

Minority Language Rights in Canada

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.[1]

The issue of language rights for Canada's minority language communities is not new. From requesting access to police and government services in their own language, to assuming control of their schools, Canada's linguistic minorities have historically been very vocal. This paper focuses on the situation of Francophones living outside of Québec. In an era where assimilation is threatening the survival of Canada's other official language in many parts of the country, it is crucial to find ways to counterbalance this threat. Some attention will also be paid to problems facing Anglophones in Québec, although a comprehensive look at this language issue is beyond the scope of this analysis.

This paper provides a brief introduction to the Acts and Regulations governing language rights in Canada, while specifically addressing case law and examples showing the current state of minority language rights in Canada. Education will be given the major share of space, as it is the "most explosive issue dividing French and English Canadians." [2] This analysis will conclude with a discussion of access to a wide variety of services, such as police, government, and judicial rights in one's own language.

Importance of Language Rights in Canada

Even though Francophones are a small minority in most provinces, and Anglophones are a minority in Québec, both groups are given constitutional rights that limit the ability of provinces to impose linguistic uniformity.[3]

Bilingualism used to be omnipresent in the country but in 1792, when the colony was divided into Upper and Lower Canada, it was abolished in the former. In 1839, official unilingualism was proclaimed. The fatal blow came in 1840, when Lord Durham abolished the use of French upon the union of Upper and Lower Canada.[4]

Language rights have not always been granted the same protection they currently enjoy. This stems from the interpretation the courts have given them. In *Société des Acadiens v. Association des Parents*, [5] the notion of "political compromise" was advanced by Justice Beetz. This was a contrast to other legal rights, which were "seminal in nature because they are rooted in principal." [6] Canada only began to seriously address the issue of national identity in the 1960s, with the start of the Royal Commission on Bilingualism and Biculturalism, [7] which reported that "relations between English and French Canadians had

deteriorated to a point where the two groups' will to live together was in jeopardy." [8] It is crucial, at this stage, to clarify that Canada is not a bilingual country. According to Joseph Eliot Magnet, "a bilingual state is a political subdivision where a substantial number of persons are able to speak in and be understood in two languages." [9] Francophones in Canada have historically needed to learn English in order to receive access to some services, but the same cannot be said of Canada's Anglophones.

The statistics are alarming: the trend is that Canada's Francophone community outside Québec is shrinking, and has been for over a hundred years. Saskatchewan, Alberta, Newfoundland and Labrador, and British Columbia have "passed the point of no return," as less than 1 percent of their population have French as their first language. [10] These frightening numbers are not due to migration but assimilation, especially in the three Western provinces. Alberta, Saskatchewan, and British Columbia have seen their Francophone populations decline by over 50 percent because of this. [11] Saskatchewan offers an interesting case study: its population is getting older, the rate of assimilation is the highest in Canada, and only 39 percent of parents are transferring French to their children. [12] Alberta has significant concentrations of Francophones, mainly located in Northern Alberta. [13] According to the latest census, Edmonton has 14,430 citizens whose first language is French. [14] This is a significant percentage of the total number of French first language speakers in Alberta, which totals 61,225. [15] The problem becomes apparent when Francophone Edmontonians were asked which language is the one spoken most often at home and at work: only 5,350 answered "French." The numbers are very similar in Alberta's other major city, Calgary. [16] Nevertheless, over 75 percent of Francophones found outside of Québec are living in New Brunswick and Ontario. [17]

Laws Governing Language Rights

Language is a crucial issue in Canada, yet there is no single plenary power to enact laws regarding it. [18] Instead of having either the provincial or the federal government have jurisdiction over the issue, the power is divided between the two. Therefore, it is an "ancillary matter." Some sections do deal with specific areas that affect language rights. For example, section 93 of the *Constitution Act, 1867* [19] provides that "each province may exclusively make laws in relation to education, thereby making instruction at all levels, including colleges and universities, a provincial responsibility." [20]

Section 133 of the *Constitution Act, 1867* has been hotly debated in the last hundred years, especially as to whether it applied to all parts of Canada. The section states that:

Either the English or French Language may be used by any Person in the Debates of the Houses of Parliament of Canada and of the House of the Legislatures of Québec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person in any Pleading or Process issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Québec. [21]

