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Chair

Mr. Pablo Rodriguez

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● (0910)

[*Translation*]

The Chair (Mr. Pablo Rodriguez (Honoré-Mercier, Lib.)): Good morning, everybody. Welcome to our committee meeting on this beautiful Tuesday morning.

We are here to continue our study of Bill S-3. This morning we shall have the pleasure of hearing from Mr. Michel Doucet, who will be making a brief presentation to us before we begin our question and answer session, which will last until around 10:30. Following that, we will have to turn our attention to future committee business, possible travel dates—in case we ever get around to travelling—and to the letter which was sent to us by Mr. Simard.

Mr. Doucet, you have the floor.

Professor Michel Doucet (Law Faculty, University of Moncton): Thank you, Mr. Chairman.

Gentlemen, I would like to begin by thanking the committee for having invited me to appear before you today to make a presentation on Bill S-3, An Act to amend the Official Languages Act (promotion of English and French). As the chairman said, I will make some opening remarks, which will perhaps provide us with fodder for our subsequent discussion. Obviously, my comments will pertain primarily to the provisions of the current Official Languages Act, and to the proposed amendments set out in Bill S-3.

The Official Languages Act is the cornerstone of bilingualism at the federal level. As is stated in its preamble, the act codifies several constitutional rights and, furthermore, implements the federal government's commitment to "enhancing the vitality and supporting the development of English and French linguistic minority communities, as an integral part of the two official language communities of Canada, and to fostering full recognition and use of English and French in Canadian society."

These objectives are also enshrined in the act itself; section 2, as you know, states the purpose of the act, while paragraph 2(b) gives expression to an objective, which is virtually identical to that set out in section 41 of the act.

As you know, the Official Languages Act is no ordinary piece of legislation. The courts have recognized it as having quasi-constitutional status, and have generally interpreted it in a broad, liberal fashion, consistent with its intended purpose. In accordance with both subclause 16(3) of the Canadian Charter of Rights and Freedoms and the unwritten constitutional principle of protecting minorities, Parliament uses the Official Languages Act to advance the equality of status and use of French and English.

If you now turn to part VII of the act, you will see that pursuant to the current section 41, the federal government is committed to "enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and fostering the full recognition and use of both English and French in Canadian society."

Section 42 and paragraph 43(1)(a) of the act state that the Minister of Canadian Heritage "shall encourage and promote a coordinated approach to the implementation by federal institutions of the commitments set out in section 41."

Part VII contains the most innovative aspects of the Official Languages Act. Three of the preamble's ten provisions are addressed exclusively in part VII. Furthermore, as we saw earlier, part VII broaches one of the two substantive paragraphs contained in section 2.

As I emphasized earlier, part VII is an extension of subsection 16 (1) of the Canadian Charter of Rights and Freedoms. The purpose in passing this part was to give effect to the principle of advancing the equality of status or use of English and French, which is set out in subsection 16(3) of the Charter.

Despite its privileged position, part VII remains little known and poorly understood. As you know, the Supreme Court of Canada will be called upon to rule on its scope for the first time on December 8, 2005. This decision will be eagerly awaited by a number of individuals. My analysis of this provision and of the proposed draft amendments will be somewhat reserved, since we are still waiting for the decision of the Supreme Court of Canada.

If we look at the legislative history of part VII and we try to determine Parliament's intention in 1998, we see that the introduction of sections 16 to 20 in the 1982 Charter was designed to constitutionalize the equality of French and English within the institutions of Parliament and the Government of Canada.

In order to ensure the actual implementation of the objective of genuine equality for the two official languages, the federal government sought to harmonize the provisions of the 1969 Official Languages Act and those of the Charter. The government's objectives in so doing were, as stated by the Right Honourable Ray Hnatyshyn, the Minister of Justice and Attorney General for Canada at the time, to ensure respect for and equality of status of the two official languages in federal institutions, to support the development of francophone and anglophone minorities, to foster the advancement of the two languages within Canadian society and to clarify the powers and obligations of federal institutions as regards official languages.

In a letter to his cabinet colleagues in July 1987, after the tabling of the bill which would become a law, the Prime Minister of Canada of the day, the Right Honourable Brian Mulroney, said: I would like to emphasize particularly that the Government of Canada has made a commitment to enhance the vitality of the English and French linguistic minorities in Canada. It is therefore crucial that all federal departments and agencies contribute to the development and vitality of the minority communities and that they take their needs and interests into account in designing their policies and implementing their programs.

In passing part VII, Parliament expressed the wish that in future government policies and programs would have comparable results for the official language minority communities as for the majority language community. Parliament thereby recognized the need to ensure that the specific needs and interests of the official language minority communities would be given full consideration, rather than being lost in a sea of general considerations.

Part VII of the act is based on subsections 16(1) and 16(3) of the Charter and its effect is to put in legislation the federal government's obligation to support the development of the official languages communities. This was done with full knowledge of the facts.

During the proceedings of the Senate committee on this bill in 1988, the Secretary of State at the time, the Honourable Lucien Bouchard, made the following comment to the committee: Clause 41 sets out the entire extent of the government's intentions. It allocates to the federal government the obligation to foster the development of language minorities, to support their development, and to promote full recognition of the use of French and of English.

This was the first time that this concept had appeared in a bill. This clause, and all those supporting it in the bill, give a legislative basis to the objective of full participation of the minority language groups in the life of our country.

Like a number of provisions that guarantee language rights, part VII of the act is remedial in nature, in our opinion. Part VII does not seek to entrench the status quo, but rather to correct the historic, progressive erosion of the official language minorities by requiring the federal government to take their interests into account and to promote their development in order to foster genuine equality between the country's official languages communities.

● (0915)

If there is a debate about the scope of part VII of the act, we think that Parliament's intention in 1988, which I have just outlined, was no less clear for that reason.

It is true—and this has been pointed out to the committee, as I see in reading your proceedings—that in its decision on the Forum des maires de la péninsule acadienne v. the Canadian Food Inspection Agency case, the Federal Court of Appeal concluded that Section 41 is declaratory and is a commitment that creates no rights or obligations that could be sanctioned at this time by the court, in any type of procedure at all.

Clearly, since I am one of the lawyers who is appealing this decision to the Supreme Court of Canada, I do not agree with this conclusion. In my opinion, if we look at the modern way of interpreting legislation as set out in the Beaulac decision, also handed down by the Supreme Court, we can come to a different conclusion.

