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Lalonde et al. v. Commission de restructuration des services de sant,; Commissioner of Official Languages of Canada et al., Intervenors*

[Indexed as: Lalonde v. Ontario (Commission de restructuration des services de sant,)]
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56 O.R. (3d) 505
[2001] O.J. No. 4767
Docket No. C33807
@4

Court of Appeal for Ontario
Weiler and Sharpe JJ.A. and Rivard J. (ad hoc)
December 7, 2001
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* Vous trouverez traduction fran‡aise de la d,cision ci-dessus … 56 O.R. (3d) 577, et elle sera publi,e le 1er mars 2002.

Charter of Rights and Freedoms -- Equality rights -- Health Services Restructuring Commission issued directions which would destroy ability of Ontario's sole francophone hospital to provide truly francophone medical services and medical training -- Directions did not violate s. 15 of Charter -- Any differential treatment of francophones resulting from directions was not based upon an enumerated or analogous ground -- Section 15 cannot be invoked to supplement language rights not expressly conferred by Charter -- Canadian Charter of Rights and Freedoms, s. 15(1).

Charter of Rights and Freedoms -- Language rights -- Health Services Restructuring Commission issued directions which would destroy ability of Ontario's sole francophone hospital to provide truly francophone medical services and medical training -- Section 16(3) of Charter did not protect hospital's status as francophone institution -- Effect of s. 16(3) is to protect but not constitutionalize measures to advance linguistic equality -- Section 16(3) is not rights-conferring provision but rather is designed to shield from attack government action that would otherwise contravene s. 15 of Charter or exceed legislative authority -- Canadian Charter of Rights and Freedoms, s. 16(3).

Constitutional law -- Fundamental principles -- Protection of minorities -- Health Services Restructuring Commission issued directions which would destroy ability of Ontario's sole francophone hospital to provide truly francophone medical services and medical training -- Protection of minorities

constituting one of fundamental organizing principles underlying Canadian Constitution -- Commission failing to comply with that fundamental organizing principle by failing to take into account importance of francophone institutions as opposed to bilingual institutions for preservation of language and culture of Franco-Ontarians -- Directions quashed.

Montfort is an Ontario francophone hospital. Its medical services and training are essentially francophone, and it is the only hospital in Ontario to provide a wide range of medical services and training in a truly francophone setting. The Health Services Restructuring Commission issued its first report and a notice of intention to close Montfort in 1997. In response to a storm of protest, the final report of the Commission reversed the initial proposal to close Montfort and instead issued directions which would substantially reduce Montfort's services to the point where Montfort would no longer function as a community hospital. Montfort and the respondents brought an application to set aside the directions of the Commission. The application was allowed. The Divisional Court found that Commission's directions would have the following effects: reduce the availability of health care services in French to the francophone population in the Ottawa-Carleton region, a region designated as bilingual under the

French Language Services Act, R.S.O. 1990, c. F.32; jeopardize the training of French language health care professionals; and impair Montfort's broader role as an important linguistic, cultural and educational institution, vital to the minority francophone population of Ontario. The court held that the directions did not violate s. 15 of the Canadian Charter of Rights and Freedoms, as any differential treatment was not based upon an enumerated or analogous ground. Montfort appealed that portion of the judgment. The court held that the directions should be set aside because they violated one of the fundamental organizing principles of the Constitution, the principle of respect for and protection of minorities. Ontario appealed that portion of the judgment.

Held, the appeals should be dismissed.

The Divisional Court did not err in its findings of fact.

Section 16(3) of the Charter does not protect the status of Montfort as a francophone institution. Section 16(3), which states that nothing in the Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French, is not a rights-conferring provision but, rather, is designed to shield from attack government action that would otherwise contravene s. 15 of the Charter or exceed legislative authority.

The Divisional Court did not err in rejecting the argument that the Commission's directions violated s. 15 of the Charter.

Assuming, without deciding, that the respondents otherwise satisfy the test for a violation of s. 15, the Divisional Court was correct in concluding that, in view of the very specific and detailed provisions of ss. 16-23 of the Charter dealing with the special status of English and French, any differential treatment of francophones resulting from the Commission's directions is not based upon an enumerated or analogous ground. Section 15 itself cannot be invoked to supplement language rights which the Charter has not expressly conferred.

The principle of respect for and protection of minorities is a fundamental structural feature of the Canadian Constitution that both explains and transcends the minority rights that are specifically guaranteed in the constitutional text. This structural feature of the Constitution is reflected not only in the specific guarantees in favour of minorities. It infuses the entire text, and plays a vital role in shaping the content and contours of the Constitution's other structural features: federalism, constitutionalism and the rule of law, and democracy. The unwritten principles of the Constitution have normative force. The fundamental constitutional principle of respect for and protection of minorities, together with the principles that apply to the interpretation of language rights, require that the French Language Services Act be given a liberal and generous interpretation. By enacting the F.L.S.A., Ontario bound itself to provide the services offered at Montfort at the time of designati on under the Act unless it was "reasonable and necessary" to limit them. Ontario did not offer the justification that it was reasonable and necessary to limit the services offered in French by Montfort to the community. The Commission's directions failed to respect the requirements of the F.L.S.A. In exercising its discretion as to what is in the public interest, the Commission was required by the fundamental principles of the Constitution to give serious weight and consideration to the importance of Montfort as an institution to the survival of the Franco-Ontarian minority. The Commission considered this beyond its mandate and its directions were therefore subject to judicial review.
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41, [1988] 2 W.W.R. 44, 56 Alta. L.R. (2d) 195, 38 C.C.C. (3d) 353, 46 D.L.R. (4th) 81 (C.A.); R. v. Sharpe, [2001] 1 S.C.R. 45, 194 D.L.R. (4th) 1, 86 C.R.R. (2d) 1, 150 C.C.C. (3d) 321; R. v. Turpin, [1989] 1 S.C.R. 1296, 34 O.A.C. 115, 96 N.R. 115, 39 C.R.R. 306, 48 C.C.C. (3d) 8, 69 C.R. (3d) 97; Regulation and Control of Aeronautics in Canada (Re), [1932] A.C. 54, 101 L.J.P.C. 1, 146 L.T. 76, 48 T.L.R. 18, 75 Sol. Jo. 796 (sub nom. Canada (Attorney General) v. Ontario (Attorney General); Quebec (Attorney General) v. Manitoba (Attorney General)); Remuneration of Judges of the Provincial Court of Prince Edward Island (Reference re), [1997] 3 S.C.R. 3, 121 Man. R. (2d) 1, 156 Nfld. & P.E.I.R. 1, 150 D.L.R. (4th) 577, 2 . 17 N.R. 1, 483 A.P.R. 1, 158 W.A.C. 1, [1997] 10 W.W.R. 417, 46 C.R.R. (2d) 1, 118 C.C.C. (3d) 193, 11 C.P.C. (4th) 1 (sub nom. Provincial Court Judges Assn. (Manitoba) v. Manitoba (Minister of Justice)); Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 9 B.C.L.R. (2d) 273, 33 D.L.R. (4th) 174, 71 N.R. 83, [1987] 1 W.W.R. 577, 25 C.R.R. 321, 38 C.C.L.T. 184, 87 C.L.L.C. 14,002; Ringuette v. Canada (Attorney General) (1987), 63 Nfld. & P.E.I.R. 126, 194 A.P.R. 126, 29 C.R.R. 107, 33 C.C.C. (3d) 509 (Nfld. C.A.); RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1, 187 N.R. 1, 31 C.R.R. (2d) 189, 100 C.C.C. (3d) 449, 62 C.P.R. (3d) 417; Roncarelli v. Duplessis (1958), [1959] S.C.R. 121, 16 D.L.R. (2d) 689; Ross v. Moncton Board of School Trustees, District No. 15, [1996] 1 S.C.R. 825, 171 N.B.R. (2d) 322, 133 D.L.R. (4th) 1, 195 N.R. 81, 437 A.P.R. 322, 35 C.R.R. (2d) 1, 96 C.L.L.C. 230-020 (sub nom. Attis v. District 15 (Board of Education), Ross v. New Brunswick School District No. 15); Saumur v. Quebec (City), [1953] 2 S.C.R. 299, 106 C.C.C. 289, [1953] 4 D.L.R. 641; Soci,t, des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch, [1986] 1 S.C.R. 549, 69 N.B.R. (2d) 271, 27 D.L.R. (4th) 406, 66 N.R. 173, 177 A.P.R. 271, 23 C.R.R. 119; Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Mackell, [1917] A.C. 62, 86 L.J.P.C. 65, 115 L.T. 793, 33 T.L.R. 37, 32 D.L.R. 1 (P.C.); Vriend v. Alberta, [1998] 1 S.C.R. 493, 67 Alta. L.R. (3d) 1, 156 D.L.R. (4th) 385, 224 N.R. 1, [1999] 5 W.W.R. 451, 50 C.R.R. (2d) 1, 98 C.L.L.C. 230-021

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APPEAL and CROSS-APPEAL from a judgment of the Divisional Court (Carnwath, Blair and Charbonneau JJ.) (1999), 48 O.R. (3d) 50 allowing an application to quash the directions of the Health Services Restructuring Commission.
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Ronald F. Caza, Pascale GiguŠre and Marc Cousineau, for respondents.
Janet E. Minor and Michel Y. H,lie, for appellant.
Ren, Cadieux and Johane Tremblay, for intervenor the Commissioner of Official Languages of Canada.
Alain Pr,fontaine and Warren J. Newman, for intervenor the Attorney General of Canada.
Fran‡ois Boileau, for intervenor La F,d,ration des communaut,s francophones et acadiennes du Canada.
Paul S. Rouleau and Louise Hurteau, for intervenor L'Association canadienne fran‡aise de l'Ontario.

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The judgment of the court was delivered by

WEILER and SHARPE JJ.A.:

I INTRODUCTION

[1] This is an appeal from the judgment of the Divisional Court (reported at (1999), 48 O.R. (3d) 50, 181 D.L.R. (4th) 263 (in English) and [1999] O.J. No. 4489 (in French)) quashing the directions of the Health Services Restructuring Commission (the "Commission") ordering the respondent H"pital Montfort ("Montfort") to substantially reduce its health services. The court remitted the question of restructuring of health services at Montfort to the Commission for reconsideration in accordance with the court's decision. The Minister of Health ("Ontario") has now replaced the Commission. Ontario appeals on the basis that the Divisional Court erred in fact and in law in ordering it to reconsider its directions to Montfort. Montfort cross-appeals from the decision of the Divisional Court holding that the Commission's directions did not infringe the equality guarantees in s. 15 of the Canadian Charter of Rights and Freedoms.

[2] This appeal raises important issues in relation to the language rights of Ontario's francophone minority. Montfort, located in Ottawa, is the only hospital in Ontario in which the working language is French and where services in French are available on a full-time basis. Montfort serves as the

community hospital for the substantial francophone community of eastern Ontario and also plays a unique role in the education and training of French-speaking health care professionals. The Divisional Court held that as the Commission's directions would cripple Montfort as an important francophone institution, they should be quashed on the ground that the Commission failed to respect the unwritten constitutional principle of respect for and protection of minorities. Ontario appeals, arguing that linguistic rights are exhaustively defined by the written text of the Constitution. As Montfort is not protected by the words of the Constitution, Ontario says that the Commission was free to alter its status. Montfort and the intervenors urge us to uphold the decision of the Divisional Court. They also rely on the quasi-constitutional protections of the French Language Services Act, R.S.O. 1990, c. F.32 ("F.L.S.A."), and say that the Divisional Court erred in rejecting their claim that Montfort is protected by s. 15 of the Charter.

II FACTS

(1) H“pital Montfort

[3] Montfort is located in the eastern part of Ottawa-Carleton. Approximately 80 per cent of Ottawa's francophone population lives east of the Rideau river. Montfort draws the most significant portion of its caseload from neighbourhoods in close proximity to the hospital. Russell County, a high-growth area with a population of 34,761, according to the 1991 census, has no hospital. The population relies entirely on Montfort and the Ottawa General Hospital for hospital services.

[4] Montfort is described in the reasons of the Divisional Court, at pp. 58-60 O.R., as follows:

> H“pital Montfort was founded in 1953 through the efforts of leaders of the Franco-Ontarian community under the direction of a religious order of nuns, the Daughters of Wisdom. Unlike other hospitals in the Ottawa area which were English or designated bilingual, Montfort was a homogeneous francophone hospital. Although today it also provides bilingual services in English, its medical services and training are essentially francophone. Moreover, the hospital plays an important role in the Franco-Ontarian community as a whole. It is the only hospital in Ontario to provide a wide range of medical services and training in a truly francophone setting. In 1975 Montfort adopted an official policy regarding its francophone nature, based upon the following premises:
>
> (a) that its francophone character was its raison d'^tre;
>
> (b) that it was necessary to offer all hospital services in French; and

(c) that it was necessary to offer a complete range of medical care, except for certain highly specialized services already available elsewhere in the region.

When the Commission began its work in Ottawa-Carleton in July 1996, there were nine public hospitals providing services on 11 main sites. These included seven acute care hospitals, six of which maintained emergency departments. H"pital Montfort was one of these six acute care hospitals.

Montfort has a total bed capacity of 252 beds. However, as of 1995-96, 56 of these beds had been taken out of use. Montfort provides services . . . at the primary and secondary level . . . . Some of its principal programs include cardiology, surgery, pulmonary medicine, orthopaedics and obstetrics. It offers emergency care. . . . Although it does not provide services in certain specific highly specialized areas, H"pital Montfort truly qualifies as a full service "general hospital" and is perceived as such by the community at large.

Montfort is a unique health care institution in Ontario for a variety of reasons. First, it has a different history than other hospitals established in the eastern part of Ontario by various orders of nuns. Although all were originally francophone institutions, the others have since become either English hospitals (e.g., Hotel Dieu in Kingston) or bilingual hospitals (e.g., Ottawa General). Only Montfort continues as a francophone institution in Ottawa-Carleton.

Although Montfort lost its paediatrics department in 1974, following the creation of the Children's Hospital of Eastern Ontario ("CHEO"), it continued to grow in size and to expand its range of services. It is significant -- both from the perspective of the Hospital's own view of its mandate, and in relation to the community's sense of that mandate -- that following the loss of its paediatrics specialty, Montfort re-emphasized its commitment to continue as a francophone institution, offering all levels of health care services in French and, as noted above, declaring its francophone character to be its very "raison d'ˆtre".

In 1984, Montfort began offering bilingual services. Today 20 per cent of its patients are anglophone. However, the working language of Montfort was at all times and remains French. Over 95 per cent of its employees are capable of providing services in French. Thus, doctors, nurses, cafeteria employees, caretakers and others touching all aspects and areas of Montfort's services work in French. A person walking in the halls of Montfort hears the French language spoken as the language of choice. All internal communications - verbal or written - are in French. With rare exceptions all administrative and medical meetings take place in the French language and the minutes of such meetings are

written in that language. Consultations, diagnoses, and communications with patients are in French.

This is unique in Ottawa-Carleton and, indeed, in the province of Ontario.

[5] Some further brief description and elaboration on Montfort's services is in order. As indicated, Montfort is a community hospital with approximately 196 beds in use. It provides primary health care services (i.e., care provided by a health care worker on a patient's first contact with the health care system, including emergency services), secondary care (i.e., care provided by a specialist health care professional, such as a general surgeon), and, according to the Commission's February 1997 report at p. 34, some tertiary level care (i.e., care that requires highly specialized skills, technology and support services). In addition, Montfort provides intensive care, treatment and referral services, and outpatient or clinical activities. In addition to cardiology, surgery, orthopaedics and obstetrics, another of its principal inpatient programs was psychiatry.

[6] Montfort also fills an important educational role. In conjunction with the University of Ottawa, Montfort offers a training program for health care providers who have chosen to be trained in French. Montfort currently accommodates 186 students in Health Sciences, including students in physiotherapy and occupational therapy, medical clerks and residents in family medicine. Many of the family physicians that admit patients requiring hospitalization to one of the family medicine beds at the hospital are actively involved in the family medicine training program for residents and undergraduate medical students. Once admitted, patients may require the services of a specialist or a surgeon who would also be involved with students and residents. The training program at Montfort has ramifications that go beyond Ottawa-Carleton and the neighbouring Eastern district. For example, a doctor trained at Montfort may serve the large francophone populations in the Northern Ontario communities of Hearst and Kapuskasing.

