

# Constitutional Litigation, the Adversarial System and some of its Adverse Effects

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*The authors of this article identify and analyze a specific and spectacular failure of the adversarial system. Between 1988 and 1990, in the *Mercure* and *Paquette* cases, the Supreme Court of Canada held that Saskatchewan and Alberta were obliged to enact and publish their laws in both French and English, but that they could also unilaterally abrogate this obligation if they so decided. They did. Twenty years later, in the *Caron & Boutet* case, the Provincial Court of Alberta disrupted the state of the law by holding that judicial and legislative bilingualism was and had always been constitutionally protected in Alberta, and thus in Saskatchewan as well.*

*In this article, the authors try to elucidate this puzzling contradiction. They identify some of the consequences that result from subjecting important public law questions to an unbridled adversarial system. They also highlight the dangers of determining major constitutional questions on the basis of historical evidence adduced by parties with unequal means and resources. *Caron & Boutet* serves as a case study to that end, offering a sobering illustration of the pitfalls of the adversarial system in constitutional cases that turn on the proper understanding of historical events. The first section of this article sets the stage by presenting and analyzing the most important aspects of the *Mercure*, *Paquette* and *Caron & Boutet* cases. The second section underlines some of the inefficacies of the adversarial system in Canada from an evidentiary perspective, and notes the near impossibility, for disadvantaged parties, to present an adequate and complete evidence record. The authors conclude by reiterating the extent to which trial judges are the gatekeepers of access to justice and by underscoring the important function of funding mechanisms such as advanced cost orders and government initiatives, such as the Language Rights Support Program.*

*Les auteurs de cet article identifient et analysent un échec particulier et spectaculaire du système contradictoire. Entre 1988 et 1990, dans les affaires *Mercure* et *Paquette*, la Cour suprême du Canada concluait que la Saskatchewan et l'Alberta avaient l'obligation d'adopter et publier leurs lois en français et en anglais, mais qu'elles pouvaient abroger cette obligation unilatéralement si elles en décidaient ainsi. C'est ce qu'elles ont fait. Vingt ans plus tard, dans l'affaire *Caron & Boutet*, la Cour provinciale de l'Alberta bouleverse l'état du droit en concluant que le bilinguisme judiciaire et législatif est et a toujours été assorti d'une protection constitutionnelle en Alberta, et donc en Saskatchewan aussi.*

*Dans cet article, les auteurs tentent d'élucider cette contradiction déconcertante. Ils mettent en exergue certaines conséquences qui peuvent survenir lorsque d'importantes questions de droit public sont décidées dans le cadre d'un système contradictoire débridé. Ils soulignent aussi les dangers reliés au fait de décider des questions constitutionnelles importantes sur la base de preuves historiques présentées par des parties dont les moyens et les ressources ne sont pas les mêmes. La cause *Caron & Boutet* sert de cas d'étude à cette fin, en illustrant les pièges que pose le système contradictoire aux litiges en droit constitutionnel lorsque ceux-ci nécessitent la présentation de preuves historiques. La première partie de cet article jette les bases en présentant et en analysant les aspects importants des affaires *Mercure*, *Paquette* et *Caron & Boutet*. La deuxième partie dresse le portrait des inefficacités du système contradictoire en matière de preuve, notamment en raison de la difficulté pour les parties désavantagées de produire un dossier de preuve adéquat et complet. Les auteurs concluent en réitérant l'ampleur du rôle joué par les juges de procès en matière de protection d'accès à la justice et en soulignant l'importance des mécanismes de financements tels que la provision pour frais et les initiatives publiques, comme le Programme d'appui aux droits linguistiques.*

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## Introduction

The outcome of constitutional litigation is never insignificant, especially when the issues pertain to identity, culture, and language.<sup>1</sup> The communities that bring such cases forward are not usually interested in compensatory damages or other such remedies, but rather in the official recognition, by the government and the judiciary, of their existence and of their entitlements. Cases regarding claims made by or against Aboriginal peoples of Canada<sup>2</sup> or Canada's official language communities<sup>3</sup> have tremendous and direct impacts on the vitality,<sup>4</sup> and indeed on the very survival of these national minority groups.<sup>5</sup> For

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1 This article takes on the difficult task of drawing from multiple disciplines in an effort to gather a richer account and deeper understanding of the many considerations that impact constitutional development. In this case, the authors draw mostly from constitutional law, but they also draw from history and other social sciences. Accordingly, the authors deemed it necessary at times to provide readers with considerable historical information to shore up some of their central claims. Further, the authors also deemed it necessary sometimes to provide readers with considerable biographical information in order to more soundly establish the legitimacy and credibility of the authors and sources on which they rely yet which are perhaps less well known, particularly by English speaking Canadians, and which were ignored or not properly understood by the courts. Of course, such a pluridisciplinary approach, with its passing references to history and biography, is vulnerable to criticism from multiple fields of study. Thus, it should be noted from the outset that the aim of this article is not to produce an exhaustive historiography of French Canadians in Western Canada. Others have done this far more competently than the authors ever could. Rather, the contribution this article seeks to make, using the *Caron & Boutet* cases as an examples, is to show the extent to which courts of law are dependent on historical and sociological evidence; how they are often ill-equipped to deal with such evidence; and to highlight the dangers of resorting to incomplete and unreliable historical and sociological evidence in such cases.

2 *Aboriginal peoples of Canada* comprise Indian, Inuit, and Métis peoples of Canada. See *Constitution Act, 1982*, s 35(2) being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

3 Sections 16 to 22 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] formalize French and English as the official languages of Canada. French-speaking communities constitute a minority in every Canadian province and territory except Québec, where the English-speaking community forms a demographic minority. See generally, Michel Bastarache, ed, *Language Rights in Canada*, 2d ed (Montréal: Yvon Blais, 2004); Peter Hogg, *Constitutional Law of Canada*, loose-leaf (consulted on 31 March 2013), 5th ed (Toronto: Carswell, 2011) vol 2, ch 56; Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th ed (Cowansville, Que: Yvon Blais, 2008) at 847-95.

4 See generally, Howard Giles, Richard Y Bourhis & Donald M Taylor, "Toward a theory of language in ethnic group relations" in Howard Giles, ed, *Language, Ethnicity and Intergroup Relations* (New York: Academic Press, 1977) 307 at 308-09: "The vitality of an ethnolinguistic group is that which makes a group likely to behave as a distinctive and active collective entity in intergroup situations. From this, it is argued that ethnolinguistic minorities that have little or no group vitality would eventually cease to exist as distinctive groups. Conversely, the more vitality a linguistic group has, the more likely it will survive and thrive as a collective entity in an intergroup context". See also Rodrigue Landry & Réal Allard, "Diglossia, ethnolinguistic vitality and language behavior" (1994) 108 *International Journal of the Sociology of Language* 15.

5 See generally, Erik Allardt, "What Constitutes a Language Minority" (1983) 5:3-4 *Journal of Multilingual and Multicultural Development* 195.

example, in *Calder et al v Attorney-General of British Columbia*,<sup>6</sup> the Supreme Court of Canada recognized for the first time that ancestral Aboriginal rights existed independently of their explicit recognition by the *Royal Proclamation of 1763*.<sup>7</sup> In *Mahé v Alberta*,<sup>8</sup> the Supreme Court of Canada recognized that section 23 of the *Charter*, to adequately fulfill its objectives, guaranteed Canada's official language communities a degree of exclusive control and management over primary and secondary instruction.<sup>9</sup> Such cases frequently require courts to understand and make determinations about events that are fundamental to the historical development of these communities, and of Canada as a whole. Indeed, "[o]ne of the primary aims of the adversarial trial process is to find the truth".<sup>10</sup> However, in some proceedings, the search for truth is critical but exceedingly difficult.

In theory, and many times in practice, the adversarial system facilitates the search for truth. Indeed,

a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.<sup>11</sup>

The adversarial system is to be understood as a procedural system "involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker".<sup>12</sup> However, as Rhode explains:

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6 [1973] SCR 313 at 322-23; 34 DLR (3d) 145; [1973] 4 WWR 1 [cited to SCR].

7 (UK), 3 Geo III, reprinted in RSC 1985, App II, No 1.

8 [1990] 1 SCR 342; 68 DLR (4th) 69; 72 Alta LR (2d) 257 [cited to SCR].

9 *Ibid* at 371-72.

10 *R v Gruenke*, [1991] 3 SCR 263, 75 Man R (2d) 112, 67 CCC (3d) 289 [Gruenke]. To be sure, truth is a very subjective thing; one person's truth may be another person's lie, as people constantly disagree about what is "true". In this article, the "search for truth" is used to refer to the process that leads to an outcome that has integrity, that is an outcome that has been reached through a full and fair consideration of all the relevant evidence.

11 *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 358-59; 57 DLR (4th) 231; 75 Sask R 82 [cited to SCR].

12 See *Black's Law Dictionary*, 9th ed, *sub verbo* "adversarial system". In *R v Swain*, [1991] 1 SCR 933 at 971-72, 63 CCC (3d) 481, 5 CR (4th) 253 [cited to SCR], the Supreme Court of Canada adopts Professor Paul Weiler's characterization of the adversarial process: "An adversary process is one which satisfies, more or less, this factual description: as a prelude to the dispute being solved, the interested parties have the opportunity of adducing evidence (or proof) and making arguments to a disinterested and impartial arbiter who decides the case on the basis of this evidence and these arguments. This is by contrast with the public processes of decision by 'legitimated power' and 'mediation-agreement', where the guaranteed private modes of participation are voting and negotiation respectively. Adjudication is distinctive because it guarantees to each of the parties who are affected the right to prepare for themselves the representations on the basis of which their dispute is to be resolved". In *Charkaoui v Canada (Citizenship & Immigration)*, 2007 SCC 9 at para

There are a number of difficulties with th[e] assumption [that the pursuit of truth and protection of rights are best achieved through partisan presentations of competing interests]. The first is that it equates procedural and substantive justice. Whatever emerges from the clash of partisan adversaries is presumed to be just. But even if both parties are well represented, the result may be inequitable because the underlying law or process is flawed. Wealth, power, and prejudice can skew legislative and legal outcomes. Decision makers may lack access to relevant information; single-interest groups may exercise undue influence over governing laws; unconscious race or gender bias may compromise trial judgments; and formal rules may be under- or overinclusive because the costs of fine tuning are too great. ... In a society that tolerates vast inequalities in wealth and costly litigation procedures, it is likely that in law, as in life, the “haves come out ahead”.<sup>13</sup>

The adversarial system’s inadequacies in the context of public and constitutional litigation have been noted:

In constitutional litigation, when a law is on trial, the traditional adversary system’s differential treatment of adjudicative and legislative facts — the former developed and tested by the parties, the latter within the purview of the judge — may undermine the very attribute that is identified as the adversary system’s fundamental strength — the guarantee that issues will be well and fully argued. Since assessments of the purpose and effect of legislation are often central to the legislation’s constitutional validity, it is important that the adjudication process ensures that factual premises are identified and tested. The persuasiveness of court decisions, and the

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- 50, [2007] 1 SCR 350, the Supreme Court of Canada said that “an adversarial system, which is the norm in Canada, relies on the parties — who are entitled to disclosure of the case to meet, and to full participation in open proceedings — to produce the relevant evidence”.
- 13 Deborah L Rhode, “Ethics in Practice” in Deborah L Rhode, ed, *Ethics in Practice: Lawyer’s Roles, Responsibilities, and Regulation* (New York: Oxford University Press, 2000) 3 at 9 [footnote omitted]. See Marilyn L Pilkington, “Equipping Courts to Handle Constitutional Issues: The Adequacy of the Adversarial System and its Techniques of Proof” in *Special Lectures of the Law Society of Upper Canada: Applying the Law of Evidence* (Scarborough: Carswell, 1991) 51 at 51-52 [footnotes omitted] for similar observations: “Even if one accepts the premises of the adversary system, its legitimacy and usefulness as a vehicle of dispute resolution is undermined to the extent that the assumptions on which it is based — in particular, the assumption that parties have equal capacity, skills and resources — do not conform with reality”. See also Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton: Princeton University Press, 1949) 80; Paul Weiler, “Two Models of Judicial Decision-Making” (1968) 69:3 Can Bar Rev 406; Neil Brooks, “The Judge and the Adversary System” in Allen M Linden, ed, *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, York University, 1976) 89; Carrie Menkel-Meadow, “The Limits of Adversarial Ethics” in Deborah L Rhode, ed, *Ethics in Practice: Lawyer’s Roles, Responsibilities, and Regulation* (New York: Oxford University Press, 2000) 123; David Luban, “Twenty Theses on Adversarial Ethics” in Helen Stacy & Michael Lavarch, eds, *Beyond the Adversarial System* (Sydney: The Federation Press, 1999) 134; David Luban, “Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers” (2003) 91 Cal L Rev 209.

legitimacy of judicial review, may well depend on the validity and objectivity of the factual premises that underlie the constitutional judgments.<sup>14</sup>

More particularly, Professor Paul McHugh raised the inadequacies of the adversarial system and its inability to properly digest historical evidence:

[T]he clinical procedures of the adversarial system demonstrated a ruthless capacity to deny the claimant histories practical consequence by privileging its own Eurocentric notions of historical veracity. The aboriginal histories might have been aired and their performability recognized, but their actual credibility was set against standards that were not their own. Judges allowed aboriginal claimants to take the court's stage—it gave them full airtime and accommodated, indeed encouraged the tribal pageantry that accompanied these histories—but, at the end of the day, the adversarial instinct usually kicked in. The performance of tribal history was not the same as acceptance.<sup>15</sup>

McHugh has also recently underlined the difficulties the adversarial system cause historians and social scientists. These experts, he argues, are being transformed into weapons to be used in the conflict settings of the adversarial system, distorting the historical and sociological methods in the process.<sup>16</sup>

This article identifies and analyzes a specific and spectacular failure of the adversarial system. Between 1986 and 2008, it was accepted law that the Constitution did not require the legislative assemblies of Alberta<sup>17</sup> and

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14 See Pilkington, *supra* note 13 at 52. In *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 1338-40, 163 ACWS (3d) 873, Justice David Vickers of the Supreme Court of British Columbia recognized how unfortunate it was that Aboriginal rights were being decided in the inappropriate adversarial settings of the courtroom. See also Kenneth L Karst, "Legislative Facts in Constitutional Litigation" (1960) 1960 Sup Ct Rev 75; Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv L Rev 1281; Thomas B Marvell, *Appellate Courts and Lawyers: Information Gathering in the Adversary System* (Westport, CT: Greenwood Press, 1978); Brianne J Gorod, "The Adversarial Myth: Appellate Court Extra-Record Factfinding" (2011) 61:1 Duke LJ 1; Brian G Morgan, "Proof of Facts in Charter Litigation" in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) 159 at 161.

15 Paul G McHugh, *Aboriginal societies and the common law: a history of sovereignty, status, and self-determination* (New York: Oxford University Press, 2004) at 12.

