Does *Beaulac* Reorient Judicial Bilingualism?

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I. INTRODUCTION

Prior to 1999, official-language minorities took little encouragement from the jurisprudence concerning use of official languages before the courts. The court then said that unlike so-called fundamental rights, language rights arose from political compromise. Because language rights were different, courts should interpret them narrowly. *R. v. Beaulac*[1] put an end to the political compromise doctrine in 1999. The Supreme Court majority ruled that "[l]anguage rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada."[2]

Beaulac considered the use of official languages before the courts in light of section 530 of the *Criminal Code*.[3] Whether and to what extent *Beaulac* impacts on the constitutional provisions that protect language rights before the courts remain to be determined.

This paper addresses the extent to which *Beaulac* applies beyond the statutory criminal context and impacts on the constitutional provisions governing the use of official languages in the courts. I argue that the direct effect of *Beaulac* is limited; complete institutional bilingualism in the courts requires additional judicial action. Nevertheless, I argue that *Beaulac* does herald a new direction for the constitutional protection of official languages in the courts by pronouncing a new interpretive style to be adopted. After reviewing what is required to implement institutional bilingualism in the courts, I

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1 [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.).

2 *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 25 (S.C.C.).

3 R.S.C. 1985, c. C-46.

consider the implications for the federal and provincial courts and administrative sectors.

II. CONSTITUTIONAL PROVISIONS

Section 133 of the *Constitution Act, 1867* governs official bilingualism in the courts:

> 133. Either the English or the French Language ... may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.[4]

Section 23 of the *Manitoba Act, 1870*[5] is modelled on section 133. The courts interpret it as a rough equivalent.[6]

Proclamation of the Charter entrenched new protections for official-language minorities. The provisions relating to official bilingualism in the courts are sections 16 and 19:

> 16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.
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> (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.
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> (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.[7]

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[4] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[5] R.S.C. 1970, App. II, No. 8. The section provides:

> 23. Either the English or the French language may be used by any person in the debates of the Houses of the Legislature and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the *Constitution Act, 1867*, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be Printed and published in both those languages.

For ease of reference, it can be assumed unless otherwise specified that any reference to s. 133 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 applies equally to s. 23 of the *Manitoba Act, 1870*.

[6] See, *e.g.*, *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721; *Bilodeau v. Manitoba (Attorney General)*, [1986] S.C.J. No. 27, [1986] 1 S.C.R. 449 (S.C.C.).

[7] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

> 16.1. (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.
>
> (2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.
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> . . . . .
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> 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.
>
> (2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.[8]

While subsections 19(1) and 19(2) are clearly twins and have been treated as such,[9] the more interesting question arises as to whether section 133 and subsection 19(1) should receive identical treatment.

An important distinction must be made between official language rights and the right to an interpreter guaranteed by the procedural fairness norms incorporated in the legal rights section of the Charter. On one hand, the right to an interpreter in the criminal context is entrenched in section 14 of the Charter.[10] Section 14 guarantees an interpreter to any person who does not understand or speak the language of the proceedings. The overlap obscures the different purposes served by trial

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[8] Section 19 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[9] *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549 (S.C.C.). *Contra* see *Charlebois v. Moncton (City)*, [2001] N.B.J. No. 480, 242 N.B.R. (2d) 259, at paras. 47-48, 62-63 and esp. 78-80 (N.B.C.A.). Although the wording is identical between s. 19(1) and (2), the unique historical context and special constitutional status of N.B. may warrant a different interpretation/treatment of s. 19(2). Despite any uncertainty suggested above, for ease of reference, it can be assumed that unless otherwise specified, any reference to s. 19(1) is deemed to apply equally to s. 19(2) and vice versa.

[10] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 14 provides that "[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." Section 7 also provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

fairness and official language rights.[11] Unlike trial fairness, the purpose of which is to ensure good communication, official language rights intend to protect culture and communities.[12] Language rights endow certain groups with the right to deal with public institutions in their own language.

> [T]he operation of public institutions in a minority language advances the intrinsic expressive interest in language use by making the state and its institutions full participants in the life of the community, and the members of the group full participants in public life. Thus, the importance to a community's self-respect, and hence to its linguistic security, of access to public institutions is enormous, even though many of its members will never end up in court.[13]

This is why Dickson C.J.C. observed that the English and the French languages are placed in a position of equality with respect to each other, and given a preferential position over all other languages.[14]

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[11] Chief Justice Dickson addressed the overlap between the two sets of rights in his dissent (but not on this point) in *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549, at 567 (S.C.C.):

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

The overlap was also addressed by Bastarache J. in *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 41 (S.C.C.):

> The right to full answer and defence is linked with linguistic abilities only in the sense that the accused must be able to understand and must be understood at his trial. But this is already guaranteed by s. 14 of the Charter, a section providing for the right to an interpreter. The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role.

In other words, the protections available in s. 14 are available to any person who does not speak or understand the language of the proceedings — not simply to those persons speaking one of the official languages.

[12] See *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at 749-50 (S.C.C.); *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] S.C.J. No. 26, [1993] 1 S.C.R. 839, at 850 (S.C.C.).

[13] Denise G. Réaume, "The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?" (2002) 47 McGill L.J. 593, at paras. 21, 45.

[14] *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 500 (S.C.C.).

Another important distinction is that between the constitutional provisions and any legislative schemes provided for by either the federal or provincial governments. Many statutory schemes provide for the use of English and French before the courts. Professor Denise Réaume observed that "the existence of these schemes ... reduces the incentive on litigants to press for a full-scale reconsideration of the [constitutional provisions]."[15]

The reason for this counter-intuitive observation is that the statutory schemes build on the assumed minimal protection afforded by the constitutional provisions. The real substantial protections are assumed to inhere in the statutory provisions. The important struggle is to impact the legislative design for official languages protection, either through legislative amendment or court interpretation.

Are constitutional language rights minimal? It is important to question that assumption because legislative protections are more subject to political pressures, trade-offs and reduction or elimination by amendment than are constitutional guarantees.[16] Constitutional protection remains the ideal for rights protection.

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[15] Denise G. Réaume, "The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?" (2002) 47 McGill L.J. 593, at para. 21.

[16] While s. 16(3) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 provides for additional legislative protection of official language rights by both federal and provincial legislatures, the Ontario Court of Appeal in *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 505, 208 D.L.R. (4) 577 (Ont. C.A.) found that such protection did not rise to the level of constitutional status. In that case, it was argued by two of the intervenors that once the province established the Montfort Hospital as a homogeneous francophone institution, s. 16(3) provided a constitutional shield, limiting the right of Ontario to affect or reduce that status. In other words, once Ontario took a step in the direction of advancing the substantive equality of French, s. 16(3) "ratchets" that step to the level of a constitutional right, limiting any retreat from that advance. The court was not persuaded by this argument and dismissed the "ratchet" argument, stating at para. 92:

> [I]t seems to us undeniable that the effect of this provision is to protect, not constitutionalize, measures to advance linguistic equality. The operative legal effect of s. 16(3) is determined and limited by its opening words: "Nothing in this *Charter* limits the authority of Parliament or a legislature." Section 16(3) is not a rights-conferring provision. It is, rather, a provision designed to shield from attack government action that would otherwise contravene s. 15 or exceed legislative authority.

Given the foregoing, it is clear that the constitutional provisions protecting official language rights remain of foremost importance.

III. The Interpretation of Constitutional Language Rights in the Pre-*Beaulac* Jurisprudence

Beaulac's impact on constitutional language rights in the courts must be considered in light of pre-*Beaulac* jurisprudence in order to best understand the normative shift that occurred.

In *Jones v. New Brunswick (Attorney General)*[17] Laskin C.J.C. ruled that section 133 provided a right to any person to use English or French in any federally established court or any court of Quebec. The Supreme Court also concluded that section 133 did not preclude a legislature from conferring additional rights or privileges beyond those provided in section 133.[18] In *Blaikie v. Quebec (Attorney General)*,[19] the Court held that the term "Courts" in section 133 should be understood as extending to administrative tribunals exercising judicial and quasi-judicial powers; such tribunals are equally subject to official languages requirements. In *Blaikie v. Quebec (Attorney General)*,[20] the Court interpreted the word "Acts" in section 133 broadly so as to require that rules of practice be bilingual.