This exact provision has since been duplicated in a number of provincial laws, including

section 23 of the *Manitoba Act*,[22] and section 110 of the *North-West Territories Act*,[23] which Alberta and Saskatchewan have had to comply with. Nevertheless, the fact remains that these language rights were not entrenched, and both provinces have repeatedly attempted to circumvent them by legislation.[24] In *Manitoba (A.G.) v. Forest*,[25] the Court found that the province's attempt to repeal section 23's bilingualism requirement, in 1890, was unconstitutional.[26] That year, Manitoba sought to eliminate the language rights promised to its citizens by enacting *An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba*. [27]

The *Official Languages Act* [28] is the law regulating bilingualism in the federal public service, an issue that will be dealt with in greater detail in the final section of this analysis. It is authorized as ancillary to the federal power to make laws for the peace, order, and good government (POGG) of Canada.[29] Pursuant to section 92(14) of the *Constitution Act 1867*, provinces are also empowered to enact laws respecting the administration of justice. In *Jones v. New Brunswick*, [30] the Supreme Court decided that when there is no competent federal legislation dealing with linguistic rights in court proceedings, a provincial legislature can legislate the use of the two official languages in its provincial court.[31] Section 101 of the *Constitution Act, 1867* provides that both official languages are to be used in the federal courts. Finally, the federal government can legislate in respect to criminal procedure, a power ancillary to section 91(27) of the *Constitution Act, 1867*. [32]

The Canadian Charter of Rights and Freedoms [33]

Language rights in the *Charter* are divided into two main sections: official languages of Canada and minority language education rights. The relevant sections of the *Charter* are as follows:

Section 16.

1. English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.
2. English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.
3. Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

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.

Section 17.

1. Everyone has the right to use English or French in any debates and other proceedings of Parliament.
2. Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

Section 18.

1. The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.
2. The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

Section 19.

1. Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.
2. Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Section 20.

1. Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where
 - a) there is a significant demand for communications with and services from that office in such language; or
 - b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.
2. Any member of the public in New Brunswick has the right to

communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Section 21.

Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

Section 22.

Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Section 23.

1. Citizens of Canada

- a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
- b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

2. Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

3. The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

- a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
- b) Includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.[34]

The *Charter* has been an important tool for Anglophones in Québec, and especially Francophones outside of Québec. Every word contained in sections 16-23 is crucial for the survival of the minority communities, from accessing public service in the language of one's choice, to being able to build minority language schools in a community. Before discussing section 23 and the educational rights it confers on the minority language communities, a brief summary of the current situation in Québec will be presented.

Situation in Québec

In 1974, the province of Québec adopted Bill 22,[35] making French the only official language of the province. A number of references were made to the English language, to show that Québec was not against linguistic duality.[36] The bigger change came in 1981, when the Parti Québécois adopted Bill 101,[37] which offers less recognition to English than Bill 22. The 1970s were a crucial decade for Anglophones in Québec. Following the October Crisis and the election of the Parti Québécois, Anglo-Québeckers longer enjoyed the good relationship they had with the provincial government, leading to a significant exodus from the province.[38]

Education Rights

The importance of minority language education was perhaps best illustrated by Chief Justice Dickson during the *Mahé* trial:

Minority-language education guarantee has two purposes: first, education in one's language provides an important way to preserve and promote the minority group's language and culture...there is also a strong remedial component- designed to protect the French and English minorities from assimilation and to give recognition and encouragement to the two official language groups in Canada.[39]

Section 23 of the *Charter* deals explicitly with the right of the French or English-speaking minority to be educated in the minority language. It only provides rights for Canadian citizens. In all provinces and territories except Québec, the three eligibility criteria are 1) that the first language of the parents is French, 2) the parents had their primary education in Canada in French, and 3) the parents have a child who has received or is receiving his or her education in French in Canada. For English-speakers in Québec, they have the right to educate their children in English if 1) the parents had their primary education in Canada in English or 2) the parents have a child who has received or is receiving his or her education in English in Canada. Governments have not been constitutionally barred from stipulating criteria which must be met before these rights are protected. In Manitoba, for example, only parents who have received at least four years of instruction in a French program in Canada are entitled to have their children instructed in French.[40]

There are instances where case law will deal with equality issues, along with language rights claims. One such example from Québec is *Gosselin (Tutor of) v. Québec (Attorney General)*,[41] where French parents demanded to send their children to an English-language school. This case is very different from others seen so far, since the parents

wanted education in the OTHER official language for their children. The Court ruled that since the parents were members of the French-language majority, section 23 *Charter* rights did not apply, and section 15 *Charter* equality rights did not trump section 23 rights in this case.

