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Mr. Pablo Rodriguez

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● (0910)

[*Translation*]

The Chair (Mr. Pablo Rodriguez (Honoré-Mercier, Lib.)): Good morning, everyone. Welcome to this meeting on Bill S-3.

It's our pleasure to have Mr. André Braën this morning. Welcome.

We'll begin since we have a quorum. The other committee members will join us shortly. I assume Mr. Braën will want to share a few comments with us to start off. Then we can continue with a series of questions, comments and discussion with our guest.

The meeting will end no later than 10:45 a.m., when we'll consider Mr. Lauzon's motion.

So I'll stop there and turn the floor over to you.

Mr. André Braën (Professor, Faculty of Civil Law, University of Ottawa): Thank you very much, Mr. Chairman.

First, I would like to thank the members of this committee for their invitation. It's truly a privilege and a pleasure for me to be able to meet with you this morning.

I understand that my role boils down to giving you a very brief presentation, a few minutes long, on Bill S-3 and then being available for a discussion, if any.

Very briefly, you are all aware that, when the Official Languages Act was passed in 1969, the primary aim was to promote the use of French in federal institutions, including in the Province of Quebec. There was also a desire at the time to prevent Canada from being divided along linguistic lines. The idea was to make it possible for the members of the official language communities to live most of their lives in their own language, regardless of their place of residence in Canada. That was the aim. Obviously, we all know there have been problems in that regard.

Of course, the legislation was criticized at the time it was passed in 1969. There were complaints that it contained no clear commitment by federal authorities to promoting the equality of Canada's two official languages or the development of the official language minorities. There were also complaints about the absence of any legal remedy. If the act were violated, could Canadians turn to the courts?

After the Charter was passed in 1982, Parliament amended the Official Languages Act, or passed a new act, in 1988, and section 41, as well as Part VII in general, turned out to be a response to the criticism about a lack of commitment by federal authorities.

Section 41 was intended as a response, but it presented an interpretation problem which has never since been resolved. Does the commitment set out in section 41 of the Official Languages Act state a political principles and thus does it invite the government to consider official languages and to do its best in the area of official languages and development of the official language minorities, or does section 41 state an obligation to act? Did Parliament legislate in such a way that we would expect the federal government to take real measures to act on that commitment?

Obviously, from the standpoint of the official language minorities, section 41 is clearly perceived as stating an obligation. So it's more than a mere political principle; it's a duty to act. Of course, there is discretion as to choice of means. No specific outcomes are imposed, but the government is expected to act in the official languages field.

As you know, opinion in the federal government was quite divided. An investigation conducted by the Office of the Commissioner of Official Languages if 1996, if I'm not mistaken, showed that, in this regard, there was a twofold perception of this commitment among federal government executives. In the view of some, it was a wish, a principle. For others, yes, it could mean a commitment.

It is nevertheless quite surprising to see that there was a bit of inconsistency within the machinery of the federal government with regard to the interpretation and implementation of section 41. Let's say that, today, as a result of the Forum des maires de la Péninsule acadienne affair, the federal government's position is clear on this. The Minister of Justice is arguing instead that section 41 ultimately states a principle rather than an obligation to act.

Whatever the case may be, having regard to the recent decisions of the Supreme Court of Canada on the interpretation of a language right — a broad, generous interpretation taking into account the object of a statutory instrument — it is legally possible to build a solid argument in support of the position that section 41, as it stands, indeed entails an obligation to act. That's possible, just as it is obviously possible to argue the opposite interpretation.

We know that the Federal Court of Appeal adopted a restrictive interpretation of section 41 in the *Forum des maires de la Péninsule acadienne* case. In its judgment, it held that it ultimately states a political principle and that Parliament had not wanted the judiciary to interfere, as it were, in the matter of the promotion and development of the two official languages minority communities.

Bill S-3, as introduced by Senator Gauthier and passed by the Senate of Canada, has one obvious merit. It clarifies in a very simple manner the exact nature of this commitment under section 41. In a way, it renders federal authorities accountable for their actions in the language field. That's why I believe the bill has one obvious merit, which is that it promotes the equality of the two official languages and the development of the official language minorities.

In my opinion, this bill will lead to a concern for language in government policy development action.

We're not talking about an obligation of result here. The federal government is simply being told that, when it puts forward policies and establishes programs, it must be concerned with the language issue and the development of the official language minorities. In short, this will make this concern systematic, as is the concern to comply with the Canadian Charter of Rights and Freedoms in administrative actions.

Second, the merit of this bill is that it will make federal action in the field consistent, once and for all, to the extent that it establishes a very precise goal and purpose to which all authorities, all federal institutions, will have to subscribe.

Part VII of the Official Languages Act definitely displays some of the problems inherent in any federal system, to the extent that it refers to advancement, the learning of the two official languages, development of the official language communities, delivery of provincial services and municipal services in both languages and private sector involvement. This definitely involves federal-provincial relations here. Once again, this is part of the federal system's consultation process. However, I don't see how these characteristics are enhanced or altered by the bill. They remain intact.

Sections 43 and 44 contain an expression of the federal government's spending power, to the extent that spending power is exercised in accordance with negotiations between the various orders of government. To the extent the official language communities can benefit from that, why not? I applaud this proposal.

Lastly, as regards leadership, you know that the Commissioner of Official Languages very recently complained, and rightly so in my view, about the lack of government leadership in the advancement of official languages. I think that leadership in the promotion of language rights and in the development of the official languages communities has thus far been provided by the courts.

