Francophone Minority Communities: The Last Constitutional Standard-Bearers of Trudeau’s Language Regime

Emmanuelle Richez

Résumé de l’article
Les communautés francophones et Acadiennes du Canada (CFAC) ont été jusqu’à présent les principaux porte-étendards du régime linguistique de Pierre Elliott Trudeau sur le plan constitutionnel, en faisant la promotion d’un bilinguisme non-territorialisé par le biais de la revue judiciaire. Toutefois, ce régime s’effrite lentement et ne peut plus satisfaire les besoins des CFAC. Premièrement, cet article explique en quoi les droits des minorités linguistiques étaient la pierre angulaire du projet politique de Trudeau et comment une interdépendance idéologique s’est installée entre ce dernier et les CFAC. Deuxièmement, l’article décrit comment le contexte institutionnel d’après 1982 a grandement facilité l’atteinte des objectifs constitutionnels des CFAC. Troisièmement, il évalue dans quelle mesure leurs objectifs ont été satisfaits, en faisant un survol de la jurisprudence de la Cour Suprême basée sur la Charte dans le domaine des droits des minorités francophones, ainsi que de ses conséquences politiques. Enfin, l’article conclut que les CFAC ont épuisé le potentiel du régime linguistique de Trudeau et qu’elles doivent désormais le dépasser, si elles veulent assurer leur épanouissement futur.
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Abstract

The francophone and Acadian communities of Canada (hereinafter “FACC”) have until now been the primary constitutional standard-bearers of Pierre Elliott Trudeau’s constitutional language regime by promoting non-territorialized bilingualism through Charter-based judicial review. However, this regime is slowly being eroded by stealth and can no longer serve the interests of the FACC. This article first explains how minority language rights were the cornerstone of Trudeau’s political project and how an ideological interdependence developed between him and the FACC. Second, it describes the importance of the post-1982 institutional context in furthering the FACC’s constitutional objectives. Third, the article evaluates to which extent these objectives were fulfilled by conducting a general survey of the Supreme Court’s Charter jurisprudence in the area of francophone minority rights and its political consequences. It concludes that the FACC have exhausted the potential of Trudeau’s constitutional language regime and must now move beyond it, if they want to ensure their future well-being.

Résumé

Les communautés francophones et Acadiennes du Canada (CFAC) ont été jusqu’à présent les principaux porte-étendards du régime linguistique de Pierre Elliott Trudeau sur le plan constitutionnel, en faisant la promotion d’un bilinguisme non-territorialisé par le biais de la revue judiciaire. Toutefois, ce régime s’effrite lentement et ne peut plus satisfaire les besoins des CFAC. Premièrement, cet article explique en quoi les droits des minorités linguistiques étaient la pierre angulaire du projet politique de Trudeau et comment une interdépendance idéologique s’est installée entre ce dernier et les CFAC. Deuxièmement, l’article décrit comment le contexte institutionnel d’après 1982 a grandement facilité l’atteinte des objectifs constitutionnels des CFAC. Troisièmement, il évalue dans quelle mesure leurs objectifs ont été satisfaits, en faisant un survol de la jurisprudence de la Cour Suprême basée sur la Charte dans le domaine des droits des minorités francophones, ainsi que de ses conséquences politiques. Enfin, l’article conclut que les CFAC ont épuisé le potentiel du régime linguistique de Trudeau et qu’elles doivent désormais le dépasser, si elles veulent assurer leur épanouissement futur.

Since Prime Minister Pierre Elliott Trudeau repatriated the Canadian constitution in 1982 and entrenched within it the *Canadian Charter of Rights and Freedoms* (hereinafter “Charter”), no major constitutional amendment has been
adopted. In reality, the institutional and political constraints imposed by the new constitutional order made it extremely difficult—if not impossible—to reform the constitution formally (Russell; Manfredi and Lusztig; Cairns, *Charter versus Federalism*). This is not to say that there have not been noteworthy constitutional developments since. Instead of resulting from mega-constitutional politics, constitutional developments are now made through micro-constitutional politics, and especially through Charter-based judicial review (Russell and Howe; James et al.). Minority language rights, so dear to Trudeau and integral to the Charter, were the object of many successful legal challenges.

