Re Official Languages Act: A Comment

In its answers sustaining the validity and effectiveness of both the federal [1] and the provincial [2] legislation involved in *Re Official Languages Act*,[3] a reference by the Lieutenant-Governor-in-Council,[4] the New Brunswick Court of Appeal carefully and properly confined itself to the particular sections which were the subjects of the reference.

The complex of related legislation, provincial and federal, is an elegant realization of the somewhat smug admonition that statutes:

> ... will have to be carefully framed ... to combine Dominion and Federal legislation so that each within its own sphere [can] in co-operation with the other achieve the complete power of regulation which is desired.[5]

The reciprocal structuring to that end raised a number of questions besides that of central concern. One related to the constitutional basis of the provincial legislation, rather easily found in section 92(14) of the *British North America Act*. Another, based on Parliament's inability to delegate to provincial legislatures,[6] yielded to a characterization that rather than delegation there was only conditional legislation postponing the operative date in criminal cases until provincial procedure in civil causes corresponded, an interesting and, it is submitted, sound illustration of the distinction.[7] An alternative claim was that if the federal legislation

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[1] *The Official Languages Act*, R.S.C. 1970, c.0-2, s.11(3).

[2] *The Evidence Act*, R.S.N.B. 1952, c.74, s.23C; *The Official Languages of New Brunswick Act*, S.N.B. 1969, c.14 s.14.

[3] (1972), 5 N.B.R. (2d) 653; (1972), 35 D.L.R. (3d) 372 (N.B. C.A.).

[4] *The Judicature Act*, R.S.N.B. 1952, c.120, s.24A, authorizes references, its provisions being similar to corresponding Acts of other provinces.

[5] The language rearranged in sequence but intact in content is that of Lord Atkin in *A.-G. B.C.* v. *A.-G. Can.*, [1937] A.C. 377, 389.

[6] See *A.G. N.S.* v. *A.G. Can.*, [1951] S.C.R. 31; [1950] 4 D.L.R. 369.

[7] Provisions giving the authority to determine the effective date for legislation are a form of delegation of a type I label as "implementing" as distinguished from "prescriptive", other examples of which are instanced and called "Amendments" in the Third Report of the Special Committee on Statutory Instruments, Votes and Proceedings of the House of Commons, October 22, 1969, 1450-1451. Where, however, instead of being an exercise of a conferred power, "the action of each legislature is wholly discrete and independent", there is a "relation incompatible with delegation"; see *A.-G. Ont.* v. *Scott*, [1956] S.C.R. 137, 142; 1 D.L.R. (2d) 433, 437 *per* Rand,J.

was valid, this merely suspended the provincial law by reason of paramountcy,[8] thus necessarily frustrating the operation of the former since the triggering condition was automatically stultified. This argument was perfunctorily answered by finding the statutes not "in conflict",[9] and would seem equally susceptible to the more refined complementary test for paramountcy.[10]

A resolution of these pertinent but subsidiary contentions does not reach the central issue of Parliament's substantive competence. Objectors to the Act on the one hand disputed its coming within any of the classes of subjects of section 91, and on the other urged that Parliament was barred by section 133. The invocation of the latter not just for its own force but indirectly to support a proposed interpretation of one term of section 91 prevents an entirely separate discussion of these points and will compel some repetition.

The objectors claimed that the enactment of section 133 removed language use as a subject of legislation by its guarantees of the status of French and English in Canadian and Quebec legislatures and courts.[11] The New Brunswick Court in an entirely orthodox exercise in statutory construction[12] declined to enlarge this precisely specified exemption into a general disqualification. The section of *The Official Languages Act* submitted for consideration by its terms carefully excepted from its operation[13] agencies men-

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[8] For a discussion of this fundamental principle of Canadian constitutional law, see Laskin, *Canadian Constitutional Law* 4th ed. (1973), 23-29.

[9] *Re Official Languages Act* (1972), 5 N.B.R. (2d) 653, 682 *per* Limerick,J.A., 702 *per* Bugold,J.A.; 35 D.L.R. (3d) 372, 393, 407.

[10] The distinction between complementing and supplementing provincial legislation has been examined most notably in connection with penal legislation, see Laskin, *Occupying the Field: Paramountcy in Penal Legislation*, (1963) 41 Can. Bar Rev. 234.

[11] 30 & 31 Vict., c.3, s.133:

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

[12] It represents an application of a very ancient common law principle whose earliest development may have been in connection with deeds to land; *cf.* Fitzherbert, *La Graunde Abridgement*, tit. Assise (1577) 316.

[13] Section 11(4) provides that "Subsections (1) and (3) do not apply to any court in which, under and by virtue of section 133 of *The British North America Act*, 1867, either of the official languages may be used by any person".

tioned in section 133. It would hardly be maintained that under section 125, another of the rare provisions in the *British North America Act* creating an immunity from legislation, owners could spell out of the exemption of lands or property owned by the Dominion or a province an incapacity to tax other property.