● (0915)

The courts have done the most to advance the language rights system in Canada by giving a meaning to, and examining the scope of, the provisions based on legal principles. With Bill S-3, I believe that the Parliament of Canada has an opportunity to take back some of that leadership.

That's what I had to say.

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

Before turning the floor over to Mr. Lauzon, I want to know whether you had an opportunity to examine the amendments moved by the various parties?

Mr. André Braën: Yes, absolutely. I read them, although briefly. I glanced at the amendments.

The Chair: So you have them with you.

Mr. André Braën: There are a number of them.

The Chair: Yes, indeed. Thank you.

Mr. Lauzon.

● (0920)

Mr. Guy Lauzon (Stormont—Dundas—South Glengarry, CPC): Thank you, Mr. Chairman.

Welcome Mr. Braën. I have one or two brief questions to ask you.

First, you just referred to leadership. The Commissioner, Ms. Adam, noted that there was a lack of leadership with regard to official languages. You say it's the courts that have assumed leadership in official languages thus far.

Do you think that's the way we should proceed in improving the official languages situation?

Mr. André Braën: Court intervention in a system like ours is inevitable. The courts are the guardians of both legality and constitutionality. When anyone asserts language rights, constitutional rights and so on, the courts obviously have to play a role.

However, in a democracy such as ours, it's also healthy for governments to be able to intervene. It's ultimately they that propose policies to society and that are responsible for implementing the policies that are adopted. The problem stems from the fact that the language issue in Canada is perceived as a divisive issue. Consequently, since it is a divisive issue, since there's no consensus among Canadians, since it's a sensitive issue, it's better not to talk about it too much. It may be better to allow the courts, whose decisions seem to be more accepted by the Canadian public, to act.

A problem then arises in the exercise of democracy. Even though judges have an important role to play, they're nevertheless not elected persons. In my opinion, it's up to elected representatives to put things forward, to propose things. Obviously, we shouldn't expect a government to base an election campaign on minority rights: it's elected by a majority, and that's not necessarily very appealing. However, in a political sense, an individual who has vision — there have been some of them in the history of Canada and there still are — won't be afraid to put that vision forward. And it's by putting that vision forward that one assumes leadership. To the extent that's not being done, there is no leadership. To the extent you move forward with a bill like Bill S-3, you assume political leadership. You're simply telling Canadian society that this is something we consider fundamental for the country's future, that we think it's important and that this is what we're putting forward. That's what assuming leadership is.

Mr. Guy Lauzon: I don't think the courts have a mandate to assume leadership of the country.

I have another question. If Bill S-3 goes into effect, how will that affect relations between the provinces, the federal government and the municipalities?

Mr. André Braën: It'll have the following effect. I think that, in any case, Part VII of the Official Languages Act currently sets out an invitation for federal authorities, within that commitment, to promote the equality and development of the official language minorities. It's an invitation to consult, to associate with the other orders of government, which are also responsible for delivering services to the public, the provincial and municipal governments, to determine whether they should agree on measures to permit, for example, the provision of public services in both official languages. The Official Languages Act currently contains provisions to that effect. As we know, the Department of Canadian Heritage — and before it, the Department of the Secretary of State — negotiated with the provinces in order to spend funds on instruction in the other official language.

This isn't something new as such, and I don't see how Bill S-3 could be perceived as upsetting the situation. There's nothing requiring a province to say yes to a proposal if it doesn't agree on that proposal. I view the federal government's role in areas of provincial jurisdiction more as an urging role. It urges the provinces, it makes proposals to them, and so on.

● (0925)

Mr. Guy Lauzon: All right. Thank you.

The Chair: Thank you, Mr. Lauzon.

The government's amendment refers more to an obligation of process than to an obligation of result. Did you read it briefly?

Mr. André Braën: The Clerk was kind enough to send me the evidence from last week, and I believe reference was made to the distinction between a process and an obligation of result. For lawyers who've been trained in the civil law tradition, this is something known to them: a distinction is drawn between an obligation of means and an obligation of result. If you go to your doctor, he has an obligation to take care of you, but not necessarily to achieve a specific state of health. In common law, this is something less well known. I find this entire discussion of an obligation of result a bit odd.

When you undertake to advance something, you simply undertake to set, have in mind and work toward achieving an objective, but that doesn't mean that the ultimate objective, that is to say the absolute equality of the two official languages, the equality of the two official language communities, will be achieved. That obviously remains an ideal, as such. I didn't understand the entire discussion on the obligation of result. The government says that, if this bill is passed now, everyone will want to take it to court because, for example, equality won't be achieved in such and such a field at such and such a place, and so on.

I believe this is a false problem. The courts will always intervene in our system, once again because they're the ones called upon to interpret statutory provisions. We can't rule them out. In that sense, they assume leadership. I don't believe in this distinction between process and result.

The Chair: Mr. André.

Mr. Guy André (Berthier—Maskinongé, BQ): Mr. Braën, thank you for accepting our invitation to come and testify before the committee. It's a pleasure for us to meet you.

I'm going to react to certain comments you made. You emphasized the fact that the Supreme Court of Canada and various statutory measures have put in place more official language compliance mechanisms than the Official Languages Act itself. The legal scope of statutory measures that have been passed has had a great influence on the courts with regard to respect for official languages.

This week, Mr. Doucet discussed the Liberals' current amendments to Bill S-3 and the fact that the Supreme Court of Canada will render a decision on the application of Part VII of the Official Languages Act on December 8. Having regard to the amendments moved by the Liberals, Mr. Doucet asked us whether it was not preferable to await the Supreme Court's judgment on the application of Part VII of the act. He expressed concerns about those amendments to the effect that the bill, including the proposed amendments, might weaken the Official Languages Act.

