

***The Recognition of Two Official Languages in Canada* by the Hon. Michel Bastarache (Irwin Law, 2023)**

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The Recognition of Two Official Languages in Canada by the
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THIS ARTICLE REVIEWS *The Recognition of Two Official Languages in Canada* by the Honourable Michel Bastarache, published as part of the *Understanding Canada* series. Drawing on his unparalleled career as a scholar, practitioner, and Supreme Court of Canada, Mr. Justice Bastarache distills the history, principles, and contemporary challenges of Canadian language rights into a concise and accessible volume. The book situates Canadian language rights within their historical, political, and legal contexts, from Canada's pre-Confederation, to the Royal Commission on Bilingualism and Biculturalism, to the 1969 *Official Languages Act*, and to the adoption of the *Canadian Charter of Rights and Freedoms* in 1982. It also surveys the Supreme Court of Canada's evolving jurisprudence, much of which was shaped by the Honourable Michel Bastarache himself, and examines contemporary policy challenges.

CET ARTICLE EXAMINE *The Recognition of Two Official Languages in Canada* de l'honorable Michel Bastarache, publié dans la collection *Understanding Canada*. S'appuyant sur une carrière exceptionnelle comme universitaire, praticien et juge à la Cour suprême du Canada, le juge Bastarache présente dans un volume concis et accessible l'histoire, les principes et les enjeux contemporains du droit linguistique canadien. L'ouvrage replace ces droits dans leurs contextes historique, politique et juridique, depuis la période préconfédérative, jusqu'à la Commission royale d'enquête sur le bilinguisme et le biculturalisme, à l'adoption de la *Loi sur les langues officielles* de 1969 à celle de la *Charte canadienne des droits et libertés* en 1982. Il passe également en revue l'évolution de la jurisprudence de la Cour suprême du Canada — largement influencée par l'honorable Michel Bastarache lui-même — et analyse les défis actuels des politiques linguistiques.

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The Recognition of Two Official Languages in Canada by the Hon. Michel Bastarache (Irwin Law, 2023)

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INTRODUCTION

In 2023, Irwin Law and the Institute of Parliamentary and Political Law published a first wave of titles—a total of eight (8) volumes²—in their ambitious new collection, *Understanding Canada*. This series of concise, accessible books aims to explain Canada's political and legal institutions and “to ensure that every Canadian citizen has access to the essential information necessary to make informed decisions, participate meaningfully in the democratic process, and contribute to the collective progress of our nation.”³ The *Understanding Canada* collection has since been taken over by the University of Toronto Press, with more titles forthcoming.

It is only natural that a series dedicated to exploring Canada's legal and political foundations would include a book on its official languages. The legal status of French and English in this country has been a significant

- 1 François Larocque is Full Professor in the Common Law Section of the University of Ottawa Faculty of Law and Chairholder of the Canadian Francophonie Research Chair in Language Rights.
- 2 Gregory Tardi, *Political Law in Canada* (Toronto: Irwin Law, 2023); Steven Chaplin, *Canada's Parliament: A Primer* (Toronto: Irwin Law, 2023); Gary William O'Brien, *The Senate of Canada* (Toronto: Irwin Law, 2023); Hon Michel Bastarache, *The Recognition of Two Official Languages in Canada* (Toronto: Irwin Law, 2023) [Hon Bastarache, *The Recognition of Two Official Languages in Canada*]; John Mark Keyes & Wendy Gordon, *Drafting, Interpreting, and Applying Legislation* (Toronto: Irwin Law, 2023); Kathy Brock & Geoffrey Hale, *Federalism in Canada: Evolving Constitutional, Political, and Social Realities* (Toronto: Irwin Law, 2023); Rob Walsh, *The House of Commons of Canada* (Toronto: Irwin Law, 2023); and Mario Bellissimo, *Canadian Immigration Law* (Toronto: Irwin Law, 2023).
- 3 Irwin Law, “Introducing the *Understanding Canada* collection !!” (31 August 2023), online : <Instagram.com/irwinlawinc > [https://www.instagram.com/p/CwnGyuLLBdj/].

issue since the early 18th century and remains one of the most challenging aspects of our federation. Indeed, anyone hoping to truly understand Canada must grapple with the complex history and current state of its language laws.

