Constitutional Ideology, Language Rights and Political Disunity In Canada

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This study argues that an important source of political disunity in Canada has been the constitutional ideology adopted by common law lawyers during this century. This ideology has ignored the importance of constitutional obligations to protect the French language undertaken prior to Confederation. It has prevented the lawyer and judge from taking account of the transformation of political power in Canada during this century. The ideology has also precluded the very possibility of the existence of fundamental rights, let alone language rights, without which minorities can have little confidence in the future.

When the student at law is asked to examine the constitutionality of any particular statute, he is trained to go immediately to sections 91 and 92 of the British North America Act, 1867, to ascertain whether the particular statute relates to a subject-matter within a class of subjects in section 91 or section 92. If related to section 91 then the statute is within federal jurisdiction. If section 92, then it falls within provincial jurisdiction.

The question of the extent to which our Constitution protects language rights in Canada has been no exception to this form of examination. Serious constitutional scholars such as Albert Abel,[1] Herbert Marx[2] and Peter Hogg[3] have examined language rights by reference to sections 91, 92 and 133 of the B.N.A. Act as well as section 23 of the Manitoba Act. Section 133 expressly protects the use of French and English in the proceedings of the federal courts, the Federal Parliament and the Quebec Legislature. Section 23 of the Manitoba Act,

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[1]Albert Abel, *Opinion to Commission of Inquiry on the Position of the French Language and on Language Rights in Quebec, Report*, Book II (Québec: Government of Quebec, 1972).

[2]Herbert Marx, *Language Rights in the Canadian Constitution*, (1967) 2 Revue Juridique Thémis 239, at 242.

[3]Peter Hogg, *Constitutional Power Over Language*, in Law Society of Upper Canada, Special Lectures 1978. However, see Hogg's adoption of custom as a source of Canadian constitutional law *infra*, footnote 4.

which is similar to section 133, was adopted by a United Kingdom amendment to the B.N.A. Act in 1871. The Report of the Gendron Commission of the Quebec Government (1972) and the Reports of the Federal Government's Bilingualism and Biculturalism Commission also analyzed the problem in the light of sections 91, 92 and 133.

In this paper I shall argue that political disunity in Canada is the result of much more than mere economic factors such as unemployment, and much more than the maldistribution of economic wealth between English-speaking and French-speaking Quebecois. I shall suggest that an important source of political disunity in Canada lies in the deeply engrained normative political values or assumptions with which the political elite (which, for reasons explained below, includes judges) perceive the world. I shall substantiate this suggestion by reference to the manner in which common law lawyers of English-speaking Canada perceive the nature of the Canadian Constitution and I shall demonstrate how this perception is connected to the problem of language rights and political disunity in Canada.

One avenue of attempting to establish this thesis might be to study empirically the values of English-speaking and French-speaking jurists through sophisticated interviewing techniques. One would then be required to show a direct connection between those values, on the one hand, and legal arguments and judicial decisions on the other. One would then be obliged to show why those decisions and arguments worked to cause political disunity in Canada. I shall, however, employ a different tactic. I shall argue that traditional constitutional analysis of language rights in Canada has focused primarily upon the B.N.A. Act, 1867 and, in particular, sections 91, 92 and 133 of the said Act. This analysis, I shall argue, leads to a restricted appreciation of the nature of the Canadian Constitution in that it has ignored the normative or "ought" presuppositions and questions as a legitimate inquiry of constitutional analysis. Evidence of such presuppositions can be found in what has traditionally been called "customary constitutional law."[4] I shall suggest that customary constitutional law prior to Confederation demonstrated that political authorities in Canada were obligated to ensure that Francophones and Anglophones be able to understand and express themselves in their own language when their own rights and privileges were at issue. The normative beliefs, as evidenced in institutional history prior to Confederation, imposed serious constitutional obligations which could only have been subsequently met with great difficulty, given the twentieth century constitutional ideology in English-speaking Canada.

[4]M. Dawson, *The Government of Canada* (Toronto: Univ. of Toronto Press, 5th ed., 1970). See also the most recent text on Canadian Constitutional Law: P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1973) at 1-11, as well as J. E. C. Munroe, *The Constitution of Canada* (Cambridge U. Press, 1889) at 40-43.

A. **The Nature of the Constitution**

The idea that there is more to our Constitution than the B.N.A. Act is not a new one. MacGregor Dawson in his classic political science text *The Government of Canada,* emphasized that "It is a convenient but far from accurate statement to say that Canada has a written constitution, for the written British North America Act and its amendments tend to overshadow those *other constitutional principles and understandings* whose nature and significance are not so clearly and obviously indicated."[5] [Emphasis added] Dawson provided evidence of the importance of the non-B.N.A. Act portion of the Constitution.[6] The non-B.N.A. Act part, he wrote:

> . . . embraces principles of the common law as defined by the courts; some British and Canadian acts of Parliament and orders-in-council; judicial interpretations of the written constitution and other laws; the rules and privileges of Parliament; and many other habitual and informal methods of government . . . All these, many of them (despite the term *unwritten)* committed to writing, others in much more intangible and elusive form; exert a powerful influence on constitutional practice.[7]

One of the leading constitutional casebooks used in English-speaking Canadian law schools, edited by Professors J. D. Whyte and W. R. Lederman, adopts Chief Justice McRuer's assertion that "it is a serious error to think that the British North America Act either gathers them all [that is, the legal forms of the Constitution] into one document or was ever intended to do so."[8] McRuer went on to suggest that constitutional essentials are found:

> . . . in the B.N.A. Act, but many more are outside it in federal statutes, provincial statutes, judicial interpretations of the B.N.A. Act, historically received English judge-made public law, conventions of cabinet government, rules of parliamentary procedure and other sources.[9]

Consistent with this perspective, one of the three parts of the above casebook attempts to explore how the legislative powers under the B.N.A. Act have been restricted by constitutional principles relating to fundamental rights.

A second constitutional casebook,[10] also used in English-speaking Canadian law schools, edited by Professor N. Lyon and R. Atkey, begins its chapter on "What is the Canadian Constitution?" with this response:

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[5]*Ibid.*, at 58.

[6]*Ibid.*, at c.4.

[7]*Ibid.*, at 60.

[8]Whyte and Lederman, *Canadian Constitutional Law* (Toronto: Butterworths, 1975) at 1-7.

[9]*Ibid.*, at 1-7.

[10]Lyon and Atkey, *Canadian Constitutional Law in a Modern Perspective* (Toronto: Univ. of Toronto Press, 1970).

> The constitution of a people is found in the attitudes and customs of its members and in the working practices of its institutions. . . . In a written constitution a people may try to articulate shared goals, that is, what they want to become, at least in their better moments. But the actual constitution of a people can be observed only in the actual patterns of behaviour of its members . . . to talk about a written document as 'the constitution' is to mistake a device for its objective . . . .[11]

These constitutional scholars have directed their attention to non-B.N.A. Act sources of constitutional law for a reason. The reason, though not explicitly stated, relates to the nature of constitutional obligation. Wherever there exists a right, Hohfeld argued, there is a duty.[12] If the Constitution requires the performance of certain duties, why does it do so? Why are political leaders *bound* to perform the constitutional duties? These questions must be faced before we can begin to analyse whether language rights are protected in our Constitution and, if so, to what extent they are protected.

The scholarly works on language rights in Canada indicate that if a bill restricts communications between citizen and bureaucracy to one or two particular languages, the constitutional issue is whether the allegedly offensive subject-matter in the bill falls within the heads of power in section 91 or, alternatively, section 92 of the B.N.A. Act.[13] Once it is established that the bill falls under the correct head, then, by virtue of the principle of legislative supremacy, the bill is considered constitutional. But, why must we suppose that the Constitution *requires* the legislature to be supreme? Why is the power and jurisdiction of the legislature, to use the words of Sir William Blackstone, "so transcendent and absolute, that it cannot be confined either for causes or persons, within any bounds"?[14] Why is this the place "where absolute despotic power, which must in all governments reside somewhere, [be] entrusted by the constitution . . ."?[15] Why is there an absence of legal restraint

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[11] *Ibid.*, at 70.

[12] Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (ed. by W. W. Cook, New Haven: Yale U. Press, 1964).

[13] See generally, *infra*, at footnotes 80 to 83.

[14] As reprinted in *Ehrlich's Blackstone* ed. J. W. Ehrlich (New York: Capricorn, 1959) at 55.

