Constitutional forum constitutionnel

Canada's Bilingual Constitution: An Unfulfilled Obligation

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I. Introduction

For over 155 years, the Canadian federation has derived its legitimacy from a written constitution made up of 31 documents, the majority of which, including the foundational *Constitution Act, 1867*, have no legal force in the French language. When the *Canadian Charter of Rights and Freedoms* enshrined the official status of English and French in 1982,[1] it became imperative that this situation would be promptly resolved, so that the supreme law of the land would reflect Canada's new constitutional bilingualism. To further entrench this obligation, section 55 of the *Constitution Act, 1982* was enacted to require the preparation and adoption of the French version of Canada's constitutional documents "as expeditiously as possible." It is worth recalling the full text of section 55.

55 A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

55 Le ministre de la Justice du Canada est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe; toute partie suffisamment importante est, dès qu'elle est prête, déposée pour adoption par proclamation du gouverneur général sous le grand sceau du Canada, conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient.

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1 *Canadian Charter of Rights and Freedoms*, being part I of the *Constitution Act 1982*, schedule B to the *Canada Act, 1982* c 11 (UK), s 16 ("[*Charter*]").

In 1984, in partial fulfillment of this obligation, the Minister of Justice established the French Constitutional Drafting Committee, composed of some of the most esteemed and accomplished jurists, scholars, and jurilinguists of the day, including former Supreme Court of Canada Justice Louis-Philippe Pigeon, Senator Gérald Beaudoin QC, and Professors Gil Rémillard and Alain-François Bisson.[2] In 1990, the Minister of Justice Kim Campbell tabled the Drafting Committee's final report in the Senate and the House of Commons, which included a complete new French version of Canada's written Constitution.

While the production of these documents in French was a crucial first step, the section 55 obligations will remain unfulfilled until the new documents are enacted "*by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada*." Unfortunately, more than three decades later, Canadians are still waiting for the government to proceed "as expeditiously as possible" with this step — the final step needed for the adoption of a fully bilingual constitution.

Wanting to move the political and legal issues at stake forward, we edited a French book in 2017 following a symposium at the University of Ottawa on November 6, 2015, titled *La constitution bilingue du Canada: Un projet inachevé* (*Canada's Bilingual Constitution: An Incomplete Project*).[3] While the titular question of the symposium was obviously answered in the negative, we continue to believe in its salience, and in the importance of raising public awareness of the unfinished business of patriation, particularly the problems that flow from our Constitution's persistent unilingualism. The book seeks to achieve this by deepening our understanding of section 55 as it relates to the bilingual character of Canada, and by providing a detailed account of the events that led to the creation of the Constitutional Drafting Committee. It also aims to shed light on the reasons why section 55 remains largely ignored after all this time, and proposes possible paths forward that would enable us to finally turn the page on this important chapter of Canadian constitutional history.

This article carries this project forward by discussing some of the most salient arguments in support of urgently following through with the fulfillment of our constitutional obligations under section 55. We are also keen to seize every opportunity — such as the *Charter at Forty* conference and the present publication — to remind fellow Canadians that section 55 exists and that its continued non-fulfilment is a matter of national concern. In our view, the (non-) fulfillment of section 55 is ultimately a reflection of Canada's (faltering) commitment to the protection of minorities, to constitutionalism, and to the rule of law.

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2 For the complete list of Committee members, see Justice Canada, "Membership of the French Constitutional Drafting Committee", online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/com.html>.

3 Linda Cardinal & François Larocque (eds), *La constitution bilingue du Canada : un projet inachevé,* (Québec: Les Presses de l'Université Laval, 2017) [Cardinal & Larocque]. The symposium included presentations by, alphabetically, the Honorable Michel Bastarache, Professor Alain-François Bisson, Maître Jules Brière, Professor Linda Cardinal, Professor Hugo Choquette, Commissionner Mary Dawson, Professor Nathalie DesRosiers, Professor Pierre Foucher, Commissionner Graham Fraser, Professor Sébastien Grammond (as he then was), Senator Serge Joyal, Professor John Mark Keyes, Professor François Larocque, the Honorable Madeleine Meilleur (Attorney General of Ontario), Maître Warren Newman, Professor Benoit Pelletier, Maître Mark Power, and the Honorable Justice Paul Rouleau.

