

Language Difficulties Facing Tribunals and Participants: The Approach of the New Official Languages Act

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I. THE *CONTEXT* OF LANGUAGE RIGHTS IN THE COURTS

The question of language rights in the courts is really a matter of the **official use** of languages — in Canada, the use of English and French¹ — in the proceedings of the judicial sphere of government. That, at least, is how the Supreme Court of Canada has characterized the matter in two well-known decisions: *MacDonald v. City of Montreal* and *Société des Acadiens v. Association of Parents*.² By **official use** in the Canadian context, I mean the extent to which English or French may be used, recognized and accommodated as a language of the proceedings and a language of record: in other words, the language employed by the judge in conducting the hearing and in rendering judgment; by the parties (including the prosecutor and accused, if the case is criminal or penal in nature) in their oral and written pleadings and submissions; by the witnesses in their testimony; by the officers of the court in issuing process documents; and by the jury (if there be one).

In this regard, Subsection 19(1) of the *Canadian Charter of Rights and Freedoms* repeats the basic right of any person to use either English or French before federally-established courts. That right is found in Section 133 of the *Constitution Act, 1867*, which still applies to both the courts of Canada and Quebec, and which was later extended expressly to the courts of Manitoba,³ the Territories,⁴ and New Brunswick⁵. As expressed in the *Charter*, the right is:

19.(1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

This right, which comes under the rubric, "Official Languages of Canada", may be contrasted with that of Section 14 of the *Charter*, which falls under the heading, "Legal Rights":

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1. Immediately following this plenary session of the Conference, I will discuss, in Workshop A ("Discrimination in remote, isolated and northern communities: subtle, overt, economic, cultural, language"), the degree to which the *official* use of *other* languages — such as the aboriginal languages recognized by the North-West Territories' *Official Languages Act* and the recent amendments to the Territories' *Jury Act* respecting unilingual aboriginal jurors — may be accommodated by the Canadian judicial system.
 2. *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460; *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549.
 3. By Section 23 of the *Manitoba Act, 1870*.
 4. By Section 110 of the old *North-West Territories Act*, which was held by the Supreme Court of Canada in *R. v. Mercure*, [1988] 1 S.C.R. 234 to have survived the creation of the provinces of Saskatchewan and Alberta in 1905 and still to apply to Saskatchewan. Despite the enactment, after the *Mercure* decision, of language laws in Saskatchewan and Alberta ousting the application of Section 110, it still applies in criminal proceedings, which are beyond the legislative reach of the provinces: see *R. v. Paquette*, [1990] 2 S.C.R. 1103.
 5. By Subsection 19(2) of the *Charter*.

14. *A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.*

Thus, Section 19 of the *Charter* expressly permits or privileges the use by anyone of specific languages in court proceedings, whereas Section 14 only facilitates the comprehension of someone who cannot speak or follow "the language in which the proceedings are conducted". The proceedings are interpreted into the language of that person only to ensure that he or she is aware of what is taking place officially in English or French, and that person's words will only form a part of the record in their translated — i.e. official language — version. At no time does the third language in question become the language of the proceedings or the language of record *per se*.

The Supreme Court of Canada carried the distinction, between guarantees like Section 19 and safeguards like Section 14 of the *Charter*, to an extreme in the *Société des Acadiens* decision. Beetz J., writing for the majority, was at pains to demonstrate that the **language right** to use either English or French is essentially an empowerment which produces no corresponding obligation on the part of the State (in this case, the judge) to understand — even if only by means of an interpreter — the language being used. The right to be understood by a court is rather a **legal right** arising out of the common law protections relating to natural justice and due process, as well as constitutional embodiments such as Sections 7 (fundamental justice) and 14 of the *Charter*. The Court, in *Société des Acadiens*, was plainly worried that enlarging the scope of language rights in court would be tantamount to reducing (and undermining) the base upon which the linguistic aspects of the right to a fair hearing had been built. If, for instance, a right to a judge who could understand **directly** — without interpretation — the official language used by the parties, were eventually to be claimed under Section 19 of the *Charter* as an enhancement of the equitability of the proceedings, what would this say about the relative fairness of proceeding to hear other, non-official language, speakers through interpreters? If a statutory expansion of the official language regime in the courts were to be justified on the basis of fairness and fuller access, again, how could these benefits be restricted to users of English or French? These questions were left unspoken, but they were relevant to the concerns expressed by Beetz J. about the mixing of such apples and oranges as language and legal rights. While both "legal rights as well as language rights belong to the category of fundamental rights", he wrote,

[i]t would constitute an error either to import the requirements of natural justice into ...language rights... or vice versa, or to relate one type of right to the other... Both types of rights are conceptually different... To link these two types of rights is to risk distorting both rather than re-enforcing either.⁶

Dickson C.J. and Wilson J. voiced strong dissents on this point in *Société des Acadiens*. A passage from the Chief Justice's reasons is apposite.

Language rights in the courts are, in my opinion, conceptually distinct from fair hearing rights. While it is important to acknowledge this distinction, each

6. Beetz J. in *Société des Acadiens*, *supra* note 2 at 578, quoting himself for the majority in *MacDonald*, *supra* note 2 at 500-501.

*category of rights does not occupy a watertight compartment. Just as fair hearing rights are, in part, intimately concerned with effective communication between adjudicator and litigant, so too are language rights in the court. There will therefore be a certain amount of overlap between the two. At the same time, each category of rights will continue to address concerns not touched by the other. For example, whether or not an individual is even entitled to an oral hearing comes under the exclusive rubric of natural justice, not language rights.*⁷

Beetz J. had found that there was an "essential difference" between legal rights and language rights (the former being "rooted in principle"; the latter "based on political compromise"), and that that difference dictated a "distinct judicial approach with respect to each".

*More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights.*⁸

Beetz J. went on to state that this "attitude of judicial restraint" was compatible with Section 16 of the *Charter* which, he agreed, contains a principle of advancement in the equality of status or use of the official languages. However, he found it "highly significant" that the principle is linked, by Subsection 16(3), to action by Parliament and the provincial legislatures.

*The legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise.*⁹

I have criticized elsewhere, as have many others, the somewhat arbitrary basis upon which Mr. Justice Beetz distinguished language rights from other basic rights (as well as the uses to which that distinction has since been put in a number of superior and appellate court decisions restricting the scope or application of language rights in civil and criminal proceedings)¹⁰. Suffice it to recall here that in the *Mercure* case¹¹ the Supreme Court itself nuanced the views of Beetz J. and balanced them with those expressed by the Chief Justice

7. Dickson C.J., *ibid.* at 567.

8. Beetz J., *ibid.* at 578.

9. *Ibid.* at 579.

10. W.J. Newman, "Language Rights, The Charter and the New Official Languages Act" (Paper presented to the First Annual Department of Justice Conference on Human Rights and the Charter, Ottawa, 21 November 1988) at 6-9, 24-26. Amongst other commentators, Professors Leslie Green and Denise Réaume offer particularly cogent criticism and reflection in "Second-Class Rights? Principle and Compromise in the Charter" (forthcoming), and Green, "Are Language Rights Fundamental?" (1987) 25 Osgoode Hall L.J. 639.

11. *Mercure*, *supra* note 4, especially at 269-270, La Forest J.

in *Société des Acadiens*. Neither in *Mercurie*, nor in its subsequent decision in the *Ford* case,¹² did the Court employ the "political compromise" distinction. Rather, in *Ford* the Supreme Court attempted a global analysis of language rights that forms, I think, a more compelling basis for distinguishing language rights from other fundamental rights.¹³ The passage is worth quoting in full:

A general freedom to express oneself in the language of one's choice and the special guarantees of language rights in certain areas of governmental activity or jurisdiction — the legislature and administration, the courts and education — are quite different things. The latter have, as this court has indicated in MacDonald, supra, and Société des Acadiens, supra, their own special historical, political and constitutional basis. The central unifying feature of all of the language rights given explicit recognition in the Constitution of Canada is that they pertain to governmental institutions and for the most part they oblige the government to provide for, or at least tolerate, the use of both official languages. In this sense they are more akin to rights, properly understood, than freedoms. They grant entitlement to a specific benefit from the government or in relation to one's dealing with the government. Correspondingly, the government is obliged to provide certain services for benefits in both languages or at least permit use of either language by persons conducting certain affairs with the government. They do not ensure, as does a guaranteed freedom, that within a given broad range of private conduct, an individual will be free to choose his or her own course of activity. The language rights in the Constitution impose obligations on government and governmental institutions that are in the words of Beetz J. in MacDonald, a "precise scheme", providing specific opportunities to use English or French, or to receive services in English or French, in concrete, readily ascertainable and limited circumstances.¹⁴

II. THE CONTENT OF LANGUAGE RIGHTS IN THE COURTS

Section 133 of the *Constitution Act, 1867*, must be the starting point for any analysis of the substantive content of language rights in Canadian courts.¹⁵ Section 133

12. *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712 (*per curiam*).

