Michel Bastarache's Language Rights Legacy

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I. Conquest to Confederation

On a battlefield almost 250 years ago, General Wolfe faced the Marquis de Montcalm and the dream of *une Amérique française* died. *La Nouvelle-France*, even then commonly known as Canada, became a British colony and the status of the language of Molière became uncertain, threatened and the source of conflict ever since. The constitutional status of the French language today in Canada, the direction in which it is headed, and the influence the Honourable Michel Bastarache has exerted over these issues is the subject of this paper.

Although the intention of the British Empire to assimilate its newest acquisition is beyond doubt, the French fact, that is, the overwhelming majority of French-speaking inhabitants north of the American colonies, presented a significant challenge to achieving this goal. As Michel Bastarache[1] states: "The efforts to achieve religious and cultural assimilation ... were doomed to failure and, as early as 1774, the *Quebec Act* ... (largely) re-established the old French law."[2] By the time the numerical superiority of Francophones was waning, the battle lines were clearly drawn. In the midst of political agitation for responsible government in the British North American colonies, Lord Durham famously wrote:

> I expected to find a contest between a government and a people: I found two nations warring in the bosom of a single state: I found a struggle, not of principles, but of races; and I perceived that it would be idle to attempt any amelioration of laws or institutions until we could

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1 I will refer to the Hon. Michel Bastarache as "Michel Bastarache" when writing or speaking prior to his appointment to the Bench in 1995 and as "Justice Bastarache" thereafter.

2 Michel Bastarache, "Language Rights in the Supreme Court of Canada: The Perspective of Chief Justice Dickson" (1991) 20 Man. L.J. 392, at 392 [hereinafter "Bastarache, 'The Dickson Perspective'"].

> first succeed in terminating the deadly animosity that now separates the inhabitants of Lower Canada into the hostile divisions of French and English.[3]

Lord Durham's Report led to the *Union Act, 1840*, joining Lower and Upper Canada. Although Lower Canada comprised 60 per cent of the population of the united Canadas, representation in the new assembly was divided equally between the two former colonies. In addition, of the 600,000 residents of Lower Canada, 150,000 were British. Hence, Anglophones comprised the majority of the new combined electorate.[4]

Article 41 of the *Union Act, 1840* provided that all written or printed material issued by the Legislative Council or Legislative Assembly "shall be in the English language only". While the law did not prohibit translation, it expressly declared that translations were not official. Article 41 was revoked nine years later by the Imperial Parliament at Westminster following a unanimous request of the Legislative Assembly and Legislative Council.[5]

By most measures, the union of Upper and Lower Canada was a failure and did little to address either the aspirations of or the divisions between these two nations. Arguably one success was the development of political leaders, who by way of elite accommodation, could find ways to govern both polities in a manner not unacceptable to each other. Nevertheless deadlock between the Canada East and Canada West was all too common and the need for a different solution pressed; hence the move towards Confederation. What Robert Baldwin and Louis-Hippolyte LaFontaine did for the united Province of Canada, John A. Macdonald and George-Étienne Cartier did for the new Dominion of Canada.

II. Confederation to the Quiet Revolution

It is difficult to understand the divisive nature of language rights in Canada without understanding the nature of Confederation. The view that most closely accords with the text of the *Constitution Act, 1867* has

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[3] C.P. Lucas, *Lord Durham's Report on the Affairs of British North America* (1912), at 16, *per* Claude Belanger. See online: Marianopolis College, <http://www.faculty.marianopolis.edu/c.belanger/QuebecHistory/docs/durham/1.htm>.

[4] Denis Vaugeois, "A Language Without Status" in *The French Language in Quebec: 400 Years of History and Life*, Conseil superieure de la langue francaise, translated by Abigail Ratcliffe. See online: Conseil supérieure de la langue française: <http://www.cslf.gouv.qc.ca/publications/PubF156.ang/Part%20Two/chapter%203/Article%2011/All_A_Language_Without_Status.pdf>.

[5] *Id.*

it that language and culture would be governed largely at the provincial level. In other words, the French language and culture would be protected by the Legislature of Quebec. As the Supreme Court of Canada put it in the *Quebec Secession Reference*:

> The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture.[6]

Hence, exclusive provincial legislative authority exists over education, municipal institutions, property and civil rights, the establishment of courts and the administration of justice as well as matters of a local and private nature.[7] With small deference to the need to ensure a modicum of accommodation for the participation of the minority Francophone population in federal institutions, section 133 of the *Constitution Act, 1867* guarantees the right to use either French or English in the federal Parliament and federally established courts, as well as the requirement that federal statutes be published in both languages.

Even the modest guarantees under section 133 were contingent upon Quebec accepting to be subject to the same strictures in regard to its provincial assembly, courts and statutes. Although section 133 was not made applicable to any of the other original uniting provinces, it was extended to Manitoba upon its entry into Confederation.[8]

From this perspective of Confederation, the survival of the French language and culture would depend on the people and government of Quebec. Developments after Confederation intended to do away with the use of the French language in other parts of the country, notably in New Brunswick, Ontario and Manitoba, would confirm this view of Confederation to the dismay of many French-Canadians. In response, an alternative interpretation of Confederation developed which was premised on a compact between two nations (or two founding peoples): English Canada and French Canada. As put by the noted founder of *Le Devoir*, Henri Bourassa, in 1904:

> La base de la Confédération, c'est la dualité des races, la dualité des langues, garantie par l'égalité des droits. Ce pacte devrait mettre fin au

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6 *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 59 (S.C.C.).

7 *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, ss. 92(8), (13), (14), (16), 93.

8 *Manitoba Act, 1870*, 33 Vict., c. 3, s. 23.

> conflit des races et des Églises et assurer à tous, catholiques et protestants, Français et Anglais, une parfaite égalité des droits dans toute l'étendue de la Confédération canadienne.[9]

This alternative interpretation gained traction and by 1963 the Government of Canada established the Royal Commission on Bilingualism and Biculturalism with a mandate to:

> ... inquire into and report upon the existing state of bilingualism and biculturalism in Canada and to recommend what steps should be taken to develop the Canadian Confederation on the basis of an equal partnership between the two foundings races ...[10]

III. *OFFICIAL LANGUAGES ACT*, 1969

The B & B Report led to the enactment in 1969 of the *Official Languages Act* providing for a degree of official bilingualism at the federal level throughout Canada. The Act declared the equality of English and French:

> The English and French languages are the official languages of Canada for all purposes of the Parliament and Government of Canada, and possess and enjoy equality of status and equal rights and privileges as to their use in all the institutions of the Parliament and Government of Canada.[11]

The meaning of the equality of both official languages is not self-evident. For instance, the right to receive services from the federal government in the official language of choice was subject to demographic requirements. The B & B Commission sought an approach "determined by the realities of Canadian life".[12] It adopted "an approach aimed at attaining the greatest equality with the least impracticality".[13] This meant that services should be available "wherever the minority is numerous enough to be viable as a group".[14]

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9 Conseil supérieur de la langue française, *Le français au Québec, 400 ans d'histoire et de vie* (Montreal: Éditions Fides, 2008) encadré 26, at 147.

10 Hugh R. Innis, *Bilingualism and Biculturalism: An Abridged Version of the Royal Commission Report* (Ottawa: McClelland and Stewart Ltd., 1973), foreword [hereinafter "*B & B Report*"].

11 S.C. 1968-69, c. 54 (now R.S.C. 1985, c. 31 (4th Supp.)) [hereinafter "OLA"].

12 *B & B Report*, *supra*, note 10, at 20.

13 *Id.*, at 21.

14 *Id.*

IV. *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

The enactment in 1982 of the *Canadian Charter of Rights and Freedoms*[15] established a watershed in the constitutional entrenchment of language rights in Canada. Sections 16 to 22, entitled the "Official Languages of Canada" entrenches the key aspects of the OLA. In much the same language of the OLA, section 16 declares the official status and equality of French and English. Sections 17 to 19 reiterate the language rights of section 133 of the *Constitution Act, 1867* as they relate to the federal government. Section 20 entrenches the right to receive services from the federal government in the official language of choice in much the same language as the OLA.