[7] The respondents emphasize that the institutional importance of Montfort to Ontario's francophone minority extends beyond the health care and educational needs of the francophone minority. Montfort, they say, is an institution that embodies and evokes the French presence in Ontario. It is asserted that the French speaking minority population is constantly faced with the threat of assimilation. The respondents led evidence, accepted by the Divisional Court, to show that a linguistic minority's institutions are essential to the survival and vitality of this community, not only for its practical functions, but also for the affirmation and expression of cultural identity and sense of belonging. Montfort, they insist, is such an institution.

(2) Mandate of the Health Services Restructuring Commission

[8] The Ministry of Health Act, R.S.O. 1990, c. M.26, s. 8, as amended by the Savings and Restructuring Act, 1996, S.O. 1996, c. 1, Sched. F, s. 1, provides as follows:

> 8(1) The Lieutenant Governor in Council may establish a body to be known in English as the Health Services Restructuring Commission and in French as Commission de restructuration des services de sant,.
>
> . . . . .
>
> (8) The duties and powers assigned to the Commission under this or any other Act shall be duties and powers with respect to the development, establishment and maintenance of an effective and adequate health care system and the restructuring of health care services provided in Ontario communities having regard to district health council reports for those communities.

(Emphasis added)

[9] Thus, s. 8(8) of the Ministry of Health Act expressly indicates that any Commission set up according to the provision must exercise its duties and powers "having regard to district health council reports" for the community concerned.

[10] By regulation (Health Services Restructuring Commission Regulations, O. Reg. 88/96) made on March 21, 1996, the government of Ontario set out the Commission's duties and powers referred to in s. 8(8) of the Act: [See Note 1 at end of document]

> 1(1) The following are the duties of the Commission:
>
> 1. To consider local hospital restructuring plans provided by the Ministry and such other information relevant to the plans as it deems appropriate.
>
> 2. To determine which local hospital restructuring plans provided by the Ministry shall be implemented and to vary or add to those plans if it considers it in the public interest to do so.
>
> 3. To determine the timing of the implementation of local hospital restructuring plans and the manner in which they are to be implemented.
>
> 4. To set guidelines respecting representations that may be made to the Commission by a hospital that has received notice under subsection 6 (5) of the Public Hospitals Act that the Commission intends to

issue a direction that the hospital cease to operate or that it amalgamate with another hospital.

5. To give the Minister quarterly reports on the implementation of local hospital restructuring plans.

6. To advise the Minister where the Commission is of the opinion that a local hospital restructuring plan should be developed for a specified hospital or for two or more hospitals in a geographic area.

7. Where a hospital fails to carry out a direction issued by the Commission under section 6 of the Public Hospitals Act, to advise the Minister as to appropriate actions, including the appointment of investigators under section 8 of the Public Hospitals Act and of hospital supervisors under section 9 of that Act.

(2) The guidelines established under paragraph 4 of subsection (1) shall set out the manner in which representations may be made and the procedure for making the representations.

(3) The Commission may exercise such powers as are necessary to carry out the duties of the Commission including the following powers:

1. To consult with providers of health care services and such other persons as the Commission considers necessary in order to determine,

   i. which local hospital restructuring plans provided by the Ministry shall be implemented,

   ii. whether and in what manner to vary or add to a local hospital restructuring plan,

   iii. the timing of the implementation of a local hospital restructuring plan, and

   iv. the manner in which a local hospital restructuring plan is to be implemented.

2. To exercise any power under section 6 or subsection 9 (10) of the Public Hospitals Act assigned to the Commission by regulation under that Act.

3. To advise the Minister as to the revocation of a licence under section 15.1 of the Private Hospitals Act.

4. To advise the Minister on all matters relating to the development, establishment and maintenance of an effective and adequate health care system and the restructuring of health care services provided in Ontario communities.

(Emphasis added)

[11] The Public Hospitals Act, R.S.O. 1990, c. P.40, s. 6, was re-enacted and amended in 1996 (S.O. 1996, c. 1, Sch. F, s. 6) to provide that "where the Minister considers it in the public interest to do so," the Minister (and the Commission in his place) is authorized to issue directions to public hospitals to "cease operating as a public hospital", to amalgamate with other hospitals, to "cease to provide specified services", to "increase or decrease the extent or volume of specified services", or to "provide specified services to a specified extent or of a specified volume" (emphasis added). These amendments provided the Commission with the authority to issue broad "public interest" directions to public hospital boards. Section 6 provides in part:

6(1) The Minister may direct the board of a hospital referred to in subsection (0.1) to cease operating as a public hospital on or before the date set out in the direction where the Minister considers it in the public interest to do so.

(2) The Minister may direct the board of a hospital referred to in subsection (0.1) to do any of the following on or before the date set out in the direction where the Minister considers it in the public interest to do so:

1. To provide specified services to a specified extent or of a specified volume.

2. To cease to provide specified services.

3. To increase or decrease the extent or volume of specified services.

(3) The Minister may direct the boards of two or more hospitals referred to in subsection (0.1) to take all necessary steps required for their amalgamation under section 113 of the Corporations Act on or before the date set out in the direction where the Minister considers it in the public interest to do so.

. . . . .

(7) The Minister may amend or revoke a direction made under this section where the Minister considers it in the public interest to do so.

. . . . .

(Emphasis added)

[12] On March 29, 1996, the Ontario government by Order-in-Council established the Commission and appointed Dr. Duncan G. Sinclair as the Commission's Chair.

[13] The Ministry of Health Act, as amended by the Savings and Restructuring Act, specifically provided that at the end of the period for which the Commission was established (4 years), the appointments of its members were revoked and it would cease to perform any duties or to exercise any powers (s. 8(10)). This has happened and the Ministry of Health now exercises the powers formerly delegated to the Commission.

(3) The Commission's Process

[14] The process established by the Commission was to conduct an initial review, issue a notice of intention regarding its proposed directions, call for public input and consultation, issue a report and then issue its directions to implement the report's recommendations.

(a) The Commission's first report

[15] The Commission's first report was issued in February 1997. The Commission ("HSRC") described its mandate and terms of reference as follows:

HSRC Mandate and Terms of Reference

Bearing in mind the magnitude of the task and the limited time and funds available, the HSRC will function in accordance with the following terms of reference:

1. To discharge its mandate, it will:

-- Make decisions on restructuring of hospitals, including the provincially operated psychiatric hospitals, by directing hospital closures, amalgamations, program transfers and any other actions considered necessary to implement hospital restructuring.

-- Make recommendations to the Minister of Health on how to improve the efficiency and effectiveness, including cost-effectiveness, of other elements of the health services system while maintaining or enhancing the quality of services provided.

-- Identify areas for reinvestment in communities that will lead to the development of a

comprehensive, integrated community, district and regional health system.

2. The HSRC's work plan will be undertaken quickly, meeting a schedule to discharge its mandate within four years.

3. Options for change will be evaluated against three broad criteria:

   -- maintenance or enhancement of quality of services;

   -- maintenance or enhancement of accessibility to service, and;

   -- affordability.

[16] It may be noted that the evaluation criteria did not include the maintenance or enhancement of the delivery of health care services in French.

[17] The report was divided into six sections plus the recommendations. Section I provided a regional and community profile of Ottawa-Carleton. Under this heading, the Commission noted that based on 1991 census data the population of the Ottawa-Carleton region was 18.4 per cent francophone. In neighbouring counties served by Ottawa-Carleton hospitals, the francophone population was reported at 20.9 per cent. (This figure is significantly lower than the stated figure of the Eastern District Health Council which puts the rate at 44 per cent.) Many people who work in Ottawa live in Quebec. The report noted that the Western Quebec population in the Outaouais region were significant users of Ottawa hospital services. Among the community hospitals, Montfort was the community hospital used by the vast majority of Quebec residents. In terms of actual numbers, two teaching hospitals, Ottawa General and Ottawa Civic, had higher admissions from Quebec particularly for secondary and tertiary care. The report stated at p. 10 that:

> Issues of access to services respecting the cultural and linguistic requirements of this population is an important consideration in the reconfiguration of services in Ottawa-Carleton.

[18] Later in its report, however, the Commission added (at p. 35) that:

> [I]t is important to note that the estimates of Quebec utilization have no impact on the operating costs or savings as identified by the HSRC. Further, depending on the existing excess bed capacity in the system it is likely that there will be no capital costs implications associated with the

utilization of health services by Quebec residents.

[19] Section II provided a broad overview of the current health care delivery system as follows:

Ottawa-Carleton Profile of Institutions

Facility	Current Role
Ottawa Civic	Acute Care: Adult Tertiary/ Teaching Hospital, includes the Ottawa Heart Institute and the Loeb Research Institute
Ottawa General Hospital	Acute Care: Adult Tertiary/Teaching Hospital, includes the Eye Institute - designated as a French Language Facility
Childrens' Hospital of Eastern Ontario (CHEO)	Acute: Paediatric Teaching Hospital, with an emergency department
Queensway-Carleton Hospital	Acute Care: Community Hospital, with an emergency department
Riverside Hospital	Acute Care: Community Hospital, with an emergency department
H"pital Montfort	Acute Care: Community Hospital, with an emergency department - designated as a French Language Facility
Salvation Army Grace Hospital	Acute Care: Community Hospital, no emergency
Royal Ottawa Health Care Group (ROHCG)	Specialty: Rehabilitation and Psychiatric (with emergency) Hospital (2 sites)
Sisters of Charity of Ottawa [Saint Vincent Pavilion and Rehabilitation Centre]	Chronic Care: Multi-site facility for chronic care, chronic rehabilitation, palliative and respite care
Perley Rideau Veteran's Health Centre (PRVHC)	Long-Term Care: Merged facility on new site with role change to Multi-level long-term care facility
National Defence Medical Centre	Acute Care: Federal facility, no longer funded by the Ontario Ministry of Health (Patient

activity not included in acute care statistics for Ottawa-Carleton)

[20] The report noted that all adult acute care hospitals, except the Royal Ottawa, have medical and surgical beds and offer services in a wide range of primary and secondary medical and surgical specialties. Adult acute care includes crisis and emergency intervention, assessment and short-term admissions, treatment and referral services. The Civic Hospital and Queensway Carleton provide almost half the emergency services in Ottawa-Carleton. Highly specialized and tertiary services for adults tend to be concentrated at the two teaching hospitals, Ottawa Civic and Ottawa General. Of the community hospitals, Montfort appears to have the highest volume of outpatient or clinical activity.

[21] The report noted that Ottawa-Carleton has an Academic Health Sciences Centre supported by the University of Ottawa. Montfort's role as a teaching and training facility of health care providers in the French language was not mentioned nor was there recognition of its supporting clinical role to the University of Ottawa's School of Medicine programs for francophone health care providers.

[22] In describing the physical site of Montfort, the report noted that Montfort is in good condition although part of the buildings is not air conditioned. There are some deficiencies in the layout of medical records and the psychiatric unit; however, the report acknowledged at p. 19 that "[t]he hospital has a built-in expansion capability vertically, and there is ample area for horizontal expansion." Next to Ottawa General, Montfort ranked highest on the scale developed by the Commission for assessing facilities.

[23] At p. 17, under the heading "French Language Services", the report stated:

> The Montfort, General, Rehabilitation Centre and Saint-Vincent Pavilion are all designated under the French Language Services Act. Partial designation has been given to four other facilities for some of their programs: CHEO, Civic, Royal Ottawa Hospital (psychiatric rehabilitation) and Riverside (sexual assault program).

[24] The report did not recognize that Montfort is the only community hospital providing services in the French language on a full-time basis. The Ottawa General is a teaching hospital and although it is designated under the F.L.S.A., it cannot offer service 24 hours a day, seven days a week in French. The Rehabilitation Centre and Saint Vincent-Pavilion are specialized facilities that do not offer general health care. The other centres have only partial designation.

[25] Section III of the report contained a summary of the

Ottawa-Carleton Regional District Health Council's report and recommendations to the Commission. Among the key recommendations of the Health Council was one envisaging merger of the Ottawa Civic and Ottawa General hospitals, creating a single hospital on two sites. A further recommendation (reproduced at p. 24 of the Commission's report) emphasized the need to:

> Recognize and encourage the primary and distinctive functions of the Montfort Hospital as a francophone hospital fulfilling regional, extra-regional and provincial functions -- including teaching components.

[26] It is worth noting that in a later portion of its report dealing with mental health services, the Commission cited with approval the Health Council's vision for mental health services delivery in Ottawa-Carleton; in describing this vision as being "comparable" to its own, the Commission quoted (at p. 44) a passage from the Health Council's earlier report containing the following statement:

> Service delivery will be considered on the basis that services in French, comparable in quality and accessibility to those offered in English, should be planned and delivered in order to conform to the language policy of the District Health Council and the requirements of an area designated under the French Language Services Act.

[27] Section IV of the report outlined the decision criteria and assessment of options considered by the Commission during its review process. The Commission determined at p. 35 that there was a significant variation between the number of beds currently in operation and the number of beds required, giving rise to "a significant opportunity to restructure hospital services in Ottawa". The report recommended that there be one community/tertiary hospital (a merged Civic/General hospital including the Heart Institute), one community hospital (Carleton-Queensway), one paediatric hospital (CHEO), one chronic care/rehabilitation centre (Sisters of Charity of Ottawa sites), and one long-term mental health centre (Royal Ottawa). The Montfort, Riverside and Grace hospitals were to be closed.

[28] Section V described the capital investment requirements of the Commission.

[29] Section VI summarized the decisions and intended directions reached by the Commission. Under the heading "Siting of Clinical Activity" the Commission stated, at p. 80:

> The recommended option for the siting of acute services is a four site scenario, utilizing the existing capacity in the Ottawa General, Ottawa Civic, Children's Hospital of Eastern Ontario, and the Queensway-Carleton Hospital. This option

> also means the closing of the following sites for acute care: Riverside Hospital, Montfort Hospital and the Salvation Army Grace Hospital.

[30] Thus, with the exception of Queensway-Carleton, a non-designated facility under the F.L.S.A., all community hospitals were to be closed. The Ottawa General, Ottawa Civic, Riverside and Montfort were to be amalgamated. Montfort's clinical activity was to be relocated to the Ottawa General site (acute) and its longer-term mental health care to the Royal Ottawa.

[31] Under the heading "Additional Planning and Research", the Commission indicated at p. 82 that it would be "looking at the feasibility of utilizing the Riverside and the Montfort facilities as future sites for long-term care and chronic care".

[32] Despite the fact that the Commission's legislative mandate under the Ministry of Health Act (as amended by the Savings and Restructuring Act) required it to have regard to district health council reports for the affected community, the Commission gave no explanation for ignoring the Ottawa-Carleton Health Council's recommendations with respect to Montfort's unique role as a clinical teaching hospital and in the provision of health care services to the francophone population, not only in the region but elsewhere in the province.

(b) Community Reaction to the first report

[33] The Commission's initial notice of intention and its subsequent directions were met with a storm of protest. Extensive efforts were made to educate the Commission concerning the effect that its recommendations would have on the francophone population not only in Ottawa-Carleton, but also in the five neighbouring counties of eastern Ontario. An extract from the April 1997 response of the District Health Council of Eastern Ontario to the Commission is set out below:

> French Health Services
>
> As identified in the HSRC's report (table on page 11), French is the mother tongue of 44 [per cent] of the population of the five counties of Eastern Ontario. It is the majority language in Prescott-Russell counties at 76 [per cent] and 67 [per cent] respectively and a significant minority language in Glengarry (38 [per cent]) and Stormont (30 [per cent]). Within the District Health Council of Eastern Ontario area, the Counties of Prescott, Russell, Stormont and Glengarry, the City of Cornwall and the Township of Winchester in Dundas County are designated under the French Language Services (FLS) Act. Consequently, planning and development of health services must be consistent with

the provisions of the Act.

a) Respecting Culture and Language

While the Report mentions community representation and regard for demographic, linguistic and cultural characteristics of the Ottawa-Carleton region as well as identifying the facilities which have complete and partial designations under the FLS Act, it does not fully address the objectives of the Act. The FLS Act is designed to help preserve the French language and culture in Ontario well into the future. It also acknowledges the desire of the Francophone community to have the long-standing contribution of their language and culture recognized. Health services in French are essential to the development of the Francophone community and to the recognition of its full and equal partnership. A community becomes assimilated when its language and culture are invisible to its own members and to society in general.

