**S3E2 Charter: A Course – Language Rights – Full Transcript**

*\*Transcripts are auto-generated\**

**Music** **(00:01.31):**

Charter a course, I will charter a course, if we can just get the country to trust us. Charter a course, south, east, west and north, and along the way we may find justice.

**Cheryl:**

Hello and welcome back to Charter a Course, a podcast created by the David Asper Centre for Constitutional Rights at the University of Toronto Faculty of Law. My name is Cheryl Milne and I'm the Executive Director of the Asper Centre.

I wish to first acknowledge this land from which our podcast emanates. For thousands of years, it has been the traditional land of the Huron-Wendat, the Seneca and the Mississaugas of the Credit. Today, this meeting place is still home to many Indigenous people from across Turtle Island and we are grateful to have the opportunity to work here. From wherever you are listening, take a moment to consider the Indigenous peoples who first called your location home.

**Cheryl** **(01:04.266):**

In this episode, we will focus on minority language rights in Canada. The Charter interacts with and protects language rights in a few different ways. Sections 16 to 22 provide that the settler languages of English and French are the official languages of Canada. They also explain how various public institutions are required to communicate with Canadians in the official language of their choice. Section 23 provides that Canadian citizens and their children have the right to be educated in either English or French. In addition, sections 2B and 15 may also protect language rights more broadly by guaranteeing freedom of expression and equality.

Our first guest today is Francois Laroque. Francois is a full professor in the common law section of the University of Ottawa's Faculty of Law. Francois currently holds the Research Chair on language rights, and his academic work is centered on the constitutional protection of the language rights of French-speaking minority communities in Canada. He has also acted as counsel in language rights cases at the Supreme Court of Canada and the Ontario and Quebec Courts of Appeal. Welcome, Francois.

**Francois:**

Hi, thank you for having me, Cheryl.

**Cheryl:**

Before we start, I must confess that unlike many Canadians, yourself included, I am not bilingual, and therefore our discussion today will be entirely in English. Could you begin by giving us an overview of the kinds of rights that the Charter guarantees with respect to linguistic minorities in Canada?

**Francois:**

Sure. And let me start also by pointing out that I am coming to you from the traditional territory of the Algonquin people around Matawa. And this is where my family and my Algonquin relatives have also been for many, many years. And so I'm happy to be here. And it's a region that is interesting and I think related to the topic we're discussing today.

in that it's a region that has obviously been occupied by indigenous communities since time immemorial, but that was successively colonized by first the French and then later the English. And so that history is still very much vibrant in the linguistic profile of the area. And this is where I grew up. And also I'd like to apologize, and I'm thrilled to be able to talk about language rights on this podcast today with you.

**Francois** **(03:31.966):**

and to do so in English because I usually only do so in French. It's an interesting feature of Canadian legal education that language rights courses, official language rights courses, I should point out, tend to be offered in French language law schools. Certainly, Ottawa and Moncton, I think have dedicated courses. I think Manitoba also had until recently a dedicated course.

Perhaps it will also in the future, but the professor who insured that class has recently been appointed to the federal court, Gerald Heckman has been appointed to the federal court. So to my knowledge, and please if anyone knows that I'm wrong, please don't hesitate to let me know, but to my knowledge, there are no dedicated language rights courses in any other English law school in Canada. With the notable exception, I would point out of the programs being offered simultaneously at

University of Saskatchewan and University of Calgary jointly with us at the University of Ottawa. And there's been a momentum in recent years to train English language law students to be more proficient or who already have a base in French to be more proficient and to learn the terminology in French. So we've been partnering with them to offer a certification of legal bilingualism, so to speak.

This is how we're getting to talk more and more about language rights in Western parts of the country, and I'm very happy about it, and I'm very happy that the Asper Centre is also interested in talking about language rights today.

That was a very long preface, I'm sorry. But to answer your question, what are the types of language rights that are protected under the Charter? So I mean, official language rights, you gave actually a very nifty summary there in your introduction.

Language rights protect first and foremost the colonial languages. They don't, the Charter does not protect per se Indigenous languages or any other language for that matter in Canada. So it's only French and English. And Section 16 does that. And it does so in a very spectacular fashion in that it declares Canada to have two official languages, French and English, and goes the extra step of highlighting that

**Francois** **(05:56.002):**

those two languages are equal to one another, in relation to one another. They are equal in status, rights, and privileges, to use the language of section 16. And this is remarkable because, well, we know down on the ground that these two languages are not on the same footing. English is the dominant language on the planet, and 1.5 billion speakers, I think, last time I checked. And whereas French has, you know,

million speakers worldwide and less than 10 million or so in Canada. And so, for the Charter, for the Constitution of Canada to hold these two languages on the same footing is remarkable indeed. And it brings about remarkable challenges for our public institutions because the next sections of the Charter after Section 16, as you pointed out in your introduction, create rights but also obligations.

on our public institutions at the federal level to be bilingual. What it means for Canada to be an officially bilingual country, it doesn't mean that every citizen must speak the two languages, of course that's clearly not the case, but it means at the very least that the government must be bilingual. The government must be able to respond to the demands of its citizens in the official language of their choice. And not just the government, but I mean the apparatus of state at large.

That means all three branches of the government. Parliament covered by sections 17 and 18, which means that any MP can rise in the House, or any Senator can rise in the Senate and speak in the official language of their choice and file documents and read reports. And also, that, of course, our statutes are enacted in both official languages and that they are equally authoritative. Every document, every report, every statute, every regulation enacted at the federal level are held to be.

equally authoritative. So that covers that branch. With respect to the judiciary, section 19 of the Charter says that everyone has the right to use the French or English in the courts established by Parliament. That's what the Charter says. Now, the Official Languages Act, we can talk about that later, goes a bit further. But the Charter says that everyone has the right to use the either official language in the courts established by Parliament. There is an interesting case.

**Francois (08:23.446):**

going back to 1986, that had to answer the question, does the right to use the official language of your choice include the right to be understood in that language by the court? And the answer of the Supreme Court at that time might surprise you. The court said, no, it does not include that right. This was the Société des Acadiens, McDonald, Bilodeau trilogy in 1986. And we can touch on that later.

**Cheryl:**

And that’s really the difference whether you have a bilingual judge or jurist and whether you have interpretation, right?

**Francois:**

Exactly. The more specific question, and you're quite right, is whether a litigant is able to address the court and be understood directly by the court without the aid of an interpreter or translation and for substantial justice to be met. The last bit is, in many respects, the most important one for Canadians on a day-to-day basis, is the right for

every Canadian to communicate and receive services from the government and the official language of their choice. And this creates a positive obligation on the government to therefore be able to serve and communicate with Canadians in the official language of their choice and therefore to be bilingual. So that's the framework with respect to the federal government. Now, Section 23 of the Charter is an intriguing section. It is by far the most litigious section, language rights section in the Charter.

And that's the provision that creates positive obligations on the provinces with respect to minority language education, whose first language and still understood language is the language of the minority of the province where they reside, or has received an important part of their primary education somewhere in Canada in the minority language, is entitled to have their kids continue their education at the primary and secondary level in that language as well.

So, in effect, that means that Francophones living in Alberta have the right to school boards and schools where the numbers warrant. And just as Anglophones in Quebec also have right to their schools and study in English where the numbers warrant. It's a remarkable section. I keep using the word remarkable because it's brought about stunning litigation with stunning results.

**Francois (10:51.062):**

And the resulting orders can cost real dollars and the cost, if we're going to talk about a case in British Columbia in a few minutes, you know, the estimated cost of that litigation, what was at stake, was you know, $300 million of investment in French language education in that province. So this is no small potatoes.

**Cheryl:**

So, you've mentioned Section 23 as being the most litigious section. So is that the section that comes most into play? in minority language litigation generally across the country?

**Francois:**

Yes, absolutely. There's no other section that has generated more litigation than section 23. And for good reason, because in the federal Canadian Charter of Rights and Freedoms, it creates, as I said, direct obligations for the provinces in an area that belongs solely to the provinces, and yet that all the provinces signed up for in 1982 when the Charter was adopted.