The Federal Court of Appeal's analysis regarding the ordinary, grammatical meaning of part VII is flawed in two ways, in my opinion.

In paragraph [35] of its reason, the Federal Court of Appeal wrote the following: [35] the obligations—as we see by the use of the word “shall” in the English text, are found therefore in Section 42 and 43; they are not found in the Section 41 and they are as general and vague as can be and are ill-adapted to the exercise of the judicial power.

The Federal Court of Appeal therefore acknowledges the existence of obligations in part VII of the act, which flow from section 42 and 43, even though it does state that these obligations are as general and vague as can be.

I think this acknowledgement is revealing, because Section 42 and 43 of the Act are not provisions that implement the commitment set out in Section 41.

How is it possible to make mandatory the implementation of commitment without the commitment itself being mandatory? In order for the implementation of the commitment to be mandatory, is it not necessary that the commitment underlying the obligation be mandatory as well?

In addition, the terminology used in the wording of some other provisions of the Official Languages Act to impose obligations—for example, expressions such as “ shall”, “duty to ensure”, “*veiller*” is not a determining factor part VII of the act is declaratory or binding in nature, in my opinion. The use of this terminology in no way rules out the conclusion that other, less strong wordings could nevertheless impose obligations of different degrees.

For example, in my view the obligation set out in section 41 of the act to enhance the vitality of the francophone and anglophone minorities in Canada and to support and assist their development and to foster the full recognition and use of both English and French in Canadian society does impose some obligations which, while less restricting, are obligations nonetheless.

Consequently, we can maintain that non-compliance with the obligations contained in part VII of the act, similar to non-compliance with the obligations that were contained in the French Language Services Act in the Monfort case or unwritten constitutional principles regarding the protection of minorities in the Reference on the Secession of Quebec, at the very least makes a discretionary decision subject to judicial review in a case where the government apparently did not take into account its obligations under this part.

In my opinion, part VII of the act impose and must imposes on the federal government the obligation to enhance the vitality of the linguistic communities, and it must also impose an obligation on the federal government to take affirmative action.

In light of the particular nature of this obligation, it may be reasonable that at the outset Parliament wanted to exclude part VII from the scope of the remedial provision of the act in section 77.

However, it is my opinion that Parliament in no way wanted to completely exempt part VII of the act from judicial review. It is certainly did not exempt part VII of the act from the judicial review that is set out in section 18.1 of the Federal Court Act. Parliament chose to pass part VII of the act.

● (0920)

Had the government just wanted to make a statement of intention, it could have opted to issue a simple document setting out its commitment to the development of Canada's official languages communities. There would have been no need, were this the case, to include this commitment in the Official Languages Act, which has quasi-constitutional status.

Obviously, Parliament is the rightful place for any debate on amendments to clause 41. Efforts have been underway for some time now, by means of Bill S-3, to amend the wording of part VII of the act with a view to making it more binding. However, such an observation does in no way mean that part VII of the act is nearly declaratory and that, therefore, the federal government and its institutions are bound neither to promote the development of Canada's French-language and English-language minority communities, nor to help them flourish.

Bill S-3 would serve to clarify the federal government's responsibilities, and would perhaps also clarify the binding nature of part VII; however, this is by no means to say that in its current form part VII could be considered as being simply declaratory.

Obviously, the advantage of the proposed amendments to Bill S-3 is that they would further clarify the legislator's intentions. As amended, subsection 41(1) would stipulate that federal institutions must ensure that positive measures are taken to implement the commitment undertaken in this part of the act. Thus, the legislation would henceforth stipulate what has already been recognized by the courts.

To my mind, the proposed amendment to clause 77, which would henceforth provide clear remedy for any contravention of part VII of the act, is the most significant of all. Remedy is currently available but, in my opinion, is provided by clause 18.1 of the Federal Courts Act rather than by the Official Languages Act. I should imagine that I will have the opportunity to answer questions from members of the committee on the amendments to the process proposed by the Attorney General of Canada. For the moment, suffice it to say that you must ensure that any amendment to part VII of the act constitutes a step forward, and that we do not find ourselves in a situation where already recognized official languages minority community rights are eroded. Amongst other amendments proposed by the Attorney General, and I will have the opportunity to go into more detail later, I struggle with what is termed process control. I get the impression that a process is being set up to control the way in which minority communities exercise their recognized rights. I will be able to elaborate further should members choose to ask me questions on this issue.

That concludes the comments that I wish to make. I would stress to members of the committee that although, as it stands, the wording of the section would benefit from being clarified, that is not tantamount to saying that it is meaningless.

● (0925)

The Chair: Thank you, Mr. Doucet.

Mr. Lauzon.

Mr. Guy Lauzon (Stormont—Dundas—South Glengarry, CPC): Thank you, Mr. Chairman. Welcome to the committee, Mr. Doucet.

How will Bill S-3 affect the provinces? In your opinion, how will it affect relations between the federal and provincial governments?

Prof. Michel Doucet: Upon reading the minutes of your committee's meetings, it became clear to me that this is an issue of great concern to the committee, and one which has been raised several times by the various people who have given testimony.

The primary objective of part VII is not to change federal-provincial relations. The primary objective of part VII is to promote the development of official language communities in Canadian society by acting in areas of federal jurisdiction.

Acting in areas of federal jurisdiction and in federal institutions working in communities is quite a task in itself.

Mr. Guy Lauzon: We deal with the provinces. We have to work together.

Prof. Michel Doucet: Absolutely. When implementing a federal program, in some cases, you have to make sure the provinces agree. But for some programs that the federal government is implementing with the provinces, there are already provisions that guarantee the promotion and development of official language minority communities.

There could be some confrontation when the federal government wants to intervene in areas that are important to minority communities but are exclusively under provincial jurisdiction. I am thinking of education, for example. However, even today, the federal government has agreements with the provinces that fully respect provincial jurisdiction over education, but that have enabled the federal government to financially support the development of official language minority communities.

I know that one of the proposed changes—and I believe it is yours, Mr. Lauzon—called for the addition of "with due regard to the powers conferred on the provinces" to bill S-3. I fully understand what you are seeking to achieve with this amendment. However, I also read what was said by Mr. Francoeur, of the Council for Canadian Heritage, with whom I am not always in agreement. But this time, I am afraid I have to agree with him and admit that due regard for the powers conferred on the provinces is already there implicitly. Due regard must be shown for provincial government obligations.