This article argues that the francophone and Acadian communities of Canada (hereinafter “FACC”) have until now been the primary constitutional standard-bearers of Trudeau’s constitutional language regime by promoting non-territorialized bilingualism through Charter-based judicial review. However, the article also suggests this regime is being slowly eroded by stealth and can no longer serve the interests of francophone minority communities. First, the article explains how minority language rights were the cornerstone of Trudeau’s political project and how an ideological interdependence developed between him and the FACC. Second, it describes the importance of the post-1982 institutional context in furthering the FACC’s constitutional objectives. Third, the article evaluates to which extent these objectives were fulfilled by conducting a general survey of the Supreme Court’s Charter jurisprudence in the area of francophone minority rights and its political consequences. It concludes that the FACC have exhausted the potential of Trudeau’s constitutional language regime and must now move beyond it if they want to ensure their future well-being.

**Trudeau’s Political Project and FACC**

Trudeau’s philosophy revolved around the idea of the “the just society” (*Values*). His vision of Canada was founded on the “purest liberalism, according to which all members of a civil society enjoy certain fundamental, inalienable rights and cannot be deprived of them by any collectivity (state or government) or on behalf of any collectivity (nation, ethnic group, religious group or other)” (*Values* 363). On the social front, “the just society” has amounted to liberal egalitarianism with the implementation of policies and constitutional guarantees favouring equality of opportunity. However, on the cultural front, it has not been perfectly equated with liberal pluralism as one may have thought. Liberal pluralism requires the state to be culturally neutral by refusing to grant special entitlements to groups based on their cultural affiliation. Yet, Trudeau’s Canada is one in which two official languages are recognized and given the means to strive. It is also a country in which the multicultural heritage of its citizens is affirmed. This is because Trudeau’s political project was anchored in the historical context of linguistic and cultural tensions in Canada.

Trudeau’s political project can be seen as a reaction to Quebec’s nationalism and a Canadian nation-building strategy (Burelle, *Trudeau*; Behiels,
Trudeau’s Legacy; Laforest, Trudeau). Influenced by the personalist philosophy of Emmanuel Mounier, Trudeau valued the inviolability of the person rather than that of the nation (Behiels, Trudeau’s Legacy). As he put it, “[i]t is not the concept of nation that is retrograde; it is the idea that the nation must necessarily be sovereign” (Trudeau, New Treason 151). Consequently, he was highly critical of the independence movement in Quebec that erupted in the 1960s. Judging from the arbitrariness of nation-state frontiers, he believed “nations” were social constructs as opposed to biological realities. He thought that French-Quebeckers’ nationalism, based on its adherents’ distinctive French culture, prompted the freedom of the Quebec nation-state to be favoured to the detriment of the freedom of its individual citizens. In Trudeau’s view, Quebec nationalism was not only parochial but also threatened the integrity of his beloved Canada (Trudeau, New Treason). His loyalty thus stood with Canadian federalism, which he saw as based on reason, rather than with a possible independent Quebec, which he believed would be based solely on emotion (Trudeau, New Treason).

Trudeau believed he could only counter Quebec nationalism and further Canadian unity, by invigorating bilingualism from coast to coast through the promotion of linguistic minorities’ rights across the country. He thus implemented the Official Languages Act in 1969 (hereinafter “OLA”), which established institutional bilingualism within the Canadian government. On the one hand, he thought this would make Quebec separatism’s cause irrelevant. The survival of the French culture in North America would now not only be ensured by Quebec closing in on itself through the pursuit of independence but by a bigger player on the world stage—that is, a truly bilingual Canada. Francophones would also be able to feel at home anywhere in Canada, which would on the other hand, strengthen their allegiance to the country (Trudeau, Bill of Rights). As for the anglophones, this newfound bilingual character would go a long way in differentiating them from their American counterparts and igniting in them a sense of national pride (Charbonneau).

