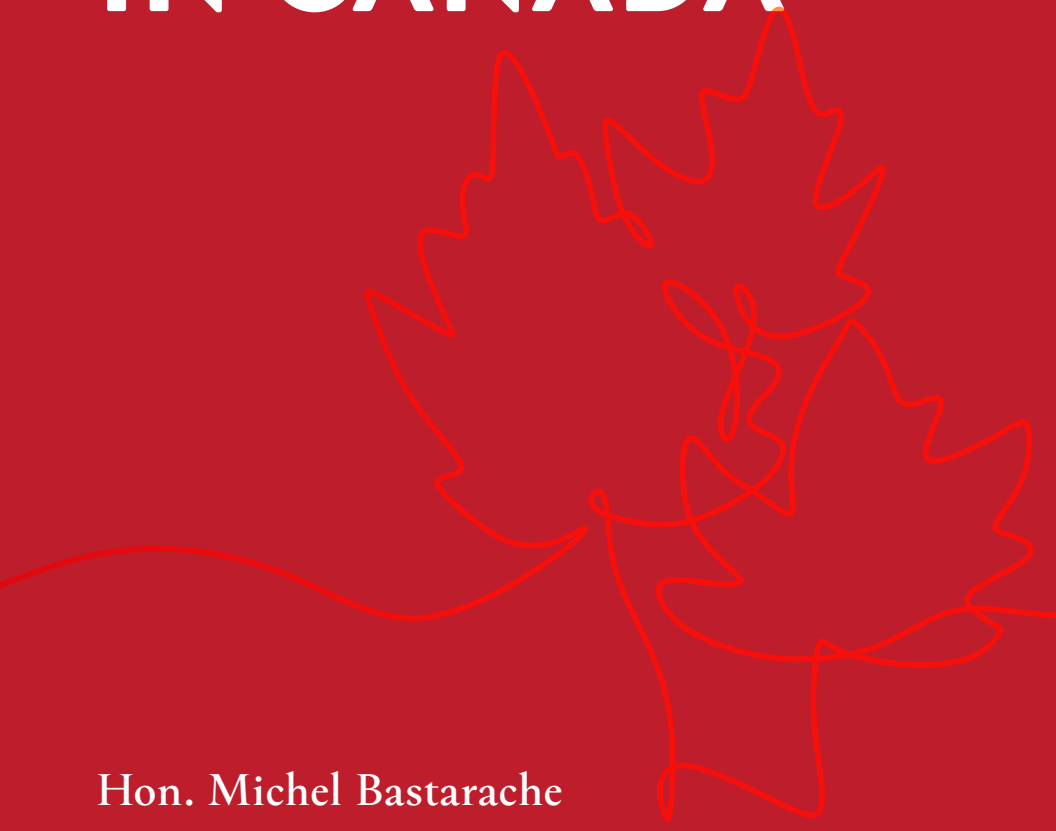
UNDERSTANDING CANADA

THE RECOGNITION OF TWO OFFICIAL LANGUAGES IN CANADA



Hon. Michel Bastarache

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SUPREME COURT OF CANADA

IRWIN LAW

INSTITUTE OF PARLIAMENTARY AND POLITICAL LAW
INSTITUT DE DROIT PARLEMENTAIRE ET POLITIQUE

Published in 2023 by
Irwin Law Inc
Suite 206, 14 Duncan Street
Toronto, Ontario M5H 3G8
irwinlaw.com

Cover image: Adobe Stock

ISBN: 978-1-55221-659-0 | e-book ISBN: 978-1-55221-660-6

Cataloguing in Publication available from Library and Archives Canada

Title: The recognition of two official languages in Canada / Hon. Michel Bastarache, retired puisne judge, Supreme Court of Canada.
Names: Bastarache, Michel, author.
Description: Series statement: Understanding Canada | Includes bibliographical references and index.
Identifiers: Canadiana (print) 20230209440 | Canadiana (ebook) 20230209645 | ISBN 9781552216590 (softcover) | ISBN 9781552216606 (PDF)
Subjects: LCSH: Canada — Languages — Law and legislation. | LCSH: Canada — Languages — Law and legislation — History. | LCSH: Canada — Languages — Government policy.
Classification: LCC KE4413 .B37 2023 | LCC KF4483.C55 B37 2023 kfmod | DDC 344.71/09—dc23

Canada

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Printed and bound in Canada.
1 2 3 4 5 27 26 25 24 23

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Foreword

A century and a half after the incorporation of elements of state bilingualism into the Constitution of Canada, and several decades following the enactment of the first *Official Languages Act*, it has become commonplace to describe Canada as an officially bilingual country. This book traces the origins of this national trait of character. It goes on to focus on the construction of bilingualism by means of political, public policy, and eventually legal instruments, primarily since the centenary of Confederation in 1967. It also deals extensively with the modern applications of bilingualism, in and by the organs of the state.

