

Publié le 15 septembre 2017

What Canada's New Indigenous Languages Law Needs to Say *and Say Urgently*

Lorena Fontaine, David Leitch, Andrea Bear Nicholas et Fernand de Varennes*

Note du rédacteur en chef

Le 6 décembre 2016, le premier ministre du Canada, Justin Trudeau, annonçait que son gouvernement « promulguera une *Loi sur les langues autochtones*, conçue de façon conjointe avec les peuples autochtones, dans le but de préserver, de protéger et de revitaliser les langues des Premières Nations, des Métis et des Inuits dans ce pays »¹. Depuis, le gouvernement fédéral a entamé un processus de consultation avec les Première Nations, les Métis et les Inuits visant l'élaboration d'un projet de loi à cet effet. Dans le contexte de ce processus de discussion et de consultation, un groupe de juristes experts en matière de langues et de droits autochtones nous a proposé le texte que voici, dans lequel ils font état de leurs réflexions sur la forme que doit prendre une éventuelle loi fédérale sur les langues autochtones. L'Observatoire se fait un grand plaisir de partager ce texte avec ses lecteurs, car il s'agit d'une question de première importance pour les droits linguistiques au Canada et à travers le monde.

* This paper is co-authored by Lorena Fontaine, David Leitch, Andrea Bear Nicholas and Fernand de Varennes. Background information about each is provided at the end. This paper represents only the views of its authors.

¹ Justin Trudeau, Premier ministre du Canada, « Le discours du premier ministre Justin Trudeau devant l'Assemblée extraordinaire des Chefs de l'Assemblée des Premières Nations », en ligne : <<http://pm.gc.ca/fra/nouvelles/2016/12/06/discours-du-premier-ministre-justin-trudeau-devant-lassemblee-extraordinaire>>.

INTRODUCTION

On December 6, 2016 Prime Minister Justin Trudeau made the following historic statement: “We know all too well how residential schools and other decisions by governments were used as a deliberate tool to eliminate Indigenous languages and cultures. If we are to truly advance reconciliation, we must undo the lasting damage that resulted. So today, I commit to you that our government will enact an *Indigenous Languages Act*, co-developed with Indigenous Peoples, with the goal of ensuring the preservation, protection, and revitalization of First Nations, Métis, and Inuit languages in this country.”

We understand that the new law is currently being drafted and will be introduced in Parliament in the next few months. Such a law is long overdue in Canada. By the end of the first decades of the 21st Century, constitutional provisions or at least national legislation on Indigenous languages had become the norm in most of the Americas. Moreover, the obligation to ‘revitalize’ Indigenous languages is increasingly recognized.

This international trend acknowledges that, as in Canada, the precarious condition of Indigenous languages is not a natural phenomenon but the legacy of the denial of the inherent rights of Indigenous peoples, the suppression of their languages and cultures, and even of the brutal attempts to assimilate Indigenous children by removing them from their families and communities. The result in Canada is that most of the sixty or so Indigenous languages originally spoken here are in danger of extinction in less than a decade. Some predict that only three will survive into the next century.

To reverse this perilous decline, the new law must do more than make symbolic statements or set aspirational goals. In particular, Canada must learn from the experience of other countries that granting “official” or “national” status to any language does not, by itself, guarantee language revitalization and is not even a necessary element of a language revitalization plan. What the new law must do is adopt enforceable rights and obligations implementing the two elements that are necessary to such a plan:

- a) the education of Indigenous children in their ancestral languages at public expense;
- b) the delivery of federal public services in the Indigenous languages of the local or regional Indian, Inuit and Métis populations.

