The legal origins of our linguistic duality

Receiving the medal of the Quebec Bar Association, former prime minister Brian Mulroney pointed out that Canada’s constitutional traditions began not with the Charter of Rights in 1982, but with the Constitution Act in 1867. To an audience of jurists, he spoke at length of the rule of law and an independent judiciary as cornerstones of our democracy.

Quebec is unique in Canada and North America, as the keeper of two great legal traditions, British common law and French civil law. Quebec is truly a bridge between Europe and America, between the old world and the new.

The bilingual character of our country has its very origins in the duality of our legal heritage. Long before there was a Charter of Rights, this duality was reflected in the Constitution Act of 1867, in words which many of us know by heart:

Either the English or the French Language may be used by any Person in the Debates of the House of the Parliament of Canada and of the Houses of the Legislature of Quebec…and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

This is the fundamental bargain of Confederation, set out in a single paragraph, article 133, of the British North America Act.

Among other things, this reminds us that the Canadian constitutional tradition of a pluralist, tolerant society did not begin in 1982. The Charter, whose 25th anniversary we observe this year, and which was preceded by the 1960 Diefenbaker Bill of Rights, is a continuum of the BNA Act, whose legal foundation can, in turn, be traced to the Quebec Act of 1774, and the Constitution Act of 1791. These are not mere dates in our history, but the legal foundations upon which our modern state has been built, from one generation and one century to the next. The Meech Lake Accord, had it been promulgated in 1990, would have become part of that constitutional continuum.

My time as prime minister was a period of transformational change for Canada. And my service was informed by my formation in the law. I understood the primacy of the rule of law. I also understood the importance of an independent judiciary, as the greatest and most important guarantor of our liberties.

Therefore, this occasion, of being honoured by my own profession, is uniquely significant to me. Thus, the two points I want to discuss: the rule of law and the independence of the judiciary.

The rule of law is not obscure, and the independence of judges is not arcane. And in today’s connected world, they are not consigned to back issues of law reviews, nor are they echoes of forgotten debates at moot courts.

What do we mean by the rule of law? We mean that everyone is subject to it, and no one is above it, without exception, and without preference. Not the prime minister, not the governor general, not even the sovereign herself, on whose behalf the rule of law is a fundamental tenet of our free society.

What do we mean by the independence of the judiciary? We mean that Canada’s judges march to their own drummer. We mean that, while they are appointed by a political process, they are above politics.

The late chief justice Brian Dickson, one of the great Canadian jurists of the last century, put it very well when he wrote in 1986: “The role of the courts as a resolver of disputes, interpreter of the law, and defender of the Constitution requires that they be completely separate in authority and function from all participants in the justice system.”
As the former prime minister Arthur Meighen said in a Senate debate on the independence of judges in 1932: “A judge is in no sense under the direction of government. The judge is in a place apart.”

Judges interpret the Constitution, the Canadian social contract, from the division of powers in the Constitution Act to the equality rights provisions under the Charter. They enforce the Criminal Code. They adjudicate disputes and settle differences, in family law, in commercial law, in constitutional law. Those are all the normal functions of the judiciary. But independent judges are also the best guarantors of our freedoms, and in some cases, the last or only line of defence for the rights and freedoms of Canadian citizens, when they fall victims to abuse of power by their own government or to witch hunts carried out by the police.

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As a lawyer myself, I had a healthy respect for the opinions of others, and I thought it was, frankly, too much power concentrated in the hands of the prime minister and the government.

In 1986, I decided that the best way to strengthen the integrity and independence of the judiciary was to create a new structure that ensured we appointed only the very best to serve: we did that by creating judicial advisory committees in each province, empowered to review and reject candidates for the bench. They had the final word. The government undertook not to appoint anyone who had not been approved by this committee. This granted the Bar and the public powerful assurances of our intention to appoint only competent and independent candidates to the bench — people who had received prior approval of the Bar itself.

