Language Guarantees and the Power to Amend the Canadian Constitution

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Introduction

An official language may be defined as one ordained by law to be used in the public institutions of a state; more particularly in its legislature and laws, its courts, its public administration and its public schools.[1] In Canada, while language rights have historically been an issue of controversy, only a partial provision for official languages as above defined is to be found in the basic constitutional Acts.

The *British North America Act,* in sec. 133,[2] gives limited recognition to both English and French in the courts, laws, and legislatures of Canada and Quebec. With the possible exception of Quebec, the Provinces would appear to have virtually unlimited freedom to legislate with respect to language in all spheres of public activity within their jurisdiction. English is the "official" language of Manitoba by statute [3] and is the language of the courts of Ontario.[4] While Alberta and Saskatchewan have regulated the language of their schools,[5] they have not done so with respect to their courts and

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[1] The distinction between an official language and that used in private discourse is clearly drawn by the Belgian Constitution: Art. 23. "The use of the language spoken in Belgium is optional. This matter may be regulated only by law and only for acts of public authority and for judicial proceedings." Peaslee, A. J., *Constitutions of Nations,* Concord, Rumford Press, 1950, p. 129.

[2] *The British North America Act,* 1867, Sec. 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 the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages."

[3] *An Act to provide that the English Language shall be the official language of the Province of Manitoba,* S.M. 1890, c. 14; R.S.M. 1954, c. 187.

[4] *The Judicature Act,* R.S.O. 1960, c. 197, s. 124.

[5] By virtue of *The Alberta Act,* S.C. 1905, c. 3, s. 17; *The Saskatchewan Act,* S.C. c. 42, s. 17.

legislatures.[6] There is no statutory regulation of the language of public institutions in British Columbia and the four Atlantic Provinces. However, English is the official language by custom and usage, and it is even possible to make an historical case that English is the official language of the courts by virtue of the Commissions and Instructions to the first colonial Governors.[7] A number of Provinces have seen fit to legislate with respect to the language of instruction in public schools and their absolute right to do so was upheld by the Privy Council.[8]

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[6] The result of this failure to legislate is some ambiguity as to the status of French. Section 16 of both the *Alberta* and *Saskatchewan Acts* provided that Northwest Territories legislation in force immediately before Sept. 1, 1905, was to continue until repealed by Parliament or the respective Legislatures. An *Act to Amend the Northwest Territories Act*, S.C. 1891, c. 22, s. 18 provided that English or French could be used in the Debates of the Territorial Assembly and the Courts of the Territory, and the Territorial Ordinances were to be published in both languages, but also provided that the Assembly could regulate the manner of recording and publishing its proceedings *proprio motu* after the next election. Any such change was to be embodied in a Proclamation made and published by the Lieutenant-Governor before having full force and effect. On January 19, 1892, a Resolution was passed making English the sole language of record in the Assembly (Journal of the Northwest Territories, 1891-2, p. 110). The authors have been unable to find any record of the publication or even preparation of the necessary Proclamation. They are consequently of the opinion that the Resolution is of no effect. *The Northwest Territories Act*, R.S.C. 1886, c. 50, s. 110, as amended by the 1891 Statute, was in force on the date of the establishment of both Provinces. The *Act to Amend Schedule A to the Revised Statutes 1906*, S.C. 1907 c. 44, s. 1, expressly declared that the Act 1891 S.C. c. 22 was not repealed as regards Alberta and Saskatchewan. Saskatchewan and Alberta have never repealed the latter Act.

[7] English was the language of the political institutions brought from Britain. The language of practice and pleading in the Courts of England was declared to be English by the Statute 1731, 4 Geo. II c. 26. The legal basis of English in Nova Scotia is the Commission and Instructions to Governor Cornwallis of May 6, 1749; similarly, in Prince Edward Island the Commission and Instructions of August 4, 1769, and July 27, 1769 respectively; in New Brunswick, the Commission and Instructions to Governor Carleton of August 16, 1784; in British Columbia the Commission and Instructions to Governor Douglas of September 2, 1858; and in Newfoundland to Governor Osborne in 1729. The effect of these Commissions was to introduce the English system of laws and judicature into the colonies, and thus indirectly English was made the official language of the courts. See Read, G. E. "The Early Provincial Constitutions", (1948) 26 *Can. Bar Rev.* 625.

[8] *Ottawa Separate School Trustees* v. *Mackell* [1917] A.C. 62. See also: *McDonald* v. *Lancaster Separate School Trustees* (1916) 35 O.L.R. 614; *Re Ottawa Separate Schools* (1917) 41 O.L.R. 259; *Ottawa Roman Catholic Separate School Trustees* v. *Quebec Bank* [1920] A.C. 230; *Ottawa Roman Catholic Separate*

In this note the authors will attempt to define the nature and extent of existing Constitutional language guarantees and the power

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School Trustees v. *Ottawa Corporation et al.* [1917] A.C. 76; *Roman Catholic Separate School Trustees for Tiny* v. *Rex* [1928] A.C. 363.

Newfoundland has no statute regulating the language of instruction.

Prince Edward Island has never legislated with respect to the language of instruction, but laws have been passed regulating the linguistic competence of teachers: See *An Act to amend and consolidate the several Acts relating to Education*, R.S.P.E.I. 1861 c. 36, s. 36; *An Act to Amend and consolidated the several Acts relating to Education*, S.P.E.I. 1868 c. 6, s. 72.

