Constitutional Guarantees for Official Languages in the Legislative Process

Christine Ruest*

I. INTRODUCTION

All states founded on the rule of law provide ready access to their legislatures and laws. Fundamental democratic norms require that citizens have opportunities to participate in the law-making process and that they know their rights and obligations.

States labour under a duty to make laws available in an understandable format.[1] Practically speaking, this means that laws must be enacted, printed and published in languages that will most likely be understood by the state's citizens.

Canada's constitution entrenches this duty. The *Constitution Act, 1867*,[2] the *Manitoba Act, 1870*,[3] and the *Canadian Charter of Rights and Freedoms*[4] require that statutes and other legislative instruments be published in French and English at the federal level and in Quebec, Manitoba and New Brunswick. These constitutional instruments also enshrine the right to use either French or English in legislative proceedings.

Implementation of these rights and obligations by certain provinces has been troubling. In 1890, the Manitoba legislature enacted an *Official Language Act*.[5] This provided that the statutes, records and journals of the Manitoba legislature were to be kept, printed and published in the

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* The author is legal counsel to the Office of the Commissioner of Official Languages. Opinions expressed in this paper are those of the author and do not reflect the position or opinion of the Commissioner of Official Languages or the Office of the Commissioner of Official Languages.

1 M.L. Friedland, *Access to the Law: A Study Conducted for the Law Reform Commission of Canada* (Toronto: Carswell / Methuen, 1975).

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

3 S.C. 1870, c. 3.

4 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

5 *An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba*, 1890 (Man.), c. 14.

English language only, contrary to the constitutional requirements of section 23 of the *Manitoba Act, 1870*.[6] The St. Boniface County Court ruled the Act unconstitutional on three occasions.[7] Nevertheless, the Court's orders were ignored by the Government of Manitoba. The Manitoba statutes remained in English only for almost 100 years — until the Supreme Court of Canada decisions in *Forest v. Manitoba (Attorney General)* (1979),[8] *Reference re Manitoba Language Rights* (1985),[9] and *Reference re Manitoba Language Rights* (1992).[10]

The Quebec National Assembly attempted to circumvent the legislative bilingualism requirements of section 133 of the *Constitution Act, 1867*[11] by the *Charter of the French language*.[12] This provided that "French is the language of the legislature ... in Quebec" (section 7) and that "[o]nly the French text of the statutes and regulations is official" (section 9).[13] The Supreme Court ruled these provisions *ultra vires* the Quebec legislature in *Blaikie v. Quebec (Attorney General)*.[14]

This paper examines Canada's constitutional guarantees for the English and French languages in the legislative process. Although the right to have access to laws in one's language and to participate in the legislative process in both official languages may not be as immediately significant to minority communities as other language rights,[15] official language rights in the legislative sphere are nonetheless important. Access to legislative materials is essential for English- and French-speaking Canadians to participate in the legislative process. Access to legislative materials is an essential means by which citizens ascertain their rights and duties under the law. Legislative bilingualism is also important to official-language minority communities as practical and symbolic

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6 S.C. 1870, c. 3.

7 *Pellant v. Hébert* (1892) and *Bertrand v. Dussault* (1909), cited in J. Magnet, "Language Rights: Canada's New Direction" (1990) 39 U.N.B.L.J. 1 at 5; *R. v. Forest*, [1976] M.J. No. 350, 74 D.L.R. (3d) 704 (Man. Co. Ct.).

8 [1979] S.C.J. No. 86, [1979] 2 S.C.R. 1032 (S.C.C.).

9 [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.) [hereinafter "*Manitoba Language Rights 1985*"].

10 [1992] S.C.J. No. 2, [1992] 1 S.C.R. 212 [hereinafter "*Manitoba Language Rights 1992*"].

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

12 S.Q. 1977, c. 5 [now R.S.Q. c. C-11].

13 S.Q. 1977, c. 5 [now R.S.Q. c. C-11].

14 [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016 (S.C.C.) [hereinafter "*Blaikie No. 1*"].

15 R. Leckey & A. Braën, "Bilingualism and Legislation" in M. Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2004), at 43.

recognition of the legitimacy of their language and the state's commitment to their communities and culture.[16]

Part II of this paper introduces the constitutional provisions which guarantee language rights in the legislative process, and provides an overview of the principles which guide their interpretation. Part III considers the guarantees for use of English and French in three areas of legislative activity: debates and other parliamentary or legislative proceedings; records and journals of Parliament and legislatures; and printing and publication of statutes and other legislative instruments. Part IV discusses the historical context of the language provisions in Alberta and Saskatchewan and examines the possibility of entrenched language guarantees in the legislative process of those provinces.

II. The Constitutional Guarantees: Time for a Purposive Interpretation

Although protection for official languages in the legislative process of the pre-Confederation colonial governments extends far back to the early 18th century, the use of English and French in the legislative processes of the Parliament of Canada and the Legislature of Quebec was entrenched in the Constitution of Canada by section 133 of the *British North America Act* (later renamed *Constitution Act, 1867*).[17]

> 133. Either the English or the French Language may be used by any Person in the Debates of the Houses of Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses ...
>
> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

A similar constitutional provision appears in the *Manitoba Act, 1870*:[18]

> 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; ...

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16 *Fédération Franco-Ténoise v. Canada (Attorney General)*, [2006] N.W.T.J. No. 33, 2006 NWTSC 20, at para. 601 (N.W.T.S.C.).

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

18 S.C. 1870, c. 3.

> The Acts of the Legislature shall be printed and published in both those languages.

Sections 17 and 18 of the *Canadian Charter of Rights and Freedoms*[19] entrench comparable guarantees with respect to Parliament and the New Brunswick legislature:

> 17.(1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.
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> (2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.
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> 18.(1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.
>
> (2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

While all of the constitutional provisions appear similar in substance and wording, they are not identical in effect. It is noteworthy that the Charter was enacted in a context vastly different from that which existed over a century earlier.[20] The Charter contains a code of expanded language rights, with unique and far-reaching principles of interpretation created by the courts. These dictate a different process of interpretation and different interpretational results. While sections 17 to 19 of the Charter are impacted by court interpretations of section 133 of the *Constitution Act, 1867*,[21] their full potentiality outstrips their 19th-century precursor.[22]

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

[20] *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 561 (S.C.C.), Dickson C.J.C., dissenting. See also P. Foucher, "L'interprétation des droits linguistiques constitutionnels par la Cour suprême du Canada" (1987) 19 Ottawa L.Rev. 380, at 396.

