LANGUAGE RIGHTS: CANADA'S NEW DIRECTION

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I

Tension between Ottawa and Quebec exploded during the Trudeau years. The FLQ crisis, proclamation of the *War Measures Act*, election of the Parti Québecois, stalemate over constitutional reform, the Quebec Referendum and the humiliation of Quebec at patriation created anxiety in the political relationship between Canada's English and French communities. An augmented language politics surfaced, supercharged with significance. Each new language conflict reminded everyone that the language pot could boil over unpredictably, extinguishing all hopes for the grand Canadian experiment. Independence for Quebec became substantial and intimidating.

In 1969 the *Official Languages Act*[1] sought to make the Federal Government open and accessible to Quebeckers through instituting a comprehensive program of language equality. This program included provision for bilingual service to the public, the use of English and French as languages of work in the public service and the equitable participation of anglophones and francophones in public service employment. At the same time, Ottawa provided new support to official language minorities in the provinces - support for their political lobbies, cultural activities, educational structures - even support for court actions brought by them to enforce constitutionally guaranteed language rights. The purpose of Ottawa's efforts was "to resist the blandishments of a Canada split along language lines. . . to construct a society in which the minorities can expect to live much of their lives in their own language."[2]

The official languages policy was complicated by the fact that it served two policy goals which were partially irreconcilable and two client groups that had conflicting objectives. The principal client group was Quebecois, and the goal was to remedy the virtual exclusion of the French language from the Federal administration.[3] By addressing this question directly through language of work, language of service and equitable participation goals, the 1969 policy attempted to appease the grievances of Quebecois, attract their loyalties, and co-opt them away

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[1]R.S.C. 1970, c. 0-2, as rep. by S.C. 1988, c. 38.

[2]Commissioner of Official Languages, *Annual Report*, 1983, preface.

[3]The exclusion of French had been noted in the *Report of the Royal Commission on Bilingualism and Biculturalism*, Vol. I, The Official Languages (Ottawa: Queen's Printer, 1967).

from nationalism by giving them an important stake in the federal government machinery.

The second client group of the 1969 policy was the official language minorities in the provinces, and the goal was to maintain, and in some cases, to resuscitate them. This was meant to have symbolic value in Quebec, for it drew a portrait of Canada where Quebecois could inhabit communities in Canada beyond Quebec without feeling culturally and linguistically foreign - where larger Canada, then, offered Francophone Quebeckers something tangible, just as Quebec offered anglophones the possibility of moving there, and living and working in English.

These two goals came into conflict. Support for official language minorities meant support for the Anglo-Quebec community, since the 1969 policy created an equivalence between all official language minorities. This brought Ottawa into direct conflict with Quebec, for it was the goal of language planners in Quebec to restrict the English language in that province.[4] The 1969 policy also brought Ottawa into conflict with the provinces with anglophone majorities. Those provinces had significant, vocal, anti-bilingualism constituencies. When Manitoba tried to expand services for Franco-Manitobans in 1983, those constituencies created a political crisis which paralyzed the Manitoba Legislative Assembly and ended support for the New Democratic Party government.[5] In short, enhancing minority rights did not impress, and to some extent offended Quebec; ignoring francophone minorities, especially during overheated periods, added rhetorical fuel to the nationalist fire.

Because the real purpose of Ottawa's official languages policy was to address the threat coming from Quebec, Ottawa concentrated its efforts on providing tangible benefits to Quebeckers. This meant opening the federal public service to Quebecois, and it was in this endeavour that Ottawa made the most progress. Writing in 1983, the Commissioner of Official Languages, who is a professional paid to complain about Canada's linguistic woes, observed with justification that

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[4]For example, Bill 101, *Charter of the French Language*, R.S.Q. c. C-11, ss.58 and 69 prohibited the use of English (and languages other than French) on commercial signs and for firm names. Section 1 declares French to be the official language of Quebec. Sections 58 and 69 were invalidated in *A.G. Quebec v. Chaussure Brown's Inc.* and *Singer v. A.G. Quebec*, [1988] S.C.R. 234. To some extent Quebec was willing to make concessions to its anglophone minority based on reciprocal treatment for francophone minorities outside of Quebec. Premier Levesque offered the anglophone provinces "accords de reciprocité" with respect to minority language instruction. See generally, J.E. Magnet, "Minority Language Educational Rights" (1982) 4 Sup. Ct. L. Rev. 195, 200. Both Ottawa and the provinces objected. Later Quebec took the view that provincial francophone minorities were past the point of no return, and were doomed. This view was expressed by many Quebec politicians, the most notable perhaps being the unfortunate statement made by Gerald Godin, Minister of Cultural Affairs and Minister responsible for Bill 101, in 1983 during the height of the Manitoba language rights crisis: See the interesting cartoon by Bado titled "Une cause perdue, dit Gerald Godin" in [Ottawa] *Le Droit* (20 September 1983).

[5]See generally *Reference Re Manitoba Language Rights*, [1985] 2 S.C.R. 721, where the history of these events is partially recounted.

"the linguistic face of the federal administration has been transformed."[6] Ottawa's support for provincial language minorities was somewhat symbolic. Ottawa's efforts never slowed demolition of Canada's linguistic communities by the inexorable march of assimilation which eclipsed minorities by as much as eighty-eight per cent in some provinces.[7] Francophone communities outside of Quebec as well as the Anglo-Quebec minority continued to decline in real numbers and as a percentage of total provincial population. Francophone communities outside of Quebec had no significant institutional infrastructure before the 1969 policy and this did not improve in the following years. Nevertheless, Ottawa did *something* in 1969, and the symbolic import, coupled with real changes in the Federal public sector, was considerable.

Ottawa's symbolic currency converted to real value for official language minorities in ways unforseen by the 1969 policy. Parents in the provinces with anglophone majorities sent their children to immersion schools in record numbers, rising from 17,763 children in 1976-77 to 102,168 children in 1982-1983.[8] This brought the two language communities into contact with each other, resulting in a profound transformation of attitudes in English Canada - an increasing open-mindedness.[9] Francophone minorities viewed the phenomenon as a mixed blessing. It was seen as an opportunity to replenish their declining ranks, and also, anxiously, as a new source of competition for economic opportunities which formerly had been open to them alone because of their bilingual ability.

Ottawa also made real and symbolic progress towards creating a coherent picture of Canadian linguistic duality during the Trudeau years. By the early 1980's this vision was reasonably well formed and was rooted in the Canadian consciousness. The portrait was associated with Prime Minister Trudeau; in political debate it was referred to as "Trudeau's vision,"[10] and entailed a Canada

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[6]*Ibid.*

[7]The *Atlas des francophones de l'ouest* (1979) at 20 reports that in British Columbia 88 per cent of francophones are assimilated; 72 per cent in Saskatchewan; 54 per cent in Manitoba. Between 1971 and 1981 the anglo-Quebec community lost 158,000 people (20 per cent in real terms), declining from 15 per cent to 12.7 per cent of provincial population and expected to fall further to 10 per cent in the next ten years: J. Henripin, *The English Speaking Population of Quebec: A Demolinguistic Projection* (Alliance Quebec, 1984) at 19.

[8]H.H. Stern, "The Immersion Phenomenon" (1984) 12 Language and Society 4,7. These numbers exclude Quebec. Quebec prohibited the teaching of English to francophone students in the early elementary grades, resulting in increased unilingualism in that province.

[9]See generally, D. Cliff, "Towards the Larger Community" (1984) 12 Language and Society 65 at 66.

