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CHARTER OF RIGHTS AND FREEDOMS

Inquiry—Debate Continued

Speech by:

The Honourable Claudette Tardif

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THE SENATE

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[*Translation*]

CHARTER OF RIGHTS AND FREEDOMS

INQUIRY—DEBATE CONTINUED

On the Order:

> Resuming debate on the inquiry of the Honourable Senator Cowan calling the attention of the Senate to the 30th Anniversary of the *Canadian Charter of Rights and Freedoms*, which has done so much to build pride in our country and our national identity.

Hon. Claudette Tardif (Deputy Leader of the Opposition): Honourable senators, it is an honour for me to speak to Senator Cowan's inquiry to mark the 30th anniversary of the Canadian Charter of Rights and Freedoms, and at the same time, recognize the important role that the Charter has played in Canadian society over the past 30 years. I would like to thank our honourable colleague for this excellent initiative.

I would like to speak briefly about the essence of this document and its place in the hearts of Canadians, as well as address in greater detail the impact that section 23 has on official language minority communities.

As others have so eloquently pointed out, since 1982, the Charter has played an important role in defining the fundamental values of our country. The Charter reflects the challenges of a modern, multicultural society and our country's linguistic duality. The Charter draws its strength from a universal understanding of human rights while emphasizing rights that are particularly relevant to Canadian history, including language rights.

[*English*]

The Canadian Charter of Rights and Freedoms has been nothing short of monumental for disadvantaged and marginalized groups. These groups may not necessarily have the ear of cabinet ministers or others at the centre of political power who must often seek to please the majority, but the Charter helps ensure that their rights are recognized and protected.

Over the last 30 years, the Charter has played an essential role in defining the character of our nation — a prosperous, just and enlightened society, one that welcomes newcomers and new ideas with enthusiasm. With the Charter in hand, Canadian judges have laid down decisions on issues ranging from abortion to Aboriginal land claims, same-sex marriage to safe injection sites.

For example, section 2 of the Charter addresses freedom of expression, and there has been some truly lasting jurisprudence in this area, including the limits to free speech. A key example can be found in the 1990 Supreme Court ruling that found an Alberta teacher who taught anti-Semitic propaganda to his students could not claim to be exercising his right to freedom of expression. This section also has allowed members of the media some important successes in advocating responsible journalism.

A particularly high-profile area of the Canadian Charter of Rights and Freedoms is section 15, the equality guarantee. One of the most important cases to make use of section 15 originates in my province, once again, of Alberta. In 1998, the Supreme Court of Canada invoked the equality rights set out in section 15 in order to strike down provincial legislation that would have allowed discrimination based on sexual orientation. In 1999, the high-profile case *M. v. H.* saw Canada take its first explicit steps towards legal recognition of same-sex marriage because section 15 of the Charter confirms that a law cannot define a "spouse" as a person of the opposite sex.

[*Translation*]

I would also like to point out some of the constitutional guarantees set out in the Charter with regard to language, which reflect ongoing and renewed efforts to recognize the principle of the equality of the two official languages. Section 16 of the Charter is the first in a series of sections that guarantee two official languages in Canada and ensure that language rights are protected in many public institutions. Section 16 expands on the language rights already set out in the Constitution Act, 1867, notably by allowing bilingualism in the federal public service. This was not completely new since Canada's Official Languages Act introduced this principle at the federal level in 1969. However, those laws were merely statutes, whereas section 16 of the Charter transformed a number of their key aspects into constitutional principles.

[*English*]

Any reflection on the impact of the Canadian Charter of Rights and Freedoms would certainly be incomplete without acknowledging section 25, which addresses Aboriginal rights. Canada's often marginalized Aboriginal peoples have been well served by the Charter. One of the defining Charter cases for Aboriginal rights, *R. v. Sparrow*, set in motion a critical element of jurisprudence for future relations between Aboriginal peoples and the Crown. The case developed a test for determining whether Aboriginal peoples' rights have been infringed under any of the provisions of the Charter of Rights and Freedoms. The so-called Sparrow test has been used since its inception by many experts as a way of measuring the extent to which Canadian legislation can limit Aboriginal rights.

[*Translation*]

Honourable senators, few of you will be surprised to learn that I was personally involved in fighting for the linguistic rights of francophone minority communities and for the right of the Franco-Albertan minority to education in its own language and control of its own educational institutions. That is why I think that any discussion on the impact of the Charter would be incomplete without underscoring the role section 23 has played. That section gives official language minority communities the constitutional right to be educated in their mother tongue and to manage their own schools when the number of students so warrants.

The section has been generously interpreted by the Supreme Court of Canada. The 1990 ruling in *Mahé* specifies the remedial

nature of section 23, which seeks to curb the problem of assimilation and promote a dual vision of Canada. The court adopted the sliding scale approach to assess section 23 claims, stating that the numbers standard "will have to be worked out by examining the particular facts of each situation which comes before the courts." The court decided that in assessing the number, consideration had to be given not only to the number of eligible parents under section 23 who want to have access to a program or a school, but also to the number of students who might eventually use those services.

Thirty years ago, this recognition opened a dialogue on official language minority education systems in Canada, a dialogue between members of civil society and various levels of government, which quickly moved into the courts.

• (1530)

This dialogue would probably never have happened in Alberta and elsewhere in Canada without the Charter. Section 23 was a critical tool for francophones in minority communities because it recognized their existence and legitimized their demands in the area of education.

The Charter has been a major force behind the evolution of language rights and remains an essential tool for progress toward equality between Canada's two official languages. More specifically, section 23 is the reason that most of the French-language schools in official language minority communities across Canada exist.

