

guardian. He is vested with the power to determine who is and who is not an Indian, how to dispose of Indian lands, minerals, tribal funds, and who may and who may not receive services such as education, social assistance, health services, and housing. In particular, we are restricted in the areas of land management, financial management, contract relations with third parties, economic development, and control over our natural and water resources.

Not so long ago, Dr. Lloyd Barber, the former Commissioner on Indian Claims, made the following observations at Yellowknife, N.W.T. in October 1974, which still ring true today. He said:

I cannot emphasize too strongly that we are in a new ball game. The old approaches are out. We've been allowed to delude ourselves about the situation for a long time because of a basic lack of political power in native communities. This is no longer the case and there is no way that the newly emerging political and legal power of native people is likely to

diminish. We must face the situation squarely as a political fact of life, but more importantly, as a fundamental point of honour and fairness. We do, indeed, have a significant piece of unfinished business that lives at the foundation of this country.

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[This essay is an excerpt from Mr. Bear Robe's forthcoming book, *Rebuilding the Siksika Nation — Treaty, Aboriginal and Constitutional Rights* (Gleichen: Siksika Nation, 1991).

1. Alberta's Memorandum of Agreement, dated Jan. 9, 1926, ss. 8, 9 and *The Alberta Natural Resources Act*, S.A. 1930, c.21, ss.10, 12.
2. For a more thorough elaboration see: Bruce A. Clark, *Indian Title in Canada* (Toronto: Carswell, 1987).

THE CONSTITUTIONAL POLITICS OF LANGUAGE

A. Anne McLellan

INTRODUCTION: CULTURE AND LANGUAGE

At the heart of Québec's demands for constitutional reform is a concern for the continuation of Québec's cultural uniqueness. The Meech Lake Accord was viewed as a small, albeit important, step in guaranteeing and protecting Québec's uniqueness and "specificity." As the Minister of Intergovernmental Affairs, Gil Remillard, noted:¹

[Québec's] identity must not in any way be jeopardized. We must therefore be assured that the Canadian constitution will explicitly recognize the unique character of Québec society and guarantee us the means necessary to ensure its full development within the framework of Canadian federalism.

Recognition of the unique nature of Québec gives rise to the need for obtaining *real guarantees for our cultural safety*. (emphasis added)

As the comments of Remillard suggest, culture is the principal factor which makes Québec unique and "language is the natural vehicle for a host of other elements of culture".² Claude Romand Sheppard, in a working paper prepared for the Royal Commission on Bilingualism and Biculturalism, describes the causal connection between language and the maintenance of cultural distinctiveness in the following terms:³

To say that language is a mere means of communication is to state less than half the truth. It is also, and foremost, the foundation of a particular culture, the prerequisite of its survival and the vehicle of its propagation. In this perspective, language can no longer be treated as an incidental: it becomes the *essential element* of ethnic identity and cultural continuity. (emphasis added)

The Commission, in the General Introduction to its Report, acknowledges the vital link between language and culture.⁴

We said that language is in the first place an essential expression of a culture in the full sense of the word; from the intellectual standpoint language is certainly the most typical expression of culture.

...
The life of the two cultures implies in principle the life of the two languages. Later, when we deal with the idea of equality, we shall see that, at the practical level, an attempt to make every possible provision for cultural equality is primarily an attempt to make every possible provision for linguistic equality.

...
Whenever a bilingual state preserves the integrity of its language groups, the tensions that might arise are neutralized to the extent that each of the groups within the state has a sense of cultural security. When a country fails to provide this sense of cultural security, the minority, seeing its language threatened, often tends to harbour feelings of hostility toward the majority and to look for other solutions, including various forms of "national" self-determination outside the framework of the bilingual state.

