TRANSLATING THE *CONSTITUTION ACT, 1867*

A Legal-Historical Perspective

by

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Abstract

Twenty-seven years after the adoption of the *Constitution Act, 1982*, the Constitution of Canada is still not officially bilingual in its entirety. A new translation of the unilingual English texts was presented to the federal government by the Minister of Justice nearly twenty years ago, in 1990. These new French versions are the fruits of the labour of the French Constitutional Drafting Committee, which had been entrusted by the Minister with the translation of the texts listed in the Schedule to the *Constitution Act, 1982* which are official in English only. These versions were never formally adopted.

Among these new translations is that of the founding text of the Canadian federation, the *Constitution Act, 1867*. A look at this translation shows that the Committee chose to depart from the textual tradition represented by the previous French versions of this text. Indeed, the Committee largely privileged the drafting of a text with a modern, clear, and concise style over faithfulness to the previous translations or even to the source text.

This translation choice has important consequences. The text produced by the Committee is open to two criticisms which a greater respect for the prior versions could have avoided. First, the new French text cannot claim the historical legitimacy of the English text, given their all-too-dissimilar origins. Its adoption through a constitutional amendment will not grant it the requisite legitimacy, as the nature of such an amendment is generally misunderstood by lawyers, let alone the ordinary citizen.

In addition, the new text is, in many instances, anachronistic, as a result both of the purism and the modernism of the Committee. This desire to erase the "mistakes" of our ancestors, to "refrancize" the language of the era, leads to the drafting of a text which is entirely divorced from its original context, a text which cannot be a true reflection of the historical source text. This necessarily results in a lack of historical accuracy in the new translation.

These two problems might have been avoided by giving greater weight to the translations of the past. In the current circumstances, the unreflecting adoption of the new text would have unfortunate effects for the understanding of our constitutional law and its history.

Résumé

Vingt-sept ans après l'adoption de la *Loi constitutionnelle de 1982*, la Constitution du Canada n'est toujours pas officiellement bilingue dans son ensemble. Une nouvelle traduction des textes unilingues anglais a pourtant été remise au gouvernement fédéral par le ministre de la Justice il y a près de vingt ans, en 1990. Ces nouvelles versions françaises sont le fruit du travail du Comité de rédaction constitutionnelle française auquel le ministre avait confié la traduction des textes figurant à l'annexe de la *Loi constitutionnelle de 1982* dont le texte n'est officiel qu'en anglais. Elles n'ont jamais été adoptées.

Parmi ces nouvelles traductions se trouve celle du texte fondateur de la fédération canadienne, la *Loi constitutionnelle de 1867*. L'examen de cette nouvelle version révèle que le Comité de rédaction constitutionnelle a voulu se démarquer de la tradition textuelle que représentent les versions françaises antérieures de ce texte. En effet, le Comité a largement privilégié la rédaction d'un texte de style moderne, clair et concis, plutôt que la fidélité aux traductions précédentes ou même au texte de départ.

Ce choix du traducteur est lourd de conséquences. Le texte produit par le Comité prête le flanc à deux critiques qu'un plus grand respect pour les versions précédentes aurait pu éviter. D'abord, le nouveau texte français ne peut prétendre à la légitimité historique du texte anglais, eu égard à leurs origines trop dissemblables. Son adoption par le moyen d'un amendement à la constitution ne lui conférera pas non plus la légitimité requise, puisque la nature de cet amendement reste incomprise de la plupart des juristes, et à plus forte raison du citoyen ordinaire.

Ensuite, le nouveau texte fait preuve, à bien des endroits, d'un anachronisme qui est le résultat à la fois du purisme et du modernisme du Comité. Ce désir d'effacer les « fautes » de nos ancêtres, de « refranciser » la langue de l'époque, aboutit à la rédaction d'un texte tout à

fait dissocié de son contexte original, un texte qui ne saurait refléter le caractère historique du texte de départ. Il en résulte nécessairement un manque d'exactitude historique dans la nouvelle traduction.

Ces deux problèmes auraient pu être évités en accordant un plus grand respect aux traductions du passé. Dans les circonstances actuelles, l'adoption irréfléchie du nouveau texte serait un méfait pour la compréhension de notre droit constitutionnel et de son histoire.

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Finally, I would like to thank my parents for their support, and for instilling in me the love of language and learning; and for her unwavering encouragement and understanding, I would like to thank my wife, Jennifer, my love and my life.

Contents

« *Au lieu de tirer du droit de conquête des conséquences si fatales, les politiques auroient mieux fait de parler des avantages que ce droit peut quelquefois apporter au peuple vaincu.* »

— Montesquieu, *De l'Esprit des lois*, X, 4

Notes

Quotations are provided in the text in their original language. English quotations are set in roman type, while quotations in other languages (mainly French) are set in italics. Translations are generally provided in footnotes for the convenience of readers, with the exception of dictionary definitions, which are not translated.

Equally authoritative texts, or texts officially published in both French and English, are always quoted in both versions in the text, either in parallel columns (for longer quotations) or immediately adjacent, in parentheses (for shorter quotations). Canadian statutes are cited by both titles, but are generally referred to subsequently and in the text by their English title only.

Because of the liberal use of italics, I have used boldface throughout for emphasis in quotations. The reader should assume that all such emphasis is mine. Any original emphasis has been left in italics (or roman in italic text).

In light of the historical nature of many of the texts quoted, I have not edited them; I have indicated by "[*sic*]" those variants which I felt to be non-standard, even in their historical context.

Chapter 1: Introduction

Canada is a land of ambiguities, and nowhere is this more evident than in the study of its constitution. Canada's constitution is neither fully written nor fully unwritten; it is neither fully domestic nor fully foreign; and, as this work shows, it is neither fully unilingual nor fully bilingual.

Canada's constitution consists of an amalgam of written documents and unwritten principles. The unwritten principles derive largely from the British tradition of government (an explicit reference to which is made in the preamble to the *Constitution Act, 1867*) and include such principles as have historically been recognized (universally or not) as forming part of the makeup of the Canadian polity.

The written documents include the *Constitution Act, 1867*—formerly known as the *British North America Act, 1867*—which created the Canadian federation and laid down its basic structures. They also include the twenty-nine enactments listed in the Schedule to the *Constitution Act, 1982*, both Imperial and Canadian, that were adopted between 1867 and 1982, and that modify the *Constitution Act, 1867* in some way. Finally, our written constitution includes the *Constitution Act, 1982*, which contains the *Canadian Charter of Rights and Freedoms* and the new procedure for amending the Constitution, and was the result of the "patriation" of our constitution.

Whether this patriation was truly accomplished is, however, an open question; the legal validity of the *Constitution Act, 1982*, as with that of the *Constitution Act, 1867*, arguably comes from its status as an Imperial statute, enacted for Canada by the Parliament of the United Kingdom. In this way, then, our constitution might still be seen as a "foreign" document.

Our founding constitutional document, the *Constitution Act, 1867*, was also enacted for Canada by the Imperial Parliament, and it was enacted in English only. There has never

been an official French version of our primary constitutional text. This is a rather startling fact for an officially bilingual country, and one which many felt was in need of rectification. Indeed, when the *Constitution Act, 1982* was adopted, it was made expressly official in both languages. In addition, section 55 of the *Act* provided for the translation of those portions of the Constitution of Canada (as defined in the *Act*) that were official in English only, and for the subsequent adoption of these new French versions. The Minister of Justice formed a committee for this purpose, and this committee made its final recommendations to Parliament in 1990. No action has been taken on this matter since then. The adoption of the new French versions would require the unanimous assent of all ten provinces and the federal government.

This work is concerned with the history and current state of the French versions of the *Constitution Act, 1867*. For while the *Act* may never have had an official French version, it was, of course, translated into French; and indeed, there have been several historical versions of the *Act* in French, the most well-known being the version included in the appendix to the *Revised Statutes of Canada*. The nature of these translations, and their relationship to the new translation proposed by the French Constitutional Drafting Committee, form the subject-matter of the following chapters.

I begin with a historical overview of constitutional bilingualism in Canada. Of course, constitutional bilingualism *per se* is a rather new occurrence in Canadian constitutional law. Statutes of a constitutional nature passed by the Canadian Parliament were official in both languages going back to 1867. But the first bilingual independent text of our Constitution did not appear until 1982, in the form of the *Constitution Act, 1982*. Before the advent of constitutional bilingualism, however, legislative bilingualism had had a much longer history in Canada. I examine this history in chapter 2, and discuss the factors which led to the development of constitutional bilingualism. In chapter 3, I turn to the subject of the *Constitution*

Act, 1867 proper. I look at the history of the translation of the *Act* and the context in which these translations were produced, as well as examining why an official French version was never adopted. I then compare the previous French versions of the *Act* with the new translation proposed by the French Constitutional Drafting Committee, and show the many ways in which the new translation is a departure from the previous ones. Finally, in chapters 4 and 5, I examine two specific problems related to the Committee's new translation: the problem of historical legitimacy, and the problem of historical accuracy. I hope to show that these problems could both have been mitigated, if not completely avoided, by a greater reliance on and respect for the prior French versions of the *British North America Act*. My argument, in short, is that the Committee failed to take full consideration of the historical context of the *Act*, as reflected in the previous translations, and that this lack of historical perspective affected the validity of its translation.

The issue of the translation of the Constitution may appear to be rather technical and esoteric. But in many ways, it is fundamental to our understanding of the nature of a bilingual society. If we truly believe in bilingualism, then we must accept its disadvantages with its advantages, its complications with its simplifications, its burdens with its benefits. But above all, we must truly understand its implications: to be a bilingual society is not a state to be achieved, but a perpetual challenge to be faced. It is not a being, but a becoming. And it can only be possible if we strive to understand its amazing complexity.

To truly understand the intricate relationship of the French and English languages in our country, we must understand their history, and the history of their speakers. It is my hope that by this work I may contribute, however minutely, to a better understanding of that history.

Chapter 2: Overview

I. A Bilingual Constitution?

"The Constitution of Canada," says former Supreme Court Justice Michel Bastarache, "is, in general, a bilingual instrument."[1] One might humbly suggest that Mr. Justice Bastarache is being somewhat generous. Of the thirty-one enactments expressly declared in the *Constitution Act, 1982*, to form part of the "Constitution of Canada" (including the *Constitution Act, 1982* itself, as part of the *Canada Act 1982*),[2] only nine are officially bilingual. To these must be added the various amendments made by the *Constitution Act, 1982* to the enactments listed in the Schedule to that *Act*,[3] as well as amendments to the *Constitution Act, 1867* made by the officially bilingual enactments listed in that Schedule.[4] When one adds all this up, one still falls far short of a fully bilingual constitution.[5]

It is a situation that, while it may be occasionally decried in principle, has been the object of little meaningful action. In 1986, R. Michael Beaupré entitled the final chapter of the second edition of his landmark work, *Interpreting Bilingual Legislation*, "Towards a Bilingual Constitution" and explained in a footnote: "The title of this chapter is intended to reflect the fact that even in 1986 the great bulk of the Constitution of Canada is still officially expressed in English only."[6] That year, the Minister of Justice tabled in the House of Commons the first report of a committee charged with producing official French versions of

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[1] The Honourable Mr. Justice Michel Bastarache, *et al*., *The Law of Bilingual Interpretation* (Markham, ON: LexisNexis Canada, 2008) at 96.
[2] *Constitution Act, 1982/Loi constitutionnelle de 1982*, s. 52(2), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[3] See *Constitution Act, 1982*, Schedule.
[4] See *Constitution Act, 1867/Loi constitutionnelle de 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 21, 22, 28, 29(2), 37, 51(1) and (2), and 93A, reprinted in R.S.C. 1985, App. II, No. 5.
[5] For an exhaustive (albeit somewhat dated) discussion of the official language of Canadian constitutional texts, including pre-Confederation documents, see Claude-Armand Sheppard, *The Law of Languages in Canada* (Ottawa: Information Canada, 1971 [No. 10 of the *Studies of the Royal Commission on Bilingualism and Biculturalism*]) at 93–96.
[6] Michael Beaupré, *Interpreting Bilingual Legislation*, 2nd ed. (Toronto: Carswell, 1986) at 199, n. 1.

those English-only portions of the Constitution. There was hope that the unequal linguistic balance of the Constitution would soon be remedied. Twenty-three years—and several constitutional crises—later, one can do no better than to update Beaupré's statement, and note that even in 2009, the great bulk of the Constitution of Canada is still officially expressed in English only.

There seems to be a generally accepted view that this is an unfortunate failing of our constitutional makeup, just one of the many constitutional dysfunctions with which we Canadians have become familiar. It is a symptom of a greater affliction: the seeming impossibility of making any multilateral amendment to our Constitution. Some commentators express a resigned frustration about the lack of movement on this issue.[7] Most simply take the time to point out the state of things and move on to better pastures.[8] The Government of Quebec made a half-hearted attempt at challenging the lack of federal action, going so far as to argue that it threatened the validity of the *Constitution Act, 1982*, and then abandoned the issue.[9]

Whether this situation is truly unfortunate is, in my view, highly debatable. But it is one that is simply not debated. The most noticeable aspect of this question of Canadian con-

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[7] See e.g. Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th ed. (Cowansville, QC: Yvon Blais, 2008) at 851: "*Étant donné que ce processus exige l'unanimité du fédéral et des provinces sur plusieurs questions, l'adoption de cette version française de la Constitution ne serait peut-être pas chose aisée. Néanmoins il n'apparaît pas conforme au texte de l'article 55 que les autorités fédérales aient pu jusqu'à maintenant ne pas tenter de faire adopter la version française de la Constitution.*" ("Given that this process requires the unanimity of the federal government and the provinces on many questions, the adoption of this French version of the Constitution might not be an easy thing. Nonetheless, the fact that the federal authorities have until now never attempted to have the French version of the Constitution adopted does not appear to be in accord with the text of section 55" [translated by author]); see also Robert Leckey & André Braën, "Bilingualism and Legislation" in Michel Bastarache, ed., *Language Rights in Canada*, 2nd ed. (Cowansville, QC: Yvon Blais, 2004) at 90–91.

[8] See e.g. the terse discussion in Peter W. Hogg, *Constitutional Law of Canada*, vol. 2, 5th ed. Supp., looseleaf (Scarborough, ON: Thomson Carswell, 2007) ¶ 56.3; in Gérald-A. Beaudoin, *La Constitution du Canada*, 3rd ed. (Montreal: Wilson & Lafleur, 2004) at 37 and 37, n. 147; and in Jacques-Yvan Morin & José Woehrling, *Les constitutions du Canada et du Québec: Du régime français à nos jours* (Montreal: Thémis, 1992) at 484–485.

[9] See *Bertrand c. Québec (Procureur général)*, [1996] R.J.Q. 2393 (C.S.) ¶ 143–60. See also *Bertrand c. Québec (Premier ministre)*, [1998] R.J.Q. 1203 (C.S.) ¶ 11–14.

stitutional law is the indifference it seems to elicit. It survives only in a few scattered footnotes of hefty constitutional treatises, and in the forgotten report of a committee with vast legal expertise but no public profile. When addressed at all, it is treated as a minor point of the law of language rights. Yet in many ways, it is a quintessentially Canadian issue, one that goes to the heart of the nature of bilingualism and linguistic equality, and challenges us to examine in detail the true nature of these concepts that we so often reflexively take for granted. It is also a question that forces us to consider the role that history plays in our constitutional order, and our understanding of, and relationship to, that history. It is a question which I believe can only be addressed from a historical perspective. I begin, therefore, with a short history of constitutional bilingualism in Canada.

II. A Short History of Constitutional Bilingualism

A. Legislative Bilingualism Before 1982

The problem of constitutional bilingualism in Canada can be said to go back as far as the first presence of British soldiers on the soil of what was then New France.[10] Indeed, it might be seen as ironic today that some of the earliest documents of constitutional import in the history of Canada[11] also remain official in one version only—the French version. The *Articles of Capitulation of Quebec* and the *Articles of Capitulation of Montreal*, documents that would come to have great significance in the struggle for cultural and religious rights in French Canada,[12] are both official in French only, as was the text of the *Treaty of Paris* of

[10] A full history of official bilingualism in Canada is beyond the scope of this work. For a detailed discussion, including on the history of bilingualism in Acadia and in the West and Northwest, see Sheppard, *supra* note 5 at 1–92.

[11] After the Conquest. This is, of course, an arbitrary starting point, one which assumes the traditional rigid division of constitutional authority in Canada between the French and British regimes, and ignores the contributions of the former to our constitutional makeup, to say nothing of the constitutional law of aboriginal peoples. Such an extended discussion is simply beyond the scope of this work.

[12] In *Campbell v. Hall* (1774), 1 Cowp. 208, 98 E.R. 1045 (K.B.), a decision of the English Court of King's Bench, Lord Mansfield declared (at 1047 [E.R.]): "[T]he articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable ac-

1763, by which France formally ceded the colony to Great Britain.[13] But the fall of the last remnants of France's American empire marked the beginning of British imperial ascendancy and with it the rise to dominance of the English language. Over the next century, all important constitutional decisions for Canada would be made in Whitehall and Westminster, and thus invariably in English.

Nonetheless, the practical reality of having to govern the roughly 70,000 French-speaking *Canadiens* of the new British colony led to the early adoption of *de facto* bilingualism, or what has been called "*bilinguisme fonctionnel*".[14] The *Royal Proclamation* of 1763 seemed to envisage a radical anglicization of the colony,[15] but faced with the improbability of a quick assimilation of the French-speaking population, as well as the confusion and uncertainty occasioned by the uprooting of French law, and anxious to secure the good graces of its new colony in the face of growing discontent in its older ones, the British government reversed course.[16] The *Quebec Act, 1774*,[17] which has been somewhat hyperbolically called the "Magna Charta of French Canadians",[18] officially confirmed the application of the "Laws

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cording to their true intent and meaning." This principle (laid down in a case involving Grenada, a Caribbean colony ceded by France to Great Britain in the same *Treaty of Paris*) was later seized upon by French-Canadian nationalists who argued that the religious, cultural, and even linguistic rights of the French-Canadian nation had been thereby guaranteed at the Conquest; see e.g. Maréchal Nantel, "La langue française au Palais" (1945) 5 R. du B. 201 at 206–210.

[13] See Adam Shortt & Arthur G. Doughty, *Documents Relating to the Constitutional History of Canada, 1759–1791*, 2nd and rev. ed. (Ottawa: J. de L. Taché, 1918) vol. 1 at 5, n. 1, at 25, n. 1 and at 113, n. 1; see also Sheppard, *supra* note 5 at 93. (Note, however, with regard to the *Treaty of Paris*, art. 2 of the Separate Articles to the *Treaty*.) To my knowledge, there have been no calls to rectify this historical linguistic inequality.

[14] See Réjean M. Patry, *La législation linguistique fédérale* (Quebec: Conseil de la langue française du Québec, Service des communications, 1981) at 13–14.

[15] See the *Royal Proclamation, 1763* (U.K.), ¶ 8, reprinted in R.S.C. 1985, App. II, No. 1: "[A]ll Persons Inhabiting in or resorting to our Said Colonies may confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England ...".

[16] For a detailed discussion of this period, see Evelyn Kolish, *Nationalismes et conflits de droits: le débat du droit privé au Québec, 1760–1840* (Ville LaSalle, QC: Hurtubise HMH, 1994) at 29–61.

[17] *Quebec Act, 1774* (U.K.), 14 Geo. III, c. 83, reprinted in R.S.C. 1985, App. II, No. 2.

[18] See e.g. Lionel Groulx, *Histoire du Canada français depuis la découverte* (Montreal: L'Action Nationale, 1952) at 71; see also, along the same lines, Thomas Chapais, *Cours d'histoire du Canada*, t. 1 (1760–1791) (Quebec: J.-P. Garneau, 1919) at 168; and Rodolphe Lemieux, *Les origines du droit franco-canadien* (Montreal: C. Theoret, 1900) at 380.

and Customs of Canada"[19] (essentially the *Custom of Paris*, as augmented and amended by various royal and colonial edicts and ordinances) in the Province of Quebec, and with them, by implication, the language of that law. The period following the *Quebec Act* was characterized by the gradual acceptance of procedural bilingualism.[20] French and English coexisted—more or less peacefully, at times—in the courts, and after the passing of the *Constitutional Act, 1791*,[21] in the legislature.[22] While there was no legal recognition of French as an official language, judicial and legislative bilingualism had become the accepted norm.

This changed dramatically after the Rebellion of 1837–38. The continuing existence of the French fact in Canada was named as a direct threat to its welfare and peace, in Lord Durham's famous—or infamous—*Report*. His oft-quoted finding of "two nations warring in the bosom of a single state" and his railing against "the vain endeavour to preserve a French Canadian nationality in the midst of Anglo-American colonies and states" precipitated a change in official policy.[23] The *Union Act, 1840*, section 41, provided as follows:

> And be it enacted, That from and after the said Re-union of the said Two Provinces ... all Writs and public Instruments ... and all Journals, Entries and written or printed Proceedings, of what Nature soever, of the said Legislative Council and Legislative Assembly ... shall be in the English Language only: Provided always, that this Enactment shall not be construed to prevent translated Copies of any such Documents being made, but no such Copy shall be kept among the Records of the Legislative Council or Legislative Assembly, or be deemed in any case to have the Force of an original Record.[24]

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[19] *Quebec Act, 1774*, s. 8.
[20] See discussion in Patry, *supra* note 14 at 26.
[21] *Constitutional Act, 1791* (U.K.), 31 Geo. III, c. 31, reprinted in R.S.C. 1985, App. II, No. 3.
[22] See Patry, *supra* note 14 at 26–30; Kolish, *supra* note 16 at 63–89.
[23] Sir C.P. Lucas, ed., *Lord Durham's Report on the Affairs of British North America* (Oxford: Clarendon Press, 1912) vol. 2 at 16 and 70. While traditionally reviled in French Canada as the embodiment of English prejudice, Durham sought to portray himself as above the base struggle between the "unprogressive" French and the "arrogant" English. While brutal in his depiction of what he saw as the backwardness of French Canadians, he is equally harsh in his criticism of the British party: "It is not any where a virtue of the English race to look with complacency on any manners, customs or laws which appear strange to them; accustomed to form a high estimate of their own superiority, they take no pains to conceal from others their contempt and intolerance of their usages." *Ibid*. at 38.
[24] *Union Act, 1840* (U.K.), 3 & 4 Vict., c. 35, s. 41, reprinted in R.S.C. 1985, App. II, No. 4.

This was a clear repudiation of the practice of *de facto* bilingualism. It would prove to be short-lived. In 1845, a unanimous address of the Legislative Council and Assembly petitioned the Queen to repeal section 41 of the *Act*,[25] and in 1848 the section was finally repealed.[26] Once again, the policy of enforced unilingualism had failed. The political reality of the united Canadas had thwarted the somewhat naive Imperial plan.

It was a political reality plagued by religious, cultural, and linguistic antagonism. This situation only deteriorated in the years before Confederation. While there were remarkable examples of bilingual co-operation in this period—most notably the production in the two languages of the new *Civil Code of Lower Canada* in 1866[27]—the mutual distrust between the two linguistic groups had been reinforced, if anything, by the *Union Act*. The inescapable failure of the Union was apparent early on, and politicians on both sides of the linguistic divide sought a new constitutional order. The breakthrough would come only in the mid-1860s.

With the bitter taste of the *Union Act* still in their mouths, the French-Canadian representatives to the Confederation conferences insisted on a constitutional guarantee of their linguistic rights at the federal level, while the English-speaking minority of what was to be the new Province of Quebec sought to protect theirs. Already the resolutions of the Quebec Conference had provided for the equality of the French and English languages in the federal Parliament and courts, and in the courts and legislature of Lower Canada,[28] and this was reiterated in the resolutions of the London Conference.[29] This resulted in the landmark section 133 of the *British North America Act, 1867.* For the first time since the Conquest, bilin-

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[25] See discussion in Patry, *supra* note 14 at 30; Sheppard, *supra* note 5 at 58; Herbert Marx, "Language Rights in the Canadian Constitution" (1967) 2 R.J.T. 239 at 245–46.
[26] *Union Act Amendment Act, 1848* (U.K.), 11 & 12 Vict., c. 56.
[27] For a thorough discussion, see Brian Young, *The Politics of Codification: The Lower Canadian Civil Code of 1866* (Montreal & Kingston: McGill-Queen's University Press, 1994).
[28] See the *Quebec Resolutions* (October 1864), res. 46, in G. P. Browne, ed., *Documents on the Confederation of British North America* (Toronto: McClelland and Stewart, 1969) at 162 (Doc. no. 34).
[29] See the *London Resolutions* (December 1866), res. 45, *ibid*. at 225 (Doc. no 74).

gualism was expressly recognized, and constitutionally protected, albeit in a document that was itself official in English only.

Section 133 of the *British North America Act, 1867*[30] provided as follows:

> **133.** Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.
>
> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.[31]

It should be noted that the section provides only for the use of the two languages in the "records and journals" of the Houses of Parliament, and that Acts of Parliament "be printed and published" in both languages. The provision itself makes no reference to the authenticity, or legal validity, of either version. This would seem to be a significant flaw of section 133. As Justice Bastarache points out, "Many jurisdictions publish their statute books in more than one language without committing in any way to a view of the two versions as equally authentic or authoritative, so it is clear that s. 133 does not logically or automatically imply a commitment to any kind of rule of equal authenticity of the statutes."[32]

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[30] The change in the official short title of the *British North America Act, 1867*—unfortunate and unnecessary, in my view—creates problems of consistency and possible confusion in a historical context. I have adopted the rule of using the title *Constitution Act, 1867*, when referring to the current or post-1982 *Act*, and the title *British North America Act, 1867* when referring to the pre-1982 *Act*. This is in some cases a rather fine distinction, but one that I feel, in light of my argument in chapter 5, is important to maintain historical accuracy. I apologize in advance for any confusion this may cause the reader.