So there's a chasm between recognizing the principle of the thing and then implementing it on the ground in the real world. And that's why litigation has been so prevalent. And it's surprising though, because the Supreme Court has been remarkably consistent in its jurisprudence on Section 23, highlighting with every case what the right entailed and how trial courts go about

settling the disputes with respect to what does it mean for numbers to warrant and what is the level of education and quality of facilities and installations that the Section 23 requires. And Supreme Court has been building over the years on its jurisprudence but has been remarkably consistent. There's been no surprise turn in the case law. And yet the provinces don't abide always by it. That's what I find striking.

we find ourselves so often in front of the courts trying to flesh out and answer once again what Section 23 entails. I should point out before we go any further, and this is again, another remarkable feature of language rights in Canada under the Charter, is that they are part and parcel of the supreme law of the land, obviously being enacted in the Charter. But also, Sections 16 to 23 of the Charter, the Language Rights Provision, it represents almost

**Francois (13:18.378):**

a quarter, more than a quarter, a third of the sections of the Charter. The Charter has, what, 34 sections and eight of them, nine of them refer to official languages. So that's no small thing. Also, worth pointing out that the language rights protected under the Charter are not subject to the Notwithstanding Clause. This is not something provinces or the federal government can opt out of. And finally, the level of entrenchment that these particular rights enjoy is also striking.

If Canada were to attempt to amend its language rights obligations federally, it would entail the section 41, the unanimity formula for every resolution in every legislature and in the provinces and territories and in Parliament, subject only to a modification to the Constitution that would affect only the province. And that would be section 43. And this is what New Brunswick, for instance, has used when it amended the Charter to establish new language rights, constitutional language rights

for the Acadians and Anglophones of that province. So yeah, these are all curious little features of language rights that I highlight for my students at the beginning of each class, this start of the term, just to set the table and make them appreciate that this is a unique subject matter in Canadian Constitutional law, and that has very distinctive features as a body of law, but yet that relates to perhaps...

one of the most fundamental conditions of our humanity, language. Language is one of those things that, is there anything more fundamental than language? We can't count to ten without using words in our brain. We can't say our name. It's part and parcel of human identity, belonging, well-being, security. This is why we talk about sometimes linguistic security as being the fundamental purpose and goal of the body of law that is language rights.

we're really talking about human security and the higher aspects of our existence on earth as human beings and collectively in Canada.

**Cheryl:**

Hence the importance of actually dedicating at least one podcast, maybe even more, to this topic. It also touches on, as you've said, so many other aspects of constitutional law, including the amending formula, which we really haven't talked about.

**Cheryl (15:41.882):**

in our podcast and in any of our episodes and it's a fascinating one. But also I want to go back to this issue about the damages. You talked about how much the British Columbia case was going to cost the province of British Columbia. And while you mentioned that the law under section 23 of the Charter is pretty settled, it keeps coming back to the courts, I think potentially because of that dollar value that gets attached to providing

this kind of education for minority groups across the country. But could you tell us a little bit more about the British Columbia case and its significance?

**Francois:**

Absolutely. And what a case it was. Now by way of a background, I should point out that the Research Chair that I occupied, the Canadian Francophonie Research Chair on Language Rights, was one of the intervenors at the Supreme Court in that case. And we made submissions on a very narrow

issue and I can talk about that further, but the Conseil Scolaire Francophone de la Colombie Britannique versus British Columbia. It is an extraordinary case that started way back in 2010 when the Conseil Scolaire Francophone, which is the only French language school board in BC and a group of concerned parents brought a lawsuit with respect to the state, the current state of 37 schools all over BC.

the civil claim raised essentially chronic failures in the provincial funding of education, which in effect unfairly, it was alleged, marginalized the Francophone communities, the Franco-Colombians as we call them, the Franco-Colombians, and therefore infringed their charter rights. Two basic categories of claims that were involved here. The first category involves systemic claims among other things, the fact that the CSF, the Conseil Scolaire, had not received

the annual grants for building maintenance that the English school boards received, for instance. And also they challenged the way capital projects were prioritized in BC. You know, English schools would get greenlit for new buildings or new additions, whereas the French schools did not. And this was urgent because no other school board in the country was growing faster than the… Conseil Scolaire…it was the fastest growing.

**Francois (18:07.71):**

school board, certainly in the province and probably amongst the fastest in the country. Schools were bursting at the seams. Schools had portable shacks in the schoolyard to accommodate the overflow and these were cold in the winter, and some had vermin. And so, these were really, really run down school buildings and so it was patently unfair and therefore they challenged

the manner in which all of this was being funded and how the province allocated its education budget. And also, the first category of claims involved damages or at least claims an amount for how school transportation was being funded. Now, because there were comparatively fewer French language schools, French families had to travel further to send their kids to school and yet there were not enough.

buses and the routes were long and therefore the whole way school transportation was being managed was also unfair. And the second category of claims really quickly, they involved specific complaints about the need for new schools or improvements to existing schools in I think 17 communities across the province. This was a monster trial.

It lasted over three years, experts on both sides testifying, and it certainly led to one of the longest trial decisions in Canadian history. I think it's nearly a thousand pages long, but this is what Section 23 required in the type of claim that was being raised. And essentially, the trial judge in that case had the task of sitting down and comparing the situation in the various...

37 schools that was run by the Conseil Scolaire de la Francophonie, Conseil Scolaire de la Francophonie Brut de la Computonique, and the English language schools, the majority language schools, essentially. And to ask, Section 23 requires the judge to ask whether the students enrolled in those schools are receiving a substantively equivalent educational experience than the children of the majority, and whether or not a reasonable parent would be deterred to send their students to

**Francois (20:28.034):**

a French language school given the state of the buildings and the programming. And so that's what Section 23 requires is that kind of comparative exercise. And the trial judge found that there were indeed some violations of Section 23 in BC and that the way these schools were funded was contrary to the Charter. In not all cases, but she did find some violation in some cases, but then went on to find that those violations of Section 23 were justified or saved under Section 1 of the Charter.

And this was a first in Canadian law. No other trial judge in Canada had found that a Section 23 violation was justified or saved under Section 1. And then also the final part of the decision, and I think that's your question touched on this, is she awarded damages, I think in the amount of $6 million to the Conseil Scolaire de la Francophonie for the freeze on the funding for school transportation at a time when, as I said, enrollment was skyrocketing in these French language schools across the province.

And so she, in recognition of the unfairness there, granted $6 million in damages. So the Conseil Scolaire obviously appealed that decision on the bits that they lost, and the government cross-appealed on the bits that they lost. And at the Court of Appeal, well, it was a complete and total victory for the British Columbia government. The Court of Appeal reversed the trial judge's decisions on the damages.

order and found that it was perfectly fine for a government to violate Section 23 rights provided the rationale fit or could survive an Oakes test. So hence the importance of heading to the Supreme Court of Canada. So this was now nine years later, by the time it goes to the Supreme Court of Canada, we're in 2019. And it was a memorable case.

as I said, because of all these features I've been discussing, but also because the hearing took place in Winnipeg. This was the time where the Supreme Court decided to go on the road. It set up shop in the courthouse in Winnipeg. Just that alone was an interesting feature, and I was glad to be a part of it. It was strange to see the nine justices outside of their usual Ottawa environment. But that was the case.

**Francois (22:52.61):**

We heard all the arguments being made by the provinces and by the interveners and obviously by the claimants. And the Supreme Court of Canada allowed the appeal in part. But the sum of it is that the Conseil Scolaire won the bulk of its initial claims. So, it was…as grim as things might have appeared to them after the BC Court of Appeal decision, this was the reverse. This was an almost complete and total victory.

and a spectacular win for the Conseil Scolaire, as I said, worth over $300 million on paper.

**Cheryl:**

I should point out that the Asper Center intervened in the case as well on the narrow issue of the remedy because the argument or what the governments were putting forward was if you find that a policy, which is what they were saying,

this was a policy issue. If the policy infringed the Charter, then there should just be a declaration under Section 52 and there should be no right to damages under Section 24. Basically, the Supreme Court of Canada basically allowed for those damages in that context. So that was the issue that the Asper Center intervened on.

