
The Constitution of Canada and the Official Status of French in Alberta

by Edmund A. Aunger

New research shows that the Rupert's Land and North-Western Territory Order, an integral part of the Constitution of Canada, effectively guarantees the official status of the French language in Alberta. On July 2, 2008, the Provincial Court of Alberta confirmed this conclusion when it ruled, in the Caron case, that the Traffic Safety Act was invalid because it had not been passed in French. (The Crown is currently appealing this ruling in the Court of Queen's Bench.) In this article, an expert witness in the Caron case summarizes his research findings.

On February 25, 1988, the Supreme Court of Canada recognized, in the *Mercure* decision, that French was an official language in Saskatchewan, and, as a consequence, in Alberta, under section 110 of *The North-West Territories Act*, passed for the first time in 1877. This section provided that:

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 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:...

This language provision was still in effect in 1905, when the Parliament of Canada created the provinces of Saskatchewan and Alberta from the North-West Territories. Section 16 of the two constitutional acts – *The Saskatchewan Act* and *The Alberta Act* – provided for legislation in effect at the time to be maintained, to be eventually amended “by the Parliament of

Canada, or by the Legislature of the said province, according to the authority of the Parliament or of the said Legislature...”, with the exception of legislation passed in Great Britain. During the debate on *The Alberta Act*, Charles Fitzpatrick, the Minister of Justice at the time, confirmed that, given that section 110 was still in effect, “it would be the law as they will have it in the province after this constitutional Act is passed”.¹

Nevertheless, in 1988, the Supreme Court also held that *The North-West Territories Act* was not an integral part of the Constitution of Canada, and that the province was therefore able to amend it unilaterally – on the condition that amendments be made in French and English. Armed with this information, the governments of Alberta and Saskatchewan each lost no time in passing a language act in both languages that repealed section 110, thereby removing the official status of French in their provinces. James Horsman, the Attorney General of the province of Alberta, explained:

Mr. Speaker, we are dealing with the reality of the fact that the *Mercure* decision has said that an Act passed in 1886 – which had never been used in this province, never been implemented, had fallen into complete disuse in the Northwest Territories prior to Alberta becoming a province in 1905 – is still the law because of a technicality... We have now been told by the Supreme Court of Canada how we must proceed in order to change

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that antiquated, unused piece of legislation which was a hangover from 1886.²

This claim that the Constitution of Canada does not protect the official status of the French language in Alberta and Saskatchewan is born of a profound misunderstanding of the historical origins and the constitutional foundations of linguistic duality in Canada. Unfortunately, a number of historians have perpetuated this misunderstanding by claiming that section 110 was a singular event, a chance accident, with no rhyme and no reason. The great historian Donald Creighton, for example, suggests that section 110 was proposed in 1877 by a Conservative senator acting on his own initiative and accepted by the Liberal government acting against its better instincts. He writes that the decision to grant official status to the French language in the North-West Territories was “hasty and ill-considered” and “characterized throughout by accident and improvisation”.³ He goes further: “this attempt to fix the political institutions of the west before immigration and the growth of population had determined its true and permanent character was a mistake for which the whole of Canada paid dearly”.

In my view, if there are mistakes for which Canada has paid dearly, they do not lie in the official bilingualism instituted by political leaders, but in the pernicious distortions propounded by great historians. Section 110 is nothing less than the tip of the iceberg, the visible evidence of a deeper and more substantial linguistic duality in the Canadian West. My research shows that French had official language status in the vast territories of the West and the North since 1835, a status recognized in law and in fact. Canada was eagerly looking for ways to annex those territories, and, in 1867, solemnly promised to respect existing rights. This commitment was enshrined in the Constitution of Canada in 1870. Let us look quickly at that research.

New Research

The name of these vast expanses, that Canada so coveted, was Rupert's Land, granted to the Hudson's Bay Company by Charles II, King of England in 1670, and comprising all the lands whose waters drained into Hudson Bay, and the North-Western Territory, to the west of this basin, also controlled by the Company. Those lands, extending from Alaska to Labrador, covered 7.2 million square kilometres, or 79% of Canada's present area. By way of comparison, Quebec at the time was only a half million square kilometres in area and Ontario a quarter million.

