

Articles

THE OFFICIAL LANGUAGE ACT OF QUÉBEC

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I. INTRODUCTION

The spring and summer of 1976 saw the reappearance of Language as a major topic of attention in Canada. The dispute over the use of French in aviation forced itself into the public consciousness and as a result revived, or revealed, the deep cultural splits that lie beneath our surface political unity. But the aviation dispute is just one rather acute symptom that can be chosen out of many. It appears that Canada is approaching a decisive turning point in the relations between its two major linguistic groups. Many anglophone Canadians resent the spread of french into the federal civil service and within Québec. Francophones in turn resent this resentment and wonder why anglophones cannot sympathize with their aspirations.

A recent cause of anglophone concern has been the infamous Bill 22, now more formally known as the *Official Language Act* of Québec. This Act was passed by the Québec legislature in the summer of 1974. Its passage occasioned much publicity and since that time various aspects of its implementation have been drawn to public attention with regularity. On the whole the impression left in the minds of most anglophone Canadians regarding this legislation has been distinctly negative.

In this essay, written in 1975 and revised to a very limited extent as of September 1976*, I have attempted what amounts to a defence of this Act. I have tried to show how it fits into the linguistic history of our country, that it is compatible with our constitutional law, and that it represents a positive development from both a national and an international perspective.

1. *An Historical Perspective*

In 1759 the British invasion force defeated the French garrison of Québec and completed its occupation of the colony of New France. There followed a brief period of martial administration until the war in Europe was ended by the Treaty of Paris in 1763. Article 4 of that Treaty ceded Canada to Britain, recognized the liberty of the Roman Catholic religion and allowed the withdrawal of French colonists who wished to return to France.

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* My revision has been greatly hampered by unavailability of recent Québec Superior Court Reports. In a test case in 1975 a Québec Superior Court judge found the Act to be constitutional. I have been unable to read this judgment which I believe is under appeal.

Nothing was said about private law or the use of language.¹

The orientation of the civil/colonial administration the British set up to govern their new possession was very assimilationist at the outset. But by 1774 the British had to alter this approach in order to maintain the neutrality of the Quêbécois during the American conflict. The *Quêbec Act*² of that year re-established French civil law in relation to "property and civil rights"³ and curtailed the anti-papist laws.⁴ There were no provisions regarding language, however both languages were used in the proceedings and records of the Legislative Council which advised the British governor till the *Constitutional Act* of 1791.⁵

Following the American separation, English settlement in Canada increased and with it returned the mood of assimilation. By 1791 the western part of the colony was predominantly English and this polarization was recognized and increased by the *Constitutional Act*⁶ of that year which divided the colony into Upper and Lower Canada. Upper Canada became more and more unilingual English, while a *de facto* bilingualism maintained a precarious existence in Lower Canada. But shortly after the Rebellion of 1837 the Imperial Parliament suspended the *Constitution Act* and replaced the Legislative Assembly of Lower Canada with an all-English special council.⁷ Lord Durham made his famous report advocating bestowing the blessings of English culture on the Quêbécois⁸ and, as a result, the *Act of Union* was passed in 1840.⁹ Section 41 for the first time declared English to be the sole language of debate and record in a unified legislature for both colonies. However concerted action by Francophone representatives soon overcame this *de jure* provision and when the Imperial Parliament repealed s.41 in 1848¹⁰ they were merely recognizing a *de facto* situation. The following year Lord Elgin read the throne speech in both languages and from that time on all official texts were printed in both languages except bills relating only to Upper Canada.

This question of the language of debate and records of Legislatures was very much an issue in the negotiations which

1. C.A. Sheppard, *The Law of Languages in Canada* (Information Canada, 1971), at p.14.

2. *An Act for making more effectual Provision for the Government of the Province of Quebec in North America 1774*, 14 Geo. III, c.83.

3. *Ibid.* Art., VIII, The Civil Law had continued *de facto* since the Conquest.

4. *Ibid.* Arts., V, VII.

5. N.1 *supra*, p.37.

6. 31 Geo. III, c.31.

7. 1838, 1 Vic., c.9, s.2.

8. *Report on the Affairs of British North America*, published in *Lord Durham's Report*, ed. C.P. Lucas, 3 vols. (Oxford, 1912).

9. 3-4 Vic., c.35.