[31] *British North America Act, 1867*, s. 133; a similar provision was later enacted for Manitoba (see the *Manitoba Act, 1870/Loi de 1870 sur le Manitoba*, S.C. 1870, c. 3, s. 23, reprinted in R.S.C. 1985, App. II, no. 8). Failure to respect this provision was later found to have drastic consequences for the validity of Manitoba statutes, forcing the Supreme Court to craft an original remedy to preserve the rule of law: see *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

[32] Bastarache, *supra* note 1 at 17 [footnotes omitted].

Nevertheless, in the seminal case of *R. v. DuBois*, in 1935, the Supreme Court of Canada affirmed the equal authenticity of both language versions of the federal statutes. Duff C.J. based his recognition of equal authenticity on the fact that both versions were passed by Parliament at the same time:

> [T]he statutes of the Parliament of Canada in their French version pass through the two Houses of Parliament and receive the assent of His Majesty at the same time and according to the same procedure as those statutes in their English version. The enactment quoted [in French] is an enactment of the Parliament of Canada just as the enactments of the same section, expressed in English, are.[33]

As Justice Bastarache points out (and Beaupré before him), this "fact" of bilingual enactment was simply judicially noticed by Duff C.J., and no evidence has ever been presented to support it. The result was that "[t]he Equal Authenticity Rule as applied to federal statutes ... was based entirely on Duff C.J.'s own views about how Parliament goes about passing legislation".[34] Nevertheless, the Equal Authenticity Rule was born; it was reaffirmed on many occasions by the Supreme Court, and has never since been seriously questioned.[35] In any event, it is likely that Duff C.J. simply reaffirmed and stated authoritatively an already existing practice of treating the two versions as equally valid; a practice admittedly honoured more in the breach than in the observance.[36]

The age of official legislative bilingualism had been ushered in by section 133 and given formal sanction in *R. v. DuBois*. But equal authenticity did not mean linguistic equality in other respects, and French was still very much treated as the secondary language of the federation. The same Supreme Court that trumpeted the legislative equality of French and English did not see fit to publish its reports in both languages until 1970, being under no

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[33] *R. v. DuBois*, [1935] S.C.R. 378 at 401.
[34] Bastarache, *supra* note 1 at 20; see also Beaupré, *supra* note 6 at 5–9.
[35] See the discussion in Bastarache, *ibid*. at 19–20 and 23–32; and in Beaupré, *ibid*. at 5–11.
[36] In spite of the tremendous progress of legislative bilingualism, this appears to be true even today, as the case of *R. v. Mac*, 2002 SCC 24, [2002] 1 S.C.R. 856, makes painfully clear; see the discussion in Bastarache, *ibid*. at 9.

statutory obligation to do so.[37] Beginning in the 1960s, in the wake of the Quiet Revolution in Quebec, the federal government began making a greater effort to promote linguistic equality. The Trudeau government presented the pursuit of an active policy of official bilingualism as the necessary means to preserve the unity of the country. In 1969, it enacted the *Official Languages Act*.[38] Section 8(1) of that Act provided as follows:

8. (1) In construing an enactment, both its versions in the official languages are equally authentic.	***8.*** *(1) Dans l'interprétation d'un texte législatif, les versions des deux langues officielles font pareillement autorité.*

The remainder of the section attempted to provide an exhaustive guide to the resolution of conflicts between the two versions. It proved impracticable, and was eventually repealed.[39] The current statutory authority for the Equal Authenticity Rule may be found in the new *Official Languages Act*, section 13 of which states:[40]

13. Any journal, record, Act of Parliament, instrument, document, rule, order, regulation, treaty, convention, agreement, notice, advertisement or other matter referred to in this Part that is made, enacted, printed, published or tabled in both official languages shall be made, enacted, printed, published or tabled simultaneously in both languages, and both language versions are equally authoritative.	***13.*** *Tous les textes qui sont établis, imprimés, publiés ou déposés sous le régime de la présente partie dans les deux langues officielles le sont simultanément, les deux versions ayant également force de loi ou même valeur.*

This statutory confirmation of the Equal Authenticity Rule comes a little late in the day. The courts have confirmed that they would apply the principles of equal authenticity

[37] See Bastarache, *ibid*. at 103–04; Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen's Printer for Canada, 1969 [No. 1 of the *Documents of the Royal Commission on Bilingualism and Biculturalism*]) at 93, describes the situation in 1969: "[W]e do not hesitate to record here as one of the Supreme Court's most serious inadequacies from the point of view of bilingualism the absence of any sustained or balanced attempt to report the Court's decisions in Canada's two 'official' languages."

[38] *Official Languages Act/Loi sur les langues officielles*, R.S.C. 1970, c. O-2 (since replaced by the *Official Languages Act/Loi sur les langues officielles*, R.S.C. 1985 (4th Supp.), c. 31).

[39] Bastarache, *supra* note 1 at 21 and 39–42.

[40] *Official Languages Act*, R.S.C. 1985 (4th Supp.), c. 31, s. 13.

even in the absence of such a statutory injunction.[41] In any case, the slow but steady progress of legislative bilingualism was overtaken by the dramatic constitutional events of 1982. With the patriation of the Constitution came the entrenchment of official bilingualism in our fundamental law: we entered the age of constitutional bilingualism.

The *Constitution Act, 1982*, is itself a bilingual instrument, and both of its versions are equally authentic by virtue of section 57 of the *Act*:[42]

57. The English and French versions of this Act are equally authoritative.	***57.*** *Les versions française et anglaise de la présente loi ont également force de loi.*

This makes it the first fully bilingual independent constitutional document in the history of Canada, a landmark step in the achievement of linguistic equality between French and English. Moreover, section 18 of the *Act* provides constitutional protection for the Equal Authenticity Rule, federally and for the Province of New Brunswick:

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative. (2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.	***18.*** *(1) Les lois, les archives, les comptes rendus et les procès-verbaux du Parlement sont imprimés et publiés en français et en anglais, les deux versions des lois ayant également force de loi et celles des autres documents ayant même valeur.* *(2) Les lois, les archives, les comptes rendus et les procès-verbaux de la Législature du Nouveau-Brunswick sont imprimés et publiés en français et en anglais, les deux versions des lois ayant également force de loi et celles des autres documents ayant même valeur.*

In addition to these measures to constitutionally enshrine both existing and new applications of the Equal Authenticity Rule, the drafters of the *Constitution Act, 1982*, took bold new steps towards full constitutional bilingualism. Seeking to remedy the linguistic imbalance of the Constitution, they provided for the translation and official enactment of

[41] Bastarache, *supra* note 1 at 21; *Cardinal v. R.*, [1980] 1 F.C. 149 (F.C.T.D.).
[42] *Constitution Act, 1982*, s. 57.

those portions of the Constitution enacted in English only. After more than 200 years of constitutional unilingualism, the achievement of equal status for the French language as a legal and constitutional medium seemed at last within reach.

It is this project of constitutional translation that is the focus of this work, and I turn now to a more detailed consideration of section 55 of the *Constitution Act, 1982*.

B. The French Constitutional Drafting Committee and Its Mandate

The *Constitution Act, 1982* came into force on 17 April 1982. Section 55 of that Act reads as follows: [43]

55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.	***55.*** *Le ministre de la Justice du Canada est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe; toute partie suffisamment importante est, dès qu'elle est prête, déposée pour adoption par proclamation du gouverneur général sous le grand sceau du Canada, conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient.*

It should be noted that while the English version of section 55 simply states that the French version of the documents referred to in the schedule "shall be prepared", the French version of section 55 is unambiguous in its use of the term "*rédiger*", which implies the drafting of a new text. Moreover, the section refers to "[**a**] French version" in English, allowing for the existence of alternative versions, whereas the French text refers to "***la*** *version française"*, which suggests the absence of any such pre-existing versions. Thus, while it might be reasonable to interpret the English text of the provision as enabling the Minister of Justice to put forward for enactment existing French versions of the documents listed in the

[43] *Constitution Act, 1982*, s. 55.

schedule, the French text makes it clear that new versions must be produced. It was to assist in this constitutional mandate that the Minister of Justice formed the French Constitutional Drafting Committee (the "Committee").

The membership of the Committee was impressive; it included several high-profile lawyers and law professors, as well as a former justice of the Supreme Court.[44] It also included several lawyers of the Legislation Section of the Department of Justice and a jurilinguist. The Committee produced a *First Report*, which was tabled in the House of Commons on 17 December 1986, by the Hon. Ray Hnatyshyn, then the Minister of Justice.[45] This interim report was then reviewed by the jurilinguist and by Department of Justice officials, among others, and a final report prepared by the Committee.[46] The *Final Report* was tabled in the House of Commons by then–Minister of Justice Kim Campbell on 19 December 1990.[47]

The *Final Report* includes a short introduction and a list of current and former Committee members; it then gives the text of the thirty constitutional documents listed in the Schedule to the *Constitution Act, 1982*, together with some eight additional documents the Committee felt should be included in its mandate, and some related modifications to the *Canada Act 1982* (including the *Constitution Act, 1982*), the *Representation Act, 1985*, and the

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[44] See Department of Justice Canada, *Final Report of the French Constitutional Drafting Committee responsible for providing the Minister of Justice with a draft official French version of certain constitution enactments* (Ottawa: Department of Justice Canada, 1990), online: <http://www.justice.gc.ca/eng/pi/const/index.html> [*Final Report*], at 9.

[45] Department of Justice Canada, *First Report of the French Constitutional Drafting Committee responsible for providing the Minister of Justice with a draft official French version of certain constitutional Acts* (Ottawa: Department of Justice Canada, 1986) [*First Report*]; see House of Commons, *Journals*, 33rd Parliament, 2nd Session, No. 50 (17 December 1986) at 334. This first report was referred to the Standing Committee on Justice and Solicitor General: see *ibid*. at 337. During an appearance by the Minister of Justice before the Standing Committee, the Chair, Blaine A. Thacker, indicated that the Standing Committee had decided to await "the second volume" (presumably the remainder of the enactments included in the *Final Report*) before considering the proposed translations as a whole. See House of Commons, Standing Committee on Justice and Solicitor General, *Proceedings*, 33rd Parliament, 2nd Session, No. 10 (17 March 1987) at 9.

[46] See the introduction to the *Final Report*, *supra* note 44 at 11–12.

[47] House of Commons, *Journals*, 34th Parliament, 2nd Session, No. 269 (19 December 1990) at 2507. The *Final Report* does not seem to have ever been formally referred to the Standing Committee on Justice and Solicitor General. I have been unable to find any further mention of it.

Constitution Amendment Proclamation, 1987 (Newfoundland Act).[48] The texts are given in their original English-language version in the English text of the *Final Report*, and in the new French version in the French-language report.[49] This list immediately makes it clear that the Committee took a broad view of its mandate. It acknowledged this in its introduction to its *Final Report*:[50]

In the Committee's opinion, the French version of the Constitution of Canada should, to the greatest possible extent, reflect Canadian constitutional law at all stages of its development, from Confederation to the present. With this principle in mind, the Committee concluded that a restrictive interpretation of section 55 of the *Constitution Act, 1982* would be inappropriate, and it decided to draft a French version of all of the documents, both British and Canadian, contained in the schedule to the Act, whether or not they are still in force. The Committee also felt that it was within its mandate to redraft the French versions of the Canadian enactments contained in the schedule to that Act, despite the fact that these documents already have official French versions. The Committee could thus ensure that the language used in those versions would be consistent with the language it used in formulating the first draft official French version of the British enactments.	*Le comité a estimé que la version française de la Constitution du Canada devait autant que possible en donner une représentation complète, dans sa chronologie comme dans son état actuel.* *Appliquant ce principe à la lecture de l'article 55 de la Loi constitutionnelle de 1982, il a jugé qu'il ne fallait pas l'interpréter de façon restrictive et il a décidé d'établir une version française de tous les textes mentionnés à l'annexe de cette loi, qu'ils fussent abrogés ou non, et britanniques ou canadiens.* *Touchant les textes canadiens, donc déjà officiels en français, il a été d'avis, puisqu'ils figuraient sur la liste de l'annexe en question, qu'il était habilité à en refaire la version française, avec l'avantage complémentaire de pouvoir en harmoniser la forme avec celle des autres textes, les britanniques, dont il était le premier à établir une version française appelée à devenir officielle.*

I shall consider below the importance of the first paragraph of this excerpt. It is fair to say that the Committee read section 55 very broadly. While the section refers only to "the portions of the Constitution of Canada referred to in the schedule", the Committee's *Final Report* includes eight additional enactments, and even proposes modifications to the *Consti-*

[48] *Final Report*, *supra* note 44 at 6–7.
[49] The texts are printed in parallel columns in the print version of the *Final Report* (as in the *First Report*); the online version of the report contains separate links to the entire French and English versions of the enactments.
[50] *Final Report*, *supra* note 44 at 12.

tution Act, 1982 itself. Moreover, its re-translation of the Canadian enactments included in the Schedule, while literally in accordance with section 55, could be seen as contrary to the spirit of section 56 of the *Constitution Act, 1982*, which states the following:[51]

56. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.	***56.*** *Les versions française et anglaise des parties de la Constitution du Canada adoptées dans ces deux langues ont également force de loi. En outre, ont également force de loi, dès l'adoption, dans le cadre de l'article 55, d'une partie de la version française de la Constitution, cette partie et la version anglaise correspondante.*

It seems clear that section 56 was intended to enshrine constitutionally, in their existing form, those parts of the Constitution that had already been enacted in both French and English. As discussed above, this includes some sections of the *Constitution Act, 1867* as well as all of the enactments referred to in the Schedule to the *Constitution Act, 1982* that were enacted by the Parliament of Canada by authority of the *British North America Act, 1867*, and thus subject to section 133 of that Act. This part of the section is not directed at the *Constitution Act, 1982* itself, as section 57 provides for the equal authenticity of its French and English versions. The Committee's interpretation of section 55 seems to render the first part of section 56 superfluous; if the drafters of the *Constitution Act, 1982* intended a wholesale revision of the entire French version of the Constitution, including those parts that were already official, they need hardly have included the first part of section 56 in the *Act*. They simply had to provide that any texts adopted as proposed by the Minister of Justice under section 55 would be equally authoritative.

A comparison of the text of the *Constitution Act, 1982* with the Committee's interpretation of its mandate, as stated in the introduction to its *Final Report*, discloses what ap-

[51] *Constitution Act, 1982*, s. 56.

pears to be a significant divergence in their understanding of the nature of the project intended by section 55. While the drafters of the *Constitution Act, 1982* admittedly entitled the Schedule to the *Act* "Modernization of the Constitution", they nonetheless appear to have had a much more modest project in mind. Presumably motivated by a desire to enshrine fully the principle of equality between Canada's two official languages, and realizing that large portions of the "Constitution of Canada", as defined in the *Act*, did not have official French versions, they seem to have intended to remedy this situation by the simplest and quickest means available. Their goal appears to have been simply to "officialize", on an itemized basis, the French version of those parts of the Constitution that were as yet unofficial, a sort of constitutional housekeeping.

By contrast, the Committee's view of the project seems to have been one of wholesale modernization of the French version of the Constitution. It did not limit its purview to only those enactments lacking an official French version, but essentially included in its revision the French versions of all documents forming the Constitution of Canada, and some related enactments. It makes clear in the introduction to its *Final Report* that it was concerned with the consistency or *harmonisation* of constitutional language, and in the French text of the report, suggests it wishes to give a "complete picture" ("*représentation complète")* of the Constitution.[52] It clearly sought the opportunity, as far as was possible, to mould the constitutional text into a coherent whole. Its holistic approach differs markedly from the analytic, list-based approach hinted at in the *Constitution Act, 1982*. Its project truly was a "Modernization of the Constitution".

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[52] If taken at face value, this statement is unrealistic; one must distinguish between the "Constitution of Canada" as defined in s. 52(2) of the *Constitution Act, 1982*, which is a collection of thirty-one specific enactments together with any amendments to these, and the Canadian Constitution, which would presumably include the entire body of Canadian constitutional law (unwritten principles, conventions, and judicial interpretation, both British and Canadian) and would thus be practically impossible to translate (at any rate, even if such a comprehensive work could be achieved, it was not in the Committee's mandate). One must therefore take the Committee to mean that it wishes to give a complete and coherent picture of the constitutional *texts* within its purview.

The result of the Committee's work is in many ways impressive. It produced a new French version of some thirty-eight enactments, plus minor modifications to other existing acts. The versions it produced are all drafted in clear, modern French, natural and idiomatic; they are, in many cases, a significant improvement on pre-existing versions, which were sometimes rightly criticized for their literalness and slavish imitation of English forms and structures. In the next chapter, I will compare the new version of the *Constitution Act, 1867* with the pre-existing versions in greater detail, and show, in some cases, how the new version is an improvement on the old.[53] It becomes clear, upon first glancing at these different texts, that the Committee's new version marks a definite break with the pre-existing versions. The Committee deliberately sought to produce a text that would stand on its own, freed from the constraints of English phraseology, a text that would be, in its own words, "in accurate and true French" ("*en un français authentique*"). In the introduction to its more detailed *First Report*,[54] the Committee made clear that it sought to make its translation independent of the English text of the *Act*:[55]

The proposed texts are not a literal translation from the English. Indeed, the committee holds the view that, in a situation of official bilingualism, the drafting of legislation requires that the same concept be rendered in each of the two official languages in conformity with the spirit of each one and that each version must possess its own internal coherence, without the necessity of any correspondence in form or imitation, in one version, of the syntax or structure of the	*Les textes proposés ne sont pas une traduction littérale de l'anglais. Le comité est en effet d'avis qu'en situation de bilinguisme officiel, la rédaction des lois consiste à rendre, dans chacune des deux langues officielles, le même concept selon le génie propre de chacune de celles-ci et que chaque version doit posséder sa propre cohérence interne, indépendamment de toute correspondance formelle ou imitation dans une version de la syntaxe ou de la structure de phrase de l'autre*

[53] I note here that this work is primarily concerned with the translation of the *Constitution Act, 1867*. While I make occasional reference to the other enactments included in the Schedule to the *Constitution Act, 1982*, I have not reviewed the translations of these texts in any detail. It follows that a general reference to the Committee's translation should be understood as limited to its translation of the *Constitution Act, 1867*.

[54] I fail to understand why the annotations accompanying the new texts in the *First Report* were not carried through to the *Final Report*, especially since the latter is much more easily accessible, notably online. The annotations are of crucial importance in understanding the reasoning of the Committee in making its translation choices.

[55] *First Report*, *supra* note 45 at 6a ¶6.

other.	*version.*

I shall return in chapter 5 to the normative assumptions that underlie the Committee's philosophy of translation. I note for now that this passage makes clear that the Committee would allow no previous version—and *a fortiori*, no version embodying a more literal translation from the English—to stand in the way of its new version in "true and accurate French". In that sense, its translation was to be fully independent not only of the forms and structure of the English text, but of any pre-existing French version of that text. Indeed, it suggested as much in its *First Report*:[56]

While the committee did not as a matter of course reject the unofficial French version of the Acts of the Parliament of the United Kingdom that are found in the Appendices of the Revised Statutes of Canada, 1970, some of which, as in the case of the *British North America Act, 1867*, were prepared as early as 1867, neither did the committee use it as a starting point because it is a literal translation from the English and therefore contains anglicisms and faulty syntactical constructions and usages. The committee is of the opinion that long usage of such incorrect words or turns of phrase should not, for that reason alone, justify their retention in the official French version of a constitutional Act. However, a few terms that are literal translations from the English version have been retained for historical reasons.	*Bien que le comité n'ait pas systématiquement écarté la version française non officielle des lois constitutionnelles du Parlement du Royaume-Uni qui figure dans le volume des appendices des Statuts révisés du Canada de 1970 et dont la rédaction, dans le cas du texte dit « Acte de l'Amérique du Nord britannique, 1867 », remonte à 1867, il n'a pas non plus adopté cette version comme texte de départ parce qu'elle est une traduction littérale de l'anglais et qu'on y trouve des anglicismes ou des constructions contraires à la syntaxe ou à l'usage. Le comité est d'avis qu'un long usage de termes ou tournures incorrects ne saurait à lui seul justifier leur maintien dans le texte français officiel d'une loi constitutionnelle. Toutefois quelques termes qui sont des calques contre-indiqués de l'anglais ont été maintenus pour des raisons d'ordre historique.*

Here the Committee shows plainly its ambivalent feeling towards the pre-existing text. On the one hand, it suggests that it has deliberately retained some "literal translations from the English" (the French version has a much more normative tone, referring to

[56] *Ibid*. at 5a–6a ¶4.

"*calques contre-indiqués de l'anglais*"[57]) and has done so "for historical reasons" ("*pour des raisons d'ordre historique*"). On the other hand, the Committee is equally clear that "long usage of such incorrect words or turns of phrase should not, for that reason alone, justify their retention in the official French version of a constitutional Act" ("*un long usage de termes ou tournures incorrects ne saurait à lui seul justifier leur maintien dans le texte français officiel d'une loi constitutionnelle*").

I suggest that this ambivalence of the Committee results from the dual nature of its work. For the enactments that the Committee was charged with translating are not only *legal instruments*, they are also *historical documents*. And one does not necessarily translate a (contemporary) legal instrument in the same way as a historical document. Of the two facets of these enactments, the Committee is clear which one it intended to favour: historical language has no privileged claim to inclusion in "the official French version of a constitutional Act" ("*dans le texte français officiel d'une loi constitutionnelle*"). Such a position, however, necessarily conflicts with the historical aspect of the Committee's mandate. As noted above, the Committee was not mandated to produce an official French version of the Canadian Constitution in its current state, and such a mandate would at any rate be practically impossible to carry out.[58] Rather, it was charged with the translation of a long list of instruments, several of which have been repealed outright, while large portions of others are either spent or have also been repealed, and the Committee itself added eight further historical enactments to that list. In other words, the Committee was charged with translating historical constitutional texts. Its project was largely one of historical translation.

Thus it might be reasonably argued that the primary concern of the Committee should have been to produce translations that were not only historically accurate, but properly "contextualized", that is, capable of being read in their proper historical context. This

[57] Lit. "inadvisable calques from the English" [translated by author].
[58] See *supra* note 52.

historically sensitive approach, moreover, would not have been at odds with its mandate of *legal* translation. For as the Committee itself recognized, the deep interpenetration of these historical texts, and their complex relationship to more recent constitutional documents, makes it all the more necessary to see these texts, and their interrelationships, in their proper historical context:[59]

The Committee's task of preparing, in accurate and true French, a draft official French version of the various constitutional enactments has been a complex one, largely because of the nature, number and, in some cases, the length of the documents involved. There have been a great many constitutional enactments in the years since Confederation, and most of these are closely interrelated. The Committee has endeavoured to ensure the greatest possible consistency in the documents without changing the substance of the laws contained in them. Each word or expression had to be considered not only in its immediate context but also with respect to constitutional law in its entirety.	*Si l'on considère le caractère fondamental des textes visés, leur nombre et l'ampleur de certains d'entre eux, si l'on songe à l'imbrication de multiples passages qui se font écho sur plus d'un siècle, de 1867 à nos jours, si l'on pense à la nécessité d'assurer, sans dévier du fond du droit, le maximum de cohérence terminologique et stylistique dans la reconstruction en un français authentique d'un pareil ensemble, on comprendra que le comité ait voulu peser chaque mot et juger de la pertinence de ses choix de formulation à la fois par rapport au contexte local et en liaison avec le tout.*

The texts are not entirely equivalent, but in both, it is clear that the Committee recognizes the monumental character of its work, given the "nature" and "number" of the documents, and the fact that they are "closely interrelated". The French version expresses the idea of interrelation in a more evocative manner, referring to "*l'imbrication de multiples passages qui se font écho sur plus d'un siècle*".[60] The Committee appears to appreciate fully the difficulty of the task of ensuring that "each word ... be considered not only in its immediate context but also with respect to constitutional law in its entirety" ("*peser chaque mot … à la fois par rapport au contexte local et en liaison avec le tout*"). It suggests later in this introduction that its goal was to produce a version that would "to the greatest possible extent,

[59] *Final Report*, *supra* note 44 at 11.
[60] "The interweaving (lit. imbrication) of multiple passages that echo each other over more than a century" [translated by author].

reflect Canadian constitutional law at all stages of its development" ("*autant que possible en donner une représentation complète, dans sa chronologie comme dans son état actuel*").[61]

This complex task, if it could be achieved at all, could only be achieved with a full understanding of the legal-historical nature of the Committee's project. Indeed, I would argue that the best *legal* translation of the constitutional texts in question is one which accords with their historical context; in other words, one that is also the best *historical* translation.[62] The Committee appeared to recognize this principle, at least in some instances, and noted its importance in the excerpt quoted above. Yet despite assurances to the contrary, I do not believe that the Committee took full account of the historical element in its translations. It did not fully recognize the importance of the historical character of the texts it was to translate, or the significance of viewing those documents or their original translations in their proper historical context. Instead, the Committee chose to privilege a translation in "true and accurate French" that bears little resemblance to the pre-existing versions, and indeed manifests a clear desire to distance itself from them.

