

The Federal Government Must Once Again Be the Champion of Official Languages

Remarks presented to the 23rd Convention of *Fédération nationale des Conseils scolaires francophones* : "School Board Management Rights: Beyond Turbulence »

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Our host, the *Fédération nationale des conseils scolaires francophones*, is asking us in this workshop to answer the following question: "*How can the Federal Government better support the implementation of, and compliance with, Section 23 by provinces and territories?*" It will be recalled that Section 23 of the *Constitution Act, 1982* deals with the right of official language minorities to receive school instruction in their language where numbers warrant.

There is much to be said about this issue but I will focus on three specific aspects which I believe to be of an imperative nature.

First, the government must establish a genuine roadmap and comprehensive plan – not a sham. Second, the government must set an example for the provinces to follow by adopting, for what falls under federal jurisdiction, a new and broader definition of what constitutes a number sufficient to warrant such services – the famous "*where numbers warrant*". Third, the federal government must resume its support for those communities that have to go before the courts to claim their rights, including the right to school instruction and the right to manage their own schoolboards.

Let us examine these three aspects.

1. Comprehensive Plan

Let us begin with the roadmap – the comprehensive plan. These days, we don't have one. What we have is a sham, a dress window to make us believe the government is doing a lot, a smokescreen to hide government cutbacks.

Yet there was a time when the federal government had a real plan – between 2003 and 2008, when it had what official language communities were kind enough to call "*the Dion Plan*". Resulting from a two-year-long, wide-ranging consultation, that plan reflected the following finding: outside Quebec, the main assimilation factor is the growing number of young francophones and anglophones who form households together – they are called

exogamous couples. Some two-thirds of francophone children outside Quebec grow up in households where one parent doesn't have French as a first language. Almost nonexistent when both parents are francophone, child assimilation is frequent when one parent is a unilingual anglophone; however, assimilation rates are lower when the anglophone parent also speaks French. So the objective of the Dion Plan was to help the parents in exogamous families pass their dual linguistic heritage on to their children, because that is the main challenge facing the French language and francophone communities in Canada. The *Société franco-manitobaine* coined a more evocative phrase: "expanding the francophone space".

The complete plan, which included detailed target figures, was designed to bring about such expansion. The efforts made in the fields of education, health, economic development, early childhood development, immigration and others were all aimed at the same overall objective, thus creating a synergistic effect.

The plan was well funded, to the tune of \$751 million over five years. And that was new money, over and above existing program funds. On page 26 of the plan, one can read that for education, "\$381.5 million are added to the existing funding of \$929 million over five years." (<http://publications.gc.ca/collections/Collection/CP22-68-2003E.pdf>). Funding for the plan grew year after year.

When they came to power, the Conservatives lost sight of the overall objective – expanding the francophone space – and failed to replace it with a new, clear direction. So what we have now is a hodge-podge of vague, targetless, visionless programs.

The Conservatives also failed to bring new money to their so-called roadmap. Instead, they kept funding more or less to the level reached by the Liberal plan in its fifth year. In so doing, they created the illusion that they were more generous, touting a five-year plan with a budget of \$1.109 billion rather than \$751 million. The Conservatives bragged about it but let's be clear: those funds came from pre-existing departmental budgets.

Do you want proof of that? Go to page 7 of the *Protocol for Agreements for Minority-language Education and Second-language Instruction 2005-2006 to 2008-2009 Between the Government of Canada and the Council of Ministers of Education, Canada* (<http://publications.gc.ca/collections/Collection/CH14-10-2005E.pdf>). You can see that during that period, the total budget provided under the Protocol to the provincial and territorial governments by the Government of Canada was gradually increased, reaching \$258,597,000 in 2007-2008. Now if you go to page 9 of the following Protocol, covering the period 2009-2010 to 2012-2013 (<http://www.cmec.ca/Publications/Lists/Publications/Attachments/211/protocol-for-agreements-2009-2013.pdf>), you read: "*the total budget to be made available to the provinces/territories by the Government of Canada will be a maximum of \$258,597,000 annually*". So the 2008-2013 roadmap doesn't add one cent to the funds to be transferred

to the provinces and territories for education purposes – not even enough to cover inflation! The Conservative sham is exposed.

I am not saying that \$750 million should be added every five years to the federal budget for official languages. What I am saying is that a so-called roadmap with no vision and no new money is nothing but smoke and mirrors.

Hiding behind the screen of a roadmap funded by recycled money, the Conservative government cut other departmental programs devoted to official languages. Official language communities have suffered all the more given that being minorities, they cannot use economies of scale – as a majority can – to offset the cuts.

The new Conservative plan – the 2013-2018 roadmap announced last Spring – makes things even worse. This plan includes \$120 million to help economic immigrants learn an official language. In provinces with an Anglophone majority, the language will essentially be English. That is a worthy objective but one that does not belong in a plan to reinforce our minority communities or to promote French learning as a second language in provinces with an Anglophone majority. In order to fund the \$120 million, the government cut essential community services, including \$15 million less for minority language learning. For the first time since the 2003-2008 Plan, the government is using funds for purposes other than those that should be served by a plan for official languages. That misappropriation of funds is a dangerous precedent; it must be condemned.

