Constitutional forum constitutionnel

The Individual is Not the Institution: The Flawed Logic of the New Brunswick Court of Queen's Bench Decision in Acadian Society of New Brunswick v Right Honourable Prime Minister of Canada

Ian Peach*

I. Introduction

In 2021, the Acadian Society of New Brunswick brought an application to the New Brunswick Court of Queen's Bench seeking a declaration that the appointment of a unilingual anglophone as the Lieutenant Governor of New Brunswick was unconstitutional. Specifically, the Acadian Society claimed that the appointment of Brenda Murphy as New Brunswick's lieutenant governor in 2019 violated the guarantees in the *Canadian Charter of Rights and Freedoms* of the equal status of English and French in New Brunswick.[1] On April 14, 2022, the Chief Justice of the Court of Queen's Bench, Tracey deWare, decided that the appointment of Ms Murphy as New Brunswick's lieutenant governor was, indeed, in violation of the *Charter*.[2] Yet, despite this conclusion, the Chief Justice also decided that it was appropriate to leave the question of what the implications of this determination should be to the executive branch of the Government of Canada.[3]

* Executive Director, New Brunswick Aboriginal Peoples Council/Director of Research and Projects at Wolastoqey Language and Culture Centre.

1 *The Acadian Society of New Brunswick v Rt Hon Prime Minister of Canada et al*, 2022 NBQB 85 [*Acadian Society of New Brunswick*].

2 *Ibid* at para 75.

3 *Ibid* at paras 72-3.

Both conclusions are dubious law. To suggest that a unilingual individual cannot occupy a legally bilingual institution is to confuse the individual occupying the role that the institution represents at any given moment with the institution itself. If, however, a court holds the appointment of a unilingual lieutenant governor to be unconstitutional, that court would bear the responsibility of providing an appropriate remedy. To suggest that the judiciary should leave the determination of how to remedy a constitutional defect to the executive branch of government — specifically because the court's substantive decision is only an "opinion" (as the Chief Justice herself declared)[4] — is to effectively abandon the judicial responsibility to uphold the principle of constitutionalism and the rule of law. Let us begin, though, by understanding what guarantees of linguistic equality the *Canadian Charter of Rights and Freedoms* provides in New Brunswick.

II. Sections 16 and 20 of the *Canadian Charter of Rights and Freedoms* and Linguistic Equality in New Brunswick

The relevant provisions of the *Canadian Charter of Rights and Freedoms* for the purpose of this challenge are sections 16(2) and 20(2), the provisions that guarantee the equality of the English and French communities in New Brunswick and make New Brunswick Canada's only constitutionally bilingual province. Subsection 16(2) states that "English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick."[5] Possibly the most important provision for the purposes of this decision, though, is subsection 20(2), which states that "[a]ny member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French."[6]

It is notable both what these provisions say and what they do not say. Certainly, it would be a violation of subsection 16(2) if francophones were denied the right to become Lieutenant Governor of New Brunswick, or if they were legally required to use English to communicate with the Office of the Lieutenant Governor. No such restrictions exist, however. Equally, all New Brunswickers can communicate with, and receive services from, the Office of the Lieutenant Governor in the official language of their choice.

The key point in these provisions is that the *institutions* of government are required to provide anglophones and francophones with equal access to communication in the language of their choice; they do not, however, require each *individual* occupying a position in the institutions of government to be able to communicate in both official languages. The failure of the Chief Justice of the Court of Queen's Bench to distinguish between what the Constitution demands of institutions and what is required of individuals within those institutions seems to be at the heart of her decision on the merits of the challenge.

4 *Ibid* at para 72.

5 *Canadian Charter of Rights and Freedoms*, s 16(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11.

6 *Ibid*, s 20(2).

