LANGUAGE EQUALITY IN CANADA: A DELICATE BALANCE

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Article 2 of the *Universal Declaration of Human Rights* confirms the fact that language rights are part and parcel of fundamental rights:

> Everyone is entitled to all the rights and freedoms set forth in the declaration, without distinction of any kind, such as race, colour, sex, *language*, religion, property, birth or other status.[1]

Other texts, such as the *International Covenant on Civil and Political Rights* and the *Convention Against Discrimination in Education* provide additional guarantees of non-discrimination against members of linguistic or national minorities.

In the Canadian context, the debates in Parliament surrounding language rights in recent years have centered less on non-discrimination than on two-language service to the public where numbers warrant, on means of advancing the equality of status and use of English and French as official languages and, concomitantly, on ensuring the growth and development of the English- and French-speaking communities in a minority situation. The Supreme Court of Canada has observed:

> The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of another, and thus to live in society.[2]

While Supreme Court Justice Jean Beetz reminded us that language rights are based on "political compromise,"[3] Supreme Court Justice Gerard V. La Forest reaffirmed the central place of language as "a well-known species of human rights."[4]

It is also worth observing, as Blair Neatby has done, "that our present day emphasis on language is a relatively recent phenomenon."[5] It is probably fair to say that a new era of language rights in Canada began with Quebec's Quiet Revolution and with the establishment of the Royal Commission on Bilingualism and Biculturalism (B & B Commission) in 1963. In retrospect, the terms of reference of the Commission seem startling: "[T]o recommend what steps should be taken to develop the Canadian

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[1]UN Doc. A/810 (1948) at 71 [emphasis added].

[2]*Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 741.

[3]*Société des Acadiens* v. *Association of Parents*, [1986] 1 S.C.R. 549 at 578.

[4]*R.* v. *Mercure*, [1988] 1 S.C.R. 234 at 237.

[5]B. Neatby, "Introduction", *Our Two Official Languages Over Time* (Ottawa: Office of the Commissioner of Official Languages, Sept. 1996) at v.

Confederation on the basis of an equal partnership between the two founding races, taking into account the contribution made by other ethnic groups to the cultural enrichment of Canada".[6]

Progression Towards Equality

The legal cornerstone of this "equal partnership" (which has its roots in history and demography) was the *Official Languages Act* of 1969 (OLA 1969).[7] This law was the stimulus for a sometimes uneven co-operative effort between the federal government and the provinces to break down the linguistic and cultural barriers to equal opportunity among English- and French-speakers, to the extent that it was feasible to do so, and to promote the full participation of citizens from either language group in all spheres of economic and social endeavour. What the B & B Commission sought was a dramatic strengthening of language rights as a means of progressing towards *communal* equality. Of course, more than a century earlier, Section 133 of the *Constitution Act, 1867* had already established a limited but important base for language duality.

The OLA 1969 proclaimed that "[t]he English and French languages are the official languages of Canada for all purposes of the Parliament and Government of Canada, and possess and enjoy equality of status and equal rights and privileges as to their use in all the institutions of the Parliament and Government of Canada."[8] The novelty of this formulation, borrowed from the Republic of South Africa, is that the "rights and privileges" initially belong to the idioms rather than to the individuals or the communities that speak them. The rights under Section 133 of the *Constitution Act, 1867*, by contrast, apply to "any Person;" they apply to individuals.

What this formulation of principle strives to do, as it plays out in the various sections of the OLA 1969, is to reconcile equality and non-discrimination with very practical and political considerations of numbers, feasibility and costs. Indeed, the originality of the Canadian solution to language protection, as it evolved from the B & B Commission, lies in the way individual rights and collective aspirations have been blended with historical, demographic and territorial considerations. The general thrust has always been the same: a desire to promote equal opportunities in a flexible manner and to provide, subject to significant demand, essential public services in English and French at reasonably comparable levels across Canada. The conundrum, of course, was how to promote equal linguistic and cultural opportunities without altering the distribution of constitutional powers over language. As might be expected in a

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[6] *A Preliminary Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen's Printer, 1965) at 151.

[7] R.S.C. 1970, c. O-2.