Recommendation: That the HSRC take into account the need to preserve l'H"pital Montfort since it is the only hospital whose language of operation is French that serves the Francophone communities of Ottawa-Carleton and of Russell County.

b) Availability of French-Speaking Health Professionals

The permanency and quality of health services in French is determined by the availability of French-speaking health professionals. Recognizing this, the government of Ontario set up the "Ontario-Quebec Health Study Program" to increase the number of French-speaking health professionals available to provide health services in French. By applying to participate in this program, French-speaking Ontarians increase their chances of being admitted to limited-enrolment programs in health studies in Quebec, which are not available in French in Ontario. In recent years, the number of Ontario colleges and universities offering health studies in French has also increased, encouraging even more French-speaking students in Ontario to pursue careers in the health field.

Unfortunately, for the clinical component, very few hospitals in Ontario are able to offer an environment in which French-speaking students can actually work in French. If this kind of work environment is not available in Ontario, the above initiatives seem futile. Such a situation serves to perpetuate Ontario's dependence on outside sources to provide training in French.

Recommendation: That the HSRC take into account the need to maintain l'H"pital Montfort for its unique role in providing a milieu where French-speaking students pursuing health studies in French can obtain training in French in Ontario.

(At pp. 6-8, emphasis in original)

[34] In addition to the Eastern Ontario District Health Council's response, the Ottawa-Carleton Regional District Health Council, the University of Ottawa Faculty of Medicine and Montfort filed responses to the Commission's recommendations. They all stressed that if the Commission's recommendations were implemented, access to health services in French would be more difficult and that the training of health care professionals in French would be imperiled. They recommended that Montfort continue to provide its full range of services.

[35] The Ottawa-Carleton Regional District Health Council's response again described Montfort as unique and recommended that Montfort remain open because it provided an environment in which francophone clients and their families could have access at all times to employees offering services in French. The Council also stressed the important role of Montfort in the training of French-speaking medical personnel.

[36] The Council also noted that the Commission had recommended the closing of the psychiatric hospital at Brockville and the transfer of long-term psychiatric patients from Brockville to the Royal Ottawa Hospital. The Council pointed out that there was no guarantee that services would be offered in French to francophone psychiatric patients at Royal Ottawa because it was not designated under the F.L.S.A. and that at least one unit would have to be designated under the Act.

(c) The Commission's final report

[37] The "final" report of the Commission was issued in August 1997. A summary of "Key Directions, Advice and Notices" (p. 5) was included in the Introduction. Items 2 and 3 concerned Montfort. They stated:

> 2. The H"pital Montfort will be maintained with its separate governance, representative of the community served:
>
> -- it will provide ambulatory care, day surgery, low risk obstetrics, acute and longer-term mental health services and long-term care services.
>
> -- an Ottawa-Carleton French Language Health Services Network will be created under the leadership of H"pital Montfort to facilitate the delivery of French language services in the other hospitals and agencies.
>
> 3. The H"pital Montfort, and Sisters of Charity of Ottawa will be required to maintain their designation; and, Children's Hospital of Eastern Ontario (CHEO), and The Ottawa

Hospital/L'H"pital d'Ottawa (Alta Vista Site, Heart Institute and The Rehabilitation Centre) will be required to obtain designation for the provision of French language health services.

[38] The second section of the report was entitled "French Language Health Services" and provided as follows, at pp. 8-9:

The HSRC's intention in amalgamating two fully designated French language providers, the H"pital Montfort and Ottawa General Hospital, was to provide a greater critical mass and clinical coherence of services available in the French language. The governance structures of the amalgamated hospital and other facilities would be established to reflect the linguistic, cultural, socio-economic and demographic mix of the community.

Principal Issues in the Responses to the Notices

-- Closure of H"pital Montfort:

-- limits access to French language services

-- seen as an assault on minority linguistic rights

-- results in dilution and assimilation of francophone health care professionals

-- removes a French milieu for training medical and health professionals

-- Merging of two bilingual facilities [Montfort and Ottawa General] with two unilingual facilities [Ottawa Civic and Riverside] weakens French language services

-- Needs of French-speaking long-term care and mental health patients not fully considered

-- Lack of consideration given to the Prescott and Russell utilization of H"pital Montfort

The HSRC's Deliberations

Many in the community were concerned that the proposed closure of H"pital Montfort would significantly reduce the accessibility of services offered in French. In drafting the Notices issued in February, the HSRC considered the issue of access to French language services. The HSRC supports completely the right of individuals to receive services in the French language and is directed in that support by the French Language Services Act.

The HSRC believes access to French language services depends on several factors:

-- designation of facilities and programs;

-- proximity of service providers to patients; and

-- French language milieu for health education.

Designation of Facilities and Programs

According to Section 5.1 of the French Language Services Act:

> A person has the right to communicate in French with, and to receive available services in French from, any head or central office of a government agency or institution of the Legislature that is designated by regulations (for example: hospitals, long-term care facilities, community health centres, mental health programs, addiction services, etc.), and has the same right in respect of any other office of such agency or institution that is located in or serves an area designated in the Schedule.

The process by which a hospital achieves a mandate to offer services in the French language is called "designation" . . .

According to the Ministry of Health's French Language Health Services Designation Plan, to obtain designation the agency must demonstrate that all the services which it intends to be designated are available in French on a permanent basis. The plan must prove the availability and permanency of these services.

. . . . .

Although hospitals must meet certain criteria to obtain either full or partial designation, the levels of services, whether primary, secondary or tertiary, offered in French may vary greatly among programs and facilities. For example the language for conducting business at the H"pital Montfort is predominantly French.

[39] Regarding its decision to reverse its proposed direction to close Montfort, the Commission stated at p. 10 that "[o]ne of the most compelling arguments heard by the [Commission] in support of retaining H"pital Montfort as a separate hospital was the view that in order to promote the development of French language health professionals there should be an environment where the working language is predominantly French." The Commission acknowledged at pp. 10-11 that:

> Closing Montfort would have serious consequences on the quality of French-language training programs at both college and university levels since it is the only hospital where trainees are guaranteed to consistently receive all aspects of training in French including instruction, charting and

consultations. In a bilingual setting, some aspects will not be available in French at all times.

(Emphasis added)

[40] The Commission elaborated on the education and training of French health care providers as follows, at pp. 71-72:

> French Language Medical Education and Education of Francophone Health Professionals
>
> Medical students and postgraduate clinical trainees can no longer undertake their medical studies in Quebec. To meet their education needs, Ottawa based institutions have developed the capacity to provide education in both French and bilingual settings.
>
> The post-secondary educational institutions and the institutions affiliated with them have a particular responsibility and capacity to educate a range of health professionals in the French language. These professionals go on to rewarding health care careers, not only in local hospitals, but in northern and eastern communities in Ontario where the predominant language is French. The University of Ottawa has an essential role to educate francophone health professionals. The University is the only Ontario institution capable of training francophone audiologists, speech pathologists, physiotherapists, occupational therapists, physicians (family physicians and specialists), nurse practitioners, nurses trained at the master's level who provide advanced nursing practice, and clinical psychologists at the Ph.D. level. The University and its affiliated institutions can also offer a bilingual setting for the education of bilingual medical specialists.
>
> To attain the educational objectives assigned by the University, francophone medical students must secure a good portion of their education and training in a francophone clinical setting. To provide medical and other health professional programs in French, the University must not only recruit students who are fluent in both official languages, it must have a critical mass of clinician-educators who will work closely with students in multidisciplinary teams in a French milieu. According to the University, the environment necessary for clinical teaching should include:
>
> -- francophone patients with a broad range of diseases;
>
> -- exposure to inpatient and outpatient programs;
>
> -- a francophone community hospital setting;
>
> -- a francophone multidisciplinary team consisting of a staff physician, resident, nurse, social worker,

physiotherapist, etc.;

-- a francophone work setting including French-language charting and communications;

-- francophone support services such as laboratory and diagnostics;

-- administrative services in French;

-- sufficient infrastructure (e.g., meeting rooms, computers, etc.); and

-- medical texts in French

In addition, it requires students who, prior to entering their health professional programs, are fluent in the French language. It also requires the University and its partner hospital and other institutions to establish and maintain 'streams' or sections of the curriculum that permit students to reinforce their language skills throughout their undergraduate and postgraduate programs, whether in medicine, or others of the health professions. It requires of the institution as well as its students a major and continuing commitment to the education of graduates who will practice their professions in French and bilingual environments.

The mission statement of the University of Ottawa contains, among other provisions, the following:

> to maintain and develop the widest range of teaching and research programs of national and international standing in both French and English (and) to exercise leadership and development of teaching, research and professional programs designed specifically for the French-speaking population of Ontario.

In response to the February report, the University of Ottawa acknowledged that it has obligations to the communities of eastern and northeastern Ontario. It also acknowledged the obligation to ensure that health services in bilingual institutions are delivered in a humane and caring manner which reflects the highest possible standards.

To meet the special needs of francophone medical students and postgraduate clinical trainees, the University recruited a Vice Dean to head up an Office of Francophone Affairs, developed new curricula with an emphasis on small group teaching and problem based learning, made arrangements with H"pital Montfort to provide a French milieu for training, and finalized a five-year action plan for a francophone medical program.

The University also established a post-graduate residency

> program in family medicine for francophone graduates, and actively recruits francophone students and staff . . .

(Emphasis added)

[41] The Commission's (HSRC's) August report, however, did significantly affect Montfort's program configuration. The following extract from pp. 14-15 of the report dealt with the programs offered by Montfort and the proposal to change them:

> The largest inpatient program of the hospital in 1995/96 was psychiatry. The hospital provides both acute and longer-term mental health care. The HSRC supports the need to continue to provide French language mental health services at the H"pital Montfort in a French language environment, to serve the needs of the unilingual francophone.
>
> The H"pital Montfort's second largest inpatient program is cardiology. To ensure greater integration of cardiology and cardiac services, the HSRC directs that the program be moved to the University of Ottawa Heart Institute and that the Institute become fully designated under the French Language Services Act as soon as possible. The Heart Institute, with its critical mass and concentration of expertise, will be able to provide patients with a full range of cardiac care services. Concentrating inpatient services on one site will also reduce transfers and expedite surgical intervention if required.
>
> The H"pital Montfort will continue to provide outpatient cardiology services. To improve communications between the facilities, the Heart Institute and the H"pital Montfort should explore effective ways to share information, particularly diagnostic and other patient care information.
>
> Low risk obstetrics is another program of sufficient size to be maintained and enhanced on the Montfort site. . . .
>
> The hospital's day care and primary care ambulatory services will also be preserved. . . . The HSRC will direct H"pital Montfort to seek an affiliation with The Ottawa Hospital/ L'H"pital d'Ottawa to provide support for the services which are not available on a 24 hour basis at the H"pital Montfort and clinical back up for the programs it does provide (e.g. day surgery and obstetrics).
>
> All other inpatient activity at the H"pital Montfort will be transferred to the Alta Vista site of The Ottawa Hospital/ L'H"pital d'Ottawa, where the programs can be integrated with those currently provided at the site.
>
> The HSRC strongly endorses H"pital Montfort's role as a teaching facility providing a French milieu for the education of physicians and other health professionals and the training

> of resident physicians in family medicine and other health care professionals.

[42] With respect to Montfort's role as a teaching facility, the Commission at pp. 73-74 directed the creation of an Academic Coordinating Body composed of the Ottawa teaching hospitals (General and Civic) and the University of Ottawa, with the participation of the French Language Health Services Network, a network that the Commission directed Montfort to establish and lead. The Academic Coordinating Body was to be responsible for "ensuring health professionals have access to opportunities for education and training in French". The report further noted, at p. 74:

> While medical residents and other professionals will have the opportunity to be educated and to train in a primary care environment in the ambulatory setting at H"pital Montfort, they will also require training in other designated facilities. The University of Ottawa, the French Language Health Services Network and the Academic Coordinating Body will all be responsible for coordinating this training.

[43] The Commission therefore recognized that, as a result of its direction, the education of health care professionals in French would be incomplete at Montfort because it was no longer a community hospital.

[44] To summarize, Montfort would go from receiving funds for a 196-bed general community hospital to a hospital receiving funds for 51 mental health beds and 15 low-risk obstetrical beds. It would no longer provide emergency, intensive care and general surgery services associated with short-term hospital admission. It would also no longer offer short-term admission and treatment for a variety of ailments in family medicine or internal medicine. Cardiology, its second largest program, would be transferred to the General campus of the amalgamated Ottawa Hospital and the Heart Centre there was given a direction to obtain designation under the F.L.S.A. It would offer "urgent care", a form of walk-in clinic and some day surgery, low risk obstetrical beds and psychiatric services.

[45] In short, Montfort would still cease to function as a community hospital despite the recommendations of both the Ottawa-Carleton and Eastern Ontario Health Councils that Montfort continue to operate as a community hospital to meet the needs of the francophone community. Although the University of Ottawa stated that the environment necessary for clinical teaching of health care professionals included a francophone community hospital setting, the Commission did not restore the services that it had directed be removed and that made Montfort a general community hospital. Although the Commission professed to strongly endorse Montfort's role as a teaching facility for physicians in family medicine, it did not restore the family medicine beds it had directed be taken away from Montfort. The

Commission gave no explanation for the gap between its stated intentions and its directions.

[46] In September 1997, the Ottawa-Carleton Regional District Health Council made a further representation to the Commission. It noted that the opening of long-term care psychiatric beds at Montfort would fill a gap in services in French. The Council asked for clarification of the mandate of the French Language Health Services Network. It expressed concern that the diminished role of Montfort would entirely eliminate the possibility of training certain categories of professionals in French (examples given were general nurses and druggists). It recommended that Montfort be assigned a sufficient number of acute care beds in internal and family medicine to permit it to maintain the critical mass of patients it needed to offer a clinical education. It further recommended that the Commission give the Working Group charged with implementing the Directions a mandate that clearly included responsibility for the provision of health care services in French and that the Commission oversee a plan that clearly defined the linguistic requirements for all positions in hospitals designated bilingual. Additional funds for the costs of providing services in both official languages were requested on an ongoing permanent basis for institutions designated under the F.L.S.A. Finally, the Council recommended that, to satisfy the requirements of the F.L.S.A., no service or program be transferred from Montfort until the Council, through its French Language Services Committee, had confirmed that the transferee institution satisfied the requirements of the F.L.S.A.

[47] In response to this and further submissions, the Commission in July 1998 directed that 22 sub-acute beds be allocated to Montfort. Sub-acute care refers to care for a patient who does not require acute care services but is not yet ready for discharge to his or her home and community. Montfort would then have a total of 88 beds.

[48] In April 1998, an interim committee for the establishment of the French Language Services Network submitted a proposal and preliminary budget to the Ministry of Health. The Ministry responded in December and provided funding for only one year but indicated funding could be made available "for specific activities".

[49] In February 1999, the Commission sent a letter to Ms. Michelle de Courville Nicol, the president of Montfort's board of directors, responding to submissions that it had not considered Montfort's larger institutional role as an agent for the preservation of the language and culture of Franco-Ontarians and that a francophone (as opposed to bilingual) milieu was essential in this regard. The letter written by the Commission's president, Dr. Duncan Sinclair, stated in part:

> Debate of this belief is not within the purview of the Health

Services Restructuring Commission. Current provincial policy is specified in the French Languages Services Act, which provides for hospitals offering services in the French language to be designated bilingual.

[50] Montfort and the individual applicants then brought an application before the Divisional Court to set aside the directions of the Commission.

[51] After the applicants began proceedings, the Restructuring Co-ordination Task Force for Ottawa-Carleton forwarded a proposal to the Commission regarding Montfort's academic service requirements and recommending the siting of 50 acute care beds at the hospital. The proposal caused the Commission to agree to review further information and to assist in the process. Both sides jointly retained two planners to report on the proposal. The Commission ceased to exist by regulation before the matter was heard by the Divisional Court and the court was not provided with the Commission's views on the additional planning reports.

III DECISION OF THE DIVISIONAL COURT

[52] In its reasons quashing the directions of the Commission, the Divisional Court made three important findings of fact. First, the Divisional Court found that the effect of the Commission's directions was to reduce the availability of health care services in French to the francophone population in the Ottawa-Carleton region, a region designated as bilingual under the F.L.S.A. Secondly, the Divisional Court found that the Commission's directives affected the training program for doctors in the French language and placed insurmountable obstacles on the ability of medical personnel, particularly doctors, to become trained to adequately serve people in the French language. The Divisional Court found, thirdly, that the Commission saw the importance of continued French language medical services only in terms of the provision of bilingual services, but did not evaluate the importance and need for a truly francophone institution or consider the broader institutional role played by Montfort in helping to protect the francophone population from assimilation.