[21] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5; *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 573 (S.C.C.), Beetz. J. See also *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, at 743-44 (S.C.C.) and *Reference re Manitoba Language Rights*, [1992] S.C.J. No. 2, [1992] 1 S.C.R. 212, at 220 (S.C.C.).

[22] *Charlebois v. Moncton (City)*, [2001] N.B.J. No. 480, 2001 NBCA 117, 242 N.B.R. (2d) 259, at para. 43 (N.B.C.A.). See also *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.) (similar wording between 2(c) of the *Canadian Bill of Rights*, S.C. 1960, c. 44 and s. 10 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 did not mean that the framers of the Charter intended for the words used to be given the same interpretation that they had previously received).

The guarantees for legislative bilingualism were construed narrowly when the Supreme Court of Canada first considered them in the 1980s. In *MacDonald*, the Court described section 133 of the *Constitution Act, 1867*[23] as:

> ... a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union. ... It is a scheme which, being a constitutional minimum, not a maximum, can be complemented by federal and provincial legislation, as was held in the *Jones* case.[24]

The same was said of section 23 of the *Manitoba Act, 1870*.[25] The Supreme Court of Canada described section 23 as "a compromise designed to achieve a level of harmony in the demographic reality of Manitoban society" rather than "a sweeping guarantee designed to achieve complete linguistic equality".[26]

The political compromise doctrine according to which language guarantees received a minimalist interpretation was sharply criticized by dissenting Supreme Court Justices and most commentators at the time of its formulation.[27] The doctrine has now been decisively rejected as a basis for a narrow construction of language rights provisions by the modern Supreme Court.[28] The modern Court ruled that provisions governing official language use are to be interpreted in light of the modern approach to language rights, and must "*in all cases* be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada".[29]

The implications of this development in the Supreme Court's jurisprudence about legislative bilingualism need to be considered. Exploration of the interpretive framework for the requirements for legislative bilingualism in the Charter must take into account the general scheme set out in the Charter for official languages, particularly section

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

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

25 S.C. 1870, c. 3.

26 *Reference re Manitoba Language Rights*, [1992] S.C.J. No. 2, [1992] 1 S.C.R. 212 (S.C.C.).

27 Some observed that many constitutional provisions are the product of a historical compromise, but that does not truncate their interpretation, a point noted in *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 79 (S.C.C.).

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

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

16's affirmation of official bilingualism and equality.[30] The interpretation of these provisions must also be consistent with the unwritten constitutional principle of minority protection, the equality of status of the English and French languages and the achievement of substantive equality for official-language communities.[31]

This interpretive framework seems to suggest that, with respect to the constitutional guarantees for official languages in the legislative process, Parliament and certain provincial legislatures have a duty to provide the means necessary for the full participation of both English- and French-speaking Canadians in the legislative process. This becomes apparent from considering the interpretive principles in light of the purpose of legislative bilingualism, which is "to ensure full and equal access to the legislatures [and] the laws ... for francophones and anglophones alike".[32] This access "is grounded in the use of the two official languages to the extent that a unilingual francophone, like a unilingual anglophone, will be able not only to follow and comprehend but to participate in the proceedings of the legislative assembly".[33] Accordingly, the constitutional provisions for legislative bilingualism guarantee access to French and English versions of legislative instruments and publications to citizens and parliamentarians. They intend that members of either official language group can participate meaningfully in the legislative process.

There is a further implication of the Supreme Court jurisprudence which replaced the political compromise doctrine with a broad and purposive interpretation for constitutional language rights. A purposive interpretation of the constitutional provisions for legislative bilingualism will ensure that the meaning given to guarantees for official languages in the legislative process results in the flourishing and development of

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[30] G. Webber, "The promise of Canada's declaration of official languages" (2006) 46 Revista de Llengua i Dret 241, at 249-50; L. Huppé, "Droit constitutionnel — Article 16 de la Charte canadienne des droits et libertés — Égalité de Statut des Langues Officielles — Une Intention ou une Obligation?: *Société des Acadiens c. Association of Parents*" (1988) 67 Can. Bar Rev. 128, at 135-37.

[31] See, *e.g.*, *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 505 (Ont. C.A.); *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.); *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1, 2000 SCC 1, [2000] 1 S.C.R. 3 (S.C.C.).

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

[33] *Waite v. Manitoba*, [1985] M.J. No. 457, 25 D.L.R. (4th) 696, at 707 (Man. Q.B.), affd [1987] M.J. No. 270 (Man. C.A.).

official-language minority communities through participation in public life in their language.[34]

Having established the interpretive context, we now turn to the content of these rights.

III. Content and Scope of the Constitutional Provisions

1. Legislative Proceedings and Debates: The Right to Use and the Right to Be Understood

Section 17 of the Charter reaffirms the right contained in sections 133 of the *Constitution Act, 1867*[35] and 23 of the *Manitoba Act, 1870*,[36] allowing "everyone ... the right to use English or French in debates and other proceedings of Parliament". The term "everyone" is intended "to facilitate understanding by the citizen regardless of language".[37]

Courts have held that the right to use either official language in legislative debates and proceedings belongs exclusively to the speaker.[38] Construed as a mere negative right in the 1980s,[39] the speaker's right has been limited to the right to express oneself in the official language of one's choice. The early appreciation of the Supreme Court withheld a corresponding guarantee of being understood by those judicial officials with whom the speaker is speaking. As a result, the early interpretation of these provisions conceived of 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".[40]

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[34] See, *e.g.*, *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1, 2000 SCC 1, [2000] 1 S.C.R. 3 (S.C.C.); *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62, [2003] 3 S.C.R. 3 (S.C.C.); *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, 2005 SCC 14, [2005] 1 S.C.R. 201 (S.C.C.); *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 15, 2005 SCC 15, [2005] 1 S.C.R. 238 (S.C.C.).

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

[36] S.C. 1870, c. 3.

[37] *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 522, Wilson J., dissenting.

[38] *Walsh v. Montreal (City)* (1980), 55 C.C.C. (2d) 299 (Que. S.C.); *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 483 (S.C.C.), Beetz J.

[39] See D. Réaume, "The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?" (2002) 47 McGill L.J. 593 ("the characterization of language rights as compromise rights provided one reason for construing the right as a negative liberty", at 596).

