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THE JUDICIAL FORTUNES OF FRENCH ON THE CANADIAN PRAIRIES

DONALD A. BAILEY

Early European settlement patterns on the Canadian and U.S. prairies had many common features. Diverse peoples settled side-by-side, though often in distinct ethnic concentrations, and heritage cultures and languages persisted for several generations, even as significant assimilation to the dominant culture simultaneously occurred. Interaction and assimilation were not always harmonious, however, for intra-ethnic disagreements about heritage loyalty versus assimilation and friction with the dominant or another culture consumed many energies. Periods of war or economic crisis brought out xenophobic suspicions among the dominant and fully assimilated groups, suspicions that sometimes led to attempts at oppressive legislative measures that were later challenged in the courts. Linguistic and cultural influences rioted back

and forth in a fashion remarkably similar in both societies, whether the national myth was of the “melting pot” of the United States or the “cultural mosaic” of Canada.¹

The Canadian experience did diverge from the American in at least one culturally significant respect: the existence and constitutional recognition of a second official language. In the century and a half preceding 1900, the exploration, commercial exploitation, settled agriculture, and even the constitution of the first new province on the prairies had been largely the work of the French and the Anglo-Celts. Both Euro-Canadian peoples were influenced in these undertakings by the plains and woodlands Indians with whom many of each European heritage had intermarried. Whatever native languages were spoken on the Canadian prairies in the nineteenth century, French and English were in daily use in roughly equal measure. The courts, schools, churches, and newspapers of the region reflected their bicultural origins, and the early governing institutions did too.²

The rapid expansion of immigration after 1875, however, overwhelmed the Métis and French Canadians and swamped their constitutional safeguards as well. Constitutional guarantees or statutory provisions, respectively, for

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French and English legislative and judicial language rights and for religiously diverse schools supported by the communal purse, were either abrogated outright, as in Manitoba, or gradually taken away, as in the territories that became Saskatchewan and Alberta. German, Ukrainian, and Polish Catholics, along with the even earlier arriving Mennonites, owed the distinctive survival of their culture in Canada in significant part to the linguistic and educational rights that French Canadians had modelled on the prairies. For various reasons, however, these others came to accept the British-Canadian dogma that the English language and nonsectarian public schools should be the country's norms. It is therefore hardly surprising that the twentieth century has treated French Canadians in the West as merely one of several prominent ethnic groups, valued as compatriots on those terms, but no longer as one of Canada's founding partners.

Prairie French Canadians did not, however, forget their rights. Throughout the present century, they struggled to maintain their culture through the surreptitious teaching of French in public schools, the maintenance in Manitoba of several confessional schools and a fine *collège classique*, continuous weekly newspapers, and the private establishment of radio and television stations—these last being finally assumed as a responsibility by the Canadian Broadcasting Corporation. Then, in the 1970s and 1980s, individual French Canadians began to trouble prairie courtrooms by asserting that they were not bound by laws that had not been passed in both official languages and that they had the right to judicial trials in French. The average anglophone Canadian thought the arguments were absurd and would not long survive judicial review; today we know differently, though no one is yet sure where the cultural revolution will end.³ On what rights in Canada are these court challenges based?

CONSTITUTIONAL PROVISIONS

In the British North America (B.N.A.) Act,

1867, two sections form the principal defense of either French or Anglo-Celtic Canadians when they find themselves in the minority within certain political jurisdictions.⁴ Section 93 undertook to protect confessional schools wherever they had been established in law at whatever time a given province entered the Dominion of Canada. Section 133 undertook to protect what our generation of Canadians has come to call, sometimes reluctantly, "official language rights." It provided that *both* French and English *shall* be used in the records and journals of the federal and Quebec legislatures and in the printing and publishing of their enactments. It further provided that *either* language *may* be used in legislative debates and "by any person or in any pleading or process in or issuing from any Court of Canada . . . and in or from all or any of the Courts of Quebec."

Virtually identical sections were placed in the Manitoba Act, the constitution given in 1870 to that new province. And the same two protections, as early amendments, eventually entered the statute law governing the North-West Territories, out of which the younger prairie provinces were later formed.⁵ A critical difference must be noted between the entrenched rights of Manitoba's provincial constitution and the merely statutory protections of the North-West Territories' ordinances, but in the practice of daily life the experiences of all prairie French Canadians have been remarkably similar.

The Canadian federation originally invested considerable powers in the federal government, but linguistic and other cultural rights were protected by the provinces. This division has served fairly well in the protection of French culture within Quebec but has not significantly helped the federal government to protect French-Canadian minorities in other provinces because of Quebec's fear that precedents would be set for federal intervention concerning cultural matters in Quebec.

As Canada took over jurisdiction of western regions, considerable debate ensued about what linguistic and cultural rights should be guaranteed. French and English were in rough bal-

ance in Manitoba at the time that province was created, but while immigration rapidly reduced the French proportion there, it did not much affect the roughly equal balance the two charter cultures enjoyed farther west until almost the end of the century. Although cultural balance was protected in the statutes governing the North-West Territories, the authority to make changes in this area was eventually transferred to the local legislatures, and it was in possession of such authority that the southern regions of these territories became provinces in 1905.

Two other peculiarly Canadian characteristics of government require brief elucidation. First, criminal law and judicial procedures are under federal jurisdiction, and civil law and judicial procedures are under provincial jurisdiction. The establishment and administration of *all* courts in the provinces are under provincial jurisdiction, however. In essence, only the Supreme Court of Canada is a court of the federal government. The right to use either official language in Canadian courts has been difficult to establish in the midst of recondite distinctions concerning criminal versus civil law, jurisdiction over the specific court, and whether or not use of a language be a matter of procedure. Federal government determination might have better guarded French rights in criminal courts in early decades, but the tendency was to leave the matter to the provinces, which usually responded to local expectations of single-language dominance.

Second, until 1949 Canadian litigants had the right to appeal beyond the Supreme Court of Canada (established in 1875) to the Judicial Committee of the Privy Council (J.C.P.C.) in Westminster, the United Kingdom. Although it is difficult to generalize on this point, the J.C.P.C. saw its role to ensure provincial autonomy vis-a-vis federal intervention. On cultural issues, this tendency reinforced majoritarian overriding of the desires of local minorities. When such a judicial decision overturned the Supreme Court's upholding of cultural rights in the area of religious education in the 1890s, federal resolve to protect provincial minorities

was further weakened.⁶

In the eastern provinces of New Brunswick and Prince Edward Island in the 1870s, and in Manitoba in the 1890s, the provisions for separate confessional schools described in the B.N.A. Act's section 93 and its counterpart in Manitoba (section 22) turned out not to guarantee the right to tax-supported funding that the French-Catholic minorities thought they had. Violent demonstrations in New Brunswick resulted in a few deaths, but the court challenges ultimately failed, despite some temporary triumphs in the Manitoba case along the way.⁷ The North-West Territories' Legislative Assembly also weakened the confessional school provisions within its jurisdiction, so that the clauses comparable to those of section 93 that were later drafted for Saskatchewan and Alberta did not even promise what had proven so illusory for their predecessors.

The school question, however, is separate from the language question, so I shall not attempt to address it here except to note that in the spring of 1986 the Manitoba Catholic School Trustees petitioned the federal government to attempt once more to enforce the Order-in-Council defied by the Manitoba government in 1895. A compromise in 1896 had exchanged language for religion as the cultural protection in education and had broadened its application to new immigrant groups. French Manitobans (along with German, Ukrainian, and Polish Manitobans) lost that protection, too, when the provincial government unilaterally abrogated the Laurier-Greenway compromise in 1916. I agree with Gordon Bale that Manitoban Catholics might well win a reopening of the judicial challenge under section 22 of the Manitoba Act;⁸ meanwhile interested Manitobans await federal reaction to the petition.

