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OFFICIAL LANGUAGES AND PARLIAMENT

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OFFICIAL LANGUAGES AND PARLIAMENT

INTRODUCTION

In Canada, a number of constitutional provisions concern the use of official languages in the legislative field, thus recognizing the right of both official language communities to participate fairly in the parliamentary process. These provisions are the result of the collective history of Canadians, and their presence in the Constitution of Canada confirms the fundamental nature of those rights.

The purpose of this paper is to provide a brief overview of the range of official languages rights and obligations that directly relate to Parliament. It examines those provisions based on their legislative source. First, the paper considers the guarantees and obligations arising from the Constitution, by examining the relevant provisions of the *Constitution Act, 1867*, as well as the *Canadian Charter of Rights and Freedoms*. Second, it analyzes the statutory provisions contained in the *Official Languages Act*. Third, the paper looks at some of the specific aspects of parliamentary procedure as they relate to official languages.

CONSTITUTIONAL PROVISIONS

A. *Constitution Act, 1867*

In the negotiations preceding Confederation in 1867, one of the proposed approaches was *optional* bilingualism in the activities of the future Parliament of Canada. French-Canadian members at the time vigorously opposed this option, and their protests culminated in the passage of a resolution providing for the *mandatory* use of English and French in certain specific areas of parliamentary activity.(1) That resolution became section 133 of the *Constitution Act, 1867*, which reads as follows:

(1) André Braën, "La rédaction bilingue des comptes rendus des comités de la House of Commons," *Revue générale de droit*, vol. 26, 1995, p. 536.

> 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.

This provision thus sets out three types of legislative guarantees:

- the right to use English and French in legislative debates;
- the use of English and French in the official records and journals of the houses of Parliament;
- the use of English and French in printing and publishing Acts.

The purpose of section 133 is to grant "equal access for Anglophones and Francophones to the law in their language" and to guarantee "equal participation in the debates and proceedings of Parliament [translation]."(2) Interpretation of this provision must take that purpose into account. Without granting English and French official status, section 133 nevertheless confirms the bilingual character of the Parliament of Canada, which Senator Gérald A. Beaudoin has called the "embryo of official bilingualism [translation]."(3) Section 133 of the *Constitution Act, 1867* has been interpreted by the Supreme Court of Canada on various occasions, thus elucidating its scope. This paper will now look at each of the components of that section.

1. Right to Use English or French in Debates

Section 133 expressly guarantees all parliamentarians the right to use English or French in parliamentary debates. As not all parliamentarians are bilingual, a system of

(2) Braën (1995), p. 537. See also *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, p. 739.

(3) Gérald-A. Beaudoin, *Essais sur la Constitution*, Ottawa, Éditions de l'Université d'Ottawa, 1979, p. 237.

simultaneous interpretation was introduced in 1959 as a result of a motion[4] by Prime Minister John Diefenbaker, thus enabling all members to speak the official language of their choice and to be understood by all members of the House. Before that system was introduced, a parliamentarian speaking French was generally not understood by the Anglophone majority, which thus had the effect of emptying the House of Commons of a large number of its Members.[5]

When the interpretation system was introduced, a small group of seven interpreters assumed responsibility for translating all debates.[6] Since then, the Translation Bureau of Parliament has expanded to some 50 permanent interpreters, and regularly calls on another 20 freelance interpreters.

As a result of a decision rendered by the Supreme Court of Canada in 1986 (*MacDonald* v. *City of Montreal*[7]), it is not currently clear whether the right to use English or French in parliamentary debates also includes the constitutional right to simultaneous interpretation. In an *obiter dictum*, Mr. Justice Beetz found that the right to use English or French in parliamentary debates did not include the right to simultaneous interpretation. However, it is useful to note that the *MacDonald* decision is part of a case law trend advocating the restrictive interpretation of language rights, a trend now overruled by the decision in *R.* v. *Beaulac*,[8] in which the Supreme Court redefined the rules for interpreting language rights. Section 133 and language rights in general must now be given a broad and liberal interpretation based on their object.

In addition, it is apparent from Prime Minister Diefenbaker's remarks when the motion on the simultaneous interpretation system was passed that the system's introduction was clearly viewed as the recognition of a constitutional right:

> I also believe this motion will provide belated recognition of the fact that under our constitution this basic right has been secured and will be maintained as part of our constitutional freedom, and will be regarded as unchangeable and unchanging. This view, I believe, is of the essence in the maintenance of unity within our country. After all, our

(4) *Journals of the House of Commons*, 70 (11 August 1958), p. 402.