The most noteworthy change is the absence of any express reference to Quebec in sections 16 to 22 of the Charter and the presence of special provisions under which New Brunswick subjects itself to language rights equal to and beyond those applicable to the federal government. For instance, under section 20(2), New Brunswick must provide services in both official languages without reference to demographic criteria. More significantly still, section 16.1 (added in 1993) provides that the English and French "linguistic communities" (not merely the languages) have "equality of status and equal rights" including:

> ... the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

As an influential and active minority language rights advocate with broad roots in New Brunswick, it is difficult not to see Michel Bastarache's influence in these constitutional provisions.[16] As he wrote in 1991:

> Fighting assimilation, therefore, requires a degree of linguistic institutional completeness which, I submit, can only be achieved through meaningful constitutional protection.[17]

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

[16] New Brunswick, *Vers l'égalité des langues officielles au Nouveau-Brunswick : rapport du groupe d'étude sur les langues officielles* (Fredericton : Direction des langues officielles, 1982) [hereinafter "*Poirier-Bastarache Report*"]. Michel Bastarache is described as "one of the artisans of New Brunswick's bilingual status" in The Great Names of the French-Canadian Community. See online: <http://franco.ca/edimage/grandspersonnages/en/carte_v04.html>.

[17] Bastarache, "The Dickson Perspective", *supra*, note 2, at 400.

The expression "linguistic institutional completeness" is a reference to the idea that one important factor permitting a linguistic minority to resist assimilation is the existence of a sufficient array of institutions serving the minority in its own language.[18]

Undoubtedly, the most significant change in language rights entrenched by the Charter are minority-language educational rights guaranteed under section 23, described by the Supreme Court of Canada as "the cornerstone of minority language rights protection".[19] For the first time, official language minorities are guaranteed the right to instruction in their own language, minority-language schools and minority-language school boards where warranted by their population. For Francophones outside Quebec, this entailed a huge real change on the ground as well as a constitutional change.[20]

For Francophones outside Quebec, Charter section 23 was also the righting of an egregious wrong. While, as noted above, the only constitutional protection for minority-language rights guaranteed under the *Constitution Act, 1867* is that contained in section 133, many assumed that the denominational school protection of Roman Catholic schools in section 93 implicitly guaranteed French-language separate schools. As the Commissioner of Official Languages put it:

> Section 93 enshrines the rights of Protestant and Roman Catholic minorities to denominational schools in provinces where they are already recognized, which — at a time when language is intimately associated with religious affiliation — amounts to recognition of language rights in education[21]

Michel Bastarache criticized the 1917 Privy Council decision[22] which held the contrary in relation to Ontario's 1912 Regulation 17 and prohibited instruction in the French language and noted the decision's long-term negative consequences:

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18. *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 505, at 537 (Ont. C.A.); *Gigliotti v. Conseil d'Administration du Collège des Grands Lacs*, [2005] O.J. No. 2762, at para. 48 (Ont. Div. Ct.); *Fédération Franco-ténoise v. Canada (Attorney General)*, [2006] N.W.T.J. No. 33, at para. 613 (N.W.T.S.C.).

19 *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, at para. 3 (S.C.C.).

20 The English-language minority of Quebec had always enjoyed, in practice, access to minority-language schools.

21 Canada, Office of the Commissioner of Official Languages, *Annual Report, Special Edition 35th Anniversary 1969 – 2004* (Ottawa: Minister of Public Works and Government Services Canada, 2005).

22 *Ottawa Separate Schools Trustees v. Mackell*, [1917] A.C. 62 (P.C.). See also Bastarache, "The Dickson Perspective", *supra*, note 2, at 393.

> L'intention évidente de garantir l'utilisation du français dans le domaine scolaire, dans l'article 93 de la même loi, s'est avérée un échec important. Cet échec a donné lieu à des conflits sociaux et politiques qui ont marqué profondément l'histoire politique.[23]

V. CHAMPION OF EQUALITY IN LANGUAGE RIGHTS

1. The French Language Advocate

As I am neither historian nor biographer, I am not in a position to describe Michel Bastarache's language rights legacy in terms of his actual influence over the remarkable legislative and constitutional developments that have taken place in Canada over the last few decades. Suffice it to say he has left many footprints of his active journey and was well described as "le justicier des minorités francophones".[24]

A few milestones are demonstrative.[25] He was a member of the New Brunswick Task Force on Official Languages and co-wrote the near 500-page 1982 report, *Towards the Equality of the Official Languages in New Brunswick*.[26] As a law professor and lawyer he advised governments and numerous French-language school boards as well as many agencies and organizations across Canada that promote French language rights. In several important cases he also represented such bodies before the courts adjudicating language rights.[27]

He was so well known as an advocate of French language rights that the provincial government brought a motion for recusal to prevent him from sitting on the panel of the Supreme Court of Canada's hearing of the appeal in *Arsenault-Cameron v. Prince Edward Island*. The Chief

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[23] Michel Bastarache, "L'Égalité réelle des communautés de langue officielle du Canada" (2005) 7 Rev. de la Common Law en Français, at 18 [hereinafter "Bastarache, 'L'Égalité réelle des communautés'"].

[24] Lucie Pacquet, "*L'Honorable Michel Bastarache*, R 922, Finding Aid 2156, prepared for Library and Archives Canada, online: <http://www.collectionscanada.gc.ca.>.

[25] For a comprehensive description of this journey, see *id.*

[26] *Poirier-Bastarache Report*, *supra*, note 16.

[27] *Marchand v. Simcoe Board of Education (No. 2)*, [1987] O.J. No. 949, 61 O.R. (2d) 651 (Ont. H.C.J.); *Reference re Public Schools Act (Man.)*, [1990] M.J. No. 68, 64 Man. R. (2d) 1 (Man. C.A.), revd [1993] S.C.J. No. 26, [1993] 1 S.C.R. 839 (S.C.C.); *Mahe v. Alberta*, [1985] A.J. No. 1066, 64 A.R. 35 (Alta. Q.B.), affd [1987] A.J. No. 709, 80 A.R. 161 (Alta. C.A.), affd [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342 (S.C.C.); *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.); *R. v. Mercure*, [1988] S.C.J. No. 11, [1988] 1 S.C.R. 234 (S.C.C.); *Ottawa Roman Catholic Separate School Board v. Ottawa Carleton French Language School Board*, [1989] O.J. No. 425 (Ont. H.C.J.), [1989] O.J. No. 702, 68 O.R. (2d) 635 (Ont. C.A.); *Reference re Schools Act (P.E.I.C.A.)*, [1988] P.E.I.J. No. 24, 69 Nfld. & P.E.I.R. 236 (P.E.I.S.C.A.D.).

Justice left the decision to him. He held that his recusal was not warranted. In his judgment, he relied on a decision of the Constitutional Court of South Africa that recusal could not be "founded on a relationship of advocate unless the advocacy was regarding the case to be heard". He also relied on an earlier decision of Cory J. that held:

> The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial
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> > does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. ...
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> > True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.
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> It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear.[28]

More germane to my assessment, Michel Bastarache is also the author of numerous writings on official language rights in Canada. He is the editor of the text *Language Rights in Canada*, published in French and English and now in its second edition.29 Marc Tremblay characterizes Michel Bastarache's contribution as author in the first edition as one of ardent defender of linguistic minorities and advocate for the reform of language rights in Canada.[30] Michel Bastarache has also written extensively on language rights in several books, peer reviewed journals and other publications.[31]

Michel Bastarache has identified the power dynamic between the English and French linguistic communities as the dominant social feature of Canadian society, national political life and constitutional history:

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[28] *Arsenault-Cameron v. Prince Edward Island*, [1999] S.C.J. No. 75, [1999] 3 S.C.R. 851, at para. 3 (S.C.C) (citation omitted).

