CANADA'S SYSTEM OF OFFICIAL BILINGUALISM: CONSTITUTIONAL GUARANTEES FOR THE LEGISLATIVE PROCESS

*Joseph Eliot Magnet**

I. THE SYSTEM OF OFFICIAL BILINGUALISM

Canada's system of official bilingualism comprises a network of heterogeneous components institutionalized in all sectors of government. The components include international, constitutional and domestic laws;[1] regulatory and watchdog agencies;[2] government structures;[3] service institutions;[4] and institutionalized political conflict.[5]

The system of official bilingualism has one overarching purpose: to ensure unobstructed access to either of Canada's two official languages as actors interface with a broad spectrum of governmental activity. The system is Canada's means to create relative equality between Canada's two major of linguistic communities in the machinery of government. As the Supreme Court of Canada said in *Reference Re Manitoba Language Rights*: "the purpose of both s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867* . . . [is] to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike".[6] The system operates effectively only to the extent that this purpose is achieved.

---

* Professor of Law, University of Ottawa. Heartfelt thanks to my friend and research assistant, Scott Fletcher, for his relentless pursuit of the elusive and his lively imagination in deciphering it.

[1] International Law: *International Covenant on Civil and Political Rights*, (19 December 1966) 1976 Can. T.S. No. 47, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368, art. 27; Constitutional Law: *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 133 (formerly *British North America Act, 1867*); *The Manitoba Act, 1870*, S.C. 1870 (3d Sess.), c. 3, s. 23, *reprinted in* R.S.C. 1970, App. II at 247 (No. 8); *The North-West Territories Act, 1875*, R.S.C. 1886, c. 50, s. 110; *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 16-23; Domestic Law: *Official Languages Act*, R.S.C. 1970, c. 0-2; *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. 0-1; *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, S.N.B. 1981, c. 0-1.1; *Charter of the French Language*, R.S.Q. 1977, c. C-11; *Criminal Code*, R.S.C. 1970, c. C-34, *as am.* S.C. 1977-78, c. 36, s. 1 (adding s. 462.1 to the *Criminal Code*); *Courts of Justice Act, 1984*, S.O. 1984, c. 11, ss. 135-6, Ontario Legislative Assembly, Standing Order 19A; Bill 8, *An Act to provide for French Language Services in the Government of Ontario*. (Royal assent given Nov. 18, 1986).

The system originates in the great national compromises which made Canadian Confederation possible in the last century. A little noticed feature of the Confederation bargain between French and English speaking communities is that in the immediate pre-Confederation period 1840-1866, under the constitutional regime of *The Union Act, 1840*,[7] all of the difficult questions of linguistic security had been worked out in the law and practice pertaining to the governmental structures operating under the 1840 constitution. Thus, in 1867, the Fathers of Confederation had little work to do on the language question. It occupied little of their time and provoked modest comments in the Confederation Debates in the then Provincial Parliament of Canada. As the language question had more or less been solved, the Fathers of Confederation searched for, and agreed upon, a means to protect the *status quo*, albeit with certain unobstrusive modifications. The major constitutional component of the present system of official bilingualism was born in the *status quo ante* 1867 and still retains its original inspiration.

There is a multitude of provincial legislation containing explicit or implicit language requirements, most of which reinforce the dominant position of the English language and impact negatively on effective operation of the system of official bilingualism. In this regard, legislation in British Columbia and Ontario is cited and reviewed by Sanda Magnet and Joseph Magnet in *Mobility Rights: Personal Mobility and the Canadian Economic Union* in M. Krasnick (Research Co-ordinator) PERSPECTIVES ON THE CANADIAN ECONOMIC UNION, Vol. 60 (Toronto: University of Toronto Press, 1986) (published in co-operation with the Royal Commission on the Economic Union and Development Prospects for Canada) [hereinafter *Mobility Rights*]. For example, British Columbia requires competency in English for mine workers, power engineers, private investigators, doctors, pharmacists, veterinarians and practical nurses. It also requires that records be kept in English pertaining to employee wages and holidays, and concerning potential employees. The province examines in English candidates for licensure under the *Real Estate Act*, R.S.B.C. 1979, c. 356, ss. 3-4, *as am.* S.B.C. 1982, c. 76, s. 33, S.B.C. 1984, c. 26, s. 43; the *Notaries Act*, R.S.B.C. 1979, c. 299, s. 4, *as rep.* S.B.C. 1981, c. 23, ss. 4-9, *as am.* S.B.C. 1985, c. 68, s. 100; the *Mortgage Brokers Act*, R.S.B.C. 1979, c. 283; and the *Pesticide Control Act*, R.S.B.C. 1979, c. 322, ss. 4, 8. Training for many professions in British Columbia must be done at specified institutions, where instruction is offered only in English. Certain lengthy prescribed forms are available only in English and must be completed prior to licensure or registration to carry on certain businesses, such as community care facilities, veterinary laboratories, travel agencies or motor dealerships. *Mobility Rights, ibid.*

[2] Official Language Commissioner, established under Federal and New Brunswick legislation (*see, e.g., Official Languages Act*, R.S.C. 1970, c. 0-2, ss. 19-34, *as am.* S.C. 1981, c. 50, s. 24); Office de la Langue Française, Commission de toponymie, Commission de surveillance and the Conseil de la langue Française, established under Quebec's *Charter of the French Language*, R.S.Q. 1977, c. C-11, ss. 100, 122, 158, 186; Standing Joint Committee of the Senate and House of Commons on Official Languages Policy and Programs.

[3] Certain government departments have separate French and English language structures. Manitoba, for example, has two Assistant Deputy Ministers of Education with separate responsibilities for English and French language education; Ontario has an Office of Francophone Affairs in the Cabinet Office.

[4] Certain institutions service principally official language minorities. Université d'Ottawa, for example, under s. 4(c) of the *University of Ottawa Act, 1965*, S.O. 1965, c.

As a nineteenth century invention, the system of official bilingualism has required and still requires continual maintenance by legislatures, courts and executive instrumentalities in order to function smoothly. The several components of the system must be frequently updated, redesigned, supplemented or replaced as the system evolves. Without intelligent maintenance, the system's components cease to mesh easily in pursuit of overarching purposes. Canadian history teaches that protracted periods of neglect result in breakdown of the system: the separate components contradict rather than complement each other. Canadian history also illustrates that when the system falls into disrepair, political conflict rages along the seams of the Confederation bargain, driving major linguistic communities apart and threatening to erode the foundation on which the grand Canadian experiment is erected.

At the heart of the system of official bilingualism are broadly defined rights, designed to assure unhindered participation by both language groups in governmental structures and institutions. The rights include the ability to speak and be understood in either official language in the legislative process and to have all documents relevant to making legislation in both official languages. The rights embrace expression in either official language in the courts. Canada's system of official bilingualism requires the right to speak and be understood in either official language before emanations of the state which provide public services such as quasi-

---

137, has as one of his objects and purposes, "to further bilingualism and biculturalism and to preserve and develop French culture in Ontario". Similar functions are served, whether legislatively or administratively, by institutions such as Collège St-Boniface (Manitoba), Royal Victoria Hospital, McGill University, the Protestant School Board of Greater Montreal (Quebec), and others.

[5] The Government of Canada provides funds to minority language associations in all provinces and also to La Fédération des francophones hors Québec. These are hybrid entities, providing some services, but their chief impact is as political lobbies on the provincial and federal governments. As such, the associations regularly come into conflict with organized and spontaneous majority opinion. The conflicts are often spectacular, as was the case with La Société Franco-Manitobaine during the language rights crisis of 1983-84, and La Fédération des Acadiens de la Nouvelle-Ecosse during the Acadian School battles in 1985. These conflicts are built in, or institutionalized, as a result of the creation and maintenance of the minority language associations and the endowment of them, sometimes by statute, of political lobby purposes.

[6] (1985), [1985] 1 S.C.R. 721 at 739 (*sub nom. Reference Re Language Rights Under the Manitoba Act, 1870*) 19 D.L.R. (4th) 1 at 15 [hereinafter *Manitoba Language Rights Reference*]. The Court was adopting the position put forward by La Société Franco-Manitobaine in both this case and *MacDonald* v. *City of Montreal* (1986), [1986] 1 S.C.R. 460 [hereinafter *MacDonald*]. *See also* the factums of La Société Franco-Manitobaine (Joseph Eliot Magnet, counsel), in both cases, where this proposition is advanced. While the proposition was accepted in the *Manitoba Language Rights Reference*, it was explained away in *MacDonald*. *See also P.G. du Quebec* c. *Collier* (1985), [1985] 2 C.A. 599 at 564, (*sub nom. A.G. Quebec* v. *Collier*) 23 D.L.R. (4th) 339 at 341 (Qué.), leave to appeal to S.C.C. granted, February 28, 1986 [hereinafter *Collier*], wherein Turgeon J. stated: "Les Pères de la Confédération désiraient offrir aux résidents francophones de notre pays la possibilité de participer aux débats du Parlement sur une base égale avec les anglophones."

[7] (U.K.), 3 & 4 Vict., c. 35, *reprinted in* R.S.C. 1970, App. II at 163 (No. 4).

judicial and administrative tribunals, Crown corporations, ombudsmen and the electoral system. The system strives towards equitable participation by both linguistic communities in the public service and thus incorporates the right to work in the state machinery in either official language. Finally, the system seeks to maintain the relative strength and integrity of existing linguistic communities. To the goal of replenishing their ranks, the system includes the right to go to school in the official language of choice.

The system's components are incomplete with respect to protecting the integrity of existing linguistic communities. The system lacks efficient means to maintain official language communities against shrinkage by assimilation and out-migration. It lacks a sufficient immigrations policy, a network of nurturing institutions to support linguistic communities, management and control of essential institutions by linguistic minorities and economic structures adequately attuned to language questions. These are the key levers of state power that impact on the numbers and locations of persons using a particular language and thus on the viability of linguistic communities pressured by assimilation and demographic restructuring.[8]

An effective system of official bilingualism must also embody an intelligible network of principles by which the exercise of official language rights by a person or groups can be reconciled with equal opportunity for other persons or groups to enjoy them. It must be sufficiently flexible so as to minimize distortions and costs in bureaucratic structures. Equally, the system must accommodate other societal interests, such as planned demography, the accommodation of ethnic minorities and indigenous populations, immigration and economic policy and the like.

A guarantee of official language rights is accomplished by limitations on state power to abridge them and limitations on state power to create governmental structures which would unduly restrict participation of official language minorities. Official language rights are equally manifested as affirmative duties on government to promote participation in the system, to eliminate indirect obstacles to participation and to make information available.

Effective operation of the system requires a realistic adminstrative structure. There must be a framework of doctrines, practices and institutions which will facilitate the participation of official language minorities in governmental structures.