The Supreme Court of Canada expounded the purpose of language rights in *Reference re Manitoba Language Rights*. That purpose, the Court observed, was to ensure equal access to legislative bodies, laws and courts, for francophones and anglophones alike.[21] The Court explained:

> The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation

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17 [1974] S.C.J. No. 91, [1975] 2 S.C.R. 182 (S.C.C.). *Jones* was a reference case initiated by the Lieutenant Governor of New Brunswick, to which the appellant Jones was deemed entitled to be heard and therefore added as a party. The submission as to s. 133 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, by counsel for the appellant is that s. 133 was exhaustive of constitutional authority in relation to the use of English and French, and that a constitutional amendment is necessary to support any legislation which, like the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), would go beyond it. The Court rejected this assertion.

18 *Jones v. New Brunswick (Attorney General)*, [1974] S.C.J. No. 91, [1975] 2 S.C.R. 182, at 193 (S.C.C.).

19 [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016 [hereinafter "*Blaikie No. 1*"].

20 [1981] S.C.J. No. 30, [1981] 1 S.C.R. 312 [hereinafter "*Blaikie No. 2*"].

21 *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, at 739 (S.C.C).

and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.[22]

1. The Political Compromise Doctrine Limits Language Rights

Robin v. Collège de Saint-Boniface[23] was the first case to strike a discordant note. A majority of the Manitoba Court of Appeal ruled that the right to plead in French guaranteed by section 23 of the *Manitoba Act, 1870*[24] imposed no corresponding obligation to provide a judge capable of understanding French without the assistance of a translator. This attracted a stinging dissent from Monnin C.J.M.[25]

The Supreme Court considered the issue of judicial bilingualism in three cases that were decided together in 1986: *MacDonald*, *Société des Acadiens* and *Bilodeau*.[26] The three cases were delivered simultaneously and are commonly referred to as "the trilogy". All three cases adopted a restrictive interpretation of constitutional language rights, justified by observing that language rights are based on a "political compromise".

In *MacDonald*, the question was whether the Municipal Court of Montreal had breached section 133 in issuing a unilingual French charge/summons document to an anglophone accused of violating a municipal by-law.[27] In answering this question, a majority of the

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22 [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, at 744 (S.C.C.).

23 [1984] M.J. No. 192, 30 Man. R. (2d) 50 (Man. C.A.).

24 R.S.C. 1970, App. II, No. 8.

25 *Robin v. Collège de Saint-Boniface*, [1984] M.J. No. 192, 30 Man. R. (2d) 50, at paras. 15-34 (Man. C.A.). Chief Justice Monnin was of the opinion that the ability to understand was critical for a judge. At para. 22 he stated:

> For the purpose of a trial in French, it is not essential that the person presiding it be able to express himself/herself either orally or in writing in that language. It is preferable but not necessary. But in my view it is essential that he or she be able to understand fully and freely — without the help of an interpreter — the various documents offered as exhibits and the testimony of the witnesses. Without that ability, there will always exist the legitimate fear that the witnesses and the parties will not be thoroughly understood and that the nuances of language, intonations, accents, local expressions or colloquialisms will overshoot the ears of the trier of facts. There exists a well-known Italian aphorism "traductore, traditore". A translator is a little bit of a traitor because he/she cannot immediately fully translate all that the witness or the writer has said. This is more so when one has to deal with oral testimony rather than the leisurely translation of a written document.

26 *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460 (S.C.C.); *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549 (S.C.C.); *Bilodeau v. Manitoba (Attorney General)*, [1986] S.C.J. No. 27, [1986] 1 S.C.R. 449 (S.C.C.).

27 *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460 (S.C.C.).

Supreme Court of Canada adopted a restrictive interpretation of section 133. Justice Beetz explained:

> 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* ... And it is a scheme which can of course be modified by way of 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.[28] (emphasis added)

Justice Beetz added that "[s]ince s. 133 confers no language right to the appellant as the recipient of a summons, it imposes no correlative duty on the State or anyone else."[29] Justice Beetz relied on a textual analysis of the provision to support his conclusion. He noted that the mandatory language of "shall/both" is used in relation to the language of the records and journals of the legislatures of Canada and Quebec and in relation to the language in which the statutes of Canada and Quebec are printed and published. In contrast, he noted that the permissive language of "may/either" was used in relation to the language of the debates in both Houses and in relation to the language of the courts in both jurisdictions. Thus, Beetz J. concluded that the legislator could not have intended to compel understanding of the language chosen by the speaker in court proceedings.[30]

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[28] *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 496 (S.C.C.).

[29] *Macdonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 486 (S.C.C.).

[30] *Macdonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460 (S.C.C.). At 483 S.C.R., Beetz J. expounded on the right to be understood:

> The same reasoning applies to the language spoken in the courts covered by s. 133 and in the written pleadings in and processes of such courts: the language rights then protected are those of 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. The appellant exercised his constitutionally protected language right when he presented his oral and written

Justice Wilson disagreed. With respect to the right to understand and be understood, Wilson J. stated that:

> [t]he 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. To say otherwise is to make a mockery of the individual's language right.[31]

In coming to this conclusion, Wilson J. reviewed the philosophical nature of rights and noted that there is substantial support in legal theory for the submission that rights by nature impose correlative duties on others; in the case of section 133, the party bearing the duty is the state.[32] This interpretation relies upon a positive construction of rights, whereby a right necessarily requires a corresponding duty imposed on the state. This is opposed to the negative construction supported by Beetz J., which requires only that the state not interfere with ability of an individual to exercise his or her rights. The state has no correlative obligation to act positively.

The second decision in the trilogy, *Bilodeau*, applied the restrictive interpretation *MacDonald* imposed on section 133 of the *Constitution Act, 1867*[33] to section 23 of the *Manitoba Act, 1870*.[34] Section 133 and section 23 use almost identical language to create constitutional protection of language rights before the courts.

In *Société des Acadiens*, a majority of the Supreme Court of Canada adopted a narrow interpretation of subsection 19(2) of the Charter.[35] At issue was whether the right to use English or French in a "pleading" before a court in New Brunswick required the judges of the court to understand the pleading. Consistent with the finding in *MacDonald*, the

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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 terms of the right to understand, Beetz J. noted at 486 that "[s]ince s. 133 confers no language right to the appellant as the recipient of a summons, it imposes no correlative duty on the State or anyone else."

31 *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 539-40 (S.C.C.).

32 *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 521 (S.C.C.).

33 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

34 *Bilodeau v. Manitoba (Attorney General)*, [1986] S.C.J. No. 27, [1986] 1 S.C.R. 449 (S.C.C.); R.S.C. 1970, App. II, No. 8.

35 *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549 (S.C.C.).

Court found that understanding was not required to meet the conditions imposed by subsection 19(2). In coming to his conclusion, Beetz J. referred again to the required restrictive interpretation of language rights based on the "political compromise" doctrine.[36]

Chief Justice Dickson concurred in the result, but departed markedly on the correct approach courts should take to constitutional language rights. Subsection 19(2), he said, encompassed the right to be understood:

> 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?

Chief Justice Dickson suggested that sections 133 and 19 ought not to be necessarily treated as conferring identical rights. This explains the seeming discrepancy between his decisions on the right to be understood

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[36] *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549 (S.C.C.), at 578 (S.C.C.). Here, the majority stated:

> Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in s. 7 of the *Charter*, are so broad as to call for frequent judicial determination.
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> Language rights, on the other hand, although some of them have been enlarged and incorporated into the *Charter*, remain nonetheless founded on political compromise.
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> This essential difference between the two types of rights dictates 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.

The differential treatment of language rights as a result of their origination from political compromise attracted a great deal of criticism. See, *e.g.*, B. Pelletier, "Bilan des droits linguistiques au Canada" (1995) 55 R. du. B. 611; A. Riddell, "À la recherche du temps perdu: la Cour suprême et l'interprétation des droits linguistiques constitutionnels dans les années 80" (1988) 29 C. de D. 829, at 846; P. Foucher, "L'interprétation des droits linguistiques constitutionnels par la Cour suprême du Canada" (1987) 19 Ottawa L. Rev. 381; A. Braën, "L'interprétation judiciaire des droits linguistiques au Canada et l'affaire Beaulac" (1998) 29 R.G.D. 379, at 384.

in *MacDonald* and *Société des Acadiens*. The basis for the argument in favour of differential treatment is explored later in this paper.[37]

The Supreme Court continued to apply the restrictive approach to judicial language rights in *R. v. Mercure*.[38] At issue was the scope of section 110 of the *North-West Territories Act*,[39] drafted in language quite similar to that of section 133. In keeping with the previously discussed cases, the Court ruled that "[t]he right to be understood is not a language right but one arising out of the requirements of due process."[40]

This restrictive interpretation of the right to be understood essentially renders the judicial language right meaningless. As an interpreter is required by due process rights, there is no work left for constitutional language rights to do. In effect, the Supreme Court's cases treated the official language no differently than any other language.