16 Paul G McHugh, *Aboriginal title: the modern jurisprudence of tribal land rights* (Oxford, Oxford University Press, 2011) at 246-49. See also Arthur J Ray, "Native History on Trial: Confessions of an Expert Witness" (2003) 84:2 The Canadian Historical Review 253; Arthur J Ray, "Creating the Image of the Savage in Defense of the Crown: The Ethnohistorian in Court" (1990) 6:2 Native Studies Review 13; Hamar Foster & Alan Grove, "Looking Behind the Masks: A Land Claims Discussion Paper for Researchers, Lawyers and Their Employers" (1993) 27 UBC L Rev 213.

17 *R v Paquette*, [1990] 2 SCR 1103, 73 DLR (4th) 575, 59 CCC (3d) 134 [*Paquette* cited to SCR]. Before the Supreme Court of Canada, counsel were Mary T Moreau, for the appellant; D Martin Low and Isabelle Plante, for the respondent, the Attorney General of Canada; and Peter T Costigan and Larry A Reynolds, for the respondent, the Attorney General for Alberta.

Saskatchewan<sup>18</sup> to enact, print, and publish their statutes, records, and journals in English and French, both language versions being equally authoritative. It was also obvious during that time that the Constitution did not grant the right to use English or French in any debate and other proceedings before either legislature.<sup>19</sup>

It is therefore no exaggeration to say that there was general astonishment<sup>20</sup>—in the language rights bar in particular—in the wake of the decisions of the Provincial Court of Alberta in the companion cases of Gilles Caron and Pierre Boutet.<sup>21</sup> There, Judge Leo Wenden found, quite unexpectedly, that the Legislative Assembly of Alberta<sup>22</sup> is, and had always been, required under the Constitution to enact, print, and publish its statutes, records, and journals in English and French. Technically, the trial judgment in *Caron & Boutet* did not purport to overrule the conclusions of the Supreme Court of Canada in either *Mercure* or *Paquette*. Rather, the trial judge in *Caron & Boutet* found that he had been seized with constitutional questions, including questions of fact, which had been ignored by the parties and the courts in *Mercure* and *Paquette* and which went to the very heart of any determination of the status of the French language in the legislature and before the courts

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18 *R v Mercure*, [1988] 1 SCR 234, 48 DLR (4th) 1, 39 CCC (3d) 385 [*Mercure* cited to SCR]. Before the Supreme Court of Canada, counsel were Michel Bastarache and Roger F Lepage, for the appellant and the interveners (which were allowed to act as principal parties after the death of Father Mercure); Robert G Richards and Cheryl Crane, for the respondent; Peter T Costigan and J Robert Black, for the intervener, the Attorney General for Alberta; and Joseph Eliot Magnet for the intervener, the Freedom of Choice Movement.

19 Peter Hogg, *Constitutional Law of Canada*, 4th ed (Toronto: Carswell, 1997) at 1296-98; Henri Brun, Guy Tremblay & Eugénie Brouillet, *supra* note 3 at 854, 856-61. See also France Levasseur-Ouimet, *Léo Piquette: A Struggle for Francophone Rights in Alberta: Remembering L'affaire Piquette* (Québec: GID, 2006).

20 See generally, Karen Kleiss, "Francophone driver wins benchmark decision", *National Post* (3 July 2008) A2; Karen Kleiss, "Edmonton case tests language law", *Calgary Herald* (3 July 2008) A1; Karen Kleiss, "Ruling reopens Languages Act debates; Provincial laws and legislation may be forced to become bilingual", *Edmonton Journal* (4 July 2008) A3; Curtis J Makar, "One nation, one official language", Opinion, *Edmonton Journal* (5 July 2008) A18; Stephane Paiement, "Let's opt out of the Charter", Letter, *Edmonton Journal* (8 July 2008) A13; Denis Perreux, "A marginal but vocal minority", Letter, *Edmonton Journal* (8 July 2008) A13; Edmund A Aunger, "Traffic ticket case a truly historic decision; Judge's ruling will force Alberta to respect French as official language after decades of trying to ban its use", Opinion, *Edmonton Journal* (9 July 2008) A15; Mark Milke, "Alberta's courts should recognize French is passé [*sic* here]", *Calgary Herald* (27 July 2008) A8; Michael Killoran, "Unsafe in any tongue", Letter, *Calgary Herald* (1 August 2008) A19.

21 *R v Caron*, 2008 ABPC 232, 450 AR 204, [2008] 12 WWR 675 [*Caron & Boutet*].

22 In principle, these conclusions should also apply to Saskatchewan. Alberta and Saskatchewan's quasi-identical constitutional roots explain why their legal frameworks have evolved in parallel. Both provinces were created out of the North-West Territories in 1905. See Peter Hogg, *supra* note 3 at s 2.5 (b); Henri Brun, Guy Tremblay & Eugénie Brouillet, *supra* note 3 at 123.

of Alberta (and therefore of Saskatchewan as well).<sup>23</sup> A nearly ninety-day trial led the Provincial Court of Alberta to conclude that the *Royal Proclamation of December 6th 1869*<sup>24</sup> not only formed part of the Canadian Constitution but effectively entrenched and guaranteed legislative and judicial bilingualism in Alberta (again, therefore in Saskatchewan as well).

Although the Court of Queen's Bench of Alberta reversed this judgment, it is highly significant that it did not disturb any of the findings of fact of the trial judge.<sup>25</sup> The Court of Appeal of Alberta granted leave to appeal this decision,<sup>26</sup> and it is reasonable to expect that the debate before that court, and perhaps one day before the Supreme Court of Canada, will centre on the legal ramifications of the trial judge's findings of fact regarding the status and use of French in what is today Alberta at the time that territory was admitted into Canada.<sup>27</sup>

If the legal findings of the trial judge in *Caron & Boutet* are one day confirmed, then French-speaking communities in Alberta (and in Saskatchewan as well) will have undeniably suffered a terrible prejudice.<sup>28</sup> Linguistic and cul-

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23 *Supra* notes 17-18. Of course, we recognize the requirement for judges to decide on the basis of the information available to them at the time. With hindsight, it is easy to discern flaws that occurred in the treatment of certain legal questions. We also recognize the social value of the principle that judicial decisions should be definitive, to allow for closure, certainty, and to allow parties to move on with their lives. However, in some cases, the flaws and judicial mistakes are so great that they justify a departure from the definitiveness of judicial decisions principle. *Caron & Boutet* is an example of such a case.

24 *Caron & Boutet*, *supra* note 21 at 390, citing Parliament, "Copy of a Report of a Committee of the Privy Council" by John A MacDonald in *Sessional Papers*, No 12 (1870) at 143-44 [*Royal Proclamation of 1869*]. See generally, François Larocque, "La proclamation du 6 décembre 1869" (2009) 33 Man LJ 299; *Le statut du français dans l'Ouest canadien : la cause Caron*, Yvon Blais [forthcoming in 2013] (The authors have on file a copy of the complete evidentiary record that was before the Provincial Court of Alberta in *Caron & Boutet*, as well as a full transcript of the trial).

25 *R v Caron*, 2009 ABQB 745 at paras 32-109, 476 AR 198, [2010] 8 WWR 318. Before the Court of Queen's Bench of Alberta, counsel were Teresa R Haykowsky for the appellant; R Beaudais, for the respondent Caron; Allan Damer for the respondent Boutet; Michel Doucet, QC, Mark C Power, and François Larocque for the Intervener Association canadienne-française de l'Alberta; and Peter Bergbusch for the Intervener Assemblée communautaire fransaskoise Inc.

26 *R v Caron*, 2010 ABCA 343, 493 AR 200, [2011] 5 WWR 66 (application for leave to appeal).

27 See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 146, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].

28 Legislative and judicial bilingualism, while perhaps not able to counter assimilation on their own, have a positive effect on the vitality and survival of French-speaking communities in Western Canada. See generally, Howard Giles, Richard Y Bourhis & Donald M Taylor, *supra* note 4; John de Vries, "Factors Affecting the Survival of Linguistic Minorities: A Preliminary Comparative Analysis of Data for Western Europe" (1983) 5:3-4 Journal of Multilingual and Multicultural Development 207; Grant D McConnell & Jean-Denis Gendron, eds, *Dimensions et mesure de la vitalité linguistique*, vol 1 (Québec: Centre international de recherche sur le bilinguisme, 1988).

tural assimilation rates in Alberta are very high.<sup>29</sup> The vitality of those communities, especially between the *Mercure* (1981) and *Caron & Boutet* (2008) trial judgments, appears to have largely depended on the strength of Alberta's economy and its ability to attract French speakers from other Canadian provinces<sup>30</sup> and from other French-speaking countries.<sup>31</sup> If the official status of the French language in Alberta is eventually confirmed, then the trial judgment in *Caron & Boutet* might be regarded as the public law equivalent of quashing the convictions of Guy Paul Morin<sup>32</sup> or David Milgaard.<sup>33</sup>

Why were the *Royal Proclamation of 1869* and other important historical documents, which were analyzed in great detail by the trial judge in *Caron & Boutet*, not raised or considered at all in either *Mercure* or *Paquette*? How could such a terrible mistake have been made?

This article is a first attempt at providing some answers to these puzzling questions. One of its purposes is to show the grave consequences of subjecting important public law questions to an unbridled adversarial system. Another objective is to highlight the dangers of determining major constitutional questions on the basis of historical evidence adduced by parties with unequal means and resources. *Caron & Boutet* serves as a case study to that end, offering a sobering illustration of the pitfalls of the adversarial system in constitutional cases that turn on the proper understanding of historical events. The first section of this article sets the stage by presenting and analyzing the most important aspects of *Mercure*, *Paquette*, and *Caron & Boutet*. The second section underlines some of the inefficacies of the adversarial system in Canada from an evidentiary perspective and notes the near impossibility for disadvantaged parties to lead adequate, if not complete, evidence in cases that can only be decided by a detailed and comprehensive understanding of complex historical facts. This article concludes by reiterating the extent to which trial judges are the gatekeepers of access to justice and by underscoring the important function of funding mechanisms, such as advanced costs orders and government initiatives like the Language Rights Support Program, in

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29 Statistics Canada, "Portrait of Official-Language Minorities in Canada: Francophones in Alberta", (Ottawa: StatCan, November 2011); Nathalie Kermoal, *Les francophones de l'Alberta* (Québec, GID, 2005).

30 Charles Castonguay, "Le déclin des populations francophones de l'Ouest canadien" (1993) 5:2 *Cahiers franco-canadiens de l'Ouest* 147.

31 Paulin Mulatris & Evaluation Plus Inc, Association canadienne-française de l'Alberta, *Enquête sur l'immigration francophone en Alberta : rapport final* (Edmonton, Alta: Evaluation Plus, 2005) online: Association canadienne-française de l'Alberta <<http://www.acfa.ab.ca>>.

32 *R v Morin* (1995), 37 CR (4th) 395, 1995 Carswell Ont 16 (WL Can) (Ont CA).

33 *Reference re Milgaard (Can)*, [1992] 1 SCR 866, 90 DLR (4th) 1, 71 CCC (3d) 260 [cited to SCR].



both levelling the playing field for unequally matched litigants and promoting the search for truth.

## ***Mercure, Paquette, and Caron & Boutet* and their opposite conclusions regarding the status of French in Alberta and Saskatchewan**

### ***Mercure and Paquette***

Father André Mercure<sup>34</sup> was charged in 1980 with speeding contrary to Saskatchewan's *Vehicle Act*.<sup>35</sup> In the Provincial Court of Saskatchewan, he applied

to be permitted to enter a plea to the charge in the French language, and to have his trial proceeded with in the French language and to have the hearing of the charge delayed until such time as the clerk of the Legislative Assembly for the province of Saskatchewan can produce before the court certain statutes printed in the French language.<sup>36</sup>

Father Mercure argued that section 110 of the *North-West Territories Act*,<sup>37</sup> which guaranteed the right to use French and English in debates in the North-West Territories' legislative assembly and in court proceedings, continued to apply in Saskatchewan by virtue of the *Saskatchewan Act*.<sup>38</sup> The *Saskatchewan Act* maintained the laws, orders, and regulations that existed before the creation of the province. Judge Deshayé of the Provincial Court of Saskatchewan held that section 110 of the *North-West Territories Act* did in fact continue to be in force in the province<sup>39</sup> but only guaranteed the right to use French

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34 Mercure was born in Montreal on December 29, 1921. He studied at the Collège Sainte-Thérèse in Sainte-Thérèse, and in the oblate Juniorat of Chambly. He then attended the Scolasticat Saint-Joseph d'Ottawa. In July 1942, Father Pierre Landreville drowned in Lake McGregor, near Ottawa. Father Mercure accepted a posting in the region of Alberta-Saskatchewan in which Landreville had worked. He became a priest in 1961 and served in various parishes of northwestern Saskatchewan. Father Mercure died on April 29, 1986, before the appeal to the Supreme Court of Canada was heard. See Musée Virtuel Francophone de la Saskatchewan, "Qui était André Mercure?" (1994) 4:4 *Revue historique* 1 online: Société historique de la Saskatchewan <<http://musee.societehisto.com>>.

35 RSS 1978, c V-3.

36 *R v Mercure*, [1981] 4 WWR 435 at 437, 44 Sask R 43 (Prov Ct). Before the Provincial Court of Saskatchewan, counsel were Raymond J Blais, for the defendant, and David M Arnot, for the Crown. The judge did not rely on any historically relevant primary or secondary sources. No expert opinion evidence was tendered into evidence.

37 *North-West Territories Act*, RSC 1886, c 50.

38 *Saskatchewan Act*, SC 1905, c 42, reprinted in RCS 1985, App II, No 21 [*Saskatchewan Act*].

39 *R v Mercure*, *supra* note 36 at 443-44.

and English before the Saskatchewan courts<sup>40</sup> and did not require that the legislature of the province enact, print, and publish its statutes in a language other than English.<sup>41</sup> That decision was then confirmed by a majority of the Court of Appeal of Saskatchewan.<sup>42</sup> Chief Justice Bayda, with whom Justice Brownridge concurred, delivered reasons for judgment. Justices Tallis and Cameron penned separate concurring reasons.<sup>43</sup> Dissenting, Justice Hall held that “section 110 of the *North-West Territories Act* remained in force only during the transitional period when the Province was being established” and “became inapplicable in the Province of Saskatchewan once the Province of Saskatchewan established Courts of its own”.<sup>44</sup> Justice Hall further noted that if he was wrong on that point, he would have held that providing an interpreter would not satisfy section 110’s requirements<sup>45</sup> but that simultaneous translation would.<sup>46</sup> Justice Hall would also have held that section 110 “requires that the statutes of Saskatchewan be printed in both English and French”.<sup>47</sup>

The Supreme Court of Canada granted leave to appeal.<sup>48</sup> The appeal was unanimously dismissed, but for different reasons than those given by the lower courts. Justice Gérard La Forest,<sup>49</sup> writing for the majority, held that the *Saskatchewan Act* effectively maintained section 110 of the *North-West Territories Act*. Consequently, legislative bilingualism had been a requirement since that province was created in 1905.<sup>50</sup> However, the Court also held that the *Saskatchewan Act* had not constitutionally entrenched section 110, and, as

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40 *Ibid* at 445. The right to use French and English before the courts conferred by section 110, in Judge Deshayes’s mind, did not include the right to be understood in the preferred language, and would be satisfied with the provision of an interpreter.

