

Contested Ground: The State and Language Rights in Canada, 1760–2000

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I. INTRODUCTION

The progressive involvement of the Canadian state, in its various incarnations since 1760, in the highly sensitive and often controversial realm of language rights has been, and remains to this day, a central theme in Canadian history. The ever-increasing involvement of the state in language policy has been, and will continue to be, controversial. Language rights are contested ground because they are intimately associated, in many cases, with cultural and religious identities. Language rights are perceived by national, ethno-cultural and religious communities as important instruments of communication in the preservation and promotion of their respective cultural, religious, social and political identities. The informal and formal recognition of a range of language rights for specific communities in Canada emerged after a protracted struggle between the French-Canadian minority community and the British-Canadian majority community over what should be the appropriate role for the state in this highly sensitive field.

The growing involvement of the Canadian state, at various stages in its development, in the delineation, protection and promotion of language rights was intimately linked with the evolution of how British Canadians, French Canadians, Acadians, and “other” Canadians and their leaders perceived the need to alter the role of the state in order to achieve their respective aspirations and goals. As the Canadian state, at both levels of the federation, matured in response to a myriad of complex and often interrelated changes taking place in the economy and society, British Canadians, French Canadians, Acadians and “other” Canadians insisted that the state play a greater role in the delineation

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and regulation of language and cultural rights. The history of the state's involvement in the expansion of language rights reveals that the process was never linear. Expansion and consolidation of language rights came in fits and starts. This was especially so during the century of British Imperial control over the British North American colonies between 1760 and Confederation. A close examination of the *British North America Act, 1867* (now the *Constitution Act, 1867*)¹ reveals the nature and scope, particularly the limitation, of language rights that prevailed at the outset of Confederation. The Constitution provided limited protection for the education rights of the Protestant and Catholic minorities in Quebec and Ontario, and eventually Manitoba, but failed miserably to provide protection for the rights to education in their own language for French-Canadian and Acadian children, except in Manitoba and the Northwest Territories. What ensued was a largely unsuccessful century-long struggle by French-Canadian and Acadian minority communities for education rights for their children.

A new stage began in the aftermath of the Second World War. Both the British-Canadian and French-Canadian societies were irrevocably transformed by mass immigration of non-British and non-French peoples, rapid industrialization, expansive urbanization and increasing secularization. With this transformation came the articulation of competing nationalisms, French-Canadian, Québécois and pan-Canadian. Both these interconnected developments propelled a greater role of the state, at both levels and in all fields, if all Canadians in all regions were to meet the highly competitive challenges of the modern world while preserving their redefined identities.

This study analyzes how and why the increasingly interventionist Canadian state, federal and provincial, responded to the enormous challenges by proposing and then implementing competing and conflicting regimes of expanded official language rights. The different official language rights regimes reflected divergent conceptions of duality. The first conception entailed the long-standing but regenerated pan-Canadian duality of official language and cultural rights. The second conception, an outgrowth of Quebec's "Quiet Revolution" in the 1950s and 1960s, called for the creation of a bi-national, Quebec/Canada conception of duality, one comprising an officially unilingual French-speaking Quebec and a largely unilingual English-speaking multicultural Canada outside Quebec. How, and if, this conflict of dualities is resolved

¹ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

will determine the future role of the state in the ongoing delineation, protection and promotion of official language rights in Canada.

II. LANGUAGE RIGHTS IN BRITISH NORTH AMERICA, 1760–1867: FROM ASSIMILATION TO ACCOMMODATION

In the century after the Conquest of 1760, the role of the British state, at all levels, in language rights evolved from one centred on wholesale assimilation into one that involved a range of state policies and practices based on a pragmatic acceptance of a limited range of language rights for French Catholic subjects living in Old Quebec, Lower Canada and later the united Colony of the Canadas. Four years after the defeat of the French Imperial forces on the Plains of Abraham just outside the Fortress of Quebec, the 1763 Treaty of Paris brought an end to the destructive Seven Years' War. A beleaguered and weakened French monarch signed the Peace of Paris in 1763, ceding the colony of New France to the British Crown, and thereby putting its 70,000 French and Catholic subjects under the authority of the British Colonial Office, appointed governors and bureaucrats, military personnel and merchants.²

This posed a serious dilemma for the British authorities. How were they to govern another European people? The British Colonial Office, in the Proclamation of 1763 and its accompanying instructions to the governors of the Old Colony of Quebec, decided that the best approach was to promote a policy of assimilation of its new French and Catholic subjects via the implementation of enlightened British institutions. First, French civil law and administrative institutions, including the seigneurial regime and landholding system, were to be abolished and replaced with British common law and freehold tenure. Second, the British Colonial Office would promote successive waves of British immigrants, the method used to populate its 13 expansive and prospering colonies to the south. In time, its new French and Catholic subjects would come to appreciate the enormous benefits of British political, judicial, religious and economic institutions. The grateful French would freely embrace the English language, the Protestant faith and British institutions, and would eventually swear allegiance to the British Crown.

² Fred Anderson, *Crucible of War: The Seven Years' War and the Fate of Empire in British North America, 1754-1766* (New York: Alfred A. Knopf, 2000), at 503-50.

In short, British colonial authorities had learned nothing from their experience with the Acadians of the Maritime region, who, after a half-century of British rule, had refused to swear allegiance to the British Crown, let alone integrate and ultimately assimilate with their conquerors. A frustrated British governor in 1755 had implemented a policy of deportation and dispersal of thousands of Acadians, making way for New England settlers to move into the region. Deportation of 70,000 new French Catholic subjects was not an option. Successive governors of the Old Colony of Quebec soon realized that the waves of British immigrants so necessary for swamping the French Catholics were not forthcoming. They received instead small numbers of aggressive American and British merchants. Governors and military leaders throughout the British North American colonies soon faced the alarming prospect of a war of independence by the American colonists. The threat was brought on by excessive taxation and a wide range of other grievances which were exploited assiduously by an emerging, ambitious middle class of financiers, merchants and farmers fuelled by a nascent but powerful American nationalism.

British colonial and military leaders believed they could head off any revolution of independence in the American colonies by retaining control over Nova Scotia and Quebec. Quebec was the key, since Nova Scotia was well protected by the British navy and the Halifax fortress. It was not so easy to defend the expansive colony of Quebec — extending right down to Louisiana and accessible by land and water at several vulnerable points — given the unhappiness and lack of loyalty of its French Catholic inhabitants. *The Quebec Act, 1774*,³ a long overdue but deeply flawed Imperial statute, constituted a less than successful attempt by British colonial leaders to provide a more “effectual” system of governance for a vast and reunited Colony of Quebec. It was a crude, largely unsatisfactory interim attempt to reconcile the interests of the majority French Catholic community living under what the British considered an alien and backward seigneurial regime with those of a small but expanding British community, mostly angry American merchants demanding freehold tenure and a legislative assembly for true British subjects but not for French Catholics. The *Quebec Act*, apart from reuniting the entire French colony, sanctioned the use of French civil law⁴ to deal with matters of property and civil rights — recognizing

³ (U.K.), 14 Geo. III, c. 83 [hereinafter the “*Quebec Act*”].

⁴ *Quebec Act, 1774* (U.K.), 14 Geo. III, c. 83, s. 8.

the seigneurial regime in the hopes of solidifying the allegiance of the seigneurial class. Yet, British criminal law would prevail. The Act recognized the free exercise of the Catholic religion⁵ and stated that the *Test Act*⁶ would not apply to French Catholics seeking government positions.⁷ British authorities hoped that this measure would guarantee the regime the full cooperation of Catholic Church officials and the remaining Seigneurs.

The *Quebec Act, 1774*⁸ was not, and is not the *Magna Carta* that many historians make it out to be. Nonetheless, the Act, while angering the merchants and American colonists who were blocked from the Mississippi region, did assist the British in retaining the loyalty of their French Catholic subjects thanks to the cooperation of its clerical and seigneurial leaders. The British forces just barely managed to defeat the invading American forces in 1775–1776 thereby retaining the colonies of Quebec and Nova Scotia, both of which experienced a substantial influx of Loyalists.

Yet, the American Revolution was successful. North America would, henceforth, be divided into what would become two competing transcontinental nation-states.⁹ The deeply flawed *Quebec Act, 1774*¹⁰ was challenged immediately by members of the seigneurial class, French and British, demanding a greater role in the executive council and the implementation of full civil law. A nascent coalition, comprising an emerging French-Canadian petty bourgeoisie, the disgruntled and ambitious merchants, and the newly arrived Loyalists, demanded representative political institutions. Intent on reinforcing the Ancien Régime, one based on a reinvigorated and largely British landed aristocracy and severely circumscribed representative democratic

⁵ *Quebec Act, 1774* (U.K.), 14 Geo. III, c. 83, s. 5.

⁶ (U.K.), 1 Geo. I, c. 13.

⁷ *Quebec Act, 1774* (U.K.), 14 Geo. III, c. 83, s. 7.

⁸ (U.K.), 14 Geo. III, c. 83.

⁹ Hilda Neatby, *Quebec: The Revolutionary Age, 1760-1791* (Toronto: McClelland & Stewart, 1966), at 125-41. While respecting the "Canadiens" human rights as individuals, Neatby reveals that the supplementary instructions to the governors made it very clear that the overall policy "can be seen only as one of gentle but steady and determined Anglicization". In sum, assimilation remained central to the British plan for the governance of its French Catholic subjects.

¹⁰ (U.K.), 14 Geo. III, c. 83.

institutions, British colonial authorities formulated a badly flawed *Constitution Act, 1791*.¹¹

Rejecting Smith C.J.'s liberal "grand design" for centralized federation of all the British North American colonies, the 1791 constitutional arrangement divided the Old Colony of Quebec into the new colonies of Lower and Upper Canada, each under the authority of the Colonial Office, an all-powerful governor, his appointed executive and legislative councils, and a broadly elected but largely powerless House of Assembly. The Act reaffirmed the use of English common law and provided for the implementation of freehold land tenure throughout the Eastern Townships of Lower Canada. Most of this land would be granted to British aristocrats, merchants and senior military officers to develop. The Act also reaffirmed French civil law and the existing seigneurial regime with which it was associated. The Roman Catholic Church, which owned over 25 per cent of seigneurial lands, was tolerated. Clergy reserves were set aside for the established Church of England. This was not enlightened self-government but rather an autocratic system intent on preserving the Ancien Régime. It was hoped that it would foster the expansion of a stable landed aristocracy and curtail the political ambitions of the rising commercial class. Colonial officials believed this was the only way to prevent a revolution in its remaining colonies in North America.¹²

Naturally, the language of local colonial governance, the "Château Clique", remained English. The British, once again, believed that Lower Canada would soon be swamped by British immigrants willing to settle in the Eastern Townships, ensuring that English would eventually become the dominant language of business and government at all levels. The realpolitik of the situation was quite different. Mass immigration did not occur until the late 1840s!

Largely out of necessity, French and English became the languages of debate, and of the journals and proceedings of Lower Canada's Legislative Assembly. The majority *Canadien* and then *Patriote* Party — comprising members of a nascent, Catholic-Church educated, French-Canadian petty bourgeoisie — defended and promoted the "national" rights of the French-Canadian habitants. By the 1820s, the *Patriote* Party

¹¹ (U.K.), 31 Geo. III, c. 31; Fernand Ouellet, *Lower Canada 1791–1840: Social Change and Nationalism* (Toronto: McClelland & Stewart, 1980), at 1-27.

¹² Hilda Neatby, *Quebec: The Revolutionary Age, 1760-1791* (Toronto: McClelland & Stewart, 1966), at 206-25, 249-63.

had a hammerlock on the legislative assembly. The English-speaking minority British Party — comprising a declining class of French and British seigneurs and an ambitious, expansive British merchant class, many of them large property holders — dominated the executive and legislative councils. It managed to hold sway for several years over the Legislative Assembly. With the consolidation of the nationalistic French-Canadian petty bourgeoisie's hold over the Assembly, the British Party had to rely on the governor and his councils to advance its economic and political interests. Legislation, except for public funds, was the joint responsibility of the Council and Legislative Assembly, but each could veto the other.¹³

This paradoxical constitutional arrangement contributed to bitter political deadlock in the early 1830s. Once the secessionist faction took control of the Patriote Party in 1834 under the leadership of a hapless Louis-Joseph Papineau, it ended all cooperation and planned to overthrow the British rulers. The governor and his council were instructed to govern without the support of the legislative branch. Hoping to defeat the British on the battlefield and gain independence from the British Empire, radical Patriotes plunged Lower Canada into the disruptive and unsuccessful Rebellions of 1837–1838.¹⁴

Between 1837 and the *Act of Union, 1840*,¹⁵ Lower Canada was governed under martial law. Lord Durham, or “Radical Jack” as he was called, was appointed Governor General of British North America and was charged with analyzing the crisis and issuing a report. Durham's 1839 report went to the very heart of the matter. A mid-nineteenth-century liberal democrat and ardent promoter of commercial and industrial capitalism, Durham expected to find a classical struggle between the people and their autocratic colonial governors.¹⁶ Instead, what he discovered was a struggle by the radical wing of the conservative petty-bourgeois Patriote Party for the national self-determination of the French-Canadian people. In a celebrated phrase which has resonated down through the ages, Durham declared that he

¹³ Fernand Ouellet, *Lower Canada 1791–1840: Social Change and Nationalism* (Toronto: McClelland & Stewart, 1980), at 29–94.

¹⁴ Fernand Ouellet, *Lower Canada 1791–1840: Social Change and Nationalism* (Toronto: McClelland & Stewart, 1980), at 158–327.

¹⁵ (U.K.), 3 & 4 Vict., c. 35.

¹⁶ Janet Ajzenstat, *The Political Thought of Lord Durham* (Kingston: McGill-Queen's University Press, 1988).

found "two nations warring in the bosom of a single state: ... a struggle, not of principles, but of races".¹⁷ Durham concluded that the colonies of Lower and Upper Canada lacked true liberal democratic institutions and would not progress unless and until this destructive clash of nationalities was put to rest. To achieve both objectives, he proposed two fundamental reforms: (1) Upper and Lower Canada should be reunited into a single, soon-to-be predominantly English-speaking British province — thanks to British immigration — with its capital in a neutral English-speaking location; and (2) a reunited, English-speaking Legislative Assembly should function under the liberal democratic principle of "responsible government" as then understood in British law.¹⁸

British colonial authorities, believing that Imperial rule and responsible government were incompatible, readily rejected responsible government. They were easily convinced, however, that the reunification of Upper and Lower Canada was a necessary condition to ending the clash of nationalities, weakening the French-Canadian political class and advancing their objective of assimilation. In advance of removing martial law, the House of Commons debated and passed a new Constitutional statute, the *Act of Union, 1840*, which created one Legislative Assembly with English as the only official language.¹⁹ Despite the fact that the population of Canada East was 600,000 compared with 400,000 in Canada West, the Act stipulated an equal number of seats, 42, for both regions so as to ensure that an English-speaking majority predominated in the deliberations.²⁰

The British Colonial Office appointed Governor General Charles Poulett Thompson to put the controversial arrangement into effect in 1841. Over time, Thompson gained the support of the French-Canadian moderate politicians, most former members of the Patriote movement. Étienne Parent and Louis-Hippolyte LaFontaine, initially denouncing the Act as undemocratic, unjust and despotic, then reluctantly backed the Union. Why? They convinced themselves and their followers that

¹⁷ Lord Durham, *Report on the Affairs of British North America* (London, 1839) cited in Jacques Monet, *The Last Cannon Shot: A Study of French-Canadian Nationalism 1837-1850* (Toronto: University of Toronto Press, 1969), at 24.

¹⁸ Lord Durham, *Report on the Affairs of British North America* (London, 1839) cited in Jacques Monet, *The Last Cannon Shot: A Study of French-Canadian Nationalism 1837-1850* (Toronto: University of Toronto Press, 1969), at 24-25.

¹⁹ Under art. 41 of the *Act of Union, 1840* (U.K.), 3 & 4 Vict., c. 35, art. 41, French was prohibited as a language "of original record", but translated copies could be made.

²⁰ *Act of Union, 1840* (U.K.), 3 & 4 Vict., c. 35, arts. 12-20.

the worst elements of linguistic and cultural assimilation could be offset by the reformers attaining true political power. Effective internal self-government, granting the Assembly full control over all taxes and expenditures, could be achieved with the support of reformers from Canada West. Furthermore, the advent of responsible government, they were convinced, had to occur within a transformed British Empire, the only institution capable of preventing the British North American colonies from being absorbed willy-nilly into the powerful United States.²¹

From his first speech in Kingston on September 12, 1842, language rights were central to LaFontaine's campaign strategy to unite the divided French-Canadian nationality behind the Reform movement's campaign for responsible government. Recognition of French as one of the two official languages of the Legislative Assembly would undermine the assimilationist imperial policy and ensure the survival of the French-Canadian nationality. In reality, unilingual French-Canadian legislators used their language while insisting that the journals and proceedings be translated. Translated speeches from the Throne were read in the Assembly. French-Canadian bureaucrats wrote their reports in French. As leader of the official Opposition in 1845, LaFontaine presented a motion — embarrassing Papineau and his reluctant followers into supporting the laudable cause — demanding that the British Parliament rescind the detested and unjust article 41 of the *Act of Union*.²²

The achievement of responsible government, as LaFontaine predicted, brought in its wake the recognition of French as an official language of the Legislature. Once the Reformers won their long-sought majority in the elections of December–January 1847–1848, Lord Elgin called upon LaFontaine and Robert Baldwin to form their first administration in March 1848. A bilingual French-Canadian, A.-N. Morin was elected Speaker of the House. An amendment was passed repealing article 41 of the *Act of Union, 1840*.²³ When on January 18, 1849 Lord Elgin read his Speech from the Throne, first in English and

²¹ Jacques Monet, *The Last Cannon Shot: A Study of French-Canadian Nationalism 1837-1850* (Toronto: University of Toronto Press, 1969), at 25-27, 45-50, 57-57, 59-62, 66-67, 78-90, 126-28.

²² Jacques Monet, *The Last Cannon Shot: A Study of French-Canadian Nationalism 1837-1850* (Toronto: University of Toronto Press, 1969), at 195-202.

