OFFICIAL LANGUAGES IN CANADA: A REVIEW OF THE CONSTITUTIONAL ISSUES

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INTRODUCTION

A topical issue in the past few years has been the status of the French and English languages in Canada. Although the majority of Canadians are English speaking, the French Canadian minority has never relinquished the right to speak its own language. The fact that the Province of Quebec, with a majority of French-Canadians, is a major political force in Canada's federal system further establishes the need to recognize officially the French language as a viable cultural legacy.

The language problem is not new to the Canadian scene. It has existed throughout Canada's history, creating at one time or another a polarizing force amongst the population along cultural and ethnic lines. The issues are forever being determined and sides taken as individuals react (indeed sometimes overreact) to the legislative efforts being made to cope with this political "hot potato".

The question, no doubt, is responsible for a lot of emotional and personal anguish because of its historical and cultural aspects, but it must be looked at with an objective eye in order to determine if bilingualism in Canada is a reality or a myth.

This article reviews the constitutional issues raised by the duality of languages in Canada. It will show the logical sequence of events and determine whether the Constitution of Canada is a proper foundation for the statement that Canada is truly a "bilingual" country.

The starting point is to define exactly what is meant by such terms as "language rights" and "official languages". There are many and diverse definitions, but the following will suffice.

> Language rights: Strictly speaking a linguistic "right" is a specific legal protection for the use of a given language. It involves the use of language in the conduct of public affairs: in the parliamentary and legislative process; in the day-to-day administration of government; in the rendering of justice; and in the public school system. It may also involve private activities. Thus language rights are measured by

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the degree to which a given language receives formal and practical recognition in the constitution of a country and in its political, social and economic life.[1]

Official Languages: "Official language" refers to a language ordained or permitted by law or well established custom to be used in one or more of the public institutions of the state: i.e. its legislatures and laws, its public administration, its courts and quasi-judicial bodies, its public schools.[2]

These all-encompassing definitions must be kept in mind throughout this study of the linguistic problem since the use of a language refers to not only governmental and public institutions but also everyday transactions of all segments of the population.

EVOLUTION OF THE LANGUAGES IN CANADA

A. *HISTORICALLY*

The cessation of the political struggles between France and England over the dominance of North America left Canada with a population composed of both French and English settlers. The French Canadians, having arrived on the scene first, claimed certain privileges while the conquering English sought to impose their own ways of life. Even at this early stage, language was a prominent concern to the developing nation.

Nevertheless, the early treaties, the Treaty of Utrecht in 1713, the Treaty of Paris in 1763 and the *Quebec Act*[3] in 1774, concerned themselves with the language issue, concentrating their efforts mainly on protection of the religious convictions of the conquered. Each provided for the free exercise of the Roman Catholic religion by the people.

In the century following the *Quebec Act*, Canadians, faced with the prospect of building a nation composed to two culturally distinct peoples, had to face the practical difficulties created by the difference of languages. The following events demonstrate how the problem was approached.

1791 — *Constitutional Act:*[4] The purpose of the Act was to divide

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1 *Royal Commission on Bilingualism and Biculturalism Report*. Vol. 1, Chapter 3 - "Language Rights in Canada: The Legal Foundations" at p. 41.

2 F.B. Sussmann, "Bilingualism and the law in Canada", (1968) Proccedings of the Sixth International Symposium on Comparative Law, at p. 9.

3 *An Act for making more effectual provision for the government of the province of Quebec in North America*. 1774 (Imp.), 14 Geo. 3, c. 83.

4 *An Act to repeal certain parts of an Act, passed in the fourteenth year of His Majesty's reign, intitled, "An Act for making more effectual provision for the government of the province of Quebec, in North America;" and to make further provision for the government of the said province, 1791 (Imp.), 31 Geo. 3, c. 31.*

Canada into the two virtually independent colonies of Upper and Lower Canada.

The legislature of Lower Canada, though composed primarily of French Canadians, was willing to compromise with its English minority on the language issue:

> As a compromise to the suggestion that French then should be the language of enactment, it was agreed that in the future all bills relating to the criminal law and the protestant clergy would be introduced in English while bills relating to the laws and usages of the province would be introduced in French. [5]

The attitude in Upper Canada was not as tolerant, as the English majority soon asserted its authority in the legislature.

1840 - *Act of Union:* [6] As a result of Lord Durham's Report, this Act undertook to wipe out everything that was French Canadian except, of course, the right to practice the Roman Catholic religion. The goal was clear - to anglicise French Canada. Section 41 of the Act provided for all statutes to be hereby enacted "in the English language only" though translation was authorized.