41 *Ibid* at 445-46.

42 *R v Mercure* (1985), 24 DLR (4th) 193, [1986] 2 WWR 1 (CA) [cited to DLR]. Before the Court of Appeal of Saskatchewan, counsel were Raymond J Blais, for the defendant, and J MacPherson and Cheryl Crane, for the respondent.

43 *Ibid* at 222-23.

44 *Ibid* at 221.

45 *Ibid*.

46 *Ibid*.

47 *Ibid* at 222.

48 *R v Mercure*, 24 DLR (4th) 193, [1986] 2 WWR 1, leave to appeal to SCC granted, [1986] 1 SCR v at xi. Chief Justice Brian Dickson and Justices Antonio Lamer (as he then was) and Bertha Wilson granted leave to appeal on February 14, 1986.

49 Justice La Forest was born in Grand Falls, New Brunswick, on April 1, 1926. He was appointed to the New Brunswick Court of Appeal in 1981 and to the Supreme Court of Canada on January 16, 1985. He retired twelve years later. See *The Supreme Court of Canada and its Justices/La Cour Suprême du Canada et ses juges : 1875-2000* (Toronto: Dundurn, 2000) at 166. See also Anne Crocker, Brent Timmons & Melinda Renner, “Bibliography of Books, Articles, Jurisprudence, and other Materials by Hon. Gerard V La Forest”, online: UNB Gerard La Forest Law library: <<http://www.unbf.ca/law/library>>.

50 *Mercure*, *supra* note 18 at 263.

a result, legislative and judicial bilingualism in Saskatchewan could be unilaterally modified or abolished by the provincial legislature.<sup>51</sup> Approximately two months later, a law enacted in French and English purported to abrogate the equality of status, rights, and privileges of French and English in the legislature, in legislation, and in the courts.<sup>52</sup>

The Supreme Court of Canada came to an almost identical conclusion when faced with a similar case that had made its way through the Alberta courts.<sup>53</sup> In 1983, Luc Paquette was charged under the *Narcotic Control Act*.<sup>54</sup> Paquette made an application for his trial to be in French. Judge Marshall of the Provincial Court of Alberta dismissed Paquette's application.<sup>55</sup> Justice Sinclair of the Court of Queen's Bench of Alberta subsequently heard Paquette's application "for an order prohibiting any judge of the Provincial Court of Alberta from proceeding in the English language with the preliminary inquiry relating to the charge against him".<sup>56</sup> As in *Mercure*, the question in *Paquette* concerned the effect of section 110 of the *North-West Territories Act*.<sup>57</sup> The debate focused on judicial bilingualism in criminal proceedings and did not concern bilingual legislation.

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51 *Ibid* at 270-72. The conclusion of the Supreme Court of Canada regarding the status of French in Saskatchewan diverged significantly from its conclusions in Quebec and Manitoba when faced with similar questions in those jurisdictions. See *Blaikie v Québec (Attorney General)*, [1979] 2 SCR 1016; *Attorney General of Manitoba v Forest*, [1979] 2 SCR 1032; *Re Manitoba Language Rights*, [1985] 1 SCR 721.

52 *The Language Act*, SS 1988-89, c L-6.1. First reading: Saskatchewan, Legislative Assembly, *Hansard* 21th Leg, 2nd Sess, No 10A (4 April 1988) at 275. Second reading: Saskatchewan, Legislative Assembly, *Hansard* 21th Leg, 2nd Sess, No 23A (21 April 1988) at 736-42; Saskatchewan, Legislative Assembly, *Hansard* 21th Leg, 2nd Sess, No 25A (25 April 1988) at 808-16. For the Committee of the Whole's work on the Bill, see Saskatchewan, Legislative Assembly, *Hansard* 21th Leg, 2nd Sess, No 25A (25 April 1988) at 816-20. Third reading: Saskatchewan, Legislative Assembly, *Hansard* 21th Leg, 2nd Sess, No 25A (25 April 1988) at 820. Royal Assent: Saskatchewan, Legislative Assembly, *Hansard* 21th Leg, 2nd Sess, No 26A (26 April 1988) at 852.

53 *R v Paquette*, *supra* note 17.

54 RSC 1970, c N-1.

55 The Provincial Court of Alberta's judgment is unreported but summarized in *Regina v Luc Paquette*, (1985) 14 WCB 69 (Alta Prov Ct).

56 *R v Paquette* (1985), 63 AR 258 at 260, [1985] 6 WWR 594 (QB). Before the Court of Queen's Bench of Alberta, counsel were Mary T Moreau for the applicant; CD O'Brian, Grant Stapon, and Louis Reynolds for the Attorney General for Canada; and Peter T Costigan and KM Eidsvik (also the presiding justice in *R v Caron*, *supra* note 25) for the Attorney General for Alberta. The justice of the Court of Queen's Bench did not rely on any historically relevant primary sources. He relied on the history of section 110 of the *North-West Territories Act* as set out both in the provincial court judgment and in *R v Lefebvre* (1982), 39 AR 203, 69 CCC (2d) 448 (QB) [*R v Lefebvre*]. None of those cases had examined historical evidence. Moreover, no expert opinion evidence was produced during the proceedings.

57 *R v Paquette*, *supra* note 56 at 260-61.

Justice Sinclair held that section 110 was incorporated into the laws of Alberta by the *Alberta Act*,<sup>58</sup> which maintained the laws, orders, and regulations that existed before the creation of the province and was never repealed.<sup>59</sup> It was also held that section 110 conferred the right to use French and English orally and in writing in the courts, the right to be understood by the judge but not by the jury, and the right to be provided with an interpreter.<sup>60</sup> All parties appealed.<sup>61</sup> Paquette claimed that the trial had to be heard by a jury that understood French; Canada appealed the finding that judges had to understand French and English; and Alberta argued that section 110 was not applicable to the proceedings.<sup>62</sup> Justice Stevenson of the Court of Appeal of Alberta, with Justice Irving concurring, felt bound by the judgment of Justice Jean Beetz in *MacDonald v Montreal (City of)*<sup>63</sup> to allow the appeals for Alberta and Canada and dismiss Paquette's appeal. In their view, the defendant's right to use French in court could not trump the rights of counsel and judges to use English in court.<sup>64</sup> Dissenting, Justice Hetherington held that the parties did not have a right to appeal.<sup>65</sup> The Supreme Court of Canada granted leave to appeal in June 1986, roughly five months before hearing the appeal in *Mercure*.<sup>66</sup> In four short paragraphs, the Court applied *Mercure* to the Alberta context.<sup>67</sup> The Alberta legislature then enacted the *Language Act*,<sup>68</sup> also purporting to abrogate section 110 of the *North-West Territories Act* for that province.<sup>69</sup>

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58 *Alberta Act*, SC 1905, c 3, reprinted in RCS 1985, App II, No 21.

59 *R v Paquette*, *supra* note 56 at 268, 273.

60 *Ibid* at 281-82.

61 *R v Paquette* (1988), 81 AR 12 at 14, 46 DLR (4th) 47 (CA). Before the Court of Appeal of Alberta, counsel were Mary T Moreau, for Luc Paquette; CD O'Brien and GN Stapon, for Her Majesty the Queen in the Right of Canada; and Peter T Costigan and JRM Black, for Her Majesty the Queen in the Right of Alberta.

62 *Ibid* at 15.

63 [1986] 1 SCR 460. At issue in the case was whether the Supreme Court of Canada had jurisdiction to hear a case for which leave to appeal to a provincial court of appeal was denied by the provincial court of appeal, and if so, whether the summons, being expressed in the French language only and not in the language of the English-speaking accused, offended the provisions of s 133 of the *Constitution Act, 1867*.

64 *R v Paquette*, *supra* note 61 at 21-23.

65 *Ibid* at 25.

66 *R v Paquette*, [1988] 55 Alta LR (2d) 1, 46 DLR (4th) 47, [1988] 1 WWR 97 (CA), leave to appeal to SCC granted, [1986] 1 SCR v at xii. Chief Justice Dickson and Justices Beetz and William McIntyre granted leave to appeal.

67 *Paquette*, *supra* note 17.

68 RSA 2000, c L-6.

69 *Languages Act*, SA 1988, c L-7.5. First reading: Alberta, Legislative Assembly, *Hansard* 21st Leg, 3rd Sess, No 93 (22 June 1988) at 1939. Second reading: Alberta, Legislative Assembly, *Hansard* 21st Leg, 3rd Sess, No 99 (28 June 1988) at 2091-2100. For the Committee of the Whole Assembly's work on the Bill, see Alberta, Legislative Assembly, *Hansard* 21st Leg, 3rd Sess, No 101 (29 June 1988) at 2246-54. Third reading: Alberta, Legislative Assembly, *Hansard* 21st Leg, 3rd Sess, No

## Caron & Boutet

Gilles Caron<sup>70</sup> and Pierre Boutet were charged with violating the *Use of Highways and Rules of the Road Regulations*,<sup>71</sup> made under the *Traffic Safety Act*.<sup>72</sup> They argued the act was unconstitutional because it was only published in English. Caron and Boutet also asked the provincial court to declare the *Language Act* of no force and effect.<sup>73</sup>

One of the longest trials in the province's history ensued and resulted in a provincial court judgment of 574 paragraphs.<sup>74</sup> At issue during the trial were questions that were either novel or had been barely studied at all by academics or the courts. For example, the provincial court noted that most research regarding the status and use of French in what is today Alberta had thus far mostly focused on education rights.<sup>75</sup> It was also noted by the trial judge that the *Royal Proclamation of 1869* had never been studied outside of the context of the amnesty granted to Louis Riel and other leaders of the Red River Resistance.<sup>76</sup> Furthermore, the constitutional convention held from January 25 until February 10, 1870, had never been thoroughly examined.<sup>77</sup> In short,

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100 (30 June 1988) at 2169-72. Royal Assent: Alberta, Legislative Assembly, Hansard 21st Leg, 3rd Sess, No 105 (6 July 1988) at 2262-63.

70 Caron was born and raised in Quebec but had been living in Alberta for a little more than twenty years as a labourer and a truck driver. He had also been implicated in other language-related legal challenges that arose from a complaint he filed against his former employer, the City of Edmonton, contending that he had been the victim of discrimination. See *Caron v Alberta (Chief commissioner of the Alberta Human Rights and Citizenship Commission)*, 2007 ABQB 200, 426 AR 370; *Caron v Alberta (Human Rights and Citizenship Commission)*, 2008 ABCA 272, 171 ACWS (3d) 815; *Caron v Alberta (Human Rights and Citizenship Commission)*, 2009 ABCA 101, 457 AR 392; "Man's call for French translation denied", *Edmonton Journal* (5 April 2007) B4; Shannon Kari, "Court ruling may impact on rights to interpreter; Civil Proceedings; Human rights commission must pay for translator", *National Post* (24 September 2007) A6.

71 Alta Reg 304/2002.

72 RSA 2000, c T-6.

73 By virtue of the *Constitution Act, 1982*, *supra* note 2, s 52(1).

74 Edmund A Auger, "Le français, langue officielle en Saskatchewan : la cause Caron et ses assises" (Les conférences de l'Institut, delivered at the Centre canadien de recherche sur les francophonies en milieu minoritaire (CRFM), Université de Regina, 29 January 2009), online: University of Alberta <<http://www.ualberta.ca>>; Natasha Dubé, "Language Rights in Alberta", online: Centre for Constitutional Studies' Featured Court Rulings <<http://www.law.ualberta.ca/centres/ccs>>.

75 *Caron & Boutet*, *supra* note 21 at para 37.

76 *Ibid* at para 40. See also Canada Bill C-417, *An Act respecting Louis Riel*, 1st Sess, 36th Parl, 1997-98-99.

77 *Caron & Boutet*, *supra* note 21 at para 39. Determined to obtain concrete guarantees, with respect to the continuation of their rights within Canada, the inhabitants of Rupert's Land elected a convention of twenty French-speaking and twenty English-speaking representatives. Georges Étienne Cartier compared this convention to the Charlottetown (September 1864) and Quebec (October 1864) conferences that led to the *Constitution Act, 1867*, *supra* note 27. See Edmund A Auger, *supra* note 74.

as Judge Wenden put it, the proceeding was “without precedent”.<sup>78</sup> The court had to assess historical evidence, largely provided by experts,<sup>79</sup> and choose between competing accounts of complex and determinative events. Alberta argued this historical evidence had already been examined in *Mercuré* and *Paquette*<sup>80</sup> and provided a complete answer to the defendants’ allegations.<sup>81</sup>

Caron and Boutet’s theory of the case was based on facts and events that took place before the admission of Rupert’s Land and the North-West Territories<sup>82</sup> into Canada and included the *Royal Proclamation of 1869*.<sup>83</sup> Relations between the Métis (inhabitants of French and Aboriginal origin) and the Half-Breeds (inhabitants of English<sup>84</sup> and Aboriginal origin), on the one hand, and the Hudson’s Bay Company (HBC), responsible for the territory’s governance, on the other, were fragile even before the admission of Rupert’s Land and the North-West Territories into Canada.<sup>85</sup> Indeed, as far back as 1847, to address a range of governance grievances and the HBC’s monopoly over the fur trade, the Métis and the Half-Breeds presented joint submissions to Her Majesty’s Secretary of State for the Colonies, Earl Granville.<sup>86</sup> Judge Wenden found as a matter of historical fact that those submissions, which represented the claims and concerns of the inhabitants of all of Rupert’s Land and the North-West Territories, included demands for the continuation of legislative bilingualism and for justice to be administered by judges capable of understanding French without the help of an interpreter or translator.<sup>87</sup>

The court also found as a matter of historical fact that French was recognized and commonly used in Rupert’s Land and the North-West Territories before those lands and territories were admitted into Canada. For example, Judge Wenden pointed to a letter written by the Governor of the HBC, Sir George Simpson, in which he offers Adam Thom the position of recorder.<sup>88</sup>

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78 *Caron & Boutet, supra* note 21 at para 42 [translated by authors].

79 *Ibid* at paras 53-65.

80 *Ibid* at para 30.

81 *Ibid* at paras 24, 75.

82 These lands and territories were administered by HBC and included, *inter alia*, what is today Alberta, Saskatchewan, and Manitoba.

83 *Caron & Boutet, supra* note 21 at paras 77-86.

84 *Ibid* at para 86.