The Rise of Community Schools

Minority language schools should not be considered a concession to the minority-language group: for pedagogical reasons they are the most efficient and most effective way of educating the minority.[42]

In Fredericton, New Brunswick, the idea of building Francophone community centres with Francophone schools gained momentum in the 1970s, as a way not only to fulfill the educational requirements of the Francophone minority, but to allow for the growth of the French language in Anglophone communities. École Sainte-Anne, part of the Centre Communautaire Sainte-Anne, used to be a kindergarten to grade 12 school, but due to increased enrolment, now houses 662 students from grades 6-12.[43] The Centre Communautaire Sainte-Anne was finalized in June 1978, with École Sainte-Anne following shortly after. When the Centre first opened in 1978, it included not only the school, but also a library, a daycare, a bank, and a bookstore. Over the years, many others have been added, such as a community radio and a Francophone sporting association.[44] Every Sunday, mass also took place in the auditorium of the community centre. After an absence of 242 years, a new French church made its home in Fredericton in 2001. Now, over 700 families consider Sainte-Anne-des-Pays-Bas their parish.[45]

Francophone community centres are not simply an Atlantic Canadian phenomenon; they are currently gaining momentum in the Western Provinces, especially Alberta. Currently, Francophone community centres can be found all over the province including: École Nouvelle Frontière in Grande Prairie, Centre communautaire Centralta in Legal, Centre scolaire et communautaire francophone in Plamondon, La Cité des Rocheuses in Calgary, Centre scolaire communautaire in Saint-Paul, and Centre communautaire scolaire Boréal in Fort McMurray.[46]

A Divisive Issue: Eligibility Criteria

In regards to the eligibility criteria to determine one's *Charter* right to school one's children in French,[47] the courts have yet to rule on whether it is sufficient that only one parent is entitled under section 23, but Mark Power and Pierre Foucher believe that that will be the case if this specific point is ever argued in the courts.[48]

The "where numbers warrant" term found in section 23(3) of the *Charter* is generally considered to be the most controversial, and there is ample case law addressing the concept. In the seminal Alberta case *Mahé*,[49] it was noted that the effect of subsection 3, especially paragraphs a and b, established a "sliding scale of entitlement based on the number of children whose parents qualify under s.23." [50] In Prince Edward Island, for example, there were enough children in a local community to justify a new school but the

Minister of Education refused, saying the children could take a bus to another community. The Court disagreed, noting that “section 23 is intended to fix past wrongs, preserve and promote the minority language community, and protect it from assimilation.”[51] The Supreme Court has adopted an intermediate approach to count the numbers for this question: the “number of persons who will eventually take advantage of the contemplated programme or facility.”[52] It is the parents that have the burden of proof regarding the demonstration that the numbers do warrant minority language educational services paid by the taxpayers.

The courts are progressively getting better at managing timelines associated with the construction of new schools and community centres. In a seminal Nova Scotia case, the Supreme Court decided that a judge could monitor a province’s effort to create new facilities, stating that “if the provincial government was left to build French schools on its own timetable, the French-speaking minority of Nova Scotia could be in danger of being assimilated into the English-speaking majority.”[53]

An important concept coming out of *Mahé* is that completely separate school boards are not necessary to fulfill section 23 requirements. The essential criterion is that “the minority language groups have control over these aspects of education which pertain to or have an effect upon their language culture.”[54] If current school boards are to be used, then:

1. the representation of the linguistic minority on local boards or other public authorities which administer minority language instruction or facilities should be guaranteed,
2. the number of minority language representatives on the boards should be, at a minimum, proportional to the number of minority language instruction and facilities,
3. the minority language representatives should have exclusive authority to make decisions relating to the minority language instruction and facilities.[55]

In Alberta, the *School Act*[56] currently provides for Francophone Education Regions and Regional Authorities to be established, similar to school districts and school boards. It is the Regional Authority that has the responsibility to ensure that the rights of the minority are protected.[57] This system differs drastically from New Brunswick, the only bilingual province in Canada, which has a dual school system permitting the minority to exercise the right to manage all facilities and instructional programmes in its jurisdiction. Bilingual instruction has been abolished everywhere in the province, save for second language instruction in Francophone schools, and French immersion programs in Anglophone schools.[58]