Because of the centrality of language in relation to the existence, preservation and promotion of cultural identity, the subject of language rights is one of singular importance to a number of constitutional players: for example, the Province of Québec and its Francophone majority, Anglophones within Québec, Francophones outside Québec, other ethnic groups, those whom Professor Cairns has referred to as "third force peoples"⁵, and aboriginal peoples. In the past, these diverse groups have been in conflict with one another over the definition and, nature of, language rights and the allocation of resources to further language claims. Due to the centrality of the issue of language in Canadian political and constitutional life, one of the most difficult challenges in any future constitutional negotiations will be the accommodation and reconciliation of these diverse claims. However, before I look to the future in relation to language rights, let me go back and provide a brief overview of where we are, constitutionally and politically, in relation to language rights.

THE DEVELOPMENT OF LINGUISTIC RIGHTS⁶

Historically, ours is a constitutional regime which has always recognized some degree of linguistic duality. This fact was recognized in s.133 of the *Constitution Act, 1867*.⁷ In essence, this section provides for the use of either French or English in the business of the federal Parliament and the

Québec legislature, and the use of either French or English before those courts established under the authority of Parliament or the Québec Assembly. A similar constitutional provision is found in the *Manitoba Act* (s.23), recognizing the demographic fact that when Manitoba entered Confederation in 1870, the Anglophone and Francophone populations were roughly equal in size. Attempts to ignore s.23 and establish a unilingual English regime in Manitoba were addressed in 1985 by the Supreme Court of Canada, at which time the Court confirmed the binding and mandatory nature of s.23.⁸

When Alberta and Saskatchewan joined Confederation in 1905, s.110 of the *North-West Territories Act*, became part of the constitutions of those provinces. Section 110 provided limited protection to the Francophone minorities in Alberta and Saskatchewan,⁹ although, the continued existence of this protection was not made clear until the recent case of *Mercure v. The Queen*.¹⁰ The legislative response to this judicial recognition has been largely to remove the protection accorded the Francophone minority by virtue of s.110.¹¹

I now move quickly forward to the period 1963-71 during which the Royal Commission on Bilingualism and Biculturalism was created and carried out its work. This Commission was "to inquire into and report upon the existing state of bilingualism and biculturalism in Canada and to recommend what steps should be taken to develop the Canadian Confederation on the basis of an equal partnership between the two founding races."¹² Almost as an aside, reference was made to taking into account the contribution made by other ethnic groups to the cultural enrichment of Canada.

In 1969, in response to recommendations made by the Bilingualism and Biculturalism Commission, the federal Parliament passed the *Official Languages Act*, the main section of which stated:¹³

The 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.* (emphasis added)

In the same year, New Brunswick enacted an *Official Languages Act* which accorded the English and French languages equal status.¹⁴

The last event of major significance before the constitu-

tional amendments of 1982 was the passage of the *Charter of the French Language* (Bill 101) in the Province of Québec.¹⁵ The Act made French the official language of the province, and it became the language of the legislature, of legislation and of the courts. Further, the public administration of the province, as well as aspects of private commerce, were to be conducted in French. Access to English schools was restricted to children whose father or mother had attended a school in Québec, the primary language of which was English. This legislation, while recognizing in its preamble a desire to deal fairly and openly with ethnic minorities and the aboriginal peoples, was seen as a major violation of the rights of non-French-speaking peoples.¹⁶

This brief history, leading up to the constitutional amendments of 1982, clearly indicates that while official bilingualism or an "official languages" policy is of relatively recent origin in Canada, there has been, for a long time, recognition of the concept of bilingualism.¹⁷

THE CONSTITUTION ACT, 1982

In 1982, significant constitutional reform took place in relation to language rights. Linguistic *duality* became an important constitutional norm. Sections 16 to 22 of the *Charter* entrenched in the *Constitution* recognition of English and French as the official languages of Canada and New Brunswick.¹⁸

Further, s.23 provided minority language education rights to the Francophone and Anglophone minorities. It is this section which is viewed as being fundamental to the continued existence of Francophones outside Québec. It recognizes the importance of language in maintaining cultural identity and the importance of education in maintaining both. In the recent case of *Mahé v. The A.G. of Alberta*,¹⁹ the Supreme Court of Canada determined that s.23 parents had the right to at least some degree of management and control over minority language education. The Court recognized that some degree of management and control was vital to ensure that the minority's language and culture would continue to flourish.