2. Setting an example

If it really wants to convince provincial governments that they should do more with respect to Section 23 and areas other than education, the federal government must set an example. It must improve bilingualism in the federal public service and consider proficiency in both official languages as a necessary competence for high-level positions, including of course the function of Auditor General. That goes without saying but it seems the current government must be reminded of that obvious fact.

Having said that, I believe that the most useful thing the government could do would be to broaden the definition of who is entitled to receive bilingual services from the federal government. The government would then be well placed to urge the provinces to do the same thing with respect to Section 23 as well as the right of official language minorities to get an education and manage their schools in their own language where numbers warrant.

The ideal would be for Parliament to carry the Bill tabled by the valiant veteran of the fight for official language minority rights, Franco-Manitoban Senator Maria Chaput. Her Bill aims to broaden the very definition of what constitutes an official language community

entitled to receive services in its own language. As such, it deals with the most fundamental issue for linguistic minorities and the future of French in Canada outside Quebec.

We know that the *Official Languages Act* does not require a federal office to be bilingual where the language of the minority is almost non-existent. There must be "*a significant demand*". In other words, services and communications need to be available in both official languages only "*where numbers warrant*", as the hallowed expression has it. The one parameter that draws the most attention is the minimum threshold of 5 percent of the population to be served or of the public demand for services in that office. The population estimate is done according to the first official language spoken or the language most used at home.

For official language minorities, this criterion raises a serious existential problem because it can be affected by the growth of the majority population. Even a minority community with a growing population can fall below the 5 percent threshold if the majority population grows faster – a common occurrence given our high immigration levels.

The Chaput Bill aims to replace the "*first language spoken*" criterion with that of "*the number of persons able to communicate in the language of the English or French linguistic minority population of the area served by an office or facility*". In other words, what constitutes sufficient demand for a federal office to be required to offer services in both languages would be based on the number of persons who can communicate in the minority official language.

Further to changing the numerical criterion, Senator Chaput proposes that the government base its appreciation of the reality of communities not only on the numbers but also on the vitality of these communities.

That is the fundamental change we need, not only to maintain – and even increase – access to bilingual federal services but also to allow the federal government to be more effective in encouraging the provinces to increase their own offer of bilingual services, notably with respect to Section 23, access to education and school management.

It must be understood that the need to take the vitality of communities into account is based on case law. In the judgment it rendered in *Beaulac*, in 1999, the Supreme Court recommended that to determine if a community is entitled to receive services in its own language, one should take into account more than just the community's population – as defined by the language spoken at home. Other criteria should also come into play, such as the strength of French in schools, the workplace and the public arena.

In 2000, in *Arsenault-Calderon*, the Supreme Court ruled that Section 23 is based on the premise that true equality requires that official language minorities be treated according to

their particular situation and needs, in order to ensure that they have access to a level of education equivalent to that of the majority.

If the Federal Government took action to deal with the consequences of the *Beaulac* judgment and the spirit of the *Arsenault-Cameron* ruling, it would be better placed to urge the provinces and territories to do the same.

Speaking of case law, we have to denounce the Conservative government's lack of action on the judicial front when it refuses to support communities in the courts in their legal wranglings with provincial governments.

3. Support Communities in the Courts

The Federal Government must make the point to the provinces that it is important to respect the spirit and the letter of Section 23 everywhere in the land. To make that point, the Federal Government must intervene before the courts to support linguistic minorities, when necessary. It has done so in the past, notably in *Doucet-Boudreau*, (<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2096/index.do>), *Mahe* (<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/580/index.do>) and *Arsenault-Cameron* (<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/1762/index.do>).

In *Fédération des conseils scolaires francophones en Colombie-Britannique*, the Federal Government did not intervene. In my opinion, this sends a very wrong signal.

When the Federal Government fails to intervene, there is a higher risk that the courts might adopt a restrictive, narrowly legalistic and technical approach; that is what the Supreme Court just did when it gave its blessing to the legal regime that specifies that only English is to be used in British Columbia's courts. The dissenting reasons seem to me to be more consistent with the spirit of case law; they might have swayed a majority of judges if the Solicitor General of Canada had intervened as convincingly and emphatically as he has done in the past. But no, he didn't say a word.

Such legal inaction is unacceptable. We have to remind the Conservatives that the Government of Canada must champion the cause of official language communities every time and everywhere these communities rise to defend their rights.

Conclusion

Since education falls squarely under provincial jurisdiction, the Federal Government's ability to intervene in the debate is not without limits. Generally speaking, the Federal

Government's role is to speak up – relentlessly and to all stakeholders including provincial and territorial governments – on the importance of linguistic duality in Canada; to promote and protect both languages with all its might; and to help official language minorities deal with education issues, matters artistic and cultural (including CBC-Radio-Canada), social and economic development issues, and health challenges. The Federal Government must show strong and consistent leadership in dealing with principles and concrete realities – including adequate funding.

The Government of Canada must have a coherent and consistent vision rather than a piecemeal approach. It must seek agreement on common objectives with the provinces and ensure that any transferred funds are put to good use. It must set an example by broadening entitlement criteria for its own services. It must support communities whenever and wherever they go to court to uphold their rights.

Such is the Federal Government's overall responsibility.