[53] Montfort made three legal submissions before the Divisional Court. First, Montfort contended that the directions issued respecting Montfort violated s. 15 of the Charter. The Divisional Court dismissed this submission, holding that any differential treatment was not based upon the analogous grounds enumerated in s. 15. As we have indicated, Montfort has cross-appealed this portion of the Divisional Court's judgment.

[54] Second, Montfort submitted that the Commission's directions should be invalidated on administrative law principles because they were patently unreasonable. The Divisional Court stressed that its role was a very limited one.

It was only to decide whether the Commission acted according to law in arriving at its decision. The Divisional Court rejected the submission that, apart from the constitutional grounds, the Commission's directions were "patently unreasonable" or "clearly irrational", the test, the parties agreed, was applicable. Montfort has not cross-appealed this portion of the Divisional Court's judgment.

[55] Third, and most significantly, Montfort argued that the Commission's directions should be set aside because they violated one of the fundamental organizing principles of the Constitution, the principle of respect for and protection of minorities -- in this case, a minority belonging to one of the country's founding cultures. The Divisional Court accepted this submission and quashed the directions. The court found, at p. 70 O.R., that Montfort's designation under the F.L.S.A. gave the francophone community a legislatively recognized right to receive health services in "a truly francophone environment", a right that included the facilities necessary for the education and training of health care professionals in French. The essence of the Divisional Court's decision is found in its conclusion at pp. 83-84 O.R. as follows:

> Directions which replace a wide variety of truly francophone medical services and training at Montfort with services and training elsewhere in a bilingual setting -- however well those bilingual facilities may appear to work in any given case -- fail to conform to the principle underlying our Constitution which calls for the protection of francophone minority rights. This is the flaw in the Commission's deliberations and in the directions emanating from them.
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> . . . . .
>
> Given the constitutional mandate for the protection and respect of minority rights -- an "independent principle underlying our constitution", a "powerful normative force" -- it was not open to the Commission to proceed on a "restructured health services" mandate only, and to ignore the broader institutional role played by H"pital Montfort as a truly francophone centre, necessary to promote and enhance the Franco-Ontarian identity as a cultural/linguistic minority in Ontario, and to protect that culture from assimilation. We find this is what the Commission did. Accordingly, its directions cannot stand.

Ontario appeals this portion of the judgment.

IV ISSUES

[56] Ontario submits that the Divisional Court erred in making certain crucial factual findings. Ontario also contends that the Divisional Court erred in law in finding that the

status of Montfort was constitutionally protected. Montfort cross-appeals the dismissal of the claim that the Commission's directions violate s. 15 of the Charter and urges this court to adopt the reasoning of the Divisional Court with respect to the unwritten principles of the Constitution. Montfort and the intervenors also rely on s. 16(3) of the Charter and on the F.L.S.A.

[57] The issues may be summarized as follows:

(1) Did the Divisional Court err in its factual findings?

(2) Does s. 16(3) of the Charter protect the status of Montfort as a francophone institution?

(3) Do the Commission's directions infringe s. 15 of the Charter?

(4) What is the relevance to Montfort of the unwritten constitutional principle of respect for and protection of minorities?

(5) Do the Commission's directions violate the French Language Services Act?

(6) Are the Commission's directions reviewable pursuant to the unwritten constitutional principle of respect for and protection of minorities?

V ANALYSIS

Part I: Factual Issues

Issue 1: Did the Divisional Court err in its factual findings?

[58] Ontario argues that the Divisional Court erred in making certain crucial factual findings. We note at the outset that Montfort successfully moved to strike from the notice of appeal certain grounds of appeal related to the Divisional Court's factual findings. However, in making that order, Charron J.A. noted in her endorsement that "the extent to which [the remaining grounds of appeal] . . . require a consideration of the evidentiary basis will be a matter for the panel to determine." Appellate courts are often required to consider legislative or social facts which form the basis for constitutional arguments: see RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1, at pp. 286-89 S.C.R. per La Forest J. Accordingly, we are prepared to consider Ontario's argument that there is an insufficient basis for the conclusion reached by the Divisional Court.

(a) Reduction in availability of health care services

in French

[59] Ontario submits that the Commission's directions ensured that those health care services that would no longer be available at Montfort would continue to be available in French at other health care institutions in the region. These institutions were either designated as bilingual or ordered to become bilingual. This issue can be disposed of summarily.

[60] Montfort is the only hospital in Ontario that can guarantee continuous access to a broad range of primary and secondary health care services in French. Other health care institutions in the Ottawa-Carleton region cannot do so. While the Ottawa General is designated under the F.L.S.A., the Ottawa Civic, with which it is merged, is only partially designated. The Commission ordered the amalgamated hospital to attain designation under the F.L.S.A. The Heart Institute, now part of the merged Ottawa Hospital and to which the Commission ordered Montfort's cardiology programs transferred, does not have any designation under the F.L.S.A. It, too, was ordered to attain designation. Even at the Ottawa General, a designated centre under the F.L.S.A., health care services are not available in French on a full-time basis in all areas. The Commission's August 1997 report acknowledged that the quality of services in French offered by designated health care providers other than M ontfort varied dramatically despite the fact of designation under the F.L.S.A.

[61] Ontario's submission that health care services to the francophone population would not be reduced by the implementation of the Commission's directions ignores reality. Ontario submitted that the situation would gradually improve with the implementation of the Commission's directions to the transferee health care providers and that patience was required. Good intentions are not a substitution for fact. Four years after the Commission's recommendations, the health care providers directed by the Commission to become designated as offering bilingual services have not yet achieved that designation and may never do so.

[62] The Divisional Court's finding that the Commission's directions for restructuring Montfort would reduce the availability of health care services in French to the francophone population in the Ottawa-Carleton region cannot be disturbed. Further, the evidence also establishes that Montfort offers significant services outside the Ottawa-Carleton region to the outlying francophone rural communities of eastern Ontario for whom it is the closest major hospital. The ability of these communities to receive the present range of health care services in French would also be adversely affected if the Commission's directives were implemented.

(b) The training of health care professionals would be jeopardized

[63] The second factual finding of the Divisional Court challenged by Ontario is that Montfort's role as the only centre in Ontario that trains health care professionals to serve people in French would be jeopardized by the Commission's directions. The Divisional Court stated at pp. 60-61 O.R. of its reasons:

> For many years now, Montfort has educated health care professionals in many different fields. An M.D. program was established in association with the University of Ottawa. More recently, a specialist program in family medicine was put in place. Montfort now offers the only French language family medicine residency outside the province of Quebec. The program has received high praise from the Accreditation team Residency Program in Family Medicine . . . We find that such a totally French program, which is invaluable in assuring that the francophone population is adequately served in the French language, will face insurmountable obstacles in a bilingual institution.

[64] This finding is supported by several sources. Two of them are Dean Walker, the Dean of the Faculty of Medicine at the University of Ottawa, and the Restructuring Coordination Task Force for Ottawa-Carleton. They are concerned that the Commission's directions removing emergency services, inpatient surgical activity and the acute care beds needed to support these services mean that Montfort will no longer be able to offer many of the rotations required for family medicine residency. Dr. Frenette, the expert from the Faculty of Medicine at the University of Laval consulted by the Restructuring Coordination Task Force, estimated (supported by Dean Walker) that 50 acute care beds were required for a sufficient educational exposure to common primary and secondary diagnoses. Without a sufficient number of acute care beds, other health care professionals would no longer be interested in being trained in French at Montfort because there would not be a large enough clientele to attract their services.

[65] Ontario presented evidence from Dr. Ruth Wilson, Head of the Department of Family Medicine at Queen's University, that reconfiguration of Montfort in accordance with the Commission's directions would enable Montfort to continue to provide an appropriate setting for training family medicine residents. Dr. Nick Busing, the Chair of the Department of Family Medicine at the University of Ottawa, filed an affidavit in response disagreeing.

[66] Ontario submits that the Divisional Court misconstrued Dr. Wilson's evidence. Dr. Wilson was of the opinion that, with proper monitoring, Montfort would continue to provide an appropriate setting for family medicine residents to complete the same number of rotations they currently do, namely, six of seven. The Divisional Court indicated it was aware of her

opinion that the training program would continue to function as before. The court however stated at p. 64 O.R. that "she [Dr. Wilson] was concerned about the removal of services and conceded that whether there would be a sufficient variety of conditions and of patients was a matter that would have to be monitored." This sentence is in reference to the fact that Dr. Wilson's opinion was qualified by the words "with proper monitoring". The impugned sentence does not indicate that the Divisional Court misconstrued her evidence but only that her evidence was given with a qualification that, in the court's opinion, was a very important one.

[67] The Divisional Court was entitled to prefer the evidence submitted by the respondents over that put forward by Ontario. We do not agree that, in doing so, the court placed undue emphasis on speculative as opposed to demonstrable concerns. Indeed, the Commission's August 1997 report provides further support for the Divisional Court's finding. It will be recalled that in that report, the Commission noted that medical residents and other professionals would "also require training in other designated facilities" in addition to the primary care environment at Montfort. The Commission itself recognized that Montfort would no longer be able to fulfill its function of training health care professionals in the French language because it would no longer operate as a community hospital offering secondary services. Outside of Montfort, clinical training is only offered in English. The Commission left it to the University and the Academic Coordinating Body, with input from the French Language Health Services Network, to resolve the problem. In other words, there would be a void unless these bodies could come up with a solution themselves.

[68] The Divisional Court's finding that implementation of the Commission's directions would jeopardize the entire program of training doctors in French, as well as the training of many other health care professionals, is amply supported by the evidence.

(c) Montfort's broader institutional role

[69] The Divisional Court held at p. 76 O.R. that the fact that adequate, existing health services and medical training in a truly francophone environment would be taken away would have "a significant negative impact on the continuing vitality of that community, its language and its culture". In coming to its conclusion, the court relied on the evidence of Drs. Raymond Breton and Roger Bernard, two sociologists with expertise in social trends affecting the existence and viability of minority communities. Their evidence was that although hospitals are not institutions of the most important order to a culture, they are nevertheless "very important in the network of institutions" of a minority culture and serve as a means of expressing and affirming cultural identity (at p. 58 O.R.). Ontario called no evidence in this regard.

[70] Ontario submits that hospitals are not institutions that prevent assimilation because people do not frequent them regularly for lengthy intervals. Ontario submits that the experts' analyses of Montfort's broader institutional role is abstract, highly speculative, not firmly rooted in fact and inextricably linked to the language of politics. As a result, Ontario submits that the court erred in accepting their opinions.

[71] In our opinion, the Divisional Court did not err in its consideration or appreciation of the evidence of Drs. Breton and Bernard. We agree that Montfort has a broader institutional role than the provision of health care services. Apart from fulfilling the additional practical function of medical training, Montfort's larger institutional role includes maintaining the French language, transmitting francophone culture, and fostering solidarity in the Franco-Ontarian minority.

[72] Ontario argues that the Commission did in fact take into consideration Montfort's larger institutional role in issuing its directions and that this was all the Commission was obliged to do. We have already referred to the letter written by Dr. Sinclair, the president of the Commission, dated February 22, 1999, and addressed to Ms. de Courville Nicol, the president of the board of directors of Montfort. The Divisional Court relied on that letter at p. 75 O.R. of its reasons, stating:

> In that letter, Dr. Sinclair admitted the Commission had not addressed the question of the necessity for homogeneous institutions for a linguistic minority. He took the position that such a question fell outside the mandate of the Commission . . .

We agree that this is the effect of Dr. Sinclair's letter.

[73] Dr. Sinclair was correct that the Commission's mandate made no mention of Montfort's institutional role (an important part of which comprised training for healthcare providers in the French language). The Commission was, however, specifically mandated to have regard to District Health Council reports. These reports were sensitive to the importance of Montfort as an institution and recommended that Montfort continue to function as a community hospital. The Commission's original directions in February 1997 completely disregarded the Ottawa-Carleton District Health Council's recommendations with respect to Montfort. The Commission's subsequent report and directions reflect an attempt to create a patchwork solution in response to further submissions from the Ottawa-Carleton and Eastern District Health Councils. No reasons were ever given by the Commission for refusing to follow the recommendations of the District Health Councils.

[74] As we have indicated at the outset of these reasons, the Commission also had the authority, incorporated by reference to the relevant sections under the Public Hospitals Act, to issue any direction relating to a public hospital it considered to be in the public interest. The preservation and promotion of the French language in regard to community health care by the only francophone institution performing this role was part of the public interest to which the Commission ought to have had regard. The Commission should also have had regard to the public interest raised by the fact that Montfort's institutional role had province-wide implications that went beyond the local health care concerns of Ottawa-Carleton.

[75] The Divisional Court did not err in its finding of fact concerning the importance of the broader institutional role played by Montfort and the adverse impact of the Commission's directions on that role. The Commission appears to have been unaware of Montfort's broader institutional role when it issued its first report, particularly its teaching role; and, as we have noted, the Commission took a limited view of its mandate throughout.

[76] Accordingly, we would dismiss Ontario's challenge to the three findings of fact made by the Divisional Court.

Part II: Legal Issues

Language Rights: The Constitution Act, 1867 and the Canadian Charter of Rights and Freedoms

[77] The Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3 contains specific language rights, as does the Canadian Charter of Rights and Freedoms. The Constitution's specific language rights are not directly at issue in this appeal. They do, however, form the background against which Montfort's claims must be assessed. Our discussion of the issues we are called to decide will be facilitated by a brief consideration of these provisions.

The Constitution Act, 1867

[78] Section 133 of the Constitution Act, 1867, guarantees the right to use both English and French in the Parliament of Canada and in Quebec's Legislature, as well as in the courts of both Quebec and Canada.

[79] The Constitution Act, 1867 affirms the protection of minorities by including, as the Supreme Court of Canada explained in Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 ("Secession Reference") at p. 242 S.C.R., "guarantees to protect French language and culture, both directly (by making French an official language in Quebec and Canada as a whole) and indirectly (by allocating jurisdiction over education and 'Property and Civil Rights in

the Province' to the provinces)".

[80] The Constitution Act, 1867 also contains, in s. 93, important education guarantees for the Catholic minority in Ontario and the Protestant minority in Qu,bec, guarantees that were replicated for religious minorities in several provinces that joined Confederation after 1867.

[81] The protections accorded linguistic and religious minorities are an essential feature of the original 1867 Constitution without which Confederation would not have occurred. In Re Regulation and Control of Aeronautics in Canada, [1932] A.C. 54 at p. 70, 101 L.J.P.C. 1 (a passage quoted by the Supreme Court of Canada in Reference re Authority of Parliament in Relation to the Upper House (S. 55), [1980] 1 S.C.R. 54 at p. 71, 102 D.L.R. (3d) 1), Lord Sankey L.C. observed:

> [I]t is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected.

[82] The Supreme Court of Canada explained in the Secession Reference, supra, at p. 261 S.C.R. that the protection of religious minorities and the fear of assimilation was a central concern in the Confederation bargain:

> [T]he protection of minority religious education rights was a central consideration in the negotiations leading to Confederation. In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated.

[83] Similarly, in Reference Re Bill 30, An Act to Amend the Education Act (Ont.), [1987] 1 S.C.R. 1148 at pp. 1173-74, 40 D.L.R. (4th) 18, Wilson J. observed that the protection of religious minorities was a "major preoccupation" at the time of Confederation and the rights accorded to protect these minorities from hostile majorities, in the words of Duff J. in Reference re Adoption Act (Ontario), [1938] S.C.R. 398 at p. 402, [1938] 3 D.L.R. 497, comprised "the basic compact of Confederation".

[84] While the text of the Constitution Act, 1867 focused on religious minorities, the minority Catholic community in Ontario at that time was, to a significant extent, also the minority francophone community and linguistic and denominational characteristics were typically twinned. As Gonthier J. observed in Reference re Education Act (Que.), [1993] 2 S.C.R. 511 at pp. 529-30, 154 N.R. 1:

> Section 93 is unanimously recognized as the expression of a desire for political compromise. It served to moderate

religious conflicts which threatened the birth of the Union. At the time, disagreements between communities hinged on religion rather than language.

[85] Fifty years after Confederation, in a highly controversial decision, the Privy Council held that s. 93 was limited to denominational protection and included no minority language protection: Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Mackell, [1917] A.C. 62, 86 L.J.P.C. 65 (P.C.). The historic grievance of the linguistic minority in relation to the language of education was finally addressed in 1982 by s. 23 of the Charter, discussed below.

