

# LANGUAGE RIGHTS: LIBERTIES, CLAIMS AND A VERY CANADIAN CONVERSATION

Graham Fraser

Language rights are not only central to the cultural identity of Canada's two founding language communities, they are central to both Canada's constitutional traditions, with group freedoms and denominational schools initially guaranteed under the *British North America Act*, and individual rights entrenched in the Charter. "In considering the Charter," writes Canada's new Commissioner of Official Languages, "it is easy to think that rights and freedoms are almost synonyms. They aren't." Graham Fraser considers the *BNA Act* versus Charter status of language rights, and recounts the modern context, from the B&B Commission of the 1960s, to the *Official Languages Act* of 1969, to the entrenchment of minority language rights in the Charter.

Les droits linguistiques sont aussi indissociables de l'identité culturelle des deux communautés fondatrices du pays que de nos deux traditions constitutionnelles. En témoignent la garantie des libertés collectives et des écoles confessionnelles inscrite dès l'origine dans l'Acte de l'Amérique du Nord britannique, puis celle des droits individuels intégrée à la Charte des droits et libertés. En vertu de celle-ci, écrit le nouveau commissaire aux langues officielles Graham Fraser, on peut d'ailleurs « imaginer que droits et libertés sont quasi synonymes, mais il n'en est rien ». L'auteur examine les statuts respectifs de l'Acte de l'Amérique du Nord britannique et de la Charte des droits et libertés à la lumière de l'histoire récente, depuis la Commission royale sur le bilinguisme et le biculturalisme des années 1960 jusqu'à la Loi sur les langues officielles de 1969 en passant par l'inscription dans la Charte des droits linguistiques des minorités linguistiques.



When the Charter of Rights and Freedoms became part of Canada's constitution in 1982, language rights were enshrined in section 16. So what are language rights, anyway? Are they individual rights? Collective rights? What do they actually mean? What is intriguing about language rights as defined in the Charter is that they are both a freedom and a right: a kind of personal armour to fend off interference, and an engine for social change. In part because of the Charter, and the Supreme Court's decisions on language cases, Canada's language disputes have become part of a contemporary international discussion on language. For, as Hong Kong jurist Phil C. W. Chan wrote in 2002, "language is essential to one's identity."

In considering the Charter, it is easy to think that rights and freedoms are almost synonyms. They aren't. Rights require a change in behaviour. And language rights are no exception. For most of Canada's first century, language rights were at best limited and constrained and at worst eliminated. Since 1982, building on a conversation on language that began with the Royal Commission on Bilingualism and Biculturalism, the Charter has set off a chain of events that

have started a process of restoring language rights, changing the behaviour of governments and creating a new dynamic for linguistic minorities in Canada. English and French are Canadian languages that belong to all Canadians; the Charter has accelerated a process to make this claim a reality.

In an international and historical context, language has been included in treaties and covenants since the 1516 Treaty of Perpetual Union between the King of France and the Helvetic state, and has involved various protections of minority groups to maintain and use their language.

However, in many discussions of rights over the centuries — including language rights — there has been a kind of dualism.

Roman law made a distinction between rights *in rem* (rights attached to a place, or property rights) and rights *in personam* (rights of the individual). In 1774, during the debate on the *Quebec Act* in the British House of Commons, Edmund Burke referred to two categories of rights: the rights of human conquest and the rights of human nature.

In a contemporary context, Peter Jones, in his 1994 book *Rights*, distinguishes between "claim rights" — rights

which require a duty to be performed, and “liberty rights” — actions one is not prohibited from performing. In terms of language rights, linguist Heinz Kloss made a distinction between “tolerance-oriented” language rights and “promotion-oriented” language rights — a slightly different, more generous version of Burke’s dichotomy between rights of conquest and rights of human nature and Jones’s categories of liberty rights and claim rights.

Jones’s distinction between liberty rights and claim rights is a particularly useful one in looking at language rights, for they are clearly in both categories. F.R. Scott wrote in 1949 that “a Bill of Rights, of any kind, is a shield for defence,” and language rights represent the protection of a liberty to speak a language. These are passive, protective rights to be, in effect, left alone. But they are also “claim rights”: the right to be responded to by the state and provided services in one’s language.

The *British North America [BNA] Act* had very limited rights but, as Frank Scott pointed out, there were more definite protections included for groups — minorities — than for individuals. “The guarantee for the use of two languages, for instance, and for denominational schools are group freedoms,” Scott wrote. Indeed, some of the parliamentarians who debated the *BNA Act* realized that even those limited rights would have some long-term effects.

It took a while; in the decades following Confederation, language rights in Manitoba, Alberta, Saskatchewan and

been before. It was not until the years that followed the Second World War, the years when the Universal Declaration of Human Rights at the United Nations was introduced, ratified and debated, that the idea of a bill of rights began to be seriously considered in Canada. But while the subject was debated in Parliament, considered in committee and made the subject of several legal analyses like Scott’s, there was little reference to language rights. But there was certainly an awareness of the difference between granting a freedom and acknowledging a right.

