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Bilingualism in the Tribunal Settings – does the right to be heard in French include the right to be understood in French? Case Commentary of *CSFTNO v Northwest Territories (Education, Culture, and Employment)*, 2023 SCC 31 [*CSFTNO*].

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In *CSFTNO,* [1] the Supreme Court of Canada was invited to clarify the scope of French language rights guaranteed under the *Charter*. Sections 19 and 23 of the *Charter* provide for French language rights in two different contexts: before the courts established by Parliament, and in education. The Court was presented with an opportunity to clarify whether the right to be heard in French includes the right to be understood in French without an interpreter. However, the Court declined the invitation and decided it was neither necessary nor appropriate to rule on the issue. While judicial restraint won the day, many intervenors put forward compelling arguments. A review of these arguments provides insight into what may come if (or when) the issue resurfaces and how this may impact the right to use French in tribunal settings.

In Ontario, debate has centered on the issue of whether a regulator's duty to deal with persons in French can be met if the regulator uses a translator. The current state of the law was set out by the Divisional Court in *Bélanger c L'Ordre des médecins et chirurgiens de l'Ontario (Bélanger).*[2] *Bélanger* provides that health professionals regulated under the *Regulated Health Professionals Act* (the "*RHPA*"),[3] have a presumptive right to a hearing before a panel that can understand and speak French, subject to certain exceptions.[4] There is therefore a presumptive right to be heard in French, by a Panel who understands French, without a translator, at an *RHPA* discipline hearing.

While *Bélanger* remains the law in Ontario within *RHPA* tribunal settings, the historic *Charter* jurisprudence indicates that the constitutional right to use French in the courts established by parliament does not, at present, guarantee the right to be understood in French. The jurisprudence emanating from Ontario, including in *Bélanger,* stands at odds with the historic jurisprudence***[5]*** that interprets the *Charter* right in a more limited manner.

Will interpreters be a permissible limit on a person's right to deal with, or appear before, a tribunal in French moving forward? It remains to be seen whether *Charter* jurisprudence will be brought in line with *Bélanger*, or whether the future reconsideration of *Charter* jurisprudence may conversely alter the state of the law in Ontario as it relates to the right to a French tribunal hearing.

Overview of *CSFTNO*

CSFTNO concerned the interpretation of minority language rights guaranteed by section 23 of the *Charter* in the context of French language schools in the Northwest Territories ("NWT"). Section 23 provides for minority language educational rights to those whose first language learned (English or French) is that of the minority linguistic group of the province, and who wish to receive their primary

instruction at school in that minority language.[6]

In 2018, the Minister of Education for the NWT denied applications brought by non-French speaking parents to have their children attend school in French because they did not hold rights guaranteed by section 23 of the *Charter*. The applications were denied despite a recommendation from the Commission scolaire francophone des Territoires du Nord-Ouest (CSFTNO) that the students be admitted. According to CSFTNO, their admission would promote the development of the francophone community in the NWT. The parents and CSFTNO successfully overturned the decision of the Minister on judicial review. The Court of Appeal overturned that decision, concluding that the Minister did not have to consider the issue of *Charter* values because the parents were not minority language rights holders under section 23 of the *Charter*. At the Court of Appeal, the appellants (as they were before the Supreme Court) could not be understood by that court without an interpreter.[7]

Among other things, the appellants asked the Supreme Court of Canada to declare that section 19(1) of the *Charter* and a similar provision in the NWT statute[8] protect the right to be understood by the court and declare that this right was infringed at the Court of Appeal. In *Société des Acadiens du Nouveau?Brunswick Inc. v. Association of Parents for Fairness in Education* ("*Société des Acadiens*"),[9] a majority of the Supreme Court of Canada found that the right to use either of the country's two official languages in any court established by parliament does not include the right to be understood. Ruling in favour of the appellants on this issue would therefore have required the Court to overturn *Société des Acadiens*.[10]

The Court focused on other grounds of appeal, namely, whether the Minister was required to consider *Charter* values in exercising her discretion, and whether the Minister was required to conduct a proportionate balancing of these values and the government's interests. The Court unanimously concluded that the Minister, in exercising its discretion, should have considered the underlying purposes of section 23 when making its decision. Drawing on the *Doré* framework, the Court concluded that administrative decision-makers are empowered to consider *Charter* values not only where an administrative decision directly infringes a *Charter* right but also where it engages a value underlying one or more *Charter* rights. The Minister should have been guided by the purposes underlying section 23 of the *Charter*, such as preventing the erosion of official language communities, redress for past injustices, and the promotion of minority language communities, to arrive at a fair and appropriate decision.[11]

The Right to be Heard and Understood in French

This appeal attracted a large number of intervenors.[12] Despite the submissions of the parties and intervenors on the issue of whether the right to use French includes the right to be understood directly in French without an interpreter, the Supreme Court found that judicial restraint was necessary.[13] Though not specifically addressed by the Court, the arguments of the parties and intervenors are likely to be revived in the future, if and when this issue resurfaces. Certain arguments have been highlighted below, which may be raised in contexts extending beyond those in which the *Charter* or *OLA* apply.