[29] Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville: Éditions Yvon Blais, 2004), translation by Devinat et Associés. Michel Bastarache, ed., *Les droits linguistiques au Canada* (Montreal: Éditions Yvon Blais, 1986).

[30] Marc Tremblay, "Book Review: *Les droits linguistiques au Canada*" (2005-06) 37 Ottawa L. Rev. 339.

[31] Terry Waltenbury, "Judging the Judges: The Bastarache Record" (1997) 9:1 Constitutional Forum includes a list. See also list referred to *supra*, note 24.

> La société canadienne a été marqué par les rapports de force entre ses deux principaux groupes linguistiques plus que par tout autre fait social. Les attitudes de ces groups linguistiques ont en effet façonné la vie politique nationale depuis les débuts de la Confédération et ont joué un rôle dominant dans l'histoire constitutionnelle.[32]

The conflict between these two linguistic communities also reflected his personal experience growing up in Moncton, New Brunswick:

> It was seriously divided by language issues and marked by frequent and highly publicized incidents of language discrimination. Language communities were isolated and in constant conflict. ... Social conflicts disturbed me and I soon came to believe that language guarantees were the best means of avoiding tensions because they remove discretion from the issues which divide the community. ... This is why I was inspired to become an advocate for language rights.[33]

The central theme of his writings on language rights is the pursuit of substantive equality between the two official language communities of Canada. He describes the constitutional recognition of language rights in Canada as a necessary condition for Confederation,[34] although he acknowledges that the textual scope of the right in the *Constitution Act, 1867* reflects "a very imperfect compromise".[35] In the *Canadian Charter of Rights and Freedoms*, he finds the answer: equality. He expressly rejects the narrower interpretations of equality as freedom from discrimination, the right to reasonable accommodation or special privileges for the minority in favour of substantive equality based on the equality of the two official linguistic communities:

> L'importance de cesser de traiter les groupes linguistiques comme des minorités bénéficiant de certains privilèges et d'accepter que les communautés culturelles sont des partenaires égaux qui doivent construire ensemble l'ordre social me semble évidente.[36]

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[32] Michel Bastarache, "La consécration des langues officielles dans la *Charte canadienne des droits et libertés*", in *Bâtir une société juste*, Library and Archives Canada. See online: <http://www.lac-bac.gc.ca./droits-et-libertes/023021-1100-f.html>.

[33] Andrew Gray & Eleni Yiannakis, "Language, Culture and Interpretation: An Interview with Mr. Justice Michel Bastarache" (2000) 58 U.T. Fac. L. Rev. 73, at 79 [hereinafter "Gray & Yiannakis"].

[34] Michel Bastarache, "La Charte canadiene des droits et libertés, reflet d'un phénomè mondial?" (2007) 48 C. de D. 735, at para. 15: "Il s'agit, de fait, d'un compromis politique qui a permis de donner naissance à notre pays."

[35] In original text: "Un compromis très imparfait, marqué par l'asymétrie des droits" in *Bâtir une société juste*, Library and Archives Canada. See online: <http://www.lac-bac.gc.ca./droits-et-libertes/023021-1100-f.html>.

[36] Bastarache, "L'Égalité réelle des communautés", *supra*, note 23, at 12.

> The essence of language rights in the Canadian Constitution is, arguably, based at least in part on the need to preserve the dignity and freedom of French and English speaking people in Canada. Social, political, economic, historical facts would seem to explain only the limited scope of the language rights recognized in the Constitution.[37]

Michel Bastarache's passionate promotion of the interpretation of language rights, premised upon the equality of the two official-language communities, entailed very significant implications. The most significant was his complete rejection of Justice Beetz's incremental approach to the interpretation of language rights that attracted the support of the majority of the Supreme Court of Canada in 1986. Other implications which flowed from the first were (1) the importance of a generous interpretation designed to promote the development of official-language minorities and prevent assimilation; (2) the exercise of what he described as judicial activism to ensure that control was placed in the hands of the minority so as to protect it from what Alexis de Tocqueville famously described as the "tyranny of the majority"; and (3) the need for effective remedies.

In *Société des Acadiens du Nouveau-Brunswick v. Assn. of Parents for Fairness in Education*, Beetz J. held for the majority of the Supreme Court of Canada that litigants were not entitled to be heard by a panel of judges that understood French without the aid of interpretation.[38] The Société had argued that because one of the judges on the panel did not understand French sufficiently, this rendered illusory the right under section 19(2) of the Charter that either official language "may be used by any person" in the courts of New Brunswick. Relying on the nearly identical language of section 133 of the *Constitution Act, 1867*, Beetz J. interpreted the provisions to guarantee the right to use the language of choice rather than the right to be understood in that language unaided by interpretation.

Similarly, in the companion case of *McDonald v. Montreal (City)*, Beetz J. held for the majority that a summons issued by a court in the French language only did not infringe section 133 because anyone, including the Court, had the right to use either official language.[39] In a nutshell, the right to use either official language imposed no corresponding obligation on the state.

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[37] Bastarache, "The Dickson Perspective", *supra*, note 2, at 396.

[38] [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549 (S.C.C.) [hereinafter "*Société des Acadiens*"]; Michel Bastarache acted as counsel for School District 32, which was denied leave to intervene before the Court of Appeal in the case: [1986] N.B.J. No. 91 (N.B.C.A.).

[39] [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460 (S.C.C.).

Justice Beetz's restrictive interpretation of language rights was premised on his view that as they derived from political compromise and lacked the fundamental character as other rights, any expansion of their scope should be left to the political arena rather than to the courts. His approach cannot be divorced from the political context of the time in which the issue of minority language rights remained highly controversial and divisive. It was also well known at the time that while Ontario had refused to submit itself to a constitutionally entrenched official bilingualism despite federal pressure,[40] it had adopted an incremental progressive legislative extension of French language rights over the years[41] and Beetz J. was concerned to promote rather than impede this development:

> Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle.
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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.
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> I think it is accurate to say that s. 16 of the Charter does contain a principle of advancement or progress in the equality of status or use of the two official languages. I find it highly significant however that this principle of advancement is linked with the legislative process referred to in s. 16(3).
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> The legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise.
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[40] Henri Brun & Guy Tremblay, *Droit Constitutionnel*, 4th ed. (Cowansville: Éditions Yvon Blais, 2002), at 832 [hereinafter "Brun & Tremblay"].

[41] *Id.*, at 862. For a review of these developments see also Ontario, Office of Francophone Affairs online: <http://www.ofa.gov.on.ca/en/flsa-history.html>.

> It is public knowledge that some provinces other than New Brunswick — and apart from Quebec and Manitoba — were expected ultimately to opt into the constitutional scheme or part of the constitutional scheme prescribed by ss. 16 to 22 of the Charter, and a flexible form of constitutional amendment was provided to achieve such an advancement of language rights. But again, this is a form of advancement brought about through a political process, not a judicial one.
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> If however the provinces were told that the scheme provided by ss. 16 to 22 of the Charter was inherently dynamic and progressive, apart from legislation and constitutional amendment, and that the speed of progress of this scheme was to be controlled mainly by the courts, they would have no means to know with relative precision what it was that they were opting into. This would certainly increase their hesitation in so doing and would run contrary to the principle of advancement contained in s. 16(3).
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> In my opinion, s. 16 of the Charter confirms the rule that the courts should exercise restraint in their interpretation of language rights provisions.[42]

Michel Bastarache characterized these decisions as a "shocking reversal" of the Court's earlier jurisprudence which had held that the purpose of the linguistic guarantees of the Constitution "was to ensure the full and equal access to the legislatures, the laws and the courts for Francophones and Anglophones alike".[43] For him, all constitutional rights reflect political compromise in the drafting details, language rights are fundamental in the sense that Confederation itself involved a fundamental bargain between French and English Canada and, more importantly, the Charter was intended to move the yardsticks and "correct present inequalities".[44] In particular, although Charter subsection 16(3) expressly declares that nothing limits the authority of governments "to advance the equality of status or use of English and French" (Beetz J.'s idea of legislative advancement by some provinces), some effect (more than the expression of "a pious wish")[45] must be given to subsection 16(1) that declares English and French to be "the official

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[42] *Société des Acadiens*, *supra*, note 38, at paras. 63-71.

