

## The Canadian Constitutional Tradition : A Brief Glimpse from an American Point of View

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Article abstract

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Pour un Américain, les problèmes constitutionnels que soulèvent au Canada la langue et l'éducation sont sans doute les plus intéressants et les plus difficiles à saisir. Selon l'auteur, il est impossible de comprendre l'état actuel de ces questions sans en connaître les racines historiques.

Le but poursuivi par l'A.A.N.B. de 1867, plus clairement encore que la constitution des États-Unis, était de lier fermement les unes aux autres des entités politiques jusque-là autonomes. L'auteur fait valoir que ce but a en fait été beaucoup plus largement atteint aux États-Unis qu'au Canada. En dépit des textes — l'alinéa introductif de l'art. 91 de l'A.A.N.B. et les 9<sup>e</sup> et 10<sup>e</sup> amendements à la constitution des États-Unis —, le fédéralisme américain est aujourd'hui beaucoup plus centralisé que le fédéralisme canadien.

L'auteur compare enfin les garanties des droits de l'homme dans les deux pays. Il constate que la *Déclaration canadienne des droits* n'est qu'une loi fédérale ordinaire, qui n'existe que depuis 1960, alors qu'aux États-Unis le *Bill of Rights* fait partie de la constitution depuis 1791. Il observe cependant que l'existence du *Bill of Rights* n'a pas empêché certaines violations des droits de l'homme de se produire aux États-Unis aussi bien qu'au Canada avant l'adoption de la *Déclaration canadienne des droits*.

# The Canadian Constitutional Tradition: A Brief Glimpse from an American Point of View\*

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Edward G. HUDON \*\*

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\* Part of this paper is drawn from a summary of a LL.D. thesis written in 1976 under Jean-Charles Bonenfant's supervision.

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The late Justice Oliver Wendell Holmes once wrote that “a page of history is worth a volume of logic.”<sup>1</sup> For various reasons, that is even more applicable to the *British North America Act*, Canada's Constitution, than it is to the written Constitution of the United States and to the unwritten Constitution of England. It is only through the historical approach that the myriad perplexities of the Canadian system can be understood by one brought up under the myriad perplexities of that of the United States. Indeed, how else can one reared in the tradition of the separation of Church and State of the American Constitution truly understand the very much different, and even contrary, tradition of the Canadian Constitution?

Or, for that matter, how else but from the historical approach can even a citizen of one Province of Canada understand, and in fact accept, the different doctrines of Church and State as they exist in other Provinces? Moreover, this can be said not only of the law of Church and State as it is set forth, provided for, and protected in the *British North America Act*, but also of the law — the traditions — applicable to education, language, and even whether the civil law of France or the common law of England will prevail in a Province. Varying as these traditions do from Province to

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1. *New York Trust v. Eisner*, 256 U.S. 345, 349 (1921).

Province, it is all the more important that a study of Canada's Constitution should be from the historical point of view. It is only if that approach is followed that there can be a clear understanding of the matter studied.

### 1. The *British North America Act*, Canada's Constitution

The *British North America Act*, a statute of the British Parliament which serves as Canada's Constitution, exists for the same reason that the Constitution of the United States does. Both were adopted to replace a pre-existing form of government which no longer worked. Both came into existence at a time when there was a realization that something else was needed to provide the political organization and leadership essential to the development and government of a young, energetic country. There was, however, a marked difference in the amount of time that was required for such a situation to develop in Canada, which led to the adoption of the *British North America Act*, and the amount of time required in the United States for the turn of events to take place which caused the Articles of Confederation to be replaced by the Constitution of the United States. In Canada it took slightly more than a century, in the United States it took a decade. In Canada it took from 1760, the year the British took the country by conquest, until 1867, the year the *British North America Act* was adopted.<sup>2</sup> In the United States it took from 1777, the year the Articles of Confederation were agreed to<sup>3</sup>, until 1787, the year the Constitution of the United States was engrossed, agreed upon, and signed by all but two of the members present at the Federal Convention in Philadelphia<sup>4</sup>.

Without a doubt, this difference in time is due largely to the different manner in which the two respective countries came into existence. In the case of Canada it was by conquest, in the case of the United States it was by revolution. For over a century following the conquest, the status of the former was that of Provinces which were largely independent of each other as colonies of Great Britain just as the thirteen American Colonies had been before the Revolution. During the decade prior to the adoption of the Constitution the thirteen original States of the United States were loosely bound together by the Articles of Confederation, but even during this period there was self-government in these States and there had been government which was responsible to the people since the Revolution.

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2. *An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith*, 30-31 Vict., c. 3 (U.K.).

3. See fn. 1 to the Articles of Confederation, *United States Code*, 1970 Edition, Titles 1-7, p. XXXIII.

4. See fn. 1 to the Constitution of the United States of America, *United States Code*, 1970 Edition, Titles 1-7, p. XLIII.

Eventually, self-government became a reality in Canada, and a large measure of responsible government was achieved even before the *British North America Act* became Canada's Constitution. However, that took all of three-quarters of a century following the conquest — until the end of the first half of the nineteenth century — and it was not until well into the twentieth century, until the *Statute of Westminster, 1931*<sup>5</sup>, that Canada gained equal status and the full measure of self-government as a member of the British Commonwealth.

## 2. *Anglicization and the Unforeseen Miracle of 1774*

The development of Canada's Constitutional system has been largely influenced — in fact, dominated — by a population which is made up of two separate peoples, the French-Canadians and the English-Canadians. The former are the descendants of those who settled Canada, the latter the descendants of those who came to Canada at the time of and following the conquest. Ever since the conquest each has had its own ethnic background, its own language, its own religion, and even its own system of laws. Although the British brought the common law with them, which they fully intended to impose on the entire country, by sheer determination and fortuitous circumstance the French-Canadians have been able to preserve the existence of the civil law of France which they brought with them when they settled the country. The same has been true of the Roman Catholic faith and the French language. And this has been accomplished in spite of the dogged determination of the English who, from the moment of the conquest, sought to do away with everything that was French and replace it with everything that was English whether it related to language, law, or religion. The outcome has been the creation of a chasm between French-Canadian and English-Canadian which is as pronounced today as it was immediately after the conquest in 1760.

Almost from the moment of the conquest the French-Canadians were able to thwart the English plan to anglify them in every way, shape, and manner. This was possible because of the "unforeseen miracle" caused by the imminence of the American Revolution. The growing possibility of armed conflict between England and the thirteen American colonies caused the British to reassess their situation in Canada. It caused them to realize that should hostilities develop between the mother country and these colonies, Britain would need the support of its newly acquired French-Canadian subjects if it were to maintain any presence in North America.

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5. *An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930*, 25 Geo. V, c. 4 (U.K.).

