government, work, instruction, communication, commerce and business, regardless of the linguistic composition. Subject to certain exceptions, Bill 101 also made it clear that all immigrants were obliged to send their children to French primary and secondary public schools.

One could describe Bill 101 as a program of “affirmative action” intended to change those practices that, over the course of time, had made English the dominant language of the business community, particularly in Montreal. The Bill also reflected the perception that a policy of bilingualism was arguably a menace to the vitality of the French language. That was one of the reasons for which so many of the language battles took place in Montreal where there existed a strong Anglophone community. While the Bill clearly discriminated against other language minorities, both Anglophone and Allophone, the drafters wanted to drive home the point that on this particular issue the majority rules. According to a former president of the Conseil de la langue française, M. Plourde, Bill 101 demonstrated a very simple truth:

Au Québec, c'est le français. Le français est la langue commune de tous les Québécois: francophones, anglophones et allophones. C'est la langue que tous les Québécois ont le droit de posséder, de savoir et d'utiliser.

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50 As a result of this perception, Québécois sovereignists often talk of Montreal in military metaphors, referring to it as a “French outpost” or “fortress.” If they lose the “battle” of Montréal, they apparently believe that the fall of the rest of Québec is not far behind. See, Martel, M., M. Pâquet, et al., Speaking up: a history of language and politics in Canada and Québec. Toronto, Between the Lines. 2010 at page 203.

After 1960, Québec neonationalism was marked by two dominant themes. First, there was a more modern concept of the state, stripped of its religious dimensions, that was designed to give the French language a priority in all areas of political, social, and economic life. In contrast to other areas in Canada, this promotion of the Francophone community became a central (though not exclusive) concern in shaping public policy in Québec (Levine 151). Second, this new nationalism was associated with a vision of political and social reform. In this period, the issue of Québec identity often manifested itself in political protests against either the Anglophone majority or, more specifically, the federal government in Ottawa. Because these confrontations often fueled the nationalistic movement in Québec, a couple of comments about them are in order.

Throughout the 1960’s, a number of terrorist groups chose political violence to advance their goal for Québec independence. The violence reached its climax in October of 1970 when the Front de Libération du Québec (FLQ) kidnapped a British diplomat, James Richard Cross (who was eventually released) and Québec’s labor minister, Pierre Laporte, who was found dead a few days later. Trudeau sent federal troops into Québec and proclaimed the \textit{War Measures Act}, which significantly restricted democratic liberties. Thousands of warrantless searches were undertaken and hundreds arrested and imprisoned without a trial.
While the FLQ did not enjoy the support of the Québec population, the Québécois objected to the way the federal government handled the crisis. Those who were wrongly arrested found the incident particularly traumatic, permanently scarring the Québécois mindset, which certainly favored the drive for Québec independence.

Following the “October crisis,” the Parti Québécois (PQ) won the 1976 general election with 46% of the popular vote, giving the party a solid majority of seats in the National Assembly. The party’s unexpected victory was the result of the dissatisfaction of the Bourassa government and the anger provoked at the 1974 adoption of Bill 22 (Meisel 247). The election sent shock waves throughout Canada because never before had Québec elected a party that advocated Québec sovereignty. Over the next four years, the PQ campaigned for public support so it could present a referendum on the question of Québec sovereignty. It laid the groundwork for the referendum by establishing a legislative framework for popular consultations and publishing papers on the details of its proposal (Linteau 537), and finally, in 1985, it called a referendum in the following statement:

The Government of Québec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations.

On these terms, do you agree to give the Government of Québec the mandate to negotiate the proposed agreement between Québec and Canada?

As one would have expected, the Referendum split the province along linguistic and cultural lines. More than 85 per cent of the Québécois voted, with 40.4 per cent voting “Yes” and 59.6 per cent voting “No.”
Notwithstanding the loss in the Referendum, Québec nationalism continued to grow over the next decade, resulting in yet another referendum in 1995. This time the results were much closer: 49.6 per cent voting “Yes,” and 50.4 percent voting “No.”

Throughout this period, Québec wanted to change the Canadian constitution so that Québec had a special status within the Canadian confederation. Under the Constitution, 1867 Québec had a bilingual government, civil (as opposed to common) law, and the guarantee of denominational (Roman Catholic) schools. But the new leadership wanted more, demanding broad powers and resources in the areas of culture, communications, social services, regional development and immigration (Linteau 545). In short, Québec wanted certain constitutional changes that would give it not only more power, but would recognize it as a distinct society or even a distinct nation within Canada. If these changes were not made, so Québec argued, the Canadian Anglophone majority would eventually threaten the Canadian French-language minority, most of whom, of course, were concentrated in Québec. From this perspective, the proposed constitutional changes envisioned Canada as a decentralized country based on the principle of equality between the two major ethnic groups. Québec nationalists attached a variety of labels to this idea, including “two nations,” “associate states,” “special status,” “cultural sovereignty,” and “sovereignty-association.” While each of these labels may have had its own particular content, they were all primarily inspired by the idea of asserting Québec’s distinct character (Linteau 546-548).

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The federal government had a different vision of Canada. They viewed the Québec mentality as primarily tribal or ethnocentric in nature. In the eyes of Ottawa, there was only one Canadian nation, and the cultural differences of any one province should not be constitutionally recognized beyond the provisions made in the Constitution, 1867 (Linteau 547). In order to govern Canada effectively, Ottawa argued that it had to retain a preponderant position over the provinces, including Québec (Linteau 548). Specifically, the federal government wanted to amend the Constitution, 1867 so that amendments were possible without the consent of Québec. It further wanted to adopt a Charter of Freedoms and Rights that would take precedence over both federal and provincial legislatures, the application of which would be decided by the Canadian Supreme Court. Québec opposed both changes. The debate eventually culminated in the “patriation” of the Constitution, 1982 that allowed those changes requested by the federal government.\(^\text{53}\) However, Trudeau, the prime minister of Canada at the time, submitted the proposed Constitution to the British Parliament without the knowledge (or consent) of Québec. René Lévesque, the prime minister of Québec, later referred to this incident as “la Nuit des Longs Couteaux (the Night of the long knives).”\(^\text{54}\) Québec perceived the

\(^\text{53}\) “Patriation” was the political process through which Canada became a sovereign country. Until 1982, Canada was governed by a constitution of British laws that could only be changed by British Parliament, although with the consent of the Canadian government. The word “patriation” was invented from “repatriation” to mean “bringing it home to Canada.” Since the Constitution, 1867 was not a Canadian Act, it could not be “restored” to Canada; hence, the idea of patriation was intended to convey the idea of the Canadian Constitution needed to be “patriated” from Westminster to Ottawa. See, Hogg, Peter W. Constitutional Law of Canada. 2003 Student Ed. Scarborough, Ontario: Thomson Canada Limited, 2003. 55.

conduct of federal government as an act of treachery, a perception which fueled the sovereignist movement leading up to the 1995 Referendum.

**The Design of Canadian Confederation: Constitution, 1867**

In order to understand the founding principles of Canadian Confederation, one must first appreciate that at the time of Confederation, Canada was comprised of the Canada colony that was divided into Canada East (Québec) and West (Ontario)) and the maritime colonies of Nova Scotia, New Brunswick, and Prince Edward Island. Prior to Confederation, the Canada colony operated on a principle of duality to ensure that neither of the two main linguistic groups in the colony could govern without the consent of the other. As a result, it was extremely difficult for any federal government to remain in office, since no single group could maintain a majority in both sections of the province of Canada. Between 1841 and 1867, for instance, there were no fewer than eighteen different governments in office (Monahan, *Constitutional 48*). As a result of such deadlocks, political leaders were convinced that fundamental structural reform was necessary if government were to become workable and effective.

Accordingly, over the summer of 1864, an eight-member Cabinet formulated a proposal for a federal union of British North America. The key feature of the scheme was a federal division of powers the exact opposite of what existed in the United States, with the general or residual power residing with the national government, and the provinces having certain enumerated powers (Monahan, *Constitutional 49*). The plan was presented to the Charlottetown conference in early September of 1864. After five
days of meetings, the delegates agreed to meet again in Québec in early October to work out the details of a more general union of the British colonies. The Québec conference produced the blueprint for the BNA Act (now known as the Constitution Act, 1867) with a list of seventy-two Québec resolutions.

In the constitutional negotiations, Québec wanted to make sure that it retained sufficient power in the new confederation to manage, protect and preserve its own language and culture. As one might expect, the Anglophone faction had a different agenda. According to Sir John Macdonald and the other English federalists, Canada was to be a highly centralized federation, largely because of their admiration for the highly centralized form of government in the United Kingdom. This intention was reinforced by the aftermath of the American Civil War, one cause of which was widely believed to be the granting of excessive powers to the states by the United States Constitution. The French Canadians, however, wanted Canada to be a loose confederation of largely independent provinces that would preclude an excessive concentration of power in the federal government, thus serving as a check against tyranny. The final draft of the Constitution, 1867, reflects this duality, with specific constitutional provisions designed to protect and preserve certain provincial rights, including educational rights of religious minorities and the use of the English and French languages was guaranteed in Parliament and the Québec legislature as well as in certain courts. The adoption of a federal structure was itself motivated by the desire to provide the French-Canadian minority with access to and control over provincial political institutions through which they could preserve and promote their specificity (Monahan, Constitutional 15). Consistent with the
principle of subsidiarity, the drafters also designated exclusive areas of legislative authority, with the provinces having jurisdiction over matters concerning local property rights and the federal government over matters of trade and commerce, defense, transportation, communication, the military, banking and insolvency.

It is perhaps easiest to get an idea of how the Canadian constitution operates by comparing it with the constitution of the United States. The drafters of the United States Constitution adopted the doctrine of separation of powers. Under this doctrine, there is a strict separation between the executive, judicial and legislative branches of government. As a result, the President may not be in a position to control Congress, since a majority of its members may belong to a different political party. The United States Constitution operates on the premise that concentrating political power in a particular institution or individual is dangerous, since those who possess such power will often use it to abuse individual rights. The result is that no single party or institution is ordinarily able to achieve its political objectives without enlisting the voluntary cooperation of others. As we have seen in the Obama administration, these checks and balances often make it difficult for a president to implement his or her political program that might have gotten him elected in the first place. For some analysts, this reflects the American suspicion and mistrust of federal power (Monahan, *Constitutional 17*).

The doctrine of separation of powers has never been a dominant feature of the Canadian Constitution (Monahan *Constitutional 17*). Unlike the United States Constitution, Canada’s 1867 Constitution concentrates political power in the hands of the executive who controls both the legislative and executive branches of government. The
prime minister controls the executive, since the governor general (appointed by the
English Crown) exercises his or her power on the basis of the advice of the prime
minister. The prime minister controls the legislative branch since the governor general is
obligated to appoint as prime minister the leader of the party controlling the greatest
number of seats in the elected House of Commons. Thus, a Canadian prime minister
with a majority in the House of Commons is much more able to advance his or her
legislative agenda than a United States president who does not enjoy the support of
Congress (Monahan Constitutional 18). For this reason, I believe the Canadian Supreme
Court plays a much more critical role in arbitrating the disputes between the federal
government and the provinces than played by the United States Supreme Court in the
United States. Both the Canadian and United States Constitutions recognize, however,
the doctrine of separation of powers with the Courts. Under the rule of law, the judiciary
must be independent from the other two branches of government. As a result, the
Constitution, 1867 contains a number of protections in this regard, including the fact that
superior court judges are only removable from office if both the Senate and the House of
Commons passes resolution calling for their removal, a procedure that has never been
used to remove a superior court judge (Monahan, Constitutional 18). Judges serve during
good behavior until they reach the mandatory retirement age of 75. The grounds for
removal are age or infirmity, misconduct, failure in the due execution of office, or being
in a position incompatible with the due execution of office (Binnie 7). The Constitution,
1982 guarantees anyone charged with a criminal offense the right to be tried by an
“independent and impartial tribunal,” which requires that the courts have a degree of
independence from the executive branch of government. The Canadian courts have also held that the other branches of government cannot remove the core jurisdiction of superior courts and transfer it to other institutions or tribunals.

While the Constitution, 1867 is more than 145 years old, it still provides the basic framework within which government in Canada operates today. It explains how laws are made, administered, and enforced through executive, legislative and judicial institutions of the state. Under the terms of the constitution, all provinces have an equal footing in the Parliament of Canada, which consists of the Governor General (representing the British Crown), the House of Commons, and the Senate. As mentioned in the introduction, members of the House of Commons are elected, while the Prime Minister appoints the members of the Senate. Seats in the House of Commons are distributed roughly in proportion to the population of each province and territory. Hence, the more people in a province or territory, the more Members they have in the House, provided however, that each province or territory must have at least as many Members in the House as they do in the Senate. In order to pass a law, a bill must be approved by both the House of Commons and the Senate, and be signed by the queen or by her representative, the governor general (Monahan, Constitutional 80-81). The Senate mainly acts to approve legislation passed by the House of Commons. As is true with the English House of Lords, representation is not based on population, since this is already done in the Lower House. As originally conceived, the Senate was to give proportional representation to the three regions of the country existing at the time of Confederation:

Québec, Ontario, and the two Maritime Provinces (Nova Scotia and New Brunswick), with each region having 24 senators.\textsuperscript{56} Under such a formula, the Senate was designed to balance the regional interests and to provide a house of "sober second thought" to check the power of the Lower House when necessary. Today, there are four regions represented in the Senate, the fourth consisting of the provinces of Manitoba, Saskatchewan, Alberta, and British Columbia, each with 6 senators. Newfoundland and Labrador, which are not a part of the Maritime Provinces, each have 3 senators, and the three northern territories each, for a total of 105 members (Monahan, \textit{Constitutional} 84). Given the change in population since Confederation, the regions are over-represented or under-represented, depending upon the population in the region. For example, British Columbia, with a current population of about four million, has six senators, while Nova Scotia, with a current population of fewer than one million, has 10. Only Québec currently has the number of senators approximately proportional to its share of the total population.\textsuperscript{57} In \textit{Reference re Senate Reform}, 2014 SCC 32, [2014] 1 S.C.R. 704, the Court protected Québec’s representation in the Senate because it was one of the protections that Québec negotiated in order to come into Confederation. I discuss this case in Chapter 2 to demonstrate the principle of institutional integrity.

\textsuperscript{56} Although Prince Edward Island was one of the three Maritime provinces at Confederation in 1867, it did not join the Canadian Confederation until 1873. “In the late 1860s, the colony examined various options, including the possibility of becoming a discrete dominion unto itself, as well as entertaining delegations from the United States, who were interested in Prince Edward Island joining the United States of America.” Library and Archives Canada. "Canadian Confederation, Provinces and Territories, Prince Edward Island". Retrieved 11-29-2014.

\textsuperscript{57} See, Canadian Senate, \url{http://www.absoluteastronomy.com/topics/Canadian_Senate} retrieved 12-6-2014.
As mentioned in the introduction, sections 91-93 of the Constitution specify how the legislative power is divided between the federal and provincial governments. In deciding how to allocate legislative power, the founding fathers often followed the principle of subsidiarity, which holds that social problems should be dealt with at the most immediate (or local) level consistent with their solution (Hogg 120). This principle has been adopted in the European community, for instance, as a guideline for the division of responsibilities between the Community institution in Brussels and the national institutions of the member states. Regarding the allocation of federal and provincial power, this principle often offers a useful way of thinking about how legislative power is allocated between the federal and provincial governments in Canada. I discuss this in more detail in chapter 3.

To place matters in context, the distribution of powers under the Canadian Constitution is more centralized than the distribution of powers in the United States. First, in Canada, the federal government was given the power to regulate “trade and commerce” without restriction. In the United States, Congress was given the more limited power to regulate “commerce with foreign nations and among the several states and with the Indian tribes.” Second, in Canada, the list of federal powers includes several areas that the United States Constitution left to the states, including banking (section 91(15), marriage and divorce (Section 91(26)), and penitentiaries (section 91(28)). Finally, in Canada, the Constitution gave the provincial legislatures only certain enumerated powers to make laws, leaving the residue of power with the federal parliament. In the United States, the residuary power is left with the states (Hogg 4).
Because the Canadian Supreme Court has interpreted the language used in sections 91-93 in a number of different ways, it is often not clear whether a particular legislative body has the constitutional authority to pass certain laws. Accordingly, the Court often exercises, through a number of different judicial doctrines, tremendous discretion in drawing the boundaries between federal and provincial power (Monahan, *Constitutional* 114-119). In exercising this discretion, the Court is guided by a very purposeful interpretation of the constitutional language, looking, again and again, at what the drafters intended to accomplish. One of the problems here is that the division of responsibilities envisaged by the drafters of the Constitution, 1867 was structured to respond to challenges of governance in an era when the government played a modest and limited role. Within a matter of decades after Confederation, however, the entire conception of the role of the state in Canada had changed, with governments being called upon to intervene in areas of economic regulation and social policy that were simply unknown in 1867 (Monahan, *Constitutional* 231-232). Understandably enough, the drafters of the 1867 Act did not address the question of how these new roles and responsibilities should be shared between different levels of government because, for them, it was inconceivable that governments would be required to exercise such powers. Accordingly, it fell to the Courts to decide just how legislative power was to be divided. In that regard, the categories set out in sections 91 and 92 of the Constitution Act, 1867, merely provided a framework within which the legislative activity of the courts could be performed. Notwithstanding the language of “exclusivity” in these sections, the courts have tended to interpret the section dealing with provincial authority much more broadly
than the section dealing with federal authority (Monahan, *Constitutional* 111-112). In Chapter 3, I discuss a number of cases in which the Court construes Section 92 such that the provinces retain significant legislative power free from federal interference. As will be argued, it is thanks to the Supreme Court that Québec is more able to advance the community vitality of its francophone population.\(^5^8\)

**The Canadian Court System**

Under section 101 of the Constitution, Parliament has exclusive power to “...provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada.”\(^5^9\) Under the Supreme Court Act of 1875, Parliament created the Canadian Supreme Court. The federal government appoints all of the judges, and such appointments are not subject to provincial approval. The Court is composed of eight judges and one chief justice. At least three of the judges must come from Québec, a

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\(^5^8\) Notwithstanding the rather antiquated language of sections 91-92 of the Constitution, 1867, the Court has recognized that contemporary Canadian federalism is radically different from the federalism that existed in the first part of the 20th century. One of the biggest differences is simply that both levels of government are playing a role in social and economic policy fields that simply did not exist 50 years ago. Whether it involves stimulating the economy, regulating markets to protect consumers, protecting the environment, or retraining workers, both the federal and provincial governments have a legitimate or “shared” role in solving such problems. Contemporary public policy issues are sufficiently multifaceted and complex that their resolution requires the coordinated attention of both federal and provincial governments. To facilitate this, the Court has held that governments may authorize the expenditure of money in areas outside of their respective areas of legislative jurisdiction, thus allowing them to support and create programs that would ordinarily not possible. See, *Reference Re Canada Assistance Plan*, [1991] 2.C.R. 525; *Lovelace v. Ontario*, [2001] 1 S.C.R. 950. As a result of these cases, the Court has advanced the cause of shared jurisdiction and functional concurrency, which allows both levels of government to collectively address problems in culture, housing, education, recreation and sports, health, tourism regional development, and the environment (Monahan 247-252).

requirement designed to give the Court the necessary level of expertise in Québec civil law. As I discuss in Chapter 2, this requirement also ensures that the Court has the means to protect Québec’s distinctive culture. Interestingly enough, bilingualism is not a criterion for an appointment, although recently it has been the subject of much discussion.\footnote{See Mulcair, Tom."Bilingualism Must Be Essential Condition For Appointment of Supreme Court Judges."Tom Mulcair NDP. February 27, 2014. <http://www.ndp.ca/news/bilingualism-must-be-essential-condition-appointment-supreme-court-judges>. Retrieved May 1, 2014. Given the fact that Québec, for instance, never files its briefs in English, this is an important issue. For instance, see “Supreme Court nominee vows to improve French skills” in which Québec opposed the appointment of Justice Moldaver because of his limited knowledge in the French language. <http://www.cbc.ca/news/politics/supreme-court-nominee-vows-to-improve-french-skills-1.1075599>. Retrieved 11-29-2014.} It is clear, however, that the Court exercises functions of the highest importance, primarily because amendments to the Constitution are very difficult to pass. Accordingly, it is often the Court that is left with the task of arbitrating the ongoing disputes between the federal and provincial governments (Brouillet 26-27).

Unlike in the judicial system in the United States, the Canadian federal government can refer a question to the Supreme Court for an advisory opinion. The Court is required to answer the question unless it is essentially political in which case the Court must justify its refusal (Brouillet 19). The best example of this is probably the case in which the federal government asked the Court to issue an opinion as to whether Québec could unilaterally secede from the Confederation. See, Reference re Secession of Québec, [1998] 2 S.C.R. 217. While the reference required the Court to construe the constitution, the issue had huge political consequences. This is an unusual procedure in that it allows the Court to review a situation before the rule concerned is duly promulgated by the political bodies of a particular province. Under such a procedure, the Supreme Court has been drawn into fundamental debates between the national and
provincial governments including the issue of ownership of offshore mineral resources, whether the Anti-Inflation Act (price controls) introduced by the Parliament of Canada was constitutional, whether the federal government had the ability to alter the composition of the Senate, whether Québec possessed a historical veto over constitutional change, and finally, whether the federal government could unilaterally change or patriate the Constitution (Kelly and Murphy 5).