In 1835, to address the needs of the growing Métis population, the Company established a civil administration in the Assiniboia district, where

the city of Winnipeg is today. The administration had a Governor, a Recorder and approximately ten councillors. This Council of Assiniboia was given executive, law-making and judicial powers; its members also made up the supreme court of Rupert's Land, commonly known as the General Court. The Recorder of Rupert's Land combined the functions of Minister of Justice, Attorney General and Chief Justice, and presided over court proceedings.

The Official Status of French

A number of clues allow us to conclude that French had official status at the Council of Assiniboia and the General Court. In the case of the former, we discovered that in 1845, the Council ordered its laws to be read aloud, in English and French, at least twice a year at General Court meetings, and at other meetings called by the Governor for the purpose.

In 1851, in order to justify ordering a printing press equipped with French accents, the clerk told the Hudson's Bay Company that all Council documents had to be printed in English and French.

In 1852, and again in 1863, the Council passed revised consolidated statutes, in English and French on both occasions.

With respect to the General Court, we discovered that in 1838, the Governor of Rupert's Land told the first Recorder that a perfect knowledge of French was a prerequisite for his legal functions: “I presume you are qualified to express yourself with perfect facility in the French Language as that may in a great measure be considered the Language of the Country and without which you would not be qualified for the Situation”.⁴

In 1849, the Council of Assiniboia required the Recorder to address the court in French and in English, in any case involving the interests of either Canadians or Métis.

In 1852, the Hudson's Bay Company dismissed Judge Adam Thom because of his lack of ability in French. He was replaced by a bilingual Recorder who had been trained in France. Court proceedings were regularly conducted in French and, at trials where respondents and appellants were Francophone, juries too were entirely Francophone.

At General Court trials where respondents and appellants were both Francophone and Anglophone, proceedings were regularly conducted in both languages, with English and French interpretation, and

juries were made up of equal numbers of Anglophones and Francophones.

Lastly, we found the testimony of Alexandre Taché, Bishop of Saint Boniface. In 1869, when he learned that the Government of Canada proposed to appoint an Anglophone administration for the annexed territories, he made a point of telling George Étienne Cartier that: "French is not only the language of a large proportion of the inhabitants of the North-West, it is also an official language. Yet most members of the new administration do not speak the language, which rather seals the fate of those who speak no other."⁵

The Solemn Commitment

The *British North America Act of 1867*, today called *The Constitution Act, 1867*, an integral part of the Constitution of Canada, provided for Rupert's Land and the North-Western Territory to be added to the Canadian federation "on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve..." (s.146). On December 17, 1867, during its very first session, the Parliament of Canada passed an address to the Queen, asking her to add Rupert's Land and the North-Western Territory to the Dominion of Canada and assuring her of its commitment to "take all necessary measures to ensure that the legal rights of any corporation, company or individual be respected and placed under the protection of duly-empowered courts". The Order in Council admitting Rupert's Land and the North-Western Territory dated June 23, 1870, now called the Rupert's Land and North-Western Territory Order, also an integral part of the Constitution of Canada, recognized and entrenched the commitment.

When the Métis inhabitants of Rupert's Land and the North-Western Territory demonstrated their opposition to any annexation made without their consent, the Governor General of Canada, Sir John Young, tried to be conciliatory by communicating the terms of the commitment to them directly. On December 6, 1869, he issued a proclamation in the name of Queen Victoria to "the Loyal Subjects of Her Majesty the Queen" declaring that "By Her Majesty's authority, I do therefore assure you that, on the union with Canada, all your civil and religious rights and privileges will be respected, your properties secured to you, and that your country will be governed, as in the past, under British laws and in the spirit of British justice". (It is particularly striking that, of all the 154 proclamations in Canada's official registry from 1867 to 1874, this one addressed to the

inhabitants of the North-West Territories is the only proclamation recorded in French.)

On the same day, Sir John Young sent a copy of the proclamation to William McTavish, Governor of Assiniboia, with the following assurance:

The inhabitants of Rupert's Land, of all classes and persuasions, may rest assured that Her Majesty's Government has no intention of interfering with, or setting aside, or allowing others to interfere with or set aside, their religious rights and the franchises which they have hitherto enjoyed or to which they may hereafter prove themselves equal.⁶

The following day, Joseph Howe, the Secretary of State for the provinces, wrote to William McDougall, the Lieutenant Governor Designate, telling him that a "Proclamation issued by the Governor-General by the direct command of Her Majesty", had been sent and asking for it to be widely distributed.

