

Section 20 of the Charter: Uncharted Territory

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I. INTRODUCTION

Section 20 of the *Canadian Charter of Rights and Freedoms* guarantees any member of the public in Canada the right to communicate with and receive services from government institutions¹ in the official language of their choice:

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.

Subsection 20(2) guarantees a similar — although more generous — right to any member of the public in the province of New Brunswick.²

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¹ The expression “government institutions” is used here as a synonym of the expression “institution of the Parliament or government of Canada” appearing in s. 20 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. However, the scope of the latter expression will be discussed at length in this paper and a generous interpretation will be proposed.

² Subsection 20(2) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 sets out: “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.”

Recent history has seen an increase in the number of legal challenges brought in part or in whole pursuant to section 20 of the Charter. This paper examines the extent to which section 20 is an underutilized but highly effective tool in the preservation and promotion of official-language minority communities. Part II addresses the importance of section 20 rights for the continued vitality and development of those communities. Part III examines the principles that must guide the interpretation of section 20 before Part IV undertakes a detailed analysis of the scope of the rights afforded by that provision. Part V discusses the *Official Languages Act*,³ which implements section 20 and can serve as a useful interpretative tool in defining the scope of the Charter right to receive government communications and services in the official language of choice. Part VI considers subsection 20(2) of the Charter and Part VII examines the section 1 analysis applicable to an impairment of section 20 rights.

II. THE IMPORTANCE OF SECTION 20

Minority language rights are fundamental because “[l]anguage is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it”: *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 362.⁴

Prior to proclamation of the Charter in 1982, section 133 of the *Constitution Act, 1867*⁵ reflected the totality of the express constitutional guarantees pertaining to language rights in Canada. That section recognizes a limited right to use French and English in the administration of the federal government. However, the section is silent with respect to the rights of citizens to use the official language of their choice in their interactions with the State. Between 1867 and 1982, Canada’s Constitution provided for no right to communicate with or receive services from the government in either official language.

The Royal Commission on Bilingualism and Biculturalism studied the federal language regime in place in the 1960s. The Commission reported that

[n]either Francophone nor Anglophone can feel that he lives in a bilingual country where the two official languages are treated as equal, if his

³ *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) [hereinafter “OLA”].

⁴ *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, 2005 SCC 14, at para. 2 (S.C.C.).

⁵ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

own language does not occupy an honourable place, in law and in practice, in the federal government and the central administration of the country ... Beyond simple allegiance to one's country, there is the dimension of identification. To ensure this sense of identification, each of the two official languages must have its due place in the principal institutions of the federal government. For we must remember that language is more than a means of communication; it is the means by which the individual expresses his personality, shares in the activities and feels a part of his environment.⁶

The Commission recommended that individual Canadians be guaranteed the right to communicate with and receive services from federal institutions in their official language.⁷ The Commission recognized that this act would endow English and French with public legitimacy and encourage the maintenance and growth of official-language minority communities.

The theory animating the Commission's recommendation was that communication with and services from government fortifies the sense of identity of members of official-language communities as well as that of the communities themselves. Official-language scholars have endorsed this theoretical foundation of the Commission's recommendation.⁸ The theory provides reasons for one to believe that should section 20 fulfil its promise, it can serve as an important tool to halt the tide of assimilation that many official-language minority communities experience. Properly interpreted and applied, section 20 can be a key component to the vitality of official-language minority communities throughout Canada.⁹

⁶ Canada, *Report of the Royal Commission on Bilingualism and Biculturalism*, vol. 1 (Ottawa: Queen's Printer, 1967), at 92.

⁷ See G. Fraser, *Sorry, I Don't Speak French* (Toronto: McClelland & Stewart, 2006).

⁸ Institutional support is one of three variables pertinent to the vitality of ethnolinguistic communities: H. Giles, R. Bourhis & D.M. Taylor, "Towards a Theory of Language in Ethnic Group Relations" in H. Giles, ed., *Language, Ethnicity and Intergroup Relations* (New York: Academic Press, 1977), at 307-48. Studies have shown an important correlation between ethnolinguistic vitality and a person's beliefs and subsequent behaviour: see A. Gilbert, *et al.*, "L'environnement et la vitalité communautaire des minorités francophones: Vers un modèle conceptuel", *Francophonies d'Amérique*, Number 20, Autumn 2005, at 53.

⁹ Although the rights granted by s. 20 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 are important tools in insuring the vitality of official-language minority communities, it is necessary to highlight the fact that s. 20 is a threshold and not a ceiling: *Société des acadiens du Nouveau-Brunswick Inc. v. Canada*, [2005] F.C.J. No. 1587, [2006] 1 F.C.R. 490, 2005 FC 1172, at para. 44 (F.C.) (overturned on appeal on different grounds: [2006] F.C.J. No. 805, 2006 FCA 196 (F.C.A.); leave to appeal to the Supreme Court of Canada granted [2006] C.S.C.R. no 309 (S.C.C.)). Accordingly, the extent to which the objectives of the Charter in this regard are fully realized depends, in part, on the federal government's willingness to go beyond the letter of the Charter and take additional

We contend that section 20 should be understood as encouraging individuals to use their official language of choice in day-to-day interactions with the state.¹⁰ Section 20 aspires to increase the opportunities available for minority language use.¹¹ This requires an array of government institutions able to communicate and provide services in both official languages so as to encourage minority language speakers to use minority languages. Any interpretation of section 20 should further this fundamental goal.

In addition, the symbolic impact of section 20 contributes to the vitality of official language communities. The status afforded to a language by a state in legal and practical senses influences an individual's desire to continue living in that language on a daily basis. Where the state accords a minority language a low status, or where the opportunities to use a minority language are not available in a practical sense, members of a minority language community are more likely to lose faith in the vitality and legitimacy of their language. In consequence, an individual's attachment to his or her language would, with time, be eroded. These are among the conditions that lead minority-language speakers to abandon the minority language in favour of the language of the majority.¹² Yet, when a member of a linguistic minority sees his or her language officially recognized by the state and reflected in daily workings of state institutions, that individual is more likely to feel that his or her language is valued and thereby desire to continue to live in that language on a daily basis. The sense of empowerment and recognition that is gained by members of a minority community by way of such a measure make it much more likely that the individual members of that community will use their minority language in their day-to-day interactions. This, in

measures to advance the equality of status and use of the English and French languages, as envisioned at s. 16(3) of the Charter.

¹⁰ Examples of such communications or interactions may range from purchasing stamps at the post office, to filing a tax return (and any subsequent audit thereof), to applying for passports, patents, employment insurance or business development grants. See S. May, *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language* (Harlow, England: Pearson Education Limited, 2001), at 312.

¹¹ That is to say, beyond the confines of home, school and/or church.

