

ENTRENCHED LANGUAGE RIGHTS†

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When one speaks of entrenched language rights in the context of this Symposium, one is considering *legally* entrenched rights, rather than social custom. The ordinary law, as distinct from constitutional law, ordinarily follows and eventually conforms to long standing social custom. This following conformity requires a period of time in which to ascertain that social custom is indeed of long standing, but even then the reformulation of the ordinary law does not occur with vertiginous alacrity. (This process, which would be a worthy subject for a symposium on law reform and how responsive it can or ought to be, is not the topic tonight, but serves to illustrate a difference between constitutional and ordinary law.)

Let me take a moment to peer back into the history of England whose laws as of July 5th, 1870, formed the basic matrix for the development of law in Manitoba, Saskatchewan and Alberta unless and until repealed, abolished or altered by the competent enactments of the provincial legislatures or of Parliament.¹ Let's go back no farther than that other conquest, that of William Duke of Normandy. From 1066, French became the language of the Court, and indeed of all the Courts, except for the official records which were expressed in Latin. That was the practice until 1362.

In 1362, during the reign of Edward III, the practice was changed by statute, which provided:

15. Item, because it is often showed to the king by the prelates dukes earls, barons, and all the commonalty, of the great mischiefs which have happened to divers of the realm, because the laws, customs, and statutes of this realm be not commonly known in the same realm, for that they be pleaded, showed, and judged in the French tongue, which is much unknown in the said realm; so that the people which do implead or be impleaded, in the king's court, and in the courts of other have no knowledge nor understanding of that which is said for them or against them by their sergeants and other pleaders; and that reasonably the said laws and customs shall be the more soon learned and known, and better understood in the tongue used in the said realm, and by so much every man of the said realm may the better govern himself without offending of the law, and the better keep, save, and defend his heritage and possessions; and in divers regions and countries where the king, the nobles, and other of the said realm have been, good governance and full right is done to every person,

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1. *The British North America Act, 1867*, 30 Vic., c.3, s.129 (U.K.); *The Manitoba Act, S.C. 1870*, c.3, s.2; and see *The Queen's Bench Act, S.M. 1874*, c.12.

because that their laws and customs be learned and used in the tongue of the country: the king, designing the good governance and tranquility of his people, and to put out and eschew the harms and mischiefs which do or may happen in this behalf by the occasions aforesaid, hath ordained and established by the assent aforesaid, that all pleas which shall be pleaded in his court whatsoever, before any of his justices whatsoever, or in his other places, or before any of his other ministers whatsoever, or in the courts and places of any other lords whatsoever within the realm, shall be pleaded, showed, defended, answered, debated, and judged in the English tongue, and that they be entered and inrolled in Latin; and that the laws and customs of the same realm, terms, and processes, be holden and kept as they be and have been before this time; and that by the ancient terms and form of pleaders, no man be prejudiced, so that the matter of the action be fully showed in the declaration and in the writ: and it is accorded by the assent aforesaid, that this ordinance and statute of pleading begin and hold place at the fifteenth of Saint Hilary next coming.²

Finally, in England, the use of any language except English in the Courts or the records, was abolished by a statute introduced by Sir Robert Walpole in 1731,

Whereas many and great mischiefs do frequently happen to the subjects of this kingdom, from the proceedings in courts of justice being in an unknown language, those who are summoned and impleaded having no knowledge or understanding of what is alleged for or against them in the pleadings of their lawyers and attorneys, who use a character not legible to any but persons practising the law: to remedy these great mischiefs, and to protect the lives and fortunes of the subjects of that part of Great Britain called England, more effectually than heretofore, from the peril of being ensnared or brought into danger by forms and proceedings in courts of justice, in an unknown language, be it enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons of Great Britain in parliament assembled, and by the authority of the same, that from and after the twenty-fifth day of March one thousand seven hundred and thirty-three, all writs, process and returns thereof, and proceedings thereon, and all pleadings, rules, orders, indictments, informations, inquisitions, presentments, verdicts, prohibitions, certificates, and all patents, charters, pardons, commissions, records, judgments, statutes, recognizances, bonds, rolls entries, fines and recoveries, and all proceedings relating thereunto, and all proceedings of courts leet, courts baron and customary courts, and all copies thereof, and all proceedings whatsoever, in any courts of justice within that part of Great Britain called England, and in the court of exchequer in Scotland, and which concern the law and administration of justice, shall be in the English tongue and language only, and not in Latin or French, or any other tongue or language whatsoever, and shall be written in such a common legible hand and character, as the acts of parliament are usually engrossed in, and the lines and words of the same to be written at least as close as the said acts usually are, and not in any hand commonly called court hand, and in words at length and not abbreviated; any law, custom or usage heretofore to the