Over the past half century, the Canada Supreme Court has undergone two institutional changes that have had a profound impact on its role in the life of the country. These changes have affected the ability and power of the Court to impact the issues of community vitality in the country, including Québec. The first change came in 1975 when Parliament gave the Court the ability to decide what cases it would hear, which gave it much more control over its own docket. The second change came in 1982 with the adoption of the Canadian Charter of Rights and Freedoms that guaranteed Canadian citizens certain political, legal, and language rights. In most general terms, the Charter has transformed the Court from a Court primarily concerned with private disputes between individuals and businesses into a court of public law. Since then, the Court has heard cases involving controversial issues as abortion, euthanasia, gay and lesbian rights, rape-shield legislation (legislation that prevents a defendant charged with rape to cross

61 While the Charter is similar to the U.S. Bill of Rights, there are some marked differences. As mentioned by Weinrib in her article, “The Activist Constitution,” the Charter “…departs from the values of a stable, hierarchical, paternalistic and patriarchal society. For example, it guarantees freedom of conscience in addition to freedom of religion; does not entrench property rights, guarantees equality before and under the law as well as equal protection and equal benefit of the law, prohibited state discrimination based on personal and communal identity; permits affirmative action for disadvantages groups, and requires that such interpretation respect gender equality as well as multiculturalism.” Russell, P. Judicial Power and Canadian Democracy. Lorraine Eisenstat Weinrib, “The Activist Constitution,” 80-93,
examine the victim on her alleged sexual history at trial), provincial funding for abortion, minority-language education rights, the scope of protection for criminal defendants, and tobacco advertising (Hausegger and Riddell 24-32). As a result of this transformation, at least in the opinion of some legal scholars, the Court has become a “super legislature” capable of striking down laws passed by duly elected parliamentary representatives, depending upon the social or political orientations of the individual judges (Bushell 477-485). Prior to 1982 such judicial power did not exist. As will be discussed in Chapters 3 and 4, the Court’s construction of the Charter and the Constitution, 1867 has been employed to protect and advance some of Québec’s language policies.62

In evaluating the role of the Court, one also has to examine how the decisions of the Court are reported in the media. It is well known that conflict sells newspapers, and, as a result, the press often reports the decisions through a political lens, focusing on adversarial aspect of litigation where there is always a winner and a loser, an approach that accentuates differences as opposed to uniting principles.63 “In the largest sense,” Sauvageau argues, “coverage begins and ends with politics. Reporting is dictated almost

62 In order to put matters into perspective, it is interesting to note that the power of judicial review in the United States is more than 200 years old. See, *Marbury v. Madison*, 5 U.S. 137 (1803) in which Chief Justice Marshall held that the Supreme Court could strike down a law passed by Congress if it violated the Constitution. In connection with the Charter of Rights and Freedoms, however, such a power is just a little more than 30 years old.

63 In *The Last Word, Media Coverage of the Supreme Court of Canada*, Sauvageau, Schneiderman, and Taras point out how media coverage of the Court has emerged as a crucial factor not only for judges and journalists but also for the public. It is the media, after all, which decides what cases to cover and how such cases are reported. A journalist translates highly complex judgments into concise and meaningful news stories that appeal to, and can be understood by the general public. For better or for worse, judges lose control of the message once they hand down their decisions, and it is the media which has the last word. Accordingly, in order to understand the relationship between Québec and the Court, one has to not only understand what the decisions say, but also how they were reported to the public. See, *The Last Word: Media Coverage of the Supreme Court of Canada*, Vancouver: UBC Press, 2006.
entirely by the political importance of decisions and by the imperatives imposed by parliamentary reporters” (227). As a result, the “…glaring reality is that the legal aspects of decisions [are] buried beneath an avalanche of political reporting” (228). In Reference re Secession case, for instance, he observes that much of the “…coverage focused on words of war and conflict between federalists and sovereignists, rather than on the cool and detached discouragement of law.”64 The Court actually tries to avoid this result by emphasizing the principles behind a decision that unite, rather than divide, the Canadian society. In the same spirit, it is also interesting to note that the Canadian Supreme Court issues many decisions by unanimous decision. When a decision is unanimous, there is a strong tendency for the Court to write a single opinion (as opposed to several concurring opinions) (Songer 154). Since 1970, there was no dissent in three-quarters of its cases, and no concurring opinions in five-sixths of its cases (Songer 154). This high rate of unanimity is in marked contrast to what is found in the United States Supreme Court. Over the past 50 years, the proportion of decisions of the United States Supreme Court issued without dissent has varied between 30 and 40 percent of the total docket (Songer 213). The reason for the high degree in unanimity in Canada is not clear, although personal interviews with the Justices indicate that there is a concerted effort to find the common ground for opinions. As a practical matter, however, some have argued that the Court loses credibility as an institution when its members issue a collection of concurring or dissenting opinions that diverge in articulating a clear rule of law. Under such circumstances, it is argued, that Court’s opinions foster confusion as to what the law is and how it should be applied (Bushell 106).

64 Sauvageau, supra, at footnote 63, page 92.
At least prior to the adoption of the Charter, some studies have indicated that Justices on the Court are strongly affected by three factors: the political party of the appointing prime minister, the political differences based on geographic regions (Québec, Ontario, the Atlantic provinces (East), and all provinces west of Ontario (West)), and the religion of the justice (Songer 195-96). Contrary to many academic writings on Canadian politics that the most important regional effect is that between Québec and “English” Canada, research indicates that in terms of actual differences in judicial behavior on the Court, it is Ontario that stands apart from the rest of the provinces, not Québec. In fact, at least in pre-Charter cases, the voting behavior of justices from Québec is largely indistinguishable from the voting of justices from the Western provinces (Songer 198). Since that time, however, it appears that gender has become an important basis for divisions on the Court. Studies have indicated that at least in civil liberty cases, female justices are substantially more likely than their male colleagues to support rights claims (Songer 206). While conventional wisdom recites that the Supreme Court has always favored the federal government in relation to those issues that have affected Québec, an examination of the Court’s decisions do not support this (Songer 93).

As is true with the United States Supreme Court, the Canadian public perceives the Canadian Supreme Court as one of their most important national institutions. For much of its history, however, the Court worked in relative obscurity and was widely considered to have little importance in major political decisions. After the adoption of the Canadian Charter this changed. Without question, the Court plays and will continue to play a major role in policy making into the foreseeable future.
Concerning the power of judicial review, however, there are some limitations. Section 33 of the Charter permits the federal Parliament and provincial legislatures to include clauses in their legislation that, for five years at a time, insulate the legislation from Charter challenge. The override can be applied to the political freedoms in section 2 of the Charter, the legal rights in sections 7 to 14, and the equality rights in section 15. Although this override clause (or the “notwithstanding clause” as it is called) has rarely been used, the fact that it exists enables elected governments to overturn decisions they believe are detrimental to their people’s interests (Russell 2). As will be discussed in Chapter 3, Québec has used this clause to protect its language and culture.

Conclusion

Generally speaking, modern Québec history is marked by Francophone community’s desire to regain a dominant position in the economy and culture of the province. This effort to define themselves in relation to other groups marks the entire history of Québec, and it is a social process that reveals a dynamic interplay of demographic, economic, political, ideological and cultural developments that continue up to the present. In this process, the Court often operates in relative obscurity, except for those cases that trigger or reflected important political controversies. In a 1999 survey, respondents were asked the following question: “Would you say that you are very aware, somewhat aware, not very aware, or have you never heard of the Supreme Court of Canada?” (Fletcher 264) Only 42 percent in Québec considered themselves in the “somewhat” or “very aware” category compared to 87 percent in the rest of Canada.
Fletcher suggests that perhaps the difference can be explained because Charter cases (as opposed to cases concerning the division of powers between the provinces and the federal government) may be less salient in Québec (Fletcher 264). This particular answer suggests a significant number of Québécois who are unaware of, or at least indifferent to, the operation of the Supreme Court. In the same survey, however, it also appeared that the Québécois were more open than other Canadians to the idea of abolishing the Supreme Court if its decisions consistently run afoul of public opinion (Fletcher 266-267). Indeed, in the public media, sovereignists or separatists are often suspicious, if not downright hostile, to the Court, as a symbol and instrument of federal authority. Contrary to this perception, however, I contend that the Court has really been an ally, albeit hidden sometimes, by developing certain principles that have, in fact, both advanced and protected the language and culture of Québec.
Chapter 2: Principle of Institutional Integrity

In this Chapter I contend that the Court has developed a principle of institutional integrity that advances the community vitality of Francophone Québec. To demonstrate this, I analyze two recent cases, *In re Reference re Supreme Court Act, sections 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, and *In re Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704. In these cases the Court honors the terms of the Constitution Act, 1867 by rejecting legislative attempts to alter the composition of the Supreme Court and the Senate, both of which play a role in protecting the constitutional rights of individuals or minorities. In so doing, the Supreme Court protects and advances the community vitality of Québec, I contend, by maintaining Québec’s confidence in the Court, by affirming the constitution and rule of law in Canada, and by ensuring that the Court retains the civil law expertise necessary to protect Québec’s legal traditions and social values.

*Reference re Supreme Court Act, sections 5 and 6 (2014)*

When Federal Parliament passed the *Supreme Court Act* in 1875, it created the Canadian Supreme Court. At that time, the Court was not Canada’s ultimate legal authority, since an aggrieved party could still appeal his or her case to the Judicial Committee of the Privy Council in England. However, in 1933 Parliament abolished appeals to the Privy Council in criminal cases and in 1949 in civil cases. Since that time,
the Supreme Court has served as the final court of appeal in all matters of federal and provincial Canadian law. When the Court was originally created, it was composed of six judges, two of whom had to be appointed from either the superior courts of Québec or the Bar of Québec.65 This requirement was intended to protect the Civil Code in Québec that generally governs private matters pertaining to persons, relations between persons, and property.66 Québec members of Parliament were worried that if the Court were composed entirely of judges from the common law provinces, the Court would not be able to interpret and properly apply the civil law of Québec. When the Court was expanded to nine judges in 1949, the number of Québec judges increased to three.

Under the Supreme Court Act of 1875, sections 5 and 6 specify the qualifications of those persons who can serve on the Canadian Supreme Court.67 If the candidate is not

65 In order to be admitted to the Québec Bar, Québec applicants must be graduates of the law faculty of one of six universities: the University of Montreal, the University of Québec at Montreal, McGill University, Laval University, the University of Ottawa, or the University of Sherbrooke. In addition, applicants must attend a four- or eight-month course at the École du Barreau (Bar School), and complete a six-month apprenticeship. Finally, applicants must pass a character and fitness examination before the Comité de vérification du Barreau du Québec (Verification Committee of the Bar of Québec). Practicing attorneys must complete 30 hours of continuing legal education every two years. See “Devenir avocat,” Barreau du Québec. April 2, 2013. <http://www.barreau.qc.ca/fr/devenir-avocat/>. Retrieved October 27, 2014.

66 As a point of information, Québec uses common law regarding those laws pertaining to the government, such as labor law, criminal law, immigration, and administrative law. Concerning private matters, however, it continues to use civil law. The Legislative Assembly of the Province of Lower Canada (Québec) originally enacted the Civil Code of Lower Canada in 1865 which dealt with “…persons, property and its different modifications, the means of acquiring and owning property, and commercial law.” On January 1, 1994, the Québec National Assembly replaced the Civil Code of Lower Canada with the Civil Code of Québec which is comprised of over 3,000 sections and is divided into ten different chapters or books pertaining to “…persons, the family, successions, property, obligations, prior claims and mortgages, evidence, prescriptions, publication of rights, and private international law.” See, Éditeur officiel du Québec. “Civil Code of Québec.” The Canadian Legal Information Institute. <http://www.canlii.org/fr/qc/legis/lois/rlrq-c-c-1991/113461/rlrq-c-c-1991.html> Retrieved October 21, 2014.

67 Sections 5 and 6 of the Supreme Court Act, 1875 read as follows:
intended to fill one of the three Québec seats, section 5 is applicable. “Under this section, there are four groups of people who are eligible for appointment: (1) current judges of a superior court of a province, including courts of appeal; (2) former judges of such a court; (3) current barristers or advocates of at least 10 years standing at the bar of a province; and (4) former barristers or advocates of at least 10 years standing” (Reference re Supreme Court Act, sections 5 and 6 at para. 45). If the candidate is intended to fill a Québec seat, section 6 is applicable. Under this section an appointee must be “from among the judges of the Court of Appeal or of the Superior Court of the Province of Québec or from among the advocates of that Province.” It is important to note that in order to fill a non-Québec seat a person can be appointed to the Court if he or she is or has been an advocate (attorney) of at least 10 years standing at the bar of a province. In order to fill a Québec seat, however, a person can be appointed if he or she is “from the advocates” of that Province. Unlike section 5, section 6 is not clear on whether or not eligible appointees include both prior and current members of the Québec Bar. An ambiguity existed in the statute. In Reference re Supreme Court Act, sections 5 and 6, the Court was asked to clarify whether under section 6(a) Québec candidate had to be a current member of the Québec bar to be appointed to the Supreme Court.

Here are the facts of the case. On October 3, 2013, the federal government appointed Justice Marc Nadon to fill one of the Québec seats on the Supreme Court of

5. Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.

6. At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Québec or from the advocates of that Province. R.S.C. 1985, c. ss.5 and 6.
Canada. At the time of his appointment, Justice Nadon was a judge of the Federal Court of Appeal, and had been serving as a federal judge for more than 20 years. Justice Nadon had been a member of the Québec Bar before his appointment to the federal bench for more than 10 years. However, when he was appointed to the federal bench, he resigned from the Québec Bar, as required by that appointment. Accordingly, when he was nominated for the Supreme Court, he had been a former member of the bar for the requisite ten year period, but was not a current member.

An Ontario lawyer, Rocco Galati filed suit to block the appointment, contending that he was not eligible because he was neither a judge of one of the superior courts of Québec nor a current member of the Bar of Québec. The federal government disagreed, contending that an appointee satisfied the requirements of section 6 by being either a former or current member of the Québec bar. To undercut Galati’s argument, the Parliament amended the Supreme Court Act, 1875 in order to “clarify” that an appointee would be eligible to serve if he or she was an existing or former member of the Québec Bar. The federal government then referred the issue to the Supreme Court as a reference question, arguing that the requirement that Québec judges be appointed from among the

68 Québec intervened in the case and supported the petitioner’s position, arguing that Nadon lacked the expertise to properly represent the provinces legal traditions on the court. Under section 6, Québec contended that only those who were currently members of the bar were eligible for appointment.

Toutefois, le fait que le législateur ait précisé que le candidat prévenant du Québec doit être choisi parmi les juges de la Court d’appel ou de la Court supérieure du Québec ou parmi les avocats de cette province, confirme clairement son intention voulant que le candidate choisi ait des liens étroits, contemporains, et tangibles avec la communauté juridique du Québec. It avait un objectif : s’assurer que le droit civil occupe la place que lui est propre dans le cadre des litiges que doit trancher la cour.

See, Reference re Supreme Court Act, sections 5 and 6, Mémoire du Procureur général du Québec, Intervenant, Exposé concis des arguments at page 29:
bar of Québec included former members of the bar as well.\textsuperscript{69} The Court rejected the position of the federal government. In a 6-1 decision, the Court ruled that Justice Nadon’s appointment was void \textit{ab initio}. In so ruling, the Court held that the plain meaning of section 6 had remained consistent since the original version of that section and that it had always excluded former advocates (\textit{Reference re Supreme Court Act}, ss. 5 and 6, p. 3). By requiring that three judges be appointed “from among” the judges and advocates of the Québec superior courts and bar, the Court interpreted this to mean that section 6, by implication, excluded former members of those institutions and imposed a requirement of current membership (\textit{Reference re Supreme Court Act}, ss. 5 and 6, p. 24). In addition, the Court also held that Parliament’s amendment to the Supreme Court Act, 1875 was not simply a clarification of the previous law, but an unlawful attempt to change the composition of the Court. Under section 41 of the Constitution Act, 1867, a change in the composition of the Court could only be made by constitutional amendment with the unanimous approval of all of the provinces.

\textsuperscript{69} As amended by Parliament, sections 5, 5.1, 6, and 6.1 read as follows:

5. Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.

5.1 For greater certainty, for the purpose of section 5, a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province.

6. At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Québec or from among the advocates of that Province.

6.1 For greater certainty, for the purpose of section 6, a judge is from among the advocates of the Province of Québec if, at any time, they were an advocate of at least 10 years standing at the bar of that Province.

Act to amend the Supreme Court Act and to make related amendments to the Federal Court Act, S.C. 1974-75-76, c. 18.
At first blush, the issue of whether or not a Québec appointment needs to be a current member of the Québec bar may not appear important. However, to look at the case in this manner is to miss the more important issue. The significant question was whether Parliament could, without Québec’s consent, change the composition of the Court in such a manner so as to diminish those specific protections negotiated by Québec at the time of Confederation in 1867, which had led to the creation of the Supreme Court of Canada in 1875. Looking at the case in this fashion, the outcome of the case has potentially a huge impact on the Court’s ability to protect Québec’s Francophone community.

The Court recognized that section 6 reflected “…the historical compromise that led to the creation of the Court. Just as the protection of minority language, religion and education rights were central considerations in the negotiations leading up to Confederation (Reference re Secession of Québec, [1998] 2 S.C.R. 217 (‘Secession Reference’), at paras 79-82), the protection of Québec through a minimum number of Québec judges was central to the creation of the Court. A purpose interpretation of s. 6 must be informed by and not undermine that compromise.” (Reference Supreme Court Act, ss. 5 and 6, para. 48). At the time of Confederation, the Court explained, “…Québec was reluctant to accede to the creation of a Supreme Court because of its concern that the Court would be incapable of adequately dealing with questions of the Québec civil law” (Reference Supreme Court Act, ss. 5 and 6, para. 50). Various members of Parliament feared that the Court would be “…composed of judges, the majority of whom would be unfamiliar with the civil laws of Québec, who would be called upon to revise and
potentially reverse the decisions of the Québéc Courts.” According to the Court, section 6 had two purposes. First, it ensured that the Court had the civil law training and experience necessary to decide Québéc’s issues of civil law. Second, it ensured that Québéc’s “…distinct legal traditions and social values [were] represented on the Court, thereby enhancing the confidence of the people of Québéc in the Supreme Court as the final arbiter of their rights.” As noted by the Court, Québéc’s civil law system was considered “…an essential ingredient of its distinctive culture and therefore required, as a matter of right, judicial custodians imbued with the methods of jurisprudence and social values integral to that culture” (Reference re Supreme Court Act, section 5 and 6 para. 49).

When reading the decision, one is struck by the Court’s determination to protect the integrity of the Court. According to the Court, section 6 “…protects both the functioning and the legitimacy of the Court as a general court of appeal for Canada.” Without legitimacy, the Court would clearly be unable to protect the distinctive cultures within the Canadian Confederation. “Just as the protection of minority language, religion and education rights were central considerations in the negotiations leading up to Confederation, the protection of Québéc through a minimum number of Québéc judges was central to the creation of the Court” (Reference re Supreme Court ss. 5 and 6, para.

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70 Debates of the House of Commons, 2nd Sess., 3rd Parl. (“1875 Debates”), March 16, 1875, p. 739, Henri-Thomas Taschereau, M.P. for Montmagny, Québéc. See, Reference re Supreme Court Act, ss. 5 and 6, para. 50.

71 See, Reference re Supreme Court Act, ss. 5 and 6, para. 49. As Justice Frankfurter said in Baker v. Carr [1962] 369 US 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, “The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.” As demonstrated in Reference re Supreme Court Act, section 5 and 6, his observation on the United States Supreme Court applies equally well to the Supreme Court of Canada.
Section 6 was accordingly designed to limit the federal government’s otherwise broad discretion in appointing judges by ensuring (1) that the Court have the expertise in civil law, (2) that Québec’s distinct legal traditions and social values be reflected in the composition of the Court, and (3) that the Court merit the confidence of the people of Québec (Reference re Supreme Court ss. 5 and 6, para. 49). Any other interpretation of section 6 would undermine Québec’s negotiated protections designed to protect its own language, law, and culture. In the words of the unanimous Court:

[49] The purpose of s. 6 is to ensure not only civil law training and experience on the Court, but also to ensure that Québec’s distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Québec in the Supreme Court as the final arbiter of their rights.

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[56] Viewed in this light, the purpose of s. 6 is clearly different from the purpose of s. 5. Section 5 establishes a broad pool of eligible candidates; s. 6 is more restrictive. Its exclusion of candidates otherwise eligible under s. 5 was intended by Parliament as a means of attaining the twofold purpose of (i) ensuring civil law expertise and the representation of Québec’s legal traditions and social values on the Court, and (ii) enhancing the confidence of Québec in the Court. Requiring the appointment of current members of civil law institutions was intended to ensure not only that those judges were qualified to represent Québec on the Court, but that they were perceived by Québécois as being so qualified.