[8] *Ibid.* at s. 2.

decentralized federation like Canada, there are as many solutions as there are provinces and territories, but there are numerous points of convergence. Also, the instruments elaborated by the federal government to promote linguistic fairness have evolved over time.

One of the key mechanisms proposed by the B & B Commission and incorporated in the OLA 1969 was the creation of bilingual districts, an idea borrowed from Finland. The purpose of such districts was to provide a demographic or communal focal point for delivery of federal services and, eventually, provincial and local services in the minority official language. Almost from the start, this concept did not prove viable, chiefly due to the negative reaction of several provinces for a variety of symbolic and practical reasons.[9]

Other forms of federal-provincial co-operation were devised, particularly through the official languages programs administered by the Department of the Secretary of State (now Canadian Heritage). These programs were instrumental in encouraging most provinces to improve their services in the minority official language, notably in regard to the administration of justice, to health and social services and to education. For example, Ontario adopted a *French Language Services Act* in 1986[10] which recognizes the right to use English and French in the legislature and requires the tabling and adoption of bills in both official languages. This Act also guarantees a wide range of government services in areas where the Francophone population represents at least 10% of the total population or is over 5,000 – bilingual districts by another name? After the Supreme Court of Canada, in 1985, confirmed the bilingual status of Manitoba's legislature and judiciary, that province gradually developed a French-language services policy to deliver provincial services in the language of the minority from offices in designated areas. In Quebec, which is subject to Section 133 of the *Constitution Act, 1867*, legislation guarantees health and social services in English for Anglophones in each administrative region (although their scope is presently under challenge) and other provincial and local services are widely available. Other jurisdictions have developed formal or informal means of delivering a modicum of services in the minority official language.

New Brunswick is a special case. It is the only province that has proclaimed not only the equality of both official languages (in 1969)[11] but also the equality of its two official linguistic communities.[12] Moreover, both of these guarantees are enshrined in

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[9]Bilingual districts of a sort continue to exist residually at the federal level in the guise of prescribed bilingual regions for the purposes of language of work. They are described in an annex of a 1977 Treasury Board and Public Service Commission circular which is incorporated by reference as Section 35(2) of the *Official Languages Act, 1988* [R.S.C. 1985 c. 31 (4th Supp.)]

[10]S.O. 1986, c. 45.

[11]S.N.B. 1968-69, c. 14; R.S.N.B. 1973, c. O-1.

[12]S.N.B. 1971, c. O-1.1.

the Constitution.[13] In doing this, New Brunswick has broken new ground by giving a clear linguistic and cultural dimension to equal opportunities.

It can be argued that Section 23 of the *Canadian Charter of Rights and Freedoms* (which deals with minority language educational rights), as interpreted by various Supreme Court of Canada decisions, has established an incipient basis for distinct educational and cultural institutions for all minority communities where numbers warrant. This gradation in defining educational rights is but another example of the Canadian genius for linguistic accommodation. This is particularly true in regard to the exceptional nature of the application of Section 23 in Quebec, a formulation devised to take into account the educational provisions of that province's *Charter of the French Language*. In that province, minority language educational rights are based on the language of the parent's primary school instruction in Canada, until such time as the legislative assembly or the government of Quebec decides otherwise.

Finally, it is worth noting that the concept of a "sliding scale" of rights in regard to access, management and control of minority educational institutions, first formulated in the *Mahé* case,[14] has been superseded in several jurisdictions by an approach that is simultaneously more generous and more practical. Faced with the administrative nightmare of tailoring school governance to the demographic reality of each local minority community, several legislatures have preferred to create either a single province-wide minority school authority or several large minority boards covering the totality of the province or territory.

These transformations suggest that language equality in Canada is very much a work in progress and that the declaration contained in Section 16(3) of the *Charter* is quite dynamic:

> Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

This "progression vers l'égalité" (as the French version of this same section felicitously puts it) has become an effort to establish an equilibrium or a delicate balance between majorities (French in Quebec, English elsewhere) and minorities (English-speakers in Quebec and French-speakers outside Quebec). This balance must encompass the fact that overall, Francophones in Canada constitute a linguistic minority. It has also to take into account practical issues of significant demand or numbers as well as questions of feasibility and cost. The missing item to level the scales is, of course, the recognition of Quebec's unique character, a recognition which cannot be achieved at the expense of historical language rights or the growth and development of minority communities.