Parliament, beginning in the early 1960s, began to respond to the obvious disparities, political, economic and social, between English-speaking and French-speaking Canada. In 1962, Cr ditiste MPs — many of whom spoke no English — complained that the Parliament of Canada was an overwhelmingly English-speaking institution: the orders of the day were in English only, the rules of procedure were in English only, the menus in the parliamentary restaurant were in English only, and the security guards spoke no French.

In 1962, in an extraordinary memo, Maurice Lamontagne, then an economic adviser to Lester Pearson, laid out his recommendations for the next Liberal government. Lamontagne argued that it was up to the Liberal Party to set out — and achieve — three concrete objectives. First, the patriation of the Constitution — and he added, “And it must include a declaration of

an anthem which would, he said, leave no doubt about the sovereignty of the country. “Finally, all federal institutions must become bilingual and be the concrete demonstration of our bilingualism,” he wrote. “These three objectives will constitute the immediate goals for the next Liberal government. If we want to maintain the integrity of Canada and assure our life together, the federal government must become as soon as possible and as completely as possible the synthesis and the symbol of a truly bicultural Canadianism.”

The process was neither as quick nor as complete as Lamontagne had hoped. In fact, it can be argued that a whole series of unanticipated and unintended consequences from political acts led to the creation of a new dynamic. The FLQ bombings in the spring of 1963 accelerated the creation of the Royal Commission on Bilingualism and Biculturalism; General de Gaulle’s “Vive le Qu bec libre!” speech in 1967 and the repercussions laid the groundwork for widespread acceptance of its recommendations; those recommendations led to the *Official Languages Act* in 1969 and the creation of the position of commissioner of official languages in 1970; the election of the Parti Qu b cois in 1976 and the failure of the Quebec referendum on sovereignty-association in 1980 made it possible for Pierre Trudeau to patriate the Constitution with the Charter of Rights in 1982; the Charter led to the amendment of the *Official Languages Act* in 1988; the failure of the Quebec referendum in 1995 resulted in the Quebec Secession Reference to the Supreme Court.

In 1963, almost immediately after becoming prime minister, Lester Pearson appointed the Royal Commission on Bilingualism and Biculturalism, which told Canadians in 1965 that Canada was passing through the greatest crisis in its history.

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Ontario were abolished before there was any thought of their being “propagated and engrafted” where they had never

human rights covering federal and provincial areas.” Secondly, the creation of a national flag and a national



Montreal Gazette archives

André Laurendeau and Davidson Dunton at the release of the final report of their landmark Royal Commission on Bilingualism and Biculturalism in 1967. The rights of Canada's two founding language communities were legislated in the *Official Languages Act* of 1969, and later entrenched in the Charter of Rights and Freedoms in 1982.

Davidson Dunton, addressed the paradox of official bilingualism: a paradox that is still widely misunderstood. An official languages policy does not exist to require everyone to learn two languages — although obviously, if no one is bilingual, the policy cannot succeed. Forty years ago this fall, Pierre Trudeau, then minister of justice, laid out the fundamental principles of language rights. It was in September 1967, and Trudeau was speaking to the Canadian Bar Association. “While language is the basic instrument for preserving and developing the cultural integrity of a people, the language provisions of the *British North America Act* are very limited,” he said. “I believe that we require a broader definition and more extensive guarantees in the matter of recognition of the two official languages. The right to learn and to use either of the two official languages should be recognized. Without this,

we cannot assure every Canadian of an equal opportunity to participate in the political, cultural, economic and social life of this country.”

There are two extraordinary things about this passage. The first is that Trudeau neatly blurs the definition of language rights, establishing them first as collective rights (“the basic instrument for preserving and developing the cultural integrity of a people”) and then describing them as individual rights (“Without this, we cannot assure every Canadian of an equal opportunity to participate in the political, cultural, economic and social life of this country”). Secondly, Trudeau defines language rights quite narrowly: the right to learn, and the right to use.

The entire edifice of language rights in Canada that has been created since then — the *Official Languages Act* (1969), the Charter of Rights and

Freedoms (1982), the amended versions of the Act (1988 and 2005) — all rest on those two, very simple but quite sweeping principles: the right to learn, and the right to use. It would take another 15 years, however, before those rights were enshrined in the Charter.

When Trudeau delivered that speech to the bar association, he was already working on a White Paper that emerged in January 1968: *A Canadian Charter of Human Rights*. In that document, the rights were clarified — a bit: “guaranteeing the right of the individual to deal with agencies of government in either official language” and “guaranteeing the right of the individual to education in institutions using as a medium of instruction the official language of his choice.” A lot of detail remained to be filled in, as the White Paper acknowledged.

In 1982, the Charter of Rights and Freedoms consolidated equality and language rights. It also recognized that the English or French linguistic minority communities of a province have a right to primary and secondary instruction in their language and to the man-

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agement of their school systems, where numbers warrant. Language rights were central to the Charter, and enshrined in section 16.

