REFLECTIONS ON ACCESS TO JUSTICE BY ONTARIO'S FRANCOPHONE VISIBLE MINORITIES*

ABSTRACT

The issue of access to justice is critical in guaranteeing the sustainability of an independent, impartial judicial system in a free and democratic country such as Canada. Yet can we speak of access to justice for Francophone visible minorities in Ontario, who constitute a minority within the minority? This article's answer is affirmative and provides the criteria on which the right of access to justice for Ontario's Francophone visible minorities is based.

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The *Constitution Act, 1867*[1] gives all persons standing before the courts the right to use English or French in Canadian courts of law. This legal recognition is a fundamental language right because it forms the foundation of Canada's linguistic duality. In this context, we believe that the courts have been called upon to play a decisive role in the advancement of language rights for Francophone minorities living outside Quebec, who have often turned to the judicial system to claim their right to use French. Furthermore, the Supreme Court of Canada has handed down over 50 decisions recognizing the language rights of Francophone minorities living outside Quebec. However, these language gains are no guarantee of equality between Canada's two official languages, since access to justice in French remains a serious problem for those Francophones living in minority communities; it's especially true for Francophone visible minorities, who constitute a minority within Ontario's Francophone minority.

That particular community will be the focus of this article, which begins by presenting an overview of the demographic weight of Ontario's Francophone visible minorities and subsequently examines the problems that they face in their interactions with Ontario's judicial system.

Ontario's Francophone visible minorities: A minority group in Ontario's Francophone minority communities

The 2001 Census shows that 548,940 Ontario residents have French as their mother tongue (5% of the total provincial population), of whom 59,000 (or 10% of the Francophone population) identify themselves as visible minorities. Also, between 1996 and 2001, more than 3 in 5 members of the Francophone visible minority came from another country (63%), while 1 in 3 came from Quebec (33%). Three-quarters (74%) were born outside Canada, including 32% from Africa, 31% from Asia and 18% from the Middle East. More than 33% live in Toronto, while 15% have settled in Ottawa and Hamilton (Office of Francophone Affairs 2005 and 2006). Statistics Canada also noted that these figures were expected to rise between now and 2017 (Statistics Canada 2003 and 2005).

Visible minority Francophones are also younger than the Francophone population as a whole, since 39% of youth under 20 years of age indicate that they belong to that community, as compared to 19% for the general Francophone population. Their level of education is substantially higher (32% have a university degree) than that of Ontario's Francophone population as a whole (15%). Despite this, the employment income of members of Francophone visible minorities is lower than that of the rest of Ontario's Francophone minority ($29,039 as opposed to $35,796) and their unemployment rate is much higher (11.2% as opposed to 6.1%) (*Idem.* 2005). These data reveal not only that Francophones from visible minorities form a minority within a minority (Ontario's Francophonie) but also that they are a vulnerable group within Ontario, despite the fact that they add to the demographic weight of Ontario's Francophonie.

Principles relating to the concept of "access to justice" in Canada

Let us now examine the concept of access to justice to determine its basis in law. An overview of Canada's legislative framework makes it clear that Canada's Constitution contains a number of

legislative provisions dealing with the concept of access to justice in both official languages. Sections 133 of the *Constitution Act, 1867*, 23 of the *Manitoba Act*,[2] 16 to 23 of the *Canadian Charter of Rights and Freedoms*[3] and 530 and 530.1 of the *Criminal Code*[4] all recognize legislative or parliamentary bilingualism, the use of English or French before the courts or in the delivery of government services, the status and privileges of the two official languages, education rights and the use of French in criminal trials.

The Supreme Court of Canada has, in fact, proceeded to construe these provisions in several cases, stressing first and foremost the progressive nature of access rights to justice in the language of the minority in Canada.[5] Recently, in *Beaulac*,[6] *Arsenault-Cameron*[7] and *Montfort*,[8] the highest court in the land and the Ontario Court of Appeal took a progressive approach to language rights in upholding the following three principles:

- The State must take positive steps to recognize equality of status between Canada's two official languages;
- The purpose of language rights is to redress previous injustices suffered by the minority community;
- Substantive equality requires that official language minorities can be treated differently than the majority, owing to their minority status and particular needs.

