

Jules Deschênes, *Ainsi parlèrent les tribunaux : conflits linguistiques au Canada, 1968-1985*, volume II, Montréal, Éditions Wilson & Lafleur, 1985, 716 pages

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## CHRONIQUE BIBLIOGRAPHIQUE

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**Jules DESCHÊNES, *Ainsi parlèrent les tribunaux : conflits linguistiques au Canada, 1968-1985*, volume II, Montréal, Éditions Wilson & Lafleur, 1985, 716 pages.**

Volume II of Justice Deschênes' *Ainsi parlèrent les tribunaux* is a continuation of his earlier work on the same subject which appeared at the end of 1980. The earlier volume covered Canada's language disputes from the Summer of 1968 and the events at St. Leonard through 1980. Included in that earlier volume were 73 court decisions and opinions, many of which are not reported, together with pertinent legislation. But, as the Justice points out in the foreword to his second volume, Canada's language controversies did not terminate with the end of the year 1980. They continue today and they are likely to continue for some time to come.

Until 1980, Canada's language problems were largely centered in the courts of Québec, Manitoba, and Canada. Since 1980, due largely to the intense constitutional activity that has rocked Canada during that interval, the language controversies have also reached the courts of Nova Scotia, New Brunswick, Ontario, Saskatchewan, Alberta, British Columbia, and the Yukon. In his second volume, Justice Deschênes gives us a very complete account of this extended language litigation that reaches almost every Province and Territory of Canada.

For lack of space, in this second volume as in the first, where a French version of a text exists only that version is included. Texts in English are used only when that is the only official version available.

The volume is divided into two major parts or chapters. The first relates to legislation and the second to case-law. Included in the first are 24 laws, one proposed law (*projet de loi*), four parliamentary resolutions, 10 regulations and one ordinance. Included in the second part are 109 court decisions and 9 arbitration decisions decided by 120 judges and 18 arbitrators, more than one half of which have never been reported.

The first part or chapter relating to legislation is subdivided into eight sub-parts as follows: laws concerning Canada, Québec, New Brunswick, and Ontario; proposed law and resolutions concerning Manitoba; laws concerning Saskatchewan and British Columbia; and an ordinance concerning the Northwest Territories.

As one might well expect, among the laws relating to Canada there is included the pertinent parts of the following: the *1982 Canada Act*,<sup>1</sup> the *Constitutional Act, 1982*,<sup>2</sup> The *Canadian Charter of Rights and Liberties*,<sup>3</sup> and language

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1. *Loi de 1982 sur le Canada*, 1982, chap. 11 (U.K.), Annexe A (p. 11).

2. *Loi constitutionnelle de 1982*, Annexe B, art. 41, 43, 52, 55, 56 et 57 (p. 12).

3. *Charte canadienne des droits et libertés*, Annexe B, partie I, art. 1, 14, 16 à 24, et 29 (p. 13).

provisions of laws and regulations that relate to certain products such as fish, meat and textiles.<sup>4</sup>

The Québec *Charte de la langue française*,<sup>5</sup> the Québec *Charte des droits et libertés de la personne*,<sup>6</sup> and the Québec *Loi modifiant la Charte de la langue française*<sup>7</sup> are included among the laws concerning Québec. But as in the case of the laws concerning Canada, there is also included among the laws concerning Québec pertinent parts of that province's consumer protection laws and regulations.<sup>8</sup> In addition, there is Québec's *Loi concernant la Communauté hellénique de Montréal*<sup>9</sup> that has as its purpose the protection of the language and culture of the Greek community of Montréal.

For New Brunswick there are pertinent parts of the school laws<sup>10</sup> and the *Official Language Act*<sup>11</sup> of the Province, as well as the law that recognizes the equality of the Province's two official linguistic communities.<sup>12</sup>

In the case of Ontario, there is included the *Act to revise and consolidate the Law respecting the Organization and Proceedings of Courts of Justice in Ontario*.<sup>13</sup> This law makes both English and French the official languages of the courts of Ontario, and assures the conduct of trials before judges and juries who speak both of these languages.