Inter-generational transmission through publicly funded education

The Preamble of the new law must formally acknowledge and proclaim the following:

- 1) Section 35 of the Constitution Act, 1982 recognizes and affirms the Aboriginal right of all Indian, Inuit and Métis peoples to transmit their ancestral languages from generation to generation; section 25 of the Constitution Act, 1982 protects this aboriginal right from abrogation or derogation;
- 2) The Government of Canada is obliged to fund all schools, including immersion schools, and other educational programs dedicated to transmitting the ancestral languages of the Indian, Inuit and Métis peoples of Canada to the children of those peoples; this obligation applies whether the children are resident on or off a reserve and whether the school is located or the program is delivered on or off a reserve.

The justification for Parliament declaring that section 35 recognizes and affirms Indigenous language rights has existed since 1996. That is when the Supreme Court of Canada adopted the following definition of aboriginal rights under section 35 for Indian and Inuit peoples: “*the practices, traditions and customs central to the Aboriginal societies that existed in North America prior to contact with the Europeans.*”² The Court later adopted the same definition for Métis people in 2003 though with a “pre-control” test rather than a “prior to contact” test.³ Clearly, Indian, Inuit and Métis societies all transmitted their ancestral languages from generation to generation prior to those dates. And clearly, those languages were central to those societies.

When writing about Métis Aboriginal rights, the Supreme Court of Canada stated: “The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.” This statement obviously applies equally to the practices, traditions and customs of all Indian and Inuit peoples.

The justification for Parliament declaring the federal Government’s funding obligation has existed since 1999 when the Supreme Court wrote: “*Language rights are not negative rights or passive rights; they can only be enjoyed if the means are*

² *R v Van der Peet*, [1996] 2 SCR 507.

³ *R v Powley*, [2003] 2 SCR 207.

*provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees.*⁴ It would be meaningless to recognize Indigenous language rights without also providing the means to exercise those rights in a modern context in order to ensure the transmission of these languages from generation to generation.

A further justification for declaring the funding obligation can be found in article 14(3) of the 2007 United Nations Declarations on the Rights of Indigenous Peoples. It reads as follows: “States shall, in conjunction with Indigenous peoples, take effective measures, in order for Indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.” The current Government of Canada has already undertaken to implement this Declaration.

But, as the Prime Minister acknowledged, the most powerful justification for Parliament codifying Indigenous language rights and providing the means to exercise those rights is not legal. It is the history of the damage done to Canada’s Indigenous languages by federal residential schools. Moreover, since Indigenous languages remain at the “core of Indianness”, the cost of their revitalization remains a federal constitutional responsibility. The financial burden of all Indigenous language education in Canada must, therefore, fall on the Government of Canada, whether it takes place on or off reserve and whether the students are resident on or off reserve.

Any attempt to restrict the scope of the funding obligation to education provided on reserve to children residing on reserve would ignore the demographic reality that many Indigenous people no longer live on reserves or never had reserves. It would also result in litigation about whether this restriction constituted unlawful discrimination based on the Supreme Court of Canada’s decisions in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*⁵ and *Eldridge v. British Columbia (Attorney General)*.⁶ Litigation is not the path to reconciliation.

⁴ *R v Beaulac*, [1999] 1 SCR 768.

⁵ [1999] 2 SCR 203.

⁶ [1997] 3 SCR 624.

The same rights and obligations for all Indigenous language groups

In our view, the rights and obligations established by the new law should be the same in relation to all Indian, Inuit and Métis ancestral languages. The linguistic situations and goals of each of these three main groups may, of course, be very different. But they may also be very different across the various communities within each group. Even within a single First Nation, the linguistic situation and goals of on-reserve members may be different from those of off-reserve members. It is not possible or practical to address this enormous diversity by drafting separate pieces of legislation for each group or sub-group. The best way for the drafters of the new law to respect the diversity of Canada's Indigenous languages is to limit themselves to proclaiming the same fundamental rights and obligations in relation to all of Canada's Indigenous languages, namely,

- 1) the right of all Indian, Inuit and Métis parents to educate their children in their ancestral languages in publicly funded schools and programmes, including immersion schools, whether on or off reserve and whether the students are resident on or off reserve;
- 2) the right of Indian, Inuit and Métis peoples to decide and control the methodologies used to transmit knowledge of and fluency in their languages to the children of their communities;
- 3) the federal Government's obligation to fund such education and to do so in a manner that ensures that the quality of the education offered in the ancestral language must be equal to that offered in English and French.