Effective operation of the system of official bilingualism also requires understanding of its legal foundation. This in no way underestimates the importance of other facets of the system, such as political consensus, demographic trends, economic institutions, public attitudes and philosophy and the media. Nevertheless, Canadians depend on legal institutions in a major way for maintaining the system of official bilingualism. While other aspects of the system cannot be ignored, any

---

[8] *See generally* J.E. Magnet, *The Future of Official Language Minorities* (1986) 27 C. de D. 189 [hereinafter *Official Language Minorities*].

serious understanding of the system must involve analysis of its legal underpinning.

While it is possible to imagine all components of the system of official bilingualism working together harmoniously in pursuit of high priority public policies, that is not the Canadian reality. The system rarely operates smoothly. Its erratic functioning has produced several spectacular national crises, driving major Canadian communities apart, reverberating in inter-provincial and federal-provincial conflict and, on occasion, threatening to incinerate the basis of the national compromises upon which Canada's federal system is constructed.

The reality is that the components of the system lack coherent motivation. Actors operating the system lack uniform purposes. The components fail to mesh; clear overarching purposes are no longer apparent. Legal guarantees are stated principally at the constitutional level. Like most constitutional guarantees, the texts are ultra-general. Until recently, there have been few opportunities for judicial consideration. The constitutional texts, as glossed by the courts, fail to indicate clear and determined purposes. They appear as fragmented obligations on government to do a particular thing here, refrain from some other action there. Courts have thus read them narrowly in ignorance of their purposive drive.[9] There is little useful doctrine; virtually none that gives clear signals to actors in the system. The system attracts exploitation by the politically opportunistic.

---

[9] *See, e.g., Walsh* v. *City of Montreal* (1980), [1980] C.S. 1054, 55 C.C.C. (2d) 299 (Qué.); *Robin* v. *Collège de Saint-Boniface* (1984), 30 Man. R. 50, 15 D.L.R. (4th) 198 (C.A.). In these cases, the respective Courts took a literal reading of the court clause of official bilingualism. This resulted in a narrow, fragmented reading of the rights, highly detrimental to official language communities. The curious implication of both cases is that the State has language rights that may be asserted against official language communities. Equally curious is the attitude of the Department of Justice. In the *MacDonald* case (*supra*, note 6), the Department argued against official language communities, stating in its factum, "A broad and generous interpretation . . . [of language rights] cannot be used." In the *St. Jean* case, *infra*, note 15, the Department intervened against the extension of official bilingualism to the Yukon Territory, stating in its factum that while this was the government's "legal" position, the government's "political" position was in favour of extending bilingualism. The curiosity of the government expending time and money to send lawyers into court in cases which could be decided either way, to argue for positions that the government considers undesirable may be left to pass without further comment. Most curious of all is the attitude of the Supreme Court of Canada in the *MacDonald* case (*ibid.*) and in *Société des Acadiens du Nouveau-Brunswick Inc.* v. *Association of Parents for Fairness in Education* (1986), [1986] 1 S.C.R. 549, 66 N.R. 173 [hereinafter *Société des Acadiens*]. In *MacDonald*, the Supreme Court of Canada stated:

> Section 133 has not introduced a comprehensive scheme or system of official bilingualism, even potentially, but a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism at the option of the speaker in Parliamentary debates and at the option of the speaker, writer or issuer in judicial proceedings or processes. Such a limited scheme can perhaps be said to facilitate communication and understanding, up to a point, but only as far as it goes and it does not guarantee that the speaker, writer or issuer of proceedings of processes will be understood in the language of his choice by those he is addressing.
>
> This incomplete but precise scheme is a constitutional minimum. . . . The

Unscrupulous politicians have made political hay by perverting the system, encouraging one community to fear or attack another.[10] The constitutional elements of the system are rigid, without safety valves through which pent-up political steam can escape. Executive and legislative instrumentalities are inconstant watchdogs and regulators. They act with contradictory purposes and motives. They send few clear signals.

These difficulties did not exist in 1867. They have occurred because of failure to renovate and maintain the system properly in response to large scale demographic and infrastructure changes. These phenomena have eclipsed most provincial francophone communities outside of Quebec and

---

scheme is couched in a language which is capable of containing necessary implications, as was held in *Blaikie No. 1* and *Blaikie No. 2* with respect to certain forms of delegated legislation. It is a scheme which, being a constitutional minimum, not a maximum, can be complimented by federal and provincial legislation, as was held in the *Jones* case. And it is a scheme which can of course be modified by way of constitutional amendment. But it is not open to the courts, under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise.

Ibid. at 496, Beetz J. And in *Société des Acadiens* the Supreme Court of Canada stated:

This essential difference between the two types of rights [legal rights and language rights] dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the court should approach them with more restraint than they would in construing legal rights.

Ibid. at 578, 66 N.R. at 188, Beetz J. This is a narrow, stultifying interpretation of constitutional guarantees for official bilingualism. It is, of course, utterly at odds with the thesis advanced throughout this article. It also squarely contradicts all known canons of constitutional interpretation, particularly the "purposive" approach to *Charter* guarantees (*see Hunter* v. *Southam Inc.*, *infra*, note 22; *R.* v. *Big M Drug Mart Ltd.* (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321), and the "living tree" doctrine flowing from *Edwards* v. *A.G. for Canada* (1929), [1930] A.C. 124 (P.C.). The Supreme Court of Canada's excess of literalism contradicts with the broad purposive approach to language guarantees required by the Court in its recent jurisprudence. In *A.G. Quebec* v. *Blaikie* (1979), [1979] 2 S.C.R. 1016, 101 D.L.R. (3d) 394 [hereinafter *Blaikie No. 1*], the Court said that section 133 "ought to be considered broadly" (*ibid*, at 1028, 101 D.L.R. (3d) at 402); it should not be read "over-technical" (*ibid.* at 1024, 101 D.L.R. (3d) at 400) so as to "truncate" its requirements (*ibid.* at 1027, 101 D.L.R. (3d) at 402). "[T]he proper approach to an entrenched provision . . . [like section 133] is to make it effective through the range of institutions . . . [to which it applies]" (*ibid.* at 1030, 101 D.L.R. (3d) at 404). These interpretational approaches strain towards principle. They reflect the inherent objective of constitutional guarantees for official bilingualism which, as the Supreme Court of Canada said previously in the *Manitoba Language Rights Reference*, is "to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike". *Supra*, note 6.

Does the Supreme Court of Canada's marked departure from accepted norms of constitutional interpretation in *MacDonald* and *Société des Acadiens* rest on a principled foundation? Mr. Justice Beetz retreats into literalism because, as he says, official language guarantees "resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union" (*MacDonald, supra*, note 6 at 496). This point fails to distinguish language guarantees from other *Charter* guarantees. All other *Charter* guarantees also resulted from a historical compromise. And is not the same true of all constitutional or legislative rights, particularly minority rights?

threaten to destroy those that remain.[11] At the same time, Ottawa has joined a protracted battle with Quebec over competing language policies and failed to win the support of the other provinces to the federal view. Quebec has taken initiatives quite at odds with federal policies; the other provinces have recalcitrantly refused to make significant progress in the channels cut by Ottawa. The resulting political fallout has fractured the unity and coherence of doctrine necessary to operate the system. For the past fifteen years, Ottawa, Quebec and the other provinces have not agreed about the purpose or utility of the system. Behind federal and provincial governments stand various actors and constituencies who must operate,

---

Mr. Justice Beetz seeks to draw from his historical compromise point the thesis that the Fathers of Confederation agreed upon a "precise scheme" of language guarantees which are specific. "[I]t is not open to the courts, under the guise of interpretation, to improve upon, supplement or amend this historical compromise" (*MacDonald, ibid.*). The crucial difficulty with Mr. Justice Beetz's approach is that it fails to examine the content of the compromise agreed to by the Fathers of Confederation. Rather, Mr. Justice Beetz seeks to divine the spirit of the Confederation compromise by literalism. This is a method of constitutional construction found unacceptable elsewhere because "the *Charter* should not be stultified 'by narrow technical literal interpretations without regard to its background and purposes'". *Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 at 28, 10 D.L.R. (4th) 491 at 518 (C.A.). (The Court, citing McKinnon A.C.J.O. for the Court in *Re Southam Inc. and R. (No. 1)* (1983), 41 O.R. (2d) 113 at 123, 146 D.L.R. (3d) 408 at 418 (C.A.)). If Mr. Justice Beetz had gone behond literalism and examined the expressed intention of the Fathers of Confederation, in the light of the text of section 133, he would have been constrained to reach a different result. The Fathers of Confederation intended to preserve the existing *status quo* with respect to language rights, with but minor modifications. In 1867 the *status quo* entitled an English criminal defendant, like MacDonald, to be summoned before the courts in the English language. It equally entitled litigants, like La Société des Acadiens and Minority Language School Board No. 50, to be heard by a judge fully competent in their language. Mr. Justice Beetz's literalism would read section 133 as repealing these rights. Mr. Justice Beetz ignores the fact that section 133 contains protections for minorities. Instead, he sees in the provision a new right for the majority, acting through the legislature and executive, to deal with minorities in the language of the majority. This is a result antithetical to the expressed intent of the Fathers of Confederation and more than a little strange as an interpretation of minority rights. As Madame Justice Wilson noted in dissent in *MacDonald*, the Court's curious interpretation permits "the litigant to use the language he or she understands but allow[s] those dealing with him or her to use the language he or she does not understand". This strange legalism provoked Her Ladyship to wonder: "What kind of linguistic protection would that be?" (MacDonald, *ibid.* at 540). Madame Justice Wilson further noted that the result reached by the majority, far from guaranteeing language rights, "fall[s] so short of that right as to effectively undermine it" (*ibid.* at 543). And, in a similar vein in *Société des Acadiens*, Chief Justice Dickson observed: "What good is a right to use one's language if those to whom one speaks cannot understand?" (*ibid.* at 566, 66 N.R. at 202).

The editorialists have universally condemned — rightly, in my view — the work of the Supreme Court of Canada in these cases. The *Globe and Mail* referred to "the smothering narrowness of [the Court's] position" — titling its editorial: "Hollow Language Right", *The (Toronto) Globe and Mail*, (7 May 1986) A6. In *Mercure* v. *A.G. Saskatchewan, infra*, note 15, appeal heard S.C.C. 26-27 November, 1986, the Court was asked to moderate *MacDonald* and *Société des Acadiens* on equality grounds implicit in the official bilingualism guarantee there at issue (s. 110, *North-West Territories Act*).