13. I had also attempted such a distinction in my paper ("Language Rights..." *supra* note 10) under the rubric, "Language rights as special rights" at 10-12, just prior, as it so happened, to the release of the decision in *Ford*.

14. *Ford*, *supra* note 12, at 750-751.

15. For ease of reference, the full text is reproduced herein below:

Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading of Process in or issuing from any Court of Canada established under this Act, and in or from any or all of the Courts of Quebec.

permits the use of either English or French in parliamentary and judicial proceedings, and requires the use of both languages in laws and legislative records. In the *Manitoba Language Rights Reference*,¹⁶ the Supreme Court went so far as to state the **purpose** of Section 133 and its equivalent, Section 23 of the *Manitoba Act, 1870*, as being "to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike". In the *Jones* case,¹⁷ Laskin C.J. had nonetheless noted that the **words** of Section 133 themselves pointed to "its limited concern with language rights", which in his view was

correctly described as giving a constitutionally based right to any person to use English or French in legislative debates in the federal and Quebec Houses and in any pleading or process in or issuing from any federally established Court or any Court of Quebec, and as imposing an obligation of the use of English and French in the records and journals of the federal and Quebec legislative Houses and in the printing and publication of federal and Quebec legislation.

This limited provision could not be read as a "legislatively unalterable determination" of the "privileged or obligatory use of English and French in public proceedings, in public institutions and in public communications." In upholding the validity of the first *Official Languages Act*,¹⁸ the Supreme Court rejected the thesis that "there can be no advance upon s. 133 without constitutional amendment".

Certainly, what s. 133 itself gives may not be diminished by the Parliament of Canada but if its provisions are respected there is nothing in it [...] that precludes the conferring of additional rights or privileges or the imposing of additional obligations respecting the use of English and French, if done in relation to matters within the competence of the enacting legislature. [...] It is one thing for Parliament to lessen the protection given by s. 133; that would require a constitutional amendment. It is a different thing to extend that protection beyond its present limits.¹⁹

That is the famous principle of advancement which is now expressed in Subsection 16(3) of the *Charter*.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

16. *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 739.

17. *Jones v. Attorney General of New Brunswick et al.*, [1975] 2 S.C.R. 182 at 193.

18. R.S.C. 1970, C. 0-2 (repealed by section 110 of the *Official Languages Act* S.C. 1988, c. 38.)

19. *Jones*, *supra* note 17 at 192-193, 195.

In the *Blaikie* case,²⁰ the Supreme Court considered *inter alia* the scope of Section 133's application to the term "Courts". The Supreme Court decided that the "proper approach" to an entrenched guarantee like Section 133 was to "make it effective through the range of institutions which exercise judicial power, be they called courts or adjudicative agencies". The Court went on to rule on the content of the Section 133 right, characterizing it as an **option** to use either language that is open not only to those who plead **before** the courts but to those who issue documents and judgments which emanate **from** the courts.

*It follows that the guarantee in s. 133 of the use of either French or English "by any person or in any pleading or process in or issuing from...all or any of the Courts of Quebec" applies to both ordinary Courts and other adjudicative tribunals. Hence, not only is the option to use either language given to any person involved in proceedings before the Courts of Quebec or its other adjudicative tribunals (and this covers both written and oral submissions) but documents emanating from such bodies or issued in their name or under their authority may be in either language, and this option extends to the issuing and publication of judgments or other orders.*²¹ (Emphasis added)

The context and the rationale for this finding come from the fact that Section 13 of the *Charter of the French language* of Quebec, one of the provisions under constitutional attack in *Blaikie*, provided that the judgments of Quebec courts must be "drawn up in French or accompanied by a duly authenticated French version", and that "[o]nly the French version of the judgment is official". It was in reaction to the intent and consequences of Section 13 that Deschênes C.J. of the Superior Court, whose reasons "on matters of detail and history" the Supreme Court adopted as its own,²² declared that the judges presiding over Quebec courts "are *persons* in the sense of s. 133".

Article 13 withdraws, in principle, the right of the Judge to render his judgment in English. However, the National Assembly has judged it opportune to incorporate in art. 13 a provision equivalent to that of art. 89: the Judge can render the judgment in English or even it seems in whatever language — provided that the judgment is accompanied by a French version duly authenticated.

But this is to nullify as in the case of arts. 11 and 12 the rights accorded by s. 133.

There is more. Article 13 provides that "Only the French version of the judgment is official." It is here that the rupture with s. 133 takes its full meaning. A judicial decision is one of the most important public Acts which our society

20. *A.G. of Quebec v. Blaikie et al.*, [1979] 2 S.C.R. 1016 at 1030. The Supreme Court held that as it was dealing with a constitutional guarantee, "it would be overly technical to ignore the modern development of non-curial adjudicative agencies which play so important a role in our society, and to refuse to extend to proceedings before them the guarantee of the right to use either French and [*sic*] English by those subject to their jurisdiction." (at 1029)

21. *Ibid.* at 1030.

22. *Ibid.* at 1027.

knows and art. 1207 of the Civil Code confers on it the character of authenticity whence the importance that the judicial decision be rendered with the greatest of precision in a language that the Judge has mastered perfectly.

Now s. 13 of the Charter refuses any value to a judgment that its author would decide to render in the English language and transfers the character of authenticity to the French translation only of the original text: the contradiction with s. 133 is total.²³

A further allusion to the right of judges to use either language was employed in *Blaikie (No 2)*²⁴ to buttress the Supreme Court's finding that court rules of practice must, under Section 133, be made in both English and French:

[A]s was noted by Deschênes C.J.S.C., (at p. 49 of his reasons), this fundamental right is also guaranteed to judges who are at liberty to address themselves to litigants in the language of their choice. When they so address themselves collectively to litigants as they peremptorily do in rules of practice, they must necessarily use both languages if they wish to safeguard the freedom of each judge.

The Court took the view that rules of practice were required to be bilingual under Section 133 by necessary intendment. It also appealed to the following essentially teleological argument to justify its position:

The point is not so much that rules of practice partake of the legislative nature of the Code of which they are the complement. A more compelling reason is the judicial character of their subject-matter for which s. 133 makes special provision. Rules of practice may regulate not only the proper manner to address the court orally and in writing, but all proceedings, processes, certificates, styles of cause and the form of court records, books, indexes, rolls, registers, each of which may under s. 133, be written in either language. Rules of practice may also prescribe and do prescribe specific forms for proceedings and processes, such for instance as the motion for authorization to institute a class action or a judgment in a class action [...], a proceeding in the Superior Court, a process of the Superior Court. All litigants have the fundamental right to choose either French or English and would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only.²⁵

In the *MacDonald* case, the Supreme Court upheld the validity of a unilingual French summons issued from the Municipal Court of the City of Montreal to the English-speaking appellant. The appellant's principal submission was to the effect that Section 133

23. *Blaikie v. Attorney General of Quebec*, 85 D.L.R. (3d) 252 at 268-269 (in translation); [1978] C.S. 37 at 49 (in the original French), Deschênes C.J.S.C.

24. *A.G.(Quebec) v. Blaikie et al* [1981] 1 S.C.R. 312 at 333.

25. *Ibid.* at 332.

gave to anyone, English-speaking or French-speaking, the right to be summoned before any court of Canada or of Quebec by a process issued in his or her own language, at least in criminal or penal proceedings where the State acts as a prosecuting party. Dickson C.J. agreed with the conclusion of Beetz J. that the summons did not violate Section 133 of the *Constitution Act, 1867*, because its very words — **either** language may be used "**in any Pleading or Process in or issuing from any Court**" — empowered the courts to issue unilingual documents.