¹² R. Landry & R. Bourhis, "Linguistic Landscape and Ethnolinguistic Vitality: An Empirical Study" (1997) 16:1 *Journal of Language and Social Psychology* 23-49, at 28; L. Green, "Are Language Rights Fundamental?" (1987) 25 *Osgoode Hall L.J.* 639. It has been said that weakness in institutional structure in providing French-language services to official-language minorities limits the opportunities of using French in meaningful contexts: R.F. Magsino, J.C. Long & R.G. Théberge, "Canadian Pluralism, the Charter and Citizenship Education" (2000) 32:1 *Canadian Ethnic Studies* (special issue) 89, at 92.

turn, increases the likelihood that the community or language group will survive.¹³

In short, the ability to use a minority language in one's day-to-day interactions with the state not only maintains that language but gives the official-language minority group a sense of purpose, recognition and empowerment that allows it to thrive and develop.¹⁴ Interpretation of section 20 should be guided by these realities.

III. PRINCIPLES OF INTERPRETATION

Any discussion of the scope of the rights and obligations that flow from section 20 must be undertaken in light of two concepts that serve as important interpretative tools in matters of language rights: recognition of the equality of the English and French languages and the foundational constitutional principle of respect for minority rights.

Language guarantees must be read purposively and in light of section 16 of the Charter, which outlines the principle of equality between the English and French languages.¹⁵ The equality conferred by section 16 is *substantive* equality.

Section 20 of the Charter must also be read in light of the underlying constitutional principle of respect for minorities first recognized in *Reference re Secession of Quebec*,¹⁶ and held to extend to the protection of linguistic minorities.¹⁷ Accordingly, section 20 should be interpreted

¹³ Sociolinguistic studies have determined that linguistic minorities who do not have a certain degree of "institutional completeness" or social organization are likely to cease to exist: see R. Landry, "Diagnostic sur la vitalité de la communauté acadienne du Nouveau-Brunswick", *Égalité*, automne 1994, numéro 36, 11-39 and works cited. See also D.G. Rhéaume, "The Constitutional Protection of Language: Survival or Security?" in D. Schneiderman, ed., *Language and the State: The Law and Politics of Identity* (Cowansville, Qc.: Éditions Yvon Blais, 1991), at 54.

¹⁴ The ability to receive quality services in the official language of their choice fosters feelings of recognition and value among official-language communities: Canada, "National Report on Service to the Public in French and English: Time for a Change in Culture", OCOL Special Study (Ottawa: Office of the Commissioner of Official Languages, 2001); L. Green, "Are Language Rights Fundamental?" (1987) 25 Osgoode Hall L.J. 639. See also R. Landry, *et al.*, "Autodétermination du comportement langagier en milieu minoritaire: un modèle conceptuel", *Francophonies d'Amérique*, Number 20, Autumn 2005, at 64.

¹⁵ *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549, at 565 (S.C.C.).

¹⁶ [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 49 (S.C.C.).

¹⁷ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 52 (S.C.C.); *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 505 (Ont. C.A.).

in a manner that enhances the vitality of and promotes the preservation and development of official-language minority communities.¹⁸

These principles of interpretation guide our understanding of the proper scope of section 20. Where the institutions of Parliament or the Government of Canada are required to communicate with or provide services to members of the public in both official languages, they are required to ensure *equal access* to their services and communications in both official languages. The services and communication provided in English and French must be of *equal quality*.¹⁹ This imposes a positive obligation upon the state to take active measures in order to ensure the substantive equality of the English and French languages.²⁰ The Supreme Court observed that the state's obligation cannot be treated

... as though there was one primary official language and a duty to accommodate with regard to the use of the other official languages. The governing principle is that of the equality of both official languages.²¹

Effectively, this means that the state is responsible for bringing about a condition of substantive equality between English and French. To conclude otherwise would render the exercise of section 20 rights reliant on the will of the government and subject to the influence of public opinion.

¹⁸ *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 25 (S.C.C.). See also *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] S.C.J. No. 26, [1993] 1 S.C.R. 839, at 850 (S.C.C.).

¹⁹ *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at paras. 22, 39 (S.C.C.). Whether or not the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) and, by analogy, s. 20 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 grant the right to services of equal quality will soon be addressed by the Supreme Court of Canada in *Desrochers v. Canada (Industry)*, [2007] C.S.C.R. no 27 (S.C.C.), an appeal from a judgment of the Federal Court of Appeal, [2006] F.C.J. No. 1777 (F.C.A.) that held that part IV of the *OLA* grants the right to equal access to services in both official languages and not equal access to services of equal quality in both languages.

²⁰ We submit that the obligations set out at s. 20 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 are obligations of result, that is to say that institutions must *ensure* the result which is services and communications of equal quality and as easily accessible in both official languages. The obligation to actively offer those services and communications is implicit to the equality of access. Good faith and effort are not the applicable standard with regards to this Charter right. Likewise, "challenges of governance" cannot be successfully invoked to justify the absence of true equality. See *Thibodeau v. Air Canada*, [2005] F.C.J. No. 1395, [2006] 2 F.C.R. 70 (F.C.), aff'd [2007] A.C.F. no 404 (F.C.A.) and *Fédération Franco-Ténoise v. Canada (Attorney General)*, [2006] N.W.T.J. No. 33 (N.W.T.S.C.) (appeals pending before the Court of Appeal of the Northwest Territories: Court file numbers AP-2006/014 and AP-2006/015).

²¹ *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 39 (S.C.C.).

Depending on the circumstances of the local official-language communities,²² offering equal access to services and communications of equal quality in both official languages will require institutions to adapt their methods of delivering their services or communications. We have long since learned that a formalistic approach to service delivery according to which both official language groups always receive the same services and communications via the same method of delivery does not bring about substantive equality. With the knowledge that formalism can contribute to the erosion of the culture and language of an official-language minority community,²³ the conclusion that formalism is incompatible with the spirit and intent of section 20 easily follows.

IV. SCOPE OF RIGHTS AFFORDED BY SECTION 20

With the equality principle entrenched in section 16 of the Charter and the aforementioned constitutional principle of respect for minority rights in mind, let us examine the scope of the rights afforded by section 20. We will first identify the beneficiaries of the rights afforded by section 20 and subsequently examine the definitions of the right to communicate and the right to receive services. We will furthermore identify those institutions upon which section 20 imposes positive duties to act and examine the application of that section where a government communication or service is offered or delivered to the public via a third party. Lastly, we will discuss the restrictions inherent to section 20 that limit the scope of that constitutional right.

²² For example, offering a service of equal quality may occasionally require that the service offered by the institution be tailored in part to address the unique needs of an official-language minority community, for example, the particular needs of these communities in the areas of community or business development. However, the Federal Court has held that this occasional need to tailor services to an official-language minority community does not go so far as to require that that service be administered by the minority community itself: *Desrochers v. Canada (Industry)*, [2005] F.C.J. No. 1218, [2005] 4 F.C.R. 3, 2005 FC 987 (F.C.), revd [2006] F.C.J. No. 1777 (F.C.A.), leave to appeal to the S.C.C. granted [2007] C.S.C.R. no 27 (S.C.C.).

²³ *Charlebois v. Moncton (City)*, [2001] N.B.J. No. 480, 242 N.B.R. (2d) 259, 2001 NBCA 117, at para. 80 (N.B.C.A.). See also *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1, [2000] 1 S.C.R. 3, 2000 SCC 1 (S.C.C.).

