Re Official Languages Act: A Comment

On all constitutional [1] points, the Supreme Court [2] has sustained the decision of the New Brunswick Supreme Court, Appeal Division,[3] upholding that province's *Official Languages Act*[4] and the jurisdiction of Parliament to enact s.11(1),(3) and (4) of the federal *Official Languages Act*.[5]

Writing for a unanimous Court, Laskin,C.J. took a view similar to that expressed by Hughes,C.J.N.B. and Bugold,J.A.:[6] that section 92(14) of the *British North America Act*, 1867 authorized the provincial legislation, that section 91(27) "provided adequate support" for the immediately relevant provisions of the federal Act and that section 133 created no "implicit constitutional limitation" on federal or provincial legislative power.

Besides noting and applauding the definitive rejection of the appellant's challenge, this sequel to an earlier comment [7] on the New Brunswick decision will examine the possible implications of some of the statements contained in the Supreme Court judgment.

Particularly noteworthy was the Court's historical orientation in interpreting section 133. In referring to the Quebec Resolutions for guidance in determining whether section 133 is limitative, the Court has recognized the legal relevance of historical documents anticipatory of Confederation.[8] One hopes that this signals the casting off of the traditional blindfold in relation to these documents.[8a]

Also with regard to section 133, the Court stated:

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[1] On a matter of statutory construction, the Supreme Court concluded, contrary to the majority in the New Brunswick court, that the legislation was operative without needing a special proclamation.

[2] *Re Official Languages Act*, [1974] 7 N.B.R. (2d) 526.

[3] (1972) 5 N.B.R. 653, 53 D.L.R. (3d) 372 (N.B.C.A.).

[4] *Official Languages of New Brunswick Act*, S.N.B. 1969, c.14, s.14. Also attacked (and its applicability upheld) was *Evidence Act*, R.S.N.B. 1952, c.74, s.23C.

[5] *Official Languages Act, R.S.C.* 1970, c.0-2, s.11(1), (3), (4).

[6] Limerick,J.A. concurred in the result for separate reasons.

[7] See comment at (1974) 20 McGill L.J. 136.

[8] *Supra*, f.n.2, 538.

[8a] *Cf. A.-G. Ont.* v. *Winner*, [1954] A.C. 541, [1954] 4 D.L.R. 657, 13 W.W.R. (n.s.) 657.

> Certainly what s.133 itself gives may not be diminished by the Parliament of Canada, but if its provisions are respected there is nothing in it or in any other parts of the British North America Act ... that precludes the conferring of additional rights or privileges or the imposing of additional obligations respecting the use of English and French, if done in relation to matters coming within the competence *of the enacting legislature.*[9]

This general proposition could have ramifications beyond the immediate context. In particular it has a bearing on measures regarding the language of work and of instruction, which are currently under consideration.[10]

The Court then turned its attention to the effect of section 91(1), which confers jurisdiction upon Parliament to make laws in relation to "the amendment from time to time of the Constitution of Canada" except, *inter alia,* "as regards use of the English or French language". While declining "to state exhaustively what is comprehended within the phrase in s.91(1) 'the constitution of Canada' ",[11] Laskin,C.J. nevertheless found "untenable" the contention that "would turn the exception from a grant of a new power under s.91(1) into a general substantive limitation unrelated to that power".[12] Presumably this would be true not only for the language exception but also for the others included in that subsection. This could mean that the inclusion of specific exceptions in section 91(1) may not be interpreted as a restraint on legislative powers conferred elsewhere in the Act.

The specific issue before the Court involved language use in criminal proceedings. Laskin,C.J., like Hughes,C.J.N.B. and differing from Limerick,J.A., found that section 91(27) was dispositive of the matter. He did, however, like Limerick,J.A., consider the consequences of the "peace, order and good government" clause of section 91. He said of these words:

> ... in relying on them as constitutional support for the *Official Languages Act,* I do so on the basis of the purely residual 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.[13]

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[9] *Supra,* f.n.2, 537. Emphasis supplied.

[10] *Cf. Official Language Act,* Bill 22, 2d Sess., 30th Leg., Que. Nat. Ass. 1974 (assented to 31 July 1974).

[11] *Supra,* f.n.2, 540.

[12] *Ibid.*

[13] *Ibid.,* 534.

This interpretation of the "peace, order and good government" clause rendered valid as within parliamentary competence not only sections 11(1),(3) and (4), independently validated by section 91(27), but also the rest of the *Official Languages Act.* While this may appear to be *obiter dicta,* it is a dictum which may be expected to discourage challenge to other portions of the Act.

How far the Court will in future opinions expand upon these statements is a matter of speculation. Not in question, however, is the constitutionality of the associated federal and provincial provisions for using either official language in criminal causes.

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