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LANGUAGE RIGHTS: MYTH AND REALITY

Joseph Eliot MAGNET*

I

French Canadians are a minority. Whatever perspective one takes on Canada, this remains the reality. Slice Canada nationally; francophones are twenty-nine per cent of the population. Cut it provincially; francophone communities range from three per cent in Newfoundland, four per cent in British Columbia, six per cent in Alberta, Saskatchewan and Manitoba, to thirty-seven per cent in New Brunswick[1]. Slice Canada east/west, north/south, old/young, rich/poor; the results are the same. The single exception is Quebec.[2]

An unmistakable psychology characterizes most language minority groups. Linguistic minorities are tightly knit, protective of community institutions, anxious about assimilation, and restricted in mobility. Minorities with stormy histories tend to be suspicious of outsiders. Fifteen years ago, a well meaning anglophone lawyer attended at a meeting of the société franco-manitobaine. He was thrown out. Only francophones were welcome.

In Quebec, minority psychology is exceptionally pronounced, for obvious reasons. Quebecois have had an exceptionally turbulent history. By 1763, francophones had created a distinctive, homogeneous society on the banks of the St. Lawrence. This society was ultra-special in North America, as it was marked off by a unique language, religion, system of laws, land holding, and economy. Protracted battles with the Iroquois had driven the community's internal cohesiveness to unparalleled dimensions.

After the 1763 Conquest, British policy threatened francophone existence. French institutions, including civil law and administration, were

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1 *Atlas des francophones de l'ouest,* (1979), p. 18.

2 Francophones comprised 79% of Quebec's population in 1971 according to the census prepared by Statistics Canada.

abolished.[3] Francophones were excluded from the higher civil service. Assimilation was encouraged. The colonial government planned to drown the francophone community in a flood of English immigration.

Attacks on francophone status were repeated after the rebellions of 1837 and 1838 in Upperand Lower Canada. By the *Act of Union*[4] in 1840, Britain tried to swamp francophone influence permanently. The *Act* provided for a United Province of Canada with an assured anglophone majority. A wave of British immigration was planned.[5] Use of the French language was prohibited in all written proceedings of the Legislative Council and Legislative Assembly.[6] Governor Bagot wrote to Lord Stanley that he considered he had the duty of "fusing.... the discordant elements" of the new province.[7] Francophones had the inevitable psychological response of a minority under attack: stick together, protect the community, survive![8]

After Confederation, a survival mentality deepened in Quebecois. They stood witness to the suppression of most provincial francophone communities. Prince Edward Island abolished french speaking separate schools in 1877.[9] British Columbia[10] and New Brunswick[11] did the same. In 1890, Manitoba abolished public support for francophone schools,[12] and

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[3] *Treaty of Paris* (Feb. 10, 1763), art. IV. ("His Britannick Majesty, on his side, agrees to grant the liberty of the Catholic religion to the inhabitants of Canada.... *as far as the laws of Great Britain permit*"); *The Royal Proclamation* (Oct. 7, 1763) ("We have also given power to the said Governors, with the consent of our Said Councils, and the Representatives of the People, so to be summoned as aforesaid, to make, constitue, and ordain Laws, Statutes and Ordinances for the public peace, welfare and good Government of our said Colonies, and of the People and Inhabitants thereof, *as near as may be agreeable to the laws of England....*"). The treaties are reprinted in Kennedy, *Statutes, Treaties and Documents of the Canadian Constitution: 1713-1929*, (Oxford Univ. Press, 1930).

[4] *Act of Union*, 3 and 4 Vict., c. 35 (U.K.).

[5] See Lord Sydenham's speech to the Canadian Parliament, 15 June 1841, reprinted in Kennedy, *supra*, note 3, p. 455 at 456.

[6] *Supra*, note 4, art. 41.

[7] Bagot letter, June 12, 1842, repr. in Kennedy, *supra*, note 3, p. 463.

[8] Bagot referred to the "unanimity and coherence as a Party" of the French Canadian vote: letter to Stanley, July 28, 1842, repr. in Kennedy, *supra*, note 3, p. 469 at 470.

[9] *Public Schools Act*, 40 Vict., c. 1.

[10] In British Columbia, clergymen were barred from holding positions as teachers or superintendents: see *Public Schools Act*, S.B.C. 1958, c. 42, s. 62.