1. The Beneficiaries of Section 20

In express terms, section 20 confers rights on “any member of the public” (“*le public*”) who communicates with a government institution or accesses government services in Canada.²⁴ Citizenship or immigration status is not relevant to the exercise of these rights. By opting for this terminology, the legislator likely intended these rights to extend beyond individual members of society. Vaz and Foucher argued that although individuals²⁵ are the primary beneficiaries of rights created by section 20, the language of that section implicitly includes associations and groups.²⁶ However, it is not so broad as to include private or public institutions as beneficiaries.

2. The Right to Communicate

The right to “communicate with” an institution refers to all direct contact — be it written or verbal — between the institution and members of the public. This right implicitly includes the right of a member of the public to communicate with an institution in the official language of his or her choice and the right to be understood by that institution in that language.²⁷ All communications initiated by a member of the public with an institution subject to section 20 also includes a corresponding right to receive a reply in that language.

To satisfy the right of communication, members of the public must be able to communicate with the institution with equal ease in both official languages. Members of the public should not be made to feel that opting for the majority language is the path of least resistance. This follows from viewing the rights through the lens of substantive equality.

To satisfy these requirements for oral communications, an institution must ensure that it has sufficient personnel able to communicate in each

²⁴ The wording of s. 20 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 clearly sets out that these rights may only be exercised within Canada: “Any member of the public in Canada has the right...” (“Le public a, *au Canada*, droit à...”).

²⁵ “Individuals” is used in the sense of those persons acting as members of the public, to the exclusion of individuals acting in the exercise of their duties as government employees or representatives.

²⁶ N. Vaz & P. Foucher, “The Right to Receive Public Services in Either Official Language” in M. Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc.: Éditions Yvon Blais, 2004) 251, at 264.

²⁷ *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549, at 575 (S.C.C.).

official language. Whether an institution's employees are bilingual or unilingual English and unilingual French is irrelevant for the purposes of ensuring the right of the public to communicate with an institution in either official language.²⁸ The institution's obligation is to ensure that it has a sufficient number of English- and French-speaking employees, respectively, so that its services and communications are equally accessible and of equal quality in both languages.

Resort to simultaneous translation services cannot satisfy the duty imposed by section 20 in matters of *oral* communication. The quality of a simultaneously translated communication is necessarily inferior to direct oral interaction.²⁹

Resort to translation in *written* communications may be appropriate in certain circumstances. The test is whether the written translation is of equal quality to the original. Equally important, the translation must not delay the delivery or reception of the institutions' response or communication. Equal access to written communications cannot be said to exist where an individual or group must wait longer to receive correspondence in the official language of its choice.

3. The Right to Receive Services

The definition of what constitutes a "service" is not yet settled in the case law.³⁰

"Service" must necessarily be given a broader meaning than "communication". To conclude otherwise would render meaningless the legislator's decision to distinguish the two concepts and would be contrary to the definitions of these words. For the purposes of section 20, "service" is most appropriately defined as "the provision or system of supplying a public need".³¹ As such, section 20 applies to direct and indirect

²⁸ It is important to note that the institution does, however, have a corresponding legal obligation towards its employees with respect to their language of work, pursuant to Part V of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.).

²⁹ See *Doucet v. Canada*, [2004] F.C.J. No. 1813, [2005] 1 F.C.R. 671, 2004 FC 1444, at para. 43 (F.C.) and *Fédération Franco-Ténoise v. Canada (Attorney General)*, [2006] N.W.T.J. No. 33, at paras. 729-732 (N.W.T.S.C.).

³⁰ See, for example, *Desrochers v. Canada (Industry)*, [2006] F.C.J. No. 1777 (F.C.A.), leave to appeal granted [2007] C.S.C.R. no 27 (S.C.C.); *Doucet v. Canada*, [2004] F.C.J. No. 1813, [2005] 1 F.C.R. 671, 2004 FC 1444 (F.C.); *R. v. Simard*, [1995] O.J. No. 4975, 27 O.R. (3d) 116 (Ont. C.A.); *R. v. Rodrigue*, [1994] Y.J. No. 113, 91 C.C.C. (3d) 455 (Y.T.S.C.), affd [1994] Y.J. No. 178, 95 C.C.C. (3d) 129 (Y.T.C.A.).

³¹ *The Canadian Oxford Dictionary*, s.v. "service".

offers of services and programs³² seeking to address past, present or future needs of members of the public.³³

Section 20 requires that institutions offer *available* services in both official languages. Where an institution chooses to offer a service in one official language, it must also offer the same service in the other official language. Like communications, the services offered by that institution must — at all times — be equally accessible and of an equal quality in both official languages. Resort to translation is only appropriate where it does not affect the quality of the service offered and does not cause unacceptable delays in the delivery of that service.

Section 20 does not demand identical service or treatment of both official-language communities. As previously discussed, such formalism does not bring about the substantive equality required by section 16. The principle of substantive equality does not preclude the establishment of innovative models of service delivery, nor is it incompatible with the modernization and rationalization of service delivery to the public.³⁴

4. Definition of “Institution of the Parliament or Government of Canada”

What public institutions are embraced by, subject to section 20’s wording, an “institution of the Parliament or government of Canada”? This expression is not defined in the Charter, nor is it defined in the jurisprudence.³⁵

The absence of such a definition makes sense given the constant changes that occur in government. It would likely be impossible to

³² Section 20 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 also encompasses the implementation of a government policy by an institution or third party. See, for example, *Desrochers v. Canada (Industry)*, [2006] F.C.J. No. 1777 (F.C.A.), leave to appeal granted [2007] C.S.C.R. no 27 (S.C.C.), where the Court was asked to determine whether Industry Canada violated the plaintiffs’ s. 20 rights with respect to the delivery of a community development program run by a third party on behalf of the institution.

³³ To the exclusion of public servants accessing those services in their professional capacity.

³⁴ See, for example, Canada, “Cooperation between the government and the communities: New models of service delivery”, OCOL special study (Ottawa: Office of the Commissioner of Official Languages, June 2000).

³⁵ Although s. 3 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) contains a definition of “federal institution” — which includes an enumeration of institutions of the Parliament or government of Canada subject to the Act — that definition is not determinative of those institutions of Parliament or the government of Canada subject to s. 20 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

provide an exhaustive list of institutions subject to this obligation. A fixed definition would freeze this provision in time. By providing for an open-ended expression, the Framers ensured that section 20's reach could vary over time as government evolves.

In the absence of a statutory definition, the principles of interpretation offer important guidance. The object of sections 16 and 20 and the underlying constitutional principle of respect for minorities call for a generous interpretation of the expression "institution of Parliament or government of Canada". Accordingly, this expression must not be read as limited to those institutions subject to section 32 of the Charter.³⁶

A purposive interpretation dictates that section 20 not only apply to institutions which fall within the purview of section 32 of the Charter but also to all institutions *created by* Parliament or the Government of Canada and over which Parliament or the government exercise a certain degree of control.³⁷ Furthermore, the expression "institution of Parliament or government of Canada" must encompass statutorily created private bodies that exercise one or more activities that are "governmental in nature".³⁸ Such private bodies are required to comply with section 20 of the Charter in respect of their activities that are governmental in nature and not in their other private activities.

