25 YEARS UNDER THE *CHARTER*: AN EXPRESSION OF CANADA'S IDENTITY

ABSTRACT

In the 25 years of its existence, building on a conversation that began with the Royal Commission on Bilingualism and Biculturalism, the *Charter* has set off a chain of events that have started the process of restoring language rights, changing the behaviour of governments, and creating a new dynamic for linguistic minorities in Canada. The inclusion of language rights in the *Charter*, the *Official Languages Act* and its subsequent amendment are recognition of the intrinsic value of the English and French communities that have helped shaped Canada's identity. English and French are Canadian languages that belong to all Canadians; the *Charter* has accelerated a process to make this claim a reality.

In the 25 years of its existence, the *Charter* has fostered a national conversation between the courts, governments and official language communities, which has enabled the interpretation of linguistic rights to evolve. In fact, it could be argued that over the years, some of the most eloquent statements about the importance of language as an element of personal and collective identity have emerged, not from Canada's universities or from debates in Parliament, but from Supreme Court decisions. "Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it," the Court wrote in 1990, "It is the means by which individuals understand themselves and the world around them."[1]

In those words, and in other decisions, one can hear the echoes of the Canadian conversation on language that has included voices as various as those of André Laurendeau, Marshall McLuhan and Camille Laurin. For example, André Laurendeau, co-author of the famous "pages bleues" of the final report of the B&B Commission, described the critical importance of language as being at the core of the intellectual and emotional life of every personality.[2] This conversation did not start with the ratification of the *Charter* in 1982. Parliament, early in the 1960s, began to respond to the obvious disparities, political, economic and social, between English-speaking and French-speaking Canada.

In 1963, Lester Pearson appointed the Royal Commission on Bilingualism and Biculturalism, which told Canadians in 1965 that Canada was passing through the greatest crisis in its history.[3] The Royal Commission addressed the paradox of official bilingualism: a paradox that is still widely misunderstood. An Official language policy does not exist to require everyone to learn two languages – although obviously, if no-one is bilingual, the policy cannot succeed. An official language policy exists for two fundamental reasons: to protect the unilingual, and to protect minority language communities. There are four million unilingual French-speaking Canadians in Canada, and one of the key reasons for the Official Language Act to exist is to ensure that they get the same level of services from the federal government as the twenty million unilingual English-speaking Canadians. There are also a million French-speaking Canadians who live in minority communities across Canada, and almost a million English-speaking Canadians living in minority communities in Quebec. Those communities deserve not only to survive, but to thrive.

With the arrival of immigrants from all around the world and today's multicultural society, collective identities are less likely than before to be strongly based on

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language and religion; they are now marked by multiple affiliations.[4]

In fact, one of the most dramatic changes in the relationship between English and French in Canada is that both language groups are welcoming newcomers. Those newcomers, in many cases, are quicker to realize the importance of linguistic duality to Canada's identity than many native-born Canadians. Indeed, the proof, if proof was needed, of the fact that cultural diversity and linguistic duality are complementary and not contradictory lies in our last two Governors-General. Both Michaëlle Jean and Adrianne Clarkson came to Canada as young girls, one from Haiti and the other from Hong Kong; both joined one language community; both decided to truly participate in the Canadian conversation, they would become not only competent but eloquent in both official languages.

How then do we define official language communities? How does a sense of belonging to a community establish or organise itself? How do we assess community vitality? These questions have become increasingly important, not just in the sociological context, but in the legal context. The very concept of community vitality is embedded within the Canadian judicial framework as it pertains to the principle of the equality of French and English, guaranteed in section 16 of the *Charter*.[5] In November 2005, nearly all parties voted to amend the Official Languages Act[6] so that the federal government would be required, in a legally binding fashion, to take "positive measures" to enhance the vitality of the English and French linguistic minority communities in Canada and support and assist their development; and to foster the full recognition and use of both English and French in Canadian society.[7]

Within the context of official languages, community traditionally refers to a geographical area where official language communities live: a neighbourhood, town, city or region. Historically, official language communities have constituted such communities. They settled the land, established towns and cities, and built churches and businesses. From this point of view, the term essentially refers to the product of settlement, which fosters both interaction between individuals and a sense of belonging.[8]