The first right gives effect to the first declaration in the Preamble by codifying the Aboriginal right recognized and affirmed by section 35, namely, the right of all Indian, Inuit and Métis peoples to transmit their ancestral languages from generation to generation.

The second right effectively codifies article 14(1) of the 2007 United Nations Declaration on the Rights of Indigenous Peoples Declaration which reads as follows: "Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning."

The funding obligation must not be left open-ended and hence subject to bureaucratic manipulation. Substandard Indigenous language education would only serve to undermine the goal of language revitalization. Equality is a legal requirement of education offered in official language minority schools. It should also be a legal requirement of education offered in Indigenous language schools.

Why the new law must support the right to immersion schools

While the destructive role of residential schools is now recognized, the modern equivalent is often overlooked: English and French remain the primary medium of instruction of Indigenous students in most schools across the country *and attendance is compulsory*. Even in schools with Indigenous language programs, students still do most of their learning, speaking, thinking, and functioning in English or French rather than in their ancestral language. As with residential schools, it is the absence of sustained contact with proficient adult speakers that denies children the opportunity to become fluent in their own ancestral languages.⁷

The literature establishes that state-funded immersion education (i.e., the Saami, Maori, Indigenous Hawaiians, Papua New Guineans, and others) has resulted in the resurgence of not only of threatened languages but the associated cultures.⁸ It also establishes that children who learn through the medium of their ancestral language tend to do as well or better than children educated solely in the medium of the dominant language. These children (in immersion) also seem to have no difficulty in learning the dominant language and becoming fully bilingual. According to one recent study bilingual children “typically develop certain types of cognitive flexibility and metalinguistic awareness earlier and better than their monolingual peers.”⁹

Finally, it is obvious that only immersion can produce truly fluent speakers capable of teaching the language to successive generations.

That said, we do not expect that immersion schools will suddenly appear the day after the new law is proclaimed. Nor do we expect that these schools will be able to immediately meet the equality standards set by the new law. Immersion schools pose significant pedagogical and personnel challenges. For many communities, they will represent a longer-term, not an immediate, goal. Yet, since some communities have already reached this goal, the law must clearly signal their immediate eligibility for federal funding. It must also signal the eventual eligibility

⁷ Tove Skutnabb-Kangas and Robert Dunbar, “Indigenous Children’s Education as Linguistic Genocide and a Crime against Humanity? A Global View”, online: (2010) 1 *Gáldu Čála - Journal of Indigenous Peoples Rights* 5-126
<<http://www.afn.ca/uploads/files/education2/indigenousschoolseducation.pdf>>.

⁸ Nancy H. Hornberger, ed, *Can Schools Save Indigenous Languages? - Policy and Practice on Four Continents*, Palgrave Studies in Minority Language and Communities (Basingstoke: Palgrave Macmillan, 2008).

⁹ Jessica Ball, “Mother tongue-based multilingual education: Towards a research agenda” paper for MTB-MLE Network, 2013 at 5.

of other communities who are successful in establishing immersion schools whether on or off a reserve.

Giving the language a *raison d'être* outside the classroom

The Preamble of the new law must also formally acknowledge and proclaim the following:

- 1) The revitalization of Canada's Indigenous languages requires more than education in those languages; it requires that those languages then be used in the delivery and receipt of public services delivered by the Government of Canada to speakers of those languages;
- 2) Ancestral languages have been and will remain of central importance to the efforts of Indian, Inuit and Métis peoples to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, up to and including self-government; the maintenance and strengthening of these institutions will, in turn, increase the use of those languages;
- 3) Ancestral languages have been and will remain of central importance to the efforts of Indian, Inuit and Métis peoples to transmit to future generations all aspects of their cultures, including their histories, oral traditions, philosophies, writing systems and names for communities, names and persons; these cultures will, in turn, increase the use of those languages to perpetuate that culture.

