

# Rebuttal to Edmund A. Aunger, “The Constitution of Canada and the Official Status of French in Alberta”

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In a *Canadian Parliamentary Review* article “The Constitution of Canada and the Official Status of French in Alberta,”<sup>1</sup> Professor Edmund Aunger contends that French is an official language of Alberta and that this status is entrenched in the Canadian Constitution. Since the Supreme Court of Canada ruling in *R. v. Mercure*,<sup>2</sup> which held that Saskatchewan (and by implication Alberta) was officially bilingual but could amend its constitution unilaterally with respect to language, new evidence has come to light which calls into question the right of Alberta and Saskatchewan unilaterally to remove French as an official language of the province. Aunger claims that he has discovered that the official status of French dates from 1835 in Rupert’s Land and the North-Western Territory, and that that status was carried over into Confederation in 1870 through section 23 of *The Manitoba Act, 1870*<sup>3</sup> when these lands were acquired by Canada. This federal legislation, Aunger argues, entrenched bilingualism in the province of Manitoba and all of the remainder of Rupert’s Land and the North-Western Territory. For Alberta, this status was confirmed through amendment to the *North-West Territories Act, 1877*<sup>4</sup> and the *Alberta Act*<sup>5</sup> of 1905. Based on a careful study of the history of this period, it is evident that Aunger has misunderstood “the historical origins and constitutional foundations of linguistic duality in Canada.”<sup>6</sup>

Aunger insists that French had “a status recognized in law and in fact”<sup>7</sup> in the District

of Assiniboia from its creation in 1835, because the use of French was permitted at meetings of the Council of Assiniboia, before the courts in the District of Assiniboia, and because petitions were accepted and laws were often printed in French and English. Based on a statement by George Cartier that French was an “official language” of Rupert’s Land and the North-Western Territory,<sup>8</sup> Aunger assumes that French was a constitutionally guaranteed linguistic right, which could only be removed through a proper process of constitutional amendment. He insists that the Parliament of Canada guaranteed the people of Rupert’s Land and the North-Western Territory that this linguistic right would be carried over into the Canadian Constitution once Canada had acquired these territories.<sup>9</sup> The process for this transfer would occur under section 146 of the *Constitution Act, 1867*,<sup>10</sup> formerly called the *British North America Act, 1867*. Under section 146 of the *Constitution Act, 1867*, the Canadian Parliament — through a formal Address to the Queen — was required to indicate to the people of Rupert’s Land and the North-Western Territory the terms and conditions of their entry into Confederation and, if the Queen (effectively the United Kingdom government) approved these measures by order-in-council, the Dominion of Canada would be permitted to acquire this vast expanse of land. According to Aunger, French linguistic rights formed part of the 1867 Address to the Queen requesting the admission of Rupert’s Land and the North-

Western Territory to the Dominion of Canada,<sup>11</sup> otherwise she would not have permitted Canada to acquire those lands. In using the process laid out in section 146, Aunger goes on to argue, Canada committed itself to bilingualism in this vast region, and French language rights were “recognized and entrenched” in the Constitution of Canada for the benefit of the whole area from what would become Labrador through the Yukon and to all of the provinces and territories in between.<sup>12</sup>

A recent case before the Court of Appeal for the Northwest Territories, *Yellowknife Public Denominational District Education Authority v. Euchner*,<sup>13</sup> sheds light on the flaws of Aunger’s argument. Although the case before the Northwest Territories appeals court focused on schooling, the court’s analyses and conclusions about Parliament’s 1867 *Address*, and the Queen’s responding 1870 order-in-council,<sup>14</sup> challenge Aunger’s views with respect to linguistic rights. The Court of Appeal noted that “the 1867 *Address* sets out the undertakings the Parliament of Canada was willing to assume as a condition of the transfer of the North-Western Territory and Rupert’s Land to Canada.”<sup>15</sup> In its decision, the court stated that “Parliament’s obligations, if any, relate only to its agreeing to govern and legislate for the territories, protect legal rights through courts of competent jurisdiction and settle aboriginal land claims.”<sup>16</sup> (It should be noted that French linguistic rights were not specifically mentioned in either the 1867 *Address* or the 1870 *Order*.) Furthermore, the court was firm in insisting that “even if some parts of either or both the 1870 *Order* and the 1867 *Address* could be construed as terms and conditions obliging Parliament to enact legislation, the precise content of that legislation would still fall wholly within Parliament’s discretion, there being no intention to constrain the exercise of that legislative authority.”<sup>17</sup> While the court was addressing denominational school rights in its decision, the same reasoning would apply to linguistic rights: “the absence of explicit language of entrenchment in the 1870 *Order* militates strongly against construing it as entrenching such rights.”<sup>18</sup> As the court concluded, “[n] either the imperial Parliament nor Canada’s Parliament could have intended to entrench as a

right in the 1870 *Order* something neither they, nor her Majesty, chose to include as a subject matter therein.”<sup>19</sup>