This does not seem consistent with the principle of advancement of official languages set out at section 16 of the Charter.

Denise Réaume provided a useful theoretical analysis of the trilogy.[41] She identified two pillars underlying the restrictive interpretation proposed in the trilogy: (i) the political compromise doctrine and its corresponding restrictive interpretive approach; and (ii) the negative construction of language rights. The negative rights approach adopted in the trilogy to the interpretation of language rights was discussed at length by Wilson J. in her dissent in *MacDonald*.[42]

2. Adopting a Broader Approach to Other Language Rights

Despite the setbacks the Supreme Court's late 1980s jurisprudence delivered, language rights advocates had reason to note that a more generous interpretation was possible. In what initially appeared to be an incongruent development, the Court has increasingly accorded large and liberal interpretations of language rights outside the sphere of judicial bilingualism.

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37 For a discussion on this point, see section VI.3, "Adoption of an Institutional Paradigm".

38 [1988] S.C.J. No. 11, [1988] 1 S.C.R. 234 (S.C.C.).

39 R.S.C. 1886, c. 50, s. 110.

40 *R. v. Mercure*, [1988] S.C.J. No. 11, [1988] 1 S.C.R. 234, at 237(S.C.C.).

41 Denise G. Réaume, "The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?" (2002) 47 McGill L.J. 593.

42 *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 515-23 (S.C.C.).

In *Ford*, the Supreme Court accepted the role of language in facilitating community and cultural development.[43] A unanimous Court observed that language is not merely a means or medium of expression, but also "a means by which a people may express its cultural identity".[44] Building on this language, the Court in *Reference re Manitoba Public Schools* stated that the interpretation of minority-language education rights "should ideally be guided by that which will most effectively encourage the flourishing and preservation of the French-language minority in the province".[45]

The Court adopted a liberal approach to interpretation of minority-language education rights set out in section 23 of the Charter in *Mahe v. Alberta*.[46] The Court paid lip service to Beetz J. in *Société des Acadiens*, by noting that while careful interpretation of language rights is wise, "this does not mean that courts should not 'breathe life' into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose."[47]

The Court went further in *Reference re Secession of Quebec* to highlight the importance of Canada's official-language minorities. In this case, the Supreme Court examined the principles underlying the Canadian Constitution.[48] The Court held that Canada's Constitution is based on four fundamental and organizing unwritten principles: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. The principle of the protection of minorities derives from the protection of the education rights of religious minorities guaranteed by section 93 of the *Constitution Act, 1867*,[49] and the provisions of the Charter relating to the protection of the language and education rights of official-language minorities.[50] The Court acknowledged that these provisions were indeed the product of a historical compromise. But the Court qualified this point:

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43 *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.).

44 *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at 748-49 (S.C.C.).

45 *Reference re Public Schools Act (Man.), s. 79 (3), (4) and (7)*, [1993] S.C.J. No. 26, [1993] 1 S.C.R. 839, at para. 16 (S.C.C.).

46 [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342 (S.C.C.).

47 *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, at para. 37 (S.C.C.).

48 [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

49 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

50 *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 79 (S.C.C.).

> [W]e highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights ... We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order ... The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.[51]

IV. MONUMENTAL SHIFT: *R. v. BEAULAC*

The following year the Supreme Court granted leave to hear a case involving language before courts. *R. v. Beaulac* was an appeal from the British Columbia Court of Appeal and dealt with the scope of language rights under section 530 of the *Criminal Code*.[52] Section 530 imposes a positive obligation on the state to allow an accused to choose between the two official languages of the proceedings based on his or her own subjective ties with the language itself and to freely assert which official language is his or her own language.

Given the focus of this paper on the constitutional protections, the intricacies of the interpretation of the statutory provision will not be covered.[53] For the purpose of this analysis, the general principles of interpretation espoused by Bastarache J. are of interest. These principles of interpretation reflect a monumental shift away from those articulated in the trilogy.

> Language rights must *in all cases be interpreted purposively*, in a manner consistent with the preservation and development of official language communities in Canada [footnote omitted]. To the extent that

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[51] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 80-81 (S.C.C.).

[52] *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.). In this case, the accused was charged with first degree murder. After two previous trials, a third trial commenced. Despite unsuccessful applications in the earlier proceedings, the accused applied again, during a hearing prior to his third trial, for a trial before a judge and jury who speak both official languages of Canada pursuant to s. 530 of the *Criminal Code*, R.S.C. 1985, c. C-46. The judge dismissed the s. 530(4) application. The trial proceeded in English and the accused was convicted. On appeal, the Court of Appeal dismissed the appeal from conviction, upholding the decision of the judge at the pre-trial hearing on the language issue. The decision from the S.C.C. dealt strictly with the language rights issue.

[53] For an extensive analysis of the rights provided for in s. 530 of the *Criminal Code*, R.S.C. 1985, c. C-46, see Vanessa Gruben, "Bilingualism and the Judicial System" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc: Yvon Blais, 2004) 141, at 181-246.

> *Société des Acadiens* ... stands for a restrictive interpretation of language rights, it is to be rejected.[54] (emphasis added)

Building on the language in *Reference re Secession of Quebec*, Bastarache J. swiftly disposed of the political compromise doctrine: "the existence of a political compromise is without consequence with regard to the scope of language rights."[55]

Unlike the trilogy, the Court sought to broaden the duty on the state to accommodate bilingualism actively through section 16 of the Charter. The majority considered the principle of equality underlying official language rights. It said: "[e]quality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning."[56] The majority went further: subsection 16(1) of the Charter

> ... affirms the substantive equality of those constitutional language rights that are in existence at a given time ... This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State.[57] (footnotes omitted)

By recognizing the principle of substantive equality of both official languages the Court rejected the negative rights interpretation that characterized the trilogy. This allowed Bastarache J. to dispel the notion that language rights require no corresponding obligation on the part of the state.

> *Language rights are not negative rights*, or passive rights; *they can only be enjoyed if the means are provided.* This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees.[58] (footnotes omitted, emphasis added)

Justice Bastarache reinforced the sharp divide between language rights protections and the right to an interpreter provided at section 14 of the Charter.

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54 *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 25 (S.C.C.).
55 *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 24 (S.C.C.).
56 *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 22 (S.C.C.).
57 *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 24 (S.C.C.).
58 *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 20 (S.C.C.).

> The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English.[59]

Chief Justice Lamer and Binnie J. dissented. They observed that the question before the Court could have been determined on the basis of statutory interpretation. It was unnecessary therefore for the Court to discuss interpreting the constitutional language provisions.

> [W]e do not consider this to be an appropriate case to revisit the Court's constitutional interpretation of the language guarantees contained in s. 16 of the *Canadian Charter of Rights and Freedoms*. It is a well-established rule of prudence that courts ought not to pronounce on constitutional issues unless they are squarely raised for decision. This is not a constitutional case. It is a case of statutory construction.[60]

V. INTERPRETING *BEAULAC*'S IMPACT

1. Applicability to Statutes and to Constitutional Judicial Bilingualism Provisions

The interpretation of section 530 of the *Criminal Code*[61] was indisputably settled in *Beaulac*. However, in *Charlebois v. Saint John (City)*[62] Bastarache J. noted that *Beaulac* dealt with the interpretation of a statute creating language rights that exceed those that are mandated by the Constitution. As such, the extent to which the general principles espoused by Bastarache J. apply beyond the statutory criminal context, and particularly to the constitutional language rights provisions, is not immediately clear.

The cases following *Beaulac* do not provide a clear answer. The Quebec Court of Appeal stated in *Baie d'Urfé (Ville) v. Québec (Procureur général)*[63] that the interpretive principles articulated in

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59 *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 41 (S.C.C.).

60 *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 1 (S.C.C.).

61 R.S.C. 1985, c. C-46.

62 [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, at para. 38 (S.C.C.), *per* Bastarache J., dissenting but not on this point.