While these principles mark a significant advancement in terms of equality of the two official languages with respect to access to justice, they cannot be applied satisfactorily to the specific socio-judicial needs of the Francophone visible minorities, owing to their broad scope, which may give rise to different constructions.

For this reason, a field research with Francophone visible minority community leaders conducted for the University of Ottawa Community Legal Clinic (UOCLC) on the question of access to justice for Francophone visible minorities reveals that access rights to justice for their communities include the following:

- Access to legal aid and legal representation in French;
- Access to rehabilitation programs sensitive to cultural diversity;
- Adequate presence of Francophone visible minorities within the judicial system;
- Training of members of the judicial system in cultural diversity;
- Access to a community legal education system in French.[9]

The following paragraphs examine the difficulties faced by Francophone visible minorities with respect to the aforementioned elements.

Access to legal aid and legal representation in French

Access to legal aid is essential to the sustainability of a liberal state such as Canada because it rests on three principles essential to democracy: universality, accessibility and equality (Government of Canada 2007, Etherington 1994). The concept of equality is particularly significant because it means that every person must enjoy, without discrimination, the right of access to an independent, impartial tribunal ruling on civil disputes and/or criminal trials. These principles must be enshrined within clear public policies intended to make legal aid accessible to all, including Francophone visible minorities, most of whom are often newcomers to Canada and do not know where to begin when they have to resolve immigration or family issues. On this point, the research conducted by the UOCLC indicates that Francophone visible minorities perceive Ontario's legal aid system as being slow and unwieldy, which adds to the stress of their integrating into Canada. Legal aid eligibility rules are so complicated that members of Francophone visible minorities who are before the courts often fail to understand the difference between Ontario's legal aid and its community legal clinics.

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Research by the UOCLC demonstrates that legal aid lawyers attach little importance to cases involving members of Francophone visible minorities, for financial reasons. Members are not encouraged to use French before the provincial courts, despite the fact that the *French Language Services Act*[10] and the *Courts of Justice Act* give them the right to legal services and legal representation in French while up against Ontario's judicial system.

Access to rehabilitation programs sensitive to cultural diversity

The goal of Canada's penal system is to punish via sanctions and rehabilitate via social and cultural programs that are sensitive to diversity (Wortley 1999). From this perspective, criminal law lies at the heart of our positivist judicial system, in that it constitutes the State's weapon to punish social elements that disobey the established social order. UOCLC's research shows that, if the penal system sometimes falls short on the punishment side, it is especially weak on the rehabilitation side. This weakness stems from the fact that some rehabilitation programs are culturally insensitive to the sociocultural realities existing within Francophone visible minorities. Failure to consider the diversity existing within visible minorities makes it impossible to respond appropriately to the needs of certain particularly vulnerable communities. Furthermore,

members of Francophone visible minorities have little or no awareness of most rehabilitation programs, whose relevance has yet to be assessed.

Another factor identified in the UOCLC study is the impact of the criminal justice system on Francophone visible minorities. Many Francophone racial minorities are ignorant of the many aspects of Canada's penal system and of the procedures applied in the administration of justice. As a result, they are often caught unawares when they must confront the penal system for offenses whose nature they do not always understand. At this level, the issue is to understand not just that Canadian law prohibits certain activities but also how the penal system will respond to their perpetration. This state of affairs reaffirms the results of research conducted in the United States, Great Britain and Canada demonstrating that visible minorities mistrust the legal system in those countries, owing to the negative experiences of those groups in their interactions with different branches of the judicial system (Bowling and Phillips 2002, Wortley 1997).