The result was the *Quebec Act* of 1774<sup>6</sup>, which restored the French civil law — *la Coutume de Paris* —, replaced with a different oath the Test Oath to which French-Canadian Roman Catholics could not subscribe, and assured the French-Canadians the free exercise of their Roman Catholic faith even though the Church of England was the established church of the Province. The 1774 Act set the pattern for Quebec's, and later Canada's, constitutional development.

### 3. The Chasm between French-Canadian and English-Canadian

Then there was the *Constitutional Act* of 1791<sup>7</sup> which was also the result of the American Revolution. It was the answer given to the Loyalists who fled to Canada from the thirteen colonies during and immediately after the American War of Independence. No sooner had these settled in Canada that they claimed their "rights as Englishmen": the right to trial by jury, *habeas corpus*, the benefit of English law, and a representative form of government. To satisfy these demands, the Province of Quebec was divided into Upper and Lower Canada with the former, the English part, given the benefits which the new settlers demanded, and both parts given representative forms of government. While this gave the English-Canadians of Upper Canada the opportunity to shape their own destiny, it also gave the French-Canadians of Lower Canada a representative assembly, the weapon which they desperately needed if they were to maintain their identity and preserve their institutions, their religion, and their language.

The *Constitutional Act* of 1791 provided a temporary solution for the problem of the day caused by the existence of two separate peoples, each of which wished to retain its own identity and everything that went with it. But in time the 1791 Act created more problems than it solved. It meant that the French and English elements of the population drifted further and further apart until a chasm came to exist between the two which has never been bridged. To a large measure, the greatest single contributing factor to the creation of this chasm was the development of a "have" and a "have not" society due to the language question, the conflict between the elected Assembly and the Chateau Clique, and the school question. There was also the French Revolution which caused the English to fear a French invasion of Canada, but which in fact actually helped the British because of the excesses which took place in France against the Church and its clergy as well as against the French nobility. This caused the French-Canadian bishops to denounce France and its Revolutionary leaders, to ally them-

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6. 14 Geo. III, c. 83 (U.K.).

7. 31 Geo. III, c. 31 (U.K.).

selves with the British, and call upon the people to adhere to the loyalty which they were told they now owed the British monarch.

Today, more than two hundred years after the British conquest of Canada, there still exists a chasm between French-Canadian and English-Canadian. The continued existence of this chasm is largely due to the causes which originally created it and which still persist. Furthermore, the continued existence of that chasm has had a profound effect on the constitutional development of the country. Indeed, without a thorough knowledge of the ethnic, cultural, and religious conflicts which led to the creation of this chasm, it is impossible for one to have anything but a superficial understanding of the constitutional development and framework of the country.

It is true that there is no longer the fear by English Canada that, at this late date, an invasion of, or an insurrection in, Canada could result from the French Revolution. Yet, in 1967 a French President could, and did, cause not only deep resentment throughout English Canada, but also a shock wave, when he concluded an extemporaneous address from a balcony of the Montreal city hall before 10 000 peoples with the cry: "Vive le Québec! Vive le Québec libre! Vive le Canada français! Vive la France!"<sup>8</sup> Perhaps the reason why a French President could still create such an emotional reaction in Canada is because the authority of the Church is not as strong now as it was even as little as fifteen or twenty years ago, not to mention 150 or 200 years ago. There is no longer the strong guiding hand of the Roman Catholic bishops to tell the French-Canadians that they owe a duty to an English monarch as they did during the Rebellion of 1837-1838, or to restrain the young and the militant. That strong hand of the Church which has played so great a part in shaping Canada's constitutional tradition was weakened during the so-called Quiet Revolution which took place in the Province of Quebec during the 1960's<sup>9</sup>. That turn of events cannot help but affect Canada's future constitutional development. That should be clear if one will but pause and consider the influence which the Church has had in the past in Canada as a whole as well as in the Province of Quebec in particular.

Immediately after the conquest it was largely through the efforts of Jean-Olivier Briand, Grand Vicar, later Roman Catholic Bishop of Quebec, that the French-Canadians gained concessions from the conquering British which enabled them to continue to enjoy their language and their religion.

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8. For a description of the occasion, see M. WADE, *The French Canadians, 1760-1967*, Toronto, Macmillan, 1968, vol. 2, pp. 1122 ff.

9. See T. SLOAN, *Quebec: The Not-So-Quiet Revolution*, Toronto, Ryerson Press, 1965.

Later, during the Rebellion of 1837 and 1838, it was the Catholic Church and its bishops that tipped the scales in favor of the British and made the *Patriote* cause all but impossible. Then it was the influence of the Church and its clergy, along with the French-Canadian majority in the Assembly, which made possible the Church-affiliated schools that existed in Lower Canada prior to the *Union Act* of 1840<sup>10</sup>. It was this same influence which made possible the 1845 and 1846 education Acts which have been referred to as *la grande charte de nos libertés scolaires*<sup>11</sup>. It was these Acts which established the parish as the basis for school corporations and helped the French-Canadians of Quebec preserve their cherished French language and their institutions. Since Confederation, similar results have been achieved because of the provision in the *British North America Act* which protects the rights or privileges with respect to denominational schools which any class of persons had by law in a Province "at the Union"<sup>12</sup>.

#### 4. Responsible Government — The Second Unforeseen Miracle

Even after Canada had been divided into Upper and Lower Canada and each part given a representative assembly, for a long time responsible government did not exist in either part. In Lower Canada this was due to the so-called Chateau Clique and in Upper Canada to the Family Compact. Both were made up of members of the Executive and Legislative Councils who were appointed by the Governors and relied on by them for advice. Both groups of permanent advisors represented interests that had little in common with the average colonist or his elected representatives. Moreover, both could, and did, thwart legislation which was distasteful to themselves even though it represented the will of the people. In Lower Canada, the manner in which the Chateau Clique promoted its own selfish interests — that of the English merchants of Montreal — contributed immeasurably to the manner in which French-Canadian and English-Canadian drifted further and further apart. One there was added to this the attitude of Governors such as James Craig, a professional soldier who had little use for anything French whether European or Canadian, it was inevitable that there should be a clash. When the clash did take place with the Rebellion of 1837 and 1838 and French-Canadian aspirations devastatingly defeated, momentarily all appeared lost. But even after the Union of the two Canadas was forced on Lower Canada in 1840, slowly the pieces were put back

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10. 3-4 Vict., c. 35 (U.K.).

11. *An Act to make better Provision for Elementary Instruction in Lower Canada*, 1845, 8 Vict., c. 41 (Can.); *An Act to repeal certain Enactments therein mentioned, and to make better Provision for Elementary Instruction in Lower Canada*, 1846, 9 Vict., c. 27 (Can.).

12. S. 93.



together and representative government achieved. To a measure, even French-Canadian aspirations were realized after the second "unforeseen miracle" took place when, in September, 1842, French-Canadians were admitted into the Government.