**Francois:**

Yes, it was a very powerful, intervention was Professor Roach who made those submissions. On the Supreme Court decision, which is thankfully, mercifully not as long as the trial court decision, but it's still a lengthy Supreme Court of Canada decision with seven judges in the majority save a, I would say, light dissent by Justices Brown and Rowe, but they only disagreed on some, I would argue, minor points.

The bulk of the decision essentially upheld, as we said at the outset of the podcast, constant jurisprudence from the Supreme Court of Canada on Section 23 since the Mahe decision in 1990, where Chief Justice Dickson fleshed out really for the first time how to run a Section 23 analysis and the comparative exercise that we talked about earlier, and how we go about pairing a school of the minority to a school of the majority.

**Francois (25:11.514):**

situated on a sliding scales, the terminology they use, and depending on extent of the breach of Section 23, the entitlement would lead to different results. For example, if the numbers aren't significantly important, the community might be entitled, for instance, to a French language classroom in an English language school. But at the other end of the spectrum, which was the case, for example, in...

Doucet-Boudreau and Arsenault-Cameron, these cases more out east, they led to the conclusion that new schools were needed to be built to accommodate this sizable francophone population in those situations. So in BC, we found ourselves with a bunch of schools that probably felt somewhere in the middle of the sliding scale. And therefore, trial judges needed to be guided from the Supreme Court on how to apply Section 23 in those cases.

And so that was much needed clarity from the Supreme Court in that case. And they also gave guidance on how to run an Oakes test on Section 23 because it hadn't really had to be done before. But the Supreme Court recognized that Section 23 is a special section, a very distinct feature of our constitutional legal order, and that it would take an especially high

threshold to be met for a Section 23 violation to be justified or saved under Section 1. Mainly because, and this is I think worth highlighting, in essence the government was trying to make the case that it should be allowed as a provincial government to manage its provincial budget as it sees fit and therefore to prioritize immobilizations and capitalization capital projects.

and decide where to invest and where to build schools. And this is something that it should be done. And that exercise of weighing the costs of a particular solution to a Section 23 problem is already part and parcel of the Section 23 analysis. And the province was essentially using it again at Section 1. And the Supreme Court says, no, that's unfair. Because we've already considered the dollar issue

**Francois (27:30.782):**

under Section 23. We can't go again and raise it under Section 1 and certainly not try to use it in such a way that managing budgets is some kind of oppressing and urgent concern. It's not. The Supreme Court said that the ordinary management of provincial funds is day-to-day business. It doesn't rise to the level of, say, in NAPE where there was a huge financial crisis at the provincial level.

And in those extreme scenarios, perhaps, it could be justified to consider the financial impact of a decision, but certainly not in an ordinary Section 23 case. And that's on this narrow ground that Canadian Francophonie Research Chair intervened. As interveners at the Supreme Court, we now get 10 pages and 5 minutes, if we're lucky. And so, my contribution had to be narrow.

We did two things and I think we did it well enough and effectively we reminded the historical context that we thought was missing from the discussion at the course below. The historical context of Section 23 is why we ended up with Section 23 in the Charter in the first place. And also we made some arguments on Section 1 and how the financial piece shouldn't be factored in too heavily in an Oakes test analysis. So that was a big case. I think one for the books to be sure. But it also...

comes is it's perfectly aligned with the previous jurisprudence and it's just the natural progression of the law and brought some clarity on issues that had not been settled until then.

**Cheryl:**

Well, it certainly sounds like the case itself has a lot of issues to unpack and that it has a lot sort of discussion that really impacts the Charter more broadly than just with the narrow.

issue of Section 23. I now want to turn to another piece of litigation that you've been involved in. You recently brought an application with retired Senator Serge Joyal regarding the ongoing breach of Section 55 of the Constitution Act 1982 and Canada's unilingual Constitution. Could you tell us a bit about that application and what you hope it will achieve? I love talking about this case.

**Francois:**

Yes, of course, I'd be happy to. Section 55 was added.

**Francois (29:46.218):**

in the Constitution Act of 1982 to remedy a vexing problem. Canada in 1982 became constitutionally speaking a bi-lingual, officially bi-lingual country. Of course, we've had the Official Languages Act since 1969 and there were various pieces of legislation throughout the country, here and there, on French and English. But at the constitutional level, the big change happened in 1982. Section 55.

creates an obligation first and foremost on the Minister of Justice, the Federal Minister of Justice, to cause to be made a French version of the 30 or so documents that are listed in the schedule to the Constitution Act of 1982. So there are 30 documents listed there that they make up the Constitution of Canada as defined at section 52. And out of their 31 documents, if you count the Constitution Act of 1982 itself, out of those 31 documents...

I believe only nine have force of law in both official languages, including the Constitution Act of 1982 itself. But the bulk, therefore, of our constitutional documents only exist in English or only are binding in English. And this obviously is a problem. So, the remedy was Section 55. And so the Minister was to have a committee and not only was going to and had this done, this first step of Section 55 has been complete.

In 1984, so two years after the Patriation, the federal government struck a committee of Canada's best legal translators, jury linguists, retired Supreme Court Justice Pigeon was part of it, some professors at the University of Ottawa and Laval. The finest bilingual legal minds in the country sat down and in the span of six years produced a beautiful French language version of

I think it's a tour de force in legal writing. They are wonderful. And the committee took six years to do its work and tabled its final report by, well, the Minister of Justice of the day in 1990, the Minister of Justice by the name of Kim Campbell, tabled the report in Parliament. And since that time, nothing. So Section 55 provides that.

**Francois (32:13.142):**

The Minister of Justice is to prepare a French version of the Constitution as expeditiously as possible. Those are the words, as expeditiously as possible. And once they are ready, they are to be enacted by proclamation under the Great Seal of Canada. That's what Section 55 says. And so the first part has been done. The French version has been produced and it's just been sitting there gathering dust since 1990. Thirty-three years later, here we are and we still have a unilingual Constitution. That section has just been ignored.

So retired Senator Serge Joyal, who was, it should be reminded, that he was co-president of the parliamentary committee that revised, that did the line-by-line analysis of the Charter in 1981 before its enactment. So he was there. He has personal knowledge of that issue of Section 55 and why it was enacted. He has been a strong champion of Canadian bilingualism and language rights. Upon retiring, we...

We discussed and he says, let's bring this challenge together. And so we brought an application in the Quebec Superior Court in 2019, basically asking the Quebec Superior Court for a series of orders and declarations, recognizing that compliance with Section 55 is mandatory, that Canada and the provinces as it stands are in breach of Section 55, and that governments must meet to discuss.

the suitability of the French translation that has been provided, prepared and tabled in 1990. And if it doesn't, if it's found to be unsuitable, then let a new one be prepared and adopted so that we can finally comply with section 55. So my main contention is that the patriation of the Constitution remains incomplete. Until we have produced a bilingual version of our Constitution, the work of patriation is still not done. And so, and every time a constitutional provision is ignored or

somehow set aside, it's problematic. It's an affront to the principles of constitutionalism and the rule of law. And courts, I think, are well positioned to order governments to do what the Constitution commands.

**Cheryl:**

Do you have any sense what the sticking point is? Why has it just languished for so long?

**Francois (34:33.93):**

Well, we, so I, as an academic, I was interested by the question. So that my first, every time I have a question that sticks in my craw, I organized a conference. That's what I did. So I organized a conference in 2017. This was around the time of Canada 150. So I said, wouldn't it be neat to bring up this discussion again around the time of Canada's 150th anniversary. It was a one-day conference and we invited some of the drafters that were there, part of the committee that prepared the French translation in the 1980s.

And just to find out what happened, now that it's been produced, why is it not moving along? And the best theory that was advanced, that at least made more sense to me, was that after 1990, well, what happened? We had Meech, we had Charlottetown, and those both failed. And so there was a certain level of constitutional exhaustion, or….in Canada, that made it difficult for anyone to bring up the question of opening up the constitution, quote unquote.

Of course Section 55, I would argue, does not entail an opening up of the Constitution. All it entails is a proofreading exercise. We need to sit down and look at the French version and agree or not, is the prepared French version equivalent or is it a reasonable translation of the English text? And if so, let's enact it under the Great Seal of Canada, Section 55 commands. And the fact that we haven't done so is problematic, as I said, for the rule of law, but also deeply problematic for the Francophone minority in this country.

who do not have the benefit of reading the constitution in their language, one of the official languages of the country.