By radically breaking with the textual tradition represented by the pre-existing French versions of the *British North America Act, 1867*, the Committee chose the path of uniformity and modernity; but it did so at the cost of historical sensitivity, and in some cases, accuracy.[63] The Committee's failure to understand the importance of historical perspective in addressing its mandate of translation has profound consequences for the reception of its new version. In favouring its modernist approach, it set itself up to encounter two significant objections to its work, objections which I believe could have been mitigated, if not en-

[61] See *Final Report*, *supra* note 44 at 12; see also discussion *supra* note 52.
[62] The term might be somewhat ambiguous, but I understand it simply as one in which the translated text takes full account of the historical context in which the original was drafted. I am well aware that such an approach raises its own theoretical and hermeneutical problems, but I lack the space to address these in this work.
[63] I discuss this point in detail in chapter 5.

tirely eliminated, by greater consideration of, and reliance on, the pre-existing French texts of the *British North America Act, 1867*.[64]

The first objection comes from the realm of constitutional theory. I call it the problem of historical legitimacy. In short, this problem results from the application of the Equal Authenticity Rule constitutionally imposed by section 56 of the *Constitution Act, 1982* to the translations produced by the Committee under section 55, once adopted through the appropriate amending formula. The Equal Authenticity Rule would make the French version of the *Constitution Act, 1867* produced by the Committee the legal equivalent of the English text. Both would have equal force of law, and no one version could be preferred to the other. While this is perfectly normal and understandable—but is it commonly understood?—in the context of legislative or even constitutional texts adopted *at the same time, by the same body*, it is a highly questionable position to adopt with regard to the contemporary translation of a 142-year-old text. The question here is one of historical legitimacy, rather than pure legality. For, while both would have equal legal validity, having been adopted by the appropriate legal means, only one of those versions would be the one agreed to by Macdonald, Cartier, Langevin, Galt, Tupper, Tilley, and the rest. Yet, were divergences between the two versions to come into play—and they almost certainly would—our courts would have no choice but to give equal weight to both versions, according to the rules of bilingual interpretation, as both versions would have equal force of law.[65] This creates serious problems of political legitimacy, which would not be remedied by the democratic legitimacy conferred by the unanimous adoption of the new texts by Parliament and the legislatures, since

[64] I note in passing that the Committee, in the introduction to its *First Report*, seems to suggest that it considered only those prior versions of the enactments included in Appendix II to the *Revised Statutes*. In the case of the *British North America Act, 1867*, this has significant implications, since there were a variety of translations, in whole or in part, of the *Act* extant at the time of Confederation, many of which differ considerably from the version included in the *Revised Statutes*. This is why I refer to the pre-existing *versions* of the *Act*. In chapter 3, I will examine these different versions and suggest ways in which they could have usefully informed the Committee's work.

[65] Although, as I argue in chapter 4, it is questionable whether the courts themselves would follow the Equal Authenticity Rule in these circumstances, in spite of a constitutional requirement to do so.

the fundamental nature of the change effected by this adoption would be widely misunderstood.

Of course, this is an objection to the project envisaged by section 55 of the *Constitution Act, 1982* itself; that is, it is an objection to the purpose of the Committee's work as a whole, rather than to its product. In that sense, it was not in the Committee's mandate to address it directly. But surely the legitimacy of the texts it produced must have been of great concern to the Committee. In the fourth chapter of this work, I will address this problem of historical legitimacy, and show how I believe that while the Committee could not eliminate this problem, it could have mitigated it by having recourse to alternative sources of legitimacy, and in particular, to the existing French versions of the *British North America Act, 1867*.

The second objection is more properly an objection of the legal historian. I have already indicated above that in my view the Committee failed to take full account of legal history in its work. This makes its translation problematic. It is subject to what I call the problem of historical accuracy. The Committee asserted in the introduction to its *Final Report* that it was aware of the historical nature of its work, and in certain places in its translation does seem to have attempted to take legal history into account. Yet the translation of the *Constitution Act, 1867* that it produced is one that is, in many cases, historically "decontextualized"; it is a text that, while purporting to be the equivalent of a historical text, lacks a proper relation to its historical intertextual environment. In other words, it does not "fit in" to its proper historical place: it is anachronistic. There are three variants of this problem that I discern in the Committee's text, which I have labelled, for lack of better terms, *conceptual anachronism*, *terminological anachronism*, and *lexical anachronism*. I shall discuss these each in turn in chapter 5, and provide examples of each. Again, I believe this problem could

have been greatly mitigated, if not completely eliminated, by a greater consideration of the prior French versions of the *British North America Act, 1867*.

I propose, then, that part of the solution to both of these problems would have been a greater reliance on the anterior French versions of the *British North America Act, 1867*.[66] But what were these pre-existing French versions? What is their origin, and what was the context of their elaboration? What was their subsequent history? How did they differ from each other, and what were the similarities between them? In chapter 3, I turn to a discussion of these prior texts. I shall first look at the political, cultural, and linguistic context in which these translations were elaborated, and discuss the absence of an official French version of the *British North America Act, 1867*. I shall then turn to a comparison of these various texts, including the standard unofficial text included in the *Revised Statutes*. I hope to show both the ways in which the Committee's translation improves on some aspects of these texts, but also indicate some of the advantages of the older versions. Finally, before turning to a discussion, in chapters 4 and 5, of the two problems outlined above, I will discuss some of the structural issues raised by the new translation.

[66] See comment, *supra* note 64.

Chapter 3: The French Versions of the *British North America Act, 1867*[67]

I. Context

In the middle of the nineteenth century, French Canada was an anomalous survival lost in the immensity of an English-speaking continent. Lord Durham spoke of the "vain endeavour to preserve a French Canadian nationality in the midst of Anglo-American colonies and states";[68] and being an Englishman, he was vilified for it. Tocqueville, who predicted equally grimly that "*[à] une époque que nous pouvons dire prochaine… les Anglo-Américains couvriront seuls tout l'immense espace compris entre les glaces polaires et les tropiques …*",[69] had the advantage of being a Frenchman: he was either forgiven or ignored. Yet Tocqueville was unequivocal about the reasons for this unavoidable fate: "*On ne peut se dissimuler que la race anglaise n'ait acquis une immense prépondérance sur toutes les autres races européennes du nouveau monde. Elle leur est très supérieure en civilisation, en industrie et en puissance.*"[70]

The beginning of the Victorian age, and the prodigious rise of American capitalism, seemed to announce the age of Anglo-Saxon dominance, and with it, the dominance of the English language. To be sure, English was not then the reigning global language that it is now; but—especially in North America—it progressed in step with the capitalists and entrepreneurs who carried it. It was the language of progress and of the future.

In those circumstances, the stubborn resistance of a handful of French Canadians surrounded and invaded by this English flood might have seemed downright pitiful:

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[67] On my use of the titles *Constitution Act, 1867* and *British North America Act, 1867*, see chapter 2, note 30.

[68] Sir C.P. Lucas, ed., *Lord Durham's Report on the Affairs of British North America* (Oxford: Clarendon Press, 1912) vol. 2 at 70.

[69] Alexis de Tocqueville, *De la démocratie en Amérique*, t. I, part II, c. 10 [(Paris: Gallimard (Folio), 1961) at 595] ("At a period which may be said to be near ... the Anglo-Americans will alone cover the immense space contained between the Polar regions and the Tropics ..." [*Democracy in America*, trans. by Henry Reeve (New York: Shocken Books, 1961) vol. 1 at 519–20]).

[70] *Ibid*. [at 593] ("It cannot be denied that the British race has acquired an amazing preponderance over all the other European races in the New World; and that it is very superior to them in civilization, in industry, and in power." [*Ibid.* at 518]).

> *Les quatre cent mille Français du bas Canada forment aujourd'hui comme les débris d'un peuple ancien perdu au milieu des flots d'une nation nouvelle. Autour d'eux la population étrangère grandit sans cesse; elle s'étend de tous côtés; elle pénètre jusque dans les rangs des anciens maîtres du sol, domine dans leurs villes et dénature leur langue*.[71]

To nineteenth-century outsiders, the French presence in North America appeared doomed. Yet these observers underestimated the power of tradition, and the tenacity of the *Canadiens* in clinging to their religion, their language, and their laws. The Rebellion of 1837–38 brought ethnic tensions to a head. It may have assured outsiders of the need to assimilate the French Canadians; but in Lower Canada, it laid the groundwork for a new spirit of co-operation. Among a new generation of educated Canadians, the benefits of bilingual cohabitation were beginning to be felt.[72] And especially in the legal community, this was a period of openness which generally favoured the knowledge and appreciation of other languages.

We know that across North America, this was a period of great interest in Continental Civil law systems, and hence in the languages that embodied them.[73] Translation was a necessary skill in the imparting of legal knowledge. In Lower Canada in particular, the worlds of legal education and legal practice were not only bijural, but bilingual—even multilingual—as evidenced by Maximilien Bibaud's unorthodox law school,[74] and the bustling

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[71] *Ibid*. [at 592] ("The 400,000 French inhabitants of Lower Canada constitute, at the present time, the remnant of an old nation lost in the midst of a new people. A foreign population is increasing around them unceasingly and on all sides, which already penetrates amongst the ancient masters of the country, predominates in their cities, and corrupts their language." [*Ibid*. at 516–17]).

[72] See the discussion in Brian Young, *The Politics of Codification: The Lower Canadian Civil Code of 1866* (Montreal & Kingston: McGill-Queen's University Press, 1994) at 11–12, 43–54, 60–98.

[73] See e.g. for the United States, M.H. Hoeflich, "Translation & the Reception of Foreign Law in the Antebellum United States" (2002) 50 Am. J. Comp. L. 753; for Upper Canada, G. Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 Law & History Rev. 319; and for Lower Canada, Eric H. Reiter, "Imported Books, Imported Ideas: Reading European Jurisprudence in Mid-Nineteenth-Century Quebec" (2004) 22 Law & History Rev. 445.

[74] See e.g. Léon Lortie, "The Early Teaching of Law in French Canada" (1976) 2 Dal. L. J. 521; David Howes, "The Origin and Demise of Legal Education in Quebec (or Hercules Bound)" (1989) 38 U.N.B.L.J. 127.

law practice of Attorney General George-Étienne Cartier.[75] This spirit of bilingual co-operation was consecrated in the bilingual drafting of the *Civil Code of Lower Canada*.[76] And, as discussed in chapter 2, *de facto* bilingualism continued to be the norm in the Province of Canada, in spite of official efforts to impose unilingualism.

Given this spirit of bilingual co-operation—or at the very least, tolerance—one might well wonder why, when drafting the document which would come to embody the pact designed to solve the problem of Anglo-French ethnic tensions in Canada, the issue of an official French version did not come into play.[77] It does not appear to have been seriously raised, at least at an official level.[78] I would suggest that two factors might explain this deficiency: the French-Canadian Fathers' ambiguity in regard to the political identity and position of the French-Canadian people; and perhaps most importantly, the feeling that there were bigger battles to be fought in the defence of French-Canadian identity.

Before turning to an examination of these factors, however, I wish to address a preliminary point of procedural interest. An obvious reason that could be given to explain the absence of an official French version of the *British North America Act, 1867* is the fact that it was a British statute, passed by the Imperial Parliament. Was this a fundamental impediment to the adoption of an official French version?

A. "*La Reyne le veult*" (?)

On 6 March 1867, *Le Canadien* reprinted the translation of the *British North America Bill* published in *La Minerve* on 2 March, and noted rather bitterly: "*Nous n'avons pas de copie officielle, en français, de notre constitution. Les six cent mille Canadiens-Français doivent*

[75] See Young, *supra* note 72 at 60–65.
[76] *Ibid*. at 14–15 and 104.
[77] One answer, of course, would be to deny that the *British North America Act, 1867* ever embodied such a pact: see e.g. Donald Creighton, "The Myth of Biculturalism" in *Towards the Discovery of Canada: Selected Essays by Donald Creighton* (Toronto: Macmillan, 1977) at 256.
[78] But see the comment in *Le Canadien*, discussed below.

commencer à s'accoutumer d'avance à l'oubli".[79] To this, *La Minerve* exasperatedly responded: "*[D]epuis quand les débats ont[-ils] lieu en français dans les Chambres anglaises, et à quel titre ... pourrait[-on] exiger une version française du bill de confédération[?]*"[80] The editor of *La Minerve* thought the answer to this question was obvious. The usual practice, after all, was for Imperial statutes to be translated into French, unofficially, after their arrival in Canada. Most French Canadians accepted this as a necessary incident of inclusion in the British Empire.

Yet a century later, when the last Imperial statute was enacted for Canada, an easy solution was found to this problem. Section 3 of the *Canada Act 1982* reads as follows:[81]

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.	***3.*** *La partie de la version française de la présente loi qui figure à l'annexe A a force de loi au Canada au même titre que la version anglaise correspondante.*

This was an ingenious solution, in that it meant that although the *Act* was still passed exclusively in English by the Parliament of the United Kingdom, it was specifically made equally authoritative in both languages *in Canada*. Why was this method not used in 1867? The easy answer may be that it was simply not thought of. But it would not have been impossible, or even completely unprecedented.

There is historical irony in this problem, in that it was only in the reign of Henry VII (1485–1509) that statutes were uniformly printed in English.[82] Before that time, they were invariably published in either Latin or French. And indeed, the *British North America Act,*

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[79] *Le Canadien* (6 March 1867) at 2 ("We do not have an official copy, in French, of our constitution. The six hundred thousand French Canadians must start getting used early to being forgotten" [translated by author]).
[80] *La Minerve* (9 March 1867) at 2 ("Since when do debates take place in French in the British Houses [of Parliament], and by what right could we demand a French version of the Confederation Bill?" [translated by author]).
[81] *Canada Act 1982* (U.K.), 1982, c. 11, s. 3 [English], Schedule A, s. 3 [French].
[82] See the discussion in *Statutes of the Realm*, vol. 1, introduction, c. 4; there does not appear to have been any requirement to do so until the statute of 22 November 1650 (*Acts and Ordinances of the Interregnum*, vol. 2 at 455).

1867, itself would have been given royal assent with the customary Law-French phrase "*la Reyne le veult*". Moreover, the greater prestige of the French language in the nineteenth century made it likely that more members of both Houses of the British Parliament had a good knowledge of French in 1867 than in 1982.

But leaving aside these general facts, there is a specific example that shows that such a course of action would not have been unthinkable. In 1771, an Order in Council of George III promulgated a code of laws for the Channel Island of Jersey.[83] What is interesting is that this code, which came into effect three years before the *Quebec Act, 1774*, was entirely in French.[84] Admittedly, the Order in Council simply ratified laws which had been made, and debated, in the States of Jersey. But the Order itself was in English, and it is unclear whether a translation of the Code was ever presented for the Privy Council's approval. This procedure was not an anomaly; it continued well into the twentieth century.[85] Indeed, just one week before the granting of royal assent to the *British North America Act, 1867*, the States of Jersey passed a law in French, which was then ratified by an Order in Council of the Queen.[86]

In spite of the differences in procedure, this shows at the very least that the British government was not averse to ratifying laws drafted in French for a territory with its own internal administration. It seems, then, that this principle would have applied *a fortiori* to a

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[83] For a discussion, see René Lemasurier, *Le droit de l'Île de Jersey* (Paris: A. Pedone, 1956) at 205–20; the Channel Islands do not form part of the United Kingdom, but are Crown dependencies. The English monarch rules the islands in his or her capacity as Duke of Normandy, represented by a lieutenant governor. Laws made by the assembly, the States of Jersey (*États de Jersey*) are ratified by Order in Council.

[84] See *Code of 1771* (Jersey Order in Council 1/1771), online: <http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%5chtm%5cLawFiles%5c1770-1849%2fJersey_Order_in_Council_01-1771.htm>.

[85] Laws in Jersey are still drafted in French in some cases, or were as recently as 2007: see *Loi (2007) (Amendement No. 4) sur les teneures en fidéicommis et l'incorporation d'associations*, online: <http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%5chtm%5cLawFiles%5c2007%2fL-30-2007.htm>.

[86] See *Loi (1867) sur la cour pour le recouvrement de menues dettes* (Jersey Law 2/1867), online: <http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%5chtm%5cLawFiles%5c1850-1899%2fJersey_Law_02-1867.htm>.

piece of legislation that would have a fully authentic equivalent in English, which could be reviewed and debated by the Houses of Parliament. The relative obscurity of the Channel Islands no doubt explains why this example was not seized upon by French Canadians at the time.[87] But it shows that the peremptory answer given by *La Minerve* is not a full explanation. It is really unknown what the British government's attitude would have been to the simultaneous adoption of both texts for Canada. One can imagine that it might have seen this as a small price to pay to be rid of the troubles of the colony. But the question must remain moot, since it was never asked. I turn now to consider two possible reasons why.

B. "French-Speaking Englishmen"

We have already seen that outside observers predicted a quick and inglorious end to the French presence in North America. The French Canadians themselves may have refused this verdict; but the Rebellion made clear that the political future of French Canada lay either in greater integration into the British Empire, or annexation to the United States. *Bleus* and *Rouges* picked sides accordingly. Those who worked at the making of the new federation believed that the future of French Canadians was linked to their political status as British subjects.

The French Canadian representatives at the London Conference, George-Étienne Cartier and Hector-Louis Langevin, were men who were passionate about their *cultural* identity as French Canadians; yet they were often accused, even by contemporaries, of betraying that identity, because they also chose to embrace, however awkwardly, their *political* identity as British subjects. This somewhat schizophrenic existence was a source of much ambivalence towards their coexisting "Frenchness" and "Britishness". The same Cartier who wrote the famous *O Canada, mon pays, mes amours!* once remarked to the Queen

[87] Although it was used later to defend French-language rights in Manitoba: see Faucher de Saint-Maurice, *Les états de Jersey et la langue française: exemple offert au Manitoba et au Nord-Ouest* (Montreal: E. Sénécal, 1893).

that an inhabitant of Lower Canada was an Englishman who spoke French.[88] The same Langevin who upon leaving England wrote, rather starstruck, "*j'ai embrassé la main de la Reine hier …*"[89] and with patriotic fervour sent a telegram to his brother stating "Confederation proclaimed to begin on first (1st) July—God Save the Queen"[90] later, upon being passed over for a distinction,[91] wrote the following bitter words to that same brother:

> *La seule chose qui m'est refusée par l'Angleterre, c'est un titre de C.B. La raison toute simple c'est que je suis un Canadien-Français. On n'aime pas à encourager cette race-là, surtout ceux qui ne sont pas trop pliants et qui ne se laissent pas prendre par de belles promesses et ne veulent pas consentir à vendre leur pays.*[92]

Indeed, a passage from another one of Langevin's letters illustrates rather beautifully this ambivalent attitude:

> *[À] ce propos, en arrivant à Marseille, et montrant mon passeport, j'eus à répondre au Commissaire de Police, qui me dit : « Mais Monsieur est Français! » Et il me fallut répondre en toute vérité : « Non, je suis Anglais. » Peu de choses m'ont autant coûté que cela dans la vie, non pas que j'eusse objection à être anglais, mais quand on est Français d'origine, de nom, de langue, &c. on n'aime pas à être Anglais pour tout cela.*[93]

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[88] See Prof. Jean-Charles Bonenfant's short biography in the *Dictionary of Canadian Biography* [*D.C.B.*], vol. X at 145.

[89] Letter from H.-L. Langevin to J. Langevin, 8 March 1867, in Quebec, Bibliothèque et Archives nationales du Québec, Fonds Hector Langevin (Collection Chapais), P134, box no. 2 (1960-01-123/2) ("I kissed the Queen's hand yesterday ..." [translated by author]).

[90] Telegram from H.-L. Langevin to J. Langevin (Bishop of Rimouski), 24 May 1867, in archives, *ibid.*, box no. 4 (1960-01-123/4); I am referring to the tone of the telegram—the fact that the telegram was in English is not so significant, as it seems French speakers at the time routinely sent telegrams in English to one another. Presumably the telegraphists' French-language skills could not be trusted.

[91] For a discussion of the controversy surrounding the dispensation of honours by the Crown in the aftermath of Confederation, see Andrée Désilets, *Hector-Louis Langevin: un père de la Confédération canadienne* (Quebec: Presses de l'Université Laval, 1969) at 179–80; John Boyd, *Sir George-Etienne Cartier, Bart.: His Life and Times*, reprint (first published 1914) (Freeport, NY: Books for Libraries Press, 1971) at 283–87.

[92] Letter from H.-L Langevin to J. Langevin, 3 July 1867, in archives, *supra* note 85, box. no. 4 (1960-01-123/4) ("The only thing that I am denied by Britain is a title of C.B. [Companion of the Order of the Bath]. The very simple reason is that I am a French Canadian. One does not like to encourage that race, especially those who are not too pliable and are not taken in by nice promises and will not consent to sell their country" [translated by author]).

[93] Letter from H.-L. Langevin to J. Langevin, 16 January 1867, *ibid*., box no. 4 (1960-01-123/4) ("In that regard, upon arriving in Marseilles, and showing my passport, I had to answer to the Commissioner of Police, who said: "But you are French, sir!" And I had to answer truthfully: "No, I am British."

The French-Canadian Fathers of Confederation accepted, however grudgingly, their political status as British subjects, and in that sense were of one mind with their English-speaking colleagues. They agreed that Canada's continued growth, its future as a country, was intimately linked to its being part of the British Empire. And whatever claims they might make for the French language in Lower Canada, or even in the new federation as a whole, they also understood that speaking the language of the British Empire was a political necessity. The *British North America Act, 1867*, at least in its final form, was agreed upon by a handful of delegates—of which only two were French Canadians—in a meeting room of the Westminster Palace Hotel in London. The discussion there was in English; the sparse notes made by Langevin to his copy of the *Bill* were mostly in English.[94] So it surely seemed a matter of course that the *Act* should be adopted in English only by the Imperial Parliament. The *Act* itself included constitutional protection for the use of the French language in the form of section 133. As Langevin wrote to his brother Edmond: "*Je suis convaincu que notre position comme peuple parlant la langue française est assurée autant qu'on peut assurer les choses humaines*."[95] No doubt the Fathers felt this was all that was necessary—perhaps even all that was appropriate—for the preservation of a linguistic anomaly in a country that was, and hoped long to be, a proud member of what was then unquestionably the most powerful entity in the world—the British Empire.

I have found few things as hard in my life, not that I object to being British, but when one is French in origin, in name, in language, etc., one does not like to be British for all that" [translated by author]).

[94] See the copy included in archives, *ibid*., box no. 43 (1960-01-123/43).

[95] Letter from H.-L. Langevin to E. Langevin, 27 December 1866, *ibid*., box no. 2 (1960-01-123/2) ("I am convinced that our position as a people speaking the French language is assured as much as human matters can be assured" [translated by author]).

C. "*Notre Religion, notre Langue, nos Institutions*"[96]—In That Order

But beyond this element of political identity, there is an element of cultural identity that may also explain the lack of attention given to the language of the *Act*. Modern French Canadians define themselves primarily in terms of language: the French language is the primary source of our identity. Our forefathers, on the other hand, saw themselves first and foremost as Roman Catholics.[97] The French-language newspapers of the time devoted as much space to the Roman Question[98] as to the issue of Confederation. The issue of religious identity was foremost in the minds of the French-Canadian Fathers of Confederation, and defined what would be the two great battlefields in the elaboration of the *British North America Act, 1867* in the eyes of French Canadians: education and divorce.

Educational rights for the Protestant minority in Canada East and the Catholic minority in Canada West had long been a simmering issue, one in which Langevin had been personally involved.[99] The future section 93 was by far the most contested part of the *British North America Act, 1867* in the French-language papers, and both Cartier and Langevin would later be accused by ultramontanes of having sacrificed the religious rights of the Catholic minority in the Maritimes. But there is no doubt that this complex issue occupied the time and efforts of the French-Canadian Fathers, and Langevin especially, during the

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[96] From the pastoral letter (*mandement*) of Mgr. Jean Langevin, Bishop of Rimouski (and brother of Hector-Louis) in *Le Courrier du Canada* (26 June 1867) at 2: "*... tout ce qui nous est cher comme nation, notre Religion, notre Langue, nos Institutions"* ("... all that is dear to us as a nation, our Religion, our Language, our Institutions" [translated by author]); compare this to *Le Canadien*'s motto, "Nos institutions, notre langue et nos lois".

[97] This is not to suggest that there were no ethnic tensions between the French- and English-speaking (mostly Irish) Catholic communities (and especially between the Catholic minorities in Canada West and the Maritimes and the Catholic majority in Canada East), but merely that religious identity was equally, if not more, important to nineteenth-century Canadians than ethnic identity.

[98] Throughout the 1860s, all that stood between Pope Pius IX's precarious control of Rome and an invasion by the army of the unified Italy of Victor-Emmanuel II was the waning power of French Emperor Napoleon III. The status of Rome as the seat of the Papacy was naturally of great concern to Catholics everywhere, and especially in clerical French Canada. For a discussion of the period, see Lynn M. Case, *Franco-Italian Relations, 1860–1865: The Roman Question and the Convention of September* (Philadelphia: University of Pennsylvania Press, 1932).

[99] For a discussion of Langevin's role in presenting a failed education bill in 1866, see Désilets, *supra* note 91 at 153–56.

drafting of the *Bill*,[100] and that the delicate balance required in managing the interests of Catholics both inside and outside the future Province of Quebec took its toll on Langevin. As he wrote to his brother Edmond:[101] "*C'est l'avenir de la nation qui est en jeu. Je le sens si bien que quelquefois j'ai la frayeur de la responsabilité qui pèse sur mes épaules.*"[102]

In addition, the question raised by the future section 91(26), granting the federal Parliament power over "Marriage and Divorce", caused a crisis within the Catholic hierarchy and almost jeopardized the Church's support for the Confederation project, which needless to say, would have had disastrous consequences for its acceptance. Again, Langevin was forced to make use of his connections and his persuasiveness to overcome this obstacle.[103] This was not an easy task. The divorce question consumed him at times and caused him a great deal of anxiety, as evidenced in a note he made on the question: "*Il est nécessaire qu'il soit fait une déclaration de principes par les membres catholiques, établissant qu'ils ne veulent en aucune manière entendre les pouvoirs conférés par la nouvelle constitution comme s'étendant au delà [*sic*] des limites des effets civils du mariage*."[104]

These issues of education and divorce consumed the French-Canadian delegates, and left them little time for other battles. The work required to guarantee these minimum requirements of the new federal arrangements no doubt made the issue of the language of the new Act disappear far into the background. And in the end, this is the most probable reason for the absence of an official French version—the lack of time and the limited political strength of the few French-Canadian Fathers of Confederation.

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[100] See the discussion *ibid*. at 160–63.
[101] Edmond Langevin was secretary to the Archbishop of Quebec.
[102] H.-L. Langevin to E. Langevin, 23 January 1867, in archives, *supra* note 89, box no. 2 (1960-01-123/2) ("It is the future of the nation which is at stake. I feel it so well that I sometimes fear the responsibility that weighs upon my shoulders" [translated by author]).
[103] See Désilets, *supra* note 91 at 144–49, 160.
[104] Unsigned note by H.-L. Langevin, marked "1865" in pencil, in archives, *supra* note 89, box no. 33 (1960-01-123/33) ("It is necessary that a declaration should be made by the Catholic members, setting out that they in no way mean to understand the powers conferred by the new constitution as extending beyond the limits of the civil effects of marriage" [translated by author]).