*Any implied affirmative obligation upon the "state" to give effect to the litigant's right to use either French or English is necessarily subordinated to the express authority of the courts to issue process in one language only.*²⁶

For Mr. Justice Beetz, the language rights in court that are protected by Section 133 clearly relate only to the **active, isolated** use of English or French. The rights are characterized as

*those of the litigants, counsel, witnesses, judges and other judicial officers who actually speak, not those of parties or others who are spoken to; and they are those of the writers or issuers of written pleadings and processes, not those of the recipients or readers thereof.*²⁷ (Emphasis added)

Because Section 133, in Beetz J.'s reasoning, "confers no language right to the appellant as the recipient of a summons", it follows that the section "imposes no correlative duty on the State or anyone else." The only duty imposed is a negative, not a positive one: a duty on everyone "not to infringe language rights conferred by the section with respect to [...] court proceedings". For example, it would be "unlawful [...] for a judge of a Quebec or a federal court to prevent the use of either language in his or her court."²⁸

*The appellant exercised his constitutionally protected language right when he presented his oral and written argument in English before Judge Bourassa, and the latter exercised his own right when he delivered judgment partly in French and partly in English. In my view, under s. 133 of the Constitution Act, 1867, and apart from other legal principles or statutory provisions such as the Official Languages Act, R.S.C. 1970, C. 0-2, the appellant was not entitled to a summons in English only, any more than to a judgment in English only, from the Municipal Court or from any court contemplated by s. 133, including this Court.*²⁹ (Emphasis added)

26. *MacDonald*, *supra* note 2 at 468, Dickson C.J. He added tersely: "It is therefore unnecessary in the present case to consider the precise extent of the litigant's right to use either language in the judicial setting; and I refrain from doing so." See also *Bilodeau v. A.G. (Man.)* [1986] 1 S.C.R. 449, which applies *MacDonald* to uphold the validity of a summons issued in English only to a French-speaking defendant under section 23 of the *Manitoba Act, 1870* (*per* Dickson C.J., for the majority; Wilson J. dissenting).

27. *Ibid.* at 483, Beetz J.

28. *Ibid.* at 486.

29. *Ibid.* at 483.

Issuing the summons in both English and French "would certainly be permissible and might well be desirable", allowed Mr. Justice Beetz. However, to impose it as a duty flowing from Section 133 would be "to make a mockery of the text" itself.³⁰ The solution proposed by intervenor Alliance Quebec — which would, upon the demand by the recipient for an official translation of the summons, have had the effect of denying the court jurisdiction to proceed until such translation were supplied — differed "only in degree but not in kind from the duty to issue an originally bilingual summons". It was "a compromise which amounts in practice to a constitutional amendment" to Section 133.³¹

Appeals to the historical record only demonstrated that "the Fathers of Confederation were quite familiar with the old and thorny problem of language rights" and that they had a "whole panoply of legislative models from which to draw".³² The clearly limited scope of Section 133 belied any attempt to read into it a complete system of language rights.

Section 133 has not introduced a comprehensive scheme or system of official bilingualism, even potentially, *but a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism at the option of the speaker in Parliamentary debates and at the option of the speaker, writer or issuer in judicial proceedings or processes.* Such a limited scheme can perhaps be said to facilitate communication and understanding, up to a point, but only as far as it goes *and it does not guarantee that the speaker, writer or issuer of proceedings or processes will be understood in the language of his choice by those he is addressing.* (Emphasis added)

"This incomplete but precise scheme is a constitutional minimum" which is "capable of containing necessary implications" and which can be "complemented by federal and provincial legislation" or which can be modified by constitutional amendment. "But it is not open to the courts, under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise."³³

Compliance with Section 133, providing, as it does, but a minimum constitutional protection of language rights, "may very well fall short of the requirements of natural justice and procedural fairness". However, such requirements protect not **language** rights but **legal** rights, "which s. 133 was never intended to safeguard in the first place" and to which, Beetz J. claimed, "it is entirely unrelated".

Suppose that a person is charged with a criminal offence drafted in either the French or the English language and that person does not understand the language of the charge. It goes without saying that this person cannot be asked to plead and be tried upon the charge in these circumstances. What will happen

30. *Ibid.* at 487.

31. *Ibid.* at 488-489.

32. *Ibid.* at 493.

33. *Ibid.* at 496.

as a matter of practice as well as of law is that the judge will call upon a sworn interpreter to translate the charge into a language that the accused can understand. But this is so whether the accused speaks only German or Cantonese and has nothing to do with what s. 133 stands for. [...]

Similarly, should a judge order in one official language the exclusion of witnesses and should one witness stay in court because he does not understand that language, this witness would have a good defence to a charge of contempt. But this will also be the case for deaf witnesses or for witnesses who speak a language other than either of the two official languages.³⁴

Where a defendant cannot understand the language in which the proceedings are conducted, the exercise of his or her right to a fair hearing "may well impose a consequential duty upon the court to provide adequate translation". The right of the defendant to understand what is taking place in court and to be understood is not a language right *per se* but an aspect of the right to a fair hearing.³⁵

However, concluded Beetz J., this was not to put English and French on a par with other languages. "Not only are the English and the French languages placed in a position of equality, they are also given a preferential position over all other languages". Both the equality and the preferential position of English and French were constitutionally protected. Without this protection, a degree of preference for one language over the other, English unilingualism, French unilingualism, "and, for that matter, unilingualism in any other language" could be imposed by ordinary legislation. "Thus it can be seen that, if s. 133 guarantees but a minimum, this minimum is far from being insubstantial."³⁶

Madam Justice Wilson dissented strongly from the view of her colleague Mr. Justice Beetz in *MacDonald*. Section 133 addresses itself to the State in imposing mandatory obligations to use both languages in its laws and legislative records; it addresses itself to the citizen in conferring permissive rights to use either language in parliamentary and judicial proceedings. The **purpose** is to "facilitate understanding by the citizen regardless of language".³⁷ A "narrow, literal interpretation" of section 133 "can totally defeat that purpose".

A literal interpretation would not require the Quebec courts to deal with an English speaker in English and a French speaker in French but, in effect, would permit an English speaking litigant to be dealt with in French and a French speaking litigant to be dealt with in English. This is the antithesis of what was intended. The purpose of the constitutional guarantee was not to ensure that French and English would be the only languages used in the province's courts and make it constitutionally impossible for a third language to achieve this status; its purpose, rather, would appear to be to put the two languages on an equal footing [...] and afford protection to each of the two founding linguistic groups from the

34. *Ibid.* at 498.

35. *Ibid.* at 499.

36. *Ibid.* at 500.

37. *Ibid.* at 522, Wilson J.

*intrusion and ultimate dominance of the other [...] This purpose is not satisfied by imposing an obligation on the province to deal with an English speaker in either English or French. Indeed, the only type of obligation that can fulfil the purpose underlying s. 133 is one which requires the provinces's courts to deal with an English speaker in English and a French speaker in French.*³⁸ (Emphasis added)

If for Beetz J., to impose a duty to issue summons in both languages would be "to make a mockery of the text" of section 133,³⁹ then for Wilson J., to conclude only that under Section 133 court documents and judgments are valid in either language would be "to make a mockery of the individual's language right".⁴⁰

*The purpose of the provision, it seems to me, goes beyond validating the use of both languages. It validates them for a reason and that reason is that the person before the Court will be dealt with in the language he or she understands. [...] Regardless of whether a judge acting in his or her official capacity retains the right as an individual to write judgments in the language of his or her choice, this cannot, in my view, detract from the state's duty to provide a translation into the language of the litigant.*⁴¹

Wilson J. accepted, in effect, the solution presented by intervenor Alliance Quebec:

*In my view the initiating documents emanating from the court must as a minimum recognize and accommodate the litigant's right to understand and be understood. [...] the state's obligation would be discharged by an addendum to the initiating document in the official language not used in the body of the document to put the recipient on notice that this is a directive from the Court commanding his or her appearance before it to respond to a charge and that translation into the other official language should be obtained by application to the appropriate court officials. I think this is consistent both with a purposive, as opposed to a literal, interpretation of s. 133 and with the legislative background from which the section sprang. Nor does it seem too onerous a duty to place upon the state.*⁴²

In the *Société des Acadiens* case, Madam Justice Wilson was joined by the Chief Justice in adopting a purposive approach to Subsection 19(2) of the *Charter*, which

38. *Ibid.* at 538.

39. *Ibid.* at 383, Beetz J.

40. *Ibid.* at 539-540, Wilson J. "With all due respect to those who think differently, I cannot read s. 133 as merely permitting the litigant to use the language he or she understands but allowing those dealing with him or her to use the language he or she does not understand. What kind of linguistic protection would that be?"

41. *Ibid.*

42. *Ibid.* at 543-544.

guarantees, along the lines of Section 133, the right to use either language before the courts of New Brunswick.