You will now be in a position, in your communication with the residents of the North-West, to assure them: – 1. That all their civil and religious liberties and privileges will be sacredly respected. 2. That all their properties, rights, and equities of every kind, as enjoyed under the Government of the Hudson's Bay Company, will be continued them...⁷

A few days later, on December 10, 1869, the Governor General appointed Donald Smith, (the future Lord Strathcona), a senior official of the Hudson's Bay Company, as special commissioner, directing him "to explain to the inhabitants the principles upon which the Government of Canada intends to govern the country, and remove any misapprehensions which may exist on the subject".⁸ During public meetings held in Fort Garry on January 19 and 20, 1870, Smith communicated the various statements binding the Canadian government to respect existing rights in Rupert's Land and the North-Western Territory. Nevertheless, the Métis inhabitants did not trust such abstract promises and wanted more specific guarantees. With the assurance that Smith was authorized to provide those guarantees, they elected delegates – 20 Francophones and 20 Anglophones – to a convention to draw up the list of the rights they claimed. (In the House of Commons a few months later, Georges Étienne Cartier favourably compared this convention with the Charlottetown and Québec City conferences that had paved the way for Confederation in 1867.)

On February 7, 1870, the convention presented Donald Smith with a charter containing nineteen rights, including two that dealt with language: "That the English and French languages be common in the Legislature and Courts, and that all public documents

and Acts of the Legislature be published in both languages”, and “That the Judge of the Supreme Court speak the French and English languages”. To both claims, Smith replied: “As to this I have to say, that its propriety is so very evident that it will unquestionably be provided for”.⁹

The convention also elected three delegates to deal directly with Ottawa. The provisional government armed them with instructions to the effect that official bilingualism was “peremptory”. In April 1870, these delegates negotiated an agreement with Canadian Prime Minister Sir John A. Macdonald and his right-hand man Georges Étienne Cartier that recognized the rights they claimed and brought about the union of the territories. On May 12, 1870, the Parliament of Canada responded by passing *The Manitoba Act* and, on June 24, 1870, the Legislative Assembly of Rupert’s Land reciprocated. According to Noël-Joseph Ritchot, the principal delegate and the only one to report to the Métis who had elected him, the Canadian act included their list of rights and guaranteed them official bilingualism.

Manitoba Act

The Manitoba Act, an integral part of the Constitution of Canada, prepared the admission of Rupert’s Land and the North-Western Territory to the Canadian federation and established two new entities: the province of Manitoba and the North-West Territories – with twinned governments and common institutions. The administration of the territories was entrusted to the Lieutenant Governor of Manitoba, who also held the title Lieutenant Governor of the North-West Territories (s. 35). But officials of the former Rupert’s Land had kept their positions in the new province and the adjacent territories (s. 36). As a result, section 23, which recognized official bilingualism in the legislatures and the courts of the province, also had the effect of establishing official bilingualism in territorial institutions.

We discovered the following about the executive and legislative branches: Adams Archibald, the Lieutenant Governor of the North-West Territories issued his proclamations in both English and French, and he even made a mistake when he signed the very first of those proclamations “Lieutenant Gouverneur de Manitoba”.

The Council of the North-West Territories, which sat in Winnipeg, was made up largely of members from

the Manitoba legislative chambers and used the same bilingual procedures.

The Council of the North-West Territories passed its bills in English and French and had them published in both languages in the *Manitoba Gazette*.

We discovered the following about the judiciary: The Recorder, Francis Johnson, addressed the court in English and French and signed his decisions “Recorder of Manitoba and the North-West Territoires”.

In 1872, the position of Recorder was replaced by the Chief Justice of Manitoba, but his jurisdiction over the province and the territories remained the same.

The General Court continued to function as the court of appeal for Manitoba and the North-West Territories. This continued even after it was renamed the Manitoba Court of Queen’s Bench in 1872.

Proceedings of the General Court were conducted as in the past; in French when both respondent and appellant were Francophone, in English when they were Anglophone, and in both languages when they were both Francophone and Anglophone, with each speaking in his own official language.