II. Translating the *British North America Act, 1867*

A. Historical Overview

On 13 February 1867, Hector Langevin wrote to his brother Edmond: "*Je pense que je pourrai t'envoyer (Viâ Londonderry) le* susdit Bill *tel que présenté hier soir à la Chambre des Lords.*"[105] Although some details of the *Bill* had been leaked in private correspondence before then,[106] it was only once the *Bill* was formally presented that it was sent for public review in Canada. The *Bill* was elaborated by a handful of delegates in London while the Canadian public waited for news of its final contents. The official copy of the *British North America Bill* arrived in Canada on 1 March 1867. The Globe had attempted to "scoop" its competitors by publishing a version of the *Bill* on 25 February 1867, but its version was not the final version of the *Bill*, but essentially the fourth draft.[107] On 2 March 1867, *La Minerve*, *Le Pays*, and *Le Journal de Québec* all published a translation of the *Bill*. The versions in *La Minerve* and *Le Pays* are identical. It is logical to assume, because of its privileged connections to the government, that *La Minerve* was the originator of this translation, and that it was copied by *Le Pays*.[108] Indeed, *La Minerve*'s version was expressly copied in the following days by *Le Courrier de St. Hyacinthe*, *L'Ordre*, and *Le Canadien* (with some mistakes in this last paper). We know that Langevin and Cartier both had strong connections to *La*

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[105] Letter from H.-L. Langevin to E. Langevin, 13 February 1867, in archives, *ibid*., box no. 2 (1960-01-123/2) ("I think I shall be able to send you (via Londonderry) the *above-mentioned Bill* as presented last night in the House of Lords" [translated by author]).

[106] Including by Langevin on the sensitive issues of divorce and education; see e.g. the letter to E. Langevin, 27 December 1866, in archives, *ibid*., where Langevin adds this warning to his brother: "*Tout cela doit rester absolument dans la famille, car je n'ai pas même écrit un mot à mes collègues & il est convenu que nous ne devons communiquer cela à personne, par conséquent n'en dis pas un mot même à l'Évêque.*" ("All this must remain absolutely within the family, for I have not even written a word to my colleagues and it is agreed that we must not communicate this to anyone; therefore do not say a word of it even to the Bishop" [translated by author]). This secrecy was honoured in the breach more than the observance, as is evidenced by the Globe's publication of "the *Bill*" on 25 February.

[107] See G.P. Browne, ed., *Documents on the Confederation of British North America* (Toronto: McClelland and Stewart, 1969) at 278 (Document No. 85).

[108] *La Minerve* had already received from Langevin the first details of the Quebec Conference to be published in the francophone press: see Désilets, *supra* note 91 at 127–28.

Minerve.[109] It is thus logical to assume that it, and the equally pro-Confederation *Journal de Québec*, received their copies of the *Bill* directly from either Cartier or Langevin, or from their associates.

The differences in the translations published by *La Minerve* and *Le Journal de Québec*,[110] however, make it clear that these were independent translations; in any event, it is highly unlikely that either Cartier or Langevin would have had the time to produce a full translation of the *Bill* while still in London. Nor were quick translations of complex documents unusual; in many ways this was the bread and butter of the French-language newspapers, as Prof. Waite points out: "Joseph Cauchon, the editor of *Le Journal de Québec*, once said that a French-Canadian editor spent the best part of his time translating ... English into French."[111] On 4 March 1867, *Le Courrier du Canada* published its own translation, which in many respects was quite similar to that in *La Minerve*. Indeed, it may have been based on *La Minerve*'s translation, or revised in reference to it, but it is distinct enough to count as a separate translation.

Thus, in early March 1867, there were already at least three French versions of the full text of the *British North America Bill* in existence, and all three were published in newspapers of wide circulation. The language of these translations had a strong influence on the debate over Confederation, and the election debates that followed shortly thereafter. These versions did not have any kind of official sanction, but some elements of the translations were no doubt influenced by political considerations, and the language of the French "ver-

[109] See Désilets, *ibid*.; P.B. Waite, *The Life and Times of Confederation, 1864–1867: Politics, newspapers, and the union of British North America*, 3rd ed. (Toronto: Robin Brass Studio, 2001) at 7.
[110] *Le Journal de Québec* may have been working from a previous translation of *The Globe*'s text; see *infra*, note 132.
[111] Waite, *supra* note 109 at 148.

sion" of the *Bill* was being continually shaped politically.[112] This culminated in the semi-official version[113] included in the *Statutes of Canada* of 1867.

This version was produced by the director of the translation office of the Legislative Assembly of the Province of Canada, Eugène-Philippe Dorion, a well-respected lawyer, scholar and translator.[114] It is said that "his contemporaries spoke highly of his knowledge of classical languages, English, French, and some Indian languages".[115] Dorion clearly had direct experience in translating statutes, the required legal knowledge, and the breadth and depth of linguistic aptitude necessary to perform such an important and complex translation. Prof. Bonenfant asserts that he "considerably improved the French text of laws".[116] One should naturally expect, then, that his translation would be an improvement on the hastily produced newspaper translations, and indeed it is a significantly better translation.[117] Of course, Dorion was working in the circumstances of the time, within a particular legal tradition; and he was not immune to the political repercussions of his translation, or even direct political pressure: according to Prof. Bonenfant, his translation of "dominion" by "*puissance*" was directly mandated by Cartier.[118] Yet his translation has stood the test of time, and has become the standard unofficial French version of the *Act*, in spite of repeated claims that it is a poor "*traduction littérale*".[119] It was not until the advent of section 55 of the *Constitution*

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[112] Notably in the case of the translation of "dominion" by "*puissance*": see the discussion in chapter 5.
[113] Of course, this version was not strictly official; but its inclusion in the *Statutes*, and the official character of its translator, gained for it the status of a "standard" translation, and it has been retained as such in every revision since, including in the *Revised Statutes* of 1985.
[114] See the biographical sketch by Prof. Jean-Charles Bonenfant in *D.C.B.*, vol. X at 235–36.
[115] *Ibid*. at 235.
[116] *Ibid*. For all these reasons, the French Constitutional Drafting Committee should have been much more hesitant to vary his translation in so many respects. See the discussion in chapter 5.
[117] Although in some cases, notably that of s. 133, his translation choices rendered the text somewhat more obscure; see the discussion below.
[118] See *D.C.B.*, *supra* note 114 at 235.
[119] See e.g. the note in the foreword to the French text of the Department of Justice's consolidation: *A Consolidation of the Constitution Acts, 1867–1982/Codification administrative des Lois constitutionnelles de 1867–1982* (Ottawa: Department of Justice Canada, 2001) [at (v) (French side)].

Act, 1982, and the creation of the French Constitutional Drafting Committee, that a new version would be proposed.

The Committee, in drafting its new version, should have had the benefit of all of the existing prior versions of the *Act*. It should have given considerable weight to Dorion's version. And it should have been especially sensitive to terminology or even forms that had been maintained across these versions. But a comparison of the versions will quickly show that the Committee's text represents a clear departure from this previous tradition. I turn now to a comparison of the various versions.

B. A Comparison of the Versions

In order to compare the various versions, I have chosen three sections of the *Act* which I find to be representative: section 3 (the "union" provision); section 91 (the "POGG" provision); and section 133 (on the use of the English and French languages). These examples are not, of course, an exhaustive account; to the extent that the structural issues which I identify here, as well as the specific lexical and terminological issues I deal with in chapter 5, recur throughout the text, the examples are merely representative of problems which affect the new translation as a whole. I have chosen to give the newspaper translations of *La Minerve* and *Le Journal de Québec*, the standard unofficial text of the *Revised Statutes* (Dorion's version), and the new proposal by the Committee, in parallel columns.

English Text	***La Minerve***[120]	***Le Journal de Québec***[121]	**R.S.C. 1985, App. II, no. 5**	***Final Report* of the French Constitutional Drafting Committee**[122]	**Author's Retranslation of Committee's Version**[123]
3. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six Months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the Name of Canada; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly.	*3. Il sera permis à la Reine, par et de l'avis du Très-Honorable Conseil privé de Sa Majesté, de déclarer par proclamation que, le et après un jour désigné, n'étant pas au-delà de six mois après la passation de cet acte, les provinces du Canada, de la Nouvelle-Ecosse et du Nouveau-Brunswick formeront et ne seront qu'un seul Etat sous le nom de Canada, et, le ou après ce jour, les trois provinces formeront et ne seront qu'un seul état sous ce nom.*	*3. Il sera légal pour la Reine, avec l'avis et le consentement du très-honorable Conseil Privé de Sa Majesté, de déclarer par proclamation, qu'après un jour déterminé, dans l'intervalle de six mois qui suivront l'adoption du dit acte, des [*sic*] provinces du Canada, de la Nouvelle-Ecosse et du Nouveau-Brunswick, formeront un domaine sous le nom de Canada et que le et après ce jour ainsi fixé, les provinces formeront leur domaine sous ce nom.*[124]	***3.** Il sera loisible à la Reine, de l'avis du Très-Honorable Conseil Privé de Sa Majesté, de déclarer par proclamation qu'à compter du jour y désigné,—mais pas plus tard que six mois après la passation de la présente loi,—les provinces du Canada, de la Nouvelle-Ecosse et du Nouveau-Brunswick ne formeront qu'une seule et même Puissance sous le nom de Canada; et dès ce jour, ces trois provinces ne formeront, en conséquence, qu'une seule et même Puissance sous ce nom.*	***3.** La Reine est habilitée, sur l'avis du très honorable Conseil privé de Sa Majesté, à proclamer l'union des provinces du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick en un dominion appelé Canada. L'union est réalisée à la date, comprise dans les six mois suivant l'adoption de la présente loi, fixée dans la proclamation.*	**3.** The Queen is authorized, on the advice of Her Majesty's Most Honourable Privy Council, to proclaim the union of the Provinces of Canada, Nova Scotia, and New Brunswick in one dominion called Canada. The union is effected on the date, to be within the six months following the adoption of the present Act, set out in the proclamation.

[120] (2 March 1867) at 1.
[121] (2 March 1867) at 1.
[122] Department of Justice Canada, *Final Report of the French Constitutional Drafting Committee responsible for providing the Minister of Justice with a draft official French version of certain constitution enactments* (Ottawa: Department of Justice Canada, 1990), online: <http://www.justice.gc.ca/eng/pi/const/index.html> [*Final Report*], at 30.
[123] Needless to say, this is neither an authorized nor an authoritative translation; I include it merely to illustrate the contrast with the previous versions.
[124] [Printing error (intercalation of wrong line) omitted.]

I note, first, that the Committee's proposal is considerably shorter and much more succinct. It is also—from the point of view of the modern reader, at least—much more stylistically appealing. But it achieves these normally laudable goals at the price of a clear break with the textual tradition represented by the prior versions. My principal critique is not so much the change in form,[125] which does lead to greater clarity, but the abandonment of historical terms and expressions. I discuss these in greater detail in chapter 5. They include, for example, the translation of "Dominion" by "*dominion*" and the abandonment of "*acte*" in favour of "*loi*", of "*passation*" in favour of "*adoption*", etc. The structural changes are less important provided they are consistent with the standard of "functional equivalence".[126] But here we find a striking example of how difficult such equivalence might be. Some English expressions simply cannot be rendered accurately in French by a parallel expression. Such is the case, for example, with "on and after that Day". *La Minerve* and *Le Journal de Québec* both translate this as "*le [et]*[127] *après ce jour*", which is "accurate", but unidiomatic. Dorion's translation has "*dès ce jour*", which is both accurate and idiomatic. The Committee's translation changes the order of the provision, but has the equally idiomatic "*à la date*"; presumably this implies that the union is continued after that date, although this is not as clear as with "*dès ce jour*", which implies a continuation ("from this day").

But some expressions in English do have natural parallels in French. "Functional equivalence" may not require the use of parallelism; but nor does it preclude it. The prob-

[125] Including e.g. the passage from the future to the present tense, standard in modern French legal texts, and conducive to clarity, but not uniformly applied in nineteenth-century legal writing: cf. e.g. art. 76 C.C.Q. (and art. 80 C.C.L.C. (1866)) with art. 103 C.c.F. (1804); see also *Constitution de 1791*, *passim*; and even up to *Loi du 25 février 1875 relative à l'organisation des pouvoirs publics*, arts. 1, 4, and 8.

[126] Simply put, saying the same thing in a different way; disregarding the formal structure of a text and concentrating on translating its message; see e.g. Jean-Claude Gémar, *Traduire ou l'art d'interpréter: fonctions, statut et esthétique de la traduction*, t. 2: *Application* (Sainte-Foy, QC: Presses de l'Université du Québec, 1995) at 165.

[127] I take the "*ou*" in the second instance in *La Minerve* to be purely an inadvertence, as it does not accord with either the sense of the English or the first instance.

lem is determining how much of a departure from the structure of the text will still constitute functional equivalence. For example, the Committee translates "One Dominion under the Name of Canada" by "*un dominion appelé Canada*".[128] Note that such a difference of expression would be equally possible in English; that is, the *Act* could have said "One Dominion called Canada". It may well be that there is no meaningful difference between "One Dominion called Canada" and "One Dominion under the Name of Canada". But anyone who has ever read a legal judgment knows the weight that such a minute change in expression can be made to carry. Given that French has the perfectly normal parallel expression "*sous le nom de*", the only possible reason for the change is brevity. Such a consideration might be perfectly acceptable in the drafting of concurrently adopted legislative texts.[129] But here one is dealing with a historical text. No doubt if the *Act* were drafted today, the modern draftsman would prefer more modern, concise expressions than "on and after a Day", "form and be", or "under that Name accordingly". But that is hardly the point. The Committee's mandate was to *translate* the *Act*, not to *modernize* it. In light of that mandate, the Committee should have followed the structure of the *Act* where this did not lead to unidiomatic results. The same logic applies, for example, to "declare by proclamation" ("*déclarer par proclama-*

[128] I am leaving aside for now the issue of the translation of "dominion", to which I return in chapter 5. It is interesting to note here, however, another structural problem of translation. French makes no distinction between the indefinite article and the cardinal number one; both are rendered "*un(e)*". Thus the distinction between "a dominion" and "one dominion" cannot be made in French, at least not in so many words. Both the translation given in *La Minerve* and Dorion's translation address this problem, the former by adding the word "*seul*" (lit., "one sole dominion"), the latter by using the expression "*seule et même*" ("one and the same dominion" or "one dominion only"). *La Minerve*'s solution is both more accurate and simpler. Of course, such an addition is only necessary if one emphasizes the number one as an indication of unity (possibly even indissolubility, which might be fraught in the Canadian context, but certainly not unusual in constitutional texts); the traditional capitalization of numerals in British statutes also makes the number stand out. But it is also possible to read the cardinal number as just a more formal variant of the indefinite article (as e.g. in the expressions "a thousand dollars" and "one thousand dollars", which are arguably equivalents). In that case, the Committee's translation would not be inaccurate. But note that even in the last-mentioned example, the use of "one thousand" rather than "a thousand" would usually be dictated not only by the formality of the context, but by a heightened need for accuracy. I am grateful to Prof. Mark Walters for bringing this problem to my attention.

[129] I return to this in chapter 4.

tion"), which the Committee translates simply as "*proclamer*" ("to proclaim"), and arguably even to such expressions as "form and be", which Dorion himself dispensed with.[130] I turn now to the second example.

[130] I am well aware, of course, that these expressions could be considered mere verbiage. The point is that they are equally redundant in English and in French; i.e. they are not more stylistically pleasing in English than they would be in French. They belong to a tradition of legislative drafting whose originators presumably felt that there was a meaningful distinction between "forming One Dominion" and "being One Dominion", between "by the Advice of the Privy Council" and "with the Advice of the Privy Council" (this last expression, however, cannot be properly rendered in French, as the corresponding prepositions "*par*" and "*avec*" cannot be idiomatically used in this context). Again, the exercise here is not one of "improving" the English text, but of translating it. "Bad" style in English should be rendered by equally "bad" style in French.

English Text	***La Minerve***	***Le Journal de Québec***	**R.S.C. 1985, App. II, no. 5**	***Final Report* of the French Constitutional Drafting Committee**	**Author's Retranslation of Committee's Version**
91. 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	*91. Il sera permis à la Reine, par et avec l'avis du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre, et le bon gouvernement du Canada ....*	*53 [*sic*].*[131] *La Reine pourra légalement, par et avec l'avis et le consentement du Sénat et de la Chambre des Communes faire des lois pour la paix, l'ordre et le bon gouvernement du Royaume*[132] *du Canada ....*	***91.** Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada ....*	***91.** La Reine est habilitée, sur l'avis et avec le consentement du Sénat et de la Chambre des communes, à légiférer pour la paix et l'ordre au Canada ainsi que pour son bon gouvernement ....*	**91.** The Queen is authorized, on the advice and with the consent of the Senate and the House of Commons, to legislate for peace and order in Canada, as well as for its good government ....

[131] *Le Journal de Québec* published its version of the *Bill* in two separate editions, and in a different order from that of either *La Minerve* or the final *Bill*; this affected its numbering of the sections. See also *infra*, note 132.

[132] The presence of this term, as well as the many typographical errors, in the *Journal de Québec*'s version, leads one to think that it was working partly from a previous translation, perhaps of the *Globe*'s prior publication of the fourth draft (see *supra* notes 106 and 107).

I note first that all the prior versions are in agreement in saying "*la paix, l'ordre et le bon gouvernement du Canada*". One might well ask why the Committee chose this iconic phrase of our Constitution to demonstrate its skills at innovation. It renders it as "*pour la paix et l'ordre au Canada, ainsi que pour son bon gouvernement*". Such a departure necessarily required an explanation. I reproduce in full the Committee's marginal note in its *First Report*, as it is highly interesting:

The phrase *pour la paix, l'ordre et le bon gouvernement du Canada*, which has generally been used, is being replaced by *pour la paix et l'ordre au Canada ainsi que pour son bon gouvernement*. This change is proposed because the former phrase, a literal translation from the English, is grammatically incorrect since it contains an anacoluthon or discontinuation of sentence. Indeed, if *bon gouvernement* can be construed correctly with a noun as a complement introduced by *de* (*le bon gouvernement <u>du</u> Canada*), the sense requires the use of the preposition à in the form of the contracted article *au* between *paix et ordre* and *Canada*. However, in the traditional formulation, one has *la paix du Canada*, which has little meaning, and *l'ordre du Canada*, which has a meaning different than that of the context. Hence is it [*sic*] necessary, in order to render the true meanings and ensure grammatical correctness, to break the phrase by the use of the two prepositions *à* and *de* included in the contracted articles *au* and *du*, which gives, as the first correction, *pour la paix et l'ordre <u>au</u> Canada et pour le bon gouvernement <u>du</u> Canada*. The second correction, this one of style, consists of the substitution of *et* by *ainsi que*, in order to avoid the two *et*s and of *le ... du Canada* by *<u>son</u> bon gouvernement*, in order to avoid the repetition of the word *Canada*.	*Substitution de l'expression « pour la paix et l'ordre au Canada ainsi que pour son bon gouvernement » à l'expression de la version française généralement employée « pour la paix, l'ordre et le bon gouvernement du Canada ». Motifs : cette dernière expression, calquée sur l'anglais, comportait une incorrection grammaticale, en l'occurrence un anacoluthe ou rupture de construction. En effet, si « bon gouvernement » se construit correctement avec un complément de nom introduit par « de » (« le bon gouvernement du Canada »), le sens exige l'emploi de la préposition « à », sous la forme de l'article contracté « au », entre « paix et ordre » et « Canada ». Or, dans la version traditionnelle, on a « la paix du Canada », ce qui ne veut pas dire grand-chose, et « l'ordre du Canada », ce qui a un tout autre sens que celui du contexte. D'où, pour assurer le sens voulu et la correction grammaticale, la nécessité de scinder la formulation par l'emploi des deux prépositions « à » et « de » incluses dans les articles contractés « au » et « du », ce qui donne, comme première correction, « pour la paix et l'ordre* au *Canada et pour le bon gouvernement* du *Canada ». À partir de là, une seconde correction, de style cette fois-ci, a donné lieu au remplacement du second « et » par « ainsi que » (pour éviter les deux « et ») et à celui de « le ... du Canada » par «* son *bon gouvernement » (pour éviter la répétition à si peu de distance du mot « Canada »).*

First, let me point out how far our knowledge of grammar has progressed, in that the Committee could so easily discern a "grammatical error" that escaped a scholar such as Eugène-Philippe Dorion, who admittedly knew only "classical languages, English, French, and some Indian languages". But note that the "grammatical error" the Committee refers to (the anacoluthon) exists only if one accepts that the phrases "*la paix du Canada*" and "*l'ordre du Canada*"[133] "*ne veu[lent] pas dire grand-chose*" ("do not mean much")[134]. One may or may not agree with the Committee on this. But the point, which the Committee seems to have missed entirely, is that the English expressions are no different in this respect from the French ones. "The peace of Canada" and "the order of Canada" are the precise equivalents, in form and in sense, to "*la paix du Canada*" and "*l'ordre du Canada*". One may agree with the Committee that the phrase should have been "for Peace and Order in Canada, and for its good Government", but that was not the phrase used by the drafters of the *Act*.[135] The Committee is not only faulting Dorion's grammar, but that of the Fathers of Confederation, and is boldly asserting that a phrase which has a long history of judicial interpretation,[136] and on which much federal power could be seen to rest, "does not mean much". That may be the case, but it was not the Committee's concern. Again, the Committee's mandate was to trans-

[133] The confusion referred to by the Committee presumably relates to the Order of Canada, i.e. the order of merit founded in 1967. Given the context here, confusion is highly unlikely.
[134] In other words, there is nothing inherently grammatically wrong about saying "*la paix **du** Canada*" or "*l'ordre **du** Canada*"; the Committee's real objection is to semantics, not syntax.
[135] And indeed, this interpretation might be seen as directly contrary to the intent of the framers: see the interesting discussion in A.S. Abel, "What Peace, Order and Good Government?" (1968) 7 West. Ont. L. Rev. 1.
[136] And a long history of use within the Commonwealth: see e.g. the close equivalent, with "Welfare" for "Order", in the *Royal Proclamation, 1763* (U.K.) ¶ 8, reprinted in R.S.C. 1985, App. II, No. 1; *Quebec Act, 1774* (U.K.), 14 Geo. III, c. 83, s. 12, reprinted in R.S.C. 1985, App. II, No. 2; *Constitutional Act, 1791* (U.K.), 31 Geo. III, c. 31, s. 2, reprinted in R.S.C. 1985, App. II, No. 3; *Union Act, 1840* (U.K.), 3 & 4 Vict., c. 35, s. 3, reprinted in R.S.C. 1985, App. II, No. 4; "Order" first appeared in statutes related to the Australasian colonies: see e.g. *Government of Western Australia Act, 1829* (U.K.), 10 Geo. IV, c. 22; *South Australia Act, 1834* (U.K.), 4 & 5 Will. IV, c. 95, s. 2; *New Zealand Constitution Act, 1852* (U.K.), 15 & 16 Vict., c. 72, s. 53; and quickly migrated north: see the *British Columbia Government Act, 1858* (U.K.), 21 & 22 Vict., c. 99; by then the phrase was the usual formula for granting general legislative competence; see also Peter W. Hogg, *Constitutional Law of Canada*, vol. 1, 5th ed. Supp., looseleaf (Scarborough, ON: Thomson Carswell, 2007) at 17-3, n. 7.

late the English text, not to “improve” it. The Committee should have realized that this so-called grammatical incorrectness was simply an accurate rendering of the English text, and left it alone. But lest I be seen as unfair to the Committee, I proceed to my next example.

English Text	***La Minerve***	***Le Journal de Québec***	**R.S.C. 1985, App. II, no. 5**	***Final Report* of the French Constitutional Drafting Committee**	**Author's Retranslation of the Committee's Version**
133. Either the English or the French Languages may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec. The Acts of the Parliament of Canada	*133. La langue anglaise ou la langue française pourra être employée par toute personne dans les débats des chambres du parlement du Canada et des chambres de la législature de Québec; et ces deux langues seront employées dans les records et journaux respectifs de ces chambres; et l'une et l'autre de ces langues peuvent être employées par toute personne ou dans tout plaidoyer ou procédé dans ou ressortant de toute cour du Canada, établie en vertu de cet acte, et dans ou ressortant de toutes ou chacune des cours de Québec.—Les actes du*	*108 [*sic*].*[137] *La langue anglaise et la langue française pourront être mises en usage par toute personne dans les débats des Chambres du Parlement du Canada, et des Chambres de la législature de Québec; et ces deux langues seront en usage dans les records respectifs et les journaux de ces Chambres; et l'une et l'autre de ces langues pourront être mises en usage par toute personne dans toute cour du Canada établie conformément à cet acte.*[138]*—Les actes du Parlement du Canada et de la législature de Québec seront imprimés et publiés dans les deux langues.*	***133.*** *Dans les chambres du parlement du Canada et les chambres de la législature de Québec, l'usage de la langue française ou de la langue anglaise, dans les débats, sera facultatif; mais dans la rédaction des archives, procès-verbaux et journaux respectifs de ces chambres, l'usage de ces deux langues sera obligatoire; et dans toute plaidoirie ou pièce de procédure par-devant les tribunaux ou émanant des tribunaux du Canada qui seront établis sous l'autorité de la présente loi, et par-devant tous les tribunaux ou émanant des tribunaux de Québec,*	***133.*** *Chacun a le droit d'employer le français ou l'anglais dans les débats des chambres du Parlement du Canada ou de la Législature du Québec et l'usage de ces deux langues est obligatoire pour les archives, les comptes rendus et les procès-verbaux de ces chambres. Chacun a le droit d'employer le français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux du Canada établis sous le régime de la présente loi ou ceux du Québec et dans tous les actes de procédure qui en découlent.* *Les lois du Parlement du Canada et de la Législature du Québec sont imprimées et publiées dans*	**133.** Everyone has the right to use French or English in the debates of the Houses of the Parliament of Canada or of the Legislature of Quebec, and the use of those two languages is mandatory for the records and journals[139] of these Houses. Everyone has the right to use French or English in all matters before the courts of Canada established under the present Act or those of Quebec, and in all procedural documents [or in any pleading or process][140] issuing from them. The Acts of the Parliament of Canada and of the Legislature of Quebec are printed and

[137] See note 131, *supra*.
[138] *Le Journal de Québec*'s translation is not a complete translation of the current s. 133; see also *supra,* note 132.
[139] The Committee's translation deliberately reflects ss. 18 and 19 of the *Constitution Act, 1982*. This is because the word "record" in English has a broad meaning that cannot adequately be rendered by a single French word. Note that an argument could be made for the retention of "*journaux*" in this historical context, but "*comptes rendus*" and "*procès-verbaux*" are both broad expressions that serve to cover largely the same ground as "records and journals". I have retranslated according to the wording in the English text of ss. 18 and 19.
[140] See *supra* note 139.

and of the Legislature of Quebec shall be printed and published in both those Languages.	*parlement du Canada et de la législature de Québec seront imprimés et publiés dans les deux langues.*		*il pourra être fait également usage, à faculté, de l'une ou l'autre de ces langues. Les lois du parlement du Canada et de la législature de Québec devront être imprimées et publiées dans ces deux langues.*	*les deux langues.*	published in both languages.

