

# THE OTHER SOLITUDE

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It is a fact that New Brunswick's two official linguistic communities don't really know much about each other. There are many points of contact between francophones and anglophones in New Brunswick, but the two groups have not really been able to develop a real sense of understanding of each other. This is probably an overly simplistic conclusion to the relationship of the two communities in New Brunswick.

Certainly from the Acadian community's perspective, it is impossible to live in New Brunswick or in Canada and to ignore the presence of the anglophone community. The anglophone community is present in almost every aspect of the francophone community's daily life: they watch English-language television; they listen to English-language radio; they read the English press every day; they watch English-language movies; there are English expressions on the billboards all over the province, including predominant francophone regions, and English is the language of business and on the streets in many francophone areas of New Brunswick. In some cases, the presence of the English language and culture is so pervasive in the francophone community that it needs to shelter itself from them, a situation which immediately feeds into the misunderstanding between the two communities. Take, for example, the policies of many French-language schools in New Brunswick to ban the use of English during school hours. This is not well understood in the English community, while in the French community, people believe that sometimes it is necessary to adopt such policies in order to protect and preserve the French language.

The francophone community of New Brunswick cannot ignore the presence of the other linguistic community. The situation is inherently different for an anglophone in New Brunswick. He or she can go about his or her daily life without seeing, hearing or thinking about the French community. It is not as overly present in his or her daily life as English is in that of the francophone. How many anglophones have listened to a French movie or even had the chance to see one in New Brunswick, or listen to French radio or television programmes?

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Unfortunately, the misunderstanding and the lack of knowledge of the other community is not only limited to New Brunswick. It is a reflection of the relationship between French-speaking and English-speaking Canada. The situation gets even more complicated when aboriginal groups and multi-cultural groups are added to that scenario. The problem in Canada right now is that people from various backgrounds don't know enough about the other communities. This being the case, the puzzle becomes, where do francophone communities outside Quebec fit in this picture ?

Over one million francophones live outside Quebec. Apart from New Brunswick, and probably Ontario, their demographic weight in other provinces is insignificant. These communities have to battle the never-ending scourge of assimilation, which year after year decimates their numbers. They are a minority in North America and they have to fight every day for their cultural survival. For English-speaking Canada and even for French-speaking Québécois, these communities do not even seem to exist. A personal example of that situation is that of the Canada Council of Law Deans. The Dean of Law of the Université de Moncton is a member of the council and as a common lawyer, he or she should feel at ease with his or her colleagues from the common law schools. But they are anglophones, teach law in English and don't really understand the difficulty of teaching and practising law in French in the common law provinces. The Dean of Moncton should, then, have an affinity with the Québec law deans, who are French. They, however, are civil, not common lawyers. So although he or she has a linguistic affinity, the legal differences keep them apart. This is just another example of a situation where a francophone outside Québec does not really fit in. He doesn't fit in with the francophones in Québec and he doesn't really fit in with English Canada.

To come back to the constitutional debate, I have been asked to assess the Calgary proposals from an Acadian point of view.<sup>1</sup> There is nothing in these proposals for the francophone communities outside Quebec. The Calgary proposals can be characterized as another attempt to reconcile the majorities - that is, the French-speaking majority in Quebec and the English-speaking majority in the rest of Canada. There is nothing wrong with this objective; if this is what it takes to keep

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<sup>1</sup> The Calgary Declaration is a framework for discussion on unity, which was released by nine premiers and two territorial leaders in September, 1997. The document recognized Quebec's unique character and provided for a broader commitment to equality and diversity in the future. See T. Glenn, *The Calgary Declaration* (Toronto: Ontario Legislative Library, Legislative Research Service, 1998) for the text of the proposals and responses to the declaration by the public, the federal government, Quebec Premier, and Aboriginal Canadians.

Quebec in Canada, so be it. But in the process of making up, couldn't Quebec and the rest of Canada find a little place, for francophone communities outside Quebec? To better understand the situation of these francophone communities, it is useful to take a cursory look at Canadian constitutional history as it pertains to these communities.