Reference re Supreme Court Act, sections 5 and 6, pp. 48-56.

Recall that prior to making the reference, Parliament had amended the Supreme Court Act, 1875 to allow for Judge Nadon’s appointment. The issue was whether Parliament could do this without the consent of Québec. For the reasons mentioned below, the Court held that Parliament could not. The Supreme Court of Canada was
created after Confederation. At that time it was understood that any decision of the Canadian Supreme Court could be appealed to the Judicial Committee of the Privy Council in London. In the period between 1868 and 1875, Sir John A. Macdonald, who was Canada’s first prime minister, introduced two bills for the establishment of the Supreme Court. Neither bill reserved any seat on the Court for Québec jurists. As a result, Québec opposed the bills and they were never passed. In 1875, Télesphore Fournier, the federal minister of Justice, introduced the current Supreme Court Act, which created the Supreme Court as a court of general appellate jurisdiction over all civil, criminal, and constitutional cases.72 When Parliament abolished all appeals to the Privy Council in 1949, the Canadian Supreme Court inherited the role of the Council under the Canadian Constitution. “As a result,” the Court explained, “the Court assumed the powers and jurisdiction “no less in scope than those formerly exercised in relation to Canada by the Judicial Committee” (Reference re the Farm Products Marketing Act, [1957] S.C.R. 198, at p. 212), including adjudicating disputes over federalism. The need for a final, independent judicial arbiter of disputes over federal-provincial jurisdiction is implicit in a federal system” (Reference re Supreme Court, ss. 5 and 6, para. 83).

72 In 1874, the Privy Council decided Brown v Les Curéét Marguilliers de l'Œuvre et Fabrique d Notre Dame de Montréal[1874] UKPC 70, LR 6 PC 157, better known as the Guibord case. In this decision, the Privy Council held that the Catholic Church could not refuse to bury one of its members in the Catholic cemetery because of his liberal political beliefs. Up until that time, it was generally believed that the question as to who could be buried in consecrated ground was answered solely by ecclesiastical law. The Guibord case accordingly outraged the Québec Catholics, causing them to support the creation of Canada’s own Supreme Court which they thought would be more protective of Québec’s interests. See, Milot, Micheline, “That Priest-Ridden Province? Politics and Religion in Québec,” Gervais, S., Christopher Kirkey, and Jarrett Rudy, eds. Québec Questions: Québec Studies for the Twenty-First Century. New York: Oxford UP, 2011 at pages 123-136.
When Canada adopted the 1982 Charter of Rights and Liberties, the courts became the guardians of those rights contained therein. Under Section 52(1), the Constitution was recognized as the supreme law of the land, effectively transforming the Canadian system of government from a system of Parliamentary supremacy to one of constitutional supremacy. Under Section 41(d) of the Charter, the unanimous consent of Parliament and all provincial legislatures was required for any amendments relating to the “composition of the Supreme Court.” In Reference re Supreme Court Act, ss. 5 and 6, the Court made it clear that the eligibility requirements for appointment to the Supreme Court of Canada were incorporated in this section, hence limiting Parliament’s unilateral authority to reform who could be appointed on the Court. As mentioned above, such a holding was necessary to give Québec the negotiated protections of the Supreme Court Act, 1875. As such, Parliament could not change the composition of the Court without Québec’s consent. By holding that the composition of the Court could only be changed by constitutional amendment requiring unanimous agreement, the Court not only protected its independence, legitimacy, and competence, it also enhanced Québec’s ability to advance its culture and language by ensuring that judges appointed from Québec have the requisite level of expertise in Québec’s civil law and legal traditions.

The Québec government had opposed Mr. Nadon’s appointment, arguing that he lacked the expertise to represent properly the province’s legal traditions on the Court. Québec leaders were accordingly thrilled with the decision. According to Liberal Leader Philippe Couillard, the ruling was further proof that the federal system works for Québec, and reinforces that Ottawa cannot unilaterally infringe on Québec’s legal traditions and
civil law. “It shows that there are institutions in the country that ensure that a balance is respected and recognizes the rights of provinces, Mr. Couillard, said. “The courts, the Canadian mechanism are there to settle these matters. It has been done and that is good news.” 73

Reference re Senate Reform (2014)

The Constitution, 1867 created a federation made of the Crown, the House of Commons, and the Senate. As is true with the English House of Lords, the Senators were not elected, but were appointed to represent Canada’s regional interests and to check, when necessary, the actions of the Lower House. There are numerous examples of this. In 1988, for instance, the Senate refused to approve the legislation implementing the Canada-U.S. Free Trade Agreement until the issue had been submitted to the Canadian people in an election. In 1991 the Senate refused to approve a bill that would have sentenced doctors to two years in prison for performing an abortion on a woman whose health was not at risk. The Senate often justifies its stand on the basis that it is protecting the constitutional rights of individuals or minorities, which would include the Francophones in Canada (Monahan, Constitutional 86). 74


74 As noted by Monahan, however, the Senate has also taken an independent stand on bills where no constitutional issues are present. In 1997, for example, the Senate threatened to veto legislation providing for new child support requirements on divorce (Bill C-41), An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assisstances Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act, 2d Sess., 35th Parl., 1996). However, the government eventually agreed to make certain compromises and the bill was passed (Monahan, Constitutional 86).
As a practical matter, the appointed Senate lacks the legitimacy of the elected House of Commons. As a result, for most of the 20th century, the Senate has tended to approve automatically bills that had been passed by the House of Commons. This tendency has been reinforced because the prime minister controls the appointment of senators.75 Hence, the party that controls the House of Commons has often controlled a majority in the Senate. Because the Prime Minister has often used Senate appointments to reward seasoned party supporters, the senators have tended to be persons whose active political life is over. Given this, many within the Canadian public do not regard the Senate as having a legitimate role to play in the public policy process. Other institutions, particularly the provincial governments, have come to be perceived as more effective representatives of regional interests (Monahan, *Constitutional 83-84*).

In order to understand the case, a brief overview of its social context is important. In 2012, the Senate became involved in a political expenses scandal in which a number of Senators claimed certain housing and travel expenses for which they were allegedly not eligible. After an investigation, the Auditor General of Canada found that a number of Senators had claimed hundreds of thousands of dollars of illegitimate expenses. As a result, certain Senators were either suspended or forced to resign. The Canadian public followed the affair closely. Because the investigation arguably revealed a significant

75 Originally, members of the Senate were appointed for life. A 1965 constitutional amendment provides that senators are to retire at age 75. See Monahan, *Constitutional 83*. 78
level of corruption within the institution, many Canadians concluded that the Senate should either be reformed or abolished.\(^7^6\)

In light of the scandal, Prime Minister Stephen Harper picked up a traditional element of his political party’s platform and proposed certain Senate reforms, including the implementation of term limits and creation of “non-binding” consultative elections. The proposal enjoyed considerable popular support. Under the Constitution, 1867 it was not clear, however, whether Parliament could accomplish these goals without provincial consent. Accordingly, Harper referred the following questions to the Supreme Court of Canada:

(1) Can the federal government unilaterally institute elections to select Senate nominees?

(2) Can the federal government act alone to set term limits for Senators?

(3) Can the federal government abolish the Senate with the consent of only seven provinces with 50 per cent of the population? Or, is unanimous consent required?

In order to understand how the Court’s ruling impacts the community vitality of Francophone Québec, a brief discussion of the issues in the case is necessary. Generally speaking, Part V of the Constitution, 1982 provides five different ways to amend the Constitution. When none of the more specific procedures are applicable (Sections 41, 43, 44, and 45), it can be amended by (1) resolutions of both Houses of the federal Parliament, and (2) resolutions of the legislative assemblies of at least two-thirds of the provinces, provided they represent at least 50 percent of the population of all the

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provinces (Hogg, *Constitutional*, pp. 74-75). This is known as the “7/50” rule (seven provinces being two-thirds of the total), which means, as a practical matter, that one of the consenting provinces has to be either Ontario or Québec. Under Section 42, the 7/50 rule applies to any constitutional change dealing with the “powers of the Senate and the method of selecting Senators.” Under Section 41, however, unanimous consent of the Parliament and provincial legislatures is required to any amendment to Part V, which includes changes affecting the Crown, the number of members in the House or the Senate, the use of English or the French language, and, as was discussed earlier, the composition of the Supreme Court. The questions before the Court were further complicated by section 44, which authorizes the federal Parliament, by ordinary legislation, to amend those parts of the Constitution of Canada that relate to the executive government of Canada or the Senate and House of Commons.77

Regarding term limits, the Court was asked to decide whether imposing term limits was to be considered a change to “the powers of the Senate and the method” of selecting Senators under section 41(b). The Attorney General for Canada argued “…that changes to senatorial tenure [fell] residually within the unilateral federal power of amendment in section 44, since they are not expressly mentioned in section 42.” He also contended “…that the imposition of the fixed terms contemplated in the Reference [constituted] a minor change that [would not] engage the interests of the provinces, because those terms were equivalent in duration to the average length of term historically served by Senators.” The provinces disagreed, however, contending “…that term limits

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would allow a prime minister who holds office for two to three terms to effectively replace the entire Senate during his or her term in office.” Such a result, they argued, “…would have a profound effect on the ability of the Senate to discharge its normal duties of “sober second thought.” Regarding this, the Provinces feared “…that term limits, particularly short ones or those with renewable terms, would create an upper house that would be beholden to the prime minister in a way the current Senate is not.”

With reference to consultative elections, the Court was asked to decide “…whether an advisory process that [did] not formally bind the prime minister’s discretion nevertheless [constituted] a change to the “method of selecting Senators” under Section 42(b).” Currently the Prime Minister selects the Senators without any accountability to the public. Under the government’s proposal, each Province could choose their Senator by popular election. They could then suggest such individuals to the Prime Minister who would not be formally bound by the results of the election.

The Attorney General argued that implementing consultative elections for Senators did not constitute an amendment to the Constitution of Canada because the proposed reform did not change the text of the Constitution, 1867 or the method of selecting Senators. On the other hand, the provinces argued that consultative elections would place undue political pressure on any prime minister to select those who win such


“consultative” elections, thereby changing the fundamental nature and role of the Senate as a complementary legislative body of sober second thought.\(^8\)

Concerning the abolition of the Senate, the Court had to decide whether such an act could be done under the 7/50 rule or whether it required unanimous consent of all of the provinces. The Attorney General argued that unanimous consent was not required because the Senate could arguably be abolished without textually modifying the provisions of Part V of the Constitution. Québec, Ontario, New Brunswick, and British Columbia among others, disagreed, however, contending that “…Part V was drafted on the assumption that the federal Parliament would remain bicameral in nature, i.e., that there would continue to be both a lower and upper legislative chambers. Eliminating the Senate would fundamentally alter the constitutional structure of the Canadian government, hence requiring the consent of all provinces” (Reference re Senate, Reform at para. 106).

In a unanimous decision, the Court ruled that Federal Parliament could not reform the Senate, limit terms or appoint only elected senator without the consent of seven provinces with half the country’s population. The Court further held that the Senate could only be abolished with the unanimous consent of the federal Parliament as well as the provincial legislatures.

On the subject of term limits, the Court noted that “…Senators are [usually] appointed for the duration of their active professional lives. This security is intended to allow Senators to function with independence in conducting legislative review.”

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\(^8\) Macfarlane, E. “Your Guide” supra, at footnote 65.
terms, the Court explained, provided a weaker security of tenure, implying “…a finite time in office and necessarily offer a lesser degree of protection [for] the potential consequences of freely speaking one’s mind on the legislative proposals of the House of Commons” (Reference re Senate Reform, para. 79-80). The Court accordingly concluded that “…the imposition of fixed terms, even lengthy ones, constituted a change that engaged the interest of the provinces as stakeholders in the Canadian constitutional design and falls within the rule of general application for constitutional change—the 7/50 procedure in s. 38” (Reference re Senate Reform, para. 82).

The Court’s comments concerning the institution of the Senate are instructive as to why this decision was an important one for Québec. As explained by the Court, the “…framers of the Constitution Act, 1867 sought to adapt the British form of government to Canada in order to have a “Constitution similar in Principle to that the United Kingdom.” They wanted to preserve the British structure of a lower legislative chamber composed of elected representatives, an upper legislative chamber composed of elites appointed by the Crown, and the Crown as head of state” (Reference re Senate Reform, para. 14). The Senate was designed to be a thoroughly independent body that could dispassionately review the measures of the House of Commons. As mentioned by the Court, the constitutional framers “…sought to endow the Senate with independence from the electoral process in order to remove Senators from a partisan political arena that required unremitting consideration of short term political objectives” (Reference re Senate Reform at para 57). Accordingly, appointed Senators “…would not have the expectations and legitimacy that stem from popular election.” As such it would be a
body “calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill-considered legislation that may come from the Lower House” (Reference re Supreme Court Reform at para. 58). According to the Court, the appointed status of the Senate shaped the architecture of the Constitution Act, 1867 and explained why the framers did not believe it necessary to specify how to resolve a deadlock between the two chambers. The government that controlled the Lower House would normally be able to have its legislation adopted by Parliament, subject to those rare instances in which the Senate found it necessary to check any legislative abuses (Reference re Senate Reform paras. 57-59).

It becomes apparent how this decision advances the ability of Québec to protect its own language and culture, when one considers why Québec bargained for the Senate in the first place. The Senate was one of the negotiated lynch pins of the Confederation. At the time of Confederation, the regions (or “divisions” as referred to in the Constitution, 1867) were Ontario, Québec and the Maritime Provinces. As made clear by MacKay, Québec “…could only be a willing partner by the grant of absolute guarantees for the protection of its institutions, its language, its religion, and its laws…”

During the constitutional convention, Québec accordingly demanded a mechanism to counter-balance the perceived perils of representation by population, which was to govern representation in the lower House. Québec as well as the Maritime Provinces were afraid that Ontario, Upper Canada at the time, would override their regional interests by way of its numerical superiority in the House of Commons. Obtaining equal regional

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representation in the Senate was therefore their protection, prompting George Brown, one of the founding fathers, to observe that “Our Lower Canadian friends (i.e. Québéciens) have agreed to give us representation by population in the Lower House, on the express condition that they could have equality in the Upper House. On no other condition could we have advanced a step.”

Québec negotiated the regional representation of the Senate to protect its own culture and language. As mentioned in Chapter 1, the Senate currently consists of 105 members, with each region having 24 senators. Under such an arrangement, Québec has proportionately more representation in the Senate than many of the other provinces. In the political process, this has consistently worked to Québec’s advantage, which explains why this decision was such an important one for Québec. While Québec may have originally designed the Senate to protect Québec from Ontario, Québec now uses the Senate to protect it from the growing political and economic influence of Western Canada, and, in particular, the resource-rich Alberta and British Columbia. According to the 2011 Census, the western provinces have 30.7% of Canada’s population, with approximately “…4.4 million in British Columbia, 3.6 million in Alberta, 1.0 million in Saskatchewan, and 1.2 million in Manitoba.” Economically, the Western provinces generate 34.58 percent of Canada’s gross national product. Québec, however, has a population of approximately 8 million and generates 19.80 percent of the Canada’s gross

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national product.\textsuperscript{84} Notwithstanding these figures, Québec has proportionately more Senators and hence more votes in the Upper House.

As the guardian of the Constitution, the Court earned the confidence of Québec by honoring the negotiated terms of the constitution that were designed, in part, to protect Québec’s language and unique culture. In this decision, the Court also consolidated Québec’s protection by concluding that the Senate could only be abolished with the unanimous consent of the federal parliament and provincial legislatures. Hence, the constitutional protections negotiated by Québec could not be eliminated without Québec’s consent. As a result, Québec can use its power in the Senate to manage its own internal affairs, free from interference from both Parliament and other provinces, more populous and economically powerful than Québec.

\textbf{Conclusion}

In \textit{Reference re Supreme Court Act, sections 5 and 6,} 2014 SCC 21, [2014] 1 S.C.R. 433, and \textit{Reference re Senate Reform,} 2014 SCC 32, [2014] 1S.C.R. 704, the Canadian Supreme Court protected the integrity of both the Supreme Court and the Senate. In so doing, the Court advanced the vitality of the Québec Francophone community. Regarding \textit{Reference re Supreme Court Act, sections 5 and 6,} Québec got the benefit of its bargain that led to the creation of the Court in the first place. In this

decision, the Court further held Québec appointees to the Court had to be current (as opposed to former) members of the bar. The Court believed that such an interpretation was more consistent with the purpose of section 6 that was to provide the Court with the civil law expertise necessary to protect Québec’s legal traditions and social values and to maintain the confidence of Québec in the Court. This ruling also protected the legitimacy of the Court, a fact necessary for the Court to properly fulfill its role as the final arbitrator of the Constitution Act, 1867 and the Constitution, 1982. In *Reference re Senate Reform* Senate, the Court again rejected a legislative attempt to alter the composition of the Senate, thus protecting the Senate’s ability to give sober reflection to those bills that pass the House of Commons and to give voice to those minority groups who do not always have a meaningful opportunity to present their views through the popular democratic process. In so holding, the Court protected Québec’s current representation in the Senate, which gives Québec a disproportionate number of senators when compared to the more populous and economically powerful Western Provinces. The Court recognized that the composition of both the Court and the Senate creates an institutional structure that allows Québec to advance its own particular social, linguistic, and cultural interests. In protecting the institutional integrity of the Court and the Senate, the Court also honored Québec’s negotiated protections in both the Constitution Act, 1867 and Supreme Court Act, 1875, thereby demonstrating the independence of the judiciary and Canada’s commitment to the constitutional supremacy and to the rule of law. In so doing, the Court has given Québec the ability to protect and advance its language, culture, and unique identity.
Chapter 3: Principle of Canadian Federalism

In this chapter I contend that the principle of Canadian federalism developed by the Supreme Court advances the vitality of Québec’s Francophone community. In construing sections 91-93 of the Constitution Act, 1867, the Court recognizes that one of the guiding principles of Canadian federalism is that the provinces have sufficient legislative and/or constitutional authority to manage their own internal affairs, including those relating to language and education, free from federal intrusion. As the arbitrator of disputes concerning federal and provincial power, the Court exercises its role with a good bit of humility, often acknowledging that the best way to solve a problem is to refer the matter back to those most affected by the problem in the first place. In so doing, the Court has affirmed, for instance, the legislative purpose of Bill 101 to protect and advance the language and culture of the Francophone community in Québec. I will use three cases to illustrate the operation of this principle.

In *Ford v. Québec*, [1988] 2 S.C.R. 712, the Court struck down as unconstitutional that portion of Bill 101 that required all public signage to be in French only. While the Anglophone community trumpeted this as a victory, a close review of the decision reveals that the Court actually advanced the vitality of the *Québécois* community by acknowledging Québec’s distinct status within the Canadian federation, as well as the legitimacy of the unilingual policy underpinning Bill 101, two significant concessions long fought for by Québec. The Court further advanced Québec’s ability to manage its internal affairs by broadly construing Québec’s ability to use section 33 to
legislatively overrule Supreme Court cases that Québec might find contrary to its social, cultural, or linguistic politics.

In *Re Reference re Secession of Québec*, [1998] 2 S.C.R. 217, the Court held that neither the Canadian constitution nor international law allowed Québec to secede unilaterally from Canada without a constitutional amendment. If a clear majority of Québécois opted for secession, however, the Court held that the federal government had a constitutional duty to negotiate with Québec on the secession issue. According to the Court, this obligation was implicit in four principles that informed and sustained the constitutional text: federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Based on these principles, neither Québec nor the federal government could dictate the terms of secession. While some believed this to be a victory for the federal government, a close review of the decision indicates that the Court actually enhanced the status of Québec by legitimizing Québécois’ desire to be recognized as a separate and distinct society with its own unique culture, language and history. The Court further enhanced the institutional support for Québec by identifying those constitutional principles that not only protect, but also encourage diversity within Confederation.

Finally, in *Reference re Securities Act*, the Court struck down an effort by the federal government to create a national Canadian Securities Commission to regulate the sale and purchase of securities. Notwithstanding considerable public pressure to the contrary, the Court construed Section 92 of the Constitution in such a manner that Québec retained, free from federal interference, the legislative power to regulate the
province’s financial markets. In so doing, the Court recognized that the legislative boundaries of Section 92 were designed to protect the regional autonomy, diversity, and priorities of each province. By honoring those boundaries, the Court accordingly promoted Québec’s unique Francophone community.


In order to appreciate the impact of this case on the vitality of French in Québec, it is helpful to review the principles of the Canadian Charter of Rights and Freedoms. Adopted in 1982, the Charter guarantees Canadians certain fundamental Canadian political and civil rights, referred to in section 2 as “fundamental freedoms.” These rights include freedom of conscience, freedom of religion, freedom of thought, freedom of belief, freedom of expression, freedom of the press and of other media of communication, freedom of peaceful assembly, and freedom of association. Under section 15, the Canadian Charter likewise guarantees equal treatment under the law. Under sections 16 and 23 the Canadian Charter gives a number of language rights, including those pertaining to minority education and the two official languages of the federal government and its subsidiaries. When passed in 1982, the Canadian Charter was intended to unify Canadians around a set of principles that embody those rights.