[10]It is fair to associate his name with it, since the vision can be found throughout his writings, speeches and legislative priorities. For example, Trudeau, *Federalism and the French Canadians* (1968), at 32: "the Canadian community must invest, for the defence and better appreciation of the French language, as much time, energy, and money as are required to prevent the country from breaking up. . . this can be achieved by a constitutional amendment granting French minorities in other provinces, as well as in Ottawa, the same rights and privileges as the English minority in Quebec." at 46: "The Fathers of Confederation showed great wisdom. . . while recognizing that French Canadians might always feel more at home in Quebec, they attempted to prevent the law from fostering in them a sense of inferiority or from giving them any excuse to feel like aliens in other parts of Canada. . . the Canadian constitution created a country where French Canadians could compete on an equal basis with English Canadians; both groups were invited to consider the whole

where citizens could live in many parts of the country in the language of their choice. Language planners call such phenomena "personal bilingualism," meaning that institutions of the state accommodate linguistic preferences of the individual by providing service in the official language of the individual's choice.[11] Mr. Trudeau's vision helped to encourage official language minorities by allowing for a small institutional network in the minority language. Where numbers warranted, the Federal government created or induced the provinces to provide minority language schools, community institutions, political lobbies, government services, public service employment opportunities, broadcasting and culture. Mr. Trudeau's vision conceived of viable English and French communities throughout Canada. This goal was more or less well understood by the end of the Trudeau years. It commanded significant acceptance[12] and, to some extent, this vision had been institutionalized in law, if not in reality, by the Patriation Reforms of 1982.

All of this activity, symbolic and real, made it seem as if Canada's habit of neglecting official language minorities was coming to an end. By 1983 even the Official Languages Commissioner could report, uncharacteristically, that "there is reason for Canadians to share a certain pride about how far we have come;" that "there is no turning back;" and point to "a brighter linguistic future there for the taking."[13] Even if this was the bitter-sweet valedictory speech of a retiring official, still the remarks did indicate just how profoundly optimistic many Canadians had become about relations between the two language communities.

II

Ottawa's actions and the resulting change in public attitudes impacted significantly on the Supreme Court of Canada. The Court's first look at official languages problems was in *Jones v. A.G.N.B.*.[14] This was a reference to determine the validity of the federal *Official Languages Act* and certain New Brunswick legislation supporting the provincial Acadian minority. The Court upheld the legislation, justifying its result in the usual federalism "techno-talk." However, with respect to language rights, Chief Justice Laskin was emphatic, describing language rights as providing "*special protection* for linguistic minorities."[15]

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of Canada their country and field of endeavour." The reasons why Trudeau perceived this vision as necessary are important. He writes at 31: "If French Canadians, and if their culture is established on a coast-to-coast basis, it is mainly because of the balance of linguistic forces within the country. . . . In terms of *realpolitik*, French and English are equal in Canada because each of these linguistic groups has the power to break the country."

[11]See generally J.E. Magnet, "The Future of Official Language Minorities" (1986) 27 C. de D. 189, 192 ff. where the language planning theory options are described.

[12]Thus, one reads the following editorial in the [Edmonton] *Sun* (7 October 1983): "The concept of Canada as a unilingual state is dead. . . we have two official languages. . . and every province will sooner or later have to meet its obligations to the Francophone minority."

[13]Commissioner of Official Languages, *Annual Report*, 1983, preface.

[14]*Jones v. A.G.N.B.*, [1975] 2 S.C.R. 182.

[15]*Ibid.* at 193; (my emphasis).

In 1979, the anglophone minority of Quebec and the francophone minority of Manitoba appealed to the Supreme Court of Canada for special protection against hostile provincial governments. The Anglo-Quebec minority sought special protection against secs. 7-13 of Bill 101[16] which purported to abolish English as a language of the legislature and courts, contrary to s.133 of the *Constitution Act, 1867*. The Franco-Manitoban situation was bizarre. By a provincial enactment of 1890,[17] Manitoba attempted to abrogate French as a language of the legislature and courts, contrary to s.23 of the *Manitoba Act, 1870*. Despite three lower court rulings[18] that the 1890 statute was invalid, Manitoba refused to respond. The Attorney General of Manitoba stated after the 1976 court ruling: "The Crown does not accept the ruling of the court with respect to the constitutionality of the *Official Language Act*." This prompted the Chief Justice of Manitoba to note: "A more arrogant abuse of authority I have yet to encounter."[19] Nevertheless, the Manitoba Legislature and Government continued to ignore the Court's ruling in that the illegal 1890 *Act* remained on the Manitoba statute books, and continued to be observed by the Province.

The Supreme Court reacted firmly with tough remedial protection, and tough talk to both provinces.[20] Building on the "special protection" language of *Jones*, the Court made clear that s.133 was an entrenched provision, tolerating no unilateral contraction of the protections therein declared. The Court then expanded s.133's protections beyond the express language of the text. "Section 133," said the Court, "ought to be considered broadly." It should not be read "overly-technical." Section 133 contained a principle "of growth," and on that principle the Court augmented s.133 beyond its express terms to subject a wide spectrum of institutions and statutory materials to the discipline of official bilingualism. As a final slap at Quebec, the Court noted that Quebec itself had taken an "enlarged appreciation" of the meaning of "Courts of Quebec" in stipulating for unilingualism therein. The Court rubbed Quebec's nose in this, holding that the bilingualism rule of s.133 would fasten throughout the range of institutions captured by Quebec's "enlarged appreciation."[21]

With respect to Manitoba, the Court was cold: the 1890 statute was invalid - period! The Court said not a word regarding the consequences. This left the impression that all Manitoba statutes since 1890 were void, as being in "flagrant contradiction" with constitutional requirements. The Court's studied silence brooded ominously in the Manitoba constitutional landscape,[22] dominating

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[16]*Charter of the French Language*, S.Q. 1977, c. 5.

[17]*Official Language Act*, S.M. 1890, c. 14.

[18]*Pellant v. Hebert*, (1892), [1981] 12 R.G.D. 242; *Bertrand v. Dussault*, (1909), [1977] 77 D.L.R. (3d) 445, 448; *R. v. Forest*, [1976], 74 D.L.R. (3d) 704.

[19]See [1977] 77 D.L.R. (3d) 445, 458.

[20]*A.G. Manitoba v. Forest*, [1979] 2 S.C.R. 1032; *A.G. Quebec v. Blaikie*, [1979] 2 S.C.R. 1032.

[21]*A.G. Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, 1028-30.

[22]See J.E. Magnet, "Validity of Manitoba Laws After *Forest*" (1980) 10 Man. L.J. 241 for a contemporaneous assessment of the legal consequences occasioned by the Supreme Court's ruling.

Manitoba politics for the next five years, and setting the Manitoba Legislature on a perilous collision course with constitutional imperatives.