However, Trudeau soon realized that official bilingualism had unleashed a cultural unrest in Canada among those who were of neither French nor English descent (A. Breton). In response to this growing “third force,” he adopted his multiculturalism policy in 1971. Officially, the policy simultaneously promoted “cultural retention” and “sociocultural integration” (Jedwab, To Preserve and Enhance). The recognition of a “cultural mosaic,” distinct from the American “melting pot” model, also contributed to reinforce Canada’s national pride. In reality though, the multiculturalism policy has tended to promote superficial cultural differences, rather than deep ones, to the benefit of a single social structure (Roberts and Clifton; Brotz). Noteworthy is the fact that it encouraged ethno-cultural groups to learn one of Canada’s two official languages. In that sense, the multiculturalism policy did not offset the importance of pan-Canadian bilingualism, which was at the heart of Trudeau’s political project.
Trudeau was able to reconcile his conflicting liberal universalist ideal and quest for national unity by promoting, and later entrenching in the Charter, the idea of “multiculturalism within a bilingual framework.” He accomplished this by “enshrining the rights of the individual members within minorities” (Values 364). This is why the linguistic rights of sections 16 to 23 were granted, in Trudeau’s view, to individuals and not to collectivities. Most importantly, they were not given to a territorially based community, such as the province of Quebec. Trudeau feared that such an arrangement would lead to the balkanization of Canada and to intolerance towards minorities living inside Quebec. However, Trudeau thought that in “certain instances, where the rights of individuals may be indistinct and difficult to define, [the Charter should] also enshrine some collective rights of minorities” (Values 364). This is why section 27 ensures the “preservation and enhancement of the multicultural heritage of Canadians.”

Nonetheless, Trudeau stressed that this provision specifically “avoid[s] any identification of [ethno-cultural] collectivities with a particular government,” thereby avoiding the possibility of balkanization and intolerance (Values 366). Moreover, as opposed to the linguistic provisions of the Charter, section 27 is considered an interpretive clause that does not guarantee a positive nor an absolute right in the domain of multiculturalism per se (Small).

Given that minority linguistic rights were of the utmost importance for Trudeau, he did not subject them to the notwithstanding clause found in section 33 of the Charter. This new pan-Canadian linguistic right scheme thus has the effect of severely reducing the federal and provincial governments’ capacity to affirm their parliamentary authority in language policy matters. Governments are left to rely exclusively on the limitation clause found in section 1 of the Charter to justify legislative choices that might be found to infringe language rights. Furthermore, the detailed nature of educational rights has been said to interfere directly with the provinces’ constitutional right to legislate in the field of education (Mandel). In the unique Quebec case, the new national linguistic rights regime goes against the province’s will to protect the culture and identity of its francophone majority, which is itself a minority in North America. This is all the more problematic since Quebec never signed off on the constitution (Laforest, Pour la liberté). Ultimately, Trudeau’s constitutional language regime amounts to non-territorialized bilingualism, which recognizes rights to every individual Canadian to use French or English across the country, as opposed to a territorialized bilingualism, which would give collective rights to national minorities, such as to French-Quebeckers to protect their language (Burelle, Mal Canadien).

Just as Trudeau needed the presence of healthy francophone communities outside Quebec to further his nation-building project, those communities needed Trudeau’s language regime to strive. Although Trudeau’s pan-Canadian linguistic rights scheme benefitted equally in theory the anglophone and francophone minority communities, in reality, it mostly benefited the latter.
This can be explained by the fact that French-speaking minorities outside Quebec have evolved in quite a different setting than the English-speaking minority in Quebec. First, the precarious status of FACC can be contrasted with the established special status of the anglophone community in Quebec. The latter can be qualified as a “dominant minority” due to its direct tie to the English majority in Canada (Woehrling). Second, consociational arrangements have given the anglophone community several institutional privileges in Quebec (Stevenson). Even prior to the adoption of the Charter, the “Quebec clause” found in the 1977 Charter of the French language (also known as “Bill 101”) guaranteed access to English education to the province’s historical anglophone community. Though the proportion of the anglophone Quebec population has been declining since the late 1970s, the English language in Quebec continues to have an important power of attraction, especially among allophones (Jedwab, Les anglophones du Québec).

Since the FACC had much to gain from Trudeau’s language regime, it came as no surprise that they became its greatest champions from the beginning. Starting in the late 1960s, they supported Trudeau’s adoption of the OLA (Cardinal and Juillet). During the 1970s and 1980s, the FACC also argued for a more robust language rights regime during the debates leading to the constitutional modification of 1982 (Behiels, Canada’s Francophone Minority) and the subsequent revisions of the OLA in 1988 and 2005. While they have remained supporters of Trudeau’s language regime, they have been critical of its application and have argued for a more expansive pan-Canadian linguistic scheme (Cardinal, Minorités francophones). Franco-Ontarians and Acadians in New Brunswick were successful in having a more generous set of rights recognized at the provincial level (Sylvestre; Migneault).