**Cheryl:**

Thank you for that. I want to turn now to sort of a different topic. You mentioned earlier the Official Languages Act. We have a Bill C-13, which is an act to amend it, and it recently received royal sent at the federal parliament. Could you walk us through the changes this bill will bring about for language rights?

**Francois:**

Yes, with pleasure. So many changes. The Official Languages Act is the legislative implementation of what Parliament understands section 16 to 23 of the Charter to require. That's the best way I can frame it. And this is only the second time since the first enactment of the OLA in 1969, this only second time that the Official Languages Act was reformed. The first time was in 1988,

**Francois (37:01.798):**

shortly after the after-patriation. So six years, it took about six years to really flesh out and implement the new provisions that the charter would require under the Official Languages Act. And now the second time is this year in 2023. This was an electoral promise that all parties ran in back in 2015. So it's been on the radar for quite some time. But by the time all the

consultations, nationwide consultations took place and there have been a few elections since 2015. By the time it got tabled and re-tabled, it took us up to this year to finally get it across the finish line. The biggest change to my mind is, in the new version of the Official Languages Act, is that Parliament is acknowledging that while what I said at the outset of the podcast, that while Section 16 of the Charter declares our official languages French and English

to be equal that in fact, they are not. They are in principle, they enjoy equal status, rights and privileges, but in reality, French and English are not on the same footing. French is in a state of decline in this country. Stats Can reports with every census that the demographic weight of francophone is in a steady state of decline for the past 100 years. And so, for the first time...

section, the Official Languages Act recognizes this reality, that French, although it is an official language that is in principle equal to the English, must be shored up, must be supported in a way that English does not need. And so it's an asymmetrical approach to the official languages that is now recognized under the Official Languages Act. So that's the biggest change to my mind,

and how that is fleshed out in the detail is really interesting. And it's across the board, but essentially it creates new obligations on the government, new positive obligations on the government to take steps to support, promote, and protect the French language in Canada. And that might involve anything from helping the minority communities where they are to have more vitality through economic development, through immigration, through...

**Francois (39:26.106):**

education through early childcare, through post-secondary education. And so there's language in the official languages that will allow the federal government to get involved in these various areas. And the idea, as I said earlier, is now to go beyond this formal equality approach to official languages and move Canada towards a substantive equality approach to official languages. And so that's...

that involvement in government in those spheres is going to be interesting to see. It includes the Official Languages Act also includes new enforcement powers for the Official Language Commissioner, who traditionally was very much like a classic ombudsman, you know, receiving language rights complaints, investigating, making reports and recommendations, nothing further. Now the language commissioner, the official language commissioner can, can go in and enter into what's called compliance agreements with the

various federal institutions that don't comply with the Official Languages Act. You can issue orders and we'll even be able to impose AMP’s, Administrative Monetary Penalties, in certain cases with respect to transportation very specifically, looking at you Air Canada. And basically, the Official Languages Commissioner will now be able to enforce the act in new ways. So, more tools in the toolbox, as he's put it. Also there is a, as part of C13, there was the Official Languages piece.

there's also a new companion legislation that's not yet in force, and that will confer new language rights for consumers and employees and new obligations for federally regulated businesses and sectors of banking and communications and transportation, for instance, that operate in Quebec and also in regions outside Quebec with a strong francophone presence. So in essence, there's a new

private dimension to the official language obligations of this country. Official languages will not only be the business of government from now on, but federally regulated businesses also will have to be mindful of their own obligations towards their clientele and towards their employees. For example, an employee who works for the CIBC in Montreal or in Quebec or in Moncton might be entitled under this new scheme to...

**Francois (41:46.106):**

work in French, be supervised in French, and clients who, for example, go to the bank in those communities will also have an enforceable right to serve, being served, and to communicate in the official language of their choice. For the legal crowd, another big feature of the Official Languages Act is the fact that litigants finally are granted the right to use either language and to be understood in that language in all federal courts and tribunals.

including the Supreme Court of Canada. This is a section 16 of the Official Languages Act, essentially has already established all this, but had a specific exemption for the Supreme Court of Canada. So the right to use and to be understood in the official language of your choice in all federal courts and tribunals, well, the Supreme Court was exempted in 1988 from that obligation. And now that exemption has been removed. So this is a new...

duty on the Justice Minister to be mindful of those rights when they appoint new justices and to be aware and mindful of the rights of francophones, for instance, in parts of Canada where access to justice in French is more difficult. So, we may see the appointment of more bilingual judges throughout Canada.

which will also resolve, I think, the issue down the road, I'm hopeful at least, of appointing more bilingual Supreme Court justices. This is the first time, by the way, in 2023, we now have a situation where not only do we have the first racialized justices, we have the first indigenous justice, but the court as it currently stands is the first time since 1875 that all nine justices are bilingual and able to understand litigants in both official languages. So.

there's been progress.

**Cheryl:**

This is going to be a big question, so I know we probably could do a whole episode on it, but there's also legislative reforms at the provincial level. And I'm thinking in terms of bigness, I'm thinking of the various pieces of legislation in Quebec, but I think it's also in other provinces as well. Could you just give us a little bit of a sense of what kind of legislative reforms there are at the provincial level in recent years?

**Francois (44:09.226):**

Sure. And you're right, we could do a show entirely what's happening at the provincial level, because there is a lot happening. You mentioned Quebec by far, I think, the most well-known changes at the provincial level. Bill 96, as it's known up there, which amended the Charter of the French Language in Quebec, this was enacted in 2022, and very much in the same vein as the New Official Languages Act recognizes the parallel in which the French language finds itself even inside Quebec.

there is a decline of the amount of French in Quebec. And so at the provincial level, they seek to take a certain number of steps to shore up the French language within its home province. That and Bill 96 also did something remarkable, which remains to be seen to what level it was permissible for them to do so. But they also amended the Constitution Act of 1867. That legislation basically added a line.

in the Constitution Act of 1867, recognizing that French is the official language of Quebec. Was that a permissible Section 43 amendment formula change or did it require something more? I think constitutional lawyers are still thinking about that issue. But outside of Quebec, as we speak, New Brunswick, which has two official languages, and Nunavut, which has four official languages, are currently preparing reforms to their respective official languages’ acts.

In 2023, earlier, I think it was in March, the Northwest Territories, which has 11 official languages, so French and English and nine Indigenous languages as official languages, have also reformed its official languages act. So that was no small event. In 2021, Ontario amended its French Language Services act, which is a quasi-constitutional statute which was involved in the famous...

Montfort Hospital challenge in 2001 at the Court of Appeal, when the Harris government slashed the funding of that hospital and wanted to close it in essence. There was an administrative law challenge and the Court of Appeal held that the decision to chop the funding of that hospital without taking into account the importance of that institution for the French language minority of Ontario was an unreasonable decision, therefore

**Francois (46:35.778):**

that decision was on appeal. So that's on the basis of the French Language Services Act. And so now there's been new changes made to that act, including regulations on active offer in Ontario of French services. So I think it should become more apparent even to non-French speakers that this legislation exists. Probably be seeing more bilingual signs and stuff like that in Ontario. And in recent years also Manitoba, which enacted in 2016, which is not, I guess, a recent development, but it's still, it's still recent enough.

it enacted the Francophonie Enhancement and Support Act, which also is just designed broadly to support the Franco-Manitobans in their quest for continued existence in that province.

**Cheryl:**

So now I want to jump back to litigation and another case in which you acted as counsel, the Kassem Mazraani and Industrial Alliance Insurance and Financial Services, Inc.

case. The arguments you presented in that case concerned the Charter and access to justice in Canada's official languages. And as a lawyer who practices in French and English, could you comment on any changes you've seen with regards to access to justice for minority language rights holders in the past five years in the courts themselves?

**Francois:**

Sure. Yeah, the Mazraani case was an interesting case. Very briefly, it involved, it was at the tax court. It involved a tax dispute.