Besides misconstruing the import of the 1867 *Address* and the 1870 *Order*, Aunger misconstrues the significance of the Royal Proclamation of 6 December 1869<sup>20</sup> (addressing the Red River Colony) and the purported promises made by Prime Minister John A. Macdonald’s envoy to the colony, Donald Smith, which Aunger claims bound the Canadian government to respect existing linguistic rights in Rupert’s Land and the North-Western Territory by entrenching French linguistic rights for the newly acquired territories in the Constitution of Canada.<sup>21</sup> Several difficulties arise with Aunger’s argument. First, he fails to place the proclamation in its proper historical context. The purpose of the proclamation was to encourage those Métis engaging in armed resistance to governmental authority in Red River to lay down their arms and return to their homes. The proclamation informed the insurgents “that in case of your immediate and peaceable obedience and dispersion, I shall order that no legal proceedings be taken against any parties implicated in these unfortunate breaches of the law.”<sup>22</sup> Since the Métis in revolt were more concerned with direct talks with Ottawa than with promises set forth in a proclamation, the document was never presented to the residents assembled as a convention in Red River. Even Louis Riel, the architect of the resistance in Red River —whom Aunger fails to mention at all in his article — only saw a copy of the document itself at the residence of Bishop Taché on 11 March 1870, as delegates from the colony were preparing to go to Canada to enter into discussions about entry into Confederation.<sup>23</sup>

Furthermore, the Alberta Court of Queen’s Bench ruled in *R. v. Jones*<sup>24</sup> that claims under Royal proclamations can only be enforceable when implemented or sanctioned by legislation. In the case of the Royal Proclamation of 6 December 1869, neither the Crown nor the people of Manitoba nor the Northwest Territories referred to it during the process of passing, or following the passage of, the *Manitoba Act, 1870* and the *North-West Territories Act* of

1875.<sup>25</sup> Never was this proclamation acted upon by any party in reliance on alleged rights and never has any court case referred to this proclamation as an authority for any rights. In fact, when the matter of the proclamation was raised before the Convention of 40 on 27 January 1870, the chairman said that “even though the proclamation had no direct and immediate bearing on the transfer of the country...” the convention should hear what the Queen had to say.<sup>26</sup> Louis Riel then stated that he was not a Canadian subject and “for that reason the Governor-General of Canada has no business with us yet, and I have no business with him...” but he was willing to have the proclamation, if there was one, read.<sup>27</sup> It never was produced or read at the convention. Clearly, Riel and the delegates to the 1870 convention had little interest in the proclamation.

In addition to his view of the proclamation, Auger’s understanding of Donald Smith is equally faulty. Smith had no authority to make any promises to the inhabitants of Red River. He was sent as a Canadian commissioner “to the people of Red River”<sup>28</sup> to attempt to bring law and order back to the colony (which was embroiled in an armed resistance), and to encourage Riel and his Métis followers to send a delegation to Ottawa to lay their wishes before the Canadian government before Canada officially acquired the territory. In a recent decision of the Manitoba Court of Queen’s Bench, *Manitoba Metis Federation Inc. et al. v. Attorney General of Canada et al.*,<sup>29</sup> the court found that Macdonald outlined to Smith precisely what the federal government was prepared to concede.<sup>30</sup> The prime minister was clear that Smith could authorize a delegation to visit Ottawa to represent the claims of the resisters to Canada’s takeover, but that “[t]he representation of the Territory in Parliament will be a matter for discussion and arrangement with such delegation.”<sup>31</sup> There was no mention of Smith “binding the Canadian government to respect existing rights in Rupert’s Land and the North-Western Territory.”<sup>32</sup> In fact, neither in Smith’s commission from the Canadian government<sup>33</sup> nor in his instructions were French linguistic rights explicitly mentioned. He was not authorized “to negotiate or to come to terms with the

insurgents,” but was asked “to probe the causes of the trouble, to explain away misapprehensions and to report upon the best mode of effecting the speedy transfer of the North-West to Canada.”<sup>34</sup> As Macdonald told Bishop Taché, “in case a delegation is appointed to proceed to Ottawa, you can assure them that they will be kindly received, and their suggestions fully considered.”<sup>35</sup> Macdonald was clearly not about to commit the Canadian government to any specific legislation with respect to Red River before discussion occurred between Red River representatives and the Canadian government, let alone commit to any promise of entrenching French linguistic rights in the Canadian Constitution.