[11] *Common Schools Act*, (1871) 34 Vict., c. 21; held constitutionally valid in *Ex Parte Renaud*, (1873) 14 N.B.R. 273, Privy Council appeal dismissed: see *Maher* v. *Town of Portland*, (1874) Wheeler 362.

[12] *An Act Respecting the Department of Education*, S.M. 1890, c. 37; *An Act Respecting Public Schools*, S.M. 1890, c. 38.

forbid use of the French language in the legislature and courts.[13] Ontario prohibited use of French in all public and separate schools in 1912.[14]

Immigration and assimilation furthered the decline of most francophone communities outside of Quebec. British Columbia francophones labour under an assimilation rate of eighty-eight per cent; Saskatchewan is similar at seventy-two per cent.[15] In Manitoba, the effect of these pressures reduced the francophone community from a slight majority in 1870 to six per cent today. With the 1961 census Quebecois could not fail to notice that the vast majority of Quebec immigrants were assimilating to the anglophone educational stream.[16] Quebecois feared of repeating the sorry history of franco Manitobans.

II

Against this extraordinary background, a peculiar Canadian myth evolved. It is the myth of equality. The myth of equality is based on the fact that in Quebec, a French majority exists side by side with a captive English minority, while outside of Quebec, an English majority exists side by side with a captive French minority. The myth is that English Canada and Quebec are mirror images of each other; reverse sides of the same coin.[17] On one side there is an English majority with a French minority; turn it over and there is a French majority with an English minority. They are equal. Premier Taché first expressed this myth in 1865 during the Confederation debates in the Province of Canada. "It should not be forgotten", he said,

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[13] *Official Language Act*, S.M. 1890, c. 14; held unconstitutional in *A.G. Manitoba* v. *Forest*, (1979), 30 N.R. 213 (S.C.C.).

[14] See Circular of Instructions issued by the Department of Education at 32 O.L.R. 252-4. The Circular was issued pursuant to the *Common Schools Act*, (1859) 22 Vict., c. 64, s. 119(4) and the *Separate Schools Act*, (1863) 26 Vict., c. 5, s. 26. Held intra vires in *Ottawa Roman Catholic Separate School Trustees* v. *MacKell*, (1917) A.C. 62 and *Ottawa Roman Catholic Separate School Trustees* v. *Ottawa*, (1917) A.C. 76.

[15] *Atlas des francophones de l'ouest*, (1979), p. 20.

[16] Legendre, *French Canada in Crisis*, London: Minority Rights Group, 1980, pp. 12-13.

[17] Ronald Sutherland in his *Second Image: Comparative Studies in Quebec/Canadian Literature*, (1971) asserts the same myth based on his reading of English and French Canadian literature. "French-Canadian and English-Canadian novels of the 20th century have traced a single basic line of ideological development, creating a whole spectrum of common images, attitudes and ideas. They have done so for the most part independently, each in its own solitude, but obviously we have twin solitudes.... it becomes evident that French Canadians and English Canadians are much more alike than many spokesmen have ever dared to suspect. Aside from language, it is quite probable that there are at the moment no fundamental cultural differences between the two major ethnic groups of Canada" (p. 23).

"that if the French Canadians were in a majority in lower Canada, the English would be in a majority in the General Government, and that no act of real injustice could take place without its being reversed there".[18] Cartier held the same view. He was sure tolerance had to prevail because any lack of liberality in English Canada would provoke retaliation in Quebec and vice versa.[19]

The myth that English and French Canada are equal, mirror images of each other, proved compelling. During the Confederation debates, attention focused on constitutional guarantees to which both minorities would be entitled. The theory was: treat like alike. Because English and French Canada are the same (but in reverse) devise one rule to protect both minority communities. That is the spirit of section 133 of the *British North America Act,*[20] which provides protection for the French and English languages in certain government institutions.

The one rule solution expresses in constitutional law the myth of Canadian equality. Like all myths, it speaks to the needs of the Canadian unconscious, but is a poor reflection of reality. The myth obtained a stranglehold on Canadian constitutional theory. The Canadian Bar Association, in the current round of constitutional proposals, adopted a one rule solution with respect to minority language educational rights.[21] So did the Pepin-Robarts Commission.[22] So did the Canadian Jewish Congress[23] and other influential groups.[24] Most importantly, the Trudeau government's Proposed *Charter of Rights and Freedoms* opts for a one rule solution with respect to collective rights. A single rule — based on the parents' maternal or school language — determines the right to publicly funded minority

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[18] *The Confederation Debates in the Province of Canada, 1865,* (ed., P.B. Waite). Toronto: The Carleton Library, 1963, p. 24.