[86] It should be mentioned as well that certain features of the Constitution Act, 1867 for the protection of minorities may have fallen into disuse, but they still may be taken as expressions of the fundamental constitutional importance attached to the protection of the French and Catholic minority outside Quebec. Linguistic and religious minorities were exposed to the risk that their interests might be ignored at the provincial level, but there is little doubt that it was implicit in the Confederation bargain that they could look to the federal government for constitutional protection. In the case of diminution of religious education rights by a provincial government, s. 93(3) gave the adherents of the religious minority a right of appeal to the federal cabinet, and by s. 93(4), Parliament had the right to enact remedial legislation. The federal power of disallowance (ss. 55-57, 90) was available where the legitimate interests of those minorities were imperiled by provincial action.

The Canadian Charter of Rights and Freedoms

[87] Language rights were significantly expanded with the enactment of the Canadian Charter of Rights and Freedoms in 1982. Section 16(1) of the Charter proclaimed English and French to be the official languages of Canada with equality of status and equal rights of use "in all institutions of the Parliament and government of Canada". The same status and rights are also accorded to English and French in New Brunswick. Section 16.1, added by amendment in 1993, guarantees the equal status, rights and privileges of the English and French linguistic communities of New Brunswick. The right to use English or French in Parliament and in the legislature of New Brunswick is conferred by s. 17 and provision is made for the publication of the statutes, records and journals of those bodies in s. 18. The right to use English or French in any court established by Parliament and in the courts of New Brunswick is guaranteed by s. 19. The right to communicate with and receive available services from the governments of Canada and New Brunswick in either official language is detailed in s. 20.

[88] Section 21 states that the specific rights in ss. 16 to

20 do not derogate from any provision that exists elsewhere in the Constitution of Canada pertaining to the use of English or French. Section 22 protects customary rights and privileges enjoyed before or after the coming into force of the Charter with respect to any language other than English or French. Section 23 guarantees the general right of primary or secondary school instruction in the language of the English or French linguistic minority population of a province, including Ontario, under certain conditions.

[89] The Charter contemplates the advancement of the equality of status of English and French not only by Parliament but also by the provincial legislatures:

> 16(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.

Section 16(3) applies to Ontario.

Issue 2: Does s. 16(3) of the Charter protect the status of Montfort as a francophone institution?

[90] Montfort adopts an argument based on s. 16(3) of the Charter advanced by two of the intervenors, the Commissioner of Official Languages of Canada and La F,d,ration des communaut,s francophones et acadienne du Canada. They submit that once the province established Montfort as a homogeneous francophone institution, s. 16(3) provided a constitutional shield, limiting the right of Ontario to affect or reduce that status. Section 16(3) embodies the constitutional objective of advancing toward the substantive equality of Canada's two official languages. This objective, it is submitted, is to be achieved by means of a "ratchet" principle. It is argued that once Ontario takes a step in the direction of advancing the substantive equality of French, s. 16(3) "ratchets" that step to the level of a constitutional right, limiting any retreat from that advance. Although not constitutionally required, provincial measures advancing linguistic equality are responsive to a constitutional aspiration. Once taken, steps towards substantive linguistic equality gain constitutional protection, and advances can only be withdrawn if properly justified. It is submitted that this interpretation of s. 16(3) is supported by the principle, elaborated below, that language rights are to be given a large and liberal interpretation. Reliance is also placed upon the unwritten constitutional principle of respect for and protection of minorities as an interpretive aid.

[91] The respondents particularly rely on the following passage from the dissenting judgment of Wilson J. in Soci,t, des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch, [1986] 1 S.C.R. 549 at pp. 618-19, 27 D.L.R. (4th) 406:

> In my view, the difficulty in characterizing s. 16 of the Charter stems in large part from the problems of construction inherent in s. 16(1). I would read the opening statement "English and French are the official languages of Canada" as declaratory and the balance of the section as identifying the main consequence in the federal context of the official status which has been declared, namely that the two languages have equality of status and have the same rights and privileges as to their use in all institutions of the Parliament and government of Canada. Subsection (3) of s. 16 makes it clear, however, that these consequences represent the goal rather than the present reality; they are something that has to be "advanced" by Parliament and the legislatures. This would seem to be in the spirit of Jones v. Attorney General of New Brunswick, [1975] 2 S.C.R. 182, namely that legislatures cannot derogate from already declared rights but they may add to them. Provided their legislation "advances" the cause of equality of status of the two official languages it will survive judicial scrutiny; otherwise not. I do not believe, however, that any falling short of the goal at any given point of time necessarily gives a right to relief. I agree with those who see a principle of growth or development in s. 16, a progression towards an ultimate goal. Accordingly the question, in my view, will always be -- where are we currently on the road to bilingualism and is the impugned conduct in keeping with that stage of development? If it is, then even if it does not represent full equality of status and equal rights of usage, it will not be contrary to the spirit of s. 16.

[92] We are not persuaded that s. 16(3) includes a "ratchet" principle that clothes measures taken to advance linguistic equality with constitutional protection. Section 16(3) builds on the principle established in Jones v. New Brunswick (Attorney General) (1974), [1975] 2 S.C.R. 182, 45 D.L.R. (3d) 583 that the Constitution's language guarantees are a "floor" and not a "ceiling" and reflects an aspirational element of advancement toward substantive equality. The aspirational element of s. 16(3) is not without significance when it comes to interpreting legislation. However, it seems to us undeniable that the effect of this provision is to protect, not constitutionalize, measures to advance linguistic equality. The operative legal effect of s. 16(3) is determined and limited by its opening words: "Nothing in this Charter limits the authority of Parliament or a legislature." Section 16(3) is not a rights-conferring provision. It is, rather, a provision designed to shield from attack government action that would otherwise contravene s. 15 or exceed legislative authority. See Andr, Tremblay and Michel Bastarache, "Language Rights", in G,rald-A. Beaudoin and Ed Ratushny, eds., The Canadian Charter of Rights and Freedoms: A Commentary, 2nd ed. (Toronto: Carswell, 1989), at p. 675:

> What was actually desired with this provision [s. 16(3)] was to assure that the power to provide a privileged status for French and English in a statute could not be challenged by virtue of the rights forbidding discrimination contained in section 15 of the Charter. Section 16(3) could thus prevent the measures designed to promote equal access to both official languages from being struck down.

[93] Nor do we find any support for the "ratchet" principle in the case law. The passage relied on from Soci,t, des Acadiens is found in a dissenting judgment that focuses on s. 19(2) and the specific obligations that ss. 16-20 of the Charter impose on New Brunswick.

[94] This argument is made on the assumption that government was under no obligation to create Montfort. This court has held in another context that in the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance Charter values. In Ferrell v. Ontario (Attorney General) (1998), 42 O.R. (3d) 97, 168 D.L.R. (4th) 1 (C.A.), a case dealing with the repeal of a statute intended to combat systemic discrimination in employment, Morden A.C.J.O. stated as follows at p. 110 O.R.:

> If there is no constitutional obligation to enact the 1993 Act in the first place I think it is implicit, as far as the requirements of the constitution are concerned, that the legislature is free to return the state of the statute book to what it was before the 1993 Act, without being obligated to justify the repealing statute under s. 1 of the Charter.
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> . . . . .
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> It would be ironic, in my view, if legislative initiatives such as the 1993 Act with its costs and administrative structure should, once enacted, become frozen into provincial law and susceptible only of augmentation and immune from curtailing amendment or outright appeal without s. 1 justification.

[95] To summarize, Montfort is a public hospital that provides services in French. Section 16(3) of the Charter does not constitutionally enshrine Montfort because it is not a rights-conferring provision. Because Montfort is not constitutionally protected by s. 16(3), Ontario can, subject to what follows, alter the status of Montfort as a community hospital without offending s. 16(3).

Issue 3: Do the Commission's directions infringe s. 15 of the Charter?

[96] Montfort cross-appeals the Divisional Court's dismissal

of the claim that the Commission's directions violate their equality rights protected by s. 15 of the Charter. This issue was not pressed in oral argument, but is fully developed in Montfort's factum. In our view, the Divisional Court was correct in rejecting this submission on the ground, at p. 79 O.R., that "s. 15 of the Charter may not be used as a back door to enhance language rights beyond what is specifically provided for elsewhere in the Charter." Assuming, without deciding, that the respondents otherwise satisfy the test for a violation of s. 15, we agree with the Divisional Court that, in view of the very specific and detailed provisions of ss. 16-23 of the Charter dealing with the special status of English and French, any differential treatment to francophones resulting from the Commission's directions is not based upon an enumerated or analogous ground. As the Divisional Court stated at p. 80 O.R.: "Section 15 itself . . . cannot be invoked to supplement language rights which the Charter has not expressly conferred."

[97] The argument advanced by the respondents has been consistently rejected in other cases: see Baie d'Urf, (Ville) v. Qu,bec (Procureur g,n,ral), [2001] J.Q. No. 4821 (C.A.). In the instant case, the Divisional Court referred to Mahe v. Alberta, [1990] 1 S.C.R. 342 at p. 369, 68 D.L.R. (4th) 69, where Dickson C.J.C. stated:

> [I]t would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to "every individual".

[98] In R. v. Turpin, [1989] 1 S.C.R. 1296 at p. 1334, 48 C.C.C. (3d) 8, the Supreme Court of Canada rejected the reasoning underlying Reference Re Use of French in Criminal Proceedings in Saskatchewan (1987), 44 D.L.R. (4th) 16, 58 Sask. R. 161 (C.A.), a case on which the respondents rely.

[99] Other provincial courts of appeal have rejected attempts to use s. 15 as a basis for expanding language rights. In McDonnell v. F,d,ration des Franco-Colombiens (1986), 31 D.L.R. (4th) 296, 69 B.C.L.R. (2d) 390, the British Columbia Court of Appeal held that, having regard to the specific rights conferred by ss. 16 to 22 of the Charter, s. 15 did not invalidate a provincial rule of court requiring documents to be filed in English. In R. v. Paquette (1987), 83 A.R. 41 at p. 51, 46 D.L.R. (4th) 81, the Alberta Court of Appeal rejected the contention that the failure to accord a trial in French infringed s. 15:

> That argument elevates official language rights into a position of equality in all cases. There would be no need for ss. 16 to 23 of the Charter. The argument makes the official languages sections redundant, as s. 15 would transform the use of one official language into the use of both. The discrimination is not based on language and the official

languages are simply not accorded equality of status by the Charter.

[100] To the same effect is the judgment of the Newfoundland Court of Appeal in Ringuette v. Canada (Attorney General) (1987), 63 Nfld. & P.E.I.R. 126, 29 C.R.R. 107.

[101] It has been held in other contexts that where the Constitution accords special rights to special groups, those specific guarantees must be respected and other Charter rights cannot be used to expand or diminish the rights so granted. In Reference Re Bill 30, supra, Wilson J. stated at pp. 1196-97 S.C.R. that although the special minority religion education rights conferred by s. 93 of the Constitution Act, 1867 "[sit] uncomfortably with the concept of equality embodied in the Charter", s. 15 can be used neither to nullify the specific rights of the protected group nor to extend those rights to other religious groups. This position was affirmed in Adler v. Ontario, [1996] 3 S.C.R. 609, 140 D.L.R. (4th) 385. There, the court dismissed a claim for funding health services for religious schools falling outside the ambit of s. 93 based on the guarantee of freedom of religion in s. 2(a) and on the right to equality in s. 15.

[102] Accordingly, we would dismiss Montfort's cross-appeal from the dismissal of the s. 15 claim.

Issue 4: What is the relevance to Montfort of the unwritten constitutional principle of respect for and protection of minorities?

[103] The most definitive and complete consideration of the unwritten or structural principles, and the authority most pertinent to the respondents' submissions before this court, is the Supreme Court of Canada's 1998 decision in the Secession Reference, supra. There, at p. 240 S.C.R., the Supreme Court affirmed the existence of unwritten constitutional rules "not expressly dealt with by the text of the Constitution" but which nonetheless have normative force as operative instruments of our constitutional order. The court identified at p. 240 S.C.R. "four fundamental and organizing principles of the Constitution" that bear upon the question of the possibility of provincial secession, namely, federalism, democracy, constitutionalism and the rule of law, and respect for minorities.

[104] These unwritten principles, said the court at p. 247 S.C.R., "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based". The court held at p. 248 S.C.R. that the unwritten principles represent the Constitution's "internal architecture" and "infuse our Constitution and breathe life into it". Further, "[t]he principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood."

Federalism

[105] Federalism, the division of legislative power between the Parliament of Canada and the provincial legislatures, reflects a fundamental fact of Canada's constitutional and political structure. As the court stated at p. 251 S.C.R., "federalism is a political and legal response to underlying social and political realities." Canada is a country with a rich geographic, cultural and political diversity. Federalism represents the constitutional definition of those aspects of our political life that unite us while preserving appropriate scope to accommodate and to enhance the heterogeneous social, cultural and economic realities of the diverse and distinctive provincial communities that make up our nation. Federalism is, as the Supreme Court of Canada explained in the Secession Reference at p. 244 S.C.R., "a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today". At p. 245 S.C.R. the court added: "Federalism was the political me chanism by which diversity could be reconciled with unity."

[106] The federalism principle has an important bearing on the situation of cultural and linguistic minorities. The reality of the distinctive language and culture of the French speaking majority of Quebec was unquestionably a principal and defining feature of the Canadian union of 1867 as it required the adoption of a federal structure in the first place. As the court explained in the Secession Reference at p. 252 S.C.R.: "The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the Constitution Act, 1867 in such a way as to promote their language and culture."

Democracy

[107] Democracy, as the Supreme Court said in the Secession Reference at p. 252 S.C.R., is "a fundamental value in our constitutional law and political culture" and, at p. 253 S.C.R., a "baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated". Although not mentioned in the text of the Constitution Act, 1867, democracy has always been a fundamental feature of our constitutional structure. In relation to minorities, democracy means more than simple majority rule. As Iacobucci J. explained in Vriend v. Alberta, [1998] 1 S.C.R. 493 at p. 577, 156 D.L.R. (4th) 385:

> [T]he concept of democracy means more than majority rule . . . In my view, a democracy requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make. Where the interests of a minority have been denied

> consideration, especially where that group has historically been the target of prejudice and discrimination, I believe that judicial intervention is warranted . . . .

Constitutionalism and the rule of law

[108] Constitutionalism and the rule of law are cornerstones of the Constitution and reflect our country's commitment to an orderly and civil society in which all are bound by the enduring rules, principles, and values of our Constitution as the supreme source of law and authority. In the Secession Reference, at p. 258 S.C.R., the Supreme Court outlined three essential elements of the rule of law. First, the law is supreme over both governments and private persons: "[t]here is . . . one law for all." Second, the creation and maintenance of a positive legal order is the normative basis for civil society. The third feature is that the exercise of public power must be based on a legal rule that governs the relationship between the state and the individual.

[109] In Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1 the Supreme Court identified the rule of law as an operative constitutional principle. The court held at p. 752 S.C.R. that "in the process of Constitutional adjudication, the court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada." There, the court found that the province's failure to comply with s. 23 of the Manitoba Act, 1870, R.S.C. 1985, App. II, No. 8 and enact its laws in both English and French rendered legislation enacted since 1890 invalid. Relying on the fundamental principle of the rule of law, the court adopted a temporary suspension of its declaration of invalidity to avoid a state of legal chaos.

[110] The related principle of constitutionalism rests on the proposition that the Constitution is the supreme source of law and that all government action must comply with its requirements. Constitutionalism qualifies majority rule and, like federalism, has an important bearing on minorities. As the court explained in the Secession Reference at p. 259 S.C.R., the constitutional entrenchment of rights protects these rights against the will of the majority and ensures that they are given due regard and protection. A constitution may, the court explained at p. 259 S.C.R., "seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority".

Respect for and protection of minorities

[111] Finally, in the Secession Reference, the court spoke of the principle of "respect for minorities" or "protection of minorities". In these reasons, we refer to this principle as "respect for and protection of minorities". The principle of

respect for and protection of minorities was described as follows at p. 262 S.C.R.:

> The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the Charter. Undoubtedly, 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. 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.

(References omitted)

[112] The protection of linguistic minorities is essential to our country. Dickson J. captured the spirit of the place of language rights in the Constitution in Soci,t, des Acadiens, supra, at p. 564 S.C.R.: "Linguistic duality has been a longstanding concern in our nation. Canada is a country with both French and English solidly embedded in its history." As stated by La Forest J. in R. v. Mercure, [1988] 1 S.C.R. 234 at p. 269, 48 D.L.R. (4th) 1, "rights regarding the English and French languages . . . are basic to the continued viability of the nation."