More fundamentally, Trudeau’s definition of Canadian identity resonated with FACC’s own sense of identity. With time, the FACC had become the greatest defenders of non-territorialized bilingualism. First, the relinquishment of the “French Canadian” identity by a majority of Quebec francophones to the profit of the “Québécois” identity, following the Quiet Revolution, signified the collapse of “French Canada” as it had been known (Martel). With Québécois now preferring territorialized bilingualism for their cultural survival—with Quebec as the homeland of francophones and the Rest of Canada as that of the anglophones—the Canadian francophone diaspora was left to fend for itself. Consequently, the FACC redefined their identity and political organization on a provincial basis and demanded the right to bilingual services for all Canadians irrespective of their geographic situation (Juteau Lee). Second, the abandonment of the Catholic faith as one of the distinctive unifying traits of francophone minority communities left their use of the French language as their only collective marker of identity (Choquette). This trend has recently been reinforced by an increasing francophone international immigration in minority settings that does not share French Canadian historical culture and memory.
Moreover, a new generation of francophones in minority settings furthers the ideal of Trudeau by defining itself foremost as bilingual, as opposed to francophone or anglophone (Gérin-Lajoie).

The Post-1982 Institutional Context

The constitutional entrenchment of the Charter in 1982 dramatically changed Canada’s institutional context and gave way to the judicialization of politics (see for e.g. Morton and Knopff; Manfredi, Judicial Power). Just as Pierre Elliott Trudeau had intended, it gave the courts, and especially Supreme Court of Canada, a greater role in interpreting the scope of rights and limiting the power of governments (Constitutional Declaration). Before 1982, the courts had mainly served as an umpire of federal–provincial relations under the 1867 constitution, but the new constitutional regime gave them the power to adjudicate effectively citizen–state relations. First, section 52(1) of the Constitution Act, 1982 substituted constitutional supremacy for parliamentary supremacy in Canada. Second, section 24(1) gave the courts the power to enforce the rights found in the Charter. Judicialization of politics greatly facilitated the promotion of Trudeau’s language regime by the FACC. Language rights challenges brought by the latter have had a high success rate (Riddell; Fraser; Manfredi, “Appropriate and Just”). This can be attributed to four factors: the entrenchment of new linguistic rights, the development of a support structure for legal mobilization, judicial leadership, and governmental compliance.

Unlike many bills of rights, the Charter goes beyond protecting political and civil rights by recognizing specific linguistic rights as well. These rights are of two categories. First, official language rights, found in sections 16 to 22, give French and English the status of official languages in the operations of the federal government and the government of New Brunswick. They extend the rights found in section 133 of the Constitution Act, 1867, and constitutionalize the principles of the OLA. The second category of linguistic rights included in the Charter is minority language educational rights in section 23. Their addition to the constitutional edifice of Canada was a novelty. While denominational education rights had been protected since Confederation, the courts had ruled that they did not include linguistic education rights (Mackell; Bureau métropolitain des écoles protestantes de Montréal). The constitutional entrenchment of this new pan-Canadian linguistic scheme prompted the FACC to mobilize to make it a reality (Behiels, Canada’s Francophone Minority; Cairns, “Fragmentation”; Foucher).

In attempting to implement this linguistic scheme through remedial decree litigation, the development of an advocacy support structure proved to be determinative (Epp). The federal Court Challenges Program (CCP), put in place in 1978 under Trudeau, was key in giving francophone minority communities the needed legal resources in constitutional test cases to further their policy goals (Brodie; Cardinal, “Pouvoir exécutif”; Canada, Library of Parliament;
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Pal). When the CCP was terminated in 2006, another governmental initiative was created in replacement, albeit with reduced means, with the Language Rights Support program in 2008. The Supreme Court has also been active in supporting the FACC by compensating successful litigants for the costs they incur. The court has even surprisingly dismissed with costs appeals made by francophone minorities (Société des Acadiens I; DesRochers). Lately, the court recognized the necessity to grant interim costs in linguistic rights litigation taking place in a provincial court because it was deemed of public interest (Caron).

This raises the important question of judicial leadership in linguistic rights jurisprudence. As will be shown, the Supreme Court of Canada has greatly favoured the FACC with its purposive approach to constitutional language provisions and has played an important role in furthering Trudeau’s ideal of a bilingual country from coast to coast. As will also be discussed, governments have followed suit by implementing the Supreme Court’s favourable decisions. The fact that minority language rights are exempted from the application of the notwithstanding clause found in section 33 of the Charter impelled such a legislative compliance. Nevertheless, in certain cases, the authorities even exceeded their constitutional obligations or reversed unfavourable judicial decisions to the benefit of the FACC.9

It is only by taking all these factors in consideration, that one can have a comprehensive understanding of the impact of judicial review in the area of francophone minority rights and its philosophical underpinnings.