I am concerned that this addition might allow a federal government, perhaps not now, but in the long term, to refuse to support the development of minority communities in the area of education on the basis that education is now under provincial jurisdiction and it is not for the federal government to intervene in that area. Minority communities and provinces have often counted on federal support for education in the minority language and particularly for infrastructure.

Mr. Guy Lauzon: In my constituency, there are francophone minority communities. How is Bill S-3 going to improve their situation, in your opinion?

Prof. Michel Doucet: I believe not only that Bill S-3 might improve the situation of minority communities, but also that part VII, as it is stands, should also help those communities. They require the government, federal institutions, to take into account the vitality and development of minority communities.

In other words, part VII, which was enacted in 1988, and the bill, seek to create a reflex within federal institutions. I am talking about departments, and the various federal commissions or corporations. The reflex is to ask themselves the following question whenever they create a program, implement a policy or make a decision: will the program, policy or decision have an adverse affect on the minority language community? If so, it has to be adjusted. Their objective has to be enhancing the vitality of minority communities.

That reflex did not exist before 1988. As least, there was no legislation to that effect. A number of decisions were made that adversely affected the minority communities, and there was nothing they could do about it. With the enactment of part VII in 1988, the federal legislator undertook to promote that reflex. I would not say that the goal has been met. There are still a great many shortcomings. That is why people are asking for part VII to be given a bit more bite, to make sure that federal institutions, before making decisions, consider the impact of their decisions on minority communities.

I am going to give a concrete example. In New Brunswick, in 1982, the New Brunswick legislator decided to ensure the equality of both official languages throughout the province. In other words, a francophone can get provincial government services in French throughout the province. However, when the RCMP is there to enforce provincial laws, can it say that it is not responsible for the provincial legislation, that it is only concerned with federal legislation and that it will only provide service in French where there is sufficient demand? That is what it currently does.

The question is whether that kind of attitude on the part of a federal institution runs counter to part VII. Does it seek to enhance the vitality and development of minority communities? No. There are multiple examples like that all across Canada. It is important for the legislator and the institution to ask whether they are enhancing that vitality and development in the implementation of their programs.

● (0930)

The Chair: Thank you, Mr. Lauzon.

Next, we have Mr. Bergeron.

Mr. Stéphane Bergeron (Verchères—Les Patriotes, BQ): Thank you, Mr. Chairman.

Good morning, Mr. Doucet. Welcome to the official languages committee. It is very nice to see you again.

In your answers to Mr. Lauzon, you raised a certain number of my concerns.

Basically, we are more or less trying to do the impossible. On the one hand, we want to protect francophone and Acadian communities and provide for their development, and on the other, we want to ensure that no provision of Bill S-3 or the Official Languages Act can interfere with legislative measures taken in Quebec and the provisions of the Charter of the French Language, it being understood that the communities that need to be protected are much more the francophone and Acadian communities than the anglophone community in Quebec, given that the francophone majority in Quebec constitutes a minority in North America and in Canada, and needs protection itself in North America.

I understood your opinion on the Conservative amendment. I have to tell you right away that I disagree with you when you state categorically that part VII of the act affects only federal institutions. When you look at paragraph 43(1)(f), you see that the federal government could intervene well beyond its own jurisdiction, in flagrant violation of the Charter of the French Language in Quebec, in the case that concerns us.

I know that the amendments put forward by the government in relation to an obligation of process, the exact meaning of which is unknown—at least as far I am concerned—and an obligation of result, which is much clearer to our mind, are problematic for you. You mentioned Mr. Francoeur's arguments earlier. He argued that the Canada Health Act had in fact created some obligations of result and that that was what provoked, and still provokes, disagreements with the provinces over funding and the provincial obligation to meet the objectives of the act in order to get federal funding, however minor. In order to avoid this type of conflict with the provinces, according to Mr. Francoeur, they want to impose an obligation of process to protect francophone and Acadian minorities and at the same time avoid pointless conflicts with the provinces, including Quebec in relation to the Charter of the French Language.

What is your position on this argument by the Government of Canada with respect to the amendments it is proposing?

● (0935)

Prof. Michel Doucet: There are a number of aspects to your question. I am going to try to answer it in stages.

First, I didn't say categorically that there could never be any conflict between part VII and the obligations vis-à-vis the provinces. Yes, there will be some conflict, and I believe that we will have to find a way to settle those issues.

As for paragraph 43(1)(f), to which you referred, I believe that the one that refers to unions...

Mr. Stéphane Bergeron: Unions, voluntary organizations, the business community and so on.

Prof. Michel Doucet: We must look at how the federal government intends to intervene. Let's take New Brunswick for example. In most cases, it was a matter of assisting a union or a volunteer organization in New Brunswick that wanted to offer services to the francophone community by becoming bilingual, whereas previously, it had only offered services in English. I do understand that in Quebec, the federal government will have to limit its involvement to federal institutions.

I fully understand Quebec's concern about the fragility of the French language in the North American context. I had an opportunity to appear before the Supreme Court in the Casimir case. It was acknowledged, in fact, that Quebec was a minority in Canada, and that that fact needed to be taken into account.

In the Ford decision, but above all in the Gosselin decision, the Supreme Court ruled that the linguistic reality of each province must be taken into account when linguistic rights are implemented. Now, it remains to be seen how the federal government will interpret the commitment to take the linguistic reality of each province into account in implementing its obligations under part VII. I would prefer wording like that to wording stating that the federal government will confine itself to areas under its jurisdiction.

I am not concerned about the current situation or the situation five years from now. I am concerned that 10 years from now, there may be a government that is less favourable to official language minority communities. When talking about the federal contribution to minority language instruction, the government could say that that is not its jurisdiction, and that under part VII, it does not need to intervene. It might well be somewhat outrageous to think about what may happen 10 years down the road, but the act is meant to last, and we want to ensure that it will not cause problems for the communities at a later date.

Wording stating that in implementing part VII, the federal government must take into account the linguistic realities of the provinces could alleviate that concern. Quebec's linguistic reality has been recognized by the Supreme Court in two decisions. That is my response to your first question.