1841 - The outcry by French Canadians following the *Act of Union* necessitated a mitigation of the harshness of the Act. In order to do this, one of the first bills presented to the newly united Parliament provided for the translation into the French language of the laws passed by the legislature. [7]

1848 - Following numerous petitions sent to the Queen on behalf of the French Canadian population, an Act was passed to amend the *Act of Union* by striking out section 41. The language issue was thereby left to the discretion of the legislature. Section 1 of the Act states:

> . . . whereas it is expedient to alter the law in this respect, in order that the Legislature of the Province of Canada, or the said Legislative Council and Legislative Assembly respectively, *may have power to make such regulations herein as to them may seem advisable.* (emphasis added). [8]

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5 J.D. Honsberger, "Bilingualism in Canadian Statutes", (1965) 43 Can. Bar. Rev. 314, at p. 315.

6 *An Act to Re-Unite the Provinces of Upper and Lower Canada, and for the Government of Canada,* 1840 (Imp.), 3 & 4 Vict., c. 35.

7 *An Act to Provide for the Translation into French Language of the Laws of This Province and for other Purposes connected Therewith,* (1841) 4 & 5 Vict., 11.

8 *An Act to repeal so much of an Act of the third and fourth year of Her present Majesty, to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada, as relates to the use of the English language in instruments relating to the Legislative Assembly of the Province of Canada, 1848 (Imp.), 11 & 12 Vict.,* c. 56.

1849 - Two years previously, in 1847, Lord Elgin had arrived in Canada as Governor General. Being more tolerant of the French Canadians' problems, and as a symbolic recognition of the official status of French, he read for the first time the speech from the throne in both languages and announced that thereafter French and English would be official languages in the legislature.[9]

While this did little to terminate the long-lasting feud between the founding cultures of Canada, it paved the way for a more tolerant and sympathetic attitude on the part of our forebearers prior to Confederation. The situation may be better explained in these words:

> The harshness and some of the disparities created by the Act of Union went in time. The suspicions of the French Canadians of the English-speaking Canadians and their motives remained. The Act of Union failed because it ignored the realities of a bicultural and bilingual country. In any future constitution guarantees concerning the use of the French language would be demanded.[10]

B. CONFEDERATION

Negotiations leading up to Confederation, although concerned with a wide variety of matters, did not ignore the language issue. The experiences of the preceding century cautioned against trying to suppress the existence of the French-Canadian fact:

> The history of the united provinces with the attempted suppression of the French language by the Act of Union made anything less than two official languages in the Federal Parliament and in the Quebec legislature impossible and unrealistic.[11]

Some sort of guarantee for two languages in Canada was thus necessary. It is by section 133 of the British North America Act of 1867 that that guarantee was given:

> 133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of Parliament of Canada and of the Legislature of Quebec shall be printed and published in both these Languages.[12] This was

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9 Honsberger, *supra*, footnote 5, at p. 318; cf. *Royal Commission Report on Bilingualism and Biculturalism, supra*, footnote 1, at p. 46.

10 Honsberger, *supra*, footnote 5, at p. 319.

11 *Ibid.*

12 *An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith*, 1867, (Imp.) 30 & 31 Vict., c. 3.

the extent of the guarantee given: provision for two official languages in the Canadian Parliament, the Quebec legislature and the Federal courts. It is proper to ask why, if everybody was sincere at that time that in order to exist Canada must be bilingual, did they restrict - or it might be more proper to say, not extend - the concept of bilingualism to all the segments of Canadian life? Perhaps the French Canadian negotiators, seeing that no strong opposition existed to having two official languages, were lulled into a false sense of security and, not wanting to anticipate problems, thought that if their rights were guaranteed on this practical level it would automatically follow in other areas also. This view finds support in the following statement:

> When the British North American Colonies began negotiating for confederation, it was assumed from the outset that both languages "would have to be permitted for at least certain minimum purposes, and no serious opposition to bilingualism arose in any quarter". The members of the Legislative Assembly were politicians and often lawyers. Consequently, when they wanted to provide for guarantees of the French language, it is most natural that they should have sought to first protect those institutions that had officially or semi-officially reacted against the use of French - that is, the Legislatures and the Courts. Language restrictions in these institutions would have impressed the French Canadian legislators most due to their proximity to the problem as lawyers, or legislators, or as was often the case, as lawyers legislators.[13]

Unfortunately for Canadians, it was the letter of the law which was followed and not its spirit. All use of French outside Quebec thereafter attempted was eventually restricted closely to the wording of section 133. Any extension of section 133 was looked upon as "asking too much" contrary to the spirit in which both English and French Canadians had united in order to form a federal Dominion.

