Language Rights in the Supreme Court of Canada: A Comment

Marc M. Monnin[*]

I. INTRODUCTION

I WOULD LIKE TO COMPLIMENT Michel Bastarache on an excellent paper. He has set out clearly in the little time he has had the development of language rights in Canada, and more particularly their development in the last seventeen years during which Chief Justice Dickson's influence has been so strongly felt.

It would be presumptuous of me to attempt to critique Michel Bastarache's address for several reasons, one of which is that he is nationally recognized as a leading scholar and advocate in the language rights field. In fact, he was involved either as counsel or was actively consulted by some of the litigants in many of the cases that he has referred to.

So instead, I see my role as providing a bit of local colour and a discussion of the profound impact Chief Justice Dickson's decisions and his role in shaping the law of language rights have had on the francophone minority in Manitoba, which minority, through litigants such as Georges Forest and Roger Bilodeau, had appealed to the Supreme Court to right one hundred years of injustice.

II. LEADING DECISIONS

THE ATTEMPT TO OBTAIN A JUDGMENT concerning the existence of language rights under section 23 of the *Manitoba Act*[1] started with the *Forest* case[2] in 1976. Eventually, this led to the benchmark decisions of the Supreme Court rendered on December 13, 1979 in *Forest* and *Blaikie*.[3] The *Forest* and *Blaikie* cases were the first

[*] Aikins, MacAulay & Thorvaldson, Winnipeg.

[1] *An Act to amend and continue the Act 32 and 33 Victoria, chapter 3; and to establish and provide for the Government of the Province of Manitoba*, S.C. 1870, 32 & 33 Vict., c. III, s. 23.

[2] *Forest* v. *A.G. Manitoba*, [1979] 2 S.C.R. 1032.

[3] *Blaikie* v. *A.G. Quebec*, [1979] 2 S.C.R. 1016.

crucial language decisions in Canada on the rights given to the francophone minority in Manitoba and the English minority in Quebec by virtue of section 23 of The *Manitoba Act* and its parallel, section 133 of the *Constitution Act* of 1867.[4]

The next leading case is the *Manitoba Language Reference*.[5] In that case, the Court was called upon to consider the mandatory nature of the requirements of section 23 of the *Manitoba Act* and also, of more importance, to determine whether the breach of the requirements of that section invalidated the laws of the Province passed in violation of constitutional imperative. For the first time the Supreme Court held that a statute which had been enacted in accordance with the requirements of section 23 was invalid.

In order to prevent legal chaos, the Court gave temporary validity to the laws and regulations of the Province to allow the Government to formulate a plan by which it could meet its constitutional obligations within the minimum period of time necessary to do so. There was therefore a recognized and effective sanction for a government's failure to abide by its constitutional obligations with respect to these language rights.

It must be remembered that the language reference was preceded by an attempt of the government of the day to achieve an arrangement with the francophone community whereby the community would receive a constitutional entrenchment of government services in exchange for an agreement not to seek invalidation of the Province's laws nor translation of all statutes passed in violation of section 23. This courageous venture proved to be politically unpalatable and led to a constitutional stalemate in the province. The matter was therefore left to the Supreme Court to devise a way out of the impasse.

Apart from that last ditch attempt by the then provincial government to seek an accommodation, the approach of provincial governments prior to that had been to ignore unfavorable court decisions dealing with section 23. As pointed out by M[e] Bastarache, there had been two previous County Court decisions prior to the *Forest* case which had found that the Province's *Official Language Act*,[6] declaring English the only official language, was unconstitutional. Those decisions were simply disregarded by the governments of the day. The

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[4] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[5] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

[6] *The OfficialLanguage Act*, R.S.M. 1970, c. O10

provincial government also attempted to ignore the original decision handed down by then Judge Dureault of the County Court of St. Boniface in the *Forest* case,[7] in which he found that section 23 had been infringed. The provincial government simply purported to avoid the problem altogether, claiming that it was not bound by such a declaration and no doubt hoping that the problem would go away.

It is only with the advent of the validating mechanism devised by the Supreme Court in the *Language Reference* that franco-manitobans obtained an effective recognition of the rights granted to them under section 23.

M[e] Bastarache singled out for particular criticism the subsequent decisions of the Supreme Court of Canada in *Société des Acadiens*[8] and *MacDonald* v. *Montreal*,[9] referring to them as "a shocking reversal in the reasoning of the Court." He noted with a certain amount of apprehension the remarks of Mr. Justice Beetz for the majority in that decision that language rights are not as important as legal rights. A strong dissent was expressed by Mr. Justice Dickson and Madam Justice Wilson in *Société des Acadiens*. They preferred a liberal construction of constitutional language rights which would ensure equal access to the Court. I wholeheartedly agree with M[e] Bastarache that the majority decision in *Société des Acadiens* constituted a reversal of the more liberal interpretations taken in previous language rights decisions.

Coincidentally, there was a Manitoba case which was making its way through the courts on the same issue. In the case of *Robin* v. *College de Saint-Boniface*, a majority of the Manitoba Court of Appeal came to the same conclusion as the majority of the Supreme Court in *Société des Acadiens*; namely, that constitutional rights do not entitle a minority language litigant to have his or her case heard by a judge who can understand his or her official language. A strong dissent was registered in our Court of Appeal by then Chief Justice Monnin, his comments being adopted in part in the minority decisions in the Supreme Court. Leave to appeal the *Robin* decision to the Supreme Court was denied shortly after the decision for *Société des Acadiens* was pronounced.

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[7] *R.* v. *Forest* (1976), 74 D.L.R. (3d) 704 (Man. Cty. Ct.).