So I'd like to hear you on that point.

● (0930)

Mr. André Braën: The courts have intervened to clarify the meaning of certain provisions of the act. For example, it was the courts that held that section 23 of the Charter includes, for the minority, a right of governance of its own school system. It was the courts that said that the publication of statutes in English and in French in Quebec, Manitoba and at the federal level and elsewhere also concerns the regulatory issue. It was therefore the courts that intervened to clarify the meaning of certain provisions of the act because Parliament can't be perfect in its use of words. That's normal; that's why there are courts.

It's true that the Supreme Court of Canada will be asked to rule on the scope of section 41. Should the Parliament of Canada necessarily wait for its decision? Unless I'm mistaken, there haven't yet been any hearings in that case. Normally, in the language field, it takes a good year before the Supreme Court renders its decision once the hearings are over.

It could decide to say that, yes, this is a political principle, or to say that, yes, it's an obligation to act. I'd be very surprised if the Supreme Court of Canada determined the details of that obligation to act in its decision. It must be understood that the courts respect the executive and legislative branches. It's obviously up to the executive branch in this country to determine the terms and conditions of that commitment and so on.

Moreover, there's a fundamental principle in our system, the principle of the sovereignty of Parliament, which is limited only by measures of a constitutional nature. To the extent that Parliament puts forward new objectives, I don't see, first, how this would dishonour the Supreme Court of Canada. If you want my opinion. I think it will be very pleased that the Parliament of Canada is defining the meaning and scope of Part VII itself.

Second, as to the amendments that have been moved, we ultimately don't know what amendments the House of Commons will accept. If those amendments are ever passed, wouldn't there be a risk of conflict with the interpretation of the Supreme Court of Canada? I think we're falling back on assumptions.

The legislative branch has a role to play; it's a leader in its field. So it should accept that role. The Supreme Court of Canada will exercise its power, and the government will do the same.

Mr. Guy André: That's fine. Thank you.

The Chair: Thank you, Mr. André.

We'll continue with you, Mr. Godin.

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

I'd like to welcome you.

To continue on in the same vein, I'd say it's true that Parliament and the court must shoulder their respective responsibilities. In the case of the latter, it's responsible for interpreting. We write the law, and the court interprets it. Mr. Doucet said that, if we carried the government's amendments, Bill S-3 wouldn't be stronger than what we have now. The Supreme Court would then have to interpret the new act. It could interpret the old act, but it would no longer be valid. It wouldn't be worth the trouble to go to the Supreme Court to determine what the old act said, since a new one would be in effect. Let's stop playing with taxpayers' money.

As I understand what Mr. Doucet said, when he appeared last Tuesday, Bill S-3 should remain as it currently stands, that is to say declaratory, because that's what we'll be asking the court: whether it's executory or declaratory.

Bill S-3 defines it and solves the problem. With the amendments, I don't believe it will; I'm afraid. That's what Mr. Doucet said. I'd like to have your opinion on that.

● (0935)

Mr. André Braën: You're asking me for my view on the amendment put forward by the government.

Mr. Yvon Godin: Precisely.

Mr. André Braën: It reads as follows:

> 1.(1) Section 41[...] is amended [...]
>
> (2) In order to implement the commitments under subsection 1, every federal institution set out in [...] to
>
> (a) determine whether the policy [...] impacts [...]

Parliament exercises legislative sovereignty. The role of the courts is to apply a charter and protect constitutional rights. There's obviously a complementary relationship here, an obvious link between the two. In my opinion, drafting the terms and conditions of an obligation, of an undertaking based on assumptions, “the Supreme Court says...” etc., seems a bit risky. If the Supreme Court of Canada says that section 41 — you said so yourself — is declaratory, the question doesn't arise. We have to move forward with Bill S-3. If it states that section 41 is executory, once again, all it's going to state is its executory nature. It will also say that it's obviously up to the government to put in place the terms and conditions of that obligation. It isn't the Supreme Court that will determine those terms and conditions.

Is the amendment proposed here subject to interpretation? I'd say yes. It states: “shall ensure that measures...”. What do the words “shall ensure” mean in this context? You can reconsider exactly the same argument as in the case of section 41 and say that the words “shall ensure” are ultimately declaratory, that they constitute more of an invitation than an obligation, etc. This doesn't resolve that debate. In my view, Bill S-3 states a principle in section 41 and simply states that the federal administration and the government must now implement this commitment. Proposals are being made here to identify the terms and conditions of application. You can obviously start to interpret the meaning of those terms and conditions. There will very likely be different opinions. Are the words “shall ensure” strong or not? Last week, I saw there had been a whole debate. Canadian Heritage “may take” or “shall take” and so on. I think that, if Parliament has a very specific objective, the words to say it will come easily.

Mr. Yvon Godin: Once again, the Bloc Québecois is moving the following amendment with respect to Bill S-3 and the Official Languages Act:

> (4) The Province of Quebec is excluded from the operation of this section.

Some said during the discussions that this clause excluded the provinces. Some witnesses, including officials and Mr. Doucet, said that wasn't what this meant. We're still protected by the Charter and by the act. Its purpose is not to tell the provinces what to do, but rather for there to be a dialogue and an agreement if they do something together. Since you read the remarks from last week, you seem to be quite informed about that. I'd like to have your opinion on the subject.

Mr. André Braën: Yes.

Mr. Yvon Godin: If the provinces are excluded, won't that undermine the desire to help the minorities in the regions? That would be the opposite effect to the one sought.