Manitoba presents a somewhat different situation. For that Province there is included laws, proposed laws, and resolutions that are the direct outcome of the 1979 decision of the Supreme Court of Canada that declared unconstitutional the 1890 Manitoba *Official Language Act* that made English the official language of the Province.<sup>14</sup> Included are Resolutions of the House of Commons of the Parliament of Canada, a Resolution of the Legislature of Manitoba proposing a modification of Article 23 of the 1870 *Manitoba Act*, and laws proposed in the Manitoba Legislature relating to the application of the 1870 *Manitoba Act*.

For Saskatchewan, there is Article 18 of the 1891 *Act Concerning the Northwest Territories* which replaced Article 110 of the 1886 Act,<sup>15</sup> and Articles 1, 2, 3, 16, 17 and 25 of the 1905 *Act creating the Province of Saskatchewan*.<sup>16</sup> According to the former, either French or English could be used in the Assembly and the courts of the Territories. The proceedings of the Assembly and the laws

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4. Pp. 6-12 of the text.

5. L.R.Q. 1977, chap. C-11 (p. 17).

6. L.R.Q. 1977, chap. C-12 modifié par L.Q. 1982, chap. 61 (p. 19).

7. 1983, chap. 56 (p. 20).

8. Pp. 17-18.

9. L.Q. 1980, chap. 58, art. 1, 4, 6 (p. 18).

10. *Loi scolaire*, L.R.N.-B. 1973, chap. S-5, modifié par 1977, chap. 50 et 1981 chap. 71., art. 3.1, 3.2, 3.3, 6 et 18.1.

11. *Loi sur les langues officielles*, L.R.N.-B. 1973, chap. 0-1, modifié par 1975, chap. 42 et 1982, chap. 47 (p. 30).

12. *Loi reconnaissant l'égalité des deux communautés linguistiques officielles au Nouveau-Brunswick*, L.R.N.-B. 1981, chap. 0-1.1 (p. 31).

13. S.O. 1984, chap. 11, ss. 96, 135, 136 (p. 35).

14. *Procureur général du Manitoba c. Forest*, [1979] 2 R.C.S. 1032.

15. R.S.C. 1886, chap. 50, art. 110, repealed and replaced by 1891, 54-55 Vict., chap. 22, art. 18.

16. 1905, 4-5 Edward VII, chap. 42.

and ordinances of the Territories were to be published in both languages. However, after the general election that was to follow, the Assembly could, by ordinance or otherwise, regulate the manner of its proceedings and how they were to be published. Article 17 of the 1905 Act assured the continued existence of separate schools and the continuation of religious instruction in public or separate schools.

For British Columbia the applicable law is the 1731 Act of the British Parliament which decrees "that all Proceedings in the Courts of Justice within the Part of *Great Britain* called *England*, and in the Court of Exchequer in *Scotland*, shall be in the *English Language*".<sup>17</sup>

The most interesting of all of the language laws is that applicable to the Northwest Territories. According to that one, not only are English and French made the official languages of the Territories, but so also are the native languages of the Territories.<sup>18</sup>

The second part (or chapter) of the book, that on case-law, is by far the larger of the two. Indeed, it takes up over 600 pages of the 710 pages of text. Also, the number of pages devoted to the various jurisdictions, federal and provincial, reflects the degree of conflict in the various areas of the country. Thus, Québec has the most — 286 pages — followed by Manitoba with 96 pages, and so on down to British Columbia which has 4 pages and the Yukon with 2 pages. Under the heading *Au Canada* there are 64 pages.