The drafters of the Charter wanted the courts to understand, however, that the rights guaranteed by the Canadian Charter were not absolute and that in some

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85 A copy of the Canadian Charter of Rights and Freedoms is included in Appendix B.
circumstances it was appropriate to limit such rights for the collective good. Accordingly, they included a general limitations clause (Section 1) that provides that the Charter rights were “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

In *R. v. Oakes*, [1986], 1 S.C.R. 103, the Canadian Supreme Court set out a four-part test as to how section 1 was to be applied. To determine whether an infringement was permissible, the Court must find two things: first, that the objective of the legislation be pressing and substantial, and second, that the government accomplish this objective by choosing a means that is reasonable and demonstrably justifiable in a free and democratic society. To satisfy this second requirement, the following three criteria must be met:

First, the measures adopted must be carefully designed to achieve the objective of the law. This rational connection test requires that the law logically further the objectives that the legislator had in mind in enacting the measure.

Second, the law must impair rights as little as possible. This involves a comparison of the impugned measure with other available alternatives, in order to assess whether the government could have achieved its objectives with a less significant impact on rights and freedoms.

Finally, there must be proportionality between the effects of the measure and the objective which has been identified as being of sufficient importance. This involves a consideration of whether the

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86 The use of a general limitations clause is unusual among western countries which possess a Bill of Rights. It does not exist, for instance, in the United States Constitution (Monahan, *Constitutional* 410).

87 Section 1 of the Canadian Charter of Rights and Freedoms reads as follows:

Rights and freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonably limits prescribed by law as can be demonstrably justified in a free and democratic society.
benefit that is achieved from the law outweighs the impact on rights associated with it.

(Monahan, *Constitutional* 412-413)

While the Court proposed a four part analysis, almost all of section 1 litigation concerns the minimal impairment branch of the proportionality test: Could the government have achieved its desired results by passing a law that would have had less significant impact on the impugned rights or freedoms in question? Between 1986 and 1997, the Canadian Supreme Court struck down fifty cases as unconstitutional. Forty-three (85%) of these failed as a result of the minimal impairment component.88 As pointed by Monahan, the reliance of the Court on the minimal impairment component of the test is not surprising:

The minimal impairment branch of the proportionality test is primarily concerned with the degree of fit between an objective and the means chosen to implement the objective. It asks whether the same objective could have been achieved through reliance on a more carefully tailored measure with less adverse impact on rights. In this way, minimal impairment analysis calls into question only the means chosen to achieve a particular legislative objective, without impugning the validity of the underlying objective itself. This means that in cases where legislation is ruled invalid on the basis or failure to satisfy the minimal impairment test, it will very likely be open to the legislature to pursue the same objective utilizing a slightly different means. This ensures that legislatures and executives rather than courts retain the primary role in the public policy process, and reduces the potential for conflict between the various branches of government.

(Monahan, *Constitutional* 413-414)

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Given the broad language of section 1, the Canadian Supreme Court has an enormous amount of discretion (and hence power) to determine the extent to which the government can limit or infringe upon Canadian Charter rights and freedoms.

Under section 33 of the Constitution Act, 1867, the federal and provincial governments can temporarily override the rights and freedoms in sections 2 and 7–15 for a renewable five year period. As mentioned in the introduction, Section 33 (often referred to as the “notwithstanding clause”) was added to the Constitution Act, 1867 in an effort to persuade the provinces to adopt the constitutional amendments in 1982. Many of the provinces were reluctant to adopt a Canadian Charter of Rights and Freedoms if the Courts had the power to strike down duly enacted laws as unconstitutional. Generally speaking, written constitutions with bills of rights were not compatible with the British concept of parliamentary supremacy. In an effort to allay the concerns of the Provinces, the then-Prime Minister Trudeau reluctantly accepted to insert section 33 in the Canadian Charter that gave the federal and provincial legislature the power to legislatively overrule a Supreme Court decision that the legislative body did not like. A declaration of invalidity was to be valid for a five year period. After that period, the Supreme Court decision would be effective, unless the parliamentary body used the notwithstanding clause to opt out a second time. Because section 33 limited the power of the judicial review, Trudeau was able to win over, after hard negotiation, the consent of the provinces (except Québec) to adopt the 1982 Canadian Charter. When Québec filed suit to challenge the legality of this, the Canadian Supreme Court held that Canada could adopt
the new constitution without Québec’s consent. In protest the adoption of the 1982 Charter, Québec accordingly added a standard notwithstanding clause to each of the statutes then in force in the province. This “blanket” use of section 33 came into play in the *Ford v. Québec* decision in which the Court struck down a portion of Bill 101 as unconstitutional.

To appreciate the significance of some of the Court’s language in the *Ford* case, it is important to know that Québec sought to amend the newly adopted Constitution twice, once in 1990 (The Meech Lake Accord) and again in 1992 (The Charlottetown Accord). In each effort, Québec sought to be recognized as a “nation” or a “distinct separate society” within the Canadian Confederation Québec made this request for two reasons. First, it symbolically recognized “the Francophone community in Québec as a permanent and distinctive feature of the Canadian identity.” Second, it was believed that such a provision would make it more difficult for the Courts to strike down Québec statutes under the “reasonable limitations” clause of section 1 of the Canadian Charter if a law was felt to advance the particular language and culture of Québec. Both constitutional accords failed for a number of reasons (Monahan *Constitutional* 207-213). Generally,

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89 See, *Reference Re Amendment of Constitution of Canada*, [1981], S S.C.R. 753 in which the Court held that the federal government could amend the constitution if it had substantial—as opposed to unanimous—provincial consent.

however, the provinces (along with the federal government) contended that Québec should have no rights or privileges that did not belong to the other provinces as well.\textsuperscript{91}

The facts in the \textit{Ford v. Québec} case are straightforward. Bill 101 declared French to be the official language of Québec and required that all commercial signage (section 58) and all business names (section 69) be solely in French. Many of the Anglophone merchants believed that this hurt their ability to service their Anglophone clients. Valarie Ford operated a retail store selling wool. She displayed an exterior sign containing the following words, “Laine……Wool.” The \textit{Commission de surveillance de la langue française} found the sign to be in violation of Bill 101 because it was not solely in French. The Commission ordered that the signs be removed. Ford refused, claiming that Bill 101 violated her constitutional right of free expression under section 2 of the Canadian Charter, and filed a court petition requesting that the law be held unconstitutional. In December of 1986, the Québec Court of Appeal ruled that, while Bill 101 could legally require that signs include French, barring other languages violated the guarantees on linguistic equality in the Constitution, 1982 and the guarantees of freedom of expression in Québec’s own Charter of Human Rights and Freedoms. Québec appealed the case to the Canadian Supreme Court.

The issues before the Court included the following: (1) whether section 33 protected this portion of Bill 101 from judicial review, (2) whether the freedom of expression rights violated the Québec Court’s decision. Since the Québec Court held that the guarantees on linguistic equality in the Constitution, 1982 and the guarantees of freedom of expression in Québec’s own Charter of Human Rights and Freedoms had been violated, the Canadian Supreme Court had to determine whether section 33 protected this portion of Bill 101 from judicial review.

\textsuperscript{91} The recognition of Québec as a “distinct” society or nation is still an ongoing political issue in Canadian politics. It is interesting to note that in November of 2006, the federal government initiated a constitutional discussion by introducing a resolution in the House of Commons proclaiming that it “recognized that the Québécois from a nation within a united Canada.” See, \textit{House of Commons Debates, No. 087 (27 November 2006)} at 125 (Hon. Stéphene Dion). Although the Minister for intergovernmental affairs resigned in protest, the House passed the Resolution in a vote of 265 to 16. \textit{House of Commons Debates, No. 087 (27 November 2006)} at 2035. See also Cameron \textit{Recognizing Québec} at page 395.
expression guaranteed by section 2 of the Canadian Charter included the freedom to express oneself in the language of one’s choice, and (3) whether the limitation expressed in Bill 101 was justified under the general limitations clause (section 1) of the Canadian Charter.

Regarding Québec’s blanket use of section 33, Ford argued that it was unlawful because the National Assembly had failed to identify the specific constitutional right infringed. The rationale underlying this argument was “…that the nature of the guaranteed right or freedom must be sufficiently drawn to the attention of the members of the legislature and of the public so that the relative seriousness of what is proposed may be perceived and reacted to through the democratic process” (Ford v. Québec at para. 30). As argued by the Attorney General for Ontario (who contended that the blanket use of section 33 was invalid), there must be a “political cost” for overriding a guaranteed right or freedom. If Québec chooses to deprive someone of their Canadian Charter rights, he contended, it must do so in a politically public and transparent manner. Otherwise, there was a risk that it would not be held accountable for its decision. The Court rejected this argument, holding that section 33 imposed no such requirement. The Court clearly was not interested in restricting Québec’s use of the section 33 override. In this particular case, however, the Court found that the section 33 five-year override had expired prior to the case reaching the Canadian Supreme Court. The Court accordingly decided that it was free to decide the merits of the case.
The Court then held that “freedom of expression” in Section 2 of the Canadian Charter included the freedom to express oneself in the language of one’s choice. Regarding this, the Court said the following:

Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colors the content and meaning of expression. It is, as the preamble of the Charter of the French Language itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality.

_Ford v. Québec_ p. 19

Regarding application of section 2(b) of the Canadian Charter, the Court held that Bill 101 limited the right of freedom of expression. The Court then considered whether such a limitation was permissible under section 1 of the Canadian Charter. As mentioned earlier, section 1 provides that Charter rights are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Arguing that such a limitation was appropriate, the Attorney General of Québec presented general studies of sociolinguistics and language planning, articles, reports and statistics pertaining to (a) “…the vulnerable position of the French language in Québec and Canada, which was the reason for the language policy reflected in Bill 101 (as well as earlier Québec legislation having the same general purpose), and (b) the importance attached by language planning theory to the role of language in the public domain, including the communication or expression by language contemplated by the challenged provisions of the Charter of the French Language” (Ford v Québec at p. 31.) In light of

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See Section 1 of Canadian Charter of Rights and Freedoms in footnote 87.
this material, the Attorney General contended that it was necessary to eliminate English from the linguistic landscape of Montreal where English was (and always has been) widely used.93

Regarding the application of section 1, the Court agreed with Québec concerning the valid purpose and pressing need for Bill 101. This was a significant concession in support of Québec’s language policies.94 Notwithstanding this, however, the Court held

93 By requiring exclusive use of French in commercial signage, the drafters of Bill 101 operated on the assumption that the use of French would increase in other wider domains of language use, including the amount of French used by Anglophone business managers (Miller 121). The exclusive use of French was also intended to demote the status of the English language relative to French in the commercial community. As mentioned by Bourhis in The Vitality of English-Speaking Communities of Québec: From Community Decline to Revival, “...empirical studies conducted with [Francophones] across Canada [indicated] that the more visible French was in the linguistic landscape, the more it [helped create] a perception that the Francophone community enjoyed a strong vitality, and the more Francophones reported using French in public settings” (Bourhis The English Speaking 140).

94 By finding that the there was a pressing and substantial need to protect the French language in Québec (and the rest of Canada), the Court’s language is both powerful and clear:

The material amply establishes the importance of the legislative purpose reflected in the Charter of the French Language and that it is a response to a substantial and pressing need. Indeed, this was conceded by the respondents both in the Court of Appeal and in this Court. The vulnerable position of the French language in Québec and Canada was described in a series of reports by commissions of inquiry beginning with the Report of the Royal Commission on Bilingualism and Biculturalism in 1969 and continuing with the Parent Commission and the Gendron Commission. It is reflected in statistics referred to in these reports and in later studies forming part of the materials, with due adjustment made in the light of the submissions of the appellant Singer in Devine with respect to some of the later statistical material. The causal factors for the threatened position of the French language that have generally been identified are: (a) the declining birth rate of Québec Francophones resulting in a decline in the Québécois francophone proportion of the Canadian population as a whole; (b) the decline of the francophone population outside Québec as a result of assimilation; (c) the greater rate of assimilation of immigrants to Québec by the Anglophone community of Québec; and (d) the continuing dominance of English at the higher levels of the economic sector. These factors have favored the use of the English language despite the predominance in Québec of a francophone population. Thus, in the period prior to the enactment of the legislation at issue, the "visage linguistique" of Québec often gave the impression that English had become as significant as French. This "visage linguistique" reinforced the concern among Francophones that English was gaining in importance, that the French language was threatened and that it would ultimately disappear. It strongly suggested to young and ambitious Francophones that the language of success was almost exclusively English. It confirmed to Anglophones that there was no great need to learn the majority language. And it suggested to immigrants that the prudent course lay in joining the
that the Attorney General had not demonstrated that the prohibition of the use of any language other than French in ss. 58 and 69 of Bill 101 was necessary to the defense and enhancement of the status of the French language in Québec or that it was proportionate to that legislative purpose. The Court went on to explain:

Since the evidence put to us by the government showed that the predominance of the French language was not reflected in the "visage linguistique" of Québec, the governmental response could well have been tailored to meet that specific problem and to impair freedom of expression minimally. Thus, whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "visage linguistique" in Québec and therefore justified under the Québec Charter and the Canadian Charter, requiring the exclusive use of French has not been so justified. French could be required in addition to any other language or it could be required to have greater visibility than that accorded to other languages. Such measures would ensure that the "visage linguistique" reflected the demography of Québec: the predominant language is French. This reality should be communicated to all citizens and non-citizens alike, irrespective of their mother tongue. But exclusivity for the French language has not survived the scrutiny of a proportionality test and does not reflect the reality of Québec society.

(Ford v. Québec para. 73)

As a result, the Court found that the limit imposed on freedom of expression by section 69 of Bill 101 respecting exclusive use of the French version in commercial signage was not justified under section 1 of the Canadian Charter. That section of Bill
101 was accordingly unconstitutional under both the Québec and Canadian Charters. \textit{(Ford v. Québec} para. 73).\footnote{In \textit{Devine v. Québec (Attorney General)}}, [1988] 2 S.C.R. 790, a companion case to \textit{Ford}, the petitioner claimed that Québec did not have jurisdiction to enact Bill 101 because it invaded federal legislative jurisdiction with respect to the criminal law and the regulation of interprovincial trade and commerce. The Court rejected the argument, concluding that the regulation of the use of language fell within provincial legislative jurisdiction. \textit{See Devine} paras. 17-19.

Following this decision, Québec enacted Bill 178 that maintained mandatory public signage in French only on the outside of businesses but allowed the use of another language inside, as long as French occupied a predominant position. The Québec National Assembly invoked the notwithstanding clause, thus legislatively protecting the new law from the \textit{Ford} decision for a five year period. When Québec did this, three Québécois, Ballantyne, Davidson, and McIntyre (hereinafter “Ballantyne”), filed a complaint against Québec before the Human Rights Committee of the United Nations, contending that Québec had violated Article 19 of the International Covenant on Civil and Political Rights that states that everyone shall have the right of freedom of expression. In May of 1993, the Commission agreed, holding that Bill 178 violated Ballantyne’s civil rights. The Committee believed that "it [was] not necessary, in order to protect the vulnerable position in Canada of the Francophone group, to prohibit commercial advertising in English." It suggested that "[t]his protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English." It concluded that "...a State may choose one or more official languages, but it may not exclude, outside the spheres of

\footnote{In \textit{Devine v. Québec (Attorney General)}}, [1988] 2 S.C.R. 790, a companion case to \textit{Ford}, the petitioner claimed that Québec did not have jurisdiction to enact Bill 101 because it invaded federal legislative jurisdiction with respect to the criminal law and the regulation of interprovincial trade and commerce. The Court rejected the argument, concluding that the regulation of the use of language fell within provincial legislative jurisdiction. \textit{See Devine} paras. 17-19.
public life, the freedom to express oneself in a language of one's choice. The Committee accordingly concludes that there has been a violation of article 19, paragraph 2."

When the notwithstanding period had expired, Québec amended Bill 101 to allow bilingual signs both outside and inside a business, provided that French have a clear predominance over any other language. “Under this new law, known as Bill 86, Gwen Simpson and Wally Hoffman, owners of a small antique store near Montreal called The Lyon and the Wallrus, faced a $500 fine because the English and French words on their sign were the same size. They contested the fine. A Québec court ruling in 1999 said the province can't continue to impose restrictions on the use of languages other than French on commercial signs unless it can prove the fragility of the French language in Québec society.” But the Québec Superior Court reversed that decision in April of 2000, [holding that such restrictions were valid.] citing “…Québec's unique geographical situation as an enclave of French speakers on an English-speaking continent.” Simpson and Hoffman appealed to the Supreme Court of Canada, but on December 12, 2002, the Court decided not to hear the appeal, thus leaving the appellate decision in place. This settled the signage issue.


99 See, Les Entreprises W.F.H. Ltée v. Attorney General of Québec, Supreme Court Docket No. 28978, “Decision on the application for leave to appeal, CJ LeB De, The application for leave to appeal from the judgment of the Court of Appeal of Québec (Montreal), Number 500-10-001846-003, dated
Even though the Canadian Supreme Court struck down the public signage portion of Bill 101, I argue that it advanced the vitality of the Québec Francophone community by effectively acknowledging the distinctive character of Québec as well as the legitimacy of the legislative measures designed to promote and protect the French language, two significant concessions long requested and for by Québec. The Court agreed that Québec was “…entitled to take steps to ensure that French is the predominant language within its borders.”¹⁰⁰ Such an acknowledgement not only validated Québec as a distinct and separate nation, it also acknowledged Québec’s efforts to protect the language as a legitimate exercise of provincial power. The Court also found that Bill 101 was critically important for Québec and in response to a pressing and substantial need that justified limiting Canadian Charter of Rights. The Court observed “…that the vulnerable position of the French language in Québec and Canada was documented in a series of reports by commissions of inquiry beginning with the Report of the Royal Commission on Bilingualism and Biculturalism in 1969 and continuing with the Parent Commission and the Gendron Commission.”¹⁰¹ These Commissions “…identified the following causal factors for the threatened position of the French language: “(a) the declining birth rate of Québec Francophones resulting in a decline in the Québec Francophone proportion of the Canadian population as a whole; (b) the decline of the


Francophone population outside Québec as a result of assimilation; (c) the greater rate of assimilation of immigrants to Québec by the Anglophone community of Québec; and (d) the continuing dominance of English at the higher levels of the economic sector.”^102 The Court noted that “…these factors favored the use of the English language despite the predominance in Québec of a Francophone population, thus [reinforcing] the concern among Francophones that English was gaining in importance [and] that the French language would ultimately disappear. English signage suggested to young and ambitious Francophones that the language of success was almost exclusively English.”^103 Such signage also confirmed to Anglophones that there was no need to learn French to succeed in the Québec community. In light of this evidence, the Court agreed that Québec was entitled to take significant measures to “…assure that the ‘visage linguistique’ of Québec would reflect the predominance of the French language” (*Ford v. Québec*, paras. 72-73). While such a conclusion did not merit forbidding English entirely, it did merit a limitation that did not challenge or jeopardize the goals of Bill 101 to assure the quality and influence of the French language. In so holding, the Court gave much institutional support to protecting and advancing the vitality of Francophone Québec.

The Court also advanced Québec’s unique culture by allowing the blanket use of section 33 that facilitated Québec’s ability to override court decisions that Québec may perceive as undermining its language and culture policies. Through a blanket override, Québec could immunize their laws from judicial review for five years with no obligation

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^103 *Ford v. Québec*, supra, at page 32.
on the part of the National Assembly to explain why the override was necessary or to identify which particular Canadian Charter right was being overridden. As such, the *Ford* case gave Québec a powerful tool to protect and advance its language and culture, free from any perceived interference from the Canadian Supreme Court.\(^{104}\)

**Re Reference re Secession of Québec (1998)**

In order to understand how the outcome of this case impacted the Québec Francophone community, one must be familiar with the facts of the case and its social circumstances. In the 1976 provincial election, Québec voted the *Parti Québécois* into power. In 1980 the government presented Québec’s population with a referendum as to whether Québec “…should seek a mandate to negotiate sovereignty coupled with the establishment of a new political and economic union with Canada. The referendum resulted in the defeat of the sovereignty option by a margin of 60% to 40%.”\(^{105}\)

In 1994, the *Parti Québécois* was re-elected and announced that it would be initiating a second referendum to take place in 1995. Under Bill 1, *An Act Respecting the Future of Québec*, the Québec National Assembly suggested a process by which the

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104 As a matter of practice, only two provinces have ever used the section 33 override, Saskatchewan and Québec. There are several theories for this. One is the “nuclear bomb” theory, which says that in most cases the use of the override is radical overkill, the equivalent of dropping the nuclear bomb in a war. There are other, less costly ways, so the argument goes, for legislatures to achieve their objections (Leeson 297-327; Kahana 1-43). Others argue that provinces are reluctant to use the override because its use can have far reaching untold political consequences. Some contend, for instance, that Québec’s use of the override in the *Ford* case ultimately led to the failure of the Meech Lake Accord, a set of constitutional amendments designed to secure Québec’s acceptance of the 1982 Constitution. The use of section 33 to uphold the linguistic privileges contrary to the Anglophone Canadian Charter rights, was perceived by the rest of Canada as unreasonable, and dampened the desire to effect a constitutional reconciliation with Québec (Gervais, Kirkey, and Rudy 209).

government, one year after making an offer of political and economic partnership with the rest of Canada, could unilaterally declare the sovereignty of Québec. “The wording of the Reference question was: “Do you agree that Québec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Québec and the agreement signed on June 12, 1995?" The Bill was presented to the voters, and on October 30, 1995, a slim majority of Québécois (50.58%) rejected the government referendum. Shortly thereafter, Parti Québécois leader Lucien Bouchard announced that his government was planning, at some point in time, to again submit the Referendum question to the voters. In reaction to this, the Canadian Prime Minister, Jean Chrétien, submitted a request for an advisory opinion to the Canadian Supreme Court on three specific questions:

1. Under the Constitution of Canada, can the National Assembly, legislature, or government of Québec effect the secession of Québec from Canada unilaterally?