Mr. André Braën: In this country, as you know, some governments may be in less of a hurry than others to respond to legitimate requests from their official language minorities. The Parliament of Canada would like the federal government to play a more active role in this area. It has previously done so by creating many programs.

In my opinion, when you talk about development of the official language minorities, you go beyond the simple framework of services provided by federal institutions. We're talking about the minority's entire living environment, which includes provincial governments, municipal governments and public agencies or...

● (0940)

Mr. Yvon Godin: Mr. Chairman, I don't think...

The Chair: Your time is up, Mr. Godin.

I'd like to ask you whether you prefer Bill S-3 as it stands or Bill S-3 with the government's amendment.

Mr. André Braën: Personally, I prefer the original bill by far.

The Chair: All right.

Also, wouldn't it be simpler to change subsection 77(1) of the Official Languages Act and to add Part VII?

Mr. André Braën: Section 77 concerns court remedy. In the event of a complaint for non-compliance with Part VII, for example, it would be possible to go to court.

The Chair: That currently excludes Part VII, but by including it...

Mr. André Braën: Wait a minute. Even though section 77 currently does exclude the application of Part VII, it should be clearly understood that the Federal Court of Canada exercises what is called a power of review over the federal administration. It can intervene where it claims there is an illegality. So, if there can be no intervention under section 77, someone will very definitely be knocking on the door of the Federal Court of Canada, saying that the federal government is acting illegally to the extent that it is not complying with the terms of its legislation. It is entirely constitutional to do so. The possibility of review is thus already provided for.

However, if this were made clearer in section 77, I believe it would make the federal authorities' commitment even more credible and certain.

The Chair: Thank you.

We'll continue with you, Mr. Godbout.

Mr. Marc Godbout (Ottawa—Orléans, Lib.): It's my turn to welcome you here today. Thank you for taking the time to come and enlighten us somewhat about Bill S-3 and the proposed amendments.

We've been told quite often that, if we accept Bill S-3 as it stands, and if Part VII is thus clearly enforceable, we'll often be winding up in court. You mentioned a word, but I would ask you to expand on the subject. Obviously, in my opinion, section 23 of the Charter was clear and we nevertheless wound up in court often.

Do we run the risk of winding up in court more often if we accept Bill S-3 as it stands, or if we pass the amendments moved by the government? Would it be better to have a statement that is perhaps less clear, or another one that seems much more specific, which is the original text of Bill S-3? I'd like you to comment on that subject because it's an argument that's often been put to us. I've always felt that, if you wind up in court, perhaps it's because you haven't done what was provided by the law.

Mr. André Braën: I understand that, in a democracy, a parliament consisting of elected representatives is sovereign, but it must also be understood that, a democracy, the role of the courts is essential, unavoidable. Otherwise, you can no longer say you have a democracy. Here we're talking about a judicial branch that has to be independent as such. In our system, we can't rule out the eventual intervention of a court of justice; that would be unconstitutional. In our system, the roles are such that the legislator legislates, the executive branch implements and the judicial branch interprets. Since the Charter, the judiciary has gone even further, since it's now asked not only to protect, but also to define the content of fundamental rights as such.

Some interventions in the language field are inevitable, for a number of reasons: first, because it is the role of the courts to interpret statutory and constitutional instruments. You can never avoid that. Moreover, it must be clearly understood that, as a result of government inaction, the official language minorities very often have no other choice but to turn to the courts. Once again, it's not very appealing to conduct election campaigns by promoting minority rights. Do you understand the importance of the courts in this regard?

There's also the fact that, even if governments are given language obligations, many unfortunately will take little or no action, for all kinds of reasons. It's quite curious that there are still schools cases before the courts based on section 23 of the Charter, which was passed in 1982. As you can see, we don't have a choice. Moreover, the federal government subsidizes a court challenges program, one of the components of which is designed to provide financial assistance for cases involving constitutional language rights.

● (0945)

Mr. Marc Godbout: Based on your expertise, what wording do you think is the least ambiguous: Bill S-3 as it was originally tabled or the amended Bill S-3? Which version is the clearest and the one that might prevent us from winding up in court perhaps more often?

Mr. André Braën: The great merit...

Mr. Marc Godbout: I'm asking you for a somewhat prospective answer.

Mr. André Braën: Yes. The great merit of the original Bill S-3, if you compare it with the amendments that have been put forward and that are much more detailed, is that it sets out an obligation, and an obligation that must be carried out as follows: the federal institutions must ensure that positive measures are taken. No one may dispute in court, for example, the fact that a measure the federal government has taken has not achieved the desired results; that's no business of the courts. The courts must simply determine whether or not, in its actions, the federal government considered the language issue as such. It's recognized that, under this bill, the onus is on federal authorities to determine means, to choose the terms and conditions of application. Once again, saying that we can avoid court intervention is a non-issue, in my view.

The Chair: Thank you.

Mr. Marc Godbout: I think that provides clarification.

The Chair: Thank you, Mr. Godbout.

We'll move on to the second round; we won't have any more than three. Is that all right with the Conservatives?

Mr. Guy Lauzon: It's all right.

The Chair: That's good. So we'll come back to the other side.

Mr. D'Amours.

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

In view of what you said earlier about whether the matter is one of process or result, in one way or another, I believe it's clear, as you said, that the courts will have occasion to rule as to whether someone finds that the processes are not complete or results haven't been achieved, depending on the interpretation that's made. So in one way or another, people will have the opportunity to go to court to debate the changes made pursuant to the amendments made to Bill S-3 which we're considering. Whether it's the present version or an amended version, that means there would be no advantage in saying there might be more or fewer court actions. Is that in fact what you're saying?