[15] *Ibid.*, continued:

> It hath sovereign and uncontrollable authority in making, confining, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical and temporal, civil, military, maritime or criminal; this being the place where absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.
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> It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power the omnipotence of parliament. True it is that what the parliament doth, no authority upon earth can undo . . . .

upon the power of the legislature?[16] Why may the legislature not bind itself into the future?[17]

The traditional response in Canada would be, of course, that the B.N.A. Act so declares. But in what section(s) of the B.N.A. Act does one find the above propositions? Do sections 91 and 92 enact that the federal Parliament and provincial Legislatures may legislate upon *all* subject-matters? What section of the B.N.A. Act provides that Canadian courts may pass judgment only upon jurisdictional disputes involving section 91 and 92? Section 17 enacts that "there shall be One Parliament for Canada".[18] Other provisions of the Act require a time limit for the calling and dissolution of Parliament.[19] These provisions, however, in no way require that the Legislatures are supreme in any of the senses elaborated by leading jurists. Nor do the provisions relating to the Judicature[20] proscribe judges from passing judgment upon enactments of the Legislatures nor do the Judicature provisions direct the Courts to accept as finally authoritative any expression of the Legislature's will. One might finally resort to the preamble of the B.N.A. Act, according to which Canada is to have a Constitution "similar in principle to that of the United Kingdoms". By virtue of the preamble, it might be submitted, Canada had adopted the principle of legislative supremacy in the 1867 United Kingdom Constitution.[21] Unfortunately, interpretation principles[22] in the United Kingdom require that one may use a preamble only to resolve an ambiguity or incongruity within the existing enacting portion of a statute. There is no such ambiguity or incongruity within the enacting portion of the B.N.A. Act.

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[16]J. B. Mitchell, in an important essay on legislative supremacy, argues that the supremacy of the legislature means "the absence of any legal restraint upon the legislative power of the United Kingdom Parliament". On the one hand Parliament may legislate upon any subject matter. On the other, once Parliament has legislated, no court or other person can pass judgment upon the validity of the legislation. J. B. Mitchell, *Sovereignty of Parliament — Yet Again*, (1963) 79 L.Q.R. 196 at 197.

[17]One of the central propositions followed by the courts is that the Legislature may not bind itself into the future. See generally *Duke of Argyle* v. *Commissioners of Inland Revenue*, [1914] L.T. 893 (K.B. Div.); *Vauxhaull Estates Ltd.* v. *Liverpool Corporation*, [1932] 1 K.B. 733 at 743 and 745; *Ellen Street Estates Ltd.* v. *Minister of Health*, [1934] 1 K.B. 590 per Scrutton, L.J. at 595 and per Maugham, L.J. at 597; *British Coal Corp.* v. *The King*, [1935] 3 D.L.R. 401, [1935] 2 W.W.R. 564, 64 C.C.C. 145; *Blackburn* v. *A-G*, [1971] 1 All E.R. 1380 (C.A.)

[18]See also, for example, sections 69 and 71.

[19]Sections 20, 91(1) and 85.

[20]Sections 96 to 101.

[21]The courts of 1867 had not yet established two of the three present day pillars of legislative supremacy. The one, the principle of the conclusiveness of statutes, was not adopted as the "ratio" of a House of Lords decision until 1974. *British Railways Bd.* v. *Pickin* [1972] 2 W.L.R. 208 (H.L.) reversing, [1972] 3 All E.R. 923, [1973] 1 Q.B. 219, [1972], 3 W.L.R. 824 (C.A.). The other, the principle that Parliament could not bind itself into the future, was not established until the early twentieth century. See *Duke of Argyle* v. *Commissioners of Inland Revenue*, [1914] L.T. 893 (K.B. Div.); *Vauxhall Estates Ltd.* v. *Liverpool Corp.*, [1932] 1 K.B. 733 at 743 and 745; *Ellen Street Estates Ltd.* v. *Minister of Health*, [1934] 1 K.B. 590 per Scrutton, L.J. at 595 and per Maugham, L.J. at 597; *British Coal Corp.* v. *The King*, [1935] 3 D.L.R. 401, [1935] 2 W.W.R. 564, 64 C.C.C. 145.

[22]*A-G* v. *Prince Augustus*, [1957] A.C. 437.

Let us assume that the B.N.A. Act did require that Parliament be supreme. The issue remains, why are the Canadian courts obligated to follow the B.N.A. Act? A student of law would answer that the B.N.A. Act was a duly enacted instrument of the United Kingdom Parliament. But why, in turn, should the Canadian courts follow the United Kingdom Parliament? Again, the student would have a reply. Canada was, at the time of the passing of the B.N.A. Act, 1867, subject to the United Kingdom Parliament and, in addition, the United Kingdom Parliament had duly enacted the B.N.A. Act according to the proper manner and form requirements at the time.

This response leads us back to the original question. What gives the "manner and form" requirements their authority? One can examine the statutory, customary or common law basis of "manner and form" requirements only so far until one returns to the question originally posed. If the courts will obey any legal rule which alters a "manner and form" requirement itself, we must ask what institution can alter the "manner and form" requirement and why should the courts obey the new rule?

It would seem that Professor Wade is proceeding in the right direction when he responds that the courts obey statutes not because of any legal rule but because of political history.[23] That is, the source of the constitutional obligation of the courts lies in the world of political norms, in the "sense of obligation" that the courts *ought* to respect certain political principles. Quoting approvingly from Salmond,[24] H. W. R. Wade explained:

> All rules of law have historical sources. As a matter of fact and history they have their origin somewhere, though we may not know what it is. But not all of them have legal sources. Were this so, it would be necessary for the law to proceed 'ad infinitum' in tracing the descent of its principles. It is requisite that the law should postulate one or more first causes, whose operation is ultimate and whose authority is underived. . . . The rule that a man may not ride a bicycle on the footpath may have its source in the by-laws of a municipal council; the rule that these by-laws have the force of law has its source in an Act of Parliament. But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal. . . . It is the law because it is the law, and for no other reason that it is possible for the law itself to take notice of. No statute can confer this power upon Parliament, for this would be to assume and act on the very power that is to be conferred.

The principle of legislative supremacy has its authority, in other words, with the Revolutionary Settlement of 1688.

The implications of Wade's important point are clear. The student's reliance upon the British North America Acts is not the ultimate

[23]H. W. R. Wade, *The Basis of Legal Sovereignty* [1955] Cambridge L.J. 172.

[24]*Salmond on Jurisprudence* (10th ed.), edited by Glanville Williams at 155 as quoted by Wade, *ibid.*, at 187.

response to the issue of why the legislature is supreme in Canada. For, the constitutional principle of legislative supremacy itself lies upon *normative* political values. Consequently, the constitutional lawyer can legitimately ask whether legislative supremacy as divided between the federal and provincial governments *ought to* provide the justificatory basis of language rights in Canada. The very nature of the Canadian Constitution, in other words, permits one to ask questions of history and normative questions of political philosophy as a legitimate inquiry into the nature and extent of constitutional obligations in Canada. The judge or lawyer who discards these issues as academic ones, on account of the constitutional principle of legislative supremacy, is adopting a value judgment in the world of political norms.[25]

If the above line of argument is correct then it would seem to follow that legislative supremacy is a mere conception, not a perception.[26] It is a real constitutional principle because it is deeply believed in. The "legal" obligation thrust upon the courts that they ought not to restrain the legislative authority of the legislature is real because the parties (that is, lawyers, judges and legislators) operate *as if* that obligation were real.

What resource materials, then, should a constitutional lawyer examine when asked to assess the nature of language rights in Canada? Clearly, the B.N.A. Act is only one document to which the lawyer can attach weight with respect to the issue of what normative political values and principles underlie our society. We have just seen that the B.N.A. Act, 1867, is not declarative of our constitutional rights and duties. The Act does not impose or posit our constitutional rights and duties. Rather, it is merely constitutive of them. It merely provides some insight as to the nature and scope of our constitutional rights and obligations in the past. Other indicia which the constitutional lawyer may legitimately use to ascertain past constitutional rights and duties are statutes, regulations, judicial decisions, legislative resolutions, policies and practices of bureaucrats, practices of the legislature, the tacit understandings between and amongst governmental officials, the acquiescence by one government in the face of the unilateral conduct of another, the failure of a government to follow or to render a judicial decision effective, pleadings of counsel, scholarly studies, Royal Commission and task force reports, legislative committee reports and the like.

Because the basis of constitutional obligation lies in the world of political norms rather than legal rules which apply in some "all or nothing" fashion, these resource materials do not, of themselves, *posit*

[25]The above argument is elaborated in further detail in William E. Conklin, *In Defence of Fundamental Rights* (Alphen aan den Rijn: Sijthoff & Noordhoff International Publishers, 1979), chap. 2, sect. 3(c).