63 [2001] J.Q. no 4821 (Que. C.A.). The Court stated at para. 140:

> La Cour suprême, dans l'arrêt *Beaulac*, énonce que ce sont les droits linguistiques expressément prévus qui doivent recevoir une interprétation large et libérale. Il

Beaulac needs to be restricted to their context: section 530 of the *Criminal Code*.[64] Elsewhere courts applied the broad interpretive approach advocated in *Beaulac* outside of the criminal context. The Supreme Court has repeatedly cited *Beaulac* in the context of minority-language education rights[65] and in determining the scope of the *Official Languages Act*.[66] The Ontario Court of Appeal in *Montfort* specifically stated that "the interpretive approach enunciated [in *Beaulac*] applies both to language rights conferred by ordinary legislation as well as to constitutional guarantees."[67] The New Brunswick Court of Appeal relied on *Beaulac* to interpret subsection 18(2) of the Charter broadly in *Charlebois v. Moncton (City)*.[68]

The Supreme Court most recently considered *Beaulac*'s interpretive method in *Charlebois v. Saint John (City)*.[69] While *Charlebois* applied *Beaulac*'s interpretive method outside of the criminal context, it did not address *Beaulac*'s applicability to the constitutional provisions. *Charlebois* involved provisions in New Brunswick's *Official Languages Act*.[70] These provisions are a statutory scheme that extends language rights in judicial proceedings beyond those in the Constitution. A majority of the Supreme Court found that as the statute was unambiguous, recourse to Charter values calling for a broad purposive interpretation was unnecessary.

> This Court in *Beaulac* held that a liberal and purposive approach to the interpretation of constitutional language guarantees and statutory language rights should be adopted in all cases. I take no issue with this principle; however, as Bastarache J. acknowledges (at para. 40), this does not mean that the ordinary rules of statutory interpretation have no place. In this case, it is particularly important to keep in mind the

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faut par conséquent replacer la décision *Beaulac* dans le contexte où la Cour devait se prononcer sur l'étendue de droits linguistiques spécifiquement prévus par l'article 530 du *Code criminel*.

64 R.S.C. 1985, c. C-46.

65 See *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1, [2000] 1 S.C.R. 3, at para. 27 (S.C.C.); *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3, at para. 27 (S.C.C.); *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2001] 1 S.C.R. 201, at para. 20 (S.C.C.).

66 R.S.C. 1985, c. 31 (4th Supp.). See *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] S.C.J. No. 55, [2002] 2 S.C.R. 773, at para. 22 (S.C.C.).

67 *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 505, 208 D.L.R. (4th) 577, at para. 137 (Ont. C.A.).

68 [2001] N.B.J. No. 480, at paras. 49-96 (N.B.C.A.).

69 [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563 (S.C.C.).

70 S.N.B. 2002, c. O-0.5.

proper limits of *Charter* values as an interpretative tool. In *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, Iacobucci J., writing for a unanimous court, firmly reiterated that

> to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can *only* receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations. [Emphasis in original; para. 62.]

In the context of this case, resorting to this tool exemplifies how its misuse can effectively pre-empt the judicial review of the constitutional validity of the statutory provision. It risks distorting the Legislature's intent and depriving it of the opportunity to justify any breach, if so found, as a reasonable limit under s. 1 of the *Charter*. In this respect, Daigle J.A. properly instructed himself and rightly found, at para. 58, that the contextual and purposive analysis of the *OLA* "removed all ambiguity surrounding the meaning of the word 'institution'". Absent any remaining ambiguity, *Charter* values have no role to play.[71]

The majority's opinion essentially equates *Beaulac*'s interpretive approach to the "Charter values" interpretive principle used in statutory interpretation. This requires that there be genuine ambiguity in the provisions under consideration for the Court to interpret the statute with a broad purposive approach in light of Charter values. The majority found no such ambiguity.[72] As such, recourse to *Beaulac*'s teachings was deemed unnecessary.

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71 [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, at paras. 23-24 (S.C.C.).

72 The question considered by the S.C.C. in *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563 (S.C.C.) was whether or not municipalities were "institutions" pursuant to s. 1 of the New Brunswick *Official Languages Act*, S.N.B. 2002, c. O-0.5. Sections 27-30 of the Act impose obligations relating to use of official languages in processes issuing from a court on such "institutions". Elsewhere, the Act, at ss. 35-38, specifically imposes obligations on municipalities depending on the minority-language-speaking percentage of the population. The specific obligations for municipalities are more restricted than those on institutions. Justice Charron, for the majority at para. 19 asks:

> If all municipalities, as institutions, are obliged to print and publish their by-laws in both official languages under s. 29, why would it matter what percentage was represented by the official language minority population in any given municipality? Likewise, what would be the sense of prescribing by regulation those services and communications required to be offered in both official languages if all municipalities, as institutions, were required under ss. 27 to 30 to provide them all? What is left for a municipality to declare itself bound under s. 37 if it is already bound by the general obligations imposed on institutions? Those are the "incoherent and illogical" consequences that Daigle J.A. found determinative

Justice Bastarache dissented. He found apparent inconsistencies in the statute on the question whether the City of Saint John was an "institution" pursuant to the Act and therefore subject to the Act's institutional bilingualism requirements.[73] He therefore used *Beaulac*'s interpretive principles to resolve these inconsistencies. He suggested that because this was an instance of a government seeking to extend language rights, courts ought not to adopt restrictive interpretations, or to read the statute down, to eliminate the apparent inconsistencies he found in the statute.

> ... where the Legislature is extending the protection of minority rights, the Court must not adopt a restrictive interpretation in order to eliminate apparent inconsistencies in the law. It must, rather, search for a meaning consistent with the protection of minorities and the achievement of equal rights for the two official languages and language communities that can be reconciled with the wording of the legislation whenever possible.[74]

Justice Bastarache observed that *Beaulac* required that "[w]here institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada."[75] He added that "[t]he Court must be guided by the need to give meaning to institutional bilingualism."

Charlebois was a case of statutory interpretation. The difference in opinion arose primarily on the extent to which the approach mandated by *Beaulac* could be used to overcome inconsistencies in the statute. The majority held that it could not do so in this case, equating the *Beaulac* approach to a Charter value, recourse to which is only possible

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> in the search for the Legislature's intent. I agree, particularly because, if the opposite interpretation is adopted and "institution" is read as not including municipalities, the internal coherence is restored.

It is worth noting that municipalities had been found to be institutions for the purpose of s. 16(2) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 in *Charlebois v. Moncton (City)*, [2001] N.B.J. No. 480, 242 N.B.R. (2d) 259 (N.B.C.A.). Neither the New Brunswick Court of Appeal in *Charlebois v. Saint John (City)*, [2004] N.B.J No. 237, 2004 NBCA 49 (N.B.C.A.) nor the majority at the S.C.C. ([2005] S.C.J. No. 77, [2005] 3 S.C.R. 563 (S.C.C.)) found this to be binding on the present matter.

[73] *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, at paras. 38-45 (S.C.C.).

[74] *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, at para. 38 (S.C.C.).

[75] *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 22, cited by Bastarache J. in *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, at para. 41 (S.C.C.).

where ambiguity cannot be resolved by a contextual approach. The nice point for analysis is whether this is contrary to the majority in *Beaulac*'s instruction that "[l]anguage rights must *in all cases* be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada".[76]

While the emphasis is given by Bastarache J. to the phrase "in all cases", the word "interpreted" is equally important. Interpretation by its very nature is used to resolve instances of ambiguity. Where there is no ambiguity,[77] as the majority found in this case, interpretive principles are not required.[78] The interesting further question is whether the majority would have agreed with Bastarache J. as to application of *Beaulac* had they found an ambiguity in the statute.[79]

2. Does *Beaulac* Overrule the Trilogy?

The applicability of *Beaulac* to the constitutional judicial bilingualism provisions has yet to be determined and will require a Supreme Court decision specifically dealing with section 19.[80] It is

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[76] *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 25 (S.C.C.) (emphasis in original).

[77] In the context of statutory interpretation, Iacobucci J. for the Court in *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] S.C.J. No. 43, [2002] 2 S.C.R. 559, at para. 29 (S.C.C.) addressed when there is ambiguity:

> What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte*, *supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang* (1965), [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *Canadian Oxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

[78] See, *e.g.*, *Canada (Attorney General) v. J.T.I. MacDonald Corp.*, [2007] S.C.J. No. 30, 2007 SCC 30, at para. 44 (S.C.C.): "The process of interpretation may resolve ambiguity in favour of a more limited meaning. This may only be done in cases of real ambiguity in the statute."