● (0950)

Mr. André Braën: If Parliament says that the government's commitment must be understood as an obligation, that means that, at the legal level, the public, individuals and members of the official language communities have, on the other hand, a right to expect that the federal government has a concern for the language issue when it establishes programs.

Furthermore, as regards the choice of means, all the act is saying that it is up to the government to determine that at its discretion. If, in the bill, you determine with greater clarity the terms and conditions of application and the means that should be chosen, you open the door much wider to court cases. It's much better to opt for general commitments under which you recognize that it is up to the government to decide on means at its discretion.

Mr. Jean-Claude D'Amours: So, if Parliament considers it an obligation to ensure the process, there may be a weakening of the obligation of result, but that would not necessarily increase the risk of court cases. Ultimately there's no way of knowing in advance whether a group will consider the obligation of process not complete. Moreover, the obligation of result would enable Francophone minorities outside Quebec and Quebec's Anglophone majority at least to feel that real action will be taken, not only to discuss or consult, but also to take real action.

Mr. André Braën: I'm going to proceed by analogy. I see the wording of section 41 as proposed in Bill S-3 a bit like a relationship between a patient and his doctor. Here there's a commitment on the federal government's part to take care of the language issue. That doesn't mean that the patient will be alive at the end of the line. We hope so. It's exactly the same thing as when I go to my doctor: I want him to care for me, but I'm not sure I'll stay alive.

So when you talk about the vitality of the Anglophone and Francophone minorities, about promoting full recognition of the use of English and French in Canadian society, what does that mean in terms of results? In each of the cases that arises, you could say that's an obligation of result. In legal terms, I don't think that makes a lot of sense.

Mr. Jean-Claude D'Amours: It means what it means.

Mr. André Braën: That's right.

Mr. Jean-Claude D'Amours: Do I have a little time left?

The Chair: You have 30 seconds left.

Mr. Jean-Claude D'Amours: In my remaining time, could you tell us about any features that would be a little more negative in Bill S-3 in its present form, which you favour, compared to Bill S-3 as amended by the amendment designed to eliminate that? Could you identify a few features that would mean minorities would have less protection, fewer benefits?

Mr. André Braën: Where the amendment states that measures must be taken to verify impact and consult organizations, an obligation to consult is already implicit in the commitment as such. It talks about considering the determination and so on. In strictly legal terms, that means that, with respect to a specific situation, you can begin to consider whether all these terms and conditions are being applied or not, complied with or not. I think that what's being proposed here could become a kind of straightjacket for federal authorities.

Why not operate with one objective and say — this hasn't been the case since 1969 or even since 1988 — that now you'll systematically have an obligation to be concerned about official languages? Once again, that doesn't mean we're going to save the patient, but, if we take action, he'll very definitely be in better health; I guarantee you that.

● (0955)

The Chair: Thank you.

Mr. André, you have five minutes.

Mr. Guy André: Good morning.

In the Casimir-Solski case and in the Gosselin decision, the Supreme Court nevertheless recognized that Quebec is a minority Francophone society living in an Anglophone society in North America — let's understand each other on that — and that this specific linguistic context has to be considered.

At the same time, we have our own Anglophone minority in Quebec, but we are nevertheless a Francophone minority. Our language may be threatened; we have to protect it. We therefore have the Charter of the French Language and Bill 101 to protect the French language. The Supreme Court has recognized this.

How do you explain that this aspect, this specific characteristic of Quebec isn't necessarily recognized in Bill S-3? The government doesn't appear to want to protect the French language any further in this bill. How do you perceive the situation?

Mr. André Braën: The courts, including the Supreme Court of Canada, obviously recognize linguistic asymmetry. Moreover, they'll have to deal with it, which won't necessarily be very easy, particularly in the case of access to English-language schools in Quebec. This is also a characteristic that stems from the legislation and the Constitution. Section 133 applies to Quebec and to the Parliament of Canada. Section 23, the mother tongue criterion for access to minority schools, does not apply in the case of Quebec. So there's an asymmetry that is recognized in constitutional and legal terms.

In the context of the Official Languages Act and of a commitment that is not binding on the Province of Quebec, but rather on federal authorities, I find it hard to see how Quebec could be excluded from its application. It could be done. The Canadian government isn't required to legislate from sea to sea. It may legislate for very specific areas, but I find it very hard to understand how it could remove Quebec from the field of application of this statutory instrument.

There's talk about development of the official language minorities. However, there's also an official language minority in Quebec. In my view, it will have to reconcile that minority's development rights and needs with French-language promotion needs in Quebec. I don't think that's impossible, even though it's a delicate matter.

Mr. Guy André: The Supreme Court recognizes this, but it's not recognized in parliamentary, legislative terms.

Furthermore, what's your view of paragraphs 43(1)(d) and (f)? Paragraph 43(1)(f) states:

> (f) encourage and cooperate with the business community, labour organizations, voluntary organizations and other organizations or institutions to provide services in both English and French [...]

This is direct interference in one of Quebec's areas of jurisdiction.

Mr. André Braën: That's the expression of what's called the spending power. The spending power is a conflictual factor in a federal system, but to the extent it is exercised, to the extent the federal government has money and to the extent in can spend it.

When it comes to spending money in areas under provincial government responsibility, that obviously means there will be negotiations. So it's an intrusion, but an intrusion that's made with...

Mr. Guy André: An intrusion that could weaken the French language in Quebec.

Mr. André Braën: No, not at all.

Mr. Guy André: The implementation of this clause could have that consequence.