[113] As we have already mentioned, the Charter enhanced language rights. The entrenched guarantee of equality in s. 15 and the provisions requiring the respect and protection of aboriginal rights enhanced the protection of the rights of other minorities and the right to be free from discrimination. As the Supreme Court of Canada explained in the Secession Reference at p. 269 S.C.R., "There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights."

[114] The principle of respect for and protection of minorities is a fundamental structural feature of the Canadian Constitution that both explains and transcends the minority rights that are specifically guaranteed in the constitutional text. This is an area where, as the Supreme Court of Canada explained in the Secession Reference at p. 292 S.C.R., "[a] superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading." This structural feature of the Constitution is reflected not

only in the specific guarantees in favour of minorities. It infuses the entire text and, as we have explained, plays a vital role in shaping the content and contours of the Constitution's other structural features: federalism, constitutionalism and the rule of law, and democracy.

The application of the principle to Montfort

[115] This appeal calls for careful consideration of the appropriate weight, value and effect to be accorded to the respect for and protection of minorities as one of the fundamental principles of our Constitution. Ontario submits that, in the face of the very specific and detailed minority language guarantees in the text of the Constitution, the Divisional Court erred by in effect adding to the list of protected rights. The text of the Constitution's specific language rights gives the Franco-Ontarian minority no right to a French language hospital and, says the appellant, the courts have no role in adding to the list of protected rights. The respondents submit, on the other hand, that the absence of a specific right in the text of the Constitution is not fatal to their case. They say that in view of the importance of Montfort as a cultural, social and educational institution in the Franco-Ontarian minority's struggle for survival, the Constitution's fundamental principle of respect for and protection of minorities properly may be invoked as a basis for reviewing the legality of the Commission's directions.

[116] The unwritten principles of the Constitution do have normative force. In Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island ("Provincial Judges Reference"), [1997] 3 S.C.R. 3 at p. 75, 150 D.L.R. (4th) 577, Lamer C.J.C. made it clear that, in his view, the preamble to the Constitution "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text". This point was reinforced in the Secession Reference at p. 249 S.C.R.:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the Patriation Reference [Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753], which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.

[117] In the Provincial Judges Reference, the court

considered the "unwritten constitutional principle" of judicial independence. The court held, at p. 67 S.C.R., that implicit in s. 11(d) of the Charter, which deals with the right to trial by "an independent and impartial tribunal", and ss. 96-100 of the Constitution Act, 1867, which deals with the appointment, tenure and remuneration of superior court judges, is "a deeper set of unwritten understandings which are not found on the face of the document itself" (emphasis in original). There are, the court held at p. 69 S.C.R., "organizing principles" that may be used "to fill out gaps in the express terms of the constitutional scheme" to ensure the protection of all of the necessary and essential attributes of this vital structural feature of the Constitution. The court found, at p. 75 S.C.R., that the preamble to the Constitution Act, 1867 "identifies the organizing principles of the Constitution Act, 1867, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text".

[118] In his very helpful discussion of the unwritten or organizing principles of the Constitution, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can. Bar Rev. 67 at pp. 83-86, Professor Robin Elliot draws an important distinction between the use of unwritten or structural principles "as independent bases upon which to impugn the validity of legislation" and their use "as aids to interpretation or otherwise to assist in the resolution of constitutional issues". Professor Elliot suggests that when used to impugn the validity of legislation or government action, the unwritten principles "can fairly be said to be generated by necessary implication from the text of the Constitution" (emphasis in original). On this theory, when the organizing principles give rise to rights capable of impugning the validity of legislation, they are grounded in the text of the Constitution. Although not expressly stated by the Constitution's text, such r ights are immanent in the text when it is understood and interpreted in a proper and complete legal, historical and political context. When used in this way, the unwritten or organizing principles allow the courts to unlock the full meaning of the Constitution and to flesh out its terms, as explained by Lamer C.J.C. in the Provincial Court Judges Reference at p. 69 S.C.R., even to the extent of allowing the courts "to fill out gaps in the express terms of the constitutional scheme".

[119] Professor Patrick Monahan draws a similar distinction in "The Public Policy Role of the Supreme Court of Canada and the Secession Reference" (1999) 11 N.J.C.L. 65 at pp. 75-77. He observes that when following the interpretive theory:

> [T]he court should attempt to fill in that gap by adopting an interpretation that is most consistent with the underlying logic of the existing text, and then to rely upon that logic in order to 'complete' the constitutional text.

[120] This is to be contrasted with what Professor Monahan describes at p. 77 as an unacceptable conception of judges "as akin to constitutional drafters. On this view, the court should fill in the gap by relying upon its own conception as to the best or most appropriate set of constitutional norms that should be added to the existing text."

[121] The unwritten principles of the Constitution do not confer on the judiciary a mandate to rewrite the Constitution's text. In the Secession Reference at p. 249 S.C.R., the Supreme Court confirmed that recognition of these unwritten structural principles:

> . . . could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary . . . there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.

[122] Similarly, in the Provincial Court Judges Reference at p. 68 S.C.R., the court stated: "There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review." Again, in Re Eurig Estate, [1998] 2 S.C.R. 565 at p. 594, 165 D.L.R. (4th) 1, Binnie J. stated that "implicit principles can and should be used to expound the Constitution, but they cannot alter the thrust of its explicit text."

[123] Against the background of these general principles we turn to the precise issue that confronts us in this appeal. As the Divisional Court observed, we are not concerned here with the validity of legislation that impinges upon the rights of a linguistic minority: compare Baie d'Urf, (Ville) v. Qu,bec, supra. Nor are we confronted with a situation where a minority group is insisting on the establishment of an institution that is not already in existence. We are asked to review the validity of a discretionary decision with respect to the role and function of an existing institution, made by a statutory authority with a mandate to act in the public interest.

[124] In its submissions, Ontario has chosen to characterize the decision of the Divisional Court as recognizing or creating a specific constitutional right capable of impugning the validity of an act of the legislature or sufficient to require the province to act in some specific manner. We do not accept that as a proper or necessary reading of the judgment. The Divisional Court at pp. 83-84 O.R. quashed the Commission's directions on the ground that given the constitutional principle of respect for and protection of minorities, "it was

not open to the Commission to proceed on a 'restructured health services' mandate only, and to ignore the broader institutional role played by . . . Montfort as a truly francophone centre, necessary to promote and enhance the Franco-Ontarian identity as a cultural/linguistic minority in Ontario, and to protect that culture from assimilation." The Divisional Court, at p. 68 O.R., explicitly recognized that "the constitutional validity or invalidity of a piece of legislation is not at issue." The Divisional Court added: "What is at issue is whether certain conduct of a government agency falls within the parameters of what is permitted by the Constitution . . . . [T]here is a difference between the validity of legislation and the possibility of unconstitutional behaviour under legislation." We agree with the Divisional Court's characterization of the constitutional issue.

[125] For the reasons that follow, we have concluded that the Constitution's structural principle of respect for and protection of minorities is a bedrock principle that has a direct bearing on the interpretation to be accorded the F.L.S.A. and on the legality of the Commission's directions affecting Montfort. This bedrock principle also informs our discussion below of the reviewability of the Commission's directions.

[126] We proceed first to consider the F.L.S.A. and its application to the facts of the present case in light of the interpretive principles applicable to language rights and in light of the constitutional principle of respect for and protection of minorities. We then turn to the application of the unwritten principles to the exercise and review of discretionary decisions of statutory bodies with a statutory mandate to act in the public interest. As the conclusion we have reached on these two issues is sufficient to dispose of this appeal, it is not necessary for us to answer the more general question -- whether the fundamental constitutional principle of respect for and protection of minorities gives rise to a specific constitutional right capable of impugning the validity of an act of the legislature or sufficient to require the province to act in some specific manner.

Issue 5: Do the Commission's directions violate the French Language Services Act?

[127] The Divisional Court held at p. 70 O.R. that Montfort's designation as a public service agency under the F.L.S.A. meant that:

> [T]he francophone community of Ontario had acquired a legislatively recognized entitlement to receive health services in a truly francophone environment at H“pital Montfort, and an expectation that those services would be provided in at least the quality and extent offered by Montfort, including the existence of a training centre that

guaranteed the instruction of medical professionals in French.

[128] The interpretation of the F.L.S.A. is central to this appeal.

[129] The F.L.S.A. is an example of the provincial legislature of Ontario using s. 16(3) to build on the language rights contained in the Constitution Act, 1867 and the Charter to advance the equality of status or use of the French language. The aspirational element contained in s. 16(3) -- advancing the French language toward substantive equality with the English language in Ontario -- is of significance in interpreting the F.L.S.A.

[130] In addition, the principle of respect for and protection of minority language rights is a useful tool not only in interpreting the F.L.S.A. but in assessing the validity of the Commission's directions in light of that legislation. Government action as well as government legislation is to be considered in light of constitutional principles, including the unwritten constitutional principles.

[131] As the title of the F.L.S.A. indicates, the Act is about the right to receive services in the French language. The interpretive principles derived from the language-rights jurisprudence have a significant bearing on the approach to be adopted to the F.L.S.A. We shall now elaborate on these principles.

[132] At one time, the Supreme Court of Canada adopted a restrictive approach to the interpretation of language rights. In Soci,t, des Acadiens, supra, at p. 578 S.C.R., Beetz J., writing for the majority, held that language rights, which were the result of "political compromise", should be approached with judicial restraint in contrast to human rights, which are "seminal in nature because they are rooted in principle". It is now clear, however, that this narrow and restrictive approach has been abandoned and that language rights are to be treated as fundamental human rights and accorded a generous interpretation by the courts.

[133] In Ford v. Qu,bec (Attorney General), [1988] 2 S.C.R. 712 at p. 748, 54 D.L.R. (4th) 577, the Supreme Court rejected the contention that the specific language rights protected by the Constitution are exhaustive, leaving no room for the protection of the right to use one's language of choice as an aspect of freedom of expression. The court quoted from its earlier decision in Reference re Manitoba Language Rights, supra, p. 744 S.C.R.:

> The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are

> able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

In Ford, the court added at p. 748 S.C.R.:

> 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 colours the content and meaning of expression.

[134] Similarly, in Mahe, supra, the court adopted a generous purposive approach to the interpretation of minority language education rights guaranteed by s. 23 of the Charter. Writing for the court, Dickson C.J.C., at p. 362 S.C.R., again referred to the cultural importance of language:

> [A]ny broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.

[135] The Chief Justice made reference at p. 363 S.C.R. to the importance of schools as institutions that function as "community centres where the promotion and preservation of minority language culture can occur". With reference to the strictures imposed by the narrow approach taken in Soci,t, des Acadiens, Dickson C.J.C. observed at p. 365 S.C.R.:

> Both its genesis and its form are evidence of the unusual nature of s. 23. Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures. Careful interpretation of such a section is wise: however, this does not mean that courts should not "breathe life" into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose.

[136] More recently, in R. v. Beaulac, [1999] 1 S.C.R. 768 at pp. 791-92, 173 D.L.R. (4th) 193, the Supreme Court flatly rejected the narrow approach of Soci,t, des Acadiens and held that a purposive and generous interpretation of language rights was called for:

> Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada. To

> the extent that Soci,t, des Acadiens du Nouveau-Brunswick, supra, at pp. 579-80, stands for a restrictive interpretation of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply.

(Emphasis in original, references omitted)

[137] We note that in Beaulac, the court was interpreting language rights conferred by the provisions of the Criminal Code, R.S.C. 1985, c. C-46, and that the interpretive approach enunciated applies both to language rights conferred by ordinary legislation as well as to constitutional guarantees.

[138] In Arsenault-Cameron v. Prince Edward Island, [2000] 1 S.C.R. 3 at p. 24, 181 D.L.R. (4th) 1, the Supreme Court reaffirmed the proposition advanced in Mahe that "language rights cannot be separated from a concern for the culture associated with the language." The court also reaffirmed the proposition from Beaulac that language rights must be given a purposive interpretation, taking into account the historical and social context, past injustices, and the importance of the rights and institutions to the minority language community affected.

[139] As we have explained, the provisions of the F.L.S.A. must be interpreted in light of these principles.

[140] In addition to the aspirational element of s. 16(3), the principle of respect for and protection of the francophone minority in Ontario, and the broad and purposive interpretation to be given to language rights, general principles of statutory interpretation also apply. Statutory interpretation cannot be founded on the wording of legislation alone. As articulated by McLachlin C.J.C. in R. v. Sharpe, [2001] 1 S.C.R. 45 at pp. 74-75, 194 D.L.R. (4th) 1, the proper approach is found in E.A. Driedger's Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) at p. 87 as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The context of the Act and its purpose

[141] It was within the overall context of steady progression and advancement of services in French that the F.L.S.A. was introduced and passed in 1986. [See Note 2 at end of document]

In introducing the legislation on May 1, 1986, the Honourable Bernard GrandmaŒtre, the Minister for Francophone Affairs, stated (Debates of the Legislative Assembly of Ontario, pp. 203-04):

> Our province has a special responsibility in this regard [to ensure that francophones receive services in their own language] because Ontario is home to the largest group of French-speaking Canadians outside Quebec. It is for that reason the government of Ontario intends to guarantee through legislation the rights of francophones to receive government services in French.
>
> The various measures contained in this bill are inspired by the basic principles of justice and equality which we value so highly in this province. These are two fundamental principles on which our country has been built by the two founding peoples. The government of Ontario believes that it is now appropriate that this reality and this duality should be reflected in the operations of all ministries.

(Emphasis added)

[142] This and other speeches made by members of the legislature noted that the governments of Ontario had, over the years, changed their policy toward the French language. The Bill was the result of years of successive steps toward the goal of providing services to francophones in their own language. The Bill received the unanimous support of all three political parties represented in the Legislative Assembly, and amendments were proposed with a view to ensuring its protections would be met. For example, s. 8(1)(d) of the F.L.S.A., which provides that services could be exempted from being offered in French where, in the opinion of the Lieutenant Governor in Council, "it is reasonable and necessary to do so" had added to it the words "and where the exemption does not derogate from the general purpose and intent of this Act": see Debates of the Legislative Assembly of Ontario, November 6, 1986, at pp. 3202-03.

[143] The legislative history and the comments of the members of the legislature when the F.L.S.A. was enacted permit this court to draw a number of inferences and conclusions about the underlying purposes and objectives of the F.L.S.A. and the intention of the legislature enacting it. One of the underlying purposes and objectives of the Act was the protection of the minority francophone population in Ontario; another was the advancement of the French language and promotion of its equality with English. These purposes coincide with the underlying unwritten principles of the Constitution of Canada. As already stated, underlying constitutional principles may in certain circumstances give rise to substantive legal obligations because of their powerful normative force: Provincial Court Judges Reference, supra, at pp. 67-70 S.C.R.

per Lamer C.J.C. and Secession Reference, supra, at pp. 249 and 290-91 S.C.R.

The words and the scheme of the Act

[144] For ease of reference, the Act is attached as Schedule A to these reasons.

[145] The preamble states that the Act is a statutory recognition of the cultural heritage of the French speaking population and a reflection of the Legislative Assembly's commitment to preserve that cultural heritage for future generations. While a preamble is not a source of positive law in contrast to the provisions that follow it, a preamble can contribute to the interpretation of a law: Provincial Court Judges Reference, at p. 69 S.C.R.

[146] Here, the preamble states "it is desirable to guarantee the use of the French language in institutions of the . . . Government of Ontario, as provided in this Act" (emphasis added). One of those institutions is Montfort, a government agency under the Act.

[147] Section 1 defines a government agency in part as a publicly-subsidized non-profit corporation that provides service to the public and that is designated by regulation. That is Montfort. The word "service" is also defined in s. 1 as any service or procedure provided by a government agency and "includes all communications for the purpose".

[148] Section 2 requires the Government of Ontario to ensure that services are provided in French in accordance with the Act. The F.L.S.A. does not impose a requirement of institutional bilingualism across the province. Instead, it provides a measured policy that varies with the circumstances. Thus our decision is a contextual one. This is not a ruling about every hypothetical situation that might arise concerning minority French language rights in the province.