The litigant himself wanted to testify in English, and which was entirely his right. But the business and the employees of the business that were called to testify, they were more comfortable to do so in French, and which, of course, is their right at the federal tax court. But the judge used pressure, used his office to essentially intimidate the witnesses to testify in the language of the taxpayer, of the main complainant. And so therefore, that went all the way up to Supreme Court.

and it asked whether that behavior on the part of the judge was consistent with the Official Languages Act and their obligations to the Act. And the Supreme Court obviously said no. And so that case was an opportunity to highlight our ethical responsibilities as lawyers who represent clients in Canada to remind them of their right to access justice in either official language and of witnesses to testify in official languages. And that's a duty that is borne by...

**Francois (48:56.982):**

by counsel, but the Supreme Court said in Mazraani, it should be chiefly borne by the courts themselves. So courts have the duty to remind litigants of their constitutional language rights and their legislative language rights as well. And so yes, there has been changes. For instance, now in the past few years, this is before Mazraani even, but there's, I think, greater, more work being done to raise awareness in the bar and in the bench on the existence of official language rights.

Recall what we said at the outset here, this is not subject matter that is typically taught in law schools in Canada. So a lot of law students don't know that language rights exist and don't know the consequences of not respecting them. But there's more work being done. The Federation of Law Societies, for instance, has a model code of conduct that provincial law societies are free and are encouraged to adopt, which includes provisions, for instance, that make it clear that it is the duty of counsel to...

remind litigants and their clients of their rights to access the courts in either official language. So the professional competency includes linguistic competency as well. So if you're going to represent a client in French, counsel should be also able to receive instructions from clients in French and to address the court and write their pleadings in that language.

**Cheryl:**

So, Canada is a country of multiple cultures and languages. Certainly, coming from Toronto, our podcast here is being recorded in Toronto and we're very much aware of the many languages that are spoken in this city. And you mentioned the 11 official languages in, I think you said the Northwest Territories. Canada's linguistic diversity goes beyond English and French, obviously. So can language minority communities that do not speak an official language use the charter to protect their language rights?

**Francois:**

Yes, the short answer is yes, they can. Now, they won't be able to avail themselves of sections 16 to 23, because those relate uniquely to French and English, the two colonial languages. And that's a feature of our own history, right? I mean, the fact that Canada was a settler nation and the fact that there were tensions since day one between the French and English, they had to find ways to coexist peacefully. And so this is why we have the language laws that we do. But also...

**Francois (51:21.634):**

there are other ways to have one's language rights recognized and enforced. And other languages than French and English can use Section 15, for instance. Even though language is not a protected or prohibited head of discrimination under Section 15, language is held to be tied to ethnic origins and nationality. If one is using sign language, then it could be tied to physical ability and handicap.

So there's different ways of enforcing certain aspects of language rights through section 15. Obviously, there's a link between freedom of expression, section two of the Charter, and language. And the Supreme Court recognized in various cases where the right to freely express themselves includes the language in which they do it. And so there could be protections there as well that could be more better enforced. But, you know, to circle back to

your initial question, I think it's important to recognize that language rights, like any constitutional enactment, is a function in Canada of our very distinct Canadian history. And it's not set in stone. And we can, I think, imagine a future where, as the demographic makeup of Canada changes, additional official languages might be recognized. And this is something that...

our constitution certainly concordance and allow. And also we should recognize, as the Official Languages Act recently enacted in 2023 does, that all of these rights with respect to French and English do not take away or diminish Canada's obligations, moral and legal, to support Indigenous communities as they embark on a journey of reclaiming and revitalizing their traditional languages and pass so that they can pass it on to their...

future generations as well. So there's now distinct and clear language in the Official Languages Act to that effect. And recall that in 2019, Parliament enacted the Indigenous Languages Act as well, which highlights Canada's obligations under UNDRIP and under the UNDRIP Implementation Act as well, that Canada is morally and legally obliged to support its Indigenous populations as they reclaim.

**Francois (53:43.63):**

their traditional languages. And there's an infrastructure now being set up. There's a commissioner of Indigenous languages with directors that represent the three Indigenous peoples groups in Canada, the Métis, the Inuit, and the First Nations. And so positive changes are being seen at that level too. And language rights, I think, is an exciting field in which to work right now.

**Cheryl:**

We'll be talking more about that with our guest for our practice corner, Aria Laskin. We'll be talking about Indigenous language rights. Finally, are there any particular issues or types of cases that you foresee playing a large role in language rights’ constitutional litigation, in particular in the near future? Or is there anything that you're working on that you'd like to share with our listeners to wrap up?

**Francois:**

There's interesting cases being brought right now in Alberta where there's the funding issue of the Campus Saint-Jean, which is the francophone wing of the University of Alberta, which is a campus that houses a number of French language programs, including education and political science and literature and whatnot. But that wing has, the Campus Saint-Jean has not been seen any increased funding in recent years. So right now, there's core challenges coming about saying that, well, the province and the University of Alberta are infringing their contractual obligations to the Campus Saint-Jean.

Campus St. Jean was created by the Oblates at the start of the last century. And when they ceded the Campus St. Jean to the University of Alberta, it came with a certain number of conditions that the university would support the French language community of Alberta and maintain this vital post-secondary institution. And they're alleging that it stands in breach of that contractual obligation. But in parallel to that argument, there's a Section 23 argument.

that's novel that I had never heard of before. And it's that by slashing the funding or the operational budget of the Campus Saint-Jean, the province of Alberta is actually undercutting its own ability to meet its Section 23 obligations. Because if we're not funding enough and not graduating enough teachers, French language teachers in Alberta, how can Alberta then meet its obligations under Section 23 to staff proper primary and secondary schools?

**Francois (56:05.094):**

with French language teachers. So that's a novel argument being raised and I'll be following that closely.

**Cheryl:**

Well, thank you so much, Francois. We've been speaking with Professor Francois Larocque, the current research chair on language rights at the University of Ottawa, about the many, many aspects of the minority language rights provisions of the charter and our official languages act as well. So thank you so much for joining us today and I've learned a lot from what you've been telling us.

**Francois:**

Thank you, Cheryl, for having me. It has been a great pleasure, and I'd be happy to come back anytime to talk about language rights.

**Cheryl:**

And next up in our practice corner, we will be speaking with constitutional litigator Aria Laskin about Indigenous language rights to bring up that issue in more detail, as has been mentioned. So thanks again for listening.

**Cheryl (56:57.238):**

Welcome back to our practice corner with constitutional litigator, Aria Laskin. Aria received her JD from the University of Toronto Faculty of Law in 2014, and now works as an associate at JFK Law LLP in Vancouver. She practices Aboriginal, environmental, and constitutional law with a focus on dispute resolution and litigation. Welcome, Aria.

**Aria:**

Thank you. I'm delighted to be here.

**Cheryl:**

Can you give our listeners an overview of how Indigenous languages interact with the Charter, and of course also Section 35 of the Constitution Act of 1982? We heard from Francois Larocque, professor at the University of Ottawa, all about the settler languages of English and French, and we'd like to talk more and explore with you Indigenous languages.

**Aria:**

Certainly, and I think a thing that is important to emphasize is that while I will speak a little bit about this right now,

This is an area of the jurisprudence that's really in its infancy. And I think there's only starting to be a recognition of the ways in which the constitution and that, when I say that I'm referring to both the Charter and Section 35, among potentially other components, protect and recognize, I would say, pre-existing rights in relation to the use of Indigenous languages across what's now Canada.

As I'm sure Professor Larocque spoke about, there's the linguistic rights at sections 16 to 23 that come out of not legal principles or fundamental legal entitlements or inalienable rights, but those are rights created through the Constitution that reflect a political compromise. So they're politically based as opposed to kind of more seminally or principally based. And I would say that, I mean, we'll go through it, but some of the different other Charter rights are different. I don't think I would say that that's a...

clearly established thing in that this Charter also has legal rights, equality rights, those don't come from political compromise, those come from basic legal principles. Section 35 is also different in the sense that what it does is recognize and codifying Canadian law, pre-existing and inherent rights of Indigenous peoples in what's now Canada. But of course, the scope of that right has been the subject of extensive legal debate. There are not a lot of cases to date in Canadian law.

