The Vitality of the English-Speaking Communities of Quebec: From Community Decline to Revival

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Preface

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« La démocratie ce n'est pas la dictature de la majorité, c'est le respect des minorités »
Albert Camus

The goal of this book is to provide a current portrait of the group vitality of the English-speaking Communities of Quebec. The enduring stereotype about the Anglophones of Quebec is that it is a pampered minority whose economic clout is such that federal or provincial support for the maintenance and development of its institutions is hardly necessary. This view of the privileged status of Quebec Anglos is widely held not only by the Francophone majority of Quebec but also by many leaders of Francophone communities across Canada. On the few occasions that Anglophones in the rest of Canada (ROC) spare a thought to the Anglophones of Quebec, either this idealised view of the community prevails, or they are portrayed as residents of a linguistic gulag whose rights are trampled on a regular and ongoing basis.

We cannot blame Francophone minorities outside Quebec for envying the institutional support and demographic vitality of the Anglophone minority of Quebec. Why should Francophone minorities outside Quebec feel they have to share precious federal resources with Quebec Anglophones who are doing so much better than themselves on the institutional support front? The first obvious response is that government support for official language minorities is not a zero-sum game and that evidence based needs should be sufficient to justify the maintenance and development of both Francophone and Anglophone communities in Canada and Quebec. The second complementary response is that the institutional support achieved by the Anglophones of Quebec during the last two centuries can be used as a benchmark goal for the further development of Francophone minorities across Canada. The combined efforts to maintain and develop the vitality of the Francophone communities outside Quebec and of the Anglophone minority within Quebec, contribute to the linguistic and cultural diversity of Canadian and Québécois societies.

But what is the current vitality of the English-speaking communities of Quebec? Taken together, the chapters in this book tell a sobering story about the decline of this historical national minority in Quebec. On the status, demographic and institutional support fronts, Quebec Anglophones are declining, especially in the regions of the province but also in the greater Montreal region. Though much of the chapters are devoted to documenting the ups and down of this decline, some effort is made in each chapter to propose options and strategies to improve and revive the vitality of the English-speaking communities of Quebec. We hope this book, along with past and future ones, will be used by Quebec Anglophones as a tool to develop their community vitality in the present and for the sake of future generations. It is also hoped that this book will inspire Quebec decision makers to pay more attention to the vitality needs of Quebec Anglophones, a minority community who contributed so much to the social, cultural and economic development of Quebec society.

Finally, a word of thanks is owed to all those who made this book possible. The editor and chapter contributors wish to thank in particular the following: the Canadian Institute for Research on Linguistic Minorities (CIRLM), the Quebec Community Group's Network (QCGN), the Department of Canadian Heritage, and the dedicated staff of the Centre d'études ethniques des universités montréalaises (CEETUM) at the Université de Montréal.

LEGAL STATUS OF ANGLOPHONE COMMUNITIES IN QUEBEC: OPTIONS AND SOME RECOMMENDATIONS

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The trust of the chapters presented in this book demonstrates two important points. First, that the English language still exerts a strong power attraction upon most people living in North America, including the French majority within Quebec. Consequently, it is a truism to say that it is French, not English that is the threatened language in Quebec and Canada. Clearly, it is languages other than English that need special legal protection. Therefore measures such as the Charter of the French Language adopted in Quebec in 1977 (hereinafter: *Bill 101*) as well as the renewed *Official Languages Act* of Canada adopted in 1988 (hereinafter *OLA*) are needed to support the French language across Canada. Without such legislative support to counter-balance "free market forces" in favour of the dominant language of North America, French would eventually lose even more ground to English across Canada (Fraser, 2006).

Second, it is also a truism to say that languages do not exist in a vacuum: they are spoken by people who form linguistic minorities and majorities in given territories and states (Fishman, 1999; 2001). In addition to being the target of language planning, languages are markers of social identity as well as means of interpersonal and intergroup communication (Bourhis, El-Geledi & Sachdev, 2007). Viewed in this light, the Anglophone community of Quebec has been placed in the uncomfortable position of being demoted from an elite to an ordinary minority, but a minority that, within a larger political unit, belongs to a continental majority (Stevenson, 1999). There are worrying signs for the vitality of the Anglophone community of Quebec on the demographic and institutional fronts: numbers and proportions are decreasing; schools are closing, the community has lost the pre-eminent status it once enjoyed as a privileged minority and feels more uncomfortable (Bourhis, 2001;Bourhis & Lepicq, 2004). Anglophone vitality indicators are troubling, resembling, in some regions of Quebec, those of the French minorities outside Quebec (Johnson & Doucet, 2006).

This chapter provides a summary analysis of the language rights of the English-speaking communities of Quebec. The first part of the chapter reviews language rights provided by the Canadian federal government to its official language minorities while the second part compares those rights to those enshrined in so-called "traditional human rights" as enshrined in the Canadian Constitution. The third part of the chapter provides an analysis of ways to improve the collective language rights of Quebec Anglophones in key domains including the Quebec legislature and the courts, education, government services, designated institutions and the private sector. The chapter closes with key recommendations for improving the judicial status of the English-speaking communities of Quebec. Although it may seem at times technical, the analysis seeks to identify gaps in the legal regime and proposes directions towards which the Anglophone minority should be moving to improve its legal status.

Two main ideas are the guiding thrust of the paper: first, that emphasis should be placed upon collective rights for the community rather than individual freedom of choice of language, since it is the collectivity, not the language, that is at risk. The

second point is that institutions for the English-speaking community should be secured: institutions where it can pursue its activities, institutions which will defend its interests, institutions where its culture may flourish in all its diversity.

1. The Anglophones of Quebec, federalism and international law

The legal challenge confronting the Anglophone community is to reframe language rights as collective rights rather than individual ones and to secure a future for their community, not for their language, because sheer market pressure will ensure that English will still be spoken in Quebec for a long time to come. By reframing the debate in collective terms, a further challenge emerges: reconciling these collective rights with the collective rights of the French majority in Quebec. The model we propose is that of linguistically homogeneous institutions where the language of work is that of the minority, but where services to the public are offered in both languages, save at school for obvious reasons. Some political scientists call this phenomenon "civil governance", where control of its institutions belongs to the minority itself.