10. 1848, 11-12 Vic., c.56 (U.K.).

lead to Confederation. Section 46 of the *Québec Resolutions* of 1864 permitted either French or English to be used in the federal Parliament, the legislature of Lower Canada and the federal and Lower Canadian Courts.¹¹ Strong pressure from the Québec representatives caused this to be toughened to include a mandatory requirement that records and acts of both legislatures be printed in both languages in the final provision — Section 133 of the *British North America Act of 1867*.¹²

In 1870 when Manitoba was brought into Canada, Section 23 of the *Manitoba Act*¹³ of the Dominion Parliament contained a similar guarantee for the Franco-Manitobans. From 1870 to 1890 all statutes and records were bilingual and Francophones had the right to use French in performing all official functions. However, those 20 years saw an influx of English-speaking settlers who swamped the existing Francophone population. In 1890 the new Anglophone majority abolished bilingualism.¹⁴ They did so despite the fact that the *Manitoba Act* had been affirmed by an Act of the Imperial Parliament, the *B.N.A. Act of 1871*.¹⁵

After Confederation Québec became more and more bilingual while the rest of the country became virtually unilingual. It was not until the Quiet Revolution in the early 60's that this more subtle drift of assimilation began to reverse, and a sense of re-awakening stirred in significant portions of the Québécois people. Long labouring under an inferiority complex imposed by a minority, the new consciousness took the form of a pride in the Québécois culture and language and a renewed affirmation of support for their survival and growth. Important segments of Québec's Francophone society began to see themselves as a Québec majority, rather than a Canadian minority.¹⁶

This consciousness found expression in a wide range of actions, from the arts to assassination. But, concurrent with a rising commitment to the Québécois culture among a large part of the most articulate citizens, has been the gradual erosion of the less conscious elements bombarded with North American culture by the new electronic media. Even more disturbing trends surfaced when evidence became available of falling birth

11. Maurice Olivier, *British North America Acts and Selected Statutes, 1867-1962* (Ottawa, 1962) p.46.

12. 1867, 30 - 1 Vic., c.3.

13. S.C. 1870, 33 Vic., c.3.

14. By means of *An Act to provide that the English Language shall be the Official Language of Province of Manitoba*, S.M. 1890, 53 Vic., c.14, now R.S.M. 1970, c.010.

15. 1871, 34-5 Vic., c.28, s.5 — These developments in Manitoba, including the Manitoba School's Question, had a profound effect in Québec. The Gendron Commission attributes the subsequent Québécois withdrawal from an active expansionist approach to their culture at least in part to these events in Manitoba. *Report of The Commission of Inquiry on the Position of the French Language and on Language Rights in Québec*, (Government of Québec, 1972), Vol. III, at p.11-12, 64.

16. Francophones make up over 80% of Québec's population — Anglophone's 10%. 80% of Canada's population have English as their mother tongue less than 30% are of French Mother tongue.

rates among the Francophone majority and the increasing choice of immigrants to join the Anglophone minority.¹⁷ They primarily expressed this choice by sending their children to the English-speaking denominational schools.

Since before Confederation the two religions had each had their own complete and separate educational system supported in Québec by public taxes. In 1960 the provincial Parent Commission¹⁸ recommended that all educational services be united within the framework of one department.¹⁹ This was done in 1964 but it was only with the passing of Bill 63²⁰ by the Union National Government in 1969 that religion was removed as an obstacle which had limited the choice of parents as regards language.²¹ The Act was meant to facilitate the access of non-catholic children to French-language schools, but its preservation and extension of the parents' right to choose the language of instruction of their children was soon questioned when it was perceived that, not only were immigrants choosing English schools, so were some Francophone parents. It was, at least in part, to restrict this freedom of choice that the Liberal government of Québec replaced Bill 63 with Bill 22 in the summer of 1974.²²

II. A CONSTITUTIONAL EVALUATION OF THE OFFICIAL LANGUAGE ACT OF QUÉBEC

The Official Language Act of Québec starts off by declaring "French is the official language of the province of Québec".²³ This treats language, as such, as a substantive jurisdiction of the province. It then goes on to specify the juridical effects of this provision on a number of areas of public activity. These specific provisions cover the language of the Public Administration, Public Utilities and Professional Bodies, the Labour Field, Business and Education. In addition the Act sets up Machinery for Supervision and Enforcement and contains a number of miscellaneous provisions. Each of these areas is a provincial responsibility and these provisions may be justified as ancillary to those jurisdictions. But first we will consider the case for substantive jurisdiction over language.

17. This evidence will be examined in Part III. See n.75, *infra*.

18. Royal Commission of Inquiry of Education of the Province of Québec.

19. N.15, *supra*, Vol. 3 at 226.

20. *An Act to promote the French Language in Québec*, R.S.Q. c.9.

21. N.15, *supra*, Vol. 3 at 228. This Commission of Inquiry on the Position of the French Language and on Language Rights in Québec was established about the same time, Dec. 1968. Its report was completed the end of 1972 and its findings and recommendations precipitated the replacement of Bill 63 with Bill 22.

22. *The Official Language Act*, S.Q. 1974, c.22. Section 112 repeals *the Act to promote the French Language in Québec*.

23. N.22, *supra*, s.1.

A. *The Substantive Jurisdiction over Language in Canada*

The concept of "official language" is a relatively new one to Canadian law. Apart from its use in the *title* of the Manitoba Act which decreed English to be the only language of the Assembly and courts of Manitoba,²⁴ it has only recently received legal recognition. From Conquest to Confederation no use of the term was made in any official text and it is not to be found in any of the B.N.A. Acts.²⁵ However, in 1968, following a Royal Commission and endless debate, the Parliament of Canada passed the *Official Languages Act*, 1968-69.²⁶ Section 2 of that Act declared that

"the English and French languages are the official languages of Canada for all purposes of the Parliament and Government of Canada, and possess and enjoy equality of status and equal rights and privileges as to their use in all the institutions of the Parliament and Government of Canada."

