
The Right to English Health and Social Services in Quebec: A Legal and Political Analysis.

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The right to English health and social services in Quebec raises important issues in the context of Quebec language policy, in that French is the official language of Quebec and intended to be the common language of all Quebecers. The author first gives an overview of language policy in the Quebec and federal contexts. He then traces the evolution of the right to English health and social services, enshrined in legislation in 1986, and its implementation. He next examines the application of the legislation during a period of transformation of the Quebec health and social services system and the degree of respect given the right under a new government. Finally, he analyzes whether the right to English services infringes the *Charter of the French language*, dealing particularly with the right to work in French and the issue of signs in the health and social services sector. The author concludes that the right to English services has become politicized in recent years and that lack of political will has prevented the government from fully respecting its obligations under health and social services legislation.

Le droit de recevoir des services de santé et des services sociaux en anglais soulève plusieurs questions importantes relatives à la politique linguistique québécoise, en ce qu'elle déclare le français langue officielle du Québec et vise à en faire la langue commune de l'ensemble des Québécois. Après avoir passé en revue les politiques linguistiques fédérale et québécoise, l'auteur retrace l'évolution du droit des anglophones à recevoir des services sociaux et de santé dans leur langue, tel qu'il a été formulé par le législateur en 1986, ainsi que sa mise en œuvre. Il examine la manière dont ce droit a été appliqué dans le contexte des transformations récentes du réseau de la santé et des services sociaux, ainsi que le respect dont il fait l'objet sous un nouveau gouvernement. Finalement, il s'interroge sur la possibilité d'un conflit entre le droit de recevoir des services en anglais et la *Charte de la langue française*, notamment en ce qui a trait au droit de travailler en français et aux règles régissant l'affichage dans les établissements publics. L'auteur conclut que le droit aux services en anglais a subi une politisation au cours des dernières années, et qu'un manque de volonté politique a empêché le gouvernement d'assumer pleinement ses responsabilités légales en vertu des lois relatives à la santé et aux services sociaux.

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Introduction

The right of English-speaking people in Quebec to receive health and social services in their language was first enshrined in legislation in 1986.¹ However, English-speaking Quebecers have received services in English for generations. Indeed, the English-speaking community founded several of Quebec's most prestigious hospitals, including the Montreal General Hospital in 1821 and the Royal Victoria Hospital in 1897. The community also founded many other institutions providing services in English, including residences for senior citizens and centres for the intellectually and physically handicapped. Although some remain private, the vast majority today form part of the public network of institutions funded by the Quebec government and provide services in both French and English to Quebecers. While many of these institutions are located in Montreal, where the majority of Quebec's English-speaking population resides, regions such as the Eastern Townships and Quebec City could also boast of institutions founded by and still closely linked to the English-speaking community. Moreover, the public education system, in particular McGill University, has for many years trained English-speaking health care professionals such as doctors, nurses and social workers, and physical and occupational therapists to provide services to English-speaking Quebecers.

Before the Castonguay reform of the health and social services system in the early 1970s, the organization of services for the English-speaking community differed from that of the French-speaking majority.² On the one hand, services in English reflected to a great extent a tradition of individual initiatives, volunteer commitment, and self-help. Institutions and community organizations relied on financial support from private corporations and foundations, and on individual gifts and bequests. On the other hand, the Catholic Church assumed an essential role in founding institutions providing services to French-speaking Quebecers. However, in the period leading up to the reform, the provincial government assumed an increasing part in providing and financing services to both communities.

Following the *Castonguay-Nepveu Report*, the government created a network of public institutions for which it assumed all the costs. In Montreal, the network of hospitals, social service organizations, and residences for seniors and the intellectually and physically handicapped were integrated into the public system. At the same time, a broad range of community organizations serving the English-speaking community continued to complement the public sector.

Outside Montreal, the reality was different. While some institutions founded by and affiliated with the English-speaking community became part of the public net-

¹ *An Act to again amend the Act respecting health services and social services*, S.Q. 1986, c. 106 [hereinafter *Bill 142*].

² *Rapport de la commission d'enquête sur la santé et le bien-être social* (Gouvernement du Québec, 1967-1972) [hereinafter *Castonguay-Nepveu Report*].

work, the majority of public institutions were French-speaking, staffed almost exclusively by Francophones. Although English-speaking people continued to use local volunteer-based community organizations, their declining population in many regions led to fewer services. In many cases, English-speaking people were more comfortable travelling to Montreal to use institutions, particularly those hospitals historically associated with the community, which could offer specialized services in English. Outside Montreal, the availability of services in English was frequently precarious.

In 1991, 600,595 Quebecers spoke English as their first language (8.7% of the population).³ However, in order to calculate the number of English-speaking people with the potential to seek access to the health and social services system, the Ministry of Health and Social Services has chosen to categorize the population by first official language spoken, and quantified the potential number of English-speaking users as 904,298.⁴ While 500,000 live in the Montréal-Centre region, where they comprise 31.68% of the population, English-speaking people reside in each of the administrative regions of Quebec. In eight of these regions, they represent less than 5% of the population, while in the remaining regions they comprise between 7 and 30%. Important concentrations reside in Estrie (23,718 or 9% of the total population), Montérégie (136,430 or 11.5%), Laval (46,183 or 14.8%), the Outaouais (48,315 or 17.5%), and the Laurentians (29,093 or 7.7%).⁵ The 1996 census revealed that the population whose first language is English declined by 0.7% from 1991 to 1996. About 762,000 people spoke English at home in 1996. This number had not changed from 1991.⁶

It is my intention in this essay to undertake a critical legal and political analysis of the right of English-speaking Quebecers to receive health and social services in English. Much has changed since *Bill 142* in 1986. In 1991, the Liberal government passed new health and social services legislation, which increased the number of administrative regions, conferred on them new responsibilities, put in place a comprehensive complaints system, gave the user a greater role in the management of the system, and provided for mergers of institutions with similar missions.⁷ The new law also affirmed all the provisions guaranteeing the right to services in English. In 1994, the Parti Québécois ("PQ") defeated the Quebec Liberal Party and assumed power. In 1995, the close result of the referendum on Quebec sovereignty exacerbated tensions not merely between federalists and sovereigntists, but also, as a consequence of Pre-

³ Quebec, Ministère de la Santé et des Services sociaux, *Données statistiques sur la population d'expression anglaise du Québec par territoire de CLSC et de RSS pour l'année 1991* (Gouvernement du Québec, 1995) at 6.

⁴ *Ibid.* at 8.

⁵ *Ibid.*

⁶ Statistics Canada, *The Daily* (2 December 1997) at 3 and 6, online: Statistics Canada <<http://www.statcan.ca:80/Daily/English/971202/d971202.ntm>> (last modified: 2 December 1997).

⁷ *An Act respecting health services and social services and amending various legislation*, S.Q. 1991, c. 42 [hereinafter *Bill 120*], replacing the *Act respecting health and social services*, R.S.Q. c. S-5 [hereinafter *Former Health and Social Services Act*], now printed as *An Act respecting health services and social services*, R.S.Q. c. S-4.2 [hereinafter *Current Health and Social Services Act*].

mier Parizeau blaming defeat on "money and the ethnic vote", between the government and Quebec's ethnic and linguistic minorities. Following the arrival of Lucien Bouchard as Premier in January 1996, the Quebec government adopted a fiscal policy designed to eliminate budget deficits, resulting in cuts to the health and social services system. At the same time, a general restructuring of the health and social services network placed renewed emphasis on an ambulatory approach (*virage ambulatoire*) to health care. More particularly, this led to the merger and closure of some institutions, together with budget cuts and changing roles for acute-care hospitals and other institutions. There were broader mandates and some new resources for the Centre local de services communautaires ("CLSC") and community sectors as community and outpatient care complemented an increase in day surgery. In Montreal, as part of these changing orientations, the government closed seven acute-care hospitals. In January 1999, legal proceedings were instituted against the newly re-elected Parti Québécois government to oblige it to respect its obligations under health and social services legislation to approve plans for services in English.

The issue of access to health and social services in English in Quebec is more than merely academic. It concerns the role of public institutions, funded by the tax dollars of all Quebecers, and the personnel who work in them. But the issue is most important for the hundreds of thousands of English-speaking Quebecers who prefer to express themselves in English when seeking services, and who desire services to be available in their language where possible. This is not simply capricious. It has been noted that in times of crisis or when we have something important to express, we revert to the language we know best, our mother tongue. People needing health care or social services frequently find themselves in situations where expression in a second language, regardless of their level of bilingualism, impedes communication. Robichaud has expressed this notion eloquently:

Les mots qui nous viendront à la bouche pour exprimer une grande peine, pour dire la joie d'une guérison inattendue, pour signifier l'incrédulité devant un événement imprévu, ce sont les mots de notre enfance. Les mots qui nous viennent à l'esprit lorsque nous vivons une grande émotion, ce sont les mots liés aux premières expériences émotives vécues. La raison est bien simple: l'apprentissage de la langue se fait en même temps que la découverte des premières émotions qui jalonnent toute notre vie. Les émotions liées à la peur, à la douleur, à la douceur, à l'amour, à la haine, à l'isolement nous les avons vécues dans notre petite enfance au même moment où nous apprenions à les nommer. Ainsi, malgré le fait que nous ayons appris à maîtriser d'autres langues, il apparaît que cette association viscérale de la langue maternelle et de l'expression émotive se vérifie à maintes occasions au cours de notre vie.⁸

For Robichaud, language plays a fundamental role in health care:

[E]lle est un moyen privilégié par lequel les hommes, les femmes et les enfants établissent des liens avec leur environnement. Or, le lien avec l'environnement

⁸ J.-B. Robichaud, *Le système de services de santé, Objectif 2000: vivre en français au Nouveau-Brunswick* (Moncton: Éditions Acadie, 1986) at 19.

est également un aspect fondamental du domaine de la santé. C'est ici que se rejoignent de façon dynamique langue et santé.⁹

While much has been written on language policy, the English-speaking community in Quebec, and its constitutional rights, there has been little direct emphasis on the right to health care and social services. Discussion of the issue has been couched in terms of its compatibility with Quebec's linguistic policy and the status of French.¹⁰ This is partly because access to health and social services, unlike education, is not governed by the Constitution and has consequently escaped the attention of those who write on Canadian constitutional law and its effects on official language minorities.¹¹ Moreover, while the *Charter of the French language*¹² regulates the use of language in public administration, of which the health and social services network is a part, it does not deal specifically with the right of access to health and social services in English. Neither health nor access to health care is considered a fundamental right in the Quebec *Charter of human rights and freedoms*¹³ or the *Charter*.¹⁴

⁹ *Ibid.* at 21.

¹⁰ See e.g. Quebec, Ministère de la Culture et des Communications, *Le français langue commune, enjeu de la société québécoise* (Quebec: Comité interministériel sur la situation de la langue française, 1996) [hereinafter *Le français langue commune*]. For a discussion of the rights of the English-speaking minority without an emphasis on the right to health and social services, see e.g. R. Rudin, "Collective Rights, the English-Speaking Minority and the Quebec Government 1867-1988" in D. Schneiderman, ed., *Language and the State: The Law and Politics of Identity* (Cowansville, Qc.: Yvon Blais, 1991) 243; L. Macdonald, "The Experience of the Canadian Linguistic Minority Community in Quebec" in S. Léger, ed., *Towards a Language Agenda: Futurist Outlook on the United Nations* (Ottawa: Canadian Centre for Linguistic Rights, 1996) 347; and J. Woehrling, "La Constitution du Canada, la législation du Québec et les droits de la minorité anglo-québécoise" in *Minorités et Organisation institutionnelle*, vol. 2 (Moncton: 4^e Colloque juridique international, organized by Le Centre international de la common law en français (CICLEF) de l'École de droit de l'Université de Moncton and Le Centre de droit public de la Faculté de droit de l'Université Libre de Bruxelles, 1996) 155.

¹¹ See e.g. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 93, reprinted in R.S.C. 1985, App. II, No. 5; *Canadian Charter of Rights and Freedoms*, s. 23, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

¹² R.S.Q. c. C-11.

¹³ R.S.Q. c. C-12 [hereinafter *Quebec Charter*].

¹⁴ However, the Ontario Superior Court of Justice (Divisional Court) recently recognized the constitutional right of a French-speaking minority to retain access to Francophone health services and to a hospital providing medical training in French. In this case, involving the status of the Montfort Hospital, the only French teaching hospital in Ontario, the court held that administrative measures "must be measured against the 'minority protection' benchmark, one of the fundamental organizing principles of the constitution." The court stated that protection of official language minorities is part of "unwritten constitutional principles", and a failure to comply with such principles can invalidate government conduct at odds with them. For the court, these unwritten principles are incorporated by reference into the Constitution. The undermining of minority rights in a context where health and social services are involved could thus lead to a violation of the Constitution, even if access to health and social services itself is not protected in the Constitution. Here the court quashed directives of the Ontario Health Services Restructuring Commission that could destroy the hospital's ability to provide truly

I shall first review some general issues of linguistic policy and minority rights and then analyze the relevant legislation, its evolution, and its application. From a legal perspective, it is my intention to analyze the scope and nature of the legal guarantee to services in English. Who is entitled to receive services? Which institutions have the responsibility to provide services in English? Why do some institutions provide services in English while others do not? Is there a conflict between health and social services legislation guaranteeing the right to receive services in English and the *Charter of the French language*, particularly those parts dealing with the right to work in French? What role does the Office de la langue française ("OLF") play in determining the range of services accessible in English? Has the guarantee to services in English increased the range or accessibility of services in English?

From a political perspective, this essay will examine a number of issues. For example, if services were already available in English, dispensed by English-speaking professionals in institutions identified with the English-speaking community, why did the Quebec government of Robert Bourassa decide to implement legal guarantees to services? Why did the Parti Québécois, then in opposition, refuse to consent to the law? Have political attitudes changed since the passing of the law? Why did the cabinet of the Parti Québécois government refuse to accept the programs of access to English services in 1997, after they had already been approved by all regional boards of health and social services? Why did one regional board, when revising its program of English services in 1998, decide to reduce the number of institutions named to provide services in English in its region from nineteen to zero? Finally, why did the government fail to approve new access programs over the course of a mandate of more than four years and start to do so only after the filing of legal proceedings against it early in 1999?

This essay will demonstrate that legislation with a linguistic component and politics are inextricably linked in Quebec. Moreover, we shall see that a relatively simple administrative process can become a contentious issue, alienating the English-speaking community from its government, and that a lack of political will can undermine the principle of legislative guarantees.

I. Language Policy and Legislation in the Canadian and Quebec Contexts

Any analysis of the right to English health and social services must be discussed in the context of Quebec's language policy and legislation. How does the right to services in English co-exist with other elements of Quebec's language policy, exemplified by the *Charter of the French language*, and how can that right be explained in terms of current theories of linguistic policy? How does language policy affect mi-

Francophone medical services and medical training. The court also referred the question of the restructuring of health services at the hospital back to the commission for reconsideration. See *Lalonde et al. v. Health Services Restructuring Commission* (1999), 181 D.L.R. (4th) 263, [1999] O.J. No. 4488 at paras. 48-50 (Div. Ct.), online: QL (OJ).

nority rights? How does Quebec language policy differ from that practised by the federal government, and where is the right to English services situated in this context? This part briefly reviews the purpose and models of linguistic policy and their application in the Canadian and Quebec contexts.

A. The Purpose and Models of Language Policy and Legislation

Language (or linguistic) policy has been described in this way: “[Le] domaine des normes sociales visant à planifier et à aménager, en principe pour les raisons d’ordre public, le statut et l’utilisation d’une ou plusieurs langues dans un contexte politique donné.”¹⁵ The same author has also described the goal of enacting language policy:

Le but fondamental de toute législation linguistique est de régler, d’une façon ou d’une autre, les problèmes linguistiques qui découlent de ces contacts, conflits et inégalités linguistiques [sur un même territoire donné], en planifiant ou en aménageant juridiquement le statut et l’utilisation des langues en présence, tout en privilégiant davantage la protection, la défense ou la promotion d’une ou de plusieurs langues nommées, et ce, par le truchement d’obligations et de droits juridiques élaborés à cette fin.¹⁶

A State will enact language policy only in instances of linguistic heterogeneity, which can lead to problems between different groups on the same territory. In the case of groups with different languages, their co-existence usually results in the creation of relationships based on dominance. It has been suggested that there is an antagonism based on ethnic groups and language just as there is one based on class; the relationship of dominance is the major cause of conflict between these groups and classes.¹⁷ According to Braën, State intervention through linguistic policies falls under four main categories:

Pluralism seeks to preserve the identity of language groups within the State. The State grants these groups a certain latitude in the administration of their affairs. Sometimes this may go as far as the creation of autonomous regions. *Integration* seeks to bring about the unity of various language groups that make up the population of a State. By the adoption of special measures, these groups are allowed to conserve their language. *Assimilation* tends towards the creation of a linguistically homogeneous society. Members of the minority group or groups must then progressively abandon their traditions, their culture and their

¹⁵ J. Turi, “Quelques considérations sur le droit linguistique” (1986) 27 C. de D. 463 at 464.

¹⁶ J. Turi, “Le droit linguistique et les droits linguistiques” (1990) 31 C. de D. 642 at 643 [hereinafter “Le droit linguistique”]. The historian Ramsay Cook described language policy in Canada somewhat more succinctly: “... an attempt to answer the question: who has the right to use what language, when and where?” See “Language Policy and the Glossophagic State” in D. Schneiderman, *supra* note 10, 73 at 73.

¹⁷ A. Braën, “Language Rights” in M. Bastarache, ed., *Language Rights in Canada* (Montreal: Yvon Blais, 1987) 3 at 9.

language to adopt those of the majority group. Finally, *segregation* seeks to isolate the minority language group and to maintain it in a state of inferiority.¹⁸

For Turi, language policy, which can envisage both the official and the non-official use of language, can have several functions. It can make one or several languages the "official" language(s) used in communications with government agencies and administration, or favour the right of individuals to interact with the State in the language of their choice. It can have as an object the making of one or more languages the normal and everyday language of people in their work, business, and communications, or envisage that the language(s) in question respect certain grammatical rules and norms, particularly in official or technical domains. Finally, language policy can have as its objective the legal recognition of linguistic rights.¹⁹

As language policy can have as its objective one or more of these functions, the State can intervene to correct perceived problems by favouring one language at the expense of another and to create rights and obligations by regulating relations between individuals and the State, between individuals and public institutions, and in some cases, between individuals themselves. In this way, the State can play a role in shaping or reinforcing the demographic and socio-linguistic reality in its territory or jurisdiction, and attempt to shape or change the mentality and behaviour of the population.

The philosophies of personality and territoriality represent the two poles of language policy. The principle of personality promotes linguistic freedom of choice and allows the individual to function in the language of his or her choice. Since public agencies and institutions serving the individual must respond in the language chosen by that individual, this creates a situation of "institutional bilingualism" in a society with a majority and a minority language. In such a case, the institution adapts to the language of the individual and thus maintains the contact and competition between languages. In contrast, the principle of territoriality requires the individual to adapt to the public institutions, rather than the other way around. As a result, it puts constraints on the right of the individual to choose the language of service and attempts to place the rights of the collectivity above the right of the individual.

¹⁸ *Ibid.* at 9-10.

¹⁹ "Le droit linguistique", *supra* note 16 at 643-47. Turi develops a typology of language legislation according to its functions—official, normalising, standardising and liberal. It has been noted that language policy and legislation may not always have the desired effect. For example, the protection of individual rights (the right to education or services in the language of the individual) could have the effect of weakening the social and territorial cohesion of the minority the policy intends to protect. Moreover, the protection of collective rights (through territorial unilingualism in particular) could have the effect of restricting possibilities of social, economic or political advancement. See J.A. Laponce, "L'aménagement linguistique et les effets pervers" in P. Pupier & J. Woehrling, eds., *Language and Law, Proceedings of the First Conference of the International Institute of Comparative Linguistic Law* (Montreal: Wilson & Lafleur, 1989) 35.

The proponents of the territorial approach point to socio-linguistic studies indicating that the best way to bring about linguistic stability between two or more linguistic groups within the same political frontiers is to create linguistic enclaves, which protect the threatened language from competing languages with more economic utility and prestige. Belgium and Switzerland are frequently cited as two democratic countries that have successfully adopted the territorial approach. Since the application of the principle of territoriality in those countries has not been considered incompatible with the constitutional protection of the fundamental rights of minorities, it has even been suggested that this example could be used as sufficient justification to restrict the linguistic and cultural rights of Canadian minorities as expressed in section 27 and subsection 15(1) of the *Charter*.²⁰

Proponents of the territorial approach believe that measures should be taken to protect the languages in question. Either the dominant language must be reinforced at the expense of the minority language on a territory, or the language at risk must be supported in the face of another language that may possess the capacity to overwhelm it. In the Canadian context, the most extreme argument would hold that guarantees for minority languages are ineffective and harmful. In discussing the future of official language minorities, Maguet summarizes the application of this extreme approach as follows:

The argument is that it is preferable for Canada to divide into two linguistic islands: French in Quebec, English elsewhere. Canadian language policy should concentrate on reinforcements for French in Quebec, and English in other provinces. Protections for linguistic minorities should be withdrawn. The faster linguistic minorities disappear, the more stable will be our political system, the more rational the relation between Quebec, Ottawa and the other provinces, the more secure the positions of the English and French languages.²¹

Maguet criticizes the strict application of the territorial model in the Canadian context by noting that Canada is not like Switzerland or Belgium. For example, these two countries are territorially compact, while Canada is territorially diffuse. Canada must adapt to 970,000 Francophones living outside Quebec and 622,000 people whose first language is English in Quebec. Maguet notes that this "is a lot of people (6% of the total Canadian population) to condemn to extinction because they do not fit in with academic theory."²²

Those advocating the promotion of linguistic duality in Canada are faced with the dilemma that the French-speaking population outside Quebec is scattered, lacking in institutional resources, and prone to assimilation. Special measures must therefore be taken to protect and promote this endangered minority if it is to survive and flourish. Foucher believes that Francophones outside Quebec can choose to use their language

²⁰ *Supra* note 11, ss. 15(1), 27; J. Woehrling, "La Constitution canadienne et la protection des minorités ethniques" (1986) 27 C. de D. 171 at 185.

²¹ J. Maguet, "The Future of Official Language Minorities" (1986) 27 C. de D. 189 at 191.