Federalism is a tool to create majorities within a given state; by creating majorities, federalism also create minorities, often minorities who are a majority within the larger political entity. This is the situation of double status majorities and minorities in Canada. French Quebec is a majority only within its borders and only with regard to powers that the *Constitution Act 1867* attributes to provincial governments. Therefore it is a minority within Canada and as such, will resent any imposition by the rest of Canada, without Quebec's consent, of any rights or measures perceived as detrimental to the survival and flourishing of the French language. But federalism has created by the same token a minority: the Anglophone community within Quebec. That minority also can legitimately claim some rights. These rights do not appear "by magic"; they have to be granted by some political institutions. The Quebec Anglophone community may appeal to the only institution within which it is majoritarian: the Federal Parliament. However, if the Federal Parliament intervenes, it is seen by the Quebec Government as an unwarranted intrusion into provincial matters. The Anglophone minority thus has to convince the Quebec government that the rights it is claiming are legitimate and will not hamper the status of French within Quebec.

Indeed, in one legal case concerning the language of commercial signs in Quebec, the Human Rights Committee of the United Nations concluded that the Anglophone community in Quebec is *not* a minority in international law. This UN committee is a body of experts whose role is to monitor and hear complaints against member states with regard to the International Covenant of Civil and Political Rights to which Canada, and automatically its member states, is a party. The UN committee has determined that a minority is a community whose distinctive characteristic (language) is in smaller numbers and weaker position *within the state as a whole* and not within a federated unit such as a province. In Canada, it is the French minority across Canada as a whole that has the legal status of minority in international law. Therefore the Anglophone minority of Quebec cannot invoke section 27 of the Covenant, which stipulates:

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

It is only in the event of Quebec becoming an independent state that section 27 and other instruments of international law such as the International Declaration of the Rights of Minorities (1992) would apply. The main difficulty with international law is its effectiveness; in the event of a special treaty between Canada and an independent Quebec concerning minority language

rights, both parties would have to agree on a dispute resolution mechanism whose decisions would be binding on each other.

Provincial governments are not always keen to abide by the *Canadian Charter of Rights and Freedoms*, seen in many quarters as the imposition of a "government by judges" rather than a "government by people". In Quebec, the opposition is not framed in the same terms: the Canadian *Charter of Rights and Freedoms* is seen as a tool designed by English Canada to hamper the efforts that the provincial government makes to enshrine Quebec as a truly French-speaking society (Woehrling, 2005). More fundamentally, it is seen as the imposition by English Canada of values and concepts that are not shared by the dominant Francophone majority in Quebec.

Courts have decided that under the *Constitution Act 1867*, language and culture are divided subject-matters: both the federal government and the provinces can legislate on these topics, each within its own sphere and considering its own aspects (see the *Jones* and *Devine* cases). This explains why there are both an *Official Languages Act* and a *Charter of the French Language*. Things are thus not clearly delineated. For example, immigration is a field within federal jurisdiction, but recognizing the special linguistic and labour needs of Quebec, the federal government entered into an intergovernmental accord with the Quebec government to grant it some administrative responsibilities (McDougall-Gagnon-Tremblay accord, 1991). Education is a field within exclusive provincial jurisdiction, but federal spending power enabled the federal government to intervene in the development of universities as well as in minority language education. This chapter addresses specific areas where gaps or risks are identified, such as the issue of divided responsibilities and the legality of federal intervention within provincial jurisdiction, especially as regards language issues. Before dwelling on the specific language rights though, a word must be said about individual human rights with respect to their impact on language use in Quebec and Canada.

2. Contrasting Human Rights and Language Rights in Canada

Not only has the Canadian Constitution divided legislative and administrative power between the central government and provinces, but since 1982 it protects fundamental human rights and language rights. Some fundamental human rights may have a bearing upon language rights: freedom of expression, right to security of the person, equality and non-discrimination. But no human right is absolute. The rights contained in the *Charter* can be subject to reasonable limits that are demonstrably justified in a free and democratic society.

Language laws curtail individual freedoms and impose, forbid or regulate language use in various contexts. They are therefore prone to constitutional challenges under the guise that they are violating traditional human rights and freedoms. Quebec Anglophones regularly invoked individual human rights and freedoms to challenge the legality of the *Charter of the French Language* (Bill 101). It is our view that this strategy is overused and should be restricted to the most obvious cases. For instance, freedom of expression has been successfully invoked to challenge Quebec commercial signs law. In both *Ford* and *Devine*, the Supreme Court of Canada concluded that commercial speech is part of the constitutionally protected freedom of expression and that freedom of speech includes not only the content but also the choice of language of speech: but this guarantee accrues to *any* language and does not specifically protect the Anglophone community in Quebec. The Court said that it is a legitimate and valid government objective to impose the use of a language when such language is threatened, but evidence showed that it is unreasonable to forbid the use of any other languages. Facing strong reaction from many quarters, the Quebec Liberal government of the day chose to use a device in the *Charter* known as the "notwithstanding clause", enabling a government to shield its laws from the application of many of the fundamental human rights of the *Canadian Charter*. In 1988, the

language of sign law (Bill 178) excluding languages other than French on commercial signs pleased no one in Quebec, was decried in English Canada, and was considered as one of the causes for the demise of the Meech Lake Accord (Bourhis, 1994). The notwithstanding clause is valid for 5 years and must be renewed by another law otherwise it ceases to have legal status. After the prescribed 5 years, and amid more controversy, the Liberal government dropped the notwithstanding clause and adopted a new sign law in 1993 known as Bill 86. The law authorized the use of other languages on commercial signs, provided French was twice as predominant as all other languages combined. Considering the national and international outcry of the language of sign debate and its divisive political and constitutional consequences, it is to be asked if the move was really productive in the long term (Bourhis & Landry, 2002). It contributed to the scuttle of the Meech Lake Constitutional Accord; it unleashed nationalist sentiments in Quebec to record high levels; and in the field, it did not change much to the existing linguistic landscape situation. Was it all worth it?