85 *Ibid* at paras 90-91.

86 *Ibid* at paras 92-93.

87 *Ibid* at paras 96-119.

88 In Georges Stubbs, *Four Recorders of Rupert’s Land* (Winnipeg: Peguis, 1967) at 5, the author describes the recorder position as follows: “In 1839, the Governor and Committee in London made further improvements in the judicial system. To meet a long-felt need for a company official with legal training, the office of Recorder of Rupert’s Land was established. The Recorder’s duties were

*In saying that I should have much pleasure in recommending you to the situation in question I presume you are qualified to express yourself with perfect facility in the French Language as that may in a great measure be considered the Language of the Country and without which you would not be adapted for the situation.<sup>89</sup>*

The court drew unambiguous conclusions of fact to the effect that French and English enjoyed equality of status, rights, and privileges both in ordinances and regulations, as well as in the courts, in Rupert's Land and the North-West Territories before their admission into Canada.<sup>90</sup>

Pursuant to the constitutional plan outlined in article 146 of the *Constitution Act of 1867*, the HBC divested itself of its land holdings in North America. However, the inhabitants were not included in the ensuing negotiations between HBC and the Crown. The inhabitants reacted by developing a common position, the terms of which were set out in bills of rights, which were the result of constitutional conventions held in the Fall of 1869 and in January and February 1870.<sup>91</sup> The trial judge thoroughly reviewed detailed historical evidence, including primary sources and expert opinion evidence on the subject. Ultimately, Judge Wenden stated that he was "convinced that the convention of January-February [1870] was a constitutional convention".<sup>92</sup> According to the trial judge, the "Bills of Rights" that emerged from the constitutional conventions were important legal documents because they were realistic,<sup>93</sup> drafted democratically,<sup>94</sup> and resulted from the work of the legitimate representatives of the inhabitants of Rupert's Land and the North-West Territories.<sup>95</sup> These bills of rights not only provided for language rights but also constituted a pact between the French-speaking Métis and the English-speaking Half-Breeds.<sup>96</sup>

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to direct the proceedings of the General Quarterly Court and to serve as a member of the Council of Assiniboia. When he sat as a judge, in civil cases, involving claims of more than £10, and in criminal cases, a jury was to sit with him and other members of the Court, to determine questions of fact".

89 *Caron & Boutet*, *supra* note 21 at para 89 [emphasis in original]. See generally regarding bilingualism within the Supreme Court of Canada, Sébastien Grammond & Mark Power, *Should Supreme Court judges be required to be bilingual?* (Kingston, ON: Institute of Intergovernmental Relations, Queen's University, 2011).

90 *Caron & Boutet*, *supra* note 21 at paras 142-43, 157-67.

91 *Ibid* at paras 168-75.

92 *Ibid* at para 206 [translated by authors]. Original text: "convaincu que la convention de janvier-février [1870] était une convention constitutionnelle".

93 *Ibid* at para 231.

94 *Ibid* at para 232.

95 *Ibid* at para 286.

96 *Ibid* at para 300.

At the heart of Caron and Boutet's cases lies the *Royal Proclamation of 1869*. This proclamation, it was argued, had the effect of confirming and ensuring the continuation of legislative and judicial bilingualism in the lands and territories formerly administered by the HBC. This instrument, which was issued in French, in English, and in Cree,<sup>97</sup> contained the following promise:

Par l'autorité de Sa Majesté, je vous assure donc que sous l'union avec le Canada, tous vos droits et privilèges civils et religieux seront respectés, vos propriétés vous seront garanties, et que votre pays sera gouverné, comme par le passé, d'après les lois anglaises et dans l'esprit de la justice britannique.<sup>98</sup>

By Her Majesty's authority I do therefore assure you, that on the union with Canada all your civil and religious rights and privileges will be respected, your properties secured to you, and that your Country will be governed, as in the past, under British laws, and in the spirit of British justice.<sup>99</sup>

The court found that the *Royal Proclamation of 1869* had been communicated to the inhabitants at the outset of the 1870 constitutional convention and was referred to on many occasions in the official correspondence between Ottawa and London during the height of the events unfolding at the Red River settlement. The court found as a matter of fact that the issuance of the *Royal Proclamation of 1869* was necessary to appease the inhabitants who had resisted the admission of their lands and territories into Canada.<sup>100</sup> Despite Alberta's argument to the effect that the *Royal Proclamation of 1869* had no legal force or effect,<sup>101</sup> Judge Wenden held that "the Governor General had the capacity and authority to issue the proclamation and that it had force of law".<sup>102</sup> The court drew essential conclusions of fact and of mixed fact and law, including (1) the *Royal Proclamation of 1869* applied to all of the lands and territories under the HBC rule and not only to the Red River Settlements;<sup>103</sup> (2) the expression "all your civil ... rights" contained in the *Royal Proclamation of 1869* included the right to bilingual legislation and judicial proceedings;<sup>104</sup> (3) the purpose of the *Royal Proclamation of 1869* was to ensure the peaceful transfer of Rupert's Land and the North-West Territories into Canada;<sup>105</sup>

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97 *Ibid* at para 422.

98 (1870) 5 *Document de la session*, No 12 at 44-46 [emphasis added].

99 *Supra* note 24 cited in *Caron & Boutet*, *supra* note 21 at para 368 [emphasis added].

100 *Ibid* at paras 392, 396.

101 *Ibid* at paras 398-99.

102 *Ibid* at para 424 [translated by authors]. Original text: "Le gouverneur-général avait la capacité et l'autorisation d'émettre la proclamation et que celle-ci avait force de loi".

103 *Ibid* at para 434.

104 *Ibid* at para 454.

105 *Ibid* at paras 472-73.



(4) “the proclamation recognized the language rights and guaranteed their existence after the entry into confederation”;<sup>106</sup> and (5) the *Royal Proclamation of 1869* forms part of the Constitution of Canada.<sup>107</sup>

Rupert’s Land and the North-West Territories were retroceded to the United Kingdom on November 19, 1869. By the terms of the *Rupert’s Land Act, 1868*, the Crown would have had thirty days to transfer Rupert’s Land to Canada.<sup>108</sup> The Canadian House of Commons granted the Governor in Council absolute power to ensure the success of the land transfer.<sup>109</sup> However, the transaction was interrupted in the Fall of 1869 by the disturbances in Rupert’s Land and the North-West Territories that were led by a coalition of Métis and Half-Breeds under the leadership of Louis Riel.<sup>110</sup> The Governor General of Canada advised Her Majesty’s Secretary of State for the Colonies that Canada would not accept the admission of Rupert’s Land and the North-West Territories unless peaceful possession was ensured.<sup>111</sup> Her Majesty’s Secretary of State for the Colonies responded by indicating that the Queen did not want to wait.<sup>112</sup> The trial judge found as a matter of historical fact that Rupert’s Land and the North-West Territories had to be admitted into Canada peacefully, and that the purpose of the *Royal Proclamation of 1869* was to put an end to the disturbances in Rupert’s Land and the North-West Territories by confirming and ensuring the continuation of the vested rights of the inhabitants, including their right to bilingual legislation and judicial proceedings.<sup>113</sup>

It is on this basis that the provincial court found the right to bilingual legislation in Alberta to be a constitutional right. Accordingly, Judge Wenden held the *Language Act* to be *ultra vires* and therefore of no effect. He consequently acquitted Messrs Caron and Boutet.<sup>114</sup>

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106 *Ibid* at para 488 [translated by authors]. Original text: “la proclamation reconnaissait les droits linguistiques et garantissait leur existence postérieurement à l’entrée dans la Confédération”.

107 *Ibid* at paras 512-61. See also Larocque *supra* note 24 at 320-24.

108 (UK), 31 & 32 Vict, c 105, s 3, reprinted in RSC 1985, App II, No 6.

109 *Caron & Boutet*, *supra* note 21 at paras 520-22. A resolution to this effect was adopted on May 28, 1869. An Address to Her Majesty to this effect was made on May 31, 1869. Both the resolution and Address are referred to in Schedule B to the 1870 *Order of Her Majesty in Council Admitting Rupert’s Land and the North-Western Territory into the Union*, reprinted in RCS 1985, App II, No 9.

110 *Caron & Boutet*, *supra* note 21 at para 527.

111 *Ibid* at para 528.

112 *Ibid* at para 529.

113 *Ibid* at paras 530-31.

114 *Ibid* at paras 574-75.

In 2009, the Court of Queen's Bench allowed Alberta's appeal. Justice Eidsvik did not find that the trial judge made any palpable and overriding errors of fact. Quite the opposite. Justice Eidsvik accepted all of the trial judge's findings of fact, stating

[t]here is little doubt that the inhabitants of Rupert's Land and the North-Western Territory enjoyed the protection of certain language rights prior to the annexation of these territories. Indeed, all of their local legislation was published in French and English. It is also clear that these language rights were of fundamental importance to the population at that time, which was equally divided between Anglophones and Francophones.<sup>115</sup>

Nevertheless, the Court of Queen's Bench disagreed with the legal effects that flowed from those findings of fact, holding that

[n]either the Royal Proclamation of 1869, nor the 1870 Order, had the effect of constitutionalizing language rights in the remaining territories. As a result of the annexation, the Canadian Parliament was granted full power and authority to legislate on language rights in the territories, subject to section 133 of the *Constitution Act, 1867*. Accordingly, when the Canadian Parliament created the Province of Alberta and established its constitution in 1905, there was no constitutional condition requiring it to include in the Province's constitution an obligation to publish provincial legislation in English and French.<sup>116</sup>

The Court of Appeal for Alberta has granted leave to appeal this decision on the specific question of a putative constitutional right to bilingual legislation in Alberta.<sup>117</sup> Whatever view the appeal court ultimately takes of the trial judge's legal conclusions, it will undoubtedly follow the well-established practice of paying due deference to the provincial court's findings of fact. As the historical narrative found by Judge Wenden will probably be the most credible and likely, the Court of Appeal might very well agree that the vested right to bilingual legislation is alive and well and entrenched in the Canadian Constitution. Of course, such a result would be diametrically opposed to the one reached in *Mercure*, but it would also be entirely defensible in light of the qualitative and quantitative differences in the primary and secondary sources that make up the evidentiary record of those two cases.

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115 *R v Caron*, *supra* note 25 at para 282.

116 *Ibid* at para 283.

117 *R v Caron*, *supra* note 26.

## Evidence and the lack thereof: a fault line in constitutional litigation?

It is more than a little astonishing that Justice La Forest, writing for the majority of the Supreme Court of Canada in *Mercure*, opined that the constitutional status of the French language in Western Canada could be ascertained “simply by the application of the ordinary principles of statutory construction”.<sup>118</sup> However, because “all parties stressed the legislative history of the appropriate provisions and grounded some of their arguments in that history,”<sup>119</sup> he was of the view that an assessment of Canadian history would yield a better understanding of the legislative purpose of section 110 of the *North-West Territories Act*. Acting *proprio motu*, Justice La Forest then went on to conduct his own independent research in order to determine whether the status of French was constitutionally protected in Western Canada.<sup>120</sup> In addition to four excerpts of *Hansard*, the Supreme Court of Canada’s entire historical analysis rested solely on three secondary sources. The first is Mason Wade’s<sup>121</sup> work *The French Canadians 1760–1967*,<sup>122</sup> originally published in

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118 *Mercure*, *supra* note 18 at 248.

119 *Ibid* at 248.

120 On the role of law clerks in the Supreme Court of Canada, see generally, Lorne Sossin, “The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada” (1996) 30 UBC L Rev 279; Mitchell McInnes, Janet Bolton & Natalie Derzko, “Clerking at the Supreme Court of Canada” (1994) 33:1 Alta L Rev 58; Michael John Herman, “Law Clerking at the Supreme Court of Canada” (1975) 13 Osgoode Hall LJ 279; Donald Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008) at 110-41.

121 The controversial Hugh Mason Wade was born in New York City on July 3, 1913. He studied medieval history and literature at Harvard University but left before a degree was ever conferred to him. Wade did not follow the normal academic path of earned university accreditation but gained recognition nevertheless, mostly because of his career as an educator. The lack of a formal degree did not prevent him from teaching at the University of Rochester, where he became director of the Canadian Studies Program, and at the University of Western Ontario. He also lectured in various other post-secondary institutions such as Université Laval, the University of Toronto, the University of British Columbia, and Carleton University. He received four honorary doctorates, grants from the Rockefeller and Guggenheim foundations, and was elected president of the Canadian Historical Association for the 1964-65. While Wade doubtlessly played an important role in the understanding of Canadian history, his work was never entirely acknowledged as serious scholarship by professional historians. See generally, Naomi ES Griffiths, “Hugh Mason Wade” in Naomi ES Griffiths & George A Rawlyk, eds, *Mason Wade, Acadia and Quebec: The Perception of an Outsider* (Ottawa: Carleton University Press, 1991) 1; Gordon Ross, *The Historiographical Debate on the Charges of Anti-Semitism Made Against Lionel Groulx* (MA History Thesis, University of Ottawa, 1999) online: Marianopolis College <<http://faculty.marianopolis.edu/>>.

122 Mason Wade, *The French Canadians 1760-1967*, Vol 1 (New York: MacMillan, 1968). The book was reprinted in two volumes. The Supreme Court of Canada in *Mercure* only relied on the 607-page-long first volume.

1955<sup>123</sup> in the United States of America and only subsequently translated into French.<sup>124</sup> The second doctrinal source is Arthur I Silver's<sup>125</sup> *The French-Canadian Idea of Confederation, 1864-1900*.<sup>126</sup> Lastly, the Court also relied on the only existing report at the time devoted to the status of the French and English languages in Canada, *The Law of Languages in Canada*,<sup>127</sup> by Claude-Armand Sheppard.<sup>128</sup>

By contrast, the parties in *Caron & Boutet* tendered an extensive number of primary historical documents and sources (including historical correspondence, excerpts from *Hansard* and other parliamentary documents, newspaper articles from such sources as the *New Nation*,<sup>129</sup> and other contemporaneous original documents), as well as considerable authoritative secondary material.<sup>130</sup> Further, the trial judge heard from eight expert witnesses,<sup>131</sup> both in chief

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123 Mason Wade, *The French Canadians: 1760-1945* (New York: MacMillan, 1955). The first edition was a 1,136-page-long single volume book.

124 Mason Wade, *Les Canadiens français : de 1760 à nos jours*, vol 1, translated by Adrien Venne (Montréal: Le Cercle du Livre de France, 1963).

125 Arthur I Silver is professor emeritus at the Department of History at the University of Toronto. He is the author of numerous articles on Canadian history, some of which have been published in the *Canadian Historical Review*.

126 Arthur I Silver, *The French-Canadian Idea of Confederation, 1864-1900* (Toronto: University of Toronto Press, 1982). This 257-page work was reprinted in 1997: Arthur I Silver, *The French-Canadian Idea of the Confederation, 1864-1900*, 2nd ed (Toronto: University of Toronto Press, 1997).