**Aria (59:15.254):**

that deal with where and how protection of Indigenous languages falls within our constitutional framework. There are lots of people making lots of arguments about how the law does protect those languages in lots of different ways. But unlike French, this jurisprudence is just not as well established. My view is that there are lots of historic reasons for that being the case, one being that for a very long time, Canadian...

law, policy, practice was much more focused on suppression of Indigenous languages than any type of recognition or preservation. And that was in a very active and intentional way, particularly in the context of residential schools. But that's just one example. There was a very active campaign by Canada to eradicate Indigenous languages, which of course was not successful. And I think in general, there was also less of a recognition of Indigenous peoples' rights in respect of their culture and self-determination.

extending to the fact that indigenous people couldn't actually hire lawyers for a while. So there are lots of reasons, none of them good, why the law has much less developed in this area, but nonetheless, and largely as a result of the efforts of indigenous advocates, there is now starting to be a body, a very small body of law, but growing around how the Charter and how Section 35 might interact with Indigenous language rights. In respect of the Charter,

My view, and this is more doctrinally based because there aren't really cases on it, is that the Charter of course protects rights with linguistic components. It does not protect outright language rights arising from political compromise in the same sense as the linguistic rights, which relate only to English or French. You know, whether or not you think that's good or bad, that's what Charter says what it says. But it does protect rights where

those rights have linguistic components, like the right to an interpreter would be a good example. So, where there is an accused who only speaks Cree or Haida or Inuktitut, then that person is entitled to have an interpreter who can help them ensure that they understand exactly what's happening in the court proceedings. And if the interpreter can't interpret adequately, as there was a case that challenged the sufficiency of interpretation,

**Aria (01:01:36.458):**

in Nunavut, in Inaktitut, then that could potentially be a basis for a finding of a breach of Charter right, although in that case I don't believe that the case was made out on its facts. So that's just one example, but my view is that all of the legal and equality Charter rights could be, you know, there's potential different ways for Indigenous languages to find themselves protected under the remit of those rights by virtue of the rights having linguistic components.

And I'm sure we'll get into this, but my view is that the presence of Section 16 to 23 has no bearing on whether or not those rights are capable of protection and vindication under the Charter. Section 35 is a little different. We don't exactly know what the courts will say about the scope of the protection offered or that Section 35 reflects in terms of recognizing the inherent scope of Section 35 rights and the extent to which they include language.

I think it's very clear that they do include language. I don't think that is a subject matter of particular debate, at least not today, that Section 35 is capable of, and likely does protect some degree of language, of Indigenous languages. And in fact, there is some language to that effect in the Federal Indigenous Languages Act that was passed in 2019. The question instead is, what is the scope of that right? And...

what's required to prove it, et cetera, et cetera. One of the big questions, and again, this is not from the case law, this is from academic and legal debate, is the extent to which Section 35 can require the provision of language-related services to vindicate Section 35 rights. And one of the reasons that this question is tricky is because historically Section 35 has been interpreted as,

a right that to establish it in Canadian law again, and there's lots of people who don't think this is the right approach, the, an Indigenous claimant group has to show that a particular right was integral to it prior to European contact, which might be an easier fit for certain types of activity-based rights like hunting or fishing, not as great a fit for broader social rights, like the way that a government operated.

**Aria (01:03:57.282):**

the scope of legal rights, how language was transmitted, the role of language in society, a little bit harder to make a sort of clear articulation of a pre- and post-contact paradigm. So, which again, raises the questions of once you're in the post-European contact world as we are today, what does section 35 require in terms of positive action by governments to protect section 35 rights? So I know there's one scholar who's written about his view that section 35,

can kind of automatically require a certain level of service provision in Indigenous languages. Whether or not the courts would agree with that, we don't know because there is not case law to that effect. So, I think that's a long way of saying that from a jurisprudential and doctrinal perspective, there's very good reason to believe that Indigenous languages are protected under both the Charter and Section 35 and very limited case law just by virtue of the fact that this is an area that's just now being explored.

**Cheryl:**

So, you mentioned that there is very limited...

are not very many actual cases that have decided these issues. Are there any particular litigation strategies concerning the charter and Indigenous languages that have been successful to date?

**Aria:**

I don't think the answer to that is clear, again, because everything is so new. One of the strategies that has been the most effective and which I personally did not appreciate the importance of when I was in law school...

is the litigation strategy that means there is no litigation. And this only works where there is an appetite on the part of government, and there isn't always an appetite on the part of government. But there are actually lots of really cool and interesting language initiatives across Canada, particularly in the area of education, I will say, where Indigenous groups work closely with federal and or provincial governments, who kind of agree…

without having to get into the minutiae of where the right is vindicated in the constitutional framework. So yeah, okay, there probably are these rights. And we also don't need to fight about it because we think it's the right thing to do. And we're going to create a framework within which these language rights can be exercised or protected. And again, education's the best example. Also, and this is another, not to overly complicate things, but this is another place where language rights fall within a much broader category of rights, which is jurisdiction.

**Aria (01:06:21.79):**

particularly in the context of Section 35, where Indigenous groups pursuant to Section 35, not that the right is created in Section 35, it's not, but it's recognized there, have inherent jurisdictional rights over certain components, you know, land, society, government, that kind of thing, because they are governments. And one of the areas where jurisdiction has been particularly well recognized and fleshed out is in the area of education. And as a result of that recognition, you know,

BC comes to mind as a great example where the BC provincial government says, yeah, okay, you have…they'll enter into these self-government agreements where both the province and the first nation in that case will say the first nation has jurisdiction over the delivery of education by virtue of these rights and through this agreement and then the first nation decides what that education looks like and it typically involves a language component and it's so cool and inspiring to see these amazing educators who created these

really immersive programs, often not just for kids, for kids and their families, where languages that were, you know, brutally subjugated for hundreds of years are now having these amazing comebacks, especially in the mouths of little kids. So that's not a case in the way that you're asking me, but it's an example of success and a good outcome where there's an appetite from different actors, a recognition that these rights exist, particularly in the jurisdictional context that

the right to transmit, teach Indigenous languages, have government services in Indigenous languages is reflective of broader Section 35 rights. Another place actually where there's another example of this being codified in Section 35-based legislation regardless of whether or not it's been effectively implemented as Nunavut, where there are particular rules around the level of Inuktitut

required to be used in institutions in the territory. And that comes out of the Nunavut Agreement, which is in itself a treaty and recognized under section 35. Unfortunately, for reasons that relate to the lawsuit that I'm sure we'll discuss soon among others, the requirements in the treaty have not been realized with respect to the level of Nuktitut that has to be spoken or Inuit languages that have to be, are to be spoken pursuant to the Nunavut Agreement in institutions in the territory. But again, that's another example

**Aria (01:08:43.234):**

where at least in theory, Indigenous and non-Indigenous governments have come together and said, yes, there are rights relating to the use of these languages, these constitutional rights, these inherent rights, and let's put them on paper. I think those are the examples that... There's other examples, those are just a couple. I'm conscious that I haven't spoken about case law. That's because there isn't very much. We will talk about the one case that I'm really aware of, which is one that I'm involved in. And I will say that I am also in conversation with other...

Indigenous groups and other litigators across the country who are contemplating litigation, I think that my answer would be really different in 10 years. But as to what strategies work, I guess we'll see.

**Cheryl:**

Yeah, so thinking about those cases in the next 10 years, do you think that there are specific types of Charter arguments or Section 35 arguments that will likely play a role in Indigenous language rights litigation moving forward?

**Aria:**

Well, I think a lot of the answers to this question will be determined by what the country looks like politically in the next 10 years. I don't have any clients who want to litigate issues. The level of openness of federal, provincial, territorial governments to these matters largely dictates whether or not cases end up in litigation. So, I will say that what this area of law will look like 10 years from now will largely be determined in my view by...

what the next 10 years look like politically in different places. I do think that there will be more guidance in the case law about where and how Indigenous languages' rights are reflected and protected within the Constitution in a way that we don't have today, but particularly what that looks like is hard to say. And I also think that, and I hope I've made this clear, but if I haven't, that from a doctrinal perspective, there's clear scope for protection.