These declarations are all intended to acknowledge the place that Indigenous languages must take in Canadian society as a whole, not just in the classroom.

The first declaration is intended to recognize that by integrating Indigenous languages into the delivery of its services to local Indian, Inuit and Métis populations, the federal government will give those languages greater visibility and prestige. It will also create increased employment opportunities in the public service for speakers of those languages. Studies in both Canada¹⁰ and Italy¹¹ show a dramatic reduction in socio-economic disparities between a linguistic minority

¹⁰ Analyse socioéconomique des communautés de langue officielle en situation minoritaire en fonction des données du recensement de 2006, Rapport final, 31 March 2010, Rapport préparé pour Industrie Canada Analyse socioéconomique des communautés de langue officielle en situation minoritaire, Environics Analytics.

¹¹ F. de Varennes, "The Challenges of Globalisation for State Sovereignty: International Law, Autonomy and Minority Rights" in Francesco Palermo, Giovanni Poggeschi, Günther Rautz, Jens Woelk, eds, *Globalization, Technologies and Legal Revolution - The Impact of Global Changes on Territorial and Cultural Diversities, on Supranational Integration and Constitutional Theory*, Liber Amicorum in Memory of Sergio Ortino, (Nomos, Berlin, Germany, 2012) 113-40.

and members of the majority once the ability to work in the minority language becomes a requirement for employment.

The reality is that parents will have various motivations for wanting their children to be educated in their ancestral languages. Ideally, that choice will not be inspired only by a respect for their elders and preceding generations. Indian, Inuit and Métis parents must also have good reason to believe that knowledge of their ancestral languages, not just English and French, will help their children find employment both in the federal public service and other sectors of the economy.

That said, it is beyond the scope of this paper to set out a specific set of proposals in relation to the federal government's obligation to provide its services in Indigenous languages. That initiative will be complex and require careful consideration and consultation with all of Canada's Indigenous language groups.

Justifications for the second proclamation is once again found in the United Nations Declaration on the Rights of Indigenous Peoples Declaration, Article 5, which reads: "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State." Self-government would also recognize the right to promulgate laws in ancestral languages. But this will mean little if those languages have lost their currency and vitality by the time self-government is achieved.

Justification for the third declaration is found in Article 13 of the Declaration which reads as follows: "Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons."

The new law should not attempt to regulate how Canada's Indigenous peoples choose to exercise their autonomy over these internal matters. It should, however, clearly recognize their right to do so using their own ancestral languages.

National and/or Regional Institutes in Indigenous Language Education

Their mandates would include:

- 1) To provide information to parents and communities about how to create new schools and educational programmes dedicated to transmitting the ancestral languages of Canada;
- 2) To support research into the teaching of Indigenous languages and to collect and disseminate the results;

- 3) To support the training and certifying of teachers and teacher-aides in culturally appropriate methods of teaching and to support new and existing institutions already engaged in the training of immersion teachers in Indigenous languages;
- 4) To disseminate information on the benefits of immersion schools;
- 5) To coordinate the establishment of committees of speakers in each language to establish criteria for the evaluation of language teachers and immersion teacher-training institutions.

CONCLUSION

Une langue que l'on n'enseigne pas, est une langue qu'on tue.

- J. Jullian

-

- Translation: A language that is not taught is killed.

