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MARGARET MACMILLAN & RANDALL HANSEN

History Wars

Memory, politics, and dark chapters in our past

PLUS

AMIRA ELGHAWABY
The jihad economy

GRAHAM FRASER
The mytho-
constitutional
Quebec universe

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- + Dennis Duffy on a sociology of CanLit
- + Anne Kingston on doctors, patients, and cash
- + Donna Bailey Nurse on the vision of David Chariandy
- + Stephen Smith on P.K. Subban and hockey-dad memoirs



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Poems in this issue are inspired by Sue Goyette's poem "You Know This":

This is how it begins, this part of winter. Its hands, clawed and chapped, undo the safety net over your ears. Once that's gone you hear things you shouldn't. Whispers.

Cover art and pictures throughout the issue, unless otherwise indicated, by Ally Jaye Reeves.

Ally Jaye Reeves is a Toronto based illustrator and a graduate of Sheridan College's illustration program. She enjoys reading children's books, petting golden retrievers and thinking about adopting a house plant.

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Undeclaring a language war

A Montreal academic confronts the 'mytho-constitutional Quebec universe'

GRAHAM FRASER

Charte canadienne et droits linguistiques: Pour en finir avec les mythes

Frédéric Bérard

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THIS IS THE YEAR OF Canadian anniversaries. But in the flurry of events surrounding Canada's 150th, Montreal's 375th, the 40th anniversary of the *Charte de la langue française* (Charter of the French Language) in Quebec, and all the symbolic gestures of reconciliation with Indigenous peoples, there has been relatively little mention—certainly in English—that 2017 is also the 35th anniversary of the patriation of the Constitution and the introduction of the Charter of Rights and Freedoms. The only discussion has been provoked by Prime Minister Justin Trudeau's spontaneous dismissal of Quebec Premier Philippe Couillard's proposal to discuss Quebec's role in Confederation. And the consensus in English Canada appeared to be relief that that other unmentionable "C" word would not return to public debate.

In a glowing editorial on the eve of Canada Day, the *Globe and Mail* recounted all the potential wrong turns Canada could have taken over the past century and a half; it wrote that steps had been taken and a change of course made in the 1960s and 1970s to correct the wrongs committed against Canada's francophones outside Quebec to deprive them of language and education rights. "Today, it is Indigenous Canadians who are owed apology, acknowledgment and redress," the editorialist wrote.

Language rights? Been there, done that—time to move on.

However, *Le Devoir's* editorial on July 1 spoke of Canada as "an unachieved compromise"—and

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by little and day by day, new realities."

There were flags and trumpets on April 17, 1982 all right—but not in Quebec. The day the Constitution was signed by the Queen in Ottawa, René Lévesque led a protest march in the rain in Montreal. Quebec's flags were lowered to half-mast. The agreement on the Constitution without Quebec was dubbed the Night of the Long Knives; Raoul Hunter, an otherwise mild-mannered cartoonist for *Le Soleil*, drew Quebec as a woman being serially raped by the premiers from the rest of Canada; Lucien Bouchard almost won the 1995 referendum by reviving a story of betrayal, mockery and humiliation.

The nationalist trope of betrayal and oppression has also been reflected in journalistic and academic writing—not simply about the way in which the Constitution was patriated, but also in analyses of the way in which the Supreme Court has interpreted the Charter. Lévesque biographer Pierre Godin described Article 23 of the Charter, which deals with minority language educational rights, as "the last attempt to anglicize Quebec." Law professor Eugénie Brouillet argued that the Charter has "led to an erosion of the [Quebec] legislative competence in linguistic terms."

Legal scholar Henri Brun maintained that the Charter consisted of "perfectly symmetrical norms, which completely ignores that Quebec is the only place in America where a French-speaking majority exists and that this majority at the same time only represents a tiny linguistic minority on this continent." And academic and conservative columnist Mathieu Bock-Côté claimed that "the regime of 1982 is fundamentally hostile to the very idea of Quebec nationalism (and even the Quebec nation) to the extent that it claimed to domesticate it. It has led, for example, to the programmed destruction of Bill 101 (Quebec's language law)."