New Brunswick has never legislated with respect to the language of instruction, hut the cases of *Maher* v. *The Town of Portland* (reported in (1874) Wheeler's *Confederation Law of Canada*, pp. 338, 367), and *Ex Parte Renaud* (1873) 14 N.B.R. 273, provided the model for the abolition of separate schools in Manitoba.

Nova Scotia. Since Confederation there has been no legislation permitting instruction in the public schools of the Province in a language other than English. But before Confederation Gaelic, French and German were specifically permitted. See *An Act to continue the Act for the Encouragement of Schools*, S.N.S. 1845 c. 25, s. xxiv.

Quebec has never legislated with respect to the language of instruction in Protestant and Catholic schools. This has been determined by the decision of the competent Catholic and Protestant school authorities: particularly The Council of Public Instruction, now the Superior Council of Education, school boards, and lately the Department of Education.

Ontario has legislated with respect to the language of schools: see *The Public School Law*, S.O. 1874 c. 28, ss. 61-2(b); *The Public Schools Act*, R.S.O. 1877 c. 204, s. 87-2(b); *The Public School Act*, S.O. 1896 c. 70, s. 76(2); *Ibid.*, R.S.O. 1897 c. 292, s. 76(2), s. 79(2), s. 82(5); *Ibid.*, S.O. 1901 c. 39, s. 85(5); *An Act to amend the Public Schools Act*, S.O. 1906 c. 53, s. 46(6); *An Act respecting the qualifications of certain teachers*, S.O. 1907 c. 52, s. 9. The most sweeping attempt at the regulation of the language of instruction was in the Ministerial Order of 1912, Regulation 17, and modified by Circular 46, of 1928.

Manitoba has also legislated with respect to the language of instruction in public schools: See *An Act to amend the "Schools Act"*, S.M. 1897 c. 26, s. 10; *The Public Schools Act, R.S.M.* 1913 c. 165, s. 258; *An Act to further amend the "Public Schools Act"*, S.M. 1916 c. 88; *The Public Schools Act*, S.M. 1952 c. 50, s. 240.

Saskatchewan has also passed such legislation: See *The Schools Act*, S.S. 1915 c. 23, s. 177; *An Act to amend the School Act*, S.S. 1918-19 c. 48; *The School Act*, R.S.S. 1920 c. 110, s. 177; *Ibid.*, R.S.S. 1930 c. 131; *An Act to amend the School Act*, (No 2) S.S. 1930, c. 46, s. 7, s. 9; *An Act to amend the School Act*, S.S. 1931 c. 52, s. 14, s. 23(c). This latter section, with its overtones of vigilante action, is surely one of the most unfortunate attempts at enforced anglicisation ever attempted by a Province. See *McCarthy* v. *The City of Regina* [1918] A.C. 911.

Alberta has also passed similar legislation: See *The School Act*, R.S.A. 1927 c. 51, s. 146; R.S.A. 1942 c. 175, s. 154; R.S.A. 1953 c. 297, ss. 385-387.

British Columbia has only legislated with respect to the language of instruction once: See *An Act to amend the "Public Schools Act"*, S.B.C. 1940 c. 45, s. 3.

of either Parliament or the Provincial Legislatures to amend them. The *British North America Act 1867 and Amendments* do not expressly recognize language as a separate head of jurisdiction; nor have the courts held it to be an over-riding substantive right beyond the narrow ambit of sec. 133. The power of Parliament or the Provinces to legislate with respect to language is, it would seem, instead merely ancillary to subjects of legislative competence attributed by the *B.N.A. Act.*

The Nature and Extent of Present Language Guarantees

(i) Legislatures and Laws

Sec. 133 provides that either English or French may be used in the Debates and shall be used in the Records and Journals of the Houses of Parliament and the Houses of the Legislature of Quebec; the section further provides that the Acts of Parliament and of the Quebec Legislature shall be printed and published in both languages.[9] However, this provision does not appear to extend to subordinate legislation.

(ii) Courts

The section stipulates that either English or French may be used in all proceedings in any "Court of Canada" established under the *B.N.A. Act* and in any "Court of Quebec".[10] This section covers the Courts of Quebec at every level, but outside Quebec covers only Federal courts.[11] Federal administrative tribunals appear to be beyond the ambit of this requirement. It could be argued that Provincial courts established under section 92(14) but designated as the courts of exclusive competence over matters of Federal jurisdiction [12] are *ipso facto* bilingual. However, the better view would seem to demand a negative reply since they are not "Courts of Canada established"

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[9] *Quaere*: Does "printing and publication" include enactment ? It can be argued *contra* that an "Act" which is to be published implies one which has been passed. Otherwise publication would be of a translation, not of the Act. See footnote 43 *infra.*

[10] However, the right is more formal than substantive, since civil litigants are obliged to pay for the costs of interpretation into the other language.

[11] Namely, the Supreme Court; Exchequer Court; Admiralty Court; Prize Court; Military Tribunals; and Courts of the Yukon and Northwest Territories.