Mr. André Braën: With all due respect, sir, let's consider the Official Languages Act that was passed in 1969. It was, first and foremost, a measure designed to promote French, because French had been only moderately used in the federal government before that time, including in Quebec.

So, even though it refers to the advancement of both official languages, let's say they had in mind the advancement of one language more than the other.

● (1000)

Mr. Guy André: French outside Quebec...

Mr. André Braën: Yes. I don't see why that would mean that, in the case of Quebec, this would automatically result in a weakening of the French language. I think the development of minorities...

There is an asymmetry in terms of case law, in legal and constitutional terms, but there's also a factual asymmetry. I don't think the situation of Montreal's Anglophone minority, for example, its institutions, the force of attraction of English and so on can be compared at all with what's going on elsewhere.

In my mind, a government that makes a commitment to advancing both official languages is obviously also bound by this factual asymmetry. Do you follow me?

If we're talking about protecting English in Quebec, my impression is that it's not necessarily in Montreal that that should be done, but rather in the Gaspé Peninsula and other places where the language is disappearing. Montreal is a special case. I dare hope that government authorities are aware of this entire situation.

The Chair: Thank you.

Mr. Godin.

Mr. Yvon Godin: I'm going to go back to the doctor example. If the doctor only prescribes aspirin, it may be time to change doctors. That's what we're trying to do now, in my opinion. The doctor may be qualified to treat the heart or to thin the blood, but results as a whole leave something to be desired. You have to treat the entire body.

Mr. André referred to union and management organizations. If Bill S-3 were passed as it stands, I don't think dictatorships would be established in the provinces or that it would disrupt all organizations rather than help them. In fact, Bill S-3 doesn't merely state that we're going to help them; it provides that we have an obligation to do so.

Back home in New Brunswick, for example, the municipalities are now required to serve the public in both languages. The federal government has allocated funds to the province so that each of the municipalities is able to translate all documents. In this case as well, the idea was to help, not handicap a province.

However, the fact that the federal government is not doing its job and that we're therefore required to go to court is a real problem. That's what happened in the case of the food inspectors, and that's what's happening right now in the case of the Bathurst recruitment centre, which the federal government has decided to transfer to Miramichi, an Anglophone region that's defined as such. And yet the Bathurst region has been offering bilingual services for the past 50 years.

In conclusion, I'd say that, in my view, excluding the provinces, and not just Quebec, would have the effect of weakening the scope of the bill. That more than ever would be a step backward.

Mr. André Braën: I would respectfully point out to you, sir, that we nevertheless can't amend the Constitution of Canada, particularly sections 91 and 92.

Mr. Stéphane Bergeron (Verchères—Les Patriotes, BQ): That's it!

Mr. André Braën: You cited two examples, including the one concerning the Canadian Food Inspection Agency, but they concern the federal administration. But it's clear here that Bill S-3 will add bite.

However, as regards the intervention of municipal services, provincial authorities and the private sector, it's much more delicate. As we know, section 43 is the expression of the spending power. The federal government therefore cannot interfere in an area of provincial jurisdiction in this way. It couldn't be claimed that Bill S-3 permits this kind of thing.

● (1005)

Mr. Yvon Godin: Mr. Chairman, I'd also like to point out respectfully that I wasn't talking about the municipal level; I was talking about the province that invited the federal government to come and spend money there in order to assist it.

Mr. André Braën: Yes.

Mr. Yvon Godin: I wasn't talking about interfering in areas of provincial jurisdiction for no reason.

Mr. André Braën: That's precisely what I was saying. For that money to be spent in areas of provincial jurisdiction, there must automatically be negotiations with the provinces concerned. For that reason, things can't be done unilaterally.

Mr. Yvon Godin: Let's go back to what Mr. Doucet said and imagine that the provinces are excluded. The federal government could then say that, as a result of that exclusion under the act, it can no longer intervene at the provincial level. That's not currently the case, but if this is passed...

Mr. André Braën: In my view, the Constitution Act is the fundamental law of the land.

Mr. Yvon Godin: That means we don't need to exclude the provinces.

Mr. André Braën: No, to the extent provision is made for a division of powers. The only way to change that division is to use the amending formula set out in the Constitution Act, 1982. I don't see how a federal statute could be used to say that the federal government can interfere in areas of provincial jurisdiction and do what it wants. Otherwise, I'll have to review my entire constitutional law course.

Mr. Yvon Godin: You'll have to consult a good doctor.

Mr. André Braën: Sometimes it's hard to find one. But there are nevertheless good ones.

Some hon. members: Oh, oh!

Mr. Yvon Godin: So it would be pointless to add that Quebec and the provinces are excluded, since we're already protected by the Constitution.

Mr. André Braën: I don't believe it's pointless, because...

Mr. Yvon Godin: Are you saying it should be done?

Mr. André Braën: I think it's fine as it is. I'm going to tell you why.

Mr. Yvon Godin: There's a Bloc Québecois amendment to exclude Quebec.

Mr. André Braën: In my opinion, that's unthinkable. How could you sell the idea that Quebec's Anglophone minority wouldn't be able to rely on the federal government's commitment? I find that hard to understand, since it's a federal, not a provincial commitment. From there, I don't believe a province can be excluded as such. That's clear in my mind.

Mr. Yvon Godin: Thank you.

The Chair: We're now starting the third and final round.

Mr. Bergeron.

Mr. Stéphane Bergeron: Thank you, Mr. Chairman.