Secondly, regarding Mr. Francoeur and the obligation of process, I do not have a problem with the obligation of process. Moreover, the terms “obligation of process”, “obligation of result”, and “obligation of means” do not bother me. When you have an obligation of process, you have procedures to follow. Have they been followed? If they have been taken into account, if there have been consultations, if everything set out in the federal proposal has been done, the objective behind the obligation of process has been met, regardless of what people appearing before you say. To my mind, it is simple: you follow the process. It is not a huge issue, and I think that it is less than what we had before.

I recall a question that the chair, if I am not mistaken, put to one of the participants. He asked if the obligation of process and the obligation of means were the same. The answer was yes. To my mind, they are not the same. The obligation of means goes a step beyond the obligation of process. When I have an obligation of means, I make a decision and I must ask if, in making the decision, I took into account my obligation to promote the development and enhance the vitality of minority communities. If I did so, I then ask myself if my decision promotes the development and enhances the vitality of the minority community. I must justify it. That is a bit like an obligation of means. That is what was done in the case of the Montfort Hospital. In that case, it was far from just an obligation of process. The court told the government that if it wanted to close an institution like that, it had to justify its action. To my mind, that was an obligation of means.

As regards the obligation of result, there have been many things. Again last night, I carefully read through this committee's proceedings. Someone said that if there were an obligation of result, the communities would be before the courts on a regular basis asking for millions and millions of dollars. I have much more confidence in the minority communities. I know that they do not want to be before the courts, given the amount of energy, time and money that requires.

For me, that is not the obligation of result. The federal government, under programming for minority communities, has set an objective: that is its result.

● (0940)

In the end, we can ask what the government has accomplished in achieving the result. If it has done everything that was reasonably possible, the government has respected its obligation of result. However, if it has given itself an obligation of result simply to shelve it in an office and then close the office door, it has done nothing to honour its obligation of result. To my mind, that is what the minority communities are looking for.

Personally, I do not know any member of a minority community, including lawyers, who are happy about continually having to make representation to governments. I do not believe in the administrative argument that you call the “floodgate argument” in English, whereby the communities would take legal action against you on everything. The communities are reasonable; at the very least, they will insure that the government honours the result as it has committed to do. That is my response to Mr. Francoeur.

I have many reservations about the obligation of process. To my mind, it offers us even less than what we have now, in this case an obligation of means. The problem is the lack of court remedies.

The Chair: Thank you, Mr. Bergeron. Your time is up.

If I understand correctly, in your opinion, the government amendments significantly reduce the scope of Bill S-3. Your are clearly saying that if we were to adopt these amendments, S-3 would be less effective than the court remedies that currently exist. Is that correct?

Prof. Michel Doucet: The problem that we have at present—and the Supreme Court will determine whether I am right or not in December—is that we should have a simple and effective court remedy as set out in section 77 to enforce part VII. Currently, we must use section 18.1 of the Federal Courts Act.

With the Attorney General's proposal, for example the amendment dealing with the obligation of process, the impact of each policy and program is determined. I would like to see that go even farther, I would like the impact of the decisions that are made to be determined, the organizations to be consulted, and the determination to be considered. However, the organizations are consulted only if the federal institution considers it appropriate. Who will determine if it is appropriate to consult the organizations? Finally, when it has been deemed appropriate to do so, the organization must be consulted and that must be taken into account when applying the determination. But how will that be taken into account? That is why I considered this process to be weaker than an obligation of means.

The Chair: Thank you.

Mr. Godin.

Mr. Yvon Godin (Acadie—Bathurst, NDP): Thank you, Mr. Chairman.

I would like to welcome Mr. Doucet, who is here this morning to give us his views. He represents minority organizations in my area, and has argued a number of cases that have been very significant for the Acadian minority in our regions. For example, the food inspectors' case will be heard by the Supreme Court. There is also a case regarding writing boundaries. One of the reasons for inviting Mr. Doucet was to hear his views on that issue, particularly since the case is just about to come before the Supreme Court.

I am concerned as well. I have sat on the Official Languages Committee for several years now. Senator Jean-Robert Gauthier brought the problem to our attention. He said that the statute was declaratory, but not enforceable. What he wanted very much was for the bill to be made enforceable and for us to stop debating it. In the end, a court ruled that it was declaratory. So this remains pending until the Supreme Court renders its decision.

At the same time, we have been trying to rework the bill. Perhaps we rushed it a little; perhaps we should have waited for the Supreme Court ruling. Then, we could have adapted the legislation, since that is what Parliament wants. If the legislation does not work, we need to rework it or go on.

My fear is that we would weaken the legislation. In this regard, I find the government amendments very worrying, because they introduce something new and we will have to start all over again. That is something that really worries me. I also worry that, because of the ambiguity of the new bill and the arguments that flow from it, the Supreme Court will have difficulty in rendering a decision, where it could have rendered one without difficulty with the old legislation.

I would like to touch on provincial jurisdictions. I do not want to use all my time, because it is you I would like to hear. When we were talking about encouraging businesses, employer organizations and unions in New Brunswick, the francophone community asked the New Brunswick Federation of Labour to provide services in both languages. I remember that the federation was able to request funding from Canadian Heritage to assist in providing those services. I am certain that I am right about this. The federal government was obliged to help organizations, not to implement its regulations. This is an area which is neither under federal nor under provincial jurisdiction. These are organizations. Under section 43, the government must encourage and support minority languages. If an organization turns to the government, the government can provide support.

Indicating that this will not affect provincial jurisdiction in any way, and thus that the provinces are excluded, might constitute a step backwards. So how do we get what we need? If we truly believe that the bill is enforceable but that the government is arguing it is declaratory, then the issue must be settled. How can we make the bill enforceable in compliance with provincial jurisdictions, and at the same time oblige the federal government to comply with sections 41, 42 and 43? How can we do that in Bill S-3 without missing the boat? You said it very clearly: generally, a bill is there to stay. What will its impact be in five or ten years?

You have done a great deal to clarify the issue, but how can you help our committee craft an amendment to Bill S-3 that would deal with our problem while remaining in line with provincial jurisdiction and making the bill enforceable?

● (0945)

Prof. Michel Doucet: In answer to the first part of the question, I would say that the debate to determine whether part VII is executory or declaratory has been going on since part VII came into existence. As I pointed it out, in December, for the first time since part VII was created, the Supreme Court will rule on this provision and tell us whether it is declaratory or simply executory.