The second "unforeseen miracle" took place not because French-Canadians were wanted in the Government, but because they were needed. Without them, no party could muster a workable majority in the Assembly because the Conservatives of Canada East and those of Canada West could not agree on the course to be adopted toward the French-Canadians. On the other hand, the twenty-two French-Canadian members of the Assembly acted as one, and that magnified their importance and their power to an extent that was much greater than their numbers warranted. As a result, after repeated overtures, Louis-Hippolyte Lafontaine was forced to accept office by Sir Charles Bagot, the Governor of the Province.

Lafontaine was a disciple of Louis-Joseph Papineau, the firebrand leader during the events which led to the 1837 and 1838 uprisings. But Papineau was now in exile in Paris and it fell to Lafontaine to take over the role of leader of the French-Canadian cause. Although he had only recently been cleared of charges brought against him due to the uprisings, he played a leading role in the achievement of responsible government. It was during the ministry which he formed in 1848 with Robert Baldwin, the Reform leader of Canada West, while James Bruce, Eighth Earl of Elgin, was Governor-General, that responsible government became a reality. Together, Lafontaine and Baldwin were even able to push through a *Rebellion Losses Bill* which granted reparations for losses suffered by French-Canadians during the 1837 and 1838 uprisings. Moreover, in 1849 the turn of events had progressed to such a point that Elgin delivered his Speech from the Throne as Governor-General in French as well as in English.

The three years of the Lafontaine-Baldwin Great Ministry can justly be termed a decisive period of Canada's constitutional development. It was during these years that government by party became recognized and the ban against the use of the French language as an original record in the Assembly repealed<sup>13</sup>. But in all of this, Lafontaine and Baldwin were helped immeasurably by Elgin as Governor-General. Elgin could accomplish much that others before him had not been able to because of his attitude and because time was in his favor. Moreover, he was the son-in-law of Durham, the Governor-General who had been sent to Canada as a fact-

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13. See the *Union Act*, *supra*, fn. 10; s. XLI of that Act was repealed in 1848 by 11-12 Vict., c. 56 (U.K.).

finder on the occasion of the 1837-38 Rebellion and who was the author of the celebrated Durham report<sup>14</sup>. In addition, Elgin served under Earl Grey, Durham's brother-in-law. But aside from this, Elgin approached his mission to Canada with a fresh outlook rather than with the theretofore traditional attitude that the French-Canadians were inferior in intelligence, education, and ability, an attitude with which even Durham had been infected.

Unlike his predecessors, Elgin did not propose to force the French-Canadians into a mould of his own formation. He did not fear change in government which placed the opposition in power. It was his belief that it was a good thing to subject all sections of politicians to official responsibilities in their turn. If this were done, it obliged heated partisans to place some restraint on passion; it obliged them to confine within bounds of decency the patriotic zeal with which, when out of office, "they are wont to be animated"<sup>15</sup>. It was there that lay the seed which not only made Elgin's Governor-Generalship a success, but also made the Lafontaine-Baldwin Great Ministry a possibility. Each depended on the other, and together they could, and did, accomplish much that had appeared impossible only a few years earlier.

The greatness of Elgin and the Lafontaine-Baldwin ministry is highlighted by the impasse that developed within a few years after the latter came to an end, and almost immediately following the former's return to England. The ministries which followed the Great Ministry were not able to muster and maintain the double majority, one for Canada East and another for Canada West, that was essential to the continued existence of a government. It was this impasse which led to the *British North America Act* of 1867 and Confederation.

## 5. The School and Language Questions

The language question is closely allied to the school question, and both have plagued Canada since the conquest. From the very beginning both the French-Canadians and the English have recognized that the control of the schools is the key to the entire matter — that whoever has control of the education of the young also has the power to control the language which they will speak, influence the institutions which they will accept as well as those which they will reject, influence which culture they will prefer, and, to a measure, even determine which religious faith they will profess. That is why, immediately after the conquest, the English

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14. See G.M. CRAIG (ed.), *Lord Durham's Report. An Abridgement of the Report on the Affairs of British North America*, Toronto/Montréal, McClelland and Stewart, 1963.

15. Elgin to Grey, May 27, 1847, *Elgin-Grey Papers*, vol. 1, pp. 46-47.

sought to gain control of the educational system of the Province, and why the French-Canadians sought so desperately to retain its control. The English wished to use the schools as a tool with which to anglify Canada. The French-Canadians sought to retain control over the education of their young so that they might preserve their language, their culture, their institutions, and, most of all, their Roman Catholic faith.

The immediate result of the conquest was the collapse of the Church-related educational system that had been developed under the French which included *les petites écoles* at the parish level as well as *le Collège de Québec* and *le Grand Séminaire* at the college or university level. All of this came tumbling down when the British confiscated the Jesuit estates, made barracks, jails and storehouses out of the classrooms and buildings of the Jesuit colleges in Quebec and Montreal. In addition, the activities of the religious orders that provided the sinew for this educational system were severely restricted. Their right to recruit new members was either limited or prohibited altogether. Equally serious was the return to France of many of the Sulpicians who had been very active in the founding of *les petites écoles*. *Le Collège de Québec* remained closed as British authorities turned a deaf ear to requests that its buildings be returned to their original use. As a result, public instruction was inadequate, or perhaps even non-existent, and the gulf between conqueror and conquered became wider and wider.

The situation remained deadlocked as British efforts for a free school system were rebuffed by the French element of the population. This was true even when it was proposed that such a system should be governed by a board made up of the Catholic and Anglican bishops of the Province, and equal number of laymen of both faiths, and the judges of the Province. The entire patronage of this system would have been in the hands of the English-dominated Chateau Clique. For that reason, it was rejected by the Catholic bishop as just another attempt to anglicize and protestantize the French-Canadian population. The situation was not helped any by the arrival of Jacob Mountain, the newly consecrated first Anglican bishop of Quebec. Mountain viewed a State-controlled public school system as one means of inducing the inhabitants of the Province "to embrace by degrees the Protestant Religion"<sup>16</sup>, and that rendered him an anathema to those of the Roman Catholic faith. Even the Royal Institution for the Advancement of Learning did not change anything even though it was approved in 1801 by an Act of the Assembly<sup>17</sup>. However, approval had been voted only after

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16. T.R. MILLMAN, *Jacob Mountain, First Lord Bishop of Quebec*, Toronto, University of Toronto Press, 1947, p. 171.

17. *An Act for the Establishment of Free Schools and the Advancement of Learning in this Province*, 1801, 41 Geo. III, c. 17 (Low. Can.).

the measure as proposed by the Crown had been amended to provide that no school could be erected in any parish unless a majority of the inhabitants asked for one by a petition addressed to the Governor<sup>18</sup>. But there were no such petitions and for years the Royal Institution was a dead letter. Meanwhile, French-Canadian children received education at the elementary level in parish schools, many of them in *les salles des habitants*.