I'm going to go back to the doctor analogy. I think there's a danger that Bill S-3 could become a kind of placebo for the Francophone and Acadian communities. I'm going to take Mr. Godin's example. I was a marine cadet instructor at Sainte-Angèle-de-Laval for a few years. When a cadet had a problem, whether it was a headache or a scraped knee, he was sent to the infirmary and given Cepacol. I imagine there was a desire to administer a kind of placebo. To go back to the doctor analogy, we have to prevent Bill S-3 from becoming a kind of placebo.

Earlier you referred to the ability of government authorities to consider the language situation. I don't doubt government authorities' ability to consider the language situation in each of the provinces. However, I doubt the ability of the courts to consider the language situation, if the legislative framework is very specific and does not permit such interpretation. That's why I'm concerned about Bill S-3, as we have it before us.

Going back to Mr. Godin's example a few moments ago, paragraph 43(1)(f) of the Official Languages Act talks about encouraging and cooperating with the business community, labour organizations, voluntary organizations and so on. I think it's fine for the federal government to encourage businesses to operate in Canada's other official language, except that, in Quebec's case, that simply goes against the Charter of the French Language.

You rightly referred to the fact that Part VII of the Official Languages Act goes beyond the areas of jurisdiction of the federal government and federal institutions. That's the problem we see in it. There's a kind of implicit recognition of the federal government's power to spend in areas of provincial jurisdiction, which might violate certain provincial legislation. As Mr. André mentioned a few moments ago, Quebec has a Francophone majority, of course, but a Francophone majority that constitutes a minority in North America.

So it's necessary to protect that minority, which at the same time is a majority, and there's a Charter of the French Language to protect that majority, which constitutes a minority in North America as a whole. However, under paragraph 43(1)(f), for example, won't the federal government intervene in flagrant violation of the provisions of the Charter of the French Language? That's what concerns us. We'd like to see the federal government limit its power to intervene in the provinces' jurisdictions.

There was talk of Mr. André's amendment to enable Quebec to opt out. There was Mr. Lauzon's amendment to ensure provincial jurisdictions are respected. On Tuesday, Mr. Doucet told us about an amendment that would take the linguistic situation of the various provinces into consideration. How do you view that?

● (1010)

Mr. André Braën: I believe that Bill S-3 will — and must — be perceived as encouraging, in particular, development of the Francophone minority outside Quebec. There is a linguistic asymmetry. The fact of the matter is that English may need less advancement in Quebec than French needs elsewhere in Canada. The federal government has previously recognized that, I believe. The Office of the Commissioner of Official Languages and the courts recognize it. They have all recognized that it is legitimate for the Government of Quebec to promote French, in view of the situation of the Province of Quebec.

I don't think Bill S-3 is an attack against the advancement of French. On the contrary, its aim is to promote French elsewhere. I don't have the same perspective as you on the subject.

The fact is that, in our country, people very often disregard or are indifferent to one of the two official languages, and it's not English. Bill S-3 should enable federal authorities to ensure slightly more harmonious development in this regard.

I find it hard to understand how Bill S-3 could be perceived as an attempt — imagine what that would look like politically — by federal authorities to promote English in Quebec. Recent studies advanced by the Conseil supérieur de la langue française du Québec have shown that, nearly 30 years after Bill 101, most immigrants, 57 percent of them, adopt English in Quebec, and so on. In the circumstances, I find it hard to understand how anyone could use Bill S-3 to promote English more, when it's French that should be promoted, including in Quebec.

In my view, Bill S-3 is aimed first and foremost at the development of Francophone minorities.

Mr. Stéphane Bergeron: And yet that's not what's stated in the wording of the act which refers more to development of the Anglophone and Francophone minorities in Canada.

Mr. André Braën: Indeed.

Mr. Stéphane Bergeron: I understand your interpretation, and I'm grateful to you for it. The problem is that that isn't what the text of the bill states.

I feel — and this is somewhat what Mr. Doucet was saying on Tuesday — that it may indeed be a good idea to include a provision in the bill urging the courts to consider the linguistic situation, if only to reassure those who, like me, aren't necessarily reassured.

I understand your argument, and I must say I agree with it. I entirely agree with you that the Official Languages Act must serve, first and foremost, to defend and promote the Francophone and Acadian communities of Canada. That said, that's not necessarily what the text states. The title of Part VII of the Official Languages Act is: "Advancement of English and French". Regardless of your interpretation, the text of the act is quite clear.

Mr. André Braën: That can be understood as well. To the extent there's duality and two official languages, it's hard to advance only one.

Mr. Stéphane Bergeron: I understand all that.

However, perhaps we should make sure a provision is included in the bill urging the courts to consider the linguistic situation, so as to avoid there being a much less generous interpretation — let's say it that way — than yours.

● (1015)

Mr. André Braën: With your permission, sir, I would say that the courts are used to working on a case-by-case basis. If you take the schools question, for example, they go on a case-by-case basis. They're not trying to instill a vision from sea to sea; they go on a case-by-case basis. They determine whether rights exists and how to implement those rights as such, in view of circumstances. The judiciary, that is to say the courts, are used to considering disparities and asymmetry.

As I said earlier, Parliament and government have previously taken action that officially recognizes the specific case of Quebec. Once again, considering that this concerns federal institutions, I find it hard to see how one province or minority in particular could be excluded.

Mr. Stéphane Bergeron: I'm not talking about excluding a minority; I'm talking about considering the linguistic situation.

Mr. André Braën: Yes.

The Chair: Thank you.

We'll continue with Mr. Simard, and we'll conclude with Mr. Godin.

Mr. Simard.

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

Welcome, Mr. Braën.

