

IN THE FEDERAL COURT OF CANADA  
TRIAL DIVISION

BETWEEN:

DEBORAH COYNE

Plaintiff

and

HER MAJESTY THE QUEEN, THE GOVERNOR  
GENERAL OF CANADA, THE ATTORNEY GENERAL  
OF CANADA, and THE ATTORNEY GENERAL OF  
NEW BRUNSWICK

Defendants

NOTICE OF CONSTITUTIONAL QUESTION

YOU ARE HEREBY ADVISED that the Plaintiff intends to question the jurisdiction, power or authority of the Governor General of Canada to issue a Proclamation amending the Constitution of Canada by adding thereto the New Brunswick Amendment, as defined in the Statement of Claim herein, in this action to be heard on a date set by a judge at a place set by a judge.

The following are the material facts giving rise to the constitutional question:

1. A proposal to amend the Constitution of Canada by adding thereto the New Brunswick Amendment was passed by resolutions of the Legislative Assembly of New Brunswick on December 4, 1992, by the Senate of Canada on December 16, 1992 and the House of Commons on February 1, 1993 (hereinafter the "Resolutions").
2. The preamble to the Resolutions stated that they were passed pursuant to s. 43 of the Constitution Act, 1982 (the bilateral amending formula).

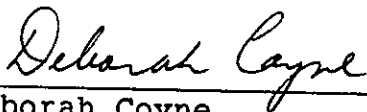
3. Such further and other facts as set out in the Statement of Claim herein, a copy of which is attached hereto as Appendix "A".

The following is the legal basis for this constitutional question:

1. The Governor General of Canada may only amend by the Constitution of Canada by adding thereto the New Brunswick Amendment if that Amendment was authorized by resolutions of the Senate and House of Commons and resolutions of the Legislative Assemblies of at least two thirds of the provinces that have, in the aggregate, at least 50% of the population of all of the provinces pursuant to s. 38(1) of the Constitution Act, 1982.

2. Such further and other reasons as set out in the Statement of Claim herein which is attached hereto as Appendix "A" hereto.

DATED at Ottawa, this 15 day of February, 1993.



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Defendants

STATEMENT OF CLAIMFiled on the 15 day of February, 1993.

1. The Plaintiff is a public policy consultant living in the city of Orleans in the Regional Municipality of Ottawa-Carleton, in the province of Ontario.
2. The Plaintiff has studied and taught constitutional law, and since 1987 has been deeply involved in constitutional debates on the proposed 1987 constitutional amendments (hereinafter referred to as the "Meech Lake Accord") and the 1992 constitutional amendments (hereinafter referred to as the "Charlottetown Accord"). In both cases, the Plaintiff co-founded organizations actively opposed to the amendments, the most recent being the "Canada For All Canadians No Committee" formed during the 1992 national referendum on the Charlottetown Accord.
3. By Notice of Motion dated December 4, 1992, the Legislative Assembly of New Brunswick passed a resolution to Amend the Constitution Act, 1982 by adding thereto the following sections (hereinafter the "New Brunswick Amendment"):

16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

(2) The role of the Legislature and Government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

4. Resolutions proposing the New Brunswick Amendment were passed by the House of Commons on February 1, 1993 and the Senate of Canada on December 16, 1992 by Notices of Motion dated December 11 and 14, 1992, respectively.

5. The preamble to the Notices of Motion set out in paragraphs 3 and 4, supra, stated that the New Brunswick Amendment was to be promulgated by the Governor General pursuant to s. 43 of the Constitution Act, 1982 (the bilateral amending formula).

6. On or about January 4, 1993, the Plaintiff wrote to all the provincial Attorneys-General requesting they institute a reference to their respective Courts of Appeal to determine the legality of proceeding with the New Brunswick Amendment under s. 43 of the Constitution Act, 1982. No provincial Attorney-General indicated an intent to make such a reference. Copies of these letters are attached hereto collectively as Appendix "A".

