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THE ROLE OF THE COURTS IN THE RECOGNITION OF LANGUAGE RIGHTS

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INTRODUCTION

A. The Adoption of the *Canadian Charter of Rights and Freedoms* and Its Judicial Implications

The role of the courts in Canada has changed a great deal over the years. From Confederation to the 1960s, the courts played a minor role in the protection of individual rights. Their primary interest in those years was the constitutional separation of powers; in the name of parliamentary supremacy, they left it to the legislators to protect and ensure respect for civil freedoms. After the *Canadian Human Rights Bill* was adopted in 1960, the government assigned to the courts responsibility for guaranteeing a number of individual rights in areas of federal jurisdiction.

Following the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, constitutional rights and human rights became more widely recognized in Canadian courts. Section 24 of the Charter states that anyone whose guaranteed rights have been infringed or denied may apply to a court of competent jurisdiction to obtain remedy. As a result of that provision, the courts became more active in ensuring that government policies and actions respect the rights set out in the Charter.

That rise in judicial activism has had an impact on the way the Canadian federation works. The courts play a bigger role in the decision-making process by acting as overseers of the action or inaction of governments. They can declare laws invalid, clarify their meaning, determine how they should be applied or even reword them.(1) The federal government, meanwhile, through the Minister of Justice, is required to examine every bill tabled in the House of Commons "in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms*."(2)

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(1) Bernard Fournier and José Woehrling, "Judiciarisation et pouvoir politique," *Politique et Sociétés*, Vol. 19, Nos. 2-3, 2000, pp. 3-8 [translation].

(2) *Department of Justice Act*, R.S. 1985, c. J-2, s. 4.1(1).

Opinion is divided when it comes to analyzing the evolution of the role of the courts. For some observers, the changes have been positive because the courts have been given the authority to remedy injustices and protect the rights of individuals and minorities who feel their rights have been violated. For others, the changes have been negative because they have put policy making in the hands of the courts, thereby diminishing the authority of Parliament to the benefit of lobby groups and the judicial system. Moreover, the time, energy and high cost associated with court actions can be obstacles to effective recognition of rights by the courts.

B. Recognition of Language Rights by the Courts

The legal protection of English and French is rooted in the *British North America Act*. Section 133 of this Act allowed for the use of English and French in parliamentary debates and court proceedings, and in the printing and publications of laws by the Parliament of Canada and the Legislature of Quebec. In 1969, the federal government established a more formal framework for the use of English and French in its very first *Official Languages Act*.

Language provisions were included in the Charter in 1982. They pertain to the equality of status of the two official languages (s. 16), the right to use either language in any debates of Parliament (s. 17) or in courts (s. 19), the printing and publication of Acts of Parliament in both languages (s. 18), the right of members of the public to be served in the language of their choice based on the criteria of "significant demand" and "nature of the office" (s. 20), and the right to education in the language of the minority "where numbers warrant" (s. 23).(3)

In 1988, a revised version of the *Official Languages Act* was passed. The current Act takes into account the new constitutional order imposed by the Charter and adds provisions pertaining to language of work in federal institutions, the vitality and development of the English and French linguistic minority communities, and the advancement of English and French in Canadian society. It also provides a remedy that allows any complainant to appeal to the Federal Court to ensure that his or her language rights are respected.(4)

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(3) Note in passing that ss. 16-20 of the Charter apply to both the Parliament of Canada and the Legislature of New Brunswick.

(4) Court remedy is made possible in respect of a right under ss. 4-7 and 10-13, parts IV, V and VII, and s. 91 of the *Official Languages Act*.

The adoption of these constitutional and legislative measures gave official-language communities in a minority setting new tools with which to affirm their rights in court. Since 1982, hundreds of judgments have clarified the scope of language rights. According to André Braën, court action in language matters falls under two main headings: "First, judicial recourse may be needed to clarify a language right; second, it may be needed to effectively implement a language right."(5)

The Supreme Court of Canada has been generous in its interpretation of language rights in recent years. For example, the decision in *Mahé*(6) confirmed the constitutional right of parents in an official-language community in a minority setting to manage and control their own schools. The decision in *Beaulac*(7) recognized that language rights must be interpreted purposively and liberally by the courts. These rights create obligations for the Crown and require the implementation of government measures to ensure the preservation and growth of official-language communities. The decision in *Reference re Secession of Quebec*(8) recognized the principle of protection of minority rights, which, according to the Supreme Court, is an "underlying principle" or "constitutional value" that must be taken into account in exercising constitutional and political authority. In the case of official-language communities, the interpretation of such a principle has often implied the importance of protecting community institutions, which contribute to the preservation and development of those communities.