Francophone communities outside Quebec did not have in 1867, sufficient numbers or political clout to demand constitutional protection and recognition of their presence in Canada. Section 133 of the *British North America Act* deals with language.<sup>2</sup> It was enacted not to protect francophone communities outside Quebec, but to protect the use of English in Quebec in the National Assembly and the use of French in the Canadian Parliament in Ottawa. It could serve no other purposes for any other linguistic groups. When Manitoba entered the confederation, provisions similar to s.133 were also included in the *Manitoba Act*, s.23.<sup>3</sup> This was a concession to the significant presence at the time of francophones and Métis in Manitoba. The same thing can be said for s.110 of the *North West Territories Act*<sup>4</sup> as it applies to Saskatchewan, Alberta, the Yukon and the Northwest Territories. Unfortunately, these two sections were soon forgotten — only to be resurrected

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<sup>2</sup> *Constitution Act, 1867*, s. 133: "Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; 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."

<sup>3</sup> S.C. 1870 c. 3, now R.S.C. 1985 App. II No. 8, s. 23: "Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; 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 the British North America Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages."

<sup>4</sup> Section 110 of *The North-West Territories Act*, R.S.C. 1886, c.50 was repealed and substituted in S.C. 1891, c.22, s.18, which provided that: "Either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of such Assembly; and all ordinances made under this Act shall be printed in both those languages: Provided, however, that after the next general election of the Legislative Assembly, such Assembly may, by ordinance or otherwise, regulate its proceedings, and the manner of recording and publishing the same; and the regulations so made shall be embodied in a proclamation which shall be forthwith made and published by the Lieutenant-Governor in conformity with the law, and thereafter shall have full force and effect." See S.A. Scott, *Mercure v. The Queen. Language Rights and Legislative Interpretation*, in J. McEvoy & R. Johnson, eds., *Gerald V. La Forest at the Supreme Court of Canada 1985-1997* (Winnipeg: Published for The Supreme Court of Canada Historical Society by the Canadian Legal History Project, Faculty of Law, The University of Manitoba, 2000) for further discussion on s.110 of the *North-West Territories Act* and the Court's decision in *Mercure v. The Queen*.

much later for Manitoba by the Supreme Court in the 1970s case of *Attorney General of Manitoba v. Forest*,<sup>5</sup> and in the 1980s for Saskatchewan and Alberta in *The Queen v. Mercure*.<sup>6</sup> In the case of Saskatchewan and Alberta, the Supreme Court, while recognizing that the linguistic rights contained in s.110 of the *NWT Act* still applied to those provinces, also accepted that they were not constitutional rights. The court also ruled that the two provinces could, if they so wished, abolish them, which they did with a certain sense of urgency — right in the middle of the Meech Lake debate with the blessing of then Québec Premier Robert Bourassa. The Alberta *Languages Act*<sup>7</sup> and the Saskatchewan *Language Act*<sup>8</sup> abolished s.110 as it applied to those two provinces. Until the 1960s, there was no recognition of Canada's linguistic duality beyond the aforementioned provisions. Following the report of the Bilingualism and Biculturalism Commission,<sup>9</sup> Canada finally passed an *Official Languages Act*<sup>10</sup> in 1969, hoping that this would ease the tensions between Canada's two official linguistic communities.

In New Brunswick, meanwhile, the Acadian community, which had been forgotten in 1867, had gained sufficient strength over the years to become a powerful political force. Louis Robichaud became in 1960 the first Acadian to be elected to the Office of Premier and he undertook radical reforms which favoured the Acadian community.<sup>11</sup> Those years also saw the establishment of the Université de Moncton and the enactment in New Brunswick of the *Official Languages of New Brunswick Act*.<sup>12</sup> Under the Premiership of Richard Hatfield, the 1970s saw the Acadian

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<sup>5</sup> [1979] 2 S.C.R. 1032.

<sup>6</sup> [1988] 1 S.C.R. 234.

