

THE LANGUAGE PROVISIONS OF THE CONSTITUTIONAL AMENDMENT BILL 1978

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Introduction

Proposals for revised constitutional provisions respecting language rights have been central to most proposals for Canadian constitutional reform during the last decade. Although dissatisfaction with present constitutional arrangements within the province of Quebec arising from a desire to provide greater protection to the preservation and development of the French language and culture in Quebec has been a major motivating force behind these language rights proposals, the author of most such proposals has been the federal government. These proposals have been a federal response to the demand for greater autonomy from Quebec as a method of protecting French culture. The federal government has been offering constitutionally protected language rights as an alternative mechanism for protecting French culture.

It is not surprising, therefore, that language rights have been given a significant place in the former federal government's proposed Constitution of Canada Act.¹ This article will outline these recent proposals and their potential impact upon the pre-existing law. It will also examine some of the problems, both philosophical and technical, that these proposals create.

Language provisions are found in three divisions of the proposed Constitution of Canada Act—in the Statement of Aims of

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¹ Canada, House of Commons (1978), Bill C-60, Part I, hereinafter cited as Bill C-60. At the time of writing, this represents the latest federal proposal for constitutional reform.

the Canadian Federation,² in the Canadian Charter of Rights and Freedoms,³ and in the House of the Federation provisions of The Federal Authority in and for Canada.⁴ The first and last of these groups of language provisions will be dealt with first since their import is more political, than legal. The provisions of the Charter of Rights and Freedoms will then be given the more extensive legal analysis that they require.

I. The Statement of Aims and Language.

The Statement of Aims speaks of ensuring "throughout Canada equal respect for English and French as the country's principal spoken languages" and of recognizing "a permanent national commitment to the endurance and self-fulfilment of the Canadian French-speaking society".⁵ While such statements can play a role in educating future generations as to the objectives of the authors of the constitution, and can thus indirectly influence the course of future events, they are unlikely to have much direct or identifiable influence on the future status of language rights in Canada. Institutions regulating and enforcing language rights, including the legislatures and the courts, are more likely to find guidance in concrete and specific provisions than in such broadly stated sentiments.

This is not to say that future law-makers, legislative or judicial, will never find occasion to refer to the Statement of Aims. When they do so, however, it is likely to be as a convenient justification of a result that has already been determined on other bases. Moreover, when a result inconsistent with the stated aims has been determined on other bases, it is likely that the Statement of Aims will simply be ignored as not relevant to the situation in issue.

In short, the language provisions of the Statement of Aims are unlikely to have much concrete beneficial impact on language rights. On the other hand, neither are they likely to do much harm, although one danger should be noted, that is, the danger of disappointed expectations. If the aspirations of "equal respect for English and French" and "endurance and self-fulfilment of the Canadian French-speaking society" fail to be realized in the future, the contrast between aspiration and reality could give those wishing to divide Canada ammunition that would be lacking if the aspirations were not so clearly stated. However, in the near future Canada's prospects for longevity do not appear great in any event unless the

² Bill C-60, s. 4.

³ *Ibid.*, ss 13-22.

⁴ *Ibid.*, s. 69.

⁵ *Ibid.*, s. 4.

broad language aspirations set out in the Statement of Aims can be realized. A real threat to Canadian unity arising from disappointed expectations in respect to language rights already exists because, in part, of the destruction of French language rights late in the nineteenth century and early in the twentieth century in Ontario and western Canada. In these circumstances, the positive impact of a new undertaking to preserve the French language clearly outweighs the danger that there may be a further disappointment. Indeed, if these particular aspirations are again disappointed in the future, any resulting dissolution of the Canadian federation would seem justly deserved.

While it seems probable that the Statement of Aims will serve little purpose other than an educational one, one alternative possibility must be noted. In a system such as Canada's in which judicial review of legislation is a normal occurrence, the potential does exist that the courts might decide to treat the Statement of Aims as a basis for judicial review. While it is assumed that this is not the intention of the Statement, and that the Aims are to be achieved by political action through the legislature, and possibly through interpretative application in the courts, there is no clear provision to this effect. It would be preferable if it were made clear whether legislation is, or is not, subject to being held *ultra vires* on the basis of the Statement of Aims.