(5) Réjean M. Patry, *La législation linguistique fédérale*, Québec, Éditeur officiel du Québec, 1981, p. 41.

(6) Address by the Minister of Public Works and Government Services, Reception on the occasion of the 40th anniversary of the simultaneous interpretation service in the House of Commons, 16 March 1999.

(7) *MacDonald* v. *City of Montreal*, [1986] 1 S.C.R. 460, p. 488. See also André Braën and Robert Leckey, "Le bilinguisme dans le domaine législatif," in Michel Bastarache (dir.), *Les droits linguistiques au Canada*, Cowansville, Les Éditions Yvon Blais, 2004, p. 56.

(8) *R.* v. *Beaulac*, [1999] 1 S.C.R. 768.

> very confederation came about as a consequence of the partnership between those of French and English origin. Because of that fact, everything we can do to ensure the preservation of those basic constitutional rights and the equality of those rights of language should be attained and implemented.(9)

Given the importance of ensuring respect for every person's right to use the official language of his or her choice and to be understood within an appropriate period of time, this practice, whether or not it enjoys constitutional protection, is now essential to the proper operation of Parliament.

2. Records and Journals of the Houses of Parliament

Section 133 provides that "records and journals" must be prepared in both official languages. This bilingualism obligation presupposes the simultaneous use of English and French in the publication of those parliamentary documents: "It is not one language or the other as one wishes, but both languages that must be used at the same time in the records and journals, [translation]."(10) Thus it is not enough to produce certain passages in English and others in French or to summarize them in the other official language. Documents must be available in full in both official languages.

What documents are subject to this obligation? First, the "records" of the houses include their Acts and bills.(11) Second, the "journals" are the *Minutes of Proceedings* and *Journals* as such, that is to say the official minutes of the votes and proceedings of the houses.(12) Prior to 1976, the *Journals* were printed in separate English and French versions. Since the second session of the 30th Parliament, they have been published in a two-column bilingual format.(13)

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(9) *Debates of the House of Commons*, vol. III (11 August 1958), p. 3498 (Prime Minister Diefenbaker).

(10) Braën and Leckey (2004), pp. 60 and 61, citing *Blaikie* v. *Quebec (Attorney General)*, [1978] C.S. 37, paras. 44 and 45.

(11) *Ibid*., p. 58.

(12) Robert Marleau and Camille Montpetit, *House of Commons Procedure and Practice*, Montreal, Chenelière/McGraw-Hill, 2000, p. 963.

(13) *Ibid*., p. 964.

3. Printing and Publishing of Acts

Section 133 expressly provides that the Acts of Canada shall be printed and published in English and French. Does that obligation apply from the moment a bill is introduced until it receives Royal Assent? In other words, must bilingualism apply to the entire legislative process or only at the printing and publication stage?

As the text of section 133 is not explicit on this point, we must turn to the interpretation made by the courts in order to determine its scope. In *Blaikie* v. *Quebec (Attorney General)*, Chief Justice Deschênes of the Superior Court of Quebec, whose findings were confirmed by the Supreme Court,(14) held that the obligation to print and publish Acts in English and French necessarily included the obligation to use English and French simultaneously throughout the legislative process:

> Now if the reasoning appears naïve, it remains none the less unassailable: how to print and publish in the two languages a law which has not been adopted and does only officially exist in one of the languages?(15)

Thus, for the English and French versions to be equally authoritative, they must be passed and assented to in both languages. Simply printing and publishing them in both languages is not sufficient to respond either to the letter or the spirit of section 133.(16)

Section 133 concerns Acts as such, but also covers delegated legislation. In *Blaikie No. 2*,(17) the Supreme Court of Canada held that the obligation of bilingualism applied to regulatory enactments issued by the government, by a minister or by a group of ministers. Government regulations, to the extent they are subject to the approval of the government or of a minister, are similar to government measures and are thus subject to the obligation of bilingualism provided for in section 133.(18)

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(14) *Blaikie* v. *Quebec (Attorney General)*, [1979] 2 S.C.R. 1016, p. 1022, and *Reference re Manitoba Language Rights (1985)*, pp. 774 and 775.