When I saw the title of Frédéric Bérard's book, I thought it would be another contribution to this narrative of defeat and victimization. On the contrary. In the book *Charte canadienne et droits linguistiques*, based on his doctoral thesis—it translates to "Canadian Charter and language rights"—Bérard summarizes and quotes from those who have established this approach, but turns the narrative on its head.

"All this is very marvellous from our point of view," Johnson continued, "But this isn't the way constitutions are made and unmade in British countries. They don't proceed with trumpet calls but on the basis of precedents. Theoretically, they don't abolish anything at all. They carefully preserve all the facade, all the rites, and even the whole vocabulary of the former state of affairs, and behind this facade, under the intangible veil of these rites and vocabulary they introduce little

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Citing authors and academics such as Michel Seymour, Frédéric Bastien, Turp, Brun, Brouillet, and Bock-Côté, Bérard finds four themes in attacks on the Charter: that it significantly reduces Quebec's ability to protect the French fact; that it constitutes a frontal attack on Quebec's language policies; that it favours, or could be used to favour, the interests of the English-speaking minority in Quebec over francophone minorities outside Quebec; and that the Supreme Court, principally consisting of anglophones from outside Quebec, has undermined Quebec's Charter of the French Language and has applied, or could apply, linguistic principles in a uniform manner across the country, thus undermining Quebec's unique character.

He sets out to verify these claims—but instead challenges or debunks them all. The result is a book-length description of how the Supreme Court over 35 years has acknowledged Quebec's distinctiveness, recognized the validity of protecting the French language in Quebec, linked individual language rights to community vitality, and acted to ensure that French-language minority schools enjoy substantive equality with English-language majority schools. It is a remarkable story: Over that period, the Supreme Court has developed a sophisticated jurisprudence of language rights that has been nuanced but clear.

In the 1985 reference *Re Manitoba Language Rights*, Bérard notes the court described in sweeping terms the vital place of language rights in society: "The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society."

However, in 1986, in cases that originated in New Brunswick, Quebec, and Manitoba, the court issued three decisions that appeared to back away from this sweeping view. Memorably, as Bérard outlines in the book, the court ruled in one of them, *Société des Acadiens*, that where there was a right to use an official language in court, there was no right to be understood. Language rights, Judge Beetz wrote for the majority, "give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice. And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867* or s.19 of the Charter... that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice."

The reason, according to the majority, was that "Language rights...remain nonetheless founded on political compromise." As a result, the court concluded, they should not be considered legal rights.

Chief Justice Brian Dickson disagreed. "This right," he wrote, "includes not only the right to make oral and written submissions in the language chosen by the individual but also, to make this right meaningful, the right to be understood by the judge or judges hearing the case, whether directly or through other means." And Justice Bertha Wilson was blunt in dissent. "Judges who sit on a case must be able to understand the proceedings, the evidence and the arguments regardless of whether the case was being heard in English or in French. This, indeed, is a requirement of due process."

Dickson's and Wilson's views eventually prevailed, even if it took 13 years. In one of the most

significant decisions in the area of language rights, Justice Michel Bastarache specifically reversed the 1986 decision in *R. v. Beaulac*. "Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada," Bastarache wrote. "To the extent that *Société des Acadiens* stands for a restrictive interpretation of language rights, it is to be rejected."

He then made it clear that the principle of official bilingualism was not accommodation, but equality. The state should not respond as though there were "one primary official language and a duty to accommodate with regard to the use of the other official language. The governing principle is that of the equality of both official languages."

Bastarache has played a huge role in the construction of the jurisprudence of language rights. Before joining the Supreme Court he was counsel in a case that led to the court's decision that the minority education rights in the Charter meant not simply the right to have access to minority language schools, but the right of the minority community to control those schools.

On the court he clarified the obligation of provincial governments to provide schools within a reasonable distance of French-speaking parents, regardless of school district boundaries. And he was a member of the court that unanimously concluded that respect for minorities was one of the unwritten principles underlying the Constitution. Now retired from the court, Bastarache continues to be active on minority language cases.

Bérard approaches this narrative of language rights jurisprudence with a specific goal: challenging the conventional wisdom in Quebec. It is generally taken for granted that the Charter of Rights and Freedoms has been detrimental to the protection of the French language in Quebec, insensitive to Quebec's distinctiveness and biased in favour of the English-speaking majority in Canada and minority in Quebec. Bérard's verdict: wrong on all counts.