[26]Hamish Gray describes sovereignty as "a metaphysical conception" in *The Sovereignty of Parliament Today*, (1953) 10 U. Toronto L.J. 54 at 54. See also, Middleton, K.W.B. *Sovereignty in Theory and Practice*, (1952), 64 Juridical Review 35.

constitutional obligations. Rather, they provide "institutional support" for the existence or non-existence of a "sense of obligation" which past political authorities might have had toward any particular issue. Because of the normative basis of constitutional obligation, the constitutional lawyer may do more than just examine institutional history. He may legitimately ask whether the principles rooted in the institutional history ought to be followed as a question of political philosophy.[27] For example, are the language rights principles which are embedded in Canadian institutional history contradictory, misdirected or otherwise inappropriate as an issue of normative political philosophy, given the claim by jurists and legislators that our civil institutions are founded upon the existence of fundamental individual rights? The latter line of inquiry is unnecessary in the present context, given this paper's limited objective of showing why the common law lawyer's manner of perceiving the Constitution has served as an important source of political disunity in Canada.

B. The Constitutional Obligation with respect to Language in Pre-Confederation Canada

It is in this light that one can better understand the legal history of bilingualism in Quebec and Ontario to be more than just "legal history". Rather, the legal history provides institutional support for the existence of wide constitutional duties thrust upon the Federal, Manitoba and Quebec governments to protect the Francophone and Anglophone minorities in the respective jurisdictions prior to Confederation. The duties emanated, to begin with, from a cluster of obligations undertaken by the United Kingdom government upon the cession of Quebec to the British.

According to the principles of constitutional law at the time of cession of the French colonies in North America, if the United Kingdom acquired a colony by conquest or cession and if the colony at that time of conquest had laws of its own, the laws of the conquered or ceded colony remained in force unless and until the Crown altered those laws.[28] This proposition, however, was *subject to two important qualifications* laid down by Lord Mansfield in *Campbell* v. *Hall.*[29] In the first place, the articles of capitulation upon which the colony was surrendered and the

[27]Some of the questions of political philosophy which constitutional lawyers should face are examined in *A Defence of Fundamental Rights, Supra,* footnote 25, chap. 3 to 7.

[28]*Campbell* v. *Hall,* 1. Comp. 204, 98 Eng. Rep. 1048 (K.B., 1774); *In re Cape Breton,* 13 E.R. 489 (P.C., 1846); *Kielly* v. *Carson,* 13 E.R. 225 (P.C., 1842).

[29]*Campbell* v. *Hall, ibid.*

treaty by which the colony was ceded were *sacred and inviolable.* Secondly, the King could not make any change in the laws of the conquered country "contrary to fundamental principles" (by which Mansfield presumably meant the equitable principles of natural justice).

There appears little dispute but that Quebec was acquired either by conquest or cession rather than by settlement.[30] Lord Mansfield's two important qualifications, therefore, must be considered. The Articles of Capitulation of Quebec[31] and Montreal[32] in 1760, and the Treaty of Paris, 1763,[33] as a consequence, provide particularly weighty evidence of the content of customary constitutional law during the late 18th century. Most noteworthy was the provision for the safeguarding of the Roman Catholic religion in Quebec. Article 6 of the Articles of the Capitulation of Quebec, 1759, guaranteed, for example, that:

> The exercise of the Catholic, Apostolic, and Roman religion shall be preserved; that safe-guards shall be given to the houses of the clergy, to the monasteries and the convents, especially to His Lordship the Bishop of Quebec, who, full of zeal for religion and of love for the people of his diocese, desires to remain constantly in it, to exercise freely, and with the decency which has standing and the sacred mysteries of the Catholic, Apostolic, and Roman religion requires, his episcopal authority in the town of Quebec, whenever he shall think fit, until the possession of Canada has been decided by a treaty between his most Christian Majesty and his Britannic Majesty.
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> Libre exercise de la religion romaine, sauves gardes accordees a toutes personnes religieuses ainsi qu'a Mr. l'eveque qui pourra venir exercer librement et avec decence les fonctions de son etat lorsqu'il le jugera apropos, jusqu'a ce que la possession du Canada ayt ete decidee entre sa Majeste B. et S.M.T.C.

According to Houston, the draft Articles sent to Lieutenant de Ramzay from the Marquis de Vaudreuil had the following comment noted beside Article 6:

> Prouver que c'est 'interest de S.M.B. dans le cas ou le Canada luy resteroit,' et qu'en Europe touttes les conquettes que font les divers souverains, il ne changent point l'exercise de religion qu'autant que ces conquettes leur restent.

Article 2 had guaranteed the preservation of "the privileges" of the inhabitants. Article 11 provided that "the present capitulation shall be

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[30]There is a dispute, however, as to whether acquisition was by conquest or by cession. See generally, Anger and Honsberger, *Canadian Law of Real Property* (Toronto: Canada Law Book Co., 1959) c.1; Armour, *A Treatise on the Law of Real Property* (Toronto: Canada Law Book Co., 1901) c.2.

[31]As reprinted in W. Houston, *Documents Illustrative of the Canadian Constitution* (New York: Books for Libraries Press, 1891, 1970 reprint) at 27.

[32]As reprinted in *ibid.*, at 33.

[33]As reprinted *ibid.*, at 61.

executed according to its form and tenor, without being subject to nonexecution under pretext of reprisals or of the non-execution of some previous capitulation."

The Articles of Capitulation of Montreal acknowledged British obligations toward the Francophone minority in even clearer language. Article 27 expressly guaranteed the freedom of the Francophones to establish their Roman Catholic religion. Article 27 provided that:

> The free exercise of the Catholic, Apostolic, and Roman religion shall subsist entire, in such manner that all classes and peoples of the towns and rural districts, places, and distant posts may continue to assemble in the churches, and to frequent the sacraments as heretofore, without being molested in any manner, directly or indirectly. These people shall be obliged by the English Government to pay to the priests, who shall have the oversight of them, the tithes and all the dues they were accustomed to pay under the Government of his Most Christian Majesty.
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> Accordé pour le libre exercise de leur Religion. L'obligation de payer la dixme aux prêtes dependra de la volonté du Roy.

Articles 28 to 35 went on to elaborate precise protections for the Roman Catholic clergy. Article 28, in particular, provided that "The Chapter, priests, cureo and missionaries shall continue with entire freedom of their parochial services and functions in the parishes of the towns and rural districts". Article 42 then went on to provide that the British were obligated to respect Francophone laws and customs generally:

> The French and Canadians shall continue to be governed according to the custom of Paris, and the laws and usages established for this country; and they shall not be subjected to any other imposts than those which were established under the French dominion.

One should note that the major source of French law at this point in time was custom and usage as opposed to the present-day sources of legislation or judicial decision. Article 42, therefore, embodied the obligation of the United Kingdom government to respect French law generally whether its source be custom as at the time of the cession or legislation as in later years. Finally, Article 50 provided that "The present capitulation shall be *inviolably executed* in *all* its articles, on *both* sides, and in good faith, notwithstanding any infraction and any other pretext with regard to preceding capitulation, and without resorting to reprisals". [Emphasis added]

By the Treaty of Paris, 1763, the French government ceded her possessions over to the Crown of Great Britain "in the most ample manner and form, without restriction and without any liberty to depart from the said cession and guaranty, under any pretense, or to disturb Great Britain in the possessions. . . ." On the other hand, the Treaty did reflect a respect toward religious freedom. Article 4 provided:

> . . . His Britannic Majesty on his side agrees to grant the liberty of the Catholic religion to the inhabitants of Canada: he will consequently give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of the Romish Church, as far as the laws of Great Britain permit.

The latter clause differed from the position in the Articles of Capitulation of Quebec and Montreal in that, although the Roman Catholic religion occupied a protected position in the Treaty, it was not acknowledged to be beyond restriction. The phrase "as far as the laws of Great Britain permit" is not found in the Articles of Capitulation.

On the other hand, the institutional support for the protection of the Francophone culture was not consistently embedded in the early constitutional experience of Quebec. As with other British colonies,[34] the authority of British administrators was set out in Royal Proclamations, Commissions and often secret Instructions. In the case of Quebec, the Treaty of Paris, 1763, was followed up with the Royal Proclamation, 1763,[35] the Commission of Governor Murray, 1763,[36] and the Instructions to Governor Murray dated 7 December 1763.[37] The latter three instruments gave wide authority for Governor Murray to introduce English laws into the colony and to encourage assimilation of the Francophone or, as the British described them, the Canadian community. The Proclamation, in particular, granted authority to the Governor with the consent of a Council and Assembly "to make, constitute, and ordain laws, statutes, and ordinances for the public peace, welfare, and good government of our said colonies, . . . as near as may be, agreeable to the laws of England". Murray could, in addition, set up courts to hear "all causes as well criminal as civil according to law and equity, and, as near as may be, agreeable to the laws of England. . . ." The Crown made similar provisions in Governor Murray's Commission. The Instructions to Murray called for the demise of 'the Canadian religion'. According to section 32:

> You are not to admit of any Ecclesiastical Jurisdiction of the See of Rome, or any other foreign Ecclesiastical Jurisdiction whatsoever in the Province under your Government.