2. 35 Edw. 3. c.15. See Mr. Justice Taylor, "The Official Language of the Courts in Saskatchewan." (1931). 9 Can. B. Rev. 277, 278; See also P. Riley, "The Official Language Act of Quebec," (1976), 7 Man. L.J. 93.

contrary thereof notwithstanding; and all and every person or persons offending against this act, shall for every such offence forfeit and pay the sum of fifty pounds to any person who shall sue for the same by action of debt, bill, plaint or information in any of His Majesty's courts of record in Westminster Hall, or court of exchequer in Scotland respectively, wherein no essoin, protection or wager of law, or more than one imparlance, shall be allowed³

That statute appears to stand, or to have stood, unamended, at least into the 1930's, if it be not still in force. It was consequently, the law of England on July 5th, 1870, the date of the official and final reception of English law in Manitoba and the North-West Territories. Insofar as Saskatchewan and Alberta are concerned, nothing more remains to be said about legally entrenched language rights.

But the Fathers of Confederation had other plans for Manitoba in 1870, as they had earlier in 1867 for Quebec and for the Parliament of Canada and courts established by its statutes.

The British North America Act, 1867, provided by Part IX — Miscellaneous Provisions: General, in Section 133:

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

One might suppose that if Manitoba had been a province in 1867, and if Louis Riel's point had then been made, Section 133 of *The B.N.A. Act* would have made reference to Quebec and Manitoba. One might reasonably suppose that because, three years later on May 12th, 1870, *The Manitoba Act* was enacted by the Parliament of Canada, and it strikingly provided by Section 23:

23. Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the *British North America Act, 1867*,

23. L'usage de la langue française ou de la langue anglaise sera facultatif dans les débats des Chambres de la législature; mais dans la rédaction des archives, procès-verbaux et journaux respectifs de ces chambres, l'usage de ces deux langues sera obligatoire; et dans toute plaidoirie ou pièce de procédure par devant les tribunaux ou émanant des tribunaux du Canada, qui sont établis sous l'autorité de

3. 4 Geo. 2, c.26.

or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

l'Acte de l'Amérique du Nord britannique, 1867, et par devant tous les tribunaux ou émanant des tribunaux de la province, il pourra être également fait usage, a faculté, de l'une ou l'autre de ces langues. Les actes de la législature seront imprimés et publiés dans ces deux langues.

What is striking is how closely the expression of Section 23 of *The Manitoba Act* is copied from that of Section 133 of *The B.N.A. Act*.

Since these are constitutional enactments, it is clear that they entrench, or secure in a constitutional way, the language rights of individual legislators in Parliament and the respective legislatures; and they entrench the language rights of "any person" in general, "or in any Pleading or Process, in or issuing from any" Court of Canada or of Manitoba, and of course, Quebec.

It seems obvious that Section 23 *The Manitoba Act*, no less than Section 133 of *The B.N.A. Act*, creates exactly that which is the topic of our discussion tonight: entrenched language rights. In the first place, these language provisions are emplaced in constitutional enactments which, by definition, override any subordinate law importing a then 140 year old statute of Great Britain as of July 15, 1870, a date which is of legal historical significance in Manitoba but not in Quebec. Constitutional law is, after all, the fundamental charter of the realm.

Analysis of the provisions of the two constitutional articles indeed confirms their creation of entrenched language rights. Scholarly quibbles aside, there is logic to the notion that rights and duties are balancing correlatives. In these language provisions one observes the right to exercise an option and the duty to exercise restraint.

The right to exercise an option is clearly expressed in the text: "Either the English or the French language may be used by any person in the debates . . ." or again "L'usage de la langue française ou de la langue anglaise sera facultatif dans les débats . . .". The right is further expressed: "and either of those languages may be used by any person or in any pleading or process", and "et dans toute plaidoirie ou pièce de procédure . . . il pourra être également fait usage, à faculté, de l'une ou l'autre de ces langues." The expression of the permissive "may", with the French language permissives noted, surely accords a right. It is an individual right, too, since it is extended in the words of both constitutional statutes to "any person".