By the 1949 *British North America [No. 2] Act*[14] section 133 was firmly entrenched in the Canadian Constitution. The Imperial Parliament in England, by this Act, gave the Canadian Parliament a power to amend its own constitution similar to that given the Provincial Legislatures by section 92(1) of the B.N.A. Act in 1867. Specifically excluded from this federal amending power were a number of things among which was "the use of the English or the French language". Obviously this prevented the federal government from affecting the linguistic rights given in section 133.

Thus at this point in time, if one refers back to the definitions given in the first part of this paper, it becomes possible to seriously

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13 H. Marx, "Language Rights in the Canadian Constitution", Themis (Revue Juridique), 1967, 239 at pp. 250-251.

14 *An Act To Amend The British North America Act, 1867, as respects the amendment of the Constitution of Canada*, S.C. 1949 (2nd. sess.), c. 81.

question whether Canada had truly become the bilingual nation it was said to be. By looking at it from a legal standpoint, i.e. the Canadian Constitution, it is doubtful. Some may say that by custom it is bilingual, but skeptics will surely point out the fact that Quebec is almost completely French while the rest of Canada is almost completely English; surely, that is not true bilingualism!

C. *OFFICIAL LANGUAGES ACTS*

Sensing the growing dissatisfaction of the French Canadians over the protection of their cultural and linguistic identity, Parliament in 1969 enacted legislation pertaining to "the status of the official languages of Canada". Better known as the *Official Languages Act* it provided:

> The English and French languages are the official languages of Canada for all purposes of the Parliament and Government of Canada, and possess and enjoy equality of status and equal rights and privileges as to their use in all the institutions of the Parliament and Government of Canada. [15]

The intent of the legislation was clear and apparent but its scope and effect was limited by the Act itself to federal institutions and agencies. The federal government was taking the lead and invited each provincial legislature to enact legislation of its own.

The Province of New Brunswick with over 36% of its population French-speaking enacted shortly thereafter the *Official Languages of New Brunswick Act* [16] which provided basically the same things as the federal Act, but on a provincial and local level. Section 2 of the Act stated:

> Subject to this Act, the English and French languages (a) are the official languages of New Brunswick for all purposes to which the authority of the Legislature of New Brunswick extends, and (b) possess and enjoy equality of status and equal rights and privileges as to their use for such purposes. [17]

Not surprisingly, the enactment of these two pieces of legislation created quite a great deal of consternation among the citizens of the Province. Opponents immediately questioned the right of the legislatures to enact such legislation; they claimed that it was "shoving French down everybody's throat" and threatening the "good relationship" which existed between the two cultures. Those

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15 *Official Languages Act*, R.S.C. 1970, c. 0-2, s. 2; see also J.B. Paradis, "Language Rights in Multicultural States: A Comparative Study", (1970) 20 U. Toronto L.J. 478 where he discusses the history and content of the Act while going into some of the problems encountered in the implementation of such an Act.

16 *Official Languages of New Brunswick Act*, R.S.N.B. 1970, c. O-1; see also R.W. Kerr, "The Official Languages of New Brunswick Act", (1970) 20 U. Toronto L.J. 478 where he discusses the history and content of the Act while going into some of the problems encountered in the implementation of such an Act.

17 *Ibid.*, s. 2.

in favour hailed the legislation as the necessary catalyst to create harmony and keep Canadians together for many years to come. The polarization of both groups resulted in most arguments being based on emotional grounds and the revival of time-worn historical squabbles.

Through this the constitutional issue was not long to emerge as being the deciding factor in whether the legislation was to be repealed or maintained as law. The Supreme Court of New Brunswick first considered the matter on a reference by the Lieutenant-Governor-in-Council.[18] Five questions were submitted to the Court:

> 1. Are subsections (1), (3) and (4) of section 11 of the Official Languages Act, R.S.C. 1970, c. 0-2, within the legislative competence of the Parliament of Canada, insofar as they purport to be applicable to proceedings in criminal matters in courts of criminal jurisdiction in the Province of New Brunswick?
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> 2. Is section 23c of the Evidence Act, R.S.N.B. 1952, c. 74 within the legislative competence of the Legislature of New Brunswick?
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> 3. Is section 14 of the Official Languages of New Brunswick Act, S.N.B., 1969, c. 14, within the legislative competence of the Legislature of New Brunswick?
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> 4. If subsections (3) and (4) of section 11 of the *Official Languages Act* and section 23C of the *Evidence Act* are intra vires the Parliament of Canada and the Legislature of New Brunswick, respectively, does section 23C of the *Evidence Act* have the effect of making subsections (1) and (3) of section 11 of the *Official Languages Act* operative in New Brunswick?
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> 5. If question 4 is answered in the negative and section 14 of the *Official Languages of New Brunswick Act* is intra vires the Legislature of New Brunswick, will section 14 of the said Act, when proclaimed, have the effect of making subsections (1) and (3) of section 11 of the *Official Languages Act* operative in New Brunswick?[18a]

Although the judges limited their opinions to the specific issues queried, it was the whole of the *Official Languages Act* and of the *Official Languages of New Brunswick Act* that was in question. The decision of the New Brunswick Supreme Court upholding the constitutionality of these two acts was subsequently appealed to the Supreme Court of Canada in the case of *Jones* v. *Attorney-General of Canada et al.*[19]

Both of these decisions will be discussed in the following parts of this paper.

