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SECTION 41 OF THE *OFFICIAL LANGUAGES ACT*: SCOPE, EVOLUTION AND IMPLEMENTATION FRAMEWORK

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17 September 2001

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Table of Contents

Page

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> Collective rights are the cornerstone on which Canada was built. Without the guarantees made to groups and minorities, it is unlikely that the peoples of Upper and Lower Canada, so different from one another, would have joined to form a country.(1)

INTRODUCTION

The concept of language rights is closely related to that of the collective rights of minorities. In Canada, language rights litigation is a relatively recent phenomenon. Since 1982, English and French have enjoyed equal legal recognition at the federal level, guaranteed by the Constitution of Canada. Through that recognition, the Canadian government has hoped to consolidate national unity by creating a legal balance between the two linguistic communities, thus ensuring social peace. The Canadian government would probably not have recognized language rights if it had not first acknowledged the principles of diversity and pluralism in its vision of Canadian society. Multilingual accommodations within a state inevitably depend on the recognition of collective rights.

Legal guarantees must be provided for most language rights.(2) At the federal level, the architecture of language rights is essentially founded on two statutory instruments: the *Constitution Act, 1982*, more precisely sections 16 to 23; and the *Official Languages Act*, first passed in 1969 and revised in 1988 in the context of the new constitutional order resulting from 1982.

Part VII (sections 41 to 45) of the *Official Languages Act*, 1988 (OLA) marked a turning point in the interpretation of language rights and the protection of minorities in Canada.

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(1) Beverley McLachlin, "Democracy and Rights: A Canadian Perspective," *Canadian Speeches, Issues of the Day*, 14:36-45, January/February 2001.

(2) A. Braen, "Les droits linguistiques," in Michel Bastarache, ed., *Les droits linguistiques au Canada*, Éditions Yvon Blais, 1986, p. 15.

The interpretation and scope of section 41 have since been the subject of extensive debate. According to section 41 of the OLA:

> The Government of Canada is committed to
>
> (*a*) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and
>
> (*b*) fostering the full recognition and use of both English and French in Canadian society.

Thirteen years after the Act was passed, has justice been done to Parliament's intentions? How has the case law helped to clarify the scope of section 41? Has the government advocated a pro-active approach and put an adequate implementation framework in place to act on the commitment it made in 1988? This paper will endeavour to answer all these questions in three main sections. First, the issues related to the interpretation of section 41 will be defined. Second, the legislator's intentions, as revealed by the parliamentary debates preceding the OLA's passage and the impact of the case law in the construction of section 41, will be considered. Lastly, the implementation framework established by the federal government since 1988 will be considered.

ISSUES

In establishing the legal infrastructure for the official languages – first by the initial act of 1969, then by sections 16 to 23 of the *Constitution Act, 1982* and, lastly, by the new Act in 1988 – the federal government made linguistic duality a fundamental part of the Canadian identity. How has the federal government taken positive action to implement that part? In other words, how has the federal government used its constitutional powers – such as its spending power – to firm up its commitment under section 41 of the OLA, that is to say, the vitality and development of Canada's Anglophone and Francophone minorities? Is section 41 a statement of intent or does it create an obligation for the federal government to act?(3) If it results in an obligation to act, how can the limits of government action be ascertained, and to what extent will

(3) In *Canada (Commissioner of Official Languages)* v. *Canada (Department of Justice)*, 2001 CFP 1239, the Attorney General of Canada contended that Part VII cannot be construed as providing an obligation for the federal government always to take the measures that promote the vitality and development of the minority communities to the greatest degree. The Attorney General further argued that language laws must be interpreted in a prudent manner.

the courts be able to intervene to ensure they are fully complied with? These are the main questions underlying the problem of the application of section 41, Part VII, of the OLA.

PARLIAMENT'S INTENT

> [Translation] It is an old principle of law that the legislator is deemed not to speak in vain. That may occur, but not when writing laws.(4)

The Canadian government's language policy has evolved considerably since the initial act was passed in 1969. Building on the main findings of the Bilingualism and Biculturalism Commission (Laurendeau-Dunton), the 1969 *Act* had three major objectives:

- permit greater participation by Francophones in the federal public administration;
- provide government services in French where numbers warranted; and
- make French one of the two languages of work within the federal Public Service.

Sections 16 to 23 of the *Constitution Act, 1982* entrenched in the Constitution the equality of English and French in the institutions of the Parliament and Government of Canada and the equality of official language minority rights, particularly education rights.

In 1988, the federal government wanted to harmonize the provisions of the 1969 *Act* with the new constitutional reality shaped by the *Canadian Charter of Rights and Freedoms* of 1982. The bill's passage was marked by a continuing focus on the following general objectives:(5)

- ensure respect for and equality of status of the two official languages in federal institutions, particularly with regard to the provision of services to the public;
- support the development of Anglophone and Francophone minorities;
- promote the advancement of the two official languages within Canadian society; and
- clarify the powers and obligations of the federal institutions with regard to official languages.