Adequate presence of Francophone visible minorities within the judicial system

Canada views itself as an international champion of diversity and multiculturalism and has established a number of policies and programs to foster diversity and multiculturalism nation-wide (Government of Canada 2003, 2008). However, Francophone visible minorities often note the absence of mechanisms within the current social structures that would help facilitate their integration into the judicial system, for the following reasons:

- Canada's judicial system is primarily an Anglo-Saxon system that does little to encourage the participation of those minorities within its structures;
- The system providing access to the legal profession is so complicated that many members of Francophone visible minorities who begin law studies are never admitted to the bar and abandon the profession;
- The foreign credentials recognition procedure is lengthy and forces visible minorities to live in straightened socio-economic conditions, without providing any guarantees that their foreign attainments will be recognized.

Training of members of the judicial system in cultural diversity

As a signatory to the *International Convention on the Elimination of All Forms of Racial Discrimination*, the Committee on the Elimination of Racial Discrimination requires that Canada provide training on cultural diversity to its officers of the law and members of the judicial system to raise their sensitivity to the realities experienced by Francophone visible minorities. However, research by the UOCLC shows that the judicial system does not educate Canada's judicial system concerning the diversity existing within Francophone visible minorities. Failure to recognize this diversity interferes with the efficient integration of Francophone visible minorities within a judicial system that sometimes fails to comprehend their cultural realities.

Access to a community legal education system in French

A community legal education system is the key to understanding the judicial system and thereby to obtaining greater access to it. It is the *sine qua non* condition for establishing constructive relations between Canadians and the judicial system. The results of the UOCLC's research demonstrate the enormous need among Francophone visible minorities for community legal education in terms of Canadian laws, services related to the judicial system, how the judicial system functions and Canadian values with respect to justice. However, the research also demonstrates that community leaders from Francophone minority communities are unfamiliar with community legal education programs in French because these are inaccessible; it further shows that those leaders believe that they should have been consulted when the programs were developed.

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Conclusion

A review of the access to justice system demonstrates that the number of trials in French in Ontario has increased steadily over the last 20 years. However, the reality in terms of access to justice for Francophone visible minorities requires that we take into account not only language but also race and status when administering access to justice policies and programs. We must not only ensure that services are delivered in French to the entire province and that a policy of actively offering services in French developed or implemented, but also that policies and programs relating to access to justice in French take into account the racial and religious diversity existing within Ontario's Francophonie.

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Notes

* The views expressed in this article are those of the authors and do not necessarily reflect those of the Department of Canadian Heritage or the Social Sciences and Humanities Research Council of Canada.

1 *Constitution Act, 1867,* (U.K.), 30 and 31 Vict., c. 3.

2 *Manitoba Act, 1870,* (U.K.), 33 Vict., c. 3.

3 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* forming Schedule B of the *Canada Act 1982* (U.K.) (1982) c. 11.

4 *Criminal Code,* R.S.C. (1985), c. C-46, Part XVII, s. 530, 530.1.

5 *Jones* v. *A.G. New Brunswick* (1975) 2 S.C.R. 182; *A.G. Quebec* v. *Blaikie (No. 1)* (1979) 2 S.C.R. 1011; *A.G. Quebec* v. *Blaikie (No. 2)* (1981) 2 S.C.R. 312; *Beauregard* v. *Canada* (1986) 2 S.C.R. 56; *McConnell* v. *Fédération des Franco-Colombiens* (1986), D.L.R. (4d) 293; *Devine* v. *A.G. Quebec* (1988) 2 S.C.R. 790; *Ringuette* v. *Canada and Newfoundland* (1987), 63 NPEIR 126.

6 *Beaulac* v. *R.*, (1999) 1 S.C.R. 768.

7 *Arsenault-Cameron et al.* v. *Government of Prince Edward Island* (1999) 3 S.C.R. 851.

8 *Lalonde et al.* v. *Commission de restructuration des services de santé,* Ontario Court of Appeal, docket C33807, December 7, 2001.

9 *Ibid.*

10 *French Services Act,* R.S.O. (1990), c. F.32.

11 *Courts of Justice Act,* R.S.O. (1990), c. C.43.