For now, of course, the federal government is right to say that it is declaratory. This was reflected in the last ruling of the Federal Court on the subject.

However, I maintain that, if part VII had been tested against the application of section 77, the Court of Appeal's ruling would have been different. I also maintain that, despite that fact, it is possible to argue before the Supreme Court of Canada that the part is declaratory.

Of course, if Bill S-3 is adopted without amendment, the whole issue becomes theoretical as far as the Supreme Court is concerned. I even wonder whether the Supreme Court would hear the case, because it would claim that the debate that had become theoretical, that the issue has been settled and that it does not see any reason to rule on a provision which does not exist anymore. That is my first answer to the question.

It is also possible that the Supreme Court will rule that part VII is declaratory. Of course, in that case, the work you are doing here is very important, because you will prepare the amendment which will be made if you think it should be executory. This is what Senator Gauthier was working on.

● (0950)

Mr. Yvon Godin: Mr. Chairman, the problem is that the Supreme Court will rule or hear the case in December. But we are talking about adopting Bill S-3 immediately.

Prof. Michel Doucet: That is up to legislators. They must repeal...

Mr. Yvon Godin: That is what I am worrying about.

Prof. Michel Doucet: The second part of your question dealt with implementing Bill S-3 while protecting provincial jurisdictions.

Perhaps I did not quite understand the deliberations of your committee, but it seems to me that your concern did not necessarily have to do with provincial jurisdiction, but rather what I would call the linguistic reality of each province, including the linguistic reality of Quebec. The provinces are open to the federal government supporting official language minority communities in the field of education as far as anglophone provinces are concerned, for instance. That is why I suggested earlier that if the federal government found a way to take into account the linguistic reality of a province, that might address the problem.

As far as jurisdictions are concerned, I know that not everyone is an agreement with me, but I have often had a suspicious attitude, because I do not know what will happen in the long term; I do not know what our country will look like in 10 years. I would not want my two daughters to criticize me 10 years from now because I told the committee that I agreed with areas of federal jurisdiction and that the federal government did not want to financially support education in minority situations for that reason. I like to be cautious, and I believe that there may be another, less dramatic wording than the one we have now which could adopted.

The Chair: Your time is up, Mr. Godin. You will have another turn later.

Mr. Yvon Godin: Time flies.

The Chair: Yes, time flies quickly, specially with you.

We will continue with Mr. Godbout.

Mr. Marc Godbout (Ottawa—Orléans, Lib.): Welcome, Mr. Doucet. It is always a pleasure to hear you speak on constitutional matters.

We have the Official Languages Act as it exists today, we have Senator Gauthier's bill and we have constitutional amendments. In light of these various elements, could one say that Senator Gauthier's bill improves the situation as opposed to the existing legislation? You seem to say that the amendments proposed until now might create more problems, rather than being useful. In your opinion, does the bill as originally worded represent a step in the right direction?

Prof. Michel Doucet: I think it was a step forward. The amendments proposed by Senator Gauthier had the advantage of clarifying matters, of putting an end to the debate as to whether or not the act is declaratory or executory, and whether it is justiciable or not.

It was justiciable, because it amended section 77 by giving any person who has a complaint in respect of a right or duty under part VII the opportunity to apply for a remedy. I consider that a step forward, because it clarified matters.

Allow me, however, to disagree with the position of the Attorney General as regards the act as it currently stands. I continue to maintain that the current act has executory value. The problem lies with the remedy that can be used to make it executory. Of course, the Supreme Court of Canada will bring down a decision and say whether I am right or not.

I have a problem with the amendments proposed by the Attorney General, which were tabled here. In this case, we are talking about an obligation of process. Earlier on, to my mind, I made a distinction between the obligation of process and the obligation of means.

It appears that the objective of this obligation of process is to oversee the application of part VII to such an extent that we will end up with limitations that will be difficult to overcome. I am not sure that it will be very difficult to meet those objectives.

What do we do if an organization decides that it is not advisable to consult communities? Who will decide if it is advisable or not? Can the RCMP decide from one day to the next to close its detachment in Saint-Vital in Winnipeg, Manitoba, without consulting the communities, because it feels that doing so is not advisable?

It is an operational decision: a decision is made to not consult the communities. Moreover, the RCMP will say that closing the Saint-Vital detachment is not even a policy or a program, but an administrative decision.

● (0955)

Mr. Marc Godbout: The amendments proposed dealing with the process. Originally, we tended to talk about the result, but now we are also talking about the means.

Would the means be somewhere between the process and the result? We have been told that if there were an obligation of result, it would be quite difficult to know, especially when talking about francization, if the result has been met or not. If we were to move towards an obligation of means rather than an obligation of process, which would be stronger?

Prof. Michel Doucet: As regards the explanation you were given with respect to the result, I am not an expert in public administration, even if I did master's level courses in that area.

Federal or government officials evaluate if objectives have been met and if results have been obtained on a daily basis, at least I hope they do. The possibility of evaluating if the result or the stated objective, which was to promote the development of the communities, has been met always exists.

All in all, I am not concerned with the obligation of result, because I have confidence in the communities. I also think that people know what that means. I would prefer an obligation of means, in line with what was done in the case of the Montfort Hospital, because the organization or the federal institution must ask questions. For example, does the decision to close the detachment in Saint-Vital in Winnipeg, Manitoba, or in Nackawic, New Brunswick, promote the development and advancement of minority communities? If yes, why? If not, why? If that is not the case, I cannot do it. I prefer that. With the obligation of means, the communities will also have to be consulted.

That goes a little farther than the limitations that are being placed upon us.

Mr. Marc Godbout: I must say that I share your opinion that we will always end up in court. If we have managed to have schools in many of our provinces, it is thanks to the courts. If we do what we have to do, theoretically we won't end up in court. if we go to court for nothing, it will end up being expensive and we won't get the desired results.

What would be the most important step to take, or not take, in order to improve the situation in terms of the justiciable nature of part VII of the act?

Prof. Michel Doucet: I think that would be the amendment proposed by Senator Gauthier: making part VII of the Official Languages Act justiciable, and adding, in order to take into account the committee members' concerns, that the federal government must take into account the linguistic realities of the provinces when applying part VII.