Now, who or what is obliged to respect that right? Against

whom or what (if push comes to shove) can that right be asserted? Clearly, that right can be asserted in (and, surely, against) legislatures which, in their proper spheres of jurisdiction, are as sovereign as the Parliament of Westminster itself.⁴ It can be asserted in courts superior as well as inferior — all or any of them! What do the statutes say? Having accorded a personal right of expression in either language, they next command the respective legislative and judicial institutions in these mandatory words: “and both those languages *shall* be used in the respective Records and Journals of those Houses” otherwise expressed as “*mais dans la rédaction des archives, procès-verbaux et journaux respectifs de ces chambres, l’usage des deux langues sera obligatoire;*”. Finally, if I may, just to save time, words and space, take the liberty of making a hybrid compendium of the termination words of the two Constitutional statutes’ language provisions, it would express this: “The Acts of the Parliament of Canada and of the Legislatures of Quebec (and Manitoba) *shall* be printed and published in both those languages.” or as it might also provide: “*Les actes du Parlement du Canada et de la législature du Québec (et celle du Manitoba) seront imprimés et publiés dans ces deux langues.*”

Thus, it appears that this personal right to use either language is entrenched or secured against abolition or diminution through the expression of a constitutional command directed to both the legislative and judicial institutions (a) to respect the right, and (b) to record, receive and publish the written expression of both languages “by any person.”

The language rights with their concomitant obligation laid firmly on the respective legislative bodies and tribunals are “entrenched” in another sense, too. That is to say, they are placed beyond interference by any legislature or court short of a legal, formal amendment of the Constitution of Canada. The language rights are certainly not expressed in, or in a situation analagous to the powers conferred by Sections 91, 92, 93, 94A or 95 of *The B.N.A. Act* which distribute legislative jurisdiction generally as between Parliament and the provincial legislatures. Nor are the respective language rights expressed in or with any language which authorizes any later legislative mutation of those rights. So in the sense of being “just there” without any power in Parliament or any provincial legislature to repeal, abolish or alter them, in this sense that they bind equally and withstand equally the totality of apparently sovereign legislative power in Canada — however it may be otherwise parcelled out and distributed — these language rights are entrenched.

4. *Hodge v. The Queen* (1883), 9 A.C. 117, 132 (P.C.).

Now, *The Manitoba Act* which includes Section 23, which seems literally copied from Section 133 of *The B.N.A. Act*, is a statute of the Parliament of Canada and one might wonder if it carries the same constitutional force as that confederation statute enacted by the Parliament of the United Kingdom in 1867. Doubts were expressed about the validity of *The Manitoba Act*, and to remove such doubts the British Parliament enacted *The British North America Act, 1871*, 34-35 Victoria, c. 28 (U.K.) which received the Royal Assent on June 29th, 1871. Section 5 of this later *B.N.A. Act* of 1871 confirms the Act of the Parliament of Canada, specifying *The Manitoba Act*, and declares it "shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date which (it) . . . received the Assent, in the Queen's name, of the Governor General of the . . . Dominion of Canada." Then, in Section 6, this later *B.N.A. Act* goes on to provide:

6. . . it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba . . . subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualifications of electors and members of the Legislative Assembly and to make laws respecting elections in the said Province.

It is clear then that although the language rights expressed in Section 23 of *The Manitoba Act* were not originally enacted in *The B.N.A. Act*, they soon found their way and were incorporated into *The B.N.A. Act*.

The legislative facts thus far reviewed might seem to conclude all question as to whether or not the language rights expressed in Section 23 of our Manitoba statute remain in force in Manitoba. It would seem they do. But there is one other possibility to consider.

The first heading of Section 92 of *The B.N.A. Act* accords every provincial legislature the exclusive power to "make laws in relation to matters coming within the classes of subject next herein-after enumerated; that is to say, —

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province except as regards the Office of the Lieutenant Governor."