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18 *Reference Re Official Languages Act and Official Languages of New Brunswick Act*, (1972) 5 N.B.R. 653, (1972) 35 D.L.R. 372.

18a *Ibid.*, 35 D.L.R. at pp. 383-384.

19 *Jones v. Attorney-General of Canada et al.* (1974), 45 D.L.R. (3d) 583.

OPPOSITION TO THE OFFICIAL LANGUAGES

As was mentioned above, a considerable amount of opposition was mounted against both the federal languages Act and the New Brunswick Languages Act. Among the more forceful of dissenters was Mr. Leonard C. Jones Jr., the then mayor of Moncton, N.B., who along with his counsel the Hon. Joseph T. Thorson, Q.C., a one-time President of the Exchequer Court of Canada, took it upon themselves to voice their opposition before the Courts. In both cases dealing with the languages acts, they were permitted to present their arguments before the courts as interested persons in the question referred.

Their two basic arguments were:

> 1. Section 91(1) of the *British North America Act 1867*, as amended by the *British North America [No. 2] Act* (1949), gave the federal government the power to amend its constitution but expressly prohibited any amendments "as regards the use of the English or French language"; whereas the *Official Languages Act* purports to legislate "as regards the use of the English or French language" within the meaning of the exception, it has the effect of amending the Canadian constitution contrary to the powers given.
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> 2. Section 133 of the *British North America Act* "defines in clear and explicit terms the exact status of the French and English languages in Canada and clearly specified the cases in which both languages must be used" [20]; in any attempt on the part of Parliament or the Provincial Legislatures to extend the use of the French language in Canada by legislation is repugnant to section 133 and thus ultra vires their powers.

These arguments seem to be based on a purely personal interpretation of sections 91(1) and 133 of the B.N.A. Act without any legal foundation to support them. There is no doubt that what is suggested is not new; it requires a strict interpretation of section 133 thereby limiting its effect to the actual wording of the section. It rejects the contention that section 133 was to serve as a base for the further propagation of linguistic rights in accordance with the spirit in which Confederation was entered into.

What it further attempts to do is require an amendment to the constitution if any additional linguistic rights are sought to be given. This would mean that any legislation relating to languages would require the approval of all of the provincial premiers, and that any legislation enacted without going through this procedure would be "a breach of an essential condition of Confederation". [21]

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20 J.T. Thorson, "Proposed Official Languages Act", (1968) 16 Chitty's L.J. 325 at p. 326.

21 *Ibid.*, at p. 329.

FEDERAL POWERS TO LEGISLATE

A. *SECTION 133 OF THE B.N.A. ACT*

As has been seen, the sole guarantee presently available for the protection of language rights in Canada is the entrenched provision of section 133 of the B.N.A. Act. A closer look at that section is now required so that one may grasp the full impact of it in the Canadian Constitution.

> 133. 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, or in or from all or any of the Courts of Quebec.
>
> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages. [22]

The wording of the section was the end result of prolonged discussions over section 46 of the 1864 Quebec Resolutions and section 45 of the 1866 London Resolutions. These original motions were somewhat similar:

> Both the English and French languages may be employed in the General Parliament and in its proceedings, and in the Local Legislature of Lower Canada, and also in the Federal Courts, and in the Courts of Lower Canada. [23]

The permissive wording of the original sections gave way in the final draft to a form neither permissive nor obligatory in toto but somewhere between the two extremes. The interplay between the words "may" and "shall" assures the right to use either language in the debates of the Houses of the Canadian Parliament and of the Quebec Legislature as well as in any Court of Canada or of Quebec; at the same time it requires the use of both languages in the records and journals and in the printing and publication of the Acts of the Canadian Parliament and the Quebec Legislature.

The view taken by the Court as to section 133 is not the restrictive approach suggested by Mr. Thorson but a much more fluid one. Chief Justice Hughes stated in his judgment in the Refernce case:

> I find myself unable to accept the contention that "so far as the subject of the status of the French and English languages in Canada is concerned, their status in the scheme of Confederation is fixed by section 133 so

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22 *Supra*, footnote 12.