Be the criticism as it may, working out constitutional doctrine with respect to language rights is a tricky business. The Supreme Court of Canada has experimented with

renovate or participate in the system. These do so with the conflicting objectives evident in the major policy differences between the three camps. Some constituencies are committed to destroying the system and have convinced certain provincial governments to act in furtherance of that view.[12]

At the present day, redesign and renovation of the system is under active consideration in various quarters. The Departments of Justice and Secretary of State are studying reform of the *Official Languages Act*;[13] Parliament's Standing Joint Committee on Official Languages is examining all aspects of official languages policy;[14] several provinces are actively redesigning their provincial components. Finally, there is an unprecedented volume of litigation concerning official languages, almost wholly at the constitutional level. Thus, the hitherto dormant responsibility of the courts to renovate and maintain the system has also been activated.

One key element in the system of official bilingualism is the guarantee for the use of both official languages as the languages of the legislatures of Canada, Quebec, Manitoba, New Brunswick and, possibly, Alberta, Saskatchewan, the Yukon and Northwest Territories.[15] That guarantee is

---

a broad generous interpretation (*Blaikie No. 1* and *Blaikie No. 2, infra*, note 17), a purposive interpretation (*Manitoba Language Rights Reference, supra*, note 6) and narrow literalism (*MacDonald* and *Société des Acadiens*). It is the thesis of the present article that all these approaches to interpretation of constitutional guarantees for official bilingualism are fatally flawed. They rest on inadequate principles, or, in the instance of *MacDonald* and *Société des Acadiens*, no principle. The "systems approach" advocated in the present article is proposed as an antidote to the Supreme Court of Canada's absence of principles in the language rights area.

[10] The Regulation 17 crisis in Ontario in the beginning years of this century is one good example; the language rights crisis in Manitoba during 1983-84 is another.

[11] *See* J.E. Magnet, *The Charter's Official Language Provisions: The Implications of Entrenched Bilingualism* (1982) 4 SUP. CT. L. REV. 163-4ff [hereinafter *The Charter's Official Language Provisions*]; *Official Lanugage Minorities, supra*, note 8.

[12] The obvious example is the Government of Manitoba, 1976-81 headed by Premier Sterling Lyon.

[13] R.S.C. 1970, c. 0-2.

[14] *See* note 2, *supra*.

[15] *See* the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 133 (formerly the *British North America Act, 1867*); *The Manitoba Act, 1870*, S.C. 1870 (3d Sess.), c. 3, s. 23, *reprinted in* R.S.C. 1970, App. II at 247 (No. 8); the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, s. 18(2); and the *North-West Territories Act, 1875*, R.S.C. 1886, c. 50, s. 110. The "possibly" qualification is necessary because the courts are currently considering whether section 110 binds Alberta and Saskatchewan to official bilingualism. In this regard, *see Mercure* v. *A.G. Saskatchewan* (1985), [1986] 2 W.W.R. 1, (*sub nom. R.* v. *Mercure*), 24 D.L.R. (4th) 193 (Sask. C.A.), appeal heard S.C.C. 26-27 November, 1986; *Re Lefebvre and R.* (1982), 69 C.C.C. (2d) 448, 141 D.L.R. (3d) 460 (Alta. Q.B.) *aff'd* by the Court of Appeal of Alberta on 5 November, 1986 [unreported]. *R.* v. *Paquette* (1985), 63 Alta. R. 258, 22 D.L.R. (4th) 67 (Q.B.); *R.* v. *Tremblay* (1985), 41 Sask. R. 49, 20 C.C.C. (3d) 454 (Q.B.) Halvorson J.

In *R.* v. *Tremblay, ibid.*, the criminal charge was heard in accordance with the accused's request for a French trial. A reference was directed on the question of whether section 110 binds Saskatchewan to official bilingualism and, if so, to what extent. Whether the Territories are bound by official bilingualism under sections 16, 18 and 20 of the *Canadian Charter of Rights and Freedoms*, s. 33, Part 1 of the *Constitution Act, 1982*,

stated, *inter alia*, in section 133 of the *Constitution Act, 1867*, which, so far as material, provides:

> Either the English Language or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec, and both those Languages shall be used in the respective Records and Journals of those Houses.
>
> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.[16]

While some judicial consideration has been given to the final sentence of section 133,[17] none has been given to the "records and journals" clause.

In the *Manitoba Language Rights Reference*, the Supreme Court of Canada made clear that the commands of section 133 "are obligatory" in the sense that "they must be observed".[18] Where, as in Manitoba, there was wholesale violation of constitutional guarantees, the Court extended a delay to rectify the illegality until "the expiry of the minimum period necessary" to effect compliance.[19] Presumably, the Court would extend a similar delay to Alberta and Saskatchewan if the Court should hold that obligations for bilingualism bind those provinces under pre-Confederation provisions.

Although there is some uncertainty, the Supreme Court of Canada's opinions make reasonably clear the scope of the legislative material required to be in both languages under the clause in section 133 referring to Acts of the legislature.[20] But with respect to the "records and journals"

---

being Schedule B of the *Canada Act 1982* (U.K.), c. 11 [hereinafter the *Charter*] is also before the courts. In *R.* v. *St. Jean* (30 June 1983), (Y.T. Terr. Ct.) Bladon J. [unreported], the accused refused to pay several parking tickets on the basis of their being unilingual. A conviction was ordered. An appeal date was set for March 30, 1986 at the Yukon Territory Supreme Court, however, the Crown was granted a postponement over the opposition of the appellant, pursuant to a chambers motion (*St. Jean* v. *R.* (22 February 1986), (Y.T.S.C.) [unreported]) in order to allow negotiations (for official bilingualism) to continue between the Federal and Territorial governments. The negotiations broke down, the appeal was argued at the Yukon Territory Supreme Court. Meyer J. ruled against St. Jean on September 29, 1986. An appeal is pending.

Also of interest is *Paquette* v. *R. (No. 2)* (12 February 1986), (Alta. Q.B.) Sinclair J. [unreported], which considers whether statutory language rights within the authority of Parliament violate section 15 of the *Charter, ibid.*, if they are extended to some but not all of the provinces.

[16] (U.K.), 30 & 31 Vict., c. 3 (formerly the *British North America Act, 1867*).

[17] *See Blaikie No. 1, supra*, note 9; *A.G. Quebec* v. *Blaikie (1981)*, [1981] 1 S.C.R. 312, 123 D.L.R. (3d) 15 [hereinafter *Blaikie No. 2*]; *Manitoba Language Rights Reference, supra*, note 6.

[18] *Ibid.* at 740, 19 D.L.R. (4th) at 14.

[19] *Ibid.* at 768, 19 D.L.R. (4th) at 36-7.

[20] *See generally* the cases cited note 14, *supra*. The uncertainty arises with respect to incorporation by reference. When an Act incorporates technical schedules by reference, are the schedules subject to the same discipline of bilingualism as is the Act? In this regard, *see Kuger Inc.* c. *Commission de la Santé et de la Sécurité du Travail du Québec* (28 February 1983), (Qué. C.S.) Lacourcière J.C.S. [unreported]; *Mathurin* c. *Coffrages Dominic Ltée* (1982), [1983] C.S. 143, 147 D.L.R. (3d) 486 (Qué.) Barrette-Joncas J.C.S.

clause, the position is shrouded in obscurity. As the issue has never been litigated or written about seriously,[21] there is no useful guide. The practice of those jurisdictions subject to the discipline of official bilingualism varies considerably. Interpreting the dimensions of the "records and journals" clause, thus, presents the courts with an important opportunity to renovate a key component of the system of official bilingualism.

Constitutionalists are now very familiar with the "purposive" approach to constitutional interpretation expounded by the Supreme Court of Canada in *Hunter* v. *Southam Inc.*[22] While that approach is a useful beginning, it is the thesis of this article that more is required for courts to discharge their responsibility to maintain the system of official bilingualism. With respect to official bilingualism (and certain other networks in our legal order) a broader systems approach is to be preferred. In the present context a systems approach implies carefully renovating the legislative component in order to insure unobstructed access to either French or English, so that francophones and anglophones can participate on the basis of equality in all manifestations of the legislatures constitutionally obliged, particularly the law-making function. Renovation requires identifying the original design of the legislative guarantees reflected in the "records and journals" clause and resculpting them to take account of modern realities in the effective functioning of the system of official bilingualism. The proper method of analysis of the "records and journals" clause, thus, is as follows: exposing the pre and post-Confederation record keeping practices in the legislatures bound by section 133; identifying the pre and immediate post-Confederation law relating to legislative record keeping; examining British record keeping practices; the emergence of section 133; orthodox methods of legal interpretation of section 133; and the policy of section 133. This will fully identify the intentions of the Fathers of Confederation concerning the scope and function of the system of official bilingualism, the dimensions of the

---

[21] There are, however, minor exceptions. In *Blaikie No. 1, supra*, note 9, at the trial level, Chief Justice Deschênes took an initial approach to interpreting the "records and journals" clause. He held that the phrase embraced at least legislative minute books, journals, votes and proceedings, bills and laws adopted ((1978), [1978] C.S. 37 at 43ff, 85 D.L.R. (3d) 252 at 285ff (Qué.)). He went on to require that "the two languages *at the same time* must be used in the records and journals of the Legislature" (*ibid.* at 44, 85 D.L.R. (3d) at 260). It was held legally insufficient to record minutes originating in English, in English; and minutes originating in French, in French. *See also Manitoba Language Rights Reference, supra*, note 6. An, Chief Justice Freedman in *Forest* v. *Registrar of Court of Appeal* (1977), [1977] 5 W.W.R. 347 at 355, 77 D.L.R. (3d) at 454 (Man. C.A.) [hereinafter *Forest*] held that a mandatory interpretation of Manitoba's official bilingualism guarantee would mean that "the provincial Hansard would have to be printed in both languages". Counsel tried to raise the issue of the scope of the records and journals clause unsuccessfully in *Re Waite and R.* (1985), 25 D.L.R. (4th) 696 (Man. Q.B.). And, in *Collier, supra*, note 6, the issue was raised with greater urgency, but no studied interpretation was forthcoming from the Court. Leave to appeal to the S.C.C. was granted February 28, 1986, but at this point it is unclear whether the records and journals issue will be raised before the Court.

[22] (1984), [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

legislative component and its integration into the system. From this vantage point, a modern court will be able to assess the extent to which the legislative component requires renovation in order to function effectively in the changed circumstances under which the modern system of official bilingualism operates.