[79] Justice Bastarache, in his dissent in *Canada (Attorney General) v. J.T.I. MacDonald Corp.*, [2007] S.C.J. No. 30, 2007 SCC 30, at para. 46 (S.C.C.), finds that there is ambiguity *per se* in that the section dealing with municipalities can be read as providing for an exception to the general provisions creating obligations that are inconsistent.

[80] In *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563 (S.C.C.), Bastarache J., dissenting but not on this point, noted that the Court could not "accept the invitation of some interveners to revisit the question of the scope of the rights in s. 19(1) of the *Canadian Charter of Rights and Freedoms*".

useful to consider whether *Beaulac* provides a normative basis for the Court to do so should such an opportunity arrive. Prior to *Beaulac*, the law on the scope of these provisions was set out in the 1986 trilogy. A useful point of departure for this analysis will be to consider whether *Beaulac* can be considered to overrule the trilogy.

To determine whether *Beaulac* overruled the trilogy, it is necessary to consider the theoretical underpinnings of each of these decisions. Interestingly, this analysis also sheds light on the seemingly disparate treatment between different types of language rights and the apparently inconsistent jurisprudence. As noted above, Denise Réaume identified the two pillars underlying the restrictive interpretation for the constitutional language rights provisions proposed in the trilogy: (i) the political compromise doctrine and its corresponding restrictive interpretive approach; and (ii) the negative construction of language use rights.[81]

The political compromise doctrine required that language rights be interpreted more narrowly because of their origin in political compromise. Justice Bastarache for the majority dismissed that application of the doctrine in *Beaulac*. He concluded that "[t]he existence of a political compromise is without consequence with regard to the scope of language rights."[82] The restrictive interpretive approach supposedly arising from the political compromise in the trilogy was also rejected: "Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada."[83] It is therefore safe to conclude the first theoretical pillar of the trilogy has been effectively overruled.

The status of the second pillar is less certain. A negative characterization of a language use right construes it as a mere negative liberty not to be interfered with in one's choice of official language before the courts. In other words, the right guarantees that the state will not interfere with the individual's choice of official language. Justice Beetz ruled that the right went this far, but no further, based on the permissive language used in the provision.[84]

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81 Denise G. Réaume, "The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?" (2002) 47 McGill L.J. 593.

82 *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 24 (S.C.C.).

83 *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 25 (S.C.C.).

84 *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 521 (S.C.C.):

> It is argued, however, that no such correlative duty can be imposed on the state under s. 133 because of the antithetical use of the words may/either and shall/both in the section. It is pointed out that shall/both is used in relation to the language of the records and journals of the legislatures of Canada and Quebec and in relation

Justice Beetz could have ruled that the right to use either official language imposes a positive duty on the state to provide administrative machinery or resources to facilitate the individual's choice of official language.[85] Justice Beetz refused to make this additional ruling.

At first blush, Bastarache J. in *Beaulac* appears to have dispensed as well with this negative rights pillar of the trilogy decisions. Justice Bastarache stated that language rights "are not negative rights, or passive rights; they can only be enjoyed if the means are provided".[86] Réaume suggested that it is incorrect to conclude that a negative rights approach has been dismissed:

> Bastarache J.'s argument tends to conflate the policy of restrictive interpretation with the characterization of a right as merely negative — to treat them as equivalent interpretive moves — so that the rejection of the former means rejection of the latter. This masks an important distinction between the provisions at stake in the trilogy and in *Beaulac*, and misses part of the reason for the adoption of a negative liberty approach in the trilogy.[87]

Recognizing the role that the negative liberty conception of language rights played in the trilogy sheds some light on the seemingly inconsistent jurisprudence with respect to the constitutional language rights provisions subsequent to the trilogy until *Beaulac*.[88] Where constitutional provisions are positive — where they clearly confer obligations on the state — the courts have adopted a broad and purposive interpretive approach. This is evident from the jurisprudence about minority-language education rights,[89] services to the

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> to the language in which the statutes of Canada and Quebec are printed and published. They must be in both languages. But may/either is used in relation to the language of the debates in both Houses and in relation to the language of the courts in both jurisdictions. These may be in either language. It is submitted that had the legislators intended to compel a particular language to be used in the courts in any given situation it would not have used may/either; it would have used shall/both ...

85 Such an approach was suggested by Wilson J. in her dissent in *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 524 (S.C.C.).

86 *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 20 (S.C.C.).

87 Denise G. Réaume, "The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?" (2002) 47 McGill L.J. 593, at para. 7.

88 See, *e.g.*, B. Pelletier, "Bilan des droits linguistiques au Canada" (1995) 55 R. du B. 611, at 620-27.

89 Minority-language education rights are protected in s. 23 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11. The Supreme Court in *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, at 362 (S.C.C.), stated:

public,[90] and the clearly mandatory portions of section 133 and their analogue at section 18 of the Charter.[91] Where provisions are more ambiguous in nature, not directly imposing correlative obligations on the state, the courts have limited the scope of the right to a strictly negative construction. Seen in this light, the trilogy no longer seems an aberration to the otherwise liberal interpretive approach, but stands as a separate statement of the interpretation to be applied to provisions that do not explicitly impose positive obligations.

In *Beaulac*, section 530 of the *Criminal Code*[92] imposed a clear obligation on the state. Such a positive provision necessarily imposes a correlative duty on the state. The Supreme Court has yet to apply the interpretive principles from *Beaulac* to a case involving rights that have previously been construed as negative. Interpreting the constitutional provisions protecting bilingualism in the courts would present the Court with such an opportunity.

> The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.

The Court added at 363 S.C.R. that "[a] further important aspect of the purpose of s. 23 is the role of the section as a remedial provision. It was designed to remedy an existing problem in Canada, and hence to alter the status quo." The nature of this provision makes its positive nature clear: it would be impossible to confer a right to education without an obligation on the state to provide it. Subsection 23(3)(b) makes this clear in specifying then when numbers warrant, the education will be provided out of public funds.

[90] See, *e.g.*, *Doucet v. Canada*, [2005] F.C.J. No. 1813, [2005] 1 F.C.R. 671 (F.C.T.D.). See also Beetz J. in *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549, at 575 (S.C.C.) when he used the wording of s. 20 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 to affirm his understanding of s. 19(2):

> I am reinforced in this view by the contrasting wording of s. 20 of the *Charter*. Here, the *Charter* has expressly provided for the right to communicate in either official language with some offices of an institution of the Parliament or Government of Canada and with any office of an institution of the Legislature or Government of New Brunswick. The right to communicate in either language postulates the right to be heard or understood in either language.

[91] The constitutional provisions respecting statutes, records and journals in s. 133 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 and s. 18 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 both use the mandatory language "shall" and must be construed as positive. See, *e.g.*, *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.), where the legislature of Manitoba was ordered by the Superme Court to print and publish all laws in both French and English.

[92] R.S.C. 1985, c. C-46.

The Supreme Court of Canada has applied *Beaulac*'s interpretive method beyond the criminal context, but has yet to address provisions that do not impose clear obligations on the state, such as section 19.[93] The Ontario Court of Appeal in *Lalonde*[94] and the New Brunswick Court of Appeal in *Charlebois v. Moncton*[95] have gone further and extended the interpretive principles espoused in *Beaulac* beyond provisions imposing clear, positive obligations on the state.

Thus, the question whether *Beaulac* overrules the trilogy on all interpretive issues awaits determination by the Supreme Court of Canada.[96] Given the above analysis, it is arguable that the second pillar underpinning the trilogy, the negative liberty interpretation of language rights before the courts, has yet to be overruled. Justice Bastarache himself seems to concur with this assessment in the introductory chapter to his textbook on language rights. Here, he states that the finding in *Société des Acadiens* that "the right to use one's language in the courts does not encompass the right to be understood or the right to select the language of the proceedings is still applicable, but could possibly be reconsidered in the future."[97] In essence, he appears to be inviting a case that allows the Court to reconsider this issue.

VI. GOING FORWARD

What does this mean for the interpretation/scope of the constitutional provisions in the future?[98] When some litigant inevitably

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[93] See, *e.g.*, *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563 (S.C.C.), where both the majority and minority affirmed that the *Beaulac* interpretive method was applicable to the New Brunswick *Official Languages Act*, S.N.B. 2002, c. O-0.5. The disagreement between the majority and the dissent hinged on the presumption of *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 consistency and the cases in which Charter values should be used as interpretive principles.

[94] *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 505, 208 D.L.R. (4th) 577 (Ont. C.A.).

[95] *Charlebois v. Moncton (City)*, [2001] N.B.J. No. 480 (N.B.C.A.).