Freedom of expression does not apply to language use in all official settings, given there are special constitutional provisions regarding such areas. Language is not included as a ground of discrimination in the anti-discrimination provision of s. 15 of the Canadian *Charter.* Courts have consistently refused to entertain an argument that a legal regime promoting one language (Bill 101, *Quebec)* or two languages (*OLA, Canada*), to the detriment of any other, represents a ground of discrimination according to the Canadian *Charter*. For example, with regard to minority language education rights, Franco-Albertans tried to argue that it was discriminatory in Alberta to refuse a French language school board. Chief Justice Dickson sternly rejected the argument in these terms:

> *Beyond this, however, the section [s. 23 of the Charter] is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada.* [Underline added]

Quebec also has a *Charter of Rights*, where the anti-discrimination provision is broader than the Canadian one. Language is a stated reason of discrimination. S. 10 of the *Quebec Charter* has been invoked a few times in support of an argument against special language rights, and has sometimes been successful. But in *Gosselin,* the Court stated that restrictions to admission in English schools was a means of protecting linguistic minorities and that neither s. 15 of the *Canadian Charter* or s. 10 of the *Quebec Charter* could be invoked by a Francophone to gain access to an English public school, because a part of the Constitution cannot be used to nullify another part thereof. In New Brunswick, suggestions that special language rights with regard to use of French or English within the court system are useless, because the Canadian *Charter* already guarantees the right to a fair trial, are consistently made by lawyers and consistently rejected by the courts (see the *Macdonald* and *Société des Acadiens* cases). This is the case because minority language rights are of a different nature than classical human rights. The difference is missed by many, within government as well as in the population, and has to be repeatedly stressed by the Courts. The Supreme Court of Canada said:

> *The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English. (*Beaulac at 41)

So an argument based on individual human rights will be entertained by the courts only when no special minority language rights are involved.

Cases will often turn around the question as to whether it is reasonable to limit these individual rights in order to pursue a specific language policy such as official bilingualism or the promotion of French as a threatened language. Generally, the balance will tilt towards vindication of language laws since they are geared at specific, collective rights and are part of a social compact which supersedes individual freedoms in a limited area. Courts will tend to vindicate individual linguistic freedoms only when governments go too far in imposing language bans, and absent a specific constitutional guarantee to support language laws. When official bilingualism or minority language education rights are at stake, as guaranteed in the Canadian *Charter*, no argument based on individual human rights will succeed. Furthermore s. 16(3) of the Canadian *Charter* has confirmed a principle already developed in jurisprudence: that Parliament and the Legislatures are not prevented from adopting laws to advance the equality of status, rights and privileges of the official languages. This usually means that any challenge to such special linguistic rights based upon constitutionally protected, traditional, individual human rights will fail.

Strategically, therefore, the Anglophone community of Quebec should strive to gain more of these collective rights rather than push for an extension of individual human rights in the field of language. Challenges based on individual human rights are often seen by the Quebec French majority as an unjustifiable attack upon its collective language regime.

Finally, it is possible that international commercial treaties could jeopardize national language legislation at the federal and provincial level, because they create obstacles to the free circulation of goods and services. Both federal and provincial legislation are at risk of yielding to the pressure of international commercial treaties promoting globalization. Voices in Quebec and Canada have sought to convince the international community to negotiate an international treaty on language diversity. This was the case especially after the UNESCO *International Covenant on Cultural Diversity* authorized states to take protective measures for cultural products (including television, video games, radio, etc). For strategic reasons, the Anglophone community in Quebec should support such efforts and lobby to involve the federal government in these international negotiations. To conclude, individual human rights should be invoked only when there is a ban on the use of English in private settings. Emphasis must be put on how this ban, albeit grounded on a valid legislative purpose, is nevertheless too severe a restriction on individual rights and freedoms.

3. Promoting the use of Official Languages: where, when and how

"Official languages" is an expression designating legal status of languages and their use within the state. Two models are generally at work in language laws: the territorial model, by which one language only is recognized within a delimitated territory, and personality, by which language rights are granted to individuals and they "carry" their rights, so to speak, everywhere in their country (Kaplan & Baldauf, 1997). The federal policy, albeit not "pure", mainly follows the personality model whereas the Quebec policy follows the territorial one. Conflicts are bound to happen. It is not to say that differences between the two can never be reconciled; but harmonization is a difficult task. And the task is further complicated by the fact that the legal sources in Canada are numerous: the *Constitution Act 1867*, the *Canadian Charter of Rights*, the *Official Languages Act of Canada,* the *Criminal Code of Canada,* and in Quebec the *Charter of the French Language,* and the *Health Act*. We have chosen to explore these matters by theme rather than by sources. It will make it easier to identify areas where, strategically, the Quebec Anglophone community should concentrate its efforts. Existing rights will be briefly mentioned without going into details, and room for improvement will be identified. More specific analysis may be found elsewhere (Bastarache, 2004).

Language of legislation

The *Constitution Act 1867* has imposed from the outset the legal obligation to discuss, adopt and publish legislation in French and English, both versions being equally authoritative. For historical reasons, this obligation was imposed only in Quebec and Manitoba, as well as in the Federal Parliament. New Brunswick imposed such obligations upon itself by law in 1969, and since 1982, has accepted to have the obligation enshrined in the *Canadian Charter of Rights*. Ontario decided to pursue this obligation by law in 1984, but as yet has resisted any suggestion to include the obligation in the Canadian *Charter*. The three northern territories are under the same rule. Language legislation in Saskatchewan, Nova Scotia, and Prince Edward Island enables the government to have some laws translated, but not all and not automatically. Quebec has always resented the fact that the constitutional obligation is not imposed upon every province. Some Franco-Ontarians have been suggesting that indeed, given that Ontario does legislate in both languages, the time has come to put it in constitutional terms. Strategically, this move would prove to Quebecers that the burden of official bilingualism is not theirs alone to bear. It would not change the fate of the Anglophone minority in Quebec but would be a gesture towards national unity.