II. *The Role of the House of Federation in Relation to Language.*

One of the major responsibilities which the federal proposal would assign to a reformed upper house of Parliament is a partial veto over any "measure of special linguistic significance". Such measures are defined to include any legislation "in relation to the status or use of the English and French languages" or "in relation to a right or privilege" involving these languages.⁶

Voting on such measures in the House of Federation, both by the entire House and by any committee, would involve separate polling of English-speaking and French-speaking members. A majority of both groups would be required for passage.⁷ The House of Commons would have power to pass such legislation without the approval of such a double majority, but only after an extended delay and re-passage of the legislation by a two-thirds majority.⁸

Since the House of Federation has proved one of the most controversial parts of the recent federal proposal, the ultimate shape of reform of the upper house may bear little resemblance to this

⁶ *Ibid.*, s. 69(1).

⁷ *Ibid.*, s. 69(3).

⁸ *Ibid.*, s. 69(7).

proposal. The language provision stands a chance of surviving, however, since it responds to a recurring concern by French-Canadians that their vital interests are too vulnerable at the national level to the whims of a simple majority under a Parliamentary system in which English-speaking Canadians are in a substantial majority. Many English-speaking Canadians may also support this proposal since those who are sympathetic to French-Canadian aspirations will be reluctant to oppose the perceived desire of Francophones for such protection, while those who are unsympathetic to French-Canadian aspirations may welcome the opportunity this device could provide to thwart such aspirations in the future.

That this device may indeed provide an opportunity for French-Canadian aspirations to be thwarted in the future is a possibility arising because the double majority principle is a double-edged sword in favour of the *status quo*. Any proposal to change can be vetoed by a simple majority of one of the two groups, even though there may be a substantial over-all majority in favour.⁹

If the status of French in Canada was presently at its optimum level, preservation of the *status quo* might be a laudable objective. However, the very impetus that has led the federal government to propose more extensive language provisions for a new constitution implies that the existing status is not the optimum. While those new measures proposed for inclusion in the constitution may in themselves be some improvement, one hesitates to suggest that they approach the optimum. The double majority principle may prove as much of an obstacle to further efforts to improve that status as to efforts to weaken it.

If it is accepted that in linguistic matters there ought to be a strong bias in favour of the *status quo*, and certainly the language provisions of the proposed Constitution of Canada Act evidence such a bias, the proposal requiring a double majority in the upper house is appropriate to the task. The two-thirds majority in the House of Commons needed to override the veto of the upper house is within the realm of the achievable. If the upper house should be thwarting a strong popular demand for action, the popular demand is likely to be directed constructively to achieving the necessary majority, rather than to build into destructive frustration with the institution responsible for the inaction. Thus, the device would stand a reasonable chance of steering the narrow course between a viable safeguard and a detested roadblock.

⁹ By way of illustration, R. Simeon, Opening Statement to the Special Committee on the Constitution (1978), p. 4, questions whether the existing federal Official Languages Act, R.S.C., 1970, c. 0-2, would have been able to obtain the support of a majority of English-speaking members in the proposed House of the Federation.

One major area of difficulty lies in the definition of "a measure of special linguistic significance".¹⁰ A common theme of demands from Quebec for constitutional reform is that language and culture are inextricably interwoven with virtually every conceivable aspect of public policy. On this rationale, a claim might arise in relation to almost any measure that it has some linguistic significance, and any such claim might be escalated into a claim of special linguistic significance. The definition specifically contemplates that substance, and not merely form, is to be taken into account. While this seems appropriate in order to deal with attempts to evade the double majority requirement by colourably framed legislation, it also opens the door to arguments that legislation without obvious connection to language has linguistic significance.

The federal proposal attempts to deal with the definitional problem by creating conclusive presumptions where a measure is classified as linguistic either by the Governor General, which effectively means the Cabinet, or by the Speaker of either House.¹¹ Such determinations will no doubt produce political disputes, although not legal ones.

Legal disputes may arise over whether measures not classified as linguistic by the Governor General or one of the Speakers ought nonetheless to be so classified. The proposal appears to contemplate that the classification of any other measures as linguistic is entirely an internal matter for the upper house since the rules of the house are to govern such determinations.¹² Whether the courts may review such internal legislative matters in Canada is an open question,¹³ but the possibility does exist.

Even more critical is the possibility that the provision with respect to rules might be treated as relating only to the procedure by which the upper house deals with the question, and not to the substantive legal question of whether a measure has special linguistic significance. It is possible that the courts might be prepared to make their own determination on the substantive question and, if they find a measure to be linguistic, to rule it unconstitutional unless it appears to have been passed in accordance with the requisite double majority for such measures. Since it would seem undesirable for the courts to strike down a measure that would have passed under the special procedures if it had been classified as a linguistic measure, and since

¹⁰ Bill C-60, s. 69(1).

¹¹ *Ibid.*, s. 69(9).