The impasse was finally broken in 1824 by the enactment of a law which placed the responsibility for Catholic education in the hands of the parish *fabriques*<sup>19</sup> and authorized them to assign a portion of their revenues for the support of their schools. The law was changed in 1829 to provide public financial assistance for the construction and maintenance of schools, and for boards of trustees elected by the taxpayers of the parishes<sup>20</sup>. By its terms, the 1829 Act expired on January 1, 1832, and had to be renewed as did the 1832 and the 1834 Acts. This policy of Acts of limited duration was adopted by the Assembly to give it the opportunity to bargain with the Chateau Clique and gain more concessions. But when the 1834 Act was not renewed in 1836 because of the controversy over the civil list, due to the disturbances of 1837-1838, Quebec was without an Education Act until 1841. Nevertheless, the principle of sectarian education had been established which recognized the right of French-Canadian Catholics, as well as that of English-Canadian Protestants, to control the education of their young. This principle was carried forward into the 1841 Act of the Parliament of the United Canadas which, though it created a non-sectarian school system, nevertheless recognized the right of those who professed a religion different from that of the majority to establish and maintain separate schools of their own, for the support of which they were entitled to a proportionate share of public funds<sup>21</sup>. The 1845 and the 1846 Education Acts, referred to as *la grande charte de nos libertés scolaires*, re-established the parish as the basis for school corporations<sup>22</sup>.

The 1845 and the 1846 Acts, together with that of 1841, set the foundation for the educational system of the various Provinces of Canada. The guiding principles of these Acts were carried forward into the Confe-

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18. See R. CHRISTIE, *A History of the Late Province of Lower Canada*, Montréal<sup>1</sup> Worthington, 1866, vol. 1, p. 216.

19. *An Act to facilitate the establishment and the endowment of Elementary Schools in the Parishes of this Province*, 1824, 4 Geo. IV, c. 31 (Low. Can.).

20. *An Act for the encouragement of Elementary Education*, 1829, 9 Geo. IV, c. 46 (Low. Can.).

21. *An Act to repeal certain Acts therein mentioned, and to make further provision for the establishment and maintenance of Common Schools throughout the Province*, 1841, 4-5 Vict., c. 18 (Can.).

22. *Supra*, fn. 11.

deration by s. 93 of the *British North America Act* with its provisions for the protection of

any Right or Privilege with respect to Denominational Schools which any Class of persons have by Law in the Province at the Union.

This provision was inserted in the 1867 Act more to protect the Protestant dissentient schools in the Province of Quebec than to protect the Catholic schools in the other Provinces. But in actual practice, the Protestants of the Province of Quebec, and even the small English-speaking Irish minority, have fared better in that Province than the French-Canadian Roman Catholics have elsewhere in Canada, a fact which has prompted a Secretary of the Province's Association of Protestant Teachers to comment:

We're well treated here. We get our full share of tax money; the Catholics go out of their way to be fair and even generous to us. We're only embarrassed because the Roman Catholics in other provinces don't get the same break<sup>23</sup>.

It was in Manitoba, Ontario, Alberta, and Saskatchewan, but not in Quebec, that there were bitter controversies over the application of this provision of the *British North America Act*. Moreover, in *Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. MacKell*, decided in 1917, the Privy Council held that the class of persons protected by s. 93 of the 1867 Act must be determined "according to religious belief, and not according to race or language"<sup>24</sup>. That ruling came to the fore when the Quebec Association of Protestant School Boards (QAPSB) challenged the recently enacted Quebec *Official Language Act*<sup>25</sup>. This Act of 1974, commonly referred to as *la loi 22*, made French the official language of the Province of Quebec and imposed language tests for the admission of children to English-language schools.

Rebuffed in its attempt to have *la loi 22* disallowed at the federal level, or to have the question of its constitutionality referred to the Supreme Court of Canada, the QAPSB proceeded to take the matter to court on its own initiative. This course of action was generally considered to start a repetition of the long and bitter process of litigation which took place in Manitoba, Alberta, and Ontario during the closing years of the nineteenth century and the early part of the twentieth century<sup>25</sup>. Indeed, Robert Bourassa, the then Premier of Quebec, soon declared that to change *la loi 22* was out of the question. Then, when he was reminded before a hostile audience that the majority of Canadians are English-speaking and told that

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23. Dr. James Paton, quoted by B. FRASER, "The Grave Inequalities in our Separate Schools", *Maclean's Magazine*, May 28, 1955, pp. 9-10.

24. [1917] A.C. 62, 69.

25. L.Q. 1974, c. 6.

Quebec must respect the rights of its minorities, Bourassa replied that his English-speaking questioner should examine the history books to learn the treatment given French minorities in the past in other Provinces.

*La loi 22* was upheld at the Superior Court level in a decision rendered on April 16, 1976<sup>26</sup>, which was immediately appealed. In essence, the question placed on appeal was whether or not Quebec can declare French to be its official language as other Provinces have declared English to be theirs. However, on January 18, 1978, the Quebec Court of Appeal ruled that the appeal must be dismissed without a hearing because *la loi 22* had been replaced by *la loi 101* which was assented to on August 26, 1977, following the November, 1976, Provincial elections in which *The Parti Québécois* (the separatist party) emerged victorious. The questions presented by *la loi 22* were said to have now become academic<sup>27</sup>.

During the November, 1976, Quebec elections, the language tests imposed under *la loi 22* for the admission of children to English-language schools became a burning issue, with René Lévesque's *Parti Québécois* promising that, if elected, it would abolish the tests. True to his promise, in the inaugural address which he delivered before the Quebec National Assembly on March 8, 1977, René Lévesque made a revision of *la loi 22* a part of his Government's legislative program.<sup>28</sup> The outcome was Bill 101, *Charter of the French Language*, which was assented to on August 26, 1977<sup>29</sup>. The Charter once more declared French to be the official language of Quebec and proclaimed the following fundamental language rights:

#### CHAPTER I

##### THE OFFICIAL LANGUAGE OF QUEBEC

###### 1. French is the official language of Québec.

26. *Bureau métropolitain des Écoles protestantes de Montréal v. Ministre de l'Éducation*, [1976] C.S. 430.

27. *Bureau métropolitain des Écoles protestantes de Montréal v. Ministre de l'Éducation*, C.A. Montréal, Jan. 18, 1978.

28. Assemblée nationale du Québec, *Journal des débats*, Deuxième session — 31<sup>e</sup> Législature, vol. 19, no 1, 18 mars 1977, pp. 5-6.

29. L.Q. 1977, c. 5. First introduced as Bill 1, then as Bill 101. In addition to the Bill itself, see *La politique québécoise de la langue française*, the White Paper published in March 1977 under the authority of Dr. Laurin, Minister of State for Cultural Development.

CHAPTER II  
FUNDAMENTAL LANGUAGE RIGHTS

2. Every person has a right to have the civil administration, the health services and social services, the public utility firms, the professional corporations, the associations of employees and all business firms doing business in Québec communicate with him in French.
3. In deliberative assembly, every person has a right to speak in French.
4. Workers have a right to carry on their activities in French.
5. Consumers of goods and services have a right to be informed and served in French.
6. Every person eligible for instruction in Québec has a right to receive that instruction in French.