Donald Smith was very careful not to go beyond his mandate. In a report to Ottawa, Smith insisted that he never acknowledged the “provisional government” headed by Louis Riel to be legal at any time during his stay in Red River.<sup>36</sup> At his meeting with the Convention of 40 on 27 January 1870, Smith said he explained the views of the Canadian government to the delegates, “and gave assurances that on entering confederation, they would be secured in the possession of all rights, privileges, and immunities enjoyed by British subjects in other parts of the Dominion...”<sup>37</sup> The convention then went about preparing a “list of rights” embodying “conditions on which they would be willing to enter the confederation.”<sup>38</sup> During the preparation of the list, Riel asked Smith whether he would pledge that Parliament would sanction through legislation what Smith suggested would be granted to the territories. Smith replied that “[t]he Government will certainly bring the matter before Parliament, but it is the Parliament which must finally decide.”<sup>39</sup> Smith told Ottawa that the delegates at the convention “professed confidence in the Canadian Government, to which I [Smith] invited them to send delegates...”<sup>40</sup>

Auger correctly indicates that three delegates were sent from Red River to deal directly with Ottawa.<sup>41</sup> He is wrong, however, to claim that there were negotiations and that an “agreement” resulted, which “brought about the union of the territories.”<sup>42</sup> As the Manitoba Court of Queen’s Bench stated in *Manitoba*

*Metis Federation*, “A treaty or agreement can only be concluded by people with capacity or authority to do so. Here, neither the delegates from Red River nor Macdonald or Cartier had such capacity or authority. As well, a treaty or an agreement must have consensus as to terms, certainty of terms, and finality. Here there was not.”<sup>43</sup> The court then concluded that “[t]here was no treaty. There was no agreement. There was an Act of the Parliament of Canada [the *Manitoba Act, 1870*] which is recognized as a constitutional document.”<sup>44</sup>

Through the *Manitoba Act, 1870*, Rupert’s Land and the North-Western Territory entered Canada (and became known as the Northwest Territories) with a very small portion of Rupert’s Land set aside for the creation of the Province of Manitoba. In addition, under section 23 of the Act, French and English became the official languages of the new province. Aunger incorrectly states that through the *Manitoba Act, 1870*, the official use of the French and English languages in Manitoba and the Northwest Territories was “enshrined in the Constitution of Canada in 1870.”<sup>45</sup>

The *Manitoba Act, 1870* was an act of the Canadian Parliament that could be modified at any time by Canada or by the Parliament of the United Kingdom. Indeed, the British Parliament did alter the nature of the *Manitoba Act, 1870* by incorporating it within the Constitution of Canada a year later by an act of the United Kingdom Parliament.<sup>46</sup> This amendment to the *Constitution Act, 1867* entrenched bilingualism in the province of Manitoba as noted in 1979 by the Supreme Court of Canada in *Attorney General of Manitoba v. Forest*,<sup>47</sup> and reiterated a decade later in *Mercure*. Thus, Aunger is wrong to conclude that French language rights were entrenched in Manitoba in 1870 rather than 1871. In any case, the determination of whether bilingualism was entrenched in Manitoba in 1870 or 1871 is not critical to Aunger’s argument regarding bilingualism in Alberta.