[43] Bastarache, "The Dickson Perspective", *supra*, note 2, at 395, quoting from Dickson C.J.C. in *Reference re Language Rights under section 23 of the Manitoba Act 1870 and s. 133 of the Constitution Act, 1867*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.).

[44] Bastarache, "The Dickson Perspective", *id.*, at 400-401.

[45] Michel Bastarache, "The Principle of Equality of the Official Languages", c. 8 in Bastarache, ed., *Language Rights in Canada* (Montreal: Éditions Yvon Blais, 1986) translated by Devinat et Associés, at 504 [hereinafter "Bastarache, 'The Principle of Equality'"].

languages of Canada" with "equality of status and equal rights" in their use in federal institutions:

> In refusing to look at the clear meaning of section 16(1), the Court transformed section 16 in its entirety into a principle of *progression* towards equality rather than accepting that it formed the fixed basis for a constitutional right.

Looking at language rights through an equality rights lens is the central recurrent theme of Michel Bastarache's analysis over the decades of his interest in this topic. This is not an obvious approach despite the presence of the word "equal" in the constitutional text, given the significant demographic qualifications on the rights even apart from the considerations articulated by Beetz J.[46] As the Supreme Court of Canada put it in *Mahe*:

> A notion of equality between Canada's official language groups is obviously present in s. 23. Beyond this, however, the section is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada.[47]

Rather than viewing the language guarantees of the Constitution as an exception to equality, Michel Bastarache views them as the fulfilment of equality in the specific Canadian context. Although he concludes that section 15 of the Charter adds very little to the advancement of language rights,[48] it is on grounds that it is superfluous as it "is not necessary in order to establish and justify the principle of equality of the official languages".[49]

Using an equality paradigm is more than semantics. For Michel Bastarache, language rights are a subset of minority rights that give rise to an entitlement to substantive equality beyond freedom from discrimination; language rights entail significant positive obligations beyond mere provision of services in the minority language. As he explains it, language rights are not primarily about providing services to individuals in the minority language. Rather they are intended to promote

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[46] While Charter s. 16(1) recognizes equality of English and French, s. 20 limits the right to communication and services in the minority language only where demographics warrant.

[47] *Mahe v. Alberta*, *supra*, note 27, at 369 (S.C.C.); Michel Bastarache represented l'Association canadienne-française de l'Alberta (his role in this case was described as having "attracted the greatest admiration" in The Great Names of the French-Canadian Community: see online: <http://franco.ca/edimage/grandspersonnages/en/carte_v04.html>.

[48] Bastarache, "The Principle of Equality", *supra*, note 45, at 519, where he states that he favours the view that discrimination on the grounds of language would be an analogous ground.

[49] *Id.*

cultural security and "encourage the flourishing of official language groups".[50]

> ... les régimes linguistiques ... visent ... la reconnaissance de communautés linguistiques et l'aménagement de régimes leur permettant de se développer en harmonie avec la majorité.[51]

In the context of the French-language minority community outside Quebec, substantive equality with the majority requires positive state action to fight the inevitable forces of assimilation faced as members of the minority seek to obtain the benefits of participating fully in public affairs at the cost of their linguistic and cultural identity:[52]

> Assimilation is both linguistic and cultural. It is a process under which the minority will lose control of its language and fundamental cultural values and substitute for these those of the dominant linguistic group. Fighting assimilation, therefore, requires a degree of linguistic institutional completeness which, I submit, can only be achieved through meaningful constitutional protection.[53]

In other words, "language rights can only be fully realized through the development of infrastructures essential to the survival of a language minority as a collectivity".[54]

While Beetz J.'s response to the controversial nature of language rights in Canada was the adoption of a posture of restraint, Michel Bastarache offers the opposite response: judicial activism. Consistent with his view of language rights as a minority equality rights issue, he argues that the official language minority cannot be left to majority rule:

> To hand over any meaningful progression *to the legislatures* is to refuse to recognize that demographic realities make it impossible for official language minorities to exercise the type of political influence that is necessary to achieve this.[55]

In support, he cites the decisions of the Alberta and Saskatchewan governments to revoke the application of a provision equivalent to section 133 which the Supreme Court of Canada decided in 1988 applied

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[50] Michel Bastarache, "Introduction", c. 1 in Bastarache, ed., *Language Rights in Canada*, 2d ed., *supra*, note 29, at 5-6.

[51] Bastarache, "L'Égalité réelle des communautés", *supra*, note 23, at 18.

[52] *Id.*, at 17.

[53] Bastarache, "The Dickson Perspective", *supra*, note 2, at 400.

[54] Bastarache, "The Principle of Equality", *supra*, note 45, at 523. See also Bastarache, "L'Égalité réelle des communautés", *supra*, note 23, at 17.

[55] Bastarache, "The Dickson Perspective", *supra*, note 2, at 402.

to them since their entry into Confederation.[56] In his view, where governments fail to act, the courts must:

> Possibly the most difficult task will involve balancing the need for greater judicial intervention in these matters against the need to respect the role of legislatures. ... The role of the courts must change in line with changing needs.[57]

> It is also obvious that a great many legislatures are now turning to the courts to avoid taking on their true responsibilities. ... Regrettable as that may be in political theory, it is happening and, therefore, requires a strong principled approach by the courts.[58]

> To refuse any form of judicial activism in the area of language rights is to repeat the errors of the beginning of the century in the interpretation of section 93 of the *Constitution Act, 1867* [denying any linguistic protection within the denominational school right guarantee].[59]

2. Justice of the Supreme Court of Canada

The Honourable Michel Bastarache was appointed to the Supreme Court of Canada on September 30, 1997, two years after his appointment to the New Brunswick Court of Appeal. He served on Canada's highest Court for a little over a decade until his retirement on June 30, 2008. It is fair to say that he remained a champion of French language rights while on the Bench.

(a) The New Trilogy

Prior to his appointment, Michel Bastarache had vigorously criticized Beetz J.'s interpretative approach to language rights articulated in *Société des Acadiens*,[60] *McDonald v. Montreal (City)*[61] and *Bilodeau v. Manitoba*.[62] He wrote that these decisions "created a great deal of anguish for official

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[56] *Id.*; *R. v. Mercure*, *supra*, note 27 (Michel Bastarache acted for the appellant and principal parties: The Fédération des francophones hors Québec, the Association canadienne-française de l'Alberta and the Association culturelle franco-canadienne de la Saskatchewan).

[57] Bastarache, "The Principle of Equality", *supra*, note 45, at 524.

[58] Bastarache, "The Dickson Perspective", *supra*, note 2, at 402.

[59] *Id.*, at 401.

[60] *Supra*, note 38.

[61] *Supra*, note 39.

[62] [1986] S.C.J. No. 27, [1986] 1 S.C.R. 449 (S.C.C.), following *McDonald v. Montreal (City)*, *id.*, that Manitoba summonses may be issued in either official language.

language minorities in Canada".[63] Within three years of his appointment to the Supreme Court, Justice Bastarache was able to overturn this trilogy and replace it with his own:

> Over a dozen years later, however, a new trilogy would revive language rights in Canada. The three cases to be noted are the *Secession Reference*, *R. v. Beaulac*, and *Arsenault-Cameron*.[64]

(i) *Quebec Secession Reference*

Within his first year at the Supreme Court, the Court issued its remarkable opinion in *Reference re Secession of Quebec*[65] which, coupled with its earlier opinion on judicial independence the preceding year,[66] suggested that legislation could be struck down despite compliance with the provisions of the Constitution where there was non-compliance with unknown principles that could be said to underlie the Constitution.[67] The decision, while viewed as politically astute, gave rise to serious concerns on the legitimacy of judicial review:

> ... there is reason to believe that it is the *Québec Secession Reference* rather than the *Provincial Court Judges Cases* that poses the greater challenge to the legitimacy of judicial review in Canada. ... it also suggests that the reasoning process to be used by the courts in the filling of "gaps" can be such as to leave the courts with a relatively free hand to devise such rules as in their view best reflect the underlying or organizing principles of the Constitution.[68]

Among the underlying principles that may "give rise to substantive legal obligations",[69] of particular significance to language rights is the principle of the protection of minorities. That principle was derived from the constitutional guarantees at Confederation respecting denominational schools, language rights and regional representation in the Senate, as well as from the more recently entrenched rights found in the

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[63] Bastarache, "The Dickson Perspective", *supra*, note 2, at 402.