His first target is the argument that the Charter punched holes in the language law, Bill 101, which established French as the only official language of the courts and the National Assembly in Quebec.

Sorry, that legislation was declared *ultra vires* in 1979 and 1981 in the two Blaikie cases. Bérard points out that the overturning of the sweeping aspects of Bill 101 had nothing to do with the Charter. The Supreme Court found that erasing the use of English in the National Assembly and the courts in Quebec was unconstitutional on the basis of the language provisions in the British North America Act of 1867—before the Charter was enacted.

His next target is the argument that Article 23 of the Charter, which defines who gets access to minority language schools and gives the right to minority language education to the child of at least one parent educated in that language in Canada, is a tool to anglicize Quebec.

The Supreme Court's clarifications of that right, Bérard points out, have led to the doors to English school in Quebec opening a mere crack, certainly not enough to anglicize Quebec.

Interestingly, what Bérard fails to mention is that the so-called "Canada clause"—as opposed to the "Quebec clause" in the original version of Quebec's language law, Bill 101—was then-premier René Lévesque's preference. He offered reciprocity to his fellow premiers at a premiers' conference in St. Andrews, N.B., in 1977—but no one was prepared to discuss it with him. Discouraged, he returned to

Quebec City to accept the idea of restricting access to English school only to the children who had one parent educated in English in Quebec.

So while Article 23 did, as the Charter's critics claim, take away the power of the National Assembly to decide who could go to English school in Quebec, it did so by adopting an approach that achieved the goal that Lévesque wanted: opening Quebec's English-language schools to the children of parents educated elsewhere in Canada. Bédard describes in detail what the Supreme Court has done for French-speaking minorities outside Quebec—and is withering about the reaction in Quebec. "What Quebec author has recognized the immense progress of francophone rights since the Charter? None," he writes. The facts, he points out, demonstrate that all of the gloomy predictions about the anglicizing effect of the Charter have been wrong. "The rights of francophones in the country, over the course of the last thirty years, have quite simply exploded."

But this has been ignored. Bédard argues that the French-speaking minorities outside Quebec have been a "disagreeable reality" for Quebec nationalists, and "an implicit enemy." As a result, the Quebec government has often intervened in court against French-speaking minorities, feeling that any gain they made could be used against the French-speaking majority in Quebec. On the contrary, he argues, the English-speaking minority has gained no benefit from the Charter.

As he proceeds, chapter by chapter, his indignation increases as he criticizes what he calls the "mytho-constitutional Quebec universe" and the "quasi-hegemony of Quebec nationalist orthodoxy" which leaves "little room for dissidents."

"The dominant Quebec doctrine has thus come, consciously or unconsciously, to ignore reality," he writes. "One can obviously explain the frustration for those who hold this doctrine that anything which approaches Trudeauism can provoke, particularly after the patriation of 1982. That being said, this frustration cannot justify the creation of an imaginary politico-constitutional construction, particularly on the part of intellectuals who, while having legitimate convictions, have nevertheless a duty of critical reflection." Ow!

He goes on to observe that the principles of asymmetry, substantive equality and the need to repair the damage done in the past, all defined by the Supreme Court, have been recognized—by French-language academics and analysts outside Quebec including Michel Bastarache, Michel Doucet of the Université de Moncton, and Pierre Foucher of the University of Ottawa. Yet all of that has been completely ignored by what Bérard calls "the Quebec doctrine."

So far, the book has yet to provoke reaction in the Quebec press. The academics and nationalist commentators that Bérard has criticized so vigorously have not taken to the pages of *Le Devoir* or *La Presse* to mount a counterattack. This is perhaps understandable: it is hard to see what the basis for an effective response could be.

But, as the departure of Chief Justice Beverley McLachlin approaches and the time comes to name her successor and fill the vacant seat on the court, it is extremely useful to have a book-length analysis of the work of the Supreme Court in the field of language jurisprudence. In addition to providing a refreshingly critical response to the nationalist narrative in Quebec, Bérard has delivered an effective anniversary tribute to the work of the court in describing in detail this uniquely Canadian version of language rights. LRC