[12] Such as courts of criminal jurisdiction: *Criminal Code*, secs. 2(10), 2(38); The Bankruptcy Court: *The Bankruptcy Act*, R.S.C. 1952 c. 14, s. 140; The Citizenship Court: *The Canadian Citizenship Act*, R.S.C. 1952 c. 33, s. 34(2), s. 2(h).

under the *B.N.A. Act.* Thus the civil procedure in force in a Province applies unless Parliament legislates otherwise.

(iii) **Public Administration**

There is no requirement under sec. 133 that either the Federal Government or Quebec should provide services in any specific language.

(iv) **Schools**

There is no provision in the Constitution of Canada requiring education to be provided to any group in either French or English, or indeed, in any other language.[13]

Jurisdiction over Language — An Ancillary Power

Jurisdiction over language apparently belongs neither exclusively to the Dominion nor to the Provinces. Rather, the power of the Dominion and of the Provinces to legislate with respect to language seems ancillary to heads of legislative jurisdiction conferred by the *B.N.A. Act.*

(i) **Federal Jurisdiction**

In areas not within exclusive Provincial jurisdiction, and not protected by sec. 133, Parliament may regulate the use of language in any manner it deems appropriate. Illustrations of this power are the provisions relating to mixed juries in criminal cases,[14] and the right under various statutes to an interpreter.[15]

The Canadian Bill of Rights provides that no Act of the Parliament of Canada shall be construed or applied so as to:

> "deprive a person of the right of the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or witness before a Court, Commission, Board or other Tribunal, if he does not understand or speak the language in which such proceedings are conducted."[16]

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[13] *Quaere*: Does the power of remedial legislation extend to language as well as to denominational matters in the schools?

[14] *Criminal Code* s. 535, (Quebec), s. 536 (Manitoba), and ss. 544, 579, and 580.

[15] *Inter alia*: *The Canada Election Act*, S.C. 1960 c. 39, s. 45(11); *The Canada Temperance Act*, R.S.C. 1952 c. 30, s. 45; *Visiting Forces (N.A.T.O.) Act*, R.S.C. 1952 c. 284 s. 3 (Referring to Art. VIII(9) of the Treaty).

[16] S.C. 1960 c. 44, s. 2(g).

However this provision applies only to matters within Federal legislative competence.[17] A number of Federal statutes provide that the language of public notices must be English or French or both.[18] A recent amendment to the *Canada Corporations Act*[19] permits bilingual corporate names.

Insofar as procedure before the Courts in matters of Federal jurisdiction is concerned, Parliament's competence to regulate proceedings[20] necessarily extends to the languages which may be used before those Courts.[21] A clear illustration of this power is to be found in the *Canadian Citizenship Act*[22] which provides that an applicant for citizenship must satisfy the Court of the adequacy of his knowledge of either French or English, and by implication permits the application to be made in either language to any Citizenship Court in Canada,[23] even before those of Ontario and Manitoba. Similarly, Parliament may regulate the languages to be used before any Provincial court designated to act in a sphere of Federal legislative competence, such as the Bankruptcy Court.

(ii) Provincial Jurisdiction

The ancillary doctrine of legislative competence over language applies equally to all areas of Provincial jurisdiction, restricted only by sec. 133. Indeed the supreme example of the ancillary character of language under the Constitution of Canada is Education, designated as a matter of exclusive Provincial competence by the *B.N.A. Act*, sec. 93. While the guarantees of the rights to separate denominational schools granted by sec. 93[24] have been upheld by the courts,

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[17] *Ibid.*, s. 5(3).

[18] *Inter alia: The Civil Service Act*, S.C. 1960-1 c. 57, s. 39; *The Canada Election Act*, S.C. 1960 c. 39, s. 25(2).

[19] S.C. 1964-5 c. 52, s. 50.

[20] See *A.-G. of Alberta and Winstanley* v. *Atlas Lumber Co.* [1941] S.C.R. 87, where Rinfret J. held that:

> "...it has long been decided that with respect to matters coming within the enumerated heads of section 91, the Parliament of Canada may give jurisdiction to provincial Courts and regulate proceedings in such Courts to the fullest extent."

[21] This is of course to be qualified by the doctrine of the "unoccupied field". Where parliament has not regulated procedure, Provincial rules apply. Cf. Laskin, B., *Canadian Constitutional Law*, (Toronto, 1960), p. 811.

[22] R.S.C. 1952 c. 33.

[23] *Ibid.*, s. 10(1)(e).

[24] *British North America Act*, 1867, s. 93. The right was also guaranteed by *The Manitoba Act*, S.C. 1870 c. 3, s. 22; *The Saskatchewan Act*, S.C. 1905 c. 42, s. 17; *The Alberta Act*, S.C. 1905 c. 3, s. 17.

the same courts have consistently held that the Provincial power to regulate the language of schools was absolute.[25] Like Parliament, the Provinces have seen fit to regulate language in a number of other areas within their competence.[26]

(iii) Limitations on Federal and Provincial Power

While it might seem that the power of Parliament and the Provincial legislatures to regulate language is unlimited within their respective spheres, the authors feel that the basic right of freedom of expression would set bounds to this power. Clearly a provincial law requiring that newspapers be published in a specific language would be a serious infringement of the freedom of the press.[27]

Similarly it would appear that a provincial law requiring that all commercial advertising be in a specific language only would infringe the liberty of expression, since in our opinion, such communications are an extension of freedom of speech.[28]

The most difficult question relates to the power of Parliament or the Provinces to regulate the language of the official texts of

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[25] *Trustees of the Roman Catholic Separate Schools* v. *Mackell* [1917] A.C. 62, Lord Buckmaster at p. 69: "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." See also *The Toronto Corporation* v. *The Roman Catholic Separate School Trustees* [1926] A.C. 81. As A. Berriedale Keith has remarked, "The essential result of the litigation is that there is no privilege whatever in Canada on language grounds in matters of education." *Responsible Government in the Dominions*, 2nd. ed. (O.U.P., 1928), vol. 1. p. 540-1.