²³ *Union Act Amendment Act, 1848* (U.K.), 11 & 12 Vict., c. 56.

then in French, French Canadians instinctively grasped that LaFontaine, not an angry and disgruntled Papineau, was their true hero and saviour. He had guaranteed their survival as a distinct nationality within a reinvigorated British North America. The British formal policy of assimilation was over, and a new but fragile era of tolerance of the French-Canadian language and culture was underway.²⁴

III. *THE BRITISH NORTH AMERICA ACT, 1867:* THE SCOPE AND LIMITATION OF LANGUAGE RIGHTS

The challenge facing French-Canadian politicians during the 1850s and the early 1860s was to consolidate the power-sharing gained under the Union, while ensuring that any new constitutional arrangement that might be required would entrench, among other important jurisdictional matters, their hard-won language rights. Complex and powerful demographic, political, economic and military forces coalesced in the mid-1860s to compel politicians from three British North American colonies — the Canadas, New Brunswick and Nova Scotia — to negotiate the terms of a new constitutional agreement. Mindful of the United Kingdom's vested interests in British North America, between 1864 and 1867, British colonial authorities strongly encouraged and monitored very closely the entire process that culminated in the creation of the Dominion of Canada.²⁵

Demographic and political pressures mounted in the wake of the Irish Famine migration when the population of Canada West greatly surpassed that of Canada East. George Brown's majority Clear Grit Party campaigned incessantly for representation by population and ultimately a loose federation of Ontario and Quebec. In 1854, his campaign was emboldened when the British Parliament abolished article 26 of the *Act of Union, 1840* stipulating an equal number of seats for Canada East and Canada West and requiring a two-thirds majority to alter the provision. This meant that the Clear Grit Party, with enough support from British-Canadian politicians of Canada East, could obtain the majority required to pass legislation implementing representation by population. French-Canadian Conservative and Rouge politicians, concerned with this troublesome turn of events, attempted unsuccessfully

²⁴ Jacques Monet, *The Last Cannon Shot: A Study of French-Canadian Nationalism 1837-1850* (Toronto: University of Toronto Press, 1969), at 264-67, 327-28.

²⁵ W.L. Morton, *The Critical Years: The Union of British North America 1857-1873* (Toronto: McClelland & Stewart, 1964), at 163-222.

to have section 26 restored. They had little option but to bargain hard to prevent representation by population being imposed on the Union before they could agree to a more suitable constitutional arrangement, one that would better protect their national interests, including their language rights. Their first option was to support George Brown's proposal for a decentralized federation comprising Ontario and Quebec, one which would overturn the worst feature of the Union of the Canadas by restoring French-Canadian control over the Quebec Assembly.²⁶

John A. Macdonald, leader of Canada West's beleaguered Liberal-Conservative Party, managed to convince French-Canadian Conservatives in the Blue Party, led by George-Étienne Cartier, that a larger federation of all or several British North American colonies was the far better option. Binational federations were notoriously unstable and prone to deadlock as the Union, a quasi-federation, had demonstrated. In addition to granting French-Canadians majority control over their very own Assembly, the larger federation, incorporating in due course Prince Edward Island, Alberta, Saskatchewan, Manitoba and British Columbia, promised all provincial governments and their citizens far greater financial and political stability, increased military security and unlimited economic expansion. Continued British control over Canada's external trade and its foreign and defence policies would reinforce imperial markets for Canada's unlimited resources, while keeping the expansive United States at bay. In a heated political battle with the anti-confederate Rouge Party for the hearts and minds of French Canadians, Cartier and the Blues contended that the Quebec Assembly would possess "co-ordinate sovereignty" over all provincial areas of jurisdiction. The survival and development of the French-Canadian nationality and the French language, Cartier assured his compatriots, would be assured under a new, more robust constitutional arrangement.²⁷

What were the terms of the *British North America Act, 1867*,²⁸ brought into effect on July 1, 1867, that made Cartier and the Blue Party so confident? While language guarantees under section 133 were

²⁶ Ged Martin, *Britain and the Origins of Canadian Confederation, 1837-67* (Vancouver: University of British Columbia Press, 1995), at 48-52. For the repeal of s. 26, see *United Kingdom Public General Statutes* (U.K.), 17 & 18 Vict., c. 118, s. 5.

²⁷ W.L. Morton, *The Critical Years: The Union of British North America 1857-1873* (Toronto: McClelland & Stewart, 1964), at 150-53; A.I. Silver, *The French-Canadian Idea of Confederation 1864-1900* (Toronto: University of Toronto Press, 1982), at 32-50.

²⁸ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

significant, Canada was not constituted as a binational federal state, as some have claimed, nor was it the result of a formal, legal compact between two founding nations, British and French. Neither was the federation the result of a formal, legal compact between sovereign provincial governments, a constitutional arrangement that could be unmade by these same provincial governments.²⁹ Indeed, a recent revisionist study maintains that the principle of monarchy — not federalism — was at the core of the new Canadian nation-state of 1867.³⁰

The Quebec Legislative Assembly, granted exclusive jurisdiction over all local matters as spelt out in section 92, was the only province in which the Assembly, Council and courts were officially bilingual, entrenching the situation which prevailed in the Union of the Canadas after 1848. Official bilingualism was extended to Parliamentary debates, both in the House of Commons, where the province of Quebec held 65 seats, and in the Senate where 24 Senators, appointed by the Prime Minister, represented the interests of Quebec's French-Canadian majority and British-Canadian minority communities. The records and journals of the Houses of the Legislature of Quebec and the Parliament of Canada were recorded in both official languages. The courts of Canada and Quebec were required to operate in both official languages. The Acts of Parliament and the Quebec Legislature had to be printed and published in both official languages.³¹ Section 133 required that official bilingualism apply to all quasi-judicial agencies within the Quebec and Canadian state — so said the modern Supreme Court.³² In reality, this was not the practice until the later third of the twentieth century. The Quebec bureaucracy and quasi-judicial agencies, staffed overwhelmingly by French Canadians, functioned almost exclusively in French. Prior to the 1970s, Ottawa's bureaucracy, including the courts, was staffed largely by British Canadians and functioned, especially among the mandarin class, primarily in English.³³

²⁹ Ramsay Cook, *Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921* (Ottawa: Information Canada, 1969).

³⁰ Frederick Vaughan, *The Canadian Federalist Experiment: From Defiant Monarchy to Reluctant Republic* (Montreal: McGill-Queen's University Press, 2003), at 48-114.

³¹ Canada, Department of Justice, *A Consolidation of The Constitution Acts, 1867 to 1982* (Ottawa: Ministry of Supply and Services, 1989); *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 133, reprinted in R.S.C. 1985, App. II, No. 5 (initially the *British North America Act, 1867*).

³² *Quebec (Attorney General) v. Blaikie*, [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016 (S.C.C.).

³³ For an excellent overview of these matters, consult H. Marx, "Language Rights in the Canadian Constitution" (1967) *Revue juridique Thémis* 239 ff. He reveals that the courts remained

The Framers of Confederation made no provision in the Constitution guaranteeing French-Canadian and Acadian minority communities education for their children in the French language. British-Canadian Protestant politicians in Canada East sought and obtained for the British-Canadian Protestant minority community in Quebec, through section 93 of the *British North America Act, 1867*,³⁴ the right to publicly-funded Protestant schools and school boards. These Protestant schools and school boards functioned exclusively in English, thereby indirectly guaranteeing the minority its language rights. British-Canadian Catholics, joined later by other ethno-cultural Catholic communities, formed part of Quebec's predominantly French-Canadian Catholic school system. Where numbers warranted, the French-Canadian Catholic school system provided programs, classes and schools in English. French-Canadians and Acadian minorities outside Quebec were guaranteed, via section 93, publicly funded Catholic separate schools and school boards where these existed in law at the time of Confederation. In 1867, only the province of Ontario met this provision and was required to provide public funding for its Catholic separate school system.³⁵ Until Regulation XVII in 1912, in several predominantly Franco-Ontarian regions, instruction in these Catholic Schools was in French. Acadian Catholics residing in Nova Scotia and New Brunswick, as events revealed, had no such guarantee in law.³⁶

The Framers of Confederation maintained that Ottawa could and would use its sections 56 and 90 powers of disallowance to enforce section 93 or have recourse to its remedial powers under section 93(4).³⁷ As shall be demonstrated, this conceptualization of language rights as subsidiary to, and dependent upon, religious rights would be severely tested and largely rejected by British-Canadian majorities, first in the Maritime and Western territories and provinces, and then in Ontario.

unilingual and the regulations to make them function effectively as bilingual institutions were never adopted: at 278-79, 293.

³⁴ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

³⁵ A.I. Silver, *The French-Canadian Idea of Confederation 1864-1900* (Toronto: University of Toronto Press, 1982), at 51-66.

³⁶ Canada, Department of Justice, *A Consolidation of The Constitution Acts, 1867 to 1982* (Ottawa: Ministry of Supply and Services, 1989); *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 93, reprinted in R.S.C. 1985, App. II, No. 5.

³⁷ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 56, 90, 93(4), reprinted in R.S.C. 1985, App. II, No. 5.

IV. CONTESTING THE NATURE AND PARAMETERS OF LANGUAGE RIGHTS AT THE PROVINCIAL LEVEL, 1870–1930

The ink was barely dry on the *Constitution Act, 1867*³⁸ when political wrangling over language and religious rights laid bare the flaws in the Constitution. The situation was exacerbated by the rise of a belligerent and powerful British-Canadian nationalism which influenced national and provincial politics and politicians. New Brunswick — home to an expansive and nationalistic Acadian community comprising 16 per cent of the population in 1871 — had not been declared officially bilingual. Unlike Ontario, there was no constitutional guarantee providing Acadian parents with publicly funded Catholic schools for their children, schools in which the language of instruction would be French.³⁹ Instead, the Acadian minority of New Brunswick was confronted with the *Common Schools Act, 1871*,⁴⁰ which established a system of publicly funded non-confessional schools. Acadian parents faced a very tough and unpalatable decision. They could enrol their children in English-language public schools, in which any instruction in the French language was prohibited by law. In time, their children would lose their language, culture and Catholic religion. Or, Acadian parents could continue to keep their children at home, which a great many did, or enrol them in one of over 100 private Acadian Catholic parish schools. These Acadian parents experienced double taxation, a severe financial hardship for what was a very poor community.⁴¹

New Brunswick's Acadian leaders attempted unsuccessfully to challenge the *Common Schools Act, 1871*⁴² by using section 93 of the *Constitution Act, 1867*.⁴³ They also argued that section 8 of the *Parish Schools Act, 1858*⁴⁴ granted them the right to confessional schools since

³⁸ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

³⁹ Sheila M. Andrew, *The Development of Elites in Acadian New Brunswick, 1861-1881* (Montreal: McGill-Queen's University Press, 1997).

⁴⁰ 34 Vict., c. 21 (N.B.).

⁴¹ Michel Bastarache, "Acadian Language and Cultural Rights from 1713 to the Present Day" in Jean Daigle, ed., *The Acadians of the Maritimes: Thematic Studies* (Moncton: Centres d'études acadiennes, Presses de l'Université de Moncton, 1982), at 356-57.

⁴² 34 Vict., c. 21 (N.B.); ruled constitutionally valid in *Ex parte Renaud* (1873), 14 N.B.R. 273 (N.B.S.C.); Privy Council appeal dismissed.

⁴³ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

⁴⁴ Cited in Katherine F.C. MacNaughton, *The Development of the Theory and Practice of Education in New Brunswick, 1784-1900* (Fredericton: University of New Brunswick Historical Studies, 1947), at 165.

it permitted Roman Catholic children in parish schools to read the Douay version of the Bible. The New Brunswick Supreme Court and the Judicial Committee of the Privy Council rejected both arguments.⁴⁵ Acadian political leaders sought to restore publicly funded, French-language Catholic schools. Simultaneously, the largely Scottish and Irish Catholic Church Episcopacy lobbied for, and eventually won in 1873, an English-language public school system in which the Catholic religion could be taught by priests and nuns before or after school hours. Over time, Acadian leaders managed to obtain an ineffectual amount of teaching of French spelling and grammar using a series of inadequate bilingual readers. There was no French-language normal school to train Acadian teachers, a situation that persisted until 1968 when the Université de Moncton opened its French teachers' college.⁴⁶

Seeking political redress at the federal level, Acadian, Scottish and Irish Catholics took their respective struggles to Parliament. An Acadian Member of Parliament from Kent County, Mr. Renaud, moved a motion, to no avail, calling upon John A. Macdonald's Conservative government to pass remedial legislation under section 93(4) disallowing the *Common Schools Act, 1871*⁴⁷ and thereby restoring publicly funded Catholic Acadian schools in New Brunswick.⁴⁸ Then, John Costigan, Conservative MP for Victoria, provoked a divisive debate in the House of Commons in the spring of 1872 with a motion demanding that the New Brunswick government restore publicly funded Catholic schools. This motion died on the order paper. In May 1873, he put a more direct motion demanding that the government disallow the *Common Schools Act, 1871*. With the support of French-Canadian Conservative and Liberal MPs, the motion passed. Prime Minister Macdonald and his government, fearful of the political fallout in Quebec and New Brunswick, rejected the motion on

⁴⁵ Michel Bastarache, "Acadian Language and Cultural Rights from 1713 to the Present Day" in Jean Daigle, ed., *The Acadians of the Maritimes: Thematic Studies* (Moncton: Centres d'études acadiennes, Presses de l'Université de Moncton, 1982), at 361-63; *Ex parte Renaud* (1873), 14 N.B.R. (Pug), at 273-92; Decision upheld by Privy Council in *Maher v. Town of Portland*, 1874, cited in G.J. Wheeler, *Confederation Law of Canada* (London: Eyre & Spottiswoode, 1896), at 338.

⁴⁶ Alexandre J. Savoie, "Education in Acadia: 1604 to 1970" in Jean Daigle, ed., *The Acadians of the Maritimes: Thematic Studies* (Moncton: Centres d'études acadiennes, Presses de l'Université de Moncton, 1982), at 404-407, 418-19.

⁴⁷ 34 Vict., c. 21 (N.B.).

⁴⁸ Michel Bastarache, "Acadian Language and Cultural Rights from 1713 to the Present Day" in Jean Daigle, ed., *The Acadians of the Maritimes: Thematic Studies* (Moncton: Centres d'études acadiennes, Presses de l'Université de Moncton, 1982), at 364.

the grounds that it entailed federal intervention in education, an area of exclusive provincial jurisdiction. Nonetheless, his government supported a motion condemning the New Brunswick government's treatment of its Acadian Catholic minority.⁴⁹ Provincial rights trumped minority rights. Acadians turned to a revitalized Acadian Catholic Church and a myriad of nationalist organizations to preserve their language, culture and religion. The politics of discrimination would eventually be challenged and overcome, beginning in the 1960s when the first Acadian Premier, Louis Robichaud, set in motion a remarkable Acadian "Quiet Revolution".

Manitoba's French-Canadian Catholic community encountered crises over language and religion that were more dramatic than those experienced by the Acadian communities. In 1871, a plurality of 5,800 French-speaking Catholic Métis joined forces with over 4,000 Protestants of mixed ancestry to forge a new province. In due course, the Métis would be joined by several thousand French-Canadians migrating from Quebec and the United States.⁵⁰ Following the Métis-led Red River uprising and formation of a provisional government in 1870, the process of elite accommodation got underway. George-Étienne Cartier, on behalf of Prime Minister Macdonald's Conservative government, negotiated with Métis representatives the Red River colony's entry into Confederation as the province of Manitoba. Indeed, the *Manitoba Act, 1870*,⁵¹ which was passed in the House of Commons on May 12, 1870 by a vote of 120 to 11 and proclaimed on July 15, 1870, was modelled on Quebec's constitutional framework. Cartier's intent was to entice Quebec's surplus French-Canadian rural population to migrate west to a bilingual and Catholic Manitoba rather than continue its migration to the Protestant New England states. Section 23 of the *Manitoba Act, 1870*,⁵² mirroring section 133 of the *British North America Act, 1867*,⁵³ read:

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

⁴⁹ P.B. Waite, *Canada, 1874-1896: Arduous Destiny* (Toronto: McClelland & Stewart, 1971), at 7, 40-41; A.I. Silver, *The French-Canadian Idea of Confederation 1864-1900* (Toronto: University of Toronto Press, 1982), at 88-89.

⁵⁰ The 1871 Manitoba Census recorded 11,963 persons: 5,757 Métis; 4,083 mixed-bloods; 1,565 Europeans; and 558 Indians. Cited in Frances Russell, *The Canadian Crucible: Manitoba's Role in Canada's Great Divide* (Winnipeg: Heartland Associates, 2003), at 98.

⁵¹ S.C. 1870, c. 3.

⁵² S.C. 1870, c. 3.

⁵³ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

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.⁵⁴

The survival of the French language and culture and the promotion of French-Canadian immigration to the west relied also on section 22 of the *Manitoba Act, 1870*.⁵⁵ Section 22, again mirroring the Quebec arrangements, required the creation of publicly funded, dual confessional school systems: French Catholic and English Protestant.⁵⁶ Of course, given the tremendous ongoing hostility of Protestant British Canadians in Ontario to the Métis Red River "Rebellion" and its outcome, it was not long before sections 22 and 23 were going to be challenged. Indeed, Sir Francis Hincks had prognosticated during the debate on the Manitoba Bill that the original inhabitants of Manitoba would soon be swamped by Protestant British Canadians from Ontario and the deal would be amended.⁵⁷

Between 1871 and 1881, Manitoba's population reached 62,260, with 60 per cent claiming English as their first language while those claiming French as their first language dropped to 16 per cent, just over 9,700. Hounded by the British-Canadian settlers, many Métis sold their river lots for a pittance or were dispossessed of their land script⁵⁸ and moved further west to the Batoche region on the banks of the North Saskatchewan River. By 1886, Manitoba's French Canadians comprised just 10 per cent: 11,000 of 109,000 Manitobans. The 1901 Census revealed a further decline in the relative weight of French Canadians to 6.3 per cent of Manitoba's population.⁵⁹ Catholic Church leaders in Manitoba and colonization societies made valiant but largely unsuccessful attempts to attract large numbers of French-Canadian settlers and their

⁵⁴ *Manitoba Act, 1870*, S.C. 1870, c. 3, s. 23, retroactively confirmed by the Imperial Parliament: *British North America Act, 1871* (U.K.), 34 & 35 Vict., c. 28, s. 5.

⁵⁵ S.C. 1870, c. 3.

⁵⁶ *Manitoba Act, 1870*, S.C. 1870, c. 3, s. 22.

⁵⁷ *Dominion Debates*, 1870, vol. 1, 1984, cited in W.L. Morton, *Manitoba: The Birth of a Province* (Altona, Man.: D.W. Friesen, 1965).