II. Context

It may seem surprising that section 55 has been swept under the proverbial rug for over 30 years. We surmise that the constitutional debates of the 1980s and 1990s — that led to patriation and also resulted in the failed Meech Lake and Charlottetown Accords — pushed the bilingual constitution to the back burner in favor of other seemingly more pressing issues, such as the threat of Quebec secession. These fraught negotiations on the heels of the patriation exercise appear to have produced a sort of constitutional fatigue that has quelled the appetite of the political class to act on section 55 "as expeditiously as possible."

As we consider the resumption of the arduous task that section 55 mandates, it is useful to recall the context in which the issue of officialization of the French version of the Constitution first arose. As Sébastien Grammond points out, several French drafts of the *British North America Act* of 1867 (the "*BNA Act*") were produced and debated at the time of confederation alongside the English drafts.[4] These first versions were based on the bilingual resolutions that emerged from the 1864 Quebec constitutional conference.[5]

Ultimately, the story of how Canada ended up with a constitution written only in English is one of editorial happenstance and carelessness. It appears, rather disappointingly, that British parliamentary lawyers oversaw the final proofreading and preparation of the enactment, and that their final edits, made in English only, caused the English text to advance as the only version to receive royal assent.[6] To be clear, nothing prevented the Imperial Parliament from formally enacting the *BNA Act* in both French and English. It simply failed to do so.[7]

A French version of the *BNA Act* was then produced in Ottawa immediately following its enactment in March of 1867 by a senior legal translator, Eugène-Philippe Dorion. George Étienne Cartier personally reviewed this translation and is apparently responsible for some significant terminological choices, such as the translation of "Dominion" as "Puissance."[8] The Dorion translation, however, was never formally enacted by the British Parliament, and thus remains unofficial and non-binding. It was, nevertheless, published in the introductory pages of Canada's first annual collection of statutes in 1867, as required by section 133 of the *Constitution Act, 1867*.[9]

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4 Sébastien Grammond, "La constitution bilingue : une visite guidée" in Cardinal & Larocque, *supra* note 3, at 17-18 [Grammond].

5 For general information on this conference, see Andrew McIntosh & Phillip A Buckner, "Quebec Conference, 1864" (February 7, 2006), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/quebec-conference>.

6 *Ibid*.

7 On March 6, 1867, the influential newspaper *Le Canadien* published a French version of the *British North America Act*, along with the following commentary: "Nous n'avons pas de copie officielle, en français, de notre constitution. Les six cent mille Canadiens français doivent commencer à s'accoutumer d'avance à l'oubli. " ("We have no official copy, in French, of our Constitution. Six hundred thousand French Canadians must begin, in advance, to get accustomed to oblivion.") Cited in Hugo Choquette, "Translating the *Constitution Act, 1867*: A Critique" (2011) 36 Queen's LJ 503 at 516 [Choquette].

8 Choquette, *supra* note 7 at 518-520.

9 *Acte de l'Amérique britannique du Nord, 1867*, 30 & 31 Victoria c 3, in Canada, *Les Statuts du Canada passés dans la trente-et-unième année du règne de Sa Majesté la Reine Victoria et dans la première session du premier Parlement du Canada, commencée et tenue à Ottawa le sixième jour de novembre, en l'année de Notre Seigneur mil huit cent soixante-et-sept* (Ottawa, Imprimés par M Cameron, 1867) at 2.

The English version of the *Constitution Act, 1867* has remained unchanged since its adoption, save for a few amendments sanctioned by the Imperial Parliament or enacted under Part V of the *Constitution Act, 1982*. The same cannot be said, though, of the unofficial French version. Dorion's "Acte de l'Amérique britannique du Nord" has undergone many changes over the years, as new French translations were prepared by the Ministry of Justice beginning in the 1960s.[10] These administrative codifications are non-binding and cannot be authoritatively relied upon by judges, lawyers, law professors, or scholars. The same is true for the latest translations, produced in 1990, by the French Constitutional Drafting Committee.