[26] See *inter alia*: *Cities and Towns Act*, R.S.Q. 1964 c. 193, s. 362; *The Quebec Municipal Code*, arts. 127-131a; *Code of Civil Procedure*, arts. 333, 334, 338, 339, 340, 351, 352 (New Code in force Sept. 1, 1966); *The Companies Act*, (Manitoba) S.M. 1964 c. 3, s. 15; *The Quebec Companies Act*, R.S.Q. 1964 c. 271, s. 31; *The Co-operative Associations Act*, R.S.N.B. 1952 c. 40, s. 11; *The Civil Code* (Quebec) arts. 1571a, 1571d, 1671a; *The Gas, Water and Electricity Companies Act*, R.S.Q. 1964 c. 285, s. 4; *Unclaimed Goods Sales Act*, R.S.Q. 1964 c. 316, ss. 7, 9.

[27] According to the *obiter dicta* in *Switzman* v. *Elbling et le Procureur général de la province de Québec* [1957] S.C.R. 285, of Abbott, J., at p. 328, neither the Federal nor the Provincial Legislature has the power to extinguish this fundamental right. The decision of the majority would appear to establish a sphere of basic civil liberty which the provincial legislatures, at least, cannot infringe. For a general discussion of the freedom of the press, see: Marc Lalonde, "Les journaux et la loi au Canada", *Cité Libre*, avril-mai 1966, VXI no. 86.

[28] This was apparently not the opinion of the former Premier of Quebec, the Hon. Jean Lesage, when he stated in an electoral speech that advertisers would soon be required to give "priority" to the French language in their advertisements in Quebec. See *La Presse*, mardi le 24 mai 1966, "Le français deviendra la langue principale de travail au Québec".

contracts. A Province can certainly require that certain contracts be drawn up in several languages for public convenience.[29] However, the authors believe that a Provincial law requiring that the authentic texts of all contracts drawn up in the Province be in a specific language *only* would also be an infringement of freedom of speech, and hence apparently *ultra vires*. The right to extend is undoubted, but any attempt to restrict the languages of authentic texts of contracts would apparently be *ultra vires* the Provincial Legislatures,[30] and, in the view of Abbott, J., *ultra vires* Parliament as well.[30a]

The Power to Amend Constitutional Language Guarantees

(i) The Federal Power

By the terms of the *British North America Act*, 1949, Parliament has the right to amend the "Constitution of Canada" except "as regards the use of the English and French Language."[31] Thus Parliament cannot abrogate the limited rights stipulated in sec. 133. From a literal reading of sec. 91(1), it does not appear that Parliament can add to these rights, but as has been stated, Parliament is at liberty to legislate with respect to all other heads of jurisdiction accorded to it by sec. 91.[32] Furthermore, whether or not sec. 23 of the *Manitoba Act*[33] was ever validly repealed by the Manitoba

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[29] See art. 1682c of the *Civil Code*, which requires that all "passenger tickets, baggage checks, way bills, bills of lading", etc., be in both French and English.

[30] Mr. Lesage also suggested that labour agreements would soon have to be in both English and French with priority going to the French text in matters of interpretation. See *La Presse*, mardi, le 24 mai 1966. The requirement of two texts would clearly be *intra vires*, but the primacy accorded to one text of a private agreement would not. (See *Labour Code*, R.S.Q. 1964 c. 141 s. 51).

[30a] See footnote 27 *supra*.

[31] 13 Geo. VI c. 81 (U.K.), s. 91(1). Prior to 1949 the Parliament of Canada was also prevented from amending s. 133 in the absence of a constitutional amendment formula. Only the Imperial Parliament could do so.

[32] The curious corollary of this situation being that such provisions as the *Canada Elections Act* and the *Canadian Citizenship Act* must not be deemed part of the Constitution if their language provisions are to be freely amendable.

[33] S.C. 1870 c. 3, s. 23: "Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the *British North America Act*, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages."

Legislature,[34] Parliament certainly did not have,[35] and possibly does not have[36] power to do so.

An interesting question is whether a general Act of Parliament, providing that English and French shall be the "official" languages of Canada, and their use permissible in all areas of Federal competence, would be held *ultra vires* Parliament, falling under the prohibition of sec. 91(1). Due to the generality of such a law the Courts might possibly so rule. However, it would probably survive as does the *Canadian Bill of Rights*,[37] also limited to areas of Federal competence.[38]

(ii) The Provincial Power

The burning issue in this respect is whether the Quebec Legislature has power to repeal sec. 133 insofar as it applies to that Province. This question is not without historical precedent. In 1890 the Manitoba Legislature enacted the following provision designed to take the place of sec. 23 of the *Manitoba Act*, except as regards debates in the Assembly:

> "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.
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> 2. This Act shall only apply so far as this Legislature has jurisdiction so to enact, and shall come into force on the day it is assented to."[39]

By sec. 5 of the *B.N.A. Act*, 1871, the *Manitoba Act* (regarding whose validity doubts had arisen) had been declared by the Imperial Parliament to be "valid and effectual for all purposes whatsoever", and placed beyond the legislative competence of the Parliament of Canada, except in compliance with sec. 3 requiring provincial consent. It can therefore be strongly argued that sec. 23 of the *Manitoba Act* was elevated to a position equivalent to sec. 133.[40] Therefore

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

[35] *B.N.A. Act*, 1871, s. 6.