What of territorial governments, which were created by statute and hold their powers at the pleasure of the governor in council?

In our opinion, Canada's three territorial governments are subject to section 20 of the Charter and are therefore required to communicate with and offer their services to the public in both official languages. The jurisprudence, however, is not settled. In *R. v. St. Jean*,³⁹ the Yukon

³⁶ Section 32 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 states: "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; ...". Note that s. 32 speaks of Parliament and government whereas s. 20 speaks more broadly of institutions of the Parliament or government of Canada; see also *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844, at para. 48 (S.C.C.), where the Supreme Court of Canada states "interpreting s. 32 as including governmental entities other than those explicitly listed therein is entirely sensible from a practical perspective".

³⁷ *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229 (S.C.C.). See also *Charlebois v. Moncton (City)*, [2001] N.B.J. No. 480, 242 N.B.R. (2d) 259, 2001 NBCA 117, at paras. 100-106 (N.B.C.A.). For example, these "institutions" would include, but not be limited to, departments, agencies, quasi-judicial or administrative bodies and Crown corporations.

³⁸ *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.); *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307, 2000 SCC 44, at paras. 33-35 (S.C.C.).

³⁹ [1986] Y.J. No. 76, 2 Y.R. 116, [1987] N.W.T.R. 118 (Y.T.S.C.).

Territory Supreme Court held that the government of the Yukon Territory was not an "institution" of the Parliament and Government of Canada for the purposes of sections 16 to 20 of the Charter. This conclusion was recently challenged in respect of the Northwest Territories in *Fédération Franco-Ténoise v. Canada (Attorney General)*.⁴⁰ Unfortunately, the trial court found it unnecessary to address the issue of the constitutional status of the territories.⁴¹ However, the issue was recently debated anew before the Court of Appeal of the Northwest Territories.

We argue that the three territorial governments are subject to section 20 of the Charter. Section 32 of the Charter expressly recognizes that those matters that fall within the authority of Parliament for the purposes of the application of the Charter include "all matters relating" to the Territories. The territories were created by and continue to be subject to the control of Parliament and the federal government. The powers exercised by their legislatures could conceivably be revoked or circumscribed, at any time, by the governor in council.

Not only do the three territories constitute "institutions" within the explicit language of section 20 of the Charter, they are charged with activities that are governmental in nature.⁴² For example, in the case of the Northwest Territories, the territorial government entered into an agreement with the federal government whereby the territorial government undertook to adopt and implement a language regime equivalent to the *Official Languages Act* ("OLA").⁴³ This regime was meant to replace a federal language regime and mirror the Charter rights entrenched in sections 16 to 20. In exchange, the territorial government received federal funding

⁴⁰ [2006] N.W.T.J. No. 33 (N.W.T.S.C.).

⁴¹ *Fédération Franco-Ténoise v. Canada (Attorney General)*, [2006] N.W.T.J. No. 33, at para. 802 (N.W.T.S.C.). The Court chose to limit the scope of its judgment to alleged breaches of the *Official Languages Act*, R.S.N.W.T. 1988, c. O-1 ("NWT OLA") because it deemed the NWT OLA to represent a legislative response to the Charter and the wording of the Act to be similar to ss. 16 to 20 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. The Court concluded to numerous and systemic breaches of the NWT OLA. The Court held that the government of the Northwest Territories is required, pursuant to the *Official Languages Act*, R.S.N.W.T. 1988, c. O-1, to communicate with and offer its services to the public in both English and French. These services and communications must be of equal quality, actively offered to the territorial population and equally accessible in both official languages. This obligation exists notwithstanding the obligation or ability of the territories to offer their communications and services in Aboriginal or other languages. Two appeals of this decision were heard by the N.W.T. Court of Appeal on November 19-21, 2007. Judgment pending (court file nos. AP-2006/014 and AP-2006/015).

⁴² *Eldridge v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307, 2000 SCC 44 (S.C.C.).

⁴³ R.S.C. 1985, c. 31 (4th Supp.).

to cover the costs associated with the provision of services and communications in French. As a result of this agreement, the Northwest Territories was excluded from the application of the federal *OLA* and its accompanying Regulations.⁴⁴ In adopting, implementing and subsequently administering an official language regime, the Government of the Northwest Territories is exercising a duty that would otherwise have been incumbent upon the federal government. Accordingly, the Government of the Northwest Territories can conceivably be held to be exercising a duty that is “governmental in nature” and be required to comply with section 20 of the Charter in the exercise of that duty.

The governor in council has such power over the territories that, in 1999, it adopted a federal law which sectioned off a large portion of the Northwest Territories in order to create Nunavut.⁴⁵ By virtue of section 38 of that Act, Nunavut inherited the *Official Languages Act* of the Northwest Territories⁴⁶ and the corresponding obligation to ensure that members of the public are able to communicate with and receive services from the territorial government in English, French and nine Aboriginal languages. The Government of Nunavut has tabled a bill seeking to repeal and replace its existing *Official Languages Act*, in part so as to reinforce and privilege the protection and promotion of the Inuit language.⁴⁷ The objective that the Government of Nunavut has set for itself is a daunting one. It seeks to ensure the presence and equal use of the Inuit language in territorial institutions, municipalities, schools and the private sector. Although the Government of Nunavut is free to create rights and obligations with respect to the status and use of the Inuit language and should be applauded for taking such much-needed measures, it will need to strive to ensure that it has sufficient resources to fully respect its constitutional obligations set out at section 20 of the Charter, all the while implementing and administering its new language regime.

⁴⁴ *Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48.

⁴⁵ *Nunavut Act*, S.C. 1993, c. 28.

⁴⁶ R.S.N.W.T. 1988, c. O-1.

⁴⁷ The Government of Nunavut has also tabled a bill entitled the *Inuit Language Protection Act*, a companion to its new proposed *Official Languages Act*. The “Inuit Language” is defined in the *Inuit Language Protection Act* as encompassing both Inuktitut and Inuinnaqtun.

5. Delegation of Services or Communications to Third Parties

The Charter does not clearly set out whether the duties of institutions of the Parliament or Government of Canada in matters of communications with and services to the public extend to situations where a government communication or service is offered or delivered to the public via a third party.⁴⁸

Despite textual ambiguity, the courts have stated clearly that the federal government may not divest itself of its constitutional obligations by delegating its responsibilities to third parties or other orders of government. When a federal institution arranges for a service normally offered by it to be offered by a third party, this arrangement cannot diminish or abrogate the language rights enjoyed by the Canadian public, including those rights guaranteed by section 20.⁴⁹ Thus, the institution must ensure that the third party offers equal access to those communications and services in both official languages and that they are of equal quality in both languages.