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[13] *Canada Act 1982* (U.K. c. 11, Schedule B; *Constitutional Amendment, 1993 (New Brunswick)).*

[14] *Mahé* v. *Alberta*, [1990] 1 S.C.R. 342.

It is no accident that Bill C-72, which was to become the *Official Languages Act, 1988* (OLA 1988), was tabled for first reading on 25 June 1987, just a few weeks after the signing of the Meech Lake Accord. Revision of federal language legislation had become necessary because bilingual districts had never been proclaimed and because other aspects of the OLA 1969 had to be adjusted to take account of the formulation of official languages guarantees in the *Charter*. It was important in light of the Meech Lake Accord's emphasis on Quebec's "distinct society" to give more formal and countervailing expression to a hitherto rather vaguely formulated federal government policy of minority community preservation and support. Indeed, one of the most startling and original features of the OLA 1988 is its Part VII which contains this broad statement:

> The government of Canada is committed to
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> *(a)* enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and
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> *(b)* fostering the full recognition and use of both English and French in Canadian society.[15]

The Secretary of State (now the Minister of Canadian Heritage) was given a specific mandate to take all necessary measures to realize this commitment.

It is one of history's little ironies that the minister who appeared before the Senate committee to explain and eloquently defend this aspect of the OLA 1988 was none other than the newly appointed Secretary of State, the Honourable Lucien Bouchard. Among other things, Mr. Bouchard declared that the federal government would never accept a provincial veto over its responsibility to protect and promote Canada's linguistic minorities. Part VII of the OLA 1988 generated little debate at the time of its adoption. Minority communities now see Part VII as being central to their development at a time when the federal government is undergoing significant change through privatization and devolution.

To ensure conformity with the *Charter*, regulations on communications and services under the OLA 1988, adopted late in 1991,[16] provide new criteria for measuring significant demand and for defining the offices which, because of their nature, must provide two-language services at all times. The regulations contain rules to ensure that services are offered according to the relative and absolute size of the minority communities and their location (urban or rural) and the importance of the services. Services are provided in a number of offices at least proportionate to the minority population. Special provisions apply to the traveling public. Somewhat

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[15] R.S.C. 1988 (4th Supp.), c. 31, s. 41.

[16] *Official Languages (Communications with and Services to the Public) Regulations* S.O.R./92-48.

presciently, these regulations also encompass a few aspects of the electronic delivery of services.

The originality of these intricate regulations is that they propose a new system of service delivery that is calipered, a system that seeks to reconcile reasonableness and feasibility with fairness and equity. In fact, under the regulations, key services can, in theory, be delivered to 96% of English-speakers in Quebec and 92% of French-speakers outside Quebec. However, this noble ideal of tailor-made service is often marred by poor implementation. But that is another story...

What does the future hold?

As we have seen, legislation on language has been a prominent feature of political processes over the last thirty years. Canada has, in fact, developed a balanced approach to language equality that seeks to maximize individual rights while taking into account demography and provincial jurisdiction. This progress has coincided with major changes driven by fiscal constraints, globalization and technological innovations, changes which are profoundly affecting governance.

It is always a risky business to predict what the future will hold, but the following language issues may soon come to the fore:

1) Section 133 of the Constitution Act, 1867

In the past, there has been considerable debate and more than one court challenge about the scope of the language rights set out in Section 133 and similar provisions as they apply, or once applied, to Manitoba, Saskatchewan, Alberta, Yukon and the Northwest Territories. New Brunswick has enshrined parliamentary, legislative and judicial bilingualism in the *Charter*. The Victoria Constitutional Conference in 1971 had proposed an extension of some provisions of Section 133 to some provinces. In 1979, the Pepin-Robarts Task Force on Canadian Unity had suggested doing away with the provisions of Section 133 to replace them with other less constraining guarantees. Franco-Ontarians have repeatedly asked their province to constitutionalize provisions similar to those contained in Section 133 and successive Commissioners of Official Languages have supported them. It seems reasonable to expect that this issue will be debated once more in the context of the *Calgary Declaration*.