The Act does not define "official languages" except in that it goes on to describe the requirements for their use by the government of Canada and any judicial, quasi-judicial or administrative body established by federal act.

In 1969 New Brunswick passed an *Official Languages of New Brunswick Act*.²⁷ Section 2(b) of that Act defines "official languages" as those so established under Section 3 — English and French. Once again the term is defined by its consequences — the requirements for their use by the government and courts and the individual's right to use them in dealing with public authorities.

Hence the bald statement in Section 1 of the Québec *Official Language Act* that "French is the official language of the province of Québec" would seem to have little effect when standing alone, except by analogy to the federal and New Brunswick Acts. The drafters of the Act have, more explicitly than those of the federal or New Brunswick Acts, recognized this inherent lack of legal meaning to the term "official language". They expressly state in Section 5 that the juridical effects of Section 1 are set out in Title III. Once again the term is defined by specific provisions which follow.

24. N.14. *supra*.

25. The concept of "official language" is of course entirely foreign to English jurisprudence. How can one expect a people so ethnocentric as to think it unnecessary to put the name of their country on their stamps and money, to ever have reason to remark on the fact that only English may be used in public activities? Hence although numerous attempts were made to suppress the French language, English was never declared the official language. It should be noted that at the time Québec entered Confederation the assimilation-appeasement pendulum had swung back, with the repeal of s.41 of the *Act of Union*, and both languages were used in the Assembly and the courts of Québec. By the same token French does not seem to ever have been declared the official language of New France.

26. R.S.C. 1970, c.0-2.

27. S.N.B. 1969, c.18.

However it can be said that by declaring French to be its official language, Québec has exercised a form of substantive jurisdiction over language. Had it merely passed a law declaring French to be the language to be used in some or all of the areas expressly given to it under s.92 of the *B.N.A. Act of 1867*, then it could have been said to only have been exercising a power ancillary to given jurisdictions. Hence one must examine the question of the substantive jurisdiction over language in Canadian constitutional law.

As mentioned above the *B.N.A. Act of 1867* makes no express allocation of the substantive power over language. The sole provision dealing directly with language in Section 133 which states that:

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

It will be seen immediately that this is a strikingly limited provision. Not only does it say nothing of "official languages", but as Professor Sheppard has said, it neglects the questions of the languages of subordinate legislation, administrative tribunals and the internal workings of the public administration itself. He points out that

"the B.N.A. Act does not ensure that the public affairs of any given jurisdiction are conducted in either language. Except for the narrow terms of Section 133, there is no guarantee of the right of anyone to use French — or, for that matter, English."²⁸

In the recent Supreme Court of Canada decision, *Jones v. Attorney-General of Canada et al.*,²⁹ Chief Justice Laskin had occasion to consider Section 133 in delivering the judgment of the Court. He said at page 591-2

"the words of s.133, themselves point to its limited concern with language rights; and it is, in my view, correctly described as giving a constitutionally based right to any person to use English or French in legislative debates in the federal and Québec Houses and in any pleading or process in or issuing from any federally established Court or any Court of Québec, and as imposing an obligation of the use of English and French in the records and journals of the federal and Québec legislative Houses and in the printing and publication of federal and Québec legislation. There is no warrant for reading this provision, so limited to the federal and Québec legislative chambers and their legislation, and to the federal and Québec Courts, as being in effect a final and legislatively inalterable determina-

28. N.1 *supra* at p.99-100.

29. (1974) 45 D.L.R. (3d) 583.

tion for Canada, for Québec and for all other Provinces, of the limits of the privileged or obligatory use of English and French in public proceedings, in public institutions and in public communications. On its face, s.133 provides no special protection in the use of English and French; there is no other provision of the *British North America Act 1867* referable to the Parliament of Canada (apart from 91(1)) which deals with language as a legislative matter or otherwise... In establishing equality of use of the two languages, s.133 did so in relation to certain proceedings of a public character in specified legislative operations and in specified courts, but it went no farther."

It would seem, then, on the basis of this opinion, that as long as Québec fulfills the narrow requirements of Section 133, it is free to extend or restrict language rights at will, at least in so far as such actions don't conflict with federal legislation or affect federal institutions. In actual fact nothing in the *Official Language Act* need be read as curtailing Section 133 rights. The Chapter dealing with the Public Administration probably doesn't apply to the National Assembly,³⁰ and certainly not to the Courts,³¹ but even if they did, — individual citizens retain the right to address the Public Administration in either language³² and official texts and documents may be accompanied with an English version. Hence as long as the National Assembly continues to exercise this latter opinion³³ they are acting in accordance with the law. In short there is nothing in this Act which compels the Québec National Assembly or the Québec courts to breach Section 133 of the *B.N.A. Act of 1867*.