Earlier versions of the *Charter of the French Language* (Bill 101, 1977) had official laws adopted in French only and non-official translations were made available upon request. Challenges of French-only laws were brought to the Canadian Supreme Court, which declared such provisions unconstitutional in 1979 (in *Blaikie)*. Government adoption of unilingual statutes should be resisted by official language minorities. The Anglophone community should not sacrifice this right in the name of linguistic peace with the dominant French majority of the province. Language of statutes is more symbolic than real and does not really threaten the French majority in Quebec any more than it threatens English majorities in the rest of Canada. However, such symbolic matters can readily degenerate into fierce conflicts and linguistic minorities must be vigilant in this regard.

Language use in Parliament

The *Constitution Act* states that both French and English may be used in the Canadian Parliament and in the Quebec legislature. The same exists in New Brunswick and in Manitoba. In Ontario, Nova Scotia, Prince Edward Island, Saskatchewan, Alberta, and in the three northern territories, the same right is granted in statutes. But there is no right to translation: translation services (simultaneous, in this case) are a matter for each legislature to decide.

Language use in the Courts

Language use in the courts is an area that deserves careful attention and where concrete gains could be made by Quebec Anglophones. The *Constitution Act 1867* states that either French or English may be used by any person in any proceedings before a federal or Quebec court of law. Courts have extended the right to administrative tribunals such as the Workers' Compensation Board, the Human Rights Tribunal, labour law arbitrators and the like. The problem with this rule is that it is granted to the benefit of anyone. Thus, in *Macdonald*, an Anglophone Montrealer was denied the right to a road traffic ticket in English: the officer writing the ticket has the constitutional right to use his language of choice, in this case French. In many provinces as well as at the federal level, legislation has corrected this situation to the benefit of the citizen: thus the *OLA* states that before federal courts, the presiding judge and the lawyers for the government must understand directly and without interpreters, and use themselves the language of the trial or both languages when the situation requires it. Furthermore, since 1990, the *Canadian Criminal Code* granted to any accused person the right to a criminal trial in his or her official language, or to persons whose language is neither, the right to

choose one of the official languages as the language of trial. The only condition, stated in *Beaulac*, is that the accused must be able to instruct his or her lawyer in the chosen language. The Supreme Court of Canada also stated in this case that the purpose of this right is neither a just and fair trial nor the right to a full and complete defence, but rather the *collective right* of the community to an equal access to the justice system.

In civil matters, the same rules apply before federal courts and courts in New Brunswick and in the Territories: the right to have a trial in one's official language. This entails the right to a translation if the other party is using the other language; the right to a presiding judge who can understand and use the language without interpreter; the right to a government lawyer who will use the language of trial or both as the case may be. In Ontario, this right is granted in designated areas only. Elsewhere, including Quebec, the only right is the right to use one's language before courts, without any right to be understood in that language, although a practice is developing in some provinces to allow civil trials in one's official language.

This is an anomaly that must be corrected. A constitutional right to a criminal trial in one's official language should be added in the Canadian *Charter* because it is already compulsory throughout Canada. As to civil and quasi-criminal matters, Quebec should follow the New Brunswick and Ontario model: even if private parties have the right to use either language, the presiding judge and state's lawyers should be obliged to use the language of the trial, or both if the situation requires it. Judicial decisions should be made available in both languages under a rule similar to the one in effect at the federal level: for cases involving a major legal issue, simultaneously; when an emergency warrants it, in one language with translation to follow. Under the present situation in Quebec, a translation is made available upon request, and such request may be made only by one of the parties. The Anglophone minority of Quebec is entitled to have equal access to judicial decisions and to the judicial system.

As well, access to justice in English deserves close attention. Outside Quebec, the French-speaking legal community is regrouped under provincial associations and a national Federation, namely *La Fédération des associations de juristes d'expression française de common law*. Such associations have been successful in pointing out to provincial governments various problems preventing an equal access to justice in the minority language. A similar association would be very useful to the Anglophone community, and we do not mean a professional one such as the Quebec Bar.

Language use in government services

Under s. 20 of the *Canadian Charter of Rights,* any member of the public can communicate with, and receive services from, a federal institution in either French or English in the following circumstances: from the central office of that institution; from any office located in the national capital; and from any other office when warranted by a significant demand, namely when the minority language population represents 5% of the overall population. The *OLA* and its regulations established complex rules to implement this right and added the right of federal civil servants to work in their own language in certain designated areas. Complaints may be put to the Commissioner of Official Languages who will launch inquiries and make recommendations. A plaintiff may then sue the government before the Federal Court of Canada. Some suggestions can be made to the federal government to enhance this right: for example, that the right be made available within any provincial capital, regardless of proportions; that the right be made available where there are minority language institutions such as schools, hospitals, health and social services offices, regardless of proportions. Any attempt by the federal government to change the proportion to higher numbers should be resisted.

The situation is much less favourable under the *Charter of the French Language* and within the Quebec government public service. Bill 101 enshrined as a general rule that French shall be used within the Quebec government as well as in communications between the State and the population. Exceptions are few and include, for example: communications with individual persons who have used another language in their own communication with the government (excluding associations, companies, legal persons, etc); contracts between the Quebec government and a party outside Quebec; signs and posters where health or security warrants the use of another language; clinical records in Health and Social Services, provided the institution has not required that these be drafted in French and provided a French version is made available upon a valid request from a person authorized to see it; communications between a professional order and a physical person having chosen to use another language; temporary permits to practice a profession, when the person would be qualified to do so save for her knowledge of French. In most other circumstances French is the only language allowed to be used, including for internal communications between two civil servants. There is no formal requirement that the Anglophone minority be represented fairly within any ministries of the Quebec civil service.

Considering the thrust of any official language regime, which is to decide upon language use in governmental institutions, and considering the impact of these measures for the status of French in Quebec, it is very unlikely that any progress could be made on that front in the future, except maybe to authorize the use of English for non-profit organizations or in communications from designated institutions to the general public, which should be in both languages. Efforts could also be made to authorize two Anglophone civil servants to communicate with one another in English and to include a clause equivalent to Part VI of the *OLA*, guaranteeing the right to a fair representation of the community within the Quebec public service.