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

Disagreement with this approach was immediate and sharp. Wilson J. noted in dissent in *MacDonald v. Montreal (City)*:

> Not only does it shape the way an individual thinks and views the world, language is also an inherently social activity. It is not enough to have a constitutional right to speak the language of one's choice. One needs to have listeners who can understand.[41]

Justice Wilson's view that a more purposive and liberal interpretation of the right is required is supported by important considerations. A person cannot fully and meaningfully exercise her right to participate in debates and other legislative proceedings if she cannot understand each speaker or be understood when she speaks. A purposive interpretation of the right to use either official language accordingly implies a right to understand and be understood. This is necessary for implementation of the right to achieve its purpose, which is to provide French- and English-speaking persons with an equal and meaningful opportunity to participate in parliamentary and legislative debates.[42]

In the legislative context, this does not mean that the speaker must be understood directly in the official language of her choice. To impose such a requirement would oblige every participant in the legislative process to be fully bilingual. Rather, the duty is on the legislative assembly to take steps to ensure that the exercise of the language guarantees in the legislative process is facilitated.[43] The constitutional provisions do not specify the way in which this duty must be fulfilled. Some form of translation, such as simultaneous interpretation, would allow members of both official-language communities to be understood when they speak and to understand others. A requirement to this effect would seemingly fulfil the purpose of sections 17 and 18, in that the requirement would facilitate the right of English- and French-speaking Members to take part meaningfully in legislative debates and proceedings.

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[41] [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 524 (S.C.C.), Wilson J., dissenting (paraphrasing Paul Weiler's observations in "Rights and Judges in a Democracy: A New Canadian Version" (1984) 18 U. Mich. J.L. Ref. 51, at 55, fn 12). See also *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.) where Dickson C.J.C. discussed the right at 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.

[42] *Quebec (Attorney General) v. Collier* (1985), 23 D.L.R. (4th) 339 (Que. C.A.), affd [1990] S.C.J. No. 13, [1990] 1 S.C.R. 260 (S.C.C.). See also *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, at 739 (S.C.C.).

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

Canadian courts have considered whether simultaneous translation is necessary for the full implementation of these rights. When called upon to interpret section 23 of the *Manitoba Act, 1870*,[44] Freedman C.J.M. of the Manitoba Court of Appeal concluded that simultaneous translation is a natural consequence of the right.[45] This interpretation was rejected in an *obiter* comment by a majority of the Supreme Court of Canada in *MacDonald v. Montreal (City)*.[46]

Now that restrictive interpretation of language rights under a doctrine of political compromise has been overthrown by the modern Supreme Court, it becomes opportune for the Court to revisit this *obiter*. When it does so, the Court will have available to it the subsequently stated principle of substantive equality. This principle mandates that "language rights ... require government action for their implementation and therefore create obligations for the State".[47] In light of this requirement, and guided by the principle of equality between the French and English languages, it would seem that simultaneous interpretation of debates and other legislative proceedings is required by sections 17 and 18 of the Charter. Such a requirement would be a rational response to the constitutional imperative to ensure equal access and participation in legislative debates and proceedings for members of both official language groups.

A constitutionally based duty to provide simultaneous interpretation of legislative proceedings and debates fulfils the purpose of the Charter provisions dealing with official languages in the legislative branch. It is worth mentioning that this duty already exists in quasi-constitutional language legislation. At the federal level, subsection 4(2) of the *Official Languages Act*[48] provides that

> [f]acilities shall be made available for the simultaneous interpretation of the debates and other proceedings of Parliament from one official language into the other.

A similar provision is also in force in New Brunswick.[49] Despite the substantial protections offered by these quasi-constitutional provisions

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44 S.C. 1870, c. 30.

45 *Forest v. Manitoba (Registrar of Court of Appeal)*, [1977] M.J. No. 106, [1977] 5 W.W.R. 347, at 355 (Man. C.A.).

46 [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 486 (S.C.C.), Beetz J.

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

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

49 *Official Languages Act*, S.N.B. 2002, c. O-0.5, s. 7.

to participants in the legislative process, their legislative nature makes them vulnerable to repeal or amendment. A constitutional obligation to provide simultaneous translation is required to prevent the political process from altering these protections. It is also required to extend the duty to the legislatures of Manitoba and Quebec, unless the Supreme Court's *obiter* in *MacDonald*[50] is rejected by the modern Supreme Court.

The right to use English or French in any debates and other legislative proceedings cannot be given full meaning and effect unless simultaneous interpretation is provided. This is true for all participants in the legislative process. Members of Parliament and of the provincial legislatures need to understand, and to be understood, to fully participate in debates, deliberations, committee meetings studying proposed legislation and other legislative proceedings. In addition, members of the public who participate in the debates or deliberations, or who appear as witnesses before committees, must be given the means to understand and to be understood in order to fully participate.

There is debate as to whether the right to use one's official language of choice extends to the distribution of unilingual documents in parliamentary committees. In the recent case of *Knopf v. Canada (Speaker of the House of Commons)*,[51] the applicant sought a declaration from the Federal Court of Canada that his language rights under sections 16 and 17 of the Charter and section 4 of the *Official Languages Act*[52] had been infringed by the House of Commons Standing Committee on Canadian Heritage. The applicant, a lawyer specializing in copyright law, appeared as a witness before the Committee on matters related to copyright reform. Prior to his appearance, the applicant sent the Committee four English-language documents in support of his position, and requested that they be distributed to members of the Committee. However, because Committee procedure provided that documents be distributed to the members of the Committee only when they exist in both official languages, the Chair of the Committee refused to distribute them. Following a complaint to the Commissioner of Official Languages, which was deemed unfounded, the applicant initiated proceedings in the Federal Court under Part X of the *Official Languages Act*.

The Court, in dismissing the application, held that the Committee's refusal to distribute unilingual documents pertained to Committee

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

51 [2006] F.C.J. No. 1034, 2006 FC 808 (F.C.), affd [2007] F.C.J. No. 1474 (F.C.A.).

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

procedure and not language rights. The language rights contained in section 4 of the *Official Languages Act*[53] and section 17 of the Charter require that (1) everyone be allowed to use either official language in debates and proceedings; and (2) some means of translation or interpretation be available to all participants. The Committee had provided Mr. Knopf with the right to address the Committee in the official language of his choice. The Committee also provided simultaneous interpretation to members of the Committee, witnesses, and other participants so that they could participate in the Committee meeting in the official language of their choice. Therefore, the Court found that the Committee had respected section 4 of the *Official Languages Act*.