Throughout the section on case-law, there are short prefatory remarks that serve to introduce the cases that follow. These remarks average from one to four paragraphs that briefly summarize the points of law involved in the cases that follow. Without these prefatory remarks, the reader would have nothing but broad section headings for guidance such as, « 1. *Au Canada* : sous la Loi sur les langues officielles 1977 S.R.C. c. 0-2 ». <sup>19</sup>

The title of the book, *Ainsi parlèrent les tribunaux : conflits linguistiques au Canada*, would seem to indicate confrontations in the use of languages, spoken or written, and in the teaching of them. However, there is more to it than that. That is brought out in the very first group of cases reproduced in the book. There can be problems of interpretation caused by the very process of translation. Different nuances attributable to French and English versions of the same text may cause disagreements as to the meaning of the text. That happened in *Cardinal et al. v. La Reine*,<sup>20</sup> a case that involved the validity of a vote by an Indian tribe to give up title to some of the tribal lands. The dispute arose over the meaning of the phrase, "some of the chiefs or principal men" in the English version of the 1906 *Indian Act*.<sup>21</sup> As an indefinite pronoun, the English word *some* was said to be subject to different meanings — either a specified or an unspecified number of persons. However, the French version of the phrase, *et par l'un des chefs ou des anciens*, was found not to convey any such ambiguity and that settled the matter.<sup>22</sup>

17. 1731, Statutes at Large, 6, 4 George II (p. 65).

18. See the Ordinance adopted in 1984 which appears in the text at pages 63-65.

19. P. 69.

20. [1980] 1 C.F. 149 (p. 71).

21. S.R.C. 1906, chap. 81, art. 49.

22. See also the *Canadian Javelin Ltd., Cie Immobilière B.C.N., Azdo, Gulf Oil*

As Justice Deschênes points out in his prefatory remark to the case-law for Québec, that Province has been fertile ground for court action in the area of languages. The material that he presents to illustrate this is divided into the following six categories: (a) under the Québec *French language charter* (Bill 101);<sup>23</sup> (b) under the *Canadian Charter of Rights and Liberties* and Bill 101; (c) under the Québec *Charter of Rights and Liberties* and Bill 101; (d) under Article 133 of the *Constitutional Act, 1867*; (e) under consumer protection laws; (f) under divers laws. As one might well expect, among the 60-odd cases in the 286 page Québec section of this second volume, a considerable variety of litigation is presented. It starts off with the second round before the Supreme Court of Canada in the celebrated *Blaikie* case,<sup>24</sup> and ends with *La Reine v. John Sheppard et autres*.<sup>25</sup>

In the second round of *Blaikie*, at the request of the Province of Québec the Supreme Court issued a clarifying opinion in which it held that Article 133 of the *British North America Act* did not extend to the level of regulations of municipal organizations and school boards. Therefore, these regulations did not have to be printed and published in both official languages. In *La Reine v. John Sheppard et autres*, the defendant was found entitled to an English-speaking jury in spite of Québec legislation to the contrary.

The apparent lack of serious language controversies in Nova Scotia is reflected by the inclusion of but one case for that Province in which there are two opinions, both unpublished. It appears that one Aurel Joseph Comeau was charged with having "unlawfully and wilfully" obstructed a fishery officer in the execution of his duty, contrary to a section of the *Fisheries Act*. The fishery officer failed to speak French to Mr. Comeau when he wished to board his vessel. For that reason, the charge was dismissed because, under the *Charter of Rights*, Mr. Comeau should more fully have had the benefit of his own native language in the establishment of an obstruction. The dismissal was upheld on appeal.

New Brunswick presents a different picture. Although only two cases are included, the decision in one, *La Société des Acadiens du Nouveau-Brunswick and L'Association des conseillers scolaires francophones du Nouveau-Brunswick v. Minority Language School Board No. 50*, presented highly emotional issues — the teaching of French in the schools, or the lack of it, in violation of the New Brunswick *Official Language Act*. The case involved the right of school counsellors to refuse admission to a French immersion program to students who already had a practical knowledge of the language. The emotional nature of the case as the sought after injunction was refused is well illustrated by the progress of the case through the New Brunswick courts.<sup>26</sup>

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*Corp.*, and *Woods et Gruener* cases reproduced at pages 73-87 of the text. In addition, see *In the Matter of Handy Andy Inc. and Roland Beaudry*, an unpublished opinion of the District of Sudbury, included with the Québec cases (p. 176), in which an Ontario court had to resolve a supposed conflict between the English and French versions of a Québec law applicable to contracts.