ORIGINAL LANGUAGE RIGHTS IN MANITOBA

This paper concentrates on the judicial fortunes of original language rights on the Canadian prairies. I say "original," because the

Charter of Rights and Freedoms, entrenched in the patriated constitution of 1982, holds out new promises of expanded language rights in both education and federal-government operations. These clauses are provoking additional court challenges, which have occasionally blended with those based on nineteenth-century provisions, but space does not permit their discussion here.

The fortunes of original language rights in Manitoba have been different from those of Saskatchewan and Alberta because the latter's language protections were not entrenched in their constitutions and because the tribal memories of their rights were not as vibrant as have been those in Manitoba. Section 23 of the Manitoba Act, 1870, provided for legislative and judicial language rights.⁹ The justification of these protections was the century-old presence of the French in the region, the extensively bilingual society throughout the first two thirds of the century at the Red River settlement, and the fifty/fifty French/English balance in the population. Figures are lacking for the fateful year 1890, but by 1880 the French proportion of the population had fallen to 15.6 percent; by 1900, to 6.3 percent, a proportion that has held rather steady during the twentieth century.¹⁰ Although due in part to the unhappy exodus westward of the Métis, the main reason for this relative decline was the rapid immigration of the period, for in absolute numbers, the French population grew also.

The waning of French social and political influence, combined with the Anglo-Protestant dogma that being British meant being English, led to gradually increasing observations that the English language and a single, U.S.-style "national schools" system were all that the public resources of the province should support. An abortive attempt to have legislative records maintained in English only was made in 1879. Then, in 1890, the new Liberal government of Thomas Greenway, a majority of whose members had not been born in the area by then called Manitoba,¹¹ passed the Official Language Act and replaced the dual-school system with

a single administration for a nonsectarian educational system. Both French and non-French Manitobans concentrated on the schools issue, so an immediate judicial challenge over language was hardly noticed.

The Official Language Act, 1890, reads in full:

1. (1). Any statute or law to the contrary notwithstanding, the English language only shall be used in the records and journals of the Legislative Assembly of Manitoba, and in any pleadings [sic] or process in or issuing from any court in the province of Manitoba.

(2). The Acts of the Legislature of Manitoba need be printed and published only in the English language.

2. This Act applies only in so far as the Legislature has jurisdiction to enact.

Notice that there is no mention of restricting the language of debate. In the County Court of Saint-Boniface, in 1892, Judge L. A. Prud'homme ruled in *Pellant v. Hébert* that the Legislative Assembly of Manitoba did not have the power so to enact. When Mr. Pellant's lawyer attempted to submit documents to the court in the French language, Mr. Hébert's lawyer objected under the terms of the 1890 Act.¹² Judge Prud'homme argued that the Manitoba Act of 1870 was an act of the Canadian Parliament, which in 1871 had been confirmed by an act of the British Parliament. Although Manitoba did have the right to amend its own constitution, the right was limited to the areas enumerated in the B.N.A. Act's section 92, and did not include the areas described in sections 93 and 133. In fact, not even the Canadian Parliament could amend those sections, for they bound both the federal jurisdiction and the specified provinces "in an indivisible sense"—as another judge was to express the same point almost ninety years later.¹³ In 1909 Judge Prud'homme had an opportunity to make the same ruling and to expand on his earlier arguments.¹⁴ In both instances, however, his ruling that the Official Language Act was *ultra vires*

of the Manitoba Act was ignored by the province and its government. These early judgments were not reported in the judicial journals and were in fact lost for almost seventy years.

CHALLENGES TO ENGLISH-ONLY LAWS

The Forest Case. Then, on February 1976, insurance broker Georges Forest was issued a parking ticket outside his agency on Marion Street in Saint-Boniface. The ticket was written entirely in English, and Mr. Forest remembered that five years before, when Saint-Boniface and other municipalities were combined into an expanded City of Winnipeg, the reincorporating act had made certain promises that the francophone governance of Saint-Boniface would be continued. Section 80(3) of the City of Winnipeg Act, 1971, stated that "All notices, bills or statements sent or demands made to any of the residents of St. Boniface community in connection with the delivery of any service, or the payment of a tax, shall be written in English and in French."¹⁵ Provincial Court Judge McTavish ruled that a parking ticket did not qualify as a notice, bill, statement, demand, service, or tax, but that the Official Language Act, 1890, applied instead.

Georges Forest appealed the judgment, at the same time deciding to challenge the 1890 Act, too, and this round he won. In the same County Court of Saint-Boniface over which Judge Prud'homme had presided at the turn of the century, Judge Armand Dureault reached the same judgment, on essentially the same grounds—though at the time unaware of the earlier judgment. Judge Dureault found it perfectly in order that Mr. Forest's defense and supporting documents had been drafted in French. This was a preliminary ruling, and Manitoba's Attorney General wrote the judge that "the crown does not accept the ruling of the Court, . . . [but] does not intend to appeal the Court's ruling . . . at this time." Instead, it wished to proceed with the "material" issues of the case. Justice Alfred Monnin, of the Manitoba Court of Appeal, later wrote, "A more arrogant abuse of authority I have yet to en-

counter." When Georges Forest then asked the government for French versions of the acts relevant to his case, the Attorney General replied that they would be made available to him if he would bear the \$17,000 translation cost!¹⁶

Mr. Forest's odyssey continued to have novel convolutions, for the government's reaction had essentially put him in the position of having to appeal a court judgment in which *he* had been the victor. He was eventually heard and again victorious in the Manitoba Court of Appeal, and once more, following the Government's appeal this time, victorious in the Supreme Court of Canada on 13 December 1979. Both these superior courts were hesitant in the face of what their judgments portended for the province. Thus, the judgments were "declaratory" in nature, and ruled the 1890 Act inoperative and without effect, while accepting Mr. Forest's right to include French materials in his defense.¹⁷ Nonetheless, the logic of the judgment was that ninety years of provincial legislation were also inoperative and without effect—about forty-five hundred statutes and many times that number of delegated regulations. The costs of translation would be enormous, the personnel of the provincial government would have to develop a bilingual capacity, and at least a few courts would have to be able to function in French.

The Bilodeau Case. The new provincial government, in power since 1977, said it would begin to address this task. It appeared to be doing so in a desultory manner, and was condescending enough to say to the Franco-Manitoban community that the cost-free bilingual court services being installed in Saint-Boniface were owing to the government's liberality rather than to a right under section 23. Almost as if they predicted such an attitude on the part of a predominantly anglophone society, three Franco-Manitobans, within six months of the *Forest* decision, raced down provincial highways and attracted speeding tickets. All pleaded that the Highway Traffic Act and the Summary Conviction Act were invalid because they had been enacted in English only; all three were convicted.¹⁸ Only law student Roger Bilodeau

was able to pursue his case through appeals. A political attempt to substitute a constitutional amendment for the continuation of the *Bilodeau* case precipitated a ten-month convulsion in the province during 1983-84, but failed on account of widespread and determined opposition. The case proceeded to judgment, which came down in two parts, the first on 13 June 1985 and the second on 1 May 1986.¹⁹

In the meantime, several governments and private associations had received permission to intervene in the case, for it would affect language law in Quebec and New Brunswick as well as at the federal level.²⁰ In fact, in order to focus the issue and make its resolution more widely applicable, the Attorney General of Canada, the Hon. Mark McGuigan, had addressed four questions to the Supreme Court, as the government has a right to do if an issue is important enough. Only three of the questions and answers need concern us here since they were the burden of the decision in June 1985.