The Chair: I've just had an idea. Could we reach that objective by simply amending subsection 77(1)?

Prof. Michel Doucet: I think it would be possible. I still say that my problem with respect to the courts is not whether section 41 is declaratory or binding. The court tells us that lawmakers have not included this in section 77 because they did not want you to use it to make that part justiciable.

If we make part VII subject to section 77, perhaps it won't be necessary to change the wording that radically.

The Chair: Thank you.

[*English*]

We're going to have a second round of five minutes each.

We'll start with you, Mr. Sheer.

● (1000)

Mr. Andrew Scheer (Regina—Qu'Appelle, CPC): Thank you very much for attending this meeting.

I just wanted to follow up on some of the questions regarding the impact of federal-provincial agreements. One of the things Minister Frulla is most concerned about is the federal-provincial agreements that have been signed for anything from day care to education to perhaps even health. One of her concerns is that if Bill S-3 is implemented, and the government can be taken to court on these sorts of things, the provincial governments will be vulnerable as well because of these agreements.

Would you want to speak to that?

Prof. Michel Doucet: Sure.

If I understand well—what has been done with day care, for example—we do find in those agreements provisions for minority language communities in various provinces. So it's there already. The provinces are open to the federal government and are making sure that some of this funding goes directly to minority language communities.

In terms of the impact, will the communities bring the provincial governments and the federal government to court? First of all, as I said a while ago, I don't think it's the objective of the communities to be in front of the courts all the time.

The other point is that if the federal government is able to show that it has done everything it can, that its efforts to try to support the communities are genuine, but because of constitutional structural problems it is not able to because that is not within its jurisdiction at this point, it would be able to make this point. And I wouldn't be surprised if the courts accepted that argument and the communities also accepted that argument, that they need to put the pressure on their provincial governments, because the federal government is ready to move on it; it is the provincial governments that are not open to it. That argument could still be made, even though it's written, as I'm suggesting, in the act.

Mr. Andrew Scheer: It would have to be made before the courts, though.

The concern about the federal-provincial agreements is that quite obviously the provinces have signed onto these commitments to provide a minority language component in these agreements. But as of yet, they're not answerable before the courts on those things. The question is, if Bill S-3 goes forward, by virtue of their agreements with the federal government, will the provinces be open to the same kind of court action that the federal government might be open to?

Prof. Michel Doucet: I don't believe they would be open to legal procedures from anybody on the basis of a federal law. They might be open to responsibility on the basis of their agreements. Being a contract law professor, I can certainly say that if they make an agreement, saying yes, they will use part of this money to help sustain minority communities, they would be liable on that basis, but not on the basis of the federal Official Languages Act. That could not impose obligations on provinces.

Mr. Andrew Scheer: So you would dismiss the concerns that Minister Frulla might have about the provinces being—

Prof. Michel Doucet: I did read her presentation before the committee, and with all due respect, there might be political implications—that's not my bag—but I don't agree that it would impose obligations on the provinces.

Mr. Andrew Scheer: Okay. The problem I see with this—and this makes the threshold results-based.... As you mentioned just a moment ago, as long as you can show that the effort was there and the intent was to provide this and there was a mechanism in place.... But some of the concerns raised at the last committee meeting were that that won't be good enough, that the court action will be based on the actual results. It won't be good enough that a department or a minister says they tried and put a plan in place and tried to implement it. It will be judged and the court action will be taken based on the actual results of those programs.

Prof. Michel Doucet: Well, I'm not sure. I cannot prejudge what a court will do or what a court will decide on that basis. I'm not even sure anybody would bring the government to court if the government could show it really did make its best effort in that case to attain the required results. I'm not sure a court would go that far.

Certainly, if there's a case made that they did not do anything to attain the result, there would be an obligation on the part of the federal institution to explain why. Then it would be up to the court to appreciate and accept that explanation. But I don't think a Canadian court would say you need to attain that objective and if you didn't attain that objective, although you did everything you could, say you're still responsible. I would be surprised if that was the end result.

Again, I'm saying I don't think, if there is a genuine, real effort made by the institution, they would be brought to court. But again, I don't have a crystal ball, so I can't predict what could happen.

● (1005)

The Chair: Thank you, Mr. Scheer.

Monsieur Simard.

[*Translation*]

Hon. Raymond Simard (Saint Boniface, Lib.): Thank you very much, Mr. Chairman. Welcome, Mr. Doucet.

I am one of those who are concerned about the need for results. I think this is very subjective and very difficult to measure. I would like to hear your comments on this. Mr. Godin stated that the court would hand down a ruling in December and for that reason he was hesitating about making a decision now. I'm sure that in one way or another you were involved in previous decisions. We are talking about decisions that almost wound up before the Official Languages Committee. We are now at our fourth attempt, and it goes without saying that it is difficult to have this bill passed by Parliament.

Would you agree that the Official Languages Committee should do all it can to ensure that Bill S-3 is passed? We are all here for the same reasons and therefore we should make sure that part VII is not weakened.

I don't know what you think. I'm sure you've been asked for opinions over the past few years for other bills.

Prof. Michel Doucet: Mr. Simard, if I felt that the bill before us promoted linguistic rights, then of course I would be the first to tell you to adopt it immediately. The Supreme Court will tell us what it will regarding the other issue. It will decide whether or not this is theoretical.

Personally, I need to be convinced that this is a step forwards. If I were told today that there is a will to adopt Senator Gauthier's bill, with a few minor changes, I would be one of the first to support that, as long as the communities involved ended up benefiting.

However I am still concerned about the amendment regarding the obligation of process. I am not sure that that is a step forward. That is what still concerns me.

Hon. Raymond Simard: You said that in its present form, part VII imposes an obligation on the government, and consequently, on all departments.

I'm thinking about the fact that in our area an incident occurred in which Industry Canada did not take into account the impacts certain decisions would have on francophone communities. These decisions ran completely counter to their interests. What remedies do the communities have at the moment if a department does not comply with its obligations?

If there had been a process in place whereby the department was required to consult the communities and report on the results of these consultations, this would not have happened.

Prof. Michel Doucet: There are two parts to your question. I will start by answering the first.

What remedies do the communities have at the moment? That is the question that has been taken to the Supreme Court. Our position is that there is indeed a remedy at the moment under section 77. That is what the Federal Court did not accept.

