Asymmetrical Federalism and Official Languages

(translation)

I was asked to speak on the issue of federalism with a view to establishing how language rights have been dealt with by the Supreme Court, particularly whether the Court has adopted an asymmetrical approach in this area of the law.

Firstly, a word on the concept of asymmetry. Asymmetrical federalism is characteristic of a system providing for a division of powers that establishes distinctions between governments of the same level based on historical, cultural or other criteria. Asymmetry already exists in our constitutional order, particularly with regard to language rights; it would have received a modern endorsement had the Meech Lake Agreement been approved, since the Accord would have designated Quebec as a distinct society within Canada.

In practice, asymmetry is *de jure* and straightforward in the constitution – for example Senate representation, continued services to PEI, the guarantee regarding denominational schools, language rights’ safeguards, standardization of laws, the qualifications of Supreme Court judges; asymmetry also results from the application of special provisions such as section 94.9 regarding pensions, 118-9 regarding subsidies, and 109 regarding natural resources in the Western provinces.

There is also *de facto* asymmetry – the result of federal/provincial agreements – in immigration, tax collection, student aid, withdrawal from cost sharing programs, participation in La Francophonie, the Atlantic Accord on offshore revenues, and the Health Accord with Quebec.

Nevertheless, Canada is still marked by a tension between the will to recognize the equality of all provinces (for example, the amendment procedure without veto for Quebec found within the 1982 Constitution Act), the equality of all cultural groups (as seen in section 27 of the *Charter*), and asymmetry (the Meech Lake and Charlottetown Agreements showing the intention of legislatures to give it recognition). The tension exists since 1867, between rival centrists (Macdonald) and provincialists (Cartier). The
The concept of asymmetry is often applied in several federations – Belgium (communities and regions are merged in the Flemish part of the country), Russia, Malaysia… and several quasi-federations such as Spain, Italy, the United-Kingdom – on account of the devolution to Scotland, Wales and Northern Ireland.

One could think that the value of diversity plays a role in applying the federal principle at the Supreme Court, especially when section 1 of the Charter is at play. In fact, Justice LeBel ruled in this respect in *obiter* in the *Advance Cutting*\(^1\) case. This case considered whether a Quebec law, which limited the number of labour unions that could be accredited in the construction industry and required membership in one of these in order to obtain the qualification certificate necessary to work in that industry, was contrary to section 2(d) of the Charter. Addressing the issue of minimal impairment, Justice LeBel wrote on behalf of four judges that, “in a system of divided legislative authority, where the members of the federation differ in their cultural and historical experiences, the principle of federalism means that the application of the Charter in fields of provincial jurisdiction does not amount to a call for legislative uniformity”\(^2\). He added that “provincial differences must be factored into any proper analysis of the concept of minimal impairment, when assessing the validity of provincial legislation.”\(^3\)

This introduction of a European style « margin of appreciation »\(^4\) is the subject of disagreement. In her article *La dilution du principe fédératif et la jurisprudence de la Cour suprême du Canada*, Eugénie Brouillet writes that this approach conflicts with the universal nature of most rights guaranteed by the Charter\(^5\). For his part, José Woehrling writes: [TRANSLATION] “though it is relatively easy to show the range of cultural or linguistic collective rights, or even economic rights, which should vary from one place to another, given the factual situation, the same cannot be said for fundamental rights and,

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3. *Ibid*.
more generally, individual rights, which are usually considered to be interpreted and applied everywhere in the same way.”

As I mentioned previously, the failure of the Meech Lake accord has left Canada with the impression that Quebec is powerless to obtain a renewal of the constitutional arrangements of 1867 and 1982. It is interesting to note in this regard that the problem initially results from differing conceptions of federalism. The pursuit of a special status conflicts with, as Woehrling points out, the principal of equality: equality of all provinces on the one hand, clearly recognized in Reference re: Amendment of Canadian Constitution; and equality of all ethnic groups and more generally of all citizens. And yet, with regard to official languages and minority rights, we find that English Canada recognizes a particular status for Quebec, but a status which imposes on it obligations more restrictive than those imposed on other provinces in 1867.

