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**CHARTER CONFORMITY OF CERTAIN REGULATORY
PROVISIONS CONCERNING ACCESS TO EDUCATION
IN ENGLISH FOR CHILDREN STAYING TEMPORARILY IN QUEBEC**

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PURPOSE

The Commission has received a number of applications alleging the discriminatory nature of certain decisions denying access to instruction in English for children staying temporarily in Québec. To clarify the situation, this document first identifies the rules governing access to education in English in these particular circumstances, and goes on to examine the question raised in the applications, i.e. the compliance of the provisions with the *Charter of Human Rights and Freedoms*.¹ The general organization of the provisions governing access to education in English is not addressed.

1. THE LEGISLATIVE AND REGULATORY FRAMEWORK

In Québec, the use of language in education is governed by the *Charter of the French language*.² Section 72 establishes the principle that «Instruction [...] shall be in French, except where this chapter allows otherwise». One of the exceptions allowed, described in section 85, concerns children staying temporarily in Québec:

«85. Children staying in Québec temporarily may, at the request of one of their parents, be exempted from the application of the first paragraph of section 72 and receive instruction in English in the cases or circumstances and on the conditions determined by regulation of the Government. The regulation shall also prescribe the period for which such an exemption may be granted and the procedure to be followed in order to obtain or renew it.»

Applications for exemption are considered by civil servants designated by the Minister of Education.³ An appeal may be brought⁴ before the Commission d'appel sur la langue d'enseignement from any decision made by the civil servants. Where the Commission does not allow an appeal, it may nevertheless report the child's case to the Minister of Education if it considers that «proof of the

1 R.S.Q., c. C-12. Hereinafter «the Charter».

2 R.S.Q., c. C-11 (sections 72-88).

3 Idem, s. 75.

4 Idem, s. 82.

existence of a serious situation has been made on family or humanitarian grounds»⁵. The Minister may then declare the child eligible for instruction in English.

In accordance with the provisions of section 85, the Government has adopted a regulation establishing the circumstances in which access to instruction in English may be granted, and the conditions to be met.

In the case of a person staying in Québec for professional reasons, section 1 of the *Language of Instruction (Temporary Residents) Regulation*⁶ stipulates as follows:

«1. The child of a person who is assigned to Québec by his employer for a period not exceeding 5 years from his arrival, or who comes to Québec to hold a job that is not expected to last longer than 5 years, shall be exempted from application of Chapter VIII of Title I of the Charter of the French language (R.S.Q., c. C-11) on the following conditions:

(1) the father or mother shall submit a sworn declaration from his employer certifying that the expected term of the assignment or the job does not exceed 5 years;

(2) the father or mother shall submit a sworn declaration stating that his stay in Québec is not expected to last longer than 5 years from the date of his arrival.»

Similar conditions are established for people staying in Québec for study purposes⁷, for medical treatment,⁸ or to carry out diplomatic⁹ or military¹⁰ duties. The exemption applies for the duration of the stay, up to a maximum of five years.¹¹ A one-year extension is possible in some cases.¹²

5 Idem, s. 85.1.

6 *Gazette officielle du Québec*, Vol. 117, No. 3 (January 16, 1985), p. 165. Hereinafter «the regulation».

7 Idem, s. 2.

8 Idem, s. 3.

9 Idem, s. 4.

10 Idem, s. 5.

11 Idem, s. 8.

12 Idem, s. 9. In the case of people staying in Québec for diplomatic or military purposes, the regulation provides for a five-year extension (s. 10).

2. ANALYSIS OF SITUATIONS BROUGHT TO THE ATTENTION OF THE COMMISSION

Two separate situations have been brought to the attention of the Commission:

- In one case, access to instruction in English was apparently denied by the appeals board because the period of exemption authorized by regulation had expired.
- In the other cases, access to instruction in English was apparently denied because the person «assigned to Québec by his employer», within the meaning of section 1 of the regulation, was the child's step-father (the mother's second husband) and not the father or mother.

Before examining the conformity of these decisions with the Charter, we will briefly review the relevant Charter provisions.

2.1 The Relevant Provisions of the Charter

Section 40 of the Charter sets out the right to free public education in the following terms:

«40. Every person has a right, to the extent and according to the standards provided by law, to free public education.»

Section 41 recognizes the right to religious or moral education in conformity with the parents' convictions, and section 42 sets down the right of the parents to choose private educational establishments for their children, provided the establishments comply with the standards prescribed or approved by law.

Nowhere in the Charter itself or in the *Canadian Charter* is there a fundamental right to education in the language of a person's choice.¹³

13 Section 23 of the *Canadian Charter of Rights and Freedoms* cannot be invoked in support of this, at least not without some major qualifications. The right to education in the language of the minority is subject to some

On the other hand, section 10 guarantees the right to full and equal recognition and exercise of human rights and freedoms:

«10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.»

