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Adieu à la Langue Française

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Case Commented On: *Caron v Alberta*, 2015 SCC 56

Introduction

Gilles Caron and Pierre Boutet, the appellants, were charged with traffic offences under section 34(2) of the *Use of Highway and Rules of the Road Regulation*, Alta. Reg. 304/2002 and sections 160(1) and 115(2) of the *Traffic Safety Act*, R.S.A. 2000, c. T-6. Both pieces of legislation were written and published solely in English, as permitted by Alberta's *Languages Act*, R.S.A. 2000, c. L-6. Mr. Caron and Mr. Boutet, however, argued that by enacting legislation solely in English, the Alberta legislature was acting contrary to the constitutional obligation of legislative bilingualism (i.e. the duty to enact in both English and French). Mr. Caron and Mr. Boutet, therefore, argued that both pieces of legislation should be held inoperative to the extent they violate this principle.

As framed by the Court, the issue presented was "whether the *Languages Act* is *ultra vires* or inoperative insofar as it abrogates a constitutional duty owed by Alberta to enact, print, and publish its laws in English and in French." The trial judge at the Provincial Court of Alberta answered this question in the affirmative (2008 ABPC 232), but this decision was reversed by the Court of Queen's Bench (2009 ABQB 745), and the Court of Appeal dismissed the appeal by the appellants (2014 ABCA 71).

This case illustrates the competition between minority language rights and provincial legislative powers. Meant to reflect the fundamental principles of constitutionalism, linguistic duality has typically been in place to protect the minority French speaking population and with it, one of Canada's official languages. The concept of federalism, however, provides a large amount of autonomy to provincial governments, allowing them to develop their jurisdictions as they fit. Unfortunately for some, this provincial autonomy includes the power to determine the language – or languages – in which legislation is enacted.

In short, the Supreme Court reviewed the historic circumstances surrounding the introduction of Alberta into Canada, or what was at the time known as Rupert's Land and the North-Western Territory. The Supreme Court ultimately ruled that the term "legal rights" does not include linguistic rights, and that to infer such would be inconsistent with the text, context, and purpose of the legislation which ultimately inducted these territories into Canada, being the *1867 Address* and the *Rupert's Land and North-Western Territory Order* (1807) (U.K.) (the "*1870 Order*"). In justification, the Court stated it was inconceivable that linguistic rights would not be explicitly entrenched if they were, in fact, meant to be provided.

Legislative History

Prior to joining Canada, the lands of present-date Alberta, Saskatchewan, Nunavut, Yukon, and Northwestern Territories, were encompassed within two areas: Rupert's Land and the North-Western Territory, all of which was controlled by the Hudson's Bay Company.

In December 1867, the Parliament of Canada delivered the *1867 Address* to the Queen, in which it asked that Rupert's Land and the North-Western Territory be united into one province within Canada, with the authority to legislate granted to the Canadian Parliament. As part of the transfer, Canada promised to respect the "legal rights of any corporation, company, or individual" within the two territories.

Canada's request for annexation was initially refused, and instead it was encouraged to enter into negotiations with the two territories in order to reach favorable terms of admission. Almost a year and a half later, upon reaching an agreement with the Hudsons' Bay Company, Parliament made the *1869 Address*, in which it asked the Queen to incorporate Rupert's Land into Canada, upon whatever mutual conditions were reached. During this Address, Parliament authorized the Governor in Council to "arrange any details that [would] be necessary to carry out the terms and conditions of the above agreement."

Following the *1869 Address*, representatives from both Rupert's Land and the North-Western Territory issued a list of demands under which they would accept Canadian control. Contained within this list, was the demand that "the English and French languages be common in the Legislature and Courts, and that all public documents and Acts of the Legislature be published in both languages." This demand reflected both the common use of the French language within the territories, and the common practice to issue legislation in both languages.

In response, the Governor General issued the 1869 *Royal Proclamation*, in which it assured residents of the territories that upon union, all their "civil and religious rights and privileges [would] be respected…" Although negotiations continued, Canada was ultimately unable to secure an agreement that the entirety of both territories would enter as one province. Instead, a small portion of the Red River Settlement, within Rupert's Land, would join Canada as the province of Manitoba, while the rest of the remaining land would be annexed to Canada as a territory under federal administration. This agreement was codified in the *Manitoba Act, 1870,* S.C. 1870, c.3 (the "*Manitoba Act*") and the *1870 Order*. The issue in this case, however, is that the *Manitoba Act* expressly provided for legislative bilingualism, while the *1870 Order* did not.