[96] Submissions were made to the Supreme Court regarding the interpretation of s. 19(2) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 in *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563 (S.C.C.), but both the majority and minority refused to reconsider the scope of s. 19 at this time.

[97] See Michel Bastarache, "Introduction" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc: Yvon Blais, 2004) 1, at 24.

[98] The scope of this paper is limited to the constitutional protection of judicial bilingualism. For a discussion on the effect of *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R.

accepts Bastarache J.'s invitation to bring forward a case involving the constitutional protections for judicial bilingualism to the Court, what would the applicant have to establish to persuade the Court to overrule the second pillar of the trilogy? If *Beaulac* did not overrule the trilogy with respect to negative rights, does it lay sufficient groundwork for a later decision to do so?

It is uncertain whether the constitutional language rights protections entrenched in section 19 impose positive or negative rights. In such cases, the nature of the interpretive style used can determine whether a right is viewed as positive or negative. A comparison of the majority and dissenting opinions in *MacDonald* illustrates how the interpretive approach adopted affects the determination of whether or not a provision seeks to impose positive obligations on the state.[99] Vanessa Gruben suggests that the adoption of a large and liberal interpretation in *Beaulac* could provide a basis for conceiving section 19 as construing positive rights, and particularly focuses on the significance of section 16: "Presumably, this broad interpretation of section 16 could be relied upon to construe section 19 as protecting positive rather than negative rights."[100]

1. Addressing the Conflict Between Interacting Rights Holders

Réaume suggests that a further intellectual shift is required in order to ensure fully that language rights are viewed as positive rights. This is necessary, she argues, because the adoption of a positive rights interpretation of the official language use rights in the courts would result in endemic, irresolvable conflict between interacting holders of

768 (S.C.C.) on ordinary legislation, see Marc Cousineau, "Survol des droits linguistiques: enfin de vrais droits linguistiques au Canada" (2000-2001) 32 Ottawa L. Rev. 117.

[99] *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460 (S.C.C.). In construing s. 133 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, Beetz J. for the majority adopts a restrictive interpretive approach. He contrasts the use of the mandatory language of "shall" when clearly imposing a duty upon the state with respect to statutes, records and journals, with the permissive language of "may" when providing individuals with the right to use either French or English when issuing processes. Justice Wilson's dissent demonstrates that a broader interpretation can result in a positive conception of rights. She suggests that the term "shall" is used in provisions directed at the state. The terms "may" and "either" are used in provisions directed at citizens. Justice Wilson notes that it would be inappropriate to use the term "shall" when conferring rights on citizens.

[100] Vanessa Gruben, "Bilingualism and the Judicial System" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc: Yvon Blais, 2004) 141, at 181.

the same right.[101] As this argument was advanced by the majority of the Court in the trilogy, counsel would have to address it to persuade the Court to overturn the previous rulings.

There are two solutions to this difficulty that might persuade the Court. The first is to remain within the individualist paradigm and simply not recognize state officials *qua* state officials as individuals able to benefit from the rights conferred in either section 19 of the Charter or section 133 of the *Constitution Act, 1867*.[102] This approach builds upon Wilson J.'s dissent in *MacDonald*.[103] The second solution is to impute an institutional paradigm on the language rights conferred in the Constitution.[104] This approach confers an obligation on the state to provide the infrastructure necessary to manage the conflict between individual rights holders. I will elaborate on each option and then address the potential implications on the scope of the constitutional protection of bilingualism in the courtroom.

2. State Officials *Qua* State Officials Cannot Benefit from Constitutional Language Protections

The foundational theory for the first solution was discussed by Wilson J. in dissent in *MacDonald*. In concluding that the state is not a "person" able to benefit from the rights conferred in section 133, Wilson J. relied on rights theory and her view of the proper application of liberal constitutionalism to bolster her argument. She explained:

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[101] *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460 (S.C.C.). Chief Justice Dickson, concurring on the constitutional issue, states at 468 S.C.R. that "[a]ny implied affirmative obligation which may be cast upon the "state" to give effect to a litigant's right to use either French or English is necessarily subordinated to the express authority of courts to issue process in one language only." Justice Beetz for the majority states at 483 S.C.R. that "[t]hose who listen to the speaker cannot have a right to be addressed in the language of their choice without defeating the speaker's own right to use the language of his choice and making the constitutional provisions nonsensical."

[102] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[103] *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460 (S.C.C.), Chief Justice Dickson suggests something similar in *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549, at 565 (S.C.C.), when he states that "the Charter was designed primarily to recognize the rights and freedoms of individuals vis-à-vis the State. When acting in their official capacities on behalf of the State, therefore, judges and court officials do not enjoy unconstrained language liberties."

[104] This is the approach advocated by Denise G. Réaume, "The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?" (2002) 47 McGill L.J. 593.

> The constitution cannot properly be said to confer "rights" on [itself or] a provincial government since the nature of governmental power is that it is unlimited except as limited by the constitution.[105]

Justice Wilson cited John Austin in support of this approach:

> To every legal right, there are three several parties: namely, a party bearing the right; a party burdened with the relative duty; and a sovereign government setting the law through which the right and the duty are respectively conferred and imposed. A sovereign government cannot acquire rights through laws set by itself to its own subjects. A man is no more able to confer a right on himself, than he is able to impose on himself a law or duty. Every party bearing a right (divine, legal, or moral) has necessarily acquired the right through the might or power of another: that is to say, through a law and a duty (proper or improper) laid by that other party on a further and distinct party.[106]

While Austin's conception of rights and sovereignty has been subject to extensive criticism, it nevertheless provides a useful basis for considering the appropriate beneficiaries of rights conferred upon citizens. The fact that the rights of individuals would be limited by those of other individuals acting *qua* state officials seems inherently unpalatable. To my knowledge, there is no other example in constitutional jurisprudence where this is the case.

While Wilson J.'s approach seems logical, it was rejected by the majority in *MacDonald*. While the Court has yet to expressly overrule itself on this point, in *Charlebois v. Saint John (City)*, Bastarache J. noted that "[i]nstitutional bilingualism is achieved when rights are granted to the public and corresponding obligations are imposed on institutions. No rights are given as such to institutions."[107]

It seems possible that the Court could adopt this approach. The question remains as to what would be the implication of excluding state officials from language use protections. If the Court adopts this approach it will have to address the conflict between interacting rights holders in instances where the individuals in question are state officials

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[105] *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 542 (S.C.C.).

[106] John Austin, *Austin on Jurisprudence*, 5th ed., R. Campbell, ed., vol. 1 (London, 1885), at 284, as cited by Wilson J. in dissent in *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 515-16 (S.C.C.).

[107] [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, at para. 36 (S.C.C.), dissenting, but not on this point.

(the judge, Attorney General, court officials), but what about other litigants in the civil context and witnesses?

3. Adoption of an Institutional Paradigm

The adoption of an institutional paradigm for all language rights would require the state to manage conflicts between rights holders. This is consistent with *Beaulac*'s affirmation of the principle of substantive equality:

> This principle of substantive equality has meaning. It provides in particular that language rights *that are institutionally based* require government action for their implementation and therefore create obligations for the State.[108] (emphasis added, footnotes omitted)

This approach requires the state to ensure that the individual rights conferred in section 19 of the Charter and section 133 of the *Constitution Act, 1867*[109] do not conflict. This approach is ideal. It would resolve not only the conflict between the language rights of state officials and individuals but also any conflict that might arise between private litigants.

The adoption of an institutional paradigm flows naturally from a positive rights approach. Although section 19 is not as clear as section 20 in imposing positive obligations on the state, it is at least ambiguous. The status quo (having the right to speak in the official language of choice but without the corresponding right to be understood) is undeniably not the only reasonable interpretation of the provision.[110] Where there is ambiguity, the interpretive principles espoused in *Beaulac* become especially relevant and militate in favour of adopting

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[108] *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 24 (S.C.C.). The Court goes on to cite *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229, at 412 (S.C.C.); *Haig v. Canada*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995, at 1038 (S.C.C.); *Reference re Public Service Employee Relations Act (Alta.)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.); and *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624, at para. 73 (S.C.C.) in support of this proposition. While all of these cases arose in the context of s. 15, this illustrates that the spirit of substantive equality embraced by s. 15 permeates the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, as a whole.

[109] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[110] Many would suggest that the status quo is an unreasonable interpretation of the provision; see, *e.g.*, Dickson C.J.C. in dissent in *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549 (S.C.C.).

the approach which best promotes language rights. The potential conflict between interacting rights holders that contributed to the negative rights approach can be resolved equally well by adopting an institutional approach, which better promotes language rights.