S. 72 of this new law declares that instruction in kindergarten classes and in elementary and secondary schools shall be in French with the following exceptions :

73. In derogation of section 72, the following children, at the request of their father and mother, may receive their instruction in English :
  - (a) a child whose father or mother received his or her elementary instruction in English, in Québec;
  - (b) a child whose father or mother, domiciled in Québec on the date of the coming into force of this act, received his or her elementary instruction in English outside Québec;
  - (c) a child who, in his last year of school in Québec before the coming into force of this act, was lawfully receiving his instruction in English, in a public kindergarten class or in an elementary or secondary school;
  - (d) the younger brothers and sisters of a child described in paragraph c.

As one might well expect, the Charter has provoked considerable controversy among English-speaking circles in the Province of Quebec as well as elsewhere in Canada. The validity of the Act is already being challenged in the courts as a violation of the *British North America Act*<sup>30</sup>, as well as a violation of the *Quebec Charter of Human Rights and Freedoms*<sup>31</sup>. Once more, the ultimate issue to be decided is whether Quebec can declare French to be its official language as other Provinces have declared English to be theirs. The issue will not be decided until it has been passed upon by the Supreme Court of Canada, and one cannot help but wonder whether a

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30. See S. 133, which guarantees the right to use either English or French in the debates of the Houses of the Parliament of Canada and of the Legislature of Quebec, as well as in the courts of Canada and Quebec.

31. L.Q. 1975, c. 6. See also "La loi 101 viole-t-elle la Charte des droits et libertés de la personne?", *Le Devoir*, Dec. 20, 1977, p. 3.

decision by that tribunal will settle the matter. Indeed, a recent decision of a Quebec Court in which a part of Bill 101 was said to be in violation of s. 133 of the *British North America Act* has already been characterized as "more political than legal" by a Laval University constitutional law expert<sup>32</sup>. The decision declared unconstitutional Chapter III of the Charter which (1) declared French to be the language of the courts in Quebec and made only the French version of the judgments of these courts official, and (2) ordered that in the National Assembly of Quebec legislative bills should be drafted, tabled and assented to in French with only the French text of statutes and regulations official<sup>33</sup>. This was said to violate the equal rights guaranteed to both English and French in the courts and the legislature of Quebec by s. 133 of the *B.N.A. Act*.

But if Quebec has an official language problem, so also does Manitoba. S. 23 of the *Manitoba Act* of 1870, the Act which created the Province, guaranteed the use of both English and French in the Legislature and the courts of Manitoba<sup>34</sup>. Yet, twenty years later the Legislature of the Province adopted an *Official Language Act* which made English the official language of the Province<sup>35</sup>. However, it took 86 years for that *Official Language Act* to be contested, but it has been and the right of a person to file a notice of appeal in French has been upheld<sup>36</sup>. This took place on December 14<sup>th</sup>, 1976, when, at the county court level, it was said to be beyond the power of the legislature of Manitoba to abrogate s. 23 of the *Manitoba Act* of 1870<sup>37</sup>. The decision is being appealed as is the decision in the Quebec case on the *Charter of the French language*.

## 6. Dominion versus Provincial Authority

The purpose for which the *British North America Act* was adopted was to bind closer together the Provinces of Canada, just as the purpose of the Constitution of the United States was to form a more perfect union out of the thirteen separate, largely autonomous States. But under the *British North America Act* the Provinces of Canada have retained a greater measure of independence than have the States of the United States under the Constitution of the United States. Perhaps this can be attributed to the fact that the respective legislative powers of the Parliament of Canada and of the

32. See the comment attributed to Professor Henri BRUN: "Bill 101 ruling "political" ", *Montreal Star*, Jan. 27, 1978, p. A2.

33. *Blaikie v. P.g. du Québec*, C.S. Montréal, Jan. 23, 1978, maintenant publié à [1978] C.S. 37.

34. *Manitoba Act*, 1870, 33 Vict., c. 3 (Can.).

35. *An Act to provide that the English Language shall be the Official Language of the Province of Manitoba*, 1890, now R.S.M. 1970, c. 0-10.

36. *R. v. Forest*, [1977] 1 W.W.R. 363 (Man. Cty. Ct.).



Legislatures of the Provinces are spelled out in specific, rather than in general, terms in the 1867 Act. On the other hand, the Tenth Amendment to the Constitution of the United States quite explicitly states that « The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. » Moreover, the Ninth Amendment to the Constitution of the United States is just as explicit when it provides: « The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. » Yet, if one reads the debates on the *British North America Act* which took place in the Parliament of Canada, it would seem that it should be Canada, not the United States, which should have the more centralized form of federal government. As one reads these debates, one finds no less an authority than Georges-Etienne Cartier, one of the founders of the Confederation, proclaiming:

The distinction, therefore, between ourselves and our neighbors was just this: — In our Federation the monarchical principle would form the leading feature, while on the other side of the lines, judging by the past history and present condition of the country, the ruling power was the will of the mob, the rule of the populace. Every person who had conversed with the most intelligent American statesmen and writers must have learned that they all admitted that the governmental powers had become too extended, owing to the introduction of universal suffrage, and mob rule had consequently supplanted legitimate authority; and we now saw the sad spectacle of a country torn by civil war, and brethren fighting against brethren. The question for us to ask ourselves was this: Shall we be content to remain separate — Shall we be content to maintain a mere provincial existence, when, by combining together, we could become a great nation?<sup>38</sup>

Whatever the import of these debates may be, like the Constitution of the United States, the Constitution of Canada creates a government of enumerated powers. In both Constitutions, there is an enumeration of the powers of the national legislature. Thus, the legislative powers of the Parliament of Canada are enumerated in Section 91 of the *British North America Act*, and those of the Congress of the United States in Article I, Section 8, of the Constitution of the United States. But in both Constitutions, authority appears to be given to enlarge on the enumerated powers. In the Canadian constitution there in the provision at the start of s. 91 which states that

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the *Peace, Order, and Good Government of Canada*, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces<sup>39</sup>.

37. *Id.*, p. 378.

38. *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 3<sup>d</sup> Session, 8<sup>th</sup> Provincial Parliament of Canada, pp. 59-60.

39. Emphasis added.

In the Constitution of the United States there is the provision of Article I, Section 8, Clause 18, which authorizes the Congress of the United States

To make all Laws which shall be *necessary and proper* for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof<sup>40</sup>.