No living Canadian is better qualified than the Honourable Michel Bastarache to write a concise primer on federal language rights law—a field in which his scholarship and jurisprudence form much of the core literature.

I. THE AUTHOR⁴

A descendant of Basque freebooters who emigrated to Acadia in the 17th century, Michel Bastarache was born in Quebec City on June 10, 1947, while his parents were completing their studies. The family moved to Moncton shortly after his birth, where he enjoyed a happy upbringing in the Acadian middle class. The election of Louis Robichaud in 1960, the first Acadian premier, energized the province and led to major social reforms, including the creation of the Université de Moncton (1963) and the adoption of the *Official Languages Act* (1969). It was during these effervescent years that the Honourable Michel Bastarache obtained a bachelor's degree from the Université de Moncton (1964–67) and Licentiate in Civil Law at the Université de Montréal (1967–70).

He oversaw the translation of New Brunswick statutes (1970–71) before pursuing graduate studies in public law in Nice (1971–73). On his return to Canada, he became president of the Société nationale des Acadiens (1974–77), where he helped create the Fédération des francophones hors-Quebec. In 1977–78, he managed marketing at Assumption Life while completing his studies in common law at the University of Ottawa.

From 1978 to 1983, he was a professor and then Dean of the Faculty of Law at the Université de Moncton. A prolific academic, he drafted *Bill 88*, which codified the equality of New Brunswick's linguistic communities, a principle later entrenched in the *Canadian Charter of Rights and Freedoms* in 1993.

4 The biographical information contained in this section was sourced from Michel Bastarache & Antoine Trépanier, *Ce que je voudrais dire à mes enfants*, (Ottawa: University of Ottawa Press, 2019). See also François Larocque, Review «*Ce que je voudrais dire à mes enfants* by Michel Bastarache and Antoine Trépanier» (2020) 50 *Francophonies d'Amérique* 122–125.

He returned to Ottawa to head the Official Languages Promotion Unit at the Department of the Secretary of State of Canada (1983–84) and served as Vice-Dean of the Common Law Section at the University of Ottawa (1984–87). During these years, he published *Les droits linguistiques au Canada*,⁵ the first and most authoritative treatise in its field. He also developed a legal practice serving French-speaking minority communities in Western Canada and took part in landmark language rights cases, including the *Mercure*⁶ case in Saskatchewan and the *Mahe*⁷ case in Alberta.

He left academia to practice law full-time with Lang, Michener, Lash and Johnston (1987–89), before returning to Assumption Life as president and CEO (1989–94). A skilled manager, he oversaw the creation of Louisbourg Investments, a subsidiary with more than \$2 billion in assets under management. Remarkably, he also somehow found the time to write *Précis du droit des biens réels*,⁸ the first French-language treatise on property law in the common law world. He joined the firm Stewart, McKelvey, Stirling, Scales in 1994, before being appointed to the New Brunswick Court of Appeal (1995) and then the Supreme Court of Canada (1997).

Justice Bastarache's influence on the Supreme Court of Canada and the law of language rights is evident. In the *Reference re Secession of Quebec* (1998)⁹, the Court recognized the principle of minority protection. In *R v Beaulac* (1999)¹⁰, he rejected an outdated and restrictive interpretation of language rights in favour of a generous and purposive approach. In *Arsenault-Cameron* (2000)¹¹ and *Doucet-Boudreau* (2003)¹², the Court further advanced the right to minority-language education. In *Société des Acadiens et Acadiennes du Nouveau-Brunswick* (2008)¹³, he clarified the Royal Canadian Mounted Police's (RCMP) linguistic obligations in providing police services in New Brunswick.