*There is no disagreement amongst the members of this Court that the right embodies at a minimum the right to speak and make written submissions in the language of one's choice. Must this right, to be meaningful, extend to the right to be understood, either directly or possibly with the aid of an interpreter or simultaneous translation? In my opinion, the answer must be in the affirmative. What good is a right to use one's language if those to whom one speaks cannot understand? Though couched in individualistic terms, language rights, by their very nature, are intimately and profoundly social. We speak and write to communicate to the judge or judges. It is fundamental, therefore, to any effective and coherent guarantee of language rights in the courtroom that the judge or judges understand, either directly or through other means, the language chosen by the individual coming before the court.*⁴³

Wilson J., speaking for herself, viewed the standard imposed by Subsection 19(2) as being a dynamic one, given the principles of linguistic duality and advancement in Section 16 of the *Charter*. "What may be adequate today in terms of protection of the litigant's right under s. 19(2) may not be adequate tomorrow." Expectations of the Canadian public with regard to bilingual government services, as well as the responsiveness of public officials to this question, had been heightened by the enactment of *Official Languages Acts* at the federal and certain provincial levels. Moreover, the federal government had taken "concrete steps towards the creation of a bilingual judiciary" through its appointments process and through specialized language training for unilinguals. "We are looking at a process which will call for a progressively expansive interpretation of the litigant's right under s. 19(2) to meet gradually increasing social expectations."

Wilson J. appeared to agree with Monnin C.J.M.'s view in *Robin v. Collège de Saint-Boniface* that judges currently must be able to understand receptively the written and spoken words of the litigant but not necessarily to speak or to write actively in that language.⁴⁴ Given the importance accorded to language rights by the *Charter* and their "sociocultural content", the minimum standard against which a judge's comprehension should be measured "goes beyond that required by fairness".⁴⁵

*If we are merely talking due process, then [...] the judge must have sufficient understanding of the language to provide a fair hearing. If we are talking equality of linguistic rights in the court structure, this may fall far short of what is required.*⁴⁶

43. *Société des Acadiens*, *supra* note 2 at 566, Dickson C.J.

44. *Ibid.* at 640, 642, Wilson J.; *Robin v. Collège de Saint-Boniface* (1984), 30 Man.R. (2d) 50 (Monnin C.J.M. in dissent; at 65).

45. *Ibid.* at 643.

46. *Ibid.* at 627.

Wilson J. concluded that "the judge's level of comprehension must go beyond a mere literal understanding of the language used by counsel". The "full flavour of the argument" must be appreciated. "I do not think, however, that the content of s. 19(2) can be expanded beyond this at the present time."⁴⁷ As for simultaneous interpretation, "if used conscientiously [it] allows some sort of interchange between the bench and counsel" and might be a "satisfactory interim measure". In the long run, however, such measures "can only be viewed as inadequate substitutes for true equality."⁴⁸

Mr. Justice Beetz, writing for the majority in *Société des Acadiens*, took the position that the language rights protected by Subsection 19(2) of the *Charter* "are of the same nature and scope" as the rights guaranteed by section 133 of the *Constitution Act, 1867*; he thus went on essentially to apply his finding in *MacDonald* that "these are essentially language rights unrelated to and not to be confused with the requirements of natural justice."⁴⁹ In contradistinction to Wilson J.'s view that the "principle of growth" implied in the commitment to equality and linguistic duality in Section 16 of the *Charter* meant that "an escalating standard commensurate with the evolution of social expectations"⁵⁰ would have to apply to the content of the right in subsection 19(2), Beetz J. stressed that certain other provinces which "were expected ultimately to opt into the constitutional scheme" of language rights prescribed by the *Charter* "would have no means to know with relative precision what it was they were opting into. This would certainly increase their hesitation in so doing and would run contrary to the principle of advancement contained in s. 16(3)."⁵¹

Finally, Mr. Justice Beetz emphatically expressed one of the underlying concerns of a dynamic and progressive interpretation of section 19 of the *Charter* in the context of Section 16.

Before I leave this question of equality however, I wish to indicate that if one should hold that the right to be understood in the official language used in court is a language right governed by the equality provision of s. 16, one would have gone a considerable distance towards the adoption of a constitutional requirement which could not be met except by a bilingual judiciary. Such a requirement would have far reaching consequences and would constitute a surprisingly roundabout and implicit way of amending the judicature provisions of the Constitution of Canada.

This passage was carefully reproduced by Mr. Justice La Forest in the *Mercure* decision,⁵² dealing with Section 110 of *The North-West Territories Act*. Writing for a

47. *Ibid.* at 643-644.

48. *Ibid.* at 644-645.

49. *Ibid.* at 574, Beetz J.

50. *Ibid.* at 640, 648, Wilson J.

51. *Ibid.* at 579-580, Beetz J.

52. *Mercure*, *supra* note 4. See S.C. 1891, C. 22, s. 18. The relevant provision of Section 110 reads: "Either the English or the French language may be used by any person [...] in the proceedings before the courts;" La Forest J. stated that Section 110 "was obviously modelled on s. 133", and although it "differs in form"

majority which, for the first time since the *Manitoba Language Rights Reference*, now included Dickson C.J., Beetz and Wilson JJ., La Forest J. summarized the principles enunciated in *MacDonald* and *Société des Acadiens* essentially in the following manner:

- *while a person is entitled to speak French (or English) in court, he has no right to be understood in that language;*
- *the judge and court officials may use either language as they wish both in oral and in written communication;*
- *the appellant has no right to a translator (interpreter), except as required for a fair trial either at common law or under ss. 7 and 14 of the Charter;*
- *the right to be understood is not a language right but one arising out of the requirements of due process;*
- *the language right, or "power", to speak or to write in the official language of one's choice can be contrasted with other language provisions which actually provide for the right to communicate (Section 20 of the Charter) or to be heard (Subsection 13(1) of the Official Languages of New Brunswick Act, R.S.N.B. 1973, C. 0-1).⁵³*

Applying those principles to the *Mercure* case itself, La Forest J. was of the view that the trial judge could have essentially proceeded with the trial of the French-speaking appellant in English.

There is no evidence to indicate that the appellant needed the services of a translator to understand the proceedings, so a fair trial could be conducted without making a translation available from English to French. [...]

*Counsel for the Freedom of Choice Movement, however, argued that the principle of equality in the use of language is breached by employing a translator to make a person understood by the trial judge. Such translation, he stressed, puts a person whose words must be translated in a far less favorable position than one who can be understood directly. However, it seems to me that this argument, too, was rejected in *Société des Acadiens*.⁵⁴ (Emphasis added)*

La Forest did, however, address an additional issue not covered by the previous caselaw, concerning "the making of a plea and the giving of evidence by the appellant"; — i.e., "whether when proceedings are required by law to be recorded, a person using one or the

— i.e., the absence of specific words relating to pleadings and process — "one would naturally assume it to be aimed at achieving the same purpose". He concluded that the language rights under Section 110 are "substantially the same" as those under Section 133, and Section 23 of the *Manitoba Act, 1870*.

53. *Ibid.* at 273-274.

54. *Ibid.* at 274.

other official language has the right to have his remarks recorded in that language." Here, translation would not suffice.

In my view, the appellant's right or power to use French would be seriously truncated if recorded in another language. For his use of the language goes beyond the immediate forum. The proceedings, for example, may continue in the Court of Appeal where the judges may quite properly wish to refer to the exact words used by a person at trial, words that person has a right to use. [...] the appellant would seem to me to have a right to have his statements recorded in the French language. His situation, of course, differs from that of a person who uses a language other than English or French whose rights to translation derive solely from the requirements of due process.⁵⁵ (Emphasis added)

III. THE *ADVANCEMENT OF LANGUAGE RIGHTS IN THE COURTS: THE NEW OFFICIAL LANGUAGES ACT*

*An Act respecting the status and use of the official languages of Canada*⁵⁶ was passed by Parliament in July, 1988, and proclaimed in force on September 15th of that year. The new *Official Languages Act*, in its parts dealing with the administration of justice in federal courts and the language of the accused in matters before courts exercising criminal jurisdiction, clearly goes beyond the "constitutional minimum" of language rights in the courts that is guaranteed by Section 133 of the *Constitution Act, 1867* and its equivalents. In this respect, the *Official Languages Act* of 1988 represents an application of the principle of advancement by legislative initiative of the equality of status and use of English and French. It is also a reflection of and a response to the dismay and consternation voiced by many quarters of public and political opinion at the restrained and limitative approach to language rights taken by the majority of the Supreme Court of Canada in the *MacDonald*, *Bilodeau* and *Société des Acadiens* cases. A foretaste of public reaction had already occurred in December, 1984, when the federal government had itself argued in the *MacDonald* hearing that Section 133 did not require the City of Montreal to issue summons for prosecutions in both languages. The criticism, inside and outside of Parliament, of that legal argument led the government in early 1985 to expand its original examination of the *Official Languages Act* of 1969, in the context of the then-ongoing *Charter* compliance review, to cover policy issues in the area of the administration of justice. Moreover, successful trial-level challenges in Saskatchewan and Alberta of the province-by-province proclamation scheme of the 1978 *Criminal Code* amendments on the language of the accused (discussed below) also sensitized the government to the need to ensure implementation of those statutory language rights in criminal courts across Canada. In answer to questions in the House of Commons in the aftermath of the *MacDonald*, *Bilodeau* and *Société des Acadiens* decisions, the then Minister of Justice and Attorney General of Canada, Mr. John Crosbie, stated that the government would be bringing in amendments to the relevant legislation to ensure that the use of both official languages would be treated equally in federal courts, and that it would be

55. *Ibid.* at 275-276.

