STRUGGLING WITH THE COMPLEX INTERPLAY BETWEEN FUNDAMENTAL AND EQUALITY RIGHTS AND THE PROTECTION OF MINORITIES: A DIFFICULT TIME FOR THE SUPREME COURT OF CANADA

BY JOSÉ WOEHRLING

The Canadian Constitution guarantees certain religious and linguistic rights for Canada's historical minorities: the Anglo-Protestant minority of Québec and the Franco-Catholic minorities of the rest of Canada. Section 93 of the *Constitution Act, 1867*, contains the denominational schools rights. Section 133 of the 1867 *Act*, section 23 of the *Manitoba Act, 1870*, and sections 16 to 20 of the *Canadian Charter of Rights and Freedoms* guarantee the linguistic rights of the English-speaking minority of Québec and of the French-speaking minorities of Manitoba and New-Brunswick. Section 133 of the 1867 *Act* and sections 16 to 20 of the *Charter* also apply to the Canadian Parliament, the federal courts, and the federal government. Finally, section 23 of the Charter recognizes the minority language educational rights.

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There is undoubtedly a potential antagonism between fundamental rights and equality, on the one hand, and the conferring of special rights to minorities, on the other. First, while the fundamental freedoms and the right to equality have a decidedly individualistic character, minority rights are collective and communitarian in nature. Second, while fundamental freedoms and the right to equality are extended to everyone, minority rights only benefit the members of the minority group.[1] Finally, special measures for a minority create for its members, as opposed to the general population, a distinct legal status which may appear difficult to reconcile with the principle of equality.

However, from another standpoint, fundamental and equality rights and the special measures relating to minority protection complement one another. For example, in human rights case law, it is now well-recognized that freedom of religion creates a duty to accommodate religious minorities, when there is a situation of indirect discrimination, i.e., when a legitimate, neutrally enforced law or policy creates a disparate disadvantage for the minority members because they must respect a religious prescription. In other words, by invoking freedom of religion, the minority can claim a special legal status, consisting in a particular benefit or in an exemption from general laws or policies. The duty to accommodate based on freedom of religion, as well as on the right to equality, has been upheld by the Supreme Court in the *O'Malley*, *Edwards Books*, and *Bergevin* cases, amongst others.

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Turning now to equality, the Supreme Court has often stated that this right does not require that everyone be treated in the same way. On the contrary, true equality may well ask for different treatment for people or groups in different situations. This is especially true for minorities. It is well-recognized, in international law for example, that the prevention of discrimination, on the one hand, and the implementation of special measures to protect minorities, on the other, are merely two aspects of the same problem that of defending fundamental human rights. When a religious, linguistic, or ethnic minority is put on an equal footing with the majority when its members are not directly discriminated against because of their membership in that minority only "formal" equality is achieved. In order that true equality may be respected, the minority must have the means to preserve and develop its distinct traditions and characteristics. In the words of the Permanent Court of International Justice (P.C.I.J.), "there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of being a minority".[2] From such a point of view, special measures for minorities are not contrary to the right to equality; they are the only ways to create true equality.

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In *Société des Acadiens*,[3] a majority of the Supreme Court, speaking through the late Mr. Justice Beetz, stated that minority language rights are based on political compromise and, therefore, "the courts should pause before they decide to act as instruments of change with respect to language rights". To make his point, Beetz J. contrasted linguistic rights with legal rights that "tend to be seminal in nature because they are rooted in principle". He then proceeded to rule that the right, contained in section 19(2) of the *Charter*, of any person to choose between English or French when addressing any New Brunswick court, did not include the right to be understood or answered by the court in the chosen language. On the contrary, either official

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language could be used by anyone, litigants, counsel, witnesses, prosecutor, judges, and other judicial officers. Following this ruling, the Québec Superior Court has come to the logical, but quite unfortunate, conclusion that section 530.1 of the *Criminal Code*, which guarantees the right of the accused to be tried in English or French and the right that the presiding judge and the Crown prosecutor speak the same official language as he or her, is inoperative in Québec because it contradicts the constitutionally guaranteed right of everyone, including the prosecutor, to use either one of the two official languages (section 133 of the *Constitution Act, 1867*).[4] If Beetz J. had contemplated linguistic rights not as different from "seminal" rights, but as partaking in the same nature as the equality principle and fundamental freedoms, he probably would have come, like Dickson C.J.C.[5] and Wilson J.,[6] to the conclusion that the right to address a court in French or English includes the right to be understood in that language.

In the *Mahé*[7] case, the Court, speaking through Dickson C.J.C., ruled that section 23 of the *Charter*, which guarantees the right to instruction in the (French or English) minority language, "provides a comprehensive code for minority language educational rights". Therefore, it was not possible to invoke section 15 (equality rights) or 27 (multicultural heritage) to foster a dynamic interpretation of section 23. The Chief Justice added that this section "is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords [the official languages minorities], special status in comparison to all other linguistic groups in Canada". Finally, he quoted the Attorney General for Ontario for the proposition that "it would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to every individual'". As

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a strict matter of statutory construction, it may be legitimate to consider that in, section 23, the drafters of the *Charter* wanted to comprehensively deal with educational rights for English- and French-speaking minorities. However, on a broader plane, it is almost shocking to hear the Chief Justice declare that a clause containing minority rights is an exception to the principle of equality, when one remembers the P.C.I.J. saying that true equality for minorities requires such special guarantees.