Even if this Act had altered Section 133 there are arguments that that part of Section 133 that applies to Québec is part of that Province's constitution and can be freely amended by virtue of Section 92(1).³⁴ It is unnecessary to examine the validity of these arguments in considering this Act.

Before leaving the question of the substantive jurisdiction over language one must carefully examine the two residual power provisions of the *B.N.A. Act of 1867*.³⁵ The federal government has the celebrated power to make laws "for the Peace, Order and Good Government of Canada in relation to (a matter)

30. Schedule A of the Act includes the government and the government departments in the Public Administration but only "texts and documents... declared (official) by law because of their public nature" are deemed official by Section 7 and that would seem to indicate that the bodies contemplated are not capable of making laws themselves.

31. They are not included in schedule A and, in any case, Section 16 imposes a duty of the Provincial Minister of Justice to "see that judgments pronounced by the courts in English are translated into the official language."

32. N.22, *supra*, s.10. Even within the Public Administration, s.15.

33. As indeed they have been since the passage of the Act — including publishing subordinate legislation, the regulations under this very Act, in both languages, s.8 permits inclusion of an English version.

34. Three good arguments can be advanced in favour of the province being able to amend s.133. First it was thought necessary to explicitly limit the Dominion Parliament's general amending ability to deny it such a power. (See s.91(1).) If part of s.133 formed part of the Constitution of Canada which Parliament could otherwise have amended — does not the residue come under the influence of the province's less hindered amending power? Secondly, the expression of one exception to the amending power in s.92(1), regarding the Lieutenant Governor, excludes other exceptions. Finally, Manitoba did virtually the same thing with impurity in 1890.

35. Section 93, of course, only applies to religion not language. See below under "Language of Instruction".

not coming within the Classes of Subjects . . . assigned exclusively to the . . . Provinces".³⁶ While the Provinces may make laws concerning "all matters of a merely local or private nature in the Province."³⁷ The question now becomes — is the declaration of an official provincial language a question involving a national dimension or is it of a local nature in the Province?

Clearly this is more a political than a legal question. Perhaps it could be argued that the *Official Language Act* represents a setback on the road to a bilingual nation and hence the federal Parliament ought to be empowered to bring Québec back into line. But should Québec be challenged for trying to accomplish *de jure* what the others practise *de facto*? Certainly the federal *Official Language Act* is a valid exercise of the "P.O.G.G." power limited though it is in application to federal institutions alone.³⁸ If the Québec Act conflicted with that federal Act, the federal Act would probably take precedence, particularly in areas ancillary to specified federal powers such as the language of federal institutions and criminal procedure.³⁹ However, in areas ancillary to provincial powers the opposite would probably take place.⁴⁰ But returning to the substantive question, the province ought to have a powerful argument that language, at least the internal language of communication, is basically a local matter and not the concern of the central government. However one cannot help but feel that should the federal government suddenly have a drastic change in attitude towards the *Official Language Act*, and disallow it on the grounds of preserving national unity, the courts would be reluctant to interfere with so basic a political judgment.⁴¹

Hence it would seem that the substantive power over language is not clearly divided between the federal Parliament and the provinces, but that either has the power to make laws regulating the linguistic aspects ancillary to an expressly given power.⁴²

B. *Language as an Ancillary Aspect of Given Jurisdictions*

As stated above, after establishing French as the official language, the Act goes on to require its use in various sectors of

36. N.12. *supra*, s.91.

37. *Ibid.*, s.92(16).

38. So recognized by Laskin C.J. at p.589 in *Jones*, n.29, *supra*.

39. *Ibid.*, at 589.

40. Laskin C.J. seems to recognize the dubiousness of a federal excursion into these areas, *Ibid.*, at 587.

41. It need hardly be said that the more likely result of such a move would be to drive Québec out of Confederation.

42. See Sheppard, n.1 at 102, *Jones* n.29 at the bottom of p.594. It appears that if the power is shared concurrently, the federal act would be paramount in the event of conflict — *Jones* at 595 and at 591 — "There is nothing in (s.133) or in any other parts of the *B.N.A. Act* . . . that precludes the conferring of additional rights or privileges or the imposing of additional obligations respecting the use of English and French if done in relation to matters within the competence of the enacting legislature".

provincial life. Each of these sectors must be examined to determine whether they are indeed areas falling under the provincial grant of powers.

1. *The Language of the Public Administration*

The provisions of this Chapter affect the Québec government, its departments and agencies, and all the municipal and school bodies of Québec,⁴³ including the universities. Basically the provisions require the use of French by these bodies as the language of internal communication and in their official communications with the public, corporations and governments.⁴⁴ But official texts and documents may be accompanied with an English version. In addition they require personnel decisions within these bodies to take into account knowledge of French.