56. S.C. 1988, C. 38; R.S.C., 1985 c. 31 (4th Supp.).

government policy that all documents and summons issued by federal courts or under federal authority would be in both languages. The government was improving bilingual services in the courts, opening language training to both provincial and federal judges, and meeting with the provinces to work out a schedule so that criminal trials could take place in both official languages across the country.⁵⁷

The new *Official Languages Act* had to be developed in a way that would allay both practical concerns and symbolic perceptions that the citizen's official language preference was almost entirely subject to the whim and mercy of the State when it came to accommodating that preference in the courtroom. The *Act* would have to respect the letter of the constitutional language provisions — including the rights of judges and court officials — but it could also reflect, in a large and progressive way, the spirit of "full and equal access to the courts for both francophones and anglophones alike" that the Supreme Court itself had characterized as being the underlying purpose of those provisions. It was important that the *Act* be conceived as a mechanism for establishing real equality, and not simply as an echo of the requirements of the Constitution.

The best means to achieve this delicate balance, it appeared, would be to:

- draw from the content and structure of the original provisions (Sections 5 and 11) of the 1969 *Official Languages Act* dealing with the courts;
- modernize those provisions by eliminating exceptions or inconsistencies with the jurisprudential interpretation of Section 133 of the Act of 1867 and Section 19 of the *Charter*;
- add a series of new duties on the federal courts and government as institutions (not on judges and officials as individuals) to expand language rights in the courts to cover the lacunae revealed by *MacDonald* and *Société des Acadiens*;
- transfer to the *Criminal Code* the intent of certain provisions in Section 11 of the 1969 Act dealing with courts exercising criminal jurisdiction and confirm other language-of-trial rights in the *Code*;
- cap off the institutional obligations relating to federal courts with the basic right to use either language in those courts;
- draft appropriate references and guides in the preamble and purpose clause of the *Act* for the future interpretation of language rights in the courts.

The second recital of the preamble of the new *Official Languages Act*, in terms evocative of the *Manitoba Language Rights Reference*, informs the **content** of the statutory provisions on the administration of justice with the **intent** behind section 133 of the *Constitution Act, 1867* (and subsections 17(1), 18(1) and 19(1) of the *Charter*):

57. *Debates, House of Commons*, 6 May 1986. (The decisions in the three cases were rendered concurrently by the Supreme Court on 1 May 1986)

AND WHEREAS the Constitution of Canada provides for full and equal access to Parliament, to the laws of Canada and to courts established by Parliament in both official languages;

The **purpose** clause itself, Section 2, states the principal object of the *Act* as ensuring "respect for English and French as the official languages of Canada" and "equality of status and equal rights and privileges as to their use in all federal institutions", notably with respect to "the administration of justice". Equal access to federal courts in both official languages and equality of status as to their use in the administration of justice are the principles which are advanced by Part III of the *Act*.

Section 14 opens Part III (Administration of Justice) with a declaration that "English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court." The term "federal court" is itself defined by Subsection 3(2) of the interpretation provisions according to the functional test provided in the *Blaikie* decision; i.e., meaning "any court, tribunal or other body that carries out adjudicative functions" and which is established by or under an Act of Parliament.

Subsection 15(1) repeats for federal courts the duty originally found in Subsection 11(1) of the 1969 Act — the obligation to ensure that witnesses "may be heard" in the official language of their choice without being disadvantaged. Like the similar provision in the *Official Languages of New Brunswick Act* which was commented on in the *Société des Acadiens* ruling, Subsection 15(1) ensures, as a **language** right — not just as a matter of natural justice — effective communication between the witness and the courtroom; either directly or through the use of interpreters when the official language of the proceedings is not that of the witness. Subsection 15(2) imposes a duty on federal courts to ensure that simultaneous interpretation facilities are made available at the request of any party to the proceedings. The exceptions in Subsection 11(2) have been eliminated in the new text. Subsection 15(3) is an entirely new provision which enables federal courts to provide for simultaneous interpretation for proceedings it considers to be of general public interest or importance or where it otherwise considers it desirable for the attendant public.

Sections 16, 18 and 19 create new institutional duties as a result of the rulings in *MacDonald*, *Bilodeau* and *Société des Acadiens*. Section 16 requires federal courts to arrange their affairs so as to ensure that in any given case,

- if English is chosen by the parties as the language of proceedings, each judge who hears those proceedings is able to understand English, without the assistance of an interpreter;
- if French is the language chosen by the parties for the proceedings, every judge hearing the proceedings is able to understand French, without the assistance of an interpreter;
- if both English and French are the languages chosen by the parties for the proceedings, every judge who hears the proceedings is able to understand both languages, again without the assistance of an interpreter.

By its very terms, Section 16 is a duty on the administration of each court, taken as a whole, to facilitate the use of either official language — or, as the case may sometimes be, both official languages — as preferred by the parties in a particular case. It is clearly **not** a requirement on all judges to be bilingual for all cases. The only exception to Section 16 is for the Supreme Court of Canada. This may appear to be ironic, but it is the very special nature of the Court itself which precluded the application of the duty to hear directly. It is a court with only nine judges, chosen from the different regions of the country, who sit collegially. The majority of the judges are bilingual and the rest are actively pursuing language training. A mandated obligation to hear each particular case directly could have automatically deprived lawyers arguing a case in French from ever appearing before a full bench; or else it would have amounted to an individual obligation on each and every one of the nine judges to be sufficiently bilingual from the moment they were named to the Court. This, given the majority of the Court's own remarks in *MacDonald* and *Société des Acadiens*, could be seen as a constitutionally suspect interference with the status and rights of the judges themselves.⁵⁸

Section 17 enables the courts to make implementing rules of practice and procedure, including rules respecting notice, to assist compliance with Sections 15 and 16. (As to the language of federal court rules themselves, in accordance with the decisions in *Blaikie (No 1)* and *(No 2)*, Sections 9 and 13 of the *Act* require that they be made, printed and published simultaneously in equally authoritative English and French versions.)

Sections 18 and 19 impose duties on the federal government and its institutions when they appear before federal courts to make their oral and written pleadings in the official language chosen by the non-governmental parties (unless unreasonable notice is proven) and to serve bilingual court forms on such parties in those proceedings. Subsection 19(2) provides that the particulars may be added to the forms in either official language, but as was suggested in the *MacDonald* dissent, it must be "clearly indicated on the form that a translation of the details into the other official language may be obtained, and, if such a request is made, a translation shall be made available forthwith" by the federal institution which served the form.

Section 20 is based on Section 5 of the 1969 Act and ensures that the final decisions, orders and judgments (including reasons) of federal courts shall be "made available simultaneously" in both official languages where the decision determines a question of law of general public interest or importance, or where the proceedings were conducted wholly or partly in both official languages. The earlier section required on its terms the actual "issuance" of these judgments in both languages, but the revised provision confirms the institutional character of the duty and permits, as a matter of law in accordance with *Blaikie (No 1)*, issuance in either language should a judge be so disposed. Likewise, Subsections 3 and 4 preserve (as did the 1969 Act) the judge's right to render decisions orally in either English or French, and the validity of judgments issued in either language. Previous exceptions to the duty respecting final decisions in Subsection 20(1) have been restricted in Subsection (2), which ultimately requires the availability in both official languages of all final decisions, orders and judgments "at the earliest possible time".

58. My earlier paper ("Language Rights, The Charter and the Official Languages Act", *supra* note 10) discusses at some length the considerations underlying the exception for the Supreme Court of Canada from the duty of Section 16 of the Act (at 36-40).

Part XII of the *Act* makes related amendments to Part XVII of the *Criminal Code*⁵⁹ respecting the language of the accused. Section 94 amends the *Code* to add a new section, immediately following Section 530 (previously Section 462.1) to ensure that, where an order is made directing that an accused will be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language that is the language of the accused (or in which the accused can best give testimony), a series of correlative rights are confirmed.