[64] Michel Bastarache, "Introduction", c. 1 in Bastarache, ed., *Language Rights in Canada*, *supra*, note 29, at 27.

[65] [1998] 2 S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

[66] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.).

[67] This notion has been severely cut back in later cases; see for instance *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.J. No. 50, [2005] 2 S.C.R. 473, at paras. 57-68 (S.C.C.).

[68] Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can. Bar Rev. 97 [hereinafter "Elliot, 'Organizing Principles'"].

[69] *Reference re Secession of Quebec*, *supra*, note 65, at para. 54.

Constitution Act, 1982 (the Charter as well as Aboriginal and treaty rights).[70] Professor Elliot has articulated a distinction between principles "that arise by necessary implication from the text of the Constitution and principles that merely serve to explain the presence of textual provisions".[71] He characterizes the minority rights principle as one that is merely explanatory of the text, that is, explains why we have the text without implying more:

> No attempt is made in the *Québec Secession Reference* to define the precise nature and scope of the protection that is to be afforded to minority rights by this principle above and beyond that afforded by the specific provisions of the Constitution upon which the principle is said to be based.[72]

Writing extrajudicially, Justice Bastarache referred to the *Secession Reference* for the proposition that the respect for minorities is a fundamental value of our federation and that: "Le respect de la diversité linguistique et culturelle est donc au centre de nos préoccupations comme nation."[73] In its later decision interpreting the scope of the criteria to be a rights holder within the meaning of Charter section 23, the anonymous court opinion relies on the *Secession Reference* for the conclusion that:

> ... the presence of two distinct language communities in Canada and the desire to reserve an important place for them in Canadian life constitute one of the foundations of the federal system that was created in 1867. ...[74]

(ii) *R. v. Beaulac*

One year after the *Secession Reference*, Bastarache J. wrote the majority opinion in *R. v. Beaulac*,[75] undoubtedly a *tour de force* that marks a new watershed in the interpretation of language rights in Canada. More than any other case, *Beaulac* epitomizes Bastarache J.'s language rights legacy. As he states himself in the foreword to the second

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70 *Id.*, at paras. 79-82.
71 Elliot, "Organizing Principles", *supra*, note 68, at 98.
72 *Id.*, at 117.
73 Bastarache, "L'Égalité réelle des communautés", *supra*, note 23, at 11.
74 *Solski (Tutor of) v. Quebec (Attorney General)*, *supra*, note 19, at para. 6.
75 [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.).

edition of his text: "It is perhaps impossible to overstate the impact of *R. v. Beaulac*."[76]

At issue, was the question of whether the accused was entitled under section 530 of the *Criminal Code*[77] to a trial before a bilingual judge and jury. While subsection 530(1) grants the accused an absolute right in this regard, subsection 530(4) makes an exception if the application has not been made in a timely way and a refusal would satisfy "the best interests of justice". While the Court was unanimous in its interpretation of section 530, the significance of the case lies in Bastarache J.'s *obiter dicta*.

While Lamer C.J.C. and Binnie J. agreed with Bastarache J. in concurring reasons that language rights are to be interpreted purposively, they took issue with Bastarache J.'s reversal of Beetz J.'s language rights legacy. They reiterated Beetz J.'s concerns that a large and liberal interpretation would discourage the incremental and progressive legislative expansion of language rights through the political process:

> A re-assessment of the Court's approach to *Charter* language rights developed in *Société des Acadiens* and reiterated in subsequent cases is not necessary or desirable in this appeal which can and should be resolved according to the ordinary principles of statutory interpretation ...[78]

The demolition of Beetz J.'s approach to the interpretation of language rights could not be more complete. Taking up the arguments he had raised in his legal writings many years earlier criticizing Beetz J.'s approach, Bastarache J. turns the jurisprudence around 180 degrees:

> Language rights must *in all cases* be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada. ... To the extent that *Société des Acadiens* ... stands for a restrictive interpretation of language rights, it is to be rejected.[79]

With respect to Beetz J.'s view that language rights should be interpreted with restraint because they are less fundamental than other rights and based on political compromise, Bastarache J. concludes the opposite: language rights are fundamental and in any event all rights are based on political compromise and so "the existence of a political

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[76] Michel Bastarache, "Foreword" in Bastarache, ed., *Language Rights in Canada*, 2d ed., *supra*, note 29, at x.

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

[78] *Supra*, note 75, at para. 5, *per* Lamer C.J.C., Binnie J.

[79] *Id.*, at para. 25, *per* Bastarache J. (emphasis in original).

compromise is without consequence with regard to the scope of language rights".[80]

The official language provisions of the Charter lack a harmonious internal consistency. While subsection 16(1) declares that English and French have "equality of status and equal rights and privileges as to their use" in all federal institutions, subsection 16(3) provides that nothing limits the authority of the federal or provincial governments to "advance the equality of status or use of English and French". The right to advance the equality of status or use of the official languages in the federal domain, suggests that section 16(1) is not as effective as it might seem. Similarly, the express limits on the scope of each of the rights contained in sections 17, 18, 19 and 20 of the Charter also belie the full equality of both official languages even at the federal level.

In light of this context, Beetz J. concluded that the progressive legislative advancement of language rights promoted under subsection 16(3) should inform and *limit* the concept of the equality of official languages contained in subsection 16(1). Justice Bastarache categorically concludes that this "idea ... must also be rejected".[81] For Bastarache J., the reconciliation lies in the recognition that while language rights may be circumscribed by the very text of the Charter that guarantees the right, whatever is expressed in the text should be interpreted broadly in light of substantive equality between the two official languages:

> The principle of advancement does not however exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada. ... Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning.
>
> .....
>
> This subsection [16(1)] affirms the substantive equality of those constitutional language rights that are in existence at a given time.[82]

Finally, Bastarache J. dismisses as irrelevant Beetz J.'s concern that a more generous interpretation of language rights would discourage provinces from a progressive legislative expansion of language rights:

> The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension

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80 *Id.*, at para. 24.

81 *Id.*

82 *Id.*, at paras. 22 and 24.

> of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply.[83]

In a nutshell, *Beaulac* reverses the restrained interpretative approach articulated in *Société des Acadiens*, and imposes a liberal and generous rule of construction that requires substantive equality as the new norm subject only to the requirement that the existence of a right first be established. In the context of judicial bilingualism, the default is the right to access, and the state must establish the appropriate infrastructure necessary to permit the full exercise of the right:

> Where 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.[84]

> It also means that the exercise of language rights must not be considered exceptional [i.e. "it is the norm"[85]], or as something in the nature of a request for accommodation.[86]

> Therefore, it is the denial of the application [for a bilingual judge and jury] that is exceptional and that needs to be justified. The burden of this demonstration should fall on the Crown.[87]

> 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.[88]

(iii) *Arsenault-Cameron*

Less than a year after *Beaulac*, the Court decided its third case with significant ramifications for minority language rights. The Court's

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83 *Id.*, at para. 25.
84 *Id.*, at para. 22.
85 *Id.*, at para. 40.
86 *Id.*, at para. 24.
87 *Id.*, at para 42.
88 *Id.*, at para. 39.

opinion in *Arsenault-Cameron v. Prince Edward Island*[89] was written by Major and Bastarache JJ. The case involved a challenge to the Minister of Education's refusal to approve the establishment of a school facility in Summerside, P.E.I. on the grounds that the student population was too small and that it was preferable for such students to travel to a pre-existing French language school located in another community 28 km away. The Minister had decided that a school facility with fewer than 100 students was not pedagogically viable and that bus transportation to the facility in the nearby community was reasonable by provincial standards. The French-language school board disagreed and so did the Supreme Court of Canada.