In 1980, a rehearing in the Quebec case was ordered at the instance of Quebec to clarify the extent of government documents caught by the Court's ruling that regulations must be bilingual. The Court continued to apply an expanding interpretation to s.133,[23] to subject regulations made by the government to bilingualism, as well as government decrees which altered regulations made by a subordinate agency. Also, the expanding interpretation approach was combined with the special protection language of *Jones* to support a holding that Court rules of practice had to be bilingual. The Court's statement on this issue is interesting because it suggests a functional approach predicated on protecting the position of linguistic minorities in majoritarian institutions.[24]

In the *Manitoba Language Rights Reference*[25] the Supreme Court gave new life to official bilingualism through a robust, expanding, purposeful interpretation of constitutional guarantees. The Court used impressive rhetoric: "The purpose of [constitutional guarantees for official bilingualism]," the Court stated, "was to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike." Those guarantees "are obligatory. They must be observed. . . ." Failure to do so "leads to. . . invalidity."[26] The Court explained its previous ruling in *Blaikie I* from the perspective of full and equal access for the minority. *Blaikie I* requires equal authority and status for English and French because "[n]othing less would adequately. . . insure that the law was equally accessible to francophones and anglophones alike."[27] Most interesting was the court's development of its "special protection" doctrine first instituted in *Jones*. The Court went beyond special protection, to read constitutional guarantees for official bilingualism "purposive[ly],"[28] finding in them "a specific manifestation of the general right of Franco-Manitobans to use their own language," and imposing upon the judiciary "the responsibility of protecting the correlative language rights of. . . the Franco-Manitoban minority."[29] In short, the Court had found in the terse phrasing of ancient constitutional texts a system of

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[23]"The requirements of s.133 of the *B.N.A. Act* would be truncated, as was said by this Court [in *Blaikie I*] at p. 1027 of its reasons, should this section be construed so as not to govern [regulations made by the government];" *Blaikie II*, [1981] 1 S.C.R. 312 at 321.

[24]"All litigants have the fundamental right to choose either French or English and would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only;" *Blaikie II*, at 332.

[25][1985] 1 S.C.R. 721. This Reference was occasioned by the failure of Manitoba politics to resolve the constitutional difficulties posed by the 1979 *Forest* case. A Manitoba francophone forced the issue by challenging the validity of two unilingual Manitoba statutes in a *Highway Traffic Act* prosecution. At the request of the Société Franco Manitobaine, the Federal government referred the issue to the Supreme Court directly.

[26]*Ibid.* at 739-40, 746-7.

[27]*Ibid.* at 776.

[28]*Ibid.* at 751.

[29]*Ibid.* at 744-5.

minority protections.[30] Through a purposive, expanding, dynamic interpretation, the Court set out to reconstruct these special protections so to ensure full and equal access for the minority, in a meaningful way, to the range of governmental institutions to which they applied.

III

Had Ottawa acted consistently and persevered, the new openness created a substantial possibility that Mr. Trudeau's vision could have been implemented in institutional reality.[31] But Ottawa did not act consistently. Ottawa lacked steady resolve. Its reaction was often incomprehensible, contradictory and fickle. Ottawa was even, too often, an aggressive advocate against linguistic minorities. The Official Languages Commissioner noted Ottawa's curious conduct repeatedly in his Reports, illustrating the problem with incident after incident.[32]

Some egregious examples of cracked federal behaviour may assist to appreciate how damaging was Ottawa's demeanour to official languages policy. In 1978, as part of suggested constitutional reform, Ottawa proposed, without even consulting the Franco-Manitoban minority, to abolish constitutionally guaranteed official bilingualism in Manitoba.[33] Broadcasting regulators and the Canadian Broadcasting Corporation consistently refused to provide programming relating to local minority communities, seemingly oblivious to the fact that francophones in St-Boniface are not interested in strikes at Laval University. They are interested in strikes at St-Boniface College for which they have to switch to programming in English, contributing to their anglicization and assimilation.[34] Opportunistic federal politicians declared themselves willing to sacrifice linguistic minorities in exchange for anti-bilingualism votes in western Canada. The most spectacular example of this was a statement by John Turner at his opening press conference during the 1984 Federal Liberal leadership campaign. Governmental services for linguistic minorities, Mr. Turner said, were a provincial matter, and must be negotiated with the province. Since the statement was made at the

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[30]A "systems theory" is more fully developed in J.E. Magnet, "The System of Official Bilingualism" (1986) 18 Ott. L. Rev. 227.

[31]"Determined governments can counterweight the principal forces causing declining numbers in official language communities. Economic development, language of work, language of education, and language of media are phenomena on which governments can and do impact profoundly. . . . The development of our official language minorities is something that lies in our power as a political community to control." See J.E. Magnet, "The Future of Official Language Minorities" (1986) 27 C. de D. 189 at 194.

[32]For example, see Commissioner of Official Languages, *Annual Report* (1982) at 5: "Three things seem to be lacking from the federal image of linguistic leadership: consistency, imagination and subtlety. . . . Propounding a single, more harmonious vision of what Canada can reasonably aim for. . . is a much more worthwhile endeavour than pursuing a variety of fragmented and often incompatible causes."

[33]Canada, The Constitutional Amendment Bill: Text and Explanatory Notes [Bill C-60], June, 1978, s.131(4)(d).

[34]See Federation of Francophones Outside of Quebec, *The Heirs of Lord Durham: Manifesto of a Vanishing People* (1978) at 60.

height of the Manitoba language rights crisis, it was interpreted, as intended,[35] to signify weakening federal support for bilingualism, with more respect being paid to red-neck anti-bilingual sentiment activated by the overheated Manitoba events.

The most inexplicable, and the most damaging of all Ottawa's behaviour, was the posture Ottawa adopted in Court. At first, the Federal positions in official languages litigation seemed merely incompetent. In its initial factum in *Bilodeau* the Justice Department embraced the strange suggestion that all Manitoba statutes prior to 1979 were valid by the doctrine of necessity. This position would have resulted in a *pro tanto* repeal of official bilingualism. Protracted lobbying by the Société Franco Manitobaine succeeded in having Ottawa's factum withdrawn, and a special counsel appointed for the government. The next Federal factum attacked the Franco-Manitoban position directly. The *Manitoba Language Rights Reference* became a contest between the Franco-Manitobans and Canada,[36] Manitoba being without a viable position.

Another strange factum in the *Ontario Educational Rights Reference*[37] produced complaints from the Association canadienne francaise de l'Ontario. Ottawa responded by submitting supplementary notes. In key cases in Manitoba[38] and Quebec[39] designed to inflate the court clause and records and journals clause of official bilingualism guarantees the Department of Justice sent only observers, who took no position at all. Finally, in the *MacDonald* case, Ottawa showed its true cracked colours. *MacDonald's* case sought an expansion of the court clause in s.133, an action supported by the Official Languages Commissioner, who "hope[d], by considered and effective involvement, to help achieve the most generous settlement possible in th[is] case."[40] What did Ottawa say in its factum? "A broad and generous interpretation [of language rights]," Ottawa maintained,

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[35]"Turner Supporters Nervous Over French Rights Stand" [Toronto] *Globe and Mail* (20 March 1984) at 1.

[36]In the period between Justice's two factums, the situation had changed dramatically. The Franco-Manitoban constitutional claim became a negotiating chip in three way talks between Manitoba, Canada and the Société Franco Manitobaine. These talks were for the purpose of exchanging Manitoba's obligations to translate a large quantity of useless statutes and records for constitutional commitments to construct a viable infrastructure of French language rights to support the Franco-Manitoban community. Although the talks ultimately bore fruit in an agreement to amend the Constitution of Canada, the necessary resolution from the Manitoba Legislative Assembly stalled because of a quirk in that Assembly's procedures. The Franco-Manitoban Court position, if successful, would have backed the Manitoba government into a corner from which the only escape would have been to reintroduce the failed resolution into the Assembly, the Assembly's procedures having by then been amended to remove the obstacle to passage of the first resolution. Franco-Manitobans recognized bilingual statutes as virtually useless to their continued existence. Canada's position, which the Court accepted, sought statute translation on a timetable - a conclusion that was a pyrrhic victory for the Franco-Manitoban minority.

[37]*Reference re Minority Language Educational Rights* (1984), 10 D.L.R. (4th) 491 (Ont.C.A.).

[38]*Robin v. Le College de St-Boniface* (1984), 15 D.L.R. (4th) 198 (Man.C.A.).