5 Michel Bastarache, *Les droits linguistiques au Canada*, 1st ed (Montreal : Yvon Blais, 1986); Michel Bastarache, *Les droits linguistiques au Canada*, 2nd ed (Cowansville : Yvon Blais, 2004) ; Michel Bastarache, *Les droits linguistiques au Canada*, 3rd ed (Cowansville : Yvon Blais, 2013).

6 *R v Mercure*, 1988 CanLII 107 (SCC).

7 *Mahe v Alberta*, 1990 CanLII 133 (SCC).

8 Michel Bastarache & Andréa Boudreau Ouellet, *Précis du droit des biens réels*, 1st ed (Montreal: Yvon Blais, 1993) ; Michel Bastarache & Andréa Boudreau Ouellet, *Précis du droit des biens réels*, 2nd ed (Montreal : Yvon Blais, 2001).

9 *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC).

10 *R v Beaulac*, 1999 CanLII 684 (SCC).

11 *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1.

12 *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62.

13 *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc v Canada*, 2008 SCC 15.

II. THE BOOK

Justice Bastarache's academic writings and judicial decisions have helped establish the remedial, egalitarian and collective basis of Canada's approach to language rights. His contribution to the *Understanding Canada* collection distills this lifetime of knowledge and experience into 103 concise pages. This makes *The Recognition of Two Official Languages in Canada* an invaluable resource for students, lawyers, and policy makers seeking a general introduction to the federal law of language rights.

The book contains six short chapters, ranging from 5 to 30 pages in length. The Notes, Table of Cases, and Index are helpful for pinpointing specific issues and discussions, but the chapters are best read sequentially, as intended.

Chapter 1, "What are Language Rights?" sets the stage by defining the scope and nature of Canadian language rights. Unlike the theoretical and grandiloquent norms sometimes articulated in international human rights instruments¹⁴, Canadian language rights are pragmatic. They essentially codify the linguistic obligations of the judicial, legislative, and executive branches of the federal government, and establish a constitutional right to education in the minority official language of each province and territory. At the federal level, all citizens may use either official language, of their choice, in the legislative process, in judicial proceedings, and when communicating with or receiving services from the government. Certain people, depending on where they live, have similar rights concerning their provincial or territorial governments as well. Justice Bastarache's efficient use of tables makes it easy to grasp, at first glance, the extent of existing language rights. The chapter concludes with a more theoretical discussion on the individual and collective nature of Canadian language rights and their classification as fundamental human rights that are "part of the fabric of the nation."¹⁵

The next three chapters summarize the historical developments that shaped Canada's current constitutional norms governing the legal status, rights, and privileges of the English and French languages. Chapter 2, "The 1867 Compromise" swiftly covers Canada's pre-Confederation history and the impact of certain tumultuous events and legal instruments on

14 *International Covenant on Civil and Political Rights*, 16 December 1966, GA Res 2200A (XXI), article 27; *Convention on the Rights of the Child*, 20 November 1989, GA Res 44/25, article 29(1)(c).

15 Hon Bastarache, *The Recognition of Two Official Languages in Canada*, *supra* note 1 at 19.

French and English-speaking communities. Events and instruments, such as the Acadian Deportation of 1755, the Royal Proclamation of 1763, the Quebec Act of 1774, the Patriot's War of 1837-1838, Lord Durham's 1839 Report, the Union Act of 1840, and the compact leading to Confederation in 1867. This compromise temporarily reconciled the warring factions of the United Province of Canada under one legislature, by guaranteeing provincial autonomy over local concerns (including health and education), and respect of minority rights.

Chapter 3, "Broken Promises: Language Rights Following Confederation (1867-1967)" examines the sweeping historical account of Canada's constitutional development, detailing how the fragile compact between French and English interests eroded and was then tentatively restored over the next century. Justice Bastarache covers this material geographically rather than chronologically, examining how the Maritime Provinces, Ontario, Quebec, and Western Canada each took steps to intentionally weaken the rights of their linguistic minorities in areas such as schooling, access to justice, and legislation.