<sup>7</sup> S.A. 1988, c. L-7.5.

<sup>8</sup> S.S. 1988-89, c. L-6.1.

<sup>9</sup> Canada, *Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen's Printer, 1967).

<sup>10</sup> S.C. 1969 c. 54, now R.S.C. 1985, c.O-3.

<sup>11</sup> For example, former Premier Robichaud was responsible for the implementation of the Program of Equal Opportunity (EO) in New Brunswick. The goal was to redistribute wealth and create equal opportunities by reallocating responsibilities and fiscal arrangements between the provincial government and the municipalities and other local bodies. Due to the disparities in economic development between the two linguistic communities, the effects of the program were greater on the Acadians. For readings on the Robichaud government and other reforms in New Brunswick, see *The Robichaud Era, 1960-70: Colloquium Proceedings* (Moncton, N.B.: The Canadian Institute for Research on Regional Development, 2001).

<sup>12</sup> S.N.B. 1969, c.14, now see R.S.N.B. 1973, c. O-1.

communities demanding more rights, specifically over education. Education plays a vital role in the preservation and promotion of linguistic and cultural vitality and there is an important connection between education, language and culture. As such, it is not only important that instruction be given in the language of the minorities; it must also be given within the minorities' cultural context. Instruction in the minority language in immersion classes or in a bilingual school system cannot satisfy this objective due to the cultural decontextualization of the teaching. To the Acadian community, the answer could only be found in a dual school system, the demand for which the provincial government finally answered.

In the 1970s, there was a long battle for duality in the school system in New Brunswick. It was a difficult experience for both members of the majority and of the minorities. It was difficult for the majority to understand that the bilingual school system in New Brunswick at that time was serving no other useful purpose than the accelerated assimilation of the francophone community. The majority also had difficulty understanding that after having gained bilingualism, the Acadian community would go a step further and demand duality. Many anglophones mistakenly saw duality as antithetical to bilingualism, but both live well together. As a policy, bilingualism is a solution to the problems of communication and provision of services in a society with two linguistic communities, while duality is a method of organizing society, in order to give both groups power over decisions that affect them. Duality does not mean segregation or separation. It only means that each group has control of the decision-making process in matters which affect them fundamentally.

The 1970s also saw the election in Québec of René Levesque's Parti Québécois. The election of the Parti Québécois and its objective of separation had a direct effect on the events that followed. This election and the referendum of 1980 were, to a certain degree, positive events for francophone communities outside Quebec. The federal government and some provincial governments, particularly the government of New Brunswick, started then to take notice of the importance of minority rights.

Following the victory of the "no" side in the referendum, Canada entered a period of constitutional reform which benefited francophone communities outside Quebec; their existence was finally recognized in the Canadian constitution. 1982 saw the entrenchment of rights pertaining to the use of the two official languages at the federal level and in New Brunswick in the new *Charter of Rights and Freedoms*

(see ss.16 to 20 of the Charter<sup>13</sup>). During the constitutional talks leading to the adoption of the Charter, Ottawa tried to gain the support of the provinces of Ontario and New Brunswick. Bill Davis, then Premier of Ontario, refused, but Hatfield was so elated by the results of the Quebec referendum, he decided that the time had come for New Brunswick to go a step further and recognize the province's bilingual nature in the constitution. This showed Quebec that English-speaking Canada was ready to accept a linguistic duality in at least one province.

Also enacted at that time was s.23 of the *Charter*, which protects minority education rights. Essentially, s.23 gave official language minority parents two levels of rights. The first was the right to have their children receive instruction in the language of the minority, (para. 23(3)(a) of the *Charter*) and the second was the right to manage the educational facilities that provide that instruction, para. 23(3)(b)<sup>14</sup>.