The mere fact that competing French versions of the *Constitution Act, 1867* exist is problematic and begs the question: should one be preferred over the other? For his part, Hugo Choquette argues spiritedly in favor of the Dorion translation, which was drafted and widely circulated shortly after confederation.[11] He highlights the historical and linguistic value of Dorion's translation while identifying certain problems with the new version of the *Constitution Act, 1867* proposed by the French Constitutional Drafting Committee.

Admittedly, following through on section 55 is not a simple matter. The project of adopting a bilingual constitution necessarily entails the cooperation of the federal and provincial governments to, first, agree on which French translation to adopt and, second, adopt the resolutions contemplated by the various applicable amendment procedures set out in Part V of the *Constitution Act, 1982*.

The first part is essentially an intergovernmental proofreading exercise. It will require the provinces and the federal government to read and analyze the proposed French texts, and then judge whether they are accurate translations of the official English texts. If terminological changes are required, alternative wordings would be proposed and agreed upon. It is emphatically a matter of revising and approving the *wording* of the proposed French drafts of the written Constitution. Section 55 is not, in this sense, an invitation for governments to re-open and renegotiate the content, substance, or structure of Canada's constitutional arrangements.

The second part of the section 55 obligations is even more arduous. Once Ottawa and the provinces agree on the French wording of our constitutional documents, section 55 commands that the documents be given the force of law by proclamation issued by the Governor General under the Great Seal of Canada, pursuant to the applicable amending procedures. In this regard, different constitutional documents will require different procedural steps. For example, the adoption of the French versions of the British Columbia Terms of Union[12] and the *Newfoundland Act*[13] required only bilateral agreement expressed "by resolutions of the Senate and House of Commons and of the legislative assembly" of the provinces concerned.[14] By contrast, the adoption of the French versions of the *Constitution Act, 1867* and *The Statute of Westminster, 1931*, which pertain to the country as a whole, would likely need the unanimous consent of Parliament and of every legislative assembly in the federa-

10 Grammond, *supra* note 4 at 18-19.

11 Hugo Choquette, "Eugène-Philippe Dorion et la traduction française de l'Acte de l'Amérique britannique du Nord, 1867" in Cardinal & Larocque, *supra* note 3, at 57-67.

12 *Order of Her Majesty in Council admitting British Columbia into the Union*, May 16, 1871 (UK).

13 *British North America Act, 1949*, 12-13 Geo VI, c 22 (UK).

14 *Constitution Act 1982*, schedule B to the *Canada Act 1982*, c 11, s 43.

tion.[15] As our national experience with the failed Meech Lake and Charlottetown Accords illustrates, this amendment procedure is particularly vulnerable to provincial filibuster rules and public consultation legislation.[16]

Fulfilling the section 55 obligations will accordingly not be easy, but it must be done because the current situation — which amounts to collective deep denial and constitutional stagnation — is indefensible as a matter of public policy and law, and because it undermines the status of official languages in the country by reproducing an illegitimate hierarchy between them.

III. Following Through

As Mary Dawson recounts in a fascinating essay,[17] there was only one serious attempt to make progress on the section 55 obligations following the 1990 publication of the French Constitutional Drafting Committee's final report. In 1997, Prime Minister Jean Chrétien tasked then Justice Minister Allan Rock and Minister of Intergovernmental Affairs Stéphane Dion to build consensus around the proposed French draft constitutional documents. In her capacity as Associate Deputy Minister of Justice, Mary Dawson wrote to every province and territory in the hope of getting them to engage with the drafts and provide comments and suggestions. She received replies by mail and over the telephone. Three provinces[18] and the Northwest Territories approved of the proposed French versions, but most of the other provinces replied that, while they agreed in principle with the initiative, they could not make it a priority at the time or were waiting for other players to weigh in. Interestingly, British Columbia provided detailed comments but also stated that it needed more time to study the proposed French drafts. For its part, the government of Quebec of the day, led by Lucien Bouchard, formally declined to take part in the exercise.[19] As best as we can ascertain, there has been no further federal, provincial, or territorial attempt to comply with section 55 of the *Constitution Act, 1982*. The apparent lack of appetite on the part of Canada's political class to move on this issue since the 1990s leads us to consider section 55's binding legal effects and to ask whether the Canadian government has a judicially enforceable duty to formalize the French version of Canada's Constitution as soon as possible.