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[34]See generally, Joseph H. Smith, *Administrative Control of the Courts of the American Plantations*, (1961), 61 Col. L. Rev. 1210 and *The English Legal System: Carry Over to the Colonies* (Univ. of Calif. 1975).

[35]*The Royal Proclamation*, 7 October, 1763 as reprinted in W. P. M. Kennedy *Documents of the Canadian Constitution, 1759-1915* (Toronto: Oxford U. Press, 1918) at 18-21.

[36]*Commission of Governor Murray*, 21 November, 1763 as reprinted in Houston, *supra*, footnote 31, at 74-78.

[37]*Instructions to Governor Murray*, 7 December 1763 as reprinted in Kennedy, *Supra*, footnote 35, at 27-37.

The Instructions continued:

> 33. And to the end that the Church of England may be established both in Principles and Practice, and that the said Inhabitants may by Degrees be induced to embrace the Protestant Religion, and their Children be brought up in the Principles of it; We do hereby declare it to be our Intention . . . all possible Encouragement shall be given to the erecting of Protestant Schools . . . , by settling, appointing and alloting proper Quantities of Land for that Purpose; and also for a Glebe and Maintenance for a Protestant Minister and Protestant School Masters; and you are to consider and report to Us . . . by what other Means the Protestant Religion may be promoted, established and encouraged in Our Province under your Government.

Article 38 added that no person could teach without a licence from the Lord Bishop of London. It is difficult not to conclude that the intent of the 1763 Proclamation, Commission and Instructions was to assimilate the Canadian community into that of the British.

In Part A above, I argued that the nature of our Constitution is such that formal documents such as the Treaty of Paris or the 1763 Proclamation are constitutive, rather than declarative, of constitutional rights and duties. As a consequence, one important criterion for the validity of a customary constitutional right or duty is whether it has been consistently acknowledged over a lengthy period of time.[38] The 1763 Proclamation, Commission and Instructions must, therefore, be read in the context of other instruments coming both before and after 1763. Secondly, one can only assess the constitutional significance of the 1763 instruments by examining the actual practice in communications between Canadian and British political officials. Once one understands the nature of the Constitution in this light, the Royal Proclamation of 1763 with its attendant Commission and Instructions is seen to be the aberration of an otherwise consistent British undertaking to respect and to protect the French religion, customs and laws — the central elements, in other words, of French culture at that time.

I have shown how the Articles of Capitulation of Quebec and Montreal in 1760 along with the Treaty of Paris, 1763, safeguarded the establishment and free exercise of Roman Catholicism, the "privileges" of the inhabitants and, in the case of the Treaty, "the custom of Paris and the laws and usages established for this country". The Royal Proclamation, Commission and Instructions of 1763 clearly contradicted these guarantees. But, as already noted, English constitutional principles held the Articles of Capitulation and the Treaty to be "sacred and inviolable". The Royal Proclamation, Commission and Instructions of 1763 were thereby invalid to the extent that they contradicted the earlier undertakings by the British.

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[38]Another important criterion is whether the political presuppositions underlying such a customary right or duty are consistent with claims by judges, legislators and lawyers, for example, that Canada is founded upon the existence of fundamental rights. See generally, Conklin, *supra*, footnote 25.

The invalidity of the 1763 Royal Proclamation, Commission and Instructions as a source of customary constitutional law is confirmed by the fact that, according to Bourinot[39] and Kennedy,[40] there remained great uncertainty between 1763 and 1774 as to the nature and extent of British obligations toward the Canadians. Furthermore, notwithstanding his Instructions, it is recorded that Governor Murray did not pursue the assimilationist policy.[41] Although his Commission and Instructions directed that he should summon a legislative assembly, Murray did not do so for fear of placing political power in the hands of the English minority.[42] By an Ordinance dated September 17th, 1764 Murray provided that all subjects were to be admitted to jury duty "without distinction" according to race.[43] Also, "*Canadian* [his emphasis] Advocats, Procters, etc., may practise in this Court." As Murray explained a month later, "Unless the Canadians are admitted on Jurys, and are allowed Judges and Lawyers *who understand their Language* his Majesty will lose the greatest part of this valuable people."[44] [Emphasis added] Finally, the September 17th Ordinance established an inferior Court of Common Pleas which, in practice, heard lesser civil cases amongst French speaking Canadians.[45] The court was essential, according to Murray, because:

> . . . not to admit of such a court, until they can be supposed to know something of our laws and methods of procuring justice in our courts, *would be like sending a ship to sea without a compass:* indeed it would be more cruel, the ship might escape . . . but the poor Canadians could never shun the attempts of designing men and the voracity of hungry practitioners in the law. They must be undone during the first months of their ignorance; if any escaped, their affections must be alienated and disgusted with our government and laws.[46] [Emphasis added]

By late 1764 official Crown policy emanating from London also deviated from the 1763 Proclamation, Commission and Instructions. The Crown officers instructed Murray *not* to use the Royal Proclamation so as to take away "from the native inhabitants the benefit of their own laws and customs in cases where titles to land and modes of descent,

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[39]Sir J. G. Bourinot, *A Manual of the Constitutional History of Canada from the Earliest Period to 1901* (Toronto: Copp, Clark, 1901) at 8-9.

[40]W. P. M. Kennedy, *The Constitution of Canada, 1534-1937* (Toronto: Oxford U. Press, 2nd ed., 1938) at 48 ff.

[41]George F. G. Stanley, *A Short History of the Canadian Constitution* (Toronto: Ryerson Press, 1969) at 27.

[42]Though elected, one could not sit in the Assembly, according to the Instructions (Article 29), unless he swore an anti-Catholic oath. In addition, only "freeholders" could stand for election (Article 11).

[43]*Ordinance Establishing Civil Courts, 1764* as reprinted in Kennedy, *supra,* footnote 35, at 37-40.

[44]Letter from Governor Murray to the Lords of Trade dated October 29th, 1764 as reprinted in Kennedy, *supra,* footnote 35, at 41.

[45]*Supra,* footnote 40, at 38.

[46]As quoted in Kennedy, *ibid.*

alienation, and settlement are in question, nor to preclude them from that share in the administration of judicature which both in reason and justice they are entitled to, in common with the rest of our subjects."[47] In 1766 the Crown's legal officers criticized the judicial system as being "without the aid of the natives, not merely in new forms, *but totally in an unknown tongue.*" [Emphasis added] Indeed, the legal officers expressly renounced the attempt by the Royal Proclamation of 1763 to abolish "all the usages and customs of Canada with the rough hand of a conqueror."[48] By 1774 the British Attorney-General could confidently state that the Royal Proclamation of 1763:

> . . . if it is to be considered according to that perverse construction of the letter of it; if it is to be considered as creating an English constitution; if it is to be considered as importing English laws into a country already settled, and habitually governed by other laws, I take it to be an act of the grossest and absurdest and cruelest tyranny, that a conquering nation ever practised over a conquered country. Look back, Sir, to every page of history, and I defy you to produce a single instance, in which a conqueror went to take away from a conquered province, by one rough stroke, the whole of their constitution, the whole of their laws under which they lived . . . My notion is, that it is a change of sovereignty. You acquired a new country; you acquired a new people; but you do not state the right of conquest, as giving you a right to goods and chattels. That would be slavery and extreme misery . . . you ought to change those laws only which relate to the French sovereignty, and in their place substitute laws which should relate to the new sovereign; *but with respect to all other laws, all other customs and institutions whatever,* which are indifferent to the state of subjects and sovereign, *humanity, justice and wisdom equally conspire to advise you to leave them to the people just as they were. . . .*[49] [Emphasis added]

The preferred position of the Canadian (that is, Francophone) culture in the Canadian Constitution is confirmed, most significantly, by the Quebec Act, 1774.[50] Interestingly, the preamble to Article IV acknowledged that the Royal Proclamation of 1763 along with the Commissions and Instructions to Governors Murray and Carleton "have been found upon experience to be inapplicable to the state and circumstances of the said Province." Upon "the conquest", the preamble continued, 65,000 inhabitants had professed Roman Catholicism. They had "for a long series of years" enjoyed "an established form of constitution and system of laws". As a result, the Royal Proclamation of 1763, all Commissions and Instructions to Governors were expressly "revoked, annulled and made void". Article V of the Quebec Act guaranteed the free exercise of the Catholic religion. It was written that persons:

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[47]As quoted in Kennedy, *ibid.*, at 42.