This is one instance where the Committee's translation does significantly improve on the standard text. Note that the English text is clear that the rights guaranteed by this section belong to "any Person". These are personal rights of English and French speakers. In Dorion's translation, however, these rights become disembodied; the word "person" is nowhere to be found. The abstract wording of the provision only exacerbates this impersonality, and makes it difficult to read. It seems it is the languages themselves that have the rights guaranteed by the section. The Committee's translation very appropriately returns the focus to these rights as personal rights. Note also that in this respect, the Committee's translation agrees with both *La Minerve*'s and *Le Journal de Québec*'s. The Committee's translation here is otherwise clear and concise, and much easier to read than the standard version while remaining faithful to the original English text. This, then, is a good example of what the Committee could have achieved with its translation, had it sought to make faithfulness to the original text, and regard for the prior versions, a priority, while not abandoning the right to improve or clarify the previous French versions where necessary.

We have now seen the historical development of the previous versions of the French text of the *British North America Act, 1867*, and the ways in which the Committee's text marks a clear departure from this tradition. I have also addressed some of the structural issues in the Committee's translation. In the next two chapters, I turn to two specific problems engendered by the Committee's break with the past: the problem of historical legitimacy and the problem of historical accuracy.

Chapter 4: The Problem of Historical Legitimacy

Canada's Constitution, like that of some other Commonwealth countries, is subject to an interesting duality. The *British North America Act,* 1867 originally derived its force from its enactment as a British Imperial statute extending to its North American colonies. It was enacted not as the constitution of an independent country, but as the governing charter of a colony. We now know that Canada is an independent state.[141] Yet its founding constitutional document remains largely the same. How are these two seemingly incongruous facts to be reconciled?

The current source of the validity of Canada's founding constitutional act is a much-debated question. One may agree with Prof. Peter Hogg that "[t]he legal force of the *Canada Act 1982* and the *Constitution Act, 1982*, like other United Kingdom statutes extending to Canada, depends upon the power over Canada of the United Kingdom Parliament. These instruments have an external rather than a local root."[142] On the other hand, one might be more inclined to the view of Prof. Brian Slattery, and argue that "while the historical source of the *British North America Acts* was the Parliament at Westminster, the legal basis for their validity and paramountcy after independence was a rule of Canadian law, *the principle of continuity*".[143] Yet while there may be a debate about the source of the formal validity of the Constitution, there is no question as to the origin of its political supremacy, its general political acceptance as the foundational document of the country; these are unquestionably of domestic provenance. The constitutional arrangements embodied in the *Constitution Acts,*

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[141] This was reaffirmed by the Supreme Court in *Reference re Amendment of the Constitution of Canada*, [1981] 1 S.C.R. 753.

[142] Peter W. Hogg, *Constitutional Law of Canada*, vol. 2, 5th ed. Supp., looseleaf (Scarborough, ON: Thomson Carswell, 2007) ¶ 3.5 at 3-11.

[143] Brian Slattery, "The Independence of Canada" (1983) 5 Sup. Ct. L. Rev. 329 at 404 [emphasis in original]; space constraints do not allow me to do justice to the richness and complexity of this argument and its jurisprudential foundations (see e.g. J. M. Eekelaar, "Principles of Revolutionary Legality" in A. W. B. Simpson, ed., *Oxford Essays in Jurisprudence (Second Series)* (Oxford: Oxford University Press, 1973) 22; J. M. Finnis, "Revolutions and Continuity of Law" in *ibid.* 44). I simply wish to note that the source of the formal validity of the Canadian Constitution remains in question.

1867–1982, do not find their origin in the United Kingdom, but in the vision, hard work, and perseverance of Canadian politicians. The *British North America Act, 1867* may have been born in the pomp and ceremony of Westminster Palace; but it was conceived in the muddy streets and stuffy halls of Charlottetown and Quebec City. It is the product of Canadian dissension and Canadian compromise; of Canadian optimism and Canadian ambivalence. Its formal validity might well reside in England, but what I shall call its political legitimacy[144] has always been firmly rooted in this country.

The political legitimacy of the *Constitution Act, 1867* is a historical legitimacy. We *feel* politically bound to it—no matter what reason we may give for being legally bound to it—not because of some shadowy "principle of continuity", and even less because we really believe the fantasy that we are still subject to the dictates of the British Parliament, but because of our feeling that we must honour the agreement reached by our forebears. It is the fact of the "deal" (to borrow from Christopher Moore) struck by the Fathers of Confederation in 1867 that gives the *Act* its true weight.

It is this particular fact of historical legitimacy that I address in this chapter. I wish to clarify that I make no argument with regard to the continuing political representativity of the *Constitution Act, 1867*, or even about its actual representativity in 1867. Any casual student of the history of Confederation will know that the process of elaboration of the *Act* was

[144] I am aware that the use of this term might itself be controversial. One might well object that I am drawing an arbitrary distinction between the legal and the political. In the context of a constitution in which the line between custom, convention and law is often blurred, however, such a distinction may be necessary. One need not take a long look at Canadian history to notice that its *de facto* political independence and its formal legal independence developed at different rates. It is quite clear, for example, that the Imperial Parliament in 1868 had the legal authority to revoke the *British North America Act,* 1867; a strong argument could be made, however, that this was politically just as impossible in 1868 as it would be in 1983, or as it is today. Thus what I mean by political legitimacy is simply that the real force of the act comes from its historical significance as a political agreement between British North Americans, no matter whether its original or continued validity is seen as external or internal. "Political validity" might have been a better term for it, but I feel it would be misleading since, as discussed below, one might recognize the *Constitution Act, 1867* as the legitimate constitutional foundation of Canada, and yet not accept the arrangements it embodies as either the right ones for Canada today, or even the right ones for Canada in 1867 (what I have called the issue of representativity).

not exactly a model of transparency. It certainly could be argued, and has been argued,[145] that the final document was not an accurate representation of the wishes of the Canadian population. Opposition newspapers in Quebec at the time of Confederation certainly portrayed it as a betrayal of the French-Canadian nation by a handful of *vendus*.[146]

On the other hand, one could also argue that a document drafted in 1867, with only four provinces at the table, represented by all-male, all-white delegates, could not possibly embody the aspirations of Westerners, women, aboriginal peoples, or Canadians of non-European origin. These are all valid arguments, but I am not concerned with them in this work. Rather, my point is that even those who might question the representativity of the *Constitution Act, 1867*,[147] accept that the *Act* has a historical legitimacy founded on the historical event of 1867. In other words, it is not the *Constitution Act, 1982* that gives the 1867 *Act* its current legitimacy, nor is it periodic reaffirmations of its desirability by our elected representatives or by plebiscite. Rather, it is the binding force of the Fathers' "deal", whatever we may make of the details of that deal. It is its status as a historical monument that gives the *Constitution Act, 1867* its true significance.[148]

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[145] See e.g. Marcel Bellavance, *Le Québec et la confédération: un choix libre?* (Sillery, QC: Septentrion, 1992).

[146] For one particularly virulent example among many, see *La confédération, couronnement de dix années de mauvaise administration* (Montreal: Presses du journal *Le Pays*, 1867) at 39: "*Que sous le fouet implacable de l'opinion outragée, les traitres [*sic*] brûlent dans le vil métal de leur trafic ... [q]ue les titres et les hochets dont ils essaieront de couvrir leur honte enveloppent leurs noms d'infamie dans l'histoire et soient le déshonneur de leurs enfants!*" ("May the traitors burn in the vile metal of their bargain, under the unrelenting whip of outraged public opinion ... may the titles and trinkets with which they attempt to cover their shame surround their names with infamy in history and be the dishonour of their children!" [translated by author].)

[147] And therefore, in a sense, its "legitimacy". Yet despite dissatisfactions, it is clear that a vast majority of Canadians (with the exception of aboriginal peoples, who might reasonably dispute the validity of the entire Canadian constitutional order) recognize the *British North America Act, 1867* as the product of the domestic agreement, however unrepresentative, of legitimately elected Canadian politicians, and not as a foreign arrangement imposed on the country. In that sense, then, they recognize the historical legitimacy of the *Act*.

[148] This is true, of course, of most constitutions. Note e.g. the quasi-scriptural status of the constitutional text in the United States. See also Roderick A. Macdonald, "Legal Bilingualism" (1997) 42 McGill L.J. 119 at 137–38.

This has important implications for its translation. For the new French version of the *Constitution Act, 1867* to function effectively as the legal equivalent of the English text, it must have not only formal validity, but also political legitimacy. Ultimately, however, in its current state, I cannot see how it could achieve this. Neither the Equal Authenticity Rule itself, nor an appeal to the legitimacy of the democratic process will make it the true equivalent of the English version. The Equal Authenticity Rule, which might in theory lend to the French version the historical legitimacy of the English text, is inappropriate in the case of the *Constitution Act, 1867*. And the unanimous approval of the new version through the procedure for amending the Constitution would fail to grant it the legitimacy of the democratic process, because of a general lack of understanding of the nature of the amendment effected through this procedure. I consider each of these points in turn.

I. The Problem of Equal Authenticity

As we saw above, the adoption of the French version of the *Constitution Act, 1867*, produced by the French Constitutional Drafting Committee (the "Committee"), according to the appropriate amending formulas prescribed by Part V of the *Constitution Act, 1982*, would make this French translation, produced in 1990, the legal equivalent of the English text of 1867. From a purely formal point of view, this is uncontroversial. The translations produced by the Committee would have been adopted "pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada" ("*conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient*")[149] and thus "in accordance with the authority contained in the Constitution of Canada" ("*conformément au pouvoirs conférés par [la Constitution du Canada]*").[150]

[149] *Constitution Act, 1982*, s. 55.
[150] *Constitution Act, 1982*, s. 52(3).

The new French versions would be *amendments* to the Constitution. This simple fact is plainly set out in the *Constitution Act, 1982*, but its true significance is not commonly recognized. This is because, in the words of Prof. Judith Lavoie, "*la plupart des juristes perçoivent la traduction comme une simple opération de transfert, et non comme un processus dont la nature même suppose une manipulation et une transformation, parfois superficielles parfois profondes, du texte original*".[151] To recognize this is to recognize that the new French versions do not simply represent a parallel restatement of the English text, a "mirror text" of sorts;[152] rather, they represent an amendment to the English text, in that the meaning of any provision of the *Act* can no longer be found exclusively in the English version. This, of course, is the fundamental point of equal authenticity: the two versions of an equally authentic instrument are not alternative versions, with one to be used in English-speaking contexts and the other in French-speaking contexts. Both of them together form the complete text, so that one has not truly read the law until one has read it in both versions. As Prof. Ruth Sullivan puts it, the two versions "are halves of a single whole, and to access the law properly both versions must be read and understood".[153] This can be problematic, to say the least, because discrepancies between the two versions are inevitable. As Prof. Sulli-

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[151] Judith Lavoie, "Droit et traductologie: convergence et divergence", in Jean-Claude Gémar & Nicholas Kasirer, eds., *Jurilinguistique: entre langue et droits/Jurilinguistics: Between Law and Language* (Montreal: Thémis, 2005) 523 at 535 ("most jurists see translation as a simple transfer operation, and not as a process whose very nature implies that the original text will be manipulated and—sometimes superficially but sometimes profoundly—transformed"; quoted and translated in The Honourable Mr. Justice Michel Bastarache, *et al*., *The Law of Bilingual Interpretation* (Markham, ON: LexisNexis Canada, 2008) at 8.

[152] See Nicholas Kasirer, "Dire ou définir le droit?" (1994) 28 R.J.T. 141 at 161: "*[L]e rêve du bilinguisme juridique est plus modeste, celui-ci ayant pour objectif de rendre le droit accessible plutôt que d'ajouter à son contenu. Son postulat de base est que chaque version linguistique d'un texte de droit reflète parfaitement son vis-à-vis. Les deux volets ayant, dans le meilleur des mondes, la même valeur juridique, on cherche tout simplement à leur faire dire la même chose.*" ("The dream of legal bilingualism is more modest, its objective being to make the law accessible, rather than to add to its contents. Its basic premise is that each linguistic version of a legal text perfectly reflects its opposite. Since, in the best of worlds, the two parts have the same legal force, one simply tries to make them say the same thing" [translated by author].)

[153] Ruth Sullivan, "The Challenges of Interpreting Multilingual Multijural Legislation" (2004) Brook. J. Int'l L. 985 at 1010.

van notes, "[C]itizens can safely rely on a single version only if they can be sure that they say the same thing. And in practice, this assurance can never be achieved",[154] since, as Prof. Nicholas Kasirer reminds us, "*[l]es textes français et anglais d'un texte juridique veulent rarement dire la même chose*".[155] Courts must then look for the meaning of the whole provision "between" the two texts, as it were: in other words, they must look for a "shared or common meaning" that may be more or less elusive. That is why Prof. Kasirer notes that "*[l]a vérité juridique, si l'on peut recourir à cette idée bien naïve pour les fins de la discussion, se situe plutôt quelque part entre les versions française et anglaise d'une règle de droit*".[156] As Justice Bastarache points out, the Equal Authenticity Rule necessarily entails the use of the Shared Meaning Rule, because "a court faced with two equally authentic versions of a statute must take care to ensure that neither version is favoured over the other. Thus, neither version of the statute can be rejected out of hand, nor can it be explicitly or implicitly favoured merely by virtue of the language in which it is cast."[157] Since "[i]t would be absurd to suppose that the two versions of the statute intend to say different things", the courts must necessarily look for the "shared or common meaning of the two versions".[158] It is clear that under the operation of the Equal Authenticity Rule and the Shared Meaning Rule, the English text of the *Constitution Act, 1867* could not be given any preponderance because of its historical primacy in the case of a discrepancy with the French version. In fact, were the legislative history of any of the provisions to come into play under the application of the Shared Meaning Rule,[159] a court would be more likely to favour the meaning of the French

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[154] *Ibid*. at 1007–08.
[155] Kasirer, *supra* note 152 at 162 ("[t]he English and French versions of a legal text rarely say exactly the same thing" [quoted and translated in Bastarache, *supra* note 151 at 8]).
[156] *Ibid.* ("[t]he legal truth—if we can resort to this fairly naïve concept for the sake of argument—would actually be found somewhere between the English and French versions of a statutory provision" [quoted and translated in Bastarache, *supra* note 151 at 8]).
[157] Bastarache, *supra* note 151 at 15.
[158] *Ibid*.
[159] See discussion *ibid*. at 90–91.

text as the more recent one: "When one version has recently been changed, we can infer that the change discloses the intention we seek."[160]

This last quote makes it clear that the Equal Authenticity Rule and its corollary, the Shared Meaning Rule, rely on a theoretical basis which is not available in the case of the *Constitution Act, 1867*. Recall that the Supreme Court, in its landmark ruling in *R. v. DuBois*, based its affirmation of equal authenticity on a judicially-noticed point of procedure: Duff C.J. found that "the statutes of the Parliament of Canada in their French version pass through the two Houses of Parliament and receive the assent of His Majesty at the same time and according to the same procedure as those statutes in their English version".[161] This is the cornerstone of the rule of equal authenticity. While the rule can now be said to have statutory[162] and even constitutional[163] authority, its doctrinal premise remains unchanged. It is logical to assume that a single legislator, adopting two versions of a statute—constitutional or otherwise—according to the same procedure at the same time, has the same intent in enacting both versions of the law. Indeed, to assume the contrary would be inimical to our idea of the rule of law, as Prof. Sullivan points out.[164] How the legislator actually goes about this process is not a concern of the rule. The idea that "a legislator" simultaneously enacts the two versions of a bilingual law raises more questions than it answers. The details of the actual process are complex,[165] and as mentioned above, the "fact" of simultaneous bilingual

[160] *Ibid*.; see also *R. v. Klippert*, [1967] S.C.R. 822.
[161] *R. v. DuBois*, [1935] S.C.R. 378 at 401.
[162] See *Official Languages Act*, R.S.C. 1985 (4th Supp.), c. 31, s. 13.
[163] *Constitution Act, 1982*, ss. 18, 56, and 57.
[164] Sullivan, *supra* note 153 at 1010: "[I]t would be an unacceptable violation of the rule of law if interpreters were to apply different rules to citizens depending on which version of the statute they invoked."
[165] See Alexandre Covacs, "La réalisation de la version française des lois fédérales du Canada", in Jean-Claude Gémar, ed., *Langage du droit et traduction: Essais de jurilinguistique/The Language of the Law and Translation: Essays on Jurilinguistics* (Quebec: Services des communications, Conseil de la langue française, 1982) 83.

enactment has never been fully demonstrated.[166] It may well be that the Equal Authenticity Rule is based on a convenient legal fiction.

The problem, however, is that by no stretch of the legal imagination can we assert that the English text of the *British North America Act, 1867*, passed by the Imperial Parliament in the thirtieth year of the reign of Queen Victoria, and its 1990 translation by the French Constitutional Drafting Committee, adopted according to the amending formulas of a 1982 constitutional statute in, say, 2010,[167] are "expressions of the same legislative intent".[168] The theoretical basis of the Equal Authenticity Rule—the "fact" of bilingual enactment—may be shaky in the case of ordinary statutes; in the case of the *Constitution Act, 1867*, it dissolves completely. The point is not really that one text is a translation of the other, or that one text predates the other.[169] It is that the two texts share such dissimilar origins as to make any claim of true equivalence seem completely absurd. It is that one text is the founding document of the Canadian federation, at least some provisions of which are familiar to any schoolchild, while the other is a translation almost no Canadian has seen, made 123 years after the fact by a committee few Canadians have heard of. In the case of ordinary federal statutes, there is a general perception that the two versions are entitled to equality, as the two sides of a coin issued by the same mint. But in this particular case, that view is unsustainable; the two texts are two different coins, and one is in the currency of historical fact, while the other is in that of legal fiction. In short, the problem is that no

[166] See Bastarache, *supra* note 151 at 20; Michael Beaupré, *Interpreting Bilingual Legislation*, 2nd ed. (Toronto: Carswell, 1986) at 8–9.
[167] This is, of course, beyond improbable. But I discuss below two possible scenarios where the translations could be adopted without meaningful scrutiny.
[168] Bastarache, *supra* note 151 at 15.
[169] These two factors may well be present, to a certain extent, in the case of other statutes. Indeed, before the late 1970s, the practice in the drafting of federal laws was simply to make a French translation of the original English text. See e.g. the discussion in Lavoie, *supra* note 151 at 532–33. But in such cases, one is dealing with simultaneous adoption by the same institutions and through the same procedures, and thus with the same source of legitimacy.

amount of constitutional fiat can give this text the historical legitimacy of the English text of the *Constitution Act, 1867*.

Legal reality is one thing, and political reality another. If forced to choose between the two, the courts will generally prefer the latter. As Beaupré points out, the Equal Authenticity Rule was adopted by the courts because it made eminent sense and was sound public policy, even in the absence of any statutory or constitutional requirement to do so.[170] I would suggest that the courts would be equally likely to abandon it, even in the presence of a strong constitutional direction, if it lost this basis in logic or sound policy. Whether explicitly or implicitly, judicial interpreters will quickly move away from a legislative constraint with a weak rationale. This might well impair effective recognition by the judiciary of the equal status of the French text, and in the absence of judicial support, it is likely that the French variety of the "living tree" would remain a bonsai. The Equal Authenticity Rule and its constitutional bodyguard—section 56 of the *Constitution Act, 1982*—would be unable to lend the required legitimacy to save the new French text.[171]

II. The Problem of Democratic Legitimacy

One might well object that the adoption of the new text through the amending formulas in the Constitution would give the new French version a stronger political legitimacy, one that would supersede the historical primacy of the English text. After all, for this new version to come into force, a veritable miracle would be required: the unanimous consent of the federal Parliament and all ten provincial legislatures. Would this remarkable demonstration of unity not achieve an unprecedented level of democratic legitimacy for the new French text? I am inclined to think not, for the following reasons.

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[170] See Beaupré, *supra* note 166 at 9–10.

[171] A judicial rule of interpretation whereby the new French text would invariably be interpreted in accordance with the English text would be equivalent to making the latter paramount, and therefore have the same effect as abandoning the Rule of Equal Authenticity outright.

I see only two scenarios in which the new French version of the *Constitution Act, 1867*, might be adopted. The first, and less probable, scenario involves a complete renegotiation of the Constitution in the context of a multilateral accord in the mould of Meech Lake or Charlottetown. It is unlikely that such a circumstance would arise in the near future, given the current revulsion of most Canadians for anything that smacks of constitutional reform. But if such an all-encompassing accord is negotiated, it is possible, even likely, that the package would include the adoption of the new French text, some thirty years or more after it was first proposed. Such an accord is only likely if important—or seemingly important—constitutional changes are made, whatever their nature. In those circumstances, I consider it highly unlikely that the public's attention would be focused on what most citizens, and indeed most constitutional lawyers, would see as an overdue item of constitutional housekeeping. It is a safe bet that the "meat" of the accord would retain the attention of politicians and pundits, and thus of the press and public. The new French version, buried in an appendix of the accord, would be ignored until the first court challenge of the new constitutional order, when some enterprising lawyer would bring it to the attention of a conscientious judge, who would then be hit with the Rule of Equal Authenticity. The new text would have been solemnly adopted, on eleven separate occasions, by the elected representatives of the Canadian people. But the absence of any meaningful understanding—let alone review or debate—of the significance of that action would undermine any political legitimacy that such unanimous adoption might confer on it.

The second scenario is not that different from the first, but it is somewhat more likely. As mentioned earlier, the *Constitution Act, 1982* called for an official French version to be prepared "as expeditiously as possible" ("*dans les meilleurs délais*") and adopted "when any portion thereof sufficient to warrant action being taken has been so prepared" ("*dès*

qu'elle [toute partie suffisamment importante] est prête").[172] By any interpretation of those words, the federal government seems to be now in clear contravention of the provision. It should be noted that the provision is couched in mandatory language ("shall be prepared"/ "*est chargé de rédiger*"). What legal consequences this might have is unclear. In *Bertrand c. Québec*,[173] the Attorney General of Quebec argued that this failure of the federal government to act impaired the validity of the entire *Constitution Act, 1982*. This argument was made in the context of a motion for dismissal, and was never fully developed. The Government of Quebec then abandoned the issue by its refusal to participate further in the *Bertrand* affair.[174] Whether the contravention of section 55 would indeed have such drastic legal consequences may be doubtful. But should the matter be raised again, the federal government might choose to act with more than its usual swiftness to have the provisions adopted before the Supreme Court gives its view of the matter. Given the public attitude described above, this is equally unlikely to generate debate. At most, it would prove a handy occasion for the provincial governments to attempt to gain concessions from the federal government in exchange for a quick resolution to adopt the new text.

Even in this case, where the provisions would come before Parliament and the legislatures on their own, I am very sceptical that any meaningful review of the translation, or any significant debate, would take place. The work of the Committee simply did not appear on the public's radar during the years of its existence. None of *The Globe and Mail*, *The Toronto Star*, *La Presse*, or *Le Devoir* so much as mentioned the tabling of its first or final reports. I am unaware of any attempt made to review critically the Committee's translation, or of any debate regarding its adoption. Indeed, the Committee itself seemed to want to discourage debate on its translation, as is apparent from the introduction to its *First Report*:

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[172] *Constitution Act, 1982*, s. 55.
[173] *Bertrand c. Québec (Procureur général)*, [1996] R.J.Q. 2393 (C.S.).
[174] See *Bertrand c. Québec (Premier ministre)*, [1998] R.J.Q. 1203 (C.S.).

"The Committee hopes that discussions simply of variances in terminology will not delay the day when the Constitution of Canada will become law in both French and English" ("*Le comité espère que des discussions sur de simples questions de variantes ne viendront pas retarder la date où l'ensemble de la Constitution du Canada entrera dans le droit du pays tant en français qu'en anglais*").[175] In those circumstances, any debate of the issue is likely to appear pedantic, and be viewed as useless quibbling on an esoteric matter. Ordinary Canadians are likely unaware that there is no official French version of the *Constitution Act, 1867*, and would probably favour the adoption of such an official version, if asked the question in the abstract. Members of Parliament and of the legislatures, in both government and opposition, would no doubt unanimously support the resolutions, as there is no political capital to be made in overtly requesting the preservation of linguistic inequality. Politicians would not dare to debate the matter, and the general public would not care to debate the matter. The new French text, buried in the end-of-session rush of legislative activity, would continue to be ignored—as in the first scenario, until brought up in court by a sharp-witted lawyer.