What were the objectives pursued by Parliament in developing Part VII of the OLA, more specifically section 41? A brief review of some ministerial statements preceding the OLA's passage is highly useful here.

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(4) Pierre E. Trudeau, cited in *Lac Meech, Trudeau parle*, Éditions Hurtubise, 1989, p. 44.

(5) House of Commons Debates, Statement by the Honourable Ray Hnatyshyn, Minister of Justice and Attorney General of Canada, 8 February 1988, 33rd Parliament, p. 12704.

On 22 March 1988, the Honourable Ray Hnatyshyn, then Minister of Justice and Attorney General of Canada, stated before the House of Commons legislative committee responsible for considering Bill C-72 on official languages:

> This part of the bill (Part VII) is based on the Charter (subs. 16(3)), that is to say the principle of advancing the equality of status for use of English and French, recognized by the Supreme Court of Canada in a number of important decisions.(6)

On 20 July 1988, appearing before the Senate Committee considering the bill, the Honourable Lucien Bouchard, then Secretary of State for Canada, affirmed that:

> The importance which the federal government attaches to the communities, Madam Chair, is expressed more particularly in Part VII of Bill C-72, implementation of which is the responsibility of the Secretary of State. Section 41 states the full scope of the government's intentions. It confers on the federal government the obligation to enhance the vitality of the linguistic minorities, to support their development and to foster the full recognition and use of English and French. This is the first time that this notion of vitality of the linguistic minorities appears in an enactment. […] This section [41], and all those that support it in the bill, provides a legislative basis for this objective we have set ourselves of full participation for linguistic minority groups in the life of our country.(7)

It may be concluded from the above passages that, in introducing Part VII, and more particularly section 41, Parliament was not limiting itself to a statement of intentions, but creating a positive obligation for the federal government to act in a manner consistent with the spirit of subsections 16(1) and (3) of the Charter.

EVOLUTION AND KEY JUDGMENTS

The *Canadian Charter of Rights and Freedoms*, enacted in 1982, considerably changed the rules of judicial interpretation in the field of language rights. Although the Supreme

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(6) Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-72, House of Commons, 33rd Parliament, 22 March 1988 (author's emphasis).

(7) Proceedings of the Senate Special Committee on Bill C-72, 33rd Parliament, 20 July 1988 (author's emphasis).

Court has never ruled on the scope of section 41 or Part VII, some of its judgments since 1982 have been revealing.

In 1986, in *Société des Acadiens du Nouveau-Brunswick* v. *Association of Parents for Fairness in Education*,[8] Beetz J., writing for the majority, held that language rights were based on political compromise and were not subject to the same rules of interpretation as the legal guarantees set out in sections 7 to 15 of the Charter. This restrictive interpretation of language rights was extensively altered by three decisions subsequently rendered by the Court: *Reference re Secession of Quebec*, *R.* v. *Beaulac*, and *Arsenault-Cameron et al.* v. *Government of Prince Edward Island*.[9]

In the 1998 *Reference*,[10] the Court determined that respect for minority rights was one of the five fundamental structural principles of the Constitution, the others being federalism, democracy, the rule of law and constitutionalism. According to Michel Doucet, a specialist in official languages law, these principles "are invested with a powerful normative force, and are binding upon both courts and governments. […] They [the principles] may in certain circumstances give rise to substantive legal obligations ..., which constitute substantive limitations upon government action."[11] Can it then be concluded that section 41 of the OLA gives rise to a more substantive obligation for the government?

In *Beaulac*,[12] Bastarache J., writing for the majority, held that language rights are neither passive rights nor negative rights and may not be exercised unless means are provided for that purpose. Does the state have a duty to take positive measures to implement the linguistic guarantees it has recognized? According to Doucet, the Charter guarantees create obligations for the government and "a clear financial and administrative commitment for the machinery of government."[13]

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(8) (1986) 1 S.C.R. 549.

(9) For a more exhaustive analysis of these three judgments, see Michel Doucet, "Les droits linguistiques : une nouvelle trilogie," *Revue de droit de l'Université du Nouveau-Brunswick*, tome 49, 2000.

(10) (1998) 2 S.C.R. 217.

(11) Doucet, *supra*, note 9, p. 5.

(12) (1999) 1 S.C.R. 768.

(13) Doucet, *supra*, note 9, p. 10.

In its judgment, the Court distanced itself from the narrow interpretation adopted in *Société des Acadiens du Nouveau-Brunswick* v. *Association of Parents for Fairness in Education*. It held as follows:

> Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada. To the extent that *Société des Acadiens* stands for a restrictive interpretation of language rights, it is to be rejected.(14)

In Doucet's view, with this decision, "the Court recognizes that it has an effective power of judicial sanction in the field of language rights and that it will not leave minority communities at the mercy of those who have previously shown a greater tendency to disregard those rights than to ensure their promotion."(15)

What is at least as important, if not more so, *Beaulac* confirmed that the OLA was a quasi-constitutional statute:

> The 1988 *Official Languages Act* is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the Canadian Charter of Rights and Freedoms, it follows the rules of interpretation of that Charter as they may have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the Charter […], it belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it."(16)

In *Arsenault-Cameron et al.,* the Supreme Court mainly considered the scope and application of section 23 of the Charter, which confers minority language educational rights. Faithful to the spirit of *Beaulac*, the Court held that governments must consider Charter requirements in exercising their discretionary power and in the conduct of public affairs.