Both provisions appear to be one as broad as the other, but in their interpretation and application that has not been the case. Except in time of war or other national emergency, the Parliament of Canada has not been able to use the "peace, order and good government" clause to extend its authority to the extent that the Congress of the United States has through the use of the "necessary and proper" clause. Thus, although the Canadian "peace, order and good government" clause has been found broad enough to permit the enactment of a *Temperance Act* which would be applicable throughout the Dominion<sup>41</sup>, it has been found not broad enough to permit the enactment of an Act which authorized the investigation and restriction of combines, monopolies, trusts and mergers, and to the withholding and the enhancement of the prices of commodities<sup>42</sup>. In the case of the *Temperance Act*, Parliament was said to be legislating in relation to public order and safety, rather than in relation to property and its rights<sup>43</sup>. In the case of the Act that related to the investigation and restriction of combines, monopolies, trusts and mergers, the Privy Council held:

It may well be that the subjects of undue combination and hoarding are matters in which the Dominion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of paramount and overriding importance as to amount to what lies outside the heads in s. 92, and is not covered by them. The decision in *Russell v. The Queen* appears to recognize this as constitutionally possible, even in time of peace; but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the Provinces<sup>44</sup>.

The pattern of the almost limitless scope of the "necessary and proper" clause of the American Constitution was set out quite early by Chief Justice John Marshall in *McCulloch v. Maryland*<sup>45</sup>. In that case the Congress

40. Emphasis added.

41. For the statute and the decision of the Privy Council, see *Russell v. R.*, (1881-82) A.C. 829.

42. *In re Board of Commerce*, [1922] 1 A.C. 191.

43. *Russell v. R.*, *supra*, fn. 41.

44. *In re Board of Commerce*, *supra*, fn. 42, p. 197. *Cf.* such recent cases as *Burns Foods v. A.-G. for Manitoba*, [1975] 1 S.C.R. 494; *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134; and *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, in which the Supreme Court of Canada upheld the constitutionality of the 1975 federal *Anti-Inflation Act*.

45. 17 U.S. 316 (1919).

was found to have the power to incorporate a bank. As the Court reached that decision, Chief Justice Marshall wrote:

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist within the letter and spirit of the constitution, are constitutional<sup>46</sup>.

## 7. The Regulation of Commerce — Canadian versus American Experience

The *British North America Act* grants the Parliament of Canada exclusive authority to legislate with respect to “The Regulation of Trade and Commerce<sup>47</sup>. Article I, Section 8, Clause 3, of the Constitution of the United States gives the Congress the power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”. Thus, it would appear that the provision in the Canadian Constitution is broader than that in the American Constitution. The former grants a power which appears to be without limit which is not true of the latter. However, it is the provision in the American Constitution which has been interpreted to be all-inclusive, whereas that in the Canadian Constitution has been found to be restricted. Or, as one authority has expressed it: “Congress has been able to do so much with so little: Parliament has been able to do so little with so much<sup>48</sup>”.

### 7.1. Canadian Experience

In the early years following Confederation, once it had been established, the Supreme Court of Canada was free to interpret the commerce clause of the 1867 Act unencumbered by decisions of the Privy Council. Thus, in 1878 in *Severn v. The Queen*<sup>49</sup>, the first case in which the commerce clause was construed, the Court gave the clause an all-embracing, sweeping

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46. *Id.*, p. 421. For a good summary of the extent to which the “necessary and proper” clause has been applied, see *The Constitution of the United States of America, Analysis and Interpretation*, Senate Document 92-82, 92nd Congress, 2nd Session, Washington, Government Printing Office, 1973, pp. 358 ff.

47. S. 91(2).

48. A. SMITH, *The Commerce Power in Canada and the United States*, Toronto, Butterworths, 1963, p. 4.

49. (1878) 2 S.C.R. 70.

interpretation consistent with that which its language seemed to indicate it should have. As the Court struck down an 1874 Ontario statute which required a Provincial licence for the wholesale of liquor for consumption in Ontario, Richards, C.J.C., wrote concerning the authority claimed for the Province by the statute:

I consider the power now claimed to interfere with the paramount authority of the Dominion Parliament in matters of trade and commerce and indirect taxation, so pregnant with evil, and so contrary to what appears to me to be the manifest intention of the framers of the *British North America Act*, that I cannot come to the conclusion that it is conferred by the language cited as giving that power<sup>50</sup>.

But starting with *Citizens Insurance Company of Canada v. Parsons*, decided by the Privy Council in 1881<sup>51</sup>, a change of direction set in. As an Ontario statute which dealt with policies of insurance entered into or in force in the Province was found not inconsistent with a Dominion Act, Sir Montague Smith wrote:

The words "regulation of trade and commerce" in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense. In the first place the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the minds of the legislature, when conferring this power on the dominion parliament. If the words have been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency<sup>52</sup>.

The *Parsons* case started a trend which led one widely respected student of the Canadian Constitution to conclude in 1948:

The Dominion's Trade and Commerce clause has been so restricted in favour of competing Provincial clauses as to afford practically no power to enable comprehensive regulation of business at large, or of any particular trade, however widespread it may be throughout the national economy, or however numerous — and dispersed — the practitioners may be<sup>53</sup>.

But even trends have their limits, and, with respect to the commerce clause of the *British North America Act*, the limit is spelled out in *Attorney-*

50. *Id.*, p. 95; cf. *City of Fredericton v. R.*, (1880) 3 S.C.R. 505.

51. (1881-82) 7 A.C. 96.

52. *Id.*, p. 112; cf. *Hodge v. R.*, (1883) 9 A.C. 117.

53. V.C. MACDONALD, "The Constitution in a Changing World", (1948) 26 *Can. Bar Rev.* 21, 41-42.

*General for Manitoba v. Manitoba Egg and Poultry Association*, decided by the Supreme Court of Canada in 1971<sup>54</sup>. Involved in the case was a plan to govern the sale of eggs in Manitoba, regardless of where they were produced. The plan was to be operated by and for the egg producers of Manitoba, and it was to be carried out by a Board to which was given the complete control of the marketing of eggs in that Province. Indeed, it was only through the Board as selling agent that any eggs could be sold or offered for sale in Manitoba, no matter where they were produced.

The purpose of the Manitoba plan was to obtain the most advantageous marketing conditions for eggs for Manitoba producers. This was to be done by the control and regulation of the sale of imported eggs. The aim of the plan was to regulate the inter-provincial trade in eggs. It was designed to restrict or limit the free flow of trade between Provinces. Therefore, it was struck down as *ultra vires* the Legislature of the Province. The plan was said to constitute "an invasion of the exclusive legislative authority of the Parliament of Canada over the matter of the regulation of trade and commerce"<sup>55</sup>.

## 7.2. American Experience

The experience with the commerce clause in the Constitution of the United States had its start in Chief Justice Marshall's opinion in *Gibbons v. Ogden*, decided in 1824<sup>56</sup>. The problem presented by the case was the validity of an Act of the Legislature of the State of New York which granted Robert Fulton the exclusive right to navigation by steamboat on the waters within the jurisdiction of the State. The specific question was whether this Act was repugnant to the commerce clause of the Constitution of the United States. As Chief Justice Marshall gave an affirmative answer to the question he set down principles which have been enlarged upon ever since. He noted that the Constitution contains an enumeration of powers expressly granted by the people to the Government, the last of which authorizes the Congress to make all laws "which shall be necessary and proper" for carrying all the others into execution. He took pains to point out that the "limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule"<sup>57</sup>. As for the power

54. [1971] S.C.R. 689. See also the *Burns Foods et Vapor Canada* cases and the *Anti-Inflation Act* reference, *supra*, fn. 44.