All of the bodies affected are provincial institutions by virtue of the provinces' power over their own governments,⁴⁵ over "Municipal Institutions"⁴⁶ and over education.⁴⁷ The provisions impose obligations on these bodies alone. Individual rights to use either language, even to an extent regarding employees within the Public Administration, have not been restricted.⁴⁸ The Act even makes it obligatory for municipal and school bodies with 10% or more English-speaking members to draw up public texts in both languages.⁴⁹

In all this Chapter merely ensures that the vast Franco-phone majority of Québec will receive the services of their public institutions in their own language. The legal rights of the Anglophone minority and English school bodies are not altered.

2. *Public Utilities and Professional Bodies*

The provisions regarding these two groups of institutions are basically the same as for the public administration. French is required and English permitted. However the composition of these groups as set out in Schedule B of the Act raises some

43. Some special exceptions are allowed for school bodies containing 10% or more Anglophones (s.9) and further exceptions where they are the majority (s.13).

44. S.6, 7, 10, 12.

45. *Jones*, n.29 at p.589 — exclusive jurisdiction over its institutions is given the Federal Parliament, by analogy the provinces have similar power over their institutions. See also 92(1) and (4).

46. S.92(8).

47. S.93. It has long been established that s.93 does not confer any language rights. See below under Language of Instruction. In any case special exceptions were made in the Act for certain predominantly English-speaking school bodies to preserve their practices — s.9, 13, 14.

48. S.10 affirms that "every person may address the public administration in French or in English as he may choose". Again the significance of "person" will be discussed under the Language of Business, s.12 establishes French as the language of internal communication in the Public Administration but s.15 permits "remarks addressed to the chair at formal discussions held within the public administration" to be in either. The position of English majority school bodies will be discussed under "Instruction".

49. S.9. provided that has been their practice.

questions.⁵⁰ Included as Public Utilities are

"Health services and social services, the telephone and telegraph companies, the air, ship, autobus and rail transport companies, the companies which produce, transport, distribute or sell gas, water or electricity, and those enterprises which hold authorization from the transport commission."

Do these provisions apply to the federal government, federal works and undertakings, crown corporations, or companies incorporated federally, which provide any of the above services?⁵¹ And if so are they *intra vires* the provincial government?

Certainly it would be open for a court to interpret this Schedule to impliedly not include federal institutions or companies should that be necessary to avoid the provisions being *ultra vires*.⁵² In the case of direct federal government bodies in Québec it is unlikely that the provincial government can establish what the internal language will be or personnel policies or even exterior communications with the public.⁵³ Fortunately current federal policy is completely in accord with the requirements of the Act. As bodies become more remote from the federal government they become more liable to its effects. Federal works and undertakings and crown corporations are at roughly the same distance. It is possible that in the absence of conflicting federal legislation a province could require such bodies to communicate with the public in the majority language at least. However, the question of the effect of these provisions on corporations incorporated outside the Province is less certain. Provincial jurisdiction to determine linguistic practices of such corporations will be examined when the specific provisions for Business are considered but first the Chapter on the Labour Field will be evaluated.

3. *The Labour Field*

Section 25 makes French "the language of labour relations, to the extent and in accordance with the terms . . . (of) the (Québec) Labour Code". As that Code only applies to employees determined to be under provincial jurisdiction by virtue of their connection to some area of provincial authority, there can be no question of this provision intruding into the federal labour jurisdiction.

50. The composition of the Professional Corporation group and the specific provisions regarding this group are unobjectionable. Provinces have jurisdiction over Professional bodies by virtue of their power over civil rights in the Province — *Re Hayward* [1934] 2 D.L.R. 210 and *R. v. College of Physicians and Surgeons of B.C., ex.p.Ahmad*, (1971) 15 D.L.R. (3d) 105 (B.C.S.C.).

51. The Province must have authority over all other listed institutions in virtue of 92(7) — "Hospitals" 92(10) — Local Works and Undertakings. 92(11) — companies with Provincial objects.

52. Restrictive interpretation approach — *Batary v. A-G. for Sask.* (1966) 52 D.L.R. (2d) 125 (S.C.C.).

53. *Jones*, n.29 *supra* at 589.

The Labour Chapter further imposes obligations of employers to communicate with their employees at least in French, English accompaniment permitted.⁵⁴ Again this provision probably doesn't apply if the employer is the federal government and the situation of the extra-provincial companies will be examined below.

Finally the Chapter encourages the development of Francization programs in businesses and provides that only those firms certified as having met Francization standards or initiated programs can receive "premiums, subsidies, concession or benefits from the public administration . . . or to make with the government the contracts of purchase, service, lease or public works".⁵⁵ The jurisdictional validity of this section depends on whether it is seen as affecting the businesses or the government. Certainly the government can choose its own criteria for distributing subsidies (provided it's not federal money with strings attached) or making contracts. Whether it can deny a civil right or capacity to an extra-provincial company on this basis is another question. However, it is more likely that the former interpretation would prevail.