[19] *Id.*, p. 51.

[20] 30 and 31 Vict., c. 3 (U.K.).

[21] *Towards A New Canada,* (1978) p. 22 recommendation 7.

[22] *A Future Together,* (1979) p. 121-122 recommendation 3 (no entrenchment of minority language educational rights anywhere unless all provinces agree).

[23] Canadian Jewish Congress, *Submission of the Select Committee on the Constitution of Canada* to the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (Nov. 1980), p. 11-13. See also Proc. of Special Joint Committee, 18 Nov. 1980, 7:96 ff.

[24] *Notes for a Statement by Max Yalden, Commissioner of Official Languages* to the Special Joint Committee on the Constitution of Canada (Nov. 1980), p. 6-7. See also Proc. of Special Joint Committee, 17 Nov. 1980, 6:13. However, an important exception is the Submission of the Société franco manitobaine: see *Submission on the Constitution of Canada, Amended Version* (Nov. 1980), pp. 6-8, Proc. of Special Joint Committee, 21 Nov., 1980, 10:30-32.

language instruction for children.[25] Assuming that the *Proposed Resolution* survives the formidable challenges ahead. a one rule complexion will colour profound changes soon to occur in the collective entitlements of Canadian minorities.

III

How will the new constitutional guarantees work in practice?

Section 23 of the proposed *Charter* provides the right to minority language education for primary and secondary school children if the following conditions are met:

1- the parents are citizens of Canada

2- a) the parents learned the minority language first, and still understand it; or

b) the parents received primary education in a minority language school

3- the numbers entitled to minority language education warrant public funding.

Section 23 is drafted wholly from a Quebec perspective. It uses legislative categories derived from Quebec's Bill 101.[26] It concentrates interest on the dilution of Quebec's francophone majority by the large numbers of immigrants assimilating to the Quebec anglophone community. Section 23 responds to the defensive protective psychology inherent in Quebec's language laws. The proposed Constitution shuts its eyes to the needs of francophone communities outside of Quebec.

What are the specific Quebec concerns which the proposed Constitution addresses? The central thrust behind Bill 101 is to stop dilution of the francophone majority by assimilation and immigration. The legislation francisizes the legislature, courts, civil administration and semi-public agencies.[27] Tremendous pressure to use french is put in place by a mandatory francisation of the work place.[28] Immigrants, whether from

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[25] *Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada*, Schedule B, (hereinafter *Proposed Resolution*), s. 23: see Senate Proceedings, 19 Feb. 1981, 91:907-8.

[26] Compare *Proposed Resolution*, s. 23(1)(b) with *Charter of the French Language* (Bill 101) S.Q. 1977, c. 5, s. 73(a). Both use a legislative category based on the parents' language of elementary school instruction as a basis for determining the right to minority language education.

[27] The legislature and courts are dealt with by ch. III. This was declared unconstitutional in *A.G. Que.* v. *Blaikie*, (1979), 30 N.R. 225 (S.C.C.). The civil administration is dealt with by ch. IV; semi-public agencies are dealt with by ch. V.

[28] *Charter of the French Language*, (Bill 101) S.Q. 1977, c. 5. Labour relations are captured by ch. VI; commerce and business are captured by ch. VII.

English Canada or abroad, are forced to send their children to francophone schools, thus insuring assimilation of the next generation to the francophone community.[29]

The proposed *Charter of Rights and Freedoms* respects all of these Quebec initiatives with one exception. Assimilation of Canadian children immigrating to Quebec from English Canada is not tolerated. In most cases, such Canadian children would have a constitutionally protected right to attend English school, where numbers warrant. In all other respects, the *Charter* is carefully sculpted in conformity with Quebec's self-defensive assimilating posture.

What is the effect of the proposed *Charter* on francophone minorities living in English Canada? Significantly less protection is forthcoming. As in Quebec, the anglophone provinces retain legislative power to assimilate francophones through English schools, through an English work place, or through English public institutions. The provinces retain unfettered power to assimilate immigrants from abroad. Non citizens have no constitutionally protected right to choose French schools for their children.