[36] *B.N.A. (No. 2) Act*, 1949; s. 91(1) *B.N.A. Act.*

[37] 1960 S.C. c. 44.

[38] Application of so general a law in the courts might, however, be extremely difficult. Would a French-Canadian bankrupt in Manitoba be cut off in mid-sentence as he turned from bankruptcy matters to mechanics liens?

[39] S.M. 1890 c. 14, ss. 1, 2.

[40] Though the technical difference between the two provisions is that s. 133 was originally enacted by the Imperial Parliament, while s. 23 was originally enacted by the Parliament of Canada.

either the Imperial Parliament alone or both the Imperial Parliament and the Manitoba Legislature had power to amend sec. 23. The Manitoba Legislature obviously acted on the latter assumption, though with evident hesitation.[41] It must be presumed that the constitutional basis for the abolition of French as an official language of the Province was the power to amend the Provincial Constitution, conferred by section 92(1) *B.N.A. Act* for the Legislative Assembly, and the power conferred by section 92(14) for the Courts.[42]

Applying the Manitoba precedent to Quebec, it may be argued that it is within the power of the Quebec Legislature to abolish English as the language of debate and record in the Legislature, of the laws,[43] and of the proceedings before the courts. Even if one

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[41] See the *Official Language Act*, S.M. 1890 c. 14, s. 2.

[42] Both sections 92(1) and 92(14) were made applicable to Manitoba by *The Manitoba Act*, S.C. 1870 c. 3, s. 2.

[43] It is open to question whether the courts should give effect to a Federal or Quebec statute enacted in one language only. A strict reading of s. 133 seems to imply that statutes of Parliament and Quebec need only be "printed and published" in the English and French language, but not enacted in both languages. The contrary argument would be that the word "Acts" implies enactment of both texts. The latter argument still begs the question of the language of enactment. The historical argument is stronger in that "printing and publication" of statutes has always been interpreted in practice as implying enactment. Thus Parliament and Quebec have always enacted both English and French texts since 1867. When Manitoba abolished the use of French in its laws and legislature it was simply stated that laws "need only be printed and published in the English language." (S.M. 1890 c. 14, s. 1). It is interesting to note that the Acts of the Parliament of Canada were passed and approved in both English and French during the years 1849-1867. (The authors, after research in the Archives of Parliament, make this assertion, despite the statement of J. D. Honsburger, in *"Bilingualism in Canadian Statutes"* (1965) 43 Can. Bar Rev. 319.) The implication is that Provinces could presently increase the number of official languages, and that the texts approved would have the same validity as the English text.

The second question is whether a statute of Parliament or Quebec requiring enactment in one language only but allowing that the statute should be "printed and published in the English and French languages" would be *ultra vires*. Such an act would clearly be *ultra vires* Parliament, under s. 91(1) of the *B.N.A. Act*. However, it might well be *intra vires* Quebec, again under a strict reading of s. 133. *Contra*, the arguments given above with respect to constitutional convention and the necessary intendment of s. 133 may also be used here. The strongest argument, according to one of the authors, would be that such an Act would be an amendment affecting the office of Lieutenant-Governor, since this would effectively remove from the Lieutenant-Governor the power to perform a function which he has traditionally exercised.

The third question concerns the validity of section 1 of *The Medical Act*, R.S.Q. 1964 c. 249, and *The Dental Act*, R.S.Q. 1964 c. 253, both of which provide that: "If there be any difference between the French and English versions of

were to argue that sec. 133 is fundamentally different from sec. 23 of the *Manitoba Act*, since it was enacted by the Imperial Parliament, while the latter was not, this distinction would, it is submitted, be immaterial to any possible abolition of English as an official language in Quebec. This assertion is supported by a close reading of the *B.N.A. Act.*

(a) Legislature and Laws

The power to amend the provincial constitution, except as regards the office of Lieutenant-Governor, exists *"notwithstanding anything in this act"*. No such *non obstante* clause is to be found in sec. 133 to except it from the plenary amending power conferred on the Province by sec. 92(1).

As Keith has said,

> "The provinces, as has been seen, are more fortunate in that, save as regards the office of Lieutenant-Governor, they can freely amend the constitution of the Legislatures and the Executive Governments; the Act of 1867 imposes, it is true, a restriction on the alteration of what were then English-speaking constituencies in the province of Quebec, unless the second and third readings of any Bill to this effect are passed by a majority of their representatives. The districts have long since ceased in the main to be British as opposed to French, and the provision itself might perhaps be abolished under the general power of constitutional change given in section 92(1)."[45]

Manitoba possessed a constitutional amending power neither more nor less complete than that of Quebec,[46] and similarly, sec. 23 of the *Manitoba Act* was unprotected by a *non obstante* clause. Therefore it can be argued that sec. 92(1) over-rides sec. 133, just as it may have over-ridden sec. 23, with respect to the Legislature and laws of the Province of Manitoba.