23 J. Pope, *Confederation Documents Hitherto Unpublished* (Toronto: The Carswell Co. Ltd., 1895), at pp. 48 & 107.

completely that it cannot be disturbed or altered in any respect, directly or indirectly, either by the Parliament of Canada or by legislature of the Provinces of Canada". [24]

This approach was further supported by Mr. Justice Limerick and Mr. Justice Bugold who gave concurring judgments in that case. Mr. Justice Limerick took the view that neither the use of French nor English is a constitutional right given by section 133.

The provision of s. 133 of the B.N.A. Act, 1867 would seem to confirm this view. If the drafters of that Constitution considered English as the constitutional language of Canada it is difficult to justify the provision protecting the use of English in the debates in Parliament and in the federal Courts. Such a provision would be unnecessary. The implication from the protection of the use of English in these forums differs considerably from that arising out of the protection of English in the Legislature and Courts of Quebec. [25]

When the matter came before the Supreme Court of Canada [26] Chief Justice Laskin reached a similar conclusion by looking at the historical orientation of section 133. He looked for guidance to the Quebec Resolutions [27] and held:

...s. 133 of the British North America Act, 1867, which prescribes the use of both official languages in Parliament, the Quebec Legislature and the federal and Quebec Courts, does not exhaust constitutional authority with respect to the use of English and French, or fix the status of the two languages so that any legislation which extends the protection afforded to or the obligations imposed respecting both languages by s. 133 must be preceded by constitutional amendment. [28]

The question of constitutional amendment arises from the fact that the B.N.A. Act cannot be looked at in an "isolated and disjunctive way" but that each section is part "of the general scheme" and

24 *Supra*, footnote 18, 35 D.L.R. at p. 377; see also the view taken by the Privy Council in *Edwards* v. *A.G. Can.*, [1930] A.D. 124 (P.C.) at p. 136 where the Court states that the provisions of the Act (B.N.A. Act) should not be "cut down by a narrow and technical construction, but should rather be given a large and liberal interpretation".

25 *Supra*, footnote 18, 35 D.L.R. at p. 389.

26 *Supra*, footnote 19.

27 This is supported by Fitzpatrick, C.J.: "In construing this constitutional enactment we are not only entitled, but bound, to consider the history of the subject-matter dealt with, and by the light derived from such source, to put ourselves as far as possible in the position of the legislature whose language we have to pound." *Regina P.S. Trustees* v. *Gratton Sep. S. Trustees* (1915), 50 S.C.R. 589, per Fitzpatrick C.J. dissenting, citing *C.P.R.* v. *James Bay* (1905), 36 S.C.R. 42 at pp. 89-90; *Re Representation in House of Commons* (1903), 33 S.C.R. 475 at p. 567. We also find the Privy Council stating in *Edwards* v. *A.G. Can.* [1930] A.C. 124(P.C.): "The history of these sections and their interpretation in Canada is not without interest and significance."

28 *Supra*, footnote 26.

must be interpreted as an entity.[29] Therefore, section 133 must be considered in light of section 91(1) which gives Parliament the right to amend the Constitution of Canada except "as regards the use of the English or the French Language". Does section 91(1) limit the right of Parliament to expand the privileges conferred in section 133? Mr. Justice Bugold succinctly states the position adopted by the Court in this regard:

> Section 91(1) prohibits amendments to the Constitution as regards the use of the English or the French language. It does not prohibit amendments as to the use of both languages. It stipulates that Parliament may not amend the Constitution respecting the use of the English or French languages, not that Parliament may enact no law whatsoever relating to the use of the English or the French language.[30]

In summary, it comes down to this: as long as the guarantees given by section 133 are not infringed upon, the federal Parliament may expand as much as it wants on the privileges conferred on both the French and English languages in Canada. The position of the Provincial legislature with respect to section 133 is not, however, as clear.

B. PEACE, ORDER AND GOOD GOVERNMENT

Under section 91 of the B.N.A. Act, Parliament has the power to "make Laws for the Peace, Order and good Government of Canada". The question must be asked whether the *Official Languages Act* might come under this general power. A number of cases have dealt with the requirements necessary for legislation to be validated under this clause.

In *Russell v. The Queen* it was held by the Privy Council that if the legislation in question did "not fall within any of the classes of subjects in sect. 92 then the Parliament of Canada had by its general power 'to make laws for the peace, order and good government of Canada', full legislative authority to pass it."[31] This seems to give wide powers to the federal government permitting it to legislate in fields which are completely within provincial jurisdiction.