²² *Ibid.* at 192.

only on three conditions: they must have the will to express their choice, the services sought have to be freely available, and their choice must be legitimate and normal.²³ Magnet underlines that a minority can only succeed if it is concentrated in large or small areas and if it is supported by a meaningful network of services and institutions.²⁴

The legitimacy of linguistic duality in Canada hinges on the continued existence of Francophone communities outside Quebec and the primacy of French in Quebec. It is for this reason that some authors have suggested that the best way to reconcile the interests of the French-speaking majority in Quebec with those of French-speaking minorities in the rest of Canada is an approach based on "asymmetry". This model would have the effect of permitting Quebec to exercise certain powers to protect and promote French that would not be extended to other provinces where the language of the English-speaking majority is not threatened. At the same time, this approach could entail strengthening or promoting the rights of Francophones outside Quebec while simply maintaining the rights of Anglophones in Quebec. This approach has the advantage of taking into account the different situations faced by the English-speaking minority in Quebec and the French-speaking minorities in the rest of Canada, and would allow Francophones outside Quebec to receive additional linguistic guarantees because of their special needs.²⁵ This model recognizes that French in Quebec, while the language of the majority, requires special protection because of the dominant position of English in North America. In addition, Francophones outside Quebec merit additional linguistic guarantees if their language is to survive and flourish in "English Canada". As we shall see, the federal approach to language policy has been based on the principle of personality, while Quebec has adopted a model based on territorialism, which has been modified by a number of successful court challenges. This paper now briefly reviews federal and Quebec language policy and legislation and examines the conflicts between them.

²³ P. Foucher, "Droits linguistiques: à l'image des cercles concentriques" (1992) 41 U.N.B.L.J. 171.

²⁴ *Supra* note 21 at 195.

²⁵ See J. Woerhling, "La Constitution canadienne et les droits linguistiques: convergences et divergences entre les intérêts des Québécois francophones, de la minorité anglo-québécoise et des minorités francophones du Canada" in S. Léger, ed., *Les droits linguistiques au Canada: collisions ou collisions?* (Ottawa: University of Ottawa, 1993) 53 at 79-83. The author points out that a certain asymmetry already exists in that s. 23(1)(a) of the Canadian Constitution (the universal clause for education) is inoperative in Quebec until the Quebec government or National Assembly approves it. See also P. Patenaude, "Les droits linguistiques au Canada: de l'intolérance à l'utopie" (1992) 41 U.N.B.L.J. 159, and B. Pelletier, "Les rapports de force entre les majorités et les minorités de langue officielle au Canada" (1994) 24 R.D.U.S. 255.

B. Language Policy and Legislation in Canada and Quebec

1. Federal Language Policy

The language policy of the federal government is exemplified by the *Official Languages Act*, passed in 1969 and revised in 1988.²⁶ The origins of the legislation can be found in the creation, in 1963, of the Royal Commission on Bilingualism and Biculturalism, mandated to report on the state of bilingualism and biculturalism in Canada and to recommend what steps should be taken to develop the Canadian Confederation on the basis of an equal partnership between “the two founding races”. The Commission found that Francophones outside Quebec had difficulty in surviving or were in danger of assimilation, that Francophones in Quebec were in a position of economic inferiority, that Francophones were under-represented in the Public Service of Canada, and that bilingualism was generally a phenomenon found only among Francophones.²⁷ The *Official Languages Act* conferred official and equal status on French and English within the federal government, and specifically required all federal institutions to provide services in English and French in the National Capital Region, regions designated “bilingual”, and other settings where there was “significant demand” for services. Moreover, the *Official Languages Act* required all federal courts and quasi-judicial bodies to be bilingual and documents destined for the general public to be published in both official languages. The *Official Languages Act* also created the position of the Commissioner of Official Languages to oversee its application and act as an ombudsman of official languages.²⁸

In addition to ensuring respect for French and English within the apparatus of the federal government and to setting out the responsibilities of federal institutions, the purpose of the *Official Languages Act* is to

support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society.²⁹

Equally important are the principles on which the *Official Languages Act* is founded. The Preamble acknowledges that French and English are the official languages of Canada and recognizes the role of the Government of Canada in supporting official language minorities:

And whereas the Government of Canada is committed to enhancing the vitality and supporting the development of English and French linguistic minority communities, as an integral part of the two official language communities of Canada, and to fostering full recognition and use of English and French in Canadian society;

²⁶ R.S.C. 1985 (4th Supp.), c. 31.

²⁷ For a summary of the Commission’s findings, see *supra* note 17 at 35.

²⁸ *Supra* note 26, Part IX, ss. 49-75.

²⁹ *Ibid.*, s. 2(b).

And whereas the Government of Canada is committed to cooperating with provincial governments and their institutions to support the development of English and French linguistic minority communities, to provide services in both languages, to respect the constitutional guarantees of minority language educational rights and to enhance opportunities for all to learn both English and French.³⁰

The Preamble also recognizes the importance of preserving and supporting the use of languages other than English and French while strengthening the status and use of the official languages.

Part VII of the *Official Languages Act* establishes government policy designed to advance the use of English and French. Section 41 states that the Government of Canada is committed to

- (a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and
- (b) fostering the full recognition and use of both English and French in Canadian society.³¹

Furthermore, the Minister of Canadian Heritage shall take the measures considered appropriate to advance the equality and use of English and French in Canadian society.³² The federal government has set up a number of initiatives that reflect the orientations of this mandate. These include the support of minority groups in their attempts to obtain provincial recognition of their legal rights and special linguistic needs, the fostering and financing of minority language education, the right to which has been constitutionally recognized since 1982,³³ the learning of English and French as a second language, and the support of organizations to improve their ability to do business in both official languages.³⁴

The measures undertaken by the Government of Canada represent a policy of integration, designed to permit both official language groups to preserve their identity. The federal government favours an institutional rather than a territorial approach, designed to recognize the equality of French and English in the federal context. The presence of French-speaking populations across the country requires that the federal government add an "element of pluralism" to this policy.³⁵ While it seems that the *Of-*

³⁰ *Ibid.*

³¹ *Ibid.*, s. 41. It was on the basis of s. 41 that the Commissioner of Official Languages wrote to Quebec's Minister of Health and Social Services reminding him of the importance of linguistic interactions between health and social services professionals and patients or clients and expressing the hope that access to services in English would not be diminished. See Commissioner of Official Languages, Information Bulletin, vol. 4 no. 3, May 1998.

³² *Supra* note 26, s. 43.

³³ *Sec Charter*, *supra* note 11, s. 23.

³⁴ Sec S. Beatty, "A New Official Languages Act for Canada—Its Scope and Implications" in Pupier & Woehrling, *supra* note 19, 185 at 190-91.

³⁵ *Supra* note 17 at 37.

Official Languages Act was passed, at least in part, to remedy the situation of Francophones, Quebec Anglophones can also successfully invoke the letter and spirit of the legislation to benefit from government programs envisaging official language minorities and to call for services in English within the province.

2. Quebec Language Policy

The position of Quebec in Canada is unique in that the vast majority of its population is French-speaking. However, although a majority at the provincial level, this population represents a minority within the Canadian federation. Although English is the minority language in Quebec, it remains the dominant language both in Canada and in North America. This dynamic has contributed to periods of tension in Quebec and has inspired the adoption of linguistic policies and legislation.

While federal legislation has encouraged official bilingualism, Quebec has, through the passing of the *Official Language Act*³⁶ and the *Charter of the French language*, attempted to build a society where French is not only the official language, but also the common language of all Quebecers. The goal, as stated in *Québec's Policy on the French Language* in 1977, was clear:

The Québec we wish to build will be essentially French. The fact that the majority of its population is French will be clearly visible—at work, in communications, and in the countryside. It will also be a country in which the traditional balance of power will be altered, especially in regard to the economy.³⁷

This policy noted several factors that required corrective State intervention. First, demographic analysis revealed that there was a decline in the number of Francophones in Quebec and a reduction in the weight of Quebec in the Canadian federation. This was exacerbated by the tendency of immigrants to integrate into Quebec's English-speaking minority. Second, the English language dominated the business world and Francophones frequently had to work in English. Moreover, management positions were generally occupied by unilingual Anglophones, while Francophones frequently occupied low-paying jobs. Third, the Canadian federation disadvantaged Francophones since "English Canada", for whom the survival of French was an anomaly, "rêve toujours d'assimilation". Fourth, people were generally dissatisfied with the quality of French and parents desired better French-language teaching in the school system. Finally, while Quebecers in general had ambivalent feelings about the quality of language and how to ensure the predominance of French, there was a strong belief that redress was necessary.³⁸ The Preamble of the *Charter of the French language*, passed later that year, made clear that its intention was to correct these problems:

³⁶ *Official Language Act*, S.Q. 1974, c. 6 (better known as *Bill 22*).

³⁷ C. Laurin, Minister of State for Cultural Development, *Québec's Policy on the French Language* (Quebec: Éditeur officiel du Québec, 1977) at 52.

³⁸ *Le français langue commune*, *supra* note 10 at 14.

Whereas the National Assembly of Quebec recognizes that Quebecers wish to see the quality and influence of the French language assured, and is resolved therefore to make French the language of Government and the Law, as well as the normal and everyday language of work, instruction, communication, commerce and business.³⁹

The *Charter of the French language* declared French the official language of Quebec, as well as the language of government, the courts, and public and para-public institutions and agencies. English versions of legislation had no validity. French became the language of work and business. Access to English education was limited to those whose father or mother had attended English school in Quebec. A number of constitutional challenges before the courts have undermined the original intention of parts of the *Charter of the French language* in areas such as access to education,⁴⁰ the language of legislation and justice,⁴¹ and the language of business.⁴²

In spite of these successful challenges, the Comité interministériel sur la situation de la langue française ("Interministerial Committee"), mandated in 1995 to describe and analyze the evolution of the situation of the French language in Quebec since the passing of the *Charter of the French language*, concluded that there was visible improvement in the generalized use of French. More particularly, its analysis revealed an increase in the number of Francophones in the job market, an almost complete reduction in wage disparities between Francophones and Anglophones, and attendance at French school by the vast majority of young immigrants. Moreover, there was an increase in the knowledge of French by Anglophones and "allophones", in the use of French in business, and in the provision of service in French in stores and businesses. There was also a new tendency for immigrants to become part of the French-speaking majority. Signs in Montreal had become predominantly French.⁴³

Quebec's language policy and legislation represent a predominantly territorial model, with some exceptions. While the *Charter of the French language* envisaged some of these exceptions, such as the recognition of the institutions of the English-speaking community and some limited bilingualism in civil administration in certain cases, other exceptions have been forced on Quebec following successful court challenges. Thus the right to English education, initially limited to those whose parents received the majority of their education in English in Quebec, has been broadened in light of the Supreme Court's judgment in *Protestant School Boards* to include education received in English anywhere in Canada. Moreover, in spite of the stated goal to make French the normal and everyday language of discourse, much official information is available in English as well as in French, resulting in a certain amount of insti-

³⁹ *Supra* note 12.

⁴⁰ *Quebec (A.G.) v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321 [hereinafter *Protestant School Boards*].

⁴¹ *Quebec (A.G.) v. Blaikie n° 1*, [1979] 2 S.C.R. 1016, 49 C.C.C. (2d) 359.

⁴² *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577 [hereinafter *Ford*]; *Devine v. Quebec (A.G.)*, [1988] 2 S.C.R. 790, 55 D.L.R. (4th) 641 [hereinafter *Devine*].

⁴³ *Le français langue commune*, *supra* note 10 at 220.

tutional bilingualism. In 1995, eighty percent of a group of thirty-five ministries and government organizations had English versions of the majority of their publications destined for public consumption, and twelve percent of the publications of the Quebec government were available in English.⁴⁴ Many official forms are available in English on request, and recorded messages in departments dealing with the public are also frequently available in English at the push of a button, as is the official Internet site of the Quebec government.

3. Conflicts between Federal and Quebec Language Policy

These federal and Quebec language policies have different goals and are in conflict with each other. The federal approach uses the principle of personality, letting the individual determine whether the language of service be English or French. While there are certain prescribed limits, such as the designation of bilingual districts and requirement for sufficient demand, the federal approach is designed to achieve equality between French and English in federal institutions across the country. In addition, federal language policy, as stated in the Preamble of the *Official Languages Act*, promotes the use of languages other than English and French, adding a further threat to the primacy of French in Quebec. This federal approach contrasts with Quebec's desire to make French the common language of all Quebecers and its policies geared to realizing this goal. Moreover, federal policies and intervention are perceived by some as specifically undermining Quebec's linguistic goals. In discussing the power of the Minister of Canadian Heritage to subsidize English-speaking groups in Quebec under the *Official Languages Act*,⁴⁵ the Interministerial Committee concluded not only that this represents federal intrusion into a realm of provincial competence, but also that the competition between the *Official Languages Act* and the *Charter of the French language* "ne peut être que néfaste à la réalisation des objectifs de cette dernière."⁴⁶ Only a constitutional amendment or sovereignty would give Quebec full powers over language, both opposed by the vast majority of Quebec Anglophones, who see the federal government as a protector of their linguistic rights.

The development of the legal right to health and social services in English is interesting to analyze in light of the official status of French in Quebec, the stated desire to make French the common language of all Quebecers, and the tension between competing language policies.

II. Evolution of the Right to Health and Social Services in English (1984-1994)

The right to services in general was introduced in 1971 as part of the reforms in the health and social services sector. While introduction of the right elicited much

⁴⁴ *Ibid.* at 112.

⁴⁵ *Supra* note 26, s. 43.

⁴⁶ *Le français langue commune*, *supra* note 10 at 41-42.

comment, there was no real consensus as to what it represented either factually or juridically. In parliamentary hearings prior to the passing of the legislation, many groups urged that the right to service be included, but without a clear attempt to define exactly what the right represented. During the Parliamentary Commission, the Minister introducing the legislation noted that the right was not "*sanctionnable*" (i.e., that it entailed no sanctions against its infringement), but that it consisted rather of a moral obligation on public institutions to provide the services ascribed to them in law.⁴⁷

The right to services in English did not become an issue until the 1980s, when further modifications to the health and social services system appeared to jeopardize access to English services.

A. The Campaign for Legal Guarantees to Services in English (1984-1985)

The campaign for legal guarantees of English services was spearheaded by Alliance Quebec, the principal English-speaking rights group. The Quebec government, as part of a reform, was planning to implement changes to the organization and structures of the health and social services system in 1984. In particular, this entailed the transfer of personnel and budgets from social service centres ("CSS") to the emerging CLSC network, as well as the regionalization and sub-regionalization of services. In concrete terms, this involved the transfer of professionals from Ville-Marie Social Services, the only CSS mandated to deal with English-speaking users, into Montreal-based CLSCs unused to providing English-language services and sometimes ill-equipped to do so. Outside the Montreal region, English-speaking professionals, sometimes working as part of multi-disciplinary teams in predominantly French-speaking CSSs, faced dispersal into the CLSC network. At a press conference organized by Alliance Quebec in November 1984, Eric Maldoff, president of the organization, underlined the fundamental principles that had to inform any restructuring:

Our community must be guaranteed access to social services in our language. There can be no treatment without communication. Failure to provide this essential guarantee is nothing less than the overt exclusion of the English-speaking community from universal access to social services.

⁴⁷ A. Lajoie, "L'émergence d'un droit social: le droit aux services" in A. Lajoie *et al.*, eds., *Pour une approche critique du droit de la santé* (Montreal: Centre de recherche en droit public, 1987) 21 at 43. Analyses of this and subsequent health and social services legislation note the limited nature of the right to services. See e.g. A. Lajoie, "Le droit aux services: une réforme en peau de chagrin" in V. Lemieux *et al.*, eds., *Le système de santé au Québec* (Sainte-Foy, Qc.: Presses de l'Université Laval, 1994) 129; Y. Martin, "Le nouveau processus d'examen des plaintes dans le cadre du réseau de la santé et des services sociaux: doit-on s'en plaindre?" (1992) 23 R.D.U.S. 239; and P. Molinari, "L'accès aux soins de santé: réflexion sur les fondements juridiques de l'exclusion" in L. Lamarche & P. Bosset, eds., *Les droits de la personne et les enjeux de la médecine moderne* (Sainte-Foy, Qc.: Presses de l'Université Laval, 1996) at 43.

The socio-cultural and linguistic mandate of our existing institutional network must be acknowledged and respected. This does not negate or reduce, in any manner, the willingness of our institutions to serve everyone in their regions. However, without the acknowledgment of the special vocation and responsibility of our institutions to the English-speaking community, we are being asked to acquiesce in an unacceptable loss for our community.⁴⁸

An editorial in *The Gazette* several days later picked up on this issue and indicated the nature of the problem:

The network of social services for English-speaking Quebecers, so painstakingly built over generations, is in danger.

If this network is to survive, the Quebec government's bureaucratic and insensitive plan of reorganization can not be allowed to proceed as it is now envisaged ... The government, it is now clear, has failed to honor its promise to respect the rights of English-speaking Quebecers.

The transfer of staff and budget from the only anglophone social service centre—Ville Marie—to local community centres is being planned without respect for traditions and without proper guarantees that services will be maintained.

The plan to "sectorize" social services, that is to require citizens to apply for services only at institutions within their residential zones, is in conflict with every citizen's right to choose his institutions and professionals. But it could have especially appalling results for anglophones.

For example: The Taylor-Thibodeau centre provides residential care and other support in English for intellectually handicapped children and adults. The reorganization would confine the centre's mandate to the western part of Montreal-Island.

English-speaking families in the eastern half of the Island would not be allowed to take their handicapped children to Taylor-Thibodeau, as they do now. They would have to go to a local institution, which in most cases would have neither the legal obligation nor the capacity to help the child in his own language.

This unbelievably callous approach has no place in social services ...⁴⁹

The campaign led by Alliance Quebec in 1984 and 1985 in favour of legislative guarantees included a number of initiatives combining community and institutional action. The group coordinated a task force of twelve institutions and community organizations that in March 1984 presented a brief to the Montreal regional council dealing with a number of issues, including the completion of the CLSC network, the sectorization of services, youth and social services, and the private and voluntary sectors. This task force then instituted a community consultation to inform English-speaking Montrealers of the dangers to the institutional network as a result of the proposed restructuring of services. Alliance Quebec met the Montreal regional council

⁴⁸ Alliance Quebec, Press Statement, "On the Future of English-language Social Service Institutions" (22 November 1984).

⁴⁹ "Network in Danger" (27 November 1984) B2.

and the Fédération des CLSC to present its position on the restructuring, and headed a delegation to meet with the Minister of Health and Social Services to review the issues and concerns facing the English-speaking community. It also organized task forces on English services in the regions of the Montérégie and Laurentides-Lanaudière, ensured that its chapters outside the Montreal region met with the local regional councils to review matters of linguistic accessibility to services, organized letter writing campaigns, and met with editorial boards, journalists, and union representatives.

The organization coordinated a three-week radio campaign in both languages to bring attention to the issues. It published both French and English versions of a newspaper advertisement, designed to complement the radio campaign and heighten the awareness of French- and English-speaking Quebecers, in *Le Devoir* and *The Gazette*.

At the same time, Alliance Quebec solicited and submitted to the Government of Quebec 345 resolutions from schools, hospitals, social service institutions, municipalities, and community groups. These resolutions demanded that the government enact legislative measures to guarantee the continued existence of the network of English-language social service institutions, adopt legislative guarantees for the English-speaking population to receive health and social services in its own language, and ensure by consultation that the rights of linguistic and cultural minorities be protected in any restructuring of services.

In March 1985, subsequent to Alliance Quebec's intervention with the Nelligan, Notre-Dame-de-Grâce, and L'Acadie riding associations, the Quebec Liberal Party at its policy convention unanimously adopted a resolution supporting a guarantee in law for English-language institutions and services. In June 1985, Alliance Quebec mobilized six hundred people to attend the annual general meeting of the Montreal regional council to express the community's concerns about the issues of service delivery and legislative guarantees. The call for legislative guarantees was echoed once again by *The Gazette* in a series of editorials.⁵⁰ The fall of 1985 saw the Parti Québécois government and the Quebec Liberal Party opposition position themselves for the provincial election that would take place on December 2, 1995. Robert Bourassa, then Leader of the Opposition, promised that he would undo the changes proposed by the Parti Québécois government and suspend any modification of the Ville-Marie Social Services Centre until after the completion of the work of the Rochon Commission, mandated by the government in June 1985 to conduct a thirty-month study into the restructuring of health and social services. At the same time, he committed a future Liberal government to supporting the existence and development of English-speaking

⁵⁰ "Ensure English Services" (27 August 1985) B2; "Let's Have Guarantees" (13 September 1985) B2; "An Unwise Experiment" (20 September 1985) B2; "Government Out of Step" (25 September 1985) B2. As the editorials make clear, the catalyst for the campaign for legal guarantees to services was the restructuring of services in Montreal and elsewhere in Quebec, which would render access to English services more difficult.

institutions and health and social services.⁵¹ After some backtracking, Pierre-Marc Johnson, then Premier, committed the Parti Québécois government to guaranteeing English social services. When the government proceeded in any case with the restructuring of services in Montreal, the Ville-Marie Social Services Centre defied the government directive and issued court proceedings to halt the transfer.⁵² The Centre desisted in its action after the victory of the Quebec Liberal Party in the election.

B. Enshrining the Right to Services in English: Bill 142 (1986)

On November 12, 1986, to respect its electoral commitment, the Liberal government introduced a bill amending the health and social services legislation.⁵³ The legislation was opposed by the Parti Québécois and the government had to invoke closure to pass the bill on December 18, 1986. The bill was given royal assent the following day.

Bill 142 included four principal components. First, it amended the existing health and social services legislation,⁵⁴ giving the Minister of Health and Social Services the responsibility to ensure that services reflected the linguistic and socio-cultural characteristics of each region. Second, it granted a qualified right for English-speaking people to receive services in English:

Every English-speaking person is entitled to receive health services and social services in the English language, taking into account the organization and resources of the establishments providing such services and to the extent provided by an access program. ...⁵⁵

Third, it gave the regional health and social services councils the responsibility to develop programs of access to English services while taking into account the organization and resources of the institutions in the regions. Finally, it provided for the government to designate by regulation which institutions recognized under paragraph 113(f) of the *Charter of the French language* (those with the right to function in both French and another language) would be bound to make all their services available in English.⁵⁶

The intention of the government can be discerned from the comments of Thérèse Lavoie-Roux, Minister of Health and Social Services, during the debates on the legislation in the National Assembly:

⁵¹ B. Aubin, "I'd Scrap Change in English Social Services: Bourassa" *The Gazette* (24 September 1985) A1.

⁵² The Ville-Marie Social Services Centre was to transfer 157 of its staff of 600 to CLSCs. It countered with a request that the transfers be limited to 82 workers, and that the government drop its plan to transfer school social workers and nurses.

⁵³ *Bill 142*, *supra* note 1.

⁵⁴ *Former Health and Social Services Act*, *supra* note 7.

⁵⁵ *Bill 142*, *supra* note 1, s. 3.

⁵⁶ *Supra* note 12, s. 113(f).

Ce que nous voulions faire par ce projet de loi, c'est de garantir l'exercice d'un droit, consacrer dans la loi le droit pour la minorité anglophone de recevoir des services dans le domaine de la santé et des services sociaux dans sa langue. Un droit qui n'est pas constitutionnellement ou légalement reconnu n'a pas de portée opératoire réelle. Et s'il est vrai que, dans les faits, ces services leur sont, même actuellement, dans une large mesure, prodigués dans leur langue, ils demeurent néanmoins soumis à la bonne volonté de celui ou celle qui dispense les services ...