6. Additional Qualifiers of Section 20 Right

Despite section 16's assurance that English and French have equal rights and privileges as to their use in all institutions of the Parliament and Government of Canada, section 20 restricts this substantive equality. The right afforded by section 20 is subject to numerous restrictions that render the right to communicate with government institutions and access government services in the official language of choice unavailable to many members of official-language minority communities. With the exception of head or central offices of institutions, which are always required to offer their services and communications in both official languages, section 20 only applies where a significant demand for

⁴⁸ Section 25 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) is clear in this regard:

Every federal institution has the duty to ensure that, where services are provided or made available by another person or organization on its behalf, any member of the public in Canada or elsewhere can communicate with and obtain those services from that person or organization in either official language in any case where those services, if provided by the institution, would be required under this Part to be provided in either official language.

⁴⁹ *Canada (Commissioner of Official Languages) v. Canada (Department of Justice)*, [2001] F.C.J. No. 431, 194 F.T.R. 181, 2001 FCT 239 (F.C.T.D.); confirmed in *Société des acadiens du Nouveau-Brunswick Inc. v. Canada*, [2005] F.C.J. No. 1587, [2006] 1 F.C.R. 490, 2005 FC 1172, at paras. 44 and 45 (F.C.). See also *Desrochers v. Canada (Industry)*, [2006] F.C.J. No. 1777, at para. 42 (F.C.A.).

services and communications in the minority official language exists⁵⁰ or where the nature of an office or service suggests that it is “reasonable” that members of the public be able to access communications and services in either official language.⁵¹

When examined in light of the principle of substantive equality, the object of section 20 and the constitutional principle of respect for minorities, section 20’s internal qualifiers contravene the spirit and object of section 16 of the Charter.⁵² However, given that the Supreme Court of Canada has held that one constitutional provision cannot invalidate another, this incompatibility cannot, in and of itself, give rise to a constitutional challenge.⁵³ Nevertheless, it is possible that a Charter challenge raising this apparent contradiction would persuade the courts to favour a generous interpretation of section 20. For example, a court may adopt a definition of “significant demand” which affords section 20 rights to the largest conceivable number of Canadians.

Section 20 does not require the entire apparatus of an institution to be able to communicate with and offer services to the public in both official languages.⁵⁴ First, the head or central office of each institution is required to have this capacity. The vast majority of head and central offices are located in large urban centres. As a result, section 20 creates some regional disparity in the availability of services in both official languages. Members of the public living in some small cities, rural or remote locations are often deprived of access to government

⁵⁰ See s. 20(1)(a) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁵¹ See s. 20(1)(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁵² See, for example, *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549, at 619 (S.C.C.) (Wilson J.) and others. An attempt to challenge the constitutional validity of s. 20 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 due to an apparent incompatibility with s. 16 is unlikely to succeed.

⁵³ For the Court’s most recent pronouncements to this effect, see *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 15, [2005] 1 S.C.R. 238, 2005 SCC 15, at para. 2 (S.C.C.). See also *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at 877 (S.C.C.) and *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] S.C.J. No. 44, [1987] 1 S.C.R. 1148 (S.C.C.).

⁵⁴ As previously stated, s. 20 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 does not require that the whole of an institution’s workforce be bilingual. All that s. 20 requires of an institution is that a sufficient proportion of its workforce be able to communicate in each official language so as to ensure equal access to services and communications of equal quality in both languages.

communications and services in the official language of their choice and are able to exercise their right only where section 20 otherwise permits.

In addition to the head or central office of an institution, an institution is required to comply with section 20 if there is "a significant demand for communications with and services from [an] office in such a language". In such a case, the office is required to possess sufficient bilingual capacity to communicate with and offer services to the public in both official languages.

The Charter does not define what constitutes a significant demand. The case law on section 20 is of little assistance. The *OLA* and its accompanying Regulations offer some clarification of what constitutes "significant demand". However, these legislative texts do not exhaust the content of section 20 and do not necessarily apply to all institutions subject to section 20 of the Charter.

"Significant demand" must be interpreted in a manner that promotes official bilingualism, the vitality of official-language communities, and the equality of the French and English languages. This purpose helps illustrate why the expression "significant demand" must be given an interpretation which renders the right to communicate with and receive services in either official language accessible to as many Canadians as possible. Contrary to past and present tendencies, significant demand should not be evaluated solely by the demographics of the minority-language population surrounding a particular office. Such an approach has been successfully challenged in Federal Court.⁵⁵ Demographics are an important indicator of demand but should not be the determining factor in all cases.

In assessing whether a significant demand for a particular service exists, the nature of that service must factor into the analysis. As the Federal Court has recently held, certain services or communications require that other factors be taken into consideration in determining whether or not there exists a significant demand in a given area.⁵⁶ Despite a somewhat low demographic representation of members of the official-language minority in a given region, the nature of the service offered may result in

⁵⁵ *Doucet v. Canada*, [2004] F.C.J. No. 1813, [2005] 1 F.C.R. 671, 2004 FC 1444 (F.C.).

⁵⁶ *Doucet v. Canada*, [2004] F.C.J. No. 1813, [2005] 1 F.C.R. 671, 2004 FC 1444 (F.C.).

In *Doucet*, the RCMP was required to take into account — in the determination of whether there existed a significant demand — the particular characteristics of the area in question (*i.e.*, the fact that the area bordered a province with an important official-language minority population and attracted an important number of minority-language speakers) as well as the nature of the service offered (patrolling a portion of the Trans-Canada highway).

members of the minority constituting a disproportionately large proportion of the users of that service, particularly where those services coincidentally respond to a pressing need of the official-language minority of the region.⁵⁷

What constitutes “significant demand” cannot be satisfactorily addressed without considering the duty of institutions of the Parliament or Government of Canada to *actively offer* to communicate with or serve the public in either official language. Neither an institution nor a court can conclude there is an absence of significant demand without first ensuring that the service or communication has been actively offered in the language of the minority for a reasonable length of time.⁵⁸ Although the Charter makes no explicit mention of such a duty, a duty of active offer is implicit in section 20. The *OLA* expressly confers a duty of active offer upon federal institutions as part of their larger duty in matters of communication with and services to the public.⁵⁹ This requirement of the *OLA* may be viewed as implementing the implicit constitutional requirement of section 20.

Requiring institutions to actively offer to communicate with and serve the public in either official language is consistent with section 20’s remedial nature. By making it known that services and communications are available in the minority language, institutions will encourage the growth of the demand for such services and communications among members of the minority. Experience has shown that where services and communications are made available in both official languages and actively offered to the public, the demand for those services and communications increases. Where members of the official-language minority group are made aware of the availability of a service or communication in their language, they are more likely to demand to receive that service or communication in that language.

Reading section 20 as containing a duty of active offer is also consistent with the equality principle set out at subsections 16(1) and (3) of the Charter. The impact of the qualifier “significant demand” on the

⁵⁷ For example, the services offered by Fisheries and Oceans Canada on the Acadian peninsula of New Brunswick or by Western Economic Diversification Canada in certain parts of Saskatchewan attract a proportionally high number of users who are members of the official-language minority when contrasted with the overall demographic representation of that minority.