Following the *Snider* case[32] which attempted to explain the *Russell* case on the basis of the existence of an emergency, Viscount Simon, L.C. defined the true test to be applied:

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29 *A.G.B.C.* v. *A.G. Can.*, [1924] A.C. 222, [1923] 4 D.L.R. 669, [1923] 3 W.W.R. 1249 (P.C.).

30 *Supra*, footnote 18, 35 D.L.R. at p. 401.

31 *Russell* v. *The Queen* (1882), 7 A.C. 829 at p. 836.

32 *Toronto Elec. Commrs.* v. *Snider*, [1925] A.C. 396, [1925] 1 W.W.R. 785, [1925] 2 D.L.R. 5, reversing 55 O.L.R. 454, [1924] 2 D.L.R. 761.

> ...the British North America Act nowhere gives power to the Dominion Parliament to legislate in matters which are properly to be regarded as exclusively within the competence of the provincial legislatures merely because of the existence of an emergency ... In their Lordhip's opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must, from its inherent nature, be the concern of the Dominion as a whole ... then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.[33]

The language issue is "unquestionably of Canadian interest and importance"[34] and as such affects the affairs of the Dominion as a whole. This was the approach taken by Mr. Justice Limerick in the *Reference* case:

> There can be no dispute that at this time in Canada's history there is no issue more vital to the unity and therefore to the peace, good order and government of Canada than the solution to the language problem existing between two peoples by whose foresight and goodwill this nation was founded in 1867.[35]

The federal languages legislation can, therefore, also be validated under the general power of section 91 of the B.N.A. Act, i.e. the general clause of peace, order and good government.

PROVINCIAL POWERS TO LEGISLATE

A. *Ancillary powers*

Up to this point this article has only looked at the competency of the Federal Government to legislate with respect to languages in Canada. The question must now be asked whether the Provinces have any powers given to them by the B.N.A. Act to legislate as regards languages.

In allowing the federal *Official Languages Act* to stand on the basis of the general clause contained in section 91 of the B.N.A. Act, Chief Justice Laskin made the following statement:

> I am in no doubt that it was open to the Parliament of Canada to enact the Official Languages Act (limited as it is to the purposes of the Parliament and Government of Canada and to the institutions of that Parliament and Government) as being a law "for the peace, order and good Government of Canada in relation to [a matter] not coming within the classes of Subjects...assigned exclusively to the Legislatures of the Provinces". The quoted words are in the opening paragraph of s. 91 of the *British North America Act, 1867*; and in relying on them as constitutional support for the

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33 *Atty-Gen for Ont.* v. *Canada Temperance Federation*, [1946] A.C. 193 at p. 205.

34 *A.G. Ont.* v. *A.G. Can.*, [1896] A.C. 348 at p. 360.

35 *Supra*, footnote 18, 35 D.L.R. at p. 386, as per Limerick, J.A.

> *Official Languages Act* I do so on the basis of the purely residuary character of the legislative power thereby conferred. No authority need be cited for the exclusive power of the Parliament of Canada to legislate in relation to the operation and administration of the institutions and agencies of the Parliament and Government of Canada. Those institutions and agencies are clearly beyond provincial reach.[36]

His statement seems clearly to indicate that Parliament may only legislate as to languages under the general power conferred in section 91 if such legislation remains within federal jurisdiction and does not infringe upon provincial powers. By inference does this not then mean that the Provinces have the power to legislate upon languages within their own jurisdiction as long as they don't infringe on federal powers? The upshot of this would be that jurisdiction over languages belongs exclusively neither to the Dominion nor to the Provinces. Their respective powers to legislate with respect to language would be ancillary to heads of legislative jurisdiction conferred by the B.N.A. Act.

The rule of law pertaining to then ancillary concept limits its application somewhat in that "there can be a domain in which provincial and federal legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, [but] if the field is not clear and in such a domain the two legislations meet, then the federal legislation must prevail."[37]

The two statutes which are of interest here seem to prevent any overlapping of two fields by the wording used in the opening sections of the respective Acts. In the *Official Languages Act,* its scope is limited to "all the institutions of the Parliament and Government of Canada";[38] on the other hand, the *Official Languages of New Brunswick Act* is restricted to "all purposes to which the authority of the Legislature of New Brunswick extends".[39]

Having solved the problems created by paramountcy, the Provinces have a clear hand in establishing language policies in all areas within their competence as an ancillary matter to these areas. These ancillary powers of the Provinces have been recognized in a number of Courts, one of which is the Supreme Court of New Brunswick in the *Reference* case (*supra*). Referring to the *R. v. Murphy* case,[40] Mr. Justice Limerick while speaking on section 23C of the

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36 Supra, footnote 19, at pp. 588-589, as per Laskin, C.J.C.