Actuellement, le dispensateur de services a la discrétion de les offrir ou non en langue anglaise. Par la reconnaissance du droit et les mesures pour le faire valoir, un élément majeur intervient du fait que le bénéficiaire pourra effectivement les obtenir en langue anglaise.⁵⁷

In responding to questions raised by the Opposition about *Bill 142's* effects on the *Charter of the French language* and the integration of immigrants, the Minister noted that the language of work and education were the tools favoured by the government to integrate immigrants into Quebec's French-speaking majority, while the purpose of the legislation was the provision of adequate services in the sense of the health and social services legislation. She contended that the introduction of the right to services in English was a service, rather than a linguistic matter, and that neither the purpose nor the content of the *Charter of the French language* would be compromised in any way. *Bill 142*, she asserted, did not question the commitment of the government to ensure that French remained the common language of all Quebecers. For the Minister, language comprised an essential tool of service delivery:

La question centrale est de reconnaître une relation entre d'une part la prestation de services de santé et de services sociaux et d'autre part la langue dans laquelle ces services sont dispensés. Concrètement, la dispensation des services englobe l'ensemble des gestes et des actions qui constituent le tissu de communication entre le dispensateur de services et un bénéficiaire. Il ne peut s'agir simplement dans ce domaine que de poser des gestes ou d'appliquer des techniques, mais le dispensateur de services doit au premier chef entrer en communication avec le bénéficiaire.⁵⁸

In granting this right to English-speaking Quebecers, the Minister differentiated the historic rights of that community from Quebec's different cultural communities, who had nonetheless equally legitimate concerns to have services adapted to their needs. However, in noting that the right was granted to English-speaking persons, she indicated that the intention of the government was not to limit the right to people whose first language was English, but to extend it to those who were uncomfortable expressing their needs in French: "Pour nous, ce sont des personnes qui, au moment où elles requièrent des services de santé et des services sociaux, ne se sentent plus capables d'exprimer leurs besoins dans cette langue."⁵⁹

⁵⁷ Quebec, National Assembly, *Journal des débats* (8 December 1986) at 4929.

⁵⁸ *Ibid.* at 4933.

⁵⁹ *Ibid.* at 4934.

For the Minister of Health and Social Services, permitting members of the different cultural communities who had over the years been integrated into the Anglophone community and who were more comfortable expressing their needs in English to avail themselves of English services for humanitarian reasons would not threaten the use of French in Quebec. These people, for all intents and purposes, formed part of the Anglophone community.⁶⁰ Noting that the use of the expression "English-speaking" had provoked concerns on the part of the Opposition, the Minister pointed out that this was the term used in the Preamble of the *Charter of the French language*, passed nine years earlier while the Parti Québécois was in power. She also underlined the incoherence of the opposition to the bill by the Parti Québécois, whose electoral program and constitutional position had committed itself to guaranteeing the same rights it was now opposing, and whose comments in the fifteen hours of debate in the Parliamentary Commission frequently referred to issues "qui leur étaient chers dans les années 1978-1979 tels: la Conquête, le rapport Durham, les minorités francophones du Manitoba."⁶¹

Unlike the Liberal government, which characterized the legislation as essentially facilitating access to services, the Parti Québécois defined it not as social-affairs legislation, but instead a linguistic law, and accused the government of weakening its commitment to the use of French in Quebec. Moreover, Pierre-Marc Johnson, now Leader of the Opposition, invoked the unequal situation between Quebec's English-speaking minority and French-speaking minorities elsewhere in Canada:

Quand on discute des questions linguistiques, quand on discute des rapports entre communautés linguistiques au Canada et au Québec, en particulier, il faut avoir à l'esprit qu'il n'y a pas de symétrie et de réciprocité entre la minorité anglophone du Québec et les minorités hors Québec qui sont francophones. Je m'explique. Peut-être, faut-il faire ces rappels historiques, malheureusement, alors que ce débat s'enclenche autour de quelque chose qui relève essentiellement, là aussi, du droit collectif et non pas des droits individuels, c'est-à-dire du droit des minorités. On sait qu'il n'y a même pas un siècle, il y avait une majorité des gens d'expression française au Manitoba. On sait ... qu'aujourd'hui ils sont moins nombreux que d'autres minorités ou communautés culturelles.⁶²

⁶⁰ *Ibid.* at 5129.

⁶¹ *Ibid.* at 5128.

⁶² *Ibid.* at 4935. Despite the Parti Québécois opposition to the legislation granting the legal right to services in English, Pierre-Marc Johnson was by no means opposed to the availability of services in English. The letter from P.-M. Johnson, Minister of Social Affairs, to Reed Scowen, Liberal M.N.A. for Notre-Dame-de-Grâce (22 June 1983), states:

Vous serez d'accord avec moi pour reconnaître que l'unilinguisme Anglophone est devenu un anachronisme dans la société francophone que constitue le Québec. Ceci étant dit, la réalité demeure ce qu'elle est et l'humanisme et le sens commun ont aussi droit de cité. Il m'apparaît en effet important que les personnes nécessitant des soins puissent communiquer adéquatement, dans les situations d'urgence et de soins intusifs notamment. Par exemple, on imaginerait mal que le Centre de coordination des Urgences-

The content and effects of the right were discussed by the Minister of Health and Social Services during the Parliamentary debate leading to passage of the bill. *Bill 142* would not create a parallel system of health and social services for the English-speaking community. Instead, some institutions would be designated to provide some or all of their services in English while forming part of the institutional network and respecting all other legislation, including the *Charter of the French language*. Nor would new institutions be created specifically to provide services in English. *Bill 142* created a mechanism whereby the regional councils would develop, in collaboration with the institutions in their region, detailed plans to ensure the delivery of services in English to their English-speaking residents. The bill would not oblige each institution to offer services in English or to have bilingual staff.

Bill 142 was designed to ensure that English-speaking people living in all regions of Quebec would have access to some services in English. This element was of particular importance in those regions where there were relatively few English-speaking people and no institutions historically affiliated with the community.⁶³ *Bill 142* also provided for the health and social services system to promote access to services for the different cultural communities in their own language. However, there was no legal obligation on regional councils or institutions to develop special programs for cultural communities.

C. Implementation of the Right: The First Access Programs to English Services (1989)

Although *Bill 142* was passed in December 1986, and came into force on January 7, 1987, the law was not implemented until over two years later when the government approved the first access programs for English services. The delay can be explained by the request by the regional councils to postpone submission of their programs until the spring of 1989, whereas the original deadline for their completion had been set for the end of 1987.

In April 1988, the government passed the order in council establishing which institutions recognized under paragraph 113(f) of the *Charter of the French language*

Santé ne puisse répondre en tout temps en anglais aussi bien qu'en français. Il va de même pour les salles d'urgence et les soins intensifs. Nonobstant l'état de la législation, la coutume et le sens commun font que les établissements du réseau des Affaires sociales, dans la région de Montréal notamment mais aussi dans toutes les régions du Québec, font tout dans leur pouvoir pour procurer aux bénéficiaires anglophones des services dans les conditions les meilleures possibles pour assurer leur bien-être.

⁶³ In eight of the eleven administrative regions in place at the time, the proportion of people who spoke English at home represented less than nine percent of the total population. In regions such as these, it was recognized that not all services could be provided within the region. The Minister noted: "En effet, dans certaines régions du Québec, compte tenu du très faible taux de la population d'expression anglaise, il vaudrait mieux, comme d'ailleurs, cela se fait maintenant dans une certaine mesure particulièrement eu égard aux services hospitaliers, qu'il y ait des ententes interrégionales pour la livraison des services" (*supra* note 57 (17 December 1986) at 5643).

would be obliged to render all their services in English.⁶⁴ The regulation designated 79 institutions among the 91 with bilingual status. Fifty-five were in Montreal, while the rest were scattered around the rest of the province. These ranged from some of Quebec's major hospitals to small private nursing homes with few residents. There were 17 acute-care and 12 long-term care hospitals, in addition to 14 rehabilitation centres, 31 nursing homes, and 2 social service centres. This number represented 9.2% of the total of 858 institutions in Quebec.

From April to August 1989, under the authority of the Junior Minister for Health and Social Services, Louise Robic, the government passed the orders in council putting into force the access programs for English services. The programs had, in conformity with the legislation, been developed by the regional councils in collaboration with the institutions in their region.⁶⁵ The government identified 170 institutions that were to provide some or all of their services in English. With the 79 institutions already identified by regulation, the total number of institutions providing all or some specified services in English represented approximately 29% of Quebec's health and social service institutions. The press releases issued at this time reinforced the notion that the access programs were intended to enable English-speaking Quebecers to receive the same services provided to the French-speaking majority, while taking into account the limitations expressed in the law.⁶⁶

⁶⁴ O.C. 580-88, 4 May 1988 G.O.Q.II.2559. *An Act to amend the Charter of the French language*, S.Q. 1993, c. 40, s. 42 [hereinafter *Bill 86*] rescinded s. 113(f) and replaced it with s. 29.1. This section, found in the chapter on the language of the civil administration, now governs the recognition of institutions which provide services to persons who, in the majority, speak a language other than French. However, recognition under s. 29.1 of the *Charter of the French language*, *supra* note 12, does not protect institutions from closure, merger or unification in cases of structural transformation of the health and social services system.

⁶⁵ This process involved a number of steps. First, the Deputy Minister invited the regional councils to submit an action plan. The regional council named a person to manage the process, formed a committee attached to the board of directors and determined the means whereby the English-speaking population would be involved. The council undertook a demographic study of the English-speaking population of the region, made an inventory of the services provided by its institutions, and identified the needs of the English-speaking population. It subsequently drew up a plan of action, submitted this to its special committee, consulted representatives of the English-speaking population, and presented the proposal to the institutions to receive their comments and reactions. If the proposal were modified, the committee and the institutions would be consulted once again. The proposal was then submitted to the board of directors of the regional council for approval and subsequently to the Ministry, which reviewed the plan to ensure it conformed with the criteria established at the outset and solicited further information from the regional councils if necessary. See Quebec, Ministère de la Santé et des Services sociaux, *Services de santé et services sociaux en langue anglaise, rapport d'étape* (Gouvernement du Québec, 1990) at Annexe 2.1, Cheminement type du plan d'action déposé par un CRSSS en vue d'approbation par le Conseil des ministres et la publication d'un décret.

⁶⁶ See e.g. the press release issued to announce the adoption of the access program for the Gaspé and Îles-de-la-Madeleine region:

Bill 142, adopted in December 1986, stipulates that the regional health and social services councils (CRSSS) are to prepare access plans that will enable English-

In May 1989, the Quebec and Canadian governments finalized an agreement whereby the federal government would support Quebec's initiatives to facilitate accessibility to English services ("Canada-Quebec Agreement"). This one-time five-year agreement, under the auspices of the federal government's official languages program, provided for a federal contribution to the expenses incurred to implement the provisions in *Bill 142*.⁶⁷ The funding for the first few years of the agreement was established at \$1,110,000, contributed equally by the two levels of government. The budget was used to hire a coordinator of English-language services in each regional council and permitted such complementary activities as the preparation and translation of documents, English courses for French-speaking personnel serving English-speaking users, projects initiated by community groups, and the holding of conferences. The presence of the coordinator was the most significant element of the agreement, since it facilitated the presence, in many regions for the first time, of an English-speaking staff member within the regional council structure.

The eleven regional councils calculated that budgets in the amount of \$1,594,000 would be needed for the year 1989-90 to implement the access programs.⁶⁸ The Ministry advised the councils that the implementation of the access programs would have to come out of the existing budgets of institutions. However, the Canada-Quebec Agreement provided the means, to a great extent, for the regions to implement their programs.

In the meantime, relations between the Quebec government and the English-speaking community had become acrimonious. The Supreme Court in *Foré*⁶⁹ had declared sections 58 and 69 of the *Charter of the French language* inoperative to the extent that they prescribed French unilingualism in commercial signs, not only as infringing the right of freedom of expression guaranteed by the *Charter*, but also as incompatible with the right to equality guaranteed by the *Quebec Charter*. To escape the consequences of the judgment, the government under Robert Bourassa passed, in December 1988, legislation containing a dual dispensation from the application of both charters, and thus restoring the validity, in modified form, of the *Charter of the French language*.⁷⁰

speaking Quebecers to receive in their language the health and social services normally provided to Quebec's entire population. The law also stipulates that every English-speaking person is entitled to receive health services and social services in the English language, taking into account the organization and resources of the establishments providing such services and to the extent provided by an access plan (Ministère de la Santé et des Services sociaux, Communiqué (2 June 1989) [emphasis in original]).

⁶⁷ The agreement was renewed in 1993 for a further five year period from 1994 to 1999.

⁶⁸ Quebec, Ministère de la santé et des services sociaux, *Mémoires au conseil des ministres: Programme d'accès à des services de santé et des services sociaux en langue anglaise pour les régions visées par la loi 142* (Gouvernement du Québec, 12 October 1989) [hereinafter *Mémoires au conseil*].

⁶⁹ *Supra* note 42.

⁷⁰ *An Act amending the Charter of the French language*, S.Q. 1988, c. 54 [hereinafter *Bill 178*]. See also Woehrling, *supra* note 10 at 208-11.

The passing of *Bill 178* created a storm of protest in the English-speaking community, led to the desertion of the Quebec Liberal Party by many English-speaking members, and provoked the creation of a new political party, the Equality Party, to contest the next provincial election. With a provincial election held in September 1989, it was not surprising that the government ensured the adoption of all access programs before the election so as not to further alienate English-speaking voters.

Moreover, during the election campaign, the Liberal government promised to spend \$3.5 million to create positions in the network to provide services already available to French-speaking Quebecers but unavailable in English. Following its re-election, the government allocated \$1.5 million in December 1990 to create 29.8 permanent positions in the health and social services network to respond to unmet needs. The remaining \$2 million was never made available.

The Ministry of Health and Social Services also initiated the creation of a documentation centre, set up under the auspices of the Fédération des CLSC, to facilitate access to the wealth of health and social services information available in English but not always accessible in the regions. This centre was funded by the Canada-Quebec Agreement.

The implementation of *Bill 142* did not appear to elicit negative reactions in French-speaking Quebec. For example, Gilles Lesage made this comment in an editorial in *Le Devoir*:

Après deux ans et demi, la loi 142 entre finalement en vigueur. Ce n'est pas trop tôt. Il n'y a pas lieu de pavoiser. Il n'y a pas lieu non plus de partir en peur ou de faire preuve de mesquinerie. Ce n'est pas une loi qui élargit des droits ou en accorde de nouveaux aux anglophones. C'est, pour l'heure, la reconnaissance pure et simple de certains services que l'on veut rendre plus accessibles à ceux qui y ont droit ...

La crainte électorale est le commencement de la sagesse politique. La mise en œuvre de la loi 142 n'enlève rien des francophones. Elle rassure, tardivement et partiellement, la communauté anglophone.⁷¹

D. Consolidation of the Right: Bill 120 (1991) and Bill 15 (1992)

In 1991, Quebec instituted another major reform of the health and social services system, including the creation of new administrative regions and increased responsibilities for the regions.⁷² For the English-speaking community, there were several points of interest. In addition to reaffirming the provisions in *Bill 142*, *Bill 120* consolidated the right of English-speaking persons in a number of ways.

⁷¹ "Des services plus accessibles: pas de mesquinerie avec la loi 142 pour les anglophones" (27 May 1989) A8.

⁷² *Bill 120*, *supra* note 7.

The new legislation established "an organizational structure of human, material and financial resources designed ... to take into account the distinctive geographical, linguistic, sociocultural, ethnocultural and socioeconomic characteristics of each region."⁷³ Moreover, it provided for the existence of a child- and youth-protection centre for English-speaking Montrealers,⁷⁴ created a provincial committee to advise the government on the delivery of English-language health and social services and on the approval, evaluation, and modification of access programs for English services, and provided for regional committees to advise the regional boards (formerly councils) on their access programs.⁷⁵ In addition, boards of institutions and regional boards were obliged to take into account, in the planning and allocation of budgets and the naming of board members, the linguistic characteristics of their users and the demographic reality of their population.⁷⁶ Finally, the legislation stipulated that the access programs for English services be revised every three years.⁷⁷

Recognizing the complexity of the reform embodied in *Bill 120*, the Quebec government modified the law in June 1992, clarifying a number of points and adopting some transitional provisions to facilitate the process of change. To ensure continuity, the law stipulated that access programs in force would continue to apply until revised. Furthermore, in anticipation of the transfer of personnel and services from institutions required to provide services in English to others with no legal obligation to do so, the law stipulated that those institutions receiving services were deemed to be in the access programs until revision took place.⁷⁸

E. Evaluation of the Right: The Impact on Service Delivery

What was the effect of the passing and implementation of legal guarantees on the availability and accessibility of English services and the attitude of those planning and providing services?

First, the regional councils, in the elaboration of their access programs, were obliged, sometimes for the first time, to take into account an English-speaking presence in their region. This was of particular importance in those regions where there were few English-speaking people. In addition to availing themselves of demographic

⁷³ *Ibid.*, s. 2(5).

⁷⁴ *Ibid.*, s. 125.

⁷⁵ *Ibid.*, ss. 509, 510. The work of the Provincial Committee on the dispensing of health and social services in the English language [hereinafter English Services Committee] is discussed below. These sections formalized the role of the committees already in place but which had no official status.

⁷⁶ *Ibid.*, ss. 171, 347 (planning and allocation of budgets), ss. 138, 398 (naming of co-opted board members after the election process).

⁷⁷ *Ibid.*, s. 348.

⁷⁸ *An Act to amend various legislative provisions concerning the application of the Act respecting health services and social services and amending various legislation*, S.Q. 1992, c. 21, s. 68 [hereinafter *Bill 15*], which added ss. 619.29 and 619.44 to the *Current Health and Social Services Act*, *supra* note 7.

data to facilitate their task, the regional councils evaluated the accessibility of the services available in their institutions and consulted the local English-speaking public, through its representative organizations, to assess its needs and to review where services were lacking.⁷⁹ This process enabled the regional councils to identify not only where services were available, but also where their development was necessary to satisfy needs that were unmet for this segment of the public. The presence of advisory committees, frequently composed of not only English-speaking volunteers but also Francophones, planning and delivering services encouraged the development of collaborative mechanisms of service planning. Moreover, the presence of a coordinator of English services within the regional councils created an additional link between the councils and the English-speaking community.

Second, the passing of *Bill 142* created expectations on the part of the English-speaking public that services which had not previously been sought would now be available in English.

Third, the legal obligation on institutions to provide services in English, although qualified by the resources at their disposal, sensitized them to the concerns of the English-speaking population on their territory. This was particularly the case with the CLSC network, mandated to offer front-line services to all on their territory.

Much of this would not have occurred without the political will to implement the project. The presence of a junior minister and subsequently a parliamentary assistant charged with implementing *Bill 142* emphasized to regional councils and institutions the importance of the right to English services. The political representatives visited many of the administrative regions to meet with the English-speaking public, the regional councils, and the institutions providing direct services to the community. Moreover, a political attaché within the Minister's office ensured a link between the political and administrative functions and, together with elected representatives, between the Ministry and representatives of the English-speaking community and the institutional network. The Ministry officials worked closely with the regional councils to oversee the implementation of the access programs from an administrative perspective.

Following the adoption of the access programs, there was little formal analysis by the regional councils of their impact on the accessibility of services. One exception

⁷⁹ While one would expect that services in English would be least accessible outside Montreal, it is interesting that certain gaps were identified for the Montreal metropolitan region: a more limited accessibility of services for those living in the eastern part of the island or in Laval (which then formed part of the region), limited accessibility for people with drug and alcohol problems, a limited number of places available in institutions with a supra-regional mandate because of the attraction for people living outside Montreal, a lack of places with complete accessibility in some long-term care centres and rehabilitation centres for the intellectually handicapped, lack of budgets to develop places in institutions for the deaf and the physically handicapped as well as a lack of information available in English (*Mémoires au conseil, supra* note 68).

was Estrie which, in 1992, commissioned an evaluation of its access program.⁸⁰ The report addressed the twin issues of accessibility to services and the implementation of the measures adopted in the access program. It indicated that services in the French hospitals in Sherbrooke were accessible in English. These institutions offered specialized services that were unavailable elsewhere in the region and their accessibility in English was therefore crucial. It was noted that these services were not always accessible in English prior to the adoption of the access program. Moreover, the CLSC network had, for the most part, managed to raise its visibility with the English-speaking community and ensure the accessibility of services in English. It was noted that this success predated the access program. The availability of English-language material had improved since the adoption of the program and language training had also contributed to a more "positive attitude" in responding to English-speaking people needing services.

In assessing the overall level of accessibility, the regional council had diligently implemented the program and the institutions had, for the most part, collaborated in good faith. There had been progress in a number of areas, including the provision of social services for young people, services provided by French hospitals, and front line services provided by CLSCs.

While reviewing areas requiring improvement, the report noted some obstacles remaining in terms of implementing the access program. In the case of two CLSCs in the region, this essentially amounted to institutional resistance to providing services in English. The problems were described as follows:

In the case of [one CLSC] the institution is ignoring the law. Management has decided not to take account of the law and simply ignores it. The rationale [*sic*] proffered is that the law provides only for anglophones who cannot speak ... [French], or that Latin Americans are more of a priority. [The CLSC] has succeeded in convincing the English clientele of the Sherbrooke area that they are not accessible; the result being that they in fact serve very few anglophones. By the way, the barrier to accessibility is not at the level of health professionals but rather at the preliminary phases of access, that is: reception, evaluation and referral.

In the case of the [other CLSC] the problem appears to be one of a lack of resources and of a decision not to mobilize any of already existing resources for the English clientele which is of the order of some two thousand in a total clientele of twenty thousand. The CLSC is quite straightforward about its position.⁸¹

In general, the developments regarding the planning and provision of English services from the passing of *Bill 142* in 1986 until 1994 are positive. It is interesting

⁸⁰ G. Caldwell, *Accessibility of Health and Social Services to English-speaking Townshippers: Evaluation of the 1988, Region 05, Law 142 Access Programme* (Sherbrooke: Conseil de la santé et des services sociaux de l'Estrie, 1992) [unpublished].

⁸¹ *Ibid.* at 35.

to contrast this period with the events following the election of the Parti Québécois government in September 1994.

III. Reorganization, Service Delivery, and Language Politics: The Revision of Access Programs to English Health and Social Services (1994-1999)

In August 1994, Lucienne Robillard, Minister of Health and Social Services in the Liberal government, asked the regional boards to revise their access programs and sent them the frame of reference document outlining the guidelines for the revision process.⁸² The Minister requested the boards to submit their programs no later than December 1, 1995. In September 1994, the Parti Québécois gained power. By the end of its first mandate in November 1998, the government had not yet adopted the revised programs. The government was obliged to justify delays surrounding the approval of the revised access programs on a number of different occasions. In January 1999, Alliance Quebec instituted legal proceedings to force the re-elected Parti Québécois government to approve the plans. Only then did it begin to approve the programs. Two main reasons can be invoked to explain such a delay in what is essentially an administrative process. First, the health and social services system was undergoing a major transformation, which obliged the regional boards to restructure the organization and delivery of services, including those to the English-speaking population. Second, and more important, the issue of the right to English services became, under the Parti Québécois government, a political issue.