Section 23 of the Charter guarantees minority-language instruction where numbers warrant and instruction in minority-language educational facilities where numbers warrant. In this case, there was no disagreement that the number of potential students (held to be between 49 and 155) warranted French-language instruction. The issue was whether these numbers warranted instruction in a facility in Summerside rather than in the existing facility 28 km away.

The Court held that the Minister erred in looking at the matter from his perspective or that of the majority and not from the perspective of the minority. From the perspective of the minority, the potential student population was pedagogically viable and the alternative of bus transportation meant in practice that parents would rather keep their children in English-language facilities (including French immersion) at home than subject them to a long bus ride.

Relying on equality rights concepts, the Court emphasized the need for substantive rather than formal equality, which means equality sometimes requires different treatment rather than like treatment. In particular, the objective standards of the majority cannot merely be transplanted onto the needs of the minority:

> Section 23 is premised on the fact that substantive equality requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language minority.
>
> . . . . .

[89] [2000] S.C.J. No. 1, [2000] 1 S.C.R. 3 (S.C.C.) (this was also the case in which P.E.I. unsuccessfully moved to have Bastarache J. recuse himself on grounds of his earlier advocacy for minority language rights).

> The pedagogical requirements established to address the needs of the majority language students cannot be used to trump cultural and linguistic concerns appropriate for the minority language students.[90]

As the Court had previously held in *Mahe*, "the majority cannot be expected to understand and appreciate ... [the needs] of the minority".[91] In this case, the Court concluded that there was a reasonable difference of opinion as to the pedagogical needs of the students. In that event, the Court held that "it is up to the board, as it represents the minority official language community, to decide what is more appropriate from a cultural and linguistic perspective".[92]

The Court held that the location of the school facility is an issue that "pertains to the preservation and flourishing of the linguistic community".[93] This conclusion was supported by the fact that, unlike majority-language students, French-language students in P.E.I. had a practical choice between attending a French-language school or an English-language school if the prospect of bus transportation was unacceptable. Most critically, in the Court's opinion:

> ... the choice of travel would have an impact on the assimilation of the minority language children while travel arrangements had no cultural impact on majority language children.[94]

Unlike most Charter rights which typically do not impose a positive obligation on the state,[95] language rights typically do. Section 23 of the Charter, in particular, imposes significant obligations on the provinces to ensure access to minority-language education. The decision in *Arsenault-Cameron* builds upon the Court's earlier decisions on section 23, and places the emphasis on substantive equality and the state's positive obligation to actively resist the natural forces of assimilation:

> In *Mahe* ... this Court affirmed that language rights cannot be separated from a concern for the culture associated with the language and that s. 23 was designed to correct, on a national scale, the historically progressive erosion of official language groups and to give effect to the equal partnership of the two official language groups in education ... Section 23 therefore mandates that provincial governments do whatever

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90 *Id.*, at paras. 31 and 38.

91 *Id.*, at para. 43, quoting *Mahe v. Alberta*, *supra*, note 27, at 372 (S.C.C.).

92 *Id.*, at para. 43.

93 *Id.*, at para. 47.

94 *Id.*, at para. 50.

95 *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 (S.C.C.); *Baier v. Alberta*, [2007] S.C.J. No. 31, [2007] 2 S.C.R. 673 (S.C.C.).

> is practically possible to preserve and promote minority language education.[96]

(iv) Criteria to Access Minority Language Rights

As noted above, both the right to minority-language education and the right to French-language services from the federal government depend in part on demographic demand. Writing extra-judicially, Justice Bastarache argues that while it is natural to consider a cost-benefit analysis of the extension of minority language rights, it ignores the more fundamental value that linguistic and cultural security are too important to be left in the hands of the majority:

> Lorsque l'on est trop tenté de mesurer l'étendue des droits en fonction du nombre de locuteurs qui les réclament, on s'éloigne en même temps des notions de droits collectifs et de sécurité linguistique. On revient nécessairement à une notion d'intérêt supérieure de la majorité et d'évaluation des droits selon une analyse coût-bénéfice. ... La question fondamentale dans notre société est celle de savoir si la sécurité linguistique des différents groupes de langues officielles est une valeur suffisamment importante, dons la reconnaissance est justifiée, pour que l'on impose des devoirs à tous les autres groupes et que l'on élimine le recours à la supériorité numérique et à la domination politique en matière de langue.[97]

He has also said that the enactment of statutory and constitutional language rights reduces discretionary decision-making and serves the public interest by removing these issues from the political arena where they serve to divide the community.[98] Justice Bastarache also argues against giving too much import to demographics on the basis of the Court's recognition of the underlying constitutional principle of the protection of minorities in the *Secession Reference*:

> This statement means that minority rights are not subject to re-evaluation according to changes in demography, nor are they subject to a restrictive interpretation because of new political realities.[99]

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96 *Supra*, note 89, at para. 26.

97 Bastarache, "L'Égalité réelle des communautés", *supra*, note 23, at 16-17.

98 Gray & Yiannakis, *supra*, note 33, at 79.

99 Bastarache, "Introduction", c. 1 in Bastarache, ed., *Language Rights in Canada*, *supra*, note 29, at 29-30.

In *Solski v. Quebec*,[100] the Supreme Court of Canada held that Charter section 23(2) guarantees that where a child has received a "significant part" of his or her education in a minority-language school, that child and his or her siblings have a right to continue to attend minority-language schools. The Court read down the legislative provision of Quebec's education law that limited the right to circumstances where the child had received a "major part" of his or her education in that system.

The anonymous opinion of the Court acknowledges that the interpretation of language rights must take into account the different context of the Anglophone minority in Quebec (*e.g.*, that they are part of the broader majority of Canada and face less risk of assimilation).[101] This implies that the scope for other provinces imposing limits on the criteria for admission to minority-language schools is likely smaller. However, even in Quebec, where more rigid criteria may be imposed in order to promote the French-language majority, limits must reflect the individual right component (beyond the collective right component) that recognizes the sense of belonging to a particular linguistic community.

(b) Meaningful Remedies

Traditionally, courts issue orders and declarations and parties, including governments, obey them. In *Mahe*, Dickson C.J.C. recognized that governments should be accorded considerable discretion in how they meet their minority-language educational right obligations.[102] In *Doucet-Boudreau v. Nova Scotia*,[103] Bastarache J. joined with the majority opinion written by Iacobucci and Arbour JJ. which held that in unusual circumstances, courts could depart dramatically from the traditional approach to remedies. At issue was whether a judge could or should order the government to build schools within certain deadlines, report back on the progress of construction and retain jurisdiction over the case until the judge was satisfied of compliance. Under the unusual circumstances of the case, the majority upheld the judge's "supervisory order" as a reasonable exercise of his authority to provide a responsive and effective remedy.

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100 *Solski (Tutor of) v. Quebec (Attorney General)*, *supra*, note 19.

101 *Id.*, at paras. 5, 21, 34.

102 *Mahe v. Alberta*, *supra*, note 27.

103 [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3 (S.C.C.).

