CHECKING OUR CONSTITUTION@30: THE INFLUENCE OF THE CANADIAN CONSTITUTION AND THE CHARTER OF RIGHTS AND FREEDOMS, AND METAPHORS OF GROWTH

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Graham Fraser est Commissaire aux langues officielles du Canada depuis octobre 2006. Avant sa nomination, il a eu une longue et brillante carrière en tant que journaliste. M. Fraser a écrit dans les deux langues officielles pour le *Toronto Star*, la revue *Maclean's, The Gazette*, *The Globe and Mail* et *Le Devoir*. Il est également l'auteur de cinq ouvrages, dont *Playing for Keeps: The Making of the Prime Minister* (1988) et *Sorry, I Don't Speak French* (2006), ce qui a contribué à relancer le débat public sur la politique linguistique au Canada. M. Fraser détient un baccalauréat ès arts et une maîtrise ès arts en histoire de l'Université de Toronto.

ABSTRACT

Graham Fraser, Canada's Official Languages Commissioner, is adamant: the significance of the Charter in the development of language rights cannot be overstated. In this article, Mr. Fraser states how tension between individual and collective rights – often at the heart of language rights – transformed Canada's linguistic landscape and will continue to do so. Reinstating the importance of having both official languages equally visible in all spheres of Canadian society, Mr. Fraser explains how the entrenchment of the Charter 30 years ago established language rights as a fundamental and permanent part of our legislative and legal environment, and made them a key part of our identity.

RÉSUMÉ

Graham Fraser, Commissaire aux langues officielles du Canada, est catégorique: l'importance de la Charte dans le développement des droits linguistiques ne peut pas être surestimée. Dans cet article, M. Fraser indique comment la tension entre les droits individuels et collectifs – souvent au cœur des droits linguistiques – a transformé le paysage linguistique du Canada et continuera de le faire. En rétablissant l'importance d'avoir deux langues officielles toutes aussi visibles dans toutes les sphères de la société canadienne, M. Fraser explique comment l'enchâssement de la Charte il y a 30 ans a établi les droits linguistiques comme élément fondamental et permanent de notre environnement législatif et juridique, et a fait de ces derniers une partie essentielle de notre identité.

Good afternoon.

I would like to thank Jack Jedwab for inviting me to participate in this conference that celebrates the 30 years of our Charter. It is an honour for me to be part of such a prestigious panel and to have the opportunity to reflect on how the country has changed since the Charter was entrenched in our constitution, and what the indications are for change in the future. As a non-lawyer, with so many

distinguished members of the bar on the panel and in the audience, I feel a bit as if I were facing an oral exam for a course in which I missed too many lectures!

Firstly, as Commissioner of Official Languages, I will say that the significance of the Charter in the development of language rights cannot be overstated.

When the Charter became part of Canada's constitution in 1982, additional language rights were enshrined in sections 16 to 23. But what is intriguing about language rights as defined in the Charter is that they are both individual and collective rights. Since the Charter was entrenched, those rights have sometimes been overshadowed by the focus on equality rights, as expressed in section 15. And the debate over equality rights—or the tension between individual and collective rights—will continue to have a substantial impact on the changing landscape of language rights.

For most of Canada's first century, language rights were at best limited and constrained and at worst eliminated. A national conversation on language began more than 50 years ago: a conversation driven by responses to dramatic events. The FLQ bombings in the spring of 1963 contributed to the creation of the Royal Commission on Bilingualism and Biculturalism later that year. General de Gaulle's "Vive le Québec libre!" speech in 1967 and its repercussions laid the groundwork for widespread acceptance of the Commission's 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 Québécois in 1976 and the failure of the Quebec referendum on sovereignty-association in 1980 made it possible for Pierre Elliott Trudeau to patriate the Constitution with the Charter in 1982. What will the impact be of political change in Quebec and other provinces? If there is a change of government in Quebec, will it have an impact on majority attitudes towards linguistic minorities? Will there be a similar response in other parts of the country?

I will admit that, when the Charter was entrenched in the Constitution, I was skeptical for several reasons. I was troubled by the fact that it had been brought forward over the objections of Quebec's National Assembly, whose continued refusal to sign the Constitution has overshadowed Canadian politics for the past quarter century. I had misgivings about the relationship between the courts and Parliament. And at the time, I shared the views of many intellectuals, including those of American political scientist Seymour Martin Lipset, who held that the Charter would lead to the Americanization of Canada in terms of its legal culture. But this did not happen. On the contrary, our language rights history clearly shows just how much the case law flowing from the Charter fundamentally sets us apart from American case law.