What is peculiar, come to think of it, is that those who opposed the distinct society concept believed that recognizing such a concept would endanger the linguistic and cultural rights of minorities because, as Woehrling notes, they concerned the very elements of Quebec’s distinct character, language and culture. No one knew what legal effect the Supreme Court would attribute to the concept of “distinct society”, but already, on a symbolic level, there was a reason to worry. Those expressing concern did not like that the Anglophone-Francophone duality was the “fundamental characteristic of Canada”; this belittled multiculturalism.

I thus return then to the status of official languages and to the treatment it has received from the Supreme Court as seen through the federalism perspective. In this sphere, there is first a formal asymmetry. Section 133 applies only to Quebec and to federal institutions – an unwise situation when we think that it is French that is at risk in Canada. We can practice unilingualism in Nova Scotia and Ontario, but not in Quebec. Minorities outside of Quebec are thus subject to a flagrant inequality. Even the right to education, which we believed to be protected by section 93, was denied in an unsound decision of the Privy

6 J. Woehrling, supra, at pp. 152-153.
7 J. Woehrling, supra, p. 124.
9 J. Woehrling, supra, p. 124.
Council, *Ottawa Separate School Trustees v. MacKell*\(^{10}\). Manitoba, having become predominantly English-speaking in 1890, illegally abolished French – a situation which took 75 years to correct and instilled in the minorities a persistent suspicion towards public institutions and the judicial system. And yet, would say Woehrling,\(^{11}\) the territorial solution would be a good one, save for the areas where Francophones formed a majority. The personal solution would be imposed because it would permit the language with the most prestige and economic usefulness to impose itself. But it is at the provincial level that French should have been protected.

I believe this context is important to understand the Supreme Court decisions. The *SANB*\(^{12}\) *MacDonald*\(^{13}\) *Bilodeau*\(^{14}\) trilogy of 1986 is probably an attempt to limit to one province the effect of imposed bilingualism; *Mahe*\(^{15}\) and *Reference re Educations Rights in Manitoba*\(^{16}\), are both efforts to correct the inequality resulting from what Woehrling refers to as « the false symmetry » of section 23. The decisions of the Court of appeals of New Brunswick in *Charlebois I*\(^{17}\) and of Ontario in *Lalonde*\(^{18}\) are also founded on the understanding that we must rectify things by addressing the inequality of minority Francophones outside of Quebec since 1867.

The adoption of the federal system was meant to respond in part to the need for cultural security for Francophones, but section 133 went about this the wrong way by creating an artificial symmetry between Quebec and federal institutions, and an unjust asymmetry between the provinces. In this context, the question is whether the Supreme Court has adopted a consistent approach in its constitutional interpretation that would have limited the political choices of Canadian legislatures. As Eugénie Brouillet points out, the *Charter* leans towards universalism, thus to uniformity, whereas the problems of culture

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\(^{10}\) [1917] AC 62

\(^{11}\) J. Woehrling, *supra*, p. 139.


\(^{16}\) *Reference re: Manitoba Statutes relating to Education* (1894), 22 S.C.R. 577.

\(^{17}\) *Moncton (City) v. Charlebois* (2001) NBCA 117

and language call for a more contextual interpretation. In cultural matters, the constitution itself sets limits to symmetry by creating specific situations in sections 93 and 133, and by creating a special status for Aboriginals. This last status was reinforced in 1982 by section 35 of the Charter. The unifying force of subsection 15(1) is also weakened by subsection 15(2), section 27 and sections 16 to 23 of the Charter.

Thus, with regard to constitutional interpretation, acknowledging special rights inevitably implies judicial distinctions. What interests me more is the use of history and constitutional principles such as the protection of minorities invoked in the Quebec Secession Reference, in the application of the Charter. Most often, it is by looking into the application of section 1 that we will be able to qualify the approach of the courts. The question consists of determining whether a province’s particular circumstances justify limiting rights while similar measures would have lead to a different conclusion in another province.