A. *Record Keeping Practices in Pre and Post-Confederation Governmental Structures*

Record keeping practices pertaining to modern day governmental structures in Canada date from the cession of sovereignty to England by France following France's defeat in the Seven Years War. At the surrender of Montreal in 1760, it was decided that all legislative records should remain in the Colony. Article 45 of the *Articles of Capitulation of Montreal* provided:

> The Registers, and other papers of the Supreme Council of Quebec, of the Prévoté and Admiralty of the said city; those of the Royal Jurisdictions of Trois Rivieres and Montreal; those of the Seignorial Juridictions of the colony; the minutes of the Acts of the Notaries of the towns and of the countries; and, in general, the acts, and other papers, that may serve to prove the estates and fortunes of the Citizens, shall remain in the colony, in the rolls of the jurisdictions on which these papers depend.[23]

The Governors of the Colony under the Military regime (1763-1774) and Civil regime (1774-1791) were required to keep detailed records of legislative proceedings. Article 11 of the Instructions to Governor Murray conferred power on the Governor, Assembly and Council to make Laws, Statutes and Ordinances. Article 11 then required:

> That all such Laws, Statutes and Ordinances be transmitted by You within three Months after their passing, or sooner, if Opportunity offers, to Our Commissioners for Trade and Plantations; that they be fairly abstracted in the Margents, and accompanied with very full and particular Observations upon each of them, that is to say, whether the same is introductive of a new Law, declaratory of a former Law, or does repeal a Law then before in being; and you are also to transmit in the fullest manner the Reasons and Occasion for enacting such Laws, or Ordinances, together with fair Copies of the Journals of the Proceedings of the Council and Assembly, which you are to require from the Clerks of the said Council and Assembly.[24]

---

[23] *Articles of Capitulation of Montreal*, in A. Shortt & A.G. Doughty, eds., DOCUMENTS RELATING TO THE CONSTITUTIONAL HISTORY OF CANADA (Ottawa: King's Printer, 1907) at 28 (English translation, French text found on page 8) [hereinafter Shortt & Doughty].

[24] *Instructions to Governor Murray*, in W.P.M. Kennedy ed., STATUTES, TREATIES AND DOCUMENTS OF THE CANADIAN CONSTITUTION 1713-1929 (London: Oxford University Press, 1930) at 45 [hereinafter Kennedy].

The instructions for record keeping and transmittal were repeated in substance to Governor Carleton under the military regime,[25] to subsequent Civil Governors under *The Quebec Act, 1774*[26] and to Governor Dorcester, as Governor of Upper and Lower Canada under *The Constitutional Act, 1791*.[27] It is crucial to notice that all the records of the Quebec Legislative Council, which was the sole legislative body established under *The Quebec Act*, 1774,[28] were kept in both English and French, from the very first session in 1774, until the very last session in 1791 when the Quebec Legislative Council was terminated by *The Constitutional Act, 1791*.[29]

Article II of *The Constitutional Act, 1791*,[30] created a Legislative Council and Legislative Assembly for the new province of Lower Canada. Preparation of Journals for the Legislative Council and Legislative Assembly was entrusted to a Clerk. The Clerk of the Legislative Council took an oath to make "true entries and records of the things done and past [in the Council]"; the Clerk of the Assembly undertook to make "true remembrances and journals of all things done and past [in the Assembly]".[31]

By law, these Journals were prepared in bilingual format. The *Rules and Regulations of the House of Assembly, Lower Canada* (1793) and 1796) provided:

> JOURNAL
> Resolved,
> I. That this House shall keep its Journal in two Registers, in one of which the proceedings of the House and the motions shall be wrote in the French Langugage, with a translation of the motions originally made in the English Language; and in the other shall be entered the proceedings of the House and the motions in the English Language, with a translation of the motions originally made in the French Language.[32]

---

[25] *See Instructions to Governor Carleton, 1768*, in Shortt & Doughty, *supra*, note 23 at 213; *Instructions to Governor Carleton, 1775*, in Shortt & Doughty, *supra*, note 23 at 422.

[26] (U.K.), 14 Geo. III, c. 83, *reprinted in* R.S.C. 1970, App. II at 131 (No. 2). *See Instructions to Governor Halimand*, in Shortt & Doughty, *ibid.* at 475; *Instructions to Lord Dorchester, 1786*, in Shortt & Doughty, *ibid.* at 555.

[27] (U.K.), 31 Geo.III, c. 31, *reprinted in* R.S.C. 1970, App. II at 139 (No. 3). *See Instructions to Lord Dorchester as Governor of Lower Canada*, in A.G. Doughty & D.A. McArthur, eds., DOCUMENTS RELATING TO THE CONSTITUTIONAL HISTORY OF CANADA (Ottawa: King's Printer, 1914) at 18.

[28] Art. XXII.

[29] Studies of the Royal Commission on Bilingualism and Biculturalism, THE LAW OF LANGUAGES IN CANADA, Vol. 10, by C-A. Sheppard (Ottawa: Information Canada, 1971) at 37-8.

[30] (U.K.), 31 Geo. III, c. 31, *reprinted in* R.S.C. 1970, App. II at 139 (No. 3).

[31] *Journal of the Legislative Council of Lower Canada* (1792) (transcription from a copy extant in the Public Archives of Canada).

[32] *Rules and Regulations of the House of Assembly, Lower Canada*, (1793) at 54; (1796) at 27 (transcription from copies extant in the Public Archives of Canada).

By resolution of the House of Assembly in 1793, repeated in 1796, all committee reports, addresses, messages and "*all other transactions or deliberations of the House*" were to be put in both languages and entered in the Journals (my emphasis).

> COMMITTEES
> Resolved,
> II. That the reports from special Committees, or from a Committee of the whole House, Addresses, Messages, and all other transactions or deliberations of the House, shall be put in both languages, and thus entered in the Registers, that is to say, the Resolutions arising from the deliberations of the private Committees in the registers of the House, and the minutes and proceedings of the said private Committees entered in both languages as above, in separate Registers; and the minutes of all committees shall be delivered to the clerk of the House, to be preserved with the other papers on the files.[33]

It is important to comprehend the vast scope of material originally included in the Legislative Journals and its subsequent expansion. From 1792 until the Confederation Period in 1867, "the Journals contain almost all the documents produced by or on behalf of . . . The House of Assembly [of Lower Canada and the United Province of Canada]".[34]

Two accounts of the Journals reveal their immense inclusion:

> The voluminous folio-books of the first years of publication of the "Journals" could easily be mistaken for the prolific but wearisome volumes of an encyclopaedia. While they do not have the same variety of content, they do have the same aspect and features. The "Journals" of that era contain not only an account of the deeds and actions of the Assembly, but also innumerable documents emanating not only from the legislative authority, but also from the executive and administrative authority. Reports of Committees of Inquiry on highways, navigation, finance, agriculture, the lumber business or the rum trade, so many inquiries amongst some even more unusual ones which embellish these publications in the same way as the design beautifies an illuminated letter. Thus, by examining these documents, historians have not only been able to write about the economic history of Lower Canada, but also about its hygiene and the eating and drinking habits of its people. Amongst other matters, the "Journals" also contained the annual reports of the government services which were not sufficiently organized at that time to be called "Departments". The first annual report was published in 1795. This was the Statement of the Public Accounts, submitted by the Governor-General for the approval of the Assembly. This report was followed in chronological order by the report of the Librarian (1804), the Commissioner of Communications (1816), the Agricultural Societies (1819), the Penitentiary Administration (1819), the Commissioner of Health (1832) and that of the Superintendent of Education (1844).[35]

---

[33] *Rules and Regulations of the House of Assembly, Lower Canada*, (1793) at 26; (1796) at 27, 29 (transcription from copies extant in the Public Archives of Canada).

[34] THE PARLIAMENTARY PUBLICATIONS OF THE PROVINCE OF QUEBEC (National Assembly of Quebec, 1977) at 3 [hereinafter PARLIAMENTARY PUBLICATIONS].

[35] PARLIAMENTARY PUBLICATIONS, *ibid.*

> Ils [the journals for the year 1801] contiennent les proclamations de l'administrateur civil prorogeant ou convoquant le Parlement, le discours du trône, l'adresse en réponse au discours du trone, le rapport financier (revenus et déboursés par catégories, liste civile, parfois importations et exportations, etc.), les pétitions et adresses à la Chambre, les rapports des comites parlementaires, les motions et amendements, les votes avec identification occasionnelle des adversaires, les messages de l'administrateur civil et ceux du Conseil legislatif, le discours de clôture, la liste des lois votées par les Chambres et ratifiées par le lieutenant-gouverneur ou le gouverneur, la liste des nouveaux députés après chaque élection, quelquefois des apprendices fort instructifs sur tel ou tel apprendices fort instructifs sur tel ou tel problème dans la colonie, etc. Inutile, cependant, d'y chercher le déroulement détaillé des débats, les textes des discours ou des projets de loi: il faut alors s'en rapporter aux journaux non officiels, i.e. autres que la Gazette de Québec et, à un moindre degré, *la Gazette de Montréal*.[36]

Inspection of the Journals reveals that they also contain verbal debates, petitions to the Assembly, addresses, messages, resolutions, orders, votes, committee reports and progress of bills.[37]

The Journals of the House of Assembly appear bilingually. The English text is on the left side of the page, the French text facing on the right.[38] In 1809, an unpaginated Appendix to the Journal appeared containing public accounts, imports and exports from Quebec and St. Jean, a parliamentary inquiry and similar materials. Beginning in 1810 many of these materials were entered in Appendices to the Journals, bearing the same volume number. The Appendices included *annual reports* of services and committes, Returns (papers presented pursuant to an Order of the House or an Address by the House to the Governor); Act Papers (Papers required by Act of Parliament to be laid before the House); and Papers presented pursuant to a standing order of the House Resolution.[39] The Journal Appendices were produced bilingually, in like manner as the Journals.[40]

The rebellions in the Canadas during 1837-38 caused Britain to suspend *The Constitutional Act, 1791*[41] and the Legislative Council and Assembly established thereunder. By *An Act to make temporary Provision for the Government of Lower Canada*,[42] a special Council was established for governance of Lower Canada. Article 22 of the *Rules of the Special Council of the Province of Lower Canada* provided that the Clerk was

---

[36] J. Hare & J-P. Wallot, LES IMPRIMÉS DANS LE BAS-CANADA 1801-1840 (Montréal: Presses de l'Université de Montréal, 1967) at 21-2 [hereinafter Hare & Wallot].

[37] *Journals of the House of Assembly of Lower Canada/Journaux de la Chambre d'Assemblée du Bas-Canada* (King's Printer, 1793), available at the Public Archives of Canada.

[38] Hare & Wallot, *supra*, note 36 at 2. *See also ibid.*

[39] Hare & Wallot, *ibid.* at 157. *See also* PARLIAMENTARY PUBLICATIONS, *supra*, note 34 at 5.

[40] This may be verified by inspecting the *Appendices du Journaux de l'Assemblée Législative de Bas-Canada/Appendix to the Journals of the Legislative Assembly of Lower Canada*, copies of which are extant in the Public Archives of Canada.

[41] (U.K.), 31 Geo. III, c. 31, *reprinted in* R.S.C. 1970, App. II at 139 (No. 3).