The Court ruled that neither the Charter nor the *Official Languages Act*[54] compelled the distribution of documents to a parliamentary committee. The distribution of documents was deemed to be a question of Committee procedure. Due to parliamentary privilege, namely, the Committee's right to control its internal procedure, it was not open to the Court to review the refusal to distribute the documents. An appeal of this decision was recently dismissed by the Federal Court of Appeal.[55]

To conclude, the right to "use" either official language in parliamentary and legislative debates and proceedings, as defined by the Supreme Court of Canada in the 1986 trilogy, needs to be revisited. The purpose of the right to use English or French in any debates and other legislative proceedings cannot be entirely achieved unless simultaneous interpretation is provided. For Members of Parliament and the provincial legislatures, committee members and witnesses, as well as members of the public, to fully participate in legislative proceedings, they must be able to comprehend the words spoken. Without including an implied right to be understood, the right of access and participation will not be fulfilled.

2. Records and Journals

Section 18 of the Charter requires that the "records and journals of Parliament ... be printed and published in English and French". This is substantially a restatement of section 133 of the *Constitution Act, 1867*,[56]

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

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

55 *Knopf v. Canada (Speaker of the House of Commons)*, [2007] F.C.J. No. 1474, 2007 FCA 308 (F.C.A.).

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

which requires that both English and French "shall be used in the ... Records and Journals". The principal interpretive issue is the scope of the terms "records" and "journals".

In *Blaikie v. Quebec (Attorney General)*,[57] Deschênes C.J. of the Superior Court of Quebec took the view that the words "records" and "journals" had distinct, but related meanings. The term "journals" was held to be akin to "*proces-verbal*" and refers to the minutes of the work done by the legislature in a day's sitting. This can include votes and other proceedings such as motions, resolutions, petitions, questions and debates. The term "records" was given a meaning more similar to "archives" and included the bills discussed as well as the laws adopted by the legislature.[58] *Hansard*, which provides a verbatim account of legislative proceedings and reports all deliberations of the legislature, as well as order papers and other agendas which detail the items of business to be dealt with by the legislature, also falls within the purview of "records" and "journals".[59]

The courts have endorsed a purposive interpretation of the bilingualism guarantees in the legislative process. In *Quebec (Attorney General) v. Collier*, Turgeon J.A. of the Quebec Court of Appeal found that sessional papers of the Quebec National Assembly which formed the substance of two bills were deemed to be "records and journals" within the meaning of section 133 of the *Constitution Act, 1867*.[60] He explained that requiring these sessional papers to be bilingual ensured that members of the legislature had access to all the necessary information to fulfil their legislative duties:

> ... s. 133 of the *Constitution Act, 1867*, must be interpreted as allowing all members to participate fully in debates and to have access to

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[57] (1978), 85 D.L.R. (3d) 252 (Que. S.C.), affd (1978), 95 D.L.R. (3d) 42 (Que. C.A.), affd [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016 (S.C.C.).

[58] *Blaikie v. Quebec (Attorney General)* (1978), 85 D.L.R. (3d) 252, at 260 (Que. S.C.).

[59] *Forest v. Manitoba (Registrar of Court of Appeal)*, [1977] M.J. No. 106, [1977] 5 W.W.R. 347, at 355 (Man. C.A.). See also *Fédération Franco-Ténoise v. Canada (Attorney General)*, [2006] N.W.T.J. No. 33, 2006 NWTSC 20, at paras. 483-91 (N.W.T.S.C.).

[60] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. *Quebec (Attorney General) v. Collier* (1985), 23 D.L.R. (4th) 339 (Que. C.A.). Justice Pare, while concurring in the result, did not find that the sessional papers in question constituted "records and journals" in question. Rather, he concluded that the sessional papers were an integral part of the two bills and were therefore subject to the bilingualism requirement because of the obligation to enact legislation in both French and English. These reasons were affirmed by the Supreme Court of Canada: [1990] S.C.J. No. 13, [1990] 1 S.C.R. 260 (S.C.C.).

> documents in either language *in order to be able to vote, when enacting legislation, with full knowledge of all details of the debates.*[61]
>
> (emphasis added)

This confirms the relationship between the keeping of records and journals (and access to them) and the right to participate fully and meaningfully in the legislative process. Thus, a purposive interpretation of this obligation could consider "records and journals" to be any "essential documentation relied on for making legislation" as well as all "documents laid on the table" in Parliament and the legislatures.[62]

However, its current interpretation is more limited. In *Manitoba Language Rights 1992*, the Supreme Court of Canada held that the scope of "records and journals" "must be limited to those documents which are *actually* tabled in the Legislative Assembly".[63] It is arguable that this interpretation satisfies the purpose of the records and journals clause, by allowing members of the public, as well as members of legislative assemblies and of Parliament, access to information regarding past debates and issues which may influence the way in which they participate in the legislative process. The expression "records and journals" refers to documents which seek to keep records and reports of the workings of the Houses of Parliament and the legislatures of Quebec, Manitoba and New Brunswick — it was therefore reasonable for the Court not to extend their scope to documents which are not part of the workings or proceedings of these Houses.

Moreover, where documents are essential to the making of legislation, such as those created by government departments, boards and agencies which are subsequently incorporated by reference into laws, but are not tabled in the legislature, they may be subject to the bilingualism requirements set out in section 133 of the *Constitution Act, 1867*,[64] or section 18 of the Charter. Although they are not considered to be "records and journals", such documents can be considered as "Acts" because they form an integral part of the legislative instrument. This

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[61] *Quebec (Attorney General) v. Collier* (1985), 23 D.L.R. (4th) 339, at 341 (Que. C.A.), affd [1990] S.C.J. No. 13, [1990] 1 S.C.R. 260 (S.C.C.).

[62] J. Magnet, *Official Languages of Canada* (Cowansville, Qc.: Yvon Blais, 1995), at 215.

[63] *Reference re Manitoba Language Rights*, [1992] S.C.J. No. 2, [1992] 1 S.C.R. 212, at 224 (S.C.C.) (emphasis added).

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

prevents attempts to skirt the constitutional translation guarantees by fragmenting the legislative process.[65]

Other documents which are not tabled in the legislature, and as such are not considered to be "records and journals", may nonetheless fall within the purview of section 133 of the *Constitution Act, 1867*[66] or section 18 of the Charter. For example, although orders in council are not considered to be records or journals, orders in council of a legislative nature are considered to be "Acts of the Legislature" and are therefore subject to the bilingualism requirement.[67]

Another interpretive question is whether the bilingualism requirement for records and journals is satisfied when a report simply states the words in the language they were spoken as opposed to requiring a translation in the other official language. In *Blaikie*, the Attorney General of Quebec submitted that the use of English and French did not require simultaneity in records and journals, but was satisfied by an alternate use of the two languages. This argument was firmly rejected by Deschênes C.J., who declared: "this is not one or the other language as a choice, but the two at the same time which must be used in the records and journals of the Legislature".[68] Thus, the duty to use French and English in records and journals requires that both languages be used simultaneously.