[48]As quoted in Mason Wade, *The French-Canadian Outlook* (Toronto: McClelland & Stewart Ltd., 1964) at 17-18.

[49]*Debates* in the British Parliament on the *Quebec Act, 1774* as reprinted in Kennedy, *supra,* footnote 35, at 92.

[50]Quebec Act, 1774 as reprinted in Houston, *supra,* footnote 31, at 90-96.

> . . . professing the religion of the Church of Rome, of and in the said Province of Quebec, may have, hold and enjoy the free exercise of the religion of the Church of Rome, *subject to the King's supremacy,* declared and established by an Act made in the first year of the Reign of Queen Elizabeth. . . . [the Act of Settlement]. [Emphasis added]

Article XV followed this up by providing that "no Ordinance touching religion . . . shall be of any force or effect, until the same shall have received His Majesty's approbation". By Article VIII, in all matters of controversy relative to property and civil rights, resort was to be had to "the laws of Canada" (that is, the laws, customs and usages of the Francophone community). Until altered by Ordinance, the "laws and customs of Canada" (that is, of the Francophone community) were to determine all future causes relating to property and civil rights. The seigneurs understandably saw the Quebec Act as "a charter for the nation", as "a kind of permanent guarantee of their ancient way of life".[51]

The constitutional obligation to protect the Francophone population as a cultural entity in the Canadas was reflected in more than just formal documents. Claude-Armand Sheppard in his study for the Royal Commission on Bilingualism and Biculturalism documented how, even in the initial military regime imposed by the British from 1760-1763, the process of government was carried on in both French and English.[52] During the period between the Treaty of Paris (1763) and the Quebec Act (1774) he concluded, "both legislative and judicial practice soon established the two languages as equals at the very least. In fact, the English authorities themselves resorted to proclaiming their ordinances in French, a fact which even received subsequent judicial notice."[53] All proclamations and ordinances were published in French and English both before and after the Quebec Act. The debates and proceedings of the Legislative Council set up under the Quebec Act proceeded in French,[54] although minutes were kept in English.[55] In a judicial decision in 1813 the courts acknowledged that:

> The French language has been used by His Majesty in his communications to His subjects in this province, as well as in His executive and in His legislative capacity, and been recognized as *the legal means of communication* of His Canadian subjects.[56] [Emphasis added]

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[51]Hilda Neatby, *French-Canadian Nationalism and the American Revolution* in J. M. Bumsted (ed.), *Canadian History Before Confederation* (Georgetown, Ont.: Irwin-Dorsey, 1972) at 203.

[52]Claude-Armand Sheppard, *The Law of Languages in Canada* (Ottawa: Information Canada, 1971) at 10-14.

[53]*Ibid.*, at 36. Also see M. Wade, *supra,* footnote 48, at 20-21 and Bourinot, *supra,* footnote 39 at 13.

[54]Bourinot, *supra,* footnote 39, at 13.

[55]M. Wade, *supra,* footnote 48, at 21.

[56]*R.* v. *Talon,* K.B., 1813 as reported in Maréchel Nantel, *La langue française au palais,* 5 R. du B. (1945), 201-16 and cited in Sheppard, *supra,* footnote 52, at 37.

The Legislative Assembly of Lower Canada confirmed the primacy of the French language in Quebec by resolving 21 to 15 on December 27th, 1792 that the official record of proceedings in the Assembly — the Journals — should be printed in both languages.[57] The Assembly further resolved 33 to 7:

> That no motion shall be debated or put, unless the same be in writing and seconded, when a motion is seconded, it shall be read in English and in French by the Speaker, if he is master of the two languages, if not, the Speaker shall read in either of the two languages most familiar to him, and the reading in the other language shall be at the table by the clerk or his Deputy before debate.[58]

After 1791 statutes were enacted in both languages. And on January 23rd, 1793 the Assembly, after heated debate for several days, formally made both languages equal as a source of law.[59]

Practice in the courts also confirmed that the Francophones should be able to express themselves and understand proceedings which affected their rights in their own language. An ordinance of 1777, which established a Court of Common Pleas, provided that writs of summons be granted in the language of the defendant.[60] Further ordinances were passed in 1785 and 1787 which established predominately Francophone juries for non-English speaking parties to both civil and criminal actions.[61] In 1788 the Quebec Court of Appeal established that pleadings be in both languages.[62]

The Constitutional Act, 1791 divided Quebec into Upper and Lower Canada. As noted above, Lower Canada clearly adopted the use of French and English in its legislative and judicial proceedings. In

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[57]Journal of the House of Assembly, Lower Canada (1793) at 64 as cited in Sheppard, *supra*, footnote 52 at 45.

[58]Rules and Regulations of the House of Assembly, Lower Canada (1793) at 142, 144 as cited in Sheppard, *supra*, footnote 52 at 45.

[59]The resolution as adopted reads as follows:

> IV. That such Bills as are presented shall be put into both languages, that those in English be put into French, and those presented in French be put into English by the clerk of the House or his Assistants, according to the directions they may receive, before they be read the first time — and when so put shall also be read each time in both languages — well understood that each Member has a right to bring in any Bill in his own language, but that after the same shall be translated, the text shall be considered to be that of the language of the law to which said Bill hath reference.

By Article III, all Bills "relative to the Laws, customs, usages and civil rights of this Province shall be introduced in the French language". All Bills relative to the criminal laws of England and the Protestant clergy were to be introduced in the English language. *Rules and Regulations of House of Assembly*, Lower Canada, 1793 as reprinted in Kennedy, *supra*, footnote 40, at 232-233.

[60]Art. 1, *An Ordinance to Regulate the Proceedings in the Courts of Civil Judicature in the Province of Quebec*, February 25, 1777 as reprinted in Kennedy, *supra*, footnote 40, at 160. For a discussion of this ordinance see Sheppard, *supra*, footnote 52, at 38.

[61]1785, 25 Geo. III, c.2, Art. IX; 1787, 27 Geo. III, c.4. As cited in Sheppard, *ibid.*, at 38.

[62]Doutre and Lareau, *Histoire générale du droit canadien*, I, 742 as cited in Sheppard, *ibid.*, at 39.

contrast, Upper Canada quickly institutionalized English as the only official language of communication with political and judicial authorities, although there exists some evidence that the Legislative Assembly did show some respect for the French language.[63]

An important obstacle with any argument which tries to establish a constitutional obligation to protect language rights arises out of the Act of Union, 1840.[64] Upon Lord Durham's recommendations the British reunited Upper and Lower Canada pursuant to the Act. Section XLI provided for the following:

> And be it enacted that from and after the said reunion of the said two Provinces, all writs, proclamations, instruments for summoning and calling together the Legislative Council and Legislative Assembly of the Province of Canada and for proroguing and dissolving the same, and all writs of summons and election, and all writs and public instruments whatsoever relating to the said Legislative Council and Legislative Assembly or either of them, and all returns to such writs and instruments, and all journals, entries, and written or printed proceedings of what nature soever of the said Legislative Council and Legislative Assembly and each of them respectively, and all written or printed proceedings and reports of committees of the said Legislative Council and Legislative Assembly respectively, shall be in the English language only: Provided always, that this enactment shall not be construed to prevent translated copies of any such documents being made, but no such copy shall be kept among the records of the Legislative Council or Legislative Assembly, or be deemed in any case to have the force of an original record.

Lord Durham had recommended that "The French be assimilated into an Anglophone Canada: French Canadians were to be absorbed, amalgamated, absolutely united."[65] On the other hand, the Act of Union conspicuously stands out as an aberration to the consistently long-standing tradition of respect for Francophone language rights and, more generally, respect for the Francophone culture as a whole. In the first place, the Act of Union did not on its own terms prevent the translation of documents or prohibit the use of French in debates. Furthermore, the Act of Union did not touch language rights in the courts. Indeed, the newly created Legislature reaffirmed and expanded the use of French in pleadings, judicial proceedings, jury selection and admission to the Bar in enactments dated 1843,[66] 1846,[67] 1847,[68] 1849,[69]

[63]See generally Sheppard, *ibid.*, at 51-53. Sheppard records that section 9 of a 1794 Act required pleadings served on Canadian defendants to be written in the French language. On June 3rd, 1793 Sheppard records that the Legislative Assembly resolved that all statutes be translated into French "for the benefit of the inhabitants of the Western District of this Province and other French settlers. . . ."