The real injustice inheres in minority language educational rights. As everyone knows, schools are the critical need of francophone minorities outside of Quebec. Under the *Charter,* the right to French schools applies only where numbers warrant. This means that in Manitoba, for example, French schools will not be required anywhere except in St-Boniface and a small region in the southeast. All other Manitoba francophones are cut adrift in an exceptionally strong current of high assimilation rates.

Furthermore, the numbers test is but one hurdle francophones must climb to secure education rights under the *Charter.* The only children entitled to french instruction are those whose parents went to french primary school or whose parents first learned and still understand the French language. Most English provinces denied french education to the last generation. Under the *Charter,* those provinces heartless enough to have prohibited French schooling to the parents, have no constitutional obligation to provide it to the children, unless the parents first learned and still understand french. Many parents didn't and don't because of the assimilating effect created by the oppressive provincial legislation already discussed. The *Charter* condones the *status quo,* which means further decline of non-Quebec francophone minorities.

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[29] *Id.*, ch. VIII, s. 73.

IV

The central failing of the proposed *Charter* is its too ready acceptance of a one rule solution based on myth. I must emphasize what everyone already knows, or ought to know. The myth is false. English and French communities are not the same. They have very different histories, and are at different stages of development. Their expectations are different. They have different needs.

In following the contours of Bill 101, the *Charter* is responding to a francophone group in peculiar circumstances. Quebec francophones are a majority in the province and control the provincial government. But they are a minority in Canada and North America. The Quebec francophone community is anxious to protect itself against unacceptably severe dilution by assimilating certain ethnic minorities. Would you not agree that in light of Canadian history and recent immigration trends that interest must be deemed legitimate?[30] The *Charter* quite properly respects Quebec's concern in this regard with one modification.

However, there is no similar need for the provinces with anglophone majorities to assimilate their francophone minorities. The English community is not threatened with dilution; it is not awash in a sea of French. In any event, North American culture and economy already create strong assimilating pressure on francophones. The *Charter* is *wrong* to reserve any further assimilating power to the English legislatures.

Nor is the English minority in Quebec identical to francophone minorities outside of Quebec. Anglophone Quebeckers do not assimilate. The community is reasonably secure. It is surrounded by English on all sides. It is supported by three thriving universities, and many libraries. English dominates business and finance. Quebec has an amazing amount of

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[30] Spokesmen for Quebec's anglophone community agree that Quebec's concern to assimilate *some* immigrants is legitimate. The English community disagrees only as to how far that concern entitles Quebec legislation to force children into french school. Anglophone spokesmen concede that freedom of choice is not required in the Quebec school system: see Positive Action Committee, *Brief on the Proposed Resolution Respecting the Constitution of Canada* to the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (November, 1980), p. 14. ("All persons whose first language learned and still understood is that of the French or English language minority of the province in which they reside or to which they move have the right to have their children receive their pre-university education in that language"). In other words, an Italian or Greek immigrant, who did not first learn English, has no right to attend English school. The oral submission is reported in Proc. of the Special Joint Committee, 18 Nov. 1980, 7:55. See also Brief of the Canadian Jewish Congress, *supra,* note 23, pp. 12-13, reported at Proc. of the Special Joint Committee, 18 Nov. 1980, 7:96-98.

Canadian and American English language radio, T.V., films, and other culture. Compare this to the Manitoba or New Brunswick francophone communities and the myth of equality falls to the ground.

English Canada and French Canada are not equal. Rather, Canada is more accurately reflected in the image of double inequality. Section 6 of the proposed *Charter* purports to create mobility rights: every permanent resident of Canada will have the right to take up residence anywhere in Canada. That principle deserves strong support. Yet, does not saying this provoke a sense of unreality? Quebecois cannot take up residence in Vancouver without assimilating. Nor can British Columbians any longer go to Quebec without being subject to strong assimilating pressure. Both groups are unequal in the sense of being denied the full advantages of Canada.