Since the files and process were completely confidential, no one was even embarrassed by negative publicity of being unqualified for appointment. The system wasn’t, and isn’t, perfect. But it did create a consultative process and a system of merit appointment, without opening up the judiciary to elections or Star Chambers, as has often been the case in the United States.
The ultimate responsibility for appointments still rested with the prime minister and minister of justice. We did our best to live up to the standards I have enunciated. At one point the Supreme Court of Canada was composed entirely of people I had the high honour and privilege to appoint: eight justices — John Sopinka, Frank Iacobucci, Gérard La Forest, Claire l’Heureux Dubé, Peter Cory, John Major, Charles Gonthier and Beverley McLachlin — and of course Antonio Lamer, whom I had elevated to the position of chief justice.

I took it as a primary obligation as prime minister to ensure that only people of the highest competence and integrity were appointed. Partisan politics never intruded on these considerations. There was place for that elsewhere in the system of government appointments. I am not infallible and I am sure mistakes were made. But the bench is the backbone of our civil society. Without fully independent judges, we will flounder and fail.

In private practice, I always marvelled at the competence and capacity of many colleagues, and often had occasion to do so when serving as prime minister. I made extensive use of both inside and outside counsel in such complex files as Meech Lake, the Free Trade Agreement, the NAFTA, the creation of the Sommet de la Francophonie and tax reform, including the GST.

In all of these important matters, I was constantly impressed by the tremendous knowledge, historical perspective and good judgment brought to the files by members of the Bar.

Let me give you the example of Meech Lake, an incredibly complex and politically sensitive file. At the long meeting at the Langevin Block, there was a question by Premier Peterson of Ontario, echoing the concern of his attorney general, Ian Scott, as to whether the distinct society clause impacted on English minority language rights in Quebec. It was about three o’clock in the morning. I called for a break in the meeting and asked our inside and outside counsel downstairs to my office and put Mr. Peterson’s question to them. They both said no, there was no impact on minority rights. Each had unique standing in the profession. Our inside counsel, Frank Iacobucci, then deputy minister of justice, was a former dean of law at University of Toronto and later a justice of the Supreme Court of Canada. Our outside counsel was Roger Tassé, the former deputy minister of justice at the time of the adoption of the Charter and one of Canada’s most brilliant legal minds.

When I pointed out that Mr. Scott’s concerns had been shared by
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Mr. Trudeau in his article denouncing Meech, Mr. Tassé observed: “You know, Prime Minister, I wrote much of the Charter. Trudeau and Scott are wrong. Nothing in Meech dilutes minority rights.” Frank Iacobucci agreed fully.

As prime minister I was reassured to receive legal advice of that calibre, at a crucial moment in the negotiations. As I told them then: “I want you to come back into the meeting and tell them what you just told me, in just those words.”

The advice of our inside and outside counsel, both of them on the same page, was critical to the success of that historic meeting, 20 years ago.

As for the rule of law, the best example I can offer you is in the negotiating history of the Free Trade Agreement with the United States.

The US system of resolving trade-related disputes was to have a self-interested allegation of subsidy or dumping decided by a group of partisan appointees of the administration, and — surprise, surprise — many of these calls went in favour of the home team.

We therefore made a fair and even-handed dispute resolution system one of our primary goals. Throughout the negotiations, we cared more about this issue than did our negotiating partners. There are reasons for this, including the definition of injury in trade law, which, because of the small size of our market and the proportion of our output that is exported, made it easier for the US to invoke against us than the other way around.

Be that as it may, through persistence and our calling upon US political will at the highest levels, we managed to get a dispute resolution system which, even if it allowed for each country to continue to apply, and even amend, its own trade laws, created a brand new system of binational panels with rotating chairs to ensure that decisions rendered were free of political influence and on the basis of judicial interpretations of the actual laws — that is to say, in accordance with the rule of law.

Unless we achieved this objective, we were prepared to walk away and told the Americans so. The agreement was signed only as the hands of the clock ticked toward midnight on the last day of President Reagan’s fast-track negotiating authority. Only then, and only when they were assured we would walk rather than accept a deal without dispute settlement, did the Americans relent.

So the Free Trade Agreement was approved by us only when we were sure that disputes would be determined in accordance with the rule of law. Canada has given as good as it has got — winning and losing disputes, but not systematically subjecting ourselves to a game where the opposing coach was also the umpire. I am very proud of that.

The rule of law and the independence of the judiciary are at the very heart of our freedoms, in which all us stand before the law as equals.

We must defend them ferociously and guard them with our very lives. Our entire democratic system rests on this reality.

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