The first question was crucial, as it involved a basic principle. Are the requirements of Canada's constitutional language provisions mandatory, or are they merely directory? Each of the lower courts hearing the *Bilodeau* case had held that section 23 was merely directory in that, while the government was obliged to obey its requirements, its legislation would nonetheless be valid and of full force and effect even if it were enacted in only one language. In these courts, the various judges agreed that Parliament had not intended legal and social chaos to be a consequence of noncompliance. Such chaos would indeed follow were ninety years of Manitoban legislation to be held invalid, which in turn would mean that the current composition of legislative and judicial institutions would have no more legal existence. In the Manitoba Court of Appeal, the two judges in the majority refused to make one declaration of the law and then to invoke the doctrine of necessity to excuse the invalidity of the past. The Supreme Court of Canada disagreed with them, and in doing so it substantially upheld the view of the

dissenting judge, Alfred Monnin.

The final judgment differed from those of the lower courts in two respects. First, it argued that the refuge of a directory interpretation was inappropriate in the adjudication of constitutional law; constitutions entrench their provisions specifically in order that they be obeyed, and this intention must be especially respected where rights are concerned. Second, it again reflected Justice Monnin's view in emphasizing the main object of the legislation; namely, that it intended to secure the right of Canadians in certain jurisdictions to use either official language in legislative and judicial operations of government. The Supreme Court wrote:

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.²¹

This was the point missed by the lower courts and missed as well by the Attorney General's department in its early confrontations with Georges Forest. They all seemed to see language as peripheral, almost as if members of the minority were neither inconvenienced nor socially declassified when the majority's language was expected of them. It was as if the "material interest" were always something other than language, and—to use the words of Sir Arthur Channell, borrowed by others for this purpose—the "main object of the Legislature" in entrenching language rights were some unstated goal having nothing to do with language at all.²²

Having clearly affirmed that language was the main object and that language requirements were mandatory, the Court then had the difficult task of avoiding temporary legal chaos without being unconventional or arbitrary in how it did so. Here it had recourse to the Rule

of Law, which, the Court wrote, depends on two features: one, the government and its officers must be under the law, and two, the general principle of normative order, on which civilized life depends, requires an actual order of positive laws. Affirming the mandatory nature of section 23 put the government back under the law; declaring the temporary validity of the positive laws on which an orderly Manitoban society depended preserved citizen respect for the Rule of Law itself. In this manner, the Court answered the second and third questions, which concerned the validity of laws passed in one language only. It gave the government 120 days to submit a plan for the urgent translation and enactment of the province's laws.

Almost one year later, the Court handed down its decision in the *Bilodeau* case itself. Drawing on its already established declaration of temporary validity, it upheld Mr. Bilodeau's conviction under the Highway Traffic and Summary Conviction Acts. As a second point, however, it distinguished the summons, which Mr. Bilodeau was attempting to have dismissed, from the issue involved in challenging those two acts. A summons is a court order, and the court is as free in choosing the language in which it issues its orders as is the citizen in choosing the language for his or her defense. While section 23 is clear that the legislature's records, journal, and enactments *shall* be in *both* French and English, it is equally clear, all but one of the justices argued, that *either* language *may* be used in legislative debates and "by any person, or in any Pleading or Process, in or issuing from any Court of Canada . . . or in or from all or any of the Courts of the Province." In her dissenting judgment, Justice Bertha Wilson argued that her colleagues failed to take into sufficient account obligations created on the state by the entrenchment of rights for the citizen. She argued that the state's right to use either language must yield to the citizen's right to be issued a summons in the official language that he or she understands.

Thus, we find that the clear and precise phrasing of Canada's language guarantees has

its ambiguities after all. Furthermore, the language of court orders is only the beginning. In a mixed-language trial, are translators and interpreters adequate, or should the judge and court personnel be bilingual? What should the court records show: original speeches in whatever languages only, or the translations too? What about the jury? All these questions are currently before the courts, and, in fact, en route to the Supreme Court. Some appeals are flowing from Eastern Canada, but most have been originating in the West.

Alberta and Saskatchewan Cases. Like the *Forest* and *Bilodeau* cases, and perhaps inspired by them, court challenges to parking (*Lefebvre*) in Alberta and to speeding (*Mercure*) in Saskatchewan flowed from tickets first incurred in the spring of 1981. By the fall of 1984, the first of another pair of charges had joined them, this time initiated by criminal charges: one an accusation of robbery (*Tremblay*); the other, possession of narcotics for the purpose of trafficking (*Paquette*). These four litigants desired French copies of the legislation under which they were charged, the right to a trial in French, the right to a judge and jury who understood French, or some combination of all these.²³ In Manitoba, an improperly abrogated section of the provincial constitution had been invoked to justify related requests. Since neither the Saskatchewan Act nor the Alberta Act, both of 1905, said a word about official languages, on what basis did these recent challenges seek to justify themselves?

ORIGINAL LANGUAGE RIGHTS IN ALBERTA AND SASKATCHEWAN

After responding to the Red River Insurrection of 1869-70, which had led to the unexpectedly early granting of provincial status to Manitoba, the authorities in Ottawa took their time about settling the affairs of the vast lands that remained the North-West Territories. Although some voices urged the extension of bi-cultural arrangements as far as the Rockies, which would have reflected the contemporary

situation for the still sparse population, other voices urged that the West be developed as an Anglo-Protestant extension of Ontario. These latter voices resented the way the francophone rebels at Red River had been conceded constitutional guarantees. Both sides were persuaded to wait and see, so the North-West Territories Acts of 1875 and 1886, and their respective amending Acts of 1877 and 1891, attempted to continue the institutions of the region and to capture them in ordinary statute law.²⁴ Whenever the population in an area warranted it, public schools were to be established for the majority religion, while separate schools, whether Protestant or Roman Catholic, were permitted for a sufficiently large minority.²⁵ Reflecting the then bicultural population, with its governing officials, courts, and newspapers, the 1877 amendments included provisions for the same legislative and judicial language rights that were protected in Manitoba.

The language provisions reappeared in the 1886 Act as section 110, but in 1891 they were amended, after sustained pressure from the rapidly increasing Anglo-Celtic population, by a very important proviso. The amended section reads:

Either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of such Assembly; and all ordinances made under this Act shall be printed in both those languages: Provided, however, that after the next general election of the Legislative Assembly, such assembly may, by ordinance or otherwise, regulate its proceedings, and the manner of recording and publishing the same; and the regulations so made shall be embodied in a proclamation which shall be forthwith made and published by the Lieutenant Governor in conformity with the law, and thereafter shall have full force and effect.²⁶

The newly elected assembly wasted no time and in January 1892 passed an ordinance, by a vote of twenty to four, to publish the legislative proceedings in English only.²⁷ The resolution reflected actual practice, but the ordinance itself was reserved by the French-Canadian Lieutenant Governor Joseph Royal and was never proclaimed into law.

Thus, the North-West Territories came up to their provincial status as legally bilingual in official operations, even though both respect for and memory of the language provision had been lost for a generation. The Autonomy Acts of 1905 carved Saskatchewan and Alberta out of the southern third of the North-West Territories. Section 16 of each act carried forward all laws, orders, and regulations, "so far as they [were] not inconsistent with anything contained in [or for which there is no substitute in] this act, . . . and all the courts of civil and criminal jurisdiction . . . existing before the coming into force of this Act . . . shall continue in the said province as if [these two Autonomy Acts] had not been passed. . . ." The section then went on to say, however, that either the new provinces or the Parliament of Canada could subsequently change any previous statutes that came within their respective jurisdictions; furthermore, the territorial courts could be abolished and replaced, so long as the proceedings affecting criminal jurisdiction were not changed without federal approval.²⁸ (This proviso merely kept the new provinces in alignment with the other provinces, whose criminal procedures had been placed under federal authority in the B.N.A. Act's section 91[27].)