It has been established in case law that section 10 constitutes a universal condition applicable to all other rights and freedoms. In the final analysis, it should be considered to form an integral part of all sections establishing rights and freedoms.¹⁴ In other words, a legislative provision governing the exercise of a right or freedom must not be discriminatory in nature; otherwise, it will be deemed ineffective in accordance with the provisions of section 52, which establish the precedence of the right to equality in the following terms:

«52. No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.»

The precedence of the right to equality applies in particular to delegated legislation.¹⁵

(...suite)

specific conditions. It is granted only to Canadian citizens whose native language is the language of the French-speaking or English-speaking minority in the province in which they reside, or who were themselves educated at elementary level in French or English in Canada and who now reside in a province where that language is the language of the minority.

It should also be noted that the rights granted by section 133 of the *Constitution Act, 1867* are concerned with religion, not language. See esp. the *Mackell* decision, Privy Council [1917] A.C. 62.

14 *Commission des droits de la personne v. Commission scolaire de St-Jean-sur-Richelieu*, [1991] R.J.Q. 3003, 3038 (T.D.P.). Confirmed by the Court of Appeal, C.A.M. 500-09-0011750-918, J.E. 94-925.

15 According to section 56 of the Charter, the word «law» or «Act» (used in particular in section 52) includes a regulation, a decree, an ordinance or an order in council made under the authority of any Act.

Taken as a whole, sections 10 and 40 thus require all legislation governing the right to free public education, and all regulations made under that legislation, to comply with the standard of equality established in section 10. Here again, however, this principle in no way recognizes the right to instruction in the language of a person's choice. In the light of similar provisions in the *European Convention on Human Rights*¹⁶ (article 14, concerning discrimination) and its first *Additional Protocol*¹⁷ (article 2, concerning the right to education), the European Court of Human Rights made the following precision in its judgment on the *Belgian Linguistic Case*:

«... the Court notes that Article 14, even when read in conjunction with Article 2 of the Protocol, does not have the effect of guaranteeing to a child or to his parent the right to obtain instruction in the language of his choice. The object of these two Articles, read in conjunction, is more limited: it is to ensure that the right to education shall be secured by each Contracting Party to everyone within its jurisdiction without discrimination on the ground, for instance, of language.»¹⁸

The Charter cannot therefore be used as a basis for demanding access to instruction in a specific language. On the other hand, where the State creates a network of schools offering instruction in a given language, the Charter prevents it from regulating access by means of discriminatory criteria.

2.2 Application to the Situations at Issue

2.2.1 The First Situation

In the first case brought to our attention, access to education in English was apparently denied because the child's stay in Québec had exceeded the maximum period of exemption authorized by the regulation.

Since the regulation is clear on this point, the civil servants and the Commission d'appel sur la langue d'enseignement were obviously required to apply its provisions rigorously. This does not, however, prevent us from questioning the compatibility of these provisions with the Charter.

The duration of the stay in Québec is the criterion used to grant or deny exemption under section 85 of

16 (1955) 213 U.N.T.S. 221 (came into force on September 3, 1953).

17 (1955) 213 U.N.T.S. 262 (came into force on May 18, 1954).

18 European Court of Human Rights, judgment of July 23, 1968 (Series A), p. 35.

the *Charter of the French language*. This criterion does not appear in the limited list¹⁹ of criteria for distinction prohibited under section 10. It is based on the passage of time and does not in fact create a burden that could constitute indirect discrimination against particular groups. In the circumstances, we are therefore of the opinion that these regulatory provisions are not of a type that would interfere with rights recognized under the Charter.

It goes without saying that this conclusion should not prevent the authorities, when processing individual files, from considering family or humanitarian factors in accordance with the provisions of the *Charter of the French language*. In our view, the child's interest should be the determining element.

2.2.2 The Second Situation

In the second situation, the children for whom instruction in English was requested were members of «blended» families staying in Québec temporarily due to the professional commitments of a person to whom they were not related. Specifically, their mothers had divorced and remarried men whose jobs had brought them to Québec.

The authorities apparently applied the provisions of section 1 of the regulation which, as stated earlier, require that the child for whom an exemption is claimed should be «the child of a person who is assigned to Québec by his employer [...] or who comes to Québec to hold a job». The children at issue here are not the children of a person who satisfies these conditions, but the children of such a person's spouse. The spouse, although the mother of the child, cannot herself invoke the regulation because she is not the one to have been assigned to Québec by her employer or to be staying in Québec to hold a job.

The provisions of the regulation were undoubtedly applied correctly, but their validity under the Charter remains to be established. There is also reason to briefly examine their validity under administrative law.