2. Does international law give the National Assembly, legislature, or government of Québec the right to effect the secession of Québec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature, or government of Québec the right to effect the secession of Québec from Canada unilaterally?

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature, or government of Québec to effect the secession of Québec from Canada unilaterally, which would take precedence in Canada?


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In drafting the questions in this manner, the federal government was hoping that the Court would condemn the illegality of unilateral secession and thereby undermine any future sovereignty referendum. As I mentioned in the introduction, the federal government can only refer legal, as opposed to political, questions to the Supreme Court. With this in mind, Québec challenged the legality of the reference, contending that Ottawa’s questions were all about politics, not law. In addition, Québec contended that only Québécois had the power to decide their future, regardless of what the Supreme Court held. As expressed by Mario Dumont, leader of Québec’s Action Démocratique Party, “Québec is today and will always be a distinct society, free and able to control its own destiny and development” (Dumont 7).

The Court issued its decision on August 20, 1998. In order to answer the first question, the Court identified four principles that were implicit in the constitution: the principles of federalism, democracy, constitutionalism and the rule of law, and the respect for minorities. The Court maintained that while these principles were not explicit in the text of the constitution, they were nevertheless its lifeblood (In re Québec Secession Reference para. 51). Moreover, the Court said that “these defining principles function in symbiosis” in which no single principle could trump or exclude the operation of any other. Applying these principles to the Reference questions, the Court held that the secession of a province from Canada required a constitutional amendment and could not be achieved unilaterally. At the same time, however, the Court held “…that if a clear majority of Québécois unambiguously [opted] for secession, the federal government and the other provinces [had] a constitutional duty to negotiate [with Québec on the
all parties appear at the bargaining table to discuss the issues. No one principle trumped any of the other principles. Definitive positions, without compromise, were not appropriate. There must be a give and take, with all parties negotiating the matters in good faith. Under such principles, Québec could not dictate the terms of secession, although neither could the federal government. However, no party could leave the bargaining table.

The Court identified the underlying principles of the Canadian Constitution that advanced and protected the diversity of the Canadian Federation and applied them to protect Québec. First, the Court declared that Canadian federalism was premised on the principle that linguistic minorities had the legislative and constitutional power to protect and advance their own cultural and linguistic goals. As the Court noted, “…the federal-division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to the provincial governments” (Reference re Secession of Québec at para. 43). Québec came into the union with this assurance, and the Court wanted to make sure that it got the benefit of its bargain.

The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Québec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Québec explains the existence of the province of Québec as a political unit and indeed, was one of the essential reasons for establishing a federal

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structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the Union Act, 1840 (3 & 4 Vict.), c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Québec, and so exercise the considerable provincial powers conferred by the Constitution Act, 1867 in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself.

(In re Québec Secession Reference, para. 59)

Second, the Court recognized that Canadian federalism “…recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity” (Reference Québec Secession at para. 58). Under this principle, Québec is best able to protect its language and culture within a dialogue shaped by those principles that embody the values essential to a free and democratic society, which include “…respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions that enhance the participation of individuals and groups in society” (R. v. Oakes, [1986] 1 S.C.R. 103 at p. 136).

Third, the Court advanced the community vitality of Québec by recognizing that the Canadian Confederation requires that all parties stay in dialogue with one another. No one has a monopoly on truth, and the system is predicated on the faith that a dialogue
will bring the best ideas to the top. As a practical matter, diversity is best protected by a democratic dialogue of all concerned parties.

Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (Saumur v. Québec (City), supra, p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

(In re Québec Secession Reference, para. 68)

Finally, the Court advanced the community vitality of Québec by recognizing that one of the underlying principles of the Canadian Constitutional order was the protection of minority rights. As observed by the Court,

“...one of the key considerations motivating the enactment of the Charter and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the Charter. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: Senate Reference, supra, at p. 71. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.”

Reference Québec Secession at para. 85.
Under this principle, Québec can rest more secure that it will be able to manage its internal affairs free from federal interference.

Reference re Securities Act (2010)

In this case the Canadian Supreme Court struck down as unconstitutional an effort by the federal government to implement the national regulation of the securities market. In order to understand the issues in the case, a few introductory comments about the economic background surrounding this decision are in order. Many economists consider the financial crisis of 2008 the worst financial crisis since the Great Depression of the 1930s. Stock markets all over the world plummeted in value, causing investors to lose trillions of dollars. While the causes of the crisis were complex, many argued that the lack of governmental regulation was one of them. In light of this, certain legislative action was taken to prevent another such financial crisis from happening again. In the United States, for instance, Congress passed the American Recovery and Reinvestment Act of 2009.¹⁰⁸

Canada likewise wished to increase the regulatory supervision of the Canadian securities market. However, in Canada, securities regulation is different from the regulatory framework in the United States. In the United States, the United States Security and Exchange Commission oversees the regulation of the market through the

constitutional power of the commerce clause.¹⁰⁹ In Canada, however, no such federal commission exists. Under the terms of the Constitution Act, 1867, it is the provinces, not the federal government, that regulate the securities market because it concerns property and contract rights. With ten different provinces, there accordingly exist ten different legal systems of regulatory control, some of which are coordinated to work together and some of which are not. As explained by the Court, these provincial regulatory agencies “…exercise a variety of responsibilities, including prospectus review and clearance; oversight of disclosure requirements; takeover bids and insider trading; registration and regulation of market intermediaries; enforcement of compliance with the regime; recognition and supervision of exchanges and other self-regulated organizations; and public education” (Reference re Securities Act, para. 41). In 2009, the Hockin Panel, comprised of experts on securities regulation, issued a report in which it argued that these local agencies could no longer adequately protect investors given the evolving national character of securities markets (Reference re Securities Act, para. 25-26). In response to this, the Canadian Parliament published in 2010 a draft of the Canadian Securities Act and asked the Supreme Court to decide if the Act was constitutional. As explained by the Court, the Act was “…designed to provide investor protection, to foster fair, efficient and competitive capital markets and to contribute to the integrity and stability of Canada’s financial system. The Act includes registration requirements for securities dealers, prospectus filing requirements, disclosure requirements, specific duties for

¹⁰⁹ In the United States, the courts have construed the commerce clause in the United States Constitution so as to give the federal government almost unlimited legislative power. For a discussion of this subject, see National Federation of Independent Business v. Sebelius, 567 U.S. ___ (2012), 132 S.Ct 2566 (Obamacare).
market participants, a framework for the regulation of derivatives, civil remedies and regulatory and criminal offences pertaining to securities” (Reference re Securities Act, para. 29-30).

At issue was the question of whether the regulation of the securities industry was a valid exercise of federal trade and commerce power. Given the global nature of the securities market, the federal government argued that Parliament had the power to enact the legislation under section 91(2) of the Constitution Act, 1867 that gave the federal government exclusive power to regulate trade and commerce. Several of the provinces, including Québec, disagreed. They argued that the Act was unconstitutional because it attempted to regulate property and contract rights, a legislative power exclusively reserved to the provinces under section 92(13).

The Court held the Act unconstitutional, finding that it was not valid under the trade and commerce clause because the Act focused “… on the day-to-day regulation of all aspects of contracts for securities within the provinces, including all aspects of public protection and professional competences. These matters remain essentially provincial concerns falling within property and civil rights in the provinces and are not related to trade as a whole” (Reference re Securities p. 839). According to the Court, such an effort simply overreached the legislative interest of the federal government. The Court’s lengthy decision boils down to the following:

In sum, the proposed Act overreaches genuine national concerns. While the economic importance and pervasive character of the securities market may, in principle, support federal intervention that is qualitatively different from what the provinces can do, they do not justify a wholesale takeover of the regulation of the securities industry which is the ultimate consequence of the proposed federal
legislation. A cooperative approach that permits a scheme recognizing the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns remains available and is supported by Canadian constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities.

*In re* Securities Act pp. 839-840

By finding the Act unconstitutional, the Court advanced the community vitality of Francophone Québec in several ways. First, it protected the legislative authority of Québec to manage its own internal affairs without federal interference. Because of the global nature of the securities market, the government had a compelling argument in favor of centralized national regulation. No one certainly wanted a repeat of the Financial Crisis of 2008, and both the United States and Canada responded with proposed legislation that subjected the market to increased scrutiny and regulation. Given this, one can certainly say that this case presented the Court with a tempting opportunity to construe the trade and commerce clause so as to redefine the balance of power between the federal and provincial governments. However, it refused to do this. The Court summarized this critical point as follows:

While flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers. The Secession Reference affirmed federalism as an underlying constitutional principle that demands respect for the constitutional division of powers and the maintenance of a constitutional balance between federal and provincial powers.

In summary, notwithstanding the Court’s promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The “dominant tide” of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.
Second, the Court’s decision advanced Francophone culture by giving Québec control of its economic markets. Language issues are, ultimately, economic issues. In any given society, the economically dominant party will set the agenda on commercial, educational, and language issues. Prior to the Quiet Revolution, the socioeconomic status of many Francophones simply did not command the economic, and hence political, power necessary to bring about changes in their society. During the 1960s and 1970s, however, the creation of a new Francophone bourgeoisie completely changed Québécois society. Highly educated and affluent, they not only modernized Québec, but also strengthened Francophone economic control over the economy (Linteau 407-424). Speaking in 1967, René Lévesque (later leader of the Parti Québécois and Premier of Québec) put the matter succinctly: “When you control the economic life, you control the linguistic life.”\(^{110}\) Consistent with this statement, every Québec government between 1960 and 1985 deployed various economic development programs to wrest the Québec’s economy from Anglophone control. In so doing, they wanted to make Québec a major player in the economy and a partner with private enterprise. For the same reason, they sought to regulate business activity (Levine 337). Aided by certain market trends in the 1980s, these economic policies transformed Québec and, among other things, led to momentous social and economic changes for Québec are English and French speaking communities. Québec was successful in doing this because it was in control of its

\(^{110}\) Quoted in Corbett, Edward. *Québec Confronts Canada*. Baltimore: Johns Hopkins UP, 1967: 95. See also Levine at p. 150.
economic affairs. *In re Reference Securities Act*, the Court decided the case in a manner that honored this economic and legislative principle.

Finally, this decision also advances the community vitality of Francophone Québec by adopting a decentralized vision of the country, one quite consistent with Québec’s Francophone vision of how the federal union should operate. In a decentralized federal union, the provinces have the power to experiment with different legislative solutions. As Judge Brandeis famously commented, “It is one of the happy incidents of the federal system that a single courageous state may, if it citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”\(^{111}\) If a new program is not successful, the nation as a whole has not been placed at risk. If it is successful, it can be copied by other provinces or even the federal government. As a practical matter, the provinces have engaged in this process in Canada, as demonstrated by the social credit program (which started in Alberta in 1935 but never took hold), Medicare (which started in Saskatchewan in 1961 and became a national program in 1968), family property regimes (which have not been adopted by all of the provinces), and no-fault automobile insurance (which has been adopted in several provinces).\(^{112}\) In such a fashion, the *Reference Securities* case encourages provincial experimentation and innovation that, in fact, works to Québec’s advantage in implementing, without federal interference, its own linguistic programs and policies. In

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fact, one could even argue that legislative initiatives could even be lost if the federal government controls the provinces too closely.\footnote{Lysyk, Kenneth M. \textit{Reshaping Canadian Federalism}. Part of the William Kurelek Memorial Lectures ser. Toronto: Canadian Professional and Business Club of Toronto, 1979. 13 U.B. C. L. Rev. 1, p. 5.}

\textbf{Conclusion}

In this chapter I have argued that the Court has advanced and protected the Québec Francophone community through the principle of federalism. Based on my analysis of three different cases, I contend that the Court has construed the Constitution, 1867 in such a manner as to give the provinces sufficient legislative and/or constitutional authority to manage their own internal affairs, including those relating to language and education. In \textit{Ford v. Québec (Attorney General)}, [1988] 2 S.C.R. 90, the Court acknowledged Québec’s distinct status within the Canadian federation, as well as the legitimacy of the unilingual policy underpinning Bill 101, two significant concessions long requested and fought for by Québec. Under the Court’s interpretation of the section 33 override, Québec can easily “overrule” Supreme Court decisions that adversely affect its community. In \textit{Re Reference re Secession of Québec}, [1998] 2 S.C.R. 217, the Court held that neither the Canadian constitution nor international law allowed Québec to secede unilaterally from Canada without a constitutional amendment. If a clear majority of Québécois opted for secession, however, the Court found that the federal government had a constitutional duty to negotiate the issues of secession with Québec. According to the Court, this obligation was implicit in four principles that informed and sustained the constitutional text: federalism, democracy, constitutionalism and the rule of law, and
respect for minorities. As a result of these, neither Québec nor the federal government could dictate the terms of secession. Each of these principles is committed to protecting the diversity within the Canadian federation and thus also the community vitality of the Québec Francophone community. In this decision, the Court used its own considerable status to legitimize Québec’s desire to be recognized as a “separate and distinct” society within Confederation, thus giving institutional support for Québec’s unique language and culture. Finally, in Reference re Securities Act, [2011] 2011 SCC 66, the Court struck down an effort by the federal government to create a national Canadian Securities Commission to regulate the sale and purchase of stocks and securities. Notwithstanding considerable pressure to the contrary, the Court construed Section 91(2) of the Constitution Act, 1867 so that Québec retained, free from federal interference, the legislative power to regulate its capital markets. Under this decision, the Court again honored the terms of the Constitution Act, 1867 by striking down a proposed law that had the potential to duplicate and even displace the clear provincial powers over local property and contract rights. Ultimately, I argue that language policy is a function of economic power, and, in this case, the Court gave Québec the power to regulate its capital markets in whatever manner it saw fit, without federal interference. In so ruling, the Court adopted a vision of Canadian federalism that embraced the idea of each province serving as a social laboratory to fashion and create a legislative solution to securities regulation that is open to innovation and experimentation, two principles that indirectly support Québec’s unique language and culture. In all three decisions the Court found certain principles implicit in Canadian federalism that sustain and protect Québec’s
ability to manage its own affairs, including the protection of its unique culture and language.
Chapter 4: Principle of Constitutional Dialogue

One of the current debates about the Canadian Supreme Court is that it has too much power. Under the Canadian Charter, the Court may impose its will upon the democratic majority by declaring what is, and what is not, permissible under the Canadian Constitution. Under such a view, judicial review of legislation is illegitimate because it is undemocratic.

Peter Hogg and Allison Bushell have challenged this perception of the Supreme Court, arguing that Charter cases are almost always followed by new legislation that accomplishes the same objective as the legislation that was struck down, except without violating Canadian Charter rights (Hogg and Bushell 75-124). This “give and take” process between the Court and the Québec National Assembly, they contend, is best regarded as a constitutional “dialogue.” In his article, “Shaping the Constitutional Dialogue on Federalism: Canada’s Supreme Court as Meta-Political,” Kelly and Murphy further describe the Court’s role as “meta-political” in which its decisions supplement, rather than subvert the constitutional role of these other political bodies (Kelly and Murphy 217). In such a role, they argue, “…the Court explicitly encourages [these institutions] to assume the lead in defining and implementing fundamental constitutional rights and freedoms, seeing its own role as one of encouraging and reinforcing this dialogue or by offering authoritative guidelines on constitutional controversies where political processes either fail to emerge or threaten to break down” (Kelly and Murphy
By facilitating the dialogue in this manner, the Court does not act as the final arbitrator of constitutional disputes, they contend, but as a mediator that announces the rules of the debate, letting the political players find a solution to the problem within their own political arena. In such a situation, they conclude, “...the power of judicial review is not a veto over the [democratic desires] of a nation, but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole” (Hogg and Bushell 105). According to Kelly and Murphy, this dialogue usually culminates in a decision whereby the legislative body can pass new legislation that accomplishes what they originally wanted to do in the first place with no violation of Charter rights.\textsuperscript{114} Hence, the Court usually scrutinizes legislative means instead of legislative ends. Furthermore, even if they do block a legislative end, the province can use the section 33 notwithstanding clause to overturn the Supreme Court decision. The result is a process enriched by a Charter rights dialogue between independent judges and accountable legislators (Fletcher 110). In such a manner, the Court protects the democratic process that gives voice to the diversity within the Confederation. Based on this argument Hogg and Bushell conclude:

\begin{quote}
\ldots that the critique of the Charter based on democratic legitimacy cannot be sustained. To be sure, the Supreme Court of Canada is a non-elected, unaccountable body of middle-aged lawyers. To be sure, it does from time to time strike down statutes enacted by the elected, accountable, representative legislative bodies. But, the decisions of the Court almost always leave room for a legislative response, and they usually get a
\end{quote}

\footnote{\textsuperscript{114} As mentioned in the introduction, Hogg and Bushell surveyed sixty-five statutes which the Court struck down as unconstitutional. In two thirds of these cases, they found that “only a minor legislative response was needed to ensure the constitutionality of the offending provision” (Kelly, Governing 221).}
legislative response. In the end, if the democratic will is there, the legislative objective will still be able to be accomplished, albeit with some new safeguards to protect individual rights and liberty. Judicial review is not "a veto over the politics of the nation," but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole.

(Hogg and Bushell 105)

According to Hogg and Bushell, there are four features of the Canadian Constitution that facilitate this dialogue. First, section 33 allows for a legislative override. Second, section 1 allows for “reasonable limits” on certain guaranteed Charter rights. Third, sections 7, 8, 9 and 12 (legal rights) allow the legislature to restrict such rights as long as such restrictions satisfy standards of fairness and reasonableness. Fourth, section 15(1) allows a legislature to satisfy the guarantee of equality rights through a variety of remedial measures (Hogg and Bushell 82). As we discussed in chapter 3, Section 1 of the Charter is the most important one when it comes to balancing Québec’s desire to maintain the vitality of the Francophone community vis-à-vis individual rights guaranteed by the Charter.

To decide whether an infringement of a Charter right is permissible, the Court must determine, under the *Oakes* test, whether or not in reaching its legislative objective the legislature has impaired the rights as little as possible. Under this “minimal impairment test,” the Court must compare the impugned measure with other available options in order to determine if the government could have achieved its objective with a less significant impact on the Charter rights and freedoms in question. As explained by Monahan, this is important in setting the stage for the legislative process:
The minimal impairment branch of the proportionality test is primarily concerned with the degree of fit between an objective and the means chosen to implement the objective. It asks whether the same objective could have been achieved through reliance on a more carefully tailored measure with less adverse impact on rights. In this way, minimal impairment analysis calls into question only the means chosen to achieve a particular legislative objective, without impugning the validity of the underlying objective itself. This means that in cases where legislation is ruled invalid on the basis of a failure to satisfy the minimal impairment test, it will very likely be open to the legislature to pursue the same objective utilizing a slightly different means. This ensures that legislatures and executives rather than courts retain the primary role in the public policy process, and reduces the potential for conflict between the various branches of government.

(Monahan, *Constitutional* 414)

Monahan and Morton, among others, have challenged the dialogue theory for two different reasons. First, they contend that the Charter dialogue initiated by the Courts does not fully capture the complexity of the legislative process and the attempts by the National Assembly and other political actors to reach principled policy decisions that

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The “dialogue” theory of Hogg and Bushell has become very influential, in part, because it was almost immediately cited with approval by the Canadian Supreme Court shortly after Hogg and Bushell published their 1997 article. See, *Vriend v. Albert*, [1998] 1 S.C.R. 493. As of the end of 2005, the Court has cited their article 10 times and the lower courts 17 times. Monahan, *Constitutional*, 401 at footnote 59.
advance Charter values independent of judicial review. The Court, they contend, is not always the entity that starts the dialogue. In Québec, for instance, such a dialogue can be started by the Québec Human Rights Commission, the Québec Ministry of Justice, the Québec Prime Minister, and the Québec National Assembly, all of which are responsible for making sure that proposed legislation is constitutional. Second, they question whether all forms of legislative amendment in response to a Supreme Court decision constitutes legitimate “dialogue.” For meaningful dialogue to occur, they contend that the legislative response must disagree with, or creatively respond to, the Court’s decision. Otherwise, that the legislative response is simply one of compliance. In “Dialogue or Monologue?” F.L Morton puts the matter succinctly: “If I go to a restaurant, order a sandwich, and the waiter brings me the sandwich I ordered, I would not count this as a ‘dialogue.’” Using this more restrictive definition, they claim that fewer than one in five Charter cases contain any “dialogue” between the Court and the legislative bodies. In most cases, they observe, the legislature rarely responds in a manner that departs from the dictates of the Court’s decision. Hence, what happens is not dialogue but simply compliance, with the “…judges doing most of the talking and the legislatures most of the listening.” Under this theory of judicial review, the Court does not just influence the


democratic process, but dictates the content of constitutionally permissible legislation and
the applicable legislature responds appropriately.119

While the arguments of the proponents of the compliance theory are not without
basis, I think they do not apply to the cases that I discuss here. They are not compliance
cases. I contend that they do, in fact, initiate a constitutional dialogue that advances
Québec’s ability to protect its language and culture within a discourse shaped by those
values that are essential to a free and democratic society. As the Court explained in
Reference re Secession of Québec, [1998] 2 S.C.R. 217 paras. 31-32, these include
“…respect for the inherent dignity of the human person, commitment to social justice and
equality, accommodation of a wide variety of beliefs, respect for cultural and group
identity, and faith in social and political institutions that enhance the participation of
individuals and groups in society” (Reference re Secession at para. 64). In order to
validate this discourse, the Court has made it clear that all of the political actors must be
at the bargaining table and engaged in the discussion concerning the problem at issue.