HISTORY OF LANGUAGE RIGHTS IN ALBERTA AND SASKATCHEWAN

Three quarters of a century later, prairie French Canadians wished to claim their rights in law under the North-West Territories' section 110. It was not quite a constitutional claim, except that the 1905 provincial constitutions had carried forward previous legislative obligations. The new provinces could have abro-

gated those commitments at any time, but the court challenges advanced the case that they had not. Since unilingual practice had been well established more than a decade before provincial autonomy, everyone had assumed its legitimacy, especially if they remembered Frederick Haultain's resolution of 1892 while forgetting its nonproclamation. But the law in fact required, or appeared to require (this was a key point at issue), bilingual legislation, journals, and records, while it permitted debates and judicial proceedings in either language. Would this legal requirement be recognized and so ordered in the 1980s?

As the four language cases from Alberta and Saskatchewan have proceeded through judicial appeals, contemporary understanding of the legal situation has been significantly enlarged, sometimes reluctantly. Despite the fact that the judgments have referred to their immediate predecessors, no one judgment has yet assembled all the elements. I propose to do so here. The two provinces are not, in my view, in absolutely identical circumstances, but no judge appeared to notice this until late 1986, when *Lefebvre* reached the Alberta Court of Appeal.²⁹

The similarities between the two provinces are, however, important. Both provinces suffered immediately from a bureaucratic error in Ottawa that was almost as soon corrected. With Saskatchewan and Alberta separated from them, the remaining Northwest Territories (with their hyphen now removed) received a set of Revised Statutes, 1906/7. These omitted the amendments of 1886 and 1891 in their entirety, which of course eliminated the section 110 contained therein. The omitted sections may not have been needed for the reorganized remaining territories, but because they were needed for the legal continuity of the new provinces they were restored within weeks by an act of Parliament specifically for those two provinces. It is perhaps not surprising, given the cultural assumptions of so many English-speaking Canadians, that some authorities have noted the revised statutes with their omissions without noticing the restoration.³⁰

A more enduring similarity is that, beginning in 1906, both new provinces abolished the courts inherited from the territories and established their own. It is plausible to argue that the previous courts had been "Courts of Canada," which are obliged to be bilingual under section 133 of the B.N.A. Act, but which have never been established within a province. The judges, however, have held that the courts of the North-West Territories were, in purpose and function, the equivalent of provincial courts even though they had of course been established under federal jurisdiction.³¹ Thus, the replacement of the courts, as provided for under section 16(2) of the Autonomy Acts, did not alone and in itself imply a shift in judicial procedures or in the language or languages of pleading and process. Although the provincial courts of these two prairie provinces were not bound by section 133, they were bound to respect their own continuity from the territories unless it were itself explicitly changed. Even then, they did not have the authority to change criminal, but only civil, procedures. The right to use French in criminal trials appears secure, therefore, by judicial consensus, even if such agreement still seems elusive in civil cases.

Official language continuity is beset by other considerations. One that the judges at provincial levels have overlooked is the narrow wording of the 1891 proviso that permitted the Legislative Assembly to regulate its proceedings and the manner of recording the same, but without including either enactments or court proceedings in that permission.³² The unproclaimed resolution of Haultain had itself spoken only about the publishing of legislative records.

Another consideration requires rather subtle interpretation in reading the Autonomy Act's section 16. In a controverted elections dispute (the case of *Strachan V. Lamont*, 1906), the parties argued about whether section 16(1) applied only to "the general body of law" or also to what Chief Justice Sifton termed "special legislation." The majority of judges denied the latter application on the grounds that in sections 14 and 16(3), for instance, the Autonomy

Acts had taken the trouble to provide for certain specific ordinances and institutions of the North-West Territories, thereby exempting them from the generality of section 16(1).³³ Applying this reasoning in the 1985 judgment of the *Mercury* case, Chief Justice Bayda of the Saskatchewan Court of Appeal argued that section 110's language protections lapsed in 1905 as regards the legislature, its records, and legislation because all this was specified as adhering to the North-West Territories. In contrast, the language protections did not lapse as regards the courts, for they were cited without qualification as to the jurisdiction in which they functioned. I find the 1906 and especially the 1985 judgments rather forced, but Justice Estey later made a fairly good case for this view in judging the subsequent appeal. He was overruled, however, by the majority of his peers, Justice La Forest concluding for the majority "that the *Strachan* case was clearly and fundamentally wrong and should be overruled." Section 16(1) of the Autonomy Acts should not be read "in a narrow and restricted manner."³⁴

In at least one important respect the Saskatchewan courts' research was also rather deficient. As early as May 1906, both new provinces had passed interpretation Acts. For Saskatchewan, the interpretations stated, "The expression 'Territories' or 'North-West Territories' means 'Province'." The next year, a similar act stated "the expression 'Act' means an Act of the Legislature of Saskatchewan and also includes an Ordinance of the North-West Territories in force in the province."³⁵ Alberta was even more explicit in its 1907 amendment to section 7(10) of its Interpretation Act, 1906: "the said words 'Territories' or 'North-West Territories' in [any law, statute or ordinance in force in the province]" shall be construed "to mean and to refer to the Province of Alberta . . . since the first day of September, 1905," wherever "it would be necessary in order to effect the purpose of such law, statute or ordinance."³⁶ While Alberta courts have cited these interpretive passages, no Saskatchewan court has yet referred to them, nor did either judge writing

for the Supreme Court refer to them despite much attention both paid to this very point. They appear, however, to remove any doubts for either province about the generality of section 16, which the Parliament of Canada had written into the Autonomy Acts, for they express a similar intention through the respective provincial legislatures.

The provinces diverge on one significant point. In its Statute Law Amendment Act, 1919, Alberta added a 61st subsection to its old Interpretation Act's section 7. "Unless otherwise provided," it said, "where any Act requires public records to be kept or any written process to be had or taken it shall be interpreted to mean that such records or such process shall be in the English language." In the *Lefebvre* case, Queen's Bench Judge Greschuk cited this English-language provision, but no Saskatchewan judge has made a comparable citation for his or her province, and, indeed, I have not been able to find such a regulation for Saskatchewan.³⁷

The implications of this 1919 interpretation received appropriate attention in the Alberta Court of Appeal. First, in his dissent, Justice Belzil argued that English was to be the language of record only for the operations of government, and thus the instruction did not touch the public functioning of statutes or court procedures, nor did it prevent the registering of wills, for instance, in languages other than English.³⁸ Second, the justice argued—as did Judge La Forest for the Supreme Court, more than two years later—that clear statutes cannot be overruled in later legislation by mere implication but only by express intention. Third, Justice Belzil echoed the crucial distinction, already made by Manitoba's Justice Monnin, that the issue of language is not just a courtroom technicality: "Section 110, is not a mere rule of procedure applying to specific courts; it is a general law entitling all persons appearing before all courts from time to time constituted to use either English or French in court. It is a right . . . granted to persons which the courts are required by law to respect."³⁹ It therefore appears that, whatever has been the situation for

Saskatchewan, Alberta did expressly legitimize the use of English alone in at least a narrow area of governmental operations in 1919, despite its ambiguous period between 1892 and 1919. The principal points in dispute, however, are not affected by the Interpretation Act, unless the Supreme Court were yet to judge the *Lefebvre* case and see this matter differently.

