The Experience of Canada in Dealing with the Adoption of Legislation and the Administration of Justice in Two Official Languages at the Federal Level

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Hizkuntza-eskubideek sekulako eztabaida politikoa sortu zuten Konfederazioaren aurretik eta ondoren. Ingelesarentzako eta frantsesarentzako berme mugatuak ageri dira 1867ko Konstituzioan. Halere, horrek ez zituen denak ase. Ordutik izan diren auzi-mauzi konstituzional nagusi guztiak hizkuntza-eskubideen ingurukoak izan dira. Hizkuntza ofizialen lege federala onartu zen 1968an, eta, laster, probintziek ere legeak onartu zituzten hizkuntzez. Kanadako Auzitegi Gorena bilakatu zen aktore nagusia auzian, eta probintzietan sortu zen erresistentziak Auzitegi horren interbentzionismoa handitu zuen.

Giltza-Hitzak: Kanada. Gutxiengoen hizkuntza-eskubideak. 1867ko Konstituzioa. 1982ko Eskubideen Karta. Auzitegiaren rola.

Los derechos lingüísticos provocaron un gran debate político antes y después de la Confederación. La Constitución de 1867 recogía garantías limitadas para ingles y francés pero el régimen resultó un fracaso. Desde entonces, todos los debates constitucionales han girado en torno a los derechos lingüísticos. A la ley federal de lenguas oficiales de 1968 siguieron legislaciones provinciales en materia lingüística. El Tribunal Supremo de Canadá se convirtió en el agente principal del debate y la resistencia por parte de las provincias acarreó un papel intervencionista mayor para el Tribunal.

Palabras Clave: Canadá. Derechos Lingüísticos de las Minorías. Constitución de 1867. Carta de los Derechos de 1982. Papel judicial.

Les droits linguistiques sont à l'origine d'une controverse politique de grande ampleur, ayant surgi avant et après la formation de la Confédération. Bien que des garanties protégeant les langues anglaise et française aient été incluses à la Constitution de 1967, le régime s'est avéré insatisfaisant. Les principales controverses constitutionnelles apparues depuis lors étaient en effet axées sur les droits linguistiques. La Charte Fédérale des Langues Officielles de 1968 a été suivie par l'implantation de législations provinciales concernant les langues. La Cour Suprême du Canada est ainsi devenue l'acteur principal au sein du débat, et la résistance venant des provinces a débouché sur un rôle accru d'intervention de la Cour Suprême.

Mots-Clé : Canada. Droits linguistiques des minorités. Loi Constitutionnelle de 1867. Charte des Droits de 1982. Rôle juridique.

Before I describe the federal regime regarding language rights in the areas of legislation and administration of justice in Canada, it may be useful to recall that jurisdiction over languages was not included in the sections of the Canadian constitution dealing with the distribution of powers between the federal government and the provinces. The power to adopt language legislation is ancillary to the power to adopt laws in other legislative fields. There are now language laws in many provinces, but a comprehensive language regime can be found only in Québec, New Brunswick and to a lesser extent Ontario. New Brunswick is the only officially bilingual province. It adopted the first *Official Languages Act* in Canada, in the year 1969. The federal government adopted its first *Official Languages Act* in the same year. The federal government later imposed language acts in the federal territories. The jurisdiction over languages is therefore restricted to matters over which the province or federal government respectively have jurisdiction. It is also restricted by the necessity to give precedence to constitutional guarantees. The right to adopt language laws was contested in the *Jones* case; the Supreme Court held that the Constitution provided minimum protections that could be improved by legislation. Section 16 of the *Canadian Charter of Rights and Freedoms* consolidated that ruling by providing specifically for the expansion of language rights, avoiding a clash with the right to non discrimination.

The particular context of language rights in Canada is defined principally by history and political compromise. A few basic language rights were constitutionalized in 1867; additions were made when Manitoba became a province in 1870 and again when the constitution was patriated in 1982. Although language rights are different from the legal rights that are recognized in the *Canadian Charter of Rights and Freedoms*, and in various international instruments, the Supreme Court of Canada has recognized in the *Secession Reference* in particular that they nevertheless constitute fundamental rights. They are evidence of the intention of the framers of the constitution to protect official minority language groups and assure their full participation in society without sacrificing their cultural and linguistic identity. This, the Supreme Court has held, is a foundational principle of the constitution that has normative effect. I mention this because, as I will explain later, it has an important impact on the interpretation of language legislation, whether it be constitutional or not.