4. *Business*

The question of the applicability of this Act to corporations of an extra-provincial origin is most strikingly posed by Section 30 of the Act which denies juridical personality — legal status — to any corporation not having an adopted firm name in French. As regards the operations of Québec companies inside the province, this provision is valid by virtue of provincial jurisdiction over "companies with provincial objects" and "civil rights".⁵⁶ But are corporations incorporated outside the province subject to this and other provisions which impose obligations to use French while permitting English as well?⁵⁷ The question seems to turn on whether these obligations are so onerous as to significantly affect essential functions of the

54. S.24.

55. S.28.

56. ss.92(11)(13) of the *B.N.A. Act of 1867*.

57. Foreign companies probably have no more exemption from this Act than Québec companies, maybe less. *Van Buren Bridge Co. v. Madawaska* (1958) 15 D.L.R. 763 (N.B.C.A.). The position of companies incorporated in other provinces is less clear. They have no Federal charter to operate anywhere in Canada and the *Bonanza Creek Case* ([1915] A.C. 330 (P.C.)) seems to indicate that these companies have only been given by their home provinces the capacity to receive rights from other jurisdictions. This seems to indicate there is a discretion with the host province as to what rights it may grant and what conditions may be required to be met. How long would the Anglophone provinces permit an extra-provincial corporation to carry on business and communicate with the public only in Japanese or French? It is likely that the Province can require these two types of corporations to adopt a French name as a condition of their entry or continued presence in the province. English names may accompany.

operations of federal companies.⁵⁸ Certainly there is no suggestion that federal companies are being singled out for special treatment.⁵⁹ However it is entirely possible that the provision denying juridical personality would be found to be similar to attempting to require an operating licence and struck down as an attempt to deny the legal status that the federal Parliament had granted the corporation.⁶⁰ However, the more specific provisions regarding communication with the public and the government would probably be found not to affect federal operations significantly enough to prevent their application.⁶¹

The remaining business provisions would probably be valid for the same reasons. They deal with consumer contracts, products labelling, public notices and advertising — all within the Province. As elsewhere they require French and permit English. But the labelling provision, which neglects the ritual “English copy may accompany” and inserts the ominous “except within certain limits provided by regulation”, might give rise to an interpretation that unilingualism is being required.⁶² However, though this power is technically reserved to the Lieutenant-Governor in Council, the Act itself need not be read as prohibiting the use of English.

5. *The Language of Instruction*

The final area where special provision is made for the use of French involves the language of instruction. Chapter V freezes the amount of instruction done in English and makes its variation subject to Ministerial approval.⁶³ As well pupils are required to demonstrate “a sufficient knowledge” of the language of instruction in order to receive instruction in that language. Where there is insufficient knowledge of either, the language of instruction will be French.⁶⁴ This reimposes a restriction on the parents’ ability to choose the language of instruction of their children. Its purpose is to force non-Anglophone

58. Either by amounting to requiring a license before they can operate — *John Deere v. Wharton* [1915] A.C. 330 (P.C.) or by significantly affecting essential operations as in *Bell Telephone v. Minimum Wage Commission* (1967) 59 D.L.R. (2d) 145 (S.C.C.). Alternatively a court could follow decision such as *C.P.R. v. Notre Dame de Bonsecours*, [1899] A.C. 367 (P.C.) or *Carnation Milk v. Québec Marketing Bd.* [1968] S.C.R. 238 and hold federal companies to be bound by at least the less onerous requirements of this Act.

59. As in *Re Royalite Oil*, [1931] 1 W.W.R. 484 (Alta. C.A.).

60. See the *Deere* case n.58, *supra*.

61. They are no more onerous than requiring the use of licenced brokers as in *Lymburn v. Maryland*, [1932] A.C. 318 (P.C.).

62. S.34.

63. S.40.

64. S.41. There was some uncertainty regarding the status of those having sufficient knowledge of both. In a recent test case this past fall a bilingual 7 year old of French mother tongue was finally allowed to attend an English school two months after she'd been told she couldn't. (The “Brophy” case.) The interrelationship of the “freeze” on English schooling and the language tests was the cause of the troubles, primarily in Montréal, during September and October of 1975. Children of Italian mother tongue passed the tests but their introduction into the local English schools contravened the “freeze”.

immigrant children and unilingual Francophones to go to French-speaking schools.

This Chapter is *intra vires* the Provincial government by virtue of the control of over education given it by Section 93 of the *B.N.A. Act of 1867*. It is in no way inconsistent with the rights and privileges guaranteed to religious schools by that section as well. It has long been established that that part of the section only gives certain narrowly restricted rights to religious schools and does not guarantee any right to choose the language of instruction.⁶⁵

The civil liberties arguments raised on this question, while perhaps of moral value, have no legal effect. The Canadian Bill of Rights⁶⁶ only applies to federal legislation and even so, it contains no guarantee of the right of parents to choose the language of instruction of their children. No such right has ever been recognized by statute or case law in Canada.⁶⁷

III SUMMARY

The *Official Language Act* of Québec establishes French as that province's official language and it obliges public entities within the province to communicate with each other and with the general public in that language while permitting bilingualism. It places no similar restriction on individuals save regarding the language of instruction of their children. All of its provisions are *intra vires* the Province vis-à-vis Québec institutions;⁶⁸ less, perhaps, in regard to federal corporations, and none have binding effect in regard to federal government activities in Québec.⁶⁹ In the existing absence of inconsistent federal legislation its provisions are constitutionally legitimate.