(15) *Blaikie* v. *Quebec (Attorney General)* (1978), par. 54.

(16) *Ibid*., para. 56.

(17) *Blaikie* v. *Quebec (Attorney General)*, [1981] 1 S.C.R. 312, paras. 18 and 19 (Blaikie No. 2).

(18) *Ibid*., paras. 52 and 53.

As regards orders in council, the Supreme Court of Canada held in *Reference re Manitoba Language Rights (1992)*[19] that the obligation of bilingualism also covered instruments of a "legislative nature." To determine whether an order in council is of a legislative nature, the Court held that the form, content and effect of the instrument in question must be considered. These criteria do not operate cumulatively.[20] As regards form, the connection between the legislature and the instrument must be examined. With respect to content, it must be determined whether the instrument embodies a rule of conduct. Lastly, as to effect, it must be determined whether the instrument has the force of law and whether it applies to an undetermined number of persons.

The Supreme Court also considered the issue of the application of the bilingualism rule in the case of documents incorporated by reference. For example, if a federal Act or regulations incorporate legislative standards from a provincial act, must those legislative standards be available in both official languages? The Supreme Court established the test that must be used in the context of section 23 of the *Manitoba Act:*

> Some documents are simply mentioned in legislative instruments; they need not be consulted before the operation of the instrument in question can be understood. Others are "incorporated by reference" in the sense that they <u>are an integral part of the primary instrument as if reproduced therein</u>. It is this latter type of incorporation that can be termed "true incorporation" and that potentially attracts translation obligations under s. 23.[21] [Emphasis added]

Thus, instruments that are an integral part of the Act or regulations must be available in both official languages.

B. *Canadian Charter of Rights and Freedoms*

As regards the provisions concerning Parliament, the Charter essentially restates the same rights and obligations as section 133, but with a few additions and clarifications.

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(19) *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212, p. 223. The Supreme Court rendered this decision in the context of s. 23 of the *Manitoba Act*, which creates obligations equivalent to those under s. 133 for the purposes of the Province of Manitoba. Consequently, the Supreme Court judgments on s. 23 also apply in the case of s. 133.

(20) *Ibid*.

(21) *Ibid*., p. 228.

First of all, it is important to note section 16, the first subsection of which enshrines in the Constitution the status of English and French as the official languages of Canada. Official language status was granted to English and French in the *Official Languages Act, 1969*,[22] but that principle had not yet received constitutional protection.

For the purposes of this study, it is important to note sections 17 and 18 of the Charter, which concern, respectively, the language of the debates and proceedings of Parliament and the language of Acts and other parliamentary instruments. More specifically, section 17 provides that "Everyone has the right to use English or French in any debates and other proceedings of Parliament." This provision essentially confirms an established fact by reasserting the right to use the official language of one's choice in debates in the houses of Parliament, a right that was previously guaranteed by section 133.

Section 17 nevertheless adds a new element, in that it extends that right to other parliamentary proceedings such as those of the committees of the House of Commons and the Senate. The right to use the official language of one's choice before the Senate or House of Commons and committees of Parliament is thus now a constitutional right.

Section 18 provides that "the statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative."

Section 18 in turn restates the rights and obligations previously provided by section 133 of the *Constitution Act, 1867*. This provision specifically states that the English and French language versions are equally authoritative, thus suggesting that acts are passed in both official languages. This principle, which was not expressly stated in section 133 of the *Constitution Act, 1867*, is now recognized in the Constitution of Canada.

STATUTORY PROVISIONS – *OFFICIAL LANGUAGES ACT*[23]

The constitutional guarantees constitute a minimum that may be supplemented by federal and provincial statutes.[24] In 1969, Parliament passed the first *Official Languages Act* following the recommendations of the Royal Commission on Bilingualism and Biculturalism. The Act recognized, for the first time, the official language status of English and French in all matters pertaining to the Parliament and Government of Canada.

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(22) S.C. 1969, c. O-2, s. 2.

(23) R.S.C. 1985, c. 31 (4th Supp.).

(24) *Reference re Manitoba Language Rights (1992)*, p. 223.

Following adoption of the Charter in 1982, the *Official Languages Act* was revised and modernized to take into account the new constitutional guarantees contained in the Charter regarding language rights. A new *Official Languages Act* (hereinafter the "OLA") was passed in 1988.