[64]3 & 4 Victoria, c. 35, 1830 as reprinted in Houston, *supra*, footnote 31, at 149.

[65]See generally Sheppard's discussion of the Report *supra*, footnote 52, at 53-55. Lord Durham's views are summarized in a letter he wrote to Lord Glenelg dated August 9th, 1838 as reprinted in Kennedy, *supra*, footnote 40, at 455.

[66]S.P.C. 1843, 7 Vic. c. 16, s.28 and S.P.C. 1843, 7 Vic., c. 19, s.11.

[67]S.P.C., 9 Vic., c. 29, s.1.

[68]S.P.C., 10 & 11 Vic., c. 13, s.23.

[69]S.P.C. 1849, 12 Vic., c. 37, s.1 and S.P.C. 1849, 12 Vic., c. 38, ss.19, 51.

1855,[70] 1861,[71] and 1864.[72] Secondly, a series of statutes enacted by the newly created Assembly offset the effect of section 41 of the Act of Union by requiring the publication in French of all Canadian statutes and all Imperial statutes.[73] Thirdly, the French language was given a preferred position in the proceedings of the Legislature itself. The first Speaker, for example, was French-speaking.[74] Standing Order 29 reasserted the former practice that all documents before the Assembly had to be translated into French. Standing Order 37 required that public bills be introduced in both languages. Further, Standing Order 38 provided that all motions be read in both French and English. Finally, Standing Order 66 required that all notices of intent to introduce a public bill be in both languages.[75] Fourthly, on December 7th, 1843, a Royal Commission recommended that both French and English laws be made more accessible to the citizenry by re-publication of all past statutes and ordinances into the French language.[76] Finally, in 1848, the United Kingdom Parliament repealed section 41 of the Act of Union, 1840.[77] By a series of further enactments and practices, the official equality of French and English reappeared for the conduct of all proceedings related to the Legislature.[78]

The consistent institutional support for the existence of a constitutional obligation with respect to the protection of the French language in the body politic was again reaffirmed by the enactment of section 133 of the British North America Act, 1867. Section 133 provided that:

> Either the English or the French Language may be used by any Person in the Debates of the Houses of 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. . . .

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[70]1855, 18 Vic., c. 104, s.1.

[71]C.S.L.C. 1861, c. 77, s.28 and C.S.L.C. 1861, c. 83, s.94.

[72]S.P.C. 1864, 27-8, Vic., c. 41, s.129.

[73]An *Act to Provide for the Translation into the French Language of the Laws of This Province and for other Purposes Connected Therewith* (1841), 4 & 5 Vict., c. 11 reasoned in its preamble that it was "just and expedient" to translate all laws "for the information and guidance of a great portion of Her Majesty's subjects in this Province. . . ." Also see *An Act to Provide for the Distribution of the Printed Copies of the Laws* (1844-45), 7 & 8 Vict., c. 68, s.3; and *An Act Respecting the Consolidated Statutes for Upper Canada* (1859), 22 Vic., c. 30.

[74]M. Cuvillier was the first Speaker.

[75]See generally, Houston, *supra*, footnote 31, at 183.

[76]"Prefatory Notice" to *The Revised Acts and Ordinances of Lower Canada* (Montreal, 1845) at ix as quoted by Sheppard, *supra*, footnote 52, at 57.

[77]The Union Act Amendment Act, 1848, 3 & 4 Vict. c. 35 as reprinted in Houston, *supra*, footnote 31, at 175.

[78]See generally, Sheppard, *supra*, footnote 52, at 58-59.

One should note that section 133 differs from the original Resolutions upon which it was based in that section 46 of the 1864 Quebec Resolutions[79] and section 45 of the 1866 London Resolutions[80] used the word "may" rather than "must". The alteration of the verb, after a contentious, prolonged debate, indicated the compulsive nature with which political leaders considered the constitutional obligation toward language rights.[81]

The Articles of Capitulation, The Treaty of Paris, Imperial statutes, Royal Proclamations, Commissions to Governors, Royal Instructions to Governors, Canadian statutes, Governors' ordinances, standing orders of legislatures, legislative practices, legislative resolutions, judicial decisions, judicial practices, Royal Commission reports, and legislative debate provide weighty and consistent evidence of the existence of a constitutional obligation on the part of the State and a corresponding constitutional right on the part of Francophones (or, as they were called, the Canadians) with respect to the French language prior to Confederation. The State's obligation was to ensure that Canadians (that is, Francophones) could read the laws, express themselves in political dialogue, communicate their grievances and defend themselves in their own language. The State was also obligated to protect the laws, customs and religion of the Canadians. The Royal Proclamation of 1763 and the Act of Union of 1840 demonstrated a lack of respect for these constitutional obligations. They can be explained, however, as isolated aberrations to an otherwise historically coherent undertaking by the State and the State's officials to protect the French culture generally and the French language in particular. The Royal Proclamation was an aberration in that uncertainty prevailed in its aftermath. Furthermore, colonial administrators did not comply with its terms in practice. In addition, it was preceded and followed by the overriding evidence of an obligation to respect the French language. Similarly, colonial legislators and administrators enacted statutes and ordinances which ran counter to the assimilationist intent of the Act of Union.

Political officials expressed a "sense of obligation" toward the Francophone language in their declaratory and operational policy during a period of over one hundred years. Both Imperial administrators and the colony's leaders appeared willing and capable of effectively translating that "sense of obligation" into concrete action. Political leaders deeply believed that they were bound by the constitutional obligation and that belief culminated in the British Parliament's enactment of section 133 of the B.N.A. Act, 1867.

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[79]As reprinted in J. Pope, (ed.), *Confederation: Being a Series of Hitherto Unpublished Documents*... (Toronto: Carswell Co. Ltd., 1895) at 48.

[80]*Ibid.*, at 107.

[81]See generally, P. B. Waite, (ed.), *The Confederation Debates in the Province of Canada*, 1865 (McClelland Stewart Ltd., Carleton Series, 1963).

Section 133 did not create a new constitutional rule. Nor did the British Parliament posit "the law" by its enactment of section 133. Rather, section 133 constitutes one of many important pieces of reliable evidence of the nature and extent of the State's constitutional obligations toward her citizens with respect to language. Section 133 does not declare "the law" today simply because it is found in the B.N.A. Act and because the latter was validly enacted according to the proper manner and form requirements. Rather, section 133 and the B.N.A. Acts as a whole constitute only one item of evidence of the Constitution. Section 133 is significant evidence because of the "sense of obligation" which institutional history had consistently demonstrated toward the French religion, laws, customs and language over a hundred year period.

Having established a constitutional obligation to respect language rights in customary constitutional law in Canada until 1867, this analysis should proceed to the issue of whether political leaders have fulfilled that constitutional obligation during the twentieth century[82] and whether there ought to be such an obligation today. These issues are the subject of essays in themselves for they would necessitate a serious examination of statutory and judicial pronouncements between 1867 and 1979 as well as difficult philosophic questions about fundamental rights. One point, however, is clear. The prevailing constitutional ideology in English-speaking Canada has failed to appreciate the significance of customary constitutional law in this country and, as a consequence, the ideology has restricted our perspective to the precise wording of section 133 and to the heads of power in sections 91 and 92. Contemporary analyses of language rights in Canada have failed to realise that normative political values underlie the Canadian judiciary's subservience to the legislature and that normative political values underlie the lawyer's reliance upon the B.N.A. Act. As shown in Part A above, the very nature of a constitutional obligation forces the lawyer to go beyond the traditional inquiry of the B.N.A. Act.

Claude-Armand Sheppard concluded, for example, that "a careful analysis of the terms of section 133 leads to the unavoidable conclusion that its scope is surprisingly limited. In effect, it deals only with some aspects of the legislative and judicial processes at the federal level and in Quebec."[83] Section 133, he wrote, failed to deal with subordinate legislation, with the many facets of court procedure and with the actual conduct of government. Because of the principle of legislative supremacy and because of section 92(1) of the B.N.A. Act which permits a province to amend its own constitution, so the argument goes, Quebec could restrict English language rights in Quebec. Indeed, Sheppard's

[82]With respect to this question see the study by my colleague, Professor Robert Kerr, entitled *Language and the Law in Canada*, to be published in Julio Menezes, ed., *Decade of Adjustment: Legal Perspectives on Contemporary Canadian Issues* (Toronto: Macmillan & Co., 1979).