III. The New Brunswick Court's Substantive Decision in *Acadian Society of New Brunswick*

The first question Chief Justice deWare answered in her judgment was whether there was even a question of law to be answered.[7] Acknowledging that the judiciary must show appropriate deference to the executive and legislative branches of government, the Chief Justice sides with the view of Justices Dickson and Wilson of the Supreme Court of Canada that the courts have a duty to decide a claim that any exercise of governmental authority, whether statutory or prerogative authority, violates the *Charter*.[8] As the Chief Justice concludes on this question, "[i]n this case, the issues raised involve the consideration of *Charter* rights and therefore the Court not only may consider the questions, it has a duty to do so."[9] As the *Canadian Charter of Rights and Freedoms* is part of the supreme law of Canada and is specifically designed to constrain governmental action so that governments cannot violate the fundamental rights and freedoms of individuals, the Chief Justice's analysis on the question of the justiciability of the appointment of New Brunswick lieutenant governors is entirely correct.

The Chief Justice's error, rather, comes in her substantive analysis of the question of whether the appointment of a unilingual Lieutenant Governor of New Brunswick violates sections 16 or 20 of the *Charter*. The heart of this error is her failure to recognize that the individuals occupying even the highest positions within institutions are not, themselves, the institution. For example, ultimate governance authority in the United Kingdom and the monarchies of the Commonwealth rests in the *institution* of the Crown. While Charles III is the current King of Canada, he, as an individual, is merely the current monarch, the current occupant of the institution of the Crown. The Crown's authority does not come from any democratic mandate or the esteem in which King Charles is held by the citizens of Commonwealth countries; rather, the source of the Crown's authority rests in the antiquity of the institution itself, no matter who the occupant of the position of monarch is at any given moment.

In her judgment, Chief Justice deWare notes then-New Brunswick Chief Justice Daigle's comment, in *Charlebois v Mowat*, that the bilingualism regime established in New Brunswick "establishes institutional bilingualism aiming for the use of both languages by the province and some of its institutions in the provision of public services. Under such a regime, individuals have the choice to use either English or French in their dealings with government institutions."[10] Interestingly, then-Chief Justice Daigle went on to state that "certain state activities must necessarily be performed in both languages, legislative bilingualism being a case in point."[11] Legislative bilingualism does not, however, require every individual MLA to use both official languages in their statements in the Legislature, or even to be able to do so.

Later in her judgment, the Chief Justice comments that "Canadian jurisprudence clearly establishes that the requirement for equality of the two official languages enshrined in the *Charter* creates obligations for the '*institutions*' of government as well as the legislature but

7 *Acadian Society of New Brunswick*, *supra* note 1 at para 15.
8 *Ibid* at paras 22-29.
9 *Ibid* at para 33.
10 *Charlebois v Mowat*, [2001] 242 NBR (2d) 259 at para 10, as quoted in *Acadian Society of New Brunswick*, *supra* note 1 at para 34.
11 *Ibid*.

does not extend to the individuals working therein."[12] Thus, as the Chief Justice notes, the lawyers for the Prime Minister pointed out that while the Office of the Lieutenant Governor is a bilingual institution, the current lieutenant governor, as an individual, is not subject to the *Charter*'s linguistic obligations.[13] Despite this recognition, though, the Chief Justice seems to focus unduly on the fact that there is only one lieutenant governor of the province, unlike the legislature, which is a collective body. The fact that there is only one individual with the title of Lieutenant Governor of New Brunswick at any one time seems to lead her to confuse the institution of the lieutenant governor with the individual occupying the office. For example, at one point the Chief Justice says that "[i]f francophone citizens are unable to interact with the head of state in the same manner as anglophone citizens it is reasonable to question whether such a situation is compliant with sections 16.1(2), 16(2), and 20(2) of the *Charter*."[14] That anglophone and francophone New Brunswickers communicate with a different level of ease with the individual occupying the Office of the Lieutenant Governor at any moment is, however, simply not relevant to whether the *institution* of the Lieutenant Governor of New Brunswick is constitutionally compliant.