¹² *Ibid.*, s. 69(9).

¹³ For extensive discussion of this issue, see W. S. Tarnopolsky, *The Canadian Bill of Rights* (2nd ed., 1975), pp. 92-112, and K. Swinton, *Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege* (1976).
¹⁴ Osgoode Hall L.J. 345.

the courts would normally lack the information necessary to determine whether the statute would have passed under the double majority requirement, it would seem inappropriate for the courts to enter upon such an inquiry. On the other hand, it may be questioned whether the courts' general duty to uphold the constitution could permit them to ignore a situation where the legislature has apparently been blind to its obligation to submit a measure to the special scrutiny implicit in the requirements for passing measures of special linguistic significance.

III. *Language Rights.*

1. *The Rights Proposed in Summary.*

The proposed Canadian Charter of Rights and Freedoms creates two categories of rights which cut across the language rights area—one category designated as “individual rights and freedoms”,¹⁴ and the other category legislatively untitled, but being referred to as “collective rights”.¹⁵

The language rights¹⁶ of the individual would be (1) the right to use either English or French in the proceedings of Parliament and any provincial legislature;¹⁷ (2) the right to use English or French in any federal court, in any court of the provinces of New Brunswick, Ontario and Quebec, and in any court of any province in a criminal proceeding or a proceeding on a provincial offence punishable by imprisonment;¹⁸ (3) a right to use English or French in communicating with the central offices of federal government bodies and, if an area has been determined to have a substantial number of persons using the language in question in accordance with federal legislation for federal purposes or provincial legislation for provincial purposes, to communicate with any principal office of a federal government body or a provincial government body in the area in English or French or either language, depending on the relevant determination as to substantial usage;¹⁹ and (4) the right of English-speaking or

¹⁴ Bill C-60, s. 27.

¹⁵ See O. E. Lang, *Explanatory Notes on The Canadian Charter of Rights and Freedoms* (1978), pp. 5-6.

¹⁶ For the purposes of this general summary, the specific provisions of Bill C-60 have been greatly simplified since any reader interested in the exact wording can as easily read the Bill as read a lengthy review of its provisions. More detailed presentation of specific provisions will be provided as necessary to understand the discussion which follows, but the reader is forewarned that this article does not purport to provide a thorough outline of the content of the language rights provisions of Bill C-60.

¹⁷ Bill C-60, s. 14.

¹⁸ *Ibid.*, s. 16.

¹⁹ *Ibid.*, s. 19.

French-speaking citizens of Canada, if they are in a minority in a particular area compared to the other of the two groups, to have their children receive their basic instruction in their own language in publicly supported schools if the number of children for whom such instruction is demanded justifies establishing the necessary educational facilities.²⁰

The collective language rights are (1) recognition of English and French as official languages to the extent determined by federal or provincial legislatures on matters within their respective powers;²¹ (2) publication of the statutes, records and journals of the Parliament of Canada and the legislatures of New Brunswick, Ontario and Quebec in both English and French, and in either or both of these languages in the other provinces as determined by each of those provinces, with provision that both English and French statutes, where they exist, are equally authoritative;²² and (3) provision that no law shall adversely affect the preservation of English or French as the spoken language of any "identifiable and substantial linguistic community in any area of Canada".²³

Supplementary provisions (1) allow for court rules to regulate proceedings in order to make feasible the rights as to language in the courts;²⁴ (2) provide against implied repeal of other constitutional language rights by reason of the provisions on language rights in legislative bodies, statutes or the courts;²⁵ (3) make clear that legislation can provide for wider use of English and French and that legal or customary rights respecting other languages are not affected;²⁶ and (4) provide against implied repeal of any legal or customary rights to receive basic instruction in the language spoken by the majority in an area, while also allowing for legislation that children receiving basic instruction in the minority language in an area must receive language instruction in the majority language.²⁷ In the case of individual language rights, there are also provisions, applicable to all individual rights in the Charter, that (1) no law shall be applied to "abrogate, abridge or derogate" from these rights;²⁸ (2) any court has jurisdiction to give relief from violations of these

²⁰ *Ibid.*, s. 21(1)-(3).

²¹ *Ibid.*, s. 13.

²² *Ibid.*, s. 15.

²³ *Ibid.*, s. 22.

²⁴ *Ibid.*, s. 17.

²⁵ *Ibid.*, s. 18.

²⁶ *Ibid.*, s. 20.

²⁷ *Ibid.*, s. 21(4).