It seems undeniable to me. And I think that scope potentially will become even more recognized as UNDRIP is implemented into Canadian law because UNDRIP has a law to say about Indigenous languages and the interconnection between Indigenous languages and jurisdictional and self-determination rights, which are really, you can't disconnect those things. So, I think we'll see a lot about that. I suppose the other area that I want to mention that I haven't mentioned yet, and this is in the specific context of section 35.

**Aria (01:11:05.534):**

is that there are lots of cases where even though the case itself, and many of these cases are underway, even though the case itself isn't about language per se, when the Section 35 rights in question, and those can be Aboriginal rights or treaty rights, are fully fleshed out, they often have a linguistic component because language is so closely related to culture, to way of life, to way of being. You know, one of the best examples would be...

When people lose their language, they can't relate key cultural components, like where important things happen, the nature of social rules, the nature of social organization, what governance looks like, what good ways of living look like, what fundamental principles look like. Because language is so intrinsically connected to the human experience, when cases that are happening now and will happen in the future, relating to section 35, I think will.

almost necessarily have linguistic components. And I can say for myself, I can think of a couple of Section 35 cases that I work on that you wouldn't call them language cases, but language is so important to them. So much of ways of life or ways of being that are protected relate to the use of transmission of language, both in and of itself and as a mechanism for cultural transmission and cultural relationships, right? There'll be certain concepts that just don't exist in English. So, language does play this kind of crucial subtler role than what we're necessarily talking about today, but I do think it's important to recognize.

**Cheryl:**

I think it's fascinating and it's so, you know, it really does resonate when you think about the efforts made through the residential schools to actually extinguish language and how much effort was put into to that really negative impact on Indigenous communities. I want to turn now to the case that you've been alluding to. You're currently acting as counsel for the plaintiff in the Nunavut Tungavik, Inc., and the Commissioner of Nunavut. As this case is ongoing, I understand that you won't be able to discuss your involvement specifically, but I think for listeners, it would be good for you to tell us about the case, like what is it about, and what are the positions of the parties as decisions will be coming somewhere down the road.

**Aria:**

Sure, yes. I'm happy to speak to what the case is about, what has brought us to court recently, and where we're at today. I...

**Aria (01:13:28.59):**

can't speak to anything in particular given that it's ongoing. So, Nunavut is a unique place in Canada. I mean, for many reasons, one of which being that it is the only place where there is a linguistic majority, a linguistic and I should say ethnic or racial majority of Indigenous peoples in Nunavut that's Inuit, where people speak Inuit languages. And that's the majority of people. In Nunavut as well, school is offered mostly...

Where a mix of English and Inuit language is up to grade four, a little bit of Inuit language education in grade four, after that it's exclusively in English, or there is also a French school. That was the case when the territory was created. If anything, things are a little worse now. So, Inuit and Nunavut are the only linguistic majority in Canada who don't actually receive education in the linguistic majority in their province or territory. And what they receive instead is education in the language of their colonizers.

There is a claim that sets out Nunavut Inuit represented by NTI, and there's also individual plaintiffs who are wonderful. Their claim alleges that this status quo is unbelievably harmful for Inuit, creates sort of accelerating and potentially a reversible language loss, which in turn, we were talking about how language and culture can't be extricated from each other.

Also harms Inuit culture, way of life, well-being, sense of self, identity, social organization. Like it's really hard to overstate. You mean you don't think you can? It also poses major and often insurmountable educational attainment barriers for kids, which then has a knock-on effect that makes it hard for Inuit to participate in the highest levels of government in Nunavut. You know, they're essentially set up to fail by their education system. And the fact that lots of kids go on to be really successful

is a testament to their hard work, not, you know, and resilience, not a virtue of a system that really does set them up to fail. And so in 2021, NTI and the plaintiffs, individual plaintiffs commenced a claim, a section 15 claim, alleging that the government of Nunavut's decades-long failure to properly implement Inuit language education is discriminatory.

**Aria (01:15:51.09):**

So it's a breach of section 15 and it breaches Inuit’s section 15, right? The way you can see that is through the adverse effects that are visited upon Inuit and Inuit alone. There have been many, many studies, reviews, Dan, all of which have said that the failure to provide Inuit language education is a major problem in Nunavut and incredibly destructive to the health of the territory and its community. In 2008, in response...

to one report in particular, the government of Nunavut passed legislation requiring such education to be implemented in a timely fashion. Notwithstanding that the passage of that legislation, the government of Nunavut did not do that and why the government didn't do it is an issue for trial, but there are different views. The government says there's complex policy reasons. My clients say there is just a lack of commitment and lack of political appetite.

In any event, in 2020, given that the government hadn’t met its own deadlines for implementation of full Inuit language education, the government passed a new bill that amended the legislation to really push off the timelines for implementation of Inuit language education and to reduce the requirement to a single language arts class, basically. So, took away the requirement for full Inuit language education.

and really pushed out the timelines for even the implementation of that one class to at the very latest 2039. So, it was particularly in response to that legislation that the claim was commenced, and the claim says that legislation infringes Section 15. On its face, it's facially neutral, but this is a classic case of adverse effects discrimination because of how it differentially impacts Inuit and does so in a way that perpetuates and exacerbates historical disadvantage and prejudice, including from residential schools.

where kids were forced to stop speaking their language and told their language was inferior to the language of their colonizers. The claim says that system is perpetuated today. So that's the claim. Following the filing of the claim, the government of Nunavut brought a motion to strike the claim on the basis that it was non-justiciable, it was not a viable claim at law, because it was effectively excluded from adjudication by...

**Aria (01:18:14.27):**

the language provisions of the Charter, and particularly Section 23, which I don't know if your listeners will have heard about from Professor Larocque, but which deals with the rights of minority Anglophone and Francophone students in particular provinces to receive education in their minority language. So, the government of Nunavut said, what you're really doing is alleging a positive right to a language entitlement, or you’re saying language could be an analogous ground, and it can't be, and Section 23 forecloses this claim. That motion was heard last summer.

It was dismissed. The motions judge found that the claim could proceed. Wasn't necessarily plain and obvious that it was deemed to fail. And of course we would say that was the right finding. That, the motion judge's dismissal of the strike motion was subsequently appealed. That appeal is set to be heard in February 2024. So that is where that case is at. And in the meantime, the status quo continues.

**Cheryl:**

And we have to see this in complex constitutional litigation, that there's years of battles just over justiciability and sort of those interim steps. And we've had, you know, we've listened to discussions about cases about standing and whether people have a right to bring a claim as well as this one, whether the Charter even covers it, despite the fact that clearly there are other sections of the Charter that are.

applicable, but interesting that they're using sort of the language rights provisions that we heard about from Professor Larocque earlier as this kind of shield against other minority language rights.

**Aria:**

Well, the argument that the plaintiffs and respondents on appeal advance is that those provisions, there's a lot of case law that makes very clear that Section 15 cannot expand the scope of those provisions. They are a very particular right carved out for particular groups in particular contexts.

You know, for example, to me, one of the easiest ways to understand it is to look at the interaction between Section 14 and the various language provisions that deal with the right to file documents or participate in court proceedings in your language, your official language of choice in some courts in some places. The right to participate in your language of choice is very circumscribed. It's made clear in Sections 16 to 23, and you can't use those provisions to push it into other places.

**Aria (01:20:34.274):**

So, like you can't, you don't necessarily have the right to make submissions in court, in BC in French, and have everyone understand you. It's not a right you have. You do have a right, regardless of a language you speak, if it's French or any other language, to understand what's going on in court, you know, as an accused. And there's section 14 and section 7 dimensions there. You don't lose that, the right to understand what is happening in your trial by virtue of the fact that you don't also have some right to be understood in French. It is very clear that the...

legal and equality rights of the Charter don't expand the scope of the language provisions, the plaintiff states equally clear that they don't, that the language provisions don't constrict the scope of existing fundamental rights. And you know, the only other thing I'll say is that there are, you know, you'd asked about case law and indigenous languages in the Charter context, there's very limited, like I said, I'm aware of a case involving interpreters, and maybe a couple others, but nothing sort of super on point. There have been cases on the Charter and language.

specifically sign language, the most well-known one being Eldridge, which the Supreme Court said that the failure to provide professional sign language services in particular hospital settings could be a breach of Section 15 because sign language was an essential component of communication for deaf people coming to hospital. So that is a Section 15 right to equal benefit and protection of the law where the vindication of the right has a linguistic component, because in order to access that equal benefit...

the deaf community, it wasn't people who spoke sign language, it was the deaf community, particular community, needed to be able to access services in their own language. And in fact, that case required government action to remediate that problem. So, you know, the plaintiffs in the N.R. case, and I would just say in general, there's this, and that's a Supreme Court case, but there's other federal court cases that are similar. So, you know, I'd say there's a framework for where Section 15 rights can have a linguistic component to ensure that there's equal protection under and benefit under the law. It's just so far come up in the sign language context.