[39]*A.G. Quebec v. Collier*, Que. C.A. (Mtl.) Sept. 19, 1985, no. 500-36-000189-830.

[40]Commissioner of Official Languages, *Annual Report* (1985) at 16.

"cannot be used."[41] This curious position provoked opposition members to question the Prime Minister about the matter in the House. The opposition asked that Canada's factum be withdrawn. Ottawa refused to withdraw its factum. Ottawa got everything it asked for in this case, bringing language rights development to an end in the Courts.

Anyone who practices before the Supreme Court or intimately observes its proceedings knows that the Attorney General of Canada is not a litigant like others. In disputes having sensitive political ramifications, Canada's position counts for more than others. It is not coincidental that Canada got virtually everything it asked the Court for in these cases - including the restrictive approach to language rights contended for in *MacDonald*. The Court knows that Ottawa has special responsibility to solve political problems resulting from its opinions. That is why the Court sometimes acknowledges the political sensitivity of the contest in its written opinion.[42] Accordingly, as appears from the results in such cases, Ottawa's litigating positions count for a great deal; they are an important instrument in the public policy process. This ought to give Ottawa an aroused sense of respect for official languages policy when its litigating positions are developed. It is a sensitivity that Ottawa lacked completely in the language cases litigated in the 1980s.

In the spring of 1984 Prime Minister Trudeau left office. The language minorities sensed that an era had passed. The Manitoba language controversy had badly frightened them, sapping their morale. Given that Mr. Turner had utilized weakened support for bilingualism as part of his political campaign, the contemporaneous Manitoba language tumult which collapsed political support for the Manitoba government, the defeat of the Liberal party federally, and the strong anti-bilingualism elements in the incoming Tory caucus, the unease of the language communities was understandable. In fact, the high water mark of the language communities - which was not all that high - was receding in history.

IV

Members of the Supreme Court of Canada must have found Canadian constitutional processes deeply troubling following patriation in 1982. The nationalist government in Quebec City simmered in barely controlled rage over its constitutional defeat. Quebec determined to opt out of Canada's constitutional processes. Quebec boycotted the four first ministers meetings on constitutional matters held after 1982.[43] Quebec's Bill 62 opted out of the *Charter of Rights*

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[41] *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, Factum of the Attorney General of Canada at 10.

[42] *Manitoba Language Rights Reference*, [1985] 1 S.C.R. 721, 728: "This Reference combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity."

[43] *Constitution Act, 1982*, secs.37, 37.1 required a first ministers meeting in 1983, and two additional meetings before 1987. In addition, a political accord signed in 1983 required another first ministers conference in 1984. In all, 4 first ministers conferences were held under these provisions, in 1983, 4, 5 and 1987.

wholesale. Quebec's intention, stormed Premier Levesque, was "to make it... as difficult as we can for some aspects of that bloody Charter to be applied" to Quebec.[44]

Quebec's isolation was not attributable alone to the Parti Québecois. The Quebec Liberals, in opposition, voted with the Parti Québecois to condemn the patriation reforms. In government, the Quebec Liberals thundered in their own way. "No Quebec government, regardless of its political tendencies, could sign the *Constitution Act, 1982* in its present form," threatened Mr. Rémillard, who warned that "Quebec's isolation cannot continue much longer without jeopardizing the very foundations of true federalism."[45] Language rights were an important constitutional axis around which Quebec's grievances orbited.[46] In these circumstances it is understandable that the Supreme Court might be re-thinking its imposition of a language rights system on the provinces by its aggressive, dynamic interpretation of the old constitutional texts.

The sensitivity of the language issue continued after the defeat of the Parti Québecois in 1985. Mr. Bourassa, for the Quebec Liberals, had campaigned to soften Bill 101, particularly the requirement that commercial signs be solely in French.[47] After his election, Bourassa found it inopportune to deliver on that promise.

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[44]*An Act Respecting the Constitution Act, 1982*, S.Q. 1982, c. 21. Premier Levesque's remarks are cited in Gibson, *The Law of the Charter* (1986) at 126.

[45]Gil Rémillard [Quebec Minister of Intergovernmental Affairs], "Nothing Less than Quebec's Dignity is at Stake in Future Constitutional Discussions," Speech given at Mont-Gabriel at a Conference organized by the Institute of Intergovernmental Relations, 1985. This speech set out Quebec's five demands. These became the basis of the Edmonton Declaration, a communique issued by the first ministers following their agreement at a conference in Edmonton, in which first ministers agreed to Quebec's five points as the basis for their discussions. It is this process, and the subsequent discussions, which resulted in the Meech Lake Accord.

[46]The reforms of 1982 were in part aimed at Quebec's language legislation, and had immediate invalidating effect on the language of instruction provisions of Bill 101. "It is therefore not surprising that Bill 101 was very much in the minds of the framers of the Constitution when they enacted s.23 of the *Charter*. . . . By incorporating into the structure of s.23 of the *Charter* the unique set of criteria in s.73 of Bill 101, the framers of the Constitution identified the type of regime they wished to correct... the provisions of s.73 of Bill 101 collide directly with those of s.23 of the *Charter*... .": *A.G. Quebec v. P.S.G.B.M.*, [1984] 2 S.C.R. 66. The Canadian *Charter* also threatened secs. 52, 53, 57, 58-61 and 69 of Bill 101. These were challenged in *A.G. Quebec v. Chaussure Brown* [1988] 2 S.C.R. 12 and *Singer v. A.G. Quebec*. Sections 58 and 69 were invalidated. The PQ Government of Quebec identified "Quebec's Responsibility for Langauge Rights" as a major grievance needing constitutional redress in its *Draft Agreement on the Constitution: Proposals by the Government of Quebec* (May 1985). *Mastering Our Future, The Program of the Quebec Liberal Party* (February 1985) also addressed Quebec's language concerns (at 56-60), although this was not made one of the five conditions necessary to allow Quebec to "sign" the Patriation Bill.

[47]*Charter of the French Language*, R.S.Q. c. c-11, s.58 requires that "signs and posters and commercial advertising shall be solely in the official language" [The official language is French by s.1]. Section 69 requires French only for firm names. These were invalidated in *Chaussure Brown v. A.G. Quebec* and *Singer v. A.G. Quebec*.

Mr. Bourassa initiated intensive consultations with federal and provincial leaders to search for a formula that would allow Quebec to re-enter the Canadian constitutional family. In a speech given at Mont-Gabriel, Quebec's Intergovernmental Affairs Minister, Gil Rémillard, stipulated five conditions that could "persuade Quebec to support the Constitution Act of 1982." Toward the end of his speech, Mr. Rémillard referred to a sixth Quebec objective - "improving the situation of Francophones living outside the Province of Quebec." Mr. Rémillard suggested improving s.23 of the *Charter*, and noted that this "could only benefit Quebec's anglophone minority."

Significantly, Mr. Rémillard's objective to assist language minorities was omitted from the Edmonton Declaration, a First Minister's communiqué stating the five points upon which First ministers agreed to discuss reintegration of Quebec through constitutional amendment. The failure to include francophones outside of Quebec is significant because it indicates the Premiers' negative attitude towards improving the language rights situation.