⁵⁸ Land script gave the Métis the right to take up homesteads in the new province of Manitoba, usually 160 acres.

⁵⁹ Frances Russell, *The Canadian Crucible: Manitoba's Role in Canada's Great Divide* (Winnipeg: Heartland Associates, 2003), at 128, 133, 140.

families, first from Quebec and then from New England. Quebec's French-Canadian clerical, intellectual and political elites denounced any and all outmigration of French-Canadian Catholics, either to the northwest or to New England. Nonetheless, between 1870 and 1900 some 400,000 French Canadians moved to the United States in search of factory work. Yet, only a few thousand opted to endure the hardships of prairie farming and the long distance from their homeland to take up homesteads in Western Canada.

The hanging of Louis Riel, by the Conservative Government of John A. Macdonald in the wake of the North-west Rebellion of 1885, had a paradoxical outcome. It compelled Quebec's French-Canadian clerical and political elites to identify with, and defend the rights of, the French-Canadian minority communities outside Quebec. Simultaneously, it fired their determination to defend and reinforce the provincial autonomy of Quebec — the homeland of the majority French-Canadian community — by discouraging migration to the prairies and repatriating Franco-Americans. By defending the beleaguered minorities, French-Canadian nationalists were defending and promoting their homeland, Quebec, against the British-Canadian nationalists who were gaining increasing influence over Ontario and national politics and policies.⁶⁰

The demographic decline of Manitoba's French-Canadian community which precipitated its loss of political clout, Riel's hanging by the Macdonald government in 1885, and the rising tide of a homegrown exclusivist British-Canadian nationalism reinforced by bigoted politicians such as Dalton McCarthy from Ontario, seriously challenged Cartier's dream of a constitutionally entrenched bilingual and bicultural Western Canada. In 1890, all these elements merged, driving Manitoba's rapidly expanding, ambitious British-Canadian community and its political leaders to set aside sections 22 and 23 of the *Manitoba Act, 1870*⁶¹ using a series of unconstitutional provincial statutes. Two statutes abolished Manitoba's publicly funded dual confessional Catholic and Protestant school systems and replaced them with a single, non-sectarian public school system funded by all Manitobans.⁶² Another ominous statute, the *Official Language Act*,⁶³

⁶⁰ A.I. Silver, *The French-Canadian Idea of Confederation 1864-1900* (Toronto: University of Toronto Press, 1982), at 130-79; Carl Berger, *The Sense of Power: Studies in the Ideas of Canadian Imperialism* (Toronto: University of Toronto Press, 1970).

⁶¹ S.C. 1870, c. 3.

⁶² *An Act Respecting the Department of Education*, S.M. 1890, c. 37 and *An Act Respecting Public Schools*, S.M. 1890, c. 38 [hereinafter the "School Acts"].

⁶³ S.M. 1890, c. 14.

trumped section 23 of the *Manitoba Act, 1870*, ending unceremoniously the era of official bilingualism in Manitoba. It declared that 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 ... The Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language".⁶⁴

Until the 1980s, it was believed that Franco-Manitoban leaders, fearing a backlash and not having the financial resources to fight on two fronts, had never contested the unconstitutional "abolition" of section 23 of the *Manitoba Act*.⁶⁵ This was not the case. Recent evidence reveals that the termination of official bilingualism in the legislature and courts was challenged twice in the courts. In *Pellant v. Hébert*,⁶⁶ Mr. Pellant contested the candidacy of Joseph Hébert, running for mayor in La Broquerie, on the grounds that Hébert was illiterate and could not represent his electors. He submitted his case in Manitoba's two official languages, which was a direct challenge to the government's 1890 language law. Hébert's lawyer claimed the bilingual documentation was not admissible under the *Official Language Act* of 1890.⁶⁷ Judge L.A. Prud'homme ruled that the documentation was admissible under section 23 of the *Manitoba Act, 1870* because the *Official Language Act* was itself patently unconstitutional. Section 23 mirrored section 133 of the *British North America Act, 1867*⁶⁸ and the Manitoba legislature could not resort to section 92 to alter its own constitution. Premier Thomas Greenway's Liberal government opted to ignore the court's decision, refusing to either appeal it to a higher court or to rescind the unconstitutional *Official Language Act*. In a second case, in 1909, Prud'homme J. again ruled that Manitoba legislators did not have the authority under section 92 to override by statute section 23 of the *Manitoba Act, 1870*.⁶⁹ Once again, the provincial government ignored

⁶⁴ *Official Language Act*, S.M. 1890, c. 14, s. 1.

⁶⁵ S.C. 1870, c. 3.

⁶⁶ *St. Boniface Co. Ct.*, March 9, 1892, reported in (1981), 12 R.G.D. 242.

⁶⁷ S.M. 1890, c. 14.

⁶⁸ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

⁶⁹ *Bertrand v. Dussault and Lavoie*, *St. Boniface Co. Ct.*, January 30, 1909, reported in *Forest v. Manitoba (Registrar of Court of Appeal)*, [1977] M.J. No. 106, 77 D.L.R. (3d) 445, at 458 (Man. C.A.).

the decision, showing its utter contempt for the judiciary. Clearly, the government's behaviour did not disturb Manitoba's largely British-Canadian lawyers since the judge was a French Canadian.⁷⁰

On the education front, Franco-Manitobans were not so easily turned away since education in their own language was imperative for their survival. Furthermore, they had the unflinching support of French- and English-language Catholic Church leaders who lobbied incessantly for the full restoration of their publicly funded Catholic school system. The *Act Respecting Public Schools* was immediately contested but ruled constitutionally valid.⁷¹ On appeal from a reference to the Supreme Court of Canada, which curiously rejected by a 3-2 vote Ottawa's right to intervene under section 93(3), the Judicial Committee of the Privy Council ruled in 1895 that while constitutional, the School Acts did infringe on the constitutional rights of the Roman Catholic minority.⁷² The Catholic minority applied immediately to the Governor-General in Council to pass remedial legislation under section 93(3) of the *British North America Act, 1867*,⁷³ which protected the rights and privileges of Canada's Catholic and Protestant minorities. Manitoba Catholics, their leaders and several Catholic Conservative MPs pleaded with Prime Minister Mackenzie Bowell to impose remedial legislation on Manitoba. Bowell, a notorious anti-Catholic and anti-francophone, fearing a backlash from his Orange Lodge constituency in Ontario, refused to contemplate remedial legislation. Rejecting Bowell's pleas to join his government, French-Canadian Conservative MPs called for his resignation. Bowell, knowing full well Premier Greenway's response, quietly requested that he restore Catholic education rights. Of course, Premier Greenway did no such thing. When Bowell was forced out of office by a cabinet revolt for merely talking with Greenway, his replacement, Prime Minister Charles Tupper, introduced remedial legislation into the House of Commons. The legislation, filibustered by Wilfrid Laurier and his Liberal caucus on the grounds that it violated

⁷⁰ Raymond M. Hébert, *Manitoba's French-Language Crisis: A Cautionary Tale* (Montreal: McGill-Queen's University Press, 2004), at 14-16.

⁷¹ *Winnipeg (City) v. Barrett*, [1892] A.C. 445 (P.C.); *Act Respecting Public Schools*, S.M. 1890, c. 38.

⁷² *Brophy v. Manitoba (Attorney General)*, [1895] A.C. 202 (P.C.).

⁷³ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

provincial autonomy in education, died on the order paper when the life of Parliament expired and an election was called.⁷⁴

A canny Laurier, hoping to keep nervous British-Canadian Liberals on-board, promised Manitoba's Catholics that he would use his "sunny ways", to hammer out an acceptable agreement with Premier Greenway. A deal, he assured all Liberals, need not involve undermining exclusive provincial control over education, a jurisdiction that was sacrosanct to Quebec's political class, but most especially to the Catholic Church, which effectively controlled education at all levels. Ultramontane Catholic Church leaders in Quebec and the West denounced Laurier's rejection of remedial legislation during the 1896 election, but French Canadians and Acadians voted for him in droves. Prime Minister Laurier moved quickly to put the crisis behind his new government. The 1897 Laurier-Greenway political compromise did not restore the religious and language rights of Manitoba's Catholic and French-Canadian minority communities. This decision had a profound impact because it ended Cartier's dream of a bilingual and bicultural Western Canada. Amendments to the *Public Schools Act*⁷⁵ did not restore the publicly funded confessional school systems. They permitted 30 minutes of Catholic instruction at the end of the school day and the hiring of Catholic teachers in urban schools with 40 Catholic children or rural school districts with 25 Catholic children. Finally, "when ten of the pupils in any school speak the French language or any language other than English, as their native language, the teaching of such pupils shall be conducted in French, or such other language, and English upon the bilingual system".⁷⁶

The amendments were based on an arrangement that rural Franco-Manitoba Catholics had worked out with Ministry of Education officials in 1895–1896. Outraged Catholic Church leaders in Western Canada and Quebec denounced the unacceptable compromise and insisted that all Catholics campaign flat out for the full restoration of a publicly-funded Catholic school system. Laurier was compelled to send emissaries to the Vatican to defend his agreement. Eager to avoid a schism between Catholic leaders and their faithful, a papal delegate,

⁷⁴ P.B. Waite, *Canada 1874-1896: Arduous Destiny* (Toronto: McClelland & Stewart, 1971), at 250, 260-72.

⁷⁵ *An Act to Amend The Public Schools Act*, S.M. 1897, c. 7.

⁷⁶ Frances Russell, *The Canadian Crucible: Manitoba's Role in Canada's Great Divide* (Winnipeg: Heartland Associates, 2003), at 181.

Mgr. Merry del Val, toured Canada and made his report. Pope Leo XIII, in his encyclical *Affari Vos*, condemned the amendment of 1897⁷⁷ since he considered the Laurier-Greenway agreement far from acceptable. Yet he urged all Catholics to accept it while continuing their peaceful campaign for full restoration of their rights. Laurier had won the political battle, but an angry Archbishop Langevin of St. Boniface never forgave his supreme leader or Laurier and continued his own open war on the deal.⁷⁸

Manitoba's predominantly rural French-Canadian Catholic communities controlled their own school districts. Their boards hired Catholic teachers trained in their own normal school who taught much of the curriculum in French using materials and textbooks brought in from outside the province. The entire edifice was destroyed in the white-hot fires of British-Canadian nationalism fuelled by the First World War. By mid-1915, Manitoba's non-British children had access to instruction in four languages: French, German, Ukrainian and Polish. Spouting a progressive discourse of equality of opportunity, class egalitarianism, social cohesion, upward mobility and economic progress, the Conservative government of T.C. Norris repealed section 258 of Manitoba's *Schools Act*,⁷⁹ which allowed instruction in languages other than English. Manitoba's British-Canadian majority felt threatened by the emerging ethno-cultural communities and distrusted the German Canadians and French Canadians for their growing hostility toward the Empire and the war. Once again, Manitoba's cauldron of race and religion fuelled the wartime debate over the rights of Canada's Catholic and French-Canadian minority communities.⁸⁰ Over the next several decades, Franco-Manitobans defended and promoted the survival of their language and culture using their Association d'Éducation des Canadiens Français du Manitoba, the support of the Catholic Church and its institutions, and a few sympathetic politicians.

Ontario's expansive French-Canadian minority community and its leaders watched with considerable trepidation Manitoba's crisis over language and religion. The French-Canadian minority communities' struggles for their language and religious rights had an unintended

⁷⁷ *An Act to Amend The Public Schools Act*, S.M. 1897, c. 7.

⁷⁸ Robert Craig Brown & Ramsay Cook, *Canada 1896-1921: A Nation Transformed* (Toronto: McClelland & Stewart, 1974), at 12-17.

⁷⁹ *An Act to Amend The Public Schools Act*, S.M. 1897, c. 7.

⁸⁰ Frances Russell, *The Canadian Crucible: Manitoba's Role in Canada's Great Divide* (Winnipeg: Heartland Associates, 2003), at 182-83, 187-95.

consequence. By the turn of the twentieth century, Quebec's industrializing and urbanizing francophone community had adopted a more complex conception of Confederation and its place in Canada. To the compact of provinces conception of Confederation — where provincial autonomy was the first and last line of defence for the survival and development of the French-Canadian nationality — was added a complementary dimension. The Catholic social critic, journalist and politician Henri Bourassa, and the emerging French-Canadian *nationaliste* movement used the struggles over the plight of the Acadian and French-Canadian minorities to articulate their conception of a pan-Canadian linguistic and cultural duality: French Canada and British Canada. This linguistic and cultural compact of two founding nations, they argued, reflected the Framers' intent and was embedded in the letter and spirit of Canada's developing constitutional structure. A pan-Canadian bilingual and bicultural duality was built upon, complemented and reinforced the primordial sovereignty of the provinces in areas of their jurisdiction. The French-Canadian community of Quebec had a moral and legal right, as well as a responsibility, to defend and promote the rights of French-Canadian minorities. If British Canadians learned to respect linguistic and cultural duality, the destructive political clashes over minority rights would diminish and Canada's unity would be reinforced.⁸¹

➤ This nascent conception of a pan-Canadian linguistic and cultural duality was stillborn, the result of a powerful clash of nationalisms, British Canadian and French Canadian. Much to Henri Bourassa's chagrin — he had managed to get minority language and religious rights into the first draft — the Laurier government's Autonomy Bills creating the provinces of Alberta and Saskatchewan in 1905 did not incorporate minority language and religious rights. British-Canadian Liberals from Western Canada, led by Manitoba's Clifford Sifton (who resigned from cabinet on the issue), did not want a repeat of what had transpired in Manitoba. In order for Canada to play a central role in the renewed British Empire it was crucial that all the provinces (with the exception

⁸¹ A.I. Silver, *The French-Canadian Idea of Confederation 1864-1900* (Toronto: University of Toronto Press, 1982), at 191-95, 202-207.

of Quebec) function exclusively as bulwarks and promoters of an English, Protestant and British-Canadian nation-state.⁸²

Bourassa's conception of a bilingual and bicultural Canada was categorically rejected when the Ontario Conservative government's Department of Education adopted Regulation 17 in 1912. Anti-French Irish Catholics had joined forces with British-Canadian Protestants to pressure the government to do away with French-language Catholic separate schools. These unconstitutional schools, they contended, would eventually lead to the abolition of all Catholic separate schools rather than their expansion with full funding. The controversial regulation did away with the long-standing French-language schools and school boards which served the needs of Ontario's rapidly expanding French-Canadian communities, comprising 10 per cent of the province's population by 1911 and located primarily in the northeastern regions adjacent to Quebec. Public funding would only go to schools which employed teachers capable of teaching in English. Teaching in French would only be allowed in the first two years to accommodate children whose maternal language was French. Franco-Ontarian leaders in the Association Canadienne-Française d'Éducation d'Ontario (ACFÉO) — created in 1910 to lobby for more and better quality French-language education and an expansion of bilingual education — became embroiled in a political war against Regulation 17. Believing that the Constitution guaranteed equal rights for French Canadians and British Canadians, they demanded the restoration of public funding for French-language Catholic separate schools, a right they had enjoyed since well before Confederation.⁸³

Franco-Ontarians felt completely powerless. Their natural political ally, the Ontario Liberal Party, was led by a Methodist lawyer, Newton Wesley Rowell, who was even more anti-French and anti-Catholic than either Conservative Premier James Whitney or his successor William Hearst. In Ottawa, Franco-Ontarian parents and school children took to civil disobedience, marching out of their classrooms when school inspectors arrived. In 1915, Hearst put the Ottawa School Board under government trusteeship. In January 1916, ministry-appointed teachers were barred from entry into Ottawa's École Guigues by a group of

⁸² Edmund Auger, "One Language and One Nationality: The Forcible Constitution of a Unilingual Province in a Bilingual Country, 1870-2005", in Richard Connors & John M. Law, eds., *Forging Alberta's Constitutional Framework* (Edmonton: University of Alberta Press, 2005), at 115-24.

⁸³ Robert Craig Brown & Ramsay Cook, *Canada 1896-1921: A Nation Transformed* (Toronto: McClelland & Stewart, 1974), at 253-57.

angry mothers wielding hatpins who kept watch on the school, protecting their own teachers and children. The protest reached a crescendo with a parade of 3,000–4,000 angry Franco-Ontarians through the streets of Ottawa!⁸⁴

Meanwhile, the matter wound its way through the courts and all the way to the Judicial Committee of the Privy Council. In its 1916 ruling on the constitutional validity of Regulation 17, the Privy Council ruled that section 93(1), which referred to the rights “which any Class of Persons have by Law in the Provinces at the Union”, only protected “a class of persons determined according to religious belief, and not according to race or language”.⁸⁵ Ontario could legally prohibit the use of French as a language of instruction.

The ACFÉO used the crisis and ensuing legal challenge to forge a stronger, more united Franco-Ontarian community. Supported by Franco-Ontarians from all regions and walks of life, the French-Canadian Catholic Church, Premier Lomer Gouin’s Quebec government, Laurier’s Liberal caucus, Bourassa’s *nationalistes* and his newspaper *Le Devoir*, the ACFÉO and the Conseil des écoles séparées d’Ottawa defied Regulation 17 as well as the Privy Council’s ruling validating the offending regulation. The battle over Franco-Ontarian rights to French-language education added high-octane fuel to the bitter and divisive battle over conscription in 1916–1917.

It took a decade of diligent diplomacy before Franco-Ontarian children regained a modicum of instruction in their own language. The papacy insisted that Ontario’s Irish-Catholic leaders and faithful reconsider their opposition to French-language instruction for Franco-Ontarian Catholics. The Unity League, created by a group of British-Canadian Protestant intellectuals, encouraged the Ontario government to re-evaluate the need for Regulation 17. A more pragmatic ACFÉO leadership worked with the Ontario government’s 1925 Commission of Inquiry regarding Ontario’s bilingual schools. The ensuing 1927 Merchant Report’s recommendations set the stage for modest amendments to Regulation 17 on November 1, 1927. French was granted legal status in Ontario’s primary schools and a limited amount of French-

⁸⁴ Robert Craig Brown & Ramsay Cook, *Canada 1896-1921: A Nation Transformed* (Toronto: McClelland & Stewart, 1974), at 257-58; Gaétan Gervais, “Le Règlement XVII (1912-1927)” *Revue de Nouvel-Ontario* 123-92.