In their presentations, both Lorraine Weinrib and Michel Bastarache referred to the American tradition of "originalism": the view that judges should limit themselves to the reasoning used by those who drafted the Constitution. Since the very first debates over the Charter, it was clear that the Charter would evolve according to how it was interpreted. The debate over the original intent of the "founding fathers" of the Constitution, which has dominated judicial thinking in the United States, would have no place in Canadian politics. Sophia Muller talked yesterday about legal metaphor: I think Lord Sankey's comparison to a "living tree" is still useful. The Charter is indeed a living tree—or what Professor Weinrib called a "living instrument" and what Karuna Thakur called a "living organism," and later "constitutions as lived cultures"—in each case, one can say that it has been sinking its roots into positive jurisprudence, not into ideology.

The debate over rights would take place mainly in the courtroom—and this was foreseen from the outset. In 1981, NDP justice critic Svend Robinson asked Jean Chrétien, then Minister of Justice, whether the Charter would exclude discrimination on the grounds of sexual orientation. "It might," Chrétien replied. "That will be for the court to decide; it is open-ended." In other words, the original idea of one of the key drafters was that the Charter would grow and change on the basis of the decisions by the courts.

Interprovincial mobility and Francophone immigration could have substantial impact on this dynamic. The challenge is to make sure that official language minority communities become welcoming communities. Article 23 was written under the assumption that communities were static; newcomers do not have access to the schools of the minority.

Michael Bergman presented a rather pessimistic vision of the future of the English-speaking community in Quebec. This confirms one of Statistics Canada's qualitative studies of linguistic minority communities after the 2006 census. Quebec's English-speaking communities had more resources, but were more pessimistic; French-speaking communities had fewer resources, but were more optimistic. The former felt that they were declining, while the latter felt like they were growing, thanks to the institutional changes required by the courts since the Charter in 1982.

In 1982, 70 years after Regulation 17 abolished French as a language of instruction in Ontario, the Charter enshrined the equality and status of English and French and began a process of giving a collective dimension to rights that had been formulated as individual rights.

Parliament significantly revised and strengthened the *Official Languages Act* in 1988 to make it consistent with the Charter, establishing that English and French are

both languages of work for public servants in designated bilingual regions, and introducing the notion of positive measures for the vitality and development of official language communities.

Perhaps even more dramatically, in 1999 the Supreme Court of Canada established a clear principle concerning the protection of official language minorities. The *Beaulac* judgment set the stage for a series of decisions by both the Supreme Court and Parliament that broadened the nature of language rights and deepened government institutions' obligations to protect them.

For the past 25 years, in his capacity as author, lawyer and judge, Michel Bastarache has helped shape Canadian case law in matters of language. In *Beaulac*, writing for the majority he explained that language rights are not negative rights or passive rights; they can only be enjoyed if the means are provided.

Just as importantly, if not more so, *Beaulac* confirmed that the *Official Languages Act* was a quasi-constitutional statute.

Parliament amended the *Official Languages Act* in 2005, making the requirement that federal institutions take positive measures for the vitality and development of official language communities a binding obligation.

Then, in the *DesRochers* case, the Supreme Court concluded that simply making services available to the minority based on the needs of the majority does not meet the obligations laid out in section 20 of the Charter and in Part IV of the *Official Languages Act*.

In the *Arsenault-Cameron* case, the Supreme Court focused on the scope and application of section 23 of the Charter, which covers minority-language educational rights. In keeping with the spirit of *Beaulac*, the Court held that governments must consider Charter requirements when exercising their discretionary power and conducting public affairs.

Finally, in *Solski* (2005) and *Nguyen* (2009), the Supreme Court required the provinces to be more flexible in establishing who has the right to attend minority-language schools.

In each case, parliamentarians and the Supreme Court have acted to ensure that language rights are not simply individual rights, but also collective rights; these rights are not in place simply to protect a single person, but to ensure the vitality of official language communities across the country.

There are three cases before the courts now that may (or may not) continue this process: a case involving French-language education in the Northwest Territories, the Caron case on Francophone rights in Alberta and Saskatchewan, and the case that I have brought against CBC/Radio-Canada, which will be the first test of the scope of Part VII of the Act and the obligations of federal institutions to take positive measures for the growth and development of official language communities.