²⁸ *Ibid.*, s. 23.

rights, if no other remedy is available;²⁹ and (3) such rights are subject to limitations justified by public safety or health, public peace and security or the rights and freedoms of others.³⁰

2. *A Comparison with Existing Rights.*

Several of the language provisions of the federal proposal continue existing constitutional provisions or constitutionally entrench existing legislative provisions. The provisions respecting language in federal and Quebec legislative proceedings, statutes and courts are virtually identical to the present language provision of the British North America Act.³¹ The inclusion of identical provisions for New Brunswick would entrench rights already conferred by provincial legislation.³² The provision as to language in the courts in criminal proceedings throughout Canada would entrench recent federal legislation that is being phased in across Canada.³³ Ontario is also in the process of introducing the use of French into its courts,³⁴ and in practice the regulated right to use either language contemplated in the federal proposal might not differ very much from what Ontario is introducing.

The provision for recognition of English and French as official languages would confer constitutional status on existing federal³⁵ and New Brunswick³⁶ legislation, although the intention does not appear to be to entrench such legislation.³⁷ In Quebec an existing provision gives official status only to French,³⁸ while Manitoba legislation does the same for English.³⁹ Various provisions exist in

²⁹ *Ibid.*, s. 24.

³⁰ *Ibid.*, s. 25.

³¹ 30 & 31 Vict., c. 3, s. 133 (U.K.).

³² Official Languages of New Brunswick Act, R.S.N.B., 1973, c. 0-1, ss 3-7 and 13.

³³ Criminal Code, R.S.C., 1970, c. C-34, Part XIV.1, as enacted by S.C., 1977-78, c. 36, s. 1.

³⁴ The Judicature Act, R.S.O., 1970, c. 228, s. 127, as am. by S.O., 1978, c. 26, s. 1.

³⁵ Official Languages Act, *supra*, footnote 9, s. 2.

³⁶ Official Languages of New Brunswick Act, *supra*, footnote 32, s. 2.

³⁷ See Lang, *op. cit.*, footnote 15, p. 19. Bill C-60, s. 13, refers to "purposes declared by" the legislature. As a legislative document, the Constitution of Canada Act would probably be interpreted as always speaking in the present tense. Thus, "declared" would probably refer to whatever the legislature might declare from time to time.

³⁸ Charte de la langue française, L.Q., 1977, c. 5, art. 1.

³⁹ An Act to Provide that the English Language Shall Be the Official Language of the Province of Manitoba, R.S.M., 1970, c. 0-10. Actually the title overstates the real effect of the Act which only explicitly provides that English shall be the exclusive language in legislative records, statutes and the courts.

other provinces giving some legal recognition to English, but not describing it as an official language.⁴⁰ The status of all such one language provisions under the federal proposal is one of the questions to be discussed below.

The provision as to communication with federal government offices would entrench statutory provisions enacted a decade ago,⁴¹ while the similar provision as to communication with provincial government offices would recognize legislation already existing in New Brunswick⁴² and Quebec⁴³ and in the St. Boniface area of Manitoba.⁴⁴ Provincial administrative practices elsewhere in Canada already make similar provisions in various areas, although such practices would not amount to the right contemplated by the federal proposal. In any event, the availability of services from local offices of federal agencies or from any provincial government offices would be subject to variation by legislation and not truly entrenched even if the federal proposal is adopted.

Provision for minority language education exists in several provinces, although under existing legislation such education is rarely guaranteed as a right, even where the numbers justify provision of facilities. On the other hand, the requirement of such justification under the federal proposal will probably mean that there will be no large scale change as a result of the federal proposal except in Quebec where some restrictions now being imposed on availability of English education⁴⁵ would have to be removed unless English schools could be eliminated as unjustified, which would be difficult in some areas of the province.

The only definitively new rights to be created by the proposed language rights provisions would be the use of French in Ontario statutes⁴⁶ and legislative records, the right to use French in giving evidence at the trial of serious provincial offences, and the provision

⁴⁰ See, for example, The Interpretation Act, R.S.A., 1970, c. 189, s. 27, making English the language of public records in Alberta, and in Ontario, The Judicature Act, *supra*, footnote 34, s. 127(1), as am., making English the language of court proceedings in Ontario, subject to certain exceptions.

⁴¹ Official Languages Act, *supra*, footnote 9, s. 9.

⁴² Official Languages of New Brunswick Act, *supra*, footnote 32, s. 10.

⁴³ Charte de la langue française, *supra*, footnote 38, art. 15. Actually this section may not really satisfy the requirements of the federal proposal since it permits, rather than guarantees, availability of English services. Also, it does not specify English, but allows for the use of any language other than French.