The talks following the Edmonton Declaration resulted in the Meech Lake Constitutional Accord of 1987. The Meech Lake Accord sent the Supreme Court an additional language rights signal. The Accord would diminish the already fragile status of francophones outside of Quebec. The distinct society clause[48] hurts Francophones outside of Quebec because "[a]n important, but unsaid, implication of this proposition is that the rest of Canada is also a distinct society and that the governments of that society have the responsibility of preserving and promoting its distinct identity."[49] At least one provincial Premier has already used Meech Lake in this sense, as a rhetorical weapon, to justify taking away the historic language rights of francophones outside of Quebec. Mr. Getty, the Premier of Alberta, explained why the government of Alberta was repealing French rights under s.110 of the *North-west Territories Act* by saying that he was standing up for the people of Alberta in the "distinct society" that existed there:

> this is a matter of the government representing the people of Alberta in the distinct society that we have in this province. . .[50]

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[48]Section 2(1)(a) declares that "the existence of French-speaking Canadians. . . present elsewhere [than Quebec] in Canada, and English-speaking Canadians. . . also present in Quebec, constitutes a fundamental characteristic of Canada." Section 2(1)(b) declares that "Quebec constitutes within Canada a distinct society." Section 2(3) affirms a role for the legislature and government of Quebec to preserve and promote the "distinct identity of Quebec." Section 2(4) provides that the section does not derogate from the "powers, rights or privileges" of the legislatures of governments of Canada or the provinces. The "minimalist interpretation" is the product of the Supreme Court's work in *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460 and *S.A.N.B. v. Assn. of Parents for Fairness in Education*, [1986] 1 S.C.R. 549: (langauge rights are "incomplete. . . a constitutional minimum," *MacDonald* at 496).

[49]R. Breton, "The Concepts of 'Distinct Society' and 'Identity' in the Meech Lake Accord, in Swinton and Rogerson (eds.), *Competing Constitutional Visions* (1988) at 5.

[50]*Alberta Hansard* (23 June 1988) at 1964. This had been foreseen by Bryan Schwartz, *Fathoming Meech Lake* (Winnipeg: LRI of University of Manitoba, 1987) at 38, who wrote: "In the [provinces other than Quebec] the Quebec clause may be read, even if misread, as mandating a Canada in which most non-Quebeckers speak English, and only English."

The duality clauses of the Meech Lake Accord describe Quebec as a "society." By contrast, francophones outside of Quebec are described as a "population," that is, as "also present elsewhere in Canada."[51] The contrast is important. The legal sources underlying "society" imply an institutional structure through which a community is formed, organized and can act. This differs from "population" which refers to an aggregate of people without such an institutional structure.[52]

The chief problem faced by francophones outside of Quebec is their lack of an adequate institutional structure. Without developing an institutional infrastructure, francophones outside of Quebec rightly perceive that they cannot survive. The difficulty with Meech Lake is that it conceives of francophones outside of Quebec without an institutional base. When Meech Lake talks about provinces preserving francophones outside of Quebec, it uses the language of preserving the "population" - *ie.*, the French speaking Canadians without any institutional structure. It does not talk about preserving the "society," as it does in the case of Quebec.

It is difficult to read the duality clauses as requiring provinces to transform language minority "populations" into "societies" - into organized communities which can act through institutions. However, it is easy to read the duality clauses as requiring provinces to preserve minority language "populations," and minority language "populations" only. On this interpretation, Meech Lake means that francophones outside of Quebec should never become "societies" - that they be "preserved" as "populations," scattered aggregates of persons without organized institutions.

Further, the duality clauses of the Meech Lake Accord contain a contrast between the work "preserve" (s.2-2) and the words "preserve and promote" (s.2-3).[53] Quebec has a role to "preserve and promote" its distinct identity; other provinces have a role to "preserve" the presence of French speakers. This language is non-justiciable; it must be interpreted by Canada and the provinces. The language suggests that provinces merely maintain the presence of french speakers; it does not suggest that provinces must take active steps to promote the vitality of minority language communities. This contrast between "preserve" and "promote" encourages the perception that Quebec is the real homeland of fran-

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[51] *Constitutional Accord, 1987*, Section 2(1)(a).

[52] The contrast between a society and a population is foreshadowed in the *Report of the Royal Commission on Bilingualism and Bilculturalism* [the B&B Report]. The preliminary report of the B&B Commission, at 103 designated the existence of Quebec: "[de] formes d'organisation et [d'] institutions qu'une population assez nombreuse, animée par la meme culture, s'est donnée et a recues, dont elle dispose librement sur un territoire assez vast et ou elle vit de facon homogene, selon des normes et des regles de conduite qui lui sont communes." The importance of this passage is its confirmation that the concept of society includes an institutional infrastructure. A population, by contrast, does not.

[53] The Federation des Francophones Hors Quebec notes this also: *Proceedings of Special Joint Committee on the Constitutional Accord, 1987*, 3:6.

cophones; those outside of Quebec are of secondary significance. In conclusion, the duality clauses suggest an unflattering constitutional portrait of language minorities. This unattractive picture could infect interpretation of constitutional guarantees which language minorities already enjoy.

Section 13 of the Meech Lake Accord provides for annual first ministers conferences on the Constitution. If francophones outside of Quebec are to make constitutional progress, they must progress at one of these conferences. How does an issue get on the agenda of the constitutional conferences? Section 13 of the Meech Lake Accord includes certain mandatory agenda items. Francophones outside of Quebec are not included. Section 50(2)(c) of the Meech Lake Accord provides that the conferences shall have included on their agenda "such other matters as are agreed on." Presumably this means unanimous agreement of the Federal government and all provinces, since that is the formula that was used to strike the Meech Lake deal. Thus, Alberta, Saskatchewan, British Columbia, or any single province for that matter, could veto inclusion of francophones outside of Quebec on the agenda. Although Federal and Quebec Ministers promised that francophones outside of Quebec would be on the agenda, the Ministers cannot deliver on their promise if any provincial premier objects. This is a net loss for language minorities because unanimity has not been required previously to get them on the agenda for constitutional reform.[54]

Senate reform is on the agenda for the forthcoming constitutional conferences. The MacDonald Royal Commission suggested that bills having linguistic significance be subject to approval of a double majority in the Senate, a majority of all Senators and a majority of francophone Senators, a suggestion which, if not ideal, at least is an improvement for francophones outside of Quebec. This proposal for linguistic rights may or may not be discussed when Senate reform is addressed around the constitutional table. The problem is that francophone minorities are not required to be invited to discuss it and they have no obvious proxy around the table to advance their views. Thus, an issue crucial to their constitutional development may be decided in their absence, or ignored entirely. The decision makers will be the provincial premiers, a group not conspicuous for aggressively pursuing the interests of francophone minorities. This results in diminished expectations that this issue will be resolved favorably to the interests of linguistic minorities.

Section 16 of the Meech Lake Accord shields aboriginal and multicultural rights from any damaging effect that might be worked by the duality clauses. The well know maxim *inclusio unius, est exclusio alterius* may mean that official language rights are not shielded from any damaging effects that the duality clauses may work.[55] Sections 2(1)(b) and 2(3) of Meech Lake can be read as declaring, in

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[54]The companion resolution agreed to on 9 June 1990 would overcome this objection. Section 5(1) of the Companion Resolution adds "matters of interest to English-speaking and French-speaking linguistic minorities" to the agenda of the first minister's conferences.

[55]See generally, S.A. Scott, "Meech Lake and Quebec Society," in R. Forest (ed.), *L'adhesion du Quebec a l'accord du Lac Meech* (1988) at 48: "The inference is both clear and inevitable that if certain sections of the *Canadian Charter* are specifically protected from the operation of s.2 [of

effect, that legislative objectives connected to Quebec's distinct society justify violating official language rights, even where not demonstrably justified in a free and democratic society. This could impact negatively on francophones outside Quebec since, as noted above, the duality clauses may portray them in a homely constitutional light. This offers the interpretative potential to dilute existing constitutional guarantees linguistic minorities now enjoy.