127 Claude-Armand Sheppard, *The Law of Languages in Canada* (Ottawa: Information Canada, 1971). This 414-page report was prepared for the Royal Commission on Bilingualism and Biculturalism. This piece was cited by the interveners in *R v Mercure*, *supra* note 18 (Mémoire des intervenantes).

128 Sheppard, a founding partner of Robinson Sheppard Shapiro LLP in Montreal and a senior member of the litigation group there, prepared a three-thousand-page study for the Commission d'enquête sur la situation de la langue française et sur les droits linguistiques au Québec: Claude-Armand Sheppard, *Inventaire critique des droits linguistiques au Québec* (Québec: L'Éditeur officiel du Québec, 1973). He was called to the Quebec Bar in 1959. See Claude-Armand Sheppard, online: RSS <<http://www.rsslex.com/en/>>.

129 *Winnipeg New Nation* (1870), Winnipeg, Manitoba Legislative Library (107437212), online: Province of Manitoba <<http://www.gov.mb.ca/>>.

130 *Caron & Boutet*, *supra* note 21 at paras 12-76.

131 *Ibid* at paras 53-65. It is worth noting that expert opinions are now more frequently used than they were when *Mercure* and *Paquette* were heard by the Provincial Court of Saskatchewan and the Court of Queen's Bench of Alberta, respectively. In language rights cases, courts regularly hear from experts in order to attempt to establish historical or sociological facts. In *Mabé v Alberta* (1985) 64 AR 35, 22 DLR (4th) 24 (QB), a case very well known by official language minority communities, the trial judge heard expert opinion evidence from Dr Stacy Churchill (an expert in matters relating to the relationship between the language of instruction and academic achievement, governance, financing, and school administration), Dr Lionel Desjarlais (former dean of the Faculty of Education at the University of Ottawa), and Madam Yvonne McLaughlin (who had actively participated in establishing a French-language minority school system and was a trustee of a French-language school board). *Lalonde v Ontario (Health Services Restructuring Commission)* (1999), 48 OR (3d) 50, 181 DLR (4th) 263 (Div Ct) is yet another language rights case where ex-

and in cross-examination: Edmund Auger,<sup>132</sup> Rodrigue Landry,<sup>133</sup> Kenneth Munro,<sup>134</sup> Joshua Fishman,<sup>135</sup> Robert Stebbins,<sup>136</sup> Wilfrid Denis,<sup>137</sup> Juliette Champagne,<sup>138</sup> and Raymond Huel.<sup>139</sup> The trial judge's very detailed reasons also cite thirteen reputable and authoritative secondary sources.<sup>140</sup> For instance, the judgment refers to the authoritative *Birth of Western Canada*,<sup>141</sup> by George Stanley.<sup>142</sup> Other important and reputable sources cited by the court included

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- pert opinion evidence played a major role. It is clear that the nature of constitutional litigation has evolved to a point where it is now almost unthinkable to expect a court to decide language rights cases without consulting or hearing evidence from experts.
- 132 Auger, PhD, is an expert in the fields of language governance in Canada, language law and the impact of language policies on minority vitality.
- 133 Landry, PhD, is an expert in the fields of ethnolinguistic vitality and language socialization.
- 134 Munro, PhD, is an expert in French Canadian and Franco-Albertan history.
- 135 Fishman, PhD, is a world-renowned sociolinguist.
- 136 Stebbins, PhD, has studied the Franco-Calgarian community.
- 137 Denis, PhD, is an expert in the social roles played by the law and legislative and judicial institutions and has also studied the sociocultural disadvantages of French Canadian minority communities.
- 138 Champagne, PhD, is an expert in French Canadian and Western Canadian history. She specializes in Métis, Catholicism, colonialism, and Franco-Albertan heritage studies.
- 139 Huel, PhD, is an expert in the fields of Western Canadian, Métis, and French Canadian history.
- 140 Eric Adams, "Ghosts in Court: Jonathan Belcher and the Proclamation of 1762" (2004) 27 Dal LJ 321; Canada, *Report of the Select Committee on the Cause of the Difficulties in the North-West Territory in 1869-79* (Ottawa: IB Taylor, 1874); Dale Gibson & Lee Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1670-1970* (Winnipeg: Peguis, 1972); Dale Gibson, *Attorney for the Frontier: Enos Stutsman* (Winnipeg: University of Manitoba Press, 1983); Marcel Giraud, *Le Métis canadien: son rôle dans l'histoire des province de l'Ouest* (Paris: Institut d'Ethnologie, 1945); William L Morton, *Manitoba: The Birth of a Province* (Altona, Man: DW Friesen, 1965); Denis Perreault & Huguette Léger, *La petite histoire des francophones dans les Territoires du Nord-Ouest* (Yellowknife, NWT: FFT, 1989); Claude-Armand Sheppard, *The Law of Languages in Canada*, *supra* note 127; Brian Slattery, *The Land Rights of Indigenous Canadian People as Affected by the Crown's Acquisition of Their Territories* (Saskatoon: University of Saskatchewan Native Law Center, 1979); George Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1970); Stubbs *supra* note 88; Thomas Lewis-Herbert, *The Struggle for Responsible Government in the North-West Territories 1870-97*, 2nd ed (Toronto: University of Toronto Press, 1978); Esten Kenneth Williams, "Aspects of the Legal History of Manitoba" (1947-48) 3:4 Historical and Scientific Society of Manitoba Papers 48.
- 141 George Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1992). Longmans, Green Co. Ltd. first published this work in 1936 in London. The 475-page-long second edition was published in 1960 by the University of Toronto Press and was reprinted multiple times. In 1992, an introduction by Professor Thomas Flanagan of the University of Calgary was added and the University of Toronto Press republished the work.
- 142 Stanley, PhD, was born in Calgary on July 6, 1907. He received a bachelor of arts degree from the University of Alberta and then studied at Oxford University as a Rhodes Scholar. He became the head of the history department at Mount Allison University in Sackville, New Brunswick, where he founded the first undergraduate program in Canadian Studies, and later became head of the history department at the Royal Military College in Kingston. He also held the first Chair in Canadian History at the University of British Columbia. See generally, Jane Doucet, "Historian designed Canada's flag", *The Globe and Mail* (2 October 2002) R11. See also Order of Canada: George FG Stanley, CC, CD, PhD, LittD, FRSC, online: The Governor General of Canada <<http://www.>

Marcel Giraud's<sup>143</sup> *Le Métis canadien*<sup>144</sup> and Lewis Herbert Thomas's<sup>145</sup> *The Struggle for Responsible Government in the North-West Territories 1870–97*.<sup>146</sup>

The tremendous discrepancy in the sources presented to the courts and consulted by the judges called upon to decide the *Mercure* and *Caron & Boutet* cases clearly illustrates some fundamental problems that come to light when the search for truth is attempted through litigation. At least three kinds of problems arise. Firstly, and perhaps unsurprisingly, *Mercure* shows how careless overreliance on only a few evidentiary sources hinders the search for truth. On the other hand, in *Caron & Boutet*, the fact that a ninety-day trial came to a close without any consideration given to other very significant and relevant secondary sources<sup>147</sup> suggests that the search for truth is an inherently imperfect enterprise. Secondly, constitutional litigation is particularly problematic as a framework for properly understanding historical events that have a bearing on the rights of national minorities when it is based on fundamentally flawed or unreliable sources. Thirdly, and perhaps most importantly, the evidentiary sources that form the basis of legal pronouncements about constitutionally significant historical events have a determinative impact on the authority and legitimacy of those decisions. If it is trite to say that reasons for judgment serve

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- gg.ca/>, where he is described as a “highly regarded historian” and a “historian whose writing on the Canadian West and on Military history have won him an eminent place in scholarship”.
- 143 Giraud, PhD, taught at the prestigious Collège de Paris, where he was appointed chair of the North American History and Civilisation Studies. See generally, Vaughan B Baker, “Marcel Giraud, 1900–1994: A Memorial and a Reminiscence” (1994) 35:3 *Louisiana History* 355; Nathan Wachtel, “Marcel Giraud: notice nécrologique” (1994) *Annuaire du Collège de France 1993–1994* 85.
- 144 This 1,300-page-long work was Giraud’s doctoral thesis and the result of extensive research of rarely read archives, such as those of Saint-Boniface’s Archbishop, of the Oblate Fathers, of the Soeurs Grises, and of the Archbishopric of Edmonton. He also consulted the HBC’s archives in London and France. His work was translated into English in 1986: Marcel Giraud, *The Métis in the Canadian West*, translated by George Woodcock (Edmonton: University of Alberta Press, 1986). See generally, Antoine d’Eschambault, Book Review of *Le Métis canadien: son rôle dans l’histoire des provinces de l’Ouest* by Marcel Giraud, (1947) 1:1 *Revue d’histoire de l’Amérique française* 137.
- 145 Thomas, PhD, was the provincial archivist for Saskatchewan and was editor of *Saskatchewan History* between 1949–57. Thomas taught history at the University of Regina and at the University of Alberta. See generally, Lewis Gwynne Thomas, “Lewis Herbert Thomas: A Biographical Sketch” in John Elgin Foster, ed., *The Developing West: Essays on Canadian History in Honor of Lewis H. Thomas* (Edmonton: University of Alberta Press, 1983) 11.
- 146 This 304-page work was Thomas’ doctoral thesis, originally published in 1956 by the University of Toronto Press. In Lewis Gwynne Thomas, *ibid* at 14, it is said that “with a second edition in 1978, the book confirmed [Thomas’] reputation as a leading figure in the developing field of western Canadian history, complementing the earlier work of Arthur S Morton and GFG Stanley” and that “it remains one of the foundation stones of western Canadian studies”.
- 147 See e.g., Lionel Groulx, *L’enseignement français au Canada*, vol 1 (Montréal: Librairie d’action canadienne-française, 1931); Auguste-Henri de Trémaudan, *Histoire de la nation métisse dans l’Ouest canadien* (Montréal: Albert Lévesque, 1936).

the important function of justifying the result to the unsuccessful parties,<sup>148</sup> then an unsuccessful party's ability to accept an unfavourable result surely depends in part on the credibility and quality of the authorities used by the court in support of its decision. Each of these problems will be discussed in turn with particular reference to *Mercure*, *Paquette*, and *Caron & Boutet*.

### Problems of comprehensiveness

With respect, the Supreme Court of Canada's historical analysis in *Mercure* lacked both depth and rigour. This was also the opinion of the judge in *Caron & Boutet*. In discussing the historical evidence adduced in *Mercure* and *Paquette*, Judge Wenden states that "[n]one of those judgments contain the quantity of detail that was raised in the course of this trial".<sup>149</sup> To be sure, inadequate evidence can only yield incorrect, unreasonable, and illegitimate decisions.

Judicial wisdom has long recognized that constitutional cases should not be decided in a factual vacuum. Writing for a unanimous court in *MacKay v Manitoba*,<sup>150</sup> Justice Peter Cory elaborates on the risks of doing so.

*Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. ... Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.

*Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a

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148 *R v Sheppard*, 2002 SCC 26 at para 22, [2002] 1 SCR 869, 210 DLR (4th) 608.

149 *Caron & Boutet*, *supra* note 21 at para 31 [translated by authors]. Original text: "Aucun de ces jugements ne contient la quantité de détails historiques qui ont été soulevés dans le cadre de notre procès".

150 [1989] 2 SCR 357, 61 DLR (4th) 385, [1989] 6 WWR 351 (at issue in the case was whether provincial funding provided to political parties based on electoral results infringed section 2(b) of the *Charter*).

court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.<sup>151</sup>

Justice Cory concludes that because the case raised issues that were of great importance to Canadians, “[i]t would be irresponsible to attempt to resolve them without a reasonable factual background”.<sup>152</sup>

In *Caron & Boutet*, the trial judge was very much alive to the importance of deciding the issues before him by having reference to a solid factual foundation. Indeed, Judge Wenden cited Justice Willard Estey’s dissenting opinion in *Mercure* with approval. In *Mercure*, Justice Estey (with whom Justice William McIntyre concurred), although in agreement with the result of Justice La Forest’s majority decision, strongly criticized the inadequate evidentiary foundation on which it rested.

Sheppard’s *The Law of Languages in Canada*, upon which Justice La Forest relied for much of his historical analysis and conclusions,<sup>153</sup> dedicates barely thirty of its over four hundred pages to the history of bilingualism and the status of French and English in Western Canada. With respect, this general report prepared in the 1960s for the Royal Commission on Bilingualism and Biculturalism is woefully incomplete. There are obvious limits to the level of detail with which a commissioned study such as this one can adequately address a subject as complex as the history of the status and use of languages in Canada.<sup>154</sup> As Sheppard himself confesses, “[S]ome parts of this report are far from exhaustive” for “the entire basic research was completed in less than four months”. He adds, “[W]e consider this report, voluminous though it is, to be no more than a preliminary survey of an extremely complex and important field of law”.

Justice Estey stingingly condemns his colleague’s approach, arguing that a case decided on such poor evidence might not constitute a precedent at all,<sup>155</sup> thereby foreshadowing *Caron & Boutet*.

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<sup>151</sup> *Ibid* at 361-62.

<sup>152</sup> *Ibid* at 366.

<sup>153</sup> *Mercure*, *supra* note 18 at 248.

<sup>154</sup> Claude-Armand Sheppard, *The Law of Languages in Canada*, *supra* note 128 at xviii. Interestingly, in *Conseil Scolaire Francophone de la Colombie-Britannique v British Columbia*, 2012 BCCA 282 at para 25, the Court of Appeal for British Columbia relied on Sheppard’s *The Law of Languages in Canada* despite the fact that none of the parties had referred to the work.

<sup>155</sup> Indeed, it seems reasonable to argue that *Mercure* was rendered *per incuriam*: “As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step



It will be seen that a proceeding which commenced as a quasi-criminal proceeding in a provincial court under a provincial statute has gradually transformed itself into either an action for declaration or an informal reference seeking the same result as though the reference were in fact made under either provincial or federal legislation for that purpose. *It is an unhappy characteristic of this style of litigation in the courts today that the factual record upon which the ultimate proceeding is based is at best an inadequate foundation of evidence or information from which this Court must discern the ultimate issues raised by successor parties and upon which to found a final dispositive judgment responding to these late emerging but very important issues. The doctrine of res judicata is of uncertain application to such proceedings.*<sup>156</sup>

Justice Estey adds:

Since writing these reasons for judgment I have had the opportunity of reading those of my colleague, La Forest J., who makes reference to historical material. The record before the Court does not include these historical opinions and comments. The courts, and particularly those at the second level of appeal, are neither qualified nor authorized to conduct a trial of historical issues. *Texts and essays on local history do not always agree. Some will be factual, some speculative and even designedly controversial.* There is rarely unanimity. Migratory history and demographic material concerning these frontier times are in my view, even if properly admissible at this stage, seldom precise. *Without the admission of this material through the conventional processes of justice the reliability of such material is not demonstrated.* Accordingly, I seek to confine my reasons to the record and to government census statistics and *Hansard* as introduced or adverted to by counsel for the several parties.<sup>157</sup>

Justice Estey concludes his reasons by advocating in favour of a more conservative approach.