However, not only legislative power but Parliamentary power must exist if *The Official Languages Act* was to be good. It did, the court held. The challenged provisions of the Act conferred a conditional option on accused persons to have evidence and trial in either of the official languages (*i.e.*, French and English) in "any court in Canada... in exercising in any proceedings in a criminal matter any criminal jurisdiction conferred upon it by or pursuant to an Act of the Parliament of Canada".[14] Although unanimous in finding the requisite authority in section 91, the learned justices differed in their choice of the appropriate head of power within the section.

For the Chief Justice, section 91(27), specifying "the Procedure in Criminal Matters" among the classes of subjects of federal character, was dispositive.[15] Limerick,J.A. found it "unnecessary to justify legislative authority" on that basis, holding the section "intra vires of Parliament as being for Peace, Order and good Government".[16] Bugold,J.A., like the Chief Justice, sustained the provisions under 91(27) "insofar as they relate to criminal proceedings" [17] — all that was before the Court on the reference. However, he also invoked the general power,[18] apparently in response to counsel's diversionary argument that the Act related to section 91(1) of the *British North America Act* ("the amendment... of the Constitution of Canada"). That suggestion is one more obfuscation to be disposed of before coming to grips with the important issue, namely whether to look to section 91(27) or to the general power.

It was argued that the English language had a constitutional status, hence any language legislation was a matter coming within section 91(1). However, "as regards the use of the English or the French language" under *The British North America Act*, Parliament's general amending authority did not apply. As nothing in

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[14] Section 11(3).

[15] (1972), 5 N.B.R. (2d) 653, 662; (1972), 35 D.L.R. (3d) 372, 379 (N.B. C.A.).

[16] (1972), 5 N.B.R. (2d) 653, 674-675; (1972), 35 D.L.R. (3d) 372, 386-387 (N.B. C.A.).

[17] (1972), 5 N.B.R. (2d) 653, 693-694; (1972), 35 D.L.R. (3d) 372, 400 (N.B. C.A.).

[18] (1972), 5 N.B.R. (2d) 653, 694-695; (1972), 35 D.L.R. (3d) 372, 401-402 (N.B. C.A.).

section 133, the only one in that Act dealing with language rights, was affected, the Court concluded that the exception was irrelevant. Thus invocation of section 91(1) proved useless to those attacking the validity of *The Official Languages Act.*

The underlying premise that the language had constitutional status was expressly rejected by a majority of the justices.[19] Their reading of a succession of English statutes as governing the practice of particular and notably judicial organs of government rather than as settling constitutional principles [20] is surely a sound assessment of a system in which, at the very apex, the formulas for Royal assent to legislation are *"le roy le veult"* and *"soit fait comme il est désiré".*[21]

The aborted claim involved a frontal attack on the whole *Official Languages Act,* and was not limited merely to the section involved in the reference. Many sections of the Act, such as those providing for dual language promulgation and publication of federal official texts,[22] for federal bilingual districts [23] and for a Commissioner of Official Languages [24] are wholly unrelated to criminal proceedings, and thus would have to rest on grounds other than section 91(27). The general power might be one such ground but, it is submitted, since the Act deals with the structure and operations of federal governmental institutions, section 91(1) might be more appropriate.[25] The traditional disinclination of courts to use references as a vehicle for gratuitous holdings [26] would, however,

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[19] The Chief Justice, having assigned the matter to the class of subjects "Procedure in Criminal Matters", had no need to speak to the matter, although his doing so manifests an implicit rejection of s.91(1) as appropriate, a view consistent with that of his brethern.

[20] See particularly the language of Limerick,J.A., (1972), 5 N.B.R. (2d) 653, 676-677; (1972), 35 D.L.R. (3d) 372, 388-389 (N.B. C.A.).

[21] See Anson, *Law and Custom of the Constitution* 5th ed. (1922), 335-337.

[22] Sections 3, 4.

[23] Sections 12-18.

[24] Sections 19-34.

[25] The omission, until s.91(1) was added by *The B.N.A. Act,* 13 Geo. VI, c.81, of anything in the classes of subjects listed in s.91 bearing on the organization of government, aside from s.91(8) on fixing official salaries and allowances, left Parliament without explicit authority in that connection, *e.g.,* as to recruitment, promotion, and tenure. This may have compelled and justified recourse to the general power to supply what s.92(1) gave the provincial legislatures, but the 1949 Act seems to have supplied this deficiency and made available a specific head of power.

[26] See, *e.g., A.-G. Ont.* v. *Reciprocal Insurers,* [1924] A.C. 328, [1924] 1 D.L.R. 789; *A.-G. Man.* v. *Manitoba Egg and Poultry Association,* [1971] S.C.R. 689, 19 D.L.R. (3d) 169.

preclude a court from enlarging the scope of the decision on the reference.

That "[a] law, respecting the use of language in a Court proceeding is a law respecting procedure" [27] seems so manifestly in accord with common understanding as to need no confirmation. But it is confirmed by provincial court decisions [28] and by the tenor of the United Kingdom statutes treating the matter as "proceedings" of Courts.[29] Hence Hughes,C.J.'s holding that section 11(3), as a "law respecting the use of language" in a criminal trial context, was a matter coming within "Procedure in Criminal Matters" seems incontrovertible.