In 1875, Alexander Mackenzie, the Liberal Prime Minister of Canada, decided to separate the governments of Manitoba and the North-West Territories and to move the territorial capital to Battleford where it remained for several years before moving to Regina. In 1876, he proclaimed his new *North-West Territories Act* and, at the same time, appointed a new territorial council made up of a lieutenant governor and three magistrates, all unilingual Anglophones. Joseph Royal, owner of the *Le Métis* newspaper, Attorney General of Manitoba and future Lieutenant Governor of the North-West Territories, protested vehemently against this “iniquitous” act and demanded a return to the “present system that provides the right to be judged in one’s own language”.¹⁰ Marc Girard, both a former premier of Manitoba and a former principal councillor of the North-West Territories also came out against the “unnecessary” act, declaring that Francophones in the territories had the same right to have their language recognized as Francophones in Québec and Manitoba.¹¹ Senator Girard successfully proposed amending the act to recognize official bilingualism in the North-West Territories. These are the true origins of section 110, which generations of historians have dismissed as accidental, inexplicable and undesirable.

Conclusion

The impact of this research will depend in part on the result of judicial deliberations. On July 2, 2008,

in the Caron case, Justice Leo Wenden of the Alberta Provincial Court held, largely on the basis of this new evidence, that the official status of the French language was entrenched in the Constitution of Canada. As a consequence, he also held that the *Languages Act* (1988) that struck down section 110 had infringed the language rights of the Francophone defendant, Gilles Caron. He also held that the *Traffic Safety Act* was invalid since it had been passed only in English. The Crown is challenging this decision on the grounds that the judge should have limited himself to the Supreme Court decision in *Mercure*. The appeal will be heard by the Court of Queen's Bench, starting on January 19, 2009.

Meanwhile my conclusions about the implications of the research are as follows.

(1) The Constitution of Canada, and more precisely the Rupert's Land and North-Western Territory Order, because it commits Canada to respect the "legal rights" that existed at the time, guarantees official bilingualism in the legislative assemblies and courts of Alberta and Saskatchewan, as well as in the provinces of Manitoba, Ontario and Québec and the three territories.

(2) This constitutional guarantee recognizes the right of each person to a trial in his own official language, that is, before a judge who understands the language and with a jury made up of speakers of the language. This goes beyond the traditional provisions that recognize only the right to speak in one's own language.

(3) The convention that met in Fort Garry in 1870 to draw up a list of claims, made up of Francophones and anglophones in equal numbers, negotiated a fundamental pact about the governance of Canada's North and West, a pact that established the essential principles of linguistic duality and cultural partnership.

(4) Once ratified by Canada in 1870, this pact became a second act of confederation, as important as the first, that brought together Canadians from West and East

and established the Métis as one of our country's founding peoples.

As our history has traditionally been written, these are troubling and shocking conclusions. They fly in the face of conventional thought and traditional myths. Is Confederation an act of union imposed by an imperial power and by British law, or is it a federative agreement negotiated by English Ontario and French Québec? It is neither. The reality is richer, more complex, and infinitely more interesting.

Notes

1. *House of Commons Debates* (Fitzpatrick), vol. 73, June 29, 1905, p. 8242.
2. *Alberta Hansard* (Horsman), vol. 102, June 30, 1988, p. 2171.
3. Donald Creighton, "Macdonald, Confederation and the West", in *Towards the Discovery of Canada: Selected Essays* (Toronto: Macmillan, 1972), p. 240.
4. Letter from George Simpson to Adam Thom, January 5, 1838, Hudson's Bay Company Archives, Winnipeg, D4 23, folio 155.
5. Letter from Alexandre Taché to George Étienne Cartier, October 7, 1869, Fonds Corporation archiépiscopale catholique romaine de Saint-Boniface, Série Taché, Centre du patrimoine, Saint-Boniface, Manitoba, Ta4013.
6. Letter from John Young to William McTavish, December 6, 1869, in *Correspondence relative to the recent disturbances in the Red River Settlement* (London: William Clowes & Sons, for Her Majesty's Stationery Office, 1870), p. 34.
7. Letter from Joseph Howe to William McDougall, December 7, 1869, in *Correspondence relative to the recent disturbances in the Red River Settlement* (London, William Clowes & Sons, for Her Majesty's Stationery Office, 1870), p. 35-36.
8. Letter from Joseph Howe to Donald Smith, December 10, 1869, in *Correspondence relative to the Recent Disturbances in the Red River Settlement* (London: William Clowes & Sons, for Her Majesty's Stationery Office, 1870), p. 51.
9. "Convention at Fort Garry", *The New Nation* (Winnipeg), February 11, 1870, p. 3.
10. "Le Gouvernement du Nord-Ouest", *Le Métis* (Saint-Boniface, Manitoba), April 12, 1877, p. 2.
11. *Debates of the Senate* (Girard), April 9, 1877, p. 319.