Again, I venture to say that its solemn adoption by our elected representatives could not, in these circumstances, lend true political legitimacy to the new French version of the *Constitution Act, 1867*. General misconceptions about the importance of the change brought about by the adoption of the new version would ensure its approval. The true character of the amendment made would not be recognized by most lawyers, let alone the general public. The passing of the resolutions would no doubt furnish multiple occasions for our politicians to wax poetic about their deep attachment to Canadian bilingualism and the great

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[175] Department of Justice Canada, *First Report of the French Constitutional Drafting Committee responsible for providing the Minister of Justice with a draft official French version of certain constitutional Acts* (Ottawa: Department of Justice Canada, 1986) at 6a ¶7; I must admit that I am baffled by this statement. Surely the Committee does not want to suggest that the necessity of the quick adoption of *any* French text of the Constitution precludes discussion of the merits of that text. By that logic, it would have been much easier to adopt the existing French texts, which had been available in their standard form for years, and the Committee's proposals might themselves be rightfully termed "*simples questions de variantes*".

achievement of linguistic equality. But the reality of equal authenticity would come soon enough, and with it the inevitable political backlash. The idea that the new French version of the *Constitution Act, 1867*, drafted by a select but small committee of legal scholars in utter obscurity, and distractedly rubber-stamped by self-congratulatory legislators, might in certain circumstances trump the original English text of the founding document of the nation would not sit well with a majority of Canadians. And in spite of my strong feelings in favour of the preservation and development of the bilingual character of our country, I must admit that I would be one of them.

III. The Pre-existing Versions of the *British North America Act, 1867* as an Alternative Source of Legitimacy

What could the Committee have done about the issue of legitimacy? I recognize, of course, that my objection so far has been directed at the very basis of the project contemplated by section 55 of the *Constitution Act, 1982*, and not at the work of the Committee itself. For better or worse, the Committee was constitutionally mandated—or rather, to be precise, the Minister of Justice who appointed the Committee was constitutionally mandated—to produce a new French version of the *Constitution Act, 1867*, and it did so. It was not within the Committee's mandate to question the legitimacy of this endeavour; theirs was not to reason why, but to do and die.

Nevertheless, it is obvious that the ultimate success of its translation was of concern to the Committee. It stated in the introduction to its *Final Report*:[176]

[176] See Department of Justice Canada, *Final Report of the French Constitutional Drafting Committee responsible for providing the Minister of Justice with a draft official French version of certain constitution enactments* (Ottawa: Department of Justice Canada, 1990), introduction, online: <http://www.justice.gc.ca/eng/pi/const/index.html> [*Final Report*] at 15.

The Committee sincerely hopes that this report, which is the culmination of five years of research and consultation by committee members in addition to their many other professional responsibilities, will be deemed a valuable contribution to Canadian constitutional law, and that the proposals contained in the report will meet with acceptance.	*Le comité espère que le présent rapport, qui constitue le résultat de cinq années de travail et de consultations, années au cours desquelles ses membres ont eu évidemment à assumer leurs multiples autres obligations professionnelles, sera jugé utile, et il en souhaite sincèrement l'adoption.*

Indeed, for the members of the Committee, each of whom was a respected member of the legal community, to have put the kind of work required in the production of the new texts without thinking of their subsequent acceptance by the legal community or even the public at large would have been unthinkable. Yet, as I discussed above, I believe that the new French version of the *Constitution Act, 1867*, in its current state, would face significant objections to its political legitimacy. What could the Committee have done differently to ensure a better reception of its translation? If as I have stated, neither the operation of the Equal Authenticity Rule itself, nor the successful adoption of the new French text by the unanimity of Parliament and the legislatures (because of the lack of meaningful review and debate, at least by the standards of public debate normally required for amendments to the Constitution, as demonstrated in the context of the highly controversial Meech Lake and Charlottetown Accords), is enough to ensure its political acceptance, could the Committee have provided its translation with an alternative source of legitimacy? I believe it could have, by appealing to the pre-existing French versions of the *British North America Act, 1867*.

As I stated above, the ultimate political legitimacy of the *Constitution Act, 1867* is historical. It draws its true force from its monumental status as the embodiment of the founding agreement of Confederation. That agreement was ultimately consecrated in the Imperial Parliament and in the language of the British Empire; but a large part of Her Majesty's loyal British subjects who formed the new Dominion was French-speaking. They reviewed, dis-

cussed, opined on, and either supported or rejected the bases of the new arrangement, all in the French language. As noted in chapter 3, there was intense debate on and discussion of the text itself in the French-language newspapers of the time, in numerous pamphlets, and in the French-language speeches of Confederation's partisans and opponents in what became Quebec. Thus, while there was never an official French text of the *British North America Act, 1867*, the *Act* nevertheless had a significant *intertextual* presence in French.[177] That is to say, the provisions of the *Act*, in their various French versions, were translated, alluded to, and cited in a variety of French texts, in various more or less standardized forms, and became a part of the French-language political discourse of the time. Both government and opposition newspapers helped turn English-language negotiations into French-language debate. We should not underestimate the power of the press, even in the semi-literate society of nineteenth-century Canada East: the trickle-down effects of the texts printed in the major French-language papers would have been important. Prof. A.I. Silver notes:

> [T]he influence of the press probably did not stop with its actual circulation, for facts and opinions picked up by one reader might be spread to many other people by word of mouth. What an editor wrote one day in his paper, he (or a political colleague) might say the next (or perhaps had said the day before) at a public meeting ....[178]

To this must be added the letters and documents of an official or semi-official character that were important textual building blocks in the elaboration of the ultimate text of the *Act*, some of which had official French versions. For example, an official report of the *Quebec Resolutions* was published in French by the Queen's Printer.[179] All of these documents would have had a great impact on the shaping of French-language discourse about Confederation and the *Act* itself. While not providing the uniformity of a standard version—

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[177] I return to this point in chapter 5.
[178] A.I. Silver, *The French-Canadian Idea of Confederation, 1864–1900*, 2nd ed. (Toronto: University of Toronto Press, 1997) at 29–30.
[179] Found e.g. in Quebec, Bibliothèque et Archives nationales du Québec, Fonds Hector Langevin (Collection Chapais), P134, box no. 33 (1960-01-123/33), file no. 1.

as was made clear in chapter 3—they nonetheless delineate the intertextual contours of a French "shadow" of the *British North America Act, 1867*, with the help of which it would be possible to reconstruct, in a manner of speaking, a composite original French version.[180]

So it would in fact be inaccurate to suggest that there was no French "version" of the *Act*, contemporary with the English text, which could inform public discourse in French Canada. There were, indeed, several versions; and these versions often shared a common vocabulary. One could in fact contend that the *British North America Act, 1867* was *expressed* in French almost at the same time as it was in English, albeit not in one single, definitive version. Moreover, some of this French vocabulary of the *Act* may have played a significant role in the francophone public's acceptance or rejection of the federal agreement.[181] In those circumstances, a text that would reflect this common vocabulary, this common expression of the English text of the *British North America Act, 1867* in French, could perhaps rightfully claim to be an equally valid expression of the "deal", of the agreement that was reached at Confederation and provided the basis for our current constitutional order. When one reflects that this is indeed the "version" of the agreement that would have been presented to a significant portion of the population of what was then to be Canada, and that this population would have supported or rejected the agreement based on that "version", one could certainly make an argument that such a "version" has an equal claim to the historical legitimacy that is the true force of the English text of the *Act*.

I believe, therefore, that the Committee could have significantly mitigated—while perhaps not completely eliminated, as discussed below—objections to the legitimacy of its new translation by drawing on the pre-existing French versions of the *Constitution Act, 1867*, as well as the significant intertextual presence of the *Act* in its historical context, to

[180] Of course, I am not suggesting that one could literally reconstruct an entire French version of the *British North America Act, 1867* using this method, but merely that such a methodology could inform the drafting of any independent translation of the *Act*.
[181] E.g. the translation of "dominion" by "*puissance*", discussed in chapter 5.

produce a translation that could purport to be, in a sense, a revised draft of the "original", historical version of the French text of the *Act*, and thus claim equal legitimacy to the English text.

But the Committee did not make significant use of the pre-existing versions of the *Act*. Indeed, it does not appear to have considered any previous versions except for the standard version included in the *Revised Statutes*. While sometimes begrudgingly accepting the necessity of historical language, the Committee largely chose to prioritize the independence of its own version from any previous French incarnation of the *Act*, thus ensuring that the "*français authentique"* of its modern version would be unblemished by any unfortunate reminders of past dalliances with English idiom. Rather than allow too much of the bastard *franglais* of our forefathers to jar its cosmopolitan, "refrancized"[182] modern readers, the Committee produced a text that belies any meaningful connection to the nineteenth century. In so doing, it precluded itself from claiming for its text any share in the historical legitimacy that may rightfully belong to the older French versions of the *British North America Act, 1867*.

But would this alternative source of legitimacy be enough to completely eliminate objections to an "official" French version? For the basic historical fact remains that there actually was no official French version. This need not necessarily have been so, as I discussed in chapter 3, but it was so. The French-speaking Fathers of Confederation approved the text in its English form without insisting on a version in their mother tongue. Their assent was given in English to an English text, and not to any French translation. In these circumstances, it is difficult to see how even such an "original" version of the *Act* in French could claim the full historical legitimacy of the English text.

[182] See Jean-Claude Gémar, *Traduire ou l'art d'interpréter: fonctions, statut et esthétique de la traduction*, t. 2: *Application* (Sainte-Foy, QC: Presses de l'Université du Québec, 1995) at 40–41.

And why should it? The notion that we can adopt, *ex post facto*, an "official", fully equal French version of a document originally drafted over a century ago in English only is a bit of wishful thinking; an overestimation of our power over historical reality. The fact that the adoption of the *British North America Act, 1867* as a unilingual instrument constitutes an instance of historical linguistic inequality should not delude us into thinking that we can remedy that inequality. We can, and indeed perhaps we should, change the fact that Canada does not currently have a fully bilingual Constitution. That is the contemporary linguistic inequality that the drafters of section 55 sought to remedy. Their error was to think that this could easily be done by purporting to change history and insisting that, somehow, through the magic of Part V of the *Constitution Act, 1982*, a modern French version of the *Constitution Act, 1867* could be granted the historical legitimacy of the original.

We have no power to change historical inequalities, only current ones. Perhaps the time has come to revisit the state of our Constitution and ask whether it truly embodies our guiding principles and aspirations as Canadians today. But so long as we cling to the documents of the past, we cannot pretend to make them other than what they are: imperfect monuments of an imperfect history. The future is ours to shape; the past can only be acknowledged, and—one must hope—understood.

Chapter 5: The Problem of Historical Accuracy

I. The Perils of Translation

"*Les origines de la traduction*", writes Prof. Jean-Claude Gémar, "*se perdent dans la nuit des temps et se confondent avec l'histoire de l'humanité et du langage.*"[183] Yet in spite of this respectable longevity, the art of the translator is often misunderstood and underestimated.[184] Translation is often viewed as a simple and formulaic act, a mindless transfer of words from one language to the other, requiring no skill beyond a mastery of the source and target languages. In reality, of course, it is a very complex endeavour, one which in many cases exercises to their full extent the intellectual capacities of the translator. The translator is no harmless drudge: rather, he is an "intervenient being"[185] whose complex relationship to both the source and target texts can have a profound impact on the perception of one and the reception of the other. As Brian Mossop puts it, "As a translator, I cannot write in no style, projecting no particular voice towards the readers. I must intervene, more or less consciously, selecting one wording rather than another."[186] Far from a mechanical exercise, then, translation is an endless series of choices, a gauntlet of dilemmas, and each one of the choices made by the translator will have an impact on the finished product and its precise relationship to its source text.

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[183] Jean-Claude Gémar, *Traduire ou l'art d'interpréter: fonctions, statut et esthétique de la traduction*, t. 1: *Principes* (Sainte-Foy, QC: Presses de l'Université du Québec, 1995) at xiii ("The origins of translation are lost in the mists of time, and merge with the history of humanity and of language." [translated by author]).

[184] Let me hasten to point out that I make no claim to any expertise in the area of translation theory (or *traductologie*), a fact that will no doubt be obvious to anyone with such expertise. My critique of the Committee's translation proceeds from the perspective of the legal historian. As such, I would welcome any contributions to my analysis in the form of—preferably constructive—criticism from the perspective of translation theory.

[185] See Carol Maier, "The translator as an intervenient being" in Jeremy Munday, ed., *Translation as Intervention* (London: Continuum International, 2007) 1.

[186] Brian Mossop, "The translator's intervention through voice selection", *ibid.* 18 at 19.

These choices must be guided by a thoughtful inquiry into the nature and purpose of the text to be translated: "Above all, the translator should take account of pragmatic considerations: To whom is the target text addressed? Why is the [source] text being translated? What are the conventional rules in the target culture for producing texts for that particular purpose? Who wrote the source text? When and where was the source text written?"[187] These are crucial considerations in determining the nature of the translation strategy to be adopted.

In the case of the *Constitution Act, 1867*,[188] one must consider the status of the text to be translated,[189] and its dual nature as a legal instrument and a historical document. Moreover, it is a particular type of legal instrument (the founding constitutional document of our federation) and a particular type of historical document (the textual embodiment of the historic pact which enabled that founding). It is unique in its importance to our constitutional history, and our current constitutional order. It is clear that special considerations apply to its translation.

In addition, one must also consider the status proposed for the translation itself. We must always remember that what section 56 of the *Constitution Act, 1982*[190] requires is an *equally authentic* text; that is, one that would purport to be fully equal to the English text. Such equality can only be achieved if the new translation reflects the meaning of the *Constitution Act, 1867* in its entirety. And much of that meaning is dictated by the historical nature of the *Act*. The legal importance of the *Constitution Act, 1867* is unquestioned. But we must also remember that it is one of our most important historical monuments, one which is the

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[187] Susan Šarčević, *New Approach to Legal Translation* (The Hague: Kluwer Law International, 1997) at 18, citing Hans G. Hönig & Paul Kussmaul, *Strategie der Übersetzung: Ein Lehr- und Arbeitsbuch* [Translation Strategy: A Text- and Workbook] (Tübingen, Germany: Gunter Narr, 1982) at 23.
[188] *Constitution Act, 1867/Loi constitutionnelle de 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.
[189] See Šarčević, *supra* note 187 at 19–21.
[190] *Constitution Act, 1982/Loi constitutionnelle de 1982*, s. 56, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

written reflection of what is arguably the most important event in our history. All readers—professionals and laypersons, scholars and citizens—should reasonably expect to find in what is termed an official, equally authentic translation, the faithful reflection of all of the elements, both legal and historical, that are present in the English text. That is indeed a high standard; but any translation that wishes to call itself the equal of the English text must meet it, or it is not worth having.

Achieving a translation of the *Constitution Act, 1867* that accurately reflects all of its facets is no easy task. It is an undertaking fraught with difficulty, and perhaps, for this reason alone—leaving aside the reasons given in chapter 4—it is one that should not be attempted. But if it is worth doing, then surely it is worth doing well. What follows is a critique of the Committee's translation from the perspective of legal history. As I stated above, the Committee claimed to have taken full account of the historical nature of the *Act* in its translation; and as I point out in Part II below, in some instances it did take it into account. Yet in spite of these efforts, I believe that the Committee did not give the historical character of the *Constitution Act, 1867* the serious consideration that it deserved. It chose to privilege modernity and uniformity, and this choice, as all choices of the translator, had a profound impact on the finished product.

The text that the Committee produced is one that can rightly be called, in many instances, anachronistic. Anachronism in literature is often seen as a harmless gaffe, one that at worst brings embarrassment to its author and merriment to the perceptive reader. But anachronism in the translation of a historical document is no laughing matter. The essence of anachronism is that it obscures historical reality by projecting the present onto the past. Anachronistic translation cannot be accurate translation. If the Committee was truly serious about its treatment of the *Constitution Act, 1867* as a historical document, then it should have made every effort to ensure the absence of anachronism in its translation. It did, ad-

mittedly, make some effort. But not the sustained, systematic effort required given the importance of its translation.

There are three forms of anachronism that I discern in the Committee's translation. I have termed them (a) *conceptual anachronism*, (b) *terminological anachronism*, and (c) *lexical anachronism*. These last two are really variants of the same problem, which as a whole could be called linguistic anachronism, but I separate them because of their differing impacts on the historical accuracy of the text, as I discuss below. I should mention that these terms are used for lack of better ones: they have no claim to scientific merit, and have no currency beyond this work. I will address each one in turn, and I need not hide that I have listed them in the order of what I perceive to be their seriousness.

The examples given below are meant as illustrations, and should not be taken as an exhaustive list. The arrow (→) between two terms means that the first one (invariably the English term) has been translated by the other (the French term) in the Committee's translation. This is followed by the section of the *Act* in which the translation is found.

II. Anachronism in the Committee's Translation

A. Conceptual Anachronism

Conceptual anachronism is the result of an anachronistic reading of the source text, such that a concept that could not be found in the source text is projected into it by the resulting translation. In other words, it results from the translator's anachronistic interpretation of the source text, and not from any anachronistic rendering in the target text. There is only one instance of conceptual anachronism that I discern in the Committee's translation, but I believe it is significant, especially in light of the importance of the concept involved for Canada's subsequent constitutional development.

1) "... to be federally united into One Dominion ..." → "... s'unir en une fédération ayant statut de dominion ..." (Preamble)

The first clause of the Preamble to the *Constitution Act, 1867* reads as follows:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom ....[191]

The Committee translates this clause in the following way:

> *Attendu :*
> *que les provinces du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick ont exprimé le désir de s'unir en une fédération* ***ayant statut de dominion*** *de la couronne du Royaume-Uni de Grande-Bretagne et d'Irlande et dotée d'une constitution semblable dans son principe à celle du Royaume-Uni ....*[192]

The Committee has chosen to translate the single English word "Dominion" by the expression "*ayant statut de dominion*". I note first that this is a literal inaccuracy, that is, the English text does not say "having the status of dominion", which one would expect given the French wording of the translation. But more importantly, this is a conceptual inaccuracy, because the words "having the status of dominion", if they had been found in the original English text, would have had no meaning whatsoever.

The concept of "dominion status" did not emerge until forty years after the passing of the *British North America Act, 1867*, in 1907; moreover, no attempt was made to define its scope until 1926, and its true nature was not formally defined until the passing of the Statute of Westminster in 1931.[193] There is irony in the Committee's translation: the word "dominion" was chosen in the expression "dominion status" (as opposed to, say, "self-governing

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[191] *Constitution Act, 1867*, Preamble.
[192] Department of Justice Canada, *Final Report of the French Constitutional Drafting Committee responsible for providing the Minister of Justice with a draft official French version of certain constitution enactments* (Ottawa: Department of Justice Canada, 1990), online: <http://www.justice.gc.ca/eng/pi/const/index.html> [*Final Report*], Enactment No. 1, at 29.
[193] See David W. McIntyre, "The Strange Death of Dominion Status" (1999) 27 Journal of Imperial and Commonwealth History 193 at 193–195; K.C. Wheare, *The Statute of Westminster and Dominion Status*, 5th ed. (London: Oxford University Press, 1953) at 21–40.

status" or "autonomous colony status") precisely because of its association with Canada, which at the time referred to itself formally as the Dominion of Canada, and was the first such self-governing part of the British Empire.[194] This formal title was taken from the *Act* itself, as particularly apt for Canada in light of its association with a verse of Psalm 72: "He shall have dominion also from sea to sea, and from the river unto the ends of the earth."[195] And according to Prof. David McIntyre, it was Sir Wilfrid Laurier who advocated its adoption as a general term for all self-governing colonies of the British Empire.[196] Thus, there was there no such thing as "dominion status" in 1867, and the term itself would likely never have been used later had it not been for its presence in the *Act*.[197] The Committee's translation relies on circular reasoning, and thereby imports a concept into the text of the *Act* that simply could not have been there. The French-speaking reader of the Committee's translation is likely to make a startling discovery in the history of the Commonwealth: not only did "dominion status" exist in 1867, it was expressly granted in an act of the Imperial Parliament!

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[194] Although responsible government in the British colonies was not new at the time of Confederation, there was nonetheless a feeling that the creation of the Canadian federation marked a new era in colonial autonomy; see e.g. Donald Creighton, *The Road to Confederation: The Emergence of Canada, 1863–1867* (Toronto: Macmillan, 1964) at 435–39.

[195] See Ps. 72:8 (A.V.); this happy coincidence was no doubt the source of the formal title "Dominion of Canada". But dominion was in no way unusual as a generic term for a British colony (e.g. "dominions beyond the seas", Virginia as "Old Dominion", etc., and even "dominion of Wales": see *Oxford English Dictionary*, 2nd ed. [*O.E.D.*], *s. v.* "dominion", 2.b.). Indeed, its generic nature is made clear by its presence in an earlier draft of the *British North America Bill*, where Canada's formal title would have been "Kingdom": "... shall form and be one united dominion, under the name of Kingdom of Canada ...". See G.P. Browne, ed., *Documents on the Confederation of British North America* (Toronto: McClelland and Stewart, 1969) at 265 (s. 4 of Document No. 84). This passage also makes clear that, whatever the history of the formal title "Dominion of Canada" (most versions involve a chance encounter between Tilley and his Bible), the *Act* itself uses the term in a generic sense; the entity it creates in s. 3 is simply named "Canada"; nothing should be made of the fact that "dominion" is capitalized, as nouns were routinely capitalized in British statutes at the time (see also Peter Hogg, *Constitutional Law of Canad*a, vol. 1, 5th ed. Supp., looseleaf (Scarborough, ON: Thomson Carswell, 2007) ¶ 5.1(e) at 5-9.

[196] McIntyre, *supra* note 193 at 194.

[197] See *ibid*. for the suggestions of the other colonies as to terms for the self-governing parts of the Empire.

It is not surprising that the Committee struggled with the translation of "dominion". But a greater consideration of the prior French versions of the *British North America Act, 1867* might have allowed it to draw on the experience of its predecessors. The problem is that there is no true French equivalent for the word "dominion". In its sense of "[t]he territory owned by or subject to a king or ruler, or under a particular government or control",[198] its most accurate translation would be something like "*domaine*",[199] "*possession*", or "*territoire*", all of which sound rather undignified in this context. The first translators of the *Act* dealt with this problem in a variety of ways. The translation given in *La Minerve* in early March 1867[200] uses the very generic "*État*", a somewhat accurate translation if taken in its sense of "*[a]utorité souveraine s'exerçant sur l'ensemble d'un peuple et d'un territoire déterminés*",[201] although it carries some connotations of independence, which would be inappropriate in this case, since "dominion" was chosen precisely because of its connotations of subjection to the British Crown. Other papers, notably *L'Événement* and *L'Ordre*, used the somewhat more positive "*souveraineté*", and this term seemed to gain official recognition for a while.[202]

Early on, however, the more lacklustre terms were replaced with the rather pompous "*puissance*".[203] This translation turns the notion of subjection inherent in "dominion" on its head, and makes the formal title "*Puissance du Canada*" ("Power of Canada") much

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[198] See *O.E.D.*, *s. v.* "dominion", 2.b.
[199] This was the translation given in the title to the royal proclamation of 22 May 1867 by *L'Événement* (5 June 1867); see also the translation of s. 3 of the *Act* in *Le Journal de Québec* (2 March 1867) at 1.
[200] See *La Minerve* (2 March 1867). As discussed in chapter 3, most other French-language papers either copied *La Minerve*'s translation outright, or followed it closely. A notable exception is *Le Journal de Québec*, which artfully, if rather inaccurately, dodged the bullet: *"... ont exprimé le désir de former une union fédérale, en se constituant sous la couronne du Royaume-Uni ..."*; see *Le Journal de Québec* (2 March 1867).
[201] *Nouveau Petit Robert* (2010), *s. v.* "État", III.B.
[202] *L'Événement* (5 June 1867); *L'Ordre* (5 June 1867); see also *Le Canadien* (10 June 1867).
[203] See e.g. the translation of the royal proclamation in *La Minerve* (5 June 1867), and the *Courrier de St-Hyacinthe* (6 June 1867). Note that these were both pro-Confederation papers.

more formidable than the humble "Dominion of Canada".[204] It is a brilliant, if disingenuous, translation, as it relies on the ambiguity of "dominion" itself to make its claim to accuracy.[205] Indeed, if one were to translate the famous verse of the Seventy-second Psalm from the Authorized Version into French,[206] one could accurately render it as "*Et il aura la* ***puissance*** *d'une mer à l'autre* …".[207] But one could not translate a phrase such as "(his or her) dominions beyond the seas" by "*(ses) puissances au-delà des mers*",[208] since this would convey the complete opposite of the notion of subjection intended by the word "dominion" in that context.

But "*puissance*" was a brilliant choice, because it was glamorous, and it allowed the project of Confederation to be sold as the building of a great nation.[209] The connotations of "*puissance*" may have played an important role in making Confederation more palatable to French Canadians, and painting an optimistic picture of the great future of the new country. Certainly the opposition understood this, and expressly railed against it in at least one instance:

> *Les anglais [*sic*] diront "The Dominion of Canada," qui inplique [*sic*] également l'idée de sujétion à un pouvoir supérieur et l'idée de souveraineté chez le supérieur. Les français [*sic*] n'ont aucun mot pour rendre la double signification de* Dominion*.*

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[204] One might think that if the Americans had cared to read the French translation of the *British North America Act, 1867*, they would no doubt have felt even more threatened by a "*Puissance du Canada*" than by a "Kingdom of Canada".

[205] "Dominion" has the primary sense of "[t]he power or right of governing and controlling; sovereign authority; lordship, sovereignty; rule, sway; control, influence"; see *O.E.D.*, *s. v.* "dominion", 1.

[206] Because, at least officially, the French-speaking peoples have traditionally been Roman Catholic, there is no equivalent in French to the Authorized (King James) Version or the German *Lutherbibel*, that is, there is no traditional standard translation of the Bible. The Latin text of the Vulgate has a verb where the Authorized Version has a noun: "*Et* ***dominabitur*** *a mari usque ad mare* ..." (cf. the Douay Version's "And he shall rule from sea to sea ..."). The classical French translation by Lemaistre de Sacy reads accordingly: "Et il regnera depuis une mer jusques à une autre mer ...".