In the *Paquette* case,⁶⁰ Sinclair J. of the Alberta Court of Queen's Bench set out an extensive list of "rights and benefits" he viewed as being conferred on the applicant, a French-speaking accused, under Section 110 of the *North-West Territories Act*. These included the right for the applicant and his counsel to use the French language for all purposes during his preliminary hearing and trial; for witnesses to give evidence in either language; for the applicant to use French in any documents involved in the proceedings, for interpreters to be provided by the court; and for the official record to consist of whatever is originally said during the proceedings in either English or French. Although Sinclair J. was reversed by the Alberta Court of Appeal, particularly on his additional finding that the judge must be able to comprehend both languages,⁶¹ the list of rights he proposed under section 110 largely conformed to the practice that had developed since 1978 under the language-of-trial provisions of the *Criminal Code* in Ontario, New Brunswick, and other jurisdictions where those provisions had been proclaimed in force. Section 94 of the *Official Languages Act* amends the *Criminal Code* to ensure that where an order is granted providing for trial of the accused before a judge or judge and jury who speak the accused's official language, the accused and his counsel may use either language for all purposes, including pleadings, during the preliminary inquiry and trial; witnesses may give evidence in either language; the accused has a right to a justice presiding over the preliminary inquiry, and prosecutor at trial, who speak the language of the accused; the court shall make interpreters available to assist the accused, his counsel, and witnesses; and the record of proceedings must include a transcript of everything in the language in which it was originally said, a transcript of any interpretation into the other language of what was said, and documentary evidence in the language in which it was tendered. Moreover, any trial judgment, including reasons, issued in writing in either language must be made available by the court in the official language that is the language of the accused.

With respect to the coming into force of the language-of-trial provisions, Part XVII as amended will take effect in **all** provinces on January 1, 1990 as a result of the changes made to the province-by-province proclamation scheme by section 96 of the *Official*

59. R.S.C. 1985 C. C-46 (formerly R.S.C. 1970 C. C-34, Part XIV.1, sections 462.1 *et seq.*) Regarding the paramount authority of Parliament to specify the language of criminal proceedings, see *Jones, supra* note 17 at 191-192.

60. *Paquette v. R. in Right of Can.* (1985) 40 Alta. L.R. (2d) 38 at 68-69.

61. *R. v. Paquette* (1988) 55 Alta. L.R. (2a) 1 at 15-16, Stevenson J.A. (Irving J.A. concurring). "The chambers judge did not have the benefit of the decisions of the Supreme Court of Canada" in *Société des Acadiens, MacDonald and Bilodeau* (at 10).

Languages Act.⁶² In *Paquette*, Marshall J. of the Provincial Court had held that the applicant was "not entitled to have the court proceedings in this matter conducted in the French language".

I do not come to this conclusion easily, because, without intending to be platitudinous, I would observe that the applicant's claim is not an empty one.

*The bottom line is that, in my judgment, section 110 is not the vehicle to carry the applicant to success. That lies elsewhere, possibly in the adoption, by Alberta, of the language provisions in Part XIV.1 [now Part XVII] of the Criminal Code or possibly by Parliament legislating the language to be used, in criminal procedure, across Canada, as it has the power to do.*⁶³

Stevenson J.A. of the Court of Appeal wrote in *Paquette (No 1)*:

The accused claims an important right — the right to have the hearing conducted in his official language. [...]

*The accused's aspirations cannot be met by s. 110 of the North-West Territories Act. It is the wrong instrument to meet those aspirations. The conduct of a trial in French can only be meaningfully provided by the introduction of the kinds of mechanisms envisaged by Pt. XIV.1 [Part XVII] of the Code. [...]*⁶⁴

In *Paquette (No 2)*, Stevenson J.A. further stressed that the case "touches upon an issue of great moment, the effective extension of official language rights. The object of the legislation [Part XVII] is important: all I can say is that it is not to be unilaterally imposed by judicial decrees under the *Charter*."⁶⁵

Sections 94 and 95 of the *Official Languages Act* deal legislatively with this matter by guaranteeing, through the *Criminal Code* provisions, access in English and French to

62. That scheme was held to be discriminatory in its effect and to violate section 15 of the Charter in *R. v. Tremblay* (1985) 41 Sask. R. 49 (Sask.Q.B.), *Reference Re Use of French in Criminal Proceedings in Saskatchewan* (1987) 44 D.L.R. (4th) 16 (Sask.C.A.), and *Paquette v. R. (No 2)* [1986] 3 W.W.R. 232 (per Sinclair J., Alta Q.B.). The latter decision was reversed in *Paquette ibid.* (Alta C.A.) on the basis that the scheme was an advancement of English and French language rights under subsection 16(3) of the Charter. This was also the view in *R. v. Paré* (1986) 31 C.C.C. (3d) 260 (B.C.S.C.) and *Re Ringuette and the Queen* 33 C.C.C. (3d) 509 (Nfld.C.A.). Leave to appeal to the Supreme Court of Canada on this issue was refused by that Court on applications in *Paquette* and *Ringuette*. See also the Supreme Court's decision in *R. v. Turpin et al.* (1989) 96 N.R. 115 (reasons of Wilson J., adopted by the court), at 161-162: "In concluding that s. 15 is not violated in this case, I realize that I am rejecting the proposition accepted by several Courts of Appeal in Canada that it is a fundamental principle under s. 15 of the *Charter* that the criminal law apply equally throughout the country: see [...] *Reference Re French Language rights of Accused in Saskatchewan Criminal Proceedings*, [1987] 5 W.W.R. 577; 58 Sask. R. 161, at 613-614 W.W.R. (Sask. C.A.) [...] See also *R. v. Tremblay* (1985), 41 Sask. R. 49; 20 C.C.C. (301) 41 (Ont. C.A.) [...]"

63. *Her Majesty The Queen v. Luc Paquette*, (unreported) Alta Prov. Ct., Marshall J., 16 October 1984 at 43.

64. *Paquette supra* note 61.

65. *Supra* note 62.

courts of criminal jurisdiction throughout Canada, in a manner that facilitates the use of the official language of the accused to the greatest extent possible, while respecting the rights of all persons in the courtroom. Since 1986, when the Minister of Justice of Canada began actively pursuing consultations with his provincial counterparts, the provisions of the *Code* on the language of the accused have been proclaimed in force in Saskatchewan and, for summary conviction offences, Nova Scotia and Prince Edward Island (adding these jurisdictions to the earlier group of New Brunswick, Ontario, Manitoba, Yukon and the Northwest Territories). By January 1, 1990, all accused persons in Canada will benefit from these language rights. Moreover, Section 95 of the *Official Languages Act* — which amends Section 841 of the *Code* to require that the pre-printed portions of court forms respecting warrants, summons and the like set out in Part XXVIII be printed in both official languages — itself came into force across Canada on February 1, 1989.

IV. CONCLUSION

An examination of the caselaw on language rights in Canadian courts reveals that for the most part the judiciary is willing to give effect to any clearly enunciated legislative policy on the use of English and French, as long as that policy respects the basic rights, both linguistic and legal, of all participants in the judicial arena. However, the courts are loathe to enhance, through judicial interpretation alone, the scope and application of such language rights, at the expense of the theoretical development of legal rights relating to natural justice and due process or in the face of a manifest political compromise. Wrote Mr. Justice La Forest in the *Mercure* case:

*I realize, of course, that, as in the case of other human rights, governmental measures for the protection of language rights must be tailored to respond to practical exigencies as well as to the nature and history of the country. But when Parliament or the legislature has provided such measures, it behooves the courts to respect them. Any inroads on them should be left to the legislative branch. This is particularly so of rights regarding the English and French languages, which are basic to the continued viability of the nation.*⁶⁶

The new *Official Languages Act* builds on the right to use English or French in judicial proceedings, by articulating and developing, through the principle of advancement set out in Subsection 16(3) of the *Charter*, the fundamental concepts of equal access to justice and equality of status and use. The *Act* is, to cite La Forest J.'s words, "a legislative initiative consistent with that principle and like other language guarantees it must, as already mentioned, be respected by the courts."⁶⁷

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66. *Ibid.* at 269.

67. *Ibid.* at 270. (La Forest J. was speaking of Section 110.)

In the three years since this paper was first delivered, there have been several jurisprudential developments of note.

The constitutional validity of paragraph 530.1 (e) of the *Criminal Code* was challenged in the *Cross*⁶⁸ and *Montour*⁶⁹ cases by four Crown prosecutors in Quebec on the grounds that the right of an accused to a prosecutor who speaks the official language that is the language of the accused, conflicts with the right of a prosecutor, as a "person" entitled under s. 133 of the *Constitution Act, 1867*, to choose to use either English or French. The prosecutions in *Cross* and *Montour* arose out of the events in Oka, Quebec, in the summer of 1990. The accused, who were English-speaking, had opted for a trial before a judge and jury who spoke English. The prosecutors wished to use French from time to time during the trial, at least when legal issues were debated outside the presence of the jury. The Attorney General of Canada intervened to uphold the constitutionality of the Code's provisions as creating an institutional obligation on the Crown, not a fetter on individual prosecutors (while arguing as well that there was an inherent discretion in the trial judge to temper paragraph 530.1 (e)'s application in the interests of the administration of justice, or with a view to obtaining the best evidence (e.g., in the questioning of witnesses who speak the other official language)).