Analysis

The Supreme Court began its analysis by stating that interpretation of constitutional documents must be done in a large and liberal manner. In doing so, language rights must be considered in a purposive and remedial manner, consistent with the preservation and development of the official languages of Canada. At the same time, however, the Supreme Court reminded us that the Constitution is not an empty vessel to fill time to time, and that its interpretation must not undermine the primacy of the written text.

Upon review of the legislation published near the time of annexation of the North-Western Territory, the *Constitution Act, 1867* and the *Manitoba Act* are prime examples of the manner in which Parliament dealt with linguistic rights. Both pieces of legislation used similar and clear

terms to reference legislative bilingualism as an explicit guarantee. In the Supreme Court's mind, the absence of similar wording within the *1870 Order* weighed heavily against the contention that the terms "legal rights" or "civil rights", as used in the *1867 Address* and the 1869 *Royal Proclamation*, were meant to include language rights.

In review of the parliamentary debates and letters which surrounded the time of the *1870 Order*, it appeared to the Supreme Court that any debate over the term "legal rights" were limited solely to inquiries about territory, and the rights stemming from property ownership. As such, the Supreme Court concluded that it was never the objective of the *1870 Order* to mandate that legislation be dictated in French and English.

It was no doubt that the representatives of the North-Western Territory sought to entrench legislative bilingualism, but the Supreme Court interpreted the lack of specific inclusion of this right within the *1870* Order as a concession required to enter as a territory, rather than one province with Rupert's Land. As such, the right to legislative bilingualism did not become a constitutional guarantee upon entering Canada. In fact, the Supreme Court pointed out a number of other condition-precedents the representatives demanded prior to joining, which were not obtained, basically implying that the representatives were poor negotiators. Further, and in any event, upon review of a telegram discussing the negotiations, the Supreme Court was of the impression that the majority of land within the North-Western Territory was unsettled and unpeopled.

Although the *Manitoba Act* established a Joint Administration, which merged the executive and legislative branches of Manitoba and the North-Western Territory, the Supreme Court was unable to find evidence that this was the result of a constitutional guarantee, noting that this Joint Administration was subsequently terminated in 1875 by the creation of the *The North-West Territories Act, 1875*, S.C. 1875, c. 49. It was not until 1877, that an amendment was created which provided for legislative bilingualism within the North-Western Territory. This guarantee was then adapted and amended into what is now the *North West Territories Act,* R.S.C. 1886, c. 50 (the "*North West Territories Act*").

After determining that legislative bilingualism was not a constitutional guarantee provided to the inhabitants of the North-Western Territory upon entering Canada, it applied this contextual analysis to the province of Alberta. In doing so, it reviewed and heavily weighed the decision of *R v Mercure*, [1988] 1 S.C.R. 234 ("*Mercure*"), which dealt with the issue of legislative bilingualism within the province of Saskatchewan. For background, in 1905, the province of Saskatchewan was created from the *North West Territories Act* through the enactment of the *Saskatchewan Act,* S.C. 1905, c. 42 (the "*Saskatchewan Act*"). The *Saskatchewan Act*, however, contained a provision which stated that all laws existing before it were subject to the power of the legislature to repeal or amend such laws. As a result, although the *North West Territories Act* entrenched the promise of legislative bilingualism, the legislature of Saskatchewan now had the authority to amend or repeal such promise. It was in *Mercure*, that the Court reviewed this provision, ruling that its purpose was to provide the provincial legislature with the ability to deal with language on its own accord. In support of its decision, the Court stated that if Parliament had wished to provide for guaranteed language rights at this time, it knew how to entrench such provisions so that they would remain constitutionally protected and outside the provincial legislature's purview.

Similarly, in 1905, Alberta became a province under the *Alberta Act*, S.C. 1905, c. 3 (the *"Alberta Act*"). The *Alberta Act* contained a similar provision which enabled the provincial

legislature to amend or repeal all prior laws. In this case, therefore, the Supreme Court was of the opinion that the decision in *Mercure* could be extrapolated, so as to infer that linguistic rights were meant to remain within the realm of provincial jurisdiction. As a result, legislative bilingualism was not a constitutional guarantee as guarantees cannot be amended or revoked.

Dissent

It is important to note the dissent by Justices Abella, Wagner, and Cote. These justices were of the opposing opinion, concluding that Alberta was required to enact, print, and publish its laws in both French and English.

Accepting the Appellants' arguments, the dissenting justices agreed that legislative bilingualism was in fact entrenched through the language in the *1867 Address*. In their discussion of constitutional interpretation, the justices emphasized that the *1867 Address* must be interpreted in light of the historical, philosophical, and linguistic context, that constitutional rights must be interpreted broadly and purposively, and that the Constitution itself must be interpreted to express the will of the people.