The Impact of Minority Language Rights Review

Language rights challenges brought by francophone minorities before the Supreme Court have greatly promoted Pierre Elliott Trudeau’s ideal of a non-territorialized bilingualism. The linguistic fight of francophones outside Quebec focused on the recognition of official language rights at the federal level and within the province of New Brunswick, as well as that of education rights at the provincial level. While some legal gains were made on the official language rights front, much more success was gained on the education rights front. In the official language rights cases, the court was mostly asked to widen the scope of rights already literally applied in practice prior to the adoption of the Charter. In the educational rights cases, the court was called upon to define and implement new rights.

Official Language Rights

As previously mentioned, access to bilingual services at the federal level was guaranteed by the OLA in 1969. Yet, the constitutionalization of its principle in the Charter brought about legal gains for linguistic minorities. In DesRochers v Canada (2009), the court affirmed without hesitation that section 20(1) of the Charter10 and section IV of the OLA,11 read in light of section 16(1) of...
the Charter, warranted the right to services of equal quality in both French and English. The justices found that the principle of linguistic equality in communications and the provision of services could entail access to services with distinct content for the minority. Justice Charron, writing for a unanimous court, held that “[d]epending on the nature of the service in question, it is possible that substantive equality will not result from the development and implementation of identical services for each language community” (par. 51). This interpretation of the underlying principles of sections 16(1) and 20(1) of the Charter created an important precedent for the FACC. However, the court was careful to qualify this new right to services of equal quality under the OLA. First, the court specified that under part IV of the OLA, the federal government did not have to provide a set minimum level of quality or to satisfy the needs of both the majority and minority completely. Second, the court contended that the right to services of equal quality did not necessarily have to produce equal outcomes for the majority and the minority. In DesRochers, the justices agreed that while the economic development services provided to the French-speaking community of Huronia by the federal government did not have the same results as the ones provided for the English-speaking community, considering all the evidence, they could not conclude that these services were not of equal quality. Consequently, the federal government was not required to improve its services to the minority.

Contrary to all other Canadian provinces, New Brunswick fully opted into the national linguistic regime created by the Charter, by guaranteeing to its Acadian community the official language rights also guaranteed to all Canadians at the federal level (Tuohy). In reality, these rights had already been recognized in the Official Languages Act of New Brunswick (hereinafter “OLANB”) since 1969. In 1993, the federal government and New Brunswick bilaterally amended the Charter to include section 16.1, which recognizes explicitly the equality of status and rights of the two linguistic communities of New Brunswick, including the right to distinct educational and cultural institutions. However, the constitutional challenges brought before the Supreme Court by New Brunswick Acadians have been based on official language rights rather than on those relating to education and culture. In Société des Acadiens v Association of Parents (1986), Acadians failed to have the right to a bilingual judge recognized under section 19(2) of the Charter. A majority of the court insisted that due process already gave them the individual right to be heard by members of the bench that were “capable by any reasonable means of understanding the proceedings, the evidence and the arguments, written and oral, regardless of the official language used” (par. 76). However, the court eventually explicitly disavowed this approach in R v Beaulac (1999). While the decision in Société des Acadiens I was not judicially reversed, New Brunswick amended the OLANB in 2002 in order to protect the right of litigants to be understood in one of the two official languages by the judiciary “without the assistance
of an interpreter or any process of simultaneous translation or consecutive interpretation” (sec. 19(1)). Finally, in Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v Canada (2008), the court held that the Royal Canadian Mounted Police, acting as New Brunswick’s provincial police, had the constitutional obligation to serve citizens of the province in both official languages under section 20(2) of the Charter.\textsuperscript{15} As of 2010, nearly 65 percent of the officers operating in the province were bilingual and learning programs had been put in place to further the learning of both official languages (Canada, RCMP New Brunswick).

**Minority Language Educational Rights**

The FACC have been even more successful in having educational rights recognized under the Charter than official language rights. In all the cases, the demands formulated by the linguistic minority under section 23 were given a positive response by the judicial branch. In the landmark case of Mahe v Alberta (1990), Chief Justice Dickson declared that the main purpose of section 23 of the Charter was “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” (par. 31). According to the court, section 23 accomplishes this objective de facto by granting a general right to minority language education.