In his excellent study for the Royal Commission on Bilingualism and Biculturalism, *The Law of Languages in Canada*, Claude-Armand Sheppard devotes careful attention to Saskatchewan and Alberta and to the question of what obligations they may have carried forward from the North-West Territories. The language cases discussed in this article have occurred since that study, so Professor Sheppard was unable to refer to them, but the courts, conversely, appear not to have benefitted from his analysis, at least not until *Mercury* reached the Supreme Court.⁴⁰ Sheppard mentions the Alberta specification concerning language of record and of course cannot say the same of Saskatchewan. Sheppard accurately describes the current linguistic practices of the two provinces, but the courts have gone beyond his position to affirm the provinces' legal obligations toward the minority official language. In their extensive, if not yet exhaustive, judgment, the courts have made it clear that it was a grave evasion of the meaning of language and intention for the two provinces to deny their legislative and judicial obligations toward the French language.

PRESENT LANGUAGE RIGHTS IN ALBERTA AND SASKATCHEWAN

The 1988 Supreme Court judgment of *Mercury* decided the principal points for both Saskatchewan and Alberta, for there is no longer judicial recourse beyond the Supreme Court of Canada. Section 110 did indeed carry forward from the old North-West Territories into the laws and procedures of the two new prairie provinces, through section 16 of their respective Autonomy Acts, 1905. All laws and regulations should have been written, passed, and proclaimed in both French and English in order to

be valid, and this obligation was as true for the final decades of the territories as it has been since. This requirement was part of statute law, not constitutional law, however, and both provinces had a choice either to comply with it without delay (which meant to translate the statutes of a century) or to proceed immediately to repeal section 110.

Neither province wasted time in repealing the obligation, thereby formally breaching at least the spirit of their premiers' undertaking the year before, namely, to "preserve the fundamental characteristic of Canada" reflected in the presence of French-speaking minorities in the predominantly anglophone provinces.⁴¹ Only time will tell how seriously they have damaged the fabric of the Canadian nation. Premiers Grant Devine of Saskatchewan and Don Getty of Alberta argued that they were trading the immense costs of translation against a better value for the money they undertook to spend on creating a bilingual capacity in their administrations. They may well prove correct, but in the short term the symbolism of repealing section 110 offends French Canadians more profoundly than the vision of future advantages pleases them.

Some issues are now clear regarding French rights in the courts. The two provinces cannot invade the federal jurisdiction in matters pertaining to criminal law, but civil law does lie within their competence. Litigants retain the right to enter pleas and documents in the official language of their choice, but they have no right to be understood in the minority language, at least not directly. While they are entitled to have a translator present, they have no right to demand a bilingual judge or jury or to insist that any other person in the court, whether an official or not, use an official language not of his or her own choice. Here the court fell back on its earlier judgment in the *MacDonald* and *Bilodeau* cases, unfortunate as that opinion was for the rights of Canadian citizens.

In *MacDonald v. Montreal* (May 1986), Justice Bertha Wilson certainly had the larger vision when she argued in dissent that rights for

the citizen must necessarily entail obligations for the state and its officials.⁴² At each stage, in virtually all the prairie cases we have been examining, judicial vision did enlarge as appeals reached higher courts, except when *Paquette* reached the Alberta Court of Appeal in 1987. For the most part, however, this enlargement responded to only two imperatives: one, that the plain meaning of the words and clear intention of the law must be taken at face value; and two, that constitutional rights are deliberately entrenched because of their high value and continuous necessity. On the whole, the judges recognized the accuracy of Manitoba Chief Justice Freedman's anticipation of disruptions, expenses, and obligations even greater than could be immediately imagined, but they joined him in accepting the responsibility of going forward.⁴³

That acceptance had its limits in the plain meaning of the words. Even Justice La Forest quoted approvingly the argument of his colleague Judge Beetz in a related case from New Brunswick: if one expects a right to be understood, one would be going "a considerable distance towards the adoption of a constitutional requirement which could not be met except by a bilingual judiciary. Such a requirement would have far reaching consequences and would constitute a surprisingly roundabout and implicit way of amending the judicature provisions of the Constitution of Canada."⁴⁴

The Court gets stuck on the plain meaning of the words rather than attempting to envision a system of court procedures that would provide clear equity. The argument is that justice before the law, the right to a fair trial, is another issue, one that is met by granting the constitutional right to each person's choice of official language and by providing the same translation service that a litigant or witness using even a nonofficial language would be entitled to have. The second part of the argument is that the courts' responsibilities are limited to interpreting the clear meaning of the law, while it remains for legislators and the political process to determine what those laws should be.

This issue illustrates the razor-thin edge between the limits of judicial interpretation and the opportunities of political statesmanship. In the words of Justice La Forest, practical exigencies are in balance with "the nature and history of the country. . . . [R]ights regarding the English and French languages . . . are basic to the continued viability of the nation."⁴⁵ Yet he wrote these words as reasons for judicial restraint at this crucial point, even though he went on to quote approvingly the words of Chief Justice Dickson in a related case: "Linguistic duality has been a longstanding concern of our nation. Canada is a country with both French and English solidly embedded in its history. The constitutional language protections [in section 16 of the 1982 Charter] reflect continued and renewed efforts in the direction of bilingualism. In my view, we must take special care to be *faithful to the spirit and purpose* of the guarantee of language rights enshrined in the *Charter*."⁴⁶

The Supreme Court leaves us in the hands of politicians for the provision of a level of judicial bilingualism that will grant equity to the minority official language. Failing that, unless the arguable yet narrow position of the Supreme Court in *MacDonald* is eventually overturned, nothing will prevent arbitrary governments from deterring the use of whichever be the minority official language in their jurisdiction through the embarrassment that the presence of interpreters imposes on private citizens using either of the Canadian languages.

CONCLUSION

The judicial fortunes of French on the Canadian Prairies indicate much about our legal processes, our history, and our cultural attitudes. Both judges and historians reconstruct the past. While their interpretative precision depends sometimes too much on the cultural tolerances and expectations of their society, their judgments in turn may influence that society. History, we know, is written by the victors, which means that historians validate the present, whether justice or injustice, legitimate or

illegitimate actions, disrupted the culture of the past. Thus, an eminent historian like W. L. Morton could write feelingly about the 1890 betrayal by the Greenway government, and then, in the 1970s, appear quite conservative in discussions of constitutional modifications that might enhance French-Canadian rights.⁴⁷

As for the judiciary, we have already seen how easily sidetracked the Manitoba Court of Appeal was by Judge Channell's concern about "the main object of the legislature"; nothing could be plainer than that the constitutional language clauses intended to protect the political use of both French and English, yet anglophone judges somehow confused that object with the general goal of establishing an order of positive laws. Chief Justice Freedman refused to regard the Greenway Official Language Act as "colourable legislation," while his colleague, Judge O'Sullivan, despite the twentieth century's ignoring of Judge Prud'homme's rulings in 1892 and 1909, and despite the Attorney General's reaction to the *Forest* judgment in his own day, could write in 1977, "there is . . . no warrant for any suggestion that crown ministers in this Province are unwilling to follow the law as declared by the Courts."⁴⁸ One can only be impressed by the care taken by the Prairie judiciary, on the whole, in reaching their conclusions, and successive judgments have gradually restored meaning and force to our language laws. But progress is sometimes slow, and one must be grateful for the few French-Canadian judges whose strategic presence helped put clear interpretations in the judicial record at early stages. The *MacDonald* and *Mercure* decisions in the Supreme Court (1986 and 1988) remind us, however, that ethnic origin is no guarantee of interpretations favorable to the minority.