**Cheryl:**

It'll be interesting to see where these cases for Indigenous languages go, as you say, over the next 10 years. I know that you can't really talk about your experience in this particular case that you've been talking about because it is still ongoing, but I'd just like you to expand a little bit or be able to talk to us about your experience.

**Cheryl (01:22:58.418):**

if there are any special considerations that counsel should keep in mind when representing an Indigenous group making a language rights claim?

**Aria:**

I'm probably not the person to ask. I'm not an expert on this. My first suggestion would be for simply non-Indigenous counsel to talk to your client and learn. Understand your ignorance, understand your blind spots. Try to talk, try to understand.

I do think there's a really important component of understanding just how important language is to culture and the gulf between, you know, if you're a counsel who doesn't actually speak the language of the case in issue, that there's a lot you're not going to understand and you need to sort of be aware of that lack of understanding. Like concepts, important concepts, it cannot be communicated. English, it turns out, is a, in some ways, a sparse and bereft language

in relation to certain concepts. It's great at some stuff, it's other things. And so just to be aware and have that humility and knowledge that you are an expert in some things and not an expert in others. And one of the things you're not an expert in is the language that you're working with respect to. And ideally someone on your team will be able to speak the language. That's not always the case. And is a clear outcome of a colonial system that again, worked very hard to eradicate

Indigenous languages across the country. So yeah, that's a long way of saying. First suggestion is to learn. The second thing to keep in mind, I think, and this is to me applicable to counsel involved in all cases where there's a sort of Indigenous language component, it doesn't have to be a case particularly narrowly on language rights or, you know, for example, the case we're working on, it's not a language rights case, it's a section 15 case with a linguistic component and

similar such cases where Section 35 case with linguistic component, like I said, many, if not most Section 35 cases will have that, is to be really aware of the role that the litigation process plays in the case. And I think courts are becoming more and more aware of that in general. I don't know how much has been discussed on this podcast ever at all on, for example, the Supreme Court's recent decision in Anderson.

**Aria (01:25:18.45):**

and Canada, which is a case that relates to advanced costs and the availability of advanced costs, an important litigation that has, to my knowledge, never, there's no advanced costs awards, or if there is, very few outside of the context of the charter, particularly section 35. Famously, there's a failed advanced costs award for the, particularly for the Charter and Little Sisters, but then there's successful ones in section 35. But that's just one example of a case where...

And actually, there's another example at the Supreme Court. There's the Innu case that was a couple of years ago that dealt with these two competing claims where the court said, look, you have to do things as simply as possible where you can in these cases. That's required to make sure that they're adjudicated justly. Anderson deals with advanced costs. There's all these different cases that are starting to recognize the role of the justice system, the litigation system, not just as a neutral arbiter of disputes, but that the way that the system works is an important component.

of whether or not the disputes can be adjudicated justly or not. That's certainly true for section 35 and for the Charter. So, you know, with all that said, there's lots that can be done to make the process fairer and more accessible. And one of those things is being aware of linguistic components. For example, are there witnesses who need to... who are going to be more comfortable testifying in their language? If so, come up with a way to make that happen. Are they going to be more comfortable testifying in their language in their community, in a setting where they feel more...

more able to use their language. If so, make that happen. There's protocols around this. That's not, you don't have to reinvent the wheel. Do you need to start your days in a different language? Does there need to be a blessing in a different language, an introduction in a different language? There's lots of different ways. You know, I think there's critics of these systems that say this is just superficial changes to a fundamentally colonial system.

That's probably true, but at the same time, there's also protocol that can be followed that makes a historically inhospitable place a little bit more hospitable for people who have different languages. And I'm sure that's true for lots of people in Canada, not just Indigenous peoples, but given that Indigenous peoples, this is their land. And, you know, the real... like French and English aren't the first languages here. So there's, you know, a particular role for respect of those languages in judicial processes, to my mind. And...

**Aria (01:27:36.438):**

Counsel should be creative about how to do that. I've seen it happen. It's not that hard, actually. There just needs to be an appetite on both sides. And where there is, you can really change the process to make sure that people who are being forced to participate in a Western process that is not their process, that is not their language, are at least able to participate in it in their language in a way that's a little bit more culturally safe. Again, up to a point.

**Cheryl:**

I do think the points you make are really critical to access to justice. And if you say that they're just symbolic gestures, we have to think about how symbolic many of the processes and procedures that happen in court really are, and how that is part of the gravitas that we extend to court proceedings. A lot of it is symbols. So, I hear what you're saying. And I also appreciate you saying that you start from acknowledging that

Well, you yourself acknowledged you weren’t the expert, but that's a part, that is actually an important lesson for lawyers working in this area, particularly if they're not indigenous and they're not speaking the language of acknowledging that lack of expertise.

**Aria:**

Well, and there's a cultural ignorance as well, right? Like a lawyer trained in the Western tradition might not know that actually to start a court case without particular ceremony is wrong.

And that's true for people representing Indigenous groups and as people for acting in opposition as well. You know, I think there's so much, the judicial processes cause so much harm to so many people over the years, you know, Indigenous peoples, and that's something that I've heard chief justices across the country speak about. That's something that, you know, our judiciary has started to recognize and the bar should too. And I don't think this is an obligation that only lies on lawyers who represent Indigenous groups.

It lies on everyone. There's nothing in anyone's code of ethics that enables or even permits them to engage in litigation that is unnecessarily expensive. It's alienating that kind of seeks to gain advantage by putting someone in a culturally unsafe place. So I don't think that there's any inconsistency between being a zealous advocate for the government or industry or whoever it is, and litigating in a respectful manner. And I've certainly seen it done.

**Aria (01:29:58.914):**

But that's a bit broader than language, but language is a part of it too, to make sure that the person who is on the other side of the table from you understands what you're asking. You can understand them. You're not rushing them. The interpreter can take the time they need to listen. To being aware that the system that for you feels culturally safe doesn't feel culturally safe for another person. That's language and other things, and there's ways to try to get towards fixing. I mean, it's a, this is a huge other issue.

There's so many other things to talk about, but language is a component of it, and one that counsel should think about a little bit more, particularly when they're dealing with elders, but more generally too.

**Cheryl:**

Well, I think that's a really great place to leave off, as an excellent message for those who are part of the system and or students who are wanting to be part of the system. And I want to thank you, Aria, for taking the time to speak with us today about Indigenous language rights, but also just how to approach litigation and advocacy in this area. So thank you for joining us today.

**Aria:**

Thank you again for having me.

**Cheryl:**

And thank you, listeners for tuning into this episode of Charter: A Course, where we have been discussing minority language rights under the Charter. We've been speaking with constitutional litigator Aria Laskin for our practice corner and previously with Professor Francois Larocque from the University of Ottawa about the language rights provisions of the Charter more generally.

Looking ahead, we will continue to explore various sections of the Charter, including concepts such as Charter values and mobility rights under the Charter. You'll be able to find our episodes on Apple Podcasts, Spotify, and other popular platforms, as well as on the Asper Center website, so check back soon. And if you want to get notifications of when our new episodes drop, please like our podcast and you'll get those notifications.

And lastly, I'd like to thank law student Emma Davies who helped produce this episode. So, until next time.

**Music:**

Charter a course, I will Charter a course, if we can just get the country to trust us. Charter a course, south, east, west and north, and along the way we may find justice. Charter a course, I will charter a course, if we can just get the country to trust us. Charter a course….