Even with s. 23 present in the Manitoba legislation a reference, with supporting material and the involvement of both levels of government, was necessary to bring about a constitutional resolution of the question. There is no historical or other material produced in this record by public authority. The Government of Canada did not participate in the proceedings. *On a very limited factual base and an equally meagre statutory base, and without any constitutional provision clearly relating to the question now raised, it is highly unsatisfactory to stretch the legislation relating to the North-West*

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in the reasoning on which it is based is found on that account to be demonstrably wrong". See Rupert Cross & JW Harris, *Precedent in English Law*, 4th ed (Oxford: Clarendon Press, 1991) at 149 citing *Morrelle Ltd v Wakeling* [1995] QB 389 at 406; see also Louis-Philippe Pigeon, *Drafting and Interpreting Legislation* (Toronto: Carswell, 1988) at 60; *Canadian Imperial Bank of Commerce v Kungie* (1994), 41 BCAC 264, 25 CPC (3d) 164 at para 52; *R v Grumbo* (1998), 159 DLR (4th) 577, [1999] 1 WWR 9 at para 21 (Sask CA).

<sup>156</sup> *Mercure*, *supra* note 18 at 294-95 [emphasis added].

<sup>157</sup> *Ibid* at 321 [emphasis added].

*Territories into a constitutional provision fundamentally affecting the organization of these provinces.*<sup>158</sup>

In *Mercure*, Justice Estey concluded that based on the poor evidentiary record before him, section 110 of the *North-West Territories Act* failed to constitutionally entrench the status of French in Saskatchewan. Questioning the ruling's legitimacy seems quite reasonable. Roughly twenty years later, seized with a proper evidentiary record, a provincial court has directly challenged the conclusions of the country's highest court.

## Problems of reliability

A careful assessment of the sources referred to in *Mercure* to decide whether the status of French is constitutionally protected in Saskatchewan (and by extension in Alberta) illustrates the tremendous risks taken when relying on a paucity of sources.

In his reasons, Justice La Forest relies on parliamentary debates in 1890 regarding the status of the French language in the North-West Territories,<sup>159</sup> and debates from 1905 regarding the creation of Alberta and Saskatchewan.<sup>160</sup> It is unsettling to read the transcripts of these debates, for they contain multiple and explicit references to the very constitutional instruments and historical facts that lie at the heart of the trial judgment in *Caron & Boutet* but which are completely ignored by the Supreme Court of Canada in *Mercure*. For example, on February 21, 1890, Mr. Alphonse Larivière, Member of Parliament for Provencher, Manitoba, read a letter written by His Grace the Archbishop of St. Boniface, Alexandre-Antonin Taché, that quotes extensively from the *Royal Proclamation of 1869* and refers to the Constitutional Convention of the Winter of 1870 and the resulting Bill of Rights drafted by the inhabitants of the territories administered by HBC, as well as official correspondence.<sup>161</sup> During this debate, Mr. Beausoleil also referred to the “the constitutional rights of the minority in the North-West” as rights “which have been put above all others — above even Provincial rights — by the Imperial Parliament”.<sup>162</sup> Once again, on June 30, 1905, Mr. Frederick Monk, Member of Parliament for Jacques-Cartier, Quebec, describes in detail the constitutional agreement arrived at in 1869–1870 in order to confirm and maintain

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<sup>158</sup> *Ibid* at 325 [emphasis added].

<sup>159</sup> *House of Commons Debates*, 6th Parl, 4th Sess, Vol 1 (21 February 1890) at 963-1018.

<sup>160</sup> *House of Commons Debates*, 10th Parl, 1st Sess, Vol 5 (30 June 1905) at 8530-8636.

<sup>161</sup> *House of Commons Debates*, 6th Parl, 4th Sess, Vol 1 (21 February 1890) at 987-92 (Hon Larivière).

<sup>162</sup> *House of Commons Debates*, 6th Parl, 4th Sess, Vol 1 (21 February 1890) at 998 (Hon Beausoleil).

the status of the French languages in the former Rupert's Land and the North-West Territories and reads the complete text of the *Royal Proclamation of 1869* as evidence of this constitutional guarantee.<sup>163</sup> It can only be assumed that Justice La Forest also read those portions of *Hansard* relating to the conditions upon which Rupert's Land and the North-West Territories would be admitted into Canada, and in particular about intended status, rights, and privileges of the French language. Yet, the reasons in *Mercure* do not mention them at all. Rather, Justice La Forest makes explicit reference to (1) the discontent of some Members of Parliament with respect to a proposed amendment to section 110 of the *North-West Territories Act*;<sup>164</sup> (2) past attempts at repealing section 110 and eradicating the use of French in Western Canada;<sup>165</sup> and (3) bald assertions by the Right Honourable Sir Wilfrid Laurier regarding the status of the French language in the North-West Territories.<sup>166</sup> All parliamentary debates referenced by Justice La Forest completely ignore the most significant contextual aspects critical to determining the historical basis for the constitutional status of French in Western Canada, including the *Royal Proclamation of 1869*.<sup>167</sup>

Perhaps Justice La Forest and his colleagues were not in a position to grasp, in 1986 (as did Judge Wenden in 2008 following the ninety-day trial in *Caron & Boutet*), the textured meaning of the transcripts of debates that had occurred nearly one hundred years ago. That would no doubt explain Justice La Forest's independent research on Canadian history, conducted *proprio motu* after the hearing in *Mercure*. However, it is more than likely that this independent historical research only aggravated matters. Indeed, the few secondary sources cited by Justice La Forest in describing the relevant historical events were also of dubious quality and reliability.

First, Justice La Forest turns to Sheppard's *The Law of Languages in Canada*, already referred to above, which makes no reference whatsoever to

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163 *House of Commons Debates*, 10th Parl, 1st Sess, Vol 5 (30 June 1905) at 8530-46 (Hon Monk).

164 *House of Commons Debates*, 6th Parl, 4th Sess, Vol 1 (21 February 1890) at 1002 (Hon Watson), referred to in *Mercure*, *supra* note 18 at 250-51; *House of Commons Debates*, 10th Parl, 1st Sess, Vol 5 (30 June 1905) at 8607 (Hon Brodeur), referred to in *Mercure*, *supra* note 18 at 250.

165 *House of Commons Debates*, 6th Parl, 4th Sess, Vol 1 (17 February 1890) at 756 (Hon Cockburn), referred to in *Mercure*, *supra* note 18 at 253-54; *House of Commons Debates*, 6th Parl, 4th Sess, Vol 1 (18 February 1890) at 857 (Hon McCarthy), referred to in *Mercure*, *supra* note 18 at 253-54.

166 *House of Commons Debates*, 10th Parl, 1st Sess, Vol 5 (30 June 1905) at 8571-72, 8576 (Right Hon Laurier), referred to in *Mercure*, *supra* note 18 at 250; *House of Commons Debates*, 10th Parl, 1st Sess, Vol 5 (30 June 1905) at 8577, 8579 (Right Hon Laurier), referred to in *Mercure*, *supra* note 18 at 256.

167 *House of Commons Debates*, 10th Parl, 1st Sess, Vol 5 (30 June 1905) at 8530ff, 8850-51 (Monk), referred to in *Mercure*, *supra* note 18 at 251, 253, 256.

the “vested rights” and constitutionally entrenched status of French in what has become Alberta and Saskatchewan.

Second, Justice La Forest appears to rely in no small measure on Wade’s *The French Canadians*.<sup>168</sup> This monograph has attracted considerable and serious criticism. In *Mason Wade, Acadia and Quebec: The Perception of an Outsider*, a work destined to complete and publish, posthumously, Wade’s unfinished research, Stephen Kenny<sup>169</sup> reflects on the historical value of Mason Wade’s work and the insight it provides. Kenny’s observations are disturbing: “While Canadian historians may have serious doubts about its scholarship and analysis, generally they recognize its use as a solid source of information”.<sup>170</sup> Kenny adds, however,

[h]e [Wade] was an American, his understanding of French imperfect. He was not a professional historian, never acquiring an advanced degree in history. ... His writing was derivative and overly dependent on secondary sources. And worst of all, he was presumptuous! ... Wade was provocative; he seemed almost to invite controversy. His work on Canada was certainly controversial and never entirely accepted as serious scholarship.<sup>171</sup>

Others have been far more scathing in their assessment of Wade’s work. Richard Arès,<sup>172</sup> for example, has argued that *The French Canadians* was seriously flawed, biased, and plainly written to serve a particular “tranche” of the English-language majority.<sup>173</sup> While many in English Canada admired Wade, most French Canadian scholars greeted his work with hostility or, at best, cold indifference.<sup>174</sup> Kenny explains that while it was initially adopted as a popular reference, *The French Canadians* subsequently lost its initial charm.

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168 When Wade refers to the *Royal Proclamation of 1869*, he does so uniquely in the context of the amnesty. See, e.g., Wade, *supra* note 122 at 400.

169 Kenny is a professor at the Campion College of the University of Regina. He received a PhD in history from the University of Ottawa.

170 Stephen Kenny, “‘Histoire sans coeur?’ Historiographical Reflection on the Work of Mason Wade” in Naomi ES Griffiths & George A Rawlyk, eds, *Mason Wade, Acadia and Quebec: The Perception of an Outsider* (Ottawa: Carleton University Press, 1991) 179 at 181.

171 *Ibid* at 182-83.

172 Arès was born in Marieville, Quebec, in 1910. After having studied philosophy and theology in Montreal, Arès obtained a PhD in philosophy from the Institut catholique de Paris and another PhD in international law from the Université de Paris. He taught briefly at the Université de Montréal between 1951 and 1953 and was a prolific author. He wrote, among others, on legal, historical, and sociological issues. See generally, François-Albert Angers, “Qui est le Père Arès?” (1979) 69:1 *L’Action nationale* 38.

173 Richard Arès, Book Review of *The French Canadians* by Mason Wade, (1955) 15:172 *Relations* 105.

174 David ML Farr, “Mason Wade as Historian of Quebec” in Naomi ES Griffiths & George A Rawlyk, eds, *Mason Wade, Acadia and Quebec: The Perception of an Outsider* (Ottawa: Carleton University Press, 1991) 13 at 32.

Professional historians, for their part, generally disregarded it as a serious contribution to their field, which explains the relative scarcity of citations to Wade's work. According to Kenny, *The French Canadians'* derivative style and strong reliance on secondary sources ultimately undermined its credibility.<sup>175</sup> Drawing from Guy Frégault's<sup>176</sup> review of *The French Canadians*,<sup>177</sup> Kenny further explains the marginalization of Wade's work:

In his preface [to *The French Canadians*], Wade regretted that Canadian historical writing differed so much in the English and French versions "as to suggest they are the histories of two different countries". For Frégault that is exactly where Wade went astray, at the very point of departure, for in fact there were two histories and Canada *was* two different places. To bridge such an interpretive gap was impossible and a futile task. Mason Wade had simply failed to understand the reality of the Canadian past.<sup>178</sup>

Finally, Justice La Forest's penurious historical account in *Mercure* is also partly based on Arthur I Silver's *The French-Canadian Idea of Confederation 1864–1900*. That work, while generally regarded as being of acceptable quality, has also been severely criticized. For example, André Lalonde<sup>179</sup> has denounced Silver's monograph for the considerable historical errors it contains, its omission of important sources, and its failure to temper or nuance various assertions.<sup>180</sup> Roberto Perin has questioned Silver's methodology of relying mostly on partisan newspapers.<sup>181</sup> Perin has also demonstrated the fallacy of Silver's contention that French Canadians, as a community, never sought the

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175 *Supra* note 170 at 187.

176 Frégault was born in Montreal on June 16, 1918. While he personally wanted to study Greek in France, the 1940 capitulation forced him into accepting Lionel Groulx's offer of a history curriculum at the Loyola University in Chicago. Groulx had read some of Frégault's early works and saw great potential in him. Frégault received his PhD in history in 1942. At the age of thirty, he was already the author of more than a hundred articles on politics, history, and nationalism. Frégault became the director of the Institut d'histoire de l'Université de Montréal, making him Quebec's first professional historian. He was also a founding member of the Académie canadienne-française and director of the *L'Action nationale* periodical. See generally, Jean Lamarre, *Le devenir de la nation québécoise selon Maurice Séguin, Guy Frégault et Michel Brunet, 1944–1969* (Québec: Septentrion, 1993) at 203–347.

177 Guy Frégault, Book Review of *The French Canadians, 1760–1945* by Mason Wade, (1955) 8:4 *Revue d'histoire de l'Amérique française* 582.

178 *Supra* note 170 at 189.

179 Lalonde was also one of the cofounders of the Société historique de la Saskatchewan and its first president. See generally, Laurier Gareau, "La Société historique de la Saskatchewan: 20 ans de promotion du patrimoine français" (1998) 8:4 *Revue historique online: Société historique de la Saskatchewan* <<http://musee.societehisto.com>>.

180 André Lalonde, Book Review of *The French-Canadian Idea of Confederation: 1864–1900* by Arthur I Silver, (1982) 36:3 *Revue d'histoire de l'Amérique française* 443.

181 Perin, PhD, is the author of more than forty books, articles, and other works.

recognition of constitutionally guaranteed minority rights.<sup>182</sup> Not only was it problematic for Silver to have relied so extensively on newspaper sources in drawing such sweeping conclusions about French Canada, it was even more egregious to have ignored other, more reputable newspapers, such as the *New Nation*.<sup>183</sup> In *Caron & Boutet*, Judge Wenden made numerous references to the *New Nation*, which provided nearly daily coverage of the constitutional convention in the winter of 1870.<sup>184</sup>

This context is instructive. It helps to understand how Silver, referring to the constitutional rights of the French Métis and the disturbances in Rupert's Land and the North-West Territories, could ever possibly write:

It was *La Minerve* which, arguing that Manitoba could never get away with banning French, maintained not only that such ban violated section 23 of the Manitoba Act, but even more, that it was a "violation of the sworn pact between the two nationalities". What was this pact between two nationalities? Surely no-one had mentioned it before?<sup>185</sup>

Silver's defective methodology also explains how, when referring to language rights as part of an agreement between Canada and the inhabitants of Rupert's Land and the North-West Territories, he could have fathomed the following:

The emphasis on the 1870 negotiations as the guarantee of French and Catholic rights sometimes led to a certain reinterpretation of the events of 1869–70, in which the resistance was no longer seen as the defence of the old buffalo-based way of life against a foreign invasion of settlement, but as a French-Catholic defence against an Anglo-Protestant threat.<sup>186</sup>

He derisively describes legitimate claims for the recognition of vested and constitutionally protected rights as mere "beliefs":

By 1896, then, French Quebecers had acquired, first, an emotional concern about the treatment of the minorities; second, a desire for harmony and mutual respect between English and French; and third, a belief in "constitutional" guarantees for minority language and school rights, at least in the West.<sup>187</sup>

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182 Roberto Perin, Book Review of *The French-Canadian Idea of Confederation 1864–1900* by Arthur I Silver, (1983) 12 *Labour/Le Travail* 264. See also Richard A Jones, Book Review of *The French-Canadian Idea of Confederation 1864–1900* by Arthur I Silver, (1986) 91:3 *American Historical Review* 764.