A. Reorganization of the Health and Social Services System

The Parti Québécois government gave several reasons for the need to reorganize the health and social services system. First, the "Politique de la santé et du bien-être", adopted in 1992, established twenty objectives in public, physical, and mental health, as well as in the areas of social adaptation and integration. These priorities were to guide planning and to affect the allocation of resources. Second, Quebec society was undergoing demographic and social changes with an impact on the delivery of health and social services. These included the aging of the population combined with the continuing presence of inequalities in health, tied to income and socio-economic status. In addition, health and social problems such as suicide, AIDS, and cancer, necessitated greater intervention in these areas. Third was the issue of health expenditures and the need to reduce costs.⁸³

⁸² Quebec, Ministère de la Santé et des Services sociaux, *Program of Access to Health and Social Services in the English Language for English-speaking Persons: Frame of Reference* (Gouvernement du Québec, 1994). The Government had passed an order-in-council (809-94) on June 1, 1994, setting September 2, 1994, as the date from which the regional boards should undertake their revision.

⁸³ Quebec, Ministère de la Santé et des Services sociaux, *La santé et les services sociaux: Enjeux et orientations stratégiques d'un système en transformation* (Gouvernement du Québec, 1996) at 7-22.

The strategies adopted by the government to reorganize the system included four major components: changing the structures of the public network and the way services were delivered, putting into place a new drug insurance program, developing new policy dealing with medication, and finally, rationalizing services and fees for services. Of these, modifying organizational structures and service delivery contributed to the delays in the submission of the access programs by the regional boards to the Ministry. Indeed, the last access program, that of Montréal-Centre, was not even submitted until December 1996, one year later than originally stipulated.

The changes imposed on the system included the amalgamation and closure of institutions, implementation of the *virage ambulatoire*, consolidation of front-line services, emphasis on prevention of illness and promotion of health, allocation of new resources for residential settings for the elderly, and elimination of staff positions in the network.⁸⁴ While this certainly affected all Quebecers, it had a particularly important impact on the English-speaking population. Several institutions with bilingual status were closed, amalgamated, or found themselves with changed mandates. In Montreal, the Queen Elizabeth, Reddy Memorial, and Lachine General hospitals were closed. In Estrie, the Sherbrooke Hospital, the only designated bilingual acute care hospital, became part of a long-term care centre and lost its acute-care mandate. In Quebec City, the Jeffery Hale Hospital, founded by and affiliated with the English-speaking community, although not enjoying bilingual status, was transformed into a long-term care centre. While Montrealers could easily find English hospital services elsewhere, the situation was more serious outside the metropolitan area. Furthermore, the change in mandates of the Sherbrooke and Jeffery Hale hospitals was perceived as a loss of community patrimony. The changing role of the acute-care hospital sector and the implementation of the *virage ambulatoire*, with a transfer of services towards the community and the emphasis on front-line services through the CLSC network, meant that English-speaking people were obliged once again to turn to institutions not necessarily used to serving them.

Worried that the reorganization of the system was jeopardizing the right to health and social services in English, the English Services Committee wrote to the Minister, Jean Rochon, stating that quick and effective action on his part was necessary. The English Services Committee, created by *Bill 120* in 1991,⁸⁵ asked the Minister to intervene in the following areas: manpower redeployment in the Montreal region after the closure of acute care hospitals and the transfer of personnel into the CLSC network, protection of institutions with bilingual status subject to amalgamation and uni-

⁸⁴ *Ibid.* at 23-31. The number of public institutions declined from 661 to 561 in the space of one year (1995 to 1996). The number of institutional boards of directors dropped from 663 in October 1992 to 429 in September 1996. While the number of CLSCs remained stable (151) from 1995 to 1996, there was a decline in long term care and acute care hospitals (from 247 to 184 and 121 to 118 respectively), centres for people with drug and alcohol problems and the intellectually and physically handicapped, psychiatric hospitals (from 46 to 34) and youth protection centres and centres for young people in difficulty (from 59 to 37).

⁸⁵ *Supra* note 75.

fication, and special recognition for institutions providing services to English-speaking people living outside their region. The English Services Committee also sought confirmation that there would be no change in the eligibility criteria for receiving services in English and requested the speedy adoption of the access programs. The English Services Committee alleged that certain regional boards believed that the Ministry had indicated that there was no urgency to complete the revision of the programs within the original deadline. The English Services Committee argued that "[b]udget pressures, network transformation, regionalization and decentralized management of the health and social-service system should not serve as a justification of the government's abandonment of its overall responsibility for application of the right of English-speaking people to receive services in English."⁸⁶

The reorganization of the system did not, however, cause delays for all regional boards. The first access programs were submitted by the Montérégie, Lanaudière, and Abitibi-Témiscamingue in November 1995. These were followed by Mauricie-Bois-Francs and Gaspésie-Îles-de-la-Madeleine in December, and by Laurentides, Côte-Nord, Québec, and Saguenay-Lac-Saint-Jean in early 1996. The remaining regional boards submitted their programs over the course of the year, ending with the submission of the Montréal-Centre plan in December 1996.

B. Language Politics and the Right to English Health and Social Services

The adoption of the access programs was also delayed because of attempts to undermine the right to English services as expressed in the health and social services legislation. A series of events in 1996 and 1997 contributed to a growing politicization of the issue and to confrontation between the English-speaking community and both the Parti Québécois government and the Parti Québécois itself. These attacks on the right of English-speaking people to receive services in English were couched as concern to protect the goals of the *Charter of the French language*, but their underlying purpose was to question that right.

1. The Interministerial Committee on the Status of French in Quebec: *Le français langue commune*

The initial attempt to question the extent of the right to English services was contained in the draft report of the Interministerial Committee, tabled in January 1996. Louise Beaudoin, Minister of Culture and Communications and Minister responsible for the *Charter of the French language*, had created the Interministerial Committee in September 1995 with this mandate: "Décrire et analyser l'évolution de la situation de

⁸⁶ Letter from the English Services Committee to Jean Rochon, April 22, 1996. This letter was obtained and published by *The Gazette* (2 May 1996) B3.

la langue française au Québec depuis l'adoption de la *Charte de la langue française* dans les différents domaines de l'aménagement linguistique."⁸⁷

The Interministerial Committee believed that *Bill 142* constituted "un nouvel aménagement linguistique, basé sur des principes différents de ceux de la Charte de la langue française." For the Interministerial Committee, the public administration provided services based on the following four linguistic principles:

[L]e français et l'anglais ne sont pas sur le même pied et ne jouissent pas du même statut au Québec; seul le français est langue officielle;

le français est la langue commune des communications et des services de tous les Québécois; pour jouir de la pleine accessibilité aux services publics, les citoyens doivent connaître le français;

si un citoyen s'adresse à l'Administration dans une autre langue que le français, on peut lui répondre dans sa langue; il faut cependant respecter le droit des fonctionnaires de travailler en français; on peut aussi encourager les fonctionnaires à apprendre d'autres langues, particulièrement l'anglais;

les services publics sont dispensés à des citoyens en tant qu'individus et non en tant que membres d'un "groupe linguistique" ou d'une communauté culturelle.⁸⁸

This passage, which did not appear in the final report, is revealing in that it clearly indicates that knowledge of French should be a prerequisite to obtaining accessible public services. Furthermore, it presupposes that there is generally no obligation to provide services in a language other than French. Such provision is left to the discretion of the civil servant. To enjoy full access to public services, the individual must adapt to the institutional and bureaucratic structures, not *vice versa*. The *Draft Report* considered that the "nouvel aménagement linguistique" of *Bill 142* was an exception in that it conflicted with each of the four principles:

[I]l place le français et l'anglais sur le même pied; n'importe qui peut choisir d'être servi en français ou en anglais, comme dans un contexte de bilinguisme officiel;

un citoyen n'a pas besoin d'apprendre ou de connaître le français pour avoir plein accès à ces services; on ne peut plus dire que le français est la langue commune de la vie publique;

si un citoyen s'adresse en anglais aux services de santé et aux services sociaux, le fonctionnaire a l'obligation de lui répondre en anglais (ou bien cette obligation ne respecte pas son droit de travailler en français ou bien le poste occupé par le fonctionnaire a été reconnu bilingue aux termes de l'article 46);

⁸⁷ *Le français langue commune*, *supra* note 10 at 4.

⁸⁸ Quebec, Comité interministériel du bilan sur la situation de la langue française, *La situation de la langue française au Québec*, Projet (January 1996) at 336 [hereinafter *Draft Report*].

même si elle n'appartient pas à la minorité d'expression anglaise, toute personne désireuse d'être servie en anglais a le droit de recevoir en anglais des services de santé et des services sociaux.⁸⁹

The consequence of this last measure is that any persons can consider themselves to be members of Quebec's English-speaking minority, sending an ambiguous message to allophones about integrating into French Quebec. The Interministerial Committee then stated that, while its mandate was not to pronounce on the law, "[c]e qui étonne, dans le cas des services de santé et des services sociaux, c'est que la dérogation accordée par le législateur s'étend bien au-delà de 'la minorité de langue anglaise' et de ses 'institutions'."⁹⁰

Here, for the Interministerial Committee, there was incontestably a risk of conflict with the *Charter of the French language*. If anyone could define oneself as English-speaking for the purposes of obtaining services, health and social service institutions could become the means of integrating immigrants into the English-speaking minority. The Interministerial Committee did acknowledge that it is not the role of the Ministry of Health and Social Services to worry about the integration of immigrants and that this dimension should not enter into consideration when someone is ill, but it asked nevertheless, "Cela justifie-t-il qu'on puisse renoncer aux obligations qui nous incombent comme prestataires de services publics?"⁹¹ In the opinion of those who wrote the *Draft Report*, services in English should be limited to people whose first language is English. The Interministerial Committee glossed over the fact that Quebec has chosen other means, such as education and the workplace, to integrate immigrants, and that the function of health and social service institutions, as defined in health and social service legislation, is to provide services, not to facilitate the integration of immigrants or allophones into the French-speaking majority. Moreover, the Interministerial Committee provided no data suggesting that *Bill 142* had facilitated the integration of immigrants or allophones into the English-speaking minority.

Next came an attack on the number of institutions providing services in English and the effect on institutional bilingualism:

En second lieu, on aurait pu penser que les services de santé en anglais se seraient développés de façon suffisante et satisfaisante autour des institutions issues de la minorité anglaise, dont les effectifs ont d'ailleurs diminué depuis un quart de siècle. En vertu de l'article 29.1 de la Charte, l'Office a reconnu 90 organismes de santé qui fournissent leurs services à des personnes en majorité d'une langue autre que française. Mais les programmes d'accès aux services en anglais, mis en place par la loi, s'étendent à toutes les régions du Québec et touchent pratiquement tous les établissements d'une façon ou d'une autre. Cette opération nous paraît très large et, même si certaines dispositions vien-

⁸⁹ *Ibid.* at 336-37.

⁹⁰ *Ibid.* at 338.

⁹¹ *Ibid.* at 340. These comments were not retained in the final report.

nent la limiter, l'encadrer ou la baliser, elle semble destinée à rendre les services en anglais partout sur le territoire du Québec.⁹²

These comments, which were not retained in the final report, *Le français langue commune*, reflect ignorance or ill will. First, they question the principle of providing services in English throughout Quebec, although English-speaking people, even if few in some cases, are present in all regions. Second, if English services were limited to institutions created by the English-speaking community and recognized by the *Charter of the French language*, hundreds of thousands of English-speaking Quebecers would be deprived of the right to English services. By August 1997, the number of institutions recognized by section 29.1 of the *Charter of the French language* had dropped to sixty-eight, of which eleven were residences for seniors that received no public funding.⁹³ Under this limit, fewer than twenty institutions, including a number of private homes for seniors, would be permitted to provide services in English off the island of Montreal. In some regions, no services whatsoever would be accessible. The CLSC network would be almost completely inaccessible in English, since CLSCs were created by the government and not by the community, and few enjoyed the bilingual status conferred by section 29.1 of the *Charter of the French language*. CLSC services in English would be limited to people living in the central and western parts of Montreal and the West Island. Not a single hospital in the Montérégie would provide services in English to the more than 100,000 English-speaking residents. No youth-protection services would be available in English outside Montreal. The English-speaking population in the Gaspé, comprising 10% of the total, would be entitled to no services.

Moreover, these comments of the Interministerial Committee ignore the effects of the transformation of the health and social services system. The restructuring of services, the declining number of public institutions, and the *virage ambulatoire* had led to a shift of services away from those institutions traditionally serving the English-speaking public. As noted, several institutions had closed and others were adapting to new mandates. In other cases, new services, such as Info-Santé, were being developed in the CLSC network to meet new needs. These were designed to be accessible to the entire public, and service planners were doing their best to ensure their accessibility in English. Moreover, if specialized services were to be centralized in a single institution in a region, they would not be accessible in English unless that institution enjoyed special status under section 29.1 of the *Charter of the French language*. Consequently, specialized services in English would be almost completely inaccessible outside

⁹² *Ibid.* at 340-41.

⁹³ Quebec, Ministère de la Santé et des Services sociaux, *Programme d'accès aux services de santé et aux services sociaux en langue anglaise pour les personnes d'expression anglaise* (Gouvernement du Québec, 1997) at Annexe 1: "Mise à jour de la liste des établissements de santé et de services sociaux reconnus en vertu de l'article 29.1 de la Charte de la langue française qui pourrait servir de référence pour la mise à jour des établissements désignés au sens de la Loi sur les services de santé et les services sociaux" [Directeur: P.-P. Veilleux].

Montreal. These points were overlooked in the Interministerial Committee's *Draft Report*.

While the rhetoric was toned down before *Le français langue commune* was submitted to the Minister in March 1996, the fundamentals of the analysis remained the same. The broad definition of "English-speaking" person, argued the report, gave all Quebecers the right to seek services in English. This undermined the government's policy of making French the common language of all Quebecers, contributed to "institutional bilingualism" by granting freedom of choice to individuals using public services, and threatened the right to work in French. In conclusion, "[l]'analyse de ce dossier nous amène à nous demander comment il est possible d'harmoniser le respect des droits consentis à la 'communauté d'expression anglaise' avec les objectifs poursuivis par la *Charte de la langue française*."⁹⁴

Despite the allegations of institutional bilingualism, it is revealing that a study of the use of French in 230 health and social services institutions in Montreal, cited in *Le français langue commune*, does not support the perception that the use of English was pervasive. The study found that 87% of the institutions that were not designated bilingual by the *Charter of the French language* used unilingual French signs, and a quarter of recognized institutions were similarly unilingual, even if they had to provide services in English. Moreover, 96% of non-recognized and 20% of recognized institutions used unilingual French documentation. Personnel in 97% of non-bilingual institutions and 21% of bilingual institutions used only French in their written communications. Finally, French constituted the predominant language of oral communication in 80% of non-recognized institutions for all categories of personnel, with the exception of technical staff, where the level dropped to 53%. Oral communications were predominantly in French at a significant portion of even those institutions recognized as bilingual, varying with the category of employee: among support staff at 41%, management at 36%, technical staff at 31%, and those providing direct care at 22% of those institutions.⁹⁵

Although these statistics are limited to Montreal, they indicate that the right to English services did not necessarily promote the widespread and consistent use of English in the public network. While *Bill 142* introduced the notion of some institutional bilingualism into the health and social services sector, not all institutions were obliged to provide services in English. Neither was bilingualism a requirement for all personnel at an institution named in an access program, nor were all services provided by an institution necessarily to be made accessible in English. Moreover, most institutions were sensitive to the notion of rendering their services accessible to people whose first language was not French. It is true that the OLF had had to arbitrate some

⁹⁴ *Le français langue commune*, *supra* note 10 at 128. The issue of English health and social services is discussed at 126-28. The English Services Committee had recommended in June 1994 that the Minister of Health and Social Services endorse a broad definition of English-speaking person in conformity with the principles expressed by Thérèse Lavoie-Roux at the time of the passing of *Bill 142*.

⁹⁵ *Ibid.* at 126.

complaints surrounding the right to work in French, but the small number of cases indicates that this was more an issue of perception and ideology for the Interministerial Committee than the reality for the institutions and personnel providing services.⁹⁶

2. The Parti Québécois, the Government of Quebec, and the Attack on "Institutional Bilingualism"

Another significant event occurred during the month that the Interministerial Committee submitted *Le français langue commune* to Louise Beaudoin. In March 1996, Premier Bouchard, in an unprecedented step, gave a speech in English before several hundred English-speaking Quebecers at the Centaur Theatre in Montreal. In some quarters, this was perceived as offering an olive branch after the divisive events of the referendum and the comments of Jacques Parizeau several months before. Others perceived the event as a public relations stunt designed to enhance the image of a new leader who had been in place only since January, and to enhance the image of his government. The Premier addressed the issue of health care and noted that a person going for a blood test should not require a language test to obtain services. This comment, widely quoted afterwards in the English media, was interpreted to mean that the government would respect its commitment to ensure the provision of English services.

One month later, the Parti Québécois held a Conseil national in which the protection and promotion of French played a central part. In addition to some forty measures announced by Louise Beaudoin following the publication of the report *Le français langue commune*, the Premier proposed to re-establish the Commission de la protection de la langue française, give the OLF the power to issue infractions on the spot for illegal commercial signs, and add five million dollars to the organizations mandated to apply these measures. Also approved was a modification to the party program calling on the Parti Québécois to "[r]evoir la loi sur la santé et les services sociaux pour éviter que l'ensemble des établissements de soins de santé et de services sociaux ne soient soumis au bilinguisme fonctionnel et institutionnel."⁹⁷

The Premier stated that the Parti Québécois "garantit aux anglophones le droit de recevoir des services sociaux dans leur langue, [mais] il ne faut pas que cela signifie que tout le personnel soignant doit être bilingue. Il ne faut pas imposer graduelle-

⁹⁶ See Part IV, below.

⁹⁷ Parti Québécois, *La volonté de réussir: programme et statuts du Parti Québécois* (19 November 1997) at 58. This contrasts with recommendations made by the Parti Québécois Task Force on the status of the English-speaking community in a sovereign Quebec. The Task Force recommended that a sovereign Quebec provide the English-speaking community with health and social services in English and that "the existing provisions of Bill 120 be maintained for this purpose" (see Parti Québécois, *The English-Speaking Community: An Integral Part of a Sovereign Quebec* (Montreal: Services des communications du Parti Québécois, 1993) at 31).

ment le bilinguisme à tous les services de santé.⁹⁸ The review of the health and social services legislation to combat “bilingualism” appears to have been part of a compromise with some party members committed to pushing the Parti Québécois to revoke the right to post bilingual commercial signs enshrined in *Bill 86*,⁹⁹ a policy contained in the party program. The publication only weeks before the Conseil national of the Interministerial Committee’s *Le français langue commune*, with its comments about institutional bilingualism in the health and social services network, would have provided extra ammunition to party members who wished to restrict the use of English. Raymond Giroux was critical of these new orientations of the Parti Québécois in an editorial in *Le Soleil*:

Le Parti Québécois cuvée Lucien Bouchard veut enterrer la hache de guerre avec la communauté anglophone du Québec. Le débat, relancé lundi par la présentation du projet de rénovation du programme politique de la formation gouvernementale, contient toutefois des éléments d’un chantage malséant qui contreviennent radicalement avec l’ouverture et la réconciliation prônées par le premier ministre ...

Le PQ dit reconnaître les droits fondamentaux des anglophones. Dans le même souffle, pourtant, il inscrit à son programme la révision de la loi 142 garantissant les services de santé et les services sociaux en langue anglaise ...

Soyons sérieux : croire ou faire croire aux Québécois que cette loi a rendu bilingues dans les faits l’ensemble des établissements du réseau tient de la plus haute snpercherie. Le ministre de la Santé, Jean Rochon, a déjà rejeté cette interprétation.¹⁰⁰

Predictably, the English-speaking public reacted critically to the change in the program of the Parti Québécois. English-speaking groups, led by Alliance Quebec, threatened to fight any attempts to change the law. In response, the Minister of Health and Social Services was quoted as saying that the party executive, which had drafted the proposal, might not have understood the law and that he saw no reason for legislative changes.¹⁰¹ Days later, the letter from the English Services Committee alleging that the restructuring of the system threatened English services appeared in *The Gazette*, fueling additional mistrust and apprehension.¹⁰²

Further tension between the English-speaking community and the government ensued in November 1996 when a complaint was filed against the Centre universitaire de santé de l’Estrie (“CUSE”). CUSE had installed some signs in English after the Sherbrooke Hospital, the only bilingual acute-care hospital in Estrie, was transformed into part of a long-term care centre. The OLF claimed that these signs infringed the

⁹⁸ Quoted in M. Venne, “Bouchard promet des ajouts au ‘bouquet de mesures’” *Le Devoir* (29 April 1996) B2.

⁹⁹ *Supra* note 64.

¹⁰⁰ “Langage, un chantage malséant du PQ” *Le Soleil* (5 May 1996).

¹⁰¹ K. Wilton, “Don’t Mess with Services to Anglos: Groups” *The Gazette* (27 April 1996) A5; “Le PQ invité à ne pas toucher à la loi 142” *La Presse* (7 April 1996).

¹⁰² English Services Committee, “PQ Should Protect English Services” *The Gazette* (3 May 1996).

Charter of the French language and demanded that the hospital remove them. The Premier refused to intervene and the majority of the signs were removed.

In December 1996, the final access program was submitted to the Ministry of Health and Social Services. The sixteen regional boards had proposed a substantial increase in the number of institutions providing some services in English. Approximately 130 institutions not named in the programs of 1989 were included in the new programs submitted in 1995 and 1996: 28 CLSCs, 30 hospitals, 29 long-term care centres, 27 residential centres for the elderly and the handicapped, 2 centres de santé (community health centres), 5 child and youth protection centres, and 8 institutions with multiple missions were added. Every region had added at least one institution and the Quebec region had proposed 18, including 8 hospitals. This represented a significant increase, particularly in a context where the network of public institutions was shrinking. The programs documented improved accessibility to English services in all regions. This was based on the number of new services available in English or new institutions named in the programs. Shortly afterwards, Louise Beaudoin wrote to Jean Rochon asking that the OLF be formally associated with the elaboration of the programs.¹⁰³

At its Conseil national in January 1997, the Parti Québécois passed three more proposals dealing with the right to English health and social services:

Que le gouvernement balise l'article 15 de la Loi sur les Services de santé et Services sociaux afin qu'en aucun cas elle ne diminue la portée des articles 22, 35, 38 et 46 de la Charte de la langue française.