Mr. Doucet told us the Supreme Court might render a decision on the question in December. You made it clear that it could take a year and a half or two years. You also said that the courts have a role to play, as does the legislative branch. So we have two different roles. It is Parliament's role to establish terms and conditions or means. So that will have to be done today or in two years, perhaps after the Supreme Court's decision.

As members of Parliament, we here, in this committee, have the opportunity to establish those terms and conditions, those means, and to do so immediately. My first question is this: since Bill S-3 and similar bills have been defeated three or four times in Parliament, do you think now is the time for members to decide the question?

Now here's my second question. Since these terms and conditions and means are also enforceable, how can this weaken the official languages bill in its present form, if we're prepared to establish and clarify those terms and conditions?

Mr. André Braën: For example, situations could arise in which it would be clear that the government immediately wants to follow an entire process that's provided for in a statutory instrument, without considering the determination and so on. If you don't do it, you become accountable and you may be liable to court action. To the extent a general provision emphasizes the mandatory nature of a commitment and you allow the government to choose the means to meet that commitment — depending on the case and considering the disparities — you become less accountable before the courts because it's recognized that this involves a "prerogative" of the government. All that's wanted is that you act.

If you start stating in a detailed manner how things are to be done, you create a more demanding framework. That might be better, but, if you don't comply with it — and once again, situations may arise in which it's preferable to act in a certain way — you will definitely become accountable before the courts.

Hon. Raymond Simard: You just said something interesting. Perhaps it would be preferable to establish a rigorous process.

That's what we're doing this morning: establishing a process by consulting people and considering the results of the consultations. I find this establishes a process that we have to follow and that creates a certain obligation. Do you agree?

Mr. André Braën: Yes, but you have to beware because there's no symmetry, and the federal government's obligations may vary depending whether you're in Goose Bay, Surrey or Magog. I believe you have to allow authorities some leeway.

Parliament also has to trust the government. Parliament must show the direction that must be taken and then tell the government to do its job.

● (1020)

Hon. Raymond Simard: Going back to my second question, if we manage to define means and terms and conditions here in committee, how can that weaken the bill in its present state? Mr. Doucet's comment really struck me. The purpose of this committee is definitely not to weaken the Official Languages Act. So I'd like to be assured that, in establishing our process here, we're strengthening the bill for the minority communities.

Mr. André Braën: The original bill simply states that the commitment is binding. In legal terms, it recognizes that it is left to government authorities to choose means. So the government has been allowed some flexibility.

Furthermore, the amendment before me states:

> (2) In order to implement the commitments under subsection (1), every federal institution set out in the schedule shall ensure that measures are taken in [...]

Then it states the measures:

> (a) determine whether the policy or program impacts [...];
>
> (b) consult any interested organizations, including organizations representing English and French linguistic minority communities in Canada, if the federal institution considers it appropriate in the circumstances; and
>
> (c) consider the determination [...]

That means that each of these words becomes enforceable. For example, the federal government might have consulted the organizations concerned, but have judged that a particular organization is not concerned. Then it would become accountable for that decision before the courts, to the extent that the organization that was not consulted and is unhappy goes to court to say that the government did not comply with the act, since the act states that the government shall consult interested organizations.

With this kind of arrangement, you're setting out a restriction that may complicate matters further.

Given the time we've spent debating and considering the meaning that should be given to Part VII and section 41, let's simply say today what the real nature of that commitment is and let's tell the government to go ahead and be accountable for its actions in this area.

Do you understand my reluctance over the details of the terms and conditions being introduced? The more you put in, the bigger risk you run of lawsuits.

Hon. Raymond Simard: Thank you very much, Mr. Chairman.

The Chair: Thank you, Mr. Simard.

We'll finish with you, Mr. Godin.

Mr. Yvon Godin: Bill S-3 is precise. The court won't be hearing the food inspectors' case until December 8. The decision may be rendered 12 months later. But it's exactly that. Instead of having a declaratory act, we want it to be executory. As Senator Gauthier said, we need an act with teeth, and this one doesn't have any.

Mr. André Braën: That's correct.

Mr. Yvon Godin: I don't really want to make another joke, but it's lost its dentures.

As regards the government's amendments, from the moment you start talking about different things, you can't list them all and you risk forgetting some. The Official Languages Act concerns everyday matters. We continue on and we evolve as well. With the coming generations, other things happen as well. I take a dim view of starting to include amendments that are going to involve handcuffs rather than moving the issue forward. This is a fairly big issue. It takes time. This is 2005. We Acadians came here in 1600.

Mr. André Braën: I entirely agree with you. We should remember one thing: the purpose of Part VII is the equality of the two official languages and the equality of the two official language communities and the development of the official language minorities.

What does that mean in concrete, practical terms? We can't answer that in an absolute and final way. The answer will depend on circumstances, contexts and so on. If you establish an over-detailed framework, you risk painting yourself into a corner and not being able to respond to each of the situations that might arise.

There's a lot of talk about court remedies, but it should not be forgotten that the Office of the Commissioner of Official Languages can also intervene in this area. I think the Office of the Commissioner has always played an extremely important role in this regard. We should indeed bear in mind the possible reaction of the courts, but there's also the Office of the Commissioner of Official Languages. Let's put forward a clear objective, and the government should act.

● (1025)

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

Mr. Braën, thank you very much for being here.

Mr. André Braën: And I thank you.

The Chair: Thank you for answering our questions and discussing this important topic with us.

I'll allow you a two-minute break. I would ask those who are not attending the in camera meeting to leave the room. Then we'll proceed in camera to discuss our future business.

Thank you.

[*Proceedings continue in camera*]

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