Nor was it controverted. Instead counsel questioned its significance for the purposes at hand and unsuccessfully raised the colourability issue, which in practice seems only to have been used to condemn statutes dealing with matters coming within classes of subjects specifically assigned to the other level of government.[30] That was not the situation here. Limerick,J.A., apparently led astray by inaccuracies of expression in the argument, misconceived the position as being whether section 11(3) dealt with something "ancillary" to criminal law and procedure, and felt that the general power dispensed him from the need to inquire into the niceties of ancillarity. Only a provision which, if enacted independently, would be *ultra vires* so that it must depend on association for survival calls for consideration of ancillarity. Section 11(3) needed no such help. Since section 91(27) sufficed, reliance on the general power was unnecessary and moreover, it is submitted, inept.

I for one do not dispute Limerick,J.A.'s pronouncement that "there is no issue more vital to the unity and therefore to the peace, good order and government of Canada than the solution of the language problem existing between the two founding peoples"[31] (which proposition he later weakened by considering the

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[27] *R.* v. *Murphy, Ex parte Belisle and Moreau* (1968), 69 D.L.R. (2d) 530, 532 (N.B. C.A.) *per* Hughes,J.A. (as he then was).

[28] *R.* v. *Murphy, supra,* f.n.27; *R.* v. *Watts, Ex parte Poulin* (1968), 69 D.L.R. (2d) 526 (B.C. S.C.).

[29] See, *e.g.,* 4 Geo. II, c.26 and *The Welsh Courts Act,* 5-6 Geo. VI, c.40.

[30] Typical examples are *A.-G. Ont.* v. *Reciprocal Insurers, supra,* f.n.26 (Criminal Code amendment enacted along with the *Insurance Act* colourable as relating to "property and civil rights"); *Reference re Alberta Debt Adjustment Act,* [1942] S.C.R. 31, [1942] 1 D.L.R. 1 (provincial statute conditioning availability of judicial process for debt enforcement colourable as relating to "interest", "banks", and "bankruptcy").

[31] (1972), 5 N.B.R. (2d) 653, 674; (1972), 35 D.L.R. (3d) 372, 386 (N.B. C.A.).

relevance of "local conditions and needs" of which "local authorities are more conscious than federal"[32]). A case can thus be made for statutory bilingualism as being a matter "unquestionably of Canadian interest and importance" of "such dimensions as to affect the body politic of the Dominion", which is the criterion for the general power.[33] A decision on that issue was not required to dispose of the narrower one raised in the reference.

The use of the French or the English language does not appear among the listed classes of subjects in either section 91 or 92. Neither does labour relations; accordingly, the validity of legislation governing these areas depends on the context of application.[34] A similar situation exists in the case of expropriation[35] and of insurance regulation.[36] Categories of command not constitutionally specified are shared, their allocation being based primarily on assignment of the subject matter of the legislation to the appropriate listed class under section 91 or 92. This applies to prescriptions of language: with respect to working conditions in a province they are assigned to the provinces;[37] with respect to criminal procedure to the federal government.

Carried to an extreme, the attribution of Parliamentary competence to the general power implies a frighteningly wide scope for federal legislation, going so far as to justify general enactments respecting the language of work, of instruction, *etc.* by Parliament. Such a prospect was probably unintended, certainly imprudent, and clearly incompatible with the notion that one looks to general power only when the specifics have failed to provide an appropriate class of subject,[38] and also with the economical principle of looking first to the narrower classes of subjects.[39]

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[32] (1972), 5 N.B.R. (2d) 653, 680; (1972), 35 D.L.R. (3d) 372, 391 (N.B. C.A.).

[33] *A.-G. Ont.* v. *A.-G. Can.*, [1896] A.C. 348; see Abel, *What Peace, Order and Good Government?*, (1968) 7 Western Ontario L. Rev. 1.

[34] *Cf. supra*, f.n.8, 363.

[35] Lajoie, *Expropriation et fédéralisme au Canada* (1972), 105-116.

[36] Compare *Citizens' Ins. Co.* v. *Parsons* (1881), 7 A.C. 96 with *A.-G. Ont.* v. *Wentworth Insurance Co.*, [1969] S.C.R. 779, 6 D.L.R. (3d) 545.

[37] See Abel, "Constitutional-Legal Competence as to Establishment of a Language of Work in Quebec" in II *The Position of the French Language in Quebec* (1972), Gendron Commission Report, 364-370.

[38] This approach dates from as far back as *Russell* v. *The Queen* (1882), 7 A.C. 829, 836.

[39] *Cf.* Abel, *The Neglected Logic of 91 and 92*, (1969) U. of T.L.J. 487, 516.

The tissue of issues made difficult tidy opinion writing in *Re Official Languages Act*. The Court is to be commended for its handling of the tangential contentions and for its holding affirming the propriety of Parliament's action. That holding can well rest on the Chief Justice's analysis, which is adequate for the matter at hand and avoids potentially embarrassing commitment on matters not in issue.

Albert S. Abel *

[Editorial Note]

The decision of the New Brunswick Court of Appeal in *Re Official Languages Act* was affirmed by the Supreme Court of Canada on April 2, 1974.