⁴⁴ The City of Winnipeg Act, S.M., 1971, c. 105, s. 80.

⁴⁵ Charte de la langue française, *supra*, footnote 38, arts 72 and 73.

⁴⁶ Ontario plans to begin translating its statutes into French. However, since there is as yet no established basis in law or custom for availability of Ontario statutes in French, it seems fair to describe the proposed constitutional provision as a new right.

against statutes adversely affecting preservation of the spoken language of identifiable English or French communities. Therefore, while the express recognition and constitutional entrenchment of existing rights as already described is important, it must be realized that on the whole the federal proposal does not contemplate any radical change in the existing status of the English and French languages in Canada, particularly since, in most areas where existing rights might appear to be expanded, such expansion will not occur unless the appropriate legislature voluntarily enacts enabling legislation. Even in Ontario, where some significant expansion of French language rights is proposed, the introduction of these rights might come about, without constitutional change, as a result of a political movement now underway to introduce French as an official language in Ontario, although the proposed constitutional change, if it comes about, might be more assured of permanence than the results of any such political movement.

In some respects, the federal constitutional proposals may narrow existing language rights in Canada, if they are fully implemented. Although the right was lost in practical terms nearly eighty years ago, Manitobans may still legally have the right to use either English or French in their legislature and courts, and to have their statutes in both languages.⁴⁷ Under the federal proposals, once the Canadian Charter of Rights and Freedoms comes into effect throughout Canada, the language provision of the Manitoba Act will be repealed.⁴⁸ Although an argument can be made that French language rights in Manitoba will nonetheless be preserved by virtue of the saving clauses for existing rights in the Charter,⁴⁹ the intention appears to be to abolish these rights.

⁴⁷ Manitoba Act, S.C., 1870, c. 3, s. 23. This provision is identical to section 133 of the British North America Act, *supra*, footnote 31. Its effect was for practical purposes eliminated in 1890 by An Act to Provide that the English Language Shall Be the Official Language of the Province of Manitoba, *supra*, footnote 39. The constitutionality of the latter Act has been ruled upon unfavourably in three decisions, *Bertrand v. Dussault* (1909), unreported (Man. Co. Ct), quoted by Monnin J.A., in *Forest v. Registrar of Court of Appeal of Manitoba*, [1977] 5 W.W.R. 347 (Man. C.A.), at pp. 361-366; *Regina v. Forest*, [1977] 1 W.W.R. 363 (Man. Co. Ct); and *Forest v. Attorney-General of Manitoba*, [1979] 4 W.W.R. 229 (Man. C.A.). The last of these was heard by the Supreme Court of Canada in October, 1979, and judgment was reserved.

⁴⁸ Bill C-60, s. 131(4)(d).

⁴⁹ *Ibid.*, ss 18 & 26. The argument in favour of repeal is that the saving clauses only protect rights from an implied repeal by the Charter itself. The repeal of existing language rights in Manitoba would result from an express provision found outside the Charter. The argument in favour of applying the saving clauses is that they operate against consequences of the Charter. The coming into effect of the Charter is what brings about the repeal of existing language rights in Manitoba. Therefore, abolition of those rights would be a consequence of the Charter and one of the things which the saving clauses preclude.

While it is contemplated that the Charter may be brought into effect in individual provinces without waiting for it to come into effect in all provinces,⁵⁰ it is interesting to note that the abolition of French language rights in Manitoba must await the time when the Charter is part of the entrenched constitution. Under present practice with respect to constitutional amendments affecting the division of powers, it is probable that approval by all provinces would be awaited before the Charter came into effect as part of the entrenched constitution. Thus, French language rights in Manitoba would remain protected, if indeed they are protected at present, as long as, but only as long as, any province for whatever reason holds out against entrenchment of the Charter. This may seem an anomalous situation, but the rationale for it is presumably that the language rights in the Charter are viewed as an alternative package to the present constitutional provisions and present provisions should not be abolished until the new package is entrenched.

There is some possibility that English and French have similar legal status in Alberta and Saskatchewan to that which may currently exist in Manitoba.⁵¹ While it is apparently assumed that these rights have lapsed in Alberta and Saskatchewan, it would be wise to resolve the question clearly for these provinces, as well as for Manitoba.

3. The Relation between the Objectives of the Charter and Language.

In a background paper to the proposed Canadian Charter of Rights and Freedoms, the former Minister of Justice stated two main justifications for the Charter in the following words:⁵²

First, because certain human rights are so basic to our society, they should be given a permanence which can only be assured by placing them beyond the reach of the ordinary legislative process. Second, these human rights should be common to all Canadians whatever may be their place of residence within Canada.