55. *Id.*, p. 703 (Martland J.).

56. 22 U.S. 1 (1824).

57. *Id.*, pp. 187-188.

to regulate commerce, he noted that not only does that comprehend every species of commercial intercourse between the United States and foreign nations but, he continued, "Commerce among the several States, cannot stop at the external boundary line of each State, but may be introduced into the interior"<sup>58</sup>. Like the other powers vested in Congress, the power to regulate commerce is, he wrote, "complete in itself."<sup>59</sup> It may be exercised "to its utmost extent, and acknowledges no limitations, other than those prescribed in the constitution"<sup>60</sup>.

The extent to which this power given Congress to regulate commerce has been extended by interpretation is best illustrated by *Wickard v. Filburn*, decided in 1942<sup>61</sup>. In that case it was held that even wheat not in any way intended for commerce, but wholly intended for consumption on the farm of the grower, is within the commerce power of Congress. Writing for the majority, Justice Jackson found it well established by the decisions of the Court "that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices"<sup>62</sup>. The contribution to the demand for wheat by the grower in the case may have been trivial, but of itself that was found not enough to remove him from federal regulation because, taken together with that of many others similarly situated, his contribution was considered to be far from trivial. Therefore, homegrown wheat was said to compete with wheat in commerce and to be subject to regulation under the commerce clause.

Perhaps the late Chief Justice Harlan F. Stone best summarized the question of the commerce clause from the American point of view — from *Gibbons v. Ogden* to *Wickard v. Filburn* and beyond — when he wrote in 1928:

Great as is the practical wisdom exhibited in all the provisions of the Constitution, and important as were the character and influence of those who secured its adoption, it will, I believe, be the judgment of history that the Commerce Clause and the wise interpretation of it, perhaps more than any other contributing element, have united to bind the several states into a nation<sup>63</sup>.

Whether or not the commerce clause in Canada's Constitution could have been used to the same purpose is open to question because the problems

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58. *Id.*, p. 194.

59. *Ibid.*

60. *Id.*, p. 196.

61. 317 U.S. 111 (1942).

62. *Id.*, p. 128.

63. H.F. STONE, "Fifty Years' Work of the United States Supreme Court", 14 A.B.A.J. 428, 430 (1928).

which that country has had in the past, and continues to have, are different. Indeed, a too militant application of that commerce clause could have a divisive, rather than a beneficial, effect.

## 8. Separation of Powers under the Canadian System

Like the United States, Canada has an independent judiciary. It does not, however, have a separation of powers or a system of checks and balances such as that which exists in the American system of government. Instead, it has a parliamentary system which is patterned after that of England. As in England, final authority rests in Parliament, and within Parliament there is an upper chamber — the Senate — as well as the House of Commons. It is, however, in the latter that the power resides rather than in the former which, like the House of Lords in England, is more ceremonial than useful. There is also the Governor-General who serves as the representative of the Crown, but he too suffers from a diminished status. One all-powerful, since the advent of responsible government his position has generally deteriorated to the point where, like the Senate, his status is principally ceremonial. He serves as head of State and, after a government has fallen for lack of support in the House of Commons, he calls upon the leader of the opposition to form a new government. He also opens Parliament, at which time he reads the Speech from the Throne which has been written for him so that it reflects the views, the aims, and the purposes of the party in power.

Unlike in the United States, in Canada the legislative and the executive powers of the government are one and the same. They are both under the leadership of the Prime Minister, instead of being separate and distinct. So long as he can command the support of a majority in the House of Commons, the Prime Minister is the head of the Government. It is the views of his Government, whether that is made up of a majority party or of a coalition of parties, which must prevail if he is to remain in power. Once his views, i.e., those of his Government, no longer prevail, his Government is said to “fall” and someone else takes his place.

Unlike the Supreme Court of the United States, the Supreme Court of Canada was not created by the Constitution of the country. Instead, it was created in 1875 by the Parliament of Canada pursuant to s. 101 of the *British North America Act*, which authorizes the Parliament of Canada to “provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada”. Thus, in Canada, Parliament could, if it wished, abolish every court at the federal

level including the Supreme Court. In the United States the Congress could, if it wished, abolish every court at the federal level except the Supreme Court. The Supreme Court of Canada can, and is expected to, render advisory opinions on matters referred to it. The Supreme Court of the United States can only entertain matters in which a case or controversy exists<sup>64</sup>. In Canada, before one can be appointed to the Supreme Court one must have ten years standing at the bar of a Province either as a judge of a Superior Court or as a barrister or advocate. In the United States there is nothing either in the Constitution or in any law which requires that a Justice of the Supreme Court even be a lawyer, although all have been<sup>65</sup>.

### 9. Civil Rights and the *War Measures Act*

The only mention of civil rights found in the *British North America Act* is that which appears in s. 92(13), which gives the Legislature of each Province the exclusive right to make laws that relate to "Property and Civil Rights in the Province." It was not until 1960 that the people of Canada were given the benefit of anything which can be said to resemble a Bill of Rights, and then all that they were given was a statute of the Parliament of Canada which can be amended or repealed just as any other law can<sup>66</sup>. And even this was enacted only because of deep-rooted dissatisfaction with the treatment of Canadians and others during World War II under the provisions of the *War Measures Act*<sup>67</sup>, an Act which had been adopted at the start of World War I and was not repealed at the end of that war as a similar British law had been<sup>68</sup>.

The legal basis for the *War Measures Act* is found in the "peace, order, and good government" clause of the *British North America Act*. The effect of the Act was to replace government by Parliament with government by Orders in Council. Virtually every phase of Canadian life was affected as Proclamations, Orders in Council, and Ordinances were issued with respect to aliens in Canada, contraband, trading with the enemy, newspaper publications which were considered improper, separation allowances for men who married without permission after having enlisted for overseas service,

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64. C. WARREN, *The Supreme Court in United States History*, Boston, Little, Brown & Co., 1947, vol. 1, pp. 108-111.

65. Personal knowledge of the author as a result of extensive research.

66. *Canadian Bill of Rights*, S.C. 1960-61, 8-9 Eliz. II, c. 44 ("An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms"); now R.S.C. 1970, App. III.

67. S.C. 1915 (4<sup>th</sup> Session), 5 Geo. V, c. 5 ("An Act to confer certain powers upon the Governor in Council and to amend the Immigration Act"); now R.S.C. 1970, c. W-2.