Section 23 jurisprudence clarified the provinces’ obligation to fund educational facilities in the language of the minority to the benefit of francophones outside Quebec. The general right to minority language education of section 23 is qualified by subsection (3)(a), which specifies that publicly funded education for the minority will only be guaranteed where the number of children is sufficient, and subsection (3)(b), which adds that where the number is sufficient, instruction will be given in publicly funded “minority language educational facilities.” In Mahe, Chief Justice Dickson believed that subsections (3)(a) and (3)(b) should not be read as separate rights, but rather as encompassing a “sliding scale” requirement, in which section (3)(a) would be the minimum level of right to which linguistic minorities are entitled and section (3)(b) the maximum one.

The court established in Mahe that the “sufficient number” requirement of section 23(3)(a) did not call for an explicit standard. In Chief Justice Dickson’s view, provincial governments had to base their analysis on “the number of persons who will eventually take advantage of the contemplated programme or facility” (par. 78) and then determine if granting such a programme was pedagogically and financially sound. However, it was noted that pedagogical concerns should have a greater weight in the balance than financial ones. In other words, the rights of individual students should be more important than the province’s financial interests. As per Chief Justice Dickson, the rights given to individual
children of the minority would have the effect of benefiting the linguistic minority community as a whole:

In addition, it is worth noting that minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where the minority community can meet and facilities that they can use to express their culture. (par. 33)

It followed in Reference re Public Schools Act (Man.) (1993) that governments had to provide minority language schools with a distinct physical setting from the majority language schools for them to be able to act as true “community centers.” The court further decided in Doucet-Boudreau v Nova Scotia (2003), that when a francophone community was entitled to educational facilities under section 23, the judiciary could have the jurisdiction of hearing reports on the implementation of school facilities under section 24 of the Charter16 to prompt authorities to act expediently and thus ensure that the minority language educational rights protected in the Charter were meaningful.

It was further decided in Mahe, that the wording of section 23(3)(b), as made evident in the French version of the Charter, warranted “management and control” of a minority-language school by the minority. As Chief Justice Dickson put it, the concept of “minority language educational facilities” would have no purpose nor place within the ambit of section 23(3) if it did not guarantee linguistic minorities a certain degree of administrative overview. Moreover, Chief Dickson noted that granting such a power was consistent with the overall purpose of section 23, which is to protect Canada’s official languages culture in minority settings. The court determined that in order to fulfill section 23’s purpose, “management and control” would need to be given to the minority for educational issues affecting their language and culture. While this could entail the creation of a completely separate school board, this was not necessary. In Mahe, the justices believed it simply meant giving francophone parents in Edmonton significant representation on the existing school board and guaranteeing them exclusive control of issues involving linguistic and cultural concerns. While in Reference re Public Schools Act (Man.), it meant the creation of an independent French-language school board in Manitoba, in Arsenault-Cameron v Prince Edward Island (2000), it meant respecting the Prince Edward Island French Language Board’s prerogative to determine the location of instruction of the linguistic minority. As expected, the provincial governments complied with the court’s decisions in the area of educational rights. In the case of Mahe, the government of Alberta even exceeded its constitutional obligations under the Charter by granting its linguistic minority a separate school board system.

In sum, the FACC furthered Trudeau’s political ideal with the complicity of the courts. Though Trudeau had never intended for them to have full school governance in certain cases (Behiels, Trudeau’s Legacy), the Supreme Court
came to the realization that individual linguistic rights of francophones could only be achieved by the granting of a collective community right. In Ontario, the legislators and the courts also understood that French language services had to be designed with community collective rights, such as the right to a French language hospital, like Montfort in Ottawa (Lalonde). While this collective interpretation of linguistic rights looks a priori contrary to Trudeau’s intention, given his preference for strictly individual rights, it would be wrong to view this development as anti-Trudeauvian. The possibility to gain greater “institutional completeness” (R. Breton, “Modalités d’appartenance”; R. Breton, “Institutional Completeness”) in matters of education and health helped many francophone minority communities feel more at home in Canada, just as Trudeau had wanted.

Discussion and Conclusion

As the constitutional standard-bearers of Trudeau’s language regime, francophone minority communities were highly successful in having their rights recognized by the judicial and executive branches. In that sense, their Charter-based challenges have recast state–minority relations in Canada in the direction Pierre Elliott Trudeau had hoped. Their rights gains conflicted with the rights of the majority, or preferably here, governmental interests. There is a general agreement that providing services in the language of the minority increases costs. Yet for Trudeau, the benefits of implementing bilingual services across Canada most certainly outweighed these additional costs. Again, it was important for him that the rights of the individual members of linguistic minorities were not infringed by majorities.