It would appear that in the area of language rights the federal proposal lacks the courage of these convictions. Not only would the individual rights and freedoms in the language area be subject to the same general qualifications as other individual rights that they may be qualified by justifiable legislation, but also, as already noted, many of the language measures depend on enabling legislation which could affect their very existence. In large part, the language rights are not placed beyond the reach of ordinary legislative process.

⁵⁰ Bill C-60, s. 131(3).

⁵¹ This arises by virtue of the Northwest Territories Act, R.S.C., 1886, c. 50, s. 110, as am. by S.C., 189, c. 22, s. 18, which was continued in effect by the Alberta Act, S.C., 1905, c. 3, s. 16 and the Saskatchewan Act, S.C., 1905, c. 42, s. 16.

⁵² Lang, *op. cit.*, footnote 15, p. 3.

Even more critically, the fundamental rights of Canadians with respect to language will be anything but "common to all Canadians whatever may be their place of residence". On the contrary, the Charter itself expressly varies those rights from province to province. It is obvious, therefore, that the federal proposal on language rights is not so much a declaration of principle as it is an exercise in pragmatic politics.⁵³

The former federal government's assessment that extension of French-language rights throughout Canada under the constitution is not politically feasible at present is probably correct. One must question, however, the apparent conclusion that it was appropriate to compromise the principle that fundamental rights should be the same throughout Canada in order to constitutionally entrench language rights to the extent that this is politically feasible at present. If a right is fundamental, then it is not something which can easily be compromised. The compromise which the federal proposal would effect threatens to throw the whole question of language rights into disrespect by recognizing that it is not a matter of fundamental right.

If language rights are to vary from province to province, it would seem more appropriate to treat them as a matter of the provincial constitution, rather than as a matter of the Canadian constitution. One suspects that the motivation for inclusion of these variable rights in the federal proposal is not a conviction that these rights should be fundamental for all Canadian citizens, but rather a desire to achieve the benefits of constitutional entrenchment for residents of those provinces where these rights are regarded as of basic importance.⁵⁴

The federal government may well have compromised too readily on its principle that fundamental rights should be the same for all Canadians. The only real right created by the Charter in respect to language which would exist in some provinces and not in others is the availability of statutes in both English and French and the right to use either language in the courts.⁵⁵ Other provisions vary

⁵³ In this regard, it is worthy of note that the one area in which the Charter proposes to expand existing rights, namely, in the legislature and courts of Ontario, coincides with the already existing political platform of the Liberal Party in Ontario. It seems unlikely that this concurrence of the federal Liberal government's constitutional proposals with the relevant provincial Liberal Party's political platform is a mere coincidence, although it would be unfair to claim that within Ontario this is mere political expediency. What is regrettable is that, in the interest of political expediency, the federal government stopped short of similar proposals elsewhere.

⁵⁴ As will be discussed below, it is arguable that even the objective of entrenchment of language rights in so far as they affect the provinces is not achieved by the federal proposal.

⁵⁵ Bill C-60, ss 15(2) and 16(2).

from province to province because they are subject to legislation in all provinces and to that extent they do not truly create fundamental rights in any province. There is reason to hope the availability of legislation and court process in both English and French might be extended to all provinces, particularly if accompanied by some palliative such as a guarantee of federal funding to cover the cost.⁵⁶

To the extent that it may not be politically possible to extend language rights on the same basis to all provinces, there is an alternative mechanism by which the objective of entrenchment might be achieved without compromising the principle that fundamental rights in the Canadian Charter of Rights and Freedoms should be the same for all Canadians. Provision could be made for entrenched provisions of provincial constitutions. If this were done, it could be recognized that constitutional provisions which apply only to some provinces properly belong in the provincial constitution, without it necessarily following that such provisions can be amended by a simple majority of the provincial legislature. The mechanics of such a provision obviously require further exploration, but it would seem a much better way to deal with interprovincial variables than to pretend that there are certain fundamental rights at the federal level which really exist only for Canadians living in some parts of the country.