However, in certain circumstances, a practical impediment to the simultaneity exists. While it is possible to draft statutes and other legislative documents in both language versions simultaneously through the practice of co-drafting, some records and journals such as transcripts of legislative debates necessarily involve an original and a translated version. This distinction is apparent in Part I of the *Official Languages Act*, which provides:

> Everything reported in official reports of debates or other proceedings of Parliament shall be reported in the official language in which it was said and a translation thereof into the other language shall be included therewith.[69]

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65 *Sinclair v. Quebec (Attorney General)*, [1991] S.C.J. No. 76, [1992] 1 S.C.R. 579 (S.C.C.).

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

67 See *Reference re Manitoba Language Rights*, [1992] S.C.J. No. 2, [1992] 1 S.C.R. 212 (S.C.C.).

68 *Blaikie v. Quebec (Attorney General)* (1978), 85 D.L.R. (3d) 252, at 260 (Que. S.C.).

69 *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 4(3). Compare with Part II of the *OLA*, which states, *inter alia*, that "journals and other records of Parliament shall be made and kept, and shall be printed and published, in both official languages" (s. 5) and that "both language versions are equally authoritative" (s. 13).

Even though the two language versions are not *initially* simultaneous, official versions of the reports are later made, kept, printed and published in both official languages.[70] The Act simply acknowledges the difference between documents which reproduce spoken words and those which are originally drafted in both languages. It also seeks to reconcile the obligation to print and publish records and journals in both official languages with the right of anyone to participate in legislative debates or other proceedings in the official language of his or her choice.

Academic commentary on the simultaneity requirement for records and journals has been mixed. Professor Magnet expressed the opinion that the requirement of bilingual records and journals is best satisfied through simultaneous interpretation of legislative debates and proceedings.[71] However, Professor Braën pointed out that simultaneous interpretation is, at best, accurate in only 80 per cent of cases.[72] He questioned whether a non-revised transcript of the simultaneous interpretation provided at a parliamentary committee meeting could infringe section 18 of the Charter, because of inconsistency with the notion that both versions be equally authoritative.[73]

For records and journals to meet the requirements of section 18 of the Charter, they must be drafted simultaneously in both official languages or, when this is not possible, translated into the other official language as soon as possible. Notice and order papers as well as other legislative documents which are prepared in writing must be produced simultaneously in both official languages. This is due to their important role in the legislative process, as documents which set out the daily schedule of activities of the legislature and which essentially commence and regulate legislative proceedings.

Official reports and transcripts of debates and other verbal proceedings should contain original language versions and revised translations in the other official language with both versions kept, printed and published in English and French.

Does section 18 of the Charter also impliedly create a duty to print and publish records and journals where there is no express provision requiring such publication? Braën argues that at the time subsection 18(1)

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70 *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 5.

71 J. Magnet, *Official Languages of Canada* (Cowansville, Qc.: Yvon Blais, 1995), at 103.

72 André Braën, "La rédaction bilingue des comptes rendus des comités de la Chambre des communes" (1995) 26 R.G.D. 531, at 532.

73 André Braën, "La rédaction bilingue des comptes rendus des comités de la Chambre des communes" (1995) 26 R.G.D. 531, at 547.

of the Charter was adopted, the framers were familiar with the practice of publishing parliamentary journals in both languages. He suggests that the inclusion of the expression "shall be printed" not only mandates the languages in which records and journals must be published, but also creates a duty to publish the records and journals.[74] This appears to conflict with the House's recognized privilege to control the publication of its debates and proceedings, which is also constitutionally protected by section 18 of the *Constitution Act, 1867*.[75] Parliament and the provincial legislatures bound by official bilingualism requirements must have the flexibility and liberty to choose to print and publish those texts which best represent their daily workings, debates and proceedings. However, when they choose to proceed with the printing and publishing of debates and proceedings, the legislatures come under a constitutional obligation to ensure that it is done in both official languages. The same requirement applies to electronic publications and the broadcasting of debates and proceedings.[76]

3. Printing and Publication of Acts

Section 18 of the Charter requires Parliament and the New Brunswick legislature to print and publish statutes in both official languages, both language versions being equally authoritative. It is, in part, a restatement of section 133 of the *Constitution Act, 1867*,[77] which provides that "Acts of Parliament and of the Legislature of Quebec" be printed and published in English and in French. Two important interpretive issues for this requirement are the simultaneity of use and the scope of the term "Acts".

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[74] André Braën, "La rédaction bilingue des comptes rendus des comités de la Chambre des communes" (1995) 26 R.G.D. 531, at 546.

[75] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] S.C.J. No. 2, [1993] 1 S.C.R. 319 (S.C.C.), McLachlin J. (there is category of privilege which includes "control of publication of debates and proceedings in the House", at 385). See also *Quigley v. Canada (House of Commons)*, [2002] F.C.J. No. 858, 2002 FCT 645, [2003] 1 F.C. 132, at para. 43 (F.C.T.D.), affd [2003] F.C.J. No. 1803 (F.C.A.).

[76] See Alistair Fraser, W.F. Dawson & John A. Holtby, *Beauchesne's Rules & Forms of the House of Commons of Canada*, 6th ed. (Toronto: Carswell, 1989), at 301-302 and J.P. Joseph Maingot, *Parliamentary Privilege in Canada*, 2d ed. (Ottawa: House of Commons; Montreal: McGill-Queen's University Press, 1997), at 50-51. See also *Quigley v. Canada (House of Commons)*, [2002] F.C.J. No. 858, 2002 FCT 645, [2003] 1 F.C. 132 (F.C.T.D.).

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

Despite the fact that section 23 of the *Manitoba Act, 1870*[78] uses the word "shall" to describe the duty for bilingual enactment, the majority of the Manitoba Court of Appeal in *Bilodeau* interpreted this provision as directory rather than mandatory.[79] This was rectified by the Supreme Court of Canada in *Manitoba Language Rights 1985*. The Court concluded that the "guarantees would be meaningless and their entrenchment a futile exercise were they not obligatory".[80] The mandatory nature of this obligation has therefore been affirmed.