Language of education in Quebec

Education remains a contentious issue in Quebec (Lamarre, 2007). The masterpiece of minority language education rights in Canada is s. 23 of the *Charter*, and although s. 23 has played a crucial role in developing French language education outside Quebec, its impact in Quebec, regardless of the sometimes hysterical reactions from some quarters, has been modest. It is because outside Quebec the issue was and still is to develop a full network of elementary and secondary schools, whereas in Quebec the main issue was and still is access to English schools.

Under s. 23, three classes of persons have a right to minority language education, meaning that they cannot be denied access. They are with regard to the Quebec context:
1. citizen whose language first learned and still understood is English, but this clause will not be applicable to Quebec unless approved by the National Assembly; 2. citizen whose primary instruction has been obtained in English in Canada; 3. citizen whose children have received or are receiving primary or secondary instruction in English in Canada. All other children are obliged to attend French language schools, save some other small exceptions described in the *Charter of the French Language*. The Quebec government is pursuing an overt policy of integrating all international immigrant children to French schools. The educational provisions of Bill 101 did achieve its avowed goal: force children from the immigrant population to switch from the English to the French public school system in Quebec (Lamarre, 2007). Combined with declining demographic trends and Anglophone out-migration from Quebec, the educational provisions of Bill 101 has had the intended effect of reducing enrolment in the English school system; enrolment dropped from 200,000 pupils in the 1970s to under 100,000 today. This attrition rate is greater than that of any Francophone minority in the rest of Canada.

The only legal way to gain access to English schools in Quebec is by means either of the "Canada clause" in s. 23(1)b) of the Canadian *Charter*, implying a long stay in Canada, or by s. 23(2) : a child who has received or is receiving instruction in English in Canada. However in 2002, the Quebec government adopted Bill 104 designed to close a "loophole" in access to English schooling in the province. Bill 104 stipulated that parents residing in Quebec who sent their child to a *private* unsubsidized English school for a year could no longer use this precedent as ground for enrolling their child in the English *public* school system. Between 1998 and 2002, education records showed that 5000 children had obtained access to English schooling through this procedure, an increase in English school enrolment loudly decried by Francophone nationalists. In August 2007, the Quebec Court of Appeal invalidated Bill 104 as it contravened s.23 (2) of the Canadian *Charter* allowing a child who previously received English instruction anywhere in Canada to be enrolled in English public school in Quebec. Should the Supreme Court of Canada uphold this 2 to 1 decision of the Quebec Court of Appeal in *N'Guyen* against *Bill 104,* cries of outrage amongst nationalists will again erupt in Quebec. Nationalists will demand to either curtail s. 23(2) by reverting to an earlier version which provided access to English public schools only in cases of inter-provincial migration, or by suspending the application of s.23 (2) in Quebec, as was done with the mother-tongue clause, s. 23(1)a). Alternatively, nationalists may demand that admissibility to *private* unsubsidized English schools be curtailed by imposing the same rule as those applied for access to *public* English schools. Such a provision would close the "loophole" which enables parents to send their children to private unsubsidized English schools for a year, and in the following year seek access to English public schools.

English language education should cease to be viewed as a threat to the French majority in Quebec or a way for pupils to surreptitiously learn English in the province. Rather, English language education should be seen as a key institution necessary to preserve and promote the unique culture of a particular national minority within the province of Quebec. It is truly a collective right; although it is granted to individuals, its "true beneficiary" is the community itself. It is a minority right. The true purpose of s. 23 was eloquently outlined by Chief Justice Dickson of the Supreme Court of Canada:

> *The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.*

As a minority society in Canada, Quebec will not accept easily that a linguistic minority within its own territory, being a majority in the country as a whole, be accorded linguistic and cultural rights to which it has not consented. The argument saying that Quebec Anglophones are the best-treated minority in the world is – from a legal standpoint – no longer true with regard to primary and secondary education. French language minorities in Canada now enjoy rights equivalent to their English-speaking counterpart in Quebec, even if there are still implementation problems. But the fact is that s. 23, even if it guarantees primary and secondary schools and school boards for the Anglophone community "where numbers warrant", does not cover either pre-schooling or college and university education.

Ideally, the mother-tongue clause (s. 23(1)a) should be made applicable to Quebec. But this is not likely to happen under the current political situation in the province. Other solutions must be sought. A strong improvement would be to recognize a right to linguistically homogenous institutions in the fields of education, culture and social services, under the model provided by s. 16.1 of the *Charter of Rights* for the Acadian community

in New Brunswick. Such minority rights, as desirable as they may be in securing a better position for the Anglophone institutions of Quebec, are not likely to emerge because of the intractable constitutional debate they would trigger in Quebec and other parts of Canada. It seems that s. 23 will not be reopened soon. Should this prove wrong, improvements to s. 23 should include: 1. to apply the mother-tongue clause (s. 23(1)a) to Quebec; 2. to abrogate the "numbers warrant" condition; 3. to extend s. 23 to pre-elementary and post-secondary education; 4. in exchange, to curtail s. 23(2) or have it suspended in Quebec.

Language provisions in health and social services

The Quebec Health and Social Services Act guarantees the right to such services in English, under access programs and a provincial advisory committee. Some institutions may be designated (see *infra*). These clauses provide a fairly comprehensive code for the delivery of health and social services in English (see Carter, this volume). If problems lie with implementation, then a suitable mechanism must be found.

Designated institutions

As regards English-language institutions in Quebec, section 29.1 of Bill 101 authorizes the government to designate some institutions, allowing them to use the English language internally and among themselves and for providing their services when more than 50% of the population they serve is not French-speaking. The following three points may be made concerning the above provisions.

Firstly, the required proportion of more than 50% seems very high, compared to other Canadian jurisdictions. In New Brunswick municipalities have some linguistic obligations when 20% of their population is of the other official language. In Ontario, designation occurs when 10% of the population is French. At the federal level, linguistic obligations are triggered when the population of the other official language is 5% of the population served by the federal institution. There is room for improvement in Quebec. A "substantial proportion" of minority language population should trigger some rights; why impose such a stringent requirement?