In sum, Meech Lake concocts an unattractive portrait of linguistic minorities, at odds with the historic aspirations of these communities. Courts or premiers can use that image to diminish existing constitutional protections now enjoyed. Meech Lake gives each provincial premier a veto against francophone minorities ever again coming onto the constitutional reform agenda. It places the important Senate reform issue on the agenda without giving francophone minorities any assurance of participation. Most importantly, Meech Lake gives provincial premiers a rhetorical weapon against linguistic minorities; a means of refusing to develop an institutional network to support francophones outside of Quebec, and to contract existing institutional structures guaranteed by existing constitutional language rights. One provincial premier has already used Meech Lake in this way. Meech Lake must be considered a further bizarre illustration of the contracting constitutional importance of the language minorities.

V

Ottawa's inconstancy on official languages policy, particularly its urging of a restricted reading of constitutional language rights in court, and the scary constitutional processes after 1982, impressed the Supreme Court of Canada. The *Manitoba Language Rights Reference* was the high water mark of language rights developments. After 1985, the Court did an abrupt about-face, being unwilling, any longer, to challenge Quebec. The expanding and dynamic reading of constitutional language rights came to a curt halt. The Court withdrew from serious constitutional review of language controversies.

This happened unequivocally in *MacDonald v. City of Montreal*[56] and *S.A.N.B. v. Association of Parents for Fairness in Education*.[57] In *MacDonald*, the Supreme Court agreed with Canada's submission that "a broad and generous interpretation of language rights cannot be used." The Court described constitutional language rights as "a constitutional minimum." "It is not open to the courts, under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise." This approach required strange reasoning and lead to perverse results. While the speaker has the right in parliamentary debates or in court to choose the language of address, "this does not guarantee that the speaker. . . will be understood in the language of choice by those he is addressing."[58] This odd statement led Madame Justice Wilson to con-

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Meech Lake] and others not, the latter are more vulnerable."

[56][1986] 1 S.C.R. 460.

[57][1986] 1 S.C.R. 549.

[58]*MacDonald*, at 496.

demn the result in dissent as falling "so short of [the s.133 language] right as to effectively undermine it;"[59] Chief Justice Dickson, in dissent, to castigate the outcome with a question: "What good is a right to use one's language if those to whom one speaks cannot understand?"[60] and the commentators to rebuke the Court for reasoning which made language rights "Hollow."[61] Nevertheless, the Court was on a new, decisive path. The reason why, explained by the majority in *S.A.N.B.*, was that developments in the language rights area were to be left to the provinces.[62]

If this is the real reason, the Court would seem to have travelled to the other side of the reality principle. The provinces are not in the mood - and never have been in the mood in Canadian history - to advance language rights. Canadian history is a history of bitter, dangerous conflict fought over language rights as a result of stingy, vindictive aggression by provincial majorities. It is a dangerous history, resulting in federal provincial conflict, heightened tension between Ottawa and Quebec, sullen brooding in French Canada, suspicion, hostility, growth of nationalism in Canada's regions, particularly Quebec. The Manitoba School crisis, Regulation 17, Penetanguishene, Gens de l'air, Bill 101, the Manitoba Language Rights Crisis - these bitter language wars threaten to tear Canada apart at the seams. Canada's political system cannot control these pathological crises. Each new conflict threatens the security of this country. That is why they are given to the courts. Courts are expected to channel political conflict into legal procedure, and to enforce a consistent bright line.

In *S.A.N.B.* and *MacDonald*, the Court dealt a crippling blow to two minorities in particular. Although the right to a judge who understands the minority language directly, without interpretation, was not controversial in New Brunswick where the *S.A.N.B.* case was litigated, it caused immediate problems in Manitoba. Since before formation of the Province of Manitoba, the Queen's Bench had always had at least one French speaking judge able to preside over French proceedings.[63] At the height of the Manitoba language rights crisis in

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[59] *Ibid.* at 543.

[60] *Ibid.* at 566.

[61] [Toronto] *Globe and Mail* (7 May 1986) at A6.

[62] *S.A.N.B.*, p. 579: The *Charter* reflected "a principle of advancement or progress in the equality of status or use of the two official languages... this principle of advancement is linked with the legislative process.... The legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights.... If the provinces were told that [constitutional language rights were] inherently dynamic and progressive... and that the speed of progress was to be controlled mainly by the courts, they would have no means to know with relative precision what it was that they were opting into. This would certainly increase their hesitation in [advancing language rights]."

[63] This was required by provincial legislation both before, and immediately after, Manitoba joined confederation in 1870: see *Minutes of the Council of Assiniboia*, (31 May 1849) which resolved that judges of the General Court should address the court in both the French and English languages (reproduced in Oliver, *The Canadian Northwest: Its Early Development and Legislative Records* (1914) at 352). This was received as law into the post-confederation Province of Manitoba by *The Supreme Court Act*, S.M. 1871, cap. 2, s.52. In 1872, the Manitoba Legislature provided: "No person shall be appointed under this Act as Chief Justice or Puisne Justice or Prothonotary of the Court of Queen's Bench unless such person is able to speak both the English and French languages: *"An Act*

1984, the Manitoba Queen's Bench, for the first time in Manitoba's history, assigned an English speaking judge, working with an interpreter, to a French proceeding.[64] A constitutional challenge to Manitobia's failure to assign a French-speaking judge to the case failed in the Manitoba Courts, producing a stinging dissent from French speaking Chief Justice Alfred Monnin. After *S.A.N.B.* the result was a foregone conclusion. The Supreme Court of Canada did not even grant leave.[65] This collapsed a right which Franco-Manitobans enjoyed since before Confederation.[66] So too, the Anglo-Quebec minority had been summoned before the courts of Montreal in English or bilingually for more than two hundred years.[67] *MacDonald* vaporized this right. *MacDonald* gave Quebec the power, which Montreal newly exercised, to summon anglophones before the courts of Quebec in French only.

The misguidedness of the Supreme Court's new approach of leaving language controversies as much as possible to provincial politics became apparent almost immediately in Father André Mercure's case.[68] In this case the Court surprisingly heard the appeal of a speeding motorist, even though the motorist had died, in order to bring before it the substantial issue raised: whether Saskatchewan is officially bilingual.

The Court's judgment is highly technical and arcane, a curiosity walk-through the ancient statutes by which Saskatchewan became a Canadian province. Virtually all constitutional lawyers would agree that the Court plausibly could have interpreted the old statutes to say that French is gone in Saskatchewan. Most would agree too that the old statutes could be read to say that French survives in Saskatchewan under constitutional protection in the sense that Saskatchewan cannot diminish it.[69] Equally credible, the Court could have read the old statutes to

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to Amend An Act to Establish A Supreme Court in the Province of Manitoba," S.M. 1872, cap. 3, sec. 5.

[64]*Robin v. College de St. Boniface* [1984] 1 W.W.R. 271; affd., [1985] 1 W.W.R. 249 (Man. C.A.) was a wrongful dismissal action where the first language of the plaintiff was French, the working language of the defendant institution was French, the employment contract was in French, the pleadings were in French, all correspondence between the parties was in French, the first language of the witnesses was French, examinations for discovery were conducted in French, and the first language of the lawyers for both parties was French.

[65][1986] 1 S.C.R. p. xiii.

[66]Government of New Brunswick, *Toward Equality of Official Languages in New Brunswick* (Report of the Task Force on Official Languages, 1982) at 661: It goes without saying that if the judge, in a trial proceeding, requires interpretation for his or her convenience most, if not all, lawyers will use the majority language. The wait for interpretation during cross examination of witnesses forfeits too much. Interpretation reduces the opportunity to impress judges with the complex psychological assessments produced by the spoken language. Government studies have already concluded that interpretation makes cross examination "virtually impossible," and that interpretation "in a profession of words. . . is unacceptable."