The appellants argued that the use of an interpreter disadvantaged their advocacy in their case. They further argued that the only fair interpretation of the *Charter* and the *OLA* is one where the right to use French includes the right to be understood in French without interpretation. The appellants and certain intervenors argued that the right to speak, without a corresponding right to be understood, denudes the right of substance. From their perspective, language expressed through interpretation causes disadvantages to minority language rights holders, not only by the added burden of the costs of translation but also by their expression losing its meaning, colour, subtleties, and nuance, impacting their ability to advocate before the court.[14]

The Attorney General of Manitoba, an intervenor, raised the practicability of requiring bilingual adjudicators in tribunal settings. Tribunal proceedings are different in nature than court proceedings and are, themselves, diverse. Hearings before tribunals may be more informal; the rules of evidence may not be the same; hearings may be conducted by documentary means only; and some hearings need to be convened very quickly. Tribunals will also often need to appoint persons with particular expertise to panels. In light of this requirement, and especially in a small province like Manitoba, requiring bilingual adjudicators may, in effect, frustrate the

tribunals' operations. It is not always possible to find qualified people willing or able to sit on the tribunal. The Attorney General of Manitoba argued that this concern is heightened in areas facing shortages of qualified personnel, such as medical specializations. What is essential, it argued, is that the adjudicator fully understands the evidence and arguments presented. If a bilingual adjudicator is not available, other means, such as simultaneous translation, may advance the purposes of section 19(1) of the *Charter,* subject to the circumstances of the particular case.[15]

Application to Regulatory Tribunals in Ontario

Some tribunals in Ontario have a duty to "deal" with people in French. The *RHPA* and the *Social Work and Social Service Work Act* (the "*SWSSWA*")[16] both provide for "the right to use French in all dealings with the College"[17] subject to "limits that are reasonable in the circumstances."[18] Analogies may be drawn between the wording of these provisions and the wording of section 19(1) of the *Charter*, which states that "Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament."

The Divisional Court in *Bélanger* held that dealing with the regulator in French without translation should be the norm, subject to reasonable limits.[19] The Court found, in *Bélanger*, that the College's Discipline Committee should decide the question of what the reasonable limits on the right to deal with the College in French were in the circumstances of the case. Relevant considerations include Council's efforts to secure the appointment of a sufficient number of bilingual members, the absence of elected members of the profession who are bilingual, or the effects of excessive delay on the public interest.[20] There may be circumstances where the assistance of interpreters is a reasonable limit.[21] However, governments have a positive obligation to put in place the necessary resources to uphold linguistic rights.[22]

Tribunals in Ontario, particularly those governed by the *RHPA* and analogous legislation, must be ready to uphold the right to be heard and understood in French. If an interpreter is used, the tribunal should be prepared to consider why that limitation is "reasonable in the circumstances", until such time as *Bélanger* or *Société des Acadiens* are brought in line with one another or otherwise overturned.

[1] *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, at para 104 [*CSFTNO*].

[2] *Bélanger c L'Ordre des médecins et chirurgiens de l'Ontario*, 2021 ONCS 5132 [*Bélanger*].

[3] *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18 ("*RHPA*").

[4] *Bélanger*, at paras 81-84, 88.

[5] Including: *Société des Acadiens v. Association of Parents*, [1986] 1 SCR 549, 69 NBR (2d) 271 [*Société des Acadiens*].

[6] *Canadian Charter of Rights and Freedoms*, s 23, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 a, s 23.

[7] *Supra* note 1, *CSFTNO*, at paras 9, 44-56.

[8] *Official Languages Act*, RSNWT 1988, c O-1, s 9(1) [*OLA*]; this provision states: "Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by the Legislature."

[9] *Société des Acadiens v. Association of Parents*, 1986 CanLII 66 (SCC), [1986] 1 S.C.R. 549 ("*Société des Acadiens")*.

[10] *Supra* note 1, *CSFTNO*, at para 107.

[11] *Supra* note 1, *CSFTNO*, at paras, 79, 92-103.

[12] Including the Attorney General of Canada and of a number of provinces; the Canadian Francophonie Research Chair on Language Rights; the Commissioner of Official Languages of Canada; le Fédération nationale des conseils scolaires francophones; le Commission nationale des parents francophones; le Société de l'Acadie du Nouveau-Brunswick; and the Yukon Francophone School Board.

[13] *Supra* note 1, *CSFTNO*, para 108.

[14] Factums of the appellant (1) *Commission Scolaire Francophone des Territoires du Nord-Ouest*, and intervenors (2) *Societe de Acadie du Nouveau Brunswick*,(3) *La Chaire de recherche sur la francophonie canadienne en droits et enjeux linguistiques*, and (4) *Le Commissaire aux langues officielles du Canada*.

[15] Factum of the intervenor, *AG of Manitoba*.

[16] *Social Work and Social Service Work Act, 1998*, SO 1998, c 31 [*SWSSWA*].

[17] *Ibid*, *SWSSWA*, s 48(1); *supra* note 3, *RHPA*, s 86(1).

[18] *Ibid*, *SWSSWA*, s 48(3); *ibid*, *RHPA*, s 86(4).

[19] *Supra* note 2, *Bélanger*, at para 88.

[20] *Supra* note 2, *Bélanger*, at para 73.

[21] *Supra* note 2, *Bélanger*, at para 74.

[22] *Supra* note 2, *Bélanger*, at para 71.

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