[8] *Société des Acadiens du Nouveau-Brunswick Inc.* v. *Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549.

[9] [1986] 1 S.C.R. 460.

Surprisingly, the end result of that case was nevertheless that the litigants in the *Robin* case were given a trial in French before a judge who spoke and understood French. The Court of Queen's Bench chose to accommodate the request of the litigants, although this was done as an accommodation and not as a right. If the restrictive approach taken by the courts in *Société des Acadiens* and *Robin* are adopted in future decisions, then it would appear that section 23 of the *Manitoba Act* may have run its course. In that case, all a future decision could do would be to describe the parameters within which those rights would operate. If this is *not* the case then, in my opinion, the francophone minority — while now enjoying specific rights to the use of French in the courts, in the legislature and before central agencies of the executive branch — would no longer view section 23 of the *Manitoba Act* as a source for a significant expansion or development of language rights in the Province.

III. Practical Effects of Decisions

The decisions in *Forest*,[10] *Bilodeau*,[11] and the *Manitoba Language Reference*[12] have had a number of effects upon the life of the francophone minority in Manitoba. The effects are both tangible and intangible.

Tangibly, the result of the cases has been to give francophone lawyers the necessary tools (though not all of them, and some are still in the process of being worked out) to provide services to their clients in French. We now have available statutes, regulations and juridical forms in French; the statutes and regulations are translated in a dual column format, like the federal legislation, allowing them to be both comprehensible and of use to the practitioner.

We now finally have the Rules of Court of both the Queen's Bench and the Court of Appeal in both languages. The Court of Queen's Bench Rules have recently been revised. The entire revision process occurred in both languages in that francophone judges and lawyers were involved in the revisions of the Rules so that they were truly formulated in a parallel manner and not as a simple translation. Finally, a number of government departments who deal with the legal profession have hired or trained bilingual staff to provide services in,

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[10] *Supra*, note 2.

[11] *Bilodeau* v. *A.G. Manitoba*, [1986] 1 S.C.R. 449.

[12] *Supra*, note 5.

e.g., the Land Titles Office, the Crown Attorney's Office, and other such offices directly related to the provision of legal services.

The demand by the francophone community for such services has been slow to materialize. A hundred years of history is difficult to overcome within a short span of time. The additional effort, and sometimes expense, required in order to obtain the services is a disincentive. Nevertheless, the rights are there and are starting to be exercised. Motions and trials in French in the Court of Queen's Bench have been held in the last two or three years. With the influx of young francophones who have received their legal training in French at both the University of Ottawa and the University of Moncton, I would anticipate that the unease which some francophone lawyers have had in conducting proceedings in French will disappear.

While significant progress remains to be made, and a number of kinks are still to be worked out, the Court of Queen's Bench has made a genuine effort to deal with most requests for French services and French judges by francophone litigants.

The intangible effect of the Supreme Court decisions is probably more telling. The victories of Messrs. Forest and Bilodeau in 1977, 1979, 1981 and 1985, I think, galvanized the francophone community into believing that historical rights could be obtained. There was a perceptible rekindling of the flame. It is clear that the renewal of the francophone minority's belief in its future did not rest solely on favourable court decisions. Rather there was, in my estimation, a perception across Canada that the rights of minorities would be given greater recognition — and therefore greater legitimacy — by the federal and provincial governments.

That buoyancy may have ebbed in the last few years, and more notably with recent political events surrounding Meech Lake. There is no doubt, however, that the vindication of the francophone minority's view of the true nature of the rights they had been granted in 1870 had a salutary effect upon the minority's wellbeing.

IV. THE NEXT STEP

WHAT DOES THE FUTURE HOLD? Where should franco-manitobans concentrate their efforts? As suggested, if the distinction between political rights and legal rights is maintained, then section 23 of the *Manitoba Act* may have run its course. While sections 16 to 20 of the

Charter[13] will impact upon linguistic rights in Manitoba as they affect federal services, these sections will have no effect on the provincial scene. The next frontier, if I may say so, is section 23 of the *Charter* and educational rights. In that vein, the *Mahe* decision[14] is the most important decision to the francophone minority insofar as its future is concerned.

It is clear that in *Mahe* the Supreme Court recognized the fact that the ability of the minority to control the education that their children receive is an essential element of its future survival. The Court viewed section 23 of the *Charter* as the method by which that can be made possible. That section seeks to ensure that children of three types of minority language parents can receive (anywhere in Canada, where numbers warrant), at both elementary and secondary levels, education in their language without any difficulty, without any roadblocks, and without any court challenges. Such a section should be interpreted fairly, liberally, and with a curative approach. That is the approach which found favour with Chief Justice Dickson and it is submitted that that is the approach that must be given to section 23 of the *Charter* if it is to have the effect for which it was enacted.

As a result of the *Mahe* decision, the Manitoba Government, in a positive step, has set up a task force to review an appropriate mechanism for implementing the principles of that decision within the province's school system. I am hopeful that, for the first time, franco-manitobans will receive the full benefits of a constitutional provision without the necessity of battling it out in the courts again. It will be a welcome change from past events.

V. CONCLUSION

IN THE 17 YEARS during which Chief Justice Dickson sat on the Supreme Court of Canada, a number of important and fundamental decisions with respect to minority language rights in Manitoba were heard and determined by the Court. Progress has been achieved. This has, in large part, been due to Chief Justice Dickson and his ability to provide a clear, fair, and liberal interpretation of minority rights. I, on behalf of franco-manitobans, wish to thank him for his decisions, which have consistently promoted tolerance and justice.

Merci, monsieur le juge en chef.

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[13] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

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