[207] Note that one could also replace "dominion" with "power" in this Bible verse without affecting the meaning: "He shall have **power** also from sea to sea ...".

[208] See e.g. the *Royal Titles Act, 1901* (U.K.), 1 Edw. VII, c. 15, reprinted in S.C. 1902, where the French translation of "His Majesty's dominions beyond the seas" is "*les* ***possessions*** *de Sa Majesté au-delà des mers*".

[209] This was precisely the reason for the Fathers' initial proposal of the term "kingdom".

> *La plupart aspirant avec impatience à la réalisation d'une idée commune ont accepté sans discussion la traduction du mot par* PUISSANCE*, comme si nous cessions d'être colons, par la Confédération.*
>
> *Certes! si un peuple peut devenir une* Puissance*, parce qu'il entre dans la voie ruineuse d'une armée permanente, d'une marine, de fortifications, pour le compte d'un pouvoir lointain, qui aura seul le droit de faire la guerre ou la paix;*
>
> *Si c'est devenir une puissance que de se charger de taxes directes et indirectes, de doubler la dette publique et les dépenses ordinaires et extraordinaires, dans l'intérêt de ce pouvoir éloigné, il faut confesser que nous sommes ou allons devenir une puissance!*[210]

This excerpt is important for two reasons. First, it provides evidence that the choice of "*puissance*" as a translation of "dominion" did indeed influence at least some public opinion in favour of Confederation. Second, it provides evidence of the acceptance of the term as an official translation. Indeed, the term "*puissance*" achieved a quick dominance, being used as the standard translation of "dominion", not only in the unofficial translation of the *British North America Act, 1867*,[211] but more significantly, in the official French version of federal statutes, as early as the 1867 sessional statutes.[212] We therefore have evidence of the historical importance of the admittedly inaccurate translation of "dominion" by "*puissance*".

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[210] *La confédération, couronnement de dix années de mauvaise administration* (Montreal: Presses du Journal *Le Pays*, 1867) at 38 ("The English will say 'The Dominion of Canada', which implies both the idea of subjection to a higher authority and the idea of the sovereignty of that higher authority. The French have no word to render the double meaning of 'dominion'. The majority [of French Canadians], impatiently aspiring to the realization of a common idea, have accepted without question the translation of the word as '*puissance*', as if by Confederation, we ceased to be colonials. Certainly, if a people can become a *power*, because it enters into the ruinous path of a permanent army, of a navy, of fortifications, for the benefit of a faraway authority, which will alone be able to make war or peace; if becoming a power means burdening ourselves with direct and indirect taxes, doubling the public debt and ordinary and extraordinary expenses, all in the interest of that faraway authority, we must confess that we are or will become a power!"). The authorship of this anonymous pamphlet is sometimes attributed to A.-A. Dorion, the famous opposition leader. Whatever one may think of his analysis of Confederation, one must admit that his criticism of the translation of "dominion" is unassailable.

[211] Prof. Jean-Charles Bonenfant asserts in his biographical sketch of the translator, Eugène-Philippe Dorion, that this was through the direct intervention of Sir George-Étienne Cartier; see *Dictionary of Canadian Biography*, vol. X at 235; if this is true, it is further evidence of the political importance of this particular translation.

[212] See e.g. *An Act respecting the Office of Speaker of the House of Commons of the Dominion of Canada/Acte concernant la charge d'orateur de la chambre des communes de la Puissance du Canada*, S.C. 1867, c. 2.

So what should the Committee have done? It will be clear by now that the translation of "dominion" is a bit of a minefield. One has to navigate between the Scylla of inaccurate translation and the Charybdis of unhistorical usage. In my view, the Committee should have maintained the translation of "dominion" as "*puissance*"[213] found in the *Revised Statutes* version (with the word "Dominion" provided in parentheses), and provided a marginal note to explain the problems with this translation. I note that simply using the word "*dominion*" (now found in French dictionaries) would be inaccurate because that loanword has the specific meaning of "self-governing part of the British Empire", which would perpetuate the anachronism of the current proposal.

But whatever the ultimate solution, one should not allow the official French version of the *Constitution Act, 1867* to contain such a conceptual inaccuracy.

B. Terminological Anachronism

The next two categories of anachronism are really variants of the same problem. This problem results from the fact that languages, while too often seen by their users as sacred and unchanging monuments, are actually living organisms in constant evolution and existing in various manifestations. The command, "Translate this sentence into French (or English or Chinese or any other language)" might be seen as a simple one. But what is often forgotten is that, explicitly or by implication, one must first answer the question, "What kind of French (or English, etc.)?" Anyone who has ever heard a Scotsman conversing with a Jamaican, or a Senegalese speaking to a French Canadian, knows the range of differences that the names "English" or "French" can encompass. And anyone who has ever read the *Chanson de Roland* or *Beowulf*, or even Shakespeare or Rabelais, knows the distance there can be between the language of our ancestors and ours. Yet we too often continue to assume that

[213] The adoption of "*puissance*" as the official translation of "dominion" in statutes and other official documents would in itself be sufficient grounds to retain the term. See the discussion below in the section on terminological anachronism.

norms of linguistic "correctness" span space and time, that what is good French in Paris is necessarily good French elsewhere, and that what was good English a century ago is good English today. Jean-Claude Gémar points out that "*l'usage ou encore le degré de lisibilité d'un texte sont liés à des règles d'écriture fixées par le temps et les élites (monde des écrivains, des académies et de l'enseignement), mais qui ne cessent néanmoins d'évoluer avec les générations et les modes du moment*",[214] while Emmanuel Didier reminds us that "*[l]es normes linguistiques entrent en permanence en conflit dans le temps et dans l'espace*".[215]

Yet despite these reminders, we continue to lack perspective where linguistic correctness is involved. And for historical reasons, this is especially true in French Canada, where the fear of assimilation has turned into neurosis, and the phobia of anglicisms has spawned an industry of self-help tools to teach us to speak our mother tongue properly and purely; nor are we content with learning it ourselves, but we feel the need to teach it to our dead forebears.

The work of the Committee broadly fits within this ideology of "*refrancisation*".[216] It is an ideology that sees very little to appreciate in the French legal translations from the time of the Conquest to the Quiet Revolution, a period that Prof. Gémar has called "*la traversée du désert*".[217] Let me be clear: I am not advocating a return to the translations of old, which did indeed too often mechanically ape the English original. I am not suggesting that today's French legal texts should be written in anything but clear, "standard", contemporary

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[214] Jean-Claude Gémar, *Traduire ou l'art d'interpréter: fonctions, statut et esthétique de la traduction*, t. 2: *Application* (Sainte-Foy, QC: Presses de l'Université du Québec, 1995) at 60 ("usage or even the degree of readability of a text are tied to rules of writing fixed by time and the elites (the world of writers, academies, and teachers), but that nonetheless never cease to evolve with the generations and the fashions of the time" [translated by author]).
[215] Emmanuel Didier, *Langues et langages du droit* (Montreal: Wilson & Lafleur, 1990) at 444 ("linguistic norms permanently come into conflict across time and space" [translated by author]).
[216] See Gémar, *supra* note 214 at 40–41.
[217] See *ibid*. at 68 ("the crossing of the wilderness").

legal French.[218] But special considerations necessarily apply to the translation—and evaluation—of historical texts. Much of the Committee's translation is a sacrifice to the twin gods of purism and modernism. And the victim of this sacrifice is historical perspective.

Essentially, the problem is that many of the Committee's translation choices ignore the variants represented in earlier versions of the *Act*, for reasons of purism and/or modernism, without appreciating the important intertextual presence of these variants. The *British North America Act, 1867* may never have had an official translation; but it reflected official French texts that came before it, and it inspired official French texts that came after it. Ignoring these relationships creates the risk that the new translation will be completely divorced from that intertextual environment, and thus completely decontextualized. Perhaps the most frustrating aspect of this part of my critique is that the Committee did indeed, at least in some instances, expressly recognize this logic and apply it. But it did so unsystematically and too often allowed its sense of "correctness" to override its sense of historical accuracy. In that sense, then, my critique is simply an application of principles that the Committee itself admitted.

I have divided the manifestations of this problem into two categories. The first I have called terminological anachronism; this is meant to reflect that the variants rejected by the Committee in this category had specific legal meanings at the time of the drafting of the *Act*, in general because they were defined in statutes. This creates special problems for the legal historian, in that the new translation does not correspond to the legal texts of the time that it is meant to reflect, and subsequent texts do not match the language of the *Act*, from which they draw their authority. Beyond this unfortunate effect on historical research,

[218] Nor, for that matter, would I advocate drafting a modern English statute in an eighteenth- or nineteenth-century style. Much of the problem with the literal French translations so decried by critics is their all-too-faithful reproduction of the English original, which was itself drafted in the convoluted jargon preferred at the time in keeping with the maxim "*abundans cautela non nocet*". Note e.g. that much of Gémar's criticism of the French translation of the *Quebec Finance Act, 1774* applies equally to the English version. See Gémar, *ibid*. at 67.

however, terminological anachronism simply obscures historical realities, which are, in some cases, important to our proper understanding of legal and constitutional history.

I have called the second category lexical anachronism. This is not meant to suggest a criticism of the modern style in which the proposed text is written, but the rejection of historical forms and vocabulary. This is the same issue as terminological anachronism, but I have separated them simply to note that the variants rejected in this category are ones that did not have specific legal meanings, but might nevertheless have been included because of either their prominence in earlier or subsequent texts, or simply by virtue of the fact that they are of interest for the history of the language. My logic for the preservation of these last variants relies on the problematic notion of "linguistic heritage",[219] and the fact that an official French translation of the *Constitution Act, 1867* might be one of the few documents where such variants might be preserved. I hope the examples below will make my meaning clearer. Before turning to examples of terminological anachronism, I will start with the instances where the Committee did indeed recognize historical principles in its choices.

1) "free and common Socage" → "franc et commun socage" (s. 23(3))

In its *First Report*, the Committee retained the translation of the phrase "free and common Socage" by "*franc et commun socage*", and added a marginal note that explained "[t]he words and expressions used in this subsection express concepts of feudal law" ("*[l]a terminologie particulière de ce paragraphe correspond à des notions de droit féodal*").[220] This was carried through, albeit without the marginal note, to the *Final Report*. With this I can only concur, as with the change from "*bien-fonds ou bâtiments*" in the *First Report* back to

[219] See discussion in Didier, *supra* note 215 at 442–444.
[220] Department of Justice Canada, *First Report of the French Constitutional Drafting Committee responsible for providing the Minister of Justice with a draft official French version of certain constitutional Acts* (Ottawa: Department of Justice Canada, 1986) at 22a.

the original "*terres ou tènements*" in the *Final Report*.[221] It is one of the ironies of history, of course, that these "English" terms have French origins.[222]

2) "felony" → "félonie" (s. 31(4))

Again, the Committee here recognizes that the translation "*félonie*" should be maintained because of its intertextual presence. Its marginal note states: "The term *félonie* is being proposed because this category of offence, no longer extant, was called this in French at the time" ("*Maintien du mot « félonie » parce que cette catégorie d'infractions, aujourd'hui disparue, était ainsi dénommée en français de l'époque*").[223] The Committee then refers to a specific instance of the word in the *Consolidated Statutes of Canada* (I shall return to this below). Given all that I have said so far, it seems that the Committee and I are in perfect agreement. As I mentioned above, I simply wish the Committee had applied this same logic in more instances.

3) "Registrar" → "registraire"; "Solicitor General" → "solliciteur général" (ss. 63, 83)

The Committee here applies the same logic: "These titles are found in provincial statutes of the time" ("*Ces titres renvoient à des lois provinciales contemporaines de la Loi constitutionnelle de 1867 où ils figurent*").[224] It does so even though it considers "*solliciteur général*" an "inappropriate literal translation from the English" ("*calque contre-indiqué de l'anglais*").[225] This is quite a categorical statement, one where the Committee lets its sense of contemporary correctness overtake its historical perspective. "*Solliciteur*" in the sense of "*avocat*" was common in classical French.[226] As with "*acte*", "*orateur*", and "*statut*", discussed

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[221] See *First Report*, *ibid*. at 22; *Final Report, supra* note 192 at 34.
[222] Anglo-French, to be more precise: see *O.E.D.*, *s. v.* "socage" and "tenement".
[223] *First Report*, *supra* note 220 at 23a.
[224] *First Report*, *ibid*. at 30a.
[225] *Ibid*.
[226] See Jean Dubois, René Lagane & Alain Lerond, *Dictionnaire du français classique* (Paris: Larousse, 1971), *s. v. "solliciteur"*; cf. Émile Littré, *Dictionnaire de la langue française* [*Littré*], *s. v.* "solliciteur",

below, this is a case where a peculiarly British concept was rendered in the closest French equivalent known at the time. "*Solliciteur général*" may well be a calque, but it is a natural one that need not be condemned.[227]

4) "Aliens" → "aubains" (s. 91(25))

Again, the Committee maintains this archaic term because of statutory references at the time. I am generally in agreement with this. Ironically, however, this is an instance where the more modern equivalent might have been preferred. Indeed, in the *Civil Code of Lower Canada* of 1866, the term "*étranger*" (the modern term used in the *Code Napoléon*[228]) had been rendered as "alien",[229] providing a contemporary attestation for the equivalence of the two terms. In addition, the use of the term "*aubain*" might have been seen as somewhat inaccurate even at the time, since, properly speaking, the "*aubain*" was not simply an "*étranger*", but an "*étranger*" subjected to the "*droit d'aubaine*".[230] In light of this, and given the Committee's general penchant for modernity, I am surprised that it did not choose the more common "*étranger*". In literary use, however, "*aubain*" has long been a synonym of "*étranger*", and given its use in most of the original translations of the *Act*, I agree that it was preferable to retain it.

The Committee also chose to maintain, for historical reasons, the terms "*banques d'épargne*", "*syndics d'école*", "*écoles dissidentes*", and "*accise*". Those were, in my view, the right decisions. Up to this point, I have reviewed those historical terms that the Committee

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3º; *Grand Larousse de la langue française* [*Grand Larousse*], *s. v.* "*solliciteur*", 2; *Trésor de la langue française* [*T.L.F.*], *s. v.* "*solliciteur*", A.1. (and notice A.2.).

[227] See discussion of "*acte*", "*orateur*", and "*statut*", below; I need hardly add that the etymology given in the *Nouveau Petit Robert* (*s. v.* "*solliciteur*"), according to which the term would be a "*calque de l'anglais américain* General Solicitor", is wrong in too many ways to list.

[228] See e.g. arts. 11–16, 726, and 912 C.c.F. (1804).

[229] See e.g. arts. 20–29 and 609 C.C.L.C. (1866).

[230] "Aliens" were also subjected to disabilities at common law, but not as severe as the "*droit d'aubaine*", by virtue of which all of an alien's property escheated to the lord, king or state: see e.g. Blackstone's *Commentaries*, I, 10; Alfred Howell, *Naturalization and Nationality in Canada* (Toronto: Carswell & Co., 1884).

chose to retain. It is apparent, then, that the Committee did have some consideration of historical perspective. I turn now to those instances to which it should have extended that reasoning.

5) "Act" → "Loi" (s. 1)

From 1867 until 1982, the *British North America Act, 1867*, was known in French as the "*Acte de l'Amérique du Nord britannique, 1867*".[231] This long history did not count for much in the eyes of the Committee. It stated in the marginal note to section 1 in its *First Report*:[232]

The retention of the informal French title *Acte de l'Amérique du Nord britannique, 1867*, is not being proposed because of the following problems: —improper use of the word *Acte*, the correct word in French being *loi*; ...	*Le titre traditionnel mais non officiel, à savoir « Acte de l'Amérique du Nord britannique, 1867 » n'a pas été retenu parce qu'il présentait les inconvénients suivants :* *—emploi impropre du mot « acte », l'équivalent correct de cet anglicisme étant « loi »; ...*

While the Committee is quite right in stating that the title was "informal" or "*non officiel*", it should properly have noted that its objection being to the word "*acte*", it was really objecting to a usage that had been consecrated in hundreds of statutes with official French titles both before and after Confederation. This long tradition is dismissed summarily by the Committee's categorical statement that "the correct word in French [is] *loi* ..." ("*l'équivalent correct de cet anglicisme [est] « loi » ...*"). I have already made the point that linguistic "correctness" is a varying concept. The Committee's objection to "*acte*" (as with "*solliciteur*") is apparently founded on the fact that this is a calque from the English; but as with the terms "*orateur*" and "*statut*", which I discuss below, its normative case is very much overstated.

[231] It is interesting to note that many of the earlier translations (e.g. all of the early newspaper translations) called the *Act* "*Acte de l'Amérique Britannique du Nord*", which translates to "North British America Act"; this is a strange expression, which presupposes the existence of a "South British America" (British Honduras and Guiana, and the British Caribbean islands?) to correspond with "North British America". This rather absurd (and inaccurate) translation was later abandoned.
[232] *First Report*, *supra* note 213 at 17a–18a.

Although these terms may well be calques, they are perfectly acceptable, at least in their historical context, because (a) they were calques of a special nature, being conceptual borrowings from the British parliamentary tradition; and (b) they were perfectly natural borrowings, being etymological and semantic equivalents to the English terms.

I admit, for the sake of my argument, that these words are calques; that is, that our ancestors adopted these words by analogically borrowing from the English. As such, these terms are "anglicisms"; and for many French Canadians, that fact alone is sufficient to condemn them. But such a simplistic view disregards the intertwined history of both languages, and the complexity of their etymological affinities.[233]

Note, first, that these terms are more properly "Westminsterisms" than "anglicisms"; i.e. they are words borrowed because of the feeling that they are peculiar to the British tradition of government. As such, they are perfectly normal in French when referring to British institutions and practices. Larousse has always maintained this peculiar sense of "*acte*": "Acte du Parlement*, loi adoptée par le Parlement britannique.*"[234] Littré also has this sense, but in addition, shows that it is properly derived from a wider sense of the word "*acte*", as a *"[d]écision de l'autorité publique … [l]es actes du gouvernement … les actes du parlement anglais*".[235] Indeed, the French word "*acte*", in its legal usages, covers a much wider range of documents than the English "act".[236] One of the facets of that broad range of meanings is

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[233] In this regard, see Maurice Grevisse & André Goosse, *Le bon usage*, 14th ed. (Brussels: De Boeck Duculot, 2008) at 25 (§14), n. R2: "*[A]u Québec, la crainte des anglicismes fait que l'on prend pour tels des tours qui ont sans doute leur équivalent en anglais, mais qui sont tout à fait normaux en français*." ("In Quebec, the fear of anglicisms means that expressions are taken as such that no doubt have their equivalents in English, but are perfectly normal in French" [translated by author]).
[234] *Grand Larousse*, *s. v.* "*2. acte*", 2.; this sense is also given in Larousse's *Lexis*, *s. v.* "acte", 2.
[235] *Littré*, *s. v.* "*acte*", 10° and 11°.
[236] See e.g. *T.L.F.*, *s. v.* "*acte*[1]", II.A.: "*Document de nature ou de portée juridique constatant un fait, consignant une décision, marquant une étape dans une procédure, etc.; ce fait, cette convention, etc.*"; see also the many examples given in the *Nouveau Petit Robert*, *s. v.* "*1 acte*", I.2.: "*Acte de vente, de donation, de partage ... [a]cte de dernière volonté ... [a]cte de notoriété ... [a]ctes de l'état civil (de naissance, de mariage, de décès) … [a]cte d'huissier … [a]cte sous seing privé, notarié, authentique*".

"legislative act", or "*acte législatif*".[237] And indeed, in the eighteenth and nineteenth centuries, even in France, the "*acte (législatif)*" was often seen as a general class of which the "*loi*" was a subcategory.

This use of "*acte*" can be found in the early French constitutions.[238] Moreover, and of special relevance given the present discussion, the term "*acte (constitutionnel)*" was often used to refer to the constitution itself.[239] These uses of "*acte*" are no longer common, but they are in no way unnatural, and indeed they follow logically from the broad meaning of the word. It was perfectly normal for French speakers of the nineteenth century to adopt this particular meaning of "*acte*". While this sense may no longer be regarded as "standard", and the most appropriate contemporary French translation for "*act*" in its legislative sense may well be "*loi*", it is quite another thing to say that "*acte*" is simply "incorrect". This peremptory statement reveals the Committee's lack of historical perspective in its normative choices. The fact that a word has maintained a particular meaning in a particular part of the French-speaking world, because of its connection to British traditions, is not an abomination; and the fact that lawmakers in Paris now make "*lois*" instead of "*actes*" is no reason to jettison a word that was a part of French-Canadian legal vocabulary for centuries, and even less to change the well-known title of our founding constitutional document.

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[237] See *Le Grand Robert de la langue française*, 2nd ed. [*Grand Robert*], *s. v.* "*acte*", I.B.1.: "*Acte … législatif : décision de l'autorité*". Admittedly, one could distinguish between the exercise of legislative will itself and the document embodying that will; but in general usage the distinction is not made (see e.g. the illustrative quotations in both *Littré* and *T.L.F.)*, and note that "*loi*" is also used in both senses, i.e. the "*loi*" is both the expression of the legislator's decision and the document containing that decision.
[238] See e.g. *Constitution de 1791*, tit. III, c. III, s. II, art. 3 and s. III, art. 7; *Constitution de l'an I* (1793), arts. 54 and 55; *Constitution de l'an III* (1795), tit. V, arts. 128–131; *Constitution de l'an VIII* (1799), tit. III, art. 28; *Sénatus-consulte organique de la Constitution du 16 thermidor an X* (1802), tit. V, arts. 55 and 60; *Sénatus-consulte organique du 28 floréal an XII* (1804), tit. XV, arts. 137 and 138.
[239] Most famously in Napoleon I's *Acte additionnel aux constitutions de l'Empire* (1815), but see also *Constitution de 1791*, final paragraph; *Constitution de l'an I*, title and art. 124; *Littré*, *s. v.* "*acte*", 18°; *T.L.F.*, *s. v.* "*acte*", II.A.2.34.

6) "Speaker" → "président" (ss. 34, 36, 44, 45, 46, and 47)

The Speaker of the House of Commons was called in most of the original translations the "*orateur*". This is another "Westminsterism", one which developed quite naturally from an older specific sense of "*orateur*" as "*porte-parole*" or "spokesperson",[240] and was therefore particularly appropriate for the Speaker of the House of Commons, whose title derives from his status as spokesperson of the House to the monarch.[241] It was thus commonly used to refer in French to the Speaker of the House of Commons in the eighteenth and nineteenth centuries.[242] This use was quite naturally adopted in Canada from the earliest days of legislative assemblies. "*Orateur*" was the official title at the time of Confederation,[243] and continued in legislative use until the adoption of the 1985 *Revised Statutes*,[244] when it was definitively changed to the more general term of "*président*", with its *Palais-Bourbon* chic. I may be alone in lamenting the loss of the specificity of "*orateur*" to the banality of "*président*"; I do understand, however, that we must be concerned lest anyone should think that our democratic institutions are somehow linked to the British parliamentary tradition.

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[240] See *Grand Robert*, *s. v.* "*orateur*", 3.: "*Personne qui prend la parole au nom des autres*"; *T.L.F.*, *s. v.* "*orateur*", A.2.: "*Personne qui parle au nom des autres; porte-parole*"; see also *Sénatus-consulte organique du 28 floréal an XII* (1804), arts. 81–85.

[241] *O.E.D.*, *s. v.* "speaker", 3.a.; see also U.K., House of Commons Information Office, *The Speaker* (Factsheet M2) (London: House of Commons Information Office, 2003), online: <http://www.parliament.uk/factsheets>.

[242] See *Littré*, *s. v.* "*orateur*", 2°: "*En Angleterre, l'orateur, le président de la chambre des communes*"; *T.L.F.*, *s. v.* "*orateur*", A.1.(b): "*[Au sein du Parlement anglais] Président de la Chambre des Communes*". Note the quotations from Voltaire (in *Littré*) and Las Cases (in *T.L.F.*).

[243] See e.g. *An Act respecting the Office of Speaker of the House of Commons of the Dominion of Canada/Acte concernant la charge d'orateur de la chambre des communes de la Puissance du Canada*, S.C. 1867, c. 2.

[244] See e.g. *Parliament of Canada Act/Loi sur le Parlement du Canada*, R.S.C. 1985, c. P-1, s. 13, and cf. *Senate and House of Commons Act/Loi sur le Sénat et la Chambre des communes*, R.S.C. 1970, c. S-8, s. 32; see also *Speaker of the Senate Act/Loi sur le président du Sénat*, R.S.C. 1970, c. S-14, and cf. *Speaker of the Senate Act/Loi concernant l'Orateur du Sénat*, R.S.C. 1906, c. 12.