Little is said in the *Constitution Act, 1982* about the language claims of those who speak languages other than French and English. Sections 15, 27 and 35 may provide the basis for arguments by aboriginal peoples and "third force" people to some protection of their languages. However, these claims can be described as tenuous at best.²⁰

One of the effects of the *Charter* has been to hand Québec a number of defeats in relation to its attempts to control its language and cultural policies. Section 23 (which cannot be opted out of) was used by the Supreme Court of

Canada to strike down parts of Bill 101 which limited the rights of Anglophone parents to educate their children in English²¹, and the provincial equivalent of s.2(b) was invoked to strike down s.58 of Bill 101, which required French only commercial signs.²² The Québec government, to the dismay of Anglophones outside of Québec, opted out of this decision. Furthermore, it is doubtful that the Québec government was enthused by the Supreme Court of Canada's articulation of the purpose of s.23 in *Mahé*:²³

The purpose is to preserve and *promote* the two official languages of Canada and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. (emphasis added)

Certainly, the demands of Québec, which later formed the basis of the Meech Lake Accord, were motivated in large part by a perceived need for recognition of its cultural distinctiveness and, in addition, to provide it with the means to protect and promote that cultural distinctiveness.

"Canada" would consist of provinces with Anglophone majorities, most of which would probably see little reason to single out tiny Francophone minorities for legislative recognition or promotion."

THE MEECH LAKE ACCORD

I now turn briefly to the provisions of the Meech Lake Accord. Section 2 of the Accord reinforced the norm of linguistic *duality* when it recognized, as a fundamental characteristic of Canada, the existence of French-speaking Canadians, largely centered in Québec but also present elsewhere, and English-speaking Canadians, concentrated outside Québec but also present in Québec.

This interpretive section provided further recognition for the English and French linguistic minorities and, indeed, recognized their existence as forming part of a fundamental characteristic of Canada. While debate continues as to the meaning and effect of this section, it is reasonable to suggest that this interpretive section could be used to assist in the interpretation of sections such as 23 and 16 to 22 of the *Charter*.

Interestingly, the Accord spoke only of the Parliament of Canada and the provincial legislatures, other than

Québec, acting to *preserve* this fundamental characteristic.

There was no reference to its *promotion*. We can speculate as to what promotion might mean; for example, legislation to ensure provision of a broad range of public services in French at the provincial level. However, the role of the legislature and government of Québec was both to preserve *and promote* the distinct identity of Québec. Of course, what promotion may mean for the Anglophone minority in Québec would hinge upon the definition of "distinct society". Is Québec a distinct society because of its linguistic duality or because of the pervasiveness of the French language in an otherwise predominantly English nation?

There was no recognition in the Accord of the language claims of any other groups.

LOOKING AHEAD

Meech Lake has failed. There is no constitutional recognition of Québec as a "distinct society," and no additional means by which it can protect and promote its cultural distinctiveness. What is likely to occur in another round of constitutional negotiations? The answers depend a great deal upon the position of Québec. For example, if Québec were to seek some form of sovereignty, then the scene is bleak for Francophones outside Québec, while it probably gets brighter for other groups with linguistic claims. "Canada" would consist of provinces with Anglophone majorities, most of which would probably see little reason to single out tiny Francophone minorities for legislative recognition or promotion. The trend would probably be toward recognition of English as the only official language and lumping the Francophone minority in with other ethnic groups in a general multicultural policy. Indeed, the tendency in some provinces might be to recognize minorities, other than the Francophone minority, as enjoying some special status.

The official languages policy, as recognized in sections 16 to 22 of the *Charter*, at least as it applies to federal institutions, would probably cease to exist. Clearly, the main impetus for the policy was the presence of a significant Francophone population within Canada, the vast majority of whom are found in Québec. If Québec were to separate, I should think it would be very difficult for a federal government, even if so inclined, to continue the policy in the face of expected widespread provincial opposition. Greater emphasis might be placed upon multicultural linguistic rights and aboriginal linguistic claims.