Another preliminary issue I want to mention is that Canada has not adopted a language regime entirely based on personality or on territoriality. In Canada, territoriality is reflected in the basic constitutional provisions dealing with languages, s. 133 of the *Constitution Act* of 1867 and ss. 16 to 19 of the *Canadian Charter of Rights and Freedoms*, which is part of the *Constitution Act* of 1982. These provisions establish rights applicable at the federal level, in Québec and New Brunswick. But these rights are available to any person whatever his or her origin, or mother tongue. For instance, s 19(2) guarantees the right to a trial in French to an Anglophone as well as a Francophone in New Brunswick, s. 20 to receive federal services in either language as a simple matter of choice. At the federal level, services are available according to specific criteria based, to a point, on evidence of sufficient demand. The system is therefore both personal and territorial.

THE ENACTMENT OF LEGISLATION

The *Act of Union* of 1840 had made English the language of legislation, debates and proceedings in the Province of Canada. This proved to be unworkable. During the constitutional debates leading to the adoption of the constitution of 1867, a compromise on languages was negotiated. It took the form of s 133 which provides that English and French shall be the official languages of Parliament and the federal courts, as well as those of the Legislature of Québec and courts of that province. Language rights did not extend to the executive or the administration. Identical obligations were imposed on Manitoba when it was created in 1870. Twenty years later, the Legislature of Manitoba unilaterally abolished these rights; this measure was deemed unconstitutional in the lower courts early in the century, but these decisions were ignored. The Supreme Court ruled on the issue in *Forest v. Manitoba,* in 1979**.** Six years later, in the important *Reference on Language Rights in Manitoba,* the Supreme Court held that all statutes adopted in English only were unconstitutional; to preserve the rule of law and constitutional order, the Court suspended the declaration of invalidity for the period necessary for Manitoba to reenact its laws in both languages**.** That same year, in *Blaikie v. Québec*, the Supreme Court declared part of the *Charter of the French Language*, adopted by the Québec legislature, unconstitutional. The *Charter* had made French the language of legislation in Québec, although it provided for the later translation and publication of laws in English. The Supreme Court held that the constitution required that the legislation be adopted, printed and published simultaneously in both official languages. It further held that the obligation extended to secondary or delegated legislation. In another language case dealing with language rights in the courts in that same year, *MacDonald v. Montreal*, Beetz J said in *obiter* that the requirement of bilingualism in the adoption of laws did not mean that simultaneous translation was required in Parliament or in the Legislature of Québec. Parliament instituted simultaneous translation in 1959 and there has been no decision regarding its constitutional status. Translation is now a requirement under Part I of the *Official Languages Act* 1988, but there is no simultaneous translation in the Québec Assembly. It is provided in New Brunswick.

There has been much controversy regarding the nature of the documents that must be adopted or adopted and published in both official languages. In *Québec v. Collier*, in 1985, the Québec Court of Appeal held that, to be effective, the right to participate in the debates of the Québec Assembly required that sessional papers be available in both official languages. The Supreme Court confirmed that decision in 1990. But there was still disagreement over the scope of the words "records and journals" used in s. 133 of the constitution. "Journals" refers to the order paper, notices and minutes. "Records" are the analytical record of the daily votes and proceedings of the House. The entries are prepared using the clerk's minutes. "Journals" also includes the official and permanent record of proceedings, petitions, readings of bills, references to committees, resolutions, votes, debates adjourned. Proceedings of the Senate are reported in similar fashion. Hansard is the official report of the debates, the verbatim transcription of what was said. At the federal level and in New Brunswick, Hansard is translated. In

Québec it is not. There is still some uncertainty regarding obligations regarding Hansard because it is not a required archival document on one hand, but it has an official character and must be referred to in the House if a member wants to have it corrected. The debate is somewhat related to the philosophy reflected in the constitution: does it provide for minimum guarantees reflecting a simple political compromise (pre-confederation practice would then be relevant), or does it constitute one of the elements of the guarantee of equal participation in the parliamentary process? This of course has serious implications regarding the work of Parliamentary committees. Is there an obligation to provide bilingual minutes of their deliberations?

As earlier mentioned, the obligation to adopt laws in both languages was extended by the Supreme Court to printing and publication; the requirement of simultaneity was added, as was the rule that both versions were of equal value. The obligations were considered implicit by the Supreme Court in *Blaikie* (1970). It would seem obvious that all bills must be presented in both official languages at first reading; in the *Manitoba Language Reference*, the Supreme Court said that simultaneity is required "throughout the process of enacting bills into law" (p. 775) . Nonetheless, the Standing orders of the House of Commons provides for bilingualism only on second reading. This was not challenged because in fact bills are presented in bilingual form at first reading. In Québec however, the Standing orders provide for minimum constitutional requirements to be met, which is interpreted to mean bilingualism at the final stage. The government of Québec considers that even if its procedure were found to be invalid, there is no judicial review of the legislative process so that its laws could not be declared unconstitutional for that reason alone.