Under a more modern definition, the inclination is to think in terms of networks of institutions, organisations or individuals associated with either one of the official language communities. A group of individuals with a shared interest – in this instance, their culture and language – may be called a community. Here, territory is less important. Instead, community implies an active tie of solidarity in a geographically dispersed group. Many such communities are commonly known as having a collective identity: for example, the Quebec English-speaking community, the Atlantic Acadian community, the Franco-Manitoban community, or the French-Canadian community.[9]

From a larger perspective, but not less important, there is no doubt that Quebec forms a minority within the country, and recently, Parliament did not hesitate to declare that the Québécois form a nation.[10] A community, whether neatly circumscribed on a specific territory or floating in networks of relationships, is never alone; it forms part of a larger whole – a state, a society or nation – within which it is neighbour to other communities, both majority and minority.[11]

Like community, vitality is a concept that can take on several meanings in the context of official languages. It can be considered from either an individual or a collective point of view. At the individual level, language can be seen as a facet of vitality since, above all, it is a skill. Language is knowledge that can be used to represent values, symbols and experiences, and that as such makes up part of one's individual identity. At the collective level, linguistic vitality deals with the use of language across time and space, and the numerous functions it fulfills in various areas of society such as culture, religion, education, administration, media and the law. From this point of view, linguistic vitality is a characteristic of the community as a whole.[12]

Like ecological zones, which are defined by their requirements for water, sunlight, heat or cold, language communities need a certain number of elements in order to be sustained, such as education, health care, and cultural and economic resources. Over the last forty years, as part of the ongoing national conversation about language, many of those elements have been developed. Solid pieces have been built for a language policy that works, although there are still gaps that need to be addressed and we have a ways to go in ensuring that the various components function in a more coherent fashion.

Forty years ago, the B&B Commission tried to encompass a more systemic or integrated approach to language with the proposal of bilingual districts,[13] which would have required participation in certain areas of all three levels of

government. This approach was rejected for many reasons, one being purely political, the Federal Government cannot simply make the rules for provinces and municipalities, but more fundamentally, Canada has chosen a path toward individual rights, independent from where citizens are, with the caveat of where numbers warrant included in the *Charter*.[14]

Though formulated as individual rights, what has occurred since the advent of the *Charter* is that these rights have taken on a collective dimension. The right to learn, which became enshrined in the *Charter* as section 23, was fleshed out by subsequent court decisions, ensuring that French-language schools are run by French-language school boards.[15] The constitutional amendment of 1993,[16] to include section 16.1, refers to the equality of the English linguistic community and the French linguistic community in New Brunswick, as opposed to the languages they speak.[17] In 2001, the Ontario Court of Appeal, citing the unwritten constitutional principal of minority protection, recognized the essential role played by the Montfort Hospital as an important linguistic, cultural and educational institution that is vital to the development and well being of the Franco-Ontarian community.[18] What this evolution demonstrates is that in order for language rights to achieve their objective, Canada's linguistic communities must be able to participate in the government decisional process to the extent that its decisions affect their economic, social, and cultural vitality.

Canadian language policies are rights-based, but they are also value-based. The inclusion of language rights in the *Charter*, the Official Languages Act and its subsequent amendment are recognition of the intrinsic value of the English and French communities that have helped shaped Canada's identity.

Another demonstration of this value is the fact that Canadian law now requires the federal government to take positive measures to enhance the vitality of the English and French minority communities in Canada.[19] This requires leadership and implies something more than mere consultation. It implies collaboration, a veritable conversation to define what positive measures can be. It also implies reciprocal responsibilities on the part of those communities. Official language communities must take the initiative and establish a certain degree of control over the decision making process. In this sense, community vitality can be defined as the ability for official language communities to empower themselves through economic, social and cultural resources that are transformed and exploited for the benefit of the community, thanks to strong and dynamic leadership.[20]

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Other actors in society must also play a substantial role. This responsibility is not limited to the federal government. Subsection 16(3) of the *Charter*[21] and the constitutional principle of minority protection[22] demonstrate the essential role that provincial and territorial governments have in advancing the equality of status and use of English and French. Institutions, such as universities, also have an important role to play. Universities, for example, have to recognise that French and English are Canadian languages, and provide opportunities for students to maintain or acquire the other official language, whether in the classroom, in summer jobs or exchange programs. Professional programs should recognize the critical importance of language mastery in Canada. Yet, astonishingly, even public administration programs, which are at least notionally preparing students for careers that should lead to the highest levels of the public service, pay little attention to language requirements. Some law schools, to their credit, have recognised the importance of Canada's bijural legal system and the critical interaction between the Common Law tradition and the *Civil Code*, most notably in the *Charter*, and have recognized that every federal law is drafted in both official languages. But too often, lawyers learn only half the law: the English half or the French half. Journalism schools sometimes pay lip service to the importance of understanding both official languages, but many, if not most graduates from Canadian journalism schools are unable to cover French-speaking politicians speaking to their constituents.