The Constitution mandates government by democratic legislatures, and an
executive accountable to them, ‘resting ultimately on public opinion
reached by discussion and the interplay of ideas’ (Saumur v. Québec
(City), supra, at p. 330). At both the federal and provincial level, by its
very nature, the need to build majorities necessitates compromise, negoti-
ation, and deliberation. No one has a monopoly on truth, and our system is
predicated on the faith that in the marketplace of ideas, the best solutions
to public problems will rise to the top. Inevitably, there will be dissenting
voices. A democratic system of government is committed to considering
those dissenting voices, and seeking to acknowledge and address those
voices in the laws by which all in the community must live.

(In re Québec Secession Reference at para. 68)

119 Macfarlane, E. "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court
Under the principle of dialogue, the Court encourages Québec to play a key role in deciding how to protect and advance its own language and culture. Significantly, this principle is both procedural and substantive. It is procedural because it creates the forum through which the political parties are required to negotiate. No one is allowed to walk away. It is substantive because the Court announces the rules that guide the negotiations, including those principles that inform and sustain the constitutional text: federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Ultimately, the principle of dialogue promotes Québec’s community vitality because it recognizes that Québec, not the Court, is the forum in which Québec seeks to protect and advance its language and culture. In some way, it is a logical consequence of the principle of subsidiarity, which I discussed in chapter 3. Here, judicial review is not a principle that challenges the democratic process, but which, in fact, encourages it.\(^\text{120}\)

The principal of constitutional dialogue forces one to look at things differently than one might if the issue were simply one of compliance. Within a dialogue, it is easier to recognize and negotiate differences, and all parties can interpret the Charter in a manner consistent with the “…preservation and enhancement of the multicultural heritage of Canadians.”\(^\text{121}\) It is a principle founded in humility, acknowledging that some

\(^{120}\) As mentioned in footnote 63, supra, the dialogue role of the Court is often underplayed, or even missed, because the press often views the decisions in through a conflict oriented, political lens. Instead of focusing on the nuances of different legal issues and arguments, the media adopts a frame of reference that concentrates on finding “winners” and “losers” (Sauvageau 223). As a result, the media can miss the big principles at play, particularly in those highly complicated cases in which the Court gives something to both sides of a dispute. After all, conflict, not complexity, sells newspapers (Sauvageau 229).

\(^{121}\) Section 27 of the Charter of Rights and Freedoms provides that the “Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” A copy of the Charter is included in Appendix B.
problems are too complex for the Court to decide and that there is no one right answer. Under the principle of dialogue, the Court recognizes that most problems are best solved by submitting them to the legislative processes created by the Constitution Act, 1867, many of which were specifically negotiated to allow Québec to manage its own internal affairs, free from federal interference. Under the dialogue principle, judicial review is not a veto over the politics of a province, but rather the beginning of a dialogue with the legislative body as to how best reconcile the individualistic values of the Charter with the accomplishment of Québec’s particular social and cultural objectives. It is clear that the Court best advances the community vitality of Québec by taking a position that encourages a dialogue between provincial and federal entities within the Charter guidelines. In fact, history shows that diversity is particularly threatened when the relevant parties stop talking. Monologues get people nervous. By setting out the rules that can both guide and direct the political debate, the Court assures that this does not happen.

*Ford v. Québec (1988)*

The *Ford* case provides a good illustration of how the dialogue created by the Court eventually enabled Québec to constitutionally change the linguistic face of Montreal. As we mentioned in chapter 3, the plaintiff challenged the provision of Bill 101 that required all public signs to be in French. While Québec conceded that sections 58 and 69 violated Ford’s freedom of expression under the Charter, Québec argued that such a limitation was reasonable under section 1 on the Charter. Based upon the evidence presented, the Court indicated that “requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining French “visage linguistique” but a total restriction was not justified” (*Ford v. Québec* para. 74).

While the *Québec v. Ford* decision prompted a number of anti-Anglophone demonstrations in Montreal, the decision was not universally condemned. As mentioned by Martel and Pâquet in *Speaking Up: A History of Language and Politics in Canada and Québec*, certain Anglophone commentators challenged the argument that the French language in Québec was in a precarious position.\(^\text{122}\) They also criticized the claim that the French face of commerce had to be preserved in order to prompt the integration of immigrants into the Francophone community. Philosopher Charles Taylor noted, for instance, that education, the labor market, and socialization provided ways of integrating immigrants into the majority that were much more efficient than maintaining French as the only language used in commercial signage (Martel 203). In my analysis, however,

the Court’s decision was a very measured response to the evidence before it. As mentioned earlier, the Court acknowledged that the evidence amply established the importance of the legislative purpose reflected in Bill 101. The Court concluded, however, that Québec could accomplish what it wanted with some very minor changes in the law. In this regard, the Court suggested that a signage law that merely required French to be more predominant over any other language would meet constitutional muster. With this comment, the Court sent the matter back to Québec, and the dialogue started.

In response, the National Assembly passed Bill 178, which still required unilingual French signs outside premises while permitting the use of bilingual signs inside. Since the Bill was contrary to the Ford decision, Québec invoked section 33 override to shield it from court review. As so used, the notwithstanding clause enabled further public dialogue on the issue. In fact, as mentioned in chapter 3, the dialogue even included litigation before the Human Rights Committee of the United Nations, where the plaintiffs contended that Bill 178 violated certain treaty rights regarding freedom of expression. In May 1993, the Commission agreed with much of the reasoning of the Ford case, concluding that Québec had violated the petitioner’s civil rights. After five years, Québec chose not to renew the override and did not protect the amendments with the notwithstanding clause. Instead, it amended Bill 101 (Bill 68) such that public signs could be in both languages, provided that the French appear twice as large as the other text. The dialogue continued. In October of 2001 the Québec Court of Appeal upheld
the constitutionality of Bill 68 and in December of 2002, the Canadian Supreme Court dismissed the appeal.

While some might say that Québec “lost” the *Ford* case, the fact remains that the Court’s decision started a constitutional dialogue whereby Québec, not the Court, developed a signage policy that neither threatened the position of the French language nor abandoned their goal that French dominate the visage linguistique of Montreal. The Court did not offer a comprehensive solution here. It did not dictate or impose its will on Québec. It simply found that Québec had failed to produce *any* evidence that bilingual signs threatened the legislative goals of Bill 101. Given this, it asked Québec to give a more measured response to the problem and more in keeping with the guiding principles of reason and proportionality. In short, the Court initiated a dialogue in which it announced certain Charter rights, leaving the political actors as free as possible to legislate a specific solution to the dispute in a manner consistent with those rights. After the expiration of the override in 1993, it was clear that Québec’s National Assembly had determined that minor revisions to Bill 101 concerning public signage could still advance Bill 101’s objective to ensure the survival of French. Had it thought otherwise, it could simply have invoked the Section 33 override a second time. After all of the political smoke had cleared, it was still Québec that was making the key decisions concerning its language policy. Under the dialogue principle, one gets a better idea of the impact of a Supreme Court decision by focusing not on the specific case holding, but on the dialogue of the political actors following the decision of the Court. In such a manner, one can see
how the Court advances the community vitality of Québec, even when it might hold a particular section of Bill 101 to be a violation of Charter rights.

_Solski (Tutor of) v. Québec (Attorney General), (2005)_

_Solski v. Québec_ concerns the constitutionality of Québec’s efforts to prevent students in Québec from attending English (as opposed to French) public schools. In order to understand how the Court implemented the constitutional dialogue principle in this case, a discussion of the Court’s approach to fundamental rights in education is helpful. First, the Court sees the educational community as a learning environment that not only transmits knowledge to students, but also impresses upon them key values of Canadian society, including that of tolerance for others and their differences. The Court has recognized that

“…education rights play a fundamental role in promoting and preserving minority language communities. Indeed, minority language education rights are the means by which the goals of linguistic and cultural preservation are achieved. Minority language education is a requisite tool to encourage linguistic and cultural vitality. Not only do minority schools provide basic language education, they also act as community centres where the members of the minority can meet to express their culture. Thus, the education rights provided by s. 23 form the cornerstone of minority language rights protection”


Second, the Court has adopted an approach to educational rights that is particularly deferential to the expertise of members of the educational community (LeBel 137-139). Consistent with its role as a facilitator of the constitutional and legislative dialogue, the Court does not claim to have the absolute answers to the various problems.
within the educational community. Given this, cases concerning fundamental language rights are particularly good examples of how the Court initiates a constitutional dialogue with other political actors, including local minority language school boards.\textsuperscript{123}  

Section 23 of the Canadian Charter of Rights and Freedoms guarantees minority language educational rights to French-speaking communities outside Québec, and, to a lesser extent, English-speaking minorities in Québec. Specifically, section 23(2) provides as follows:

(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.

This section enumerates three circumstances under which a child can receive minority language instruction (either English or French) in Canada: (1) based on the mother tongue of a parent (section 23(1)(a)), (2) based on the language of instruction received by a parent in Canada (section 23(1)(b)), and (3) based on the language of instruction received by one of the children in the family in Canada (section 23(2)). In interpreting this section, the Court has acknowledged that the general purpose of section 23 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

\textsuperscript{123} See, \textit{Mahe v. Alberta}, [1990] 1 S.C.R. 342, 1990 Carswell Alta 26, 1190 Carswell Alta 649 (S.C.C.) in which the Court found that section 23 of the Canadian Charter effectively granted language minorities not only the right to the right of instruction in the minority language, but also to the management and control of educational facilities and programs by an independent French school board, noting that such participation of minority parents was vital to the survival of the language and culture. See also LeBel, Louis. "Supreme Court of Canada Case Law Regarding Fundamental Rights in Education." \textit{Education & Law Journal} 16.2 (2006): 137-181.
provinces where it is not spoken by the majority of the population.” The Court has further understood section 23 to be remedial, as it seeks to remedy historical injustice suffered by minority language groups in various provinces.

In *Solski v. Québec*, the Court applied these principles in addressing an alleged conflict between section 23 of the Canadian Charter and section 73 of Bill 101, both of which give certain language rights to the English or French linguistic minority population of a province, referred to as “minority language instruction.” In Québec, this refers to the Anglophone community, while in other parts of Canada, it includes the Francophones. Under section 23, a child is entitled to minority language instruction (English or French) only if such a child has or is receiving primary or secondary school instruction in the minority language, that is to say, either English or French in Canada. Under section 73 of Bill 101, such child is entitled to minority language instruction under the same conditions, provided, however, that such instruction constitutes the *major part* of the elementary or secondary instructions received by the child in Canada. The issue in the case was whether the “major part” requirement in Bill 101 conflicted with the requirements of section 23 of the Canadian Charter.

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125 In Canada, section 23 of the Charter address the rights of Canadian parents to have their children educated in either French or English in any part of the country. This section also makes English and French the official languages of the country and requires that all governmental services be provided in both official languages. Under section 23, other language minorities in Canada do not have language rights. Generally speaking, there has been fierce resistance to the establishment of heritage language classes at public expense. See, Burnaby, Barbara. “Language Policy and Education in Canada.” *Volume 1: Language Policy and Political Issues in Education.* <http://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/2890/CRLC00349.pdf?sequence=1>. Retrieved November 15, 2014.
The case involved the Casimir, Lacroix, and Skolski families, all of whom had applied for certificates of eligibility to attend an English-minority-language school. Ms. Casmir was a Canadian citizen who had two children, Shanning and Edwin. Regarding her application, Shannon had completed the first and second grade, receiving 50 percent of her education in French and 50 percent in English. She received her French instruction in a French immersion program administered by an English school board in Ottawa.

The Solski family left Poland in 1990 to take temporary jobs in Quebec. Pursuant to section 85 of Bill 101, their children were permitted to attend an English-language school. Three years later, the family decided to settle in Quebec on a permanent basis. Accordingly, they attended a French language school beginning in November 1994 and remained there until September 1997. In May 1997, they acquired Canadian citizenship, and, in the fall of 1997, they applied to send their children to an English high school.

Marie Lacroix was a Canadian citizen who had completed her own primary and secondary instruction in French schools. She had two children, Eve and Amélie. Regarding her application, Amélie had completed grades 1 and 2 in an unsubsidized private school that provided 60 percent English instruction and 40 percent French instruction.

In all three cases, the Minister interpreted the “major part” requirement in a strictly mathematical manner, determining eligibility solely on the basis of the number of months a child spent in English and French schools. The Minister testified that he would consider either the child’s primary school attendance or the child’s secondary school attendance, but he would not consider them cumulatively. Other factors, the Court noted,
including the availability of linguistic programs and the presence of learning disabilities or other difficulties were not considered (Solski v. Québec para. 25).

The Court found that the Minister deprived the petitioners in this case of their section 23 Charter rights. In so concluding, the Court interpreted the “major part” language of Bill 101 to involve a qualitative rather than a strictly quantitative assessment of the children’s educational experience. Accordingly, the Court construed section 78 of Bill 101 to mean that the child’s education path “…must involve a qualitative rather than a strict quantitative assessment of the child’s educational experience through which it is [to be] determined if a significant part, though not necessarily the majority of his or her instructions, considered cumulatively was in the minority language.”126 In this regard, the Court noted that the “…past and present educational experience of the child is the best indicator of genuine commitment to a minority language education.”127 The Court explained the analysis as follows:

…the focus of the assessment is both subjective, in that it is necessary to examine all of the circumstances of the child, and objective, in that the Minister must determine if the admission of a particular child is, in light of his or her personal circumstances and educational experience, past and present, consistent with the general purpose of section 23 and, in particular, the need to protect, preserve, and reinforce the minority language community by granting individual rights to a specific category of beneficiaries.

(Solski v. Québec, para. 28.)

The Court construed section 23(2) to accomplish its intended purpose to guarantee continuity of minority language rights and mobility to children educated in one

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127 Solski v. Québec, supra, para. 28.
of the official languages. In so holding, the Court sought to protect both the family and child:

If children are in a recognized education program regularly and legally, they will in most instances be able to continue their education in the same language. This is consistent with the wording of s. 23(2) and the purposes of protecting and preserving the minority-language community, as well as with the reality that children properly enrolled in minority-language schools are entitled to a continuous learning experience and should not be uprooted and sent to majority-language schools. Uprooting would not be in the interest of the minority language community or of the child. Nevertheless, a qualitative assessment of the situation to determine whether there is evidence of a genuine commitment to a minority language educational experience is warranted, with each province exercising its discretion in light of its particular circumstances, obligation to respect the objectives of s. 23, and educational policies.

Solski v. Québec, para. 47.

Under this interpretation of section 23 of the Canadian Charter, the amount of time that a child spends in a particular program, an objective component, is not necessarily conclusive in identifying the “major part” of a child’s educational pathway, although the amount of such time can obviously be a “…marker of an existing affiliation with the official minority language community.” 128 The test has a subjective component as well. Subjectively, one has to ask first, whether such a factor shows an intention to adopt the minority language as the language of instruction, and second, whether the objective educational experiences and choices support such an intention? In making this decision, one must make room for the nuances and subjectivity required to determine whether the admission is consistent with section 23’s purpose “to provide continuity of minority language education rights, to accommodate mobility and to ensure the family

128 Solski. v. Québec, supra, p. 5.
unity is engaged.‖ This decision should include all of the child’s circumstances, including how much time was spent in each program, when the child made his or her choice of language instruction, what specific minority language education programs were available, past and present; and whether any learning disabilities or other difficulties exist. The Court summarized its analysis as follows:

35 The pertinent question, then, is whether the ‘major part’ requirement is consistent with the purpose of s. 23(2) and capable of ensuring that the children meant to be protected will actually be admitted to minority language schools. In our view, the “major part” requirement as interpreted by the ATQ is underinclusive; it does not achieve the purpose of s. 23(2) and, therefore, cannot be said to complete it or to act as a valid substitute for it. Thus, the “major part” requirement cannot be saved unless it is interpreted such that the word “major” is given a qualitative rather than a quantitative meaning.

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37 The strict mathematical approach lacks flexibility and may even exclude a child from education vital to maintaining his or her connection with the minority community and culture. For example, a child who has completed grades 1, 2 and 3 in French and grades 4, 5 and 6 in English may have formed a sufficient link with the minority language community, but would not qualify under s. 73(2). It might also be that the language learned in the last three years may provide a better marker than that learned in the first three years. Too many relevant factors are ignored. In short, the strict approach mandated by the Minister of Education fails to deal fairly with many persons who must be qualified under a purposive interpretation of s. 23(2) of the Canadian Charter.

*Solski. v. Québec*, *supra*, paras. 35, 37.

By defining section 78 of Bill 101 in light of the purpose of section 23, the Court invited a dialogue with the Québec National Assembly. As in the *Ford v. Québec* case, 

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129 *Solski. v. Québec, supra*, p. 5

130 *Solski v. Québec, supra*, para. 39-60.
the Court interpreted section 23 in a manner that was consistent with the constitutional objective of protecting minority language communities. The Court observed that the rules that govern language rights are a sensitive issue that “…inevitably [has] an impact on how Québec’s French-speaking community perceives its future in Canada, since the community, which is the majority in Québec, is in the minority in Canada, and even more so in North America as a whole.”\textsuperscript{131} The Court further noted that the application of section 23 must take into account the educational context and the very real differences between the situations of the minority language community in Québec and the minority language communities elsewhere in Canada. Significantly, the Court did not tell Québec how to solve this problem. The Court merely interpreted the “major part” requirement in such a fashion so as to maximize the protection of the child’s relationship with the minority language community. The Court held that the Minister’s mechanical black and white approach simply did not do this. The Court accordingly invited more dialogue on the subject.

\textit{Nguyen v. Québec (2009)}

The constitutional dialogue on educational rights continued in the \textit{Nguyen v. Québec} case. In order to understand this decision, a brief review of the facts and legal circumstances is necessary. The Nguyen parents were Canadian citizens whose children did not meet the criteria of section 23(1) (b) of the Canadian Charter because neither of the parents had received primary or secondary school instruction in an English school. In order to qualify their children for instruction in an English public school, they enrolled

\textsuperscript{131} \textit{Solski v. Québec, supra, at para. 5.}
them in an unsubsidized private school ("UPS") offering instruction in English. After the children had attended the UPS for a short period of time, ranging from a few weeks to a few months, the parents filed an application that the children be allowed to attend an English public school. The Minister of Education denied the application.

As mentioned in chapter 1, Bill 101 did not apply to unsubsidized private schools, known as "bridging schools." This exemption created a backdoor to the English school system by allowing a child to attend grade 1 at an unsubsidized English private school and then transfer into the English public school system. Contending that this "loophole" threatened the Francophone school system, French language activists demanded legislative action. In 2002, the Québec National Assembly passed Bill 104 to solve the problem. Under the new law, the Minister of Education could not consider any time spent in a privately supported English school in deciding whether a child had received a major part of his primary or secondary education in English. In the Nguyen case, the Minister of Education relied upon Bill 104 when he denied the parents' application. Under Bill 104, any periods of instruction in an unsubsidized English private school were, in a manner of speaking, struck from the child’s educational pathway as if they had never occurred. At issue in the Nguyen case was whether such exclusion violated the child's educational rights under Section 23 of the Charter.

The Court ended up finding Bill 104 unconstitutional. The Court found that Bill 104 was a disproportional response to the problem it was intended to solve. As explained by the Court, if Québec wanted to impair Charter 23 rights, it must do so as little as possible. In enacting Bill 104, the Court found that Québec had failed to do this (Québec
v. *Nguyen* at para. 41). In so finding, however, the Court conceded that Bill 104’s objective to protect the French language was a legitimate one, particularly in light of Québec’s unique language and culture. The Court also admitted that even thirty years after the adoption of Bill 101, there continued to be great concern about the survival of the French language in Canada. Notwithstanding these concessions, the Court found that Bill 104 did not meet the standard of minimal impairment. In so concluding Justice LeBel made the following remarks:

[42] I will begin by discussing the *Nguyen* case, and therefore the case of unsubsidized private schools contemplated in the second paragraph of s. 73 CFL. As I mentioned above, Bill 104 rules out any consideration of a child’s educational pathway in an unsubsidized English-language private school. No account whatsoever is to be taken of the duration and circumstances of that pathway or of the nature and history of the educational institution in which the child was enrolled. The prohibition against taking this into account is total and absolute. In light of the evidence presented in the *Nguyen* case, this legislative response seems excessive in relation to the seriousness of the identified problem and its impact on school clientele and, potentially, on the situation of the French language in Québec.