[83]Sheppard, *supra*, footnote 52, at 99.

argument seems to be convincing because Manitoba succeeded in doing just that with respect to the French language which had been similarly protected in the Manitoba Act.

Sheppard is not alone in his restrictive view of language rights in the Canadian Constitution. The Bilingualism and Biculturalism Report similarly concluded that:

> . . . even a superficial analysis of the terms of section 133 makes it clear that its scope is very limited . . . Constitutionally speaking, neither federal nor Quebec administrative law is required to be bilingual . . . The section is not intended to secure fully the linguistic rights of the French-speaking or English-speaking minorities in Canada . . . it cannot be expected to provide for the many complex situations that must now be faced.[84]

Similarly, the Gendron Commission concluded that:

> . . . there are no language stipulations elsewhere in the B.N.A. Act (than in section 133). On ordinary principles of English statutory construction, the language stipulations in s.133 *are exclusive and exhaust the field;* and there is no room for any legal implication as to any other special protection of language interests in the B.N.A. Act.[85] [Emphasis added]

Finally, the legal opinions submitted to the Gendron Commission by English-speaking Canada's foremost constitutional lawyers searched in vain for the existence of serious language rights within the confines of the B.N.A. Act.[86] Albert Abel, for example, asserted that:

> One of the well-established principles first laid down in *Hodge* v. *The Queen,* 9 App. Cas. 117 (1883) that the legislatures of the Province have 'authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow.' I should have assumed that there were no limitations on what the 'Assemblee National can enact other than such as one might trace to the British North America Act.'[87]

Having confined the ambit of the Constitution to the four corners of the B.N.A. Act, the conclusions of these leading scholars are not surprising. Customary constitutional law and normative issues of political philosophy have had little place in their analyses.

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[84]Royal Commission on Bilingualism and Biculturalism, *Report,* Book I (Queen's Printer, 1967) at 52-53.

[85]Commission of Inquiry on the Position of the French Language and on Language Rights in Québec, *Report,* Book II (Québec: Government of Quebec, 1972) at 22. See esp. 15-36.

[86]See generally, Commission of Inquiry, *ibid.,* Book II.

[87]Commission of Inquiry, *ibid.,* Book II at 369.

C. Constitutional Ideology as a source of political disunity in Canada

It was argued above that the existence and scope of language rights in Canada depend upon the manner in which we conceive the nature of the Constitution. The failure to appreciate the importance of normative assumptions as exemplified in customary constitutional law and the corresponding conception of the B.N.A. Act as pository rather than constitutive of the law have contributed in no small degree to political disunity in Canada. I now wish to show why this has been so. I wish to explain how orthodox constitutional ideology has contributed to political disunity for at least two reasons.

(i) The transformation of political power in Canada

In the first place, orthodox constitutional ideology has deterred constitutional lawyers from appreciating the nature or the importance of the changes in the sources of political power since 1867. As a consequence, constitutional lawyers have failed to address the implications which those political changes should have for language rights in particular and the Constitution more generally. Because the Constitution rests upon moral-political values rather than upon posited rules which apply in an "all-or-nothing" fashion, section 133 of the B.N.A. Act, 1867 does not declare the law with respect to language rights. Rather, it is merely evidence of the deeper moral-political value that Francophones outside of Quebec and Anglophones in Quebec possess the constitutional right to express themselves in their own language when communicating with the institutional sources of political authority in Canada and Quebec respectively. This constitutional right as reflected in section 133 must be seen as only a part of a bundle of constitutional rights originally intended to provide the Francophone community outside of Quebec and the Anglophone community in Quebec with the "peace of mind" that their deep cultural values would be protected.

Why, then, was section 133 so narrowly drafted as to cover only the proceedings of federal courts and the proceedings of the Federal Parliament and Quebec Legislature? Because the courts and the Legislature constituted the major political institutions in 1867 wherein the citizen's rights were burdened or enlarged. Professor Corry in an important study done for the Rowell-Sirois Commission in 1936 documented how the sphere of government in 1867 was quite minimal.[88] The Confederation Fathers expected that this minimal role of government would remain. The society of the Canadas of the late eighteenth and early nineteenth centuries perceived freedom in what Isaiah Berlin has called "negative freedom". That is, freedom was

[88] J. A. Corry, *The Growth of Government Activities Since Confederation*, a study for Royal Commission on Dominion-Provincial Relations (Ottawa: Queen's Printer, 1936) at 1-6.

conceived to be "freedom from chains, from imprisonment, from enslavement by others".[89] Although Canadian leaders did not accept the prescriptions of Adam Smith in a literal sense (the State's financial backing of the canals and railways acknowledges that), they did believe that government should restrict its conduct to the general conditions of public order. Section 133 did not need to cover language rights in administrative law simply because there was no such thing as administrative law at that time. The public service consisted of a few hundred hand-picked men, politically loyal and literally subservient to the Minister. The Minister's source of power emanated from the legislative Assembly in a very real sense. The only other political institution which had the authority to determine rights was the Court.

This century, in contrast, has witnessed a transformation of political assumptions and political power in Canada. Citizens have come to expect the State to contribute positively to the well-being of society. After the Depression, the citizenry came to conceive freedom in terms of the creation of socio-economic conditions whereby the citizen could fulfil his "true self". This radical change in political values has been accompanied by changes in the sources of political power in this country. The courts and the legislature were no longer the chief institutions which determined the citizen's rights and obligations. Rather, new sources of political power have arisen. The dimensions of power which the Legislature and the Courts formerly exercised over the individual have gradually shifted to large, complex governmental bureaucracies and to corporate decision-makers.

Statutes being drafted in very general terms during the past forty years, for example, have been replaced by statutory instruments, regulations and memoranda. The extent to which the courts may review these regulations is, generally speaking, limited. The Legislature likewise possesses very little, if any, influence in formulating the regulations or policy memoranda. Indeed, the latest Report of the Statutory Instruments Committee of the House of Commons and the Senate shows how federal public servants have refused even to disclose the content of a great number of statutory instruments under the excuse that they are not, in the opinion of the bureaucrats, statutory instruments at all.[90] The regulations are enforced as well as "enacted" by a massive bureaucracy whose size and influence could not possibly have been foreseen prior to 1867. Furthermore, major policy initiatives have emanated initially from the Cabinet (after the 1880s) and eventually, especially after World War II, by the bureaucracy. Today political power

[89]Isaiah Berlin distinguishes between negative and positive freedom. The former constitutes what we have traditionally considered as "'liberal', individual freedom". The latter comprises social and economic freedom. Mere economic or other incapacity does not mean that one lacks political freedom. Citizens lack political freedom only if they are intentionally prevented from attaining a goal. Berlin, *Two Concepts of Liberty* and *Introduction* in *Four Essays on Liberty* (1969) at lvi.

[90]Canada, Joint Committee of Senate and House of Commons on Regulations and Other Statutory Instruments, *Second Report*, 2nd sess., 30th Parliament, 1976-77.

is not exercised so much when the Cabinet approves the various alternatives presented to it. Rather, political power prevails when the senior public servants determine the issues for the Ministers and submit what they deem to be the "realistic" alternatives facing a Minister.

Indeed, political scientists have documented how the initiation of legislative policy underlying statutes itself rarely proceeds from the Commons itself.[91] Even in the case where a Minister himself initiates a legislative policy it is a bureaucrat — the legislative draftsman — who rounds out the policy and who decides the "practicality" of implementing it. Once the proposed bill reaches the floor of the House, party discipline within the majority party as well as the Standing Orders of the House militate against any substantial amendment to a bill either from Opposition Members or Backbenchers of the majority party. The dialectical debate within the Chamber possesses an air of unreality except in those relatively rare circumstances when a minority government exists.

The participants in the constitutional process from the Articles of Capitulation in 1760 to the B.N.A. Act in 1867 could not have foreseen the transformation of political institutions in Canada. Nor has it been possible for constitutional lawyers to take account of the transformation since their horizons have been restricted to the B.N.A. Act. But once one realises that the B.N.A. Act is constitutive rather than declaratory of constitutional law, section 133 brings on new meaning. It constitutes evidence of the moral-political value that the Francophone citizen outside of Quebec and the Anglophone citizen in Quebec possessed the constitutional right to express himself in his own language when communicating with the important institutions of political power. As new political institutions evolved, the constitutional obligations with respect to language rights could have been met only if lawyers had applied the principle of law underlying section 133 to the new sources of political power, namely the government bureaucracy and the large corporations.