2) Significant Demand

Significant demand criteria in regulations under the OLA 1988 will be reviewed when the results of the next decennial census (2001) are known. However, due to technological progress, significant transformations in the delivery of federal government services are taking place. Many federal services will be delivered electronically (through media such as the Internet, call centres and electronic data

transmission) in the future from offices remote from the communities being served. In the context of "virtual" offices, measures of significant demand on a geographical basis will be much less important. Also, as the federal government devolves responsibility for programs to the provinces and territories, there will be increasing pressure on both levels of government to harmonize the linguistic aspects of their service delivery. This could lead to debate and court challenges about divergent interpretations of significant demand.

3) Minority Language Educational Rights

In several jurisdictions in Canada, a great deal of effort has been expended on defining the form, content and limits of minority school governance and on implementing minority language educational rights. These efforts have had to take due account of the special protection afforded to denominational, separate or dissentient schools under Section 93 of the *Constitution Act, 1867* and other similar provisions. These issues are far from resolved and may well find new life as provinces attempt to amalgamate or otherwise modify existing educational structures or to centralize administrative power. Minority official-language parents may challenge, before the courts, the extent of provincial authority in this regard.

4) Minority Community Development

The nature of the community development commitment contained in Part VII of the OLA 1988 is gradually being defined or refined. Differences about the scope of this commitment and the pace of its implementation have already arisen between federal institutions and minority communities. Whether the guarantees contained in Part VII are justiciable is now a matter of debate among jurists; strictly speaking, in the wording of the OLA, they are not. It would be imprudent, however, to exclude the possibility of a court challenge on this issue within a few years. There may also be calls to adopt legislative or constitutional provisions similar to those contained in the New Brunswick *Constitutional Amendment, 1993* to protect minority communities in other provinces.

5) Redress

The relationship between official languages rights, minority language educational rights and equality rights is not made explicit in the *Charter*, but it is clear that language rights are a species of equality rights and should be treated accordingly. Most language-related applications for remedy under Section 24 of the *Charter* have, until now, concerned education. It does not seem unreasonable, however, to expect future challenges to relate more widely to community development not only in the area of education but also of culture. In particular, court challenges may arise which seek interpretation of the nature and scope of the equality of the two linguistic communities in New Brunswick or elsewhere.

Finally, the eventual recognition, in some constitutional form, of the unique character of Quebec society will lead, no doubt, to court interpretation of the scope and impact of such an enactment. But, to paraphrase Churchill, that is, for now, a riddle wrapped in a mystery inside an enigma...

As We Approach the Millennium

Although it is too early to predict the outcome of the *Calgary Declaration* initiative, it is not too early to draw lessons from the history of Canada's efforts to protect language rights. The federal government and several provinces have shown daring and imagination in their formal efforts to strengthen the edifice of linguistic equality. The principles of official bilingualism – of equal status for English and French – are well established. However, the principles of recognition of Canada's two official linguistic communities (including the unique character of Quebec society) are far less well anchored. And there's the rub. Language duality is not our problem: our problem is that we have not finished the job. We have not yet found the right formula to recognize the equality of our two great linguistic communities. In particular, we have not found a formula that will, at once, achieve this goal and accord prompt and serious recognition to the rights and aspirations of Canada's aboriginal peoples.

The Honourable Madame Justice Claire L'Heureux-Dubé of the Supreme Court of Canada expressed the dilemma faced by governments in protecting human rights as follows:

> These days, there seem to be more and more people for whom justice and dignity are not reasons enough to protect human rights. The language of the ledger has become the *lingua franca* and there is a danger that intrinsic values such as justice and dignity may be lost in the translation. Even after it has been shown that non-discrimination is an essential precondition to a free and democratic society, some economists and accountants still ask how much it costs and whether we can afford it.[17]

The equality of our two official languages and of our two linguistic communities does not come cheaply – but, then, neither does the failure to live up to our ideals. Language strife is very expensive in both economic and social terms. Equality of opportunities for both linguistic communities enables all citizens to contribute fully to the development of Canadian society.

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[17]Madam Justice C. L'Heureux-Dubé, "Volatile Times: Balancing Human Rights, Responsibilities and Resources" (Notes for an address to the CASHRA Human Rights Conference, Victoria, British Columbia, 3 June, 1996) at 11.