For retired Justice Michel Bastarache, another way to reflect on this question is to ask whether governments, writ large, have a general duty to legislate. After reviewing a portion of the relevant jurisprudence, Bastarache concludes rather astonishingly that section 55 would not be justiciable because its breach arguably does not directly threaten the rule of

15 *Ibid*, s 41.

16 For example, Alberta's *Referendum Act*, RSA 2000 c R-8.4, s 2(1) requires the government to call "a referendum before a resolution authorizing an amendment to the Constitution of Canada is voted on by the Legislative Assembly."

17 Mary Dawson, "Souvenirs de l'article 55" in Cardinal & Larocque, *supra* note 3, at chapter 2 [Dawson].

18 While Ms Dawson did not specify which ones in her book chapter, Professor Larocque's access to information requests have confirmed that New Brunswick, Prince Edward Island, and Saskatchewan gave their approval to the proposed French drafts. This is confirmed in correspondence between Associate Deputy Minister of Justice Mary Dawson and Quebec Deputy Minister of Justice and Deputy Attorney General Michel Bouchard, 23 April 1998 (on file with Professor Larocque).

19 Dawson, *supra* note 17 at 52-54.

law.[20] Offering a different take, François Larocque and Maître Darius Bossé argue that section 16(1) of the *Canadian Charter of Rights and Freedoms* grounds both the obligation of governments to follow through on section 55 and the jurisdiction of the courts to enforce compliance.[21] Finally, constitutional lawyers Mark Power, Marc-André Roy, and Émmanuelle Léonard-Dufour forcefully rebut Bastarache's claim regarding section 55's non-justiciability, using both legal and moral arguments. The authors conclude, as did the Supreme Court of Canada in the *Reference re Manitoba Language Rights*, that constitutional guarantees "would be meaningless and their entrenchment a futile exercise were they not obligatory."[22] As a practical solution, the authors propose a kind of instruction manual for Part V of the *Constitution Act, 1982*, which would allow the provinces and Ottawa to adopt the French version of certain constitutional texts on a piecemeal basis without resorting to the unanimity formula pursuant to section 41.

As Warren Newman reminds us,[23] there were attempts to challenge Canada's non-compliance with section 55 before the courts, but the cases were thrown out because of procedural problems and an inadequate evidentiary record.[24] Newman is therefore convinced that federal-provincial cooperation is the most likely way forward in order to break the deadlock and finally fulfill the section 55 obligations.

By contrast, Senator Serge Joyal is more skeptical when it comes to the prospect of such cooperation. As a witness to the constitutional debates on patriation and Co-chair of the Special Joint Committee on the Constitution in 1980-81, Joyal acknowledges that a political solution is preferable. Nonetheless, he concludes that the possibility of such a solution is all but illusory. In this regard, Joyal is critical of the Department of Justice's decades-long dithering, and urges political leadership to overcome the impasse and facilitate cooperation on fulfilling this unavoidable task.[25] At the same time, Joyal believes that the ultimate guardians of the Constitution — the courts — can properly exercise a supervisory function and ensure that positive steps are taken to successfully carry out the section 55 obligations.