Que le gouvernement révisé les critères qui permettent aux régies régionales d'"indiquer" les établissements devant offrir les services en anglais en tenant compte, entre autres, du nombre d'usagers d'expression anglaise afin d'éviter le bilinguisme institutionnel réservé aux établissements reconnus en vertu de l'article 29.1 de la *Charte de la langue française* (dont la clientèle anglophone dépasse 50 pourcent) tout en garantissant le droit universel d'accès aux services.

Que les programmes d'accessibilité linguistique fassent l'objet de directives claires respectant la Charte de la langue française et soient tous révisés par l'Office de la langue française (O.L.F.) pour s'assurer de leur conformité avant

¹⁰³ "L'Office de la langue française m'informe que les régies régionales ne sont pas tenues de le consulter au cours de l'élaboration de leurs programmes d'accès aux services en langue anglaise. Elles le font cependant, semble-t-il, de façon informelle. Compte tenu du fait que nous avons l'un et l'autre à nous prononcer sur ces programmes comme membres du Conseil des ministres, je me demande si vous ne jugeriez pas opportun d'associer plus formellement l'Office de la langue française au processus d'élaboration des programmes en question. Je vous en fais la proposition." Letter from L. Beaudoin, Minister of Culture and Communications and Minister responsible for the application of the *Charter of the French Language*, to J. Rochon, Minister of Health and Social Services (16 December 1996).

leur adoption par le gouvernement; qu'on élargisse la consultation aux groupes d'expression française.¹⁰⁴

These resolutions were adopted unanimously by the delegates. That this should occur was unusual:

Le passé enseigne que ce genre de résolutions aurait pu normalement provoquer des débats musclés. Il n'en fut rien. Pas un seul des 300 participants ne s'y est objecté. Du jamais vu au PQ. Les sbires du bunker avaient passé le mot. Quelques députés et même le ministre de la Santé, Jean Rochon, ont donné le feu vert à l'assemblée.¹⁰⁵

The Premier explained the resolutions by stating that vigilance was needed to prevent institutional bilingualism, that some hospitals had exaggerated the need for English services, and that it was necessary for the Parti Québécois to protect the right to work in French.¹⁰⁶

The implementation of these proposals would significantly change the nature of the right to English services. A revision of the criteria used by the regional boards based on the number of English-speaking people in a region rather than on their service needs would have the effect of reducing access to services in regions with small concentrations of English-speaking people and consequently strip them of the right to service in their language. This effectively introduces the notion that services would be available "where numbers warrant", an approach that was rejected by the government when *Bill 142* was passed in 1986. This would also change the mission of the regional boards, which are now obliged by law to take into account the linguistic, demographic, and socio-cultural characteristics of their regions in the allocation of budgets and the organization of services. Moreover, the call for the OLF to review the access programs before their adoption would be a significant departure in that it would give that body a role not then recognized under health and social services legislation. The OLF did not review the 1989 programs prior to their approval by the government. In addition, the framing of section 15 of the *Current Health and Social Services Act* so as not to conflict with parts of the *Charter of the French language* would explicitly change the nature of the right already qualified by the availability of resources and the existence of an access program.¹⁰⁷ Finally, the call for Francophone groups to participate in the consultation process ignores the fact that Francophones

¹⁰⁴ Parti Québécois, Conseil national (25 and 26 January 1997). Ss. 22, 35, 38 & 46 of the *Charter of the French language*, *supra* note 12, refer to signs and posters, the issue and renewal of permits, and the prohibition of knowledge of a language other than French as a condition of employment. These three emergency resolutions were proposed by the Sherbrooke riding associations. This is not surprising: The Mouvement estrien pour le français had been active in challenging the access program in this region and opposing signs in English at the CUSE.

¹⁰⁵ P. O'Neil, "Le PQ convainc Bouchard de freiner le bilinguisme institutionnel" *Le Devoir* (27 January 1997) A1.

¹⁰⁶ D. Lessard, "Bilinguisme dans la santé: la vigilance sera de rigueur" *La Presse* (27 January 1997) A11; E. Thompson, "Health Care under Review" *The Gazette* (27 January 1997) A1.

¹⁰⁷ *Supra* note 7, s. 15.

are, for the most part, those responsible for the development and implementation of the programs, both at the level of institutions and at the regional boards. Furthermore, the boards of directors of regional boards and participating institutions, composed of Francophones in the vast majority, must approve the access programs. The proposal that Francophone groups be consulted seems intended to counter the role of the regional advisory committees, which contain representatives from English-speaking groups in most regions.

The adoption of the proposals at the Conseil national and the decision of the government to send the access programs to the OLF provoked once again a wave of criticism in English-speaking quarters. One week later, Alliance Quebec organized a public meeting at the Centaur Theatre in Montreal to protest the decision to send the programs to the OLF. Several hundred people heard a succession of speakers denounce the government and call for the access programs to be adopted immediately.

Some commentators in the French press, while finding the reaction of Anglophones excessive and orchestrated for broader political purposes, refuted the notion of institutional bilingualism and saw the issue as one where the government, under pressure from its own party, needed to make concessions on some issues to ensure party unity. Alain Dubuc noted:

Bien des francophones trouveront que la croisade des leaders anglophones est excessive. Mais il ne faut pas oublier que les débats linguistiques sont explosifs. Et que les politiques de santé sont celles qui provoquent le plus d'inquiétude chez les citoyens. Quand on mêle les deux, on touche à ce qui engendre les pires angoisses: la peur d'être malade sans être compris, la peur de mourir dans l'isolement. Souvenons-nous de l'"affaire Lester", ce banal incident où une infirmière a répondu en anglais à un journaliste francophone. On en a fait des manchettes ...

Et voilà pourquoi les droits linguistiques en santé doivent être abordés avec une infinie prudence et une grande délicatesse. Deux qualités totalement absentes de la démarche du PQ et du gouvernement Bouchard.

Le principe des services dans leur langue pour les anglophones, recouru par le gouvernement Bourassa, et que le gouvernement Bouchard ne conteste pas, ne pose pas de problèmes à Montréal où les anglophones disposent de leurs propres institutions. Mais en région, ces services devront être dispensés par des institutions francophones, et ce sont les régies régionales de santé qui ont identifié les besoins. Selon les militants péquistes, les régies sont allé [*sic*] trop loin, ce qui menace des travailleurs francophones dont les postes deviendraient bilingues et ce qui ravive le spectre du "bilinguisme institutionnel". D'où la proposition d'urgence.

En principe, il n'y a pas de mal à ce que le gouvernement balise le bilinguisme, pour éviter les abus et ne pas oublier le gros bon sens. Mais la façon dont le gouvernement se lance dans cette révision comporte de graves lacunes qui expliquent pourquoi les anglophones ont d'excellentes raisons d'être inquiets, même si le premier ministre Bouchard a affirmé que leurs droits ne sont pas remis en question.

D'abord, ce n'est pas le gouvernement qui a déclenché ce processus, mais bien le Parti Québécois, dans un autre tiraillement interne entre radicaux et modérés.

La nature des services de santé pour les anglophones a donc été définie dans un cadre partisan, ce qui est odieux.

Le second problème découle du premier. Le gouvernement Bouchard n'a pas la moindre idée de ce qu'il fera. Il a confié à l'OLF, qui n'y connaît rien, la tâche de réviser les décisions des régies régionales, dont c'est le métier. Le premier ministre Bouchard a d'ailleurs montré son ignorance du dossier en citant, comme exemple d'abus, le fait que tous les CLSC de Montréal prévoyaient un accueil bilingue. Il n'y a pas d'abus là-dedans. Avec le virage ambulatoire, les anglophones ne peuvent plus compter comme avant sur leurs hôpitaux et devront s'adresser aux CLSC de leur quartier.¹⁰⁸

For Michel C. Auger, this was another artificially generated linguistic fight, initiated on the one hand by some extreme Parti Québécois members who saw institutional bilingualism in the possibility of even a single institution providing services in English, and on the other hand by groups such as Alliance Quebec, for whom mention of the OLF provoked a passionate, visceral response. On each side of the divide, there were "ces gens qui veulent utiliser le débat linguistique pour manifester leurs frustrations politiques. Comme il n'a pas de quoi le faire à partir de la réalité, on va créer une crise artificiellement à coupe des mots boutefeux."¹⁰⁹

Lise Bissonnette argued that the defence of "anglophone rights" and criticism of the government were motivated by political opportunism and pointed the finger at Alliance Quebec, *The Gazette*, and Eric Maldoff, president of the English Services Committee. The Quebec Liberal Party, which had also voiced its opposition, had let itself be manipulated by Alliance Quebec, which "se substitue constamment à l'opposition politique au Québec."¹¹⁰

In light of the controversy and the questions as to its jurisdiction and competence to review the access programs, the OLF felt compelled to issue a press release explaining its role and justifying its intervention.¹¹¹

How does one explain the reaction of the English-speaking population to the government's decision to send the plans to the OLF? First, the plans were already one year late and a review by that body would lead to further delays. Second, comments by the Premier that services in the plans were exaggerated raised concerns that the OLF would find ways to recommend reductions in English services. The English-speaking population does not regard the OLF as a protector of its rights. Third, *Le Français langue commune*, the report of the Interministerial Committee, which had examined the ambit of the right and its compatibility with the *Charter of the French language*, had already put into question the nature and extent of the right. Fourth, attacks on "institutional bilingualism", now part of Parti Québécois policy, were under-

¹⁰⁸ "Santé, langue et politique" *La Presse* (30 January 1997) B2.

¹⁰⁹ "Les mots-boutefeux" *Le Journal de Montréal* (1 February 1997) 14.

¹¹⁰ L. Bissonnette, "La véritable opposition" *Le Devoir* (8 February 1997) A12.

¹¹¹ "Rôle de l'Office de la langue française dans le secteur de la santé et des services sociaux" Communiqué (13 February 1997).

stood to be indirect attacks on the right to English services.¹¹² Fifth, the public was wary of the government in light of the transformation of the health and social services system which had already had an impact on institutions traditionally affiliated with the community and was now directing the community to Francophone institutions.

While it is true that Alliance Quebec, the English media, and the English Services Committee vociferously opposed these developments, some Francophone opinion leaders had expressed similar reservations about the measures adopted by the Parti Québécois. To appease the English-speaking population, the Ministry of Health and Social Services issued a press release stating that the review of access programs would not compromise accessibility to services and that the cabinet would approve them by the end of the spring. The Parti Québécois, also by press release, underlined that the resolution adopted at the Conseil national was intended exclusively to allow people to have access to employment in the network without having absolutely to master English. The resolution was not intended to reduce the number of institutions offering services in English, change the parts of the law dealing with the provision of services in English, or modify the *Charter of the French language* in any way. The Parti Québécois even encouraged Alliance Quebec to hold its public meeting at the Centaur and communicate these points to concerned English-speakers.¹¹³

In February 1997, the Ministry of Health and Social Services asked the regional boards to justify the modification of their access programs. One month later, the OLF wrote to the Ministry to the effect that the programs submitted by the regional boards were incomplete and would not permit an adequate evaluation of the consequences of their application vis-à-vis the *Charter of the French language*.¹¹⁴ At the same time, the English Services Committee recommended to the Minister that the access programs be adopted as submitted by the regional boards. According to the English Services Committee, the programs met all the necessary criteria for approval in that they were developed in conformity with the frame of reference prepared by the Ministry and is-

¹¹² For example, Lyse Leduc, Parti Québécois MNA for Mille-Îles, wrote to the Laval regional board regarding a meeting which had taken place between the regional board and the PQ caucus for Laval:

Lors de cette réunion, il a été question, entre autres, du Programme d'accès aux services de santé et aux services sociaux pour les personnes d'expression anglaise de Laval. Le caucus questionnait à ce moment-là la pertinence d'assurer un service bilingue dans deux CLSC du territoire lavallois, compte tenu que la population anglophone ne représente que 4 pourcent des résidents et résidentes de Laval (Letter from L. Leduc to J.-L. Bédard, President, Régie régionale de la santé et des services sociaux de Laval (3 April 1997)).

In fact, according to the 1991 census, the proportion of English-speaking residents in Laval was 14.8%.

¹¹³ Quebec, Ministère de la Santé et des Services sociaux, Communiqué, "La révision des programmes d'accès en langue anglaise vise à adapter les programmes aux besoins de la population et non pas à les diminuer" (27 January 1997); Parti Québécois, Communiqué "Le Parti Québécois encourage Alliance Québec à tenir sa réunion d'information au Centaur" (2 February 1997).

¹¹⁴ Letter from N. René, President, Office de la langue française, to P.-A. Paré, Deputy Minister of Health and Social Services (26 March 1997).

sued by the Minister. Moreover, the programs took into account the reorganization of the health and social services system and the efforts to adapt the system to the needs of the English-speaking community. They also recognized the fundamental humanitarian purpose of service delivery and identified discrepancies in access between the English-speaking community and the population as a whole.¹¹⁵ In April, the Minister responded to questions by Liberal MNA Russell Williams at hearings of the Commission des affaires sociales:

On se rappelle que la dernière étape de ce projet-là est le Conseil des ministres. La loi prévoit que les plans doivent être présentés au Conseil des ministres pour approbation finale. Alors, on va essayer autant que possible, au moins pour les régions où il y a le plus de population de langue anglaise, en priorité, d'avoir terminé l'opération des plans. Mais on va essayer de le faire pour l'ensemble des régions autant que possible avant l'été.¹¹⁶

In April, the Ministry commissioned an outside analysis of the access programs of each region. The report, which included a summary of the reasons given by the regional boards for the modification of their programs, reviewed both organizational and demographic issues. From the organizational perspective, the regional boards had taken into account seven factors: decentralization of the network, de-institutionalization, non-institutionalization, the *virage ambulatoire*, reconfiguration of institutional structures, rationalization, and the different roles of institutions providing services. From a demographic point of view, the regional boards had linked accessibility to the number of English-speaking people in a region or CLSC territory. Yet CLSCs were often named in access programs even where there were only small concentrations of English-speaking people. This could be for two reasons: the regional boards wanted to ensure minimal front-line services, or since the law made no mention of "where numbers warrant", there could be a tendency to see more CLSCs identified in future access programs.¹¹⁷ The authors concluded that the legal recognition of the right to English services had stimulated the English-speaking community to ensure the application of the law in its own best interests and that the wording of the law, with no mention of minimum numbers, encouraged the provision of services to all English-speaking people in a region. Organizational factors would lead to the naming of additional institutions in access programs despite a smaller institutional network. Moreover, the implementation of the programs entailed a partial bilingualization, which appeared to be voluntary and not imposed, of the network. Finally, in light of the possibility of institutions entering into conflict with some aspects of the

¹¹⁵ Letter from the English Services Committee to J. Rochon, Minister of Health and Social Services (27 March 1997).

¹¹⁶ Quebec, National Assembly, *Débats de la Commission des affaires sociales* (22 April 1997), online: Assemblée Nationale <<http://www.assnat.qc.ca/archives-35leg2se/fra/Publications/debats/Journal/cas/970422/1740.htm>> (last modified: 23 November 1998).

¹¹⁷ J. Turgeon & C. Girard, *Rapport de recherche portant sur les programmes régionaux d'accès aux services de santé et aux services sociaux en langue anglaise pour les personnes d'expression anglaise déposé en 1995 et 1996 au ministre* (Gouvernement du Québec, 1997).

government's linguistic policies, the OLF could be more involved than previously in verifying the legitimacy of certain measures in the access programs, such as signs and the posting of bilingual positions.¹¹⁸

While there was little in the report that could be used to justify additional delays in the adoption of the access programs, word spread that further delays were imminent. For the English-speaking population, such tactics were seen as a way to amputate the right to services without changing the law. *The Gazette* noted in an editorial: "English Quebecers have good reason to worry that the Bouchard government is gearing up to erode and restrict access to English health services. ... By stalling, scuttling and eroding the access plans ... the PQ government can effectively gut English health guarantees ..."¹¹⁹

In the meantime, a few Francophone groups, some of whom were close to the Parti Québécois, had expressed their opposition to the access programs and the right to service in English in general. The Société Saint-Jean-Baptiste de Montréal had protested against the Montreal access program and intimated that services in English should only be available to those who did not understand French.¹²⁰ Le Mouvement estrien pour le français, whose members had piloted the resolutions at the most recent Conseil national of the Parti Québécois, was leading an attack in Estrie. Rodrigue Larose, its vice-president, wrote:

Destinées à neutraliser le virus injecté dans les services de santé et les services sociaux par les termites fédéraux de la bilinguisation institutionnelle, si on les applique, les propositions issues du dernier Conseil national du Parti Québécois en janvier 1997 sont de nature à ralentir la progression du mal. Ça ne suffit pas: on s'attaque aux symptômes. Un jour, il faudra se résoudre à amputer, de la Loi, les articles 15 et 348 entre autres plaçant les anglophones sur un piédestal avec leurs "services (rendus) en anglais" obligatoirement par le personnel francophone; ils sont les seuls à dominer ainsi comme usagers privilégiés des services de santé et services sociaux dans leur langue ... Comme en chirurgie, tous les moyens doivent être pris pour extirper le mal à la racine jusqu'aux ramifications législatives. Comme des cellules malades, elles déséquilibrent l'organisme et déstabilisent les travailleurs francophones.¹²¹

In July, the Minister presented a report on the access programs to the cabinet and was sent back to submit a new proposal. For the cabinet, it was once again a case of too much bilingualism. Deputy Premier Bernard Landry commented:

¹¹⁸ *Ibid.* at 39-40.

¹¹⁹ "PQ Gunning for Anglo Services" (5 July 1997) B4. See also "Hands Off Access Plans" (3 May 1997) B4 and E. Thompson, "English Health Access Plans Face Delays" *The Gazette* (6 May 1997).

¹²⁰ Société Saint-Jean-Baptiste de Montréal, Communiqué, "Des services en anglais mur à inur" (4 February 1997).

¹²¹ "Le virus du bilinguisme institutionnel dans les hôpitaux et les services sociaux" (18 May 1997), online: Impératif français <<http://www.synapse.net/~imperatif/archives/rodrigue.html>> (last modified: 18 February 1998).

On a reçu un rapport du ministère de la Santé totalement inacceptable, qui allait beaucoup trop loin. Le nombre d'établissements bilingues n'avait absolument aucun rapport avec les besoins réels de la minorité anglophone. Ça nous a rendu plus vigilants ... C'est rendu presque la moitié au Saguenay-Lac-Saint-Jean ... Ce n'est pas acceptable. Les proportions ne sont pas bonnes et tout cela doit être revu de fond en comble.¹²²

This was compatible with the opinion of the OLF that the regional boards had proceeded with an "excès de zèle" in drawing up the plans.¹²³ Here, once again, the politicians and the OLF had put themselves in the shoes of health care planners, not merely in assessing an acceptable level of bilingualism, but also in assessing needs in which they had no expertise. For *Le Devoir*, the government had to balance two contradictory rights and find a satisfactory compromise.¹²⁴ Other Francophone commentators were less accepting of Bernard Landry's comments. Alain Dubuc noted that the Deputy Premier was in fact denouncing a process conducted almost exclusively by Francophones, many working in the regions. Moreover, the apprehended "bilingualism" did not constitute a threat to French or a problem that could alarm Quebecers, but instead involved merely a knowledge of English, which was not the same thing. In taking the example of the Deputy Premier, it was obvious that services in Saguenay would be limited and occasional.¹²⁵ Even *Le Nouvelliste* of Trois-Rivières was critical:

C'est vrai que la Charte de la langue française interdit à un employeur d'exiger la connaissance de l'anglais pour embaucher quelqu'un dans un poste où l'usage de cette langue n'est pas requis. Mais justement dans la santé, un service public, ne peut-on pas accepter d'être un peu moins tâtilons et un peu plus ouverts à l'environnement? Doit-on absolument mener la guerre linguistique avec autant de zèle dans un domaine aussi sensible et qui ne menace en rien la prépondérance du français?

La loi reconnaît que la communauté anglophone a le droit de recevoir des services sociaux et de santé dans sa langue. Mais on voudrait circonscrire ce droit en délimitant scrupuleusement les aires d'accès. Cela tient de la mentalité d'assiégé et non de la bonne foi.¹²⁶

The reaction of English-speaking groups and the English press was predictably harsh. *The Gazette* commented:

In any other Canadian province or, indeed, most countries on Earth, a report showing health councils were adopting plans to improve hospitals' communi-

¹²² Quoted in P. O'Neil, "Excédé, Québec mettra un frein à la bilinguisation en santé" *Le Devoir* (19 July 1997) A1.

¹²³ *Ibid.*

¹²⁴ M. Venne, "Bilinguisme et bilinguisme" *Le Devoir* (22 July 1997) A6: "C'est un cas où le Québec a su maîtriser l'art du compromis entre deux droits. Pour trouver ce compromis, le mécanisme en place actuellement semble être le moins mauvais. Les régies régionales proposent un plan; l'Office de la langue française en fait l'évaluation; le gouvernement tranche entre deux bureaucraties."

¹²⁵ "Les mauvaises batailles linguistiques" *La Presse* (2 August 1997) B2.

¹²⁶ G. Gagnon, "Une autre crise linguistique" *Le Nouvelliste* (23 July 1997) 6.

cation with their patients would be greeted with pride and praise. In Quebec—or at least the Quebec of Mr. Landry and like-minded PQ hard-liners—the ability of health care institutions to serve people in their own language seems to be seen as some kind of evil that should be squashed like a superbug in a cancer ward.¹²⁷

In another editorial on the following day, *The Gazette* commented that Anglophones had good reason to be suspicious of the government's motives. The government's handling of the access programs indicated that it was more interested in catering to "a handful of PQ language fanatics" than to the needs of the English-speaking community.¹²⁸ Gretta Chambers, one of the most moderate English-speaking commentators, made this comment:

What appears to be bugging the deputy premier is the idea that French-speaking professionals, when faced with distressed English-speaking patients, deal with these people in English when they can. This "disturbing" fact is apparently making the government "more vigilant". What about is not yet clear ...

It is the good will that has gone into the access plans for English health and social services that the Minister finds "unacceptable". Over the last eight years, regional boards, hospitals, CLSCs and the English-speaking community have drawn up guidelines in conformity with Bill 142 ... These access plans have purposely been kept as flexible as possible so as not to lock regions and institutions into rigid hiring practices ...

The Quebec government now appears to be determined to undo all this by decreeing good will to be bad form and by setting quotas for the provision of English health-care services. To assist in this endeavour, it has brought in the Office de la langue française to rule on the acceptable amount of English to be allowed to roam the health-care system.¹²⁹

Reacting to the cabinet decision to reject the Ministry report, a number of Anglophone groups, including Alliance Quebec, the Voice of English Quebec, Outaouais Alliance, the Committee for Anglophone Social Action, the Townshippers' Association, Chateauguay Valley English-Speaking People's Association, the Coasters' Association, and the Council for Anglophone Magdalen Islanders formed a coalition to pressure the government to adopt the access programs and to refute the allegations made by some members of the cabinet about exaggerated needs and widespread bilingualism in the network.¹³⁰ A request for a meeting with the Minister went unheeded.