The Court was unimpressed by the recurrent delays in the fulfilment of section 23 rights. The case had been commenced in 1998, some 16 years following the enactment of the Charter and several years following considerable parental pressure to construct schools. Even after the commencement of legal proceedings, an official moratorium on construction was imposed in 1999 pending further review. The majority emphasized the remedial nature of section 23, including the goal of "halting the progressive erosion of minority official language cultures" as well as "actively promoting their flourishing".[104] The Court noted in particular, the critical risks that delay posed to the survival of the Francophone minority:

> Another distinctive feature of the right in s. 23 is that the "numbers warrant" requirement leaves minority language education rights particularly vulnerable to government delay or inaction. For every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation which carries the risk that numbers might cease to "warrant".[105]

In this regard, the Court relied on lower court judgments, including one argued by then counsel Michel Bastarache, providing for affirmative remedies to ensure prompt remedial action by the government:

> The affirmative promise contained in s. 23 of the *Charter* and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected.[106]

In light of the majority's finding of recurring delays in the province fulfilling its constitutional obligations and the irreparable harm suffered by the minority language community, the Court upheld what it described as an original and novel order as an appropriate and just remedy within the meaning of section 24 of the Charter.

(c) Discrimination on Grounds of Language

Section 15 of the Charter guarantees the equal benefit of the law without discrimination on enumerated and analogous grounds. While national and ethnic origin are enumerated grounds, language is not. In

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104 *Id.*, at para. 27.
105 *Id.*, at para. 29.
106 *Id.*, citing *Marchand v. Simcoe County Board of Eduation (No. 2)*, *supra*, note 27.

the first edition of his language rights text, Michel Bastarache argued that language should constitute an analogous ground in light of the "parallel between language and 'national or ethnic origin'" as well as its inclusion in various international instruments.[107]

It is important to note that Michel Bastarache's argument that language constitutes an analogous ground must still be understood and limited by the context of other constitutional provisions guaranteeing official language rights. Similarly, the notion of discrimination itself contains internal qualifiers that account for practical realities. As Michel Bastarache pointed out in his text, non-discrimination clauses are intended to protect individual rights rather than collective interests and so quite rightly do not prevent the provision of state-funded education in one language only in part of the state's territory.[108] As noted by others, equality rights cannot require the state to respond to the language proficiencies of every resident without absurd results.[109] As the Ontario Court of Appeal put it: "All government documents will inevitably be unreadable by some group of persons. It would be trivializing s. 15 to declare them all discriminatory ..."[110] Since the Quebec *Charter of Human Rights and Freedoms*[111] expressly enumerates language as a prohibited ground of discrimination, it has been interpreted by the Supreme Court of Canada to prohibit unreasonable state prohibitions on the use of the English language[112] as well as to permit reasonable state-imposed requirements to promote the use of the French language.[113]

These issues were addressed in *obiter* by the Supreme Court of Canada in *Gosselin (Tutor of) v. Quebec (Attorney General).*[114] The claimants were members of the Francophone majority in Quebec who sought access to publicly funded English-language schools contrary to

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[107] Michel Bastarache, "The Principle of Equality", *supra*, note 45, at 507-508. Brun & Tremblay, *supra*, note 40, make the same argument at 855. See also José Woehrling & André Tremblay, "Les dispositions de la Charte relatives aux langues officielles" [hereinafter Woehrling & Tremblay"] in Gérald-A. Beaudoin & Errol Mendes, *Canadian Charter of Right and Freedoms*, 4th ed. (Markham, ON: LexisNexis Canada, 2005), at 1046.

[108] Bastarache, "The Principle of Equality", *supra*, note 45, at 506.

[109] Woehrling & Tremblay, *supra*, note 107, at 1040.

[110] *R. v. Crete*, [1993] O.J. No. 1525, at para. 1 (Ont. C.A.).

[111] R.S.Q., c. C-12.

[112] *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at para. 82 (S.C.C.).

[113] *Devine v. Quebec (Attorney General)*, [1988] S.C.J. No. 89, [1988] 2 S.C.R. 790, at para. 30 (S.C.C.); *Forget v. Quebec (Attorney General)*, [1988] S.C.J. No. 68, [1988] 2 S.C.R. 90, at paras. 24-27 (S.C.C.).

[114] [2005] S.C.J. No. 15, [2005] 1 S.C.R. 238 (S.C.C.).

the Quebec *Charter of the French Language.*[115] Quebec education legislation, mirroring in this regard the minority-language educational rights guarantee of section 23 of the Charter, prohibited their access for they were not members of the Anglophone minority holding section 23 rights. The claims were easily rejected on principles long accepted that one part of the Constitution cannot be used to negate another part.[116] Since the purpose of the impugned education provisions was to implement the province's constitutional obligation under Charter section 23 to the Anglophone minority, the exclusion of Francophones could not be discriminatory under Charter section 15.[117]

Of interest is that the Court went out of its way to comment on the relationship between official language rights and equality rights. In its anonymous opinion, the Court ignored lower court case law concluding that language is not an analogous ground under Charter section 15 and expressly agreed with the observations of the Saskatchewan Court of Appeal that held it might be included:

> Nor, in our view, does the presence in the Charter of the language provisions of ss. 16 to 20, or the deletion from an earlier draft of s. 15(1) of the word "language", have the effect necessarily of excluding from the reach of s. 15 the form of distinction at issue in this case.[118]

What is all the more unusual about this reference is that it arose in the context of the failure to proclaim into force in Saskatchewan the right to be tried by a bilingual judge and jury while the right had been proclaimed into force in some other provinces. The Court of Appeal held that a Francophone in Saskatchewan was the subject of discrimination relative to Francophones in provinces like Ontario and Manitoba where the provision was in force. This appears to be an attempt by the Court to leave the door ajar to the inclusion of language as an analogous ground:

> In *Québec (Procureure générale) v. Entreprises W.F.H. Ltée*, [2000] R.J.Q. 1222, at p. 1250, the Quebec Superior Court held that [translation] "maternal language" was an analogous ground. *It is not necessary to explore this point further on this appeal* because the principal issue is not the content of the equality rights under the *Canadian Charter* but,

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115 R.S.Q., c. C-11.

116 *Supra*, note 114, at para. 14, noting that federal power over Indians necessarily means race-based legislation is not inherently discriminatory and that denominational school rights do not *per se* infringe freedom of religion of excluded religious groups.

117 *Id.*, at para. 16.

118 *Id.*, at para. 12, quoting *Reference re Use of French in Criminal Proceedings in Saskatchewan*, [1987] S.J. No. 490, 36 C.C.C. (3d) 353, at 373 (Sask. C.A.).

> assuming the appellants have an arguable case to bring themselves within s. 15(1) of the *Canadian Charter*, the issue at the root of this appeal is the relationship of equality rights in both the *Canadian Charter* and the *Quebec Charter* to the positive language guarantees given to minorities under the Constitution of Canada and the *Charter of the French language*.[119]

The case is also suggestive of the hand of Bastarache J. While noting that official language rights may be viewed as exceptions to equality insofar that the official language minority is granted special rights granted to no others,[120] it offers the opposite view as an alternative:

> As noted earlier, s. 23 could also be viewed not as an "exception" to equality guarantees but as their fulfilment in the case of linguistic minorities to make available an education according to their particular circumstances and needs equivalent to the education provided to the majority (*Arsenault-Cameron*, at para. 31).[121]

This is a return to the recurrent theme of Justice Bastarache that official language rights are in effect a kind of equality between the two founding peoples. In fact, in the first edition of his text, he cites Professor Gold's argument that the interpretation of analogous grounds under section 15 of the Charter should take into account grounds that are fundamental in the Canadian context including "the concept of two founding nations".[122]

(d) New Brunswick Institutions

Despite his near-universal success in persuading his colleagues on the Supreme Court of Canada to his view of language rights, the notable exception is the Court's 5-4 decision in *Charlebois v. St. John (City)*.[123] The majority held that a municipality is not an "institution" within the meaning of New Brunswick's *Official Languages Act*[124] for the purpose

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[119] *Gosselin*, *supra*, note 114, at para. 12 (emphasis added).

[120] This was the view expressed by Dickson C.J.C. in *Mahe v. Alberta*, *supra*, note 27, at 369: "[s. 23] is, if anything, an exception to the provisions of ss. 15 and 27", quoted in *Gosselin*, *supra*, note 114, at para. 21.