Nevertheless, Trudeau’s constitutional language regime seems to have reached its limits for the FACC. As the Supreme Court has shown, the minority linguistic rights of the Charter cannot be blindly upheld without regard for the public purse. For example, the judiciary has qualified the rights of the FACC under the “where numbers warrant” provision of section 23(3) and in turn limited their host province’s financial obligations towards them. In addition, the “sliding scale” approach developed in Mahe gave provincial governments some flexibility in formulating educational policies (Urquhart). This is an indication that minority language rights are not absolute, perhaps because of their political nature, and have to be weighed against the interests of the majority as a whole.

Additionally, Charter-based judicial review has not protected equally all the members of the French linguistic minority. As per Michael D. Behiels, “[section] 23 as written and interpreted by the Supreme Court, left the smallest, assimilation-ravaged communities with fewer rights than the larger, more self-supporting communities” (Canada’s Francophone Minority 178–79). As francophone communities outside Quebec are plagued by ravaging assimilation rates, they will certainly soon lack the necessary political power to further the
Trudeauvian dream. In that sense, territorial bilingualism may triumph through force of circumstance. The fate of the FACC thus remains decidedly dependent on the federal and provincial governments’ will to go beyond constitutional requirements and actively promote their cultures.

Interestingly, the concretization of Trudeau’s language regime by the FACC through Charter-based judicial review has pitted them against the Québécois. Most Québécois accepted the concept of expanded official bilingualism conferred by the OLA in 1969 and in 1988. However, they did not want Ottawa to use the OLA or the Charter to undermine Bill 101’s language regime completely. To the Québécois’ disappointment, the Supreme Court of Canada has adopted a “constitutional parallelism” approach regarding the interpretation of minority language rights, which consists of treating linguistic minorities equally regardless of their spoken official language (Tuohy; Ryan). The purposive approach developed in francophone minority educational rights cases was used recently to justify the right of allophone and francophone Quebeckers to gain access to publicly funded English instruction in certain circumstances (Solski; Nguyen), thereby reducing Quebec’s means to ensure the survival of its French public culture. In these particular cases, several francophone minority organizations intervened against the Quebec government to ensure the jurisprudence would favour linguistic minorities rather than government interest. This creates a problematic state of affairs since the FACC believe that their fate is intertwined with the vitality of the French language in Quebec.

In the end, francophone minority communities seem to have exhausted the potential of Trudeau’s constitutional language regime. Most of the Charter’s language rights provisions are self-explanatory and have already been delimited by the courts. Therefore, any new constitutional legal challenge brought by linguistic minorities is unlikely to bring about significant changes to the meaning of Canadian bilingualism. The only exception to this state of affairs is possible future judicial articulations of section 16, which pertains to “Official languages of Canada.” So far, this guarantee has been interpreted by the Supreme Court as declaratory as opposed to remedial (Société des Acadiens I; DesRochers). However, by stipulating in her minority opinion in Société des Acadiens I (1986) that section 16 provided for “gradual progression towards the ultimate goal of bilingualism” (par. 138) “to meet gradually increasing social expectations” (par. 180), Justice Wilson did open the door to further litigation.

Since Trudeau’s constitutional language regime cannot guarantee the long-term vitality of French outside Quebec, francophone minority communities need to find alternate ways to do so. One possible avenue is to abandon the ideal of non-territorial bilingualism and to opt for a new type of territorial bilingualism instead. Originally, territorial bilingualism referred to the idea of a unilingual francophone Quebec and a unilingual anglophone Rest of Canada.
in which the FACC were sacrificed. The new proposed territorial bilingualism would additionally require the recognition of delimited francophone community homelands outside Quebec. It would entail establishing “bilingual districts” in areas where francophones make-up a significant part of the population. That said, these districts would provide a wider range of services to the FACC than they are presently entitled to constitutionally. The recommendation for such districts had been made by the Royal Commission on Bilingualism and Biculturalism’s final report in 1969, but had not been retained by the federal government in the elaboration of the OLA. This type of asymmetrical bilingualism is gaining ground among the FACC, especially in the Acadian community (Bourgeois; Thériault).