What of the obligations regarding delegated legislation? There are two major inquiries here: First, what is the scope of the guarantee? Second, what are the requirements regarding enactment?

This is a complex issue which was dealt with in three cases: *Blaikie II*, the *Manitoba Language Reference* rehearing, and *Sinclair*. One problem of course is terminology. It is very inconsistent. There are however some statutory definitions that provide a little guidance. "Regulation" means, under the *Statutory Instruments Act,* for instance*,* a statutory enactment being a rule, order or regulation governing the practice or procedure in any proceeding before a judicial or quasi-judicial body established under any act; "statutory instrument" includes any order, rule, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established under certain kinds of authority. Other laws define "regulation" differently; the *Act respecting the consolidation of the statutes and regulations of Québec* simply defines regulation as an order, decree or rule.

In *Blaikie II*, the Supreme Court identified four types of delegated legislation. First, regulations enacted by the government, a minister or a group of ministers. All of these are formally issued by the Governor or Lieutenant Governor in Coun-

cil. They therefore pose no problem. Directives and guidelines are excluded. The difference is in substance, not form. Directives provide no legal sanction for non performance, though they may give rise to administrative sanctions. But rules of practice of courts and quasi-judicial tribunals are included; this results not from their legislative but from their judicial character. One problem we have today is that the quasi-judicial characterization has disappeared from our law. Some authors suggest that the duty applies to all tribunals required to provide procedural fairness; but I think all tribunals would then be covered unless we established categories according to the importance of that duty. The bilingualism requirement does not apply to school boards or municipal governments in Québec according to *Blaike II*. The reason for this is historical; these boards preexisted confederation and were not compelled to provide bilingual services. The Supreme Court held that s 133 was a political compromise and that its scope should not be artificially enlarged. The same is true of Indian band councils. The New Brunswick Court of Appeal has however held in *Charlebois v. Moncton,* in 2005, that municipal by-laws must be translated in New Brunswick because the rationale for excluding the same in *Blaikie* is inapplicable in the context of the *Charter* extension of language guarantees to New Brunswick in 1982. Another important category comprises rules of professional associations; here the obligation depends on the relationship between the association and government. If the regulation is approved by government in any way, the obligation arises. Approval by a board is not sufficient, nor is publication in the Official Gazette. Sub-delegation is therefore not covered.

The Rehearing in the *Manitoba language Reference* was meant to elucidate further regarding orders in council and documents incorporated by reference to primary and secondary legislation. The answer was not very satisfactory. The Supreme Court ruled that orders in council were included if they were of a legislative nature either because of their form, content (does it initiate norms or determine how rights can be exercised) or effect (does it create a legally binding rule applicable to an undetermined number of persons). In fact its decision in the main reference did not find form sufficient, undermining the test. This deficiency appeared in the *Sinclair* decision a month after the *Manitoba Reference* where the Court decided that the Québec Assembly could not adopt a shell law and incorporate by reference unilingual documents to achieve its purpose. A legislative act could not be disingenuously divided into discreet parts. Here, bilingualism applied to all instruments though many would not have been found to satisfy the test in the Reference on their own. But incorporation by reference is not so simple to resolve; *Sinclair* referred to procedural acts having to do with the adoption process, but some incorporated documents will have the effect of imposing norms. The test adopted with regard to them requires that one first determine if the incorporated instrument is itself of a legislative nature; if not, it is excluded. The second question is whether the incorporated instrument is an integral part of the primary instrument. The Ontario Court of Appeal was divided on the issue of the incorporation of traffic laws in *Massia*! It held that if the body creating the incorporated document was not one to which s 133 applied, the document need not be translated. The Supreme Court disagreed in giving its answer to the third question, i.e. whether there is a *bona fide* reason for incorporation without trans-

lation. It cited as reasons government cooperation, practicability, the technical nature of documents. This open ended test is much criticized as a clear departure from the focus in *Blaikie* on equal access.