Recently, I found out how that occurred. Senator Serge Joyal, then a member of Parliament, was asked by then-Prime Minister Pierre Trudeau to be the co-chair of the parliamentary committee examining the Charter. He agreed — but on the condition that the principles of the *Official Languages Act* be included.

The reason, he told me recently, was an experience he had had in 1976. At that time, there was an intense controversy over the right of French-speaking pilots to speak to French-speaking air controllers in French: what became known as the Gens de l'Air Affair. Joyal took the Department of Transport and Air Canada to court — ultimately unsuccessfully — at his own expense. During the controversy, he was a guest on a popular television program, and the host, Lise Payette (later a Parti Québécois cabinet minister), welcomed him with the words “Now, our next guest, Serge Joyal — our hero!” Joyal told me that he decided then that a citizen should never have to be a hero to defend his or her language rights.

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eral reasons. I was deeply troubled by the fact that it was introduced over the objections of the Quebec National Assembly, whose continued refusal to sign the Constitution has left a long shadow over Canadian political life for the last quarter-century; I was con-

cerned about the relationship between the courts and Parliament; and I shared the view, expressed most cogently by the late Seymour Martin Lipset in 1990, that the Charter would lead to the Americanization of Canada. “Although the principles of parliamentary supremacy and consideration for group rights are retained, the Charter makes Canada a more individualistic and litigious culture, one that will place more stress on the enforcement of personal rights through adversary procedures rather than government adjudication,” Lipset wrote.

My view has changed, particularly with regard to language, and language rights. The Charter has introduced a critical voice, but not the only voice, in a Canadian conversation about language that has gone on for the last 45 years. Language rights have developed and advanced in Canada over the last quarter-century through an elaborate three-way discussion between the Canadian Parliament — often engaged in its own dialogue with first the Royal Commission on Bilingualism and Biculturalism and then the commissioner of official languages — the provinces and the Canadian courts. It is a conversation in which the Charter, far from Americanizing Canada, has created a new jurisprudence, building on the critical rela-

tionship between Canada's English-speaking and French-speaking communities that has defined our past, underpins our present and will continue to shape our future.

An official languages policy exists for two fundamental reasons: to protect the unilingual, and to protect minority language communities. There are 4 million unilingual French-speaking Canadians in Canada, and one of the key reasons for the *Official Languages Act* to exist is to ensure that they get the same level of service from the federal government as

the 20 million unilingual English-speaking Canadians. There are also a million French-speaking Canadians who live in minority communities across Canada, and almost a million English-speaking Canadians living in minority communities in Quebec.

Those communities deserve not only to survive, but to thrive — and in 2005, the Parliament of Canada amended the *Official Languages Act* for only the second time to require the government to take positive measures to help those communities develop.

The Charter came about as a series of political compromises —and even though the Quebec National Assembly refused to sign the Constitution, section 23 was drawn up in a way that took account of the language debate that had been going on in Quebec. But the fact that compromises occurred as a result of the three-way dialogue I referred to earlier has not diluted the nature of those rights.

In fact, a series of decisions by the Supreme Court laid out, in eloquent terms, the way in which language rights in Canada were not merely protective, but transformative. In those judgments, and many others, one can see how the Supreme Court has used the dynamic relationship between liberties and claims, and built on the federal *Official Languages Act* and Quebec's Charter of

the French Language to strengthen both the liberties and the claims that are so interwoven in language rights.

The conversation between judges and parliamentarians has continued over the last 25 years. As a result of section 16 in the Charter, the *Official Languages Act* was amended and strengthened by the Mulroney government in 1988, leading the Federal Court of Appeal to observe:

*The 1988 Official Languages Act is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose...[I]t belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted*

*ed "as to advance the broad policy considerations underlying it."*

The judges drew on not simply the Charter, but also the Charter of the French Language; more recently, in 2005, parliamentarians from every party but the Bloc Québécois voted to strengthen the *Official Languages Act* by giving minority communities the right to legal recourse to ensure that the federal government takes positive measures to help their development. This was a change in the Act driven by parliamentarians, not the courts or the government. It renders the *Official Languages Act* an even more important lever to improve the status of French and English minority communities in Canada, and to help them achieve substantial equality with the majority communities.

It is that national conversation, that interaction of liberties and claims, rights and obligations, rights and the delivery of services, that has made section 16, the language provisions in the Charter of Rights and Freedoms, and the *Official Languages Act* of 1988 so dynamic and transformative. In 25 years, that conversation has changed the linguistic landscape of the country. It will continue to do so.

*On October 17, 2006, after a career in journalism that began in 1968, Graham Fraser became the sixth Commissioner of Official Languages. The author of PQ: René Lévesque and the Parti Québécois in Power (1984), he most recently published: Sorry, I Don't Speak French: Confronting the Canadian Crisis That Won't Go Away (2006).*



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