IV A BROADER POLITICAL AND SOCIAL EVALUATION

Throughout the debate that has surrounded Bill 22, now the *Official Language Act*, it has been clear that the questions in issue were political, social and cultural rather than purely legal. Within Québec the ethnic and Anglophone minorities have at-

65. *Ottawa Separate School Trustees v. Mackell* [1917] A.C. 62 at 69.

In any case the Act merely freezes English language instruction at existing levels and makes so many exceptions for English school bodies that, even if Section 93 guaranteed language rights, (or if this Act were found to be a "colourable device" to get at the Protestants) it cannot be said that Anglophone Protestant "Powers, Privileges and Duties" existing at Confederation are necessarily restricted by this provision.

66. *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*, R.S.C. 1970, App. III.

67. *Bintner v. Regina Public School Board* (1966) 55 D.L.R. (2d) 647 (Sask. C.A.)

68. Foreign companies and companies incorporated in other provinces included.

69. Possibly including Federal works and undertakings and Crown corporations.

tacked it for going too far, while at least an equal number of Francophones feel it doesn't go far enough. Outside Québec a general ignorance of the specifics of the Act has not prevented opinion formation. There has been widespread disapproval expressed by non-Francophones.⁷⁰ However, in order to make an informed evaluation of this Act, one must know its specific provisions and have an appreciation of the role of language in human society — from its significance to the individual to its importance in the development of a global civilization.

A. *The Individual*

It is very difficult for a North American Anglophone to put himself into the mind of a Francophone from Québec. English Canadians are virtually never required to speak or understand other languages in their home provinces. The French part of any obligatory bilingualism is even often thoughtfully muted to avoid its intrusion into the consciousness of Anglophones. Conversely it is only recently that a Francophone in Québec, particularly in Montréal, could find labels or other consumer communications in their own language and even now it is often less prominently displayed.⁷¹ Francophones in Québec are often forced to use English by the 10% Anglophone minority in work and consumer situations. As a result of these unavoidable excursions into another language many Québécois have had the relatively uncommon experience (for native North Americans) of perceiving and describing in two languages.⁷² Anglophones by contrast have a very difficult time making the jump to the first non-maternal language. Hence most have never had to examine their language as the environment and framework for thought that it is.⁷³

The study of linguistics has discovered a fascinating interaction between language and the way we think. A language is an historical product of ways of thinking and it in turn channels new minds to think in those ways. Hence the important historical differences between Eastern and Western thought are reflected in the structure of the languages of the two great groups.⁷⁴

70. A Gallup poll in Oct. 1974 found that 74% of non-Québec citizens polled thought the Act was a "bad thing for Québec" while only 39% of the same group had indicated "an awareness" of the Bill. Results published in *Toronto Star*, October 12, 1974.

71. This will no longer be so, s.32 and s.46 of the Act require at least equal prominence in bilingual communications.

72. One could almost say that it has been harder for a Francophone to avoid learning English (if only by osmosis) in Montréal than for an Anglophone to learn French outside Québec. Almost one-third of those of French ethnic background speak both languages. Only 5% of those of British origin do. 1971 Census Vol. 92-736.

73. Like the fish that never realized they were in water.

74. It is impossible to discuss this fascinating contrast here. Eastern languages are recorded by ideograms — symbols which each represent complex concepts. Western languages are recorded phonetically — the symbols represent simple sounds. But their differences extend to basic syntax as well and reflect radically different ways of perceiving the world. Of course, the classic example of the interaction of culture and language is the number of words the Eskimos have for snow.

However, such an evident contrast should not blind us to less obvious differences. French and English are both Indo-European languages, but one is predominantly Romance, the other Germanic. As such they too are products of, and causes of, different ways of thinking and perceiving.

These differences have not been overlooked by the Québécois. Many are conscious of English as the embodiment of the Anglo-Saxon racial temperament. They picture this spirit as some combination of the Protestant Work Ethic and Puritanism and, while some accord it grudging respect for the material successes it has brought to its adherents, many others compare it unfavourably with the Latin temperament — so well expressed in the phrase “*joie-de-vivre*”. They fear that changing their language will fundamentally alter their temperament and hence their culture.

Whether or not these perceptions of the two temperaments are correct, the basic link between language, ways of thinking, temperament, and culture is undeniable. Changing one's language has far-reaching consequences for the individual which go beyond the mere alteration of the sounds one uses to express oneself and one's ideas. The ideas and the ‘self’ are altered by the means used to describe them.