The second right was recognized in two very important Supreme Court of Canada decisions - *Mahe v. Alberta*<sup>15</sup> and *Reference re Public Schools Act of Manitoba*,<sup>16</sup> and was again reaffirmed in a recent decision of the Supreme Court in *Arsenault-Cameron v. PEI*<sup>17</sup> In the *Mahe* decision, Chief Justice Dickson states that minority language representatives should have the exclusive right to make decisions

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<sup>13</sup> Section 16 of the *Constitution Act, 1982*, provides that English and French are the official languages of Canada and New Brunswick. S.16.1 amends the *Constitution Act, 1982* (*Constitution Amendment, 1993* (New Brunswick)) and gives both English and French linguistic communities in New Brunswick equality of status and equal rights and privileges. It also includes the right to distinct educational institutions and cultural institutions for the purpose of preserving and promoting those communities. Furthermore, s.16.1(3) provides that the legislature and government of New Brunswick is to "preserve and promote the status, rights and privileges" referred to in subsection (1). Sections 17 to 19 of the *Constitution Act, 1982*, restate the language rights set out in section 133 of the *Constitution Act, 1867*, in respect of Parliament and the courts, and also guarantees those rights in respect of the legislature of New Brunswick and the courts of that province. Finally, s.20 recognizes the right of communication for services from any head or central office of an institution of the parliament or government of Canada in English or French.

<sup>14</sup> *Constitution Act, 1982*, s.23(3): "The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds."

<sup>15</sup> [1990] 1 S.C.R. 342.

<sup>16</sup> [1993] 1 S.C.R. 839.

<sup>17</sup> [2000] 1 S.C.R. 3.

relating to minority language instruction and facilities.<sup>18</sup> In New Brunswick, as it was done by other provinces, Francophone parents are taking the provincial government to court over the province's new *Education Act*.<sup>19</sup> They are challenging the constitutionality of this legislation on the ground that it does not comply with the obligation contained in s.23. Their main argument is centred around the notion of exclusive authority recognized by the Supreme Court. At best, the new *Education Act* provides that many of these powers are to be shared with the Minister of Education. According to the parents, the *Act* only gives parents an advisory role and threatens the rights of New Brunswick Acadian communities to manage their education system.

The recognition of these constitutional rights was seen as a positive step by francophone communities all across Canada, but the Supreme Court decision in *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*<sup>20</sup> dampened any hope that these provisions would be, by themselves, sufficient to promote linguistic equality in Canada. The court ruled that they were different from the other fundamental rights in the Charter. Since they were the result of a political compromise, courts should take care when integrating these rights. Two recent decisions of the Supreme Court of Canada have all but overruled this decision. In *R. v. Beaulac*<sup>21</sup> and *Arsenault-Cameron*, the Supreme Court stated that language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada and that to the extent that *Société des Acadiens* stands for a restrictive interpretation of language rights, it is to be rejected.

Then came the Meech Lake and Charlottetown Accords, which sought to redefine Canada in an attempt to answer Quebec's historical demands. The Accords did not receive a warm welcome from francophone communities outside Quebec, for they could not accept the way in which the Accords defined Canada's linguistic duality. In retrospect, the Accords did not in any way diminish the rights of these communities. The real reason for their opposition to the Accords was their frustration towards Quebec, whose government had, on many occasions, opposed their linguistic struggles. For example, in both the *Mahe* and *Mercure* decisions, the government of Quebec took the opposite side from the francophone communities.

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<sup>18</sup> *Supra* note 16 at 375-76.

<sup>19</sup> S.N.B. 1997, c. E-1.12.

<sup>20</sup> [1986] 1 S.C.R. 549.

<sup>21</sup> [1999] 1 S.C.R. 768.

This, along with the arrogance of the Mulroney government towards the francophone communities, was too much for them to take. These are the main reasons why the communities opposed the Meech Lake Accord.