Access to Services in French

The *Reference re: Manitoba Language Rights* case is crucial for many reasons, especially for

what it says about government documents. In this case, the Court looked at whether the laws and documents of both Parliament and the Manitoba legislature must be published in French as well as English, saying that they must.[59] As mentioned earlier in this paper, the Western provinces have not always been receptive the notion of minority language rights. In *R v. Mercure*,[60] the government of Saskatchewan took up the Court's suggestion to write a new bilingual statute removing all restrictions imposed by the previous language law, which abolished any requirements that documents be translated in French.[61] Father Mercure was charged with speeding, and requested three things when he appeared in Provincial Court: to 1) plead to the charge in French, 2) have a trial in French, and 3) delay the trial until there were adequate French translations of all relevant statutes.[62] Justice LaForest concluded that section 110 of the *NWT Act* did apply to the modern courts of Saskatchewan, that no statute purporting to remove language rights in court proceedings had been passed by the province.[63]

An even more striking example is "l'affaire Piquette" in Alberta. Piquette, an MLA for the Athabasca-Lac La Biche region, was routinely interrupted by the Speaker of the Alberta Legislative Assembly for speaking in French. The premier also rose to demand an apology from Piquette for having done so.[64] Feathers were ruffled across the country, including then Prime Minister Brian Mulroney, who was quoted as having said "can you imagine how a unilingual French-Canadian from a small town in Québec must feel watching on French TV the denial of the right to speak French in the Alberta Legislative Assembly." [65]

Receiving court services in French has long been an important issue in Canadian jurisprudence. Four foundational principles are at the core of official minority languages in the courts:

1. Constitutional entrenchment of minority language rights in the judicial system.
2. Right to use minority language rights in judicial proceedings, separate and apart from the right to an interpreter or, said differently, the right to be understood.
3. Recognition of language rights based on individual choices (personality) rather than location (territoriality).
4. Use of non-legislative tools to promote the integration of minority languages at the institutional level of the judicial system.[66]

In 2008, important clarifications and changes were made through the adoption of Bill C-13, amending the *Criminal Code*[67] which clarified court-related language provisions, as well as improved Canada's criminal procedure and sentencing. Section 530.1 of the Code excludes New Brunswick, as that province is already covered under *Charter* rights. Among the changes are the right to be advised by a judge to hold a trial in the official language of one's choice in all cases, and codifying the right to obtain a translation of the indictment or information upon request.[68]

In 1999, the Supreme Court of Canada ruled that even if a person understands both French and English, they have a right to a trial in their first language, a right that has nothing to do with fundamental justice.[69] The language of the accused is part of his or her cultural identity, very personal in nature, and cannot just be tossed aside when it comes to choosing which language the proceedings will follow.[70] An important distinction to note is that the right to an interpreter is not a minority language right, unlike the right to use a minority language in the courts.[71]

The *Official Languages Act* of New Brunswick guarantees equal access to the courts in both official languages, whether it is the conduct of proceedings, the issuance of decisions or communications to the public.[73] Unlike its federal counterpart, the New Brunswick Act does not include an obligation for the province to provide all final judgments and decisions in both official languages, although the province has taken the responsibility to do so. In contrast, the three Western provinces have extremely low degrees of judicial bilingualism, especially in British Columbia, where the use of French in the courts is almost non-existent.[74] Alberta was the host of a long traffic ticket case over the last few years, culminating in a favourable ruling from the Provincial Court.[75] Gilles Caron, a truck driver, received a \$54 ticket for an unsafe left turn. He proceeded to ask for a French hearing, but was denied under the *Languages Act*[76] that revoked these rights in Alberta.