The other argument is that the appeal of the decision made by the government currently under judicial review, could be allowed under section 18.1 of the Federal Courts Act. However, as the chair was saying earlier, if we were to amend section 77 to include part VII, that would solve this problem.

With respect to the second part of your question, if the proposed process had been in place, would that have covered the situation you raised? We would have to see. In some cases, it might be enough.

Let us take my case, the one involving the Forum des maires de la Péninsule acadienne. There was no consultation. Would the Canadian Food Inspection Agency have thought consultation was indicated? I think the agency would have said that they did not think that a consultation process was indicated. The agency would say that it was involved in an administrative reorganization, nothing more. No policy or program was being revised. Therefore, given that context, it was not necessary to hold consultations or anything else. Would the agency have looked at the impact of the policy or program on the implementation of its commitment? It probably would have said, once again, that this was not a policy or a program. Should it have taken the outcome of the consultations into account? Since it had not held any consultations, it did not have to take this into account. So in this case, I would not even have been able to rely on part VII.

● (1010)

Hon. Raymond Simard: So you think we should specify in which cases there should be consultation.

Prof. Michel Doucet: We should specify in which cases there should be consultation—

Hon. Raymond Simard: If there were a process obligation, we would have to specify when there should be consultation. There should be an obligation to hold consultations.

Secondly, consultations normally result in recommendations. If there were some recommendations and the government did not take them into account, then the matter would be justiciable, in my opinion.

Prof. Michel Doucet: I would go a little further still. I would say not to restrict this just to policies and programs, because problems often occur when decisions are made in the context of these policies and programs.

If I had to work on the amendment you have put forward, after "consult any interested organizations, including organizations representing English and French linguistic minority communities in Canada", I would remove the words which follow, namely, "if the federal institution considers it appropriate in the circumstances." I would eliminate those words.

When you talk about taking the results of the consultations into account, I would require the reasons be given for the decision. In other words, I would ask for an explanation as to how the decision made following the consultations enhances the vitality or development of the linguistic minority communities.

Hon. Raymond Simard: Thank you very much.

The Chair: Thank you.

Mr. Doucet, if you had to choose today between passing Bill S-3 as amended by the government or setting it aside and going to the Supreme Court, which would you choose?

Prof. Michel Doucet: Obviously, as I am a lawyer involved in the Forum des maires de la Péninsule acadienne case, I would choose to go to the Supreme Court.

The Chair: And if it were Bill S-3, without amendment?

Prof. Michel Doucet: What do you mean?

The Chair: If you were dealing with the version put forward by Jean-Robert Gauthier?

Prof. Michel Doucet: In that case, I would choose Bill S-3 without amendment, as put forward by Mr. Gauthier.

The Chair: Thank you.

Mr. André.

Mr. Guy André (Berthier—Maskinongé, BQ): Good morning, Mr. Doucet. Thank you for being here. This is most interesting.

I have two or three questions.

In your opinion, should Bill S-3 be applied equally to all official language minority communities in Canada, or should it be adapted to the linguistic realities of Quebec and Canada? If you choose the latter, how could the bill be better adapted to the different linguistic realities of Quebec and of Canada?

Prof. Michel Doucet: It is interesting to see that today, the Supreme Court itself in two decisions recognized the principle of asymmetry concerning language rights. It did so in the Gosselin and Casimir decisions.

I pointed out earlier that I could probably live with the formulation stating that the linguistic reality of the provinces would be taken into account in the implementation of Bill S-3 or of part VII of the act. I believe that if we studied the linguistic reality of different provinces, that would largely deal with the concerns of some committee members. I say that as a preliminary analysis, because I must admit that it came to me this morning. I had not done an in-depth legal analysis of the implications. But obviously, the Supreme Court has already said that section 23, for example, must be interpreted taking into account the linguistic reality of different provinces.

The federal government itself could, in the act, state that it is prepared to go much further with part VII, but that it will take into account the linguistic realities of different provinces, always with the idea of enhancing the vitality and promoting the development of the communities. It would not be possible to decide to use these provisions to diminish the rights of communities in New Brunswick, in Alberta or in British Columbia under the pretext that the linguistic reality is something else. But this is a preliminary analysis.

Mr. Guy André: You have emphasized that it is important that the bill remain focused on results.

I am just floating this as an initial proposal — the bill is moving in that direction —: if the bill included a requirement to achieve results in respect of official language minorities, in consultation with and after agreement with the provinces, would that not...

● (1015)

Prof. Michel Doucet: Once again, that depends. People seem to believe that part VII is only there for federal-provincial relations, but it deals with a great many other things. It also affects the role that federal institutions themselves must play. The Canadian Food Inspection Agency does not have federal-provincial relations, nor does the RCMP.

In this context, one must not mix apples and oranges, and create a situation wherein every time a federal institution wants to undertake an initiative, it must negotiate with the province.

In the case of decisions affecting the provinces, I believe this is already being done. For example, in education, the federal government negotiates with the provinces when the issue is ensuring the funding. This is already being done.

We must be careful. I have the impression, reading the proceedings of the committee—and this is the law professor in me speaking—that we think that part VII is limited to federal-provincial relations, whereas it largely deals with the federal institution.

Mr. Guy André: I have another question in the same vein. What do you think of the Bloc Québécois' amendment?

Prof. Michel Doucet: The first amendment? I believe it is the first one I read.

Mr. Guy André: I am referring to the amendment under which Quebec would be exempted from the application of the legislation, in an effort to better protect Quebec's French Language Charter.

Prof. Michel Doucet: The wording I propose is perhaps less politically... In this context, “to take into account ” would mean the same thing. That is to say to take into account the linguistic reality of the different provinces. Quebec linguistic reality is that it is the only province in North America where there is a majority of francophones. We do not need to use terminology that goes back to the 1980s: “a distinct society”.

The Chair: Thank you very much, Mr. André.

We will now carry on with you, Mr. Godin.

Mr. Yvon Godin: The same is true for New Brunswick. It is the only bilingual province in Canada.

Prof. Michel Doucet: New Brunswick did not have a Quiet Revolution, but its evolution has been noisy.

Mr. Yvon Godin: We call that the “Tintamarre” and it takes place on August 15th.