As mentioned earlier, ss 17 and 18 of the Charter have been said to have the same effect as s 133 of the Constitution Act of 1867. They are however a little more precise. For instance, s 17 confirms the right to use the two official languages in any debates "or other proceedings" of Parliament. Committees are therefore specifically included. S 18 does not use the word "acts" but refers to "statutes"; it would therefore be necessary to conclude that statutes includes regulations. The above conclusion would seem to be inapplicable to ss 17(2) and 18(2) which extended the constitutional rights to New Brunswick. As earlier mentioned, the NB Court of Appeal set aside the purposes of s. 133 in its interpretation of the 1982 provisions and preferred to draw on the legislative and political evolution of the Province. Another stange distinction to be made is that rights under s. 133 are absolute while *Charter* rights like those found in ss 17 and 18 are subject to s. 1 limitations of the Charter.

The *Official Languages Act* has reaffirmed the constitutional rights and expanded them. For instance, s 7 captures instruments not caught by the interpretation of s 133: anything published in the Gazette for instance must be bilingual.

BILINGUALISM IN THE JUDICIAL SYSTEM

The constitutional provisions entrenching minority language rights in the judicial system include s. 133 of the *Constitution Act* 1867, s. 19 of the *Canadian Charter of Rights and Freedoms*, and s 23 of the *Manitoba Act* 1870. These rights represent a minimum that has been completed by a number of legislative provisions. At the federal level, those provisions are found principally in the *Official Languages Act* and the *Criminal Code*.

A few preliminary remarks are necessary at this point. First, I will observe that contrary to other constitutionally protected language rights, those pertaining to the legal system received a narrow interpretation in the Supreme Court of Canada, creating the need for progressive legislation, this until the Supreme Court reversed itself in the *Beaulac* decision of 1999. Second, it is important to underscore the important difference between language rights and legal rights in the constitution. Language rights are about the protection of culture; legal rights are about due process and fair trials. This means that the right to an interpreter under s 14 of the *Charter* is not a language right. It has a distinct origin and role. Language rights are substantive, not procedural. This will have implications: the right to language of choice is not constrained by maternal language or the fact that the accused or witness is knowledgeable of the language of the majority. Third, a word about the division of powers in this area. The legislative authority to regulate languages depends on the nature of the court and the matter before it. At the federal level, language use in the administration of justice is provided for

in three respects. The *Official Languages Act* is ancillary to the power to make laws for peace order and good government. The power to determine the use of languages in federal courts is authorized under s. 101 of the *Constitution Act* of 1867. The power to determine the use of languages in criminal proceedings is ancillary to the power to legislate in respect of criminal procedure under s. 91(27) of the *Constitution Act* of 1867 even though criminal law is applied in provincial courts. Provincial legislatures can regulate the use of languages under the power to administer justice coming under s. 92(14) of the *Constitution Act* of 1867. It is clear then that the language of prosecution of provincial offences and civil proceedings is determined by the provinces. Because federal courts rarely have exclusive jurisdiction, many cases can proceed either in those courts or in provincial courts; language rights will not be the same in many cases. If there is conflicting legislation, the federal act will apply. If the federal government delegates the prosecution of federal offences, it cannot thereby eliminate language protections.

The general constitutional right is to use one's language in the protected courts. Unfortunately, in the 1986 decision of *Société des Acadiens v. Association of Parents for Fairness in Education*, the Supreme Court of Canada decided that this right does not impose a corresponding obligation on the state or any other individual to use the language so chosen, or to be required to understand that language. This meant that judges, lawyers, court staff all had the right to use their language of choice and were not required to provide access to justice in the language of the accused or party having the right to make a choice. Beetz J. advocated restraint in the application of language rights because they were based on political compromise and not on fundamental principles like legal rights. This analysis was inconsistent with the evolution of Canada and based blindly on continuity of the pre-confederation regime, forgetting that under that regime all judges and court officials were bilingual and that there was no need to provide for translation and special rules. In 1999, in the case of *R v. Beaulac*, that decision was reversed. The Court decided that all language rights had to be interpreted in accord with their object which was to guarantee equal access to the courts to members of the two official language communities and that equality of service meant substantive equality; regarding the Criminal code provisions, this meant that the state had the obligation to provide an institutional framework to accommodate the choice of language.