⁸⁵ *Ottawa Roman Catholic Separate School Trustees v. Mackell*, [1917] A.C. 62, at 69 (P.C.).

language instruction was allowed in all Catholic and public secondary schools. Regulation 17 was eventually rescinded in 1944 but no officially sanctioned bilingual schools were created.⁸⁶ The divisive politics of race, language and religion had attenuated, but a deep residue of mistrust between the linguistic communities persisted well into the 1960s.

V. QUEBEC'S "QUIET REVOLUTION" AND OTTAWA'S RESPONSE, 1960-1970

This prevailing paradigm of circumscribed constitutional language rights was challenged and then effectively replaced thanks to a conjuncture of new circumstances in the years after the Second World War and eventually the emergence of visionary leadership in the 1960s. First came the tremendous expansion of the state at both federal and provincial levels. The arrival of the Keynesian-inspired interventionist and social service state, initially promoted, financed and administered by the Canadian government, set in motion a chain of events that severely challenged the existing language rights regime. Ottawa's activist executive and legislative branches and its expanded bureaucracy, Crown corporations and agencies functioned almost exclusively in English, arousing the ire of French Canadians and their nationalist organizations.

Traditional French-Canadian nationalists objected in principle to the exponential growth of the Canadian state, yet insisted on expanded bilingualism within, and bilingual services from, the federal government, agencies and Crown corporations. While supportive of increased bilingualism, emerging Québécois neo-nationalists contended that the long-standing regime of unilingualism effectively excluded educated French Canadians from participating in the governance of Canada. This was especially irksome and divisive considering that increasing numbers of educated French Canadians were emerging from the Catholic Church's pan-Canadian system of classical colleges. While supportive of a larger role for French Canadians in a functionally bilingual central government, the neo-nationalists' primary solution was for a new generation of Québécois to build a modern, unilingual and secular Quebec state to serve primarily the needs and aspirations of the Québécois. A modern Quebec state would facilitate the process of

⁸⁶ Gaétan Gervais, "Le Règlement XVII (1912-1927)" (1996) 18 *Revue de Nouvelle-Écosse* 123-92.

Québécois becoming "masters in their own house" in both the public and private sectors.⁸⁷

Other factors challenged the restrictive paradigm of language rights. Canadians' direct and indirect experience with Canada's remarkable role in the Second World War set in motion the slow but inevitable transformation of the sociological and ideological foundations of Canada. British Canada and British-Canadian nationalism were replaced by a more open, pluralistic English-speaking Canada which found expression in a North American liberal civic nationalism, one committed to economic and social justice at home and abroad. What had emerged slowly by the early 1970s was a Canadian identity based not on ethnic (that is, British) origins, but rather on shared civic values and a common citizenship.⁸⁸

Symbols of this transformation include the passage of the 1946 *Canadian Citizenship Act*,⁸⁹ which came into effect on January 1, 1947, the implementation of more liberal immigration policies and the adoption of the Canadian flag in 1964. There was also the largely positive response by urban, middle-class, English-speaking Canadians to the Royal Commission on Bilingualism and Biculturalism, 1963–1968. A majority of Canadians supported the recommendations for the expansion of bilingualism in the federal government at all levels and public funding for a dramatic expansion of the teaching of official languages, as maternal and second languages, in primary and secondary school systems across the country. These developments facilitated the Trudeau government's enactment and implementation of the *Official Languages Act*,⁹⁰ and that government's decision to provide funding for the regeneration of the francophone and Acadian minority communities. Driving this wholesale transformation forward was the massive and sustained post-war immigration that altered the demographic, social and political balance between the French-Canadian and British-Canadian communities.⁹¹

⁸⁷ Consult Michael D. Behiels, *Prelude to Quebec's Quiet Revolution: Liberalism versus Neo-nationalism, 1945-1960* (Kingston, ON: McGill-Queen's University Press, 1985).

⁸⁸ Raymond Breton, "From Ethnic to Civic Nationalism: English Canada and Quebec" (1988) 11:1 *Ethnic and Racial Studies* 85-102.

⁸⁹ S.C. 1946, c. 15.

⁹⁰ R.S.C. 1970, c. O-2.

⁹¹ José E. Igartua, *The Other Quiet Revolution: National Identities in English Canada, 1945-71* (Vancouver: University of British Columbia Press, 2006).

There was a simultaneous, parallel socio-economic and ideological transformation taking place within Quebec's French-Canadian community. The process was fuelled by the growing awareness by French Canadians across the entire social spectrum of their economic inferiority as individuals and as a collectivity. Educated French Canadians were under-represented in all the booming sectors of Quebec's private-sector economy, which remained firmly in the hands of Anglo-Canadian and American elites and their corporations. While there was a nascent but fragile French-Canadian middle bourgeoisie, there was no French-Canadian corporate bourgeoisie. The Quebec state and its public sector, administered largely by the Catholic Church, were greatly underdeveloped and offered limited opportunities for educated, middle-class francophones to work in their own language.

During the 1940s and 1950s, French Canada's homegrown "Quiet Revolution" was well underway. Its effective political expression was constrained by the prevailing political culture and highly conservative political and clerical elites who remained staunchly opposed to the "revolution of mentalities" taking place among the expanding community of urban, educated, increasingly secular, middle-class French Canadians. Yet, the traditional, Catholic-Church centred French-Canadian nationalism was displaced by a secular Québécois neo-nationalism, one that focused on a dynamic Quebec state administered by and for the Québécois.⁹² By the late 1950s, neo-nationalist historian Michel Brunet proclaimed that for the Québécois to overcome their economic inferiority as individuals and as a collectivity — a deplorable and unacceptable situation brought on by the Conquest of 1760, which had destroyed a nascent French-Canadian bourgeoisie — it was imperative for Quebec to secede from the Canadian federation. Quebec City would become the capital of an independent, unilingual French-speaking Quebec Republic, while Ottawa would assume its full role as the capital of a unilingual English-speaking Canada. He contended that the beleaguered French-Canadian and Acadian minority communities, long sustained by the Catholic Church, were doomed and no attempt should be made to shore them up.⁹³

⁹² Consult Michael D. Behiels, *Prelude to Quebec's Quiet Revolution: Liberalism versus Neo-nationalism, 1945-1960* (Kingston, ON: McGill-Queen's University Press, 1985) and Michael Gauvreau, *The Catholic Origins of Quebec's Quiet Revolution, 1931-1970* (Montreal: McGill-Queen's University Press, 2005).

⁹³ Michel Brunet, *La présence anglaise et les Canadiens: études sur l'histoire et la pensée des deux Canadas* (Montreal: Beauchemin, 1958).

This "Quiet Revolution" of mentalities achieved its full political take-off with the election of the Jean Lesage Liberal government in 1960. His regime, pushed incessantly by the neo-nationalist new middle class and a radicalized organized labour movement, ushered in a rapid and wholesale transformation of the Quebec state and its public and para-public institutions. The expanded, interventionist Quebec state and its Crown corporations and agencies operated almost exclusively in French. Québécois nationalists of all stripes demanded that the Quebec state establish language laws declaring French the official language of the state and making French the dominant language of all public and para-public institutions. Language laws would stream all immigrant children and Canadian children moving into Quebec from other parts of Canada into French language schools, thereby ensuring their integration into Québécois society. More importantly, coercive and permissive language laws⁹⁴ mandating the use of French would be used as a powerful instrument of social promotion. Language laws would require that French be made the dominant language of work in every sector of the private economy where skilled and educated French Canadians were badly under-represented. The long-standing economic inferiority of French Canadians, as individuals and as a collectivity, would be overcome within a generation.⁹⁵

By the late 1960s, the Pearson and Trudeau governments responded to the ongoing political fallout from Quebec's "Quiet Revolution" by expanding Ottawa's role in the sensitive field of language legislation. Since the early 1960s, Ottawa faced the emergence of an increasingly powerful Québécois neo-nationalist movement which gained control over an expansive Quebec state, one which governed largely in the interests of its francophone majority community. Francophones in Quebec went from a reliance for their survival and development on an *Église-État* to an *État-Nation*. By the mid 1960s, the Québécois neo-nationalist movement spawned the founding, by left- and right-wing radical elements, of a secessionist movement. In 1968, an ambitious, populist, former Liberal politician and minister, René Lévesque, brought the warring factions together in the Parti Québécois. For the first time

⁹⁴ The laws were coercive for education and public services but permissive for the private sector.

⁹⁵ Kenneth McRoberts, *Quebec: Social Change and Political Crisis*, 3d ed. with Postscript (Toronto: Oxford University Press, 1993).

since Confederation, Canada faced the prospect of secession by a francophone majority province. Much to everyone's surprise, the Parti Québécois formed the official Opposition following the Quebec election of 1970 with 24 per cent of the popular vote and six seats. This watershed election marked the beginning of a prolonged, ongoing struggle over the political and territorial integrity of Canada.⁹⁶

Prime Minister Pearson had responded in 1963 to the emerging crisis in Quebec–Ottawa relations with the creation of the Royal Commission on Bilingualism and Biculturalism. The Commission issued a preliminary report in 1965 warning that “Canada without being fully conscious of the fact, is passing through the greatest crisis in its history”. Confederation, for the first time since its inception, was “being rejected by the French Canadians of Quebec ... [and if the crisis] should persist and gather momentum it could destroy Canada.”⁹⁷ André Laurendeau the Commission's highly respected yet mercurial co-chair, intended the Commission's wake-up call to set the stage for radical reforms in language laws as well as a fundamental restructuring of Quebec's relationship with Canada.

Beginning in 1967, the year of Canada's centennial celebrations, the Commissioners produced a multi-volume report.⁹⁸ In his revealing blue pages of volume I, *The Official Languages*, Laurendeau warned that the French-Canadian nation in Quebec was fully intent on acting as a majority community, one firmly in control of an activist and interventionist Quebec state which was determined to exercise more powers. Laurendeau was convinced that a pan-Canadian linguistic and cultural duality would only be sustained if it was founded upon, and buttressed by, a Quebec/Canada conception of territorial duality. This territorial conception of duality must receive recognition in the form of a constitutional “special status” for the province of Quebec. It was imperative to retain the crucial link between language and culture if the Commission's recommendations were to be relevant to the francophone majority community of Quebec, as well as to the francophone and

⁹⁶ William Coleman, *The Independence Movement in Quebec, 1945-1980* (Toronto: University of Toronto Press, 1984).

⁹⁷ Canada, Royal Commission on Bilingualism and Biculturalism, *Preliminary Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen's Printer, 1965).

⁹⁸ Canada, Royal Commission on Bilingualism and Biculturalism, *Report of the Royal Commission on Bilingualism and Biculturalism: The Official Languages*, vol. 1; *Education*, vol. 2; *The Work World*, vol. 3; *The Cultural Contribution of Other Ethnic Communities*, vol. 4 (Ottawa: Queen's Printer, 1967).

Acadian minority communities. Effective policies and practices dealing with official bilingualism and biculturalism, backed by constitutional reforms recognizing Quebec's special role in the federation, would go a long way to redress the balance of power — the *rapport de force* — between Canada's anglophone and francophone communities inside and outside Quebec. This was the only way to ensure that a majority of Québécois rejected the option of independence for Quebec.⁹⁹

Virulent opposition to Laurendeau's conception of bilingualism and biculturalism based upon his constitutional vision for a radically restructured Quebec/Canada relationship, and his untimely death in June of 1968, coalesced to turn his blue pages framework into a dead letter.

In its 1967 Report on *The Official Languages*, the Commission recommended that "English and French be formally declared the official languages of the Parliament of Canada, of the federal courts, of the federal government, and the federal administration". It called for Ontario and New Brunswick to declare themselves officially bilingual and, using the Finnish model, proposed a system of bilingual districts across Canada where the percentage of the minorities exceeded 10 per cent. To ensure the survival of the official language minorities, the Commissioners recommended that all provincial governments provide education in French and English.¹⁰⁰

In volume 3, *The Work World*, the Commission made innumerable recommendations on how to ensure that bilingualism in the public service was institutional rather than merely individual. The public service had to establish French-language working units at every level of bureaucracy. Only then would francophones enjoy meaningful access to working in their language and culture on an equal basis with English-speaking Canadians.¹⁰¹ Laurendeau's vision of a federal elite cadre of bilingual francophones and anglophones working apart but together had clearly won out over the proponents of the model of integral

⁹⁹ Canada, Royal Commission on Bilingualism and Biculturalism, *Report of the Royal Commission on Bilingualism and Biculturalism: The Official Languages*, vol. 1 (Ottawa: Queen's Printer, 1967), at xxi-lii; André Laurendeau, *The Diary of André Laurendeau* (Toronto: Lorimer, 1991), at 58.

¹⁰⁰ Canada, Royal Commission on Bilingualism and Biculturalism, *Report of the Royal Commission on Bilingualism and Biculturalism: The Official Languages*, vol. 1 (Ottawa: Queen's Printer, 1967), at 91.

¹⁰¹ Canada, Royal Commission on Bilingualism and Biculturalism, *Report of the Royal Commission on Bilingualism and Biculturalism: The Work World*, vol. 3 (Ottawa: Queen's Printer, 1967), at 263-64, 272.

bilingualism, whereby every citizen would learn both languages. Canada would remain a country of two unilingual communities, an English-speaking majority outside Quebec with its francophone minority communities, and a French-speaking majority in Quebec with its anglophone minority community, whose members would be able to communicate with, and work for, their federal and provincial governments in their maternal language.¹⁰²

Pierre Trudeau's government was concerned about the concept of a Quebec/Canada duality envisioned by Laurendeau. It was confronted by the growing threat of the secessionist Parti Québécois, as well as the demand by Québécois nationalist organizations to make French the official language of Quebec and to require all immigrant children to enrol in French-language schools. These moved Trudeau's government to action on the language front.

Trudeau rejected categorically Laurendeau's vision of a Quebec/Canada territorial conception of duality because it would fuel the secessionist movement while further weakening the beleaguered francophone and Acadian communities.¹⁰³ He proceeded with a speedy passage and implementation of the *Official Languages Act*.¹⁰⁴ The Act and the multitude of programs which it generated were intended to make the federal government, at all levels, function effectively in two official languages in both internal and external communications. The goal was to increase the presence of francophone Québécois and members of the francophone and Acadian minorities in the federal government, in the belief that this would dissuade a majority of Québécois from supporting the secession of Quebec.¹⁰⁵

The increasingly expensive and expansive official-languages programs were vigorously contested by remnants of the rapidly declining British-Canadian community, as well as by some elements in the immigrant communities who contended that official bilingualism fragmented Canadian society, made second-class citizens out of English-speaking Canadians and weakened the Canadian nation-state.

¹⁰² Graham Fraser, *Sorry, I Don't Speak French: Confronting the Canadian Crisis That Won't Go Away* (Toronto: McClelland & Stewart, 2006), at 65-67.

¹⁰³ Pierre Elliott Trudeau, "Quebec and the Constitutional Problem" in his *Federalism and the French Canadians* (Toronto: Macmillan, 1968), at 3-51.

¹⁰⁴ R.S.C. 1970, c. O-2.

¹⁰⁵ Pierre Elliott Trudeau, *Memoirs* (Toronto: McClelland & Stewart, 1993), at 118-28. He insisted that his approach was based on the principle of *institutional* bilingualism because the intent of the Act was not to compel every civil servant or Canadian citizen, as was often alleged, to become bilingual.

Of course, these opponents preached that all unilingual French-speaking Canadians should learn to function in English! The ensuing expansion of official bilingualism throughout the entire federal bureaucracy, Crown corporations and agencies proved controversial and destabilizing in the short term. But, in time, the policy was quite successful in increasing the number of bilingual francophones and Acadians working at all levels. The task of recruiting and training bilingual anglophones and allophones proved far more difficult, but eventually this goal was also largely achieved. The federal government's policy of substantially enhanced official bilingualism was entrenched in sections 16 to 22 of the *Canadian Charter of Rights and Freedoms*¹⁰⁶ in 1982.¹⁰⁷

There was a second, closely interrelated development that pushed the Canadian state into the business of expansive language legislation and regulation. Ottawa faced increasing discontent among Canada's beleaguered francophone and Acadian minority communities. These minority communities faced assimilation at the hands of increasingly interventionist provincial governments. During the 1960s, francophone and Acadian communities, no longer sustained by the Catholic Church, experienced wholesale rejection by the Québécois neo-nationalist and secessionist movements. The Canadian state and its political leaders took on a very difficult but not impossible challenge. This involved assisting financially and politically the regeneration of the francophone and Acadian minority communities, their myriad of provincial and national institutions and organizations, and their leadership. Federal intervention was imperative considering their rejection by the Québécois neo-nationalists and secessionists, who focused exclusively on constructing the *État-Nation* of Quebec. The newly expanded Quebec state and its neo-nationalist bureaucrats made feeble attempts to fill the void left by the Catholic Church, but their reach was constrained by their Quebec-centred agenda and their cultural and political imperialism,

¹⁰⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the "Charter"].

¹⁰⁷ Graham Fraser, *Sorry, I Don't Speak French: Confronting the Canadian Crisis that Won't Go Away* (Toronto: McClelland & Stewart, 2006). For a highly negative analysis of how and why Trudeau derailed André Laurendeau's conception of a territorial, Quebec/Canada model of language management, consult Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford, 1997), at 78-188.

as well as by the federal system which precluded provincial governments from meddling in the affairs of other provincial governments.¹⁰⁸

Under the aegis of the *Official Languages Act*, Ottawa funnelled hundreds of millions of dollars to provincial governments to assist them in implementing substantial improvements in primary and secondary French-language education for francophone and Acadian minority communities. Moreover, Ottawa fuelled the expansion of French as a Second Language "FSL" instruction across the entire country by funding core French programs in school curricula and by assisting in the construction and operation of very popular French-language immersion schools for anglophone and allophone middle-class children. By the mid 1970s, it was clear that provincial governments were spending the bulk of federal funds on FSL programs rather than providing francophone and Acadian minority communities with improved access to education in their maternal language. Pressured by perplexed and angry francophone organizations, the Trudeau government sought a way to compel the provincial governments to ensure the survival of their minority language communities.¹⁰⁹

Ottawa's ultimate solution to the crisis of assimilation facing members of these beleaguered francophone and Acadian minority communities was to provide francophone and Acadian parents with a constitutional guarantee for publicly funded French-language schools, secular and religious, for their children. Ottawa believed a constitutional guarantee would also ensure the survival of Quebec's anglophone minority community which, in the context of Bill 101, faced the prospect of a demographic decline since it could not recruit immigrants into its schools. Ottawa's constitutional mechanism became section 23 of the 1982 Charter of Rights and Freedoms. Yet, implementation of this constitutional guarantee by recalcitrant and obstructive provincial governments took two decades of long, arduous political and judicial struggle! After experiencing over a century of discrimination by the provincial governments against their language, francophone and Acadian minority communities, with the assistance of the Canadian state

¹⁰⁸ Ramsay Cook, *Canada, Québec, and the Uses of Nationalism*, 2d ed. (Toronto: McClelland & Stewart, 1995), at 118-32; Marcel Martel, *Le deuil d'un pays imaginé: Rêves, luttes et dérouté du Canada français* (Ottawa : Presses de l'Université d'Ottawa, 1997), at 139-70.

