Protecting Indigenous Languages: The Role of Canadian Law

Article Summary: *Understanding the critical state of Indigenous languages in Canada and the importance of preservation efforts, a review on how Canadian law can be used to protect these languages and address the barriers to language preservation*

Many of the 70+[1] Indigenous languages in Canada are at a crossroads. Steep declines in first-language speakers – due to aging populations and residential schools – are coupled with massive gains in second-language speakers, through remarkable language revitalization efforts.[2] The urgency of this issue cannot be overstated. Language loss is recursive; the pace of language loss accelerates as the number of language speakers decline.[3] Today, language preservation and revitalization is a priority for many communities *because* of its importance and urgency. Without immediate action, many languages are at risk of being permanently lost.

Canadian law offers at least two categories of powerful—though imperfect—tools for codifying and operationalizing Indigenous language and language-related rights: negotiations and litigation. Out of court, Canadian law can be deployed to support a range of Indigenous-Crown arrangements that vest authority and resources in Indigenous bodies mandated to preserve and promote language.[4] When needed, litigation can be an effective tool for applying strategic pressure on Crown parties unwilling or unable to take the steps to protect Indigenous languages.

This article briefly outlines major systemic and legal barriers to language protection and proposes legal bases for challenge of those barriers.

Barriers to Language Preservation

Despite close to uniform agreement regarding the importance of Indigenous languages, there is often a gulf between theoretical agreement and state action. Nunavut provides a striking example: although Nunavut's legislation enshrines the rights of Inuit children to receive Inuit Language instruction, in practice, post-Grade 4 education in Nunavut is delivered exclusively in English and French.

Major structural barriers to language preservation include:

- Crown, not Indigenous, governments legally and practically control many key sites of language use and transmission, such as schools and hospitals. People must go to school and access medical care; typically, they cannot do so in their Indigenous languages.

[1] Indigenous languages across Canada

[2] For example, in Squamish babies and toddlers learn in *Ta Tsíptspi7lhk̓n* (Language Nest)[2]; thousands of kilometers away, the *Mi'kmaw Language Act* codifies legislative obligations respecting the Mi'kmaw language. See: Sḵwx̱wú7mesh Sníchim - Squamish Nation; Nova Scotia Legislature - Bill 148 - Mi'kmaw Language Act - RA

[3] Inuit-Language-Loss-in-Nunavut-Martin-status-report-Mar-7-2017-v3.pdf

[4] While out of the scope of this article, examples include: the Yukon Native Language Center, which is administered by the Council of Yukon First Nations and is funded by the Yukon territorial government with a joint mandate to support language revitalization in the territory; the 2021 Memorandum of Understanding between Grand Council Treaty #3, Canada and Ontario sign to improve education for First Nations students, including but not limited to language education; and, inclusion of language provisions in modern Treaties.

- For many governments (Indigenous and Crown), the demanding work of language preservation and revitalization is undermined not by opposition but by inaction – the result of competing priorities, coupled with shortfalls in resources and capacity.
- Legal remedies to such inaction have historically been limited, as Canadian law rarely requires Crown governments to take specific positive action, even in constitutional contexts. There is a strong history of courts finding state acts illegal, but there are fewer instances of courts holding governments liable for a failure to act. For example, while there is extensive legal precedent holding that arrests without warrants or certain hunting charges for Indigenous hunters are illegal, there are no cases to date holding that government's failure to provide medical care in an Indigenous language is illegal.

While state inaction may not be expressly designed to harm Indigenous languages, that can be its almost inevitable result in the absence of intervention. As the Truth and Reconciliation Commission predicted, "if the preservation of Aboriginal languages does not become a priority both for governments and for Aboriginal communities, then what the residential schools failed to accomplish will come about through a process of systematic neglect."[5]

Canadian Law as a Lever for Change

The law in this area is rapidly progressing, with increasing scope for argument that, in the unique circumstances of Indigenous languages, positive state action is legally required to protect Indigenous languages. Among other examples:

- ***Section 35 of the Constitution Act, 1982*** recognizes and affirms the existing Aboriginal and Treaty rights of Indigenous peoples in Canada. While there are no major cases to date directly on language, it is hard to imagine that a court would not find in favour of a right to language and / or rights incidental to language if properly articulated. Although the law on s. 35 is in flux, at a minimum, it "protect[s] practices that were historically important features of" Indigenous communities".[6] Nothing could more profoundly important to a community than its language. As the Assembly of First Nations noted in 1994, "language is necessary to define and maintain a world view. For [some] First Nation elders … a First Nation world is quite simply not possible without its own language."[7]

  The more significant impediment to asserting a s. 35 language-related right is establishing that an absence of state action regarding language infringes s. 35. To be accepted, that argument requires an incremental step in the law on s. 35. There are, however, strong foundations supporting such a step, particularly where existing systems and frameworks compel interaction with the state (like schools or hospitals). Given that children must attend school today, and that children were taught in their own languages prior to the assertion of Crown sovereignty, there are s. 35 arguments that the state may, in some circumstances, be compelled to ensure children can access education in their own languages (subject to justification).

[5] IR4-7-2015-eng.pdf
[6] *R. v. Powley*, 2003 SCC 43 at para. 45; see also *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at paras 21-26.
[7] Quoted in: IR4-7-2015-eng.pdf

- Certain provisions of the ***Canadian Charter of Rights and Freedoms*** such as section 15 (equality) and section 7 (life, liberty and security) can be invoked to support claims that the government has a duty to deliver certain services in Indigenous languages. For example, JFK Law is representing the Inuit of Nunavut on their claim that, in the specific circumstances of Nunavut, it is discriminatory for the territorial government not to provide K-12 instruction in the Inuit Language – the territory's majority language. While the government sought to have the claim struck on the basis that it was not justiciable in light of s. 23 minority language rights, the Nunavut Court of Appeal firmly rejected the territory's argument,[8] and the Supreme Court of Canada has since dismissed the territory's application for leave to appeal.

- Now affirmed in Canadian law through federal legislation, the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)** explicitly recognizes the rights of Indigenous peoples to revitalize, use, develop, and transmit their languages. While the actual domestic force of UNDRIP remains tenuous, at a minimum, UNDRIP can be deployed to guide statutory and constitutional interpretations regarding language rights, and potentially to compel positive action (especially alongside s. 35 or *Charter* arguments).[9]

- Finally, in situations where the Crown has made specific, language-related commitments—such as negotiated self-government and / or service provision agreements—Indigenous litigants may be able to draw on both **contractual and Honour of the Crown obligations** to hold the Crown to its commitments (including but not limited to contractual promises).

JFK Law LLP is experienced in all of the above areas, and in both negotiations and litigation relating to language. We understand that language lies at the heart of community and identity and are honoured to support clients taking steps to enforce and protect their rights to language.

[8] *Nunavut Tunngavik Incorporated et al v The Commissioner of Nunavut et al,* 2024 NUCA 9.
[9] See e.g. *Kebaowek First Nation v. Canadian Nuclear Laboratories*, 2025 FC 319.