[42] (U.K.), 1 & 2 Vict., c. 9 (February 10, 1838).

required to "read all matters brought before the Council, he shall keep a Journal of the Proceedings, in which shall be entered in the order of succession, all subjects brought before the Council".[43] All Journals of the Special Council were printed and published bilingually as formerly under *The Constitutional Act, 1791*.[44]

The Special Council came to an end with the enactment of a new constitution in 1840. By *The Union Act, 1840*,[45] power was conferred on Her Majesty to declare by proclamation that the Provinces of Upper and Lower Canada be united into one province under the name of the Province of Canada. This Act stipulated for the governance of the new United Province. Article III established a legislature for the United Province consisting of "One Legislative Council and One Assembly".

The Assembly of the United Province published Journals and Appendices to the Journals from 1841 until 1859. These journals and appendices were published in a bilingual format, just as had been the case with the predecessor legislative bodies established under *The Constitutional Act, 1791*. A small change in practice occurred in that the English and French texts appeared in separate volumes rather than in the same volume on facing pages. The Appendices continued to expand. By 1854 the annual Appendices were enormous, comprising eleven volumes in that year.[46]

In 1860 there was a change. From 1860 until the United Province ceased to exist in 1867, the Appendices to the Journals of the United Province were published in a separate series of numbered volumes under the title *Sesssional Papers of the Legislative Assembly of the Province of Canada/Documents de la Session de l'Assemblée de la Province du Canada*. The series was published bilingually. The English text appeared in separate volumes from the French text.[47]

Immediately after Confederation in 1867 the newly created Province of Quebec continued the practice of publishing annual volumes of *Sessional Papers under the title Sessional Papers of the Legislature of Quebec/Documets de la Session de la Legislature de Québec*. The series was published until 1936. In 1916, though the official title remained unchanged, in practice the volumes were referred to as *Parliamentary*

---

[43] *Rules of the Special Council of the Province of Lower Canada, in Journals of the Special Council of the Province of Lower Canada/Journaux du Conseil Special de la Province du Bas-Canada*, (April 20, 1838).

[44] This may be verified by inspecting the *Journals of the Special Council of the Province of Lower Canada/Journaux du Conseil Spécial de la Province du Bas-Canada*, copies of which are extant in the Public Archives of Canada.

[45] (U.K.), 3 & 4 Vict., c. 35, *reprinted in* R.S.C. 1970, App. II at 163 (No. 4).

[46] These changes become evident and may be verified by inspecting the *Journals of the Legislative Assembly of the Province of Canada/Journaux de l'Assemblée Législative de la Province du Canada*, and the *Appendices to the Journals of the Legislative Assembly of the Province of Canada/Appendices des Journaux de l'Assemblée Législative de la Province du Canada*, copies of which are extant in the Public Archives of Canada.

[47] This may be verified by inspecting the *Sessional Papers of the Legislative Assembly of the Province of Canada/Documents de la Session de l'Assemblée Législative de la Province du Canada*, copies of which are available in the Public Archives of Canada.

Papers/Documents Parlementaires. The series was published bilingually. The English text appeared in separate volumes from the French text, as formerly was the case with the Sessional Papers at the United Province of Canada, 1860-1866.[48]

The Quebec series is described in a Government of Quebec publication as follows:

> Documents de las session. Vol. 1, 1869 – vol. 69, 1936.
>
> Cette collection constitue un vaste ensemble de publications gouvernementales. Elle couvre la période 1867 à 1936. Les *Documents de la session* groupent la majeure partie des publications annuelles du gouvernement, c'est-à-dire les rapports des départments ou sous-départments, ceux des commissions et des comités spéciaux ou permanents, enfin les Réponses aux adresses de l'Assemblée législative. . . .
>
> Publiés en français et en anglais (nous sommes donc en présence de deux collections distinctes puisque le gouvernement a commencé d'une façon systématique l'initiative des publications bilingues qu'en 1941-42) ces documents, groupés en volumes, sont parfois pourvus d'index généraux et souvent d'index propres aux différents rapports.
>
> Avec l'année 1915 les documents cessent d'être numérotés. De plus, en 1924, la collection, à l'imitation des documents fédéraux, prend le titre de *Documents parlementaires*.[49]

In 1937 an important change was made in that the various papers were no longer bound, but collected together in bulk and published on microfilm. Bilingual publication ceased on that date. The documents appear only in the language of the original submission. In 1968 the name of the series was changed to *Document d'Assemblée Nationale*. Publication was unilingual and, for the most part, in French. Obvious questions are now raised about the constitutionality of this practice and the validity of any *Acts* which flow from the unilingual documents as from 1936.[49a]

At its inception in 1867, the Parliament of Canada adopted the identical practice. Bilingual Sessional Papers were published in a separate series for English and French texts. The series lasted until 1925.

---

[48] This may be verified by inspecting the *Sessional Papers of the Legislature of Quebec/Documents de la Session de la Législature de Québec and the Parliamentary Papers/Documents Parlementaires*, copies of which are available in the Public Archives of Canada. *See also* PARLIAMENTARY PUBLICATIONS, *supra*, note 34 at 6-7.

[49] A. Beaulieu, J-C. Bonenfant & J. Hamelin, REPERTOIRE DES PUBLICATIONS GOUVERNEMENTALES DU QUEBEC DE 1867 A 1964 (Québec: Imprimeur de la reine, 1968) at 39.

[49a] *Manitoba language Rights Reference*, *supra*, note 6; *Blaikie No. 1*, *supra*, note 9, where the Supreme Court of Canada affirmed the statement by the Court of Appeal which said both languages must be used "at the same time . . . in the Records of the Legislature". See (1978) 85 D.L.R. (3d) 252 at 260-1.

B. *Record Keeping Law in Pre-Confederation Governmental Structures*

We have already noted the 1793 and 1796 *Rules* of the House of Assembly which sat under *The Constitutional Act, 1791*.[50] This parliamentary law required bilingualism in the Journals of the Assembly and it remained in effect until *The Constitutional Act, 1791* was suspended in the aftermath of the 1837-38 rebellions.[51]

The Legislative Assembly of the Province of Canada which sat under *The Union Act, 1840*[52] became subject to similar legal requirements at an early date. On December 19, 1844 the Assembly approved this motion:

> *Ordered* that all Bills and documents submitted to the consideration of this House, be printed in each of the English and French languages, in equal proportions.[53]

This Provision was incorporated into the *Rules and Standing Orders of the Legislative Assembly, of Canada* (1858) as article VIII, in similar language.[54]

In substance the 1844 order, as codified in the 1858 *Standing Orders*, provides that "all Bills and Documents submitted for the consideration of the House [shall be printed bilingually]".[55] A footnote to articles 93 and 94 of the *Rules* of the Assembly (1863), repeated as a footnote to article 94 of the 1866 *Rules*, makes it clear that the requirement for bilingualism in all documents had been complied with ever since the motion of 1844. Articles 93, 94 and the footnote are as follows:

> 93. All Bills shall be printed, before the Second Reading, in both languages, with the exception of Bills exclusively relating to Upper Canada, which may be printed in English only, unless otherwise required by the House.
>
> 94. On Motion for Printing any Paper being offered, the same shall be first submitted to the Standing Committee on Printing, for Report, before the Question is put thereon.
>
> Note —
>
> On the 19th December 1844, a Resolution was passed, directing "[t]hat all Bills and Documents submitted to the consideration of this House, be printed in each of the English and French languages, in equal proportions."

---

[50] *See supra*, note 33.

[51] This may be verified by inspecting the *Parliamentary Papers/Documents Parlementaires*, copies of which are extant in the Public Archives of Canada. *See also* PARLIAMENTARY PUBLICATIONS, *supra*, note 34 at 5.

[52] (U.K.), 3 & 4 Vict., c. 35, *reprinted in* R.S.C. 1970, App. II at 163 (No. 4).

[53] *Journal of the Legislative Assembly of the Province of Canada*, Vol. 4, (King's Printer, 1844-45) at 84.

[54] *See Rules and Standing Orders of the Legislative Assembly of Canada* (Toronto: John Lovell, 1858).

[55] *Ibid.*

> This Resolution (modified, as to Bills, by the 93rd Rule [)] has been acted upon ever since, except as regards the proportions of documents in each language, which are regulated by the Joint Committee on Printing (*Vide 17th Rep. of Com. on Printing, Journal of* 1860 [)]. (Appendix No. 10).[56]

These materials indicate that at the very eve of Confederation, the Law of the Parliament of the Province of Canada required that *all documents considered by the Parliament* be printed bilingually. The pre-Confederation Parliamentary Law indicates that at least twenty-three years prior to Confederation, the Parliament of the United Province had fulfilled the requirement that all documents submitted to the consideration of the Parliament of the United Province be bilingual. To this picture should be added what surfaces from review of parliamentary law relating to the Houses of Assembly of Lower Canada; that for its forty-nine-year life, the House of Assembly equally laboured under legal requirements for bilingualism in its Journals and Appendices, where *all transactions or deliberations of the House* were published with English and French texts facing.

C. *Emergence of Section 133*

During Debates on Confederation of the British North American colonies in the Parliament of the United Province of Canada, French Canadian members expressed concern about the scope of guarantees for use of the French language afforded by Resolution 46 of the Conference at Quebec. Resolution 46 provided that "both the English and French languages may be employed in the . . . Local Legislature of Lower Canada".[57] Mr. Geoffrion stated:

> We French-Canadian members, I repeat, ought to insist that the word "shall" be substituted for the words "may" in the resolution relating to this matter, with reference to the publication of the proceedings of the Legislature. . . . [I]t is the duty of the French-Canadian members of this House to induce the Government to embody the understanding arrived at amongst the members of the Conference in the Constitution, and to require that the guarantees said to be afforded to us by the Constitution shall be more clearly expressed than they are in the resolutions.[58]

Earlier, Mr. Geoffrion expressed anxiety that the proceedings of Parliament were insufficiently protected. "A close examination of this resolution shews at once", he said:

---

[56] *Rules, Orders, and Forms of Proceeding of the Legislative Assembly of Canada, 1866* (Ottawa: Hunter, Rose & Co., 1866).

[57] Resolution 46, The Quebec Conference.

[58] PARLIAMENTARY DEBATES ON THE SUBJECT OF THE CONFEDERATION OF THE BRITISH NORTH AMERICAN PROVINCES, printed by order of the 8th Provincial Parliament of Canada, 3d Sess., 1865 (Ottawa: King's Printer, 1951) at 782.