If Québec chooses to negotiate with the rest of Canada in an effort to develop some form of reconstituted federal-

ism, what then?

It is likely that Québec will want greater, if not exclusive, jurisdiction over all matters touching upon language and culture. Of course, the recognition of Québec as a "distinct society" will be a given. In addition, Québec will probably want the repeal of s.133 of the *Constitution Act, 1867* and s.23 of the *Charter*, as those sections apply to it. This is not to say that upon the repeal of those sections, the Anglophone minority in Québec will see their language rights disappear. It is simply to suggest that Québec views the issue of language, and its use within Québec, as an exclusively provincial matter. Indeed, the Québec government has stated that language protection for the Anglophone minority would be provided for in their own provincial laws, be it in Québec's *Charter of Rights* or in the *Charter of the French Language*, or perhaps such protection might be found in a future Québec constitution.

While arguing that language and its use, as it relates to Québec, is a matter properly within the exclusive jurisdiction of the province, Québec will also demand *constitutional* guarantees for the protection of the Francophone minority outside Québec. Indeed, Gil Remillard has stated that one of the three reasons the Québec government had for making its Meech Lake demands, and thus agreeing to the constitutional amendments of 1982, was to improve the situation of Francophones living outside Québec. He described the situation of Francophones outside Québec as being one of Québec's major concerns, and spoke particularly of the necessity to clarify important parts of s.23 of the *Charter*. Phrases like "minority language education facilities" and "where numbers warrant" could be defined within the *Constitution* itself to provide greater protection to the Francophone minority outside Québec.²⁴

On a more cynical note, it is possible that Québec may sacrifice the Francophone community outside Québec, if that is the price at which exclusive control over language and culture, within Québec, can be bought. The Francophone minority would then be left to the mercy of Anglophone provincial governments, in which political sentiment is often antithetical to the *promotion*, if not the continued existence, of the Francophone minority. If the status quo is maintained in relation to the Francophone minority, statistics indicate that assimilation is unavoidable.

I have said little about the language claims of other groups within Canada; for example, the aboriginal peoples and "third force" peoples. Presently, there appears to be no constitutional recognition, or protection, of these groups' language claims. Some have attempted to create a constitutional language claim for aboriginal peoples on the basis of s.35 of the *Constitution Act, 1982*, in which existing aboriginal

rights are "recognized and affirmed"²⁵. However, the success of this argument is uncertain, at best.

The constitutional claims for other ethnic groups are even more tenuous. Difficult legal gymnastics are required to create a claim through the use of sections 15 and 27. The *Official Languages Act* refers in its preamble to the importance of preserving and enhancing the use of languages other than English and French, but the economic reality of language rights is such that after Canada's two official languages are fostered, there are few resources left to provide meaningful support for other language claims.

CONCLUSION

In conclusion, we might note the following:

1. Our history in relation to language has been one of linguistic duality, with little, or no, official recognition of other language claims;
2. The likelihood of this situation continuing depends upon the actions of Québec in the next months. If Québec opts for sovereignty, then the present *raison d'être* of official language policies largely disappears. The Francophone minority outside Québec will probably be viewed as just another ethnic group and treated accordingly. Indeed, in some provinces, policies might be adopted to enhance other ethnic language claims;
3. If Québec determines that its future is best served within a reconstituted federal state, then it is likely that our present official languages policy will continue, with even greater emphasis placed upon the *promotion* of the Francophone community outside Québec. In addition, Québec will demand exclusive legislative jurisdiction over language and will wish to be exempt from provisions of the *Charter*, such as s.23.
4. However, the language claims of other groups within Canadian society cannot be ignored and, indeed, the level of tension in relation to such claims will rise dramatically as those left out of the Meech Lake process, in particular, aboriginal peoples and "third force" peoples, assert their claims for constitutional recognition and protection.