The contrary argument is based on a restrictive definition of the term "Constitution of the Province" insofar as it applies to the Province of Quebec. The jurisprudence on the scope of this term is very limited, and in only two cases was an attempt made at a

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this Act, the French version shall prevail." (A similar provision was passed in 1937 by the Quebec Legislature declaring the French version to have primacy in the event of divergences between the French and English texts of all Quebec statutes. S.Q. 1937 c. 13; repealed by S.Q. 1938 c. 22). All the arguments respecting s. 133 in Quebec (*vide supra*) apply here. The authors must regretfully conclude that these sections must be held valid by a strict construction of s. 133.

[44] Emphasis added.

[45] Keith, A. B., *op. cit.*, p. 588.

[46] See footnote 42 *supra.*

specific definition. The clearest statement is that of Beck, J. A. in the case of *R.* v. *Ulmer*:

> "Thus it seems to me reasonably clear that the power to change the constitution can only be exercised in relation to those matters which are treated of in Art. (*sic*) V, and captioned 'Provincial Constitutions'."[48]

Following this line of reasoning it may be argued that sec. 133 is not comprehended within the Provincial Constitution, as it was not included under the rubric of Part V of the *B.N.A. Act.*

The term "Constitution of the Province" may be reduced still further, for sec. 92(14) would appear to except the judicial function from the "Constitution", and sec. 92(1) expressly excepts the power to amend the executive function, as represented by the Lieutenant-Governor.[49] One may therefore conclude that the amendable Constitution of Quebec is restricted to the constitution of its Legislature, as provided for in secs. 71-87, of the *B.N.A. Act.*

However, by adopting a strict position with reference to Manitoba, it might be argued that the entire *Manitoba Act,* with the exception of certain sections,[50] but including sec. 23, forms part of the Constitution of Manitoba, amendable under sec. 92(1).

In sum, protection of these language rights from interference by Provincial Legislatures turns upon the possibility of establishing that sec. 133 is not within the ambit of sec. 92(1).

(b) The Courts

The same argument applies to the courts, substituting sec. 92(14) for sec. 92(1). Thus sec. 92(14) might be the basis of the abolition of English in the courts of Quebec as the authors presume that it was in Manitoba for that of French.

However, it might be argued *contra* that the general legislative authority granted to a province to regulate the administration of justice in the province is *subject to* the specific provision of sec. 133. Unlike sec. 92(1), sec. 92(14) lacks a *non obstante* clause, and by

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[47] *Ex parte Dansereau* (1875) 19 L.C.J. 210; *Fielding* v. *Thomas* [1897] A.C. 600; *Cunningham* v. *Tomey Homma* [1903] A.C. 151; *In re Initiative and Referendum Act* [1919] A.C. 935; *R.* v. *Ulmer* (1925) 1 W.W.R. 1; *R.* v. *Clark* (1943) 2 D.L.R. 554, [1944] S.C.R. 69.

[48] (1925) 1 W.W.R. 1, at p. 25. See also the remarks of Stuart, J.A., at pp. 11-14. In the same sense see the dissenting judgment of Ramsay, J. A., in *Ex parte Dansereau* (1875) 19 L.C.J. 210, at p. 227.

[49] See the notes of Stuart, J. A., *R. v. Ulmer* (1925) W.W.R. 1, at p. 14.

[50] 1, 3, 4, 5, 24, 25, 27, and 28-35.

the rule of statutory interpretation *generalia specialibus non derogant* the power to amend sec. 133 with respect to the language of the courts is removed from the competence of the Legislature of Quebec. By the same token, if this argument is valid for Quebec, the *Official Language Act of Manitoba*,[51] is *ultra vires* in its application to the courts of that Province. It is surprising that the *Official Language Act* has not been challenged, to date, on these grounds.[52]

(c) The General purpose of section 133

Apart from the foregoing considerations based on literal construction of the words of sec. 133, it can also be maintained that the general intention of those responsible for the preparation of sec. 133[53] was to entrench French language rights at the federal level and English language rights in Quebec.[54] This intention was succinctly stated by Cartier:

> "The members of the Conference were desirous that it should not be in the power of that [French majority in Lower Canada] majority to decree the abolition of the use of the English language in the Local Legislature of Lower Canada any more than it will be in the power of the Federal Legislature to do so with respect to the French Language. I will also add that the use of both languages will be secured in the Imperial Act to be based on their resolution."[55]

Consequently, a Supreme Court, faced with a Quebec statute similar to the Manitoba *Official Language Act*, might well be prepared to base its decision on the broader policy concern, as was

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[51] S.M. 1890 c. 14; R.S.M. 1954 c. 197.

[52] We know of only one case in the Province of Manitoba involving the validity of the use of the French language before the courts of the Province. In *Dumas* v. *Baribault*, June 1916, (as noted by G. M. Weir, in *Separate School Law in the Prairies Provinces*, Toronto, 1917), an attempt was made to test the status of French in judicial proceedings by seeking a *mandamus* to force an inferior court to accept a written plea in French. The Court of Queen's Bench refused to issue the order, and the matter was not pursued.