[67]The history is set out in my factum (for the Société Franco Manitobaine) in the Supreme Court of Canada in *MacDonald's* case, copies of which are on file in the Supreme Court.

[68]S.C.C. Feb. 25, 1988.

[69]This would have obliged Saskatchewan to implement official bilingualism in the shortest possible time.

preserve French in Saskatchewan, but without constitutional protection. In strict law, no one of these conclusions is more compelling than any other. The result, therefore, is based on the Court's constitutional policy, albeit disguised in the techno-talk of statutory interpretation.

The Court ruled that French survives in Saskatchewan, but without constitutional protection. Presumably, under the Court's new policy that language rights should be left to provincial politics, this ruling invited the Saskatchewan legislature to advance language rights by making an appropriate deal with the Franc-Saskois. That was thoughtful. However, the Court should have realized that its ruling also invited the Saskatchewan legislature to abolish French.

The Court's judgment set Canada off on another serious round of language pathology. Predictably, Saskatchewan abolished French, although it sugar coated its actions with vague promises to implement some French rights in the future.[70] The Franc-Saskois were lucky, said Premier Devine, because "we were this close [holding his thumb and index finger together] to completely denying the official use of French."[71] Prime Minister Mulroney said he was "pleased. . . I am sure that your government's initiative will reflect the goodwill and generosity of the people of your province. . . ."[72] Subsequently, under heavy fire from the editorialists,[73] Mr. Mulroney became inventive. He blamed former Prime Minister Trudeau for the plight of the Franc-Saskois, a remark that occasioned the only laughter from the President of the Franc-Saskois, Mr. Baudais, during the entire affair.[74] Quebeckers stood by impotently, watching their tiny Franc-Saskois cousins being mauled in the grizzly Saskatchewan political machine.

The journalists poured predictable fuel on the flames by asking: "Will Quebec punish its anglophone minority in retaliation?" Two wrongs, of course, do not make a right, but the journalists rightly sensed a deep sense of frustration and anger gnawing away in Quebec. To make matters worse, Quebeckers watched on television, while their Premier, sitting with Saskatchewan's Premier Devine, praised Devine's stinginess to the Franc-Saskois as "prudent" and "responsible," and flattered Mr. Devine as "one of the most dynamic leaders in this country."[75] This prompted the President of the Association canadienne-francais de l'Alberta, Mr. Ares, to cancel a planned meeting with Mr. Bourassa, calling Bourassa a "traitor."[76] Mr. Bourassa was unfazed. He advised

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[70]*The Language Act*, S.S. 1988, c. L-6.1, s.13.

[71][Toronto] *Globe and Mail*, (20 April 1988) at A1.

[72]Letter of Mr. Mulroney to Mr. Devine (8 April 1988) available from the Prime Minister's Office.

[73]Lise Bissonette, "Dealing another blow to the French minorities," [Toronto] *Globe and Mail* (9 April 1988) at D2.

[74]"Francophones' Plight is Trudeau's Fault, Mulroney tells House," [Toronto] *Globe and Mail* (20 April 1988) at A1.

[75]"Saskatchewan Language Bill Gets Support from Bourassa," [Toronto] *Globe and Mail* (14 April 1988) at A1.

[76]"French Groups Blast Bourassa for Backing Sask. Language Bill," [Ottawa] *The Citizen* (14 April 1988) at 1.

Alberta francophones to trust their Premier who was "one of the strongest supporters of Quebec in reaching an agreement on the Meech Lake Accord. . . why will you not trust him?"[77] Mr. Getty told Mr. Bourassa to mind his own business.[78] Then Mr. Getty abolished the French language in Alberta.[79] While western language problems raged out of control Quebeckers felt not only wronged, they felt humiliated.

The language issue caused problems with acceptance of the Meech Lake Accord. *Globe and Mail* columnist Lise Bissonnette, expressing the view of many influential commentators, observed that "the general outrage [about Saskatchewan] was turning against the Meech Lake Accord [because] the Saskatchewan case was deemed to be a casebook illustration of the Accord's flaws with respect to the protection of minority language rights in this country."[80] As Canadians turned away from Meech Lake, Quebeckers felt increasingly rejected and powerless. Even Quebec's minimal five conditions accommodated in the Meech Lake Accord appeared unobtainable.

The climate of opinion in Quebec turned nasty. Graffiti appeared all over Montreal expressing hostility to anglophones. There were attacks on English language business establishments. The St. Jean Baptiste Society organized a demonstration in support of Bill 101 expecting to draw a few hundred people. Twenty-five thousand excited activists came out to parade. Opinion-makers who previously thought the language issue was well regulated and basically solved by Bill 101 began to feel they were wrong; something, unspecified, needed to be done. The press became mesmerized by the language issue, the Meech Lake debates and the impending failure of the Accord. Important opinion-makers felt frustrated, powerless, anxious.

At this point the Supreme Court of Canada stumbled again into the picture. The Court was asked to invalidate Bill 101 insofar as Bill 101 required French only in commercial advertising and firm names, and to annul Quebec's wholesale opt-out of the *Charter of Rights*.[81] In keeping with its new approach, the Court returned the issue to provincial politics by rejecting the federalism attack on Bill 101 and inviting use of the notwithstanding option to cure free expression and non-discrimination violations.[82] This opened the door immediately to an

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[77] *Ibid.*

[78] "Getty to Tell Bourassa Not to Meddle on Language," [Toronto] *Globe and Mail* (11 April 1988) at A3.

[79] *Languages Act*, S.A. 1988, C. L-7.5, s.7.

[80] [Toronto] *Globe and Mail* (9 April 1988) at D2.

[81] *Singer v. A.G. Quebec*; *A.G. Quebec v. Chaussure Brown*

[82] The override had been challenged on grounds of substantive review. The theory of the attack was that the *Charter* section overridden had to be specified in order to bring the democratic process to bear on the legislator. The court stated: "In so far as requirements of the democratic process are relevant, this is the form of reference used in legislative drafting with respect to legislative provisions to be amended or repealed. There is no reason why more should be required under s.33;" *Chaussure Brown*, at 29. Mr. Bourassa repeatedly referred to the Court's "legitimization" of the override in the subsequent controversy respecting Quebec's invocation of s.33 in respect of Bill 178.

acrimonious debate within and without Quebec, a further exercise in language pathology which continues at this writing.[83] In the provinces with anglophone majorities, the Quebec haters parade their spleen in more or less concealed forms. The nationalist movement in Quebec is reinvigorated. There is an increased amount of violence against anglophone businesses in Quebec and mass demonstrations in favour of tougher language laws. Manitoba used the events as an excuse to withdraw support for the Meech Lake Accord, making it unlikely that the Accord can become law without amendment. Quebec's anglophone minority is insecure, fearful; experiencing the shell-shocked dread upsetting francophone minorities in other provinces.[84] The only comic relief is provided by Prime Minister Mulroney. He conjured up Mr. Trudeau to blame for the problems.

The situation is unhealthy and Canada's seam is opening. Premier McKenna of New Brunswick summed up the situation: "Canadians," he said, "are adopting an attitude of to hell with minorities that threatens to divide the nation and pit anglophones against francophones. . . We are beginning to see a reversal of the vision we have seen emerge in the last 20 years. . . . The Province of Quebec is increasingly looking to become unilingual French and the other provinces unilingual English - to hell with minorities. We are going to be facing, in the future, two solitudes in this country."