¹²⁷ "Landry Stoops to New Low" *The Gazette* (22 July 1997) B2.

¹²⁸ "No Trust on Health Care" *The Gazette* (23 July 1997) B2.

¹²⁹ "On Health, Landry Sees Good Will as Bad Form" *The Gazette* (25 July 1997) B3.

¹³⁰ Louise Beaudoin, Minister responsible for the *Charter of the French language*, had declared that it was unacceptable to require nurses working for Info-Santé in the Montérégie to be bilingual despite the presence of over 100,000 English-speaking people in the region: "Il y a environ 10 pourcent d'anglophones dans cette région, mais la régie exige le bilinguisme comme condition d'embauche pour la douzaine d'infirmières qui œuvrent au service Info-Santé régional. Je ne peux accepter cela, là où il y a 90 percent de francophones.", cited in N. Delisle, "Vingt ans après la loi 101, le français a fait des progrès 'significatifs mais inachevés'" *La Presse* (21 August 1997) B1.

In the meantime, the Minister, in replying to questions raised by Pierre Paradis, health and social services critic for the Liberals, stated that the government counted on completing its work in the autumn.¹³¹ In a letter sent the same day to Alliance Quebec president, Michael Hamelin, the Minister commented that the government “n’a pas comme projet de retarder indûment l’adoption des programmes d’accès. Certaines précisions sont requises et nous comptons faire diligence à ce niveau.”¹³² In September, it was announced that the regional boards would be asked to review their access programs.

In the same month, the government published the final report on the mandate of its agencies, commissions, and committees. Chaired by Parti Québécois MNA Joseph Facal, the Working Group on the Examination of Government Agencies (“Facal Committee”) made far-reaching recommendations on the operation of all government bodies, including the English Services Committee, one of seventeen bodies set up to advise the government on various issues related to health and social services. The Facal Committee recommended that the provincial status of five of these be maintained, while the others be merged, abolished, or downgraded to “ministerial” status. The Facal Committee recommended that the English Services Committee lose its provincial designation and that it become a consultative committee answerable to the Minister and subject to abolition at any time.¹³³ For the English-speaking community, this represented another attempt to undermine its already limited influence.¹³⁴

At the end of November, the Parti Québécois held another Conseil national at which language was discussed. The delegates adopted a resolution, presented once again by the Sherbrooke riding associations, to this effect:

Que le gouvernement, en dehors des organismes reconnus bilingues par la Charte de la langue française, mette fin à la discrimination basée sur la connaissance d’une langue seconde, en interdisant à l’administration d’exiger, lors de l’embauche, de promotion ou de mutations, la connaissance par les employés d’une autre langue que la langue officielle.¹³⁵

This resolution, which specifically envisaged the health and social services sector, would have the effect of modifying the *Charter of the French language*. It aimed to reduce the number of bilingual positions and would mean that knowledge of English could not be required in the vast majority of health and social service institutions in Quebec. Its implementation would result in a gradual decline in bilingual personnel in institutions named in the access programs and would consequently, over time, erode the ability of those institutions to provide services in English. With the exception of

¹³¹ Letter from J. Rochon to P. Paradis (26 August 1997).

¹³² Letter from J. Rochon to M. Hamelin (26 August 1997).

¹³³ Quebec, Ministère du Conseil exécutif, Groupe de travail sur l’examen des organismes gouvernementaux: Rapport (Gouvernement du Québec, 1997), online: Ministère du Conseil exécutif <<http://www.eex.gouv.qc.ca/ouellet.htm>>.

¹³⁴ See G. Chambers, “Pulling Teeth from an Anglo Watchdog” *The Gazette* (3 October 1997) B3.

¹³⁵ Parti Québécois, Conseil général (November, 1997).

those enjoying bilingual status under section 29.1 of the *Charter of the French language*, an institution would be prohibited from seeking the knowledge of English when replacing bilingual personnel retiring or leaving their positions. This was a backdoor attack on the right to English services, expressed in terms of ending discrimination based on the knowledge of English.¹³⁶ A request by Alliance Quebec to meet the Premier to discuss the effect of the resolution and the delays in adopting the access programs went unanswered, and the Minister stated that the delay did not affect the accessibility of service delivery in English. While the resolutions adopted by delegates of the Parti Québécois did not bind the government, they were hardly reassuring to the English-speaking public. Neither was the message well-received elsewhere:

Nous savons cependant que cette vision étriquée des droits linguistiques ne correspond pas à la vision du gouvernement Bouchard, ni à celle de la majorité des membres du PQ, ni au point de vue des électeurs de ce parti, et encore moins à celle de l'ensemble des Québécois.

Il n'en reste pas moins que, dans un parti qui affiche un minimum de principes, une résolution comme celle-là n'aurait jamais dû passer. Cela révèle encore une fois, de façon crue, la dérive des instances de ce parti et du problème que pose la domination de groupes radicaux, que ce soient les fons de la langue ou les socio-démocrates d'un autre temps.

Même si le premier ministre Bouchard a appris à contrôler leurs débordements les plus fous, on l'a vu au Conseil national avec la défaite des soi-disant socio-démocrates, il n'en reste pas moins que ce hiatus entre le PQ et la société québécoise oblige le gouvernement à des contorsions, à des compromis qui ne sont pas dans l'intérêt public. Nous payons tous pour les psychodrames idéologiques du Parti québécois.¹³⁷

3. Ministry Intervention and the Consequences: From Nineteen to Zero in St. Maurice

Following the adoption of the resolution at the Conseil national of the Parti Québécois in November 1997, the Ministry of Health and Social Services asked the regional boards to review their access programs in light of the changes that had taken place since their submission, which in some cases amounted to two years. The Minis-

¹³⁶ A group in the Outaouais, *Impératif français*, had taken up the same call, alleging that Francophones were the subject of discrimination, in that they were increasingly being excluded from positions because they did not speak English. The group did not, however, submit any evidence of this (see P. O'Neil, "Impératif français crie à la discrimination" *Le Devoir* (6 November 1997) A2). A second resolution at the Parti Québécois Conseil national that recommended the government pay bonuses to employees required to know a language other than French was defeated. Although its proposers said it would make administrators think twice before requiring bilingualism, others argued that it would backfire because the prospect of a pay increase would encourage more people to speak English on the job.

¹³⁷ A. Dubuc, "Un parti en otage" *La Presse* (15 December 1997) B2.

try also asked the boards to identify the number of existing positions requiring a knowledge of English and those that would be needed under the new programs. It was underlined that the services identified would become a right for English-speaking users and that their inclusion must therefore correspond to the ability of institutions to provide them. The boards were informed that, according to a preliminary analysis, it seemed possible to anticipate a presentation of the programs to the cabinet between January and March 1998.¹³⁸

In early 1998, it was reported that Ministry officials were putting pressure on regional boards to reduce the services in their access programs. After receipt of the Ministry's letter asking them to revise their programs, some boards received visits or follow-up calls, intimating that Anglophones could sue if the services identified in the programs were not available at all times.¹³⁹ While the Minister denied this and the majority of boards stood by their original access programs, the call for revision and resulting Ministry intervention had important ramifications in one region. In March 1998, the Mauricie-Bois-Francis regional board voted unanimously to identify no English services in the institutions of its region and to renew an agreement relating to the availability of some English services in Montreal. Instead of an access program, it proposed a "policy" facilitating access to English services.¹⁴⁰ The board, arguing also that its institutions had not understood the legal implications of being designated in an access program, explained itself in this way:

The revision of the Access Plan led to the conclusion that the demand for services in English is practically inexistent at all of the 17 institutions mentioned [*sic*] in the plan of 1995 and even for the services designated since 1989. Thus, no establishment appears justified to be designated according to section 348 of the Health and Social Services law. However, the regional health board still wants to encourage and maintain the good will of its institutions to respond to the needs of its anglophone community, in English, even if it represents only from 3 to 15 requests a year per institution. To that effect, a policy was drawn up in order to ensure a genuine accessibility to all services, everywhere on the territory, instead of only certain services outlined in a document, providing a theoretical Access Plan.¹⁴¹

The board disregarded the recommendations of its own regional committee on English services, which had proposed that fourteen institutions in the region be included in an access program to provide some services in English. When the Montreal

¹³⁸ See letters sent by P.-A. Paré, Deputy Minister of Health and Social Services, to the regional boards (between 28 November 1997, and 27 January 1998).

¹³⁹ E. Thompson, "Anglo Health Plans Snagged: MNA Charges Bad Faith" *The Gazette* (3 March 1998) A1; C. Clark & I. Block, "No Cuts in English Service: Rochon—Health Minister Denies Pressure on Regional Boards to Scale Down Planned Access for Anglophones" *The Gazette* (21 March 1998) A3; "Tampering with Access Plans" *The Gazette* (21 March 1998) B4.

¹⁴⁰ Quebec, Régie régionale de la santé et des services sociaux Mauricie-Bois-Francis, "Résolutions CARR-98-14" and "CARR-98-15" (25 March 1998).

¹⁴¹ Quebec, Régie régionale de la santé et des services sociaux Mauricie-Bois-Francis, Press Release (25 March 1998).

regional board declined to renew the agreement, based on the existence of the services in its 1989 access program, the Mauricie-Bois-Francs region found itself in a situation that in all likelihood infringed the provisions in *Bill 142* calling on each regional board to develop an access program.¹⁴² An editorial in *Le Nouvelliste*, the daily newspaper of the region, pointed the finger at the Bouchard government for creating such a situation:

Si le gouvernement Bouchard n'avait pas remué la poussière linguistique dans le réseau de la santé, l'an dernier, en s'indignant que trop d'établissements soient désignés pour accommoder les malades de langue anglaise, la Mauricie ne se retrouverait pas au cœur d'une controverse linguistique qui n'a rien à voir avec la réalité régionale.¹⁴³

In May 1998, the Minister stated that five or six access programs were ready and that his goal was to terminate the whole operation by the end of June. This did not occur. Asked again by Liberal MNA Russell Williams in June, the Minister noted that the date had been pushed back to Labour Day and then to the end of October 1998. However, Premier Bouchard was reported to have said that the access programs would have to return once again to the OLF for review.¹⁴⁴

The approach of the regional board in Mauricie-Bois-Francs raises important questions about the operation of the legal guarantee to English services in regions with few English-speaking residents. In that region, English-speaking people numbered 5,600 (1.25%) of a population of 459,000.¹⁴⁵ It is not entirely clear if the small demand for services in English reflects the tiny population, or if people seek services in French because they are fluently bilingual and comfortable in doing so. Limited demand for services in English in the region may result from the fact that English-speaking residents do not wish to draw attention to their minority status. It could also mean that English-speaking people of the region choose to go elsewhere, particularly

¹⁴² As a result of *Bill 142*, s. 348 of the *Current Health and Social Services Act*, *supra* note 7, states:

Each regional board, in collaboration with institutions, must develop a program of access to health services and social services in the English language for the English-speaking population of its area in the centres operated by the institutions of its region that it indicates or, as the case may be, develop jointly, with other regional boards, such a program in centres operated by the institutions of another region ...

In consequence, a decision not to name any English services in an access program, coupled with the refusal of Montreal to agree to provide services in English, would not, in my opinion, constitute an "access program" in accordance with the law.

¹⁴³ G. Gagnon, "Sur fond de tension politique" *Le Nouvelliste* (27 March 1998) 8.

¹⁴⁴ Quebec, National Assembly, *Débats de la Commission des affaires sociales* (4 May and 17 June 1998), online: Assemblée Nationale <<http://www.assnat.qc.ca/archives-35leg2se/fra/publications/debats/Journal/cas/980617/1740.htm>>. Moreover, see D. Macpherson, "Campaign of Harassment—PQ is Bullying an Aging, Shrinking Anglophone Community" *The Gazette* (19 September 1998) B5.

¹⁴⁵ This refers to people whose first official language spoken is English. Numbers ranged from 70 (0.58%) to 1,250 (1.60%) per CLSC territory (see Quebec, Régie régionale de la santé et des services sociaux Mauricie-Bois-Francs, *Programme d'accès à des services de santé et des services sociaux pour les personnes d'expression anglaise* (1995) at 21).

to Montreal, to receive services in their language, or perhaps signify that people needing services do not seek them at all. Moreover, if a regional board with a small population of English-speaking people decides that services should be furnished in English outside the region with no legal obligation to do so locally, this would have the effect of undermining the legal guarantees introduced by *Bill 142* in 1986.¹⁴⁶ If services are furnished according to a policy based on the good will of institutions, this appears to create a situation similar to that which existed prior to the passing of *Bill 142*.

The statement of the Mauricie-Bois-Francs regional board that institutions had been unaware of their legal obligations is disturbing. This refers to concerns allegedly raised by the Ministry that institutions could be sued if English services named in an access program were not accessible at all times. Institutions previously willing to be included were now afraid of possible legal consequences. In fact, institutions and regional boards receive few complaints about linguistic inaccessibility, and there have been no cases of threats to sue because services were not available.

4. Legal Action as Catalyst

In January 1999, Alliance Quebec applied for a writ of *mandamus* against the Quebec government on the ground that it had not respected its obligation to approve the access programs as stipulated in the *Current Health and Social Services Act*. In the same month, the government approved access programs for Bas-Saint-Laurent, Côte-Nord, Gaspésie-Îles-de-la-Madeleine, Lanaudière, Nord-du-Québec, the Outaouais, and Saguenay-Lac-Saint-Jean. Shortly afterwards, it approved a program, containing minimal services, for the region of Mauricie-Bois-Francs. The inclusion of some services was presumably intended to ensure compliance with the law. These eight regions contain less than ten percent of the English-speaking population of Quebec.

Other regions, including those with substantial numbers of English-speaking people, continued to pose a problem for the government. With a court date set for June 1999, Pauline Marois, named Minister of Health and Social Services after the election of November 1998, wrote to regional boards in Estrie, Laurentides, Montréal-Centre, Chaudière-Appalaches, the Montérégie, Laval, and Abitibi-Témiscamingue in March 1999. She told them that she intended to present the programs in her possession to the cabinet in May and that their revised access programs would not receive a favourable recommendation. Failure by the regional boards to submit programs with the desired changes would result in the presentation to the cabinet of the programs already submitted. In the probable event of the refusal by the cabinet to approve those programs,

¹⁴⁶ The regional board justified its decision in part by citing the words of Thérèse Lavoie-Roux, the Minister at the time of the passing of *Bill 142* in 1986, to the effect that a region could negotiate inter-regional agreements where the English-speaking population was small.

the Minister would subsequently advise the regional boards of the approach that the government would take.

The attempt by the Minister to cut back English services in the access programs in these regions came a month before yet another Conseil national of the Parti Québécois. A resolution to repeal *Bill 142* was presented by Estrie delegates and, after intervention by the Minister, tabled until the next meeting. However, it was made clear that, if *Bill 142* was to be respected, its application would be tightened to reduce the accessibility of English services in the health and social services network.¹⁴⁷

Days before the court date in June, the government approved programs for all regions except Montreal and Estrie. Between the date of the hearing and the judgment, the government passed the two remaining programs.

It seems likely that the prospect of a court case incited the government to approve the programs rapidly. Aware that the failure to approve access programs would constitute non-compliance with health and social services legislation, it ensured that all programs were passed before the court had the opportunity to render its decision. While the majority of the programs were approved in conformity with the proposals originally submitted by the regional boards, the government unilaterally cut back services in several regions where the English-speaking populations were small.¹⁴⁸ By July 1999, almost five years after the government had asked the regional boards to initiate the revision process, all the programs had been enshrined by order in council.

C. Searching for an Understanding

Analysis of events since the election of the Parti Québécois in September 1994 indicates a marked reluctance on the part of the government to adopt the English-service access programs. While originally attributing delays to the restructuring of the health and social services system, it became apparent that the government had to deal with opposition by some of its own ministers and party members hostile to the use of English by Francophone personnel in the health and social services sector. Publicly committed to promoting the use of French and enforcing the *Charter of the French language*, the government nonetheless refused to proscribe the use of English on

¹⁴⁷ See S. Gordon, "Anglo Access Assailed" *The Gazette* (26 April 1999) A5, and "Critics Decry 'Intimidation'" *The Gazette* (27 April 1999) A5; K. Gagnon, "Les troupes péquistes contestent plusieurs décisions ministérielles, et surtout l'aide promise aux Expos" *La Presse* (26 April 1999) A4; P. Cherry, "Premier Cowed by PQ Zealots, Charest Says" *The Gazette* (28 April 28, 1999) A8. See also the critical editorial by A. Gruda, "La fixation linguistique" *La Presse* (30 April 1999) B2, which noted that the issue was still open although the resolution had not been adopted: "Ce chapitre plutôt honteux des relations entre le PQ et la minorité anglophone n'en est pas fermé pour autant. En fait, la rhétorique qui alimente ce combat d'arrière-garde s'est malheureusement frayée un chemin jusqu'aux plus hautes sphères de pouvoir, soit jusqu'au Conseil des ministres."

¹⁴⁸ The following regions were particularly affected: Saguenay-Lac-Saint-Jean, Abitibi-Témiscamingue, Laurentides and Mauricie-Bois-Francis. There were also some unresolved questions about the organization and delivery of inter-regional services.

commercial signs, as written into its party program. However, faced with new access programs that proposed to expand the number of institutions providing services in English, the government could legitimately acquiesce to demands from some members of its own party that the right to services in English be reviewed to prevent institutional bilingualism and examined by the OLF to ensure conformity with the *Charter of the French language*. This can be understood as the essence of a compromise with those party members so that, outside the health context, the government would not have to resort to the "notwithstanding" clause in the *Charter* to prohibit the use of English or other languages on commercial signs.¹⁴⁹

Thus the government's actions can largely be understood as an attempt to minimize conflicts within its own party, rather than to respond to concerns of Francophone personnel worried about using English in their dealings with English-speaking people. While the hostile reaction from English-speaking groups and media to the adoption of the resolutions by the Parti Québécois was entirely predictable, the majority of French editorial writers who discussed this question were equally critical of the Parti Québécois and the Parti Québécois government's handling of the issue. French editorialists refuted the allegations of rampant institutional bilingualism in the health and social services network. Moreover, they accused the government of stirring up an unnecessary language war and of bad faith in compromising the right of access to English services by pandering to the concerns of party members whose views were unrepresentative of Quebec society as a whole.

By requesting a review of the access programs at the end of 1997, the Ministry of Health and Social Services likely expected the regional boards to reduce the number of institutions providing English services from those submitted in 1995 and 1996, while at the same time providing at least as many services and institutions as those originally approved in 1989. This would enable the government not only to respond to the Parti Québécois members who pushed through the resolutions aimed at curtailing the use of English in the health care sector, but also to respect its commitments to the English-speaking population, which was worried that services would be cut back. It is to the credit of the regional boards that, for the most part, they resisted pressure from the Minister and Ministry to reduce the services in their programs for political reasons that had nothing to do with service delivery.

It is ironic that, with the exception of the English Services Committee, whose recommendation to approve the access programs in their original form was ignored, there was no consultation by the government with any recognized English-speaking group subsequent to the submission of the programs by the regional boards until a meeting between the Minister and the Townshippers' Association in May 1999. In this respect, the English-speaking community was effectively excluded from the revision process after the elaboration of the programs in 1995 and 1996. It was this sense of frustration and impotence, coupled with the long delays, that led Alliance Quebec to

¹⁴⁹ *Supra* note 11, s. 33.

initiate court proceedings in January 1999 to force the government to approve the programs.

IV. The Right to English Health and Social Services and the *Charter of the French language: Conformity or Incompatibility?*

Much discussion of the right to services in English has centred on its compatibility with the *Charter of the French language*, and the government has stated on several occasions that ensuring the revised access programs' conformity with the *Charter of the French language* caused the delays in their adoption. Most of the controversy has centred on the need for Francophone personnel to use English in their dealings with English-speaking people receiving services. Some critics believe that the increased number of institutions identified in the new programs, extending beyond those traditionally offering services in English, amounts to a form of "institutional bilingualism" within the health and social services system. This change constitutes, in their eyes, an unacceptable deviation from both the letter and the spirit of the *Charter of the French language*, which stipulates that French is the language of civil administration, with the exception of those bodies that enjoy special recognition because they provide services to people who, in the majority, speak a language other than French.¹⁵⁰ Moreover, the right conferred by *Bill 142* and operationalized in the access programs has an effect on the right of workers to carry on their activities in French and on institutional management which seeks to ensure that services are available in English to English-speaking users.¹⁵¹

In addition to the language of work, the right to English services raises questions about whether health and social service institutions can install signs in English, as well as in French, so as to orient and inform their English-speaking users. This has been contentious in recent years. In light of these issues, it is interesting to examine the criteria used to evaluate whether a health and social services institution can require that personnel have some knowledge of English and to examine in what context an institution can use English in signs designed for people using its services.

A. *The Right to Work in French*

The Preamble of the *Charter of the French language* encapsulates its spirit and provides the foundation for the concrete rules that follow:

[Whereas] the French language, the distinctive language of a people that is in the majority French-speaking, is the instrument by which that people has articulated its identity;

Whereas the National Assembly of Québec recognizes that Quebecers wish to see the quality and influence of the French language assured, and is resolved

¹⁵⁰ *Supra* note 12, ss. 14-29.1.

¹⁵¹ See especially *ibid.*, ss. 4, 46.

therefore to make of French the language of Government and the law, as well as the normal and everyday language of work, instruction, communication, commerce and business;

Whereas the National Assembly intends to pursue this objective in a spirit of fairness and open-mindedness, respectful of the institutions of the English-speaking community of Québec, and respectful of the ethnic minorities, whose valuable contribution to the development of Québec it readily acknowledges ...¹⁵²

The right to work in French is expressed as a fundamental language right, and the requirement that a worker know a language other than French to obtain employment is prohibited unless justified by the employer. Section 46 states:

An employer is prohibited from making the obtaining of an employment or office dependent upon the knowledge of a language other than the official language, unless the nature of the duties requires the knowledge of that other language.

The burden of proof that the knowledge of the other language is necessary is on the employer, at the demand of the person or the association of employees concerned or, as the case may be, the Office de la langue française. The Office de la langue française has the power to decide any dispute.¹⁵³

This part first reviews the general application of section 46 of the *Charter of the French language* and the decisions rendered by the OLF relating to section 46 in the health and social services sector. The impact of this jurisprudence on the ability of institutions to provide services in English is then analyzed.