> that it does not declare that the French language is to be on the same footing as the English language in the Federal and Local Legislatures; in place of the word "shall," which ought to have been inserted in the resolution, the word used is "may," so that if the British majority decide that the *Votes and Proceedings* and Bills of the House shall be printed only in English, nothing can prevent the enactment taking effect.[59]

And Mr. Remillard said:

> It is feared that the laws, the *documents*, and the proceedings of the Federal Parliament are not to be printed in the French language.[60]

In response to this questioning Attorney General John A. Macdonald replied:

> I may state that the meaning of one of the resolutions adopted by the Conference is this, *that the rights of the French Canadian members as to the status of their language in the Federal Legislature shall be precisely the same as they now are in the present Legislature of Canada in every possible respect.* I have still further pleasure in stating that *the moment this was mentioned in Conference, the members of the deputation from the Lower Provinces unanimously stated that it was right and just*, and without one dissentient voice gave their adhesion to the reasonableness of the proposition *that the status of the French language, as regards the procedure in Parliament, the printing of measures, and everything of that kind, should be precisely the same as it is in this Legislature.*[61]

The French Canadian members remained unsatisfied. Mr. Dorion rose in reply:

> The Hon. Attorney General West stated that the intention of delegates at the Quebec Conference was to give the same guarantees for the use of the French language in the Federal Legislature, as now existed under the present union. I conceive, sir, that this is no guarantee whatsoever, for in the Union Act it was provided that the English language alone should be used in Parliament, and the French language was entirely prohibited; but this provision was subsequently repealed by the 11th and 12th Victoria, and the matter left to the discretion of the Legislature. So that if, tomorrow, this Legislature chose to vote that no other but the English language should be used in our proceedings, it might do so, and thereby forbid the use of the French language. There is, therefore, no guarantee for the continuance of the use of the language of the majority of the people of Lower Canada, but the will and the forebearance of the majority.[62]

The questions hit their target. Resolution 46 had to be amended to respond to the anxieties expressed. The amendments were designed to entrench the full range of pre-Confederation bilingualism, including the parliamentary law and practice relating to the legislative materials in pre-Confederation legislative structures. The amendments equally made clear

---

[59] *Ibid.* at 779 (original emphasis).
[60] *Ibid.* at 786 (my emphasis).
[61] *Ibid.* at 944 (my emphasis).
[62] *Ibid.* at 944.

that guarantees for official bilingualism were to be imperative, not permissive. Resolution 46 of the Quebec Conference was rewritten accordingly. "Records and Journals" was added in a first draft as article 43; the word "shall" replaced the word "may" in the third draft as article 81. The new provision therefore read "shall be used in the respective records and journals [of the Parliament of Canada and the Legislature of Quebec]".[63]

We may usefully summarize the major points arising from this review of pre and post-Confederation law and practice in the following way:

(a) The practice of all pre-Confederation governmental structures in Canada and Quebec was that all documents used by the Legislature, and recorded in Legislative Journals and Appendices, were bilingual.
(b) The Law of Lower Canada and of the United Province required bilingualism in *all legislative documents.*
(c) The Fathers of Confederation expressed serious concerns that bilingualism continue in parliamentary documents and proceedings after Confederation.
(d) The Government sponsoring section 133 of the *Constitution Act, 1867* assured the Parliament of the United Province that bilingualism in printing of parliamentary documents would remain precisely the same after Confederation as before.
(e) Section 133 was amended to reflect this intention better.
(f) The Parliament of Canada and the Legislative Assembly of Quebec acted pursuant to the declared intention of maintaining the status quo by printing their respective sessional documents bilingually from the beginning. These documents contained all materials considered by the House relevant to its legislative, administrative and judicial functions.

These points lead irresistably toward the conclusion that in designing a system to protect English and French speaking minorities, the Fathers of Confederation were pre-eminently concerned with the operation of the Legislature. What was desired in the legislative component of the system was complete bilingualism, complete in the sense that all documents used by the Legislature would be available in both English and French. Anglophones and francophones could thus participate fully in the legislative process in their own language, as they had done previously. They could speak their language in the Legislature and consider any document used by the Houses in their own language. One could hardly ask for more. It is significant that the energetic interveners in the Confederation Debates did not ask for more. The conclusion is irresistible that as everything was granted, there was no more at issue.

---

[63] J. Pope, ed., CONFEDERATION: BEING A SERIES OF HITHERTO UNPUBLISHED DOCUMENTS BEARING ON THE BRITISH NORTH AMERICAN ACT (Toronto: Carswell, 1895) at 156, 175-6.

D. *Legal Interpretation of Official Bilingualism*

I have suggested that a systems approach to constitutional interpretation of official bilingualism is to be preferred to "the austerity of tabulated legalism".[64] The systems approach builds on the broad purposive drive of section 133, and certainly, as suggested in *Hunter* v. *Southam Inc.*, gives that provision "a large and liberal interpretation", interpreting the "specific provisions of . . . [section 133] in the light of its larger objects".[65] Yet a systems approach requires more. It is insufficient for a court to merely take a generous, expanded interpretation of the original guarantee. Rather, courts should recognize their responsibility, in harness with the executive and legislative arms of government, to maintain, update, renovate, supplement and replace separate components of an integrated network in the Canadian legal order. This certainly involves assessing the limits of governmental power as comports with curial traditions of constitutional review, but it may also imply more. In proper cases, courts may have to expound affirmative obligations for government, of greater or lesser precision, to renovate, supplement, or replace components of the system, or to make information available. Abstract rights to receive particular documents, even if broadly interpreted, are of little value if those rights do not function as part of an overall system which can maintain the security of English and French communities, on the basis of relative equality, in the machinery of government. Constitutional guarantees for bilingualism should be treated as part of an operating system; not as isolated, fragmented entitlements.[66]

The broad purposive drive of the original guarantee forms a base from which to assess the design and intent of the system. It is equally useful to reach that base by more orthodox methods of legal interpretation — methods which would certainly have been in the minds of the legal advisors drafting the various Resolutions which resulted in section 133. With respect to the "records and journals" clause there are two useful guides: the doctrine of in pari materia and previous legislative uses of the concept "records and journals" by the pre-Confederation authorities.

1. *Statutes in Pari Materia*

Article 41 of *The Union Act, 1840*[67] stipulated the "Languages of Legislative Records". The article went on to specify what documents are and are not to be kept among the "records of the Legislative Council or

---

[64] The phrase is cited in *Minister of Home Affairs* v. *Fisher* (1980), [1980] A.C. 319 at 328, [1979] 3 All E.R. 21 at 25 (P.C.), but it is better known to Canadians for its repetition by Chief Justice Dickson in *Hunter* v. *Southam Inc.*, *supra*, note 22.

[65] *Ibid.* at 155, 11 D.L.R. (4th) at 650.

[66] *See generally* note 9, *supra*, where the conflicting tendencies in the Supreme Court of Canada on this point are explored.

[67] (U.K.), 3 & 4 Vict., c. 35, *reprinted in* R.S.C. 1970, App. II at 163 (No. 4).

Legislative Assembly''. Lord John Russel explained that article 41 ''dealt with English as the language of 'orginal record'".[68]

Addressed as it is to the language of Legislative Records, article 41 is *in pari materia*, or at least in the same category, with section 133 and subject to these general rules: (a) statutes *in pari materia* ''shall be taken and construed together, as one system, and as explanatory to each other''; (b) statutes in the same category ''may influence the meaning of the other, so as to produce harmony within the body of the law as a whole''. Article 41 may thus be read with section 133 as an aid to interpretation of the word ''Records'' therein.[69]

Article 41 details legislative records with great specificity. It is as broad as can possibly be, embracing ''all . . . public Instruments whatsoever relating to the said Legislative Council and Legislative Assembly''. This broad sweep is consistent with the 1844 motion of the Legislative Assembly of Canada requiring bilingualism in ''all . . . documents submitted to the consideration of this House''.[70]

Article 41 provides:

> And be it enacted, That from and after the said Re-union of the said two Provinces *all Writs, Proclamations, Instruments for summoning and calling together the Legislative Council and Legislative Assembly* of the Province of Canada, and *for proroguing and dissolving the same*, and all *Writs of Summons and Election, and all Writs and public Instruments whatsoever relating to the said Legislative Council and Legislative Assembly* or either of them, and *all Returns to such Writs and Instruments*, and *all Journals, Entries, and written or printed Proceedings, of what nature soever of the said Legislative Council and Legislative Assembly* . . . respectively, shall be in the English language only: Provided always, that this enactment shall not be construed to prevent translated Copies of any such Documents being made, but no such Copy shall be kept among the Records of the Legislative Council or Legislative Assembly, or be deemed in any Case to have the force of an original record.[71]

Article 41 of *The Union Act, 1840* was repealed by *The Union Act Amendment Act, 1848*,[72] which used substantially the same language. Article 41 of *The Union Act, 1840, The Union Act Amendment Act, 1848*,

---

[68] *See* Kennedy, *supra*, note 24 at 440, n. 1.

[69] *See R.* v. *Loxdale* (1758), 1 Burr. 445 at 447, 97 E.R. 394 at 396 (K.B.); E.A. Driedger, CONSTRUCTION OF STATUTES, 2d ed. (Toronto: Butterworths, 1983) at 159.

[70] *Supra*, note 54.

[71] *The Union Act, 1840* (U.K.), 3 & 4 Vict., c. 35, *reprinted in* R.S.C. 1970, App. II at 163 (No. 4).

[72] (U.K.), 11 & 12 Vict., c. 56. The text is as follows:

> Whereas by an act passed in the session of Parliament held in the third and fourth years of Her Present Majesty, intitled "An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada", it is amongst other things enacted that from and after the said reunion of the said two Provinces, *all writs, proclamations, instruments for summoning and calling together the Legislative Council and the Legislative Assembly* of the Province of Canada, and *for proroguing and dissolving the same*, and *all Writs of summons and elections*, and *all writs and public instruments whatsoever relating to the said Legislative*

article 8 of the *Standing Orders of the Legislative Assembly of Canada* (1858)[73] and section 133 of the *Constitution Act, 1867* all deal with the language of legislative records. All are enacted in the same category and all are *in pari materia*. It would thus be reasonable to read all together as explanatory of each other. In this light, it is easy to reach the conclusion that the word "Records" in section 133 of the *Constitution Act, 1867* embraces at least all items referred to in article 41 of *The Union Act, 1840*, and *The Union Act Amendment Act, 1848*, and in article 8 of the *Standing Orders of the Legislative Assembly of Canada* (1858). The conclusion implies that all documents used by the Legislature are required to be bilingual under section 133, as being included in the phrases "all . . . public instruments whatsoever relating to the . . . Legislative Assembly" and "all journals, entries and written or printed proceedings of what nature soever, of the . . . Legislative Assembly" in section 41 of *The Union Act, 1840*, and *The Union Act Amendment Act, 1848*, and the phrase "all . . . documents submitted to the consideration of this House" in article VIII of the *Standing Orders* (1858).