23. Loi 101, L.R.Q. 1977, chap. C-11.

24. *Le Procureur général de la Province de Québec v. Peter M. Blaikie, Roland Durand et Yoine Goldstein*, [1981] 1 R.S.C. 312.

25. [1983] C.S. 713.

26. The New Brunswick court action is reported as follows: 48 N.-B. R. (2d) 361, 51 N.-B. R. (2d) 219 (pp. 423, 441).

The cases included for Ontario are particularly interesting. The question presented in two, *Her Majesty the Queen v. Daniel Lapointe*<sup>27</sup> and *Sa Majesté La Reine c. Daniel Lapointe et Bruno Sicotte*,<sup>28</sup> was the admissibility into evidence of statements, oral and written, made without the benefit of an interpreter who understood and spoke French. The issue was the capacity of the accused to have made and understood the utterances because of his lack of fluency in English. Under the circumstances, the statements and utterances were ruled not admissible. The last case included for Ontario was a constitutional reference to the Supreme Court of Ontario Court of Appeal respecting the Ontario *Education Act* and *Minority Language Educational Rights*.<sup>29</sup> The court rejected the argument that constitutional barriers existed against according special linguistic rights to French speaking separate school supporters. The case is particularly interesting because it gives an excellent historical summary of minority language rights in Ontario.<sup>30</sup>

Manitoba has been a hotbed of language controversy since the Province was founded in 1870.<sup>31</sup> It is second only to Québec in the diversity of the type cases presented. Now it has been a question of the validity of traffic regulations, then a question of the validity of legislation authorizing the City of Winnipeg to hold a referendum on language questions, or else the validity of the trial of a French Canadian before an English-speaking judge assisted by an interpreter, and so on. In one case, *Her Majesty the Queen v. Jervis*,<sup>32</sup> it was held that one whose language choice was English could refuse to sign a Census of Population form that was partly printed in French. Another case, *Bachman v. St. James-Assiniboia School Division No. 2*,<sup>33</sup> was a school bus case. The court held that it would be discriminatory to require a parent to pay for the transportation of her child to a public French school for instruction in French, rather than to a public English school where there would not have been transportation costs to pay.

Then, in Manitoba there is the question of the validity of all of the laws enacted by the Manitoba Legislature since 1890. In *Attorney General of Manitoba v. Forest*<sup>34</sup> the Supreme Court of Canada declared the 1890 *Manitoba Official Language Act* unconstitutional. The effect of that was to declare all of these laws invalid. However, in a subsequent opinion the Supreme Court of Canada held that, though invalid, these laws should remain in force pending their translation, and re-enactment and publication in both official languages.<sup>35</sup>

The cases included for Saskatchewan follow traditional lines. There is also the question of the designation of certain schools where instruction would

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27. Not published (p. 457).

28. Two opinions: one not published (p. 472) and the other published, 3 C.C.C. (3rd) 366 (p. 484).

29. Not yet published at the time of its inclusion in the book (p. 505).

30. Pp. 511-516.

31. See Justice Deschênes' prefatory remark, p. 543.

32. One opinion not published (p. 588) and the other published, (1984) 27 Man. R. 217 (p. 589).

33. Opinions not published (pp. 599, 603).

34. [1979] 2 R.C.S. 1032.