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1. Taken from a speech by Gil Remillard, Minister of Intergovernmental Affairs for Québec at a conference entitled "Rebuilding the Relationship: Québec and its Confederation Partners", May 9, 1986, reproduced in Anne F. Bayefsky, *Canada's Constitution Act 1982 and Amendments*, Vol. II (Toronto: McGraw-Hill Ryerson Limited, 1989) at 946.

2. Report of the Royal Commission on Bilingualism and Biculturalism, Vol. 1, (Ottawa: Crown's Printer, 1967) General Introduction, at xxxix.
3. *The Law of Languages in Canada*, 10 Studies of the Royal Commission on Bilingualism and Biculturalism (Ottawa, 1971).
4. Royal Commission, *supra*, n. 2 at xxiv, xxxviii and para. 40, p. 14.
5. This is an expression used by Alan Cairns to describe those people of "ethnic backgrounds and cultures outside of the founding peoples." "Citizens (Outsiders) and Governments (Insiders) in Constitution-making: The Case of Meech Lake" (1988) 14 Canadian Public Policy, 120 at 129.
6. Most people agree that linguistic rights are of relatively recent origin and should be kept conceptually distinct from classical human rights. Unlike classical human rights which belong to, and can be exercised by, each person by virtue of their being human, language rights often are described as being collective in nature, requiring a critical mass for their exercise. In addition, linguistic rights are thought to require positive public policy initiatives for their implementation while classical human rights usually flourish with government inaction. Indeed, the implementation of linguistic rights may require that limitations be placed upon individual rights. There is a growing literature on the nature of linguistic rights. For example, see generally D. Schneiderman, ed., *Language and the State: The Law and Politics of Identity* (forthcoming from Les Éditions Yvon Blais, 1991).
7. However, no one could suggest that the limited scope of s.133 provided recognition of official bilingualism, as a constitutional norm.
8. [1985] 1 S.C.R. 721.
9. s. 110. "Either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of such Assembly; and all ordinances made under this Act shall be printed in both those languages."
10. [1988] 1 S.C.R. 234.
11. For example, *An Act Respecting the Use of the English and French Languages in Saskatchewan* S.S. Vol 5, c.L-6.1 makes English only acceptable for all acts and regulations. However, in s.11(1) any person may use English or French in proceedings before the courts and s.12(1) permits any person to use English or French in the debates of the Assembly.
12. P.C. 1963 - 1106.
13. R.S.C. 1970, c.O-2.
14. R.S.N.B. 1973, c.O-1.
15. R.S.Q. 1977, c.C-11.
16. There have been numerous challenges to this legislation, the earliest being *P.G. Québec v. Blaikie (No. 1)*, [1979] 2 S.C.R. 1016 in which it was decided that Québec could not unilaterally amend s.133, as it applied to Québec. Thus, the Court declared ss. 7-13 of Bill 101 unconstitutional.
17. See for a discussion of the legal history of bilingualism in Canada, Sheppard, *supra*, n. 3 at 5 - 92.
18. To date only one case has considered the scope of these provisions: *Société des Acadiens du Nouveau Brunswick Inc.*, [1986] 1 S.C.R. 549. This case considered sections 16 and 19(2) of the *Charter* and concluded that s. 19 gave the speaker or issuer of court processes the right to speak and write in her official language but provided no right to be heard or understood in the language of her choice.
19. [1990] 1 S.C.R. 342.
20. *Contra*: see *Language and the State*, *supra*, note 6, Pt. 9.
21. *The Attorney General of Québec v. Québec Protestant School Boards*, [1984] 2 S.C.R. 66.
22. *Ford v. A.G. Québec*, [1988] 2 S.C.R. 712; *Devine v. A.G. Québec*, [1988] 2 S.C.R. 790.
23. *Supra*, n. 18 at 362.
24. Remillard, *supra*, n. 1.
25. *Language and the State*, *supra*, note 6, Pt. 9.