What is important to the question of bilingualism in Alberta is Aunger’s rather imaginative but false supposition that, through the *Manitoba Act, 1870*, “the province of Manitoba and the North-west Territories [entered Confedera-

tion] with twinned governments and common institutions.”<sup>48</sup> By insisting that the Lieutenant Governor of Manitoba governed the Northwest Territories, Aunger concludes that section 23 of the *Manitoba Act, 1870* “established official bilingualism in territorial institutions.”<sup>49</sup> This assertion is inaccurate. The Lieutenant Governor of Manitoba and the Lieutenant Governor of the Northwest Territories were one and the same person, but with entirely separate offices of state. On 30 July 1870 Adams Archibald was appointed Lieutenant Governor of Manitoba;<sup>50</sup> “[b]y separate instrument dated July 30, 1870, he also was appointed Lieutenant-Governor of the North-West Territories.”<sup>51</sup> In August 1870, Archibald received instructions from the Under Secretary of State for the Provinces relative to his appointment as Lieutenant Governor of Manitoba and also separate and extensive instructions relative to his position as Lieutenant Governor of the Northwest Territories.<sup>52</sup>

Archibald’s position in 1870 was akin today to the status of Elizabeth II as Queen of Canada and at the same time Queen of the United Kingdom. Although Queen and Head of State of both countries, Elizabeth’s role and duties are different in each country, and neither country’s laws and practices apply to the other. The same was true for Adams Archibald in 1870. Although resident in Winnipeg, he acted very differently as Lieutenant Governor of Manitoba than he did as Lieutenant Governor of the Northwest Territories. His main duty as Lieutenant Governor of the Territories was to collect information for the use of the Canadian government.<sup>53</sup> To fulfill this obligation, he hired Lieutenant W. F. Butler to undertake a fact-finding expedition throughout the North West.<sup>54</sup> As Lieutenant Governor of Manitoba, his primary task was to establish the elaborate apparatus of a provincial government at Winnipeg.<sup>55</sup> The Lieutenant Governor of Manitoba eventually acted like other lieutenant governors in a province with a premier, while the Lieutenant Governor of the Northwest Territories acted as both head of the Territories and head of government until the arrival of responsible government at the end of the nineteenth century.

Finally, in discussing Senator Marc Girard’s



amendment to the *North-West Territories Act* in 1877, Aunger's reasoning becomes rather muddled. On the one hand, he suggests that the amendment inserting an article providing for bilingualism into the original Act was not necessary because bilingualism already existed in the Northwest Territories through section 23 of The *Manitoba Act, 1870*; on the other hand, he lauds Senator Girard for successfully amending the Act "to recognize official bilingualism in the North-West Territories."<sup>56</sup> In the spring of 1987 I wrote an article in which I argued that through Senator Girard's amendment to the *North-West Territories Act* of 1875, the Northwest Territories became officially bilingual at that time. Despite subsequent attempts by the territorial legislature to modify section 110 (the section of the *North-West Territories Act* providing for the use of French and English in the Territorial legislature and courts), that section was carried over, as originally written, into the *Alberta Act* at the time the province of Alberta was created in 1905. I suggested, however, that French language rights could be modified by the provincial government of Alberta alone.<sup>57</sup> Unlike The *Manitoba Act, 1870*, section 110 "was at no time included in the Constitution by the Parliament of the United Kingdom, or by the Parliament of Canada pursuant to any action taken by it under the *Constitution Act, 1871*."<sup>58</sup> Both Aunger and I agree that the Province of Alberta was bilingual until 1988 at which time the legislature passed a bilingual act, which transformed Alberta into a province, which was unilingually English. I contend the province acted constitutionally because bilingualism was not entrenched in the Constitution and language rights can be modified by the province alone; Aunger argues that the province acted unconstitutionally in 1988 because French language rights were entrenched in the Constitution both before and after the province was created.

In his article, Aunger informs us that the Provincial Court of Alberta in *Sa Majesté la Reine et Gilles Caron*<sup>59</sup> held that on the basis of new evidence, "the official status of the French language was entrenched in the constitution of Canada."<sup>60</sup> On appeal, the Alberta Court of Queen's Bench is considering whether Alberta is correct in its contention that no new evidence

has emerged since *Mercure* which would cause the court to overturn or amend the Supreme Court's 1988 decision. This is the issue over which the courts are presently grappling.