37 *G.T.R. v. A.G. Can.*, [1907] A.C. 65 (P.C.) at p. 68, wherein it was held that the above two propositions had been established by *A.G. Ont.* v. *A.G. Can.*, [1894] A.C. 189(P.C.) and *Tennant* v. *Union Bank*, [1894] A.C. 31 (P.C.)

38 *Supra*, footnote 15.

39 *Supra*, footnote 16.

40 *R. v. Murphy, Exp. Belisle and Moreau* (1968), 69 D.L.R. (2d) 530, [1968] 4 C.C.C. 229, 5 C.R.N.S. 68.

N.B. *Evidence Act*[41] dealing with languages used in the courts of the Province, states:

> [It] is in the legislative powers of the Provincial Legislature as ancillary to the power to legislate as to "The Administration of Justice in the Provinces including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts" (s. 92, class 14 of the B.N.A. Act, 1867). This legislative power exists unless the subject-matter conflicts with federal legislation assigned to Parliament by s. 91 of the B.N.A. Act, 1867, in which case the application of the provincial legislation is suspended as long as Parliament occupies the field or unless it is provided in the Constitution that it is beyond its legislative powers.[42]

One field in which the Provinces may clearly legislate languages is education, which was exclusively given to the provinces under s.93 of the B.N.A. Act, 1867. This was upheld in an early case, *Trustees of the Roman Catholic Separate Schools* v. *MacKell*,[43] where the Judicial Committee of the Privy Council held that the provinces have control over schools as an absolute power granted by section 93.

B. Quebec and Bill 22

> The power to amend the Constitution as to the use of either language is therefore only curtailed to the extent that English or French must both continue to be acceptable in the debates in Parliament and the Legislature of Quebec and in the records and journals of those Houses and in the pleadings and process in the Courts of Canada (Federal Court and Supreme Court of Canada) and the Courts of Quebec.[44]

At Confederation, Quebec was placed in a special position vis-a-vis the other Provinces with respect to section 133 of the B.N.A. Act. Sec. 133, a part of the Canadian Constitution, was also made a part of the province's constitution so as to ensure the same guarantees to the English minority of the Province, as those enjoyed by their French counterparts on the Federal scene. In actual fact, the English minority in Quebec enjoyed more rights than those guaranteed by section 133 and much more than those enjoyed by French Canadians in any other part of Canada. This seemed to work well enough until unrest developed amongst the Quebec population over the fact that the English language was gaining more ground within the Province and depriving the French speaking Quebecois of the control over their own province. To remedy the situation, drastic measures were

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41 *Evidence Act*, R.S.N.B. 1973, c. E-11.

42 *Supra*, footnote 18, 35 D.L.R. at p. 393.

43 *Trustees of the Roman Catholic Separate Schools* v. *MacKell*, [1917] A.C. 62 at p. 69 as per Lord Buckmaster: "Further, the class of persons to whom the right or privilege is reserved must, in their Lordship's opinion be a class of persons determined according to religious belief and not according to language."

44 *Supra*, footnote 18, 35 D.L.R. at p. 387.

taken by the Liberal government of Premier Bourassa. These measures took the form of Bill 22.

Like all previous language legislation, Bill 22 created quite a furor in Quebec and outside of the Province in the rest of Canada. The reason is obvious: the main purpose of the Bill was to make French the official language of the Province of Quebec thereby limiting the use of English throughout the province. It nevertheless did go on to become the *Official Language Act*[45] of the province.

Although it is similar to the New Brunswick legislation in that it purports only to apply to the institutions under provincial jurisdiction, the *Official Language Act* does tend to regulate private as well as public matters affecting the lives of the citizens of the province. Immediately the Act was denounced as unconstitutional by many, but to date the federal government has refused to refer the matter to the Supreme Court of Canada and no case involving it has come before any court.

It may indeed be rather difficult to find grounds on which to question the constitutional validity of this Act. Since the Province is obviously using its ancillary powers to legislate in areas within its jurisdiction, the legislation will only be restricted from areas where there is already federal legislation as to the language to be used. Such federal legislation is virtually non-existent, except perhaps where federal governmental departments are concerned; these are covered by the federal languages Act.

An argument may be found if the Quebec Act attempts to infringe on the constitutional guarantees of section 133 of the B.N.A. Act, 1867. But even if it did, it is not certain that the Quebec government does not have the constitutional power to amend section 133. As mentioned earlier, this section became part of Quebec's provincial constitution; similar to all the other provinces. Quebec has by section 92(1) of the B.N.A. Act 1867, the power to "make laws in relation to . . . the Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor".[46] No express limitation is placed on this amending power "as regards the use of the English or the French language" as in the federal amending power under section 91(1).