[53] Notably Galt, Langevin, Dorion, Cartier and MacDonald; see *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3rd Session*, 8th Provincial Parliament of Canada, Quebec, 1865.

[54] An argument based on statutory analysis, albeit weak, in support of this view can be made from the fact that sec. 133 was included under Part IX, "Miscellaneous Provisions," rather than that entitled "Provincial Constitutions".

[55] *Parliamentary Debates on the Subject of the Confederation of the British North American, op. cit.*, p. 945.

done by that Court in the *Barrett* and *Logan* cases,[56] rather than to follow the restrictive approach of the Privy Council. As has been noted above, a Supreme Court decision declaring the Manitoba *Official Language Act ultra vires,* would close the door on the possibility of Quebec ever enacting a similar statute.

Amendment Formulae

With respect to the problem of entrenched language rights, the authors feel that three broad approaches to a suitable means of constitutional language protection under a new amendment formula may be discerned: The first consists of a tightening of the existing relevant sections in the *B.N.A. Act,* in the light of comments made in this article. The second approach consists of the promulgation of a more far-reaching amendment formula, which, while permitting Parliament and the Provinces to make whatever additions they wished to language rights, would make it extremely difficult to abrogate these rights once they had been granted. The third, and certainly most radical, approach lies in the creation of language as a new and separate head of exclusive federal jurisdiction, at least with respect to certain defined public sectors, such as the legislatures, laws, courts and schools.

(i) Strengthening of Existing Language Guarantees:

Any possible abolition of language rights in the courts and Legislature of Quebec could be prevented by adding a *non obstante* clause to sec. 133. For greater certainty this right should be covered by a proviso in sec. (92)1 similar to that presently protecting the office of Lieutenant-Governor.[57] In the light of the possible difficulties which Parliament might encounter in extending language rights in the Federal sphere,[58] an amendment of the phrase in sec. 91(1): "The amendment from time to time of the Constitution of Canada except, ... as regards the use of the English or the French Lan-

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[56] It is well to remember that the Supreme Court took a liberal view on the separate schools question and was reversed by the Privy Council. It would appear that the subsequent conservatism of the Supreme Court on separate school and language rights, viz. *Ottawa Separate School Trustees* v. *Mackell* [1917] A.C. 62, (1915) 34 O.L.R. 335 was due to the Privy Council's insistence on a strict statutory construction of these rights during the Manitoba schools crisis.

[57] This argument is predicated on the assumption that Canadian courts, often ready to look to the letter rather than to the spirit of a legal question, would be hesitant to declare the *Manitoba Official Language Act ultra vires.*

[58] See p. 510 *supra.*

guage," so as to make clear that it refers only to the reduction and not to the extension of such rights, would be appropriate. Sec. 133 should also be amended to read "enacted, printed and published in the English and French languages", for greater certainty.[59]

Such an amended section would at present be amendable only by the Imperial Parliament, and under a "repatriated" constitution should be subject to the highest degree of entrenchment envisaged by the governing amending procedure, such as the concurrence of Parliament and the ten Provincial Legislatures required by the Fulton-Favreau Formula.

The Fulton-Favreau Formula attempted to define an acceptable amending procedure without changing the existing law. Insofar as language guarantees are concerned, it is open to criticism for exactly this reason.

Secondly, while it deals with language at the federal level,[60] the Formula makes no new provision for provincial constitutional amendment, even with reference to Quebec. Hence if *all* of sec. 133 is part of the constitution of *Canada* the "one plus ten" rule would apply, but if not, it would seem that Quebec's jurisdiction over language is as complete as that of any other province, the words of sec. 133 notwithstanding.

(ii) Protection of Extended Rights

The foregoing argument assumes only the tightening of existing constitutional provisions. However, if Canadian public institutions are truly to reflect the bilingual and bicultural character of Canada today, it is possible that Parliament and certain Provinces will see fit to extend language rights in the near future. What degree of protection should these rights acquire ? The authors believe that such new rights, once vested, should be so entrenched that once Parliament or the provinces had conferred them, these rights could not be repealed without the concurrence of Parliament and a designated number of Provinces. For language rights in the federal sphere the concurrence of all the ten Provinces would not be unreasonable. On the other hand, this mechanism might well prove unwieldy and politically unacceptable insofar as the Provinces are concerned, if more than the concurrence of Parliament were required to permit a provincial amendment. The potential weakness of such a procedure is that it might deter Provinces from creating new

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[59] See footnote 43 *supra*.

[60] Even here the above-mentioned problems of extending language rights in the Federal sphere still remain.

minority language rights in view of the difficulty of their repeal. This problem might be alleviated in the eyes of the provinces by requiring only the concurrence of Parliament, as mentioned above. The formula would be particularly adaptable to the creation of bilingual districts by Parliament and the Provinces.

In the opinion of the authors sec. 133 of the *B.N.A. Act* could also be submitted to the application of this procedure. Thus the section could only be amended with respect of the federal sphere by the concurring votes of all the Provinces, while Quebec would be able to amend the section with the sole concurrence of Parliament.