Let us take a step back and fully realize the concept being discussed here. At various times, French and English explorers, settlers, soldiers, churchmen, and entrepreneurs came to different parts of North America that would eventually be incorporated into Canada. Their areas of domination at times differed, and at other times collided. The two groups of colonizers competed for a long time; ultimately, the force of English arms incorporated the entire area into the British Empire. Thereafter, one option of socio-political development may have been to attempt to assimilate life conducted in French into the growing English majority. The last public attempt at such a course of action was the Durham Report of 1839.

Subsequently, through political efforts that flowered through the cooperation of Louis-Hippolyte Lafontaine and Robert Baldwin, a more tolerant policy of mutual accommodation became the other option for society.

Over the course of the last two centuries, Canada has very gradually evolved from a condition in which two nations were warring in the bosom of a single state; first to an agglomeration of two solitudes, and later still toward a recognition of linguistic duality. Along the path of that evolution, the modernization of legal texts has combined with litigation to induce societal progress in the direction of the recognition of linguistic rights.

Official bilingualism comprises Canadians' ability to deal with their own state authorities, and in matters of public life, in the official language of their choice. This is based on the recognition of the fact that each of the (European-originated) founding linguistic communities is inherently entitled to live in its own language forever. It is also a sign of the reality that in a democratic political system, linguistic accommodation is immeasurably preferable to the stresses born of attempts at assimilation of one group by another.

In this book, former Justice Bastarache focuses on the evolution and the modern fabric of the bilingual state. In this context, Canada is in good company with tolerant, democratically advanced countries like Belgium and Switzerland. There is also necessarily afterthought resulting from this work. Official bilingualism has generated in Canada a significant component of the citizenry that has embraced the benefit of this policy and has come to espouse social bilingualism. Many Canadians now perceive bilingualism not only as a vital element of the state, but also as a multi-faceted benefit: societal, educational, and cultural, as well as economic. In this sense also, official bilingualism is worthy of the acknowledgement that it has brought enormous and lasting benefit to Canada.

Gregory Tardi, DJur.
Editor, Understanding Canada Collection
February 2022

Introduction

One might ask why language rights issues are so important in Canada. The reason given most often is that it is because it was a linguistic compromise that made Canada possible, and that most attempts to diminish its impact have resulted in a constitutional crisis. It is therefore important to know how linguistic issues have influenced the development of Canadian federalism.

There have been six major constitutional conflicts in Canada. All of them have had a language issue at their core. The Manitoba crisis was caused by the rejection of the linguistic obligations in the Act that established the province.[1] The Regulation 17[2] crisis was caused by the decision of the province of Ontario to abolish French-language education. The school law crisis in New Brunswick, which led to the death of Louis Mailloux,[3] resulted from the decision of the province of New Brunswick to impose secular English education in all public schools. The crisis resulting from the Mercure affair[4] was also related to the failure of the province of Manitoba to adopt its laws in French as well as in English as provided for in its provincial constitution. The two Quebec referendums were the result of failed attempts by Quebec to obtain the right to unitarily secede. It is also worth mentioning that the *Constitution Act, 1982*[5] was not endorsed by the Quebec government and is still considered to constitute an

impediment to the evolution of the Canadian federation. There were two attempts to deal with this issue — the failed Meech Lake Accord and the failed 1992 referendum on constitutional reform.

What was the compromise of 1867? First, it was the adoption of section 133 of the *Constitution Act, 1867*, which created limited linguistic obligations applicable only to the federal and Quebec legislatures and governments. This section was hardly discussed during the constitutional negotiations because it only ensured continuity with the provisions in place before Confederation, which were the result of a compromise that followed several conflicts. There was also an agreement that primary and secondary education and social affairs would be under provincial jurisdiction so that Quebec would have the means to protect the French language and culture. The *Constitution Act, 1982* also contained a clause, section 93, which allowed the federal government to step in to protect minorities in education should a province not respect minority education rights. The Judicial Committee of the Privy Council in the United Kingdom, however, interpreted the provision in a manner contrary to the legislative intent, determining that section 93 protected only religious rights and not language rights. At the time of Confederation, when establishing a Catholic school in Ontario or a Protestant school in Quebec, the school board would determine the language of instruction; the Privy Council set that aside.