What is the Constitution of the Province? An exhaustive answer to that question may be found *inter alia* in the Manitoba Law Reform Commission's Report on the Case for a Provincial Bill of Rights, Chapter III, submitted May 19th, 1976.⁵

In the context of this country the "constitution" means more than the written statutes and Orders-in-Council, but includes the

5. Queen's Printer, Publications Division, 200 Vaughan Street, Winnipeg, Manitoba, R3C 0V8.

traditions and practices of the British form of Parliamentary government. Indeed, the first preamble to *The B.N.A. Act, 1867*, itself recites:

"Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom."

Our constitution, that of Canada and of each province, is composed of elements not even mentioned in *The B.N.A. Act*, such as cabinet government, the office and position of the Prime Minister, the vital need of the government of the day to retain the confidence of the elected legislators, and many others.

It can and did happen that provinces exert their legislative power to amend their own constitutions. For example there is now no Legislative Council as a chamber of any provincial legislature, all provinces having exercised the power to amend their constitutions by abolishing what were, in effect, provincial senates. Provinces can, and do, alter the structure of government by creating or amalgamating departments or ministries of government.

But what of those entrenched language rights which appear in print in the actual constitutional statutes? Can they be considered as part of the particular constitution of the province? Or are they part of the overall constitution of this federally united Canada? As noted there is no power granted in *The B.N.A. Act* to either Parliament or the Legislature for the specific purpose of repealing, abolishing or modifying the language rights. In fact, Section 6 of the 1871 British statute specifically ordains that the Parliament of Canada shall not be competent to alter the provisions of *The Manitoba Act*. It then provides that the provincial legislature may make laws in relation to elections. This juxtaposition almost seems intended to illustrate, by an example, the meaning of the expression "Constitution of the Province" employed in Head 1 of Section 92 of *The B.N.A. Act, 1867*.

It would seem curious, indeed, to characterize personal language rights, accorded by a British statute which also imperatively requires Parliament, legislatures and all courts to recognize those rights, as an element of the constitution of the province. As against that strained characterization, it would be rather more logical to characterize these language rights as part of the very fabric or substance of the federal uniting of the provinces — or, in a word, one of the entrenched terms of Confederation. Seen in this light, then, it is clearly not open to the provinces of Quebec or Manitoba to invoke the provision of

Section 92 permitting them to amend the provincial constitution, for the purpose of purporting to repeal or abolish an element of the federal union's constitution.

Indeed, up to now at least, the Province of Quebec and the federal government have both respected that view of those language rights. In 1890, the Manitoba Legislature purported to abolish the French language rights of Manitobans in general, and of those non-Manitoban francophones who also happen to come before and into our courts, by enacting the *Official Language Act* S.M. 1890, c.14. That statute accords sole hegemony to the English language, and its constitutional validity is now *sub judice*. That is, unless the decision of His Honour, Judge Armand Dureault of the County Court of St. Boniface, in *Regina v. Forest*⁶ be permitted to stand unappealed.

Judge Dureault, as is well known, found it "beyond the power of the legislature of Manitoba to abrogate s. 23 of *The Manitoba Act*, and the provisions of *The Official Language Act of Manitoba*, particularly subss. (1) and (2) of s. 1, are *ultra vires* its jurisdiction." Since the date of the rendering of Judge Dureault's decision, on December 14th, 1976, an earlier decision of the late Judge Prud'homme, dated January 30th, 1909, has come to light. Presiding in that same County Court of St. Boniface, Judge Prud'homme expressed identical conclusions in the case of *Bertrand v. Dussault*; *Bertrand v. Lavoie*. This decision is reported in full in the dissenting reasons of Monnin, J.A. in the next of Georges Forest's attempts to re-institute the French language in Manitoba's courts: *Forest v. Registrar of Court of Appeal of Manitoba*, [1977] 5 W.W.R. 347, 361 - 366 (Man. C.A.).

Thus, at present it would seem that while from 1890 onwards the weight of custom is against the employment of the French language in Manitoba's courts (if not in the Legislative Assembly), the weight of judicial *ratio* accords it an equal and official place with the English language in both the Assembly (including its journals) and the courts of Manitoba.

The language rights expressed in Section 133 of *The British North America Act*, 1867, and in Section 23 of *The Manitoba Act* (confirmed as it was by *The B.N.A. Act*, 1871) appear to be constitutionally entrenched.

6. *R v. Forest*, [1977] 1 W.W.R. 363; (1976), 34 C. C. C. (2d) 108 (Man. Cty. Ct.).