(iii) Language as a Head of Exclusive Federal Jurisdiction

A grant of exclusive legislative power over language to Parliament would be a radical amendment to the present constitution. The advantages are that language would be freed from its straitjacket of ancillary status and that Parliament could act with speed and flexibility to create and protect linguistic rights throughout the Dominion. Such power could be conferred on Parliament either by the addition to sec. 91 of a new and separate head of jurisdiction, or by the inclusion of this power in an entrenched Bill of Rights, or even by a broad judicial construction of the power of Parliament under sec. 91 of the B.N.A. Act to legislate for the "peace, order and good government" of Canada. The disadvantages of this solution are that Parliament is arguably too remote to legislate effectively for matters of essentially "local" concern; secondly, it would put the protection of French language rights in the hands of an English language majority; thirdly, and most important, a constitutional enactment to implement it would probably never receive the approval of the provincial authorities.

Conclusions

The authors believe that the constitutional status of language rights in Canada is far from clear. The protection of English language rights is in serious doubt. Conversely, the reservations entertained by the Manitoba legislators when they enacted the *Official Language Act,* may be amply justified. It would therefore seem that the supposed entrenchment of Quebec English language rights requires considerable tightening before it attains the same force as the Federal guarantees of the French language. The possible *lacunae* are surely contrary to the intent of the Fathers of Confederation.

In all other Provinces the provincial legislatures are apparently free to regulate the language of public institutions within their jurisdiction. This would apply to any express repeal of French as an official language in Alberta and Saskatchewan, assuming that the argument for its continued status as an official language of those Provinces is valid.[61]

With respect to the Northwest and the Yukon Territories, there is no doubt that French is an official language of the courts, since they are courts of Canada established under the authority of the *B.N.A. Act*, within the meaning of sec. 133. By virtue of the latter section, and sec. 91(1) of the *B.N.A. (No. 2) Act*, 1949, the Parliament of Canada cannot abolish the use of English or French in these courts. However, could Parliament enact a law declaring French to be an official language of the Territorial Councils ? If such legislation were to be deemed an amendment of the Constitution of Canada the answer would be in the negative in view of sec. 91(1). On the other hand, if such legislation were to be deemed ancillary to the general power to make laws for the peace, order and good government of the Northwest and Yukon Territories[62] such legislation would be *intra vires* the Federal Parliament.[63]

The choice of an acceptable amendment formula is a supremely political decision. Insofar as language guarantees are concerned any amendment formula would have to combine a judicious mixture of rigidity and flexibility due to the population shifts which are bound to occur in Canada. Clearly the balance of federal and provincial legislative authority designated by the Constitution must be main-

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[61] See footnote 6 *supra*.

[62] Federal jurisdiction over the Territories is derived from this general power, in the absence of any specific head of jurisdiction.

[63] In any case, French may still be an official language of the Territorial Councils. *The Yukon Territory Act*, S.C. 1898 c. 6 provided in secs. 3-5 that the Territory was to be governed by a Commissioner and Council, appointed by the Governor-General. Sec. 6 provided that the Commissioner-in-Council was to have the same power to make ordinances as possessed before the passage of the Act by the Lieutenant-Govenor of the Northwest Territories acting by and with the advice and consent of the Territorial Assembly. By sec. 9 the existing laws of the Northwest Territories were to remain in force until repealed or altered by either the Commissioner-in-Council or Parliament. A similar form of government was established in the Territories by the *Northwest Territories Amendment Act*, S.C. 1905 c. 27, and sec. 6 provided that the Commissioner-in-Council was to have the same legislative power as that previously exercised by the Territorial Assembly. French may still have been an official language of the Territorial Assembly at the time of the passage of both these Acts. Hence it may be argued that the status of French has never been altered in the Yukon and Northwest Territories. See footnote 6 *supra*.

tained. Yet greater rigidity should be sought at the Federal level than at the provincial, since the ultimate expression of the bicultural nature of Confederation must be found in federal institutions.

The Fulton-Favreau Formula met the foregoing requirement, but neglected to give sufficient protection to language rights in the Provinces; both because it would have entrenched sec. 133 with its existing imperfections, and also because it failed to provide for the entrenchment of future provincial language legislation.[64]

Of the three general options outlined above[65] the authors prefer the second, involving automatic entrenchment of language rights as they are created by Parliament or the Provinces. However, the political feasibility of this option cannot be taken as assured. The Provinces might be unwilling to accept the requirement of Parliament's concurrence in the repeal of any extension of language rights. Furthermore, it is obvious that some distinction must be made between those language rights which are worthy of entrenchment[66] and those which are purely local and trivial.[67] Thus if this option should prove unacceptable, the authors feel the amendment of sec. 133 as suggested above[68] and its continued entrenchment is a basic minimum. Included in an amended sec. 133 they would also hope to see entrenchment of French language rights similar to those enjoyed by the English of Quebec in Provinces where the French-speaking population was large enough to justify it.

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[64] It is not unlikely that New Brunswick, for example, will shortly become officially bilingual. The authors, moreover, venture to hope that Ontario, and possibly Manitoba, will soon see fit to accord legal recognition to the claims of their French-speaking populations.

[65] See p. 515 of this article *supra*.

[66] Such as those pertaining to the legislatures, laws, courts, schools, and certain basic principles of public administration.

[67] Such as the language of public notices in a particular locality.

[68] See pp. 515-16 *supra*.

V. — Lawmaking According To Law