1. Application of Section 46 of the *Charter of the French language*

In light of the importance of the right to work in French, it is interesting to note that the OLF has dealt with a surprisingly small number of cases under section 46 since the *Charter of the French language* was passed in 1977. In its 1979-80 annual report, the OLF reported that it had ruled on 10 cases and that 6 others were pending.¹⁵⁴ In its 1996-97 annual report, the OLF noted that a total of 277 files had been opened over the previous nineteen years. While the OLF had rendered 78 decisions, the person or association laying the complaint had desisted in 157. Thirteen cases had been abandoned, 3 files closed, and in one case, the competition for the position in question had been cancelled. Another 25 files were pending. Of the decisions rendered on the merits by the OLF, knowledge of English was judged necessary in 41 out of 62 cases. Knowledge of Chinese and Italian were judged necessary in one case each and knowledge of Greek unnecessary once. Nine cases were inadmissible and, in 3 cases, there was no decision to make because the employer voluntarily renounced

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ Québec, Office de la langue française, *Rapport d'activité 1979-1980* (Gouvernement du Québec, 1980) at 5.

the linguistic requirement for the position.¹⁵⁵ Since that time, the OLF has ruled in at least two more cases dealing with the health and social services sector.¹⁵⁶ In one of these cases, the employer was able to justify the knowledge of English as a job requirement. In the other, the OLF rejected the decision of the employer to require the ability to speak fluently a language other than French.

Analyses of the early decisions of the OLF noted the development of criteria to evaluate the necessity of another language for a particular position and the realization of some of the objectives of the *Charter of the French language*. A review undertaken by Alain Prujiner in 1981 underscored the need to show, first, the existence of a specific linguistic need directly linked to an essential aspect of the task at hand, and second, the absence of possibilities other than the requirement of sufficient linguistic competence. These criteria must be considered for each position, since a generalization of linguistic requirements for a whole category of jobs would be unacceptable if the goal could be accomplished by requiring a language other than French for certain limited positions.¹⁵⁷ A study published by Louis Garant in 1982 concluded as follows:

Les buts fixés par le législateur, lors de l'adoption de la *Charte*, semblent avoir été atteints. En effet, l'usage de la langue française, a été favorisé et protégé en ce qui a trait à la langue du travail ...

La *Charte* a certes eu un effet curatif quant à la langue du travail, comme les décisions nous indiquent. Toutefois, l'on ne peut passer sous silence l'effet préventif de ces dispositions. La force dissuasive de cette loi est sans doute son impact le plus grand, bien que moins facile à évaluer.¹⁵⁸

An analysis of the decisions of the OLF up to 1982 permitted Raynald Mercille to draw the following conclusions. First, the OLF recognized the right of employers to provide services in the language of their clientele. In situations where the employers provided services to the public, the OLF frequently acknowledged the need for another language when the existence of a non-Francophone clientele could be established and when an appropriate linguistic requirement was the only way to furnish adequate services to that clientele. Second, it was possible to establish the policies and principles restricting the right of the employers to invoke the necessity of another language. The OLF would not be satisfied by the good faith of employers in imposing the linguistic requirement, but would require proof of the absence of any other means. Neither would the OLF permit policies of general bilingualism, but instead would require employers to develop selective linguistic requirements that did not necessitate all personnel for a certain category of position to be bilingual. Moreover, the OLF

¹⁵⁵ Quebec, Office de la langue française, *Rapport annuel 1996-1997* (Gouvernement du Québec, 1997). This covers the period up to March 31, 1997.

¹⁵⁶ As of October 1, 1999. Two other cases involving health and social services institutions had been heard and were under deliberation as of this date.

¹⁵⁷ A. Prujiner, "Les décisions de l'Office de la langue française en vertu de l'article 46 de la *Charte de la langue française*" (1981) 22 C. de D. 827 at 836-37.

¹⁵⁸ L. Garant, "La Charte de la langue française et la langue du travail" (1982) 23 C. de D. 263 at 276.

would sometimes incorporate political considerations and criteria into its decisions. The employers would have to prove five points to succeed: (1) the existence of a linguistic requirement; (2) the specific character of this requirement; (3) that this requirement was directly linked to the position's main tasks; (4) that the employer had exhausted all other possibilities; (5) that the linguistic requirement conformed to a criterion of proportionality of the linguistic group to be served.¹⁵⁹ For Mercille, the OLF had developed criteria beyond the simple balance of probabilities required by the civil law in the matter of proof and the general requirement of good faith in the organization of tasks. In his opinion, "L'Office tranche un litige avec une partialité linguistique conforme à sa mission."¹⁶⁰

Emmanuel Didier noted in 1987 that decisions rendered by the OLF tended to reduce bilingualism as much as possible and to make French the *only* language of work, even though the *Charter of the French language* speaks only of the right to work in French.¹⁶¹

The OLF itself has summarized the application of section 46 as follows: the knowledge of English or another language can be required if the institution can demonstrate the necessity to the OLF where a person or union challenges the linguistic requirement. In such a case, in accordance with section 46, the burden of proof lies on the employers. The OLF will take into account the real clientele, rather than the potential clientele; employers must show that they have envisaged other measures that could avoid or reduce the requirement for English or another language; the fact that employers have provided means to reduce the impact of the requirement for English or another language does not exclude the obligation to prove necessity; each post is examined individually, even if the challenge applies to several positions of the same nature; the level of linguistic competence is evaluated. Moreover, employers can take

¹⁵⁹ R. Mercille, "La langue du travail: analyse de la jurisprudence relative à l'application des articles 41 à 50 de la Charte de la langue française" (1985) 45 R. du B. 33 at 52-58.

¹⁶⁰ *Ibid.* at 62.

¹⁶¹ E. Didier, "The Private Law of Language" in Bastarache, *supra* note 17, 312 at 362. The author also points out the contradiction between the spirit of the *Charter of the French language* and its application by the OLF and cites as an example the "measures to be taken" to promote the francization of head offices. The standard agreement mentioned the need "to examine the possibility of transferring to a less strategic position those people who cannot satisfy the language requirements of their position." As cited from Quebec, Office de la langue française, *Entente particulière type pour les sièges sociaux*, Direction des programmes de francisation (30 September 1981) at 15. Didier concludes that it is difficult to reconcile such a measure with s. 142 of the *Charter of the French language*, which requires that "francization programs ... take account of the situation of persons who are near retirement or of persons who have long records of services with the business firm" or even with s. 45, which protects French-speaking workers from discrimination.

advantage of a person's knowledge of English without formally attaching a linguistic requirement to the position.¹⁶²

In light of these criteria, it is interesting to analyse the decisions rendered by the OLF in the health and social services sector.

2. Jurisprudence of the Office de la langue française under Section 46 in the Health and Social Services Sector

The right to services in English imposes on some institutions the obligation to furnish some of their services in that language. There is consequently a need for some of their personnel to have a knowledge of English and for the institutions to modify their hiring requirements as a result. This could theoretically contravene section 46 of the *Charter of the French language*. How has the OLF ruled in cases pitting the right to work in French in health and social service institutions against the right to receive services at those institutions in English?

Between the passing of the *Charter of the French language* in 1977 and February 1999, the OLF heard seventeen cases where it considered the application of section 46 to health and social services settings. Fifteen of these cases involved the knowledge of English as a linguistic requirement. One case also dealt with the knowledge of another language. Another case involved the knowledge of Greek and another of Cantonese. The OLF ruled in sixteen cases and decided that there was no need to intervene in the remaining case, since even the complainant admitted the necessity of a knowledge of English.

It seems worthwhile to examine whether the introduction of the legal guarantee to English services in *Bill 142* has had an impact on the decision-making of the OLF.

a. Decisions Rendered prior to Bill 142

The OLF rendered seven decisions prior to the passing of *Bill 142* in December 1986, six of which involved the challenge of the employer's requirement of a knowledge of English. The OLF held that the requirement for a knowledge of a language other than French was justified in each case. Even in the single case where there was no direct contact between the employee and users of the services, the OLF held that the requirement of the knowledge of English by the employer was justified.¹⁶³ The employer there had regrouped all tasks requiring the use of English in the research division under one position, that of a "commis principal", whose tasks included working with different committees and the preparation of scientific texts. The OLF found

¹⁶² Quebec, Office de la langue française, *Balises pour l'application de la Charte de la langue française dans les établissements de santé et des services sociaux désignés ou indiqués dans les programmes d'accès aux personnes d'expression anglaise* (Montréal) at 5 [undated].

¹⁶³ *Syndicat des travailleurs unis de Pinel v. Institut Phillippe-Pinel de Montréal* (6 December 1984), n° 46-069, [1983-1991] Décisions sur la langue du travail 46.

that knowledge of English was justified for this position in the research department of a specialized psychiatric centre whose activities extended outside Quebec. The OLF also ruled in one instance involving a private clinic dispensing services to the public, holding knowledge of English to be justified for a nursing position involving direct contact with a clientele that was 83% English-speaking.¹⁶⁴

In the four cases dealing with the employer's requirement of English concerning positions in public health and social service institutions, the OLF held that the linguistic requirement was necessary. These decisions reveal the orientations of the OLF in dealing with service delivery in the para-public sector. The requirement for a bilingual secretary-receptionist in a CLSC where 14.5% of the population on the territory was Anglophone and where the population whose first language was neither English nor French amounted to 47.8% was justified. In that territory, English was generally the language of use of "allophone" users and 75% of calls received by the CLSC were in English. The OLF held that the CLSC must be able to communicate with the clientele that it has an obligation to serve and that English must be used for this purpose.¹⁶⁵ The OLF also ruled that spoken English was a necessary linguistic requirement for a nursing position serving 2,200 Cree who either did not understand French or refused to speak it. The OLF agreed that providing nursing services through an interpreter was not adequate as a general rule.¹⁶⁶

The importance of verbal communication in service delivery was recognized by the OLF in a case involving a position requiring direct contact with unilingual Anglophones and allophones who did not speak French at an external counselling centre in legal psychiatry:

Dans un domaine tel que la psychiatrie, il est évident que la communication verbale est d'une très grande importance, d'autant que, dans le cas qui nous occupe, les patients qui se présentent ou qui téléphonent au centre sont souvent psychologiquement perturbés et que leur premier contact peut être déterminant. Cette situation particulière suppose donc que la connaissance de langues autres que le français (et en particulier l'anglais) est non seulement un atout mais une nécessité tant pour le personnel soignant que pour le personnel d'accueil.¹⁶⁷

¹⁶⁴ *Bertrand v. Institut de Bio-endocrinologie* (1 August 1980), n° 46-020, [1979-1980] Décisions rendues en vertu de l'article 46 de la *Charte de la langue française* 48.

¹⁶⁵ *Émond v. CLSC St-Louis-du-Parc* (5 October 1979), n° 46-012, [1979-1980] Décisions rendues en vertu de l'article 46 de la *Charte de la langue française* 36.

¹⁶⁶ *Syndicat professionnel des infirmières et infirmiers de Chicoutimi v. Centre hospitalier de Chibougamau* (6 February 1981), n° 46-027, [1980-1982] Décisions rendues en vertu de l'article 46 de la *Charte de la langue française* 18. The OLF took note of the declaration of the employer that notes were drafted in French and that a knowledge of written English was not required. Moreover, it took into account the intention of the Cree to eventually put an end to this exceptional situation by encouraging the implementation and a broadening of the use of French.

¹⁶⁷ *Lavoie et le Syndicat des travailleurs unis de Pinel v. Institut Philippe-Pinel de Montréal* (7 July 1982), n°46-046, [1980-1982] Décisions rendues en vertu de l'article 46 de la *Charte de la langue française* 33.

Similarly, in the delivery of specialized services to children and their families, the OLF was ready to recognize the interest of the child and accept that the proportion of English-speaking social service personnel be superior to the proportion of clients. The OLF was not ready to intervene in the organization of services and rejected arguments founded on proportions and percentages: “[L’Office] ne pourrait demander à l’employeur de modifier l’organisation du service qu’au prix d’une ingérence directe dans le fonctionnement du C.S.S. dans un domaine où la compétence professionnelle et les qualités humaines doivent passer au premier rang.”¹⁶⁸

The OLF also ruled on one case involving the requirement of a knowledge of Chinese for the position of receptionist at a CLSC that served a Chinese population estimated officially as 3.4% of the total population, but thought to be larger because of recent shifts. The policy of the CLSC was to count on its personnel to respond to the needs of a variety of ethnic groups in their language. Following the departure of a Chinese-speaking doctor, the CLSC needed another employee who could communicate in this language and the first position to fall open was that of receptionist. The person filling this post would thus accomplish the ordinary duties of a receptionist and ensure a response to the needs of Chinese users. The OLF accepted the CLSC’s policy and recognized that, given the other factors, the receptionist’s task necessitated a knowledge of Chinese.¹⁶⁹

b. Decisions Rendered after Bill 142

The OLF has rendered nine decisions involving public health and social service institutions since the passing of *Bill 142* in December 1986. Eight cases entailed the knowledge of English as a job requirement and one the knowledge of Cantonese. Seven dealt with positions providing direct services to the public. In six cases, the OLF held that the employer was justified in requiring the knowledge of a language other than French.

In two cases where the position involved no direct contact with English-speaking users, the OLF decided that the linguistic requirement was justified. In *Syndicat des travailleurs et des travailleuses de Maisonneuve-Rosemont v. Hôpital Maisonneuve-Rosemont*, the OLF recognized the necessity of requiring the knowledge of English for a medical secretary who had to type English texts for professors and teaching assistants.¹⁷⁰ In the second case, the dispute stemmed from a ministerial decision to

¹⁶⁸ *Goulet v. Centre de services sociaux de l’Outaouais* (1 October 1982), n° 46-051, [1980-1982] Décisions rendues en vertu de l’article 46 de la *Charte de la langue française* 40 [hereinafter *Goulet*].

¹⁶⁹ *Syndicat des travailleurs du CLSC St-Louis-du-Parc v. CLSC St-Louis-du-Parc* (13 July 1979), n° 46-009, [1979-1980] Décisions rendues en vertu de l’article 46 de la *Charte de la langue française* 29 [hereinafter *CLSC St-Louis-du-Parc*].

¹⁷⁰ (August 28, 1987), n° 46-115, [1983-1991] Décisions sur la langue du travail 99. While this decision was rendered after the passing of *Bill 142*, the original complaint was filed in October 1986. The decision was rendered prior to the adoption of the access programs in 1989, in which the hospital was named to provide only emergency services in English.

transfer pathology services from the Brome-Missisquoi Hospital to the Centre hospitalier de Granby and the subsequent transfer of an English-speaking pathologist into a French-speaking milieu. The OLF decided that knowledge of English was justified for the position of a medical secretary specially assigned to the doctor, who drafted her reports in English as permitted by section 27 of the *Charter of the French language*.¹⁷¹ The OLF recognized that, in imposing the knowledge of English in one position of three, linguistic requirements could differ for positions designated by the same job title within the same service. Thus an institution could require the knowledge of English for one position while not for another in the same category or class if it could justify the requirement. A third case dealt with the position of a medical secretary at the nuclear medicine department of a hospital. In addition to maintaining contacts with international suppliers and organizations, the person occupying this position had to welcome patients, 30% of whom were non-Francophone. The OLF again decided that the employer had successfully justified the requirement for a knowledge of English.¹⁷²

The issue of *Bill 142* was first raised in OLF decision-making in 1987, but not discussed since the access programs had not yet been approved.¹⁷³ In deciding that a transition centre for adolescents, 30% of whom were Anglophone, could require the knowledge of English for an educator's position, the OLF once again recognized the importance of language in service delivery: "[L]'employeur doit accueillir de manière habituelle un nombre important de jeunes anglophones, qui présentent des caractéristiques psychologiques telles que l'usage de leur langue maternelle revêt une grande importance."¹⁷⁴

The OLF was also of the opinion that the rights under the *Youth Protection Act*¹⁷⁵ and the *Former Health and Social Services Act* should receive the same large and generous interpretation as other fundamental rights. These do not, however, have precedence over the fundamental right to work in French, and while the employer can invoke the obligation to furnish services in another language, this argument, in itself, will not be sufficient unless it can be shown that the objective cannot be achieved except by imposing linguistic requirements for certain positions. The OLF also reviewed the service plans of the transition centre and concluded that the human resources were too limited to allow any restructuring according to linguistic skills.

¹⁷¹ *Syndicat des employés du Centre hospitalier de Granby v. Centre hospitalier de Granby* (November 13, 1996), n° 46-197, [1991-1998] Décisions sur la langue du travail 83 [hereinafter *Centre hospitalier de Granby*].

¹⁷² *Syndicat des employés de l'hôpital du Sacré-Cœur de Montréal v. Hôpital Sacré-Cœur de Montréal* (24 February 1989), n° 46-127, [1983-1991] Décisions sur la langue du travail 122. When the access program for Montreal was adopted later that year, the hospital was not named to provide nuclear medicine in English but only emergency services.

¹⁷³ *Syndicat des employés du Centre de réadaptation Cartier v. Centre de réadaptation Cartier* (28 August 1987), n° 46-092, [1983-1991] Décisions sur la langue du travail 73.

¹⁷⁴ *Ibid.* at 79.

¹⁷⁵ R.S.Q. c. P-34.1.

The OLF once again emphasized the importance of language in a service setting in *Syndicat canadien de la fonction publique v. Centre d'accueil Miriam*. In that case, it accepted the institution's requirement for the knowledge of English for the position of a night-time "préposé aux bénéficiaires/préposé à la buanderie" in a residential centre for the intellectually handicapped where nearly all residents were unilingual Anglophones. The OLF agreed in principle that "la communication est un élément fondamental et indissociable de la qualité des soins."¹⁷⁶

Five years later, the OLF discussed the effect of *Bill 142* in depth for the first time.¹⁷⁷ Wishing to ensure that there would be one person with a good knowledge of English on each team to deal with Anglophone patients, who numbered between 7% and 10% of the total, a hospital named in the access program of that region sought the knowledge of English as a requirement for an assistant head nurse position. In examining the relationship between *Bill 142* and section 46, the OLF rejected the notion that *Bill 142* constituted proof of necessity for a bilingual position. For the OLF, "l'article 46 conserve toute sa portée face à un autre texte législatif qui n'en a pas exclu expressément l'application."¹⁷⁸

The OLF refused to accept blindly that the identification of an institution in an access program for English services permitted it to organize its services as it wished:

[F]aut-il que l'Office de la langue française accepte d'emblée toutes les conséquences (sur l'exigence de la connaissance d'une autre langue que le français) de tous les programmes d'accès adoptés par les établissements de santé et qu'il refuse d'exercer son jugement, fondé sur l'article 46 de la *Charte*, sous prétexte qu'il n'a pas à s'immiscer dans l'organisation administrative de ces établissements? Répondre par l'affirmative à cette question, c'est ouvrir la porte à tous les abus et permettre à quiconque le voudrait, par l'adoption de mesures administratives, de contourner la loi.¹⁷⁹

In reaffirming its competence to review the organization of services within an institution, the OLF decided that the employer had not demonstrated that the function in question could not be exercised without a knowledge of English. The hospital had tried to demonstrate only that no one else in that department and on that team could communicate in English with those who were ill. For the OLF, this was not sufficient:

[L]a preuve démontre que c'est une circonstance fortuite qui a amené l'hôpital à exiger la connaissance d'une autre langue pour accéder au poste affiché; un autre employé de même service aurait-il connu cette autre langue que l'hôpital n'aurait pas eu les mêmes exigences pour le poste d'infirmier(ère)-chef adjoint(e). La tâche spécifique d'un infirmier(ère)-chef adjoint(e) exige tellement

¹⁷⁶ (12 February 1988), n° 46-094, [1983-1991] *Décisions sur la langue du travail* 80 at 80 [hereinafter *Centre d'accueil Miriam*].

¹⁷⁷ *Syndicat des infirmières et infirmiers de l'Est du Québec v. Hôtel-Dieu de Gaspé* (12 February 1993), n° 46-203, [1991-1996] *Décisions sur la langue du travail* 36 [hereinafter *Hôtel-Dieu de Gaspé*].

¹⁷⁸ *Ibid.* at 41.

¹⁷⁹ *Ibid.*

peu de connaissance de l'autre langue que l'établissement n'en tient pas compte quand il fait appel à des remplaçants, en cas d'absence du titulaire du poste.¹⁸⁰

Moreover,

la mise en application du programme d'accès de l'établissement entraîne presque automatiquement une forme de discrimination. Un candidat, par ailleurs très compétent au plan professionnel, pourra se voir refuser un poste si, par hasard, une autre personne dans le même département ne peut s'exprimer en anglais; mais l'établissement pourra accorder un autre poste semblable à un autre candidat tout aussi compétent et tout aussi unilingue, dans une autre circonstance.¹⁸¹

In short, the OLF found a total lack of correlation between the nature of the tasks required and the level of responsibility of the staff who had to ensure communication with the patients. It also took note of a petition signed by eighty employees opposed to the means that the hospital had taken to provide services in English.

The OLF ruled against the employer for a second time in *Syndicat des employés du CSSMM v. Centre jeunesse Laval*.¹⁸² It held there that the centre was not justified in requiring the knowledge of English for caseworkers at the Department of Youth Protection or in CLSC zones where there was little or no demand for English services. Only thirty-seven (2.5%) cases handled by the centre were in English, although the English-speaking population for the region amounted to almost 15%. The OLF stated that the centre had to justify language requirements based on existing, rather than potential, demand for services. It added that the organization of services so that one person would be able to work in English in each zone was foreign to its notion of necessity. It was not ready to accept the argument of "commodité administrative" to justify necessity:

Il faudra accepter que des mesures soient prises pour adapter les horaires de travail et la répartition des dossiers en fonction des aptitudes linguistiques de chacun des membres du personnel, même au prix d'efforts supplémentaires de planification, si ces mesures sont nécessaires pour réduire le nombre des postes pour lesquels l'exigence du bilinguisme est imposée.¹⁸³

Sixteen months later, the OLF recognized once again the importance of language, the relative nature of the right to service under health and social services legislation, and its own role in examining how the employer is organized to respect the right of employees to work in French:

L'Office ne pourrait nier l'importance de la dimension linguistique, en matière de soins de santé, sans contredire les principes qu'il a lui-même établis dans plusieurs décisions antérieures ... Dans douze cas sur quatorze, en matière de

¹⁸⁰ *Ibid.* at 43.

¹⁸¹ *Ibid.* at 44.

¹⁸² (13 December 1996), n° 46-247-265, [1991-1996] Décisions sur la langue du travail 94 [hereinafter *Centre jeunesse Laval*].

