The Obligation to Enact the French Version of Canadian Constitutional Documents

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1. Introduction

On July 1, 2017, Canadians from coast to coast will celebrate the 150th anniversary of Confederation. This important event offers an outstanding opportunity to underline the richness of our history and continue the work of founding of the country. Canadians are proud of their country, its achievements and its distinguishing features, including its bilingualism. Canada’s commitment to the equality of French and English was first expressed by the enactment of the Official Languages Act,¹ which made French and English the official languages of the country. Next, in 1982, the equality of French and English was enshrined in the Constitution of Canada with the enactment of section 16 of the Constitution Act, 1982,² which was naturally drafted in both official languages.³

Yet many Canadians would be astonished to learn that the majority of Canadian constitutional documents are not officially bilingual, including in particular the Constitution Act, 1867.⁴ Although a French version of this fundamental document was drafted at the time of Confederation by Eugène-Philippe Dorion,⁵ it was never filed with the Westminster Parliament.⁶

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¹ RSC 1970, c 0-2, section 2.
² Schedule B to the UK Canada Act, 1982 c 11 [Constitution Act, 1982].
³ The Canada Act, 1982 was enacted in English only, but includes in its schedules a bilingual version of the Constitution Act, 1982 and stipulates in its section 3 that the French version of the Act “has the same authority in Canada as the English version.”
⁴ (UK), 30 & 32 Vict, reproduced in RSC 1985, schedule II, no. 5 [Constitution Act, 1867].
⁵ Eugène-Philippe Dorion was born in Saint-Ours on August 6, 1830. He was called to the bar in 1853 and in 1855 became a translator at the Legislative Assembly of the Province of Canada. In 1859, he led the office of French translators, subsequently holding the same position at the House of Commons in Ottawa. He was known for his knowledge of classical languages, English, French, and some Indian languages. Eugène-Philippe Dorion was the president of the Société Saint-Jean-Baptiste and the Institut canadien-français. He died in Ottawa on July 1, 1872. See Université Laval/University of Toronto, “Dictionary of Canadian Biography: Volume X (1871-1880)”, online: <http://www.biographi.ca/>; search keyword “Dorion, Eugène-Philippe”. Dorion took inspiration from and benefitted from at least three different French translations of the Constitution Act, 1867 which had been produced.
Consequently, at present, only the English version of the Constitution Act, 1867 enjoys official status. The same is true of the other fundamental constitutional documents enacted at Westminster on behalf of Canada, including the Rupert’s Land and North-Western Territory Order (1870), the British Columbia Terms of Union (1871), the Prince Edward Island Terms of Union (1973), the Statute of Westminster (1931) and the Newfoundland Act (1949). In fact, of the thirty-one documents declared in the Constitution Act, 1982 to be part of the “Constitution of Canada,” only nine have been enacted by Parliament in both official languages as required by section 133 of the Constitution Act, 1867. These documents are: the Manitoba Act, 1870, the Alberta Act (1905), the Saskatchewan Act (1905), the British North America Act, 1952, which was abrogated, the Constitution Act, 1965, the Constitution Act, 1974, the Constitution Act 1975 (No. 1), the Constitution Act 1975 (No. 2) and the Constitution Act, 1982 itself. These nine documents, added to a number of amendments made by the Constitution Act, 1982, make up the whole of Canada’s bilingual constitution. The remainder is official in English only.

Remedying this incongruity was the aim of the authors of Constitution Act, 1982 in including section 55, which provides as follows:

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<th>Version française de certains textes constitutionnelles</th>
<th>French version of Constitution of Canada</th>
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<td>55. Le ministre de la Justice du Canada est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l’annexe; toute partie suffisamment importante est, dès qu’elle est prête, déposée pour adoption par proclamation du gouverneur général sous le grand sceau du Canada, conformément à la procédure applicable à l’époque à la modification des dispositions constitutionnelles qu’elle contient.</td>
<td>55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.</td>
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and printed in French newspapers of the time, such as La Minerve, Le Pays, Le Canadien, Le Courrier de St. Hyacinthe, L’Ordre, Le Courrier du Canada and Le journal de Québec: see Hugo Choquette, “Translating the Constitution Act, 1867: A critique” (2010-2011) 36 Queen’s LJ 503, pp. 516, 519-21 [Choquette].

We do not know why the legislator did not at the time use the same mechanism that enabled enactment of the bilingual version of the Constitution Act, 1982 (that is, to include both versions in schedules and to proclaim that they had equal force of law in the act enacted by the Westminster Parliament). It would seem that the answer to this question is that the legislators simply did not think of doing so, but also that the practice at the time seems to have been that the official English version of laws was translated into French after a copy was received in Canada: see Choquette, supra note 5 on p. 517.