Were a future case to characterize language rights before the courts as institutionally based,[111] *Beaulac* makes it clear that this confers a positive obligation on the state. The Court said "[w]here institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada."[112]

The other important issue to address is whether an institutional approach would apply equally to section 133 of the *Constitution Act, 1867*[113] (and its parallel section 23 of the *Manitoba Act, 1870*[114]) and section 19(1) of the Charter (along with its parallel section 19(2)). Does the spirit of substantive equality permeating the Charter affect the interpretation of section 133? It seems difficult to argue otherwise. The unwritten principle of protection of minorities identified in *Reference re Secession of Quebec* originated both from the protection of the education rights of religious minorities guaranteed by section 93 of the *Constitution Act, 1867*, and the provisions of the Charter relating to the protection of the language and education rights of official-language minorities.[115] This principle inherently imposes a positive obligation and embodies the notion of substantive equality. As such, it seems that the provisions are most appropriately still treated similarly, as was held by the majority in the trilogy.

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[111] In attempting to characterize the language before the courts provisions as institutional it would be necessary to confront the obvious counter-argument that was raised by Beetz J. for the majority in *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549 (S.C.C.). Justice Beetz compared the wording of s. 20 with that in s. 19 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 and noted that s. 20 clearly imposes a positive obligation on the state. As such, if the framers had intended a similar obligation in s. 19, they would have phrased it similarly. This observation is not without merit, but is only one factor to consider in the interpretation of an ambiguous provision such as s. 19. The accepted interpretation of s. 16 is equally (and arguably more so) of importance. Furthermore, this is where the large and liberal interpretation proposed in *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.) could be useful in construing the rights as institutional.

[112] *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 22 (S.C.C.).

[113] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[114] R.S.C. 1970, App. II, No. 8.

[115] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 79-82 (S.C.C.).

VII. Implications for Constitutional Provisions

While *Beaulac* did not overrule the trilogy on its own, it has provided a foundation for the Supreme Court to explicitly establish a positive construction of official language rights. Assuming that either a section 19 or section 133 case is brought before the Court, I expect that that we will see the aforementioned doctrinal changes take place, namely, the recognition that judicial bilingualism rights are institutionally based. The question that inevitably follows is the impact of adopting an institutional approach to the constitutional provisions providing for judicial bilingualism on court proceedings. I will examine this issue by looking at the right to be understood by the judge and jury, the right to understand processes, the role of the Attorney General, language of decisions and evidence. I will also examine the impact of such a change on the administrative sector and the provincial civil courts of Manitoba, New Brunswick and Quebec.

1. Right to Be Understood

The adoption of an institutional paradigm for the various constitutional provisions for language use before the courts will allow for a right to plead in the official language of choice as well as the corresponding right to be understood directly, without the filter of an interpreter. Both the negative liberty and political compromise doctrines having been overcome, no theoretical impediments exist to giving official language use rights additional content beyond what is provided in trial fairness rights.

The content of the duty to be understood also requires examination. Does the duty require a bilingual judge and/or jury or will translation suffice? The answer to this question becomes clear when adopting the broad and purposive interpretive approach proposed in *Beaulac*. Given the principles of substantive equality and advancement embodied in section 16 of the Charter, it is difficult to see how translation alone could protect and promote the development of minority-language communities. A bilingual judge would clearly be required to give full effect to the rights conferred.

The trial process is a method to seek the truth. Trial effectiveness depends on exactness of communication and precision of inference. Interpreted trials are beset by fundamental difficulties which diminish their effectiveness as a discoverer of truth. Use of an interpreter imposes

a barrier between the speaker and the Court, necessarily involving substitution of meaning and nuance.

This concern was eloquently explained by Monnin C.J.M. in his dissent in *Robin*:

> For the purpose of a trial in French, it is not essential that the person presiding it be able to express himself/herself either orally or in writing in that language. It is preferable but not necessary. But in my view it is essential that he or she be able to understand fully and freely — without the help of an interpreter — the various documents offered as exhibits and the testimony of the witnesses. Without that ability, there will always exist the legitimate fear that the witnesses and the parties will not be thoroughly understood and that the nuances of language, intonations, accents, local expressions or colloquialisms will overshoot the ears of the trier of facts. There exists a well-known Italian aphorism "traductore, traditore". A translator is a little bit of a traitor because he/she cannot immediately fully translate all that the witness or the writer has said. This is more so when one has to deal with oral testimony rather than the leisurely translation of a written document.[116]

These fine nuances are often critical when the court is assessing the credibility of the witnesses, one of the most significant functions of the trial judge.[117] Additionally, cross-examination of witnesses is made extremely difficult when court interpreters are used.[118] The oral advocacy skills of lawyers whose words are interpreted for a judge also suffer, since their words often lose their emotive and connotative impact.

2. Right to Understand

The right to be understood does not necessarily imply that the right to understand also exists. The adoption of an institutional framework would oblige state officials dealing with private citizens to make an effort to ensure that any communication issued in either official

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[116] *Robin v. Collège de St-Boniface*, [1984] M.J. No. 192, 30 Man. R. (2d) 50, at para. 22 (Man. C.A.).

[117] See, *e.g.*, *State v. Vasquez*, 121 P.2d 903, at 908 (Utah Sup. Ct. 1942). Justice Wolfe, speaking of evidence translated from Spanish, stated: "Certainly the reaction of a witness, his demeanor on the stand, is much more discernible to [the trier of fact] when questions and answers are framed in English."

[118] Bergenfield, "Trying Non-English Conversant Defendants: The Use of an Interpreter" (1977-78) 57 Ore. L. Rev. 549, at 533.

language can be understood by its recipient. The most common communications in the judicial context are court summonses, the pleadings of private litigants and judicial reasons.

Court summonses were the subject of both *MacDonald* and *Bilodeau*.[119] Given the possible uncertainty over the recipient's preferred official language, it is arguable that the state should be required to provide bilingual summonses. Justice Wilson in *MacDonald* offered an interesting compromise. She suggests that the summonses be offered in only one language, but that an addendum be attached in the other official language offering a translation on request.[120] This solution appears to be sufficient to meet the obligations of the provision and not overly onerous for the state to discharge.[121]

In the case of civil proceedings, it is obvious that sometimes the parties will prefer to file pleadings in different official languages. An institutional paradigm as applied to the right to understand could be fulfilled by the state offering translation of pleadings documents or by setting rules for the parties to do so. This right would apply equally in instances involving two individuals, as well as cases involving an individual and the state.

The issue of judicial reasons turns on the interpretation of the term "process", found in section 133 of the *Constitution Act, 1867*[122] and section 19 of the Charter. This term refers to the procedural written

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[119] See *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 539-40 (S.C.C.), *per* Wilson J. (in dissent):

> I take no issue with this Court's conclusion in *Blaikie No. 1* that under s. 133 documents, judgments and other materials issued by Quebec courts are valid in either language. It does not, however, follow from this that a French speaking litigant may be dealt with in English and an English speaking litigant in French. 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. To say otherwise is to make a mockery of the individual's language right. 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.

[120] *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 543-44 (S.C.C.).

[121] It should be noted that the language provisions in particular in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 are subject to the possible limitation of s. 1. While there is little if any jurisprudence in this area, it is nevertheless possible that such considerations would be relevant.

[122] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

documents emanating from the Court.[123] The issue has already been addressed in the institutional framework provided by the *Official Languages Act*[124] in *Devinat v. Canada (Immigration and Refugee Board)*.[125] In that case, the Federal Court of Appeal held that section 20 of the *Official Languages Act* requires that all final decisions issued by any federal court be made available in both official languages. The court in that case applied the interpretation principles proposed in *Beaulac*.[126] A similar application to the constitutional context would likely have a similar result.

3. Crown Attorneys / Government Counsel

The adoption of an institutional framework of the constitutional judicial bilingualism provisions would require the state to provide counsel speaking the official language selected by the individual facing the state through the courts. In the criminal context, this is already provided for statutorily, as was affirmed in *R. v. Cross*.[127] In the civil context, where a private litigant initiates an action against the government or faces an action commenced by the government, the

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123 *Blaikie No. 1*, [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016 (S.C.C.).

124 R.S.C. 1985, c. 31 (4th Supp.).

125 [1999] F.C.J. No. 1774, [2000] 2 F.C. 212 (F.C.A.).