It is no accident that education has been and remains a key issue for Canada's Francophonie. School is critical to the survival of language and culture. Schools are gathering places and serve to transmit knowledge that is indispensable to linguistic continuity, and they are even more important when a language is in the minority. Given the importance of education, section 23 is a positive right with a remedial nature that was clearly not enacted in the abstract. It must be interpreted in Canada's historical context, specifically in the context of the struggle of francophones in minority communities to create education systems that meet their needs.

Section 23 is therefore not the kind of provision typically found in the charters and declarations of other states or international organizations.

In his March 15, 1990, ruling, Chief Justice Dickson of the Supreme Court of Canada stated:

> The purpose of section 23 of the Charter is to maintain French-language culture and reduce assimilation. Section 23 is also designed to correct, on a national scale, the progressive erosion of minority official language groups and to give effect to the concept of the "equal partnership" of the two official language groups in the context of education.

The legal victories under section 23 made it possible to remedy certain shortcomings in the political process and allowed francophone minority communities, which have less electoral weight, to move forward with their demands. This is particularly true for my community, the francophone community in Alberta.

Before the Charter, there were no publicly funded French-language schools. As I pointed out recently in this chamber, despite the province's deep francophone roots and the strong presence of the Franco-Albertan community, in the past, the Province of Alberta first prohibited and then strictly limited French-language instruction in the province's schools. These decisions led to high rates of assimilation among Franco-Albertans but also sparked numerous efforts by this community to fight for access to and control over French-language educational institutions.

However, it was only after 1982 that it was possible to think about creating publicly funded French-language schools in Alberta. The entrenchment of the Charter in the Constitution gave legitimacy and legal weight to Franco-Albertan parents' demands, which eventually made it possible to change political decisions that were considered to be unfair.

As Serge Roussel, a law professor at the Université de Moncton, said recently:

> The inclusion of a person's right to education in his or her own language in the country's Constitution did not come about automatically. . . . Over the past 30 years, the courts have often had to remind our elected officials of their constitutional obligations. . . .
>
> Several examples of this come to mind, and they show that legal action is the only recourse available in the face of government inaction and the stubbornness sometimes demonstrated by certain elected officials.

Honourable senators, as I am sure many of you know, it was the legal action taken by three citizens of Edmonton in 1983 that ultimately forced the hand of the Alberta government. These people argued that the provincial government was depriving them of their legitimate right to manage and run a French language school under section 23 of the Charter. This case marked the beginning of a long process that ended in the Supreme Court in 1990. As I mentioned earlier, in March 1990, the Supreme Court of Canada ruled in the *Mahé* case that the purpose of section 23 was to preserve and promote the language and culture of official language minorities. More specifically, it confirmed the right of the minority to manage its own schools independently and with public funds.

Following the *Mahé* decision, school management was finally obtained in 1994 with the creation of French-language school boards, 12 years after the Charter's enactment. Important policies on student transport and access to increased funding, for instance, have been implemented since that time in order to promote the development of the Franco-Albertan community.

In other provinces, some governments have since provoked new legal action and new decisions, such as the *Arsenault-Cameron* case in 2000 in Prince Edward Island, which had to do with the formula used to determine the number of people required for a community to be able to exercise its rights under section 23. That Supreme Court ruling used important nuances and clarifications to strengthen and expand on the *Mahé* decision.

Honourable senators, thanks to section 23, francophone minorities have been able to defend their right to French-language education before the courts. The Supreme Court has paved the way for a broader and more generous interpretation of our language rights in order to redress past and present injustices

with a view to achieving substantive equality between the official language communities and promoting their development.

[*English*]

There can be no doubt, honourable senators, that Canada has benefited from the rights entrenched in our Constitution by the Charter. We have flourished as a society that treats individuals with respect — one that practices responsible stewardship of individual rights. The Charter of Rights and Freedoms has added a whole new dimension to Canadian politics, not so much the creation of new rights but, rather, a new way of making decisions about rights.

Honourable senators, by and large, the Canadian people deeply value the entrenchment of their rights and freedoms in our Constitution. In 2010, the Association for Canadian Studies found that the 1982 Constitution and the creation of the Charter of Rights and Freedoms ranked third in a nationwide survey of the country's most significant moments. In the eyes of Canadians, Confederation in 1867 and the creation of a public health system in the 1960s were the only events ranking higher in historical importance.

A 2010 Nanos Research study found that nearly 6 in 10 Canadians believe that the Charter is moving our society in the right direction. The majority also feel that it has had a positive effect on Canada.

• (1540)

[*Translation*]

In conclusion, I would like to quote from a speech given by the Chief Justice of the Supreme Court of Canada, the Right Honourable Beverly McLachlin, on the 20th anniversary of the Charter, which provides a good summary of the essence of the document. She said:

> . . . the uniquely Canadian character of the *Charter* is reflected in its emphasis on three kinds of rights: individual rights, tied to a conception of tolerance and respect; collective interests, bound up with an appreciation of the relationship of support and obligation between individual and community; and group rights, tied to a recognition that pluralism is one of Canada's animating values. The *Charter* reconciles these three types of rights, not as contending forces balanced precariously against each other in basic opposition, but as complementary rights, drawing strength and support from each other. . . . And, to the extent this is so, it resonates with Canadians' conception of themselves.

Honourable senators, in light of the progress that has been made since the enactment of the Canadian Charter of Rights and Freedoms with regard to our country's linguistic duality, among other things, I would like to say that I believe it is essential to mark the 30th anniversary of this milestone.