Through the Charter, the Supreme Court has drawn on Canada's democratic tradition and established its foundations, including minority rights. A lot will depend upon future appointments to the Court, and whether they build on these foundations.

We often refer to the "Charter generation" when we think of the children who attended schools created following the establishment of the Charter. But I believe that there are two "Charter generations," because there is a huge generation gap between the lawyers who graduated before 1982 and those who studied law after 1982. That gap is now beginning to disappear, as post-Charter lawyers are now in their late 50s and thinking about retirement. However, at the time of the debates leading up to the Charter, this generation gap was at the very heart of the paradox. On the one hand were lawyers who had taken the law course taught by Pierre Elliott Trudeau and, on the other, those who had studied under Jacques Yvan Morin at the Université de Montréal's law school. It was a debate between Civil Code lawyers and Civil Code law professors. Politicians and common-law legal advisors watched from the sidelines like spectators at a tennis match.

Five, six and even seven years later, from 1987 to 1990, the Charter became firmly anchored in the mindset of English Canadians. What had been a debate between Quebecers suddenly became a sacred trust in English Canada.

It may be that, despite the controversy that surrounded the creation of the Charter, Quebec's political class and legal profession have assimilated it into their way of thinking. Its origin, after all, was rooted in Quebec's legal tradition.

However, the quasi-mythological memories of Quebec's refusal to sign the repatriated constitution and of the determination with which, for three years, it systematically invoked the notwithstanding clause for each statute to be enacted are still painful ones.

Thirty years later, where are we at with the Charter, and what do we see for the future? We are entering a new legal era, with many court decisions based on interpretations of the Charter, and the implementation of language rights well under way. However, we are lagging far behind in terms of compensation and symbolic value, and we need to address this. Under the Charter and the Constitution, language rights are considered to be guaranteed, as the Constitution is the supreme law in Canada. The rights conferred by the Charter are so fundamental that they must take precedence over all other rights.

This means that where values are concerned, language rights are of the utmost importance to Canadians. Although these rights have pride of place in our legal system, there seems to be a double standard when it comes to monetary damages awarded by the courts for violations. The monetary awards to victims for damages are minimal and in no way reflect the value that our legal system purports to attach to them.

Recently, the Supreme Court of Canada awarded only $5,000 in damages for a violation of section 8 of the Charter for an abusive strip search.[1] Last year, the Federal Court, based on this same Supreme Court ruling, awarded $1,500 in damages for a violation of the language rights guaranteed by the *Official Languages Act*. Considering the wording of section 24.1 of the Charter, which deals with the powers of the courts to grant remedies, the amount of the awards is very small. I believe that, as a society, we have to ask ourselves the following questions: What importance must we attach to the collective nature of rights? How can we protect our fundamental rights if we attach so little importance to them in terms of damages? If language rights are fundamental rights that define our Canadian identity and if they are immutable and inseparable, they must be a true embodiment of this value and genuinely reflect the idea of primacy. Only by attaching true "value" to the equality of both official languages will linguistic duality become a fundamental value of our Canadian identity. Symbolism is not enough when it comes to language rights—we need substance. We have to put our money where our constitution is.

This leads me to say a few words about the economic context, which is so often used these days as an unquestioned justification for taking—or not taking—political action.

Language rights are not a frill. To become part of our social landscape, they have to be understood as a fundamental value and as a key part of our identity. Austerity cannot be used as an excuse for backsliding on individual and collective rights—or on the obligations of governments towards official language communities.

Canadians' language rights are a fundamental and permanent part of our legislative and legal environment; they need to be an equally visible part of our public space. The presence of both official languages needs to be a given, the same way that we take for granted that at curbs there is a place where people in wheelchairs can cross the street, that there are more recycling bins than garbage cans, and that same-sex couples may hold hands without hiding from their fellow citizens. These are social changes that will endure.

It would never occur to anyone that, because of the economic situation, we would roll back fundamental rights. Language rights need to be visible and audible in our public spaces, to make sure that the presence of both official languages is a statement about Canadian identity.

Thirty years on, it is clear: our Charter really is a living tree. In fact, a more useful metaphor might be a living garden, with different plants that bloom at different times as the seasons change and as Canada and its society evolve.

NOTES

[1] *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28.