Judgments by courts at other levels have also been favourable to official-language communities in a minority setting. In the action to preserve the Montfort Hospital (in Ottawa),(9) the Ontario Court of Appeal acknowledged that the hospital is an institution essential to the survival and growth of the Franco-Ontarian community. The decision by the Health Services Restructuring Commission to reduce on a massive scale the health care services provided by the hospital violated the unwritten constitutional principle of respect for minority rights. The ruling has repercussions nationwide, because the conclusions are being used more and more to support the importance of the preservation of community institutions to the growth and development of official-language communities in a minority setting.

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(5) André Braën, "Le recours judiciaire et la gouvernance linguistique," in Jean-Pierre Wallot, ed., *La gouvernance linguistique: le Canada en perspective*, University of Ottawa Press, Ottawa, 2005, p. 131, [translation].

(6) *Mahé* v. *Alberta*, [1990] 1 S.C.R. 342.

(7) *R.* v. *Beaulac*, [1999] 1 S.C.R. 768.

(8) *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

(9) *Lalonde* v. *Ontario (Commission de restructuration des soins de santé)*, [2001] 56 R.J.O. (3d) 577.

Judgments like these show that language rights must ultimately contribute to the growth and development of official-language communities in a minority setting. Language rights must be interpreted in context, bearing in mind the specific situation of each community and the specific linguistic dynamic of each province and territory.

COURT CHALLENGES PROGRAM

A. Background, Role and Operation

In the late 1970s, the federal government introduced the Court Challenges Program, the objective of which was to help official-language communities in a minority setting to take legal action to clarify and affirm their language rights. The program came about in a context where the protection of language rights was being challenged in two cases. In *Blaikie*(10) in Quebec, the courts were being asked to determine whether the *Charter of the French Language* prejudiced the application of sections 93 and 133 of the Constitution. And in *Forest*(11) in Manitoba, the issue was whether the restrictions on the use of French imposed by the province in 1890 violated the rights protected by the Constitution under section 23 of the *Manitoba Act, 1870*. The federal government decided to provide financial support to the applicants in these two cases in order to clarify the degree to which the Constitution protected official-language communities in a minority setting. The program was at that time managed jointly by the Department of Justice and the Department of the Secretary of State.

In 1982, the federal government renewed its support for the Court Challenges Program for an additional three years. The program was updated and its budget increased in order to broaden the scope of its funding to include cases dealing with the language rights newly entrenched in sections 16 to 23 of the Charter.

In 1985, the program was again expanded to provide financial support for individuals and groups wishing to challenge statutes and government policies and practices related to the equality rights newly added to the Charter. To avoid any conflict of interest, it was decided that the program would in future be administered by an independent body, the Canadian Council on Social Development. Under an agreement with the council, the government provided

(10) *A.G. Quebec* v. *Blaikie*, [1979] 2 S.C.R. 1016.

(11) *A.G. Manitoba* v. *Forest*, [1979] 2 S.C.R. 1032.

funding for court challenges by a growing number of individuals and groups, thus giving them increased access to the judicial system. Program administration was transferred to the University of Ottawa's Human Rights Research and Education Centre in August 1990.

When the February 1992 budget was tabled, the government announced the cancellation of the program and gave two reasons for its decision. First, the program no longer had a purpose, since it had supported the establishment of a solid body of case law pertaining to Charter rights. Second, in a period of budget cuts, there were cheaper ways of managing funding for court challenges. The Department of Justice would now have to fund court challenges on a case-by-case basis.

Following a storm of protest, the government reinstated the Court Challenges Program in October 1994. The new objective was to provide funding for nationally significant cases initiated by individuals or groups seeking to affirm and defend the constitutional provisions related to equality rights and language rights under sections 2, 15, 16-23, 27 and 28 of the Charter, sections 93 and 133 of the Constitution, and section 23 of the *Manitoba Act, 1870*.