¹⁸³ *Ibid.* at 103.

santé et de services sociaux, l'Office a du reste reconnu la nécessité d'imposer la connaissance d'une autre langue comme condition d'accès à un poste. Mais si les services peuvent dans une certaine mesure être fournis dans la langue des usagers, il n'en découle pas obligatoirement une exigence linguistique du type de celle que formule l'employeur, au même degré ni pour les mêmes postes. L'Office conserve à cet égard une certaine marge d'appréciation, et il lui appartient de déterminer si les exigences imposées entraînent des effets d'exclusion trop élevés à l'endroit des salariés ... l'argument juridique sur l'accessibilité des services, basé sur la *Loi sur les services de santé et les services sociaux*, reçoit donc une portée toute relative.¹⁸⁴

The most recent decision of the OLF involved two positions of nursing team leader at the Hôpital chinois de Montréal, an institution recognized under section 29.1 of the *Charter of the French language*, since the majority of its users speak a language other than French.¹⁸⁵ The OLF drew a distinction between the right of English-speaking people to receive services in English, as originally enshrined in *Bill 142*, and the rights of other linguistic minorities in Quebec, who have no legal right to services in their own language. While those previously holding the positions at the hospital had mastered both languages and the union was prepared to accept a certain knowledge of the languages used by the hospital's patients, the OLF found that the requirement to "parler couramment le cantonnais ou le toisonnais" was too high and not justified. Even if the person occupying this position spent half his or her time with patients, he or she was generally not alone with them. The OLF refused to determine the level of linguistic competence necessary for the position. This decision was highly publicized by those who believed that the OLF was targeting the Chinese community. In a press release explaining and justifying the decision, the OLF commented on its role as follows:

Dans le domaine de la santé et des services sociaux, on comprend que la qualité des soins soit une préoccupation constante des administrateurs. Toutefois, le statut de la langue française est une valeur primordiale au Québec et l'Office est chargé, en cas de nécessité, de veiller à ce que le droit de travailler en fran-

¹⁸⁴ *S.C.F.P. v. CLSC Saint-Michel*, (9 April 1998), n° 46-227-228-229-242-243-244-250-257-283, [1991-1998] *Décisions sur la langue du travail* 116 at 127-28 [hereinafter *CLSC Saint-Michel*]. The OLF accepted the requirement of English but rejected the requirement of knowledge of a third language for a telephone operator/receptionist. Of the population of 56,000 on the CLSC territory, 34% had neither English nor French as mother tongue and 6% were Anglophone. Some 74% of the population spoke French at home, 12% English and 6% neither French nor English. The CLSC had been named in the 1989 access program to provide English reception services. For certain groups whose mother tongue was not English, this was the language of use when seeking services. Over 32 days, there were 202 users speaking a language other than French: 89 in English, 68 in Spanish, 44 in Italian. The CLSC successfully invoked previous decisions of the OLF that went beyond mere percentages, and argued the human dimension of services offered, the importance of the relationship between the institution and its milieu, its mission as a CLSC and the right of English-speaking people to service.

¹⁸⁵ *S.C.F.P. v. Hôpital chinois de Montréal* (19 June 1998), n° 46-290, [1991-1998] *Décisions sur la langue du travail* 134 [hereinafter *Hôpital chinois*]. The hospital challenged the decision of the OLF before the Superior Court under ss. 33 and 846 of the C.C.P., see *infra* note 187.

çais soit protégé et garanti, y compris pour les salariés œuvrant dans les établissements du réseau de la santé. Les exigences linguistiques d'un employeur peuvent avoir un effet d'exclusion à l'égard des salariés. C'est le rôle de l'Office de s'assurer que ces effets d'exclusion n'aillent pas au-delà de ce qui est nécessaire.¹⁸⁶

However, the decision of the OLF was overruled by the Superior Court,¹⁸⁷ which held that the hospital had discharged the burden of proof in establishing the need for the languages in question and that the criterion for judicial review in a quasi-judicial context such as this was simple error or an incorrect decision. The court also noted that the OLF had not taken into account the special status of the hospital conferred by section 29.1 of the *Charter of the French language*. Also of importance for the future role of the OLF, the court raised the issue of a reasonable apprehension of partiality in the OLF's decision-making process. The court questioned the ambiguous role played by the OLF's legal counsel, who not only advised the members rendering a decision, but also pleaded the case on behalf of the OLF, and the possible conflict of interest of one of the OLF members, Fernand Daoust, a vice-president of the *Fonds de solidarité des travailleurs du Québec*, to which the complainant union was affiliated. The court concluded that the OLF, its members sitting in this case, and its legal counsel did not enjoy the objective conditions essential for judicial independence and public confidence in the administration of justice.

3. Effect of the Jurisprudence of the Office de la langue française on the Ability of Institutions to Provide Services in English

An analysis of the jurisprudence of the OLF relating to the right to work in French and the right to receive services in English reveals that there is no conflict between the *Charter of the French language* and *Bill 142*. The right to work in French, as expressed in section 4 of the *Charter of the French language*, of which section 46 is a consequence, is not an absolute right, and the OLF will take into account the particular circumstances of the case when the right is invoked.¹⁸⁸ The decisions rendered by the OLF also permit the following conclusions:

1. The OLF has generally ruled in favour of the employer. This indicates that the employer has usually been successful in establishing the necessity of a linguistic requirement. The OLF has also shown itself sensitive to the issue of language as a communication tool in the health and social services sector, particularly in cases of a vulnerable clientele. However, since each case must be decided on its own merits, there is no guarantee that this trend will continue.

¹⁸⁶ Office de la langue française, Communiqué, "Décision de l'Office de la langue française concernant des exigences linguistiques à l'Hôpital chinois de Montréal" (31 July 1998).

¹⁸⁷ *S.C.F.P. (section locale 2948) v. Hôpital chinois de Montréal*, [1999] J.Q. No. 5345 (Sup. Ct.), online: QL (QJ), AZ00021001, online: AZIMUT.

¹⁸⁸ Sce J. Dansereau, Office de la langue française, *La Charte de la langue française et sa cohérence avec d'autres textes législatifs* (Montreal: 1995) at 7.

2. *Bill 142* is not a determinative element. As *Hôtel-Dieu de Gaspé* makes clear, an institution will not be able to justify necessity of language requirements on the basis of the institution's inclusion in an access program for English services alone. This is merely one of the elements that the OLF will consider in rendering its decision.

3. That an institution is recognized as "bilingual" under section 29.1 of the *Charter of the French language* does not exempt it from having to establish necessity. As *Centre d'accueil Miriam* and *Hôpital chinois* indicate, hospitals and other institutions with this special status are required to justify the necessity of a linguistic requirement, despite the fact that the status was originally granted because the majority of their users speak a language other than French.

4. The OLF has, over the years, increasingly examined the organization of services and personnel in an institution when making a decision. In early cases such as *Goulet*, the OLF refused to intervene in the internal operation of the centre. Neither would it intervene in *CLSC Saint-Louis-du-Parc* when that centre required the knowledge of Chinese for a receptionist's position in 1979 because it was the first position to fall vacant after the departure of a Chinese-speaking doctor. In more recent cases, the OLF has systematically reviewed the organization of services in coming to a decision.

5. It is difficult to justify the necessity for a linguistic requirement in situations where there are few English-speaking people and little demand for services. This was the argument raised by the Régie régionale Mauricie-Bois-Francs in developing a "policy" to facilitate services in English instead of implementing a full access program. The regional board believed that it would not be possible to justify positions requiring a knowledge of English since the demand for services at its institutions was minimal.

6. The creation of new administrative regions in the reform of 1991 and the ongoing restructuring of services in the network will result in increased difficulties in justifying the presence of bilingual positions. This is because services are transferred from institutions with regional mandates to CLSCs with more limited territorial mandates. These measures reduce the critical mass of English-speaking people needing services by splintering groups into new regions and territorial zones. For example, the creation of the Laval region hived off approximately 45,000 English-speaking people formerly part of the Montreal region. As a result of the creation of the Centre jeunesse de Laval, English-speaking young people previously served by English-speaking workers of Ville-Marie Social Services Centre or Jewish Family Services in Montreal were obliged to seek services from a Francophone centre. The small demand for services in English, less than the proportion of the English-speaking population, made it impossible for the Centre jeunesse de Laval to justify the knowledge of English as a requirement for caseworkers at the Youth Protection Department. Similarly, as services are increasingly developed in CLSCs or transferred to the CLSC network, it will be difficult to justify the knowledge of English for positions where the number of English-speaking people on the territory is small and demand for services limited.

Moreover, as *Centre hospitalier de Granby* indicates, administrative decisions by the Ministry on the organization of services, particularly specialized medical services, can have the effect of creating the need for bilingual positions and thus lend them-

selves to a possible challenge of the linguistic requirement by employees working in the system.

7. Positions providing services in English in current access programs are less likely to be challenged because they are based on bilingual personnel already in place. However, as *Centre jeunesse Laval* indicates, new hirings brought about by retirement and the restructuring of the network could lend themselves to challenges if institutions attempt to impose a linguistic requirement.

8. As indicated in *Hôtel-Dieu de Gaspé*, creative attempts by institutions to provide services to English-speaking users by requiring that one person in a team have a knowledge of English will fail unless the employer can prove that the knowledge of English is an integral part of the job function. In the eyes of the OLF, this amounts to discrimination since knowledge of English could be required of an employee simply because no other member of the team is capable of working in English. In practice, this will render the designation of bilingual positions exceedingly difficult unless there is a significant proportion of English-speaking users or demand for services in English. It also underlines that it will be easier to justify the knowledge of English for a single position, such as a receptionist, than for employees who work as part of a team in delivering direct services.

9. In two cases involving CLSCs, one prior to the passing of *Bill 142* and one more recently, the OLF accepted the employer's requirement for a knowledge of English for positions serving users who expressed themselves in English when this was not their first language. This leads one to ask if the notion of "English-speaking person" as expressed in *Bill 142* added something new, or whether the user's language of choice determined the language of service delivery to some extent even prior to *Bill 142*. The decision of the OLF in *CLSC Saint-Louis-du-Parc* in 1979 acknowledges that the language of choice of users can have an impact on the right of an employer to require the knowledge of English, a decision reinforced in 1998 in *CLSC Saint-Michel*.

10. The decision in *Hôpital chinois* underscores that the OLF is prepared to rule not only on the necessity of a language other than French, but also on the level of knowledge of an employer's linguistic requirement. In this case, it appeared that the justifiable knowledge for the positions in question lay somewhere between "a certain knowledge" of the language of the patients, acceptable to the union by virtue of agreements previously signed with the hospital, and the ability to speak "couramment" (fluently), a level judged too high by the OLF. If this approach is followed, there could be future cases of hair-splitting in determining the justifiable level of knowledge of a language other than French. This situation did not appear to be envisaged in the drafting of section 46, which refers to the knowledge of another language and not the extent of that knowledge.

11. It may be advantageous for the employer to make use of an employee's knowledge of English without formally attaching a linguistic requirement to the position. This would avoid the possibility of recourse under section 46. However, if the employee were to leave that position, the employer would then have to decide whether to attach a linguistic requirement to the post, leaving open the possibility of

challenges, or to hope that the incoming employee would be sufficiently adept in English to provide services without a formal designation of a position as bilingual.

B. English Signs and Internal Communications in the Health and Social Services Sector

The last few years have seen several occasions where hospitals serving English-speaking people have been required to remove signs in English aimed at informing and orienting these users. In 1996, the CUSE chose to add some signs in English after the Sherbrooke Hospital, the only designated bilingual hospital in the region, lost its acute-care mandate, thus obliging English-speaking people to go to a Francophone institution. Following a complaint to the OLF, the hospital was told to remove the signs. After publicity and negotiations, the vast majority of the signs were removed.

In September 1997, the OLF ordered La Providence Hospital in Magog to remove signs giving directions to the emergency ward in English after another complaint and, in 1988, ordered the Broome-Missisquoi-Perkins Hospital, founded by the English-speaking community in 1911, to remove its English signs. Each of these hospitals was named in an access program to provide some services in English. These events raise questions about the nature of the right to English services and the ability of public institutions to provide them.

While the right to English services is governed by *Bill 142*, the *Charter of the French language* regulates the internal functioning of health and social services institutions, which form part of the civil administration.¹⁸⁹ Institutions recognized under section 29.1 of the *Charter of the French language* may function in both French and another language. Consequently, while ensuring that all their services are available in French, they may erect signs and posters in both French and another language, the French version predominating. They may also give themselves a bilingual name, unlike other institutions, which must have a unilingual denomination. They can also use French and another language in their internal communications and in communications with other recognized institutions.¹⁹⁰

All other institutions, even those named in access programs to provide services in English, must function in French. An exception exists in the case of signs and posters, where reasons of health or public safety require the use of another language as well. The government may also determine by regulation the cases, conditions, and circum-

¹⁸⁹ *Supra* note 12. See the Schedule of the *Charter of the French language*. In addition to public institutions regulated by the *Act respecting health services and social services*, the civil administration includes the government and government departments, government agencies, municipalities, urban communities and school boards.

¹⁹⁰ *Ibid.*, ss. 14-29. See also Office de la langue française, *Politique administrative de l'Office de la langue française relative au statut d'un organisme en vertu de l'article 29.1 de la Charte de la langue française* (Gouvernement du Québec) [Ratified 11 February 1994].

stances in which a health and social services institution may use French and another language in signs and regulations.¹⁹¹

It seems worthwhile to compare the provisions in the *Charter of the French language* governing the right of institutions in the health and social services sector to erect signs and posters in English with the rules surrounding public signs, posters, and commercial advertising. Section 58 states:

Public signs and posters and commercial advertising must be in French.

They may also be both in French and in another language provided that French is markedly predominant.

However, the Government may determine, by regulation, the places, cases, conditions or circumstances where public signs and posters and commercial advertising must be in French only, where French need not be predominant or where signs, posters and advertising may be in another language only.¹⁹²

The notion of the marked predominance of French, without prohibiting the use of another language, was introduced by *Bill 86* in 1993. This modification stemmed from decisions rendered by the Supreme Court in 1988 and allowed the government to avoid recourse to the "notwithstanding" clause relating to freedom of expression.¹⁹³

Well aware of the symbolic role that signs play in Quebec and sensitive to the political ramifications of enforcing the *Charter of the French language* and the media coverage which frequently accompanies non-compliance, the OLF has suggested means other than signs to facilitate access to services for English-speaking users in health and social services institutions. These include bilingual or multilingual flyers, preferably in distinct versions, indicating the location of services, a multilingual micro-computer indicating where services or departments are located, pictograms, a combination of pictograms and flyers, a handbook of drawings or expressions in different languages to facilitate oral communications with patients, and illustrated panels such as those in shopping centres where the user chooses the language. These are legal, but possibly more cumbersome, alternatives to the use of English in signs.

While the OLF proposes alternatives to signs as a means to facilitate access for English-speaking users, this has not always been the case. It has on occasion taken on a role pertaining to the operation of institutions providing health and social services that extends beyond its function of examining and ruling on matters related to cases of non-compliance. In such instances, it has effectively broadened the ambit of the legislation so as to promote French, while at the same time suppressing or relegating the status of English. For example, the OLF told a CLSC in 1981 that brochures and flyers should be available in English only for those people who specifically requested them, and that the CLSC should remove the English versions from the reception and

¹⁹¹ *Supra* note 12, s. 22. The power of the government to determine exceptions to the "French only" rule by regulation was introduced in *Bill 86*, *supra* note 64.

¹⁹² *Supra* note 12, s. 58.

¹⁹³ *Ford and Devine*, *supra* note 42 and accompanying text; *Charter*, *supra* note 11, s. 33.

waiting area. This request was based on internal documents prepared by the OLF to promote French, but not explicitly envisaged in the *Charter of the French language*.¹⁹⁴ In addition, the OLF recommends that, in the case of bilingual messages, the French version should be heard first on answering machines even in institutions specially recognized under section 29.1, even though that status stems directly from the fact that the majority of users speak a language other than French.¹⁹⁵

At the very least, one must question the internal coherence of the *Charter of the French language* as it pertains to the language of signs. It seems ironic that a super-market or department store has the right to post signs in English for the benefit of its English-speaking clients, as long as French is predominant, while a hospital or CLSC is prohibited from doing so unless the majority of people to whom it provides services are English-speaking or it can successfully invoke reasons of health or public safety. As a result, the vast majority of institutions providing services in English are not permitted to post signs in English. The argument that a hospital, CLSC, or long-term care centre is part of the civil administration, while a commercial enterprise is not, seems illogical.

If the prohibition of a language other than French on commercial signs infringes freedom of expression in the *Charter* and the *Quebec Charter*, it is conceivable that a health and social services institution could also invoke the same argument. In practice, unlike some businesses, which have chosen to challenge these provisions or ignore orders from the OLF to comply, hospitals have acquiesced to demands that signs in English be removed. Health or social services institutions have yet to invoke health or public safety as a justification for the use of a language other than French.¹⁹⁶

¹⁹⁴ Letter from J. Gilbert, Service de la promotion du français dans l'Administration, to J.-M. Le-Brasseur, Executive Director, CLSC Chaleurs (13 July 1981). Mme Gilbert added:

J'ai d'ailleurs l'impression que s'il y en a autant, c'est justement qu'il n'y a pas suffisamment de clientèle anglaise pour justifier cette présentation contraire au 1^{er} principe de la fiche hors-série A qui veut désamorcer le bilinguisme institutionnel au Québec. Vous voudrez bien corriger ce point en remplaçant lesdits documents et brochures par les textes en français dont on semble faire si vive consommation que souvent il ne reste que le texte anglais.

¹⁹⁵ *Supra* note 162.

¹⁹⁶ As for the exception for reasons of health or public safety included in s. 22 of the *Charter of the French language*, the OLF contends that

chaque ministère ou organisme a compétence pour apprécier les cas où la santé ou la sécurité publique exigent aussi l'utilisation d'une autre langue que le français, tout en pouvant bénéficier de l'aide et des conseils de l'Office. Toutefois, selon les règles habituelles d'interprétation, une exception à un principe général énoncé par la loi doit recevoir une interprétation restrictive. Les mots "santé" et "sécurité publique" doivent donc être pris dans le sens plus restreint, et l'exception ne doit jouer que dans les cas où il y a un danger réel pour la santé ou la sécurité publiques : par exemple, les consignes d'évacuation en cas d'incendie (Quebec, Office de la langue française, "version annotée de la *Charte de la langue française*", September 1997, online: Office de la langue fran-

Conclusion

The right of English-speaking people to receive health and social services in English constitutes an exception to general Quebec government policy to make French the common language of all Quebecers. This legal recognition acknowledges that the needs of the vulnerable and sick should come before the promotion of the ideology of language. As such, this constitutes a partial breach of the territorial model adopted by Quebec to promote the use of French. At the same time, the passing and implementation of *Bill 142* is not necessarily incompatible with the Preamble of the *Charter of the French language*. This states that the objective of making French the language of government and the law, as well as the normal and everyday language of work, instruction, communication, commerce, and business, must be applied in a spirit of fairness and open-mindedness, respectful of the institutions of the English-speaking community of Quebec and of ethnic minorities.

Nonetheless, language remains a volatile issue in Quebec, and the right to health and social services in English has on several occasions come under attack. While the Parti Québécois opposed *Bill 142* at the time of its passing in 1986, its party program now commits a Parti Québécois government to provide health and social services to the “anglophone” community in its language and to maintain, to this effect, the current provisions of health and social services legislation. However, in 1996 and 1997, party members successfully proposed resolutions, couched in terms of the need to protect the right to work in French and to counter “institutional bilingualism”, whose underlying objectives constituted an attack on the right to services in English. While the government is not bound to implement its party program, the latter nonetheless has some importance. It is likely that the Parti Québécois leadership had to make some compromises to maintain party unity. Thus, at its Conseil national in April 1996, the party leadership agreed to take a number of measures to combat “institutional bilingualism”, including a review of the health and social services legislation. It did so rather than agree to abolish *Bill 86*, which, while part of the party program, would entail recourse to the “notwithstanding” clause of the *Charter*. Similarly, the adoption of the resolution at the Conseil national in November 1997 calling for a prohibition on requiring a language other than French in the hiring, promotion, or transfer of all workers, except those in institutions recognized as bilingual, can be perceived as a way of appeasing those party members for whom the use of English in the health and social services sector remained a crucial target. The decision by the Minister of Health and Social Services to refer the access programs to the OLF, as demanded at the Conseil national of January 1997, can also be seen in this light.

It is also necessary to ask why the Parti Québécois government did not approve the revised access programs for English services in the course of its first mandate

çaise <<http://www.olf.gouv.qc.ca/charte/pages/c.02qe.html>> (date accessed: 4 September 1998)).

This seems particularly restrictive. It could be argued that signs in hospitals designating the emergency department or other services could also meet the definition.

from September 1994 to November 1998, and why it began to approve the programs only after the filing of legal proceedings against it by Alliance Quebec. The failure for so long to approve the new programs indicates a reluctance to observe the letter and the spirit of the law, which calls for a revision of the programs at least every three years. While the reorganization of the health and social services system can be used to explain this delay to some extent, the regional boards submitted the original versions of their revised access programs no later than December 1996. Only lack of political will can explain why the government did not adopt the programs in the following two years. Regardless of government explanations, the constant delays have undermined the goals of the legislation and the rights of English-speaking people. It is hardly reassuring to hear a minister state that institutions continue to provide services in English, that he has received few complaints, and that transitory measures remain in force to correct non-compliance with the law. Reports of Ministry personnel attempting to convince regional boards to remove services in access programs inspire little confidence. These events served only to contribute to a climate of increased mistrust between the Parti Québécois government and Quebec's English-speaking population.

In spite of all this, the legal guarantees incorporated in *Bill 142* and affirmed in subsequent health and social services legislation have been at least partially successful. Institutions and regional boards, largely run by French-speakers, have shown themselves sensitive to the needs of English-speaking people needing services. English services have continued to be available despite the government's reluctance to approve the new programs. However, the ongoing restructuring of the health and social services system is a dynamic process that necessitates constant re-evaluation. The traditional model whereby English-speaking Quebecers, particularly those in the Montreal region, obtained all services from a network of "English" institutions no longer exists. Front-line services are now predominantly delivered on a territorial model through the CLSC network, and specialized services are now organized on a regional or sub-regional basis. The "English" institutions are fully integrated into this model. Institutions outside Montreal have also been susceptible to these changes and services are now frequently organized by municipal regional counties. Services in English are increasingly provided by public institutions that operate mainly in French. These changes may incite institutions to designate new bilingual positions, which could lead to further challenges before the OLF.

Moreover, the administrative structures that support the right to services in English appear fragile. The decision of the Quebec government not to renew the Canada-Quebec Agreement to facilitate access to English services could jeopardize the positions of the coordinators responsible for English services within the regional boards. This agreement, which has in part financed the implementation of *Bill 142*, expired in 1999. Unless special provision is made, the boards may not be able to fund these positions. In addition, the provincial committee charged with advising the government on English services could eventually see its role diminished as a consequence of the Faal report on government agencies. Moreover, the Ministry of Health and Social Services has dismantled the administrative unit responsible for English services and has consolidated it with the coordination of services to cultural communities as part of its own downsizing. In consequence, the institutions providing services directly to the

public will assume a more important role than ever in ensuring the availability and accessibility of services.

The events of the past few years reveal that the right to health and social services in English in Quebec remains for some a political issue inextricably linked to the question of language. Moreover, these events demonstrate that a right to access, even one enshrined in legislation, relies on the administrative apparatus of the State for its value in daily life. A statutory right is worth little if administrative interference and delays prevent its effective exercise. However, an analysis indicates that the institutions and regional boards delivering and planning services respectively are primarily concerned with the provision of adequate services to people in need and less with the political or ideological issues that would restrict accessibility to services. Now that the government has, for the second time, approved access programs to English services in conformity with health and social services legislation, it is to be hoped that emphasis will now be placed on ensuring service delivery, rather than political rhetoric.