183 Arthur I Silver, *supra* note 126 at 245–46.

184 *Caron & Boutet*, *supra* note 21 at paras 178, 193–94, 197–98, 202, 207, 217, 219, 227, 258, 294–95, 298–99, 386.

185 Arthur I Silver, *supra* note 126 at 148 [footnote omitted].

186 *Ibid* at 189, n 73.

187 *Ibid* at 191.

Silver therefore concludes,

It will be apparent that expressions like “guaranteed by the constitution” or “constitutional guarantees” were used in vague and varied ways in these discussions of the 1890s. It was precisely this vagueness about what “the constitution” was and what it contained that permitted people to claim it guaranteed minority rights or perfect equality between English and French Canadians, and thus permitted the emergence of the bilingual theory of Confederation.<sup>188</sup>

On the basis of such an impoverished account of Western Canadian history, it is perhaps not surprising that Justice La Forest and his peers failed to appropriately grasp many of the historical and constitutional dimensions of the issues at stake in *Mercure*. Simply put, Justice La Forest’s analysis rested quite unfortunately on very few secondary sources, and unreliable ones at that. This may stem from the fact that, as stated by Justice Estey in his dissent, the secondary material used by the Supreme Court was not subjected to cross-examination. Of course, it may sometimes be unrealistic to review a court’s attempt to determine historical facts to a standard of correctness. Be that as it may, while judges are clearly not social scientists, it is nevertheless legitimate to expect the judiciary to tread carefully when called upon to determine the constitutional ramifications of important historical events.

### Problems of legitimacy

Perhaps the most unfortunate consequence of decisions like *Mercure* is their lack of legitimacy. While no one could seriously cast doubt on Justice La Forest’s impartiality in drafting the Court’s reasons in that case, “[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”.<sup>189</sup> As Justice Estey intimated, by basing its decision on incomplete evidence and flawed or irrelevant historical commentaries, the majority arguably undermined the jurisprudential value of its own reasons for judgment.

In *Caron & Boutet*, Judge Wenden cites approvingly Professor Huel’s explanation as to why no historical works documenting the Métis peoples were written by the Métis themselves: “According to professor Huel, the reason why there are no histories written by the Métis themselves stems from the fact that they travelled a lot, and did not have the time or the tools to record

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188 *Ibid* at 191-92, n 87.

189 *The King v Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256, at 259 cited in *R v RDS*, [1997] 3 SCR 484 at 530.

their thoughts. Theirs was rather a society with an oral tradition”.<sup>190</sup> Thus, as is often the case with cases regarding claims made by Aboriginal peoples, courts must regularly turn to materials written by non-Aboriginal observers and scholars.

But why did the Supreme Court of Canada in *Mercure* rely solely on an English Canadian perspective of the history of the Métis and French settlers in Western Canada when French-language sources were readily available and would have provided a more balanced account of relevant events? It would have been understandable if no French-language sources had existed, but this was not the case. Marcel Giraud’s authoritative *Le Métis canadien*, relied upon in *Caron & Boutet*, had been in circulation for more than forty years when the Supreme Court of Canada heard *Mercure* and *Paquette*. Likewise, Gilles Martel’s<sup>191</sup> significant and important article about historical, demographical, and geographical aspects of the Métis culture in Western Canada had been in print for nearly a decade when *Mercure* was heard.<sup>192</sup> Not only had French-language social scientists and historians written extensively about the status and use of French in Western Canada, but the eminent Quebec historian, Lionel Groulx,<sup>193</sup> had also written about the *Royal Proclamation of 1869* and the context within which it was issued.<sup>194</sup> Auguste-Henri de Trémaudan’s

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190 *Caron & Boutet*, *supra* note 21 at para 249 [translated by authors]. Original text: “Selon le professeur Huel, la raison pour laquelle il n’y a pas d’histoire rédigée par les Métis eux-mêmes provient du fait qu’ils voyageaient beaucoup et qu’ils n’avaient ni le temps, ni les outils nécessaires pour enregistrer leurs pensées. C’était plutôt une société ayant une tradition orale”.

191 Martel completed his PhD in sociology at the Université de Paris in 1976. He taught at the faculties of theology and philosophy at the Université de Sherbrooke. In 1985, Martel was awarded the Prix de Champlain for his book titled *Le Messianisme de Louis Riel*, which is based on his doctoral thesis.

192 Gilles Martel, “Quand une majorité devient une minorité : les Métis francophones de l’Ouest canadien” (1979) 23:58 *Cahiers de géographie du Québec* 73.

193 Groulx, a well-respected and prolific writer, was born in the parish of Saint Michel in Vaudreuil, Québec, on January 13, 1878. At the age of thirteen, Groulx was already publishing his political opinions. He completed his classical studies at the Séminaire de Sainte-Thérèse-de-Blainville, before pursuing the study of theology at the Université de la Minerve in Rome and literature at the Université de Fribourg in Switzerland. Groulx became a priest in 1903. He also taught at the Collège de Salaberry-de-Valleyfield, the Université de Laval de Montréal, the École des hautes études commerciales, and the Collège Basile-Moreau. He received four honorary doctorates. He was the director of *L’Action française*, the vice-president of the Société Saint-Jean-Baptiste in Montreal, the president of the Comité des fondateurs de l’Église du Canada, and the founder of both the Institut d’histoire de l’Amérique française and the Revue d’histoire de l’Amérique française. See generally, Maurice Filion, dir, *Hommage à Lionel Groulx* (Montréal: Léméac, 1978); Georges-Émile Giguère, *Lionel Groulx : Biographie* (Montréal: Bellarmin, 1978).

194 Lionel Groulx, *L’enseignement français au Canada*, vol 2 (Montréal: Librairie d’action canadienne-française, 1933) at 71-193. For an historical survey of references to the *Royal Proclamation of 1869*, see François Larocque, Mark C Power & Michel Doucet, “L’archéologie d’un pacte constitutionnel oublié : la proclamation royale du 6 décembre 1869” in *Le statut du français dans l’Ouest canadien : la cause Caron*, Yvon Blais [forthcoming in 2013].



masterful *Histoire de la nation métisse dans l'Ouest canadien* is another glaring omission.<sup>195</sup> Thus, in *Mercure*, had the Supreme Court considered a proper cross-section of secondary material, or had the Court consulted historical sources at all in *Paquette* a few years later, it would likely have learned of the *Royal Proclamation of 1869* and come to a very different understanding of the linguistic, cultural, and, therefore, legal issues at stake in the annexation of Rupert's Land and the North-West Territories. Indeed, when *Paquette* was argued before the Court of Appeal of Alberta, counsel for the defendant asked the court to consider the broader historical and cultural significance of the events leading to the annexation.<sup>196</sup> The majority summarized the argument as follows:

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195 de Trémaudan, *supra*, note 147. De Trémaudan was a teacher, lawyer, and journalist. Born in Quebec in 1874, he lived in St-Boniface, Manitoba, between 1914 and 1924, where he wrote extensively about the cultural and language rights of Western Canadian francophones. In his preface to *Histoire de la nation métisse dans l'Ouest canadien*, de Trémaudan explains that the book took fifteen years to research, and that he collected "original documents, eye witness testimony, rare books, blue books, works of all kinds containing useful information, much of which has never been published until now" [translated by authors]. Based on this rigorous research, de Trémaudan asserts his belief that "Had Louis Riel and the Métis been left to their own devices in 1870, and after that year's fiasco, caused by the young leader's faith in those who claimed to be his best friends, had we let him unhindered in 1885, there would now be, in Manitoba in the first case, and on the Saskatchewan in the second, a French province, a second province of Quebec in Western Canada". [translated by authors] The Comité Historique de l'Union Nationale Métisse Saint-Joseph de Manitoba explains that in presenting de Trémaudan's work, it aimed to establish that "For two centuries, the French language has had a legitimate place in western Canada. It was the first to be understood by the Aboriginal peoples; it was the tongue of the first explorers and discoverers. Various trading companies confirmed this reality by surrounding themselves with officials that spoke this language; after the Hudson's Bay Company and North West Company merger, the Government of Assiniboia recognized the official status of the French language on May 31st, 1849, where both languages were put on an equal footing. [...] on May 1st, 1851, the government of Assiniboia contributed 200 louis for the purposes of instruction: 100 for the English language and 100 for the French language". [translated by authors] (*ibid* at 7, 20).

196 In her factum, counsel for *Paquette* refers to various historical facts that were key in deciding *Caron & Boutet*. For example, she refers to the judicial bilingualism in Rupert's Land and the North-West Territories prior to 1870; the distinctiveness of the French-language majority in Rupert's Land and the North-West Territories; the 1869 disturbances in Rupert's Land and the North-West Territories; and the bills of rights presented by the Métis and the Half-Breeds. It was submitted by Luc Paquette that the maintaining of judicial bilingualism in Rupert's Land and the North-West Territories was a condition to the admission of these territories into Canada. To attempt to establish this point, counsel for the appellant relied on primary and secondary sources, including *House of Commons Debates*, 6th Parl, 4th Sess, Vol 1 (13 February 1890) at 626-27 (Hon Mills); *House of Commons Debates*, 6th Parl, 4th Sess, Vol 1 (18 February 1890) at 879-80 (Hon Thompson); *House of Commons Debates*, 10th Parl, 1st Sess, Vol 5 (30 June 1905) at 8577 (Hon Laurier); *House of Commons Debates*, 10th Parl, 1st Sess, Vol 5 (30 June 1905) at 8603 (Hon Brodeur); Parliament, "Report of Donald Smith to the Secretary of State" in *Sessional Paper*, No 3 (1870) at 1-12; Edmund Henry Oliver, *The Canadian Northwest: Its Early Development and Legislative Records*, Vol 1 (Ottawa: Government Printing Bureau, 1914); Arthur Silver, "French Quebec and the Metis Question, 1869-1885" in Carl Berger & Ramsay Cook, ed, *The West and the Nation*

She [Mary Moreau] points out, firstly, that there were elements of a bilingual justice system present in Rupert's Land and the Northwestern Territory prior to 1870 (citing Oliver,<sup>197</sup> *The Canadian Northwest: Its Early Development and Legislative Records*, Vol. 1 (Ottawa, Government Printing Bureau, 1914), at pp. 150, 280, 290 and 352). She also notes the predominance of French speaking Metis in the Red River Settlement and the turmoil that existed culminating in the List of Rights of 1869 requiring that English and French be common languages in the courts and that the judge of the Supreme Courts speak both English and French.<sup>198</sup>

However, writing for the majority, Justice Stevenson of the Court of Appeal of Alberta paid very little attention to this submission and instead relied on a very truncated history of section 110 of the *Northwest Territories Act*, one devoid of much context.<sup>199</sup> The Supreme Court of Canada paid no attention at all to this submission in applying *Mercure* to the Alberta context.<sup>200</sup>

To be sure, deciding cases of the utmost importance to national minorities by relying on secondary materials that provide a one-sided account of history undermines the legitimacy and authority of the decision itself.<sup>201</sup> If Kenny is correct that Wade's mistake amounted to a failure to understand the existence of two Canadian histories, then it would appear that one of those histories was never told in *Mercure* and *Paquette*.<sup>202</sup> Litigation should provide an opportunity to weigh and compare competing historical accounts.

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(Toronto: McClelland & Stewart Ltd, 1976); Thomas Lewis-Herbert, *The Struggle for Responsible Government in the North-West Territories 1870–97* (Toronto: University of Toronto Press, 1956); Kenneth Munroe, "Official Bilingualism in Alberta", (1987) 12 *Prairie Forum* 37; Joseph Eliot Magnet, "The Charter Official Language Provisions: The Implication of Entrenched Bilingualism" in Walter S Tarnopolsky & Gérard A Beaudoin, *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) 163. See generally, *R v Paquette* (1987), 81 AR 12 at 14, 46 DLR (4th) 47 (CA) (Factum of the Appellant) (on file with the authors).

197 See generally, Gordon Barnhart, "Oliver, Edmund H. 1882–1935" (2007), online: The Encyclopedia of Saskatchewan <<http://esask.uregina.ca>>.

198 *R v Paquette*, *supra* note 61 at 20.

199 *Ibid*, citing *R v Lefebvre*, *supra* note 56.

200 *Paquette*, *supra* note 17. Counsel for the appellant, Luc Paquette, did not ask the Court to consider the broader historical and cultural significance of the events leading up to the annexation of Rupert's Land and the North-West Territories to Canada as she had done before the Court of Appeal of Alberta. See *R v Paquette*, [1990] 2 SCR 1103 (Mémoire de l'Appellant).

201 Richard Arès, Book Review of *The French Canadians* by Mason Wade, (1955) 15:172 *Relations* 105 at 106.

202 Other than historians Groulx and de Trémaudan, and until quite recently, very few historians studied the *Royal Proclamation of 1869* or the historical events related to it. This reality might be an unfortunate consequence of what historian Éric Bédard describes as the radical transformation of the historiographical research of French Canadian historians in the 1970s and 1980s. These historians, Bédard explains, grew disinterested with the study of French-speaking communities in North America and increasingly focused on, and were limited to, the territorial boundaries of the province of Quebec. See Éric Bédard, *Recours aux sources : Essais sur notre rapport au passé*

Moreover, independent post-hearing inquiries by the judiciary, such as the one conducted in *Mercury*, can also have the effect of undermining the legitimacy of the decision. It is interesting to note that Justice La Forest had also grappled with an inadequate evidentiary record in *R v Edwards Books and Arts Ltd*. He explained in that case that despite the inherent dangers of judicial notice, the alternative of deciding a case without an adequate factual basis was far worse, because, in his words, “[i]t is undesirable that an Act be found constitutional today and unconstitutional tomorrow simply on the basis of the particular evidence of broad social and economic facts that happens to have been presented by counsel”.<sup>203</sup> Justice La Forest also admits having independently conducted additional social science research in *R v Corbett*.<sup>204</sup>

Deciding facts without the benefit of cross-examination or testing by counsel not only derogates from the principles of the adversarial system but ignores them completely.<sup>205</sup> Justice Estey also made that point in his dissenting opinion in *Mercury*. Pilkington, for instance, argues that

[t]he approach of the traditional adversary system—to treat the factual assumptions underlying legal policy as a matter for argument, rather than proof, and to provide judges with scope for relying on their own assumptions and judgments, informed by their private experience and research, is not adequate to the determination of constitutional questions. It undermines the fundamental rationale of the adversary method.<sup>206</sup>

To be sure, judicial notice should not be used to circumvent the adversarial process. In Canada,

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(Montréal: Boréal, 2011) at 47-64. See also Michel Bock, *Quand la nation débordait les frontières: “les minorités” françaises dans la pensée de Lionel Groulx* (Montréal: Hurtubise HMH, 2004).