Parliament launched the Court Challenges Program in 1978, with a goal to finance cases involving important constitutional issues relating to language rights and equality,[77] but federal governments made a number of changes to the program during the 1990s and more recently, and it was cancelled in 2006.[78] Nevertheless, Prime Minister Stephen Harper has since decided to restore some parts of the program. The new “Program to Support Linguistic Rights” aims to help Anglophones in Québec and Francophones in the rest of Canada to defend their language rights under the *Charter*. It puts more emphasis on mediation and alternative dispute resolution, but still does not fund challenges to provincial laws, unless it can be shown that provincial law violates the *Charter*. [79] The program will be granted a \$1.5 billion budget per year, and will begin in 2009.[80]

The relationship between the courts and the Royal Canadian Mounted Police (RCMP) regarding official languages had not always been smooth. A recent case from New Brunswick illustrates this point: Marie-Claire Paulin was issued a speeding ticket April 26, 2000 by a unilingual RCMP officer in Woodstock, New Brunswick.[81] While she paid the fine that day, Paulin later brought a declaratory action against the Crown because her right to receive police services in her native tongue of French was denied, breaching section 20(2) of the *Charter*. At the Federal Court level, her action was joined by the Société des Acadiens et Acadiennes du Nouveau Brunswick (SAANB), a partisan group that is not a stranger to the Supreme Court. An earlier judgment pronounced by the Federal Court held that since the RCMP was serving as a provincial police in New Brunswick, making it a “New Brunswick institution” for the purposes of section 20(2) of the *Charter*, the officers are required to provide police services in both French and English.[82] The respondent’s main rebuttal to the argument was that the RCMP is a federal institution, not a provincial body, and is therefore not subject to section 20(2), which only applies to New Brunswick

institutions. Both the Federal Court, and the Federal Court of Appeal were in agreement that the RCMP is “at all times subject to the minimum obligations imposed on it by section 20(1) of the Charter and by federal official languages legislation, regardless of whether it is acting as the federal police force or as a provincial or municipal force under an agreement.”[83] In the end, the Supreme Court stated that as a resident of Canada’s only officially bilingual province, Mrs. Paulin had a constitutional right to receive police services in French, and that nothing the RCMP could say would trump this right.[84]

Bilingualism in the courts is not only an issue for the people commencing actions. Lawyers are also faced with the difficulty of not being able to speak their own language in front of a court. Most minority-language lawyers in the country are bilingual, and they will refrain from speaking French when a court insists on using interpreters, setting up a vicious cycle where French rarely gets used in court proceedings in some provinces, especially in Western Canada.[85]

Conclusion

Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one’s choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression.[86]

Language rights in Canada are not all afforded the same protection. While language rights contained in sections 16-20 of the *Charter* are not subject to the notwithstanding clause of section 33, any breach of these rights could potentially be deemed acceptable and reasonable under section 1 of the *Charter*, the reason usually being “administrative inconvenience.”[87] On the other hand, one could claim there is no stronger *Charter* rights than those contained in section 23, which “imposes upon governments an explicitly positive obligation to act.”[88] A huge issue with minority-language education is that if we open the doors of minority Francophone schools to children of the majority language, these schools could turn into immersion or bilingual schools, and completely negate all the positive aspects of having a homogenous language environment.[89]

The old adage that the “more things change, the more they stay the same” rings true in the context of language rights. One can look at the employment situation of a Northern New Brunswick man, for example. Instead of making the trip down to Saint John to find employment, he will be inclined to sojourn to Fort McMurray and other regions in Alberta, where English is the only language spoken.[90] While this person might be ready to fight to receive services in French, the reality is he will most likely end up following the rules of the majority instead of being categorized as a “trouble maker” championing his rights.

Nevertheless, language rights are far from obsolete. While Canada’s two official languages have not always lived peacefully side-by-side, the recent events in New Brunswick surrounding the elimination of early French immersion show that most Canadians recognize the importance of knowing a second language, and will not lose it without a fight.[91] This was not always the case in New Brunswick, a province which once elected eight MPs from

the Confederation of Regions Party (COR), a party whose main goal was to abolish all forms of bilingualism in the province.[92]

The situation in New Brunswick regarding early immersion will be interesting to follow, whether one is a legal scholar or not. Bilingualism has been such a big part of our history and for many, our heritage, and that any assault on this principle is guaranteed to anger some citizens. Language is not something that can be tossed aside or belittled, and can have positive, as well as extremely negative consequences, depending on how it is treated in Canadian society:

The system of language rights is symbolically charged. Canada's bilingual character is an essential feature of Canadian national identity, a reference for national loyalty, pride and patriotism. Like the flag, the national anthem and other overarching symbols of nationhood, Canada's bilingual composition portrays the national personality- a symbol of Canada- that has potential to strengthen the nation when properly managed. When mishandled, official languages policy has an equal aptitude to contribute to national destruction.[93]

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