2. *Use of the Words "Parliamentary Records" by the Legislature*

The concept expressed in the words "Parliamentary Records" was well understood by legislators in the pre-Confederation period. A Select Committee of the Parliament of the United Province of Canada was appointed "to inquire into the state of the Judicial and *Parliamentary Records* in Lower Canada". The Committee issued its report on May 19, 1846.[74]

Council and Legislative Assembly, or either of them, and *all returns to such writs and instruments*, and *all journals, entries, and written or printed proceedings, of what nature soever, of the said Legislative Council and Legislative Assembly*, and of each of them respectively, and *all written or printed proceedings and reports of Committees of the Said Legislative Council and Legislative Assembly* respectively, shall be in the English language only: Provided always that said enactment shall not be construed to prevent translated copies of any such documents being made, but no such copy should be kept among the records of the Legislative Council or Legislative Assembly, or be deemed in any case to have the force of an original record: And whereas it is expedient to alter the law in this respect, in order that the Legislature of the Province of Canada or the said Legislative Council and Legislative Assembly respectively, may have power to make such regulations herein as to them they may seem advisable: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this act so much of the said recited Act as is hereintofore recited shall be repealed. (my emphasis).

[73] *See* note 54, *supra*.

[74] Select Committee appointed to inquire into the State of the Judicial and Parliamentary Records in Lower Canada, *Report*, in *Appendix to the Fifth Volume of the Journals of the Legislative Assembly of the Province of Canada* (App. K.K.), 9 Vict. (1846).

The Committee reported that:

> The Rolls, *Records and Journals* belonging to the Legislative Council of the late Province of Lower Canada . . . remain deposited in the vault of the *Evêché*, or Parliament House, at Quebec, formerly occupied, as at present, by the Journals, Archives, Rolls and Papers of that Body. Those Archives are valuable.
>
> The *Records and Papers* . . . appertaining to the Assembly of Lower Canada . . . are kept in the loft or garret of the said *Evêché*.
>
> All the *Records and Papers* belonging to the Assembly of the late Province of Upper Canada . . . were . . . destroyed by fire.[75]

The Minutes of Evidence taken by the Committee make clear that a wide spectrum of materials, including sessional papers, accounts, public instruments and so on, were retained as "records and journals" in the Parliament Building at Quebec.[76] These paper were under the legal control of the Clerk of the House.[77]

The Committee Report thus makes clear that the phrases "Parliamentary Records", "Records and Journals [of the Legislative Assembly]" and "Records and Papers [of the Legislative Assembly]" were terms in current usage in the pre-Confederation period. They were equally terms of legislative art, used as they were in the very title and style of a Select Parliamentary Committee. These words, as the parliamentary evidence demonstrates, embraced virtually every public document which came into the legal custody of the Clerk. It is these documents, used by the House and retained by the Clerk, which is what the constitution makers understood by the phrase "records and journals" employed in section 133. The conclusion arrived at is that all documents used in the House and retained in the Archives under the "*garde*"[78] or control of the Clerk are "records" within the meaning of section 133 and must be bilingual.

E. *British Record Keeping Practices*

Section 133 of the *Constitution Act, 1867* is an enactment of the United Kingdom Parliament. It is therefore useful to inquire as to the understanding of the term "records and journals" in British parliamentary practice to throw additional light on the original intent of the framers.

British practice with respect to parliamentary records of the House of Lords and House of Commons was well known at the time of Confederation. Prior to 1801, documents later included in the series of Sessional Papers were included in the body of the Journal (as in Lower

---

[75] *Ibid.* (my emphasis).

[76] *Ibid., Minutes of Evidence*, para. 32.

[77] *Rules, Orders, and Forms of Proceedings of the Legislative Assembly of Canada* (Quebec: Hunter, Rose & Co., 1863), rule 104: "The Clerk of the House shall be responsible for the safe keeping of all the *Papers and Records* of the House." (my emphasis).

[78] *Règlement de l'assemblée nationale du Québec*, rule 15(4).

Canada). After 1801, complete annual sets of printed Sessional Papers, numbered consecutively for each session, were published and this practice has been continued to the present day. A separate series exists for each of the House of Lords and House of Commons.[79]

The scope of documents included in the British series of Sessional Papers mirrors that found in the Canadian series. British Sessional Papers include:

1. Returns
2. Command papers
3. Act papers
4. Papers presented pursuant to a Standing Order; to a resolution of the House; to the Report of a Select Committee; or to a Church Assembly Measure
5. Papers laid pursuant to a subsidiary legislation
6. Petitions
7. Private Bill papers
8. Public Bill papers.[80]

British scholarship is unanimous in the belief that all public documents included in the British Sessional Papers constitute "records" of the British Parliament. Bond includes eight major items in his chapter "*Records* of the House of Commons". They consist of House of Commons proceedings (journals, and so on); Records of Committee proceedings; Records of Bills; Sessional Papers; Records of the Speaker (Minutes of Commissioners for regulating the Offices of the House of Commons); Small Classes (elections, et cetera); Office Records; and Records of the Sergeant at Arms Department.[81] Furthermore, Bond treats early papers bound in the Journals as "records" of the House.

---

[79] *See* M.F. Bond, GUIDE TO THE RECORDS OF PARLIAMENT (London: Queen's Printer, 1971) at 131ff, 232ff [hereinafter Bond]; F. Rodgers, A GUIDE TO BRITISH GOVERNMENT PUBLICATIONS (New York: H.W. Wilson, 1980) at 95.

[80] Bond, *ibid.* at 232. Categories 1-3 are terms of legal art. They may be more precisely defined as follows:

Command papers are papers presented to Parliament by command of the Sovereign. They are not required by statute to be laid before Parliament and include "treaties, agreements, and exchanges of notes with foreign states. . . . Annual reports of certain government departments and other organizations, reports of Royal Commissions and of some departmental committees and statistical reports on a wide variety of subjects". (C. Gordon, ed., ERSKINE MAY'S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT, 20th ed. (London: Butterworths, 1983) at 265 [hereinafter MAY'S TREATISE].

Act Papers are "papers presented to Parliament pursuant to statutory requirements. . . . [They] include such documents as annual reports and accounts of statutory and other bodies, statistical reviews and statements relating to the remuneration of members of the boards of nationalized industries". *Ibid.*

Returns consist of papers produced and presented to Parliament pursuant to a motion for a return. They are "made in response to the desire of the House expressed in an Order, or made pursuant to an Address by the House to the Crown". Bond, *ibid.*

[81] *Ibid.* at 199-201.

> The earliest domestic Commons *records* still extant are the manuscript Journals (from 1547), the original *Papers* bound in the *Journals* (1603-10) . . . and the *Papers* and Journals mixed with Lords records during the 17th c. and so preserved.[82]

These are the papers which, after 1801, were bound separately in the Sessional Papers series. Whether included in the Journal or in the Sessional Papers series, such documents are treated by the authors as "records" of the House.

Custody of the records mirrors that found in Canada. Under current British practice, "[t]he records of H.C. are in the custody of the Clerk of the House, except that the . . . series of Bills, Papers, etc., ordered to be printed by the House (together with the unprinted papers) are in the care of the Librarian".[83] Therefore, the Clerk of the House "is still the theoretical and legal custodian of all the Houses records and papers" although Sessional Papers remain in the care of the Librarian.[84] From this review we reach the same conclusion as previously: "records" as understood in British parliamentary law and practice means those public documents used by the Houses of Parliament, and kept in their archives (or library) under the legal control of the Clerk.[85]

F. *A Systems Approach*

The Fathers of Confederation intended to create a governmental structure equally open to the French and English languages. In the Legislature, both languages can be spoken and both languages are required in all documents considered by the House and retained in the archives under the Clerk's control. Both languages were equally protected in the courts.[86]

---

[82] *Ibid.* at 204 (my emphasis).

[83] *Ibid.*

[84] O. Williams, THE CLERICAL ORGANIZATION OF THE HOUSE OF COMMONS, 1661-1850 (Oxford: Clarendon Press, 1954) at 191, n. 1.

[85] This conclusion may be supported in yet another way, by reliance on *Blaikie No. 1, supra*, note 21, which was approved and adopted by the Supreme Court of Canada "on matters of detail and of story", (*supra*, note 9 at 1027, 101 D.L.R. (3d) at 401). In this important case, Chief Justice Deschênes probed the meaning of the word "Records" at length. Chief Justice Deschênes concluded that "c'est le mot archives qui rend le mieux son sens naturel. . . . Tout bien considéré, la Cour est d'opinion que, dans l'article 133, le mot *Records* se réfère aux archives de la Chambre". *Supra*, note 21 at 43-4, 85 D.L.R. (3d) at 258, 260.

Chief Justice Deschênes went on to note that "dans un corps legislatif, c'est sans doute la documentation relative aux projets de loi discutés et adoptés qui constitue l'élément le plus important de la documentation et le premier objet du souci du gardien des archives". *Ibid.* at 43, 85 D.L.R. (3d) at 259.

Thus, documentation relative to bills discussed, kept in the archives, would fall within the embrace of the word "records" in section 133.

[86] For a history of the court clause of section 133, *see* the Factum of the Société Franco Manitobaine (Joseph Eliot Magnet, counsel) in the *MacDonald* case, *supra*, note 6; J.E. Magnet, CONSTITUTIONAL LAW OF CANADA: CASES, NOTES AND MATERIALS, 1st Supp., (Toronto: Carswell, 1984) at 235ff; and *The Charter's Official Language Provisions, supra*, note 11 at 187ff.

These were the two significant emanations of government existing in 1867; the executive sector was not then developed as it is today. The framers insured that bilingualism guarantees were as strong as could possibly be. They were made obligatory and perched on top of twenty-seven years of good experience in the workings of the Legislative Assembly of Canada, where a satisfactory system of legislative bilingualism had evolved.

The system was thought to be protected, additionally, by political realities. "[I]t should not be forgotten", said Premier Taché in the Confederation Debates, "that if the [French Canadians] were in a majority in Lower Canada, the English would be in a majority in the General Government, and that no act of real injustice could take place . . . without its being reversed there".[87] Cartier emphasized that tolerance had to prevail. Any lack of liberality in English Canada would provoke retaliation in Quebec, and vice versa.

The Fathers of Confederation utterly misjudged the political realities. While Quebec remained tolerant of its anglophone minority, the provinces with anglophone majorities repeatedly attacked francophone schools,[88] and forbade the use of the French language in the provincial administrative machine.[89] These legislative incursions into the status of provincial francophone communities, in harness with high rates of anglophone immigration, interprovincial migration and assimilation, crippled most provincial francophone communities outside of Quebec, destroying their institutional structure and reducing their number to a point where many of the communities are no longer viable.[90] In the language of the Fédération des Francophones hors Québec, these communities have become "a family whose home has been destroyed by fire . . . without shelter, . . . [with] eyes fixed on odd belongings scattered her and there" — a people with an empty soul.[91] Similar pressures have recently thrust the anglo-Quebec minority into a process of "ineluctable decline".[92] Its size is diminishing rapidly, and it may soon plunge below the self-sufficient mark to the point where its numbers are insufficient to support its extensive institutional

---

[87] P.B. Waite, ed., THE CONFEDERATION DEBATES IN THE PROVINCE OF CANADA/1865 (Toronto: McClelland and Stewart, 1963) at 24.

