ARE LANGUAGE RIGHTS REALLY FUNDAMENTAL?

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The Quasi-Fundamental Nature of Language Rights

Results from

1. Placement in the Constitutional scheme
2. Adherence to the “Political Question Doctrine”
3. Refusal to adopt a purposive interpretation

Constitution Act (1867)
Section 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.

Official Languages Act

R.S.C., 1985, c. 31

- **2** The purpose of this Act is to
- **(a)** ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all ***federal institutions***, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions; . . .

Political Compromise Doctrine

- The language rights guarantees of Section 133 of the *Constitution Act, 1867*, and Section 23, of the *Manitoba Act, 1870,* were the result of a political compromise designed to achieve agreement on the basics of union.
- This approach views the language provisions as “lowest common denominator” agreements.

Section 133: Purposive Interpretation

- *Jones v. Attorney General of New Brunswick,* [1975] 2 S.C.R. at 192-193 (Section 133 is a floor not a ceiling)

- *Attorney General of Québec v. Blaikie*, (*Blaikie I*), (The word "courts" in Section 133 includes administrative tribunals "which are adjudicative.")

- *Attorney General of Québec v. Blaikie* (*Blaikie II*), [1981] 1 S.C.R. 312 (delegated legislation are "Acts" of the legislature)

Section 133: Narrow Interpretation

- "[N]ot only is the option to use either language given to any person involved in proceedings before the Courts of Québec . . . (and this covers both written and oral submissions) but documents emanating from such bodies or issued in their name or under their authority may be in either language, and this extends to the issuing and publication of judgements or other orders."

--Blaikie I

The Trilogy

- *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460 (court summons need not be in English).

- *Bilodeau v. Attorney General of Manitoba,* [1986] 1 S.C.R. 449 (same under the Manitoba Act).

- *Société des Acadiens du Nouveau Brunswick v. Association of Parents for Fairness in Education,* [1986] 1 S.C.R. 549 (“the right to be understood and the right to understand what is going on in court is not a language right but an aspect of the right to a fair hearing.”)

Legal Rights v. Language Rights

Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. . . . Language rights, on the other hand, although some of them have been enlarged and incorporated into the *Charter*, remain nonetheless founded on political compromise. This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But . . . the courts should approach them with more restraint than they would in construing legal rights.

Société des Acadiens, [1986] 1 S.C.R. at 578.

Legal Rights v. Language Rights

- Hierarchy of Rights
  - 1. Legal rights are at the top
  - 2. Language rights are in the middle.
  - 3. Statutorily-created rights at the bottom.

- Courts should approach language rights “with more restraint” than they would in construing legal rights. Language Rights are to be interpreted narrowly

Why the Cramped Approach?

- Some dates:
  - Succession Referendum (1980)
  - Charter of Rights (1982)
  - The Trilogy (1986)

“Modern” Approach?

“Language rights must *in all cases* be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada. . . . To the extent that *Société des Acadiens* stands for a restrictive interpretation of language rights, it is to be rejected.”

R. v. Beaulac, [1999] 1 S.C.R. 768.