Secondly, to avoid the drama provoked by the forced amalgamation of English majority municipal institutions within the city of Montreal a few years ago (Aubin, 2004), a rule should stipulate that before revoking a designation, the government must demonstrate that limits are necessary and justifiable in the circumstances, under the model of s. 7 of the *Ontario French Language Services Act*. The *Montfort Hospital* case (*Lalonde*) proves that such a clause can be effective to protect a minority language institution against forced amalgamations. This should be a priority for the safeguard of the Anglophone minority of Quebec.

Thirdly, designation should be opened to more institutions than those provided for in s. 29.1 of Bill 101. There is room for designating other types of institutions such as institutions that deliver public services "on behalf of" the provincial government. Ontario has a designation mechanism open to any private body entrusted with governmental responsibilities. Federal, Territorial and New-Brunswick legislation have a clause which automatically extends linguistic obligations to any organism acting "on behalf of" the government. The term "on behalf of" is a designation recently made applicable to a regional economic development corporation administering some federal programs, as was stated in *Desrochers*, presently under appeal from the Federal Court of Appeal to the Supreme Court of Canada. Be it either by way of a general clause or by specific designations, such an extension of language rights would have the legal regime adapt to an increasingly pressing reality, that of privatization and of partnerships with the private sector in Quebec and elsewhere in Canada.

Immigration and language

Amendments to the Canadian Immigration Act have included, as an object of the Act, to strengthen the bilingual character of Canada and to "support and assist the development of minority official languages communities in Canada" (s. 3b) and (b.1)). The 1991 McDougall-Gagnon-Tremblay agreement between Quebec and Canada has devolved to Quebec the main responsibility for the selection and integration of immigrants. The Quebec government has made it clear that its objective is to integrate immigrants within its Francophone host majority rather than within its Anglophone minority. There have been talks to amend the Constitution to make this permanent. It is very unlikely that Quebec would revert to a federal role in the immigration process. Since Immigration is a federal responsibility from the outset, the federal government still has a legal obligation to at least negotiate a linguistic clause within an updated McDougall-Gagnon-Tremblay accord and to make sure such linguistic provisions are implemented.

The language of media and culture

By virtue of its proximity to the huge English markets of Canada and the US, the mass media are a vitality component where the Quebec Anglophone community is well served, though access to local content remains limited in many regions of the province (see Rodgers, Garber & Needles, this volume). The federal government is responsible for the electronic media and one of the goals of the *Broadcasting Act* is the promotion of linguistic duality in Canada by making broadcasting available in both French and English (see s. 3 (m), (t), (q)). Any suggestion of transferring responsibility of this very important sector to the Quebec government should be resisted. Federal agencies such as Telefilm Canada, the CRTC, the Arts Council, etc, should be scrutinized to ensure that Quebec Anglophone communities receive their fair share of media and cultural resources. As to other forms of media, they are mostly left to the private sector and the Canadian and US markets are the driving force for them. The CRTC is pursuing a policy of open competition in the broadcasting markets, has refused to regulate the Internet and ensures that the rules for Canadian content and levies to finance Canadian productions work well. There is room for improvement in entrenching a right to cultural institutions belonging to the Anglophone community, again on the model of s. 16.1 of the Canadian *Charter*. Such a right should bind both levels of government: federal and provincial.

Language rights in the private sector

Canadian federal laws sometimes impose bilingualism in some areas, and at other times authorize the use of one or the other official language. These measures are limited to companies and businesses under federal jurisdiction. Most public dealings in the ordinary life of a citizen are under provincial responsibility, and provisions of Bill 101 promote French as the normal language of use in most domains of public life including the work world as well as commercial and business exchanges. This is also a contentious issue. Although it is acceptable to impose French as the language of work and of commerce, it seems a bit exaggerated to forbid the use of any other language. Bill 101 allows the use of English in some limited circumstances. The *Office de la langue française* is monitoring the process.

Considering that the language of work and commerce is one of the centrepieces of Bill 101, and considering the socio-linguistic situation of French with regard to English in North America, it is unlikely that the French majority would tolerate the legal situation to change in favour of linguistic diversity in Quebec. There are ongoing nationalist pressures to extend the obligation to use French in small businesses of fewer than 50 employees and to curtail access to English language CEGEPS (colleges; proposed Parti Québécois Bill 195, 2007). Given such pressures, the present status quo represents an acceptable compromise and should

not be challenged. Suggestions made in 2007 by the Bloc Québécois (BQ) to subject federal undertakings operating within Quebec to be bound by the *Charter of the French Language* should be resisted. It is possible that the proposed BQ measure would be unconstitutional in the first place.

The following technical area deserves to be studied more extensively: the reach of provincial law in federal matters. Given that the Quebec government is very often opting out of federal programs and asking for financial compensations, is it possible, mandatory, or irrelevant for the Canadian government to impose linguistic rules in federal-provincial agreements? Although technical, these questions all have practical implications for the Anglophone minority community: any transfer of a federal program to Quebec or any opting out by Quebec of a national program will yield the question. Members of the Anglophone minority affected by the program in question should not lose their language rights as a result of a transfer of responsibility from the federal to the provincial government.

Political representation of the Anglophone community

Under the federal regime, electoral districts must take into account the linguistic fabric of a territorial area as one of the criteria. This rule is not enshrined in the Constitution, but it could be implied from the unwritten constitutional principle of protection of regional linguistic minorities. The Federal Court has already quashed the New Brunswick federal electoral map, for want of respect for this linguistic territorial rule (*Raîche*). Therefore any reform of the representation within the Canadian House of Commons should take into account the demographics of the Anglophone communities in different regions of Quebec.

With regard to Senate reform, any reform should preserve the representation of minority language communities. An elected Senate under a proportional rule would jeopardize the present linguistic and territorial representation. Therefore, this issue should be carefully studied and any proposal for electoral reform should be analyzed from the perspective of maintaining a political representation of the Quebec Anglophone community within the Federal Senate.

Within the province of Quebec, the problem is the same. Electoral reforms are in the air; many people are considering having the province move towards a mixed local-proportional representation. Any reform should be carefully studied to guarantee the continued political representation of all Anglophone communities in the Quebec National Assembly. Protection of political representation for linguistic minorities is an often neglected but crucial collective right, recognized in international law.