4. *The Declaration of Official Status for English and French.*

The proposed general declaration of the official status of English and French throughout Canada⁵⁷ would cast some doubt on the continued validity of legislation, such as that in Alberta, Manitoba, Ontario and Quebec,⁵⁸ which purports to make only one of those languages official for certain purposes. While the federal proposal leaves it up to the provincial legislature to determine the purposes to which official status extends, it is arguable that any such declaration of official status must extend to both languages, and not to one only. On such a reading, provincial legislation extending official status to only one language would likely be rendered *ultra vires*, although it is just possible that the effect would be to extend to

⁵⁶ See Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (1978), pp. 21-25, which proposes extending such provisions to all provinces. For a different view, see *The Task Force on Canadian Unity, A Future Together* (1979), pp. 51-53. The Task Force is pessimistic as to the prospect of an early extension of language rights on a common basis across Canada at the provincial level. At the same time, the Task Force is in accord with the view that inclusion of provincial language rights in the federal constitution should be based on a commonality of such rights among the provinces, and that otherwise such rights should be a matter of provincial law.

⁵⁷ Bill C-60, s. 13.

⁵⁸ *Supra*, footnotes 38, 39 and 40.

the other language the official status already accorded to one language.

Some support for an interpretation of the official language declaration allowing official status to be given to only one language may be drawn from the provision on language in the legislatures which makes it clear the provinces, other than New Brunswick, Ontario and Quebec, may prescribe that their legislative records be in only one language.⁵⁹ Also, it might be thought that this provision would validate the existing Manitoba statute in so far as it relates to statutes and legislative records. However, Manitoba may have to enact new legislation. If the existing legislation is *ultra vires* because of conflict with the language provision of the Manitoba Act, then it is a mere nullity. A subsequent grant of power to enact such legislation would not in itself give any effect to such a nullity.

5. *Entrenchment of Language Rights under the Charter.*

Although the weight of judicial authority supports the view that the provinces do not have power to abrogate the present language guarantees in the British North America Act and the Manitoba Act,⁶⁰ it must be noted that this question has not yet been ruled upon by the Supreme Court of Canada. This means there is still a possibility that the existing Manitoba and Quebec legislation abrogating those rights is *intra vires*.

The argument in favour of provincial power to abrogate language rights under the present constitution is that, in so far as those rights relate to the province, they are part of the constitution of the province. Thus, power to alter these rights is within the power of the province to amend its own constitution.⁶¹ The opposing argument, which has so far found favour in the courts, is that the language protections are not within the group of provisions which make up the concept of the provincial constitution as that term is used in the British North America Act.⁶²

Under the federal proposal the argument that language provisions are part of the provincial constitution in so far as they apply to the provinces would still be open. As such these provisions might be subject to the continuing power of the province to amend its own

⁵⁹ Bill C-60, s. 15(2).

⁶⁰ The Manitoba legislation and the relevant cases are set out in footnote 47. The Quebec legislation is found in the Charte de la langue française, *supra*, footnote 38, arts 7-12. These provisions were held unconstitutional in *Blaikie v. Attorney-General of Quebec* (1978), 85 D.L.R. (3d) 252 (Que. C.S.), *aff'd.*, [1978] C.A. 351. This case was heard by the Supreme Court of Canada in June, 1979, and judgment was reserved.

⁶¹ British North America Act, *supra*, footnote 31, s. 92(1).

⁶² *Ibid.*, ss 58-90.

constitution.⁶³ Indeed, the federal proposal would revise this provincial power in such a way as to strengthen this argument. It expressly prohibits the province from amending its constitution so as to derogate from the provisions of the Canadian Charter of Rights and Freedoms relating to elections and legislative bodies. This implies that other provisions of the Charter, such as those relating to language rights, are subject to the power of the province to amend the provincial constitution.

The specific exclusion of the Charter provisions relating to elections and legislative bodies from the provincial power of constitutional amendment may, however, be explained on the basis that these matters fall within the concept of the provincial constitution, while other matters dealt with in the Charter do not. Moreover, the specific saving clause in the Charter for justifiable limitations on individual rights and freedoms implies that the provinces are not free to disregard those rights in the absence of justification.⁶⁴

The lack of a general amending formula in the federal proposal accounts for this potential loophole in entrenchment of the Canadian Charter of Rights and Freedoms. In other recent constitutional proposals, entrenchment of certain constitutional provisions has been a function of inclusion of such provisions under the umbrella of the general amending formula. In the absence of such a formula, there is uncertainty whether the respective federal and provincial powers of amendment in the division of powers cover everything which is not expressly excluded, as language rights are in the case of the federal amending power.⁶⁵ This same uncertainty under the existing constitution led to a reference case as to the validity of the former federal government's plan to act unilaterally with respect to proposed reform of the Senate and the Supreme Court.

Since most provisions respecting language rights in the provinces are substantially subject to provincial legislation by the express terms of the proposed Charter, the possibility of provincial legislation abrogating such rights may not have great practical impact. However, since it is widely understood that the intention of the federal proposal is to entrench these rights in so far as it does create them, it would be preferable if entrenchment were more clearly provided for.