BACKGROUND INFORMATION

Lorena Fontaine (LL.B., LL.M.) Lorena Sekwan Fontaine: l.fonatine@uwinnipeg.ca Lorena is a Cree-Anishinabe lawyer from the Sagkeeng First Nation in Manitoba. She is also an associate professor in the Department of Indigenous Studies at the University of Winnipeg. She is also a doctoral candidate at the University of Manitoba. Her research is on Aboriginal language rights in Canada. Lorena spoken nationally and internationally and has authored articles in on residential school issues and Aboriginal language rights in Canada. Her most recent publication “Our Languages are Sacred: Indigenous Language Rights in Canada” is contained in a collection of essays that reflects the recommendations of Indigenous legal scholars and policy leaders on how Canada can braid together a new legal framework through the implementation of UN Declaration on the Right of Indigenous Peoples. Her PhD research was presented in a CBC documentary entitled “Undoing Linguicide” which was awarded the 2017 RTDNA Adrienne Clarkson Award for Diversity, Radio and Network. She has also worked with the Assembly of First Nations as an advisor on Aboriginal languages for a number of years. Currently, Lorena is an Equality Rights Panel Member of the Court Challenges Program.

David Leitch (LL.B., LL.M.) dgl@dgleitch.ca David went to law school at the University of Toronto and was called to the Bar in 1978. In the year 2000, he completed an LL.M.in constitutional law at Osgoode Hall Law School. His area of interest was linguistic rights, particularly section 23 of the Charter which guarantees francophones outside Quebec the right to educate their children in French in publicly funded schools. He soon started thinking about whether Canada’s aboriginal peoples had similar protection under section 35 of the *Constitution Act of 1982*. Building on an earlier article by Fernand de Varennes, David published an article in 2006 arguing that indeed section 35 can and should be interpreted to include the right of aboriginal parents to have their children educated in their own languages. Later that year, he was asked by the Assembly of First Nations to write a proposal for what an Aboriginal Languages Education Act would say. He has continued to speak out on this issue but is currently holding off on his threat to put the issue before the Courts while waiting to see what the new law says.

Andrea Bear Nicholas (BA, BEd, MEd.) andrea.bearnicholas@gmail.com Andrea is Maliseet from Nekohtkok (Tobique First Nation), New Brunswick. She served as Chair in Native Studies at St. Thomas University, in Fredericton, NB, for twenty years. Now retired, she was named Professor Emeritus in 2015. Andrea has collaborated with Dorothy Lazore, the founder of the Kahnawake Immersion Program, to establish a 13 course University-based Native Language Immersion Teacher Training Program in 2002, which she continues to administer. She also publishes on Indigenous education, oral traditions, linguistic rights and revitalization. Andrea's extensive experience and background on Indigenous language and education issues include collaborating and editing ten books of oral traditions for publication in Maliseet; organizing an international conference on immersion education in First Nations co-sponsored by St. Thomas University and the Assembly of First Nations in 2005; a Social Sciences and Humanities Research grant in 2010 to study the effectiveness of adult immersion in the revitalization of Maliseet; and developing sixteen university courses in the Maliseet language for use in an adult immersion programme.

Fernand de Varennes (LL.B., LL.M., Dr. Juris) is Dean of the Faculté de droit at the Université de Moncton and Extraordinary Professor at the Centre for Human Rights of the University of Pretoria. He is also the United Nations' Special Rapporteur on Minority Issues. He is a renowned legal expert on minority and language rights in international law and has published some 200 papers in 30 languages worldwide. Fernand has appeared before UN committees in Geneva and the European Parliament in Brussels, worked with the OSCE High Commissioner on National Minorities, prepared a number of UN documents on linguistic rights of Indigenous peoples and minorities; prevention of ethnic conflicts; political participation of minorities, and been involved in a dialogue seminar on minority rights with the judges of the African Court on Human and Peoples Rights. He prepared a practical handbook on language rights for the Office of the UN High Commissioner for Human Rights which was launched in March 2017. Fernand has also been keynote speaker for international conferences and taught in training sessions in Africa, Asia, Europe and the Americas. His work has been recognized with accolades and is the recipient of the 2004 Linguapax Award (Barcelona, Spain) and the Knight's Cross of the Order of Merit of the Republic of Poland for his work on advancing and protecting minority language rights.