As to representation within the public service of the Quebec government itself, the Quebec Human Rights Commission showed that in 1998, while Anglophones made up more than 8% of the Quebec population, their presence in the Public Service was less than 1%, a trend that has not changed in the last decade (CDPDJ, 1998) and which analysts are attributing in part to discriminatory behaviours on the part of language majority employers (Bourhis & Gagnon, 2006). Though the adoption of employment equity provisions in the Quebec public service did improve the position of Francophone women in the public service, the situation has not improved much for Anglophones, cultural communities and visible minorities in the last decade (Déom, Mercier & Morel, 2006). The Quebec government must give the good example and a right to fair, proportional representation of the linguistic and cultural communities of the province should be pushed for by Anglophone communities.

Government role in promoting official language minorities

As part of its nation-building responsibilities. Canadian government has legislated in favour of the As part of its nation-building responsibilities, the protection and promotion of its official language minorities (Foucher, 2007). Part VII of the *OLA* creates a very important justiciable obligation for the federal government, under s. 41. This obligation is sustained by direct federal support to the minority language community, its initiatives and associations, and by the use of federal spending power to help provinces foster bilingualism, linguistic equality and services in the other official language. The Quebec government has frequently indicated that control of federal spending power is one of its priorities and the current federal Conservative government has stated it would be open to such negotiations. By way of approval by its Treasury Board, Quebec already controls any financial attribution amounting to more than 50% of an organization coming from non-Quebec sources. Any general curtailment of federal spending power should exempt from its reach minority communities support, in order to preserve the financial leverage the federal government has to help minority language communities, including the Anglophone minority of Quebec.

Some remedies

At the federal level, the *OLA* provides for a Commissioner of Official Languages, whose role is of the utmost importance in implementing the Act both in letter and in spirit. As is evident from its annual reports, this "linguistic ombudsman" model is well known within the federal public service and is appreciated especially by members of Canada's official language minorities. A similar language ombudsman office was also created in Ontario, in New Brunswick and in the Northwest Territories. Its utility lies in the fact that it levies no financial expense to the individual complainant, it is vested with important powers of inquiry, while it can act as a "discrete" influence and can help solve systemic problems at all levels of the state and beyond. At the international level, the European Council has had such a High Commissioner to National Minorities, whose interventions at times have helped to diffuse some potentially explosive situations. The Human Rights Commission of the United Nations recently appointed a "special rapporteur" for minorities. Such national and international ombudsmen are an invaluable resource for linguistic and national minorities: they produce extensive research documentation, draft key proposals and act as mediators, negotiators and promoters with officials and leaders of ruling majorities. There is no such equivalent in Quebec. Courts are the only forum where the Anglophone community can voice its grievances against the provincial government. The mandate of the *Office de la langue française* is to promote French and apply the *Charter of the French Language*. Given its terms of reference and its track record, this office can hardly be expected to be receptive to the needs and aspirations of the Anglophone minority, let alone its grievances. The same can be said of the *Conseil supérieur de la langue françai*se.

Quebec must create an ombudsman office or Council for the protection of its national minorities, including Anglophones. This office, accountable to the National Assembly, should be mandated to receive complaints, inquire into the implementation of language rights of the Anglophone minority, and negotiate, mediate and propose solutions, while producing research and documentation on the national minorities of Quebec. The reinstatement of the Court Challenges Program should also be a priority for the Anglophone minority in Quebec and for the Francophone minorities in other parts of Canada.

4. Concluding recommendations

We have reviewed what seemed to be in our opinion important issues on the legal and constitutional front for the Anglophone minority of Quebec. Under an ideal scenario for the English

speaking communities of Quebec, the province would be officially bilingual. Language rights would mirror what is available at the federal level. Under the worst-case scenario, restrictions on the use of English would be even more strenuous. An intermediate ground must be found. Our analysis was founded on the basis that although the English language is not in jeopardy in Quebec, the Anglophone communities are. Therefore, we think that organizations should regroup this community and foster its mobilization. The discourse should move from individual freedom to use one's own language to a discourse of protecting the Anglophone community as a rightful national minority in Quebec. In short, we suggest that efforts be made to secure the following specific rights, in decreasing order of priority:

1. Restore the Court Challenges Program;
2. The nomination in Quebec of an independent officer or Council on the model of a Commissioner of Official Languages or a High Commissioner for Minorities;
3. An enlargement of the designation of some institutions that serve the Anglophone community: lower the threshold and increase the possibility of designations; include a clause whereby any limitation of rights must be demonstrably justified as necessary;
4. Exempt from any curtailment of federal spending power all programs and services aimed at official languages communities in Canada, or otherwise devise a mechanism ensuring the continued existence of such;
5. Secure the right to political representation both at the federal (Senate and House of Commons) and provincial (*Assemblée Nationale*) level;
6. Fine tune rights with regard to access in English of provincial public services; include a right to fair representation in employment within the public service;
7. A right to homogeneous institutions in the fields of education and culture on the model of s. 16.1 of the *Charter* for the Acadians;
8. Enshrine a constitutional right to criminal trial in one's own language, the exercise of which will be prescribed by law;
9. A statutory right to civil and quasi-criminal trial in one's own language.

Other proposals were made throughout this chapter, but the nine listed above need immediate attention for the sake of developing the vitality of the English-speaking communities of Quebec. Should any of these suggestions be adopted as strategic priorities, they should be backed up by further studies to document more fully the true situation and also to develop more detailed and reasoned arguments in favour of the proposal as well as strategies to achieve them. Finally, great care must be taken to secure the consent of the Quebec government, for the reasons mentioned in the opening observations of this chapter.

Bibliography

Aubin, H. (2004). *Who's afraid of demergers?* Montreal: Véhicule Press.

Bastarache, M. (2004) (Ed.). *Language Rights in Canada.* Cowansville, Quebec: Éditions Yvon Blais.

Bourhis, R.Y. (1994). Introduction and overview of language events in Canada. *International Journal of the Sociology of Language*, 105-106, 5-36.