When the original constitutional protections, the manner of their vitiation, and the enduring determination of the linguistic minority to enjoy their rights are brought together under the synchronized reflections of today, one may be pardoned if he or she hopes for a new generosity toward the Canadian language question. As the justices observed in the *MacDonald*

and *Bilodeau* cases, Canada's language protections were the result of a political compromise in the 1860s; judicial interpretations appear to have their limits in giving effective life to those protections in the 1980s. As events since the launching of Georges Forest's odyssey in 1976 have shown, however, those interpretations have significant impact on the fortunes of language rights for the minority. Little short of a cultural revolution is being accomplished.

NOTES

This paper is dedicated to Georges Forest.

For the research essential to this paper, I wish to thank John Davis, for several years reference librarian, Faculty of Law, University of Manitoba, who has given unstintingly of his time and advice. Further advice and friendly encouragement came from my colleague Professor David Burley, from law professors Douglas Schmeiser (Saskatchewan) and Gordon Bale (Queen's), and from Vaughan L. Baird, Q.C. None of these generous contributors, of course, bears final responsibility for my judgments.

1. An earlier version of this paper was presented at the Midwest Association for Canadian Studies, Minneapolis, 19 September 1986. This version includes the outcome of the cases decided since then. For rich illustrations of the process here described see Paul Schach, ed., *Languages in Conflict: Linguistic Acculturation on the Great Plains* (Lincoln: University of Nebraska Press, 1980), in particular the first chapter, by Frederick C. Luebke, "Legal Restrictions on Foreign Languages in the Great Plains States, 1917-1923," pp. 1-19. For Canada, besides the material cited below, consult Raymond Breton, Jeffrey G. Reitz, and Victor Valentine, eds., *Cultural Boundaries and the Cohesion of Canada* (Montreal: Institute for Research on Public Policy, 1980).

2. The general history summarized in this and the next two paragraphs may be most succinctly found in the following works: G.F.G. Stanley, "French and English in Western Canada," in Mason Wade, ed., *Canadian Dualism/La Dualité canadienne: Studies in French-English Relations/Essais sur les relations entre Canadiens français et Canadiens anglais* (Toronto: University of Toronto Press/Québec: les Presses Universitaires Laval, 1960), pp. 311-50; Cornelius J. Jaenen, "French Roots in the Prairies," in Jean Leonard Elliott, ed., *Two Nations, Many Cultures: Ethnic Groups in Canada*, 2nd ed. (Scarborough, Ontario: Prentice-Hall Canada, 1983), pp. 187-203; and William L. Morton, *Manitoba: A History*, 2nd ed. (Toronto: University of Toronto Press, 1967).

3. See Gilbert-L. Comeault, "'L'Affaire Forest': Franco-Manitobans in Search of Cultural and Linguistic Duality," in Raymond Breton & Pierre Savard, eds., *The Quebec and Canadian Diaspora in North America* (Toronto: Multicultural History Society of Ontario, 1982), pp. 101-21; see also Joseph Eliot Magnet, "Validity of Manitoba Laws after Forest: What is to be Done?" in *Manitoba Law Journal* 10 (1980): 241-57.

4. The British North America Act, 1867, is reprinted in numerous places: see William Paul McClure Kennedy, ed., *Documents of the Canadian Constitution, 1759-1915* (Toronto: Oxford University Press, 1918), pp. 665-83.

5. The Manitoba Act, 1870, may be found in William L. Morton, ed., *Manitoba: The Birth of a Province*, The Manitoba Records Society Publications, vol. 1 (Canada [sic]: Manitoba Records Society, 1965; 1984): 251-59; I know of no book reprinting the various North-West Territories Acts and their amendments, but they may be found, *seriatim*, in the *Statutes of Canada*.

6. Gordon Bale, "Law, Politics and the Manitoba School Question: Supreme Court and Privy Council," *The Canadian Bar Review*, 63 (September 1985): 463-64 and 517-18.

7. See Lovell Clark, ed., *The Manitoba School Question: Majority Rule or Minority Rights?* (Toronto: Copp Clark, 1968); W.L. Morton, "Manitoba Schools and Canadian Nationality, 1890-1923," in Craig Brown et al., eds., *Minorities, Schools, and Politics*, Canadian Historical Readings, vol. 7 (Toronto: University of Toronto Press, 1969): 10-18; and Bale, "Law, Politics," pp. 461-518.

8. Bale, "Law, Politics," pp. 464-65.

9. Section 23 of the Manitoba Act, 1870, states:

Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses: and either of those languages may be used by any person or in any pleading or Process, in or issuing from any Court of Canada established under the British North America Act, 1867, or in or from all or any of the Courts of the Province.

The Acts of the Legislature shall be printed and published in both those languages.

The wording is virtually identical to that in section 133 of the B.N.A. Act, 1867.

10. Cornelius J. Jaenius, "The History of French in Manitoba: Local Initiative or External Imposition?" *Language and Society* 13 (Spring 1984): 10-11.

11. *Ibid.*, p. 11; in his speech during Second Reading of "An Act Respecting the Operation of

Section 23 of the Manitoba Act in regard to Statutes" ("Bill 2"), Premier Sterling Lyon stated that 31 of the 35 M.L.A.s in the 1888-92 House had been born outside Manitoba. *Manitoba Debates and Proceedings*, Fourth Session, Thirty-First Legislature (7 April 1980), p. 2002. The validity of this act was the object of the fourth question put to the Supreme Court by the Attorney General of Canada and decided by the Court on 13 June 1985; sections 1-5 were found to be contrary to the intentions of section 23.

12. The case of *Pellant v. Hébert* was described in the French-language newspaper of the day, *Le Manitoba*, on 9 March 1890. The item is reproduced in Joseph Eliot Magnet, "Court Ordered Bilingualism," *Revue Général de Droit*, 12 (1981): 242-44.

13. See *Attorney-General of Quebec v. Blaikie et al. / Attorney-General of Quebec v. Laurier et al.* Supreme Court of Canada, Laskin C.J.C. Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ. (13 December 1979), *Dominion Law Reports* (Third Series), 101 (1980), pp. 394-404.

14. The case of *Bertrand v. Dussault* was decided on 30 January 1909 but was not reported. Justice Alfred Monnin had been informed of its existence in time to read it into his dissenting judgment in *Re Forest and Registrar of Court of Appeal of Manitoba*. Manitoba Court of Appeal, Freedman C.J.M., Guy, Monnin, Hall and O'Sullivan JJ.A. (22 June 1977), *Dominion Law Reports* (Third Series), 77 (1977), pp. 445-68. (*Bertrand* is on pp. 458-62.) In 1916 the case of *Dumas v. Baribeault* temporarily occupied court attention, but it was withdrawn without explanation. See Claude-Armand Sheppard, *The Law of Languages in Canada*, Studies of the Royal Commission on Bilingualism and Biculturalism, No. 10 (Ottawa: Information Canada, 1971), p. 80. Dumas, a Métis, found himself criticized for his initiative by Euro-French Manitobans who wished to concentrate on the contemporaneous issue of the schools. See Donald A. Bailey, "The Métis Province and its Social Tensions," in James Silver and Jeremy Hull, eds., *Essays on the Political Economy of Manitoba* (Regina: Canadian Plains Research Center, forthcoming).

15. Sections 79 through 81 of the City of Winnipeg Act, 1971, are also reproduced by Justice Monnin in *Re Forest* pp. 455-56.