Since 1994, the program has been managed by a not-for-profit organization independent of the government to which the Department of Canadian Heritage transfers $2.75 million annually through a contribution agreement. The funding provided under that agreement breaks down as follows: $525,000 for language rights, $1,575,000 for equality rights and $650,000 for program administration.

The funding provided for language rights is available only to individuals, groups and not-for-profit organizations representing an official-language community in a minority setting that seeks to defend a nationally significant case. The funds are not intended to support:

- challenges to provincial law, policy or practice;
- any case that covers an issue already funded by the program or currently before the courts;
- complaints under the *Official Languages Act*;
- public education, community development, lobbying or political advocacy.(12)

(12) Web site of the Court Challenges Program, "Funding: Language Rights Funding," http://www.ccppcj.ca/ e/funding/funding-language.shtml.

There has been talk in recent years of broadening the mandate of the Court Challenges Program. Some observers would like the funding provided by the program to apply to provincial law, policy or practice or complaints under the *Official Languages Act*. The logic behind this position is that: "Rights are meaningless without real and accessible remedies."(13) However, the current contribution agreement does not provide for any such measure. This means that official-language communities in a minority setting that take court action to challenge violations of provincial laws or the *Official Languages Act* have to use their own money to get their day in court.

B. Data Analysis

Since 1978, the program has funded 237 language rights cases:(14) 95 between 1978 and 1992(15) and 142 between 1994 and 2005.(16) An evaluation report produced in 2003 for the Department of Canadian Heritage showed that "many of these courts cases would never have been brought to the attention of the Courts without the [Court Challenges Program]."(17) Not every request related to language rights receives funding from the program,(18) but the program is an additional incentive for official-language communities in a minority setting to make greater use of the courts to affirm their rights.

The following tables show that cases involving education rights have received the most financial support from the Court Challenges Program since 1985.(19) Further, most of the cases that received funding were heard by a trial court.

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(13) Arne Peltz, *Deep Discount Justice: The Challenge of Going to Court with a Charter Claim and No Money*, document prepared for the Court Challenges Program, November 1997.

(14) It should be noted that these figures do not include funding provided to the other sectors covered by the program, that is, case development, impact studies, promotion, program access and negotiation. Financial assistance for those sectors accounts for almost half of the program's budget.

(15) Richard Goreham, *Language Rights and the Court Challenges Program: A Review of its Accomplishments and Impact of its Abolition*, Report to the Commissioner of Official Languages, Ottawa, 1992, p. 6.

(16) Court Challenges Program of Canada, *Annual Report 2004-2005*, 2005, p. 51.

(17) Prairie Research Associates, *Summative Evaluation of the Court Challenges Program: Final Report*, prepared for the Department of Canadian Heritage, 26 February 2003.

(18) The approval rate for applications related to language rights was 74.7% between 1994 and 2005. For more details, see Court Challenges Program of Canada (2005).

(19) The data are taken from Court Challenges Program of Canada (2005) and Linda Cardinal, "Le pouvoir exécutif et la judiciarisation de la politique au Canada. Une étude du Programme de contestation judiciaire," *Politique et Sociétés*, Vol. 19, Nos. 2-3, 2000, pp. 43-64. Similar data are not available prior to 1985.

Table 1

**Breakdown by Category of Language Rights Cases
Funded by the Court Challenges Program, 1985 to 2005**

	Number of Cases Funded	Percentage (%)
Education rights (s. 23)	122	55.7
Judicial rights (s. 19)	30	13.7
Language of work, communication and service (s. 20)	30	13.7
Legislative bilingualism (s. 18)	18	8.2
Other	19	8.7
Total	219	100

Table 2

**Breakdown by Level of Court of Language Rights Cases
Funded by the Court Challenges Program, 1985 to 2005**

	Number of Cases Funded	Percentage (%)
Trial court	119	54.3
Court of Appeal	61	27.9
Supreme Court of Canada	39	17.8
Total	219	100

LANGUAGE RIGHTS

A. Political and Judicial Recognition

As indicated earlier, litigation has been a means of promoting language rights that has benefited official-language communities in a minority setting. In some cases, "court action has made it possible to reorient government action that had not always been favourable to minorities or to compel government action outright. […] Court action has also made it possible to overcome the political weakness of linguistic minorities in their relations with both the majority and the government."(20)

(20) Braën (2005), p. 135 [translation].