## Notes

- \* Department of History and Classics, University of Alberta.
- 1 Edmund A. Aunger, "The Constitution of Canada and the Official Status of French in Alberta" (2009) 32:2 in *Canadian Parliamentary Review* 22.
- 2 1988 SCC 107 (CanLII) [*Mercure*].
- 3 *An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870*, 33 Vict., c. 3 (Can.).
- 4 *An Act to amend the "North-West Territories Act, 1875."*, 38 Vict., c. 49 (Can.).
- 5 1905, 4-5 Edw. VII, c. 3 (Can.).
- 6 Aunger, *supra* note 1 at 23.
- 7 *Ibid.*
- 8 *Ibid.* at 24.
- 9 *Ibid.*
- 10 (U.K.) 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. Section 146 reads:  
It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.
- 11 *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, 16 & 17 December 1867, reprinted in R.S.C. 1985, App. II, No. 9, Sch. A [1867 Address].
- 12 Aunger, *supra* note 1 at 24.
- 13 2008 NWTCA 13 (CanLII) [*Euchner*].
- 14 *Rupert's Land and North-Western Territory Order* (U.K.), 23 June 1870, reprinted in R.S.C. 1985, App. II, No. 9 [1870 Order].
- 15 *Euchner*, *supra* note 13 at para. 68.

- 16 *Ibid.* at para. 76.
- 17 *Ibid.*
- 18 *Ibid.* at para. 81.
- 19 *Ibid.*
- 20 Aunger, *supra* note 1 at 24. For the proclamation, see “Proclamation of Sir John Young, Governor General of Canada, Dec. 6, 1869” in E. H. Oliver, ed., *The Canadian North-West, Its Early Development and Legislative Records*, vol. 2 (Ottawa: Government Printing Bureau, 1915) at 901.
- 21 *Ibid.*
- 22 *Ibid.*
- 23 Raymond J. A. Huel, *Archbishop A.-A. Taché of St. Boniface* (Edmonton: University of Alberta Press, 2003) at 109.
- 24 [2000] ABQB 591 (CarswellAlta) at paras. 21 and 38.
- 25 *An Act to amend and consolidate the Laws respecting the North-West Territories*, 1875, c. 49 (Can.).
- 26 “THIRD DAY, Jan. 27, 1870,” *The New Nation* (29 January 1870).
- 27 *Ibid.*
- 28 “Report of Donald A. Smith, Esq., to The Hon. Joseph Howe, Secretary of State for the Provinces, Ottawa, 12th April 1870” in Oliver, *supra* note 20 at 920.
- 29 2007 MBQB 293 (CanLII) [*Manitoba Metis Federation*].
- 30 *Ibid.* at para. 87.
- 31 *Ibid.* at para. 88.
- 32 Aunger, *supra* note 1 at 24.
- 33 “Commission issued to Donald A. Smith appointing him Special Commissioner, Dec. 17, 1869” in Oliver, *supra* note 20 at 907-08.
- 34 George F. G. Stanley, *The Birth of Western Canada* (Toronto: University of Toronto Press, 1961) at 89 and 90.
- 35 Macdonald to Taché, private correspondence (16 February 1870) as cited in Stanley, *ibid.* at 110.
- 36 920.
- 37 *Ibid.* at 925.
- 38 *Ibid.*
- 39 *Manitoba Metis Federation*, *supra* note 29 at para. 471.
- 40 “Report of Donald A. Smith, Esq., to The Hon. Joseph Howe,” *supra* note 28 at 926.
- 41 Aunger, *supra* note 1 at 25.
- 42 *Ibid.*
- 43 *Manitoba Metis Federation*, *supra* note 29 at para. 507.
- 44 *Ibid.* at para. 510.
- 45 Aunger, *supra* note 1 at 23.
- 46 *Constitution Act, 1871* (U.K.), 34 & 35 Vict., c.28.
- 47 [1979] 2 S.C.R. 1032.
- 48 Aunger, *supra* note 1 at 25.
- 49 *Ibid.* at 25.
- 50 *Manitoba Metis Federation*, *supra* note 29 at para. 152.
- 51 *Ibid.* at para. 153.
- 52 *Ibid.* at paras. 154-56.
- 53 “Under Secretary of State for the Provinces to Archibald, Aug. 4, 1870” in Oliver, *supra* note 28 at 974-75.
- 54 Lewis Herbert Thomas, *The Struggle for Responsible Government in the North-West Territories 1870-97* (Toronto: University of Toronto Press, 1956) at 51.
- 55 *Ibid.* at 49.
- 56 Aunger, *supra* note 1 at 25.
- 57 Kenneth Munro, “Official Bilingualism in Alberta” (1987) 12.1 *Prairie Forum* 37.
- 58 *Mercure*, *supra* note 2 at 299.
- 59 2008 ABPC 232 (CanLII).
- 60 Aunger, *supra* note 1 at 26.