Accordingly, in August 2019, Senator Joyal and Professor François Larocque brought an application in the Quebec Superior Court seeking declaratory relief and a total of 20 orders aimed at getting the governments of Canada and Quebec to deploy best efforts to meet, discuss, and agree upon the wording of the French constitutional texts so that they can be adopted as contemplated by section 55. Joyal and Larocque also requested that the Court remain seized

20 Michel Bastarache, "Le devoir de légiférer : un tour d'horizon jurisprudentiel" in Cardinal & Larocque, *supra* note 3, at 71-86.

21 François Larocque & Darius Bossé, "L'obligation de faire adopter la version française des textes constitutionnels canadiens" in Cardinal & Larocque, *supra* note 3 at 87-126.

22 Mark Power, Marc-André Roy & Émmanuelle Léonard-Dufour, "L'adoption de la version française des textes constitutionnels ayant valeur officielle uniquement en anglais : le recours au tribunaux ou la volonté politique pour parvenir au bilinguisme constitutionnel" in Cardinal & Larocque, *supra* note 3 at 173, citing the *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721 at 739.

23 Warren Newman, "L'obligation de rédiger et de déposer pour adoption la version française de certains textes constitutionnels, de l'affaire Bertrand à l'affaire Langlois" in Cardinal & Larocque, *supra* note 3 at 193.

24 *Bertrand c Québec (PG)*, [1996] RJQ 2393, 138 DLR (4th) 481 (SCt) and *Langlois c Québec*, 200-73-000514-979, unreported (QC).

25 Serge Joyal, "L'article 55 : un objectif incontournable mais une avenue à suivre piégée dans un cul-de-sac" in Cardinal & Larocque, *supra* note 3 at 197-208.

of the matter and order the federal and provincial governments to provide regular updates on the steps taken in fulfillment of the governments' section 55 obligations.[26] The applicants allege that they have the legal standing to pursue the application, and that the chronic non-compliance with section 55 of the *Constitution Act* amounts to a violation of section 16(1) of the *Canadian Charter of Rights and Freedoms* that Superior Courts have the jurisdiction to remedy under section 24(1) of the *Charter*. Both respondent governments have filed a defense, and the case remains in its early procedural stages.

IV. Normative Arguments for an Officially Bilingual Constitution

The fact that most of Canada's constitutional texts — including the foundational *Constitution Act, 1867* — are binding only in English raises intolerable inconsistencies and problems. A written constitution that enshrines the equal rights, status, and privileges of both French and English must be binding in both languages, as a matter of internal coherence and normative integrity. Politically and morally, how can Canada afford to maintain a status quo of constitutional non-compliance by failing to enact the French version of its written Constitution?

As Francophone citizens and professional scholars in the fields of law and public policy, we think that these questions are deeply concerning and that they must be resolved as soon as possible. We recognize, however, that Canada's non-compliance with its section 55 obligations may not seem very mobilizing to a non-Francophone majority, especially compared to other, more pressing issues, such as pandemic response, climate change, reconciliation, health care, education, and immigration.

On the other hand, the current immobilism on section 55 is perhaps symptomatic of Canada's enduring struggle with recognition issues. Like many democracies, Canada continues to wrestle with problems of identity, belonging, and recognition. Those issues are well known: reconciliation with Indigenous peoples, Quebec's unmet demands for constitutional recognition, and demands from LGBTQ2 people, cultural and religious minorities, persons with disabilities, and official language minorities in and outside Quebec.

Struggles for recognition are an integral part of Canadian constitutionalism, understood here as the expression of an ongoing intercultural dialogue among citizens about how to live together. We cannot put an end to recognition issues once and for all; to do so would be to deny the political freedom of citizens or to impose the reign of post-history, to use more fashionable terms. As James Tully explains, struggles for recognition are struggles for individual and group self-determination.[27] The claims of minorities, in particular, are claims for self-determination. Those claims are guided by shared histories, which, for minorities, form an essential part of their identity. It gives them meaning and informs their sense of freedom. This understanding of constitutionalism, which we borrow in part from Tully, also generally aligns with other political philosophies, such as those of Charles Taylor or Will Kymlicka, for whom recognition is also closely tied to issues of political freedom.