126 *Devinat v. Canada (Immigration and Refugee Board)*, [1999] F.C.J. No. 1774, [2000] 2 F.C. 212, at paras. 15-21 (F.C.A.).

127 [1998] J.Q. No. 2629, 165 D.L.R. (4th) 288 (Que. C.A.). Section 530.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, provides:

> Where an order is granted under section 530 directing that an accused 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 ... (e) except where the prosecutor is a private prosecutor, the accused has a right to have a prosecutor who speaks the official language that is the language of the accused;

In this case, the Quebec Court of Appeal sought to reconcile the rights found in s. 133 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, with those imposed statutorily by s. 530.1. Justice Biron expressed the compromise as follows (at para. 42):

> L'art. 530.1 ne vise pas le poursuivant privé, ce qui, à mon avis, et avec respect pour l'opinion contraire, tend à démontrer qu'en adoptant l'art. 530.1, le Parlement n'entendait pas diminuer les droits qu'accorde l'art. 133, mais plutôt imposer au Procureur général d'une province l'obligation d'affecter à la conduite d'une cause où une ordonnance a été rendue en vertu de l'art. 530 C.cr., un substitut capable de parler la langue officielle de l'accusé et qui consent à le faire.

It is worth noting that this case occurred prior to *Beaulac* and relied on the interpretation of language rights expressed in the trilogy.

government should provide counsel able to function in the official language chosen by the private litigant.

4. Evidence

The issue of evidence in the constitutional context turns on the interpretation of the term "pleadings", found in both section 133 and section 19. The Court in *Blaikie No. 1* found that the term "pleading" refers to the written and oral arguments emanating from the parties.[128] In *Lavigne v. Canada (Human Resources Development)*, the Court held that there is no constitutional right "entitling a party to read affidavit evidence in the official language which he or she has chosen, and hence no corresponding obligation on the part of the government party to provide a translation".[129] While this case arose in the context of the *Official Languages Act*,[130] the court specifically referred to the constitutional provisions.

Lavigne v. Canada (Human Resources Development) occurred prior to *Beaulac*. Does the adoption of the broad and purposive approach and the rejection of the negative rights approach suggest that a change could occur? Ultimately both of the above approaches only apply where a right exists.[131] A broad interpretation or positive rights approach is only likely to be relevant where a provision is ambiguous. The word "pleading" is not ambiguous. In *Lavigne v. Canada (Human Resources Development)* the Federal Court ruled that "[w]hatever construction one may wish to give to the term 'pleadings' or 'plaidoiries', it does not include evidence tendered in the course of a proceeding".[132] The Supreme Court in *Charlebois* also affirmed that in the context of the New Brunswick *Official Languages Act*,[133] "pleadings" do not include

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128 [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016 (S.C.C.).

129 [1995] F.C.J. No. 737, at para. 12 (F.C.T.D.).

130 R.S.C. 1985, c. 31 (4th Supp.).

131 In this regard, the Quebec Court of Appeal in *Baie d'Urfé (Ville) v. Québec (Procureur général)*, [2001] J.Q. No. 4821 (Que. C.A.) was correct in observing in paras. 143-44 that there is a difference between creating new rights and interpreting existing rights broadly so as to ensure their purpose is achieved. Creating rights is a political decision, whereas interpreting rights is a function of their application, and thus within the remit of the courts.

132 *Lavigne v. Canada (Human Resources Development)*, [1995] F.C.J. No. 737, at para. 6 (F.C.T.D.). The Court in that case went on to cite Isaac J. (as he then was), in *Zavitz Technology Inc. v. 146732 Canada Inc.*, [1991] O.J. No. 448, 49 C.P.C. (2d) 26, at 38 (Ont. Gen. Div.): "In the context of a civil proceeding, pleading are the opposite of affidavits, which consist of evidence by which facts may [be] proved or from which they may be inferred".

133 R.S.C. 1985, c. 31 (4th Supp.).

evidence tendered in the course of a proceeding.[134] As such, *Beaulac* is unlikely to have an impact on the law with respect to evidence.

VIII. Scope of Application

It is evident from this discussion that *Beaulac*'s progeny will generally increase the scope of the obligation imposed on the state to promote judicial bilingualism. The final point of analysis is to consider the scope of the state's obligation.

The adoption of an institutional framework for language use rights will apply to the federal courts and the provincial courts in Manitoba, Quebec and New Brunswick. Given the existing legislative protections in place in New Brunswick,[135] the impact of this shift in the law will likely be small. Similarly, the federal *Official Languages Act*[136] and *Criminal Code*[137] already impose institutional obligations on the federal court in order to promote judicial bilingualism. The impact could be considerably more severe in Manitoba and Quebec, where civil proceedings are beyond the scope of the *Criminal Code* provisions.[138]

What is more interesting is the potential result on the provincial administrative sectors. In *Blaikie No. 1*,[139] the Supreme Court held that administrative tribunals exercising judicial and quasi-judicial powers should be bound by the language requirements of section 133 of the *Constitution Act, 1867*.[140] While the judicial or quasi-judicial nature of a tribunal was once an important factor in the assessment of standard of review, this is no longer the case.[141] When combined with the extensive

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134 *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, at paras. 7, 53-55 (S.C.C.).

135 See New Brunswick *Official Languages Act*, S.N.B. 2002, c. O-0.5.

136 R.S.C. 1985, c. 31 (4th Supp.).

137 R.S.C. 1985, c. C-46.

138 The Manitoba *Court of Appeal Language Rules*, C240 – M.R. 555/88R, provide for the translation of documents under orders of language directions, which are made by either the registrar or a judge. The rules also provide for interpreters for oral hearings.

139 [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016 (S.C.C.). The Court defined these tribunals at 1028:

> If they are statutory agencies which are adjudicative, applying legal principles to the assertion of claims under their constituent legislation, rather than settling issues on grounds of expediency or administrative policy, they are judicial bodies, however some of their procedures may differ not only from those of Courts but also from those of other adjudicative bodies.

140 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

141 See, *e.g.*, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.).

obligations imposed on federal administrative tribunals by the *Official Languages Act*,[142] it is not surprising that the issue has not been expanded upon by any court.

The more interesting issue is at the provincial level. There are more tribunals at this level, and more are being created constantly. Many of these in Quebec, Manitoba and New Brunswick would be affected by any new official language use obligations. Undoubtedly for those provinces which do not have extensive statutory schemes in place, the cost of implementing institutional judicial bilingualism may be significant.

Justice Bastarache in *Beaulac* provided guidance in this regard:

> I wish to emphasize that mere administrative inconvenience is not a relevant factor. The availability of court stenographers and court reporters, the workload of bilingual prosecutors or judges, the additional financial costs of rescheduling are not to be considered because the existence of language rights requires that the government comply with the provisions of the Act by maintaining a proper institutional infrastructure and providing services in both official languages on an equal basis. As mentioned earlier, in the context of institutional bilingualism, an application for service in the language of the official minority language group must not be treated as though there was one primary official language and a duty to accommodate with regard to the use of the other official language. The governing principle is that of the equality of both official languages.[143]

It thus seems unlikely that such obligations can be ignored by either provincial courts or administrative tribunals.

IX. Conclusion

While Bastarache J.'s bold words for the majority in *Beaulac* appear to overturn the trilogy, close analysis shows that these words, while inspiring, are unlikely to be unilaterally determinative of the interpretation of constitutional language rights. Nevertheless, the *Beaulac* decision establishes the spirit and foundation for a subsequent case to overrule

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142 R.S.C. 1985, c. 31 (4th Supp.).

143 *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 39 (S.C.C.). Despite Bastarache J.'s pronouncement on the issue, it is important to note that the issue has not been litigated and that any rights under s. 16 or s. 19 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 are subject to limitation under s. 1 of the *Charter*. See, *e.g.*, *Doucet v. Canada*, [2005] F.C.J. No. 1813, [2005] 1 F.C.R. 671 (F.C.T.D.) for a s. 1 analysis of a violation of s. 20 of the Charter.

the trilogy. This may, in turn, finally give full meaning to the judicial bilingualism provisions in the Constitution. In short, *Beaulac*'s bold opening is a welcome change in approach. The adoption of an institutional paradigm will have an impact on a variety of aspects of court proceedings and will require changes by those affected federal and provincial courts and administrative sectors. Only then will the interpretation of section 133 of the *Constitution Act, 1867*[144] and section 19 of the Charter truly fulfil their purposes of promoting and protecting minority official-language communities in Canada.

[144] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.