⁶³ Bill C-60, s. 92(1).

⁶⁴ *Ibid.*, s. 25.

⁶⁵ *Ibid.*, s. 91(1).

6. *The Language of Delegated Legislation and Quasi-Judicial Tribunals.*

Another issue raised in current litigation over existing language rights is whether the provisions respecting the language of the statutes and the courts apply to delegated legislation and to quasi-judicial tribunals. It has been held by the trial court in *Blaikie v. Attorney-General of Quebec*⁶⁶ that the existing provisions do extend to delegated legislation and quasi-judicial tribunals, but the Supreme Court of Canada has yet to rule upon this issue.

Again, the federal proposal fails to clearly address this issue when dealing with the language of legislation and the courts.⁶⁷ In view of the explicit reference to "judicial, quasi-judicial or administrative body" in the separate provision for communicating with offices of the federal government in either English or French,⁶⁸ it may be that the right to use either language in the courts does not apply to such bodies. On the other hand, the argument in the *Blaikie* case that exclusion of delegated legislation and quasi-judicial tribunals would permit easy evasion of the language protections is a strong argument against limiting the protection to legislation passed by the legislature itself and to judicial bodies which are formally called courts.⁶⁹

7. *The Rights of Identifiable Linguistic Communities.*

The general provision against legislation which adversely affects the preservation of English or French as the language used by any "identifiable and substantial linguistic community" might potentially have the broadest effect of any provision of the Canadian Charter of Rights and Freedoms.⁷⁰ Of all of the rights and freedoms which might provide a substantive basis for judicial review of legislation, this is the only one which is not an individual right or freedom. Thus, it is not subject to the express provision for justifiable limitations on individual rights and freedoms.⁷¹ While the courts might imply reasonable limitations on the rights and freedoms

⁶⁶ *Supra*, footnote 60.

⁶⁷ Bill C-60, ss 15 and 16.

⁶⁸ *Ibid.*, s. 19(1).

⁶⁹ W. C. Conklin, *Constitutional Ideology, Language Rights and Political Disunity in Canada* (1979), 28 U.N.B.L.J. 39, at pp. 60-62, identifies the failure of the Fathers of Confederation to conceive of the creation of a bureaucracy which would play as important a role as the legislature and courts, and the resulting omission of that bureaucracy from the language provision of the British North America Act, as a factor in Canadian disunity because lawyers failed to adapt the express provision of the constitution to the new reality.

⁷⁰ Bill C-60, s. 22.

⁷¹ *Ibid.*, s. 25.

in the Canadian Charter of Rights and Freedoms if there were no express provision for such limitations, it is arguable that, in the face of express provision for limitations on certain rights, there is no room for implied limitations on other rights in the Charter.

On the other hand, the protection of identifiable linguistic communities would not have the benefit of the express provision in the Charter for judicial relief in the event of a violation of an individual right or freedom.⁷² However, in light of the Supreme Court's recent liberalization of the requirements for standing to challenge unconstitutional legislation,⁷³ it may not be difficult to obtain access to the courts to challenge violations of group rights.

The scope of the protection of identifiable linguistic communities would seem extremely broad. Laws are not to "apply or have effect so as to affect adversely" language usage. The pairing of words "have effect" with "apply" suggests that the courts should look at the real practical effects of legislation, and not merely at the legal application of the legislation on its face. Thus, legislation which has no obvious, or even foreseen, connection with language might be reviewable under this provision because of its impact on an identifiable linguistic community. The words "affect adversely" further imply that even a minimal impact may be sufficient to bring this provision into operation.

Conclusion

The proposed protections of language rights in the federal government's Constitutional Amendment Bill would not create any massive extension of the right to use English or French in Canada. They would, however, give added stature to many existing rights, and make some significant changes. As in the case of the provisions in the original British North America Act, it is unlikely that these provisions will constitute a final settlement of the language question in Canada. On the contrary, they are likely to stimulate further extensions of that debate into the judicial forum because of the implicit invitation to judicial review of legislation that the concept of a Charter of Rights and Freedoms involves. Whether the results of this development will advance the cause of Canadian unity, or ultimately assist in its undoing, only time will tell.

⁷² *Ibid.*, s. 24.

⁷³ See *Thorson v. Attorney-General of Canada* (No. 2), [1975] 1 S.C.R. 138, 1 N.R. 225, 43 D.L.R. (3d) 1, and *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, 5 N.R. 43, 12 N.S.R. (2d) 85, 55 D.L.R. (3d) 632.