¹⁰⁹ Matthew Hayday, *Bilingualism Today, United Tomorrow: Official Languages in Education and Canadian Federalism* (Montreal: McGill-Queen's University Press, 2005).

and the Supreme Court, managed to obtain education in their own language for their children.¹¹⁰

VI. THE QUEBEC STATE AND THE POLITICS OF LANGUAGE, 1968–1977

By the late 1960s, Québécois neo-nationalist and secessionist movements, working inside and outside political parties and governments, pressured the Union Nationale government into the potentially explosive minefield of language policy, legislation, regulation and enforcement. Driving this campaign for language legislation was a heady mixture of demographic, social, psychological and ideological factors, coupled with a very large dose of economic self-interest.¹¹¹ The Québécois new middle class, which quickly took control of the public and para-public sectors of the Quebec economy because its members controlled the expanded Quebec state, was eager and determined to take control over the much larger and more lucrative private sector of the Quebec economy from the English-speaking, ethnically diverse community of Montreal. One of the easiest and most effective ways of achieving this goal was to make the French language an instrument of social promotion. French would become, by law, the dominant language of work in both the private and public sectors. To ensure that all immigrants and their children would be able to function in a predominantly French-language work world, French language training would be provided to parents and their children would be streamed into French-language schools. These immigrant children would work in French and eventually become fully integrated into the francophone host society of Quebec. These developments, neo-nationalists believed, would reverse the Québécois society's declining demographic position within the province, as well as its weakening demographic and political stature within the federation.¹¹²

¹¹⁰ Michael Behiels, *Canada's Francophone Minority Communities: Constitutional Renewal and the Winning of School Governance* (Montreal: McGill-Queen's University Press, 2004).

¹¹¹ Kenneth McRoberts, *Quebec: Social Change and Political Crisis*, 3d ed. with Postscript (Toronto: Oxford University Press, 1993), at 173–88.

¹¹² Abderrazzak Khoubbane, *L'État du Québec, les législations linguistiques et les positions des minorités ethnique et linguistique (1968–1980)* (Ph.D. Thesis, History, University of Ottawa, 2001).

In 1968–1969, Premier Jean-Jacques Bertrand's Union Nationale government contemplated and then proceeded with legislation in the very sensitive area of education in the wake of the St. Léonard Catholic School Commission's decision requiring that all Catholic immigrant children be enrolled in French-language schools. Bill 63, *An Act to Promote the French Language in Quebec*,¹¹³ proposed that all immigrants be given a knowledge of French. Yet, it was the Act's guarantee of freedom of choice for all Quebec parents regarding the language of education of their children that provoked a vociferous outcry from the Québécois community at large. Before and after the passage of Bill 63, mass demonstrations for and against the legislation were orchestrated by francophone, anglophone and allophone organizations in St. Léonard and Montreal, as well as in front of the National Assembly in Quebec City.¹¹⁴ Hoping to quell the demonstrations and in response to lobbying from several organizations on all sides of the issue (i.e., the media, the Parti Québécois and the Liberal Party), the Union Nationale government created a commission to investigate the situation of the French language and language rights in Quebec.

The Gendron Commission, named after its chair Jean-Denis Gendron, issued its extensive report in 1972. It called for substantive and comprehensive legislation in the field of language regulation for both the public and private sectors.¹¹⁵ In 1974, Premier Robert Bourassa's Liberal government — facing crises on both business and labour fronts as well as pressure from the Parti Québécois, which opposed Bill 63 while endorsing the Gendron report — introduced substantially different and far more comprehensive legislation, hoping to garner the support of a majority of dissatisfied francophones. Following a heated debate in the National Assembly, the Bourassa government passed Bill 22, making French the official language of Quebec's public and para-public sectors.¹¹⁶ A new era of state intervention in the field of language began. Henceforth, the Quebec state would use language laws and regulations, among many other tools, to

¹¹³ S.Q. 1969, c. 9.

¹¹⁴ Richard Jones, "Politics and the Reinforcement of the French Language in Canada and Quebec, 1960-1986" in Michael D. Behiels, ed., *Quebec Since 1945: Selected Readings* (Toronto: Copp Clark Pitman, 1987) at 228-31.

¹¹⁵ Québec, Gouvernement de Québec, *Rapport de la Commission d'enquête sur la situation de la langue française et sur les droits linguistiques au Québec : la langue de travail*, livre 1 (Québec : Éditeur officiel, 1972), at 114-26, and various tables.

¹¹⁶ *Official Language Act*, S.Q. 1974, c. 6.

construct an increasingly homogeneous and integrated French-speaking civil society while promoting the social and economic interests of the Québécois francophone community. The legislation instituted a controversial, unwieldy process of streaming children of immigrant parents into French-language schools. The law adopted a non-coercive, largely ineffective approach to enhancing the use of the French language in the private sector. Bill 22 enraged the anglophone and allophone minority communities while failing to satisfy the majority of Québécois who were convinced by the Québécois nationalists that it did not go far enough to ensure their social promotion. The secessionist Parti Québécois skillfully and successfully exploited the widespread anger over Bill 22 in its lead-up to the election in the fall of 1976.¹¹⁷

In April 1977, Premier René Lévesque's newly elected Parti Québécois government, intent on transforming Quebec into a unilingual, independent *État-Nation*, introduced Bill 1, the *Charter of the French language*.¹¹⁸ It was conceived by the Minister of Cultural Development, Camille Laurin, as a grand societal project to liberate francophones in Quebec from the trauma of the Conquest of 1763. The *Charter of the French language* was to function as an instrument of social promotion for francophones as well as a vehicle of linguistic promotion for all Quebec citizens.¹¹⁹ Sections 7 to 13 of Bill 1, set out to repeal section 133 of the *British North America Act, 1867*,¹²⁰ which guaranteed official bilingualism in Quebec's National Assembly and the courts.¹²¹ These blatantly unconstitutional sections of Bill 1, as well as other provisions, provoked widespread public outrage throughout the summer legislative hearings from representatives of the anglophone and allophone communities inside and outside Quebec. Organizations challenged sections challenged in the Quebec Superior Court, the Quebec Court of Appeal and the Supreme Court of Canada, with the financial assistance of the Trudeau government's newly established Court Challenges

¹¹⁷ Michael Stein, "Le Bill 22 et la population non-francophone au Québec : une étude de cas sur les attitudes du groupe minoritaire face à la législation de la langue" (1975) 7 *Choix* 127-159.

¹¹⁸ S.Q. 1977, c. 5.

¹¹⁹ Camille Laurin, *La politique québécoise de la langue française* (Québec : Gouvernement du Québec, 1977).

¹²⁰ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

¹²¹ Graham Fraser, *René Lévesque and the Parti Québécois in Power*, 2d ed. (Montreal: McGill-Queen's University Press, 2001), at 60-70.

Program. In its December 1979 ruling, the Supreme Court of Canada confirmed the decisions of Quebec's lower courts to the effect that Chapter III of Title I of the *Charter of the French language*, being sections 7 to 13 of that statute, was manifestly unconstitutional.¹²²

In the interim, Premier Lévesque was obliged to withdraw Bill 1 from the Assembly.¹²³ Shorn of some of its most discriminatory clauses, the *Charter of the French language* was reintroduced as Bill 101, amended yet again and then passed on August 26, 1977 in time for the opening of the new school year. The language of external communications in all public institutions, including municipalities, school boards, and health and social service institutions, was to be French. Internal communications for all municipalities were to be in French, while other institutions could communicate in French or "another language" if a majority of their clients were non-francophone.¹²⁴

In contrast to Bill 22, Bill 101 streamed all immigrant children as well as children from Canada's other provinces into French-language schools. As was the case with Bill 22, there would be no language tests for children whose parents wanted to enrol them in English-language schools. Exemptions would be very difficult to obtain.¹²⁵ Following strong and persuasive criticism from the corporate sector during Bill 1 committee sessions, Bill 101's regulations for the use of languages in the private sector abandoned Bill 1's coercive approach, opting instead for Bill 22's persuasive approach. Bill 101 called upon all large corporations doing business in Quebec to make French their internal language of operations if they wished to receive government contracts. The program of francisation certificates was mandatory only for firms with over 50 employees, and head offices could be treated with some leniency in the application of the law with the consent of the Office de la langue française, set up under Bill 101 to implement the law. Bill 101, functioning as an instrument of both social and linguistic promotion, allowed for bilingual firm names and labelling of products as long as French was predominant. Bill 101

¹²² *Quebec (Attorney General) v. Blaikie*, [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016 (S.C.C.). See also "Le jugement sur la Charte de la langue française," Editorial, *Le Devoir* (14 December 1979).

¹²³ Alison d'Anglejan, "Language Planning in Quebec: An Historical Overview and Future Trends" in Richard Y. Bourhis, ed., *Conflict and Language Planning in Quebec* (Cleveland, England: Multilingual Matters, 1984), at 29-52.

¹²⁴ *Charter of the French language*, S.Q. 1977, c. 5, art. 26.

¹²⁵ William D. Coleman, "From Bill 22 to Bill 101: The Politics of Language Under the Parti Québécois" in Michael D. Behiels, ed., *Quebec Since 1945: Selected Readings* (Toronto: Copp Clark Pitman, 1987), at 245-51.

required medium- and large-scale Quebec businesses to use French in notices and signs advertising products. While it protected a unilingual francophone's right to work in French, it did not mandate affirmative action hiring practices.¹²⁶

In theory, the goal of the *Charter of the French language* was the linguistic promotion rather than the socio-economic advancement of French Canadians. In reality, Bill 101 accomplished both objectives over time. Social promotion occurred in large measure thanks to the negative reaction of many English-language corporations and over 100,000 anglophones and allophones who decided to leave the province. This outmigration provided numerable opportunities for Québécois companies and individuals to play greater roles in Quebec's economy.¹²⁷ The successful, if somewhat painful, integration of immigrant children into metropolitan Montreal's French-language schools proceeded apace and helped transform Montreal into the world's second-largest French-language, multicultural, urban conglomeration, after Paris. In the view of one historian of Quebec, Ramsay Cook, Bill 101's effectiveness in making French the language of communication in the public sector and the economy was largely responsible for momentarily weakening the Québécois independence movement, thereby ensuring the defeat of the Parti Québécois in the referendum on sovereignty-association in 1980.¹²⁸ It was patently clear to all observers that Bill 101 was an aggressive policy to promote a Quebec/Canada conception of linguistic and cultural duality as a way of advancing piecemeal the independence of Quebec.

VII. TRUDEAU, LANGUAGE RIGHTS AND THE CHARTER, 1970–1982

Prime Minister Trudeau's long struggle for the expansion and entrenchment of official language rights began well before he assumed office in 1968. The first round of mega-constitutional negotiations, which culminated in the 1970 Victoria Charter, entailed patriation, a

¹²⁶ *Charter of the French language*, S.Q. 1977, c. 5, art. 4; William D. Coleman, "From Bill 22 to Bill 101: The Politics of Language Under the Parti Québécois" in Michael D. Behiels, ed., *Quebec Since 1945: Selected Readings* (Toronto: Copp Clark Pitman, 1987), at 253, note 38.

¹²⁷ Graham Fraser, *René Lévesque and the Parti Québécois in Power*, 2d ed. (Montreal: McGill-Queen's University Press, 2001), at 110-12.

¹²⁸ Ramsay Cook, "Has the Quiet Revolution Finally Ended?" (1983) 90:2 *Queen's Quarterly* 330-42.

four-region-based amending formula, and a limited Human Rights Charter entrenching Ottawa's *Official Languages Act*¹²⁹ and the bilingual status of New Brunswick and Ontario. An inexperienced Premier Bourassa, pressured by his cabinet and Québécois nationalists of all stripes, walked away from the deal. Trudeau's dislike and distrust for Premier Bourassa increased when the latter passed Bill 22, a law Trudeau considered highly discriminatory. Trudeau became more concerned when the Parti Québécois, elected in 1976, replaced Bill 22 with the blatantly unconstitutional Bill 1 and then the less unconstitutional but still coercive Bill 101. He maintained that laws promoting French unilingualism in Quebec made it very difficult to promote official bilingualism in the federal government and throughout Canada. He had no objection to Quebec laws promoting the use of French or providing greater access of immigrants to French-language schools. "But when you begin to coerce people and take away free choice", Trudeau insisted, "that is using the law in an abusive way".¹³⁰

Trudeau demurred when prominent leaders of Quebec's anglophone and allophone communities, including his angry and disillusioned friend Frank Scott, lobbied hard for Ottawa to disallow Bill 101. Given the popularity of Bill 101 among Québécois, Trudeau realized that it would be foolhardy to attack it head-on. Instead, he encouraged all Quebec's citizens to use the Court Challenges Program to challenge Bill 101 in the courts. Over several years, there were a number of successful legal challenges to Bill 101. Trudeau decided that the more effective, long-term strategic approach was to entrench a Charter of Rights and Freedoms which protected the *Official Languages Act*¹³¹ from the vagaries of the politicians, allowed other provinces to declare themselves officially bilingual and provided official-language minority communities the right to publicly funded education in their own languages. A hybrid Charter, he argued would help eliminate Bill 101's worst discriminatory features, protect the rights of Quebec's official-language minority community and provide Canada's francophone minority communities with education in their language. It would also enhance Canadians' sense of a shared citizenship based on fundamental rights and freedoms. Quebec secessionism would be undermined and national unity would be enhanced.

¹²⁹ R.S.C. 1970, c. O-2.

¹³⁰ Pierre Elliott Trudeau, *Memoirs* (Toronto: McClelland & Stewart, 1996), at 235.

¹³¹ R.S.C. 1970, c. O-2.

Beginning in 1976, Trudeau repeatedly invited the premiers to join him in a new round of mega-constitutional negotiations. In his *A Time for Action: Toward the Renewal of the Canadian Federation*, Trudeau proposed a comprehensive Charter entrenching citizens' fundamental civil liberties as well as language and education rights for Canada's official-language minority communities.¹³² "The unity of Canada", Trudeau declared, "must transcend the identification Canadians have with provinces, regions and linguistic or other differences. But for Canada to be deserving of the transcendent loyalty that such unity involves, there must be a sense that it does serve, as a country, the vital needs of all its citizens and communities."¹³³ Trudeau was convinced that a hybrid Charter — in transferring sovereignty to the people by limiting the power of the federal and provincial states — would foster the development of national identity so crucial to undermining the Québécois secessionist movement and Parti Québécois government.

Trudeau's vision of linguistic harmony engendered by a Charter might well have remained a mirage. The premiers' lists of demands, in exchange for a Charter, grew longer each year. Trudeau refused to barter Charter rights for more powers to the provinces. In the 1979 election, Joe Clark's Progressive Conservatives defeated the Trudeau government. Trudeau gave notice that he intended to retire from politics. In a strange twist of fate, Clark's minority Conservative government was defeated on its poorly managed budget. By offering Trudeau a final opportunity to defeat the Quebec secessionists and bring in his Charter, loyal supporters convinced him to return. Handed a second chance to leave a lasting legacy, Trudeau was convinced that for the sake of national unity failure was not an option. Winning the 1980 national election in grand style — taking 74 out of 75 seats in Quebec — Trudeau declared on election night: "Welcome to the 1980s!" He promised Canadians that, the moment he defeated the Québécois secessionists, he would move swiftly to patriate Canada's Constitution along with an amending formula and a *Canadian Charter of Rights and Freedoms*.¹³⁴

¹³² Pierre Elliott Trudeau, *A Time for Action: Toward the Renewal of the Canadian Federation* (Ottawa: Minister of Supply and Services, 1978).

¹³³ Pierre Elliott Trudeau, *A Time for Action: Toward the Renewal of the Canadian Federation* (Ottawa: Minister of Supply and Services, 1978), at 12.

¹³⁴ Pierre Elliott Trudeau, *Memoirs* (Toronto: McClelland & Stewart, 1996), at 264-72.