Bourhis, R.Y. (2001). Reversing Language shift in Québec. In J. Fishman (Ed.). *Can threatened languages be saved?* Clevedon, Avon, UK: Multilingual Matters, pp.101-141.

Bourhis, R.Y, El-Geledi, S. & Sachdev, I. (2007). Language, ethnicity and intergroup relations. In: A. Weatherall, B. M. Watson & C. Gallois (Eds.). *Language, discourse and social psychology.* New York, N.Y.: Palgrave Macmillan, pp.15-50.

Bourhis, R.Y. & Gagnon, A. (2006). Les préjugées, la discrimination et les relations intergroupes. Dans R.J.Vallerand (Ed). *Les fondements de la psychologie sociale*, 2e édition. Montréal, Canada : Gaétan Morin & Chenelière Éducation, pp. 531-598.

Bourhis, R.Y. & Landry, R. (2002). La loi 101 et l'aménagement du paysage linguistique au Québec. *Revue d'aménagement linguistique*. Québec : Office québécois de la langue française, pp.107-132.

Bourhis, R.Y & Lepicq, D. (2004). *La vitalité des communautés francophone et Anglophone du Québec: Bilan et perspectives depuis la loi 101*. Montréal : Chaire Concordia-UQAM en études ethniques, Cahier de Recherche No.11.

CDPDJ (1998). *Les programmes d'accès à l'égalité au Québec : Bilan et perspectives*. Montréal : Commission des droits de la personne et des droits de la jeunesse.

Déom, E., Mercier, J. & Morel, S. (2006). *La discrimination en emploi. Quels moyens faut-il prendre ?* Lévis, Québec : Presses de l'Université Laval.

Fishman J. (1999) (Ed.) *Handbook of Language and Ethnic Identity*. New York: Oxford University Press.

Fishman, J. (2001). Why is it so hard to save a threatened language? In J. Fishman (Ed.) *Can threatened languages be saved?* Clevedon, Avon, UK: Multilingual Matters, pp.1-22.

Fraser, G. (2006). *Sorry, I Don't Speak French: Confronting the Canadian Crisis That Won't Go Away*. Toronto: McClelland & Stewart.

Foucher, P. (2007). Legal environment of official languages in Canada. *International Journal of the Sociology of Language*, 185, 53-69.

Johnson, M.L. & Doucet, P. (2006). *A Sharper View: Evaluating the Vitality of Official Language Minority Communities*. Office of the Commissioner of Official Languages. Ottawa: Minister of Public Works and Government Services Canada.

Kaplan, R.B. & Baldauf, R.B. (1997). *Language Planning: From Practice to Theory*. Clevedon, Avon, UK: Multilingual Matters.

Lamarre, P. (2007). Anglo-Quebec today: looking at community and schooling issues. *International Journal of the Sociology of Language*, 185, 109-132.

Stevenson, G. (1999). *Community Besieged: The Anglophone Minority and Politics of Quebec*. Montreal: McGill-Queen's University Press.

Woehrling, J. (2005). L'évolution du cadre juridique et conceptual de la legislation linguistique du Québec. Dans A. Stefanescu et P. Georgeault (Eds.). *Le Français au Québec : Les nouveaux défis*. Montréal, QC: Conseil Supérieur de la langue française et Fides, pp. 253-356.

International treaties

International Covenant on Civil and Political Rights, General Assembly, resolution 2220 (XXI), December 16, 1966, on line: http://www.ohchr.org/english/law/ccpr.htm (Last access October 1st 2007).

International Convention on the Protection and Promotion of the Diversity of Cultural expressions (UNESCO) October 20, 2005, on line: http://portal.unesco.org/culture/en/ev.php-URL_ID=33232&URL_DO=DO_TOPIC&URL_SECTION=201.html (Last access October 1st 2007).

International Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, General Assembly, Resolution 47-135 (1992), December 18th, 1992; on line : http://www.ohchr.org/english/law/minorities.htm (last acceded October 1st 2007).

Legislation

Canadian Broadcasting Act S.C. 1991 c. 11

Canadian Charter of Rights and Freedoms being annex B of the Canada Act (1982) 1982 c. 11 (U.K.)

Charter of the French Language (Qc) L.R.Q. 1977 c. C-11

Constitution Act 1867

Criminal Code of Canada R.S.C. 1985 c. C-46
French Language Services Act (N.S.) S.N.S. 2004 c. 26
French Language Services Act (Ont.) R.S.O. 1990 c. F.32
French Language Services Act (P.E.I.) S.P.E.I. 1999 c. 13
Health and Social Services Act (Qc), R.S.Q. c. S-4.2
Language Act (Sask.) 1988 R.S.S. c. L-6.1
Languages Act (Yukon) R.S.Y. 2002 c. 133
Official Languages Act of Canada L.R.C. 1985 c. O-1
Official Languages Act of New Brunswick, LR.S.N.B. 1973 c. O-0.5 (2002)
Official Languages act of the Northwest Territories R.S.N.W.T. 1988 c. O-1

Jurisprudence

Ballantyne v. Canada CCPR/C/47/D/359/1989, views adopted on May 5th 1993, on line: CCPR/C/47/D/359/1989 (Last access October 1st 2007)
Blaikie v. Attorney General of Quebec [1979] 1 S.C.R. 1011
Devine v. Attorney General of Quebec [1988] 2 S.C.R. 790
Ford v. Attorney General of Quebec [1988] 2 S.C.R. 712
Gosselin (tuteur) c. Québec (Procureur général) [2005] 1 S.C.R. 238
H.N. v. Quebec (Attorney General) 2007 QCCA 1111
Jones v. Attorney General of New Brunswick [1975] S.C.R.
Lalonde v. Restructuring Commission (2001), 56 OR 3d 577
Macdonald v. Montreal [1986] 1 S.C.R. 460
Mahe v. Alberta [1990] 1 S.C.R. 342
R v. Beaulac [1999] 1 S.C.R. 768
Raîche et als c Attorney General of Canada [2004] F 679
Solski v. Quebec (Attorney General) [2005] 1 S.C.R. 201

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