For its part, the Acadian community in New Brunswick did not like the way the Accords described its reality. Since the enactment in 1981 of the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*,<sup>22</sup> Acadians felt that the definition of Canada's fundamental characteristics in the Accords did not reflect the social contract between the two official linguistic communities in New Brunswick. The linguistic reality of this province was different and it needed to be expressed as such in the Constitution. From the very beginning, it was suggested that this demand of the Acadian community could be met without reopening the Meech Lake Accord. The amending formula under s. 43 of *Constitution Act, 1982* provides that an amendment pertaining to one province may be made by proclamation issued by the Governor General of Canada when authorized by a resolution of the Senate and the House of Commons and the Legislative Assembly of the province concerned. The demand for the entrenchment of this Act pertaining only to New Brunswick could then be obtained on a bilateral basis between Ottawa and New Brunswick without affecting Meech.<sup>23</sup> Ultimately this was accomplished and it is rather ironic that the only thing that was salvaged from the Meech Lake process was this simple amendment pertaining to New Brunswick which was demanded by the Acadian community from the very beginning.

This little historical perspective is useful for understanding the situation of the Acadian and Francophone communities outside Quebec in the present constitutional debate. Over the years these communities, and more particularly the Acadian communities, have succeeded in obtaining certain protections under the *Charter* and under the federal *Official Languages Act*. Unfortunately, these gains are often overshadowed by the debate over Canadian unity, in which Francophone communities outside Quebec have very little input, even though the results could be dramatic for them.

Quebec nationalists are taking the two-prong approach. On the one hand, they hold, without any explanation, that Francophone communities outside Quebec would be better off with an independent Quebec. On the other hand, they seem to believe

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<sup>22</sup> S.N.B. 1981, c. O-1.1.

<sup>23</sup> See section 16.1 of the *Constitution Act, 1982*, which provides for the equality of the two linguistic communities in New Brunswick.



that these communities are not worth any consideration, that they are "dead ducks." Some sovereignists believe that the Francophone communities outside Quebec are not even worth any consideration because they will disappear over time. For their part, federalists would like to see the communities take a tougher stand towards Quebec sovereignists.

Francophone communities are caught in the middle. On the one hand, they don't want to play the game of the Quebec sovereignists but on the other hand, they also recognize that as Quebec is the only majority French jurisdiction in North America, it needs to protect by legislation, if need be, the French character of its society. Meanwhile, even though they are strong federalists, Francophone communities outside Quebec have come to the sad realization that the rest of Canada barely acknowledges their existence and that their situation in most Canadian provinces is far worse than that of the English-speaking communities in Quebec, Bill 101 notwithstanding.<sup>24</sup>

Francophone communities outside Quebec consider themselves pawns in a chess game over which they have no control. The nationalist movement in Québec keeps pressuring them to give complete support to Québec sovereignty while offering nothing in return. On the other hand, the federal government, which holds the purse strings to many of the programmes for these communities, cannot be ignored and does not see in a positive light any courtship between Québec and these communities. Being strong federalists, francophones outside Quebec are hard pressed to show how Canada's federal structure has helped them to preserve and protect their heritage. In every province, except New Brunswick where the rate is 9%, the assimilation rate reaches astronomical proportions, well over 25% and even in some cases, well over 50%. It is clear that the federal policy on languages has not been that successful in curbing assimilation. Provincial governments, again with the possible exception of New Brunswick, have completely ignored these communities, refusing in some cases to even acknowledge their existence. To this situation must also be added the fact that francophone communities were often the victims of English Canada's reaction to decisions made in Quebec. English-speaking Canada tends to overreact to developments in the language front in Quebec. French communities outside Quebec often become scapegoats for decisions which were made in a very different context. The linguistic problem in Quebec is totally different from that in New Brunswick. It is not a matter of the co-existence of a

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<sup>24</sup> Section 33 of the *Constitution Act, 1982* was invoked to protect bill 101, *Charte de la Langue Française*, 31<sup>st</sup> Leg., 2<sup>nd</sup> sess., Qc, 1977, now R.S.Q. 1977, c. C-11, which required French-only commercial signs and firm names.

majority with a minority, but rather the matter of the co-existence of two minorities in the same province. French-speaking Quebecers are part of a minority in Canada and North America and their unique character must be protected, unlike English-speaking Quebecers, who, even though they are part of a minority in Quebec, are also part of a majority in Canada and in North America.