16. See *Regina v. Forest*. County Court of St. Boniface, Manitoba, Dureault Co.Ct.J. (14 December 1976), *Dominion Law Reports* (Third Series), 74 (1977), pp. 704-17; Justice Monnin quotes the letter to Forest's counsel, Alain J. Hogue, and the statement sent to Judge Dureault by the crown attorney, David Rampersad, dated 31 January 1977, in his judgment in *Re Forest*, pp. 457-58 (Monnin himself quoted, p. 458). The Attorney General's reply to Forest is quoted by Chief Justice Samuel Freedman, in *Re Forest*, p. 450.

17. *Forest v. Attorney-General of Manitoba; Attorney-General of Canada, Intervenor*. Manitoba Court of Appeal, Freedman C.J.M., Monnin, Hall, Matas and O'Sullivan JJ.A. (25 April 1979), *Dominion Law Reports* (Third Series), 98 (1980), pp. 405-24. Followed by *Attorney-General of Manitoba v. Forest*. Supreme Court of Canada, Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and McIntyre JJ. (13 December 1979), *Dominion Law Reports* (Third Series), 101 (1980), pp. 385-90. See Robert W. Kerr, "Comments/Commentaires: Blaikie and Forest: The Declaratory Action as a remedy against Unconstitutional Legislation," *McGill Law Journal*, 26 (1980-81): 97-109.

18. Comeault, "L'Affaire Forest," p. 106 (citing *La Liberté*, 22 mars 1980); *R. v. Smith*. Manitoba County Court, Jewers Co.Ct.J. (5 February 1980), *Western Weekly Reports*, 3 (1980), pp. 591-97; *R. v. Guay*. Manitoba County Court of St. Boniface, Dureault Co.Ct.J. (3 March 1980), *Manitoba Reports* (Second Series), 10 (1981), pp. 322-26; and *R. v. Bilodeau*. Manitoba Provincial Court (Criminal Division), Gyles C.Prov.J. (29 August 1980), *Western Weekly Reports*, 1 (1981), pp. 474-80. Bilodeau's summons had been served on 29 May 1980. The latter two judgments followed Judge Jewers's arguments in *Smith* for the principal issue.

19. *Bilodeau v. Attorney-General of Manitoba*. Manitoba Court of Appeal, Freedman C.J.M., Monnin and Hall JJ.A. (7 July 1981), *Western Weekly Reports*, 5 (1981), pp. 393-414; *Reference Re Language Rights under the Manitoba Act, 1870*. Supreme Court of Canada, Dickson C.J.C., Beetz, Estey, McIntyre, Lamer, Wilson and Le Dain JJ. (13 June 1985), *Dominion Law Reports* (Fourth Series), 19 (1985), pp. 1-47; and *Bilodeau v. Attorney-General of Manitoba*. Supreme Court of Canada, Dickson C.J.C., Beetz, Estey, McIntyre, Lamer, Wilson and Le Dain JJ. (1 May 1986), *Dominion Law Reports* (Fourth Series), 27 (1986), pp. 39-47.

20. These interveners were the Attorney General of Canada, the Société Franco-Manitobaine, Alliance Quebec, the Fédération des Francophones hors Québec, the Attorney General of Manitoba, and a self-styled Group of Six from Manitoba (Douglas L. Campbell, James A. Richardson, Cecil Patrick Newbound, Russell Doern, Herbert Schulz, and Patricia Maltman). The Attorney-General of New Brunswick had already withdrawn, after Premier Richard Hatfield had discovered his A.-G. was in on the wrong side (Vaughan L. Baird, Bilodeau's counsel, to Donald A. Bailey, 27 November 1985). Some of the interveners were in only for the Reference decision.

21. *Reference Re Language Rights*, p. 19.

22. In his decision in *Montreal Street Ry Co. v. Nomandin* (a 1909 case), which was cited by A. Kerr Twaddle, counsel for the A.-G. of Manitoba, in his

factum submitted to the Manitoba Court of Appeal in *Bilodeau* and taken as guidance by Chief Justice Freedman in his decision, p. 400.

23. *R. v. Mercure*. Saskatchewan Provincial Court, Deshayes Prov.J. (15 April 1981), *Western Weekly Reports*, 4 (1981), pp. 435-47; *R. v. Mercure*. Saskatchewan Court of Appeal, Bayda C.J.S., Brownridge, Hall, Tallis and Cameron JJ.A. (28 October 1985), *Canadian Criminal Cases* (Third Series, Part 2), 23 (25 March 1986), pp. 140-70. Then, *R. v. Lefebvre*. Alberta Provincial Court, McMeekin Prov.J. (28 January 1982), *Western Weekly Reports*, 2 (1982), pp. 349-60; *R. v. Lefebvre*. Alberta Queen's Bench, Greschuk J. (2 June 1982), *Western Weekly Reports*, 5 (1982), pp. 481-508; *R. v. Tremblay*. Saskatchewan Court of Queen's Bench, Halvorson J. (11 June 1985), *Canadian Criminal Cases* (Third Series), 20 (1985), pp. 454-67. Then, *R. v. Luc Paquette*, Alberta Provincial Court, Marshall Prov.Ct.J. (26 October 1984), summarized in *Weekly Criminal Bulletin*, 14 (1984), pp. 69-70; *Paquette v. R. in Right of Canada*. Alberta Queen's Bench, Sinclair J. (30 July 1985), *Western Weekly Reports*, 6 (1985), pp. 594-631. The *Paquette* case has also moved further on appeal. *Re Paquette and The Queen*. Alberta Court of Appeal, Stevenson, Hetherington and Irving JJ.A. (11 September 1987), *Canadian Criminal Cases* (Third Series), 38 (1988), pp. 333-53, which considers the validity of section 110 of the North-West Territories Act. Then, *Re Paquette and The Queen* (No. 2). Alberta Court of Appeal, Stevenson, Hetherington and Irving JJ.A. (27 November 1987), *Canadian Criminal Cases* (Third Series), 38 (1988), pp. 353-80, which considers the applicability of section 15 of the Charter of Rights and Freedoms. The court upheld the continuing validity of section 110, but in disagreement with the lower court held that Paquette's right to use French did not impose on the court personnel an obligation to understand French.

24. See Donald G. Creighton, "John A. Macdonald, Confederation, and the Canadian West," in Brown, *Minorities* pp. 1-9; Ralph Heintzman, "The Spirit of Confederation: Professor Creighton, Biculturalism, and the Use of History," *Canadian Historical Review* 52 (September 1971): 245-75; and David J. Hall, "The Spirit of Confederation: Ralph Heintzman, Professor Creighton, and the bicultural compact theory," *Revue d'études canadiennes/Journal of Canadian Studies* 9 (November 1974): 24-43.

25. See Manoly R. Lupul, *The Roman Catholic Church and the North-West School Question: A Study in Church-State Relations in Western Canada, 1875-1905* (Toronto: University of Toronto Press, 1974).

26. "An Act to amend the acts respecting the North-West Territories" (Assented to 30 September 1891), in *Statutes of Canada* (1891), "Public Acts," p. 131. Other references to North-West Territories

Acts are also in *Statutes of Canada*.

27. Grant MacEwan, *Frederick Haultain: Frontier Statesman of the Canadian Northwest* (Saskatoon, Saskatchewan: Western Producer Prairie Books, 1985), p. 70.

28. "An Act to establish and provide for the Government of the Province of Alberta" (Assented to 20 July 1905), in *Statutes of Canada* (1905), "Public Acts," pp. 77-83 (Schedule, p. 83ff). Sections 3, 10, 14, 16, and 17 are important regarding the continuity of governing institutions and education.