⁵⁸ By “reasonable length of time” we refer to a time frame sufficiently long as to expect that, if a demand existed, it could by then have manifested itself. This time frame would be liable to vary according to the nature of the service offered. Given that certain services are only rarely or occasionally accessed, the length of time required to foster awareness of the existence of those services in the language of the official-language minority would necessarily be longer.

⁵⁹ Section 28 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.).

right of the public to equal access to communications and services of equal quality in both official languages is diminished by imposing a duty of active offer on the institution. This duty of active offer is "in keeping with the principle expressed by the Supreme Court of Canada in *R. v. Beaulac* that 'the exercise of language rights must not be considered exceptional, or as something in the nature of a request for accommodation'".⁶⁰

In contrast, it is possible to expand the application of section 20 by interpreting the expression "due to the nature of the office" found at section 20(1)(b) of the Charter generously. Despite the presence or absence of a significant demand, certain offices of institutions are nonetheless required to communicate with and provide services to the public in both official languages because of the nature of the office. For example, services pertaining to the health, safety and security of the public must be made available throughout Canada in both official languages due to their nature.⁶¹

The Charter does not define the expression "the nature of the office". The interpretative approach developed here suggests that "nature of the office" should be consistent with the purposes of the Charter, which are to enhance the vitality of the official-language minority communities and ensure the equality of the English and French languages.

The duty to communicate with and provide services to the public in both official languages goes beyond circumstances where it is *necessary* for those services or communications to be offered in both languages. The duty attaches where it is *reasonable* to communicate with and provide services to the public in both official languages. It is reasonable that all offices which have frequent contact with the public and whose communications or services have an important impact on the lives of Canadians should communicate with and provide their services to the public in both official languages. This approach is consistent with the observations of Vaz and Foucher, who suggest that customs offices, airports, police services, means of public transportation and the like should be subject to the duty set out at section 20.⁶²

⁶⁰ [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.). See also R. Caron, *Employment in the Federal Public Service*, looseleaf (Aurora: Canada Law Book, 2004), at 4-18.1.

⁶¹ For further examples, see s. 24 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) and its accompanying regulations.

⁶² N. Vaz & P. Foucher, "The Right to Receive Public Services in Either Official Language" in M. Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc.: Éditions Yvon Blais, 2004) 251, at 290-91.

V. OFFICIAL LANGUAGES ACT

Part IV of the *OLA* implements section 20 of the Charter.⁶³ Like its constitutional counterpart, the quasi-constitutional *OLA*⁶⁴ recognizes the right of the public to communicate with and receive services from federal institutions in the official language of their choice. Like the Charter, the *OLA* requires that those services and communications be of equal quality and be equally accessible in both official languages.

The paucity of case law interpreting the scope of the rights conferred by section 20 is likely attributable to the existence of the *OLA*, which implements the Charter rights and obligations. Part IV of the *OLA* sets out substantive obligations, and Part X establishes remedial provisions. Most cases that could assist to determine the scope of rights and obligations under section 20 stem from applications filed pursuant to the *OLA*. To the extent that the *OLA* constitutes a more expedient⁶⁵ and cost-effective method of bringing before the courts matters pertaining to the right to communicate or receive services in both official languages, most litigants have favoured the procedure provided for in the *OLA*, and have foregone Charter proceedings. However, there has been a recent rise in the number of Charter challenges brought — in whole or in part — pursuant to section 20.⁶⁶ This trend is likely to continue in the future,

⁶³ The *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) and its accompanying Regulations (*Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48) do not exhaust the full scope of s. 20 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, nor do they dictate the content of the Charter provision. For those institutions subject to Part IV of the *OLA*, the degree to which Part IV of the *OLA* reflects the full scope of the rights afforded by s. 20 has yet to be determined by the courts. Accordingly, we disagree with Gauthier J.'s characterization of the Regulations (in *Société des acadiens du Nouveau-Brunswick Inc. v. Canada*, [2005] F.C.J. No. 1587, [2006] 1 F.C.R. 490, 2005 FC 1172, at para. 44 (F.C.)) as setting out the rules for determining what constitutes a significant demand within the meaning of s. 20(1) of the Charter. Rather, the Regulations serve to define "significant demand" within the meaning of Part IV of the *OLA* only, although they may serve as a guide for courts seeking to determine what constitutes a significant demand pursuant to s. 20 of the Charter (subject to the constitutionality of those Regulations: *Doucet v. Canada*, [2004] F.C.J. No. 1813, [2005] 1 F.C.R. 671, 2004 FC 1444 (F.C.)).

⁶⁴ *Canada (Attorney General) v. Viola*, [1990] F.C.J. No. 1052, [1991] 1 F.C. 373, at 386 (F.C.A.), confirmed by the Supreme Court of Canada in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] S.C.J. No. 55, [2002] 2 S.C.R. 773, at para. 23 (S.C.C.).

⁶⁵ Pursuant to s. 80 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), an application made under Part X must be heard and determined in a summary manner.

⁶⁶ See, for example, *Doucet v. Canada*, [2004] F.C.J. No. 1813, [2005] 1 F.C.R. 671, 2004 FC 1444 (F.C.); *Desrochers v. Canada (Industry)*, [2006] F.C.J. No. 1777 (F.C.A.), leave to appeal granted [2007] C.S.C.R. no 27 (S.C.C.), *Société des acadiens du Nouveau-Brunswick Inc. v. Canada*, [2005] F.C.J. No. 1587, [2006] 1 F.C.R. 490, 2005 FC 1172 (F.C.) and *Fédération Franco-Ténoise*

particularly where it is unclear whether or not the institution in question is subject to the *OLA*.

Like section 20 of the Charter, the *OLA* expressly incorporates notions of “significant demand” and “nature of the office”. Although the wording of Part IV of the *OLA* closely mirrors that of section 20,⁶⁷ there are several important differences. Unlike the Charter, the *OLA* provides a definition⁶⁸ of institutions deemed to be “institutions of the Parliament or government of Canada”. The *OLA* recognizes explicitly the duty of institutions to ensure that third parties acting on their behalf offer their communications and services in both official languages,⁶⁹ as well as the duty of active offer.⁷⁰ The *OLA* identifies certain communications and services which must be available to the public in both official languages — at all times and regardless of demand. These include communications and services related to the health, safety or security of the public.

Much of the detail with respect to the implementation of the *OLA* is found in the *Official Languages (Communications with and Services to the Public) Regulations*.⁷¹ The Regulations provide a complex formula for determining what constitutes a “significant demand”. The Regulations also define the phrase “nature of the office” as those offices where it is reasonable that communications with and services from those offices be available to the public in both official languages.

The formula for determining what constitutes a significant demand under the Regulations was recently held to be constitutionally deficient. In *Doucet v. Canada*,⁷² the Federal Court of Canada held that paragraph 5(1)(h)(i) of the Regulations infringed subsection 20(1) of the Charter because it violated the right of members of the public to communicate with a federal institution in either official language where there is a significant demand for the use of that language.⁷³ The Court ruled that

v. Canada (Attorney General), [2006] N.W.T.J. No. 33 (N.W.T.S.C.). Appeal pending before the N.W.T. Court of Appeal (court file nos. AP-2006/014 and AP-2006/015).