Court action does not, however, solve all of the problems encountered by these communities. A study released in 2001 by the Office of the Commissioner of Official Languages found that 12 years after the decision in *Mahé*, a significant proportion of Francophone children were not attending French schools, which erodes the vitality of Francophone communities in a minority setting.(21) This is an indication that the development of official-language communities in a minority setting does not depend on the judicial system alone.

Litigation takes time, energy and money and may or may not lead to government action in the end. In the absence of governments' clear expression of political will to further minority rights, it would appear to serve little purpose for courts to offer an interpretation of those rights. The former minister responsible for official languages, the Honourable Stéphane Dion, made the point that it takes both judicial action and political responsibility to provide optimum protection for official language rights. In his words:

> Legal battles consume resources, wear down litigants, and sometimes create divisions within communities […]. Until governments themselves assume their constitutional and legal responsibilities for Canadian bilingualism, citizens and communities will be justified in turning to the courts. At the same time, it is important that court remedy be used advisedly. It must stimulate and encourage governments to move in the right direction, and do nothing that would dissuade them from doing so.(22)

Since the Charter came into force, official languages commissioners have maintained that the recognition of language rights is a responsibility shared by governments and the courts. In his 1985 annual report, Commissioner D'Iberville Fortier wrote:

> Litigation is a lengthy and very costly business, and its outcome is far from sure. It often exacerbates already tense relations between government and governed. However, in seeking to exercise their rights, the minority communities are sometimes left with no alternative. More often than not, they turn to the courts only when their approaches to the political powers have not produced the desired results or have been humiliatingly rebuffed.(23)

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(21) Angéline Martel, *Rights, Schools and Communities in Minority Contexts: 1986-2002. Toward the Development of French through Education, An Analysis*, Department of Public Works and Government Services, Ottawa, 2001.

(22) Stéphane Dion, "The proper use of the law in the area of the official languages," Notes for an address, keynote address to members of the Ontario Bar Association, Toronto, 24 January 2002.

(23) Commissioner of Official Languages, *Annual Report 1985*, Minister of Supply and Services Canada, 1986, Ottawa, pp. 11-12.

In the same vein, Commissioner Dyane Adam recently stated:

> Although the courts have an essential part to play in clarifying the language rights guaranteed, our parliamentary representatives have the primary responsibility for acting when an ambiguity in legislation leads to inaction by the governmental and administrative structure. This responsibility results from the constitutional undertaking by Parliament and provincial legislatures to promote progress towards equal status and use of English and French.(24)

B. Bill S-3: What Impact Will It Have?

The introduction of Part VII of the *Official Languages Act* in 1988 was a milestone in the establishment of language rights and the protection of linguistic minorities in Canada. The interpretation and scope of section 41 have since been the subject of much debate. To date, the federal government has taken the stance that section 41 is a political statement that does not create any legal or binding obligations for the government.

Since 2001, no fewer than four bills have been tabled in the Senate with the objective of amending Part VII of the Act in order to make it binding in law. The purpose of those bills was to: clarify the obligations of federal institutions regarding implementation of the commitment made in Part VII; prescribe the adoption of regulations establishing the terms and conditions of implementation of the obligations set out in Part VII; and establish a right to challenge in court any violation of Part VII. When the parliamentary committee was studying Bill S-3, An Act to amend the Official Languages Act, various opinions were expressed regarding the possible impact of the proposed changes.

The organization that represents Francophone communities, the Fédération des communautés francophones et acadienne du Canada (FCFA), voiced its dissatisfaction with the implementation of section 41 by the Government of Canada since 1988. In its brief, the FCFA reiterated the position it has stated in other forums, namely that Part VII was already binding in its current form and constituted a *bona fide* commitment by the federal government and federal institutions to support the growth and development of official-language communities in a minority setting. Still, the FCFA welcomed Bill S-3 because it would "clarify Parliament's

(24) Office of the Commissioner of Official Languages, *Language Rights 2003-2004*, Minister of Public Works and Government Services Canada, Ottawa, 2005, p. iii.

intent"[25] and shed more light on the issue. Further, the introduction of a right of recourse in the event of a breach of the commitments set out in Part VII is an important and meaningful addition to the Act for official-language communities in a minority setting. According to the FCFA, litigation can be useful in clarifying the government's obligations to communities. That being said, communities realize that going the court route is a costly and tiring solution that is considered only when all other options have failed.[26]

The organization that represents Quebec's Anglophone community, the Quebec Community Groups Network (QCGN), also expressed support for Bill S-3, saying that it would "strengthen the support and protection given to official language minority communities."[27] In the QCGN's opinion, making Part VII binding will not necessarily lead to an increase in court cases. If there is political will on the part of the government and if Parliament clarifies the *Official Languages Act*, there will be no need for litigation.