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

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

*Québec v. Nguyen*, paras. 41-46.

After the Court’s decision, the matter was referred back to the Québec National Assembly to craft a new law to limit access to English schools without violating section 23 of the Charter. The dialogue began again, and this time, it was detailed and complex. On the one year anniversary of the decision, the National Assembly passed Bill 115 that permits the Québec Ministry of Education to determine a student’s eligibility based on a grid, whereby an applicant accumulates or loses points based on several factors. The regulation is a complicated one, with a series of questions designed to determine the “continuity and consistency” of the child’s commitment to pursue studies in English. A student must accumulate 15 points to receive a Certificate of Eligibility. Students accumulate or lose points based on the number of years they have attended English or French schools, with 15 points awarded to students who have attended three or four years in an English Elementary School. Students also accumulate or lose points depending upon where their siblings went to school.\(^\text{132}\)

After the *Nguyen* decision, the Québec sovereignists demanded that Québec override the decision, contending that the decision would lead to cultural genocide. Describing the Supreme Court as a “political organism” directed by the federal

\(^{132}\) See “Regulation respecting the criteria and weighting used to consider instruction in English received in a private educational institution not accredited for the purposes of subsidies.” *Publications du Québec*, November 1, 2014. <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&file=/C_11/C11R2_1_A.HTM>. Retrieved November 9, 2014. I have included a copy of this regulation in Appendix B.
government, they maintained that it had no business meddling in Québec’s internal affairs. Contrary to this perception, however, I contend that the Court created a constitutional dialogue in this case in which Québec was ultimately able to get what it wanted, with minimal legislative changes. When it started, the Court did not give an answer to this problem. Neither did the Court tell Québec how to solve it. The Court conceded that parents should not be able to register their children in an English public school after a relatively short period of time in one of the bridging schools. In so conceding, the Court admitted that the goal of Bill 104 was a valid one and in response to a pressing need to protect the French language in Québec. In directing the dialogue, the Court merely said that any response needed to be a proportionate response to the problem, with minimal impairment to Charter rights. In addition, in order to make sure that Québec had enough time to solve the problem, the Court postponed its decision for one year. The court thus followed the principle of subsidiarity, leaving Québec to find the solution. By starting a dialogue, the Court put Québec in charge of deciding how best to advance and protect their language and culture. In response, Québec passed Bill 115,

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133 The Canadian Press covered the April, 2010 public protest of the Nguyen decision. In their coverage of the event, the author demonstrates some of problems created when one reports a case solely through a political or “zero-sum” paradigm. See, See, “Sovereignists call for notwithstanding clause to override Supreme Court ruling,” http://montreal.ctvnews.ca/sovereignists-call-for-notwithstanding-clause-to-override-supreme-court-ruling-1.501276. Retrieved 12-21-2014.

134 The Court does not always strike a law down when it finds it unconstitutional. In some instances, it suspends the declaration of invalidity, as it did in Nguyen v. Québec, usually for a period of 6-18 months. Macfarlane observes that the “numbers appear to support the argument that the suspected declaration remedy encourages a dialogue,” although he suggests that a “different but compatible explanation is [that] the preservation of the Court’s legitimacy.” He observes that the suspected “declaration remedy is most often used in cases where invalidating the law would have a troubling policy vacuum and the Court knows some type of legislative response is necessary.” Not giving the legislative body time to remedy the problem would only bring criticism to the Court. See, Macfarlane, E. “Dialogue or Compliance? Measuring Legislatures’ Policy Responses to Court Rulings on Rights.” International Political Science Review 34.39 (2012): 49-50.
which implemented a response to the *Solski* and *Nguyen* decisions. Under Bill 115 a child can transfer from a nonsubsidized English private school to an English public school if such child has a minimum of 15 points under a rather complicated point system. A six-page regulation explains how points are awarded. Generally speaking, the child can accumulate the necessary number of points by spending at least three years in an unsubsidized English private school, although an educational panel can add or subtract points based on other factors, such as what kind of private school the child attends or whether or not a sibling is already in the English public system. The regulation is a good example of the constitutional dialogue in that it is designed to authenticate and evaluate the “continuity and consistency” of the child’s commitment to pursue studies in English.

Under Bill 115 Québec wanted to make it very difficult for a child to use an unsubsidized English private school as a means to transfer into the English public school system. When it passed this Bill, it accomplished this purpose. As a practical matter, most parents can no longer simply pay the private school tuition for a relatively short period of time to get their children into English public schools. Accordingly, as is often the case in a constitutional dialogue, Québec was able to advance its language and culture by drafting a law which is more respectful of Charter rights and, most importantly, able to accomplish what Québec wanted in the first place.

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Reference re Secession of Québec (1998)

As mentioned in chapter 3, the Québec Secession Reference of 1998 questioned the legality of the Québec sovereignty debate. After narrowly winning the 1995 Referendum, the federal government submitted three reference questions to the Supreme Court. The first question dealt with the legality of Québec’s unilaterally leaving the Canadian federation. Regarding this, the Court held that neither the Canadian constitution nor international law allowed Québec to secede unilaterally from Canada without a constitutional amendment. If a “clear majority” of Québécois opted for secession, however, the Court found that the federal government had a constitutional duty to negotiate with Québec the issues of secession. According to the Court, this obligation was implicit in four principles that informed and sustained the constitutional text: federalism, democracy, constitutionalism and the rule of law, and respect for minorities. As a practical matter, the Canadian and Québec government had refused to discuss the sovereignty issue since the election of the Parti Québécois in 1976.136 The federal government contended “…that it did not have a mandate to negotiate the secession of a province from the federation, while Québec [argued] that sovereignty was an internal

136 Under the dialogue principle discussed herein, the parties are most able to respect, identify, and resolve differences, with no party leaving the bargaining table. Regarding this principle, it is instructive to compare the Québec 1995 Referendum with the Scottish 2014 Referendum. Unlike Québec and the federal government, the Scottish and United Kingdom governments were able to negotiate an agreement which not only addressed the legality of the Referendum, but also provided rules about campaign financing, referendum regulation, oversight and conduct. In such a dialogue, the process was both more democratic and legitimate, for all persons involved, including those supporting and opposing the move for secession. In the Referendum Election, the “No” side won, with 2,001,926 (55.3%) voting against independence and 1,617,989 (44.7%) voting in favour. The turnout of 84.6% was the highest recorded for an election or referendum in the United Kingdom since the introduction of universal suffrage. See “Agreement Between the United Kingdom Government and the Scottish Government on a Referendum on Independence for Scotland.” Internet Memory Foundation – The National Archives. October 15, 2012. <http://webarchive.nationalarchives.gov.uk/20130109092234/http://www.number10.gov.uk/wp-content/uploads/2012/10/Agreement-final-for-signing.pdf>. Retrieved November 9, 2014.
political debate based on the will of the people and not a legal decision that needed to be consistent with the Canadian constitution” (Kelly, Governing 238). Operating on the principle of dialogue, the Court advised that if Québec expressed a clear desire to leave the Confederation by way of a popular referendum, both Québec and the federal government would be required to negotiate their constitutional differences (Reference Re Secession of Québec, 2, S.C.R. 217, paras. 132-136).

*Reference Re Secession of Québec* is an excellent example of constitutional dialogue and the Court’s role as a meta-political actor. The Court announced the rules of the debate but refrained from determining the wording of any questions put to the public in a referendum or what it meant by a “clear majority.” Other than imposing an obligation to negotiate in good faith, the Court further refrained from telling the parties what they should do, what they should talk about, or how such negotiations should be resolved. The Court merely said that any negotiations would need to consider many issues of great complexity and difficulty, such as economics, debt, minorities, Aboriginals, and boundaries. According to the Court, “…these would have to be resolved within the overall framework of the rule of law, thereby assuring Canadian residents in Québec and elsewhere a measure of stability in what would likely be a period

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137 When the courts are not able to engage the political actors in a constitutional dialogue, the results are often sobering. In *Dred Scott v. Sandford*, 60 U.S.393 (1857), the Court held that the federal government had no power to regulate slavery in the federal territories acquired after the creation of the United States. Dred Scott, an African American slave who was taken to a free state and/or territory, filed suit to gain his freedom. In a 7–2 decision written by Chief Justice Roger B. Taney, the Court denied Scott’s request. The Court’s decision left little room for any sort of constitutional dialogue, causing some to argue that the decision was an indirect catalyst for the American Civil War. It is now widely regarded as the worst decision ever made by the Supreme Court. See, *Dred Scott v. John F.A. Sanford*, March 6, 1857; Case Files 1792-1995; Record Group 267; Records of the Supreme Court of the United States; National Archives.
of considerable upheaval and uncertainty.”

Without suggesting a specific agenda, the Court recognized that such negotiations would be difficult, complex, and comprehensive:

Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Québec. As the Attorney General of Saskatchewan put it in his oral submission:

A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation, ... when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation.

*In re Secession of Québec*, para. 96.

The best evidence of the Court’s role in starting a dialogue in this case is to look at the legislative responses of both Parliament and Québec to the decision. Shortly after the decision came down the federal government passed *The Clarity Act* (known as Bill C-20 before it became law) that clarified the conditions under which the Government of Canada would negotiate sovereignty of Québec. Under the Act, the House of Commons would be entitled to authorize negotiations only where it determined that Québec had satisfied the conditions laid down in the Supreme Court, including the clarity of the questions asked in the referendum and the percentage of those voting for secession that would constitute a clear majority. The House would further consider the views of other parties of the province in which the referendum would take place. If the House

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138 *Reference re Secession of Québec, supra*, at para. 96.

139 See, *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Québec Secession Reference* (aka Clarity Act) S.C. 2000, c. 26
determines that a clear majority voted in favor of a clear question on succession, then the Government of Canada and the provinces must enter into negotiations on amendments to the Constitution to effect secession. In the negotiations, all parties must consider the rights and interests of Aboriginal peoples and minority groups. If the referendum fails to meet these criteria, the Government could disregard the referendum election and refuse to come to the bargaining table.

As one might expect, Québec responded to the Clarity Act by passing its own legislation, The Fundamental Rights Act (Bill 99), which recites that Québécois alone can determine when and in what circumstances secession can be pursued.\footnote{See, An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State, R.S.Q., chapter E-20.2} In the Bill, the Québec National Assembly rejected the idea that Parliament could review either the question or the result of a sovereignty referendum.\footnote{In 2013, the Québec National Assembly passed unanimously a motion that condemned the federal government for intruding into its local affairs. The motion stated: “[Québec’s] National Assembly condemns the intrusion of the Government of Canada into Québec’s democracy by its determination to have struck down the challenged articles of the Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State. The National Assembly demands that the Government of Canada abstain from intervening and challenging the Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State.” See Johnson, William. “Québec’s Constitutional Powers, Real and Imagined.” National Post. October 25, 2013. <http://fullcomment.nationalpost.com/2013/10/25/william-johnson-quebecs-constitutional-powers-real-and-imagined/>. Retrieved November 1, 2014.} Further, the Bill defined a “clear majority” as constituting 50 percent plus one vote. The constitutionality of this last piece of legislation is currently on its way to the Supreme Court.\footnote{See Wells, Paul. “Exclusive: Stephen Harper’s Legal Challenge to Québec Secession.” MacLeans. October 8, 2013. <http://www.macleans.ca/politics/ottawa/exclusive-stephen-harpers-legal-challenge-to-quebec-secession/>. Retrieved October 7, 2014.} Again, the decision of the
Court has encouraged a dialogue whereby Québec (and other political actors) are expected to negotiate how best to protect its unique language and culture.

**Conclusion**

As noted previously by Kelly and Murphy, the Canadian Supreme Court has played a central role in balancing the unity and integrity of the federation with the autonomy and diversity of the provincial governments, particularly following the introduction of the Canadian Charter of Rights and Freedoms (Kelly and Murphy 217). By developing the principles of institutional integrity and provincial legislative power, the Court advances the ability of the provinces to protect their diverse culture and language. In the same fashion, I contend that the principle of dialogue advances the Francophone Québec community because it gives the province the power to solve its own problems within the parameters of those Charter values that protect, encourage, and advance the language and culture of Canada’s minority communities. In effect, the Court does not act as the final arbitrator, but rather as a moderator who announces the rules of the debate, letting the political players work out the particular solution. As such, the Court respects the democratic process whereby a province can enact new legislation that still accomplishes the same objectives as the legislation that was struck down. By creating a dialogue, the Court acknowledges that the best way for Québec to protect its language and culture is to allow it to do so within a dialogue shaped by those values that are “...essential to a free and democratic society, including a respect for the inherent dignity of the human person, a commitment to social justice and equality, an
accommodation of a wide variety of beliefs, a respect for cultural and group identity, and a faith in the social and political institution that enhance the participation of individuals and groups in Canadian society” (Reference re Secession of Québec, [1998] 2 S.C.R. 217 paras. 31-32). Ultimately, I contend that the principle of dialogue promotes Québec community vitality because it recognizes that Québec, not the Court, is the forum in which Québec seeks to protect and advance its language and culture. Here, judicial review is not a principle that challenges the democratic processes, but one that, in fact, encourages them. Under the principle of dialogue, it is easier to recognize differences. It is a principle founded in humility, acknowledging that some problems are too complex for the Court to decide and that there is no one right answer. Under the principle of dialogue, the Court studiously avoids imposing comprehensive solutions. Instead, it recognizes that most problems are best solved by submitting them to the legislative processes created by the Constitution, 1867, many of which were specifically negotiated to protect Québec’s ability to manage its own affairs. When the Court operates under the dialogue principle, instead of ordering a remedy, it deflects the issue back to the political arena, placing the onus on the Québec National Assembly for a constitutional resolution. Under the principle of constitutional dialogue, the Court is more interested in a political, as opposed to judicial, resolution of the problem. Judicial remedy, by definition, is an outcome that is based on compliance rather than dialogue. Under the dialogue theory, the pivotal question is not: Who wins? but, rather, Who is talking?

In the Ford, Solski, and Nguyen cases, the Court articulated the broad principles regarding public signage and what factors should be considered in determining a
children’s commitment to a minority language educational experience, leaving Québec as free as possible to accomplish whatever the problem may be. In the Secession case, the Court held that the Constitution Act, 1867 required all parties to negotiate the issues of secession in good faith, provided that Québec obtain a referendum to leave the Confederation. This obligation, according to the Court, was implicit in four principles that inform and sustain the constitutional text: federalism, democracy, constitutionalism and the rule of law, and respect for minorities (Re Secession of Québec at para. 49). Under these, neither Québec nor the federal government could dictate the terms of secession. In all of these cases, the Court started a constitutional dialogue in which the Québec National Assembly ultimately accomplished what it wanted, operating within certain broad Charter guidelines. Recall that Morgan criticized the dialogue theory, contending that most of the decisions do not precipitate a dialogue, but simply a matter of the Québec National Assembly complying with the dictates of the Court’s decisions. As explained by Morgan, if he (i.e., the Supreme Court) goes into a restaurant, orders a sandwich, and the waiter (i.e., the Québec National Assembly) brings it to him, he would not consider this exchange as a “dialogue.” Regarding the cases that I have discussed herein, however, the dynamic is quite different. In my version of the story, the client has simply told the waiter that he wants to eat but that he hates certain specific things. In response, the waiter has brought what he believes, upon consulting the kitchen staff, the client should have. In a similar fashion, the principle of constitutional dialogue allows Québec, not the Court, to decide how best to protect, advance, and encourage Québec’s unique language, laws, and culture.
CONCLUSION

Perhaps it is best to conclude by making reference to Gibson’s 1999 survey in which the Québécois were asked if they agreed with the following statement: “If the Supreme Court started making a lot of decisions that most people disagreed with, it might be better to do away with the Supreme Court altogether.”\textsuperscript{143} Fifty-two and one-half percent said “Yes.” I believe that this majority response reflects the popular perception, particularly among the Québec sovereignists and separatists, that the Court has not done much to advance the language and culture of Québec. As mentioned in the discussion of the \textit{Nguyen} decision, Jean-Paul Perreault, president of a French-language advocacy group, made it quite clear that Canada’s Supreme Court, which he essentially described as a federal puppet, had no business in Québec’s internal affairs.\textsuperscript{144} After all, the prime minister can unilaterally appoint the judges with no input from the provinces, a majority of the Court is Anglophone, and there is no requirement that the judges even be bilingual.\textsuperscript{145} The Court has arguably fueled this perception by finding several sections of Bill 101 unconstitutional.

\textsuperscript{144} In connection with this, it is interesting to note that Québec (unlike the federal government) never files an English copy of its briefs.
\textsuperscript{145} In connection with this, it is interesting to note that Québec (unlike the federal government) never files an English copy of its briefs.
I do not believe that this perception of the Court is accurate. A studied review of the Court’s jurisprudence reveals that the Supreme Court is, in fact, the hidden ally of Québec. I say “hidden” because first, the majority of Québeckers do not appear to see or understand (e.g. Gibson’s 1999 survey) that many of the Court’s rulings have actually helped Quebec preserve its distinct language and culture. This failure to see the Court as an ally is in part due to the way that the media reports the decisions of the Court. Media accounts of Court rulings often adopt a frame of reference that pits “winners” against “losers” rather than identifying the big principles at play, particularly in those highly complicated cases in which the Court gives something to both sides of a dispute. My research indicates that the Court does not treat Québec’s language issues as a “zero-sum” game. Rather, I contend that the Court has developed, over a period of time, the principles of institutional integrity, Canadian federalism, and constitutional dialogue, all of which advance and protect the Québec Francophone community.

To understand the relationship between the Court and Québec, it might be helpful to think of a car engine. The pistons represent those demographic, economic, political, ideological and cultural forces that have advanced the vitality of the Québec Francophone community. The engine block represents those constitutional principles that the Court has developed to protect and encourage those gains. Without both parts of the engine working together, the car does not move. And so it is with Québec and the Court.

Of course, the question presents itself as to why all of this even matters. If a significant number of Québeckers believe that the Court does not advance their language or culture, does that really make a difference? Is that even important? My contention is
that it is. An accurate perception of the Court tends to take one beyond a view of the world where everything is divided into two camps. Dualistic thinking accentuates not what unites us, but rather what divides us. The preservation of the Québec culture and language, however, is not a zero-sum game. Both the Anglophones and the Québécois communities can thrive here, provided that they stay in dialogue with each other. If Québécois were to perceive the Canadian Supreme Court as an institution that promotes their language and culture, then perhaps that could change the paradigm through which the Anglophone community would not appear as threatening. If Québéccers (as well as all Canadians) were to view differences as a source of strength, they might be more open to political and social dialogues that celebrate diversity, democracy, and tolerance. Ultimately, a dualistic paradigm is based on fear, and people who are afraid make bad choices.

My conclusions herein suggest other possible areas of research. If we were to agree that some Canadian Supreme Court decisions are more conducive to dialogue between the federal government and Québec while others seem to be more oriented toward compliance, can we in some way correlate these decisions with the composition of the Court? For example, can we say that the Court in which a significant number of judges were appointed by a Conservative prime minister tends to lean toward rendering “compliance-oriented” decisions and the other way around? Moreover, if the Canadian Supreme Court is so committed to protecting Québec’s negotiated bargain, it would be interesting to know why there are still Québéccers who view it as an institution hostile to their efforts to protect and promote their own language and culture. Is this perception the
result of how cases are reported in the media? Or is it just a reflection of Québec’s sovereignist politics that often paints the Court as a federalist institution inimical to Quebec’s interests? Is it a consequence of the fact that Québec has never approved of the adoption of the Constitution, 1982? Since the loss of the 1995 Referendum, has this perception change at all? Interestingly enough, a 2012 survey indicates that Québécois are happier than most Canadians (or, for that matter, than most other people in the world) because they are now arguably more secure about their identity within Québec and Canada.\textsuperscript{146} As Barrington-Leigh said in a recent interview, “It may be that the Québécois are now more at peace with their government, their identities and with each other, including across linguistic and religious lines.”\textsuperscript{147} Whether or not he is correct here is of course a matter of debate, but if his comment is accurate, I challenge Quebec to consider the following question: Could this increased sense of security be (at least in part) due to the realization that the Canadian Supreme Court has been an "ally" of Quebec? Maybe this ally is not so "hidden" anymore.


\textsuperscript{147} See Barrie McKenna, \textit{supra}, at footnote 146.
Bibliography


- - -. “Québécois French and Language Issues in Québec.” Trends in Romance Linguistics and Philology. Rebecca Posner and John N. Green, eds. Vol. 5 of Gruyter,


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157


Martel, M., M. Pâquet, et al., Speaking up: a history of language and politics in Canada and Québec. Toronto: Between the Lines.2010 (1-301)


Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21, [2014] 1 S.C.R. 433


Solski (Tutor of) v. Québec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14


Appendix A: Constitution Act, 1867
Part VI: Distribution of Legislative Powers

Powers of the Parliament

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.

1A. The Public Debt and Property.

2. The Regulation of Trade and Commerce.

2A. Unemployment insurance.