Determined to win the Quebec referendum, the Trudeau government did everything in its power to convince francophones in Quebec that it was not in their political or economic interests to vote for secession. When it became clear that Claude Ryan, leader of the Quebec Liberal Party who advocated special status for Quebec, was no match for René Lévesque, Trudeau sent in his most trusted and experienced minister, Jean Chrétien, to head up the "No" campaign. Quebec Liberal and Conservative MPs and senators campaigned vigorously for the "No" Committee. Trudeau weighed in with four timely and very powerful speeches in which he warned that voting "Yes" to secession would create a major political crisis. He reminded everyone that neither he nor the premiers had a mandate to negotiate the break-up of the country. On the contrary, under the Constitution it was his responsibility to maintain the territorial integrity of Canada. In a calculated move to bind the premiers to his agenda, Trudeau promised that if a majority of Québécois voted "No" to secession, his government would proceed immediately with constitutional renewal. Despite a shaky start, the "No" forces won a resounding victory, 60 to 40 per cent. Trudeau was overjoyed that the "No" forces had triumphed over the Parti Québécois's ambiguous and misleading question on sovereignty-association.¹³⁵

As promised, Trudeau proceeded quickly and decisively. He surrounded himself with a team of tough-minded advisors, Michael Kirby, his executive assistant, and Michael Pitfield, Clerk of the Privy Council. Over the summer, his Minister of Justice, Jean Chrétien, visited the premiers to tell them that Ottawa would move unilaterally if they were unwilling to cooperate in a limited package of constitutional reforms comprising the Victoria Charter's amending formula, patriation and a basic Charter. True to form, the premiers demanded additional powers in exchange for a Charter. Trudeau restated his position: Ottawa would not swap the Charter, his "people's package", for more powers to the provinces. The break-up of the September 1980 federal/provincial conference was a foregone conclusion. Encouraged by his cabinet and caucus, Trudeau decided to proceed with a comprehensive "people's" Charter, including a full range of rights and freedoms as well as linguistic and education rights for Canada's official-language minorities. Initially, the government tried to limit the scope of the televised parliamentary hearings on its constitutional resolution. But, once it realized that most of the witnesses favoured the Charter and wanted

¹³⁵ Pierre Elliott Trudeau, *Memoirs* (Toronto: McClelland & Stewart, 1996), at 273-84.

substantial improvements, the government decided to use the Joint House and Senate Committee proceedings to give the popular comprehensive Charter much greater visibility and political legitimacy.¹³⁶

Given the political and judicial counter-attack launched by the "Gang of Eight" premiers, Trudeau required all the public support his "people's package" could muster. The premiers, except Bill Davis of Ontario and Richard Hatfield of New Brunswick, were determined to derail Trudeau's constitutional package. They argued that the Charter undermined legislative sovereignty and that the region-based amending formula undermined the equality of the provinces. René Lévesque rejected Trudeau's "people's package" because, if passed, it would end his party's struggle for any form of sovereignty-association. The premiers lobbied in London to convince Margaret Thatcher's Conservative government not to consider a patriation bill that was not supported by all the provinces. They also challenged the constitutional validity of Ottawa's patriation bill in the courts of Quebec, Newfoundland and Manitoba. The Manitoba and Quebec courts ruled that the patriation bill was constitutional. The Newfoundland court ruled that it was illegal. Facing a filibuster from the official opposition, Trudeau put off a final vote on the Canada Resolution until after the Supreme Court of Canada's ruling on his government's patriation reference. The Gang of Eight proposed a limited patriation package comprising a 7/50 amending formula (seven provinces comprising 50 per cent of the Canadian population), the right of fiscal compensation for any province opting out of a constitutional amendment, and the right of Parliament to delegate legislative authority to any province. There was no mention of a Charter. Convinced that the Gang of Eight alliance guaranteed the defeat of the Trudeau government's patriation bill, Lévesque surprisingly agreed to relinquish Quebec's alleged constitutional veto.¹³⁷

Much to Trudeau's shock and dismay, the Supreme Court justices produced an unexpected and unorthodox two-part ruling on the patriation reference. First, they ruled, seven judges to two, that the Liberal government's unilateral patriation bill was legal. Second, by a

¹³⁶ Stephen Clarkson & Christina McCall, *Trudeau and Our Times: The Magnificent Obsession*, vol. 1 (Toronto: McClelland & Stewart, 1990), at 274-97.

¹³⁷ Pierre Elliott Trudeau, *Memoirs* (Toronto: McClelland & Stewart, 1996), at 310-14; Stephen Clarkson & Christina McCall, *Trudeau and Our Times: The Magnificent Obsession*, vol. 1 (Toronto: McClelland & Stewart, 1990), at 328-48.

majority of six to three, they ruled that although legal, the unilateral patriation bill did not accord with what they claimed was a constitutional convention requiring Ottawa to obtain the support of a "substantial number" of provinces before proceeding with its patriation bill.¹³⁸ Trudeau won the legal battle but lost the political battle. Very critical of the Supreme Court for manufacturing a constitutional convention,¹³⁹ Trudeau was concerned that the dubious decision would force him into accepting amendments that might compromise the Charter.

The dramatic November 1981 federal provincial conference was crucial since national unity hung in the balance. The Gang of Eight had to be split up if Trudeau hoped to obtain the support of a "substantial number" of provinces. He isolated René Lévesque by proposing a referendum on the amending formula and Charter within two years of patriation. Lévesque jumped at the offer, convinced that he could defeat Trudeau the second time around. It was a tactical mistake, since it allowed some of the premiers, who had their own constitutional agendas, to abandon the Gang of Eight. The vast majority of Canadians favoured a *Canadian Charter of Rights and Freedoms* and would not countenance any further obstructionism. In the kitchen of Ottawa's National Congress Centre, the Attorneys General of Saskatchewan and Ontario, Roy Romanow and Roy McMurtry, with the concurrence of other premiers, hammered out a deal with the federal Minister of Justice, Jean Chrétien. The premiers would accept Trudeau's Charter if it included a "notwithstanding" clause. Trudeau would have to give up his region-based amending formula (granting Quebec a veto) for Alberta's 7/50 amending formula based on the equality of the provinces. Finally, there would be no deadlock-breaking referendum mechanism.¹⁴⁰

Initially, Trudeau rejected the deal because it weakened the Charter.

¹³⁸ Stephen Clarkson & Christina McCall, *Trudeau and Our Times: The Magnificent Obsession*, vol. 1 (Toronto: McClelland & Stewart, 1990), at 352-56.

¹³⁹ Pierre Elliott Trudeau, "Patriation and the Supreme Court" in Gerard Pelletier, ed., *Against the Current: Selected Writings 1939-1996* (Toronto: McClelland & Stewart, 1996), at 246-61. Trudeau outlines the contrary position of the dissenting judges, who included Chief Justice Bora Laskin. They could find no evidence whatsoever in Canada's constitutional history for any sort of constitutional convention. Trudeau contended that the "Supreme Court allowed itself — in Professor P.W. Hogg's words — 'to be manipulated into a purely political role,' going beyond the lawmaking functions that modern jurisprudence agrees the Court must necessarily exercise" (at 252).

¹⁴⁰ Michael Behiels, "Premier Peter Lougheed, Alberta and the Transformation of Constitutionalism in Canada, 1971-1985" in Richard Connors & John Law, eds., *Forging Alberta's Constitutional Framework* (Edmonton: University of Alberta Press, 2005), at 439-43.

I saw the charter as an expression of my long-held view that the subject of law must be the individual human being; the law must permit the individual to fulfil himself or herself to the utmost. Therefore the individual has certain basic rights that cannot be taken away by any government. So, maintaining a strong charter was important to me in this basic philosophical sense. Besides, in another dimension, the charter was defining a system of values such as liberty, equality, and the rights of association that Canadians from coast to coast could share.¹⁴¹

Trudeau had conceived of the hybrid Charter as Ottawa's primary instrument in the defence and promotion of individual rights and of the official-language minorities, both of which would enhance a shared sense of Canadian identity and national unity. Since legislative majorities were unlikely to override individual rights except under exceptional circumstances, he insisted that the premiers' "notwithstanding" clause not apply to the official language sections 16 to 20 and 23, which guaranteed the language rights of the official-language minority communities. He reluctantly accepted Alberta's amending formula based on the equality of the provinces. To his surprise, nine premiers, none of whom wanted to be seen opposing the popular Charter or of siding with the secessionist government of Quebec, agreed with the "kitchen" deal. This resulted in the self-imposed isolation of a very angry and embittered René Lévesque, who had given up Quebec's alleged veto in the hopes of derailing Trudeau's constitutional reforms.¹⁴² Trudeau complained bitterly that he did not get his ideal Charter, but was shrewd enough to appreciate that it was far better than no Charter. The language provisions were shielded from the notwithstanding clause, and Trudeau was firmly convinced that Canadians had found, in their Charter, a new and very powerful instrument of shared citizenship and national unity.

VIII. THE CLASH OF THE CHARTERS, 1982–2006

The *Constitution Act, 1982*¹⁴³ was proclaimed by Queen Elizabeth on April 17, 1982. René Lévesque refused, of course, to sign the

¹⁴¹ Pierre Elliott Trudeau, *Memoirs* (Toronto: McClelland & Stewart, 1996), at 322.

¹⁴² Pierre Elliott Trudeau, *Memoirs* (Toronto: McClelland & Stewart, 1996), at 323–25; Stephen Clarkson & Christina McCall, *Trudeau and Our Times: The Magnificent Obsession*, vol. 1 (Toronto: McClelland & Stewart, 1990), at 376–86.

¹⁴³ Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Constitution Act, 1982 or to attend its proclamation. His government, with the backing of Claude Ryan's Liberal opposition, passed Bill 62 authorizing Quebec to opt out of the Charter.¹⁴⁴ Quebec's political and intellectual classes launched an incessant public discourse to delegitimize the Constitutional reforms which they claimed denied Quebec its historic veto, prevented it from acquiring constitutional special status, and weakened the National Assembly's control over education. Claude Morin, Lévesque's constitutional advisor, dubbed the deal the outcome of "the night of the long knives", a deliberate betrayal of Quebec by Trudeau and the premiers.¹⁴⁵ A prominent Québécois political scientist and supporter of secession, Guy Laforest, contended that the *Constitution Act, 1982* was a veritable *coup d'état* which lacked any and all legitimacy and needed to be overturned.¹⁴⁶ This unfounded and politically explosive interpretation was quickly embraced by Québécois nationalists and secessionists as well as many federalist Québécois. Yet, this myth of "the night of the long knives" went largely ignored in the rest of Canada until it was too late to counter effectively.

This was reinforced in the public imagination of all Québécois when Brian Mulroney, during the 1984 election campaign embraced the myth. Pressured by Lucien Bouchard, a long-time friend and Parti Québécois member, Mulroney promised to reintegrate Quebec back into the constitutional family with honour and dignity. This would be accomplished via a set of constitutional amendments that entrenched the special constitutional status of the state of Quebec with the clear intent of reinforcing the territorial Quebec/Canada conception of duality. Prime Minister Mulroney and his ally, Premier Robert Bourassa (who was elected to office in 1985), opened a new round of mega-constitutional politics in the summer of 1986. These were based on five demands, including the recognition of the "distinct society" of Quebec in an interpretative clause. Their decision set in motion a titanic political struggle between the Canadian and Quebec states, between the *Charter*

¹⁴⁴ *An Act respecting the Constitution Act, 1982*, S.Q. 1982, c. 21.

¹⁴⁵ Claude Morin, *Lendemains piégés : Du référendum à la nuit des longs couteaux* (Montréal : Boréal, 1988).

¹⁴⁶ Guy Laforest, *Trudeau et la fin d'un rêve canadien* (Québec : Septentrion, 1992), at 19, 25-54.

of the French language and the Canadian Charter of Rights and Freedoms.¹⁴⁷

This clash of states and their competing Charters came very close to destroying Canada during the Meech Lake Accord, 1987–1990, and the Charlottetown Consensus Report, 1990–1992, constitutional rounds. The Meech Lake Accord failed to achieve ratification by all premiers, while the omnibus Charlottetown deal, accepted by all premiers and Aboriginal leaders, was rejected resoundingly by Canadians in their first-ever referendum on the Constitution. During both rounds of destabilizing mega-constitutional politics, Bourassa and Mulroney had one central goal: the constitutional entrenchment of the Quebec/Canada territorial conception of duality, which would trump the long-standing model and practice of pan-Canadian linguistic duality embedded in the *Constitution Act, 1982*. This would be accomplished with the 1987 Meech Lake Accord's highly controversial "distinct society" interpretative clause, one which applied to the entire Constitution. Premier Bourassa maintained that the "distinct society" clause would guarantee the Quebec state's exclusive control over language rights, including section 23 rights. In speeches promoting the Meech Lake Accord, Premier Bourassa also contended that the clause would assist, and even compel, the Supreme Court of Canada over time to grant the Quebec state new powers over jurisdictions that were deemed crucial to the survival and blossoming of its majority Québécois community.

Premier Bourassa damaged his political credibility and severely undermined the chances of the Meech Lake Accord being ratified when he demonstrated what, he claimed, Quebec could and would do with the Accord's controversial "distinct society" clause. This came in the form of Bourassa's poorly timed and framed legislative response to the Supreme Court's December 15, 1988 decision concerning Bill 101's requirements for unilingual French commercial signage.¹⁴⁸ The Court ruled these requirements unconstitutional but suggested that Quebec, because it was home to Canada's French-speaking majority, had a right to give public prominence to French while respecting the freedom of expression of other languages in the field of commercial signage. The

¹⁴⁷ Consult Michael Behiels, "Brian Mulroney and a Nationalist Quebec: Key to Political Realignment in Canada" in Raymond Blake, ed., *Transforming the Nation: Canada and Brian Mulroney* (Montreal & Kingston: McGill-Queen's University Press, 2007), at 250–93.

¹⁴⁸ *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.),

Bourassa government, ignoring the heart of the decision and resorting to a now-infamous outside/inside formula, restored unilingual French commercial signage by invoking the *Canadian Charter of Rights and Freedoms*'s notwithstanding clause to pass Bill 178. The law required that all outside commercial signage be unilingual French while allowing limited bilingual inside commercial signage if French was predominant. An intemperate Bourassa proclaimed that the use of the notwithstanding clause would not have been necessary had the stalled Meech Lake Accord been ratified.¹⁴⁹

A tsunami of political outrage swept across Canada and effectively drowned the hapless Accord. Responding to public pressure from inside and outside Manitoba, Premier Gary Filmon took the opportunity to withdraw the Meech Lake Accord from the Legislature where it was slated for debate and perhaps rejection by a majority of MLAs. Bourassa's Bill 178 confirmed Canadians' growing perception that the Accord's Quebec/Canada territorial duality was about to trump a pan-Canadian linguistic duality. The Meech Lake Accord, given the three-year ratification period, was facing its demise on June 24, 1990, Quebec's national holiday. Despite a last-ditch "roll of the dice" by Prime Minister Mulroney to get all governments to ratify the Accord without a single alteration, two provincial governments, Newfoundland and Labrador (having initially ratified it and then unratified it) and Manitoba, refused to ratify it.¹⁵⁰ This did not end the political crisis. Rather, the failure accentuated the growing political instability in the federation as the Trudeau federalists, the Mulroney/Bourassa special status proponents and the secessionist movement clashed with one another for control over the political and constitutional agenda in the hopes of determining Canada's and Quebec's futures.

Capitalizing on the outburst of feigned anger among Québécois nationalists and secessionists to the demise of the Meech Lake Accord, a deal which they overwhelmingly condemned but said they would exploit to their advantage, Premier Bourassa decided to put a "knife to the throat" of Canada.¹⁵¹ With Mulroney's full acquiescence and

¹⁴⁹ One analyst, Patrick Monahan, contends that Bill 178 effectively destroyed the Meech Lake Accord; consult his *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991), at 155-69.

¹⁵⁰ Andrew Cohen, *A Deal Undone: The Making and Breaking of the Meech Lake Accord* (Toronto: Douglas & McIntyre, 1990), at 257-68.

¹⁵¹ L. Ian MacDonald, *From Bourassa to Bourassa: Wilderness to Restoration*, 2d ed. (Montreal: McGill-Queen's University Press, 2002), at 322-23. The expression was coined by a

cooperation, he pressured the reluctant premiers into coming up with a constitutional package acceptable to the Quebec government. If such an offer was not forthcoming, Premier Bourassa would act on legislation which authorized his government to hold a referendum on secession no later than October 1992. Following months of negotiations between representatives from the provinces and four national Aboriginal organizations, Quebec's five demands, including the controversial "distinct society" interpretative clause circumscribed within a broader "Canada Clause", were incorporated within the far more comprehensive and complex Charlottetown Consensus Report of August 1992. Québécois nationalists and secessionists, supported by a great many disenchanted Quebec Liberals in and outside the Bourassa government, rejected the watered-down version of the "distinct society" clause as well as the recognition of a Third Order of Aboriginal self-governing nations within the Canadian federation.¹⁵² The mere presence of the Meech Lake Accord's five elements, especially the questionable "distinct society" clause, when combined with an amorphous Aboriginal constitution within the Canadian constitution, convinced a majority of Canadians, in virtually every region, to reject the package in their first-ever national referendum on the Constitution.¹⁵³

The defeat of the Meech Lake and Charlottetown constitutional deals created political and constitutional instability that endured for over a decade. The Mulroney/Bourassa alliance's failed attempts to restructure the Canadian Federation into a bi-national Quebec/Canada federation via the Meech Lake and Charlottetown constitutional accords radicalized dramatically the political and constitutional discourse.¹⁵⁴ To begin, the failure of mega-constitutional politics brought about the resignation of Prime Minister Mulroney and the defeat and virtual

renowned Laval political scientist, Léon Dion, during his testimony to the Bélanger-Campeau Commission on Quebec's constitutional future.

¹⁵² Alan C. Cairns, "Aboriginal Canadians, Citizenship, and the Constitution" in Douglas E. Williams, ed., *Reconfigurations: Canadian Citizenship and Constitutional Change: Selected Essays by Alan C. Cairns* (Toronto: McClelland & Stewart, 1995) at 246-49.

¹⁵³ Alan C. Cairns, "The Charlottetown Accord: Multinational Canada v. Federalism" in Curtis Cook, ed. *Constitutional Predicament: Canada after the Referendum of 1992* (Montreal: McGill-Queen's University Press, 1994), at 25-63; Alain Noël, "Deliberating a Constitution: The Meaning of the Canadian Referendum of 1992" in Curtis Cook, ed. *Constitutional Predicament: Canada after the Referendum of 1992* (Montreal: McGill-Queen's University Press, 1994), at 64-88.

¹⁵⁴ Kenneth McRoberts, *Quebec: Social Change and Political Crisis*, 3d ed. with Postscript (Toronto: Oxford University Press, 1993), at 441-61.

destruction of the Progressive Conservative Party in the 1993 election. Two new sectional parties emerged, the secessionist Bloc Québécois, led by Mulroney's former cabinet minister, Lucien Bouchard, and the Alberta Reform Party led by Preston Manning. The Reform Party championed the equality of the provinces to be achieved principally by reforming the Senate into an institution that was "elected, equal and effective". This "Triple E" Senate reinforced intrastate federalism by granting the provinces more control over the formulation of national policies and programs, especially in areas of provincial jurisdiction, including natural resources and language rights.¹⁵⁵

Since 1987, a re-energized Parti Québécois government, had been led by hard-liner Premier Jacques Parizeau. He maintained that secession was a purely political matter and declared that Quebec's National Assembly, in the wake of a majority vote in a referendum, had the authority under international law to make a Unilateral Déclaration of Independence. Parizeau successfully exploited the trumped-up constitutional crisis to gain office in 1994. As promised, Parizeau proceeded with a referendum on the secession of Quebec in October 1995. He found ready and willing allies in Lucien Bouchard's Bloc Québécois, which functioned as the Official Opposition with 54 seats in the House of Commons, and Mario Dumont's Action Démocratique du Québec, which represented disenchanted Québécois Liberals and nationalist conservatives throughout rural Quebec. Secession, or "sovereignty-partnership" as Bouchard and Dumont preferred to label it, was necessary because the *Constitution Act, 1982* and its *Canadian Charter of Rights and Freedoms*,¹⁵⁶ according to their myth of the "night of the long knives", were constitutionally and politically illegitimate. All three leaders conveniently ignored the Supreme Court of Canada's 1982 Quebec veto judgment, which ruled that Quebec never had a veto over constitutional change.¹⁵⁷ The Quebec state, they proclaimed, had been stripped of its historical veto over all constitutional change while the centralizing, homogenizing Charter destroyed the Quebec state's exclusive control over language and cultural legislation. Only the

¹⁵⁵ Michael Behiels, "Brian Mulroney and a Nationalist Quebec: Key to Political Realignment in Canada" in Raymond Blake, ed., *Transforming the Nation: Canada and Brian Mulroney* (Montreal & Kingston: McGill-Queen's University Press, 2007), at 284-87.