Government spokespersons were less enthusiastic about the proposed amendments to the Act. Counsel from the Department of Justice and the Department of Canadian Heritage expressed fear that litigation might become the preferred option for fostering the growth and development of official-language communities in a minority setting. In the long run, political authority might be marginalized and court actions could proliferate. Further, the federal government could be powerless to use the means at its disposal to help attain equality for English and French in Canadian society. The constant risk of being the target of litigation could, for example, prevent the federal government from signing agreements with other levels of government. The Minister of Canadian Heritage raised that argument when Bill S-3 was being studied:

> Bill S-3 could also have the effect of considerably reducing the government's margin to manoeuvre within its capacity to develop policies and programs and when exercising its spending power.

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(25) Joint brief from the Fédération des communautés francophones et acadienne du Canada and the Fédération des associations de juristes d'expression française de common law to the House of Commons Standing Committee on Official Languages, Bill S-3, An Act to amend the Official Languages Act (Promotion of English and French), 16 June 2005, p. 9.

(26) Fédération des communautés francophones et acadienne du Canada, *Evidence before the Standing Committee on Official Languages*, Meeting 39, 38th Parliament, 1st Session, 16 June 2005 (09:25, 10:00 and 10:25).

(27) Quebec Community Groups Network, *Evidence before the Standing Committee on Official Languages*, Meeting 43, 38th Parliament, 1st Session, 4 October 2005 (09:15).

> Ministers' decisions could be subjected to revision by the courts, and the courts could rule for amendment or cancellation of government initiatives.(28)

Meanwhile, the Commissioner of Official Languages stated that the government's fears were unfounded. To support her arguments, she referred to the small number of cases initiated in Federal Court under Part IV of the Act (communication with and services to the public). In this particular instance, there have been only a dozen cases since the Act was proclaimed in 1988.(29) According to the Commissioner, court challenges are a last resort, to be used when political will fails:

> When federal institutions demonstrate leadership and adopt, without being forced by the courts, the dynamic and liberal approach that the Supreme Court has clearly indicated they should follow, Canadians, and official language minorities, do not feel it necessary to resort to the courts. Legal challenges become necessary, indeed inevitable, where there is no other choice, when goodwill and respect are lacking.(30)

Despite the government's concerns, Bill S-3 received Royal Assent on 25 November 2005. At the time of writing, no litigation had yet been filed in Federal Court to challenge a breach of Part VII of the Act. Will political action be subtly relegated to second string behind the courts as the preferred means of advancing language rights in Canada? Are we going to see a significant increase in litigation under Part VII? It is really too early to tell.

CONCLUSION

The courts have contributed much to the recognition of language rights in Canada. A good example of their contribution is the progress made by official-language communities in a minority setting with regard to minority-language education. However, long, complex court cases can be very costly and time-consuming. Moreover, systematic use of the courts can create a culture of confrontation where the parties lock horns more than they communicate and work together.

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(28) Liza Frulla, *Evidence before the Standing Committee on Official Languages*, Meeting 35, 38th Parliament, 1st Session, 31 May 2005 (09:10).

(29) Dyane Adam, *Evidence before the Standing Committee on Official Languages*, Meeting 44, 38th Parliament, 1st Session, 6 October 2005 (09:40).

(30) *Ibid*. (09:05).

Official-language communities in a minority setting cannot make any real headway without a clear commitment from governments to the advancement of their rights. Political action cannot be, and must never be, brushed aside. Further, it is important always to bear in mind the important role communities must play in their own development. The only way communities can ensure their development is to take matters into their own hands and exercise power in practical terms. According to Michael Mandel, "the ability to take advantage of some rights, to make use of them, depends on social power. […] Certain rights are not only of little use without social power; their very meaning is different."(31)

(31) Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, Wall and Thompson, Toronto, 1994, p. 176.