Going back to the Calgary proposals, there is nothing in them for francophone communities outside Quebec; their existence is reduced to the reference of "collective presence" or to the "need to protect or promote our existence." They had reason to be worried by this definition of Canada. It confirms that Canada is basically French Quebec and English Canada. On the other hand, the francophone communities outside Quebec understood that their expectations should not be too high. They accept that the Quebec question should be the central focus of the present constitutional debate and are conscious of the fact that they cannot oppose new proposals because they would then be singled out as opposing the work of those who want to find a solution to keep Quebec in Canada. They know very well that the presence of Quebec in Canada is essential to their future. If the price of achieving this goal is the recognition in the Canadian constitution of Quebec as a distinct or unique society, so be it. Even though, in the past, there have been and there will certainly be in the future, strong differences between the government of Quebec and the francophone communities outside Quebec, the presence of Quebec in the Canadian federation is fundamental to their survival. Québec's presence best guarantees the need for linguistic policies at the federal level. The significant presence of French-speaking Quebecers in the federal public service also insures continued support francophone communities outside Quebec.

Another reason why the presence of Quebec is so essential for the future of francophone communities outside Quebec is that the alternative is too uncertain and can only be detrimental to these communities. If Quebec ever decides to leave Canada, there may be no future for the federal government's involvement in official language minority programmes. Why would Ottawa be concerned with a minority which then would be outnumbered by many other minority cultural groups? In New Brunswick, the Acadian community, in the short term, might be better off than the rest of the francophone communities outside Quebec. The Province of New Brunswick, however, relies on substantial cash infusions from Ottawa in order to pay the bill of its official bilingualism. Were Ottawa to withdraw from these programmes, New Brunswick would have to rearrange its finances to find necessary money to support its legislative and constitutional linguistic obligations. Great pressures would then be exerted on the government to review the linguistic arrangements of the province. I do not even dare talk about the possibility of the

union of the Maritime provinces and what dramatic effect this would have on the Acadian community of New Brunswick.

It is against this background that the Acadian and francophone communities of Canada have to look at the constitutional debate. They feel that they should be part of the solution. They believe that Canada should do more to protect and promote their existence, but they realize that at the present time nobody speaks for them and that their voice is not being heard at the political level.

Why should francophones outside Quebec expect to be treated differently than anybody else? Why should they expect that their concerns will be addressed. The answer to those questions rests in the short history of the Canadian constitution pertaining to francophone communities. The principles of the two founding nations were recognized in s.133 of the *Constitution Act of 1867*, and s.23 of the *Manitoba Act*, in s.110 of the *North West Territories Act*, in ss. 16 to 20, and s.23 of the *Charter*, in the *Act Recognizing the Equality of the Two Linguistic Communities in New Brunswick* and in the *Official Languages Act* of this province. In addition, the *Official Languages Act of Canada* commits the federal government to enhancing the vitality of the English and French linguistic communities and supporting and assisting their development. The francophone communities across Canada, outside Quebec, are not seeking a special status, but simply that the federal and provincial governments of Canada respect and abide by their legal and constitutional obligation towards them. Again, it is appropriate to quote from Bernard Richard who stated in an article "Le mythe de l'égalité" that what the francophone communities are asking for is that their government respect the legal obligations towards them. In French he read,

Toutes nos aspirations et toutes nos revendications peuvent se traduire par un seul mot: l'égalité, ni plus, ni moins. Ce ne sont pas les solutions qui manquent, mais plutôt la volonté ferme, inébranlable et solidaire d'atteindre un statut égalitaire.<sup>25</sup>

For francophone communities outside Québec, the question of national unity is not an abstract theoretical problem which should only be discussed in an academic setting. It is to the contrary a real issue - a fight for the survival of their cultural identity and for the future of their children.

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<sup>25</sup> B. Richard, "Le mythe et l'égalité" (1985), 15 *Égalité* 105 at 110.