[88] *Public Schools Act*, S.P.E.I. 1877, c. 1; *Public Schools Act*, S.B.C. 1958, c. 42, s. 62; *The Common Schools Act, 1871*, S.N.B. 1870-74 (2d Sess.), c. 21; *An Act Respecting the Department of Education*, S.M. 1890, c. 37; *An Act Respecting Public Schools*, S.M. 1890, c. 38; *Circular of Instructions* pursuant to the *Common Schools Act*, published in 32 O.L.R. at 252-4.

[89] *Official Language Act*, S.M. 1890, c. 14; *An Act respecting the Administration of Justice*, R.S.O. 1897, c. 324, s. 7; *An Act to amend the Registry Act*, S.O. 1895, c. 22, s. 7; *The Statutes Amendment Act, 1897*, S.O. 1897, c. 15, Sch. A, No. 70.

[90] *See Official Language Minorities, supra*, note 8.

[91] Fédération des Francophones hors Quebec, *The Heirs of Lord Durham: Manifesto of a Vanishing People*, trans. D. Norak, (Ottawa: Burns and MacEachern, 1978) at 19.

[92] This is a finding of fact by Chief Justice Deschênes in *Quebec Ass'n of Protestant School Bds. c. P.G. du Québec* (1982), [1982] C.S. 673, 140 D.L.R. (3d) 33 (Que.), *aff'd* [1983] C.A. 77, 1 D.L.R. (4th) 573, *aff'd* [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321.

network, no matter how tolerant may be, or may become, the attitude of the Quebec government.[93]

One of the "odd belongings" of official language minorities are the guarantees for official bilingualism in the Legislatures of Canada, Quebec, Manitoba, New Brunswick and, possibly, Alberta, Saskatchewan and the Territories. The practice of legislative bilingualism in these jurisdictions varies widely, but none of them respects the letter or spirit of the "records and journals" clause by which they are constitutionally obliged. The records and journals of the prairie provinces and the territories are entirely in English.[94] In Quebec, the provincial *Journal des Débats* is published in the language in which members happen to speak. If a member speaks in English, his speech is published in English. If a member speaks in French, the remarks are published in French. There is no interpretation[95] and certainly no simultaneous publication in English and French as required by *Blaikie No. 1*[96] and the *Manitoba Language Rights Reference*.[97] Committee reports are published only in French. The *Agenda Paper* (Feuilleton) and *Votes and Proceedings* of the National Assembly are in English and French. The minute books are recorded in French only. They are then translated into English, edited and published bilingually as the *Votes and Proceedings*, after which the original notes are thrown away. In New Brunswick and Canada, most records and journals, including the *Order Paper, Votes and Proceedings* and *Hansard*[98] are translated and published in both languages, but there are gaps. Canada does not translate long technical schedules incorporated into its legislation by reference, even where the schedules have statutory force.

A full renovation of the records and journals clause requires very large scale intervention by the courts — intervention on a scale more massive than that needed in the *Manitoba Language Rights Reference*. Some will argue that the game isn't worth the candle. Official language minorities in the prairies, they will say, are smaller than German and

---

93 Between 1971-81 the community lost 158,000 people (20% in real terms) declining from 15% to 12.7% of provincial population and expected to fall further to 10% in the next fifteen years: J. Henripin, THE ENGLISH SPEAKING POPULATION OF QUEBEC: A DEMOLINGUISTIC PROJECTION (Alliance Quebec, 1984) at 19.

94 A theoretical exception must be made for Manitoba. French speeches in the Assembly are recorded in French, English speeches are recorded in English, in the provincial *Hansard* or Debates. But the practice amounts to unilingualism all the same.

95 The Supreme Court of Canada, in a split opinion, stated *obiter* that translations of parliamentary debates is not required by the constitutional guarantees. *See MacDonald, supra*, note 6 at 486, Beetz J. This issue was not before the Court. It is hard to understand why the Court would decide this important question without at least affording counsel an opportunity to make submissions.

96 *Supra*, note 9.

97 *Supra*, note 6.

98 In New Brunswick the provincial equivalent of *Hansard* is called the *Synoptic Report*; the provincial equivalent of the Votes and Proceedings is called *Synopsis of House Business*. This latter publication is prepared from the *Synoptic Report*, not from the Clerk's notes.

Ukranian minorities, not viable and not worth the expense of translating mountains of useless materials.

There are only two alternatives. Official bilingualism could be repealed in those jurisdictions. This would require constitutional amendment — resolutions of the Legislative Assemblies concerned, and of the Senate and House of Commons.[99] The Supreme Court of Canada rejected Manitoba's and Quebec's attempts at unilateral repeal of official bilingualism and was reaffirmed in this position by the constitution makers in 1982.[100] No forseeable government in Ottawa would consent to a repealing amendment, although modification is a possibility. Ottawa would almost certainly extract some constitutional *quid pro quo*: expanded services in exchange for abbreviating the translation task.[101] A second alternative is for the courts to abbreviate the translation task by a narrow interpretation of the records and journals clause. The effect would be palliation of official language minorities, while they continued their descent into obscurity. The courts would appear to protect official language communities by declaring their rights to be obligatory, yet, in reality, would expose the communities to the stingy spirit animating the provincial governments by shrinking the content of those rights. This would probably wash with many official language minorities, who are, in the main, weak and without effective leadership. However, it would be a cruel deception for which the courts have no constitutional mandate. As well, this strategy implies or accepts a future for official language communities that Canadians rejected when they strengthened official language rights by the constitutional reforms of 1982.

---

[99] *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), c. 11, s. 43.

[100] *See A.G. Manitoba* v. *Forest* (1979), [1979] 2 S.C.R. 1032, 101 D.L.R. (3d) 385; *Blaikie No. 1, supra*, note 9. I say the Court was reaffirmed by the Constitution makers because the *Constitution Act, 1982*, Schedule I, no. 2 declares that the *Manitoba Act, 1870* is part of the *Constitution of Canada*. Whether section 133 was part of the Constitution of Canada or part of the Constitution of the province (and was amendable unilaterally by the provincial legislatures) was the main issue in *Forest* and *Blaikie No. 1* cases. As well, subsection 52(3) requires that "amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada". There is no authority in the Constitution of Canada for repeal of official bilingualism, except by constitutional amendment under Part V of the *Constitution Act, 1982*, sections 41 and 43.

[101] This is the substance of the *Constitution Amendment Proclamation, 1983 (Manitoba Act)* introduced into the Manitoba Legislative Assembly on July 4, 1983. The Assembly was prorogued without the Resolution being adopted as required by section 43 of the *Constitution Act, 1982*. Thus, the proposed amendment died on the Order Paper. Ottawa is on record as supportive of such a deal. On October 6, 1983, the House of Commons, by resolution, "endorsed on behalf of all Canadians, the essence of the agreement". House of Commons Debates (*Hansard*) at 27816. And on February 24, 1984 the House of Commons, by resolution, "urge[d] the Legislative Assembly of Manitoba to consider such resolutions . . . in an urgent manner so as to ensure . . . timely passage". House of Commons Debates (*Hansard*) at 1710.

It is certainly true that if the Supreme Court of Canada renovates the records and journals component of the system of official bilingualism, this, by itself, will not significantly improve the *in extremis* condition of official language minorities. But then again, the Court is not responsible for all, or even most, components of the system of official bilingualism. In order for the status of official language communities to improve, equally large scale renovations of other components of the system will have to be made by other organs of government. The current interest in official language communities displayed by the executive and legislative branches may, or may not, bear fruit. However, the possibility that other organs of government may default in their responsibility to maintain separate components of the system is a lame excuse for the courts to adopt a palliation policy with respect to the records and journals clause which they superintend. The courts must presume good faith in the political arms of government. The Supreme Court of Canada should discharge its limited responsibility for maintaining and renovating the constitutional components of the system in the spirit of honest and co-operative partnership with coordinate branches of government. All branches of government, including the courts, should strive to make the system function effectively, to the purpose of preserving relative equality between Canada's two major linguistic communities in the governmental machine.

Section 133 was entrenched as part of the Constitution of Canada to relieve anxieties of the French speaking inhabitants of Quebec, that they be able to participate in the Parliament of Canada on the basis of equality. Section 133, and sister provisions, are a constitutional guarantee of equality to francophones and anglophones alike in the legislative processes at Ottawa and certain provincial capitals. This is why all documents laid on the table[102] and kept in the Archives of the House — all "records" — must be bilingual. It would be impossible for francophones to participate in the Parliament of Canada and certain legislatures on the basis of equality if documents read and used in the House were not available in French. The essential documentation relied on for making legislation — the legislative facts and opinions — would be unavailable to them. So too with anglophones in the legislative process at Quebec. If the word "Records" is narrowly interpreted — "truncated" in the forbidden sense explained by the Supreme Court of Canada in *Blaikie No. 1*[103] the crucial guarantee for equal participation by anglophones and francophones in the legislative process would be revealed as hollow. In that event, section 133 would fail "to be effective through the range of institutions [to which it applies]",[104] the Parliament of Canada and certain provincial legislatures.

---

[102] It is a principle of parliamentary law that all documents which are read or used in the House must be laid on the table and made accessible to general inspection: J. Redlich, THE PROCEDURE IN THE HOUSE OF COMMONS, Bk. II (London: Constable & Co., 1908) at 44.

[103] *Supra*, note 9 at 1027, 101 D.L.R. (3d) at 402.

[104] *Ibid.* at 1030, 101 D.L.R. (3d) at 404.

A systems approach to the "Records and Journals" clause, thus, implies complete institutional bilingualism in all documents laid on the table or used in making legislation. It requires also that government relentlessly remove all obstacles to equal participation of official language minorities in the legislative process and that government make information available about the bilingual legislative processes in order to stimulate participation. These are, no doubt, large scale undertakings in view of the fact that no constitutionally obliged legislature today complies with the "Records and Journals" clause and some have failed to comply completely for almost one hundred years. Nevertheless, the game is worth the candle. In 1867 the Fathers of Confederation made solemn promises for linguistic security to each other. These compromises made the Canada of today possible and created for us the opportunity for a rich heritage together. Four years ago, during patriation, we reaffirmed and strengthened these promises, earnestly rededicating ourselves to our great traditions, as part of our renewed commitment, to endure united.