A literal reading of section 133 requires only the printing and publishing of Acts in both languages. Nevertheless, the Quebec Superior Court in *Blaikie v. Quebec (Attorney General)* held that this necessarily implies bilingual enactment so that both versions possess an official, or "authentic" character.[81] In affirming this decision, the Supreme Court of Canada noted that "it would be strange to have a requirement, as in section 133, that both English and French 'shall be used in the ... Records and Journals' ... and not have this requirement extend to the enactment of legislation".[82] Simultaneous use of both official languages is required throughout the law-making process. Translation of a legislative instrument enacted in only one language is not sufficient to respect this requirement.[83]

One wonders whether current rules of practice conflict with this requirement for the bilingual enactment of legislation. For example, rule 70 of the *Standing Orders of the House of Commons* only requires bills to be printed in English and in French before the *second* reading. In Quebec, the Standing Orders of the National Assembly are silent as to language requirements for bills tabled in the Assembly. Similarly, there are no explicit requirements for the Rules, Orders and Form of Proceedings of the Legislative Assembly of Manitoba. Professor Leckey, in "Bilingualism and Legislation", argues that compliance with

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78 S.C. 1870, c. 3.

79 *Bilodeau v. Manitoba (Attorney General)*, [1981] M.J. No. 122, [1981] 5 W.W.R. 393, at 402 (Man. C.A.). *Contra* Monnin J.A., dissenting in part (at 405): "Section 23 of *The Manitoba Act* is nearly identical in wording to s. 133 of the *BNA Act*. I see no necessity to import into this argument the notion of directory legislation as opposed to mandatory legislation."

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

81 *Blaikie v. Quebec (Attorney General)* (1978), 85 D.L.R. (3d) 252, at 264 (Que. S.C.).

82 *Blaikie v. Quebec (Attorney General)*, [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016, at 1022 (S.C.C.).

83 *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, at 775 (S.C.C.).

section 133 of the *Constitution Act, 1867*,[84] requires all bills in the Quebec legislature and Parliament of Canada to be drafted at first reading in both official languages.[85] Only then will the French and English versions of the enactment be "on exactly the same footing of equality".[86]

What then are the "Acts" required to be bilingual under section 133 of the *Constitution Act, 1867*[87] and section 23 of the *Manitoba Act, 1870*?[88] In *Blaikie No. 1*, delegated legislation was included within the meaning of "Acts". To exclude it "would truncate the requirement of s. 133".[89] Two years later, the Supreme Court of Canada further specified the types of documents within the purview of section 133. These include regulations enacted by the government, which are considered an extension of the legislative power of the legislature. Section 133 was also deemed to extend to regulations made by semi-public agencies and the civil administration, insofar as they could be assimilated to government enactments.[90] Thus, provided that some government action, such as approval or confirmation, is needed for regulations to be enacted, they constitute "Acts" and are subject to the bilingualism requirement of section 133. In *Blaikie No. 2*, court rules of practice were classified as "Acts" because of the judicial character of their subject-matter.[91]

However, by-laws enacted by municipal and school bodies do not fall within the scope of section 133. The Supreme Court of Canada concluded that, although their adoption may require approval by the government, by-laws are exempt from the application of section 133 as a separate category of regulations.[92] As discussed below, the same does not hold true for subsection 18(2) of the Charter.

More recently, the Supreme Court of Canada developed a set of criteria to determine whether an instrument is subject to the constitutional

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

85 R. Leckey & A. Braën, "Bilingualism and Legislation" in M. Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2004), at 58.

86 *Quebec (Attorney General) v. Blaikie* (1978), 95 D.L.R. (3d) 42 (Que. C.A.), Dubé J.A., affd [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016 (S.C.C.) (cited with approval in *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, at 774 (S.C.C.)).

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

88 S.C. 1870, c. 3.

89 *Blaikie v. Quebec (Attorney General)*, [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016, at 1027 (S.C.C.).

90 *Blaikie v. Quebec (Attorney General)*, [1981] S.C.J. No. 30, [1981] 1 S.C.R. 312, at 329 (S.C.C.) [hereinafter "*Blaikie No. 2*"].

91 *Blaikie v. Quebec (Attorney General)*, [1981] S.C.J. No. 30, at 330-33 (S.C.C.).

92 *Blaikie v. Quebec (Attorney General)*, [1981] S.C.J. No. 312, at 324 (S.C.C.).

requirement of official bilingualism.[93] The Court considered two types of documents: orders in council and documents incorporated by reference.

With respect to orders in council, one must examine their form, content and effect to determine whether they are of a legislative character. Although each of these factors are indicative of the instrument's nature, the Court explained that they do not operate cumulatively. Hence, a document that is legislative in form establishes a "sufficient connection" between the legislature and the instrument.[94] As for the content and effect, an instrument is of a legislative nature if: (i) it embodies a rule of conduct; (ii) it has force of law; and (iii) it applies to an undetermined number of persons.[95]

With respect to documents incorporated by reference into "Acts of the Legislature", they must meet three conditions in order to be subject to section 133. First, the primary instrument into which the document is incorporated must be of a "legislative nature". The incorporated document is only subject to the bilingualism requirement if the primary instrument is also subject. Second, it must be an integral part of the primary instrument, and not simply a document mentioned in a legislative instrument. Third, the document must be generated by the legislature which has incorporated it. However, where a document is issued by an independent body, such as standards set by a non-governmental body, there is no duty to translate. This is because these documents are frequently revised and are highly technical, which renders them inaccessible to the majority of citizens.

Requiring incorporated documents to be bilingual prevents legislatures from circumventing the obligation to enact legislation in both official languages. For example, in *Quebec (Attorney General) v. Collier*, two bills were tabled before the National Assembly, the contents of which were mostly contained in sessional papers which had been previously tabled in French only. Because the bills were found to be void of content without reference to the sessional papers, Paré J.A., of the Quebec Court of Appeal, found that the incorporated documents were an integral part of the Act and subject to the requirements of section 133.[96]

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93 *Reference re Manitoba Language Rights*, [1992] S.C.J. No. 2, [1992] 1 S.C.R. 212 (S.C.C.).

94 A sufficient connection "is established where the instrument is, pursuant to legislation, enacted by the Government or made subject to the approval of the Government": *Reference re Manitoba Language Rights*, [1992] S.C.J. No. 2, [1992] 1 S.C.R. 212, at 224 (S.C.C.), referring to *Blaikie v. Quebec (Attorney General)*, [1981] S.C.J. No. 30, [1981] 1 S.C.R. 312, at 329 (S.C.C.).