This new type of territorial bilingualism could be achieved at first through administrative means, and in time through constitutional means. The FACC’s goal should be to convince governments to increase the types of services available substantially in targeted geographical areas where a large number of francophones reside, in view of ensuring self-supporting communities eventually. Stephen Harper’s government seems to be moving in that direction. Since the amendment of the OLA in 2005, the federal government has the duty to take positive measures for the implementation of the commitment set out in part VII, which is to support and assist the development of official language minority communities. In order to do this, the Harper government has adopted a Roadmap for Canada’s Linguistic Duality 2008–2013. This strategy aims at increasing support for linguistic minority communities in the areas of health, immigration, justice, economic development, and arts and culture. The delivery of related services is determined by federal–provincial agreements in which the provinces maintain great policy latitude. Many provinces already provide some services to their francophone communities in designated areas. Therefore, the implementation of true homelands for the FACC is slowly taking shape.

Though the implementation of this new type of territorial bilingualism would mean sacrificing the smallest, assimilation-ravaged communities, it might be the only long-term solution to ensure the vitality of the major francophone minorities outside Quebec. According to Rodrigue Landry, the revitalization of francophone minority communities that suffer from the linguistic transfers of their members to the benefit of the anglophone majority is dependent notably on federal–provincial co-operation to achieve “institutional completeness.” If the FACC prefer having stronger institutions of their own in limited geographical areas, and to abandon the ideal of bilingualism from coast to coast, Trudeau’s language regime will be left with no real supporter.
Notes

1. In 1984, the Canadian constitution was amended to define Aboriginal treaty rights further, taking into account land claims agreements and gender equality. Section 16.1, which recognizes the equal status of the English and French linguistic communities in New Brunswick, was added to the Charter in 1993. In 1994, a bridge, as opposed to ferry transportation services, became the condition for the province of Prince Edward Island’s adhesion to Confederation. In 1997, Quebec was allowed to restructure its school board system on linguistic lines rather than on a denominational basis. In 1998, the province of Newfoundland was given exclusive authority to reform its education system and Nunavut was officially recognized as a Canadian territory. Finally, in 2001, the province of Newfoundland was renamed the province of Newfoundland and Labrador.

2. The Constitution Act, 1982, provides different amending formulas depending on the nature of the proposed amendment. While amendments requiring unanimous consent (section 41) or the general amending procedure (section 38) are hard to achieve, amendments of provisions relating to some but not all provinces (section 43) and amendments by Parliament (section 44) are less cumbersome. Most of the amendments made to the Canadian constitution since 1982 have been made according to section 43 (see supra note 1).

3. The early Trudeau claimed to follow the communitarian personalism of Emmanuel Mounier and Jacques Maritain. But according to André Burelle, the later Trudeau wrongly equated personalism with liberal individualism to serve his political passions and dropped the “communitarian” aspect of personalism that would have warranted a greater accommodation of Quebec’s national aspirations (Trudeau).

4. Whether sections 16 to 23 of the Charter only entrench strictly individual rights is debatable. Some provisions imply the existence of minority language communities. For example, section 20 provides that the right to minority language services offered by the federal government is contingent on significant demand and section 23 specifies that the right to minority language instruction is only guaranteed in places where numbers warrant. Section 16.1, which was only added in 1993, explicitly refers to the equality of status, rights, and privileges of the English and French linguistic communities in New Brunswick. This is also why section 25 of the Charter and section 35 of the Constitution Act, 1982, guarantee specific collective rights for the Aboriginal peoples of Canada.

5. Section 33(1) of the Charter reads as follows: “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.”

6. Section 1 of the Charter reads as follows: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
7. More precisely, section 72 and 73 of Bill 101 required that all children attend public elementary and secondary school in French with the exception of those whose parents had received primary school instruction in English “in the province of Quebec.”

8. As will be discussed, this was the case in Société des Acadiens v Association of Parents (1986) and in Mahe v Alberta (1990).

9. Section 20(1) of the Charter reads as follows: “Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where (a) there is a significant demand for communications with and services from that office in such language; or (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.”

10. Section IV of the OLA pertains to the “communications with and the services to the public” of the federal government.

11. Section 16(1) of the Charter reads as follows: “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.”

12. The Court of Appeal of New Brunswick ruled in Charlebois v Mowat (2001) that section 18(2) of the Charter, read in light of section 16.1, warrants the right to municipal bilingual laws where the minority language population is significant.

13. Section 19(2) of the Charter reads as follows: “Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.”

14. Section 20(2) of the Charter reads as follows: “Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.”

15. Section 24(1) of the Charter reads as follows: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

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