[121] *Gosselin*, *id.*, at para. 21; similarly in *Solski*, *supra*, note 19, at para. 20, the anonymous Court opinion describes minority language educational rights as follows: "it is rather an example of the means to achieve substantive equality in the specific context of minority language communities."

[122] Bastarache, "The Principle of Equality", *supra*, note 45, at 510.

[123] [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563 (S.C.C.) [hereinafter "*Charlebois*"].

[124] *Official Languages Act*, S.N.B. 2002, c. O-0.5.

of the statutory requirement that the institution plead in civil proceeding in the language of choice of the private litigant.[125]

Writing for the majority, Charron J. held that the inclusion of a municipality within the meaning of the word "institution" would render the statutory scheme incoherent. While the definition of the word "institution" could include a municipality under the expression "other body ... established to perform a governmental function by or pursuant to an Act of the Legislature", other provisions made this unlikely. The word "municipality" was defined separately from the word "institution" and specific language obligations were expressly imposed upon municipalities that would have been superfluous had the word "institution" included municipalities.

Justice Bastarache dissented on the ground that a court "must not adopt a restrictive interpretation" unless the legislative text is incapable of a broader interpretation:

> This approach is not new. It is now a template for the interpretation of language rights, specially, as just demonstrated, where there is apparent conflict and ambiguity. Under it, the first step is not to read down the protections to eliminate inconsistencies, but to make sense of the overall regime in light of the constitutional imperative of approaching language rights purposefully, with a view to advancing the principles of equality and protection of minorities. Institutional bilingualism is achieved when rights are granted to the public and corresponding obligations are imposed on institutions (see *Beaulac*, at paras. 20-22).[126]

Justice Charron disagreed for the majority, holding that absent true ambiguity in the legislative text, a broader interpretation for the sake of expanding language rights not within the intention of the Legislature constituted one step too far:

> In my respectful view, the approach ... adopted by Bastarache J., exceeds the scope of this Court's decision in *R.* v. *Beaulac*. ... 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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125 *Supra*, note 123.

126 *Id.*, at para. 36.

proper limits of Charter values as an interpretative tool. In *Bell ExpressVu Limited Partnership* v. *Rex*... 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 ... as a reasonable limit. ... In this respect, Daigle J.A. properly instructed himself and rightly found ... 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.[127]

This decision raises some doubt as to the correctness of the New Brunswick Court of Appeal's earlier decision that section 18(2) of the Charter requires municipalities to enact its by-laws in both official languages.[128] In *Quebec (Attorney General) v. Blaikie (No. 2)*,[129] the Supreme Court of Canada had held that while section 133 required the provincial government to enact delegated legislation in both languages this did not apply to municipalities. In *Charlebois*, Charron J. was content to "express no opinion on whether this interpretation is correct".[130] In the second edition of his text, Justice Bastarache described the earlier Court of Appeal decision as a "superb recent example" of the new contextual interpretation which "focussed chiefly on the present impact upon the official language minority community of the possible outcomes".[131]

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127 *Id.*, at paras. 23-24.

128 *Charlebois v. Moncton (City)*, [2001] N.B.J. No. 480, 242 N.B.R. (2d) 259 (N.B.C.A.).

129 [1981] S.C.J. No. 30, [1981] 1 S.C.R. 312 (S.C.C.).

130 *Charlebois*, *supra*, note 123, at para. 15.

131 Bastarache, "Introduction", c. 1 in Bastarache, ed., *Language Rights in Canada*, *supra*, note 29, at 32.

VI. CONCLUSION

Had then Prime Minister Jean Chrétien asked about Michel Bastarache prior to making his decision to appoint him to the Supreme Court of Canada (if not to the New Brunswick Court of Appeal two years earlier), he would likely have been told that, in the words of the *Telegraph Journal*, he was "an ardent champion of language and minority rights".[132] Upon his appointment, Senator Simard paid tribute to him "for his boundless devotion to the Acadian community and to francophone minorities all across Canada".[133] In the House, in response to the Bloc Québécois complaint that the appointment was inappropriate given that Michel Bastarache had been co-chair of the national committee for the "yes" side in the Charlottetown Referendum, the Prime Minister responded: "if there is someone who has fought for the French fact before every court in Canada, it is Justice Bastarache".[134]

Justice Bastarache's judicial approach to the interpretation of language rights is exactly as one would have predicted given his early writings on the subject as well as his lifelong commitment to the promotion of minority language rights in Canada. What is perhaps more surprising has been his effectiveness in persuading a majority if not most of his Supreme Court colleagues to his view in a short time.

Of course, constitutional and quasi-constitutional instruments, like living trees, grow and develop in fits and starts and not in a linear path. What Justice Bastarache has done is to eliminate the restrained approach to the interpretation of language rights that existed upon his appointment to the Supreme Court. He has consistently characterized official language rights as "an integral part of the broader protection of minority rights",[135] and interpreted them through the prism of equality rights. This has led him to an expansive reading of language rights even in the face of what a majority of his colleagues found to be a conflicting legislative intention.[136]

We can reasonably expect that in his absence from the Bench, other cases will demonstrate the give and take or balancing of competing interests that will not always reflect his most liberal approach to the interpretation of language rights. For instance, in what is probably the

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[132] Debates of the Senate (*Hansard*), 1st Sess., 36th Parl., Vol. 137, Issue 5 (October 2, 1997), *per* Hon. Jean-Maurice Simard.

[133] *Id.*

[134] Oral Question Period, House of Commons (*Hansard*), 1st Sess. 36th Parl., No. 8 (October 1, 1987), *per* Right Hon. Jean Chrétien.

[135] *Solski*, note 19, at para. 2, *per* the Court.

[136] *Charlebois*, *supra*, note 123.

first language rights case on which he did not sit,[137] one cannot help but wonder where he would have landed.

The Court unanimously held that Industry Canada's regional industrial development office eventually remedied its deficiencies in providing services of equal quality to the Francophone community of Huronia in Ontario. Despite having failed to attract the participation of the Francophone community in its program, the Court was not prepared to attribute this shortcoming to its failure to ensure linguistic equality. In the result, the Court refused to grant the request of CALDECH, a grassroots Francophone community organization, that developed as an alternative to Industry Canada, that it receive permanent and stable funding, to serve the Francophone business community in Huronia.

Given Justice Bastarache's commitment to the concept of institutional completeness (the linguistic community needs its own institutions to ward off assimilation), his view of the outcome is not predictable. While the absence of the equivalent of section 16.1 of the Charter, guaranteeing "distinct cultural institutions" for New Brunswick but not the federal government, supports the outcome, it is not determinative in light of the more expansive interpretative approach adopted by Justice Bastarache (in dissent) in *Charlebois*.[138]

We know that Justice Bastarache's views on linguistic rights have been informed by his personal experience growing up in a community often divided by language issues. It is apparent, that Justice Bastarache's view of language rights in the particular context of Canada, places him comfortably in the tradition of Henri Bourassa and others who viewed Canada as a pact between two nations. His support of the Meech Lake Accord is consistent with this perspective.[139] In his writings, he has tied the promotion of language rights to the goal of national unity and the recent anonymous decision of the Supreme Court follows suit:

> The constitutional protection of minority language rights is necessary for the promotion of robust and vital minority language communities which are essential for Canada to flourish as a bilingual country.[140]

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[137] *Desrochers v. Canada (Industry)*, [2009] S.C.J. No. 8, 2009 SCC 8 (S.C.C.), heard May 20, 2008 prior to his retirement but in his absence, and decided February 5, 2009.

[138] *Supra*, note 123.

[139] Michel Bastarache, "L'Accord constitutionnel de 1987 et la protection des minorités francophone hors Québec" (1988-89) 34 McGill L.J. 119.

[140] *Solski*, *supra*, note 19, at para. 2, *per* the Court.

While the legacy of a judge cannot be determined in the short term, there is reason to believe that the legacy of Justice Bastarache on language rights will be lasting, albeit perhaps not as complete as he would like it. His lasting legacy is a clear advancement of French language rights throughout Canada.