95 *Reference re Manitoba Language Rights*, [1992] S.C.J. No. 2, [1992] 1 S.C.R. 212, at 224-25 (S.C.C.).

96 *Quebec (Attorney General) v. Collier* (1985), 23 D.L.R. (4th) 339, at 346 (Que. C.A.), affd [1990] S.C.J. No. 13, [1990] 1 S.C.R. 260 (S.C.C.). However, as discussed above, Turgeon J.A.

No matter what form the legislative instrument takes, or the number of distinct parts in which it can be divided, it is the substance of the documents which is determinative. The guarantee for bilingual enactment of Acts applies "not only to statutes in the strict sense, but equally to all other instruments of a legislative nature".[97] The purpose of printing and publishing laws and other legislative instruments in English and French is so that members of the public speaking either language can understand them. Because the underlying objective of the bilingual requirements is to ensure full access to the law, unilingual statutes and regulations are invalid and have no force and effect.[98]

A broad and purposive approach to section 18 of the Charter can be seen in the New Brunswick Court of Appeal's decision in *Charlebois v. Moncton (City)*.[99] Despite the Supreme Court of Canada's judgment that municipal by-laws did not fall within the scope of section 133 in *Blaikie No. 2*,[100] the New Brunswick Court of Appeal came to a different conclusion with regard to subsection 18(2) of the Charter. After applying the three criteria developed by the Supreme Court of Canada in *Manitoba Language Rights 1992*,[101] the Court of Appeal determined that the by-laws of the City of Moncton were of a legislative nature and fell within the expression "statutes of the legislature". The Court of Appeal highlighted the contextual differences between the Charter and the *Constitution Act, 1867*.[102] The latter constituted a "constitutional minimum" and is "based on a political compromise" whereas the former reflected "a linguistic dynamic much more fertile in nature than the context which might have inspired the framers of section 133 at the time of Confederation".[103] Therefore, the City of Moncton's failure to enact, print and publish its by-laws in the two official languages of New Brunswick constituted a breach of subsection 18(2) of the Charter.

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came to the same conclusion by considering that the sessional papers were "records and journals" within the meaning of s. 133 (at 341) (Que. C.A.).

97 *Sinclair v. Quebec (Attorney General)*, [1991] S.C.J. No. 76, [1992] 1 S.C.R. 579, at 587 (S.C.C.).

98 However, a certain period of time is allowed for the translation, re-enactment, printing and publishing of unilingual legislative instruments in order to avoid legal chaos: see *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.).

99 [2001] N.B.J. No. 480, 2001 NBCA 117, 242 N.B.R. (2d) 259 (N.B.C.A.).

100 *Blaikie v. Quebec (Attorney General)*, [1981] S.C.J. No. 30, [1981] 1 S.C.R. 312 (S.C.C.).

101 *Reference re Manitoba Language Rights*, [1992] S.C.J. No. 2, [1992] 1 S.C.R. 212 (S.C.C.).

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

103 *Charlebois v. Moncton (City)*, [2001] N.B.J. No. 480, 2001 NBCA 117, 242 N.B.R. (2d) 259, at para. 93 (N.B.C.A.).

Shortly thereafter, the Province of New Brunswick enacted a new *Official Languages Act* to give effect to the language rights entrenched in the Charter.[104]

Although the Court of Appeal's decision in *Charlebois v. Moncton (City)*[105] was influenced by the particular constitutional provisions applicable to New Brunswick, namely sections 16.1 and 16(2) of the Charter, it is hoped that this judgment signals a decisive shift in the interpretation of all constitutional guarantees for official languages in the legislative process. This shift stems not only from the difference between the *Constitution Act, 1867*[106] and the Charter, but also from the broad and purposive interpretation established in *R. v. Beaulac*[107] and the unwritten principle of respect for minority rights. The Court of Appeal in *Charlebois* interpreted subsection 18(2) of the Charter in light of its context, within a scheme of parliamentary bilingualism and, most importantly, by considering the principle of equality entrenched in section 16. It reaffirmed that language rights require government action for their implementation and that, in some circumstances, it was necessary "that the minority language community be treated differently in order to fulfill both the collective and individual dimensions of a substantive equality of status".[108] Therefore, to achieve the provision's objective, namely, equal access to anglophones and francophones to the statutes of New Brunswick, in a manner compatible with the preservation and development of official language communities, the Court deemed that municipal by-laws must be bilingual. Many principles applied and discussed by the Court of Appeal transcend the specific context in New Brunswick and should be applied in all cases concerning language guarantees for official languages in the legislative process.

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104 See the Preamble of the New Brunswick *Official Languages Act*, S.N.B. 2002, c. O-0.5.

105 [2001] N.B.J. No. 480, 2001 NBCA 117, 242 N.B.R. (2d) 259 (N.B.C.A.).

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

107 [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.).

108 *Charlebois v. Moncton (City)*, [2001] N.B.J. No. 480, 2001 NBCA 117, 242 N.B.R. (2d) 259, at para. 80 (N.B.C.A.).

IV. SECTION 110 OF THE *NORTH-WEST TERRITORIES ACT*: CONSTITUTIONAL PROTECTION FOR OFFICIAL LANGUAGES IN ALBERTA AND SASKATCHEWAN?

The issue of Alberta's constitutional language obligations has recently resurfaced. The obligations at issue arise from section 110 of the *North-West Territories Act*,[109] which reads:

> 110. Either the English and the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of such Assembly; and all ordinances made under this Act shall be printed in both those languages: Provided, however, that after the next general election of the Legislative Assembly, such Assembly may, by ordinance or otherwise, regulate its proceedings, and the manner of recording and publishing the same; and the regulations so made shall be embodied in a proclamation which shall be forthwith made and published by the Lieutenant Governor in conformity with the law, and thereafter shall have full force and effect.

The first version of section 110 was added to the *North-West Territories Act* in 1877,[110] and applied to a large area of land, part of which later became Saskatchewan and Alberta. When these two provinces were created in 1905, by virtue of the *Alberta Act*[111] and the *Saskatchewan Act*,[112] no specific mention was made of the use of the French language in the provincial courts or legislatures. However, both the Alberta and Saskatchewan statutes provided that the laws of the North-West Territories would continue to apply unless otherwise stated.[113] A year later, section 110 of the *North-West Territories Act* was repealed by a federal statute.[114]

Despite the language guarantees provided by section 110 when it was in force, the French language ceased to be used by the North-West Assembly in the publication of the legislature's journal in 1892; its departmental reports and regulations in 1893; and its ordinances and

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109 S.C. 1875, c. 49.