[149] Section 5(1) of the Act gives a person the right "to communicate in French with, and to receive available services in French from, any head or central office of a government agency" and "the same right in respect of any other office of such agency . . . that is located in or serves an area designated in the Schedule". The right in s. 5 does not apply to all government agencies. It only applies to those institutions that are defined as a government agency in s. 1. Montfort receives public money and is designated under the Act. Montfort satisfies the definition of a government agency. Ottawa-Carleton is also a designated area in the Schedule. Thus, a person has the right to communicate in French with, and to receive available services from, Montfort and any "office" of Montfort. In order to understand the meaning of "available services" as used in s. 5, it will be helpful to provide an

overview of the other provisions of the Act.

[150] Section 6 gives some protection to existing practices with respect to the use of English or French outside the application of the Act. It provides that the Act cannot be used to limit the use of either language where the Act does not apply.

[151] Section 7 makes the obligations of government agencies to provide services in French subject to "such limits as circumstances make reasonable and necessary" but requires first that "all reasonable measures and plans for compliance with this Act have been taken or made".

[152] Section 8 gives the Lieutenant Governor in Council the power to make regulations (a) designating public service agencies; (b) amending the Schedule by adding designated areas to it; and (c) exempting services from the application of ss. 2 and 5 where, in its opinion, "it is reasonable and necessary to do so and where the exemption does not derogate from the general purpose and intent of this Act" (emphasis added).

[153] Section 9 provides that the right to receive services in French from a designated agency may be limited in that designation may apply only to certain specified services, as opposed to all services, provided by the agency, or the agency may exclude certain of its services from designation. Montfort has not specified certain of its services for inclusion or exclusion. Thus the designation applies to all of the services offered by Montfort.

[154] Section 10 provides that where a regulation exempts a service, revokes the designation of a public service agency, or amends a regulation designating a public service agency so as to exclude or remove a service from the designation, at least 45 days' notice must first have been published in the Ontario Gazette and a newspaper of general circulation in Ontario inviting comments to be submitted to the Minister for Francophone Affairs. After the expiry of this period, the regulation may be made without further notice.

[155] The implication of s. 10 is that when there is a change in the services offered by a government agency, a regulation will be passed. Before the regulation passes, 45 days' notice of the change must first be published in both the Ontario Gazette and a general circulation newspaper, inviting comment.

[156] Section 11 provides that the Minister for Francophone Affairs is responsible for the administration of the Act, and his function is to develop and co-ordinate the policies and programs of the government.

[157] Section 12(2) provides that the Office of Francophone Affairs may, inter alia, "recommend changes in the plans of

government agencies for the provision of French language services" and "make recommendations in respect of an exemption or proposed exemption of services under clause 8(1)(c)".

[158] Section 13 requires that a French language services coordinator be appointed for each ministry and that all the coordinators be part of a committee presided over by the Office of Francophone Affairs.

[159] Ontario submits that designation as a government agency under the Act merely confers the right to receive the services provided by the designated agency at any given point in time. In support of its position, Ontario relies on the wording of s. 5: "A person has the right in accordance with this Act to communicate in French with, and to receive available services in French from, any . . . government agency" (emphasis added). Ontario submits that the Act only gives a person the right to receive whatever services Montfort offers. If Montfort offers ten services in French one year and two services in French the following year, that is all a person has the right to receive. Ontario's position is, further, that the F.L.S.A. requires that only services are to be provided in French, and "services" does not include the training of health care professionals in French.

[160] We cannot accept this submission. In our opinion, the words "available services" in s. 5 of the Act refer to available healthcare services at the time the agency is designated under the Act. The legislature has quite clearly manifested its intention in the preamble of the F.L.S.A. to "guarantee" the provision of services in French. Ontario's submission, if accepted, would result in seriously undermining the guarantee. Our interpretation is reinforced by the French version of the statute which speaks only of "services" and not "available services". Our interpretation is also consistent with the objectives of the F.L.S.A., the aspirational element of s. 16(3) of the Charter, and the unwritten constitutional principle of respect for and protection of minorities.

[161] Ontario's submission also fails to pay adequate attention to the overall scheme of the legislation. Montfort's designation does not apply only in respect of specified services. It applies in respect of all the healthcare services offered by Montfort at the time of designation. If Ontario's submission is correct, there would never be any need to pass an amending regulation under s. 8 or give notice under s. 10 to exempt or remove a service from the designation. In our opinion, before removing an existing service, such as cardiology, from Montfort's designation, it would have been necessary to pass a regulation because cardiology services were no longer going to be available in French not only at Montfort but elsewhere in the Ottawa-Carleton region. Of course, the requirement of s. 7 that circumstances make it "reasonable and necessary" to limit the provision of French language healthcare

services would first have to be met.

[162] The Commission appears to have attempted to frame its directions so as to make available equivalent healthcare services in French at other institutions. Language and culture are not, however, separate watertight compartments. The reality of the matter is, as found by the Divisional Court, that the Commission's directions would reduce the availability and accessibility of healthcare services in French, both directly in the Ottawa-Carleton region and eastern Ontario, and indirectly by imperiling the training of health care professionals, which would in turn increase the assimilation of Franco-Ontarians. Montfort's designation under the F.L.S.A. includes not only the right to healthcare services in French at the time of designation but also the right to whatever structure is necessary to ensure that those healthcare services are delivered in French. This would include the training of healthcare professionals in French. To give the legislation any other interpretation is to prefer a narrow, literal, compartmentalized interpretation to one that recognizes and reflects the intent of the legislation.

[163] It can hardly be said that the serious adverse effects of the Commission's directions are consistent with the purpose and objectives of the F.L.S.A. Nor do the directions accord with the government's criteria for designating an agency under the F.L.S.A. The four criteria are: 1) permanency and quality of services in French; 2) access to services in French; 3) francophone representation in the governance and management of the institution; and 4) accountability (Health Services Restructuring Commission, Report, August 1997 at p. 82). Designation entails preparing and submitting a plan specifying the manner in which the institution seeking designation meets these criteria. By designating Montfort under the Act, Ontario has signified it is government policy that the services of Montfort, a general community hospital, are intended to be permanently offered and readily accessible in French. The Commission's directions represent a shift in this policy. Even the Commission itself recognized that the transfer of services from Montfort meant that "some" existing services would not be available in French in Ottawa-Carleton, and that it would no longer be possible to train healthcare professionals completely in French in a bilingual setting. The Commission, and now Ontario, has given no explanation for this shift in policy. Nor has there been compliance with s. 7 of the F.L.S.A.

[164] Section 7 of the F.L.S.A. states that the right to receive services in French may only be limited "as circumstances make reasonable and necessary, if all reasonable measures and plans for compliance with this Act have been taken or made". The definition of "necessary" implies "une chose absolument indispensable, ce dont on ne peut rigoureusement pas se passer. En somme, une n,cessit, in,luctable": L.-P. Pigeon, R,daction et interpr,tation des lois, 3e ,d. (Qu,bec:

Gouvernement du Qu,bec, MinistŠre des Communications, 1986) at p. 36. The word "necessary" in this context would appear to mean that existing services can only be limited when this is the only course of action that can be taken.

[165] Before limiting Montfort's services as a community hospital, Ontario must also have taken "all reasonable measures" to comply with the Act. It is possible to state with greater precision what falls short of "all reasonable measures". "All reasonable measures" does not simply mean giving a direction to the transferee hospital to attain F.L.S.A. designation and then transferring the French services before that designation has been attained. Nor does "all reasonable measures" mean creating a seemingly insurmountable problem for the training of healthcare professionals in French and leaving the affected community to solve the problem itself. The Commission's directions do not comply with s. 7 of the Act.

[166] Although it is impossible to specify precisely what is encompassed by the words "reasonable and necessary" and "all reasonable measures", at a minimum they require some justification or explanation for the directions limiting the rights of francophones to benefit from Montfort as a community hospital.

[167] While the Lieutenant Governor in Council may make regulations exempting services from the application of ss. 2 and 5 where, in the opinion of the Lieutenant Governor in Council, it is reasonable and necessary to do so, there has been no attempt to pass a regulation exempting any of the healthcare services from being provided in French. We also note the requirement that any regulation exempting a service from the application of the Act not derogate from the general purpose and intent of the Act. These words appear to invite some objective scrutiny and indicate that the discretionary opinion of the Lieutenant Governor in Council is not absolute.

[168] While the Commission, and now the Minister, may exercise a discretion to change and to limit the services offered in French by Montfort, it cannot simply invoke administrative convenience and vague funding concerns as the reasons for doing so: see by analogy R. v. Beaulac, supra, at pp. 805-06 S.C.R.; Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services), 2001 SCC 41 at para. 116. The Commission's mandate has to be reconciled with the statutory requirements of the F.L.S.A. The Commission may not issue a directive removing available services in French from Montfort, particularly when the services are not available in French on a full-time basis elsewhere in the Ottawa-Carleton region, without complying with the "reasonable and necessary" requirement of the F.L.S.A.

[169] Accordingly, we conclude that the Commission's directions fail to respect the requirements of the F.L.S.A.

Issue 6: Are the Commission's directions reviewable pursuant to the unwritten constitutional principle of respect for and protection of minorities?

[170] The Commission had a broad statutory discretion to issue directions for the restructuring of Ontario's health care system. There is no dispute that as a public hospital, Montfort was properly subject to the exercise of the Commission's discretion.

[171] It has long been established in Canadian law that "there is no such thing as absolute and untrammelled 'discretion'": Roncarelli v. Duplessis (1958), [1959] S.C.R. 121 at p. 140, 16 D.L.R. (2d) 689, per Rand J. In Mount Sinai, supra, the Supreme Court reviewed the exercise of discretion by the Quebec Minister of Health in relation to Mount Sinai Hospital. Section 138 of the Act Respecting Health Services and Social Services, R.S.Q., c. S-4.2 is similar to s. 6 of the Public Hospitals Act. Both statutes give the Minister of Health a wide discretion to act in the manner he or she considers justified in the public interest. In his concurring reasons at para. 16, Binnie J. observed:

> It is true, as the appellant points out, that the Minister's power under s. 138 is framed as a broad policy discretion to be exercised "in the public interest". Yet the discretion, however broadly framed, is not unfettered. At the very least the Minister must exercise the power for the purpose for which it was granted: Roncarelli v. Duplessis, [1959] S.C.R. 121, at p. 140; Padfield v. Minister of Agriculture, Fisheries and Food, [1968] A.C. 997 (H.L.), at p. 1030.

[172] The basic principle of the reviewability of ministerial discretion has been applied in relation to the exercise of discretion in relation to s. 23 minority language education rights. In Arsenault-Cameron, supra, when striking down a decision of the Minister of Education not to establish a French-language school because of an insufficient number of francophone students, Major and Bastarache JJ. wrote at p. 27 S.C.R.:

> The Minister has a duty to exercise his discretion in accordance with the dictates of the Charter; see Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441; Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038. In reaching his decision, the Minister failed to give proper weight to the promotion and preservation of minority language culture and to the role of the French Language Board in balancing the pedagogical and cultural considerations. This was essential to giving full regard to the remedial purpose of the right. The approach adopted by the Minister therefore increased the probability that his decision would fail to satisfy constitutional review by the courts.

[173] The present case does not involve a written constitutional guarantee, but it does involve a situation with profound implications for Ontario's minority francophone community that engages the constitutional principle of respect for and protection of minorities.

[174] Fundamental constitutional values have normative legal force. Even if the text of the Constitution falls short of creating a specific constitutionally enforceable right, the values of the Constitution must be considered in assessing the validity or legality of actions taken by government. This is a long-established principle of our law. Before the advent of the Charter and the constitutional entrenchment of rights and freedoms, there can be no doubt that those same rights were fundamental constitutional values. Although they had not been crystallized in the form of entrenched and directly enforceable rights, they were regularly used by the courts to interpret legislation and to assess the legality of administrative action. See R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at p. 344, 18 D.L.R. (4th) 321. The fundamental rights and freedoms of a liberal democracy are very much a product of our British parliamentary heritage. As explained by Rand J. in Saumur v. Quebec (City), [1953] 2 S.C.R. 299 at p. 329, [1953] 4 D.L.R. 641, "[F]reedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order." Although these fundamental rights and freedoms had no place in the text of the Constitution until 1982, the courts were entitled to take them into account when deciding cases and interpreting statutes, and when considering the legality of governmental actions.

[175] Similarly, since the enactment of the Charter, the application of constitutional values to situations not strictly governed by the text of the Constitution has been recognized and accepted. The Charter does not apply as between private individuals, yet Charter values are to be applied by the courts in common-law decision making: Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174; Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129.

[176] Unwritten constitutional norms may, in certain circumstances, provide a basis for judicial review of discretionary decisions. As Bora Laskin wrote as a professor of constitutional law in "An Inquiry Into the Diefenbaker Bill of Rights" (1959) 37 Can. Bar Rev. 77 at p. 81, although not entrenched in the Constitution, civil liberties were frequently used "as a means of curial control of administrative adjudication". More recently, Professor David Mullan commented on the same doctrine in Administrative Law (Toronto: Irwin Law, 2001) at p. 114, noting that in the pre-Charter era, the courts

were "alert in their scrutiny of the exercise of discretionary power" where civil liberties and freedoms were at stake. The statutory conferral of the power to make a discretionary decision does not immunize from judicial scrutiny the decision-maker who ignores the fundamental values of Canada's legal order. In "Unwritten Constitutionalism in Canada: Where Do Things Stand?" (2001) 35 Can. Bus. L.J. 113 at p. 115, Professor S. Choudhry questions the propriety of using unwritten principles to challenge the validity of legislation, but regards as benign their use to review administrative action: "To the extent that unwritten principles have been used to control executive action, they function in a manner similar to the common law grounds of judicial review of administrative action."

[177] The possibility of the review of discretionary decisions on the basis of fundamental Canadian constitutional and societal values is reinforced by the Supreme Court of Canada's decision in Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193: see Mullan, supra, c. 6; D. Dyzenhaus and E. Fox-Decent, "Rethinking the Process/Substance Distinction: Baker v. Canada" (2001) 51 U.T.L.J. 193; MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001) 80 Can. Bar Rev. 281. In Baker, the court considered a challenge to the exercise of a ministerial decision to refuse to exempt an applicant for permanent resident status, on compassionate and humanitarian grounds, from the requirement that the application be made from outside Canada. Noting that a ministerial discretionary decision made pursuant to a broadly worded statutory mandate is ordinarily entitled to a high level of deference from the courts, L'Heureux-Dub, J. wrote at pp. 853-55 S.C.R. that there were, nonetheless, significant judicially enforceable limits where fundamental constitutional and societal values are at stake:

> [D]iscretion must . . . be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (Roncarelli v. Duplessis, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the Canadian Charter of Rights and Freedoms . . .
>
> . . . . .
>
> [T]hough discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.

[178] L'Heureux-Dub, J. found that the Minister's decision to

refuse an exemption for a woman who had given birth to four children during her 11 years in Canada failed to respect the values expressed in the international Convention on the Rights of the Child. The Convention had been signed by Canada, but not adopted in statutory form by Parliament. The Minister held the majority of the Supreme Court of Canada, at p. 859 S.C.R., was required "to give serious weight and consideration" to the values of the Convention and the interests of the applicant's children who would be left behind if she were not admitted. The Minister's decision was quashed.

[179] If the values of an international convention not adopted in statute form by Parliament have a bearing on the validity of the exercise of ministerial discretion, it must be the case that failure to take into account a fundamental principle of the Constitution when purporting to act in the public interest renders a discretionary decision subject to judicial review.

[180] The Commission was required by statute to exercise its powers with respect to Montfort in accordance with the public interest. In determining the public interest, the Commission was required to have regard to the fundamental constitutional principle of respect for and protection of minorities. The Commission was also required to have regard to the recommendations of regional health councils. As noted earlier, the regional health councils recognized the unique role of Montfort and its importance to the continued survival of the language and culture of the francophone community. The Commission, however, viewed consideration of Montfort's larger institutional role as beyond its mandate. This is demonstrated by the letter written by Dr. Sinclair dated February 22, 1999 to which reference has already been made at paras. 49 and 72.

[181] We agree with the Divisional Court, at pp. 65-66 O.R., that the language and culture of the francophone minority in Ontario "hold a special place in the Canadian fabric as one of the founding cultural communities of Canada and as one of the two official language groups whose rights are entrenched in the Constitution". If implemented, the Commission's directions would greatly impair Montfort's role as an important linguistic, cultural and educational institution, vital to the minority francophone population of Ontario. This would be contrary to the fundamental constitutional principle of respect for and protection of minorities.