After 25 years, linguistic duality is increasingly becoming a key element in the identity that Canada projects of itself. This is clearly reflected in opinion surveys[23] which show unprecedented levels of support for bilingualism: 7 out of 10 Canadians say they are personally in favour of bilingualism for the country as a whole as well as for their own province. For youth aged from 18 to 34, those born or raised in the *Charter*-era, the level of support increases to as much as 80 percent. When asked if living in a country with two official languages is one of the things that really defines what it means to be Canadian, and overwhelming majority of those surveyed agreed.

Evidently, the *Charter* has helped shape the modern Canadian identity, and the youth of today have integrated its values into the way they see themselves, their country, and the world around them.

Since 1982, building on a conversation on language that began with the Royal Commission on Bilingualism and Biculturalism, the *Charter* has set off a chain of events that have started a process of restoring language rights, changing the behaviour of governments, and creating a new dynamic for linguistic minorities in Canada. English and French are Canadian languages that belong to all Canadians; the *Charter* has accelerated a process to make this claim a reality.

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Notes

[1] *Mahé v. Alberta,* [1990] 1 S.C.R. 342, at page 362.

[2] Graham Fraser, *Sorry I Don't Speak French: Confronting the Canadian Crisis That Won't Go Away* (Toronto: McClelland & Stewart, 2006), p. 81.

[3] *A Preliminary Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen's Printer, 1965) at p. 13.

[4] *Annual Report 2005-2006* (Canada: Office of the Commissioner of Official Languages, 2006), p. 44.

[5] 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.

[6] Bill S-3, *An Act to Amend the Official Languages Act (Promotion of English and French)*, received Royal Assent on November 24, 2005.

[7] See, *Official Languages Act,* R.S.C. 1985, c. 31 (4th Sup.), Part VII.

[8] Marc L. Johnson & Paule Doucet, *A Sharper View: Evaluating the Vitality of Official Language Minority Communities* (Canada: Office of the Commissioner of Official Languages, 2006), pp. 7-8

[9] *Ibid*, pp 11-12

[10] On November 28, 2006, the House of Commons voted in favor of the motion introduced by Prime minister, Right Honorable Steven Harper by a margin of 266 to 16. The motion reads: "That this House recognizes that the Québécois form a nation within a united Canada."

[11] *Supra*, note 8, at p. 15.

[12] *Supra*, note 8, at pp. 16-17.

[13] Minutes of 1-2 September, 1966, Royal Commission on Bilingualism and Biculturalism, Ottawa. See generally, Daniel Bourgeois, *The Canadian Bilingual Districts: from Cornerstone to Tombstone* (Montreal: McGill-Queen's University Press, 2006).

[14] See subsection 23(3) of the *Charter*. Also see paragraph 20(1a) of the Charter, where the criterion of "significant demand" applies.

[15] See Michael D. Behiels, *Canada's Francophone Minority Communities: Constitutional Renewal and the Winning of School Governance* (Montreal: McGill-Queen's University Press, 2005).

[16] Constitution Amendment, 1993 (*New Brunswick Act*).

[17] 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.

[18] *Lalonde v. Ontario (Commission de restructuration des services de santé)*, 56 O.R. (3d) 505

[19] *Supra*, note 7.

[20] As suggested by Marc Johnson during the conference entitled *Positive Measures, Policy Commitments and Principles: An exploration of the legal scope of Part VII of the Official Languages Act,* March 28, 2007.

[21] 16(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.

[22] *Supra*, note 18.

[23] Decima Research Limited, *The Evolution of Public Opinion on Official Languages in Canada* (Ottawa: Office of the Commissioner of Official Languages, July 2006) and CROP, *Les Canadiens et le bilinguisme* (Présenté à la Société Radio-Canada, décembre 2006).