⁶⁷ See, for example, ss. 21 and 22 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.).

⁶⁸ Section 3 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.).

⁶⁹ Section 25 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.). See, for example, *Desrochers v. Canada (Industry)*, [2006] F.C.J. No. 1777 (F.C.A.).

⁷⁰ Section 28 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.).

⁷¹ SOR/92-48.

⁷² [2004] F.C.J. No. 1813, [2005] 1 F.C.R. 671, 2004 FC 1444 (F.C.).

⁷³ The institution in this case was the RCMP, acting pursuant to an agreement between the province of Nova Scotia and the RCMP. That agreement stipulated that the RCMP was responsible for patrolling a portion of the Trans-Canada Highway bordering New Brunswick. This case dealt with the right of a member of the public driving along the Trans-Canada to communicate with an RCMP officer in the language of his or her choice during the course of a traffic stop.

the section was unconstitutional insofar as the formula to determine significant demand was based solely on the official-language minority population residing in the service area (as well as their percentage of the total population of the area). Justice Blanchard held that the formula failed to take into account the particular situation that existed in the region in question. Specifically, it failed to consider that, in addition to the local French-speaking population, a significant number of members of the French-speaking minority from neighbouring New Brunswick used a particular portion of the Trans-Canada Highway on a daily basis. Accordingly, it appears that in certain circumstances the Regulations may be contrary to section 20 of the Charter insofar as they rely solely on the demographics of the local population to determine significant demand.

VI. SUBSECTION 20(2): IN THE PROVINCE OF NEW BRUNSWICK

Unlike subsection 20(1), subsection 20(2) of the Charter guarantees that any member of the public in the Province of New Brunswick has the right to communicate with and receive services from *any* office of an institution of the legislature or provincial government in English or French *irrespective* of the nature of the office or demand for such services. It does not limit the right to communicate with or receive services. The subsection 20(2) right exists with respect to “any office” of an institution of the legislature or Government of New Brunswick. Accordingly, the rights afforded by subsection 20(2) to members of the public in New Brunswick are broader than their federal equivalent. They better reflect the principle of substantive equality set out at section 16 of the Charter.

The practical applications of subsection 20(2) are established in related legislation. The *Official Languages Act* of New Brunswick (“OLA N.B.”) implements the province’s constitutional obligations. The OLA N.B. does not, however, determine the nature or scope of the duties imposed by the Charter.⁷⁴

The OLA N.B. establishes the right to communicate with and receive services from institutions of the legislature or Government of New

⁷⁴ In addition to the New Brunswick *Official Languages Act*, S.N.B. 2002, c. O-0.5, *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, S.N.B. 1981, c. O-1.1, recognizes the equality of the English- and French-speaking *communities* of the province, thus going beyond the equality guarantees enshrined in ss. 16(2) and 16.1 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, which pertain only to the equality of the English and French *languages*.

Brunswick.⁷⁵ It also expressly imposes a duty on those institutions to ensure that members of the public are able to communicate with and receive services in the official language of choice.⁷⁶ The *OLA* N.B. goes further than its federal equivalent in recognizing the right of members of the public to communicate with and receive services from police officers,⁷⁷ certain municipalities⁷⁸ as well as certain provincial commissions⁷⁹ in the official language of their choice.

The *OLA* N.B. mirrors the federal *OLA* in that it requires institutions to make an active offer⁸⁰ with respect to the delivery of communications and services in both official languages. The *OLA* N.B. imposes a duty on provincial institutions to publish all postings intended for the general public in both languages. Provincial institutions must ensure that all communications with or services offered to the public by a third party are available in both official languages.⁸¹

VII. SECTION 1

All rights and freedoms guaranteed by the Charter are subject to limitations that can be justified under the four-part proportionality test elaborated under section 1.⁸²

Although section 1 has been invoked to justify limitations on minority-language educational rights guaranteed by section 23 of the Charter,⁸³ governments have seldom invoked section 1 to justify limits on official language rights guaranteed by sections 16 to 20.

⁷⁵ Section 27 of the *Official Languages Act*, S.N.B. 2002, c. O-0.5.

⁷⁶ Section 28 of the *Official Languages Act*, S.N.B. 2002, c. O-0.5.

⁷⁷ Sections 31 and 32 of the *Official Languages Act*, S.N.B. 2002, c. O-0.5. However, it should be noted that the right conferred by these provisions is not one of substantive equality to the extent that police officers are empowered to take means to accommodate a request to receive services in either official language — within a reasonable time — where he or she is unable to provide a service in that language. See for example, *Société des acadiens du Nouveau-Brunswick Inc. v. Canada*, [2005] F.C.J. No. 1587, [2006] 1 F.C.R. 490, 2005 FC 1172 (F.C.).

⁷⁸ Sections 35-38 of the *Official Languages Act*, S.N.B. 2002, c. O-0.5. See, for example, *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, 2005 SCC 74 (S.C.C.).

⁷⁹ Sections 39-41 of the *Official Languages Act*, S.N.B. 2002, c. O-0.5.

⁸⁰ Section 28.1 of the *Official Languages Act*, S.N.B. 2002, c. O-0.5.

⁸¹ Sections 29 and 30 of the *Official Languages Act*, S.N.B. 2002, c. O-0.5.

⁸² *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) and progeny.

⁸³ See *Solski (tuteur de) c. Québec (Procureure générale)*, [2000] J.Q. no 5789, [2001] R.J.Q. 218 (Que S.C.); *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342 (S.C.C.). However, some authors still question whether an impugned measure which has the effect of limiting s. 23 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 could be justified under s. 1:

The most useful case to shed light on the factors to be considered by courts when assessing a potential justification for a breach of section 20 rights is *Doucet*.⁸⁴ Although the Court concluded that section 1 could not justify the infringement considered, it offered important guidance for the resolution of future cases. Most notably, the Court held that financial considerations in and of themselves cannot justify an infringement of rights.

Doucet considered the case of a speeding motorist stopped by a member of the RCMP on the Trans-Canada Highway near Amherst, Nova Scotia. The RCMP member could speak only English. Mr. Doucet contended that his language rights were infringed because he did not receive services in French and could not communicate with the RCMP member in French. A lower court found that there was insufficient evidence to establish "significant demand" for French services. Doucet then challenged the *Official Languages (Communications with and Services to the Public) Regulations*⁸⁵ in light of subsection 20(1) of the Charter in that the method for determining "significant demand" was based solely on the demographics of the area.⁸⁶ He argued that the formula did not account for the number of French-language speakers using the Trans-Canada Highway in a given area. The Court agreed. Justice Blanchard found that the large number of members of the minority-language group likely to be travelling on the section of the Trans-Canada Highway serviced by the Amherst detachment of the RCMP created a "significant demand" for services in French.⁸⁷ Accordingly, the Court held that the Regulations did not comply with subsection 20(1) of the Charter.