One initial problem was to define the word "court". Did this apply to administrative tribunals? The Court decided it applied to all courts created by the federal government or the Province of Québec and to quasi-judicial tribunals. These tribunals were defined as adjudicative bodies applying legal principles to the assertion of claims under their constituent legislation. As earlier mentioned, this categorization has been abandoned; nevertheless, no problem has surfaced since the *Official Languages Act* has imposed bilingualism on all adjudicative bodies. The right is awarded to "any person"; this has been interpreted to include corporations as well as individuals, including not only litigants but also judges and judicial officers. There is no constitutional right to be understood without translation, and the right to a translation would not be a language right but the

right to be heard, a legal right. The right is exercised in "pleadings" and "process". Pleadings are the oral and written arguments, not the evidence. There is no right to a translation of evidence in the form of affidavit or otherwise. Process refers to procedural documents emanating from the court. In *MacDonald*, the Supreme Court said a summons was a process and therefore subject to s. 133, which meant that it could be issued in the language of choice of the person issuing it. The choice is not that of the litigant, but that of the issuer. This would seem inconsistent with the decision to impose bilingualism regarding rules of procedure on the basis that the rules are necessary to a meaningful access to the judicial system. Nevertheless, that is the state of the law when constitutional norms are considered in isolation. The approach of the Supreme Court in the 1986 decisions was much criticised. The *Beaulac* decision addressed these criticisms and overturned the 1986 decisions with regard to the rules of constitutional interpretation. The new interpretative framework could however only be applied to the criminal code provisions in the context of that case. The problem now is that there is some conflation of language rights and fair trial rights: for example, can a court find that a breathalyser certificate must be in the language of the accused without considering the language competency of the accused?

It is necessary to say something of s 20 of the *Charter* because it outlines the right to receive services from the administrative component of the judicial system as part of the government. Several litigants have tried to enlarge language guarantees by arguing that issuing a ticket or laying an information is a government service. This was caused by the restrictive position taken in the 1986 trilogy. The arguments did not succeed. An information is judicial in nature and s 20 does not apply. To the extent the courts as institutions communicate with the public to offer services (notices of practice, hearing dates, etc.), s 20 applies. In fact federal institutions must make an active offer of service in both languages.

The federal regime has been completed by the *Official Languages Act* and amendments to the *Criminal Code*. The first *Official Languages Act* was adopted in 1969; the new act was adopted in 1988. It expands the rights conferred on parties in proceedings before federal judicial or adjudicative bodies. It has been interpreted purposefully. The most important expansion is in the affirmation of the right of a party to speak and be understood without the assistance of an interpreter by the court in the official language of choice. The right applies to all judges and officers hearing a case except for the judges of the Supreme Court of Canada. The duty to provide court officers that speak the language of the litigant applies in the case of bilingual proceedings as well as unilingual proceedings. Witnesses can give evidence in the language of their choice, but they can be examined through an interpreter. Evidence taken can be obtained in the language of choice upon request at no cost to the requesting party. Federal courts all have rules respecting notice requirements regarding the choice of language. The second most important expansion is in the obligation for the Crown, where it is a party to a civil proceeding, to use in its oral and written pleadings the language chosen by the other party. Evidence is given by the witness in the language of his choice; no translation can be obtained unless there is a ruling that it is necessary in a specific case in order to provide the right to a fair trial. Regarding

process, the law provides that the pre-printed portion of any form shall be in both official languages; details are in the language of choice but their translation can be obtained on request. Every final decision, order and judgment must be in both official languages where the issue is of general interest and also in cases where proceedings were conducted in both official languages in whole or in part. Simultaneity is not required, although it is in fact observed at the Supreme Court of Canada.

Even though criminal proceedings occur in provincial courts, the federal government has the authority to legislate with respect to criminal procedure, and therefore, the use of official languages in criminal procedure. Part XVII of the Code applies to criminal offences; it also applies to many non-criminal offences because its terms were incorporated in provincial legislation dealing with provincial offences. The main rights are found in ss 530 and 530.1. As earlier mentioned, s 530 was interpreted in *Beaulac* to require positive measures by the Crown to accommodate the choice of language of the accused. There is a substantive right to be tried in one's language without translation by judge or judge and jury. One's language is that language with which the accused has a sufficient connection; the accused can decide this subjectively but must demonstrate that he or she has sufficient command of the language to instruct counsel. Knowledge of the other official language is irrelevant. The accused has the right to proceedings in the language of choice, or to bilingual proceedings in some circumstances. The accused has the right to be informed of the right to choose the language of proceedings. Under s. 530.1, the judge, prosecutor and other court staff are viewed as an institution and required to function in the language of the accused. The obligations of the Crown extend to preliminary inquiries. If the accused cannot understand a witness, he can obtain the services of an interpreter. If pre-printed forms are used, the printed portions must be bilingual.

CONCLUSION

In Canada, the development and interpretation of language rights have been difficult issues to deal with; the political ramifications of the long debate have been profound. I believe we have now reached a national consensus on constitutional and legislative protections. Implementation in concrete situations will occasionally raise problems, but courts are now usually diligent in their task and no surprises are expected after the decision in *Beaulac*.