The Chief Justice then goes on to comment that "[i]n my view, it is overly simplistic to interpret the relevant *Charter* provisions as inapplicable to the role of Lieutenant-Governor as the position is occupied by an individual and therefore falls outside the scope of the *'institutional'* language obligations."[15] This seems to be at the heart of her confusion and, as a consequence, her error. Yes, the position of lieutenant governor is only occupied by one person at a time, but the institution of the Office of the Lieutenant Governor is more than that one individual. The individual has staff to support them and, so as long as that staff, as a group, is bilingual, the institution of the lieutenant governor is compliant with sections 16 and 20 of the *Charter*. A few paragraphs further on, Chief Justice deWare then observes that:

> There are two significant components to the role of the Lieutenant-Governor. There is the important role as head of state which calls upon the Lieutenant-Governor to sign all laws, deliver the government's speech from the Throne, and perform other essential functions at the direction of the executive arm of government. In addition to these responsibilities of the Lieutenant-Governor set out in the *Constitution Act, 1867*, there is the important social and community functions undertaken by a Lieutenant-Governor. It is during the discharge of these tasks that a Lieutenant-Governor is most frequently interacting with the citizens of the province. It will be understandably difficult, if not impossible, for a unilingual anglophone Lieutenant-Governor to converse and interact with francophone citizens. In such situations, should the French-speaking New Brunswicker wish to speak directly to the head of state, she will need to speak in English, if she is able, otherwise, the French speaking citizen will need to speak to the Lieutenant-Governor with the assistance of an interpreter or a bilingual staff member.[16]

It is true that lieutenant governors do perform both of these types of functions and it is indeed unfortunate if, in performing her social and community functions, francophone New Brunswickers cannot communicate with equal ease with the current Lieutenant Governor of New Brunswick as can anglophone New Brunswickers. There is, however, no constitutional, legal recourse for those dissatisfied with this situation. Only the first of the sorts of functions of a

12 *Acadian Society of New Brunswick*, *supra* note 1 at para 42.
13 *Ibid* at para 45.
14 *Ibid* at para 53.
15 *Ibid* at para 54.
16 *Ibid* at para 58.

lieutenant governor that the Chief Justice describes are their legal, constitutional responsibilities, which is why they are the only roles of the lieutenant governors set out in the *Constitution Act, 1867*. In performing these functions, the institution of the Lieutenant Governor of New Brunswick is a bilingual institution, whether the individual lieutenant governor is bilingual or not. Citizens have no legal recourse for their opposition to how the individual occupying the position of lieutenant governor at any given moment engages in their extra-legal roles, or even whether they do so at all.[17]

In coming to her conclusion, the Chief Justice comments that "[y]es, the language rights enshrined in the *Charter* are institutional in nature, however, the Lieutenant-Governor is the head of state — the head of the institution. In order to ensure true equality as required by the *Charter*, the Lieutenant-Governor of New Brunswick must be bilingual, otherwise the protections provided by sections 16(2), 16.1(1), and 20(2) of the *Charter* are rendered meaningless."[18] On this theory, the *Charter* would require that only bilingual individuals could be selected as the Premier of New Brunswick, as the individual who serves as premier is the head of the institution of the government. The claim that the premier should be exempt from this rule because they are democratically elected is nothing but a red herring, as premiers are not directly elected by the voting public at large under our system of responsible government.

IV. The Decision on the Appropriate Remedy: The Chief Justice's Second Critical Error

Having concluded that the appointment of a unilingual Lieutenant Governor of New Brunswick violated provisions of the *Charter*, and was therefore unconstitutional, Chief Justice deWare was then confronted with the question of the appropriate remedy for this violation of the Constitution. As Lieutenant Governor Murphy had been Lieutenant Governor of New Brunswick since September 2019, and had therefore signed numerous laws and orders-in-council, the Chief Justice was understandably concerned about the "potential chaos" which a declaration that Lieutenant Governor Murphy's appointment was unconstitutional, and therefore null and void, could create.[19] While this is certainly a legitimate and serious concern, in a society built on the fundamental constitutional principle of constitutionalism and the rule of law,[20] government action must conform to the requirements of the Constitution, and the uncertainty that this may create is not a legitimate justification for inaction.