29. Alberta Justice Prowse is the first in either province—if my reading was precise on this point—to notice and mention the parallel case (*Mercure*) in his sister province. In *Re Lefebvre and The Queen*. Alberta Court of Appeal, Prowse, Belzil and Irving JJ.A. (5 November 1986), *Dominion Law Reports* (Fourth Series), 41 (1988), p. 318. In his dissent, Justice Belzil also notes *Mercure*, p. 328. For its 1988 decision, the Supreme Court also saw the relevance of comparing the parallel cases. See *Mercure v. the Queen*. The Supreme Court of Canada, Dickson C.J.C., Beetz, Estey, McIntyre, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ. (25 February 1988), *Dominion Law Reports* (Fourth Series), 48 (1988), pp. 33-35.

30. Justice Taylor, "The Official Language of the Courts in Saskatchewan" (an address delivered at a meeting of the Moose Jaw Bar Association), *The Canadian Bar Review* 9 (1931): 281. The full story of the omission and restoration is found in Judge Sinclair's decision in *Paquette* (1985), pp. 600-02. Justice Estey considers the point in *Mercure*, but concludes that "the survival of s.110 in the laws of Saskatchewan remains untouched by all this parliamentary activity." In *Mercure* (25 February 1988), pp. 37-38.

31. See Judge Greschuk in *Lefebvre*, Alberta Queen's Bench, p. 490. But Judge Greschuk also argues that the replacement of the courts of the territories meant a change in procedures, too, pp. 494 and 497. Chief Justice Bayda in *Mercure*, Saskatchewan Court of Appeal, disagrees with Greschuk on this point without referring to the Alberta decision, p. 153; Judge Sinclair implies the same in *Paquette*, p. 611, but slips away from an explicit statement by then focusing narrowly on the issue of criminal procedure only. See the second paragraph of note 35, below.

32. The distinction is finally noted by Justice Estey in his dissenting opinion in *Mercure*, pp. 10-11.

33. *Re Prince Albert City Provincial Election. Strachan v. Lamont*. Supreme Court of the North-West Territories (Regina), Sifton C.J., Wetmore, Scott, Newlands and Harvey JJ. (22 October 1906), *The Western Law Reporter*, 4 (1906), pp. 411-25. Judge

Sifton makes the distinctions on pp. 412-13.

34. Chief Justice Bayda applies the distinction in *Mercure*, pp. 148-50; Judge Estey in *Mercure* (25 February 1988), pp. 27-30; Judge La Forest in *Mercure*, p. 53, quoted p. 51.

35. The Saskatchewan definitions were in "An Act to amend 'The Interpretation Ordinance'" (Assented to 26 May 1906), quoting only section 1(4), and "An Act respecting the Form and Interpretation of Statutes" (Assented to 3 April 1907), quoting section 5. I think much is implied by the former Act's taking over a territorial ordinance and merely amending it. The latter Act may seem to beg the question by the words "an Ordinance . . . in force in the province," for that is, indeed, the issue, but can it be resolved without returning to the Autonomy Acts' section 16(1), where we began?

Pursuing the interpretations question to the courts, we find that section 55 of "An Act respecting the Establishment of a Supreme Court in and for the Province of Saskatchewan" (Assented to 8 March 1907) says the following: "All rules of court in force in the supreme court of the North-West Territories at the time of the coming into force of this Act and which are not inconsistent therewith shall remain and be in force in the supreme court of Saskatchewan until they shall be altered or annulled by any rules of court under this Act." Section 24 of Alberta's "Act respecting the Supreme Court" (Assented to 11 February 1907) says essentially the same thing.

36. The Alberta definitions were in "An Act Respecting the Statutes" (Assented to 9 May 1906), section 7(10), and "An Act to Amend the Statute Law" (Assented to 15 March 1907), quoting from section 1. Judge Greschuk refers to these acts in *Lefebvre*, p. 502.

37. Section 30 of "An Act to amend the Factories Act, . . . and certain other Acts and Ordinances" (Assented to 17 April 1919). Section 27 of "An Act respecting the Interpretation and Construction of Statutes . . ." (Assented to 14 April 1958) reiterates the regulation to use English for public records and written processes. Judge Greschuk refers to these Acts in *Lefebvre*, pp. 502-03. The address by Judge Taylor to the Moose Jaw Bar Association, reprinted in *The Canadian Bar Review* 9 (1931): 277-83, was to mark "the introduction of the English Language as the language of the Courts in Saskatchewan" (footnote, p. 277), but I cannot find any clause to that effect in the Interpretation Acts or Judicature Acts, etc. in the immediately preceding years. Was the change in fact owing to a judicial decision about that time?

38. *Lefebvre* (5 November 1986), p. 33. It should be noted that, although in a minority in his own court, Justice Belzil's line of argument more closely anticipates the majoritarian judgment of the Supreme Court in *Mercure*.

39. *Ibid.*, pp. 331-33. See Justice La Forest in *Mercure* (25 February 1988), pp. 49-55, especially the last two pages; Justice Belzil quoted p. 329. Justice Monnin wrote, "Also, we are not dealing with a matter of procedure, but with one of great substance," in his dissent in *Bilodeau* (7 July 1981), p. 407. Writing for the majority of his court, Judge La Forest stated that "while s.110 governs procedural matters, it does not serve merely procedural ends. It embodies procedural rules that give rights to individuals." In *Mercure*, p. 56.

40. Sheppard, *Law of Languages*, pp. 87-91. Professor Sheppard is incorrect in his assertion (p. 91) that the English-record provision "does not appear in the 1958 revision of the Act"; it is found there as section 27. He cites the opinion of Mr. Justice Tavender, in *General Motors Acceptance Corporation of Canada Ltd. v. Perozni* (Alberta District Court, 1965) that French is a "permissive language" in the legislature and courts of Alberta (p. 90); Judge La Forest, in *Mercure*, p. 42.

41. In the spring of 1987, the provincial premiers and the prime minister of Canada signed an agreement at Meech Lake, Quebec, to seek a further amendment to the Constitution of Canada. I quote from it here. Highly controversial, this "Meech Lake Accord" may in fact fail to achieve final approval. (I must confess that I do not see how the right to appeal section 110 as regards the future legitimizes all the statutes of the preceding three generations that the judges held to be invalid by its terms.)

42. *MacDonald v. The City of Montreal*. Supreme Court of Canada, Dickson C.J.C., Beetz, Estey,

McIntyre, Lamer, Wilson and Le Dain JJ. (1 May 1986), *Dominion Law Reports* (Fourth Series), 27 (1986), pp. 321-88. After the *Reference Re Language Rights* decision of the year before, the court reserved judgment in *Bilodeau* in order to deliver it at the same time as its decision in *MacDonald*; the arguments for the majority are set forth by Justice Beetz, a brief qualification by Chief Justice Dickson, and an extensive dissenting judgment of Justice Wilson by herself—all in the former decision, so that, in *Bilodeau*, parallel brief judgments could be based on the extensive arguments in *MacDonald*.

43. In *Re Forest and Registrar* (22 June 1977), pp. 453-54.

44. In *Mercure* (25 February 1988), p. 62, quoting from *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, a 1986 case reported in *Dominion Law Reports* (Fourth Series), 27 (1986), pp. 426-27.

45. In *Mercure*, p. 58.

46. Quotation from *Société des Acadiens*, p. 415. My emphasis.

47. In Morton, *Manitoba: A History*, pp. 246-47. Professor J. A. Bailey, formerly a colleague of Professor Morton's at University College, University of Manitoba, reported such a conversation to me.

48. In *Forest v. Attorney-General of Manitoba*, p. 421. He no doubt had in mind the contrary opinion of Judge Dureault, in *R. v. Forest*, p. 717; Chief Justice Freeman quoted from *Re Forest and Registrar*, p. 468.