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26 *Serge Joyal & François Larocque v Canada (AG) & Quebec (AG)*, Superior Court of Quebec, Montreal District, N° 500-17-109358-195, filed August 30, 2019.

27 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 2012).

For Kymlicka, this freedom mainly involves granting rights to minorities or groups on the basis of whether they belong to a minority nation or to an ethnic group.[28] However, the official recognition of the French version of the Canadian Constitution goes beyond the right to have rights based on one's group membership. By failing to enact a French version of the Canadian Constitution, an entire people are denied the symbolic recognition they negotiated, and to which they are entitled. Granting such recognition is not a neutral exercise, of course, but would entail discussions and debates that risk calling into question the legitimacy of the Anglo-majority's dominance in an ever-evolving constitutional order.

For Taylor, freedom and membership in a national community provide access to a history, a tradition, and an identity that the group may want to pursue and protect.[29] For example, Taylor advocated for the recognition of Quebec as a distinct society during the 1990s because he saw it as necessary for the pursuit of solidarity within the Canadian federation.[30] He argued that Canada was characterized by solidarity among the different communities that make up the country. Today, it is the same attitude or spirit of dialogue that should spur Canada into action and nurture the solidarity of which Taylor spoke by enacting the French version of the Canadian Constitution.

Unfortunately, with respect to official languages, this spirit of dialogue too often comes up against the indifference of elected officials; more specifically, the indifference of the Anglo-majority. Half a century after the adoption of the first *Official Languages Act*, the debate on bilingualism in Canada continues to be trivialized, instrumentalized, and misunderstood. The courts have consistently reminded us of the importance of addressing the concerns of official language minorities — namely Anglophones in Quebec and Francophones in the rest of Canada — and of offering them services in the official language of their choice.

The principle of linguistic duality must also be borne in mind. This principle, which flows from section 16 of the *Charter* and must guide all of the federal government's actions and activities, is fundamental to solidarity within our country. French and English are a part of Canada's federal DNA; every aspect of its endeavors must be carried out in both official languages so that Canadians can interact with their government at all times in the official language of their choice. Linguistic duality must also form part of our basic political conventions that guide government action in a number of areas, such as the appointment of the Governor General, Supreme Court Justices, Senators, and Officers of Parliament. Finally, the ideal of linguistic duality serves as a reminder that the official languages in Canada are common public languages. It is in English and French that Canadians have access to citizenship and can feel included in their country. In this respect, the section 55 obligations formalizing the French version of Canada's written Constitution remind us that linguistic duality is an integral part of our country's supreme law, political fabric, and social contract.

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28 Will Kymlicka, *La citoyenneté multiculturelle : Une théorie libérale du droit des minorités* (Paris: La Découverte, 2003).

29 Charles Taylor et al, *Multiculturalisme, différence et démocratie* (Paris: Aubier, 1994). See also Charles Taylor, *Les sources du moi : La formation de l'identité moderne* (Paris: Seuil, 1997).

30 Charles Taylor, *Rapprocher les solitudes : Écrits sur le fédéralisme et le nationalisme au Canada* (Ste-Foy: Laval University Press, 1992).

The longer the situation described above is ignored, the more glaring and perverse the injustice becomes. Francophones, and indeed all Canadians, have the right to demand that section 55 obligations be honored. At stake is our collective confidence in our most basic constitutional rights and political arrangements. If officials instead simply decide to ignore an obligation as clear and unequivocal as the one codified by section 55, what is to prevent them from dishonoring other constitutional imperatives, such the calling of elections, or the guarantees of *habeus corpus*, jury trials, equality, and mobility rights?

Has the national mood changed? Is Canada finally prepared to complete the work of patriation and adopt a fully bilingual constitution? We do not have a definitive answer to these questions, but as the country reflects on the 40th anniversary of the *Charter* in 2022, we believe that it is imperative to ask them anew. We believe that the time has come for Canada, as a mature federation, to complete the work of patriation and enact a truly Canadian Constitution in both official languages.