7) **"Consolidated Statutes of Canada" → *"recueil des lois du Canada"; "*Consolidated Statutes for Lower Canada" → *"recueil des lois du Bas-Canada" (ss. 22, 40(2))***

Section 40 of the *Constitution Act, 1867*, in describing the electoral districts of Quebec, makes reference to "Chapter Two of the Consolidated Statutes of Canada" and "Chapter Seventy-five of the Consolidated Statutes for Lower Canada". The first refers to the consolidation of the laws of the Province of Canada made in 1859, and known in French as the "*Statuts Refondus du Canada*";[245] the second refers to the special consolidation of the laws applying to what used to be Lower Canada made in 1860, and known in French as the "*Statuts Refondus pour le Bas-Canada*".[246] The problem here is that the Committee wants to avoid using the expression "*statuts*" as a translation for "statutes", since it considers this, no doubt, a "*calque contre-indiqué de l'anglais*". It is true that in modern French, the term "*statuts*" is generally used in the specific sense of "statutes (of an organization)".[247] But, as is the case with "*acte*" and "*orateur*", discussed above, the normative case against "*statut*" is not as strong as it might appear. This is another term borrowed because of its connection to British institutions. Larousse and Littré both noted this specific sense of "*statut*": "*En Angleterre, loi issue de la volonté commune du souverain et du Parlement*".[248] In the same way, "*bill*"[249] was widely used at the time in French, even though "*projet de loi*" was certainly not unknown, and was sometimes used.[250] "*Bill*", like "*statut*", was felt to reflect a concept particular to the British Parliamentary system. So again, the "incorrectness" of "*statut*" is a mat-

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[245] See *An Act respecting the Consolidated Statutes of Canada/Acte relatif aux Statuts Refondus du Canada*, S.Prov.C. 1859 (22 Vict.), c. 29.
[246] See *An Act respecting the Consolidated Statutes for Lower Canada/Acte concernant les Statuts Refondus pour le Bas-Canada*, S.Prov.C. 1860 (23 Vict.), c. 56.
[247] Cf. *O.E.D.*, *s. v.* "statute", I.1.c.
[248] *Grand Larousse*, *s. v.* "*statut*", 4 (cf. *T.L.F.*, *s. v.* "*statut*", A.1.(b)); *Littré*, *s. v.* "*statut*", 1°: "*Les statuts du parlement d'Angleterre, les lois faites par ce parlement.*" It is interesting to note that the Committee chose to maintain the term "*statut*" in the title of its new translation of the *Statute of Westminster, 1931* ("*Statut de Westminster*").
[249] Note that both the *Petit Larousse Illustré* and the *Nouveau Petit Robert* retain the word "*bill*", a good indication of its specificity; needless to say, this all-too-obviously "English" word is not to be found in the Committee's translation.
[250] See e.g. the title used in *Le Courrier du Canada* (4 March 1867).

ter of perspective. It would not be the best translation, in contemporary French, for "statute". But there is no reason to avoid it in a historical context. This avoidance creates a comical effect in the Committee's *First Report*: on four separate occasions, in its marginal notes, it refers its readers to either the "*Statuts Refondus du Canada*"[251] or the "*Statuts Refondus du [*sic*] Bas-Canada*",[252] yet the readers of its translation of section 40 would not have the benefit of such clear references. They are left with the ambiguous terms "*recueil des lois du Canada*" and "*recueil des lois du Bas-Canada*". Both are ambiguous not only because of the existence of several volumes of sessional laws which could be thought of as a "*recueil*" (or "collection") of laws, but the first is ambiguous in that it might appear to refer to the laws of the new federation; the lack of initial capitalization only increases the ambiguity. What is meant in the provision is not some generic "*recueil de lois*" but volumes published under specific, statutorily established titles,[253] and which should be referred to by these titles. There was no reason for the Committee not to apply here the same logic it applied for "*félonie*", "*solliciteur général*", and "*aubains*".

8) "City of Quebec" → "ville de Québec" (s. 68)

Contemporary (esp. North American) English distinguishes between the terms "city" and "town" largely on the basis of size. Thus a "city" is felt to be larger than a "town".[254] Contemporary French makes no such distinction, and "*ville*" is commonly used to translate both "city" and "town". The history of these terms, however, is somewhat complex.

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[251] *First Report*, *supra* note 220 at 23a, 37a, and 38a.
[252] *Ibid*. at 40a.
[253] See S.Prov.C. 1859 (22 Vict.), c. 29, s. 4; S.Prov.C. 1860 (23 Vict.), c. 56, s. 4.
[254] See e.g. *Webster's Third New International Dictionary*, *s. v.* "city", 2b; *The American Heritage Dictionary of the English Language*, 4th ed., *s. v.* "city", 1; see also the statutory stipulations contained in the old *Municipal Act*, R.S.O. 1990, c. M.45, s. 11 (cf. the new *Municipal Act, 2001*, S.O. 2001, c. 25, s. 455).

"Town" has a Germanic origin; in its original meaning, "town" referred to any enclosed space, and by extension to a farm and farmhouse.[255] In that sense, it has undergone the same etymological evolution as the French "*ville*", from the Latin "*villa*", meaning "farm, country-house".[256] Thus the proper equivalent of "town" is "*ville*". "City", adopted in English from the Latin "*civitas*"[257] (through the French "*cité*"[258]), was originally an honorific title applied especially to towns that were episcopal sees.[259] This appears to have also been the case in France.[260] "*Cité*" is in many cases still a literary synonym for "*ville*", but with the particular connotation of legal personality; that is, it refers primarily to the corporation or the citizens as a body.[261] The English "city" seems to have also carried this meaning, especially with reference to London.[262]

This, then, is likely the origin of the distinction made in referring to the "City and Town of Quebec",[263] a distinction which may seem rather pointless to us now. This expres-

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[255] See *O.E.D.*, *s. v.* "town", 1.
[256] *Ibid.*; see also *Littré*, *s. v.* "*ville*": "*Beaucoup de maisons de campagne latines étant devenues l'origine de villages, de bourgs, de cités,* villa *a dans le français pris le sens de* ville."
[257] See e.g. *Magna Charta* (1297), 25 Edw. I, c. 9: "***Civitas** London' habeat omnes libertates suas antiquas & consuetudines suas. Preterea volumus & concedimus quod omnes **Civitates** alie & Burgi & **ville** ... habeant omnes libertates & liberas consuetudines suas*" ("The city of *London* shall have all the old liberties and customs, which it hath been used to have. Moreover we will and grant, that all other Cities, Boroughs, Towns ... shall have their liberties and free customs" [*Statutes at Large* (Ruffhead), vol. 1 at 4; cf. *Statutes of the Realm*, vol. 1 at 34]).
[258] See e.g. the *Statutes of Gloucester* (1278), 6 Edw. I, c. 14: "*Le Rei graunte de sa grace a Citeins de Lundres qe la ou avaunt ces houres ceus qi furent dessisi de fraunc tenement en mesme la **Cite** ne poeient recoverir lur damages avaunt venue des Justices a la Tour ...*" ("The King of his special Grace granteth unto the Citizens of *London*, that whereas beforetimes they that were disseised of Freehold in the same City could not recover their Damages before the coming of the Justices to the Tower …" [*Statutes at Large* (Ruffhead), vol. 1 at 69; cf. *Statutes of the Realm*, vol. 1 at 50]).
[259] See *O.E.D.*, *s. v.* "city".
[260] *Ibid.*; there is evidence of this particular sense in *Littré*, *s. v.* "*cité*", 3°: "*La partie la plus ancienne d'une ville; **celle où se trouve la cathédrale**. On divisait autrefois Paris en ville, cité, et université*."
[261] See e.g. *Littré*, *s. v.* "*cité*", 2°: "*Ville, plus général que cité, exprime seulement une agglomération considérable de maisons et d'habitants. Cité, même en éliminant le sens antique, ajoute à cette idée et représente la ville comme une personne politique qui a des droits, des devoirs, des fonctions*"; *T.L.F.*, *s. v.* "*cité*", I.D.: "*Ville en tant que corps politique et/ou administratif; communauté politique, administrative que constituent les habitants, les citoyens d'une ville*"; *Ibid.*, II.A.2.: "*Souvent désigne une ville importante, cité étant alors simple synon. de ville dans le lang. littér., poét.*".
[262] See *O.E.D.*, *s. v.* "city", 5.a.
[263] See the *Proclamation, dividing the Province of Lower-Canada, into Counties, Cities and Towns* (7 May 1792): "... and that the first of the said Cities to be called (as heretofore) the City and Town of

sion was quite properly translated as "*cité et ville de Québec*", with "*cité*" being the proper equivalent to "city", and this term was retained when the city was incorporated under the name "City of Quebec" ("cité de Québec").[264] This was thus the official legal name of the municipality at Confederation.[265]

But even setting aside this issue of legal terminology, there was no reason for the Committee to abandon the translation of "city" as "*cité*", in spite of ordinary modern usage. "*Cité*" is a good French word, *de bon aloi*, and its use as a specific translation of "city" is both etymologically and semantically sound, and well-established. Again, the Committee let its modernism get in the way of historical accuracy.

9) "pound" → "livre"; "dollar" → "dollar" (ss. 23, 105, 112, 114–16, 118–19)

We are no longer used to the traditional distinction between currency and money of account. But in the early days of the colony, there was a plethora of coins of a variety of origins in common circulation, and these were assigned fixed, sometimes arbitrary values in terms of the money of account, that is, the official units of account used in the mother country.[266] These units traditionally corresponded to old Roman coins or measures: thus the English "penny" and the French "*denier*" corresponded to the Roman "*denarius*"[267] (hence the abbreviation "d."); the English "shilling" and the French "*sol*" or "*sou*" corresponded to

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Quebec ..." ("*... et que la première des dites cités que l'on nommera (comme ci-devant) la cité et ville de Québec ...*").

[264] See *An Ordinance to incorporate the City and Town of Quebec/Ordonnance pour Incorporer les Cité et Ville de Québec* (1840), 3 & 4 Vict., c. 35, s. 2, reprinted in *The Revised Acts and Ordinances of Lower Canada/ Les actes et ordonnances révisés du Bas-Canada* at 472 (English), 483 (French) [Note that the Ordinance gives the wrong date for the proclamation cited *supra*, note 263].

[265] See e.g. *An act further to amend the act to Amend and Consolidate the provisions contained in the acts and ordinances relating to the Incorporation of ... the City of Quebec .../Acte pour amender de nouveau l'acte pour amender et refondre les dispositions contenues dans les actes et ordonnances concernant l'incorporation de la cité de Québec ...* (1868), S.Q. 1868, c. 33.

[266] For a thorough discussion, see the reprint of *Adam Shortt's History of Canadian Currency and Banking, 1600–1880* (Toronto: Canadian Bankers' Association, 1986); James Powell, *A History of the Canadian Dollar* (Ottawa: Bank of Canada, 2005).

[267] See e.g. Matt. 20:2–13 and 22:19; Mark 12:15; Luke 20:24 (A.V.).

the Roman "*solidus*"[268] (abbreviated "s.", later in English "/",[269] which is still called a "solidus"); and the English "pound" and French "*livre*" corresponded to the Roman "*libra*", a unit of weight measurement (abbreviated "l.", or in English, as now, "£").[270] In the British American colonies, however, the most common form of currency was the Spanish "piece of eight" (worth eight "*reales*"), called a "dollar" in English by analogy with the German silver "*thaler*" (short for "*Joachimsthaler*", from a silver mine at Joachimsthal, in Bohemia[271]), and in French called a "*piastre (espagnole)*" (from the Italian "*piastra*", applied to various coins)[272].

"*Piastre"* was therefore the natural equivalent of "dollar", and was used as such at the time of Confederation,[273] by which time it had become an official money of account.[274]

The distinction between money of account and currency no doubt explains the use of the terms "*louis*" and "*chelin*"[275] for "pound" and "shilling", instead of the expected terms "*livre*" and "*sol*" or "*sou*". The gold sovereign coin, having the nominal value of one pound,

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[268] See e.g. *Magna Charta* (1297), 25 Edw. I, c. 2: "*... de feodo Militis integro per Centum **solidos** ad plus ...*" ("... for one whole Knights fee, one hundred shillings at the most ..." [*Statutes at Large* (Ruffhead), vol. 1 at 2; cf. *Statutes of the Realm*, vol. 1 at 33]); and the *Statutes of Gloucester*, 6 Edw. I, c. 8: "*E qe nul eit desoremes bref de trespas devaunt Justices se il na fie par fei qe les biens enportez vaillent qa-raunte **sol** al meins*" ("And that none from henceforth shall have Writs of Trespass before Justices, unless he swear by his Faith, that the Goods taken away were worth Forty Shillings at the least" [*Statutes at Large* (Ruffhead), vol. 1 at 67; cf. *Statutes of the Realm*, vol. 1 at 48, which has "*souz*" instead of "*sol*"]).

[269] No doubt derived from the traditional printed forms of long *s* ("ſ" or "*ſ*").

[270] Note that the English names for these units had Germanic origins (although "pound" ultimately derives from the Latin "*pondus*"), but were taken at an early date as corresponding to the Roman units: see *O.E.D.*, *s. v.* "shilling".

[271] Now Jáchymov in the Czech Republic; see *O.E.D.*, *s. v.* "dollar".

[272] See *Nouveau Petit Robert*, *s. v.* "*piastre*".

[273] See *An Act respecting the Currency/Acte concernant le cours monétaire*, Consolidated Statutes of Canada/Statuts Refondus du Canada, 1859, c. 15; *An Act respecting the Currency/Acte concernant le système monétaire*, S.C. 1868, c. 45.

[274] See *An Act respecting the Public Moneys, Debt and Accounts/Acte concernant les deniers, la dette et les comptes publics*, Consolidated Statutes of Canada/Statuts Refondus du Canada, 1859, c. 14, s. 21.

[275] "*Chelin*" appears to have been a popular, phonetic formation; it is unattested outside dictionaries of popular Canadian French; see e.g. Jean-Paul Vinay, *et al*., eds., *Dictionnaire canadien/The Canadian Dictionary*, conc. ed., (Montreal: University of Montreal Press, 1962), *s. v.* "*chelin*"; Léandre Bergeron, *Dictionnaire de la langue québécoise* (Montreal: VLB Éditeur, 1980), *s. v.* "*chelin*".

was assimilated to the French *louis* (or *louis d'or*);[276] the silver shilling coin, on the other hand, was not assimilated to the copper *sou*, worth much less.[277] The fact that the French units of account were still used in some contexts in Lower Canada probably also contributed to the need for different terms.[278] So, while "*livre sterling*" might have been sufficient to distinguish from the French "*livre (tournois or parisis)*",[279] the more common term by far was "*louis*".[280] And indeed, in the new Dominion's legislation, the term used was "*louis*", even in the expression "*louis sterling*".[281]

There was no reason to abandon the word "*piastre*", which is the natural equivalent to the English "dollar"; and the balance of the evidence also favours the retention of the term "*louis*" in the context of the *Act*. Once again, the Committee should have maintained these specific, legally-defined terms, in spite of modern usage.

10) "Indians" → "Indiens" (s. 91(24))

This particular translation requires special consideration in light of the sensitivity of the issues it raises. The term "*Indien*" was not unknown in French before the Conquest;[282] but the much more general term was "*Sauvage*".[283] This was the term used in legislation at

[276] A similar shift happened later in France, where the twenty-franc gold "*napoléon*" was called a "*louis*"; see *Nouveau Petit Robert*, *s. v.* "*louis*", 2.
[277] But copper tokens later issued in Lower Canada were called "*sous*": see the many examples in Darryl A. Atchison, ed., *Canadian Numismatic Bibliography*, vol. 1 (Willowdale, ON[?]: Numismatic Education Society of Canada, 2007) at 135–161.
[278] See *Shortt*, *supra* note 259 at 225.
[279] And was sometimes used: see *An Act respecting the Currency/Acte concernant le cours monétaire*, Consolidated Statutes of Canada/Statuts Refondus du Canada, 1859, c. 15, s. 4.
[280] Used, for example, in all of the newspaper translations of the *British North America Act, 1867*.
[281] See *An Act respecting the Currency/Acte concernant le système monétaire*, S.C. 1868, c. 45, s. 1(3).
[282] See e.g. Montaigne's *Essais*, I, 32 [(Paris: Gallimard (Folio), 1965) at 315, but see the note: this is a reference to a Spanish source]; and note the *Articles of Capitulation of Montreal*, art. 9, where "*Indien*" is treated as a subcategory of "*Sauvage*"; it is unclear who the "*Moraigans*" (Mohicans?) might be.
[283] While certainly considered offensive in Canada today, the term "*sauvage*" should not be seen as the equivalent of the much more pejorative "savage"; note that the *Nouveau Petit Robert*, for example, simply labels it "*vieux*", whereas it considers "*nègre*" to be "*péjoratif*" and even "*raciste*".

the time of Confederation;[284] and it was the term used to render "Indian" in the original *Indian Act, 1876*.[285] The term was carried through to the *Revised Statutes* of 1906, where the *Indian Act* was known in French as the *Loi des Sauvages*.[286] In the 1927 revision, however, the official designation was changed to "*Indien*", and the title of the statute accordingly amended to *Loi concernant les Indiens*.[287] The unofficial translation of the *British North America Act, 1867* contained in the *Revised Statutes* was quietly changed to reflect this new terminology.[288]

The presence in any official French translation of our founding constitutional document of a term now deemed offensive necessarily creates difficulties. On the principle I have advocated so far, the retention of "*Sauvage*" would clearly be required; because of the offensive nature of the term, however, the Committee may indeed have rightly changed the term to "*Indien*", in conformity with modern terminology, but should have indicated in a note, retained in the final version, the reasons for this translation.

On the other hand, it may be that the retention of the older term in this case is even more important than in the other examples. The abandonment of "*Sauvage*" in favour of the more acceptable "*Indien*" could be seen not only as a historical inaccuracy, but as a form of whitewashing of the past. We should not acquiesce in the quiet revision of the unsavoury aspects of our history; if we wish to get rid of racist terminology, let us do it publicly and

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[284] See *An Act respecting Civilization and Enfranchisement of certain Indians/Acte concernant la civilisation et l'émancipation des Sauvages*, Consolidated Statutes of Canada/Statuts Refondus du Canada, 1859, c. 9.
[285] *Indian Act, 1876/Acte des Sauvages, 1876*, S.C. 1876, c. 18, s. 3.
[286] *Indian Act/Loi des Sauvages*, R.S.C. 1906, c. 81.
[287] *Indian Act/Loi concernant les Indiens*, R.S.C. 1927, c. 98.
[288] This seems to have been ignored by the Supreme Court in its 1939 opinion on whether the word "Indian" included "Eskimo" (see *Re Eskimos (Reference re Term "Indians"),* [1939] S.C.R. 104, [1939] 2 D.L.R. 417); Cannon J., in his concurring opinion, asserted that this equivalence of "Indian" with "sauvage", which he took to include "all the present and future aborigines native subjects of the proposed Confederation of British North America", argued conclusively against a restrictive interpretation of the term "Indian". This judicial opinion might provide an additional reason to retain the term "sauvage" in the *Act*. I am grateful to Prof. Mark Walters for bringing this case to my attention.

officially. It is easy enough to get rid of the words of old statutes. It is a much more difficult task to eliminate the attitudes reflected in those words.

C. Lexical Anachronism

As I mentioned above, this category includes variants rejected by the Committee which, while they may not have had specific, legally-defined meanings at the time of Confederation, nonetheless might have been retained in light of the historical nature of the text. This includes expressions such as "*être loisible à (quelqu'un) de*" for "*être habilité(e) à"* (ss. 3, 14, 54, 91, 146), "*passation*"[289] for "*adoption*" (ss. 3, 6, 127, 135), "*Ontario*" and "*Québec*" used without articles (ss. 6, 22, 37, 65, 69–87, 89, 94, 97–98, 113, 134–38, 140–44),[290] "*soixante-et-douze, soixante-et-cinq*" for "*soixante-douze, soixante-cinq*" (ss. 21, 37),[291] "*aucun(e)(s)*" used in the positive sense (ss. 12, 14, 65, 84, 93(3), 95, 135, 146), "*votants*" for "*électeurs*" (ss. 41, 84), "*vacations*" for "*vacances*" (ss. 41, 84), "*amarques*" for "*balises*" (s. 91(9)), "*hospices de charité*" (or "*lazarets*") for "*établissements de bienfaisance*" (s. 92(7)), "*cabaret*" for "*débit de boissons*" (s. 92(9)), "*Terreneuve*" for "*Terre-Neuve*" (s. 146), etc.

I note, first, that none of these terms is an anglicism,[292] and could not be objected to as such. Rather, they are words or forms which are no longer usual in contemporary French, though they were perfectly normal in the legal French of the time. Here it is the Committee's modernism, rather than its purism, that mandates the rejection of these variants. In the in-

[289] Although not used in the legislative context in standard modern French, the word "*passation*" is usual in other legal contexts (e.g. "*passation d'un contrat*") and would have followed naturally from the use of the word "*acte*" (see discussion above). Note that "pass" in this sense of "to be approved by a legislative body" (*O.E.D.*, *s. v.* "pass", 39.a.) is also present in French (cf. *Littré*, *s. v.* "*passer*", 14°; *Grand Larousse, s. v.* "*passer*", B.II.5.; and note in general *T.L.F.*, *s. v.* "*passation*", B.1.).
[290] See Grevisse, *supra* note 226 at 761 (§588(c)).
[291] See *ibid*. at 766–67 (§593).
[292] With the possible exception of "*passation*", the choice of which was no doubt influenced by the presence of its English counterpart; but see discussion, *supra* note 289.

troduction to its *First Report*, the Committee stated the following with regard to historical language:[293]

The committee considered the question of the extent to which the language of the period should be taken into account. It was agreed that a single rule was not possible and that wherever the question arose it would be resolved according to the circumstances. Explanatory notes in the proposed texts provide reasons in support of **the use of certain words and expressions that might surprise when taken out of the 1867 context or the context of the subsequent years during which the amending Acts were enacted.**	*Le comité s'est demandé dans quelle mesure il devrait tenir compte de la langue de l'époque. Il a été convenu qu'une règle unique n'était pas possible et qu'il fallait, dans chaque cas où la question se posait, décider selon les circonstances. Les notes explicatives dans les textes proposés en annexe fournissent les raisons à l'appui de* ***l'utilisation de termes ou expressions qui pourraient surprendre hors du contexte de 1867 ou des autres années en cause.***

I note first that this passage applies equally to what I have termed "terminological" issues as well as what I have termed "lexical" issues. Indeed, the Committee's marginal notes all deal with terminological issues (and the French marginal title for this paragraph is "*terminologie*"). I quote it here, however, principally because I feel it is indicative of the Committee's general approach to the language of its translation. What is obvious from the passage above is that the Committee feels that what requires explanation is "the use of ... words and expressions that might surprise when taken out of the 1867 context" ("*l'utilisation de termes ou expressions qui pourraient surprendre hors du contexte de 1867*"). Might I humbly suggest that the Committee has it backwards: in translating this historical text, what should be explained are rather words and expressions that might surprise when used *within* the context of 1867. In other words, it is departures from *historical* usage, not departures from *contemporary* usage, that require explanation. This passage offers real insight into the Committee's attitude in translating the *Act*, and its view of historical language in general. Its view appears to have been—in spite of its assertion that "a single rule was not possible"—that his-

[293] *First Report*, *supra* note 220 at 6a, ¶5.

torical language should be included only where absolutely necessary. Given this approach, it is not surprising that the Committee chose to abandon the forms I have noted in this section, which could not even claim the status of legally-defined terms.

But why should these terms be retained? I am aware that the notion of "linguistic heritage" ("*patrimoine linguistique*") may be problematic.[294] Nonetheless, if one accepts that language in its entirety forms part of our cultural heritage, then one must necessarily provide for the preservation of this heritage. Linguistic heritage is not the same as documentary heritage, although the two are related. Presumably, we will continue to preserve documents which have historical value in and of themselves. But linguistic heritage is much more amorphous; it is not contained in any specific document, but is spread among a large number of documents and instances. Its preservation depends largely on the availability of this intertextual corpus. Our legal linguistic heritage depends for its preservation on the maintenance of the various manifestations of this language. And in the legal world, there is much reason to fear for it.

The world of law is obsessed with currency. It is a world where a book just published is already out of date, and last decade's dusty tomes take up the valuable space needed for today's glossy new materials. The need for space alone is enough to displace the more arcane older volumes. And with these documents goes their language. As Didier puts it, "*[l]es langages spécialisés meurent avec les textes législatifs et réglementaires qui les contiennent. … La compartimentation du langage du droit … a pour effet négatif d'entraîner la disparition de pans entiers du langage juridique en même temps que les lois qui les contiennent.*"[295] Much of the vocabulary discussed above might not be found outside the language of

[294] For a discussion, see Didier, *supra* note 215 at 442–44.
[295] *Ibid*. at 192–93 ("specialized forms of language die with the legislative and regulatory texts that contain them. ... The compartmentalization of the language of the law ... has the negative effect of bringing about the disappearance of entire sections of legal language at the same time as the laws containing them" [translated by author]).

the law; doing away with the legislative materials that contain it is doing away with that language itself. One might well imagine, for example, that if the Committee's translation were finally adopted, the federal government might reprint a new version of the Appendices to the *Revised Statutes*, with the new translation. The English text being the same, and the new French version purporting to be the definitive, authoritative version, it is likely that the days of the old Appendices would be numbered, and with it would go the traditional language of the *Act*.

The textual tradition represented by the previous translations of the *British North America Act, 1867* was part of our ancestors' cultural and political world. It is an essential tool in understanding that world. We may no longer speak the language of our ancestors; but if we remove all traces of it, if we refuse to acknowledge its existence, we make it impossible ever to understand them. We make it impossible to understand our past.

And a people without a past has no future.

Conclusion

It follows from the preceding chapters that I am uneasy about the adoption of the new French text of the *Constitution Act, 1867* as an equally authoritative, official version. Yet the fact remains that our Constitution is still not fully bilingual. Is this appropriate for a bilingual country?

That this issue remains unresolved twenty-seven years after the adoption of the *Constitution Act, 1982* is a good indication that it is not perceived as the main front in the battle for linguistic rights. Indeed, these rights have developed in Canada over the last three decades in the absence of an official French version of the entire Constitution.

The status quo has the further advantage of being clear and predictable. As previously discussed, legislative bilingualism *imposes* a burden on the unilingual citizen, rather than removing one; statutory interpretation is complex enough without the added layer of bilingualism. Where we have the advantage of a single definitive version of a constitutional text, it might be that we ought to retain it.

But bilingualism is not really about convenience. It is about the recognition of the inherent equality of the speakers of both languages, and their right to have both languages used in the constitution, laws, and government of the country. Achieving linguistic equality in the constitutional realm is a laudable goal; but it cannot be achieved by purporting to remake history. If we truly wish to have a constitution that reflects the values and aspirations of all Canadians today, then we must do what was left undone in 1982, and truly modernize the Constitution by recasting it in one comprehensive document, in both French and English (and perhaps even other languages). This would be a monumental task, but one which might well be overdue.

A new comprehensive constitutional text would also have the advantage of freeing the old texts from the constraints of legal validity, and opening them up to critical review

from a historical perspective. Then perhaps we might see a scholarly edition of our founding constitutional document, and of its French translations. One could only welcome such a valuable contribution to our understanding of the constitutional history of Canada.

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