VI

Parliament, the legislatures, and the courts have no serious policy to counteract assimilation. In the absence of determined government policy to alter demographic forces, numbers tell all. In Canada the numbers are clear and the trends are unmistakable. Whether measured by maternal language or home language, outside of Quebec francophones are declining in real numbers and as a percentage of total provincial population. Whether measured by maternal language or home language, anglophones in Quebec are declining in real numbers

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[83]By Bill 178 the Bourassa government overrode the *Charter of Rights* and reinstituted a French only requirement. See an Bill 178, *Act to Amend The Charter of the French Language*, 2nd sess. 33d Legislature, 1988. The explanatory note reads that the Bill "lays down the rule that public signs and posters and commercial advertising, outside or intended for the public outside must be solely in French." It also provides that "this rule applies inside public means of transport and certain establishments, particularly commercial centres." Secondly, it requires "public signs and posters and commercial advertising inside establishments" to be in French [subject to exceptions]. See Decision draws condemnation from both sides, The [Ottawa] *Citizen* (14 December 1988) at A1.

[84]"9,000 Quebeckers rally to keep Bill 101," The [Ottawa] *Citizen* (19 December 1988) at A3; "Les representants anglophones: Des démissions aggraveraient le désarroi de leur communauté," [Montreal] *Le Devoir* (20 December 1988) at P6; "Des francophones hors-Québec sont divisés," [Montreal] *Le Devoir* (20 December 1988) at P3; "Bourassa trouve le Canada anglais nerveux," [Ottawa] *Le Droit* (20 December 1988) at P1; "Rémillard menace de se retirer des discussions," [Ottawa] *Le Droit*, (20 December 1988) at P11 ("Le ministre de Justice du Québec. . . a menacé hier de ne plus participe a aucune discussion constitutionelle tant que l'accord du lac Meech n'aura pas été adopté"); "Actes de vandalisme a Montréal," [Ottawa] *Le Droit* (20 December 1988) at P12; "Filmon Criticism of Decision [to use notwithstanding clause] Triggers Angry Riposte from Quebec," [Toronto] *Globe & Mail* (20 December 1988) at A1.

and as a percentage of total provincial population. The decline is rapid, steep and alarming. The assimilation rates are extraordinary.

Some examples might help to illustrate what is happening. In the five years between 1981 and 1986 the francophone community outside of Quebec lost 40,000 people, declining to 842,815 or 4.48 per cent of the population, measured by maternal language. Measured by the language used in the home, francophones declined 51,075 to 575,100, or 3.06 per cent of the population. The assimilation rates are accelerating. In Nova Scotia, for example, between 1981 and 1986 37 per cent of the community was lost to assimilation.

Examples from some provinces illuminate the picture from a startling perspective. In Manitoba, 39,600 people used French in the home in 1971. In 1981 that number dropped to 29,065; in 1986 it fell to 23,840. In Saskatchewan, 15,930 people used French as the home language in 1971; in 1981 that number was reduced to 9,175; in 1986 it was 6,670. In Alberta, 22,700 people used French as the language of the home in 1971. Because of the energy boom, that number increased to 25,930 in 1981. In 1986, the number dropped to 17,640.

In the five years between 1981 and 1986, measured by maternal language, anglophones in Quebec lost 61,520 souls, declining to 580,030; from 10.0 per cent to 8.9 per cent of the provincial population. Measured by language used in the home anglophones declined from 1.1 million to 676,050, *an amazing 42 per cent drop in the Anglo-Quebec community over five short years.*[85]

VII

The official language minorities are disappearing rapidly. Some, the Franco-Terre Neuviens and the Franc-Saskois, have already disappeared.[86] This is exactly where we did not want to go, and why we instituted the official language policy in the first place in 1969. The official languages policy has carried us a long distance towards the unwanted situation of two monolingual enclaves: French in Quebec, English in the rest of Canada. The new *Official Languages Act*, proclaimed in force on September 15, 1988, is a fortified version of the 1969 policy.[87] The Meech Lake Accord is not even more of the same; it is less of the same. It detracts from the fundamental vision of Canada's linguistic condominium established during the Trudeau years.

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[85]The numbers are taken from *Recensement Canada 1986*, a publication of the F.F.H.Q., summarizing data from the 1986 census.

[86]Between 1971 and 1981, the small francophone community in Newfoundland shrank 21 per cent, to a mere 1800 persons. In my lexicon, this counts as "a disappearance," since there are no economic incentives to use French, no institutional structures to support the French language, and such a small concentration (0.3 per cent of provincial population) as to make private use of the French language rare indeed. In Saskatchewan during the same period, the Franc-Saskois community contracted by 37 per cent to 9,000 people, or 1 per cent of provincial population. In 1986 the Franc-Saskois had declined to 6,600 people.

[87]S.C. 1988, c. 38.

What are these legislative and constitutional reforms meant to achieve? Are they meant to achieve the grand vision of a Trudeau-esque Canada populated by thriving official language minorities from sea to sea, conceived in the 1969 Policy and evoked in the subsequent Reports of the Official Languages Commissioner? If this is the goal of the updated *Official Languages Act* there is little doubt that it will fail. Massaging the 1969 Policy will not change anything. The demographic trends will remain relentless, accelerating in this final terminal stage, as the last miniscule mass of the minorities melts away.

Superimposed upon a predominantly French Quebec and a predominantly English Canada outside of Quebec will be an increased population of bilinguals, both in Quebec and in the other provinces - the result of the new Quebec and the immersion phenomenon. As conceived in Mr. Trudeau's vision, these bilinguals were meant to relate significantly to the critical mass of language minorities. It was thought that immersion graduates in Manitoba would reinforce the Franco-Manitoban community, that community having been secured by the 1969 Policy. The hard truth is that there will be no critical mass of Franco-Manitobans. So it is appropriate to ask again: What is the significance of the increased numbers of bilinguals? Where do we think we are going?

We are not going in the direction of Mr. Trudeau's vision as conceived by the 1969 policy. We are travelling in an opposite direction. To reverse course would require a massive governmental effort.[88] Is there any foreseeable political scenario in which this effort might occur?

The new reality is that we shall shortly have a Canada where languages are territorially concentrated: French in Quebec and English outside of Quebec. The federal administration will be made up of bilinguals who will come from the remnants of the official language minorities, French and English elites, and the immersion graduates. There will also be a reduced critical mass of official language minorities in the "bilingual belt" which stretches from Moncton in New Brunswick to the Soo in Northern Ontario.[89] Outside of that belt, the minorities will have disappeared.

The 1988 official languages policy would thus appear to have two goals. First, official languages policy seeks to continue bilingualizing the federal administration. Secondly, the policy strives to lessen the pain of official language minorities - to palliate them - while current demographic trends conclude their demolition. This policy differs from what is parroted by the authorities. Is it worth asking if Canadians accept this policy - the real policy?

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[88]The nature of the effort required is described in "The Future of Official Language Minorities" *supra* at note 11.

[89]The bilingual belt was first discussed by Richard J. Joy, *Languages in Conflict* (1967). At 26 the author noted "the French speaking communities outside of the Soo-Moncton limit have become vanishing islands in a steadily-encroaching sea of English-speakers. . . . The perpetuation of the French language seems assured within the Soo-Moncton limit."

The hard truths of our demographic trends make it increasingly difficult to be sanguine about our official language policy. If we believe Mr. Trudeau's vision is the prevailing inspiration of official languages policy, and that we are acting in pursuit of that vision, there is no problem. However, our demographic realities make it difficult to hold that belief. They present us with another, perhaps unwanted, image of Canada's linguistic future. It therefore becomes necessary to imagine ourselves in new panoramas. Reality makes this effort possible; it also requires it.