Section 85 of the *Charter of the French language* provides that «children staying in Québec temporarily may, at the request of one of their parents», be exempted from the requirement to attend

19 See esp. *Forget v. Québec (Attorney General)* [1988] 2 S.C.R. 90.

French school. The regulation establishing the circumstances in which such an exemption may be granted and the conditions to be met cannot, however, change the Act on which it depends.²⁰ Specifically, it cannot impose more severe standards or requirements than the Act itself. Garant described the current law applicable to this issue:

«The regulation, through its object or content, cannot go beyond the enabling clause. This rule is the logical expression of the subordinate relationship between the Act and the regulation. Regulatory power can and must be exercised only in accordance with the enabling Act.»²¹

By restricting the possibility of exemption to situations in which the student is the child of a person staying in Québec for professional reasons, the regulation creates a requirement (a relationship between the person and the child) that does not exist in the Act. The Act simply requires that the child's stay in Québec is temporary and that the application for exemption is made by one of his parents. In fact, section 74 states that the application may be made by a person who has *de facto* custody of the child, provided the holder of parental authority does not object. In such a context, the validity of section 1 of the regulation under administrative law seems to be us to be uncertain.

Considered from the standpoint of the Charter, the validity of the provisions depends on the discriminatory or non-discriminatory nature of the distinctions made by the regulatory authority. In *Commission des droits de la personne v. Town of Brossard*,²² the Supreme Court of Canada, ruling on the interpretation of the «civil status» criterion of section 10 of the Charter, clearly established that filiation was an element of a person's civil status. The highest court of the land, noting that the «civil status» criterion covered a range of facts related to the three classical elements of civil status, i.e. birth, marriage and death,²³ addressed the issue of filiation as follows:

«Filiation is, to my mind, one of the cardinal elements of the notion of civil status in

20 René DUSSAULT and Louis BORGEAT, *Traité de droit administratif* (Vol. 1), Québec, P.U.L., 1984, p. 519.

21 Patrice GARANT, *Droit administratif* (Vol. 1), 3rd Edition, Cowansville, Éditions Yvon Blais, p. 370 (our translation).

22 [1988] 2 S.C.R. 279.

23 Idem, 291.

the *Civil Code* and falls within the scope of «civil status» under s. 10 of the *Charter*. In most cases, filiation can be established by the acts of civil status. [...] In other instances, of course, acts of civil status will not fully account for filiation, but filiation nevertheless remains a fact relating to birth, in some cases to marriage, and sometimes even to death, in keeping with the general parameters of civil status under s. 10 which I have described above. Filiation is plainly part of «civil status» under s. 10 of the *Charter*.»²⁴

Here, the regulation grants an exemption to the child of a person working temporarily in Québec, and denies it to the child of that person's spouse. Yet, a significant legal relationship exists between the child and his mother on the one hand, and between the mother and her spouse on the other. These relationships include, for the child, the obligation to follow the parent who has custody, and for the spouses, the obligation to live together.²⁵ In short, the child is obligated to accompany his mother and her spouse, but he is denied the instruction in English that is granted to the spouse's children. Since the person staying in Québec for professional reasons is neither the father nor the mother of the child, but only his step-father, the denial of exemption seems to us to be based on civil status.

A distinction is discriminatory if it has the effect of destroying or compromising the right to equal recognition or exercise of a right or freedom. For the reasons described above, sections 10 and 40 of the *Charter* must be read together. It thus becomes clear that the provisions of section 1 of the regulation, on the basis of a prohibited criterion (civil status), break the equality that should exist in the recognition and exercise of the right to free public education. As Professor P. Carignan pointed out:

«Where equality is only a universal condition applicable to another right, it is not necessary for its violation to constitute a denial of that right in order to give rise to a remedy. It is sufficient that a distinction incompatible with the rule of equality be established in determining the conditions of the right.»²⁶

No clause granting dispensation from the *Charter* in this respect has yet been adopted. The provisions

24 Idem, 292 (Beetz, J., giving the Court's unanimous ruling).

25 See article 392, CCQ.

26 P. CARIGNAN, «L'égalité dans le droit: une méthode d'approche appliquée à l'article 10 de la Charte des droits et libertés de la personne», (1987) 21 R.J.T. 491, 507. Quoted in *C.D.P.Q. v. C.S. St-Jean-sur-Richelieu*, cited above (Note 14), 3037 (our translation).

of section 52 of the Charter must therefore be applied. Thus, since the provisions of section 1 of the regulation create a distinction based on civil status, they should be considered ineffective. Denials of exemption under these provisions should therefore be considered as unlawful interference with the right to equality.

CONCLUSION

A. On the denial of exemption based on the expiry of the maximum period of time granted by the regulation

Such denials are not incompatible with the Charter. However, family or humanitarian elements may be considered in the analysis of individual cases, in accordance with the provisions of language legislation. The child's interest should be the determining factor.

B. On the denial of exemption based on the fact that the person staying in Québec for professional reasons is neither the father nor the mother of the child

These denials are based on regulatory provisions that create a distinction based on civil status. The provisions should be considered ineffective, since they are incompatible with the Charter. Denials based on these provisions should be considered as unlawful interference with the right to equality.