At the end of the last century the Province of Manitoba was responsible for an interesting precedent on this very point. When it

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45 *Official Language Act*, S.Q. 1974, c. 6. For a summary description see Whyte & Lederman, *Canadian Constitutional Law, Case Notes and Materials* (Toronto: Butterworths, 1975).

46 *Supra*, footnote 12.

entered Confederation in 1870, Manitoba had included in its *Manitoba Act*[47] a section analogous to section 133 of the B.N.A. Act 1867. Section 23 of the Act provided:

> Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the British North America Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

Pursuant to this section, as in Quebec, extensive language rights were given to its minority French population extending beyond the scope of the section. Unfortunately, greater forces were at work to make Manitoba a unilingual English province. Their efforts resulted in the Manitoba Legislature passing in 1890, *An Act to provide that the English language shall be the Official Language of the Province of Manitoba*[48] which stated:

> 1. Any statute or law to the contrary notwithstanding, the English language only shall be used in the records and journals of the House of Assembly for the Province of Manitoba, and in any pleadings or process in or issuing from any Court in the Province of Manitoba. The Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language.
>
> 2. This Act shall only apply so far as this Legislature has jurisdiction so to enact.

The *Manitoba Act* (supra) had been confirmed by the Imperial Parliament in the *British North America Act* 1871.[49] Section 6 of this latter Act stipulated that "it shall not be competent for the Parliament of Canada to alter the provisions of the last mentioned Act of the said Parliament, in so far as it relates to the Province of Manitoba . . ." Section 23 of the *Manitoba Act* was thus entrenched in the Canadian Constitution in the same manner as section 133 had been entrenched into the British North America Act.

The Manitoba *English Language Act* therefore directly repealed section 23 of the *Manitoba Act.* The Quebec legislation does not on the face of it attempt to affect directly section 133 of the B.N.A. Act but if it is found that it does, the question is open to debate whether or not it is within its powers to do so.

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47 *An Act to amend and continue the Act 32 and 33 Victoria, chapter 3; and to establish and provide for the Government of the province of Manitoba,* S.C. (1970) 33 Vict. c. III.

48 *An Act to provide that the English Language shall be the Official Language of the Province of Manitoba,* R.S.M. 1891, c. III.

49 *British North America Act* 1871, 34-35 Vict., c. 28.

An interesting fact to note is the federal government in the Manitoba case refused to question the constitutionality of the legislation before the Courts. The question has, therefore, never come before any Court for a decision.[50]

CONCLUSION

Canada has now arrived at the point where it has *two* official languages, French and English. The legislation permitting this has been held to be constitutionally valid but it is by no means constitutionally entrenched. Any future government may repeal these statutes, thereby taking a step back into history.

This article has not attempted to devise any magic solutions to the language problem. The most it has done is present comprehensive review of the events leading up to the Official Languages Acts and then attempt to note the elements relevant in a consideration of their constitutionality. The summary thus presented hopefully gives a realistic view of the Canadian Constitution as it affects the linguistic rights of both the French and English cultures which form the nucleus of our Canadian nation.

The following citation sums up, I think, the attitude that must be taken if the Canadian federal system, as we know it, is to survive:

> Canadians must approach the language question with two special qualities: realism and goodwill. Realism means accepting facts. French-fact and English-Canada is a fact. The English minority in Quebec now numbers one million; the French minorities outside Quebec also number about one million. If Canadian federalism is to survive, it must accept bilingualism sensibly applied, in Quebec as well as in Canada as a whole. It is one of the essential conditions of our survival. It is not the only one, for economic benefits must come to all Canadians from our association. We must believe we are worthwhile as a nation. But it must be a bilingual nation.[51]

Since the coming into power of the Separatist government in Quebec, the future of Canada seems to revolve around this question of languages. Bilingualism itself is being redefined as politicians are grasping for new solutions to the age old prqblem. What F.R. Scott was telling us in 1971, is still as true today, and it is up to each Canadian to decide whether Confederation will survive.

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50 Since this article was prepared the constitutionality of the Manitoba English Language Act has been questioned in the Courts of that province. In *Regina* v. *Forest*, [1977] 1 W.W.R. 363 at p. 378, Dureault Co. Ct. J. stated "I find it beyond the power of the legislature of Manitoba to abrogate s. 23 of the Manitoba Act, and the provisions of The Official Language Act of Manitoba, particularly subsections (1) and (2) of s. 1, are ultra vires its jurisdiction." We may see this case appealed to higher courts in the near future.

51 F.R. Scott, "Language rights and language policy in Canada", (1971) Man. L.J. 243 at p. 256.