The justices distinguished *Mercure*, arguing that it did not deal with the effects of the 1869 *Royal Proclamation*, the *1870 Order*, or the 1867 or 1869 Addresses. These documents are central to the Appellants case, and as such, the justices stated that *Mercure* was of limited relevance.

As stated above, the *1867 Address* promised to respect the "legal rights" of Rupert's Land and the North-Western Territory. This address was delivered in both English and French. The dissent was of the opinion that this promise was a "forward-looking undertaking meant to be shaped by subsequent negotiations." The representatives consistently demanded legislative bilingualism as a condition-precedent to admission into Canada, and there was no evidence to show that such demand was met with much opposition. From review of the historical context, the dissent believed that by the time of the *1870 Order*, Canada was aware that legislative bilingualism was in effect within the North-Western Territory, and had come to accept it.

In fact, the dissenting justices insisted that linguistic rights were of paramount importance to the inhabitants of the territories, such that it would have been a non-negotiable condition. Prior to joining Canada, legislative bilingualism was within use throughout the North-Western Territory and Rupert's Land, and the French language was a fact of everyday life in the social and judicial contexts. The representatives consistently and resolutely demanded legislative bilingualism, including this term in their list of demands in 1869 and 1870.

In examining the socio-political context of the time, the dissent noted that Canada was unwilling to annex the territories while resistance was present. As a result, the representatives had a powerful influence during negotiations. Given the importance of legislative bilingualism to these representatives, if it had been denied as a condition for entry, the dissenting justices expected there would have been a serious discussion or explanation on record. The fact that there was no documented opposition bolstered the argument that legislative bilingualism was accepted by Canada and was effectively a non-issue for admission.

Post-annexation, the North-Western Territory was governed pursuant to the *Manitoba Act* and bilingualism continued within the legislative, judicial, and social spheres. The inhabitants were

administered by many of the same Manitoban officials, many of whom were bilingual, and as such, a de facto joint administration was in effect. This practice was later codified in *The North-West Territories Act, 1877, S.C. 1877, c. 7,* when an amendment was passed through without debate, on the premise that the French people of the North-Western Territory had as much right to have their language acknowledged as those in Quebec and Manitoba. In response, at paragraph 205 of their reasons, the dissent stated that "the fact that a constitutional promise has been ignored for over a century takes nothing away from it. The passage of time does not remedy this injustice – it remains an injustice today."

In conclusion, upon examination of the historical textual and contextual evidence, the dissent found that the promise to protect legal and civil rights included a linguistic guarantee. The *1870 Order* was meant to ensure the annexation would occur peacefully, and its French translation referred to legal rights as vested rights. Further, the dissent believed that term "all civil and religious rights" was sufficiently broad to support an interpretation which included linguistic rights, especially in the absence of any documentary evidence that the term was too narrow. Therefore, in embracing a general and liberal interpretation of the Constitution, the dissent believed that legislative bilingualism was a guarantee made to the residents of the North-Western Territory upon entering Canada, and as such, cannot be revoked or amended by Alberta's provincial legislature.

Conclusion

In the reasons of the majority decision, the loss of legislative bilingualism was chalked up to a necessary compromise and poor negotiation skills. A constitutional guarantee of language would have limited provincial power to legislate within a province's own area of competence, and would have far-reaching consequences for today's Saskatchewan, Ontario, Quebec, Yukon, Nunavut, and Northwest Territories. As a result, the Supreme Court was worried that constitutionally entrenching legislative bilingualism would open the floodgates for further inferences of guarantees within the terms "legal rights" or "civil and religious rights", and feared that a broad interpretation of these terms could lead to great uncertainty.

In this case, the provincial right to autonomy won the battle against versus protection. Without clear textual and contextual evidence to support a guarantee, the Court was reluctant to interfere with the exclusive areas of provincial jurisdiction. In essence, absent an entrenched guarantee, the Supreme Court ruled that provinces have the authority to decide the languages to be used in their legislative process, even if it means the continued deterioration of a fading official language.

The difficulty with this case, and the previous decision in *Mercure*, is that if we refuse to broadly interpret language rights and to entrench the value of the French language within our society, we are effectively ensuring its demise in the years to come. It we cannot, at a minimum, ensure the French language will be used in our legislatures and among our judiciary and lawmakers, it will become increasingly difficult to protect or encourage its use within the general population, and we will effectively be bidding it adieu within Canada.