7. The New Brunswick Amendment is based on the provisions of An Act Respecting the Equality of the Two Official Linguistic Communities in New Brunswick, enacted by the Legislature of New Brunswick on July 17, 1981 (hereinafter referred to as "Bill 88").

8. In or about 1987, The Meech Lake Accord was put forward which among other things, provided for the following

amendment to the Constitution Act, 1867 (hereinafter referred to as the "1987 Distinct Society Clause"):

1. The Constitution Act, 1867 is amended by adding thereto, immediately after section 1, thereof, the following section:

"2(1) The Constitution of Canada shall be interpreted in a manner consistent with

(a) the recognition that the existence of French-speaking Canadians, centered in Quebec, but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside of Quebec, but also present in Quebec, constitutes a fundamental characteristic of Canada; and

(b) the recognition that Quebec constitutes within Canada a distinct society.

(2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada referred to in paragraph (1)(a) is affirmed.

(3) The role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed.

(4) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or the legislatures or governments of the provinces, including any powers, rights or privileges relating to language."

9. In or about October, 1989, the New Brunswick Select Committee on the 1987 Constitutional Accord submitted its final report and recommended that the principles of Bill 88 be entrenched in the Constitution of Canada, possibly as a new subsection of the 1987 Distinct Society Clause, and that responsibility to preserve and promote New Brunswick's two linguistic communities be made the responsibility of both the Legislature and Government of New Brunswick, as well as the Parliament and Government of Canada. A copy of this report is attached hereto as Appendix "B".

10. Pursuant to these recommendations, on or about March 21, 1990, the Premier of New Brunswick introduced a

resolution in the New Brunswick legislative assembly proposing certain constitutional amendments to both The Meech Lake Accord and the Constitution Acts of 1867 and 1982 (hereinafter referred to as the "New Brunswick Companion Resolution"). Among other things, the New Brunswick Companion Resolution would have entrenched the principles of Bill 88 in the 1987 Distinct Society Clause as well as the promotion of Canada's linguistic duality by the Parliament and Government of Canada. The relevant provisions of the New Brunswick Companion Resolution are as follows:

- 1(1) Subsection 2(1) of the Constitution Act, 1867, as enacted by section 1 of the Constitutional Amendment, 1987, is amended by adding the word "and" at the end of paragraph (b) thereof and adding thereto the following paragraph:

"(c) the recognition that, within New Brunswick, the English linguistic community and the French linguistic community have equality of status and equal rights and privileges."

- (2) Section 2 of the said Act, as enacted by section 1 of the Constitution Amendment, 1987, is further amended thereto, immediately after subsection (2) thereof, the following subsection:

"(2.1) The role of the Parliament and Government of Canada to promote the fundamental characteristic of Canada referred to in paragraph (1)(a) is affirmed."

- (3) Section 2 of the said Act, enacted by section 1 of the Constitution Amendment, 1987, is further amended thereto, immediately after subsection (3) thereof, the following subsection:

"(3.1) The role of the legislature and Government of New Brunswick to preserve and promote the equality of status and equal rights and privileges of the two linguistic communities referred to in paragraph (1)(c) is affirmed."

11. The New Brunswick Companion Resolution also would have extended the bilateral amending procedure by a related amendment to s. 43 of the Constitution Act, 1982, as follows:

5. Section 43 of the said Act is renumbered as subsection 43(1) and is further amended by adding thereto the following subsection:

"(2) An amendment to the Act of the Legislature of New Brunswick entitled An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick, chapter 0-1.1 of the Acts of New Brunswick, 1981, may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolution of the Senate and House of Commons and the Legislative Assembly of New Brunswick."

A copy of the relevant provisions of the Companion Resolution is attached hereto as Appendix "C".

12. In or about May, 1990, the Report of the Special Committee (of the House of Commons) to Study the Proposed Companion Resolution to the Meech Lake Accord made the following relevant recommendations:

4. Your Committee recommends that the clause respecting the equality of New Brunswick's two official linguistic communities is an appropriate subject for a Companion Resolution.
5. Similarly your Committee agrees with the New Brunswick proposal to affirm a role for the legislature and government of New Brunswick to preserve and promote the equality of status and equal rights and privileges of that province's two official linguistic communities.
6. Your Committee endorses the clause in the New Brunswick Companion Resolution which calls for promotion of Canada's linguistic duality by the Parliament and Government of Canada."

A copy of the relevant provisions of this report is attached hereto as Appendix "D".

13. On or about June 9, 1990, the First Ministers' Meeting on the Constitution included proposals for further constitutional amendments in its Final Communiqué (the "Final



Communiqué"). The Prime Minister of Canada and the Premiers of every Province of Canada (collectively the "First Ministers") endorsed in its entirety the proposal in the New Brunswick Companion Resolution to amend section 43 of the Constitution Act, 1982 as set out in paragraph 10 above. But the First Ministers agreed to entrench the principles of Bill 88 as an amendment to section 133 of the Constitution Act, 1867, rather than as an amendment to the 1987 Distinct Society Clause. This particular proposal in the Final Communiqué was set out as a separate constitutional amendment for New Brunswick as follows:

1. The Constitution Act, 1867 is amended by adding thereto, immediately after section 133 thereof, the following section:

133.1(1) the Constitution of Canada, as it relates to New Brunswick, shall be interpreted in a manner consistent with the recognition that, within New Brunswick, the English linguistic community and the French linguistic community have equality of status and equal rights and privileges.

(2) The role of the legislature and Government of New Brunswick to preserve and promote the equality of status and equal rights and privileges of the two linguistic communities referred to in subsection (1) is affirmed.

(3) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislature or Government of New Brunswick, including any powers, rights or privileges relating to language."

2. This amendment may be cited as the Constitution Amendment, (year of proclamation) (New Brunswick).

A copy of the Final Communiqué is attached hereto as Appendix "E".

14. On or about June 15, 1990, the legislative assembly of New Brunswick passed resolutions for amending the

Constitution Acts of 1867 and 1982 in accordance with the proposals in the Final Communiqué. No resolutions, however, were passed by the House of Commons and Senate or any other provincial legislative assembly.

15. On or about September 21, 1991, the Government of Canada put forward new proposals for constitutional change. Among other things, it proposed that a new clause be added to section 2 of the Constitution Act, 1867, which would include the following elements:

-recognition of the responsibility of governments to preserve Canada's two linguistic majorities and minorities;

-the special responsibility borne by Quebec to preserve and promote its distinct society.

In addition, the Government of Canada recommended an amendment to the Canadian Charter of Rights and Freedoms, to deal with Quebec's distinct society, as follows:

- 25.1 (1) This Charter shall be interpreted in a manner consistent with
- (a) the preservation and promotion of Quebec as a distinct society within Canada; and
  - (b) the preservation of the existence of French-speaking Canadians, primarily located in Quebec but also present throughout Canada, and English-speaking Canadians, primarily located outside Quebec but also present in Quebec.
- (2) For the purposes of subsection (1), "distinct society", in relation to Quebec, includes
- (a) a French-speaking majority;
  - (b) a unique culture; and
  - (c) a civil law tradition.

A copy of this provision is attached hereto as Appendix "F".

16. On or about January 14, 1992, the New Brunswick Commission on Canadian Federalism, appointed in September 1990, submitted its final report to the premier of New Brunswick. The relevant recommendations are as follows:

Chapter IV - Linguistic Partnership --  
Canada's Distinction

16. That the foundations of our linguistic-regime be maintained.
17. That the existence of the English and French linguistic communities throughout the country constitutes a fundamental characteristic of Canada and should therefore be expressed in the proposed "Canada clause".
18. (a) That the Constitution be amended to affirm the responsibility of the Parliament and Government of Canada to preserve and promote the English and French linguistic communities throughout the country; and  
(b) That the Constitution be amended further to affirm the responsibility of provincial legislatures and governments to preserve the English and French linguistic communities throughout the country.
19. That the Constitution be amended to include a clause recognizing the equality of status, equal rights and privileges of the English and French linguistic communities in New Brunswick and that this equality includes the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of these communities".

A copy of these recommendations are attached hereto as Appendix "G".

17. On or about August 28, 1992, the First Ministers issued the Final Text of a Consensus Report on the Constitution recommending a set of constitutional amendments (hereinafter referred to as the "Charlottetown Accord"). On or about October 9, 1992, a draft legal text was issued which contained the following proposals for a Canada Clause;

1. The Constitution Act, 1867 is amended by adding thereto, immediately after section 1 thereof, the following section:
2. (1) The Constitution of Canada, including the Canadian Charter of Rights and Freedoms, shall be interpreted in a manner consistent with the following fundamental characteristics:
  - (a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;
  - (b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of three orders of government in Canada;
  - (c) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition;
  - (d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;
  - (e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;
  - (f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;
  - (g) Canadians are committed to the equality of female and male persons; and
  - (h) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.
- (2) The role of the legislature and Government of Quebec to preserve and promote the distinct society of Quebec is affirmed.
- (3) Nothing in this section derogates from the powers, rights or privileges of the Parliament or the Government of Canada, or of the legislatures or governments

of the provinces, or of the legislative bodies or governments of the Aboriginal peoples of Canada, including any powers, rights or privileges relating to language.

- (4) For greater certainty, nothing in this section abrogates or derogates from the aboriginal and treaty rights of the Aboriginal peoples of Canada."

18. The Charlottetown Accord also included provisions for a bilateral (New Brunswick and Canada) amendment to the Charter of Rights and Freedoms as follows:

1. The Constitution Act, 1982 is amended by adding thereto, immediately after section 16 thereof, the following section:

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

- (2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed."

A copy of the relevant provisions of the Charlottetown Accord are attached hereto as Appendix "H".

19. On or about October 26, 1992, in referenda throughout Canada, the Charlottetown Accord was rejected by an overall majority of the Canadian people.

20. On or about December 4, 1992, the New Brunswick legislative assembly authorized an amendment to the Constitution Act, 1982 in exactly the same form as in the Charlottetown Accord set out in paragraph 17 above.

21. The Plaintiff claims that the New Brunswick Amendment cannot be made pursuant to the bilateral amending

formula in section 43 of the Constitution Act, 1982. Rather, it can only be made pursuant to the general amending formula in section 38(1). Accordingly, the Plaintiff seeks a declaration, pursuant to the s. 52(1) of the Constitution Act, 1982, that the Governor General has no jurisdiction, power to authority to issue a proclamation to amend the Constitution by adding thereto the New Brunswick Amendment.

22. The bilateral amending formula in section 43 of the Constitution Act, 1982, can only be used in limited circumstances for amendments "in relation to any provision that applies to one or more, but not all, provinces.", including amendments relating to "the use of the English or French language within a province." For example, a province could declare itself officially bilingual within the meaning of the Charter language provisions pursuant to section 43. In order for the bilateral amending formula in section 43 to apply, the amendment must be characterizable, in form, substance, purpose and effect, as an amendment to an existing constitutional provision that is explicitly limited in application to one or more, but not to all provinces.

23. While of limited significance with respect to Charter rights of a universal nature such as the Fundamental Rights and Freedoms, the purpose of the framers is of considerable weight in determining the meaning of those provisions of the Constitution that derive directly from a political bargain or compromise.

24. The New Brunswick Amendment cannot be characterized as an amendment to an existing constitutional provision, such as s. 133, that applies to one or more, but not all provinces. The New Brunswick Amendment amends the Charter of Rights and Freedoms which, by s. 32, applies to the

Parliament and government of Canada and the Legislatures and governments of all of the provinces.

25. In addition, the New Brunswick Amendment effectively amends parts of section 23 the Canadian Charter which apply to all provinces. Section 23, as it now stands, affords to minority language communities some measure of management and control over minority language instruction, where demographic and other factors warrant, but falls far short of an absolute guarantee of distinct educational institutions as is now proposed in the New Brunswick amendment.

26. Section 23 provides a comprehensive code for minority language educational rights; it has its own internal qualifications and its own method of internal balancing. By creating a different and overlapping right to minority language education to apply in a single province, the New Brunswick amendment would alter the coherence and comprehensiveness of section 23, and thereby change its very core.

27. The New Brunswick Constitutional Amendment does not amend a "provision that relates to the use of the English and French language in the province" in the sense intended by section 43(b). Rather, the amendment is in relation to the broad subject matters of education and culture, and relates to the special rights and privileges of linguistic communities, not to the use of official languages in the province.

28. The New Brunswick Amendment creates a special legislative status in affirming the role of the Legislature and government of New Brunswick to preserve and promote the equality of status and equal rights and privileges of the two

linguistic communities in New Brunswick. In so doing, the Amendment diminishes federal powers in several areas including, but not limited to, language, culture, broadcasting and communications.

29. Unlike some of the previous proposals and drafts for the New Brunswick Amendment, there is no reference to a comparable federal role in preserving and promoting the two linguistic communities, thereby raising the inference that the role of the Legislature and government of New Brunswick is to be expanded in the subject areas referred to in paragraph 28 above.

30. If those who drafted the New Brunswick Amendment had intended that governmental powers not be affected by the amendment, they could have said so. (See, for example, the non-derogation clause in previous drafts of the 1987 Distinct Society Clause (paragraph 8, supra), the Charlottetown Accord's Canada Clause (paragraph 17, supra), and the 1990 New Brunswick proposals (paragraph 10, supra).

31. The New Brunswick Amendment, if permitted to be made pursuant to the bilateral amending formula, will set a powerful precedent for future bilateral amendments such as Quebec's Distinct Society Clause, something which was always considered to have required the general amending formula in section 38(1) of the Constitution Act, 1982.

32. The New Brunswick constitutional amendment introduces, for the first time, the concept of collective rights in the Charter of Rights and Freedoms. Charter rights and freedoms, including the minority language and education rights, are clearly stated as belonging to individuals, and not to groups. Section 24 of the Charter empowers "anyone"



to seek enforcement of guaranteed rights and freedoms. Yet the New Brunswick constitutional amendment confers rights on linguistic communities and empowers the Legislature and Government of New Brunswick to promote the power of groups over individuals.

33. While section 23 of the Charter may be said to confer rights on a specific group in the narrow sense that the rights therein may only be exercised by certain classes or categories of individuals (i.e. those who belong to a minority language community) , it is the individual members of the group who bear, exercise, and may enforce the rights themselves. The New Brunswick amendment, by contrast, sets up linguistic communities as direct bearers of rights, thereby altering the structure of the Charter.

34. Section 43 should be interpreted strictly. The core of the political compromise which informed the amending formula provisions in the Constitution Act, 1982 was the requirement of a high degree of provincial consent wherever an amendment affects the structural and symbolic functions of the constitution as a fundamental framework for government and society.

35. Therefore the use of section 43 should be limited to modifications or adjustments to discrete, self-contained constitutional provisions not applying to all provinces, which do not involve the creation of new elements and basic structures in the Canadian constitutional order, such as the introduction of collective rights into the Charter.

36. The Plaintiff claims as follows:

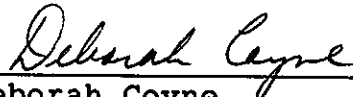
- (i) a declaration pursuant to sections 17 and 18 of the Federal Court Act and s. 52(1) of the Constitution Act, 1982 that the Governor

General has no jurisdiction, power or authority to issue a Proclamation to amend the Constitution by adding thereto the New Brunswick Amendment;

(ii) her costs of this action; and

(iii) such further and other relief as this Honourable Court considers just.

DATED at Ottawa, this 15 day of February, 1993.



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ATTORNEY GENERAL OF CANADA, and  
THE ATTORNEY GENERAL OF NEW  
BRUNSWICK

Defendants

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STATEMENT OF CLAIM

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