Professor Woehrling mentions that the Supreme Court has held such reasoning in the Ford case where it found that imposing the use of French in public displays could only constitute a reasonable limit to freedom of expression in Quebec’s particular context. The Court mentions the need to maintain a French “visage linguistique” in Quebec because of the language’s vulnerability in Canada. Woehrling stresses that this approach remains exceptional because the notion of a free and democratic society [TRANSLATION] “invites the Charter interpreters to proceed to a comparison between the contested standard, on one hand, and on the other hand, those that were adopted in the same area in other societies that are considered to be free and democratic.” In fact, it seems to me that these comparisons are neither frequent nor decisive, especially if the subject is cultural or social rights, Canada being seen on that point as a unique society by the Supreme Court.

19 E. Brouillet, supra, para. 95.
22 Ibid., pp. 777-779.
23 J. Woehrling, supra, at p. 153.
In fact, we can speak of distinctions made forcefully by the Supreme Court in a more recent case, *Solski*24, where the Court said at paragraph 5:

*Thus, in interpreting these rights, the courts have a responsibility to reconcile sometimes divergent interests and priorities, and to be sensitive to the future of each language community. Our country’s social context, demographics and history will therefore necessarily comprise the backdrop for the analysis of language rights. Language rights cannot be analysed in the abstract, without regard for the historical context of the recognition thereof or for the concerns that the manner in which they are currently applied is meant to address.*

and at paragraph 7:

*Any broad guarantee of language rights attests to a fundamental respect for and interest in the cultures that are expressed by the protected languages (Mahe, at p. 362). Thus, the recognition of rights to minority language instruction contributes to the preservation of the minority language and culture, as well as of the minority group itself (Doucet-Boudreau, at para. 26). With this in mind, this Court has been sensitive to the concerns, and the language dynamics, of Quebec, where a majority of the members of Canada’s French-speaking minority is concentrated (see, for example: Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66, at p. 82; Ford, at pp. 777-78; Reference re Public Schools Act (Man.), s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, at p. 851).*

and at paragraph 21:

*Given the national character of s. 23, the Court has interpreted the rights provided by this provision in a uniform manner from province to province: Quebec Association of Protestant School Boards; Mahe; Reference re*

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Public Schools Act (Man.); Arsenault-Cameron; Doucet-Boudreau. This is not to say however that the unique historical and social context of each province is irrelevant; rather, it must be taken into account when provincial approaches to implementation are considered, and in situations where there is need for justification under s. 1 of the Canadian Charter: Ford, at pp. 777-81.

and at paragraph 34:

The application of s. 23 is contextual. It must take into account the very real differences between the situations of the minority language community in Quebec and the minority language communities of the territories and the other provinces. The latitude given to the provincial government in drafting legislation regarding education must be broad enough to ensure the protection of the French language while satisfying the purposes of s. 23. As noted by Lamer C.J. in Reference re Public Schools Act (Man.), at p. 851, “different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province”.

In sum, the Supreme Court will take into account the distinctiveness of the provinces regarding issues of language and culture. It is in the application of the Charter that we will make room for differences, a result of the contextual analysis that takes place in constitutional matters. Moreover, this analysis will allow for decisions going other way. In *Tremblay*25, the Court dealt with section 462.1 of the Criminal Code, which allows for trials to be held in French but only applies to the provinces which have accepted it. Mr. Tremblay argued that Saskatchewan had the necessary facilities, personnel and resources to proceed with such an acceptance and that its refusal to act constituted a violation of section 15. The Court accepted this argument and refused to recognize a reasonable limit under section 1. In a similar case that did not deal with language rights, the *Sheldon* case, the Court stated that “it is legitimate for Parliament to allow for province-based

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distinctions as a reflection of distinct and rationally based political values and sensitivities”26. We could therefore make distinctions in the way we treat adolescents who have committed criminal acts.

In conclusion, I will simply say that the Supreme Court has certainly recognized a particular status for Quebec with respect to language rights, but this does not mean that it could create parity between provinces by setting aside the guarantees currently in place by way of judicial interpretation. Asymmetry exists in the constitution and in the interpretation of the constitution, but it has a limited effect.