35. *Renvoi sur les droits linguistiques au Manitoba*, (1985) 59 N.R. 321.

be in French, and also the question whether or not in Saskatchewan there is the right to a trial in French. On the question of the right to a trial in French, one case included in the book went one way in favor of such a right,<sup>36</sup> while another case included went the other way.<sup>37</sup> It appears that it is all a matter of the interpretation of regulations. As for the right to a trial in French, a Saskatchewan provincial court decided that there is no such right in that Province, and further that there is no legal obligation for the laws of Saskatchewan to be published in both English and French.<sup>38</sup>

In Alberta, once again there was the question of the right of an accused to a trial in French, a right that was found not to exist in Alberta.<sup>39</sup> But more interesting is another case, *R. v. Holman*,<sup>40</sup> that involved a person who refused to fill out a 1981 Census of Population form because part of it was in French. This time the result was different from the one reached in Manitoba in the *Jervis* affair.<sup>41</sup> Unlike the Manitoba court, the Alberta court reasoned that the 1982 *Canadian Charter of Rights and Freedoms*

does *not* provide [ . . . ] that any member of the public in Canada has the right to communicate with, and to receive available services, etc., *entirely* in English or French.

That being the case, it is, in my opinion, extremely important that the notice in French upon this otherwise English form can have no adverse or prejudicial effect upon an anglophone who signs the form.<sup>42</sup>

British Columbia and the Yukon are represented in Justice Deschênes' second volume by one case each. The case for British Columbia, *Regina v. Watts, ex parte Poulin*,<sup>43</sup> held that the law of the Province "requires that trials in provincial Courts be conducted in English". In the opinion of the court, "when the rights of an accused person ignorant of the English language are absorbed and the evidence given at the trial translated to him, as it must be, [ . . . ] it cannot be assumed that any unfairness to him will then arise".<sup>44</sup> In the Yukon case, *Regina v. Daniel St. Jean*,<sup>45</sup> the argument was made that a traffic ticket should be in French as well as in English. As the court rejected that argument it wrote:<sup>46</sup>

36. *R. v. Board of Trustees of the Prince Albert Roman Catholic Separate School District No. 6* (not published) (p. 641).

37. *R. v. Board of Education of the Saskatoon East School Division No. 41 and the Minister of Education of Saskatchewan*. One opinion not published (p. 641), and the other published, 117 D.L.R. (3d) 600 (p. 645).

38. Not published (p. 647). An appeal was taken in the case but it is not included because it had not been decided when the book went to press.

39. *R. v. Lefebvre*, one opinion not published (p. 657) and one published, 69 C.C.C. (2d) 448 (p. 661); *R. v. Paquette*, not published (p. 683).

40. 28 Alta. L. R. (2d) 35 (p. 675).

41. *R. v. Jervis* (pp. 588-589).

42. P. 678.

43. (1968) 4 C.C.C. 221 (p. 705).

44. P. 706.

45. Not published (p. 709).

46. P. 710. An appeal was taken to the Supreme Court of the Yukon, but by agreement of the parties it was suspended (see note, p. 71).

In the result both English and French may be said to be required in the Legislature and in the courts of Quebec and Manitoba by constitutional legislation enacted in the 19th century. In New Brunswick the use of both languages is secured specifically by the *Charter of Rights and Freedoms* enacted in 1982. No such constitutional requirement exists in the Yukon Territory, as it would not appear to exist in provinces other than Québec, Manitoba and New Brunswick.

Justice Deschênes has presented us with a very impressive second volume of his *Conflits linguistiques au Canada*. He has amassed a wealth of information that would be very difficult to find elsewhere. That is particularly true of the unpublished opinions. His dedication to, and his knowledge of, his subject represents a level of scholarship that would be difficult to duplicate. Once more he has given us a book that should be of immeasurable value to any who are interested in Canada's linguistic problem, a problem that has existed since 1760 and which shows no sign of coming to an end.

The book is well organized. At the start there is a list of other publications by Justice Deschênes. That is followed by a short foreword, a plan of the book, and a detailed table of contents. At the end of the volume there is a table of opinions and decisions, and a table of judges and arbitrators whose opinions are included in this second volume. The book is attractively bound with a durable binding which is important for a book such this one which can serve as a valuable reference work for years to come.

As Justice Deschênes points out near the end of his foreword, a number of cases were pending and others were waiting to be tried on June 15, 1985, the terminal date of the volume. He speculates that these cases could be *le noyau* — the kernal — for a third volume. Let us hope so.

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