B. Québec

The recognition of this inter-relationship is the root cause of Québécois concern over the recent evidence of the erosion of the French language in their province.⁷⁵ Language is an essential pillar of culture and when a group's distinctive language goes, it soon loses its cultural uniqueness and cohesiveness. The Québécois place a high value on their culture and rightly so. It is worth preserving and cultivating simply because it is a thing of value in and of itself. It was to prevent the erosion of their language and hence their culture that the Québec government passed the *Official Language Act*.

The Act uses two major means to restrict and reverse this trend. First it makes it illegal for any public entity within

75. The most recent, and least suspect, examination of language statistics for Canada and Québec was conducted by Jacques Henripin as part of the Green Paper on Immigration. His paper, entitled “Immigration and Language Imbalance” was published by Information Canada in late 1974.

He concludes that since 1941 English has been gaining ground relative to French in Canada as a whole by virtue of the marked preference immigrants have shown for that language. Only about 30% speak English on arrival but 95% of those who are not of British or French origin adopt English. He forecasts that Francophones will be down to 24% of the total population in 20 years with most of them concentrated in Québec and only isolated pockets in New Brunswick and Eastern Ontario. In Québec he feels that the relative significance of Francophones will decrease from the present 81% to 78% at the turn of the century. This will be the result of immigrants choosing English, emigration of Francophones, and the fact that the Francophone birth-rate has dropped to that of the Anglophones. This may not seem too drastic but most of this erosion will take place in Montréal. Unless immigrants alter their patterns of choice, Francophones will slip from being 2/3 to only a half of that city's population by the year 2000. (See pgs. 37-38.)

Québec to communicate with the general public, 60% of whom speak only French, in English alone.⁷⁶ Secondly, it prevents parents whose children do not know English from sending them to English schools. It could be argued that both measures involve a restriction on individual freedom, even though no legal rights are altered. However, such a trade-off is justifiably balanced against the preservation of the culture of Québec. For too long corporations have insulted the Québécois by giving their language second class status. More importantly the Québec government should not permit immigrant fears that English is the language of upward social mobility to become a self-fulfilling prophecy. The plain fact is that 90% of the citizens of Québec understand French, only 38% understand English.⁷⁷ As long as the Francophone elements maintain their present determination to preserve their language, French will increasingly become a pre-requisite to upward mobility within Québec. One may question whether compulsory provisions, the 'stick' rather than the 'carrot', are appropriate means for influencing linguistic practices on a pragmatic basis⁷⁸ — but surely one cannot dispute the Québec government's right to respond to heartfelt demands by its citizens that their culture be protected. There are times when liberal freedoms must give way to collective needs.

C. Canada

No one who has any familiarity with the Québécois can question their determination to defend and maintain their culture. This is a political fact that the rest of Canada must come to grips with if our federation is to survive. Only if their fears of cultural assimilation are laid to rest will political and economic integration remain possible.⁷⁹

Canadians outside Québec ought not to be so antagonistic to this Act. First of all it merely tries to bring about a situation closer to that that has existed in all the other provinces for years. In fact the rights of the 10% Anglophone minority remain better protected than those of the Francophone minorities in the other provinces, including New Brunswick's 35% French-speaking citizens. Even after this Act, Québec remains the *only* province that even approaches being truly bilingual.

76. 3.7 million speak French only. .6 only English out of a total population of 6.0 million. 1971 Census Vol. 92-726.

77. Add the 1.7 bilingual citizens to each of the totals in the preceding footnote.

78. It would of course have been preferable had market forces brought about the provision of services in French (as they have brought about *de facto* unilingualism in the rest of Canada), but non-economic factors have distorted the market in Québec.

79. This means acceding to a large extent to Québec's demands for "cultural sovereignty". This would include greater input by the government of Québec in the areas of immigration and communication, and in particular greater control over federal cultural programs in Québec such as Radio Canada. This does not deny completely a federal role in cultural development but some rearrangement of responsibility seems necessary.

At the same time it is evident that French will become increasingly necessary for those living in Québec. The days of Westmount residents who can't say 'bonjour' after a lifetime in the province are numbered. But this development need not be viewed as detrimental to Canada as a whole. We have theoretically committed ourselves to becoming a bilingual and multi-cultural state and a strong, viable, French-speaking culture in Québec can assist both these aims. As long as French is a living, growing, language in an important part of the country, the incentive will remain for those outside the province to learn the country's other official language. As well the Québécois culture can serve as an example to other ethnic groups that their heritage can be preserved on this continent.

D. *The World*

In accomplishing and maintaining the political integration of majority and minority cultures, Canada can serve as a valuable example to other parts of the World. In many places the fear of cultural assimilation and dominance is hindering the gradual evolution towards political integration and the better ordering of man's material activities on this globe. Only if constitutional arrangements guarantee the survival and cultural self-determination of minority groups within federations will such inter-gration proceed.

Once again pragmatism is not the only rationale for preserving these minority cultures. Troublesome though our culture differences have been throughout the ages, much would be lost in an excess of homogeneity.