One would think, from paragraph 68 of her judgment, that Chief Justice deWare would agree. In that paragraph, she quotes the judgment of Supreme Court of Canada Justices

17 For example, the replacement of Ed Shreyer as governor general by Jeanne Sauvé was a radical change in style in the political/social role of the governor general. While Rideau Hall and its grounds were remarkably open to the public during the Shreyer years, Governor General Sauvé decided to largely close the grounds of Rideau Hall to the public. Although this caused some significant consternation among the residents of Ottawa, Ottawans had no recourse against this decision, as it was in no way related to the governor general's legal role or obligations.

18 *Acadian Society of New Brunswick*, *supra* note 1 at para 62.

19 *Ibid* at para 65.

20 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 32, 49, 70.

Arbour and Iacobucci in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, highlighting the sentence in paragraph 25 in which they state that "[p]urposive interpretation means that remedies provisions must be interpreted in a way that provides 'a full, effective, and meaningful remedy for *Charter* violations' since 'a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach.'"[21] Yet, the Chief Justice goes on to conclude that:

> A declaration that the Order-in-Council appointing Brenda-Louise Murphy was unconstitutional and of no force and effect would render every law, decree, or appointment executed by Lieutenant-Governor Murphy likewise of no force and effect. Such a result could be very problematic for the Province of New Brunswick and its citizens. … As the Court has now provided the requested '*opinion*' on the issue, it is appropriate to leave a determination on necessary next steps in the hands of the federal government for it to '*consider what actions to take*' … An immediate declaration that the Order in Council appointing Lieutenant-Governor Murphy is unconstitutional, and therefore null and void, could create substantial hardships for the Province of New Brunswick and its citizens. This Court cannot issue a declaration which could undermine countless lawfully enacted pieces of legislations, appointments, and decrees. Such a situation would create a legislative and constitutional crisis within the Province of New Brunswick which is not necessary to adequately vindicate the infringed language rights in question.[22]

In coming to the conclusion that, in this circumstance, this right has no remedy, the Chief Justice seems to be completely oblivious to the fact that this is not the first time that our courts have had to address the chaos that a declaration of unconstitutionality could create by crafting a remedy that is both "full, effective, and meaningful" and avoids the creation of a legal vacuum. Probably the most notable instance of a court carefully crafting a remedy to achieve both objectives is in the Supreme Court of Canada's judgment in the *Reference re Manitoba Language Rights*. In that decision, the Court concluded that all Manitoba legislation passed between the passage of Manitoba's *Official Language Act, 1890* — which claimed to make English the only official language of the province — and 1982 violated the provisions of the *Manitoba Act, 1870*, which is part of the Constitution of Canada, and was therefore unconstitutional.[23] The Court well understood that simply declaring all of Manitoba's laws since 1890 to be unconstitutional, and therefore null and void, would create a chaotic legal vacuum in the province. The Court accordingly observed, that "declaring the Acts of the Legislature of Manitoba invalid and of no force or effect would, without more, undermine the principle of the rule of law … [which] requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order." Thus, the Court commented that "[t]he task the Court faces is to recognize the unconstitutionality of Manitoba's unilingual laws and the Legislature's duty to comply with the 'supreme law' of this country, while avoiding a legal vacuum in Manitoba and ensuring the continuity of the rule of law."[24] This is exactly the challenge that confronted Chief Justice deWare in the *Acadian Society* case.

In arriving at its decision on how to balance these two competing obligations in the *Manitoba Language Reference*, the Supreme Court of Canada noted that:

---

21 *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 at para 25, as quoted in *Acadian Society of New Brunswick*, *supra* note 1 at para 68.

22 *Acadian Society of New Brunswick*, *supra* note 1 at paras 71-3.

23 *Reference re Manitoba Language Rights*, [1985] 1 SCR 721.

24 *Ibid* at 753.