203 [1986] 2 SCR 713, 35 DLR (4th) 1, 30 CCC (3d) 385 at 803.

204 [1988] 1 SCR 670, [1988] 4 WWR 481, 41 CCC (3d) 385 at 726-29.

205 This nevertheless occurs. See, e.g., *R v Sioui*, [1990] 1 SCR 1025, 70 DLR (4th) 427, 56 CCC (3d) 225 Lamer J; *Willick v Willick*, [1994] 3 SCR 670, 119 DLR (4th) 405, 173 NR 321 L’Heureux-Dubé J. In *First Nations Child and Family Caring Society v Canada*, 2012 FC 445, [2012] 3 CNLR 79 at para 190, Justice Mactavish criticized a tribunal’s decision to consider evidence not tendered by any of the parties: “At the end of the day what we are left with is the Tribunal’s own statement that it had ‘vetted’ 10,000 pages of material in relation to the motion to dismiss, when the record on the motion before it was only some 2,000 pages in length. There is, moreover, no suggestion by any of the parties that the authorities filed in relation to the motion came anywhere close to accounting for the 8,000 page difference”. She then adds, “Taking the Tribunal’s statements in its decision at face value, I can only conclude that the Tribunal considered thousands of pages of material not properly before it on the motion to dismiss, without advising the parties accordingly, and without affording them any opportunity to make representations in this regard. This is a clear breach of procedural fairness” (*ibid* at 191).

206 Pilkington, *supra* note 13 at 56.

[j]udicial notice is the acceptance by court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons; or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party.<sup>207</sup>

Judicial notice is often conducted in chambers, rendering nearly impossible any attempt to challenge or test the veracity of the information so gleaned.<sup>208</sup> Independent research by members of the judiciary should be conducted with at least as much care and circumspection as when judicial notice is taken of given facts. But ultimately there appears to be no substitute for subjecting evidence to the adversarial system.<sup>209</sup>

## Conclusion

In *R v Van der Peet*,<sup>210</sup> the Supreme Court of Canada was confronted with significant evidentiary problems and held that

[i]n determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.<sup>211</sup>

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207 Alan W Bryant, Sidney N Lederman & Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3rd ed (Markham, Ont: LexisNexis Canada, 2009) at 1268; see also Ian Binnie, "Judicial Notice: How Much is Too Much?" in The Law Society of Upper Canada, *Special Lectures 2003: The Law of Evidence* (Toronto: Irwin Law, 2004) 543; GD Nokes, "The Limits of Judicial Notice" (1958) 74 Law Q Rev 59; Danielle Pinard, "La notion traditionnelle de connaissance d'office des faits" (1997) 31 RJT 87.

208 Bryant, *supra* note 207 at 113-32; Binnie, *supra* note 207 at 546-47.

209 Danielle Pinard, "La connaissance d'office des faits sociaux en contexte constitutionnel" (1997) 31 RJT 315 at 376, 394-95; Peter W Hogg, "Proof of Facts in Constitutional Cases" (1976) 26 UTLJ 386 at 396; Brian G Morgan, *supra* note 14 at 172; Marilyn L Pilkington, *supra* note 13 at 84-86; Carl Baar, "Social Facts, Court Delay and the *Charter*" in Frederick L Morton, *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1992) 375 at 379, 382.

210 [1996] 2 SCR 507, 137 DLR (4th) 289, 109 CCC (3d) 1.

211 *Ibid* at para 68.

Courts seized with cases regarding Aboriginal claims admit oral historical evidence<sup>212</sup> and adapt the rules of evidence so that “this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with”.<sup>213</sup> The parallels between the type of accommodation offered by courts when dealing with Aboriginal claims and those that should be made in cases regarding the history of national minorities are apparent. Indeed, Judge Wenden highlights the need for such a parallel in *Caron & Boutet*.<sup>214</sup>

In *Gruenke*, Justice Claire L’Heureux-Dubé makes the following comments about the adversarial system:

To assist in [the search for truth], all persons must, if requested, appear before the courts to testify about facts and events in the realm of their knowledge or expertise. This requirement — some would call it a duty — can be traced far back into the history of the common law, and can now be found in statutory form in the federal and provincial Evidence Acts. If the aim of the trial process is the search for truth, the public and the judicial system, must have the right to any and all relevant information in order that justice be rendered. Accordingly, relevant information is presumptively admissible. Exceptions may be found both in statutory form, and in the common law rules of evidence, which have developed in order to exclude evidence that is irrelevant, unreliable, susceptible to fabrication, or which would render the trial unfair. Courts and legislators have also been prepared to restrict the search for truth by excluding probative, trustworthy and relevant evidence to serve some overriding social concern or judicial policy.<sup>215</sup>

At the very least, this article confirms some of the structural frailties of the adversarial system, especially in constitutional litigation in which an interpretation of history is called upon to play a decisive role. Commentators have formulated propositions to address some of the problems created by the ad-

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212 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 84, 153 DLR (4th) 193, [1999] 10 WWR 34.

213 *Ibid* at para 87.

214 *R v Caron*, 2008 ABPC 232 at paras 7074, 450 AR 204.

215 *Supra*, note 10 at 295 [emphasis added]; but see *Canadians for Abolition of the Seal Hunt v Canada (Minister of Fisheries & the Environment)* (1980), [1981] 1 FC 733 at para 31, 20 CPC 151, Walsh J: “Procedure in our courts is based on the adversary system, that is to say each party must present the evidence on which it seeks to rely and attempt to refute the other party’s evidence by cross-examination of its witnesses or rebuttal proof. The fact that one party encounters difficulty in obtaining the required evidence or that the opposing party prevents it from obtaining same does not justify the Court in attempting to obtain the evidence itself. What applicants suggest really amounts to the Court providing experts as witnesses whose evidence applicants hope will support their case. This is a civil proceeding and not a Commission of Inquiry into the Seal Hunt and the distinction must be maintained. The Court cannot conduct independent investigations in an attempt to establish applicants’ case”.

versarial system in constitutional litigation.<sup>216</sup> In our view, *Caron & Boutet* illustrates the need to take those propositions for reform seriously and to engage in an honest reflection about them. *Caron & Boutet* also offers an example of the value of an interdisciplinary approach<sup>217</sup> to the constitutional litigation framework.

The adversarial system appears to be an ineffective paradigm in the search for truth when determining constitutional matters, and independent research conducted by courts,<sup>218</sup> even when done in order to attempt to mitigate the effects of the adversarial system, has the potential to aggravate rather than ameliorate the integrity of the outcome. This was the case in *Mercurie* and *Paquette*. The situation is troubling, particularly given the underfunding of legal aid and other access-to-justice programs which clearly work to provide the

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216 Marilyn L Pilkington, "Equipping Courts to Handle Constitutional Issues: The Adequacy of the Adversarial System and its Techniques of Proof" in *Special Lectures of the Law Society of Upper Canada: Applying the Law of Evidence: Tactics and Techniques for the Nineties* (Scarborough, Carswell, 1992) 51; Brian G Morgan, "Proof of Facts in Charter Litigation" in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) 159; Neil Brooks, "The Judge and the Adversary System" in Allen M Linden, ed, *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, York University, 1976) 89; Carrie Menkel-Meadow, "The Limits of Adversarial Ethics" in Deborah L Rhode, ed, *Ethics in Practice: Lawyer's Roles, Responsibilities, and Regulation* (New York: Oxford University Press, 2000) 123; Thomas B Marvell, *Appellate Courts and Lawyers: Information Gathering in The Adversary System* (Westport, CT: Greenwood Press, 1978); Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv L Rev 1281; David Luban, "Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers" (2003) 91 Cal L Rev 209; Adam Liptak, "American Exception: In US, Expert Witnesses are partisan", *New York Times* (11 August 2008) online: nytimes.com <<http://www.nytimes.com>>; Jeff Gray, "Why judges like 'hot-tubbing'", *The Globe and Mail* (20 April 2011) B10; Steven Rares, "Expert Evidence in Copyright Cases — Concurrent Expert Evidence and the 'Hot Tub'" (4th Biennial Copyright Law and Practice Symposium, delivered at 4th Biennial Copyright Law Practice Symposium, hosted by Australian Copyright Council and the Copyright Society of Australia, 15 October 2009), online: Federal Court of Australia <<http://www.fedcourt.gov.au>>; Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996). This list is far from being exhaustive.

217 By *interdisciplinary approach*, we mean the co-ordinated resort to the methods, experience, and results of more than one field of scientific research. Interdisciplinarity is thus an intellectual approach founded on at least three postulates: 1) complex facts cannot be understood through any one individual scientific field; 2) each individual scientific field provides a valuable perspective on facts; and 3) the resort to a number of scientific approaches normally leads to a more complete and holistic understanding of facts. See generally, Jules Deschastel & Danielle Laberge, "La recherche comme espace de médiation interdisciplinaire" (1999) 31:1 Sociologie et société 63; Serge Robert & Catherine Garnier, "Épistémologie de l'interdisciplinarité et représentations sociales" (2003) 1:1 Journal international sur les représentations sociales 1.

218 "Law office history" is problematic. See Matthew J Festa, "Applying a Usable Past: The Use of History in Law" (2008) 38:2 Seton Hall L Rev 479; Alfred H Kelly, "Clio and the Court: An Illicit Love Affair" [1965] Sup Ct Rev 119; Mark Tushnet, "Interdisciplinary Legal Scholarship: The Case of History-in-Law" (1996) 71 Chi-Kent L Rev 909 at 917-25.

resources necessary to ensure effective litigation.<sup>219</sup> Perhaps, then, one of the realistic remedies to the structural problems outlined in this article would be to attempt to level the financial playing field for litigants. For example, while mandatory pro bono work is a subject of debate in the United States, such reforms do not appear to be on the horizon in Canada.<sup>220</sup> Moreover, attempts to provide parties with better funding are other obvious ways to try to increase the effectiveness of the adversarial system in the search for truth. The Court Challenges Program of Canada<sup>221</sup> was set up in 1994, abolished in 2006, and partially replaced in 2008 by the Language Rights Support Program.<sup>222</sup> The Language Rights Support Program is undoubtedly helpful to a number of litigants, but it offers a modest amount of funding for parties who raise novel constitutional questions of any significant complexity and therefore of any significant cost.<sup>223</sup> More needs to be done.

In the meantime, the search for truth in constitutional litigation depends largely on judicial intervention. A number of decisions rendered/taken by a judge during the course of a hearing have a profound impact on the outcome of a case. For example, courts have an inherent jurisdiction to grant advance

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219 Remarks of the Right Honourable Beverley McLachlin, PC Chief Justice of Canada, "Reflections: The Challenges We Face" (2007) 40:2 UBC L Rev 819.

220 See Lorne Sossin, "The Public Interest, Professionalism and Pro Bono Publico" (2008) 46 Osgoode Hall LJ 131 at 148-49, n 46. See also Reed Elizabeth Loder, "Tending the Generous Heart: Mandatory Pro Bono and Moral Development" (2001) 14:2 Geo J Legal Ethics 459.

221 Online: <<http://www.ccpcj.ca/>>. See also Michel Doucet, "La décision judiciaire qui ne sera jamais rendue : l'abolition du Programme de contestation judiciaire du Canada et la Partie VII de la *Loi sur les Langues Officielles*" (2008) 10 RCLF 27. The Court Challenges Program of Canada was only allowed to fund test cases that advanced official language rights protected by sections 93 or 133 of the *Constitution Act, 1867*; section 23 of the *Manitoba Act, 1870*; sections 16 to 23 of the *Charter*, or any parallel constitutional provision; and cases involving the clarification of the linguistic aspects of "freedom of expression" in section 2 of the *Charter*. It was also allowed to fund test cases that challenged a law, policy, or practice of the federal government and advanced equality rights under section 15 of the *Charter*. The program received \$2.75 million per year from the Government of Canada through the Department of Canadian Heritage.

222 Online: Language Rights Support Program <<http://www.padl-lrsp.uottawa.ca/>>. The Language Rights Support Program is only allowed to fund test cases that concern official language rights as guaranteed by the interpretation or application of sections 16 to 23 of the *Charter*; sections 93 or 133 of the *Constitution Act, 1867*; section 23 of the *Manitoba Act, 1870*; any other equivalent constitutional provision; and the clarification of the linguistic aspect of freedom of expression guaranteed by section 2 of the *Charter* when this freedom is invoked in a matter concerning an official language minority. The Language Rights Support Program receives \$1.5 million per year from the Government of Canada through the Department of Canadian Heritage.

223 Maximum funding for legal remedies for plaintiffs is limited to \$125,000 for the trial (this includes settlement discussions); \$20,500 where the court orders a conference designed to facilitate settlement of the lawsuit; \$10,000 for a motion for leave to appeal (if applicable); and \$35,000 for an appeal. For interveners, maximum funding for legal remedies is limited to \$10,000 for a motion for leave to intervene and \$40,000 for an intervention.

costs awards to impecunious parties, therefore allowing them to pursue public interest litigation.<sup>224</sup> Judges also enjoy a wide array of procedural discretionary powers that can, or rather, should, be used to ensure access to justice in Canada, particularly when parties are on an unequal footing. In *Caron & Boutet*, Judge Wenden granted the defendant's application for leave to adduce additional rebuttal evidence. The Crown had sought a first adjournment of seven months and the trial resumed with fourteen additional binders of evidence. The Crown vigorously contested the further adjournment granted by Judge Wenden.<sup>225</sup> This type of procedural decision made by Judge Wenden in *Caron & Boutet* is an example of judicial intervention that can ensure some level of equality in litigation, enhance access to justice, and improve the search for truth. Trial judges are gatekeepers and they can facilitate access to justice. The procedural decisions made by the trial judge in *Caron & Boutet* significantly affected the outcome of the case and are worthy of further study in the context of constitutional litigation, in and of themselves.

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224 See *R v Caron*, 2011 SCC 5, [2011] 1 SCR 78 (advance costs award) [*Caron Costs*]; Mark Power, "Commentaire d'arrêt: *Colombie-Britannique (Ministre des Forêts) c. Bande Indienne Okanagan*" (2005) 7 RCLF 447; François Larocque & Mark C Power, "Les provisions pour frais : *L'affaire R c Caron*" (septembre-octobre 2010) L'Association des juristes d'expression française de l'Ontario 3; Mark C Power & François Larocque, "Advance cost awards and Access to Justice" (April 15, 2011) 30:46 The Lawyers Weekly 10.

225 *R v Caron*, *supra* note 25 at paras 263-81.