In *Cross*, Greenberg J. of the Quebec Superior Court, after examining the caselaw on Section 133 and the enactment of Section 530 of the Code by Bill C-72, the *Official Languages Act* of 1988, concluded that paragraph 530.1 (e) was indeed unconstitutional, to the extent that it infringed on the right of a Crown prosecutor to use English or French in a court of Quebec at his or her choice. Greenberg J. declared paragraph 530.1 (e) to be inoperative in Quebec as inconsistent with s. 133's guarantee of the power to use either of the two languages at the choice of the person speaking.

The same issue was argued, this time to a different conclusion, in *Montour*,⁷⁰ wherein Tannenbaum J. of the Quebec Superior Court stated respectfully that he could not agree with the conclusions of his colleague and, accordingly, could not follow them. Acceding to the arguments advanced on behalf of the Attorney of Canada and the defence, Tannenbaum J. held, *inter alia*, that

There is nothing in the wording of Article 530.1 (e) that indicates that a prosecutor is being forced to use a language contrary to his or her will. Since Article 133 provides the right to choose a language, it is perfectly in order for a prosecutor to agree to choose the language of the accused should he or she wish to do so. Should the prosecutor choose not to speak the language of the accused, he or she obviously could not be forced to act. Article 530.1 (e) does not impose an obligation on the prosecutor to choose one or the other of the official languages, but only gives the accused a right to have as a prosecutor a person who has agreed to use his or her language. In this sense I see no conflict

68. *The Queen c. Ronald Cross et autres, Re Constitutional Challenge against Section 530.1 (e) of the Criminal Code* [1991] R.J.Q. 1430.

69. *La Reine c. Lorraine Montour et autres*, [1991] R.J.Q. 1470.

70. *Supra* note 69 at 1476.

between Article 133 of the Constitution Act, 1867 and Article 530.1 (e) of the Criminal Code.

One must bear in mind that the case to be tried is that of the accused. It is the accused's personal liberty which is at stake. The prosecutor, on the other hand, does not or should not have anything personal at stake when prosecuting on behalf of the State. If a prosecutor is not agreeable to using the language of the accused, then the State, given its resources, has the duty and responsibility to assign to the case one who is.

Leave was sought to appeal the *Cross* and *Montour* decisions to the Quebec Court of Appeal, which agreed to hear the appeal.⁷¹ In the meantime, the trials were conducted in English.

Subsection 841 (3) of the *Criminal Code*, which came into force on February 1, 1989 (through a related amendment made to the Code by section 95 of the 1988 *Official Languages Act*), has been the subject of almost a dozen judicial decisions as to its scope and effect. Subsection 841 (3) requires that the pre-printed portions of forms set out in Part XXVIII of the Code "shall" be printed in both official languages.

In the *Lavoie*⁷² case, Boilard J. of the Quebec Superior Court held that s. 841 (3) requires forms in a bilingual format, not two separate forms in each language. The accused, a francophone, had received an appearance notice in French only, which she evidently had understood. While the notice was defective in light of s. 841 (3), it did not, in the circumstances, invalidate the arrest warrant issued in this case. As well, the defect had since been corrected by use of a bilingual form in the file.

In *Cotton*,⁷³ Landry J. of the Quebec Superior Court chose to read s. 841 (3) of the Code as not requiring a unilingual French information to be in a bilingual form, given the right, under s. 133 of the *Constitution Act, 1867*, to use either English or French in pleading and process. This decision was followed by Martin J. of the same court in *Belval c. Noiseux*.⁷⁴

71. See *Cross c. Teasdale (C.A.)*, [1991] R.J.Q. 1826. The appeal has yet to be argued on the merits.

72. *Linda Lavoie c. Le juge Jean Massé et autres*, Que. Superior Ct. (Criminal Div.), 23 March 1990, C.S. 500-36-000010-903; reported (in English translation) as *Regina v. Lavoie et al.*, 58 C.C.C. (3d) 246.

73. *La Reine c. Vincent Cotton* (13 March 1991), N° 550-36-000038-909 (Que. S.C., Crim. Div.).

74. *Belval c. Noiseux* (22 November 1991), N° 750-36-000019-913 (Que. S.C. Crim. Div.).

Outside of Quebec, there have been several decisions in Ontario⁷⁵ and at least one in each of the provinces of British Columbia,⁷⁶ Alberta,⁷⁷ Manitoba⁷⁸ and Nova Scotia on the content and application of s. 841 (3). These decisions have been divided over whether the failure to observe the requirements of the provision results in an absolute nullity of the procedures, whether nullity is dependent on demonstrating that the accused was prejudiced by the defect, or whether the defect is merely one of form with no real juridical consequences attached.

The most recent and indeed, leading authority to date is the decision of the Nova Scotia Court of Appeal in *Rodney Goodine v. The Queen*,⁷⁹ which overturned the appeal from conviction granted by MacDonnell of the County Court.⁸⁰ The County Court, following the precedent of Silverman J. of the Ontario Provincial Court in *R. v. Tripp*,⁸¹ held that the unilingual English form used to lay the information in this case was invalid *ab initio*. MacDonnell J. was quite critical in his judgment of the use of unilingual forms almost a year and a half after the enactment of this "very important legislation".⁸²

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75. Besides *Tripp* and *Sorensen*, discussed *infra* (notes 80 and 82), see also (1) *The Queen v. John Shields* (20 July 1990), (Ont. Dist. Ct.), Byers J.: the information was not in both official languages and is therefore void. "The Criminal Code did not say that the forms shall be bilingual unless proper forms cannot be provided in time. [...] the legislation is plain." (at 2) (2) *R. v. Davies*, [1991] O.J. 40 (Ont. Ct. Gen. Div.), Borins J.: a promise to appear on a form in English and French, wherein the required sections of the *Criminal Code* were printed on the back of the page and the signature of the accused on the front, is not invalid because it remains a form to the like effect and the accused was not prejudiced or misled.
76. *R. v. Keith Perry* (28 August 1989), (B.C.S.C.), MacDonald J.: An information sworn in the bilingual form prescribed by s. 773 (3) (now 841 (3)) of the Code does not require the informant, a police officer, to be fluent in both English and French, and a defect in the French version of the form can be cured by amendment. The accused was not misled or prejudiced thereby. The English words of the form and the particulars typed thereon in that language, which he understands, comply with the requirements of the Code and inform him fully of the case he must meet.
77. *The Queen v. Jerry Keenan* (17 December 1990), (Man. Prov. Ct. Crim. Div.), Duval J.: the accused was not prejudiced by failure to use a bilingual form for the search warrant; however, s. 841 (3) is mandatory and a search warrant issued in contravention of it is invalid. Nor can the requirement of s. 841 (3) be ignored or circumvented by the use of other forms (in this case, a search warrant issued under s. 103 of the Code) which have been varied to suit the case or are to the like effect as those forms which are set out in Part XXVIII of the Code.
78. *The Queen v. Sang Cam Diep* (26 June 1992), (Alta Prov. Ct. Crim. Div.), Broda J.: the accused had no knowledge of French and only a very limited knowledge of English, and was in no way misled or prejudiced by use of an information completed on a unilingual English form. Non-compliance with s. 841 (3) without more does not justify the quashing of a warrant or the exclusion of evidence (*The Queen v. Keenan*, *supra* note 77 was not followed.)
79. *The Queen v. Goodine* (1992), 71 C.C.C. (3d) 146.
80. *Rodney Goodine v. The Queen* (1991), 68 C.C.C. (3d) 366.
81. *The Queen v. Douglas Tripp* (9 May 1990), (Ont. Prov. Ct. Crim. Div.), Silverman J.: the accused was not misled or prejudiced by a unilingual English information form. However, the requirement of s. 841 (3) is mandatory; penal legislation is to be construed strictly and any ambiguity should be resolved in favour of the accused. "This particular information is defective not because it misleads, not because it prejudices and not because it affects the substance, but simply because there is a mandatory provision in the Criminal Code that the pre-printed forms, and this information is, shall be in both official languages" (at 14).
82. *Supra* note 80 at 373.