110 An *Act to amend the North-West Territories Act, 1875*, S.C. 1877, c. 7. Section 110 took the above-quoted form in 1891 following a request made by the North-West Assembly to Parliament for its removal: S.C. 1891, c. 22, s. 18. See E. Aunger, "Legislating Language Use in Alberta: A Century of Incidental Provisions for a Fundamental Matter" (2004) 42 Alta. L. Rev. 463, at 468.

111 S.C. 1905, c. 3.

112 S.C. 1905, c. 42.

113 *Alberta Act*, S.C. 1905, c. 3, s. 16 and *Saskatchewan Act*, S.C. 1905, c. 42, s. 16.

114 *An Act respecting the Revised Statutes of Canada, 1906*, S.C. 1907, c. 43.

gazettes in 1895.[115] The practice of conducting the legislature's business in English only continued in Alberta and Saskatchewan, with one exception. In 1909 Alberta's government announced that some of its statutes had been translated into French.[116]

The use and status of English as the sole official language of Saskatchewan was considered by the Supreme Court of Canada in *R. v. Mercure*.[117] Among the many issues which arose was whether the statutes of Saskatchewan had to be published in both English and French, and if so, whether this obligation was constitutionally entrenched.

In this case, Father Mercure was stopped for speeding and charged under *The Vehicles Act*,[118] which was enacted in English only. On appearance before the Court, Father Mercure's counsel applied, *inter alia*, to have the hearing of the charge delayed until the statute could be provided to him in French. He argued that the province had language obligations under section 110 of the *North-West Territories Act*,[119] similar to section 133 of the *Constitution Act, 1867*.[120] He argued that section 110 applied in Saskatchewan by virtue of section 16 of the *Saskatchewan Act*,[121] which provides that the laws existing in the province at the time of its establishment shall continue to apply, subject to their repeal by the appropriate legislature.

Justice La Forest, for the majority of the Court, first examined the Saskatchewan's legislative history as well as the continuation of laws when the province was formed. He concluded that "s. 110 continued in effect in Saskatchewan after the establishment of that province either by virtue of s. 16(1) or of the combined effect of ss. 16(1) and 14." The latter provided that the law governing the operation of the Legislative Assembly of the North-West Territories continued to apply to the provincial legislature, "[u]ntil the said Legislature otherwise determines".[122]

Justice La Forest also highlighted the fundamental nature of the rights at issue:

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115 E. Aunger, "Justifying the End of Official Bilingualism: Canada's North-West Assembly and the Dual Language Question, 1889-1892" (2001) 34 Can. J. Pol. Sc. 451, at 466.

116 E. Aunger, "Legislating Language Use in Alberta: A Century of Incidental Provisions for a Fundamental Matter" (2004) 42 Alta. L. Rev. 463, at 469.

117 [1988] S.C.J. No. 11, [1988] 1 S.C.R. 234 (S.C.C.).

118 R.S.S. 1978, c. V-3.

119 S.C. 1875, c. 49.

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

121 S.C. 1905, c. 42.

122 *Saskatchewan Act*, S.C. 1905, c. 42, s. 14.

> If human rights legislation can be said to be fundamental or almost constitutional, it is at least equally true of the legislation at issue here; for many years it was entrenched, so far as the inhabitants of the area to which it applied were concerned, since it could only be removed by Parliament, not the local legislature, something it will be remembered, Parliament had refused to do. It formed part of the basic law of a vast area of this country from the earliest days of the founding of the nation and is rooted in a deeply sensitive reality recognized in the *Canadian Charter of Rights and Freedoms*, which among our fundamental constitutions values sets forth that English and French are the official languages of this country.[123]

Despite the Court's recognition of the fundamental, "almost constitutional" nature of the rights involved, it concluded that these rights were not entrenched. Rather, sections 14 and 16(1) of the *Saskatchewan Act*[124] expressly allowed for the laws to be repealed by the appropriate legislature, making section 110 distinguishable from section 23 of the *Manitoba Act, 1870*[125] and section 133 of the *Constitution Act, 1867*.[126] Therefore, it held that section 110 was not entrenched because it was subject to amendment or repeal.

Because the Saskatchewan legislature had not repealed section 110, the Court found that this provision was still in force in the province. It rejected Saskatchewan's submission that section 110 had been impliedly repealed due to the fact that it had been largely ignored by the legislature. The Court added that section 110 could not be impliedly repealed by statute enacted in a manner contrary to its requirements, which is to say by statute enacted in English only. Since all the statutes of Saskatchewan had not been enacted in the manner and form required by section 110, they were held to be invalid. Although this result was similar to the conclusion reached in *Manitoba Language Rights 1985*,[127] the major difference was that Saskatchewan had the authority to unilaterally amend the language requirement by ordinary statute, whereas Manitoba did not. Insofar as such a statute was enacted, printed and published in both official languages, the Saskatchewan legislature could declare that all existing unilingual provincial statutes were valid. Similar reasoning also applied to Alberta.

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123 *R. v. Mercure*, [1988] S.C.J. No. 11, [1988] 1 S.C.R. 234, at 268 (S.C.C.).

124 S.C. 1905, c. 42.

125 S.C. 1870, c. 3.

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

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

A few months after the *Mercure*[128] decision, both Saskatchewan and Alberta adopted laws declaring that section 110 did not apply in their respective province.[129] A few years later, Alberta's unilateral repeal of section 110 was challenged before the courts without success.[130] A similar challenge was rejected in Saskatchewan.[131]

In "Bilingualism on the Prairies: The Constitutional Status of French Saskatchewan", Professor McConnell criticized the Court's approach in *Mercure*[132] as too "mechanical and formalistic",[133] claiming that it was overly concerned with the terms of the *Saskatchewan Act*[134] while ignoring more important constitutional issues.[135] In his view, the Court's decision goes against the "strong constitutional current ... which suggests that official bilingualism is a very basic element in the constitutional structure of Canada".[136]

Indeed, one wonders whether the courts, if faced with a similar issue today, would reach the same decision regarding bilingualism requirements in Saskatchewan and Alberta. The debate resurfaced in *R. v. Caron*,[137] where the accused, Gilles Caron, is challenging the validity of the Alberta *Languages Act*.[138] The accused is invoking the unwritten constitutional principle of minority protection,[139] as well as section 16 of the Charter, to argue that Alberta did not have the authority to repeal section 110 and abolish the language rights of the French-speaking minority in Alberta. Caron wishes to bring forth evidence that was not considered by the Supreme Court in *Mercure*.[140] