SUBMISSION OF

L'ASSOCIATION DES JURISTES D'EXPRESSION FRANÇAISE

DE LA NOUVELLE-ÉCOSSE

(« AJEFNE »)

TO

THE STEERING COMMITTEE

FOR THE CIVIL PROCEDURE RULES REVISION PROJECT

November 10, 2004

1. L'Association des juristes d'expression française de la Nouvelle-Écosse (the French-Speaking Jurists Association of Nova Scotia, also known as “AJEFNE”) is a non-profit organization created in 1994 to promote and improve the accessibility to legal services in French for the Acadian and Francophone population in Nova Scotia. Our Association comprises lawyers, judges, professors, translators, law students and other members of the community who support our objectives.

2. The number of Nova Scotians who claim French as their mother tongue is constantly declining and assimilation continues, even in our traditional Acadian regions. Statistics Canada confirms that the number of francophones diminished in Nova Scotia by 0.3% between 1991 and 2001: from 37,525 (4.2 %) in 1991 to 35,380 (3.9 %) in 2001.

3. In **Doucet-Boudreau v. Nova Scotia (Minister of Education)**, [2003] S.C.R. 3, at paragraph 29, the Court highlighted, in the context of education, the importance of adopting a proactive approach to reversing assimilation :

> “ 29 Another distinctive feature of the right in s. 23 is that the "numbers warrant" requirement leaves minority language education rights particularly vulnerable to government delay or inaction. For every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation which carries the risk that numbers might cease to "warrant". Thus, particular entitlements afforded under s. 23 can be suspended, for so long as the numbers cease to warrant, by the very cultural erosion against which s. 23 was designed to guard. In practical, though not legal, terms, such suspensions may well be permanent. If delay is tolerated, governments could potentially avoid the duties imposed upon them by s. 23 through their own failure to implement the rights vigilantly. The affirmative promise contained in s. 23 of the *Charter* and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected... ”

4. Further, in **Doucet-Boudreau**, the Supreme Court noted the direct correlation between language and culture :

> "26 …This Court has, on a number of occasions, observed the close link between language and culture. In *Mahe* [Mahe v. Alberta, [1990] 1 S.C.R. 342], at p. 362, Dickson C.J. stated:
>
> . . . any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them."

5. In order to stem the tide of assimilation, the French community in this province has identified the importance of addressing its concerns in priority sectors such as health, justice, and education.

6. The Acadian and francophone population of Nova Scotia recognizes the importance of having access to legal services in French and the ability to communicate in their mother tongue in appearances before the Courts and administrative tribunals. In a 2003 provincial survey of Acadians, conducted by Corporate Research Associates, 77% of respondents noted the importance of having access to legal services and justice in French. They also indicated their desire to access the different levels of courts in their own language, including Small Claims Court, Provincial Court and the Supreme Court.

7. While the repatriation of the **Canadian Charter of Rights and Freedoms** in 1982, as well as the enactment of the federal **Official Languages Act** in 1988, has not prevented assimilation, it has brought the issue of minority language rights to the forefront in both Canada and this province. Further, it has confirmed the protected status of the French language in Canada.

8. The equality and privileged status of the French and English languages, as compared to other languages, was confirmed in **MacDonald v. City of Montreal,** [1986] 1 S.C.R. 460, at page 500 :

> " This is not to put the English and the French languages on the same footing as other languages. Not only are the English and the French languages placed in a position of equality, they are also given a preferential position over all other languages. And this equality as well as this preferential position are both constitutionally protected by s. 133 of the *Constitution Act, 1867*. Without the protection of this provision, one of the two official languages could, by simple legislative enactment, be given a degree of preference over the other as was attempted in Chapter III of Title 1 of the *Charter of the French Language*, invalidated in *Blaikie No. 1*. English unilingualism, French unilingualism and, for that matter, unilingualism in any other language could also be imposed by simple legislative enactment. Thus it can be seen that, if s. 133 guarantees but a minimum, this minimum is far from being insubstantial. "

9. In **R. v. Beaulac**, [1999] 1 S.C.R. 768, at paragraphs 24 and 25, the Supreme Court of Canada recognized the state's responsibilities with respect to the implementation of linguistic rights and the liberal interpretation that such rights should be afforded :

> "24 Though constitutional language rights result from a political compromise, this is not a characteristic that uniquely applies to such rights. A. Riddell, in "À la recherche du temps perdu: la Cour suprême et l'interprétation des droits linguistiques constitutionnels dans les années 80" (1988), 29 *C. de D.* 829, at p. 846, underlines that a political compromise also led to the adoption of ss. 7 and 15 of the *Charter* and argues, at p. 848, that there is no basis in the constitutional history of Canada for holding that any such political compromises require a restrictive interpretation of constitutional guarantees. I agree that the existence of a political compromise is without consequence with regard to the scope of language rights. The idea that s. 16(3) of the *Charter*, which has formalized the notion of advancement of the objective of equality of the official languages of Canada in the *Jones* case, *supra*, limits the scope of s. 16(1) must also be rejected. This subsection affirms the substantive equality of those constitutional language rights that are in existence at a given time. Section 2 of the *Official Languages Act* has the same effect with regard to rights recognized under that Act. This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State; see *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 412; *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1038; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Eldridge v. British Columbia*

> *(Attorney General)*, [1997] 3 S.C.R. 624, at para. 73; *Mahe*, *supra*, at p. 365. It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation. This being said, I note that this case is not concerned with the possibility that constitutionally based language rights may conflict with some specific statutory rights.
>
> 25 Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; see *Reference re Public Schools Act (Man.)*, *supra*, at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick*, *supra*, at pp. 579-80, stands for a restrictive interpretation of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply. It is also useful to re-affirm here that language rights are a particular kind of right, distinct from the principles of fundamental justice. They have a different purpose and a different origin."

10. In **Beaulac**, the discussion related to the right of an accused to be tried in the language of his choice under s. 530 of the **Criminal Code**. In the context of the criminal proceeding that existed in **Beaulac**, the Supreme Court identified the concept of institutional bilingualism and the necessity of protecting the equality of both official languages. At paragraph 22:

> "22 The *Official Languages Act* of 1988 and s. 530.1 of the *Criminal Code*, which was adopted as a related amendment by s. 94 of the same *Official Languages Act*, constitute an example of the advancement of language rights through legislative means provided for in s. 16(3) of the *Charter*; see *Simard*, *supra*, at pp. 124-25. The principle of advancement does not however exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada. It does not limit the scope of s. 2 of the *Official Languages Act*. Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada. Parliament and the provincial legislatures were well aware of this when they reacted to the trilogy (*House of Commons Debates*, vol. IX, 1st sess., 33rd Parl., May 6, 1986, at p. 12999) and accepted that the 1988 provisions would be promulgated through transitional mechanisms and accompanied by financial assistance directed at providing the required institutional services."

11. The Nova Scotia Legislature has recently committed the Province to the delivery of more French language services. On October 14, 2004, the Legislature passed the **French-Language Services Act**, S.N.S. 2004, c. 26, which recognizes the contribution made by the Acadian and francophone community, the commitment of the government to its development, and the importance of preserving the French language for future generations. Our appearance here is in keeping with the spirit of that legislation.

12. Tonight, our submission to the Steering Committee is twofold :

- That the revised **Civil Procedure Rules** be translated into French; and
- That both the English and French versions be equally authoritative in proceedings before the Supreme Court and the Court of Appeal.

13. While there has been some question regarding the right of parties to have matters litigated in French, our Association notes that there are some instances where a party appearing before the Supreme Court is entitled to have the matter heard in French :

- In a criminal matter as required under s. 530 of the **Criminal Code** (see **R. v. Beaulac**), including an appeal of a criminal matter to the Court of Appeal;
- In an appeal from a Small Claims Court decision to the Supreme Court respecting a matter arising in the Yarmouth region, where the provincial Department of Justice has initiated a Pilot Project allowing parties to conduct the matter in French;

- It is our understanding that some proceedings in the Supreme Court (Family Division) are conducted in French where both spouses are unilingually French;
- The Association is also hopeful that at some point in the future opposing litigants may be able to consent to the conduct of their civil matter in French.

14. Moreover, the existance of an official French version of the **Civil Procedure Rules** will serve as an important resource for a number of French speaking lawyers and judges in Nova Scotia, providing an important reference tool for such jurists wishing to examine a procedural issue in their mother tongue.

15. In our future deliberations with the provincial government, our Association will be seeking the following amendments to the Nova Scotia **Judicature Act** :

> 1. Every party may use French in any pleading or process or representation before the Court.
>
> 2. (1) Subject to subsection (2), every written decision of the Court shall be released simultaneously in English and in French where (a) the proceedings before the Court have taken place, in whole or in part, in both languages; or (b) pleadings or other documents have been written, in whole or in part, in both languages.
>
> (2) Where it is clearly stated on a written decision of the Court issued pursuant to subsection (1) that a translation will be provided by the Court upon request, the Court may issue the decision in either English or French.
>
> (3) Legal decisions rendered in English only or in French only pursuant to subsection (2) are equally authoritative.
>
> 3. The Court shall (a) ensure that any person be heard in English or French, according to that person's choice; and (b) provide simultaneous interpretation services from English to French or from French to English where requested by any party in any proceeding before the Court.

16. Our Association is sensitive to the requirement that such amendments should be implemented carefully to ensure the fair, efficient and effective administration of justice. It further recognizes that the enactment of such provisions may be better implemented in phases to ensure the smooth transition to the bilingual administration of justice across all levels of Courts. However, for our purposes tonight, we emphasize the importance of enacting a bilingual set of **Civil Procedure Rules** so that the transition will be an orderly one when it does occur.

17. In ending, we thank the Committee for allowing us the opportunity to make this presentation and we look forward to working with you towards the implementation of our recommendations.

Roland A. Deveau – AJEFNE President