In the section 1 analysis, the Court ruled that the impugned measure had a valid objective: "In a country as large as Canada, with a relatively small and diverse population, it is reasonable and legitimate to limit the availability of bilingual services in those areas where it is not justified

see, for example, M. Power & P. Foucher, "Language Rights and Education" in M. Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc.: Éditions Yvon Blais, 2004), at 426.

⁸⁴ *Doucet v. Canada*, [2004] F.C.J. No. 1813, [2005] 1 F.C.R. 671, 2004 FC 1444 (F.C.).

⁸⁵ SOR/92-48.

⁸⁶ Subparagraph 5(1)(h)(i) of the *Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48, provide that there is a "significant demand" in rural areas where "the service area of the office or facility has at least 500 persons of the English or French linguistic minority population and the number of those persons is equal to at least 5 per cent of the total population of that service area".

⁸⁷ *Doucet v. Canada*, [2004] F.C.J. No. 1813, [2005] 1 F.C.R. 671, 2004 FC 1444, at para. 49 (F.C.).

by the demand”.⁸⁸ Justice Blanchard also found that a rational connection existed between this objective and the method of determining “significant demand” under the Regulations.

The impugned measure failed at the proportionality stage of the section 1 analysis. The defendant failed to demonstrate that the Regulations minimally impaired the rights of the travelling public belonging to the minority official-language group. According to Blanchard J., the Regulations failed altogether to address the concerns of francophone travellers. The Court also held that the deleterious effects of the challenged Regulations outweighed the benefits. Justice Blanchard explained:

The beneficial effects of the Regulations are only appreciable in terms of the money saved by Treasury in not being required to supply bilingual officers [in the area]. ... In my opinion, the deleterious effect of the omission noted in the Regulations largely outweighs any benefit conferred by the policy of denying access to bilingual services on the Amherst Highway 104. The effect of the measure is thus disproportionate to the benefit sought by the rationalization.⁸⁹

Accordingly, Blanchard J. ruled that the breach of subsection 20(1) of the Charter was not justifiable under section 1 and declared that subparagraph 5(1)(h)(i) of the Regulations did not comply with paragraph 20(1)(a) of the Charter.

Doucet offers guidance regarding the relevant factors in a section 1 analysis applicable to an impairment of section 20 rights. Notably, *Doucet* confirms that financial considerations in and of themselves do not justify an infringement of rights.⁹⁰ Absent a financial crisis,⁹¹ cost and

⁸⁸ *Doucet v. Canada*, [2004] F.C.J. No. 1813, [2005] 1 F.C.R. 671, 2004 FC 1444, at para. 54 (F.C.).

⁸⁹ *Doucet v. Canada*, [2004] F.C.J. No. 1813, [2005] 1 F.C.R. 671, 2004 FC 1444, at para. 60 (F.C.).

⁹⁰ *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 109 (S.C.C.). But see *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381, 2004 SCC 66 (S.C.C.), where the S.C.C. declared that budgetary considerations can — in exceptional cases such as a financial crisis — be invoked to justify an infringement of Charter rights. Although the Court stated that courts will continue to look with strong skepticism at attempts to justify infringements of Charter rights on the basis of budgetary constraints, it held that “courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis” (para. 72). See generally P. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Scarborough: Thomson, 2002), at 35.9(f).

⁹¹ *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381, 2004 SCC 66 (S.C.C.).

administrative inconvenience do not justify an infringement of section 20 rights, nor can they impact the interpretation of those rights.

*Doucet*⁹² leaves many unanswered questions about the relevant factors to be taken into account when considering the government's justification for impairing section 20 rights. To what extent is the unique historical and social context of each province relevant to a section 1 analysis?⁹³ What is the impact of the qualifiers built into section 20 on a section 1 analysis?⁹⁴ Should courts be reticent to defer to legislatures since official language rights have been exempted from legislative override at section 33?⁹⁵ On the last point, it is our view that courts should be reticent to afford deference to legislatures when dealing with official language rights. That these rights have special importance was signalled by the Framers of the Charter when they made the fundamental decision to exempt official-language guarantees from legislative override at section 33.⁹⁶

⁹² *Doucet v. Canada*, [2004] F.C.J. No. 1813, [2005] 1 F.C.R. 671, 2004 FC 1444 (F.C.).

⁹³ The relevance of the historical and social contexts to a s. 1 analysis was affirmed by the Supreme Court in the context of s. 23 education rights in *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, 2005 SCC 14, at para. 21 (S.C.C.) and in situations where there is need for justification of an infringement of subsection 2(b) of the Charter under s. 1: *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at 777-81 (S.C.C.).

⁹⁴ For a discussion of the applicability of s. 1 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, to the justification of infringements of qualified rights, see P. Hogg, *Constitutional Law in Canada*, 4th ed., looseleaf (Scarborough: Thomson, 2002), at 35.14. Contrast with arguments presented before the Supreme Court by the intervenors AFOCS and ACEPO in *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, 2005 SCC 14 (S.C.C.) (according to which an infringement to s. 23 of the Charter, which is by its own terms qualified, could only be justified in the rarest of circumstances).

⁹⁵ It could be argued that the limited applicability of s. 33 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, calls for a stringent justification standard for denials of rights not susceptible to the notwithstanding clause. The fact that language rights are not subject to s. 33 indicates that these rights benefit from a special constitutional status: see J. Woehrling & A. Tremblay, "Les dispositions de la Charte relatives aux langues officielles (Articles 16 à 22)" in G. Beaudoin & E. Mendes, *Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2005) 1027, at 1034-37. See also T. Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52 U.T.L.J. 221, at 232 (mobility and language rights cannot be left to provincial legislatures or the federal Parliament because of the legislative bias associated with these rights).

⁹⁶ See *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519, 2002 SCC 68, at para. 14 (S.C.C.), where McLachlin C.J.C. confirmed that a rigorous justification standard should be applied in case of an impairment of voting rights because of their exemption from s. 33 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

VIII. CONCLUSION

We have focused on the meaning and scope of the right of members of the Canadian public to communicate with, and to receive available services from, institutions of the Parliament or Government of Canada in English or French. Given its essential role in developing and maintaining the vitality of official-language minority communities and its symbolic impact on community members' sense of identity, the right afforded by section 20 of the Charter must be afforded its full value.

As such, the right to receive government services and communications in one's official language ought to receive a generous interpretation. The right should be understood in light of the constitutional principles of equality and respect for minorities. Court interpretation of the scope of section 20 rights must take into account the notions of promotion of official bilingualism and vitality of communities, so as to ensure that the right is accessible to as many members of the public as possible. When called upon to examine a potential justification to an impairment of a section 20 right, courts should apply a stringent standard of justification. They should continue to be extremely reticent to accept explanations based on financial and administrative considerations.

A discussion of the full recognition of the right enshrined in section 20 of the Charter cannot be limited to its legal potential. From a practical standpoint, delivery of bilingual services and communications in both official languages depends on organizational culture, language policies and the embodiment of values such as linguistic duality and equality in the public service. Although legal challenges play an important role in protecting the right to quality services and communications in both official languages, full recognition and implementation of this right cannot be achieved without fulfilment by the state of its duty to take positive measures to carry out language guarantees.