Constitution Act, 1982, supra note 2, s. 52(2).

These amendments are shown in column II of the Schedule to the Constitution Act, 1982.
In 1984, in order to carry out the mandate assigned to him by section 55, the Minister of Justice set up the French Constitutional Drafting Committee, composed of eminent jurists and jurilinguists.\(^9\) In December 1986 the then Minister of Justice, the Honourable Ray Hnatyshyn, tabled the first report of the French Constitutional Drafting Committee in the House of Commons.\(^10\) This report included a new French version of the *Constitution Act, 1867* which was sent to all the provinces.\(^11\) By December 1990, six years after it was created and after over fifty meetings, the French Constitutional Drafting Committee had completed its work and produced French versions of Canada’s constitutional documents; the then Minister of Justice, the right Honourable Kim Campbell, tabled in the House of Commons the *Final Report of the French Constitutional Drafting Committee responsible for providing the Minister of Justice of Canada with a draft official French version of certain constitution enactments*\(^12\) and sent a copy to all provincial ministers of justice.\(^13\) Regrettably, no steps have been taken to enact these French versions, despite the requirement laid down in section 55 of the *Constitution Act, 1982*.

This article focuses, essentially, on the obligation placed on the federal government (and the provincial governments, in accordance with the amending formula) by section 55 of the *Constitution Act, 1982*, to enact the French versions of the Canadian constitutional documents.

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\(^9\) The following persons were members of the committee: Mr. Jules Brière, of Hickson, Martin et Blanchard, Québec City, Chairman of the Committee; The Honourable Gérald A. Beaudoin, Senator, O.C., Q.C., Professor, Faculty of Law at the University of Ottawa; Mr. Robert C. Bergeron, Q.C., General Counsel, Legislation Section, Department of Justice; Mr. Alain-François Bisson, Professor, Faculty of Law at the University of Ottawa; Mr. Alexandre Covacs, Jurilinguist, Legislation Section, Department of Justice; Mr. François La Fontaine, Senior Counsel, Legislation Section, Department of Justice, Secretary of the Committee; Mr. Gérard Bertrand, Q.C., at the time Chief Legislative Counsel of the Government and Chairman of the Committee; Mr. Robert Décary, Q.C., at the time of Noël Décary, Aubry et associés, Hull; Ms. Christine Landry, at the time Legislative Counsel, Legislation Section, Department of Justice, and Secretary of the Committee; the late Louis-Philippe Pigeon, a former member of the Supreme Court of Canada, at the time Professor at the Faculty of Law of the University of Ottawa; Mr. Gil Rémillard, at the time Professor at the Faculty of Law at Laval University; Mr. Michel Robert Q.C., Bâtonnier (see Final Report, infra note 12).


\(^13\) *Bertrand v Québec (PG)*, [1996] RJQ 2393 para 151.
concerned once they were prepared. This obligation will be analyzed in light of paragraphs 16(1) and (3) of the *Canadian Charter of Right and Freedoms*\(^{14}\) and also of Part VII of the *Official Languages Act*.\(^{15}\) The constitutional principles of the protection of minorities, the primacy of law, and federalism will also be cited to substantiate our argument, whose avowed aim is to put an end to the lack of action on this file and to envisage the implementation of section 55 of the *Constitution Act, 1982*.

Using concrete examples taken from jurisprudence, our study will highlight the impact, both practical and symbolic, of the unilingualism of the current written Constitution. As well as violating the principle of the equality of status and the equal rights and privileges of French and English, and the principle of advancement towards equality of status and use of both official languages, the continued existence of a chiefly English-language Constitution is a failure to comply with section 55 of the *Constitution Act, 1982* and the federal commitment to “enhancing the vitality of […] French linguistic minority communities in Canada and supporting and assisting their development, and fostering the full recognition and use of both English and French in Canadian society.”\(^{16}\) Besides the negative effect of these failings on minority francophone communities, we will contend that there is indubitably no more fundamental language right for all Canadians than to be able to read the documents of the Constitution of Canada in the official language of their choice. At present, only English-speaking Canadians enjoy this right. Our study will demonstrate that the status quo is legally inadmissible.

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\(^{14}\) Part I of the *Constitution Act, 1982*, constituting schedule B to the UK *Canada Act, 182*, c 11 [*Charter*].

\(^{15}\) *Official Languages Act*, RSC 1985, c 31 (4th supp) [*Official Languages Act*].

\(^{16}\) *Official Languages Act, supra* note 15, s. 41(1).