(ii) **The federalist perspective**

The second reason why orthodox constitutional ideology is connected with political disunity in Canada is that the federalist perspective itself leaves little room for the existence of any fundamental

[91]See generally T. A. Hockin, *Apex of Power* (Scarborough: Prentice-Hall, 1971); C. E. S. Frank, *The Dilemma of the Standing Committee of the Canadian House of Commons*, 4 Can. J. Pol. Sc. 1, (1971); T. d'Aquino, *The Prime Minister's Office: Catalyst or Cabal? Aspects of the Development of the Office in Canada and some Thoughts About its Future*, 17 Can. Pub. Adm. 55 (1974); D. Smith, *Comments on 'The Prime Minister's Office: Catalyst or Cabal'?* 17 Can. Pub. Adm. 80 (1974); House of Commons (Canada), Special Committee on Statutory Instruments, *Third Report*, 1969; J. E. Kersell, Parliamentary Supervision of Delegated Legislation (London, 1960), G. B. Doern, and Aucoin (eds.), *The Structures of Policy-Making in Canada* (Toronto: Macmillan, 1971).

For studies done with respect to the British Parliament see generally R. H. S. Crossman, *Introduction* in Walter Bagehot's *The English Constitution* (London: Fontane, 1963); S. Walkland, *The Legislative Process in Great Britain* (1968); H. V. Wiseman (ed.), *Parliament and the Executive* (London: Routledge & Kegan Paul, 1966); R. M. Punnett, *Front-Bench Opposition* (Heinemann, 1973); J. P. Mackintosh, *The British Cabinet* (London: Methuen, 1968 2d ed.) esp. at 72-218 and 567-577.

rights, let alone language rights in Canada. Constitutional lawyers have presumed, in their analysis of the B.N.A. Act, that legislative power is complete in that there is no sphere of legislation dealing with political affairs which is not covered by the division of legislative powers in the B.N.A. Act, 1867. What legislative authority the federal Parliament does not have, the provincial legislatures do, and vice versa. Because there is no conceivable limit to the scope of the legislative intervention into the lives of the citizens contemplated by the division of powers perspective, it has been logically impossible for there to exist any fundamental rights, let alone language rights, in Canada.

The principle of the exhaustiveness of legislative power appears to have gone unquestioned by Canadian courts and legislators since it was initially laid down in the 1887 Privy Council decision of *Dow* v. *Black*[92] (1875). Authors of texts on Canadian constitutional law have accepted the courts' premise in their traditional descriptively-oriented examination of the law. *Clement's Canadian Constitutional Law*[93] declares, for example, that "the whole field of self-government in Canada is covered in the distribution of legislative power effected by the British North America Act. Whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces within the limits of the Act. Whatever is not thereby given to the provincial legislatures rests with the parliament of Canada." A. H. F. Lefroy in his *Canada's Federal System* asserted that:

> There is, then, no possible kind of legislation relating to the internal affairs of Canada, which cannot be enacted either by the Dominion parliament or by the provincial legislatures. If the subject-matter of an Act is not within the jurisdiction of the provincial legislatures, acting either severally or in concert with each other, it is within the jurisdiction of the Dominion parliament; . . .[94]

In his earlier *Legislative Power in Canada*[95] Lefroy emphasized that the exclusive authority of the legislatures was "as plenary and ample within the limits prescribed by section 92 as the Imperial Parliament, in the plenitude of its power, possessed and could bestow". Its authority was "absolute".[96] The 1939 Senate Report on the B.N.A. Act reaffirmed this proposition.[97] Finally, the most influential text on constitutional law in

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[92]*Dow* v. *Black* (1875), L.R. 6 P.C. 272; 44 L.J.P.C. 52. See also *Valin* v. *Langlois* (1879), 5 App. Cas. 115; 49 L.J.P.C. 37; *Russell* v. *Reg.* (1882), 7 App. Cas. 829; 51 L.J.P.C. 77; *Lambe's Case* (1887), 12 App. Cas 575; 56 L.J.P.C. 87 and *Brophy's Case* (1895), A.C. 202; 64 L.J.P.C. 70. Note, for example, the recent decision of *Dupond* v. *City of Montreal* (1978), 19 N.R. 478 (S.C.C.).

[93](3rd ed.), 1916 at 453.

[94]Toronto: Carswell, 1913 at 96-97.

[95]Toronto: Toronto Law Book & Publishing Co., 1897-1898 at 244.

[96]Lefroy, *ibid.*, at 270 ff.

[97]Senate of Canada, *Report Relating to the Enactment of the British North America Act, 1867* (1939) at 14 ff.

English-speaking Canada acknowledges that although sections 91 and 92 are not entirely exhaustive, the qualifications to the exhaustiveness principle merely flow from other "fundamental" provisions of the B.N.A. Act (such as sections 133 or 91(1)) rather than from customary constitutional law.[98]

The consequence which the exhaustiveness doctrine poses for minority rights can be readily seen in the case of *Union Colliery Co.* v. *Bryden.*[99] At issue in that case was section 4 of the Coal Mines Regulation Act, 1890, which provided that "no boy under the age of twelve years, and no woman or girl of any age, and no Chinaman, shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground." In approaching the problem the Court found that it need only ascertain whether the legislation was a matter in relation to s.92(10) ("Local Works and Undertakings"), s.92(13) ("Property and Civil Rights in the Province"), s.91(25) ("Naturalization and Aliens") or the "deeming clause" at the end of s.91. In justifying this approach the Privy Council asserted that evidence as to the character of the legislation was "of no prevalency." The Court continued:

> But the question raised directly concerns the legislative authority of the legislature of British Columbia, which depends upon the construction of ss. 91 and 92 of the British North America Act, 1867. These clauses distribute *all subjects of legislation* between Parliament of the Dominion and the several legislatures of the provinces. In assigning legislative power to the one or the other of these parliaments, it is not made a statutory condition that the exercise of such power shall be, in the opinion of a court of law, discreet. In so far as they possess legislative jurisdiction, the *discretion committed to the parliaments, whether of the Dominion or of the provinces, is unfettered. . . .*"[100] [Emphasis added]

In *Bryden,* the Court's analysis left no room for minority rights.

The doctrine of the exhaustiveness of legislative power has militated against the steadfast protection of language rights in Canada and Quebec for the following reasons. First, language rights have become "ad hoc" rights, rights which may exist one day in a given circumstance but not the next in a similar circumstance. They may be granted one day by one legislature but taken away the next by another.

Secondly, how could legislatures and courts possibly have fulfilled their constitutional obligations with respect to language rights when constitutional ideology contemplated that either the provincial legislature or Parliament could create rights, determine their meaning, ascertain their scope, and authorize their destruction? Whether a Francophone out-

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[98]B. Laskin, *Canadian Constitutional Law,* revised 3rd edn. (Toronto: Carswell, 1969) at 92-93.

[99]*Union Colliery Co.* v. *Bryden,* [1899] A.C. 580.

[100]*Ibid.,* at 584-585.

side of Quebec or an Anglophone in Quebec possessed a right to express himself and defend his rights in his indigenous language depended entirely upon the beliefs of the legislative majority of Parliament or of the provincial legislature at any particular moment in history. By ignoring normative political assumptions as exemplified in customary constitutional law and by focusing upon sections 91 and 92, neither the courts nor the legislatures have acknowledged any theoretical limit to the extent to which a legislative majority could repress the minority in each respective jurisdiction. The legislative majority in Parliament could enslave all Quebeçois. Indeed, the legislative majority — or, more accurately, the mandarins, technocrats and other wielders of power — could conceivably enslave all persons whose language is English.

Constitutional lawyers who have examined the nature of language rights in Canada have implicitly incorporated into their analysis the "tyranny of the majority," which Mill so feared, as the basis of our Constitution and, at times, as the basis of an ideal Constitution. I have argued that such an ideology propogates a "make-believe" world which inaccurately presumes that the real source of political power is the majority of the elected Members in the Legislature or Parliament. Such an ideology also contemplates that there is no immunity from the legislative, judicial or administrative denial of any right believed to be fundamental to the body politic. One can hardly claim, therefore, that there is a solid basis upon which any Canadian could have confidence in the implementation of his constitutional rights. Given the constitutional ideology of the "division of powers" there could hardly be expected to be any confidence in the future by any minority group which believed its rights to be essential for the preservation of its very entity. The ideology of our constitutional lawyers has by definition rejected the very possible existence of fundamental rights, let alone language rights. Unless lawyers, jurists and legislators are prepared to conceive that there are some rights which are so fundamental as to be immune from legislative, judicial or administrative denial, neither the individual nor a minority group can justifiably possess confidence in the future. Until that confidence can be justifiably established, political unity will remain upon sandy ground.