> A number of the parties and interveners have suggested that the Court declare the unilingual Acts of the Manitoba Legislature to be invalid and of no force or effect and leave it at that, relying on the legislatures to work out a constitutional amendment. This approach, because it would rely on a future and uncertain event, would be inappropriate. A declaration that the laws of Manitoba are invalid and of no legal force or effect would deprive Manitoba of its legal order and cause a transgression of the rule of law. For the Court to allow such a situation to arise and fail to resolve it would be an abdication of its responsibility as protector and preserver of the Constitution.[25]

In response to this problem, however, the Supreme Court of Canada did not decide that the violation of the Constitution that they were confronted with in the *Manitoba Language Rights Reference* would have no remedy, as did Chief Justice deWare. In its judgment, the Supreme Court noted that the Attorney General of Manitoba had argued that the linguistic rights guaranteed by the *Manitoba Act, 1870* could be protected by the lieutenant governor of the province by withholding royal assent to unilingual bills. The Court dismissed this suggestion, though, with the comment that "[t]he fundamental difficulty with the Attorney General of Manitoba's suggestion is that it would make the executive branch of the federal government, rather than the courts, the guarantor of constitutionally entrenched language rights … [which] would be entirely inconsistent with the judiciary's duty to uphold the Constitution."[26] Noting that "[t]here is no question that it would be impossible for all the Acts of the Manitoba Legislature to be translated, re-enacted, printed, and published overnight," the Supreme Court of Canada concluded that:

> the only appropriate solution for preserving the rights, obligations, and other effects which have arisen under invalid Acts of the Legislature of Manitoba … is to declare that, in order to uphold the rule of law, these rights, obligations, and other effects have, and will continue to have, the same force and effect they would have had if they had arisen under valid enactments, for that period of time during which it would be impossible for Manitoba to comply with its constitutional duty under … the *Manitoba Act, 1870*. … Thus, it will be necessary to deem temporarily valid and effective the unilingual Acts of the Legislature of Manitoba which would be currently in force, were it not for their constitutional defect, for the period of time during which it would be impossible for the Manitoba Legislature to fulfil its constitutional duty.[27]

Why could the Chief Justice of the New Brunswick Court of Queen's Bench not have drawn on this Supreme Court of Canada decision to develop an analogous remedy, rather than simply stating that her decision on the merits of the case was merely "an opinion" and declining to provide a remedy for what she determined was an unconstitutional act? Her decision was not, in fact, an "opinion"; in reference cases, the courts render an opinion in response to a legal question put to the courts by government, but this was a legal challenge to a government action, not a reference case. In that circumstance, the Chief Justice had a duty to provide a remedy for the constitutional defect she found. Drawing on the Supreme Court of Canada's decision in the *Manitoba Language Rights Reference*, the Chief Justice could have validated Lieutenant Governor Murphy's appointment for an additional year, to give her an opportunity to step down graciously and to give the Governor General time to appoint a new Lieutenant Governor. She could also have required the newly appointed, bilingual lieutenant governor to provide royal assent again to all bills, regulations, and Orders-in-Council signed by Lieutenant Governor Murphy as their first order of business; this would provide those government acts

25 *Ibid*.
26 *Ibid* at 753-4.
27 *Ibid* at 758.

brought into force by Lieutenant Governor Murphy's royal assent with retroactive legality, had the Chief Justice thought this was necessary.

V. Conclusion: Two Wrongs Do Not Make a Right

Thus, there are two serious errors of constitutional interpretation in Chief Justice deWare's decision. While the Chief Justice's unwillingness to provide the Acadian Society a remedy is deeply concerning in the way it simply ignores what the rule of law demands, however, it is likely a lesser error than her substantive decision that each individual appointed to the position of Lieutenant Governor of New Brunswick must be bilingual. This decision creates a constitutional rule that the text of the Constitution cannot support. To return to where I began, then, as the obligation of official bilingualism in New Brunswick is an institutional obligation, to have found the appointment of this unilingual individual, Brenda Murphy, to the post of Lieutenant Governor of New Brunswick to be unconstitutional is to confuse the individual occupying a post within the institution of the Lieutenant Governor of New Brunswick for the institution itself.