The first two parts of the OLA are particularly relevant to this study. Part I involves the language of the debates and proceedings of Parliament; Part II, the language of legislative and other instruments of a parliamentary nature. Incidentally, it is also important to note that the provisions concerning the institutions of Parliament do not appear solely in the first two parts of the OLA. The Senate, House of Commons and the Library of Parliament are "institutions" enumerated in section 3 of the OLA and, consequently, are subject to other parts of the Act involving in particular, language of work and language of services offered to the public.

The courts have given quasi-constitutional status to the OLA. In *Lavigne* v. *Office of the Commissioner of Official Languages*, the Supreme Court of Canada confirmed that the OLA is no ordinary statute:

> The importance of these objectives and of the constitutional values embodied in the *Official Languages Act* gives the latter a special status in the Canadian legal framework. Its quasi-constitutional status has been recognized by the Canadian courts. […] The constitutional roots of that Act, and its crucial role in relation to bilingualism, justify that interpretation.(25)

The OLA contains provisions that derive from various constitutional provisions, but, with regard to parliamentary debates and legislative enactments these provisions often go beyond the constitutional guarantees examined above.

A. Debates and Proceedings of Parliament

Part I consists of a single section on the language of the debates and proceedings of Parliament. The first subsection of this section confirms that English and French are the official languages of Parliament, and that everyone has the right to use either of those languages in any debates and other proceedings of Parliament. This first subsection essentially restates the rights guaranteed by section 133 of the *Constitution Act, 1867* and section 17 of the Charter. Subsection 2 goes beyond existing constitutional provisions by guaranteeing the right to simultaneous interpretation of the debates and other proceedings of Parliament.

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(25) *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, para. 23.

The broadcasting of the debates and proceedings of Parliament constitutes a service within the meaning of Part IV of the OLA.(26) Since 1977, the general public has been able to follow the debates of the House of Commons on radio and television. From 1979 to 1991, debates were broadcast by the Canadian Broadcasting Corporation (CBC) through two parliamentary channels, one in English, and the other in French.(27) The public was thus able to follow the debates in the official language of their choice.

In 1991, these parliamentary channels became a thing of the past as a result of budget cuts at the CBC. Since then, the Cable Public Affairs Channel (CPAC) has broadcast parliamentary debates and proceedings. The House transmits the English, French and original audio feeds to CPAC, which redistributes them to the cable companies. The agreement between the House of Commons and CPAC provided that the latter would distribute all signals to the cable companies. However, the latter, which were not bound by that agreement with the House, could choose to broadcast only one of the three audio signals. As a result, in some regions of the country, parliamentary debates were broadcast in only one official language or from the original feed without translation. That situation resulted in a complaint filed under the OLA with the Commissioner of Official Languages, and then an application for remedy before the Federal Court. The Court held that the House of Commons "must, if it uses another person or organization to deliver services that are required to be provided in both official languages, ensure that the person or organization providing such service does so in both official languages."(28) The House must, therefore, ensure that CPAC, and ultimately the cable companies, broadcast the debates in both official languages.

Since that time, regulations of the Canadian Radio-television and Telecommunications Commission have required the cable companies to broadcast the signals in both official languages to ensure that parliamentary debates and proceedings are accessible to the public in the official language of their choice.(29)

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(26) This part of the OLA concerns communications with and services to the public and includes the obligations of the institutions concerned by the OLA toward the public. See *Quigley* v. *Canada (House of Commons)*, [2003] 1 F.C. 132.

(27) Canada, Standing Joint Committee on Official Languages, *The Broadcasting and Availability of the Debates and Proceedings of Parliament in Both Official Languages*, report, 1st Session, 37th Parliament, http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=223&SourceId=37301&SwitchLanguage=1.

(28) *Quigley* v. *Canada (House of Commons)*, para. 55.

(29) See *Broadcasting Distribution Regulations*, amended by Public Notice CRTC 2001-115.

B. Legislative and Other Instruments

Part II of the OLA concerns legislative and other instruments of a parliamentary nature. Among other things, this Part contains provisions relating to the keeping, printing and publication of the records and journals of Parliament (section 5), as well as a provision on the enactment, printing and publishing of the Acts of Parliament (section 6).

These provisions reproduce the constitutional obligations that were examined above, but, once again, the OLA adds greater clarity by expressly stating that the legislation enactment process is contemplated by the OLA and thus must be carried out in both official languages.