[182] Ontario relies on the following passage in Mount Sinai, supra, where Bastarache J. held at para. 58, "Decisions of Ministers of the Crown in the exercise of discretionary powers in the administrative context should generally receive the highest standard of deference, namely patent unreasonableness."

[183] There is little doubt that the Commission's directions themselves are entitled to a high level of curial deference:

Pembroke Civic Hospital v. Ontario (Health Services Restructuring Commission) (1997), 36 O.R. (3d) 41 (Div. Ct.). However, as we have pointed out, they are by no means immune from judicial review. While the Commission's directions are entitled to deference, as pointed out in Baker, supra, at p. 859 S.C.R., quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M. Taggart, ed., The Province of Administrative Law (Oxford: Hart Publishing, 1997) 279 at p. 286, deference "requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision". See also "Transforming Administrative Law", supra, where Professor MacLauchlan states at p. 289:

> As explained by Justice McLachlin [in "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999) 12 CJALP 171], the rule of law should be seen as an essential attribute of decision-making in a democratic society, taking as its overarching principle "a certain ethos of justification", under which an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness.

(Emphasis in original)

[184] The Commission offered no justification for diminishing Montfort's important linguistic, cultural, and educational role for the Franco-Ontarian minority. It said that matter was beyond its mandate. The Commission failed to pay any attention to the relevant constitutional values, nor did it make any attempt to justify departure from those values on the ground that it was necessary to do so to achieve some other important objective. While the Commission is entitled to deference, deference does not protect decisions, purportedly taken in the public interest, that impinge on fundamental Canadian constitutional values without offering any justification.

[185] The Divisional Court did not find the Commission's decision to be patently unreasonable or clearly irrational, the test that the parties acknowledged was applicable in the circumstances. Ontario points out that the respondents have not appealed this finding. However, this aspect of the Divisional Court's judgment must not be taken out of context or read in isolation from the court's central findings. The Divisional Court did find that the Commission ignored Montfort's broader institutional role and failed to pay appropriate heed to a fundamental principle of the Constitution. The application of that constitutional principle to the circumstances of this case is squarely raised by Ontario's appeal, and the point under consideration was fully canvassed in argument.

[186] The Divisional Court, viewing the matter in purely administrative law terms, and without considering the relevance of the constitutional issues to the standard of review, found the standard to be patent unreasonableness. Where

constitutional and quasi-constitutional rights or values are concerned, correctness or reasonableness will often be the appropriate standard: see e.g. Baker, supra; Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 S.C.R. 5, 81 D.L.R. (4th) 121; Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825, 133 D.L.R. (4th) 1. In the circumstances, detailed consideration of the appropriate standard of review is neither necessary nor appropriate as it is clear that the directions cannot survive even the most deferential standard because the Commission refused to take into account or give any weight to Montfort's broader institutional role.

[187] We conclude, accordingly, that the Commission's directions must also be quashed on the ground that, contrary to the constitutional principle of respect for and protection of minorities, in the exercise of its discretion, the Commission failed to give serious weight and consideration to the linguistic and cultural significance of Montfort to the survival of the Franco-Ontarian minority.

VI CONCLUSION

[188] Our conclusions may be summarized as follows:

(1) We affirm the Divisional Court's findings of fact that the Commission's directions to Montfort would:

   (a) result in a reduction in availability of health care services in French;

   (b) jeopardize the training of French language health care professionals; and

   (c) impair Montfort's broader role as an important linguistic, cultural, and educational institution, vital to the minority francophone population of Ontario.

(2) The status of Montfort as a francophone institution is not constitutionally protected by s. 16(3) of the Charter.

(3) The Commission's directions relating to Montfort did not violate s. 15 of the Charter and Montfort's cross-appeal is accordingly dismissed.

(4) The constitutional principle of respect for and protection of minorities is a fundamental constitutional value that has an important bearing upon the status of Montfort and the validity of the Commission's directions.

(5) The fundamental constitutional principle of respect for and protection of minorities, together with the principles that apply to the interpretation of language rights, require

that the F.L.S.A. be given a liberal and generous interpretation.

(6) By enacting the F.L.S.A., Ontario bound itself to provide the services offered at Montfort at the time of designation under the Act unless it was "reasonable and necessary" to limit them. Ontario has not offered the justification that it is reasonable and necessary to limit the services offered in French by Montfort to the community. The Commission's directions failed to respect the requirements of the F.L.S.A.

(7) In exercising its discretion as to what is in the public interest, the Commission was required by the fundamental principles of the Constitution to give serious weight and consideration to the importance of Montfort as an institution to the survival of the Franco-Ontarian minority. The Commission considered this beyond its mandate and its directions are therefore subject to judicial review. This is a second reason for quashing the Commission's directions.

(8) Ontario's appeal is dismissed, the order quashing the Commission's directions relating to Montfort is affirmed, and the matter is remitted to the Minister for reconsideration in accordance with these reasons.

Appeals dismissed.

APPENDIX A

French Language Services Act

R.S.O. 1990, c. F.32

Amended by: 1993, c. 27, Sched.; O. Reg. 407/94, s. 1; 1997, c. 25, Sched. E, s. 3; 1997, c. 26, Sched.; 1999, c. 14, Sched. F, s. 4; 2000, c. 5, s. 12.

Preamble

Whereas the French language is an historic and honoured language in Ontario and recognized by the Constitution as an official language in Canada; and whereas in Ontario the French language is recognized as an official language in the courts and in education; and whereas the Legislative Assembly recognizes the contribution of the cultural heritage of the French speaking population and wishes to preserve it for future generations; and whereas it is desirable to guarantee the use of the French language in institutions of the Legislature and the Government of Ontario, as provided in this Act;

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as

follows:

Definitions

1. In this Act,

"government agency" means,

(a) a ministry of the Government of Ontario, except that a psychiatric facility, residential facility or college of applied arts and technology that is administered by a ministry is not included unless it is designated as a public service agency by the regulations,

(b) a board, commission or corporation the majority of whose members or directors are appointed by the Lieutenant Governor in Council,

(c) a non-profit corporation or similar entity that provides a service to the public, is subsidized in whole or in part by public money and is designated as a public service agency by the regulations,

(d) a nursing home as defined in the Nursing Homes Act or a home for special care as defined in the Homes for Special Care Act that is designated as a public service agency by the regulations,

(e) a service provider as defined in the Child and Family Services Act or a board as defined in the District Social Services Administration Boards Act that is designated as a public service agency by the regulations,

and does not include a municipality, or a local board as defined in the Municipal Affairs Act, other than a local board that is designated under clause (e); ("organisme gouvernemental")

"service" means any service or procedure that is provided to the public by a government agency or institution of the Legislature and includes all communications for the purpose. ("service")

1997, c. 25, Sched. E, s. 3.

Provision of services in French

2. The Government of Ontario shall ensure that services are provided in French in accordance with this Act.

Use of English or French in Legislative Assembly

3. (1) Everyone has the right to use English or French in the

debates and other proceedings of the Legislative Assembly.

Bills and Acts of the Assembly

(2) The public Bills of the Legislative Assembly introduced after the 1st day of January, 1991 shall be introduced and enacted in both English and French.

Translation of Statutes

4. (1) Before the 31st day of December, 1991, the Attorney General shall cause to be translated into French a consolidation of the public general statutes of Ontario that were re-enacted in the Revised Statutes of Ontario, 1980, or enacted in English only after the coming into force of the Revised Statutes of Ontario, 1980, and that are in force on the 31st day of December, 1990.

Enactment

(2) The Attorney General shall present the translations referred to in subsection (1) to the Legislative Assembly for enactment.

Translation of regulations

(3) The Attorney General shall cause to be translated into French such regulations as the Attorney General considers appropriate and shall recommend the translations to the Executive Council or other regulation-making authority for adoption.

Right to services in French

5. (1) A person has the right in accordance with this Act to communicate in French with, and to receive available services in French from, any head or central office of a government agency or institution of the Legislature, and has the same right in respect of any other office of such agency or institution that is located in or serves an area designated in the Schedule.

Duplication of services

(2) When the same service is provided by more than one office in a designated area, the Lieutenant Governor in Council may designate one or more of those offices to provide the service in French if the Lieutenant Governor in Council is of the opinion that the public in the designated area will thereby have reasonable access to the service in French.

Idem

(3) If one or more offices are designated under subsection

(2), subsection (1) does not apply in respect of the service provided by the other offices in the designated area.

Existing practice protected

6. This Act shall not be construed to limit the use of the English or French language outside of the application of this Act.

Limitation of obligations of government agencies, etc.

7. The obligations of government agencies and institutions of the Legislature under this Act are subject to such limits as circumstances make reasonable and necessary, if all reasonable measures and plans for compliance with this Act have been taken or made.

Regulations

8. The Lieutenant Governor in Council may make regulations,

(a) designating public service agencies for the purpose of the definition of "government agency";

(b) amending the Schedule by adding areas to it;

(c) exempting services from the application of sections 2 and 5 where, in the opinion of the Lieutenant Governor in Council, it is reasonable and necessary to do so and where the exemption does not derogate from the general purpose and intent of this Act.

Public service agencies; limited designation

9. (1) A regulation designating a public service agency may limit the designation to apply only in respect of specified services provided by the agency, or may specify services that are excluded from the designation.

Consent of university

(2) A regulation made under this Act that applies to a university is not effective without the university's consent.

Notice and comment re exempting regulation, etc.

10. (1) This section applies to a regulation,

(a) exempting a service under clause 8 (1) (c);

(b) revoking the designation of a public service agency;

(c) amending a regulation designating a public service agency so as to exclude or remove a service from the

designation.

Idem

(2) A regulation to which this section applies shall not be made until at least forty-five days after a notice has been published in The Ontario Gazette and a newspaper of general circulation in Ontario setting forth the substance of the proposed regulation and inviting comments to be submitted to the Minister responsible for Francophone Affairs.

Idem

(3) After the expiration of the forty-five day period, the regulation with such changes as are considered advisable may be made without further notice.

Responsible Minister

11. (1) The Minister responsible for Francophone Affairs is responsible for the administration of this Act.

Functions

(2) The functions of the Minister are to develop and co-ordinate the policies and programs of the government relating to Francophone Affairs and the provision of French language services and for the purpose, the Minister may,

(a) prepare and recommend government plans, policies and priorities for the provision of French language services;

(b) co-ordinate, monitor and oversee the implementation of programs of the government for the provision of French language services by government agencies and of programs relating to the use of the French language;

(c) make recommendations in connection with the financing of government programs for the provision of French language services;

(d) investigate and respond to public complaints respecting the provision of French language services;

(e) require the formulation and submission of government plans for the implementation of this Act and fix time limits for their formulation and submission,

and shall perform such duties as are assigned to the Minister by order in council or by any other Act.

1993, c. 27, Sched.

Annual report

(3) The Minister, after the close of each fiscal year, shall submit to the Lieutenant Governor in Council an annual report upon the affairs of the Office of Francophone Affairs and shall then lay the report before the Assembly if it is in session or, if not, at the next session.

Office for Francophone Affairs

12. (1) Such employees as are considered necessary shall be appointed under the Public Service Act for the administration of the functions of the Minister responsible for Francophone Affairs, and shall be known as the Office of Francophone Affairs.

Function of Office of Francophone Affairs

(2) The Office of Francophone Affairs may,

(a) review the availability and quality of French language services and make recommendations for their improvement;

(b) recommend the designation of public service agencies and the addition of designated areas to the Schedule;

(c) require non-profit corporations and similar entities, facilities, homes and colleges referred to in the definition of "government agency" to furnish to the Office information that may be relevant in the formulation of recommendations respecting their designation as public service agencies;

(d) recommend changes in the plans of government agencies for the provision of French language services;

(e) make recommendations in respect of an exemption or proposed exemption of services under clause 8 (1) (c),

and shall perform any other function assigned to it by the Minister responsible for Francophone Affairs, the Executive Council or the Legislative Assembly.

1993, c. 27, Sched.

French language services co-ordinators

13. (1) A French language services co-ordinator shall be appointed for each ministry of the government.

Committee

(2) There shall be a committee consisting of the French

language services co-ordinators, presided over by the senior official of the Office of Francophone Affairs.

Communication

(3) Each French language services co-ordinator may communicate directly with his or her deputy minister.

Deputy minister

(4) Each deputy minister is accountable to the Executive Council for the implementation of this Act and the quality of the French language services in the ministry.

Municipal by-laws re official languages

14. (1) The council of a municipality that is in an area designated in the Schedule may pass a by-law providing that the administration of the municipality shall be conducted in both English and French and that all or specified municipal services to the public shall be made available in both languages.

Right to services in English and French

(2) When a by-law referred to in subsection (1) is in effect, a person has the right to communicate in English or French with any office of the municipality, and to receive available services to which the by-law applies, in either language.

Metropolitan and regional councils

(3) Where an area designated in the Schedule is in a metropolitan or regional municipality and the council of a municipality in the area passes a by-law under subsection (1), the council of the metropolitan or regional municipality may also pass a by-law under subsection (1) in respect of its administration and services.

SCHEDULE

MUNICIPALITY OR DISTRICT	AREA
City of Greater Sudbury	All
City of Hamilton	All of the City of Hamilton as it exists on December 31, 2000
City of Ottawa	All
City of Toronto	All
Regional Municipality of Niagara	Cities of: Port

	Colbourne and Welland
Regional Municipality of Peel	City of Mississauga
County of Dundas	Township of Winchester
County of Essex	City of Windsor Towns of: Belle River and Tecumseh Townships of: Anderdon, Colchester North, Maidstone, Sandwich South, Sandwich West, Tilbury North, Tilbury West and Rochester
County of Glengarry	All
County of Kent	Town of Tilbury Townships of: Dover and Tilbury East
County of Middlesex	City of London
County of Prescott	All
County of Renfrew	City of Pembroke Townships of: Stafford and Westmeath
County of Russell	All
County of Simcoe	Town of Penetanguishene
County of Stormont	All
District of Algoma	All
District of Cochrane	All
District of Kenora	Township of Ignace
District of Nippissing	All
District of Sudbury	All
District of Thunder Bay	Towns of: Geraldton, Longlac and Marathon Townships of: Manitouwadge,

	Beardmore, Nakina and Terrace Bay
District of Timiskaming	All

O. Reg. 407/94; 1997, c. 26, Sched.; 1999, c. 14, Sched. F, s. 4; 2000, c. 5, s. 12.

Notes

Note 1: The Regulation came into force on April 1, 1996. On April 29, 1999 [filed April 30, 1999], O. Reg. 272/99 revoked O. Reg. 88/96 and provided for more restrictive advisory duties for the Commission.

Note 2: S.O. 1986, c. 45. Prior to this, the 1960s showed an increased sensitivity to French language rights both as a question of fairness to Ontario's own residents and as a larger backdrop to national unity. The Ontario government passed a motion giving members of the Legislature the right to address the House in English or in French. The Schools Administration Act, R.S.O. 1960, c. 361, and the Secondary Schools and Boards of Education Act, R.S.O. 1960, c. 362, were passed to facilitate the establishment and support of French elementary and secondary schools. On May 3, 1971, Premier Davis made a formal statement in the legislative assembly in which he pledged to continue the general philosophy of former Premier Roberts concerning bilingualism. He indicated that Ontario's policy would be to provide, wherever practicable, public services in the English and French languages. He recognized the special emphasis given by the federal government to bilingualism in the National Capital region and pledged to support efforts made to date by the municipalities in the region to increase provision of bilingual services: Debates of the Legislative Assembly of Ontario, May 3, 1971 at pp. 1104-09. In the field of justice, a pilot project was begun in June 1976 to permit the use of French in trials before the Criminal Division of the Provincial Court in Sudbury. The project was extended to Ottawa the following year. Bilingual services were then extended to the Family Court Division in Sudbury and Ottawa. At the request of the Attorney General for Ontario, the Criminal Code, R.S.C. 1970, c. C-34 was amended in 1979 to provide for trials before a judge or jury who spoke the official language of the accused or both English and French (S.C. 1978-79, c. 10). In April 1984, the Courts of Justice Act, 1984, S.O. 1984, c. 11 was amended to provide in s. 135 (now s. 125, R.S.O. 1990, c. C.43) that the official languages of the courts in Ontario are English and French (S.O. 1984, c. 11). At that time, the then Attorney General for Ontario, the Honourable Roy McMurtry, stated that the government had made it clear that services in the French language in relation to health care had to be a priority: Debates, April 10, 1984 at pp. 616-17.

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