68. See the *Defence of the Realm Act*, 4-5 Geo. V, c. 29, am. by 4-5 Geo. V, c. 63 (U.K.).



and disturbances over conscription once that was voted by the Parliament in spite of assurances made by the Government early in the War that such measures would not be sought and used<sup>69</sup>. The resentment over the *Military Service Act* became so bitter in the Province of Quebec that violence broke out during 1918, shots were fired, soldiers wounded and civilians killed. No sooner had this happened than the Province of Quebec was, in effect, placed under martial law. Once again it was French Canada against English Canada. Action taken under the *War Measures Act* continued even after peace had been restored and Canada's expeditionary force had been withdrawn and disbanded. This was possible because January 10, 1920, was set as the official date of the termination of the war with Germany<sup>70</sup>.

To a considerable extent, World War II was a repetition of World War I, only this time the *War Measures Act* was invoked on September 1, 1939, two days before hostilities actually broke out between the United Kingdom and Germany<sup>71</sup>. Once more there was government by Order in Council under the authority of the *War Measures Act*, once more there were statements at the start of the war to the effect that voluntary enlistments would be depended upon for the prosecution of the war, and once more there was a gradual step by step movement from voluntary enlistment to conscription<sup>72</sup>.

Added to the measures which Canada borrowed from its earlier experience during World War I, in World War II there were the Defence of Canada Regulations which were put into effect at the outbreak of hostilities. As the war progressed, these were amended to strengthen the Government's hand to a point that even exceeded the measures which had been used during World War I<sup>73</sup>. The Government not only took control of the economic life of the country, but also over the press and what could be said in public. There were extensive powers of detention which could be, and were, used to detain public figures such as Camillien Houde, the Mayor of Montreal. Houde's crime was that he spoke out against conscription and pointed out that the leaders of the party in power had promised that no such measure would be adopted. For that he was made to spend five years in a detention camp.

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69. *Military Service Act*, 1917, 7-8 Geo. V, c. 19 (Can.).

70. See *Fort Frances Pulp and Paper Co. v. Manitoba Free Press*, [1923] A.C. 695.

71. *Canada Gazette*, 3<sup>rd</sup> Extra, September 1, 1939.

72. See R. McG. DAWSON, *The Conscription Crisis of 1944*, Toronto, University of Toronto Press, 1961.

73. For a collection of Orders in Council and Regulations for at least the first three years of the war, see *Proclamations and Orders in Council relating to the War*, 8 vols., 1940-1942.

Then there was the question of the Japanese-Canadians, many of whom were not only Canadian citizens but had been born in Canada. After Japan entered the war, not only were persons of Japanese nationality made to register, but also all those of the Japanese race who resided anywhere in Canada. After that, about 21 000 Japanese-Canadians were moved from “protected areas” — a strip 100 miles wide along the Pacific coast — and relocated in detention camps in the interior. This was done pursuant to an order which authorized

the detention of any persons, other than enemy aliens, ordinarily resident or actually present in such protected area in order to prevent such persons from acting in any manner prejudicial to the public safety or the safety of the State<sup>74</sup>.

But this treatment of persons of Japanese nationality or ancestry was not peculiar to Canada. The same thing happened to Japanese-Americans in the United States, but on a much larger scale that involved about 100 000 persons<sup>75</sup>. The only difference between what happened in Canada and what happened in the United States is that in the latter the validity of the detentions could be contested in the courts even while the war continued<sup>76</sup>. When viewed together, the experience of the Japanese-Canadians and the Japanese-Americans during World War II appears to indicate that in times of stress and grave national emergency, on occasion the presence or absence of a Bill of Rights — even of one that is entrenched as is that of the Constitution of the United States — may not suffice to protect the rights of the individual.

## 10. The Canadian Bill of Rights

Canada has a Bill of Rights as the United States does, but there is very little similarity between the two. The *Canadian Bill of Rights*<sup>77</sup> has existed only since 1960, whereas that of the United States has existed since 1791. As a statute of the Parliament of Canada, the *Canadian Bill of Rights* can be amended or repealed by Parliament as it sees fit. The American Bill of Rights is “entrenched” as a part of the Constitution. The *Canadian Bill of Rights* provides that Parliament can enact laws and make them applicable notwithstanding its provisions which are intended to protect the rights of the individual<sup>78</sup>.

74. P.C. 365, January 16, 1942, *Canada Gazette*, Extra, January 27, 1942.

75. See *Japanese Evacuation from the West Coast, 1942 — Final Report*, Washington, Government Printing Office, 1943.

76. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex p. Mitsuye Endo*, 323 U.S. 283 (1944).

77. *Supra*, fn. 66.

78. S. 2.

During the crisis of October, 1970, which followed the abduction of James Cross, a British diplomat, and the abduction and subsequent murder of Pierre Laporte, Quebec Minister of Labour, the *War Measures Act* was invoked and made applicable in time of peace notwithstanding the Bill of Rights. Over 400 persons were arrested in the Province of Quebec and detained without bail, the majority for only brief periods of time. As a result, it appears self-evident that while this crisis continued the civil rights of numerous individuals were violated as the measures taken to forestall what was considered to be an insurrection, real or apprehended, were carried out. Again this was a situation in which those in authority chose to be safe at any price as they acted under the broad umbrella of the "peace, order, and good government" provision of the *British North America Act*. But perhaps the action taken by Canadian authorities during this crisis illustrates the difference between the American and the Canadian constitutional systems. It is doubtful that, today, such action could take place under the American system with its "entrenched" Bill of Rights without immediately being contested in the courts. But from that it should not be concluded that similar measures could never have been taken under the Constitution of the United States. Such a conclusion would ignore the Alien and Sedition Acts and the action taken under them only a very few years after the Constitution of the United States and its Bill of Rights were adopted<sup>79</sup>.

### Conclusion

However the constitutional systems of Canada and the United States may fare when they are compared one to the other, it should not be forgotten that it is not only what these Constitutions provide which is of primary importance, but also the manner in which their provisions are applied. Or, as the then Governor, later Chief Justice of the United States, Charles Evans Hughes expressed it:

We are under a Constitution, but the Constitution is what the judges say it is<sup>80</sup>.

The Constitutions of both countries can be said to be "experiment(s), as all life is an experiment"<sup>81</sup>. They can be measured only by the effectiveness of their application in time of war as well as in time of peace, in time of stress

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79. See J.C. MILLER, *Crisis in Freedom: The Alien and Sedition Acts*, Boston, Little, Brown & Co., 1951.

80. Speech before the Elmira Chamber of Commerce, May 3, 1907.

81. HOLMES, J., dissenting in *Abrams v. United States*, 250 U.S. 616, 630 (1919).

as well as in time of tranquillity. Both must be judged by the extent to which they serve the needs of the country and at the same time respect the rights of the people. To the extent that they succeed in achieving these objectives they can be said to be constitutions in the true democratic sense ; to the extent that they fail in this respect they must be dismissed as empty words that have no real content or meaning.