To follow up on Mr. André's comments, I would say that in including only Quebec, we exclude other provinces. When we include all the provinces, while respecting certain areas of jurisdiction, no one is excluded. We cannot decide to include only one province.

Remember the case of Canadian Food Inspection Agency, which transferred inspectors from Shippagan to the southeast of the province. There is currently another similar case. I do not know if you are aware of this, but I filed a complaint with the Official Languages Commissioner. It was in the papers. The federal government decided to move the Canadian Forces Recruiting Center, which has existed for 50 years, from Bathurst to Miramichi. You are aware of the situation regarding the ridings of Acadie—Bathurst and Miramichi. The day that the electoral boundaries commission transferred a part of the territory to Miramichi, the City of Miramichi recognized, at City Hall, that that part was rather anglophone.

The same arguments could apply here. In the paper, the Canadian Forces stated that it would be more difficult for people to receive bilingual service in Miramichi. That is how it was stated. The argument is the same. I would go so far as to say that it is even worse.

If the Supreme Court were to decide that it is only declaratory, that means that the federal government does not have to give a hoot about part VII of the Official Languages Act, or even of the act in its entirely. What would it be worth in that event?

Prof. Michel Doucet: We are not talking about the entire act.

Mr. Yvon Godin: I am talking about the possibility of the Supreme Court deciding that it is only declaratory.

Prof. Michel Doucet: In such a case, it would only be part VII that would be judged to be declaratory and not the entire act.

The example you mentioned is interesting. It is true that for a long time, the federal government considered the issue of positions in New Brunswick according to a north-south axis. The north is francophone and the south is anglophone. And so there was a facility in the north and another in the south. Currently, we are seeing another trend manifest itself within the institutions. There could be centralization in Halifax—which is, as you know, anglophone—or they could be an east-west axis in New Brunswick. Most of the time, the anglophone majority is on both sides and there is no presence in the francophone regions. It is the perfect example of a situation that could be covered. Did the Canadian armed forces take into account part VII, the enhancement of the vitality and development of official languages communities, into account? In my opinion, the answer is no.

● (1020)

Mr. Yvon Godin: That is my view as well. There was no consultation. If they had held consultations, they would have noticed that they normally recruit in the northern part of the province. Let us take the riding of Acadie—Bathurst, for example. Eighty per cent of the people are francophones. If we look at the Campbellton region and the idea is to locate in the middle of the road between Sackville and Campbellton, I would suggest that the Canadian Armed Forced close the offices in Fredericton and transfer them to Woodstock. I am told that such a thing would never be done. However, if their argument is the road, in order to be fair, they would have to do the same thing in the same way in the eastern and western parts of the province. In any case, I have filed a complaint with the Office of the Commissioner of Official Languages and with the Minister of Defence. I think this is a violation of the Official Languages Act, as in the case of the inspectors.

Personally, I think you answered my questions about the government's amendments. They are of concern to me. We are going to have to adopt a new approach if we want to pass Bill S-3. We will be hearing from other witnesses and that will give us an opportunity to discuss what you told us today with them. Mr. Gauthier definitely did not intend to lessen anything at all or to weaken the arguments that have been used over the last 10, 15 or 20 years to determine whether certain provisions of the act are binding or declaratory, particularly since there is already a case before the courts. I would like to thank you very much for appearing before us today.

Prof. Michel Doucet: Of course, not everyone will necessarily share my opinion.

Mr. Yvon Godin: Not everyone is here to share your opinion. We can see how far we got today.

Let me give you an example quickly. This is one of my favourite stories about the fisherman who had polio. In New Brunswick, it is possible to advertise unilingual English positions—and you may want to comment on that—but it is not possible to advertise unilingual French positions. We are asking for official recognition of the equality of the two languages in Canada, but this distinction still exists in the public service. Perhaps you would care to comment on this.

The Chair: Mr. Godin, I was starting to worry because I had not yet heard your fish story.

If you wish, we can have a final, two-minute round. You could have the floor at that time, if you wish.

You have the floor, Mr. Bergeron.

Mr. Stéphane Bergeron: I will be brief. On the one hand, I would just like to say that I am not one of those who thinks that part VII applies to federal-provincial relations only. I know that part VII may be a source of potential conflict with some provinces. I am trying to find a way of avoiding this type of conflict between the federal government and certain provinces. Thank you for the information you have given us.

I would like to come back very briefly to the question I asked a little earlier. What do you think about the federal government's argument that the obligation of result is a potential source of conflict with the provinces?

Prof. Michel Doucet: I repeat, I do not think this is a source of conflict with the provinces. Of course, the obligation of result means that there are some objectives to be met. If we meet them, great. If we did everything possible in order to meet them and there are what I would call structural or constitutional obstacles that caused the province to say no, I do not think that anyone could hold it against the federal institution for doing everything it could.

I'm thinking of the various areas. So far, in the area of education, this has not been a source of conflict, particularly as regards the agreements. I think they succeeded. I fail to see why this would cause conflicts in federal-provincial relations. I think the fact that respect is shown for each side's areas of jurisdiction is part of our Canadian constitutional order. If the two sides try to agree, great. If this is not successful, despite all the efforts that were made, I think the communities can live with that. I am not saying that that was your case, but we should not look at just part VII in this way, with reference to federal-provincial relations.

● (1025)

The Chair: Thank you.

Mr. D'Amours.

Mr. Jean-Claude D'Amours (Madawaska—Restigouche, Lib.): Thank you, Mr. Chairman.

You will be going to the Supreme Court in December, Mr. Doucet, to defend your case. If Bill S-3 were amended, could the court use this new piece of legislation in making its decision, or would it be required to make its decision based on the act in the form in which it existed at the time you brought your case forward?

Prof. Michel Doucet: The new act will not be retroactive. Consequently, the court will not be able to take the proposed amendments into account. It could decide to rule, or, since we are asking it merely to review the decision, it could tell us that the question we asked has now become theoretical. There may not even be any point in the court hearing our argument. I do not think that the court could decide to enforce the amendment under study at the moment, because the government did not have it at that time. The court must enforce the act that existed at the time.

The Chair: Thank you for taking the time to answer our questions and for discussing these issues with us, Mr. Doucet. This has been most interesting.

I would like to thank all the members of the committee as well.

After a two-minute break, we will sit in camera to discuss the committee's future business.

[*Proceedings continue in camera*]

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