The situation of French-speaking minorities was very dire until the 1960s. Federal institutions remained English-speaking, while Quebec was largely bilingual; furthermore, anglophones dominated economic activities. In 1969, Ottawa and Fredericton passed the first official language laws recognizing equal status to French and English. In the 1970s, French-language education began to flourish. In 1982, the *Canadian Charter of Rights and Freedoms* (the *Charter*)[6] expanded language rights and created national education rights. This gave rise to legal proceedings in all provinces because of their refusal to fully comply with their obligations. New Brunswick established a commission to reform the *Official Languages Act*;[7] its report created a major conflict, which led to the abandonment of the

objective of adopting a new *Official Languages Act*. The government tried to avoid further trouble by adopting *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*,[8] which has been seldom invoked before the courts. Ontario then adopted French-language services legislation, a movement that Nova Scotia, Prince Edward Island, and Manitoba followed timidly.

What is remarkable in all of this is that the courts have not only welcomed language laws, but also firmly defined their origin and purpose, going so far as to read into section 23 of the *Charter* the right of minorities to participate in the management of minority-language schools. In 1999, the Supreme Court took another important step by stating that public services to the minority cannot be treated as mere accommodations, but rather that they require the implementation of an institutional structure guaranteeing services of equal quality.

Did the multicultural policy adopted by the Canadian government nullify the old theory of this pact between two nations? That is the fundamental question today. There is apparently no consensus on the definition of multiculturalism or the scope of the policies that implement it. What is clear is that the federal government rejects the idea of a Canadian culture and has failed to identify the specific values that unite Canadians. It has even been argued that it is universal health insurance which defines Canadian social policy, even though similar schemes exist throughout the developed world. The federal *Official Languages Act*[9] is poorly enforced according to the commissioner of official languages, who is charged with upholding its provisions; a white paper was, however, tabled in 2021 promising major reforms to the *Official Languages Act*. The bill died because of the election called a few weeks later, but it was introduced again in the following legislature. The integrity of the country is not presently at risk. However, official language communities continue to affirm that Canada needs a coherent policy on bilingualism and multiculturalism.

Despite the difficulties, much progress has been achieved in providing bilingual language services since the adoption of the

Canadian Charter of Rights and Freedoms; but apparently nothing is definitively assured. In 2016, for example, the British Columbia Superior Court ruled on the right of the provincial linguistic minority to obtain educational facilities of equal quality to those of the linguistic majority. While it agreed that schools meeting the section 23 test should be established, it ruled that these schools could only exist where it would be "cost-effective."[10] The ruling also eliminated the participation of parents in the decisions on the establishment and location of new minority-language schools. Fortunately, most of these problematic conclusions have now been overturned by the Supreme Court of Canada.[11] This event is an indication that provincial governments need to take their obligations seriously so that francophones no longer have to rely on the courts to have their existing rights enforced.

Since the *Quebec Secession Reference*, questions have been raised about identity in Canada. The two-nations theory has been rejected, and Quebec has been defined as a distinct society. It has been recognized that Acadians and francophones in Ontario and in the West are not Quebecers in exile but have formed their own communities, with their own identity and challenges. But what is it that now unites the Canadian Francophonie, and how are members of the Francophonie to achieve full participation in Canadian society? These are questions that are not answered at this time. It is, however, clear that language minorities must be able to participate in public affairs without having to give up their language and cultural identity. They argue that Canada should recognize rights not based on the number of speakers, but rather on the fundamental values of the nation and on a recognition of the historical and heterogeneous nature of Canadian society.

When adopting a language law, it is necessary to decide on the factors that will be used to test its effectiveness. Does the law serve to resolve an ethnic conflict, to counter discrimination, or to create the conditions for real equality between communities? Legislators need to recognize that the difficulty in participating in public life in the minority language often creates a sense of inferiority or

insecurity among the minority and that this diminishes language use. If the law is not effective in correcting social problems, it will crystallize the present situation. Attitudes will not change. There will not be integration, but isolation.

In Canada, it is important to teach the history of languages, the social context in which languages interact, and the barriers to equality and to participation in public affairs. It is when these considerations are considered that a coherent language policy can be developed. It is not unrealistic to refer to this; the Supreme Court itself referred to it in the *Quebec Secession Reference*[12] when it stated that there is an unwritten basis in the Constitution for the protection of minorities.

The object of this book is to explain the nature of language rights and their importance in Canada's constitutional history. It is intended to educate anyone with an interest in public policy, whether they are students, lawyers, or policy makers, and to inspire in readers a willingness to promote justice in language policies, however best they can.

The first chapter will present a list of current language rights in Canada and explain some of the interpretative principles that must be used when analyzing these rights. The next three chapters will present the history of language rights as part of the history of Canada, starting with the pre-Confederation period, then with the first few decades following Confederation, and lastly, the period from the Bilingualism and Biculturalism Commission to today. The final chapter will discuss language rights issues present in Canada today, from education to immigration, and will look at some proposed legislative reforms.

Many thanks to my research assistant, Mr. Samuel Joseph Gagnon.