In 1996, in the *Adler*[8] case, five of the nine Supreme Court Justices[9] have applied the concept of minority rights as forming a "comprehensive code" in a quite different context. It served them to reinforce the conclusion that the existence of section 93 of the *Constitution Act, 1867*, which guarantes denominational school rights to Protestant and Catholic minorities, absolutely precludes the Court from deriving any similar rights for other religious minorities from sections 2(a) (freedom of religion) or 15 (equality rights) of the *Charter*. In other words, section 93 must not only be considered as a "comprehensive code" for the rights of Protestant and Catholic minorities, to whom it applies, but also for other religious minorities, to whom it does not apply. For the five Justices, for whom Iacobucci J. is speaking, recognizing similar rights for other minorities would be akin to extending section 93 to them. However, this was not what the appelants claimed; they demanded, on the basis of sections 2(a) and 15 of the *Charter*, certain benefits similar, but not necessarily identical, to those guaranteed in section 93 to Catholic and Protestant minorities.

The view adopted by the five Justices paradoxically signifies that the existence of special rights for certain historical minorities in the Constitution absolutely precludes the courts from deriving from the fundamental freedoms and the right to equality any similar, albeit not identical, rights for other minority groups, even if they are important in numbers or have been in Canada for a long time.

> *The majority ruling in* Adler *has the negative result of leaving intact a blatant discrimination between Catholic and Protestant minorities, on the one hand, and other religious minorities, on the other. Of course, this discrimination is not unconstitutional, since it is explicitly recognized in section 93 of the* Constitution Act, 1867. *However, it may well be considered contrary to section 26 the equality clause of the United Nations Covenant on Civil and Political Rights.*

Fortunately, in *Adler*, the four other Justices have clearly rejected the "comprehensive code" reasoning. Two of them, Sopinka and Major JJ., have however come to the conclusion that the absence of public funding for religious minority schools in Ontario (other than Catholic schools) contravened neither sections 2(a) nor 15 of the *Charter*. The two remaining Justices concurred with them on the absence of any infringement of freedom of religion, but found

religious discrimination. McLachlin J. ruled such discrimination reasonable under section 1, but L'Heureux-Dubé J. found the complete refusal to fund religious private schools unjustifiable because it was not the least intrusive means to achieve the legitimate objective of the Ontario *Act*. In her view, partial public funding would have been a lesser restriction of the right to religious equality.

One can only hope that, in future cases, the Supreme Court will better appreciate the intricate and delicate interactions between equality and fundamental rights and minority guarantees. This would contribute to better relations between majorities and minorities and ease some of the strains resulting from the multicultural nature of Canadian society.

Of all the different positions in *Adler*, Justice L'Heureux-Dubé's appears to be the most sensible, from both a legal and political standpoint. Like the P.C.I.J., she found that, in the case of a minority, the right to equality requires not only the absence of direct discrimination, but also special measures to accommodate the minority group in order to prevent indirect discrimination. Her opinion would not extend the section 93 rights to groups other than those mentioned in this clause, as the five Justices feared, but would recognize similar, though not identical, rights to those other groups (i.e., partial, but not complete, public funding of minority schools).

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Notes

[1] This is legally true of the rights conferred by section 93 of the *Constitution Act, 1867* and by section 23 of the *Charter*. However, the rights relating to the official use of English and French (s. 133 of the *Constitution Act, 1867*, s. 23 of the *Manitoba Act, 1870*, and ss. 16 to 20 of the *Charter*) benefit all those who speak English or French, and not solely members of official languages minorities. Nevertheless, it is the minority, not the majority, whom these constitutional guarantees aim at protecting. In terms of their purpose, they are truly "special measures for protecting minorities".

[2] *Minority Schools in Albania* (6 April 1935) ser. A/B 64 P.C.I.J. 4, at 17.

[3] *Société des Acadiens* v. *Association of Parents*, [1986] 1 S.C.R. 549 at 578.

[4] *La Reine* c. *Cross*, [1991] R.J.Q. 1430 (Q.S.C.). But in *La Reine* c. *Montour*, [1991] R.J.Q. 1470 (Q.S.C.), another judge of the Québec Superior Court came to the conclusion that, under s. 530.1 of the *Criminal Code*, the State has the duty to assign to the case a prosecutor willing to speak the language of the accused and that, in this sense, there was no conflict between this provision and s. 133 of the *Constitution Act, 1867*. The issue is now before the Québec Court of Appeal.

[5] *Société des Acadiens, supra* note 3 at 564-67.

[6] *Ibid.* at 619.

[7] *Mahé* v. *Alberta*, [1990] 1 S.C.R. 342 at 369.

[8] *Adler and Elgersma* v. *A.G. Ontario*, 21 Sept. 1996.

[9] Lamer C.J.; La Forest, Gonthier, Cory, and Iacobucci JJ. (judgment delivered by Iacobucci J.).

[10] *International Covenant on Civil and Political Rights*, 19 December 1966, 1007 U.N.T.S. 172 (in force in Canada 19 August 1976): "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

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