It is crucial that the Canadian Constitution support English and French minorities wherever found. Our common destiny together depends upon this basic understanding. Francophone minorities outside of Quebec must be developed so that Quebecois do not become trapped on a small ship of French awash in English North America. Sound constitutional policy would support constitutional affirmative action to develop non-Quebec francophone minorities with appropriate institutions of education, culture, and government. The minorities must be encouraged to grow and prosper; their sense of security must be enhanced. The double inequality should be attacked. Either the project on which we are now embarked protects and is seen to protect the linguistic and cultural security of English and French minorities, or we have failed at the noblest achievement men can undertake, the building of a great nation.

V

A constitution designed to develop English and French minorities cannot be founded upon myths; a one rule solution will not do. Because the needs of the communities are not the same, the Constitution cannot treat them the same.

In Quebec, the proposed Constitution responds reasonably to the provincial interest in protecting against dilution of the francophone majority. In my mind, it is an open question whether Quebec should be prevented from forcibly assimilating the children of Canadian citizens who come to Quebec from English Canada. But it is not an open question whether the anglophone provinces should retain any power to assimilate francophone minorities or francophone immigrants from abroad. I answer

that they should have no such power. They have no need to do so. A different constitutional rule must apply to the anglophone provinces.

What would that rule be? At the minimum, francophone minorities should have the right to freedom of choice in education. The right should not be limited to citizens of Canada; it should not be limited to persons who learned French first and still understand it; it should not be limited to parents who received primary education in French. Furthermore, the numbers test is not sufficiently precise as applied to the anglophone provinces. There should be a different requirement: a test which has regard to the need to develop the French language. Cost considerations would be relevant as well. These tests would determine not only when the right accrues, but also the content of the right. It would not make sense, for example, to build a school for one francophone family living in Flin Flon. However, having regard to the necessity to develop the French language, it might be wise to provide public funds to educate that child in St-Boniface if the parents so desired. By contrast, having regard to the necessity to develop the French language, St-Boniface children would be entitled to more. They require french language schools, under the administrative control of the francophone community.

Some would argue that regionalization of constitutional rights is inappropriate. It is said our tradition forbids against discriminating between various groups. I answer that uniformity is not an independent constitutional value. Furthermore, it is foreign to our constitutional tradition which always has adopted a regionalized solution to collective rights. There would have been no Canada had not the Catholic and Protestant collectivities agreed to preserve denominational rights. Our original constitutional solution was to regionalize denominational rights by s. 93 of the *B.N.A. Act*. Different rights pertained to the first four provinces. This continued to be our constitutional legacy as new provinces were added. The statute books of British Columbia, Manitoba, Prince Edward Island, Alberta, Saskatchewan, and Newfoundland were frozen with respect to protected denominational school rights at the time those provinces joined Confederation.[31] The rights differ in each province.

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[31] The Imperial Order in Council, May 16, 1871 and the Imperial Order in Council, June 26, 1873 which admitted respectively British Columbia and Prince Edward Island to the Union provided that provisions of the *British North America Act, 1867,* except those parts which by their terms might be held to be specially applicable to one, but not all provinces then comprising the Dominion, should be applicable "in the same way and to like extent as they apply to the other provinces of the Dominion". This extends s. 93 to British Columbia and Prince Edward Island. S. 22 of the *Manitoba Act,* S.C. 1870, c. 3 is to the same effect as s. 93 of the *British North America Act*. It is given constitutional bite by the *British North*

I propose that the time has come to deal with the Canadian reality, and to relinquish Canadian myth. In my submission, this implies a two rule solution to educational rights. One rule, like s. 23 of the *Charter,* should recognize the legitimate concern of the francophone majority in Quebec while dealing justly with its anglophone minority. A second rule should give freedom of choice to francophone minorities in English Canada, and develop those minorities by constitutional affirmative action. I think our founding fathers were right to develop a regionalized solution, and my proposal would continue the wisdom of our constitutional traditions.

America Act, 1871, 34 and 35 Vict., c. 28, s. 5 (U.K.). S. 17 of the *Alberta Act,* (1905) 4-5 Edw. 7, c. 3 and s. 17 of the *Saskatchewan Act,* (1905) 4-5 Edw. 7, c. 42 incorporate a principle very similar to s. 93 of the *British North America Act* with respect to those provinces. S. 17 was held constitutionally valid in *Reference Re Section 17 of the Alberta Act,* (1927) S.C.R. 364. A similar principle, but in different language, is incorporated by s. 17 of the Terms of Union with Newfoundland, 13 Geo. 6, c. 1, Schedule.