¹⁵⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁵⁷ *Reference re Amendment of Canadian Constitution*, [1982] S.C.J. No. 101, [1982] 2 S.C.R. 793 (S.C.C.).

Québécois people, Parizeau declared, could guarantee their survival and development by seceding from Canada following a simple majority victory in a referendum. If the Canadian government refused to negotiate Quebec's secession from the federation, the Quebec *Referendum Act*¹⁵⁸ mandated the Quebec National Assembly to proceed with a unilateral declaration of independence as per the right of the Québécois people under international law. Parizeau later revealed that he had assurances that the French government would support an independent Quebec's drive for international recognition.¹⁵⁹

The federalist forces, led by the provincial Liberal leader, Daniel Johnson, ran a dismal campaign until the last week of the campaign. When polls revealed that the "Yes" forces had a substantial lead, a panicked Chrétien government was propelled to intervene with promises to recognize the distinct society of Quebec and to grant Quebec a veto over major constitutional changes. To gain maximum media coverage for the federalist side, Ottawa organized a mass rally in Montreal which attracted federalists from all regions of Canada.

The federalist forces snatched the narrowest of victories from the jaws of defeat. The "No" side won the 1995 referendum by 50.5 per cent to 49.4 per cent, a difference of less than 54,000 votes. Parizeau lost the biggest political gambit of his long career. He was replaced as premier by Lucien Bouchard immediately after blurting out on referendum night that the "Yes" side was beaten by "money and the ethnic vote".¹⁶⁰

Following a short period of serious reflection, a determined Prime Minister Chrétien took quick action in order to head off another Quebec referendum based on an ambiguous questions such as sovereignty-association in 1980, sovereignty-partnership in 1995 — as well as the claim that a simple majority of 50 per cent plus one was sufficient to break up Canada. He was also deeply concerned that increasing numbers of Québécois believed Parizeau's claim, outlined in the referendum law, that the process was exclusively political and Quebec was not bound by the Canadian Constitution and the rule of law. He recruited Stéphane Dion, a Université de Montréal political science

¹⁵⁸ R.S.Q. c. C-64.1.

¹⁵⁹ Jacques Parizeau, *Pour un Québec souverain* (Montréal : VLB, 1997).

¹⁶⁰ Graham Fraser, *René Lévesque and the Parti Québécois in Power*, 2d ed. (Montreal: McGill-Queen's University Press, 2001), at xxxii-xxxiii.

professor well known for his vigorous intellectual opposition to secession into his government to head up the struggle against the secessionist government of Quebec. In a series of hard-hitting statements and letters, Minister Dion successfully countered the Parti Québécois' and the Bloc Québécois' heavy barrage of propaganda in favour of secession.¹⁶¹

In what proved to be, in hindsight, a fateful political miscalculation, Ottawa had refused to support Guy Bertrand's legal challenge concerning the constitutionality of the Quebec *Referendum Act*.¹⁶² Following the near-death experience of the referendum campaign, Prime Minister Chrétien made a volte-face on this issue. His government referred questions to the Supreme Court of Canada hoping that the Court would clarify that Quebec had no right to secede from the Canadian federation unilaterally, either under Canada's Constitution or under international law.

The Supreme Court ruled in Ottawa's favour in its 1998 landmark decision, *Reference re Secession of Quebec*.¹⁶³ The Court said emphatically that Quebec did not have, under international or domestic law, the right to secede unilaterally from the federation.¹⁶⁴ Venturing into the realm of politics and political theory, the Supreme Court justices then opined that if Quebec held a referendum on outright secession and won a substantial majority of support, the federal and the provincial governments and other stakeholders would be required to negotiate, but not to conclude, a secession agreement entailing all matters, including borders, with the province of Quebec. If negotiations failed, the Quebec government could resort to an illegal unilateral declaration of independence. It would do so with very little prospect of obtaining international recognition until it demonstrated that the new state had full authority over its entire territory.¹⁶⁵

¹⁶¹ Stéphane Dion, *Straight Talk: On Canadian Unity* (Montreal: McGill-Queen's University Press, 1999).

¹⁶² *Bertrand v. Quebec (Attorney General)*, [1995] Q.J. No. 644, 127 D.L.R. (4th) 408 (Que. S.C.J.). Justice Lesage would not grant an injunction to prevent the holding of the Quebec referendum. But, he ruled that the Draft Bill, *An Act respecting the sovereignty of Québec* and Bill 1, *An Act respecting the future of Québec* violated the Canadian Constitution by authorizing Quebec's National Assembly to make a unilateral declaration of sovereignty following the success or failure of treaty negotiations with Canada on an economic and political partnership. Canada's Constitution, its amending formulae and the rule of law were all conveniently ignored.

¹⁶³ [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

¹⁶⁴ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

¹⁶⁵ For a thorough analysis, consult Warren M. Newman, *The Quebec Secession Reference: The Rule of Law and the Position of the Attorney General of Canada* (Toronto: York University,

In what was considered a high-risk venture, the Chrétien government followed up the Supreme Court's landmark ruling with Bill C-20, the *Clarity Act*,¹⁶⁶ a statute outlining the general terms and conditions for any and all future referenda on secession. A provincial government must put to its citizens a clear and unambiguous question on outright secession, and it must obtain a substantial majority of support of the electorate. Only when Parliament deemed both of these conditions to have been fulfilled, could it authorize the federal government to negotiate the terms and conditions of secession of any province.

Premier Lucien Bouchard's Parti Québécois government attempted to exploit the Supreme Court's ruling in *Reference re Secession of Quebec*, particularly the justices' opinion that Ottawa had a constitutional obligation to negotiate secession with the Quebec government following a victory in another referendum.¹⁶⁷ Bouchard attempted desperately to use the Chrétien government's *Clarity Act*¹⁶⁸ to create the winning conditions for a third referendum on secession. He was unsuccessful. A majority of Québécois decided that the *Clarity Act* was a reasonable law. Premier Bouchard came to the conclusion that it would be foolhardy to call another referendum. Several months later, exhausted from the responsibilities of office and the ongoing bickering within caucus and the party, Bouchard resigned the premiership.

The vast majority of Québécois were tired of referendum politics and relatively satisfied with the Official Language regimes that had been put into place by the Canadian and Quebec states since the 1960s. These regimes appeared to serve their economic and social interests as well as their psychological needs. It has become increasingly difficult to convince a substantial majority of Québécois that an independent Quebec would be able to provide vastly enhanced guarantees for the survival of the French language and culture in North America. Perhaps, as one perceptive political commentator suggests, the Québécois have come to the conclusion that a largely French-speaking and autonomous

Centre for Public Law and Public Policy, 1999) and Yves-Marie Morissette, *Le renvoi sur la secession du Québec : Bilan provisoire et perspectives* (Montréal : Éditions Varia, 2001).

¹⁶⁶ An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the *Quebec Secession Reference*, S.C. 2000, c. 26.

¹⁶⁷ Robert A. Young, *The Struggle for Quebec: From Referendum to Referendum?* (Montreal: McGill-Queen's University Press, 1999), at 146-47.

¹⁶⁸ S.C. 2000, c. 26.

Quebec sub-state, one functioning within a moderately bilingual Canadian state, is their best guarantee for survival in a globalizing and homogenizing world.¹⁶⁹

IX. LANGUAGE RIGHTS UNDER THE CHARTER: PROVINCIAL AND FEDERAL

While the political battles over failed mega-constitutional deals and the second referendum on secession were taking place, more acceptable and less discriminatory state language regimes were being put into place at both the federal and provincial levels. Over two decades, Canada's francophone and Acadian minority communities and their representatives improved their lobbying skills and made effective use of the courts to achieve a remarkable advancement of their language rights in the field of education, including the right to govern their own school boards where numbers warranted in every province and territory of Canada.¹⁷⁰

The situation is now considerably more complex than it was a generation ago. Reforms in Quebec's educational system in the 1960s and Bill 101 have enabled francophones, as individuals and as a collectivity, to experience both linguistic and social promotion. They are now truly "masters in their own house". The outcome of state language regulations has been mixed for the English-speaking communities of Quebec, anglophone and allophone. Both communities live under the language regime of Bill 101, which limits their freedom of expression in the work world, both public and private sectors. Fluency in the French language is now a *sine qua non* for middle-class professionals working hard to have productive careers in Quebec. Francophone and allophone parents are denied the right to choose the language of education for their children. The ability of the declining anglophone community to grow by attracting English-speaking immigrants is curtailed by the Quebec government's control over the selection of immigrants. Over time, this ancestral community will dwindle into a shadow of its former self as a fluently bilingual and multicultural community throughout the Montreal region emerges to take its place.

¹⁶⁹ André Pratte, *Aux pays des merveilles. Essai sur les mythes politiques québécois* (Montréal : v/b éditeur, 2006).

¹⁷⁰ Consult Joseph Eliot Magnet, *Official Languages in Canada* (Cowansville, Qc.: Yvon Blais, 1995) and Michael Behiels, *Canada's Francophone Minority Communities: Constitutional Renewal and the Winning of School Governance* (Montreal: McGill-Queen's University Press, 2004).

The prolonged political battle in Manitoba over the restoration of section 23 of the *Manitoba Act, 1870*,¹⁷¹ which mandated bilingualism in the legislature and the courts of Manitoba, was particularly bitter and divisive.¹⁷² Yet, thanks to the growing acceptance of bilingualism among Manitoba's educated, urban middle class, this struggle achieved considerable if not complete success. The landmark 1985 ruling of the Supreme Court of Canada¹⁷³ on Manitoba language rights played no small part in this sea change in Manitoba public opinion. Following protracted negotiations over two decades and many false starts, the Société franco-manitobaine and the Manitoba government agreed to limit the amount of translation of past statutes in return for the provision of a greater range of provincial and municipal government programs, including but not limited to health, social services and justice, in the French language.¹⁷⁴ The Société franco-manitobaine and Judge Richard Chartier, who chaired a 1997-98 commission to review and make recommendations on the Manitoba government's French language services, pushed for and obtained a far greater range of provincial and municipal programs and services in French in six designated Franco-Manitoban community centres.¹⁷⁵ They were assisted by extensive, ongoing federal funding¹⁷⁶ and by the Supreme Court's 1999 *Beaulac* opinion, which broadened the definition of language rights to include not only services and education but the minority-language communities themselves.¹⁷⁷ While the campaign for effective and more comprehensive bilingualism in Manitoba is far from over, the situation is vastly improved from where it stood in 1982.

Acadians continue to experience different language regimes in each of the Maritime provinces. The Acadians of New Brunswick,

¹⁷¹ S.C. 1870, c. 3.

¹⁷² Consult Raymond M. Hébert, *Manitoba's French-Language Crisis: A Cautionary Tale* (Montreal: McGill-Queen's University Press, 2004).

¹⁷³ *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.).

¹⁷⁴ Frances Russell, *The Canadian Crucible: Manitoba's Role in Canada's Great Divide* (Winnipeg: Heartland Associates, 2003), at 489-510.

¹⁷⁵ Judge Richard Chartier, Commissioner, *Above All, Common Sense — Avant Toute Chose, Le Bon Sens* (Manitoba: Report and Recommendations on French Language Services within the Government of Manitoba, May 1998).

¹⁷⁶ Canadian Heritage, Evaluation of the "Intergovernmental Cooperation" Component of the Promotion of Official Languages Program, online: <http://www.pch.gc.ca/progs/em-cr/eval/2004/2004_04/index_e.cfm>.

¹⁷⁷ *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.).

comprising one-third of the population concentrated in selected regions, including the City of Moncton, began their "quiet revolution" under the Liberal government of Louis Robichaud in the 1960s and continued it under the Conservative government of Richard Hatfield in the 1970s and early 1980s. Acadians used their political clout to obtain state-sanctioned language rights in the *Official Languages of New Brunswick*¹⁷⁸ and then in Bill 88, *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*¹⁷⁹ in 1981. During the mega-constitutional negotiations involving the Meech Lake and Charlottetown Accords, Acadian leaders lobbied aggressively to have Bill 88 entrenched in the Constitution. In return for his political support, Premier Frank McKenna was able to negotiate a bilateral amendment with the Mulroney government in 1993 entrenching Bill 88 in the *Constitution Act, 1982* as section 16.1(1) and (2) of the Charter,¹⁸⁰ albeit with its scope narrowed to the language, education and cultural rights of both communities.

Acadians, under section 12 of the *Official Languages of New Brunswick Act*,¹⁸¹ had the right to education in their language. The vast majority of the schools in which this right was exercised were bilingual schools. These contributed to the assimilation of Acadian children. In 1981, the *New Brunswick Schools Act*¹⁸² was amended to create a dual-language system which granted Acadian parents the right to their own French-language educational facilities managed by their own school boards. The government passed legislation creating four French-language colleges.¹⁸³ It was hoped that section 23 of the Charter would help clarify and reinforce these statutory provisions to French-language education. The Société des Acadiens du Nouveau-Brunswick (SANB) was already in the process of contesting the *Schools Act* in the Supreme Court to ensure that their French-language schools were for Acadian children and not open to English-language children seeking an immersion education. The Supreme Court of Canada ruled in favour of

¹⁷⁸ R.S.N.B. 1973, c. O-1 [repealed].

¹⁷⁹ R.S.N.B. 1981, c. O-1.1.

¹⁸⁰ Michel Doucet, *Le discours confisqué* (Moncton : Éditions d'Acadie, 1995), at 127-220.

¹⁸¹ R.S.N.B. 1973, c. O-1 [repealed].

¹⁸² S.N.B. 1981, c. S-5.

¹⁸³ Canada, Office of the Commissioner of Official Languages, *School Governance: The Implementation of Section 23 of the Charter* (Ottawa: Minister of Works and Government Services Canada, 1998), at 33-43.

the SANB and Acadian parents, allowing Acadian parents to build and manage their own system of schools.¹⁸⁴

The Acadian community's control over its school system was destroyed in 1997 when the provincial government abolished all the school boards, replacing them with District Education Councils which effectively transferred the governance and control over schools to the Minister of Education. A group of Acadian parents challenged the *Education Act*¹⁸⁵ in the Court of Queen's Bench.¹⁸⁶ Their lobby eventually compelled the New Brunswick government to amend the *Education Act* by transferring certain, but not all, governance powers to the District Education Councils.¹⁸⁷ Acadian organizations and some communities in Nova Scotia pursued their section 23 rights to homogeneous French-language schools and school boards under their control, but they encountered continued opposition from many Acadians as well as the provincial government.¹⁸⁸ This occurred despite largely favourable court decisions supporting a reasonable right to homogeneous schools and school boards.¹⁸⁹ A similar pattern of political lobbying and a mix of favourable and unfavourable court decisions prevailed in Prince Edward Island, allowing the government to procrastinate on the construction of repeatedly promised and much needed Acadian schools.¹⁹⁰

The provision in French of government health, social, educational, police and judicial services by provincial and municipal government

¹⁸⁴ *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549 (S.C.C.).

¹⁸⁵ S.N.B. 1997, c. E-1.12.

¹⁸⁶ *Comité de sauvegarde de l'École de la découverte de Saint-Sauveur c. Nouveau-Brunswick (Ministre de l'Éducation)*, [1997] A.N.-B. no 582 (N.B.Q.B.).

¹⁸⁷ Canada, Office of the Commissioner of Official Languages, *Annual Report 1997* (Ottawa: Minister of Supply and Services, 1998); Canada, Office of the Commissioner of Official Languages, *School Governance: The Implementation of Section 23 of the Charter* (Ottawa: Minister of Works and Government Services Canada, 1998).

¹⁸⁸ Canada, Office of the Commissioner of Official Languages, *Annual Report 1997* (Ottawa: Minister of Supply and Services, 1998); Canada, Office of the Commissioner of Official Languages, *School Governance: The Implementation of Section 23 of the Charter* (Ottawa: Minister of Works and Government Services Canada, 1998), at 30-31.

¹⁸⁹ *Lavoie v. Nova Scotia (Attorney General)*, [1988] N.S.J. No. 57, 84 N.S.R. (2d) 387 (N.S.S.C. (T.D.)); *Doucet-Boudreau v. Nova Scotia (Department of Education)*, [2000] N.S.J. No. 191, 185 N.S.R. (2d) 246 (N.S.S.C.).

¹⁹⁰ *Arsenault-Cameron v. Prince Edward Island*, [1998] P.E.I.J. No. 38, 162 Nfld. & P.E.I.R. 329 (P.E.I.S.C. (A.D.)); *Reference re Minority Language Educational Rights (P.E.I.)*, [1988] P.E.I.J. No. 24, 69 Nfld. & P.E.I.R. 236 (P.E.I.S.C. (A.D.)).

departments and agencies as well as by para-public institutions has been expanding in the officially bilingual province of New Brunswick under section 20(2) of the Charter. This development is often expedited as complaints find their way through the courts, whose role it is to establish the nature and scope of the required French-language services under section 20(2) of the Charter.¹⁹¹ This process is aided by the Supreme Court of Canada's 1999 *Beaulac* decision, which affirmed that substantive equality applied to language rights.

Time will determine whether the Court's turnaround in *Beaulac* is advantageous for New Brunswick's Acadians.¹⁹² The ongoing saga of court cases and government's centralization of important services is not a positive sign. However, New Brunswick's revised *Official Languages Act*¹⁹³ expanded the range of services available in both official languages, and the City of Moncton declared itself officially bilingual.¹⁹⁴

Developments to advance official-language minorities in the other Maritime provinces have been much slower in coming. There is no constitutional obligation to provide bilingual services at the provincial level and section 20(1) only extends to the federal government, its departments, Crown corporations and agencies.