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(14) *R.* v. *Beaulac*, *supra*, note 12, pp. 850-851 (author's emphasis).

(15) Doucet, *supra*, note 9, p. 11.

(16) *R.* v. *Beaulac*, *supra*, note 12, p. 788 (author's emphasis).

What conclusions are to be drawn from these judgments on the scope of section 41 and Part VII? It appears that recent Supreme Court judgments on language rights add clear weight to the scope of section 41 of the OLA and of the government's obligations provided for therein, mainly because it evidently subjects the OLA to Charter interpretation rules.

IMPLEMENTATION FRAMEWORK

Under sections 42 and 43 of the OLA, the Minister of Canadian Heritage (formerly the Secretary of State) has essential responsibility for the implementation of section 41. In consultation with Cabinet colleagues, that minister "must encourage and promote a coordinated approach to the implementation by federal institutions of the commitments set out in section 41" (OLA, section 42). In addition to being named as the coordinator of federal government action in implementing section 41, the Minister is required to take all possible measures "to advance the equality of status and use of English and French in Canadian society" (OLA, section 43).

To meet its commitments under the OLA, has the federal government made support programs available to the official language communities? It would appear that most of those programs were already in existence when section 41 of the OLA was enacted in 1988. These include: the Official Languages in Education Program (first and second (immersion) languages); the Official Language Minorities Aid Program, which is intended for community groups; and the Promotion of Official Languages Program, which is aimed at organizations in the volunteer and private sectors.

On 24 March 1988, the Honourable David Crombie, then Secretary of State, informed the House of Commons Committee considering Bill C-72 that:

> Many of the provisions of this bill concerning the Secretary of State merely entrench in the act what we have already been doing for some time now. The programs I named a moment ago, official languages, education, minority assistance and so on have been in existence for a certain number of years. The only area where we have not been substantially present in the past is the private sector.(17)

(17) Minutes of Proceedings and Evidence, Legislative Committee on Bill C-72, House of Commons, 33rd Parliament, 24 March 1988, 3:5.

Because the Department of Canadian Heritage is not a "central" agency of the federal government, in that it has no coercive power over the other departments, can it be concluded that the government's commitment under section 41 is shared and one of the priorities of all government departments and agencies? Note that, in June 1996, the Joint Committee on Official Languages recommended that the Privy Council Office coordinate the implementation of section 41, Part VII, of the OLA.

In August 1994, Cabinet approved a corporate accountability framework for the implementation of sections 41 and 42, Part VII, of the OLA. Under that decision, 27 designated federal institutions were required to consult the official language minority communities for the purpose of developing an annual action plan and to submit a report on their previous year's achievements to the Minister of Canadian Heritage. Since that time, the Minister of Canadian Heritage has tabled an annual report in Parliament on results achieved. This was the first government initiative to implement Part VII since the OLA was passed. Consequently, in March 1994, the Clerk of the Privy Council reactivated a deputy ministers' committee on official languages. Apart from programs and policies already concerned with official languages, do the federal departments take into consideration the government's commitment under section 41 of the OLA in their decision-making processes?

In the Throne Speech of 30 January 2001 at the opening of the 37th Parliament, the federal government asserted:

> Canada's linguistic duality is fundamental to our Canadian identity and is a key element of our vibrant society. The protection and promotion of our two official languages is a priority of the Government – from coast to coast. The Government reaffirms its commitment to support sustainable official language minority communities and a strong French culture and language. And it will mobilize its efforts to ensure that all Canadians can interact with the Government of Canada in either official language.

Lastly, on 25 April 2001, Prime Minister Chrétien announced the appointment of Privy Council President, the Honourable Stéphane Dion, as official languages "coordinator."(18)

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(18) In a news release dated 25 April, the Prime Minister's office announced: "In addition to coordinating issues in which the question of official languages is raised, Minister Dion will be at the forefront of the federal government's efforts to promote bilingualism. His duties will also include the development of a new policy framework to strengthen the Official Languages Program." The Prime Minister added: "I have asked Minister Dion to consider strong new measures that will continue to ensure the vitality of minority official-language communities and to ensure that Canada's official languages are better reflected in the culture of the federal public service."

CONCLUSION

Thirteen years after section 41 of the OLA was adopted, it is hard to say with any certainty whether the federal government has done justice to the intentions Parliament expressed in 1988. It is clear, however, that the legislator's intentions at the time the OLA was passed and the Supreme Court judgments on language rights since the *Reference re Secession of Quebec* tend to show that there is a positive obligation for the Canadian government to act on the objectives described in subsections 16(1) and (3) of the Charter, which are implemented under section 41 of the OLA. The means used to meet this obligation may clearly vary, and their effectiveness must be measured on the basis of results achieved.

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