

Is post-secondary education in French protected by the Canadian Charter of Rights and Freedoms?

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In February 2021, Laurentian University in Sudbury, a bilingual university recognized under the *French Language Services Act*, filed for protection under the *Companies' Creditors Arrangement Act* due to serious financial difficulties. In June 2021, the Senate of Canada passed a motion expressing concern about the closure of programs at Laurentian University, including 28 French-language programs (representing 50 per cent of French-language programs) and the dismissal of many professors, nearly half of whom are French-speaking.

It is an unfortunate reminder of the difficult reality facing minority French-language and bilingual post-secondary institutions in Canada, namely that post-secondary education in French is underfunded.

We note that in 1968, the Laurendeau-Dunton Commission (whose inquiry led to the enactment of the first *Official Languages Act* in 1969) published the second volume of its report on education in which it recommended that Laurentian University make it a priority to increase the number of its courses in French.

The importance of post-secondary institutions for Francophone minority communities

In 1990, the Supreme Court of Canada in *Mahe v. Alberta* held that a language is more than a mere means of communication; it is part and parcel of the identity and culture of the people speaking it. French-language and bilingual post-secondary institutions play a vital role in the linguistic, cultural, social and economic growth and development of Francophone minority communities (including Francophiles). As noted by the Commissioner of Official Languages of Canada in his 2020-2021 Annual Report, these institutions are part of the educational fabric that is crucial to the vitality of official language minority communities.

Is there a constitutional right to post-secondary education in French?

Section 23 of the *Canadian Charter of Rights and Freedoms (Charter)* provides for the right of citizens from the country's French and English linguistic minorities to have their children receive instruction in their language where the number of children so warrants. Section 23 is preventive, remedial and unifying in nature. According to the Supreme Court of Canada, the purpose of section 23 is not only to prevent the erosion and assimilation of official language communities, but also to redress past injustices and promote their development.

Notwithstanding the fact that section 23 expressly refers to the right of instruction in the minority language at the primary and secondary levels, it is our view that a large, liberal and purposive interpretation can include instruction at the post-secondary level. In recent decades, the Supreme Court of Canada has confirmed jurisprudential concepts specific to the interpretation of section 23 which are not expressly contained in the language of the provision itself, but which have been developed to compensate for the silence of section 23 regarding the level of services and quality of instruction, such as the right to management and control, sliding scale and substantive equivalence.

The question of whether section 23 includes the right to post-secondary education in the minority language has not yet been definitively determined by the courts. However, an important case to note is the situation of the University of Alberta's Campus Saint-Jean in Edmonton (Campus Saint-Jean), the only French-language post-secondary institution in Alberta. According to the lawsuit filed in August 2020 by, among others, the Association canadienne-française de l'Alberta (ACFA) against the Government of Alberta and the University of Alberta, chronic underfunding has prevented and prevents the Campus Saint-Jean from fulfilling its cultural, linguistic and educational mandates, including the training of sufficient numbers of French-speaking teachers and staff to address shortages in French-language school boards in Alberta. Among other things, the ACFA relies on section 23 of the *Charter*, namely that the Government of Alberta has an obligation to provide sufficient funding to the Campus Saint-Jean to train sufficient numbers of qualified teachers and staff for French-language school boards in Alberta.

This is a legitimate legal position. Access to post-secondary education in French is necessary not only to address the shortages of qualified French-speaking teachers and staff in minority Francophone schools across the country, but also to guarantee an educational experience truly equivalent to that of the majority. Achieving substantive equivalence requires increased funding from the provincial and federal governments.

Federal intervention

While education falls under provincial/territorial jurisdiction, the federal government plays an important role in funding post-secondary institutions through institutional grants, research fund grants, student bursaries, capital project contributions, etc. The federal government's commitment is necessary to ensure increased funding for French-language and bilingual post-secondary institutions. A recent example is the joint federal-provincial funding agreement between the federal and Ontario governments in January 2020 to support the Université de l'Ontario français, the first French-language university governed by and for Francophones in Ontario.

Finally, we also note that Bill C-32, introduced in June 2021 to modernize the *Official Languages Act*, proposes to provide explicitly that the federal government commits to strengthening learning opportunities in the minority language as follows:

*(1.3) The Government of Canada is committed to advancing opportunities for members of English and French linguistic minority communities to pursue quality learning in their own language throughout their lives, **including from early childhood to post-secondary education.***

[Emphasis added]

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