Ontario is home to Canada's largest francophone minority community. While its language rights regime in the public and para-public sectors has expanded dramatically since 1982, this regime remains fraught with tension and problems. The Franco-Ontarian community is increasingly urban. As a result of higher levels of education, its professional middle-class is far more mobile. Dispersed throughout all of Ontario's major cities, middle-class Franco-Ontarians insist on education for their children and public services in French. Ontario's government is constantly criticized by the Franco-Ontarian minority community, its organizations and leaders because it refuses to entrench official bilingualism for the province in the Constitution.¹⁹⁵ In

¹⁹¹ Nicole Vaz & Pierre Foucher, "The Right to Receive Public Services in Either Official Language" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Quebec: Yvon Blais, 2004).

¹⁹² Denise G. Réaume, "The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?" (2002) 47 McGill L.J. 593.

¹⁹³ S.N.B. 2002, c. O-0.5.

¹⁹⁴ Canada, Office of the Commissioner of Official Languages, *Annual Report 2002-2003* (Ottawa: Minister of Public Works and Government Services Canada, 2003).

¹⁹⁵ Yves Le Bouthillier, "La nécessaire enchâssement de la dualité linguistique et des droits des francophones de l'Ontario" (2002) 24 Ottawa L. Rev. 117.

the lead-up to and following the passage of the *Constitution Act, 1982*,¹⁹⁶ Franco-Ontarians campaigned vigorously to convince Premier Bill Davis to include Ontario in the official bilingualism provisions of the new Constitution. Despite relentless pressure from Prime Minister Trudeau and New Brunswick Premier Hatfield, Premier Davis, always fearful of a political backlash, opted instead for an incremental and pragmatic legislative approach to developing a limited degree of institutional bilingualism in Ontario's Legislative Assembly and in many of its multitude of public and para-public programs.¹⁹⁷ Franco-Ontarians prefer that their province be declared officially bilingual and brought within sections 16 to 20 of the Charter. This would facilitate the expansion of bilingual services throughout the government bureaucracy, agencies, Crown corporations and court system. Most Franco-Ontarians are uncomfortable with the political reality that this will not occur in the very near future.¹⁹⁸

After considerable debate and years of stalling, in 1990 the Ontario government passed Bill 8, the *French Language Services Act*,¹⁹⁹ which mandated bilingual services in the public administration — agencies, hospitals and long-term care facilities — in 23 bilingual areas, mostly in eastern and northern Ontario.²⁰⁰ The courts urged the government to expand the scope of mandated language services provided by municipalities within these bilingual areas. In the *Chaperon*²⁰¹ decision, the Ontario Court of appeal ruled that the *Municipal Act*²⁰² did not give the right to the City of Sault Ste. Marie to declare English as its official language and recommended that the provincial government make the

¹⁹⁶ Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁹⁷ J.L. Gilles LeVasseur, *Le statut juridique du français en Ontario* (Ottawa : Presses de l'Université d'Ottawa, 1993), at 23-39; Robert Leckey & André Braën, "Bilingualism and Legislation" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Quebec: Yvon Blais, 2004), at 96-97.

¹⁹⁸ J.L. Gilles LeVasseur, *Le statut juridique du français en Ontario* (Ottawa : Presses de l'Université d'Ottawa 1993), at 23-39.

¹⁹⁹ R.S.O. 1990, c. F.32.

²⁰⁰ Nicole Vaz & Pierre Foucher, "The Right to Receive Public Services in Either Official Language" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Quebec: Yvon Blais, 2004).

²⁰¹ *Chaperon v. Sault Ste. Marie (City)*, [1994] O.J. No. 1602, 49 A.C.W.S. (3d) 381 (Ont. Gen. Div.).

²⁰² R.S.O. 1990, c. M.45 [repealed].

Municipal Act's requirements for bilingual services more explicit.²⁰³ Yet, constant government restructuring and centralization of hospital and social services, according to the Annual Reports of the Commissioner of Official Languages,²⁰⁴ often resulted in a marked decrease in services in French.

The proposed closure of Ottawa's only French-language hospital, Hôpital Montfort, attracted a court challenge from the Franco-Ontarian community. In the ensuing proceeding, the Ontario Court of Appeal agreed with the Divisional Court

that Montfort has a broader institutional role than the provision of health care services. Apart from fulfilling the additional practical function of medical training, Montfort's larger institutional role includes maintaining the French language, transmitting francophone culture, and fostering solidarity in the Franco-Ontarian minority.²⁰⁵

By failing to give any weight to "Montfort's role as an important linguistic, cultural and educational institution vital to the francophone population of Ontario",²⁰⁶ Ontario's Restructuring Commission exceeded its mandate. The Commission's resulting decision conflicted with principles underlying Canada's constitution.²⁰⁷

In the area of French-language education rights, Ontario was the first province to begin to comply with section 23 of the Charter. The long political and legal process was kick-started by the Ontario Court of Appeal's decision in the 1984 reference case.²⁰⁸ The Court of Appeal ruled that sections of Ontario's *Education Act*²⁰⁹ did not comply with section 23 minority-language education rights because they placed too many restrictions on section 23 rights holders; gave too much discretion

²⁰³ See also *Nottingham v. Emond*, [1997] O.J. No. 3166 (Ont. Gen. Div.) and *Dehenne v. Dehenne*, [1999] O.J. No. 4745, 47 O.R. (3d) 140 (Ont. S.C.J.).

²⁰⁴ Canada, Office of the Commissioner of Official Languages, *Annual Reports 1990 to 2000* (Ottawa: Minister of Supply and Services, 1991 to 2001).

²⁰⁵ *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 505, at para. 71 (Ont. C.A.).

²⁰⁶ *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 505, at para. 181 (Ont. C.A.).

²⁰⁷ *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 505, at paras. 180-81 (Ont. C.A.). The court based its ruling on the unwritten constitutional principle of respect for and protection of the rights of minorities, and on the *French Language Services Act*, R.S.O. 1990, c. F.32.

²⁰⁸ *Reference re Education Act of Ontario and Minority Language Education Rights*, [1984] O.J. No. 3260, 10 D.L.R. (4th) 491, 47 O.R. (2d) 1 (Ont. C.A.).

²⁰⁹ R.S.O. 1980, c. 129 [repealed].

to school boards; set numbers thresholds for education rights too high; and confined the provision of minority French-language education to existing territorial boundaries of school boards. On the issue of school governance sought by the Franco-Ontarian communities, the Court of Appeal ruled that section 23 curtailed only moderately the exclusive power of the legislature to make laws in the area of minority-language legislation by requiring that Franco-Ontarian communities be provided with their own educational facilities on a basis of equality with the majority. Nonetheless, the Court was unwilling to rule that section 23 required full and unfettered school governance, that is, a system of French-language public school boards, administered by Franco-Ontarians.

Negotiations between Franco-Ontarian leaders and the provincial government stalled. In 1990, the Supreme Court ruled in *Mahe*²¹⁰ that section 23 of the Charter established a sliding scale of governance rights over schools and school boards for Franco-Ontarian parents where numbers warranted. The *Mahe* ruling forced the Ontario government to amend its 1990 *Education Act* yet again. The revision granted full school governance over French-language public school boards to Franco-Ontarian communities in Toronto, Ottawa, Eastern Ontario and several communities in Northern Ontario.

Because they were badly under-funded and lacked managerial experience, the Franco-Ontarian school boards quickly ran into financial trouble. They were forced to lobby very hard, during times of financial constraint, to ensure funding equal to that of the English-majority school boards from the provincial government, which had taken over full responsibility for financing all of Ontario's schools.²¹¹ Matters improved when the Supreme Court of Canada reaffirmed and expanded the principle of school governance by the official language minorities in the 1992 *Manitoba Reference* and the 2000 *Arsenault-Cameron* decisions.²¹²

The ongoing clash over which state, federal or provincial, has paramouncy over language rights remains most prevalent in Quebec.

²¹⁰ *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, 68 D.L.R. (4th) 69 (S.C.C.).

²¹¹ Canada, Office of the Commissioner of Official Languages, *Annual Report 1997* (Ottawa: Minister of Supply and Services, 1998), at 103. The provinces were closely monitored by the Office of the Commissioner of Official Languages.

²¹² *Reference re Manitoba Language Rights*, [1992] S.C.J. No. 2, [1992] 1 S.C.R. 212 (S.C.C.); *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1, [2000] 1 S.C.R. (S.C.C.).

Quebec governments interpret language rights as political rather than human rights, thereby allowing them to use language rights as an instrument for the socio-economic promotion of the majority Québécois community. This approach makes it considerably more difficult for Quebec's English-speaking communities to obtain equal treatment in the legislature, in the courts and in government services.²¹³ Quebec's *Charter of the French language*²¹⁴ stipulates that French is the only official language of Quebec. Nonetheless, the province remains bound by section 133 of the *Constitution Act, 1867*,²¹⁵ which permits both official languages of Canada to be used in the National Assembly and the Quebec courts and requires that the records of the Quebec Legislature be printed and published in both languages. While the courts have taken a positive and purposeful approach to section 133 language rights, Quebec has tried to limit the extent of bilingualism in practice. The quality of translation from French to English is very poor.²¹⁶

The *Charter of the French language*²¹⁷ gives primacy to French in the courts and permits translation only when requested by the party involved. Due to a lack of bilingual court personnel and legal services, effective bilingualism in the judicial system and regulatory agencies is not available as an equal right.²¹⁸ Quebec's English-language minority community had long-standing access to public health and social services in English, but this right has been circumscribed by the *Charter of the French language*, which gives priority to French. The *Act respecting health services and social services*²¹⁹ stipulates in great detail when and to what extent the use of English is to be allowed. The ongoing consolidation and centralization of the health and social services has reduced access for English-language speakers, forcing the community to lobby for and obtain necessary reforms.²²⁰ In 2000, Quebec's Bill 170,

²¹³ Robert Leckey & Emmanuel Didier, "The Private Law of Language" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Quebec: Yvon Blais, 2004), at 495-96.

²¹⁴ R.S.Q. c. C-11.

²¹⁵ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

²¹⁶ Robert Leckey & André Braën, "Bilingualism and Legislation" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Quebec: Yvon Blais, 2004), at 49-52, 79-80.

²¹⁷ R.S.Q. c. C-11.

²¹⁸ Vanessa Gruben, "Bilingualism and the Judicial System" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Quebec: Yvon Blais, 2004), at 160, 212, 222, 219-24; Nicole Vaz, "The Principle of Equality of Official Languages" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Quebec: Yvon Blais, 2004), at 631.

²¹⁹ R.S.Q. c. S-4.2.

²²⁰ Nicole Vaz & Pierre Foucher, "The Right to Receive Public Services in either Official Language", in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Quebec: Yvon Blais,

*An Act to reform the municipal territorial organization of the metropolitan regions of Montreal, Québec and the Outaouais*²²¹ created five super-municipalities out of 60 towns and cities, and access to municipal services in English was diminished dramatically. When this Bill was challenged, the courts ruled that the mergers and the limitations on English-language services were constitutionally valid.²²²

In 1997, following a bilateral constitutional amendment to section 93, Quebec's denominational school system was replaced by one based on language. The declining anglophone community has at its disposal nine English-language school boards. Children can attend English-language schools if they meet conditions spelled out in section 73, 76 or 86.1 of the *Charter of the French language*.²²³ The parents of three families contested section 73(2) on the grounds that the requirement that their children receive the "major part" of their education in English to gain access to English-language schools violated section 23(2) of the *Canadian Charter of Rights and Freedoms*.²²⁴ In 2005, the Supreme Court of Canada ruled that while Quebec had the right to determine the criteria for access to English-language education, it was imperative that these criteria complied with the purpose of section 23(2) of the Charter, which was to guarantee the collective and individual education rights of Quebec's official-language minority. A child's educational experience had to be evaluated on the qualitative dimensions of his or her minority language education experience *i.e.*, length, stage, availability and commitment rather than on a narrow mathematical formula. The Supreme Court ruled that the children in question qualified for minority-language education.²²⁵

To date, the Quebec government has not opted into section 23(1)(a) of the Charter, which would assist Quebec's anglophone community to

2004), at 325-30; Canada, Office of the Commissioner of Official Languages, *Annual Report 2002-2003* (Ottawa: Minister of Public Works and Government Services Canada, 2003) and *Annual Report 2005-2006* (Ottawa: Minister of Public Works and Government Services Canada, 2006).

²²¹ S.Q. 2000, c. 56.

²²² *Baie-d'Urfé (Ville) c. Québec (Procureur général)*, [2001] J.Q. no 4821, R.J.Q. 2520 (Que. C.A.).

²²³ Mark Power & Pierre Foucher, "Language Rights and Education" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Quebec: Yvon Blais, 2004), at 436-40.

²²⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²²⁵ *Solski (Tutor of) c. Québec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201 (S.C.C.); Canada, Office of the Commissioner of Official Languages, *Language Rights, 2005-2006* (Ottawa: Minister of Public Works and Government Services Canada, 2007), at 5-6.

stem its precipitous demographic decline. It would enable the community to attract English-speaking Canadian citizens, including immigrants who obtain citizenship after three years, to bolster its population base. This is unlikely to occur, since it would allow immigrants settling outside Quebec to eventually gain access to Quebec's English-language schools while those settling in Quebec would not have this option. Quebec's language regime is based on one of tolerance of the English-language minority community rather than on equal protection.

Following the revised 1985 federal *Official Languages Act*,²²⁶ various *Annual Reports* of the Commissioner of Official Languages have outlined an ongoing litany of problems in the provision of adequate bilingual services throughout federal government departments, agencies, courts and Crown corporations. This was and remains especially so in federal government offices located in the provinces. Major problems emerged as a result of government cutbacks in the 1990s and privatization of Crown corporations. When, for example, Air Canada was privatized in 1998, the requirement to maintain adequate and efficient bilingual services was rarely respected in a timely manner. Unrelenting pressure from the Commissioner of Official Languages and representatives of Canada's official-language minority communities is required to ensure that the federal government, at all levels and in all regions, complies in a timely manner with the *Official Languages Act*²²⁷ and its regulations. This is now imperative given that all federal institutions, under the 2005 amendments to Part VII of the *Official Languages Act*,²²⁸ "have a duty to ensure that positive measures are taken to implement the federal government's commitment to enhance the development of Anglophone and Francophone minorities in Canada and to assist their development and foster the full recognition of English and French in Canadian society".²²⁹

²²⁶ R.S.C. 1985, c. 31 (4th Supp.).

²²⁷ R.S.C. 1985, c. 31 (4th Supp.).

²²⁸ S.C. 2005, c. 41.

²²⁹ Canada, Office of the Commissioner of Official Languages, *Language Rights, 2005-2006* (Ottawa: Minister of Public Works and Government Services Canada, 2007), at 42.

X. CONCLUSION

The role of the state in Canada over the "contested ground" of language rights has evolved quite dramatically since the British colonial authorities took over the governance of New France in 1760. As the Canadian state evolved from colonies within the British Empire to domestically sovereign federal and provincial states within a federated Dominion of Canada and then to full independence in 1931, federal and provincial involvement in language policy, legislation and regulations became more complex, competitive and contested. The Canadian state moved toward the recognition and promotion of pan-Canadian official bilingualism, while the Quebec state pursued the recognition and eventual entrenchment of a territorial Quebec/Canada conception of linguistic and cultural dualism. A clash between the *Canadian Charter of Rights and Freedoms*²³⁰ and the Quebec *Charter of the French language*²³¹ ensued.

British colonial governors of Old Quebec, while committed to the eventual assimilation of French Canadians, were forced by demographic and military factors to adopt a pragmatic approach to language policy. After the Rebellions of 1837–1838 and the winning of responsible government, this pragmatic approach to language rights found expression in the *British North America Act, 1867*²³² which outlined a limited regime of recognized but often flouted minority language rights. As the British North American colonial societies evolved into a more cohesive British Canada, the English language was used by British-Canadian nationalists and imperialists as a major instrument of nation building and nation consolidation.

In the interwar years, 1919–1939, Prime Minister Mackenzie King's Liberal Party and government promoted a conception of pluralistic liberal civic nationalism based on the toleration of religious, ethnic and linguistic communities. The Canadian state adopted a far less coercive approach to language policy, one which encouraged British Canadian and immigrant communities to accept the French-Canadian and Acadian communities as integral components of a pan-Canadian bicultural and

²³⁰ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²³¹ R.S.Q. c. C-11.

²³² (U.K.) 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

bilingual duality. It was only a partially successful policy since it slowly transformed attitudes, but not institutions.

With the tremendous expansion of the Canadian social service state, both federal and provincial, after the Second World War, language rights once again became hotly contested ground. Canada's francophone and Acadian minority communities felt excluded from their national government. The French-Canadian majority community of Quebec came to perceive that much-needed government programs, including social, health and education, to name only a few, were being designed, funded and administered by the English-speaking majority which controlled the Canadian state, a state which functioned primarily in English. The crisis provided much of the impetus behind Quebec's "Quiet Revolution" of state building. The emerging Québécois urban, secular middle class, which controlled the expanded Quebec state, decided to use language as a tool of social promotion for francophones in Quebec. They had two main goals. First, they wanted to ensure that they overcame their economic inferiority and that the francophone Québécois majority gained control over all sectors of the Quebec economy, public and private. Second, the coercive language laws were motivated by the precipitous decline in the birth rate among French Canadians and the integration of the majority of the immigrants into the anglophone community located in Metropolitan Montreal. A political and juridical clash between the *Charter of the French language*²³³ and the *Canadian Charter of Rights and Freedoms*²³⁴ ensued, and persists to this very day.

Competing and often contested conceptions of state language regimes remain at the centre of the protracted debate over Quebec's role within or outside the Canadian federation, as well as the place of the francophone and Acadian minority communities within the provinces and Canada. The resolution, thanks to a shrewd series of judicial decisions, followed by difficult and protracted political negotiations, of a great many of the long-standing grievances over language rights for Canada's official-language minority communities and the francophone majority community of Quebec, has had a paradoxical outcome. These developments have significantly reinforced the pan-Canadian conception of linguistic duality between Canada's English-speaking communities

²³³ R.S.Q. c. C-11.

²³⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

and its francophone and Acadian minority communities. Court and political decisions pertaining to Bill 101, while stripping Quebec's language regime of its worst discriminatory features, have preserved the essence of the *Charter of French language*²³⁵ which has allowed the French language and culture to thrive throughout the public and private economies of Quebec. Quebec's francophone majority community will, perhaps, be called upon one day to decide whether its continued survival and blossoming requires a fully independent Quebec state which would exercise exclusive control over language policy and law.

²³⁵ R.S.Q. c. C-11.