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.


7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.


11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.


17. Weights and Measures.


19. Interest.

20. Legal Tender.


22. Patents of Invention and Discovery.

23. Copyrights.


26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

**Exclusive Powers of Provincial Legislatures**

Subjects of exclusive Provincial Legislation

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3. The borrowing of Money on the sole Credit of the Province.

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes:

   (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

   (b) Lines of Steam Ships between the Province and any British or Foreign Country:

   (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

**Non-Renewable Natural Resources, Forestry Resources and Electrical Energy**

Laws respecting non-renewable natural resources, forestry resources and electrical energy

**92A.**

(1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the
province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

Taxation of resources

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

“Primary production”

(5) The expression “primary production” has the meaning assigned by the Sixth Schedule.

Existing powers or rights
(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

**Education**

Legislation respecting Education

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen’s Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen’s Protestant and Roman Catholic Subjects in Québec;

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen’s Subjects in relation to Education;

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under
this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

Québec

93A. Paragraphs (1) to (4) of section 93 do not apply to Québec.

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick

Legislation for Uniformity of Laws in Three Provinces

94. Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

Old Age Pensions

Legislation respecting old age pensions and supplementary benefits

94A. The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors’ and disability benefits irrespective of age,
but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.

**Agriculture and Immigration**

Concurrent Powers of Legislation respecting Agriculture, etc.

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

http://laws-lois.justice.gc.ca/eng/const/page-4.html#h-17
Appendix B: Constitution Act, 1982
Part I: Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

Democratic Rights

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members. (81)

   (2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of
more than one-third of the members of the House of Commons or the legislative assembly, as the case may be. (82)

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months. (83)

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

   (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

   (a) to move to and take up residence in any province; and

   (b) to pursue the gaining of a livelihood in any province.

   (3) The rights specified in subsection (2) are subject to

   (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

   (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

   (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

    (a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.
14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (84)

Official Languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed. (85)

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament. (86)
(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick. (87)

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative. (88)

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative. (89)

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament. (90)

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick. (91)

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has 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.

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada. (92)

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

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. (93)

(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.

Enforcement

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General
25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. (94)

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

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

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

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

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

34. This Part may be cited as the Canadian Charter of Rights and Freedoms.
Appendix C: Charter of the French Language: Regulation respecting the criteria and weighing used to consider instruction in English received in a private educational institution not accredited for the purposes of subsidies, chapter C-11, s. 73.1.

Regulation respecting the criteria and weighting used to consider instruction in English received in a private educational institution not accredited for the purposes of subsidies

Charter of the French language

(chapter C-11, s. 73.1)

DIVISION I

OBJECT AND SCOPE

1. The purpose of this Regulation is to determine the analysis framework to be used for eligibility requests referred to in section 2 in order to assess whether instruction received in English constitutes the major part of the instruction received by a child.

O.C. 862-2010, s. 1.

2. This Regulation applies to all requests for eligibility to receive instruction in English, submitted under paragraphs 1 and 2 of section 73 of the Charter of the French language (chapter C-11), in which the instruction invoked in support of the request was received in Québec after 1 October 2002 in one or more private educational institutions not accredited for the purposes of subsidies that hold a permit under the Act respecting private education (chapter E-9.1).
Despite the first paragraph, this Regulation does not apply to an eligibility request when the instruction received in English invoked in support of the request was received in an institution that ceased operating during the period from 1 October 2002 to 22 October 2010.

Nor does it apply when the elementary- or secondary-level instruction invoked in support of the request was received in an institution that offers only some of its classes in English at that level of instruction.

O.C. 862-2010, s. 2.

DIVISION II
CRITERIA, INTERPRETIVE PRINCIPLES AND PASSING SCORE

3. The criteria and weighting to be used in assessing whether instruction received in English constitutes the major part of the instruction received by a child are described in Schedule 1 under the 3 following divisions:

Division 1- “Schooling”

This division deals with the duration of the instruction received in English that is liable to reveal a genuine commitment to pursue studies in English, given the environment in which the schooling invoked in support of the request took place.

Among other elements, the following are considered: the different types of educational institutions attended and the characteristics of their enrolments that illustrate their relationship with the Québec anglophone minority, as well as any special educational projects or programs of study the institution offers to meet the needs of certain groups of students.
Division 2- “Consistent, true commitment”

This division deals with the family context and other elements of the child's environment that may shed light on the authenticity of the commitment to an English-language education, especially in terms of the continuity and consistency of this commitment.

Division 3- “Specific situation and overall education”

This division deals with related or distinct contextual elements that allow a more in-depth assessment, with respect to the child's personal and family situation, of the authenticity of the commitment made.

This division makes it possible to complete, enrich or nuance the assessments made under the previous divisions, as needed, according to the circumstances and contexts specific to the case examined. Specifically, this division concerns elements other than those explored under the previous divisions, such as what prompted the choice of or change in educational institution, when this choice or change was made during the child's schooling, the instruction received in a language other than English by the parents of the child concerned, the importance of continuity in the context of special programs as well as the proportion of courses received in each language of instruction.

O.C. 862-2010, s. 3.

4. When interpreting and applying Schedule 1, in particular Division 3, it is important, among other things, to make a distinction between cases that demonstrate a genuine commitment to an English-language education, and cases where attendance at a private educational institution described in the first paragraph of section 2 could simply denote a
desire to create an artificial educational pathway in order to circumvent the Charter of the French language.

O.C. 862-2010, s. 4

5. For an eligibility request submitted under section 2 to be granted, a passing score of 15 points, calculated according to the weighting set out in Schedule 1, must be attributed to it.

An eligibility request that is attributed this 15-point passing score is nonetheless subject to all other applicable conditions, including the requirement to provide proof of citizenship or proof of filiation

O.C. 862-2010, s. 5.

DIVISION III

CLASSIFICATION OF INSTITUTIONS AND OTHER RULES FOR APPLYING SCHEDULE I AND THE WEIGHTING SYSTEM

§1. Application of Schedule 1

6. All divisions of Schedule 1 are applicable to eligibility requests referred to in section 2, whether submitted under paragraph 1 or paragraph 2 of section 73 of the Charter of the French language (chapter C-11), except for subdivisions 2.2 and 2.3 of Schedule 1, which do not apply to requests submitted under paragraph 1 of section 73 of the Charter.

O.C. 862-2010, s. 6.

§2. Classification of institutions

7. In this Regulation, “private educational institution” means a private educational institution described in the first paragraph of section 2 that offers elementary- or
secondary-level instructional services, or both, and that offers one or more courses in English, in addition to the English course.

O.C. 862-2010, s. 7.

8. A private educational institution may be given more than one of the classifications defined below, depending on its characteristics and the rules set out in this Regulation.

A classification is assigned for each level of instruction, elementary or secondary, offered by the institution, subject to the situation referred to in paragraph 2 of the definition of a type A English-language institution given in section 9, where the classification assigned applies to both levels of instruction.

When a permit issued under the Act respecting private education (chapter E-9.1) authorizes the operation of more than one facility, a classification must also be assigned to each facility in which instructional services are provided.

O.C. 862-2010, s. 8.

9. In this Regulation, “type A English-language institution” means a private educational institution to which one of the following situations applies:

(1) 60% or more of the students enrolled in the first 3 years of elementary or secondary school have a certificate of eligibility or a special authorization to receive instruction in English under the Charter of the French language (chapter C-11); or

(2) the institution provides elementary- and secondary-level instruction and satisfies the following 2 criteria:
(a) 70% or more of the students at the elementary level go on to attend the institution throughout their secondary studies; and

(b) 70% or more of the hours of instruction are provided in English, at both the elementary and secondary levels, the proportion of English instruction having been determined by the institution concerned and certified by a member of the professional order of accountants authorized by law to audit books and accounts;

“type B English-language institution” means a private educational institution that is not a type A or type C institution;

“type C institution” means a private educational institution that is specially dedicated to providing bilingual or multilingual learning to students in the context of an immersion or other program and less than 60% of whose students have a certificate of eligibility or special authorization to receive instruction in English under the Charter of the French language;

“French-language institution” means a public French-language school or a private educational institution, subsidized or not, whose elementary- and secondary-level courses, with the exception of language courses, including English courses, are offered in French.

O.C. 862-2010, s. 9.

10. Private educational institutions that have been providing instructional services for 3 years or less and that were not created following the division or merger of existing private educational institutions are temporarily considered, during their first 3 years of
operation, as type C educational institutions whose percentage of students who have a certificate of eligibility or an authorization to receive instruction in English is between 0% and 25%.

O.C. 862-2010, s. 10.

§3. Other rules for applying Schedule 1 and the weighting system

11. The following rules apply in the calculation of a percentage mentioned in this Regulation:

(1) percentages must be calculated annually for each institution by averaging the percentages for the previous 3 school years;

(2) in the case of educational institutions created following the division or merger of existing educational institutions, the calculation must take into account the percentages of the institution or institutions from which they originate;

(3) the percentage of students who are eligible to receive instruction in English is based on the number of students in the first 3 grades of elementary education or the first 3 grades of secondary education offered by the institution, depending on the case;

(4) fractions are rounded up to the next whole number; and

(5) data from the Ministère de l'Éducation, du Loisir et du Sport is used to calculate the percentage; the department makes the data available as well as the classification assigned to educational institutions on the basis of the data.

O.C. 862-2010, s. 11.
12. If the instruction invoked in support of an eligibility request was received in private educational institutions that have different classifications, subdivision 1.1 of Schedule 1 is applied to the most significant portion of the instruction received. However, if no instruction clearly stands out, points are attributed to each educational institution attended as though it had provided the child's entire schooling and the average number of points for those institutions is retained.

O.C. 862-2010, s. 12.

DIVISION IV

TRANSITIONAL AND FINAL PROVISIONS

13. Despite paragraph 1 of section 11, during the first 3 years of application of this Regulation, percentages for a given year are based on the average of the percentages for the previous 2 school years.

O.C. 862-2010, s. 13.

14. For the period from 22 October 2010 to 30 June 2011, and for the 2011-2012 school year, the percentage of students attending a private educational institution who have a certificate of eligibility or a special authorization to receive instruction in English under the Charter of the French language (chapter C-11) is the higher of

(1) the percentage determined in accordance with the provisions of Division III; and

(2) the percentage that corresponds to the average of the percentages of elementary school students who attended secondary school, in the previous 2 years, at a school under the jurisdiction of an English-language school board, a private English-language
educational institution accredited for the purposes of subsidies under the Act respecting private education (chapter E-9.1), or the same institution.

O.C. 862-2010, s. 14.

15. The percentage determined for the period from 22 October 2010 to 30 June 2011 is deemed to have remained the same since 1 October 2002 for the elementary or secondary school enrolments of the same institution, or, if the institution began operating after that date, since it began operating.

O.C. 862-2010, s. 15.

16. (Omitted).

O.C. 862-2010, s. 16.

SCHEDULE 1

(s. 3)

DIVISION 1 “Schooling” (section 3)

§1.1 Duration of English school attendance invoked in support of the eligibility request, according to the type of educational institution and the characteristics of its enrolments

Type A English-language institution

<table>
<thead>
<tr>
<th>Total school attendance</th>
<th>Type A English-language institution</th>
<th>Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 year</td>
<td>elementary and secondary</td>
<td>+2</td>
</tr>
</tbody>
</table>

189
<table>
<thead>
<tr>
<th>Term</th>
<th>Level</th>
<th>Duration</th>
<th>Additional</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 years</td>
<td>elementary</td>
<td>+6</td>
<td></td>
</tr>
<tr>
<td></td>
<td>elementary and secondary</td>
<td>+6</td>
<td></td>
</tr>
<tr>
<td></td>
<td>secondary</td>
<td>+8</td>
<td></td>
</tr>
<tr>
<td>3 or 4 years</td>
<td>elementary</td>
<td>+15</td>
<td></td>
</tr>
<tr>
<td>3 years</td>
<td>elementary and secondary</td>
<td>+15</td>
<td></td>
</tr>
<tr>
<td>3 years</td>
<td>secondary</td>
<td>+15</td>
<td></td>
</tr>
<tr>
<td>5 years</td>
<td>elementary</td>
<td>+17</td>
<td></td>
</tr>
<tr>
<td>4 or 5 years</td>
<td>elementary and secondary</td>
<td>+18</td>
<td></td>
</tr>
<tr>
<td>6 years</td>
<td>elementary</td>
<td>+20</td>
<td></td>
</tr>
<tr>
<td>4 or 5 years</td>
<td>secondary</td>
<td>+25</td>
<td></td>
</tr>
<tr>
<td>6 to 9 years</td>
<td>elementary and secondary</td>
<td>+30</td>
<td></td>
</tr>
<tr>
<td>10 or 11 years</td>
<td>elementary and secondary</td>
<td>+35</td>
<td></td>
</tr>
</tbody>
</table>
Type B English-language institution

<table>
<thead>
<tr>
<th>Total school attendance</th>
<th>Type B English-language institution</th>
<th>Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Institution where 0% to 25% of the enrolments hold a certificate of eligibility or a special authorization to receive instruction in English:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 to 3 years</td>
<td>elementary or secondary, or both</td>
<td>+3</td>
</tr>
<tr>
<td>4 to 6 years</td>
<td>elementary or secondary, or both</td>
<td>+8</td>
</tr>
<tr>
<td>7 to 11 years</td>
<td>elementary and secondary</td>
<td>+13</td>
</tr>
<tr>
<td>Institution where 26% to 40% of the enrolments hold a certificate of eligibility or a special authorization to receive instruction in English:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 to 3 years</td>
<td>elementary or secondary, or both</td>
<td>+4</td>
</tr>
<tr>
<td>4 to 6 years</td>
<td>elementary or secondary, or both</td>
<td>+10</td>
</tr>
<tr>
<td>7 to 11 years</td>
<td>elementary and secondary</td>
<td>+16</td>
</tr>
</tbody>
</table>
Institution where 41% to 59% of the enrolments hold a certificate of eligibility or a special authorization to receive instruction in English:

<table>
<thead>
<tr>
<th>Years</th>
<th>Description</th>
<th>Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 to 3 years</td>
<td>elementary or secondary, or both</td>
<td>+5</td>
</tr>
<tr>
<td>4 to 6 years</td>
<td>elementary or secondary, or both</td>
<td>+13</td>
</tr>
<tr>
<td>7 to 11 years</td>
<td>elementary and secondary</td>
<td>+21</td>
</tr>
</tbody>
</table>

---

**Type C institution**

---

<table>
<thead>
<tr>
<th>Total school attendance</th>
<th>Type C institution</th>
<th>Weighting</th>
</tr>
</thead>
</table>

Institution where 0% to 25% of the enrolments hold a certificate of eligibility or a special authorization to receive instruction in English:

<table>
<thead>
<tr>
<th>Years</th>
<th>Description</th>
<th>Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 to 3 years</td>
<td>elementary or secondary, or both</td>
<td>+2</td>
</tr>
<tr>
<td>4 to 6 years</td>
<td>elementary or secondary, or both</td>
<td>+5</td>
</tr>
<tr>
<td>7 to 11 years</td>
<td>elementary and secondary</td>
<td>+8</td>
</tr>
</tbody>
</table>
Institution where 26% to 40% of the enrolments hold a certificate of eligibility or a special authorization to receive instruction in English:

<table>
<thead>
<tr>
<th>Duration</th>
<th>Type</th>
<th>Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 to 3 years</td>
<td>elementary or secondary, or both</td>
<td>+3</td>
</tr>
<tr>
<td>4 to 6 years</td>
<td>elementary or secondary, or both</td>
<td>+7</td>
</tr>
<tr>
<td>7 to 11 years</td>
<td>elementary and secondary</td>
<td>+11</td>
</tr>
</tbody>
</table>

Institution where 41% to 59% of the enrolments hold a certificate of eligibility or a special authorization to receive instruction in English:

<table>
<thead>
<tr>
<th>Duration</th>
<th>Type</th>
<th>Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 to 3 years</td>
<td>elementary or secondary, or both</td>
<td>+4</td>
</tr>
<tr>
<td>4 to 6 years</td>
<td>elementary or secondary, or both</td>
<td>+9</td>
</tr>
<tr>
<td>7 to 11 years</td>
<td>elementary and secondary</td>
<td>+14</td>
</tr>
</tbody>
</table>

§1.2 Type and availability of special programs of study

<table>
<thead>
<tr>
<th>Special mission or purpose</th>
<th>Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attendance at an institution most of whose enrolments are 0 to +5</td>
<td>193</td>
</tr>
</tbody>
</table>
students requiring special services because of a physical or mental handicap, behavioural problems, social maladjustments, learning difficulties or other similar problems

**DIVISION 2 “Consistent, true commitment” (section 3)**

§2.1 Changes or inconsistencies in terms of the language of instruction during the schooling invoked in support of the eligibility request

<table>
<thead>
<tr>
<th>Length of interruption</th>
<th>French-language institution*</th>
<th>Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td>or change in language of instruction or school</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 year</td>
<td>elementary</td>
<td>(-3)</td>
</tr>
<tr>
<td>2 years</td>
<td>elementary</td>
<td>(-3 per year)</td>
</tr>
<tr>
<td>3 or more years</td>
<td>elementary</td>
<td>(-5 per year for each additional year after the first 2 years)</td>
</tr>
<tr>
<td>1 year</td>
<td>secondary</td>
<td>(-5)</td>
</tr>
</tbody>
</table>

194
2 years secondary (-5 per year)

3 or more years secondary (-8 per year for each additional year after the first 2 years)

* Enrolment in a French-language institution is not considered if motivated by the availability of special services needed because of a physical or mental handicap, behavioural problems, social maladjustments, learning difficulties or other similar problems. Similarly, the period of enrolment in a French-language institution is to be disregarded if ascribable to the student's participation in a special program of studies with limited access or availability, such as sports-study or music-study programs.

§2.2 Continued commitment, changes or inconsistencies in siblings' school attendance

In this division, “siblings” means

(1) brothers and sisters who attended elementary or secondary school during the period when the child concerned was also enrolled in elementary or secondary school, or

(2) brothers and sisters who attended such an institution during the 5 years before or after the child concerned received elementary or secondary school instruction.
<table>
<thead>
<tr>
<th>Siblings</th>
<th>Language of instruction and type of educational institution</th>
<th>Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td>No siblings</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 or more siblings</td>
<td>Siblings attended a type A English-language institution at the elementary or secondary level for a total of 1 year of instruction</td>
<td>+2</td>
</tr>
<tr>
<td>1 or more siblings</td>
<td>Siblings attended a type A English-language institution at the elementary or secondary level for a total of 2 years of instruction</td>
<td>+5</td>
</tr>
<tr>
<td>1 or more siblings</td>
<td>Siblings attended a type A English-language institution at the elementary or secondary level for a total of 3 or 4 years of instruction</td>
<td>+8</td>
</tr>
<tr>
<td>1 or more siblings</td>
<td>Siblings attended a type A English-language institution at the elementary or secondary level for a total of 5 or 8 years of instruction</td>
<td>+15</td>
</tr>
<tr>
<td>1 or more siblings</td>
<td>Siblings attended a type A English-language</td>
<td>+20</td>
</tr>
</tbody>
</table>
institution at the elementary or secondary level for a total of 9 or more years of instruction

<table>
<thead>
<tr>
<th>1 or more siblings</th>
<th>Siblings attended a French-language institution** at the elementary or secondary level for a total of 1 year of instruction</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(-2)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>1 or more siblings</th>
<th>Siblings attended a French-language institution** at the elementary or secondary level for a total of 2 years of instruction</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(-5)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>1 or more siblings</th>
<th>Siblings attended a French-language institution** at the elementary or secondary level for a total of 3 or 4 years of instruction</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(-15)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>1 or more siblings</th>
<th>Siblings attended a French-language institution** at the elementary or secondary level for a total of 5 or 8 years of instruction</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(-20)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>1 or more siblings</th>
<th>Siblings attended a French-language institution** at the elementary or secondary level for a total of 9 or more years</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(-30)</td>
</tr>
</tbody>
</table>
** Enrolment in a French-language institution is not considered if motivated by the availability of special services needed because of a physical or mental handicap, behavioural problems, social maladjustments, learning difficulties or other similar problems. Similarly, the period of enrolment in a French-language institution is to be disregarded if ascribable to the student's participation in a special program of studies with limited access or availability, such as sports-study or music-study programs.

§2.3 Continued and consistent commitment in relation to the parents' mobility

In this division, “parents” means the parents of the child concerned for the purposes of an eligibility request submitted under paragraph 2 of section 73 of the Charter of the French language.

<table>
<thead>
<tr>
<th>Length of residency elsewhere in Canada (without receiving elementary- or secondary-level instruction in French)</th>
<th>Parents</th>
<th>Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td>More than 10 years out of the 20 years preceding the beginning of the schooling invoked in support of the eligibility request</td>
<td>1 parent</td>
<td>+5</td>
</tr>
<tr>
<td>2 parents</td>
<td>+8</td>
<td></td>
</tr>
</tbody>
</table>

DIVISION 3 “Specific situation and overall education” (section 3)
Related or distinct contextual elements that allow a more in-depth assessment, with respect to the child's personal family situation, of the authenticity of the commitment made

O.C. 862-2010, Sch. 1.

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