The OLA also addresses the issue of delegated legislation and concerns all instruments published in the *Canada Gazette*, as well as instruments of a public and general nature [section 7(1)]. The OLA thus goes beyond the tests established by the Supreme Court in *Blaikie* and *Reference re Manitoba Language Rights (1992)* by requiring that all enactments published in the *Gazette* be published in both official languages. Subsection 7(2) concerns instruments made under executive power. Such instruments must also be published in both official languages if they are of a public and general nature.

Section 13 restates a constitutional principle, and, by doing so, highlights an important principle of legislative interpretation: the English and French versions of legislative acts covered by Part II are also equally authoritative.

OFFICIAL LANGUAGES AND PARLIAMENTARY PROCEDURE

Canada's linguistic duality appears not only in the Constitution and legislation, but also in the procedure and practice of the Senate and the House of Commons. For example, the first bilingual Speaker of the House, Joseph-Godéric Blanchet[30] used to alternate between English and French versions of the prayer recited at the start of each sitting.[31] Standing Order 7(2) of the *Standing Orders of the House of Commons*, provides that the member elected to serve as Deputy Speaker of the House shall be required "to possess the full and practical knowledge of the official language which is not that of the Speaker for the time being." For example, when Jeanne Sauvé, who was of Franco-Saskatchewanian origin, was Speaker of the

(30) Mr. Blanchet was Speaker of the House of Commons during the 4th Parliament, from 1879 to 1882.

(31) Marleau and Montpetit (2000), p. 360.

House of Commons, the Deputy Speaker was Lloyd Francis, an Anglophone from the Ottawa region. However, this Standing Order has not been followed since the beginning of the 37th Parliament.

The reflection of linguistic duality also occurs in the context of the parliamentary committees. At the start of each parliamentary session, a number of committees pass motions providing that the documents provided by a witness shall be distributed only once they are available in both official languages.(32) This type of motion illustrates the potential conflict between the right of parliamentarians to receive documents in the official language of their choice and the right of witnesses to use English or French in their relations with Parliament. Following a complaint filed with the Office of the Commissioner of Official Languages, an application for remedy was recently made to the Federal Court to dispute the validity of this practice. The applicant claimed that the practice was contrary to his right to use the official language of his choice before a parliamentary committee. However, the Federal Court held that this practice does not infringe that right. In the Court's view, this right, which is provided for in subsection 4(1) of the *Official Languages Act*, does not include the right to distribute documents to the members of a committee.(33) The language rights of the applicant were thus not infringed.

The decision to distribute documents is governed more by the absolute power of parliamentary committees to control their own process and is protected by parliamentary privilege.(34)

Languages other than English and French may be used in the debates of the House, but with moderation and preferably with advance notice.(35) For example, members spoke in Inuktitut in the debates concerning the creation of the Territory of Nunavut. Other members have marked important dates by speaking briefly in Japanese, Greek and Gaelic, among other languages.(36) It is also important to note that on 31 May 2006, a motion was introduced in the Senate by Senator Eymard Corbin to recognize the right of Aboriginal senators to use their ancestral language to communicate in Senate proceedings.

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(32) *Ibid.*, p. 849.

(33) *Knopf* v. *Speaker of the House of Commons and Attorney General of Canada*, 2006 FC 808 (neutral citation), see paras. 38 and 39.

(34) *Ibid.*, see paras. 50 and 53.

(35) Marleau and Montpetit (2000), p. 515 (note 92).

(36) *Ibid*., p. 515.

CONCLUSION

As seen above, a number of constitutional and statutory provisions relate to the use of the official languages in the legislative field. Those provisions, which are deeply rooted in the bilingual nature of Canada, concern a range of parliamentary activities such as debates, proceedings, the legislative process and various parliamentary documents. These various provisions grant rights to parliamentarians and the Canadian public, thus making Parliament an institution accessible to all members of both official language communities. As noted by André Braën and Robert Leckey, participation in the parliamentary process is particularly essential to the vitality of an official language minority community:

> The right to take part in legislative activity is one of the minimum conditions of a language that seeks to be effective not only in the private domain, but also in the public domain. That is what enables a linguistic minority group to participate in public life in its own language [translation].(37)

As a result of the vigilance of legislators, Canada has the tools and rights to ensure that both official language communities are actively involved in the Parliament of Canada and, consequently, in Canadian society.

(37) Braën and Leckey (2004), p. 52.