There had been a great deal of publicity on the importance of the Official Languages Act for all Canadians as demonstrated by the debates in Parliament which preceded the legislation. It is for this reason that Section 841 (3) of the Criminal Code was enacted as a mandatory provision.

[...]

The use of both official languages in matters relating to the administration of justice, should be seen as much more than a matter of form. The Parliament of Canada in enacting mandatory provision [sic] such as Section 841 (3) of the Criminal Code intended to define the cultural fabric of the nation and clearly showed that this was not merely a matter of form, but a matter going to the very essence of the nation.

The majority of the Nova Scotia Court of Appeal (Hallett and Chipman, J.J.A.; Freeman J.A. dissenting) took a different view. Agreeing with the reasoning of Then J. of the Ontario Court in *R. v. Sorensen*,⁸³ Mr. Justice Hallett held that the unilingual information form did not result in a nullity. He added that MacDonnell J. had failed to balance properly the interests that s. 841(3) was designed to promote with Parliament's intention, expressed elsewhere in the Code, to give the courts extensive powers of amendment respecting indictments and informations. Bearing in mind s. 32 of the *Interpretation Act*, "[t]he defect was one of form, not of substance."⁸⁴ As the accused's mother tongue was English, there was no prejudice to him. "The Crown could have followed the usual practice of filing an amended Information re-typed on a bilingual form", but in any event, there was no need to amend an information defective in form only.

*As a consequence, it was not fatal that the method used by the Crown was less than perfect. Use of unilingual forms more than two years after s. 841 (3) amendment [sic] is a sloppy practice which should not be continued in the future. However, the respondent was fully informed of the charge against him.*⁸⁵

Freeman J.A., in a strongly-worded dissent,⁸⁶ stated:

Section 841 (3) appears to create a threshold below which informations are insufficient in form, and are therefore nullities. This was no casual amendment but a well-considered ingredient of the national language policy. It is significant that s. 841 (3) was enacted by s. 97 of the Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.). [...]

83. *R. v. Sorensen* (1990), 59 C.C.C. (3d) 211, (Ont. Ct. Gen. Div.). Then J. reversed the finding of Bovard J. of the Provincial Court (Crim. Div.) that the unilingual information in this case was a nullity in view of the requirement of s. 841 (3) of the Code. Then J. underlined that there was "no prejudice or misleading of the accused and accordingly the trial judge should have amended the information to cure the defect", although in other circumstances, where an accused is prejudiced irreparably by being misled or denied access to the court because of a unilingual information, "the trial judge may consider quashing the information" (at 668).

84. *Supra* note 79 at 154, Hallett J.A.

85. *Ibid.* at 155-156.

86. *Ibid.* at 161, 164-165, Freeman J.A.

Section 841 (3) [...] is a development beyond s. 133 of the Constitution Act, 1867, which [...] "being a constitutional minimum, not a maximum, can be complemented by federal and provincial legislation." [MacDonald]

An attempt was made to remedy the defect in the form used in the present case by merely attaching a bilingual form to the information originally sworn. That was inadequate. The information must be on a bilingual form when it is sworn; s. 841 (3) makes it mandatory. [...]

If, s. 841 (3) is not given mandatory effect, and an information printed in one language is a document flawed in form only and capable of amendment, as opposed to a nullity, [...] the language rights represented by s. 841 (3) would be unenforceable. A recalcitrant police officer or prosecutor could continue using forms printed in one language only with impunity; they might not even require amendment. That would be contrary to the intention of the Official Languages Act, the vehicle chosen by Parliament to give effect to and expand entrenched constitutional language rights, and the vehicle chosen to amend s. 841 of the Criminal Code.

Finally, it should be underlined that the Supreme Court of Canada's decisions in *MacDonald* and *Société des Acadiens* on the limited scope of s. 133 of the *Constitution Act, 1867* and s. 19 of the Charter, respectively, as concerns the right to use either English or French in the courts, have not quieted the legal controversy over the extent to which one has the right to use either English or French in legal proceedings in New Brunswick. In *R. v. Gautreau*,⁸⁷ Richard C.J. of the New Brunswick Court of Queen's Bench held that a summons issued under the *Motor Vehicle Act* of the province which was printed on a bilingual ticket form but which was completed in English with regard to the particulars, violated the francophone accused's language rights under s. 20 (2) of the Charter and should therefore be set aside and further proceeding prohibited.

The fact that the *Gautreau* ruling neglected to consider the application of s. 19 of the Charter to the summons, as a "pleading or process" which could be made and issued in either English or French, at the choice of the drafter of the summons, not the recipient (as the Supreme Court had clearly held in *MacDonald*), was respectfully criticized by Richard C.J.'s colleague, Deschênes J. of the Court of Queen's Bench, in *R. v. Boudreau*.⁸⁸ In this case, the accused had opted for a trial before a judge who speaks French, as provided by Part XVII of the *Criminal Code*. The Crown sought to tender in evidence the certificate of a qualified breathalyser technician, which had been printed in both English and French but had been completed in English only.

Mr. Justice Deschênes ruled the certificate admissible, given that s. 19 (2) of the Charter permits process documents to be issued in either English or French. When the prosecution seeks to introduce as evidence an analyst's certificate, it is not providing a service

87. *R. v. Gautreau* (1990), 101 N.B.R. (2d) 1 (N.B.C.Q.B.). There are several decisions dealing with the issue of policing services and the application of s. 20 (2) of the Charter: see notably *Robinson v. The Queen* (10 February 1992), (N.B.C.Q.B.), Miller J.; *The Queen v. Yvon Bastarache* (4 August 1992), (N.B.C.Q.B.) Riordon J. and *La Reine c. Eloi Bourque* (29 August 1992), (N.B.C.Q.B.), Landry J.

88. *R. v. Boudreau* (1990), 103 N.B.R. (2d) 104 (N.B.C.Q.B.)

under s. 20 (2) of the Charter, Deschênes J. reasoned, on the basis of his analysis of the *MacDonald* and *Société des Acadiens* decisions.

The New Brunswick Court of Appeal reversed the decision of the Court of Queen's Bench in *R. v. Gautreau*⁸⁹ on procedural grounds, ruling that the Court had erred in granting an application for judicial review of the Provincial Court's original decision (dismissing a preliminary motion from the defendant seeking a stay of proceedings on the grounds that his s. 20 (2) Charter rights had been violated). The matter was returned to the Provincial Court.

In *R. v. Boudreau*,⁹⁰ the Court of Appeal held that the analyst's certificate was not admissible because it would be contrary to the principles of fundamental justice and a fair trial to admit, without the consent of the accused, evidence in a language other than the one chosen for the trial, without translating it into the language of trial. "In short, the document was potentially admissible and became evidence as soon as it was translated into the language of the trial."

In the implementation of a fair trial, the common law offers numerous examples over the centuries of how interpretation services have been used for the benefit of and to ensure the understanding of an accused who speaks a foreign language. I do not believe that the requirements are any less when one or the other official languages is in issue.

In reversing the Court of Queen's Bench, the Court of Appeal upheld the decision of the trial judge to acquit the accused.

Section 13 of the *Official Languages of New Brunswick Act* was amended in June 1991 to provide that "a person who is a party to proceedings before a court has the right to

89. *R. v. Gautreau* (1991), 109 N.B.R. (2d) 54 (N.B.C.A.).

90. *R. v. Boudreau* (1991), 107 N.B.R. (2d) 298 (N.B.C.A.) at 304, 305. *Quare* whether the judgment of the Court of Appeal would require the actual *translation* in writing of the evidence (*all* the evidence?) into the official language of the trial, or whether, in some (or many?) cases, *interpretation* services would suffice. The amendments to the *Criminal Code's* provisions on the language of the accused (Part XVII) made by the 1988 *Official Languages Act*, would appear to contemplate the latter. Section 530.1 provides that when an order has been issued under s. 530 that the trial proceed before a judge (or judge and jury) who speak the official language that is the language of the accused,

(f) the court shall make *interpreters* available to assist the accused, his counsel or any witness during the preliminary inquiry or trial;

(g) *the record of proceedings* during the preliminary inquiry or trial shall include

(i) a transcript of everything that was said during those proceedings in the official language in which it was said,

(ii) a transcript of any interpretation into the other official language of what was said, and

(iii) any documentary evidence that was tendered in the official language in which it was tendered;

(Emphasis added)

be heard by a court that understands, without the need for translation, the official language in which the person intends to proceed". This provision is similar to section 16 of the 1988 *Official Languages Act* enacted by Parliament, and responds to the Supreme Court's decision in the *Société des Acadiens* case.

As this *post scriptum* has illustrated, the debate over the official use of the English and French languages in judicial proceedings continues to engage the interest of our courts.