Chapter 4, "Major Milestones from 1967 to Today" opens with a discussion of the transformational influence of the Royal Commission on Bilingualism and Biculturalism (B&B Commission) (1963-70), an important moment of reckoning for Canada that led to the enactment of the first *Official Languages Act* (OLA) in 1969.¹⁶ Justice Bastarache also devotes a few pages to Quebec's Gendron Commission (1968-73) on the status of the French language in Quebec, which eventually led to the 1977 enactment of the embattled *Charter of the French Language*.¹⁷ Both developments, Justice Bastarache convincingly argues, had "profound impacts" on the constitutional negotiations leading up to the adoption of the *Canadian Charter of Rights and Freedoms* in 1982.¹⁸ In my opinion, quite apart from the historical and political context it provides, Chapter 4's most insightful section is Justice Bastarache's discussion on pages 56-65 of the Supreme Court of Canada's post-*Charter* language rights jurisprudence. These are mostly cases in which Justice Bastarache was involved as counsel or as a member of the Court.

Chapter 5 ("Language Rights Issues Today") stands out. It contains 15 tables and charts presenting statistical trends on a variety of issues of great interest to Canada's language policymakers and analysts. How many

¹⁶ RSC 1985, c 31 (4th Supp) [OLA].

¹⁷ *Charter of the French Language*, CQLR c C-11.

¹⁸ Hon Bastarache, *The Recognition of Two Official Languages in Canada*, *supra* note 1 at 54.

Canadians are bilingual? Does official bilingualism enjoy broad public support? How many young Canadians are enrolled in French, French immersion, and English schools? How many complaints does the Commissioner of Official Language receive every year, and in relation to which sections of the OLA? While the data is not entirely up to date, it is thought-provoking, clearly presented, and usefully illustrates historical trends. The chapter concludes with a discussion of a few ideas for reforming the OLA, including greater emphasis on the promotion of bilingualism, tougher enforcement mechanisms, stronger minority institutions, and second-language learning opportunities.

Chapter 6, aptly titled “General Conclusion”, is a final reflection on the particular role language laws play in Canada in fostering linguistic and cultural security, while also bringing Canadians together around shared values and sense of community.

CONCLUSION

Readers of this book will undoubtedly receive an authoritative historical and legal account of Canada’s current official language scheme. They should keep in mind, however, that notable recent developments that arose after the manuscript was submitted to the publisher are not addressed. For example, the author’s discussion of the OLA modernization does not extend beyond the 2021 federal policy statement on the subject.¹⁹ There is no mention of the ensuing government bills²⁰ or of the fully revamped OLA that received royal assent in June 2023, after the book was published.²¹ Similarly, recent landmark language rights decisions fall outside the scope of the book.²²

19 Heritage Canada, *English and French: Towards a Substantive Equality of Official Languages in Canada*, Catalogue No CH14-50/2021E-PDF (Ottawa: Heritage Canada, 2021).

20 Bill C-32, *An Act to amend the Official Languages Act and to make related and consequential amendments to other Acts*, 2nd Sess, 43rd Parl, 2021 (first reading 15 June 2021) ; Bill C-13, *An Act to amend the Official Languages Act, to enact the Use of French in Federally Regulated Private Businesses Act and to make related amendments to other Acts*, 1st Sess, 44th Parl, 2023 (assented to 20 June 2023).

21 OLA, *supra* note 15.

22 See *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 (whether Charter values and the purpose of s 23 should direct ministerial discretion on enrolment of non-right holders); *Acadian Society of New Brunswick v Right Honourable Prime Minister of Canada*, 2022 NBQB 85, rev’d 2024 NBCA 70 (whether the Charter requires the Prime Minister of Canada to appoint a bilingual person to the office of Lieutenant-Governor General of New-Brunswick).

The unassailable value of this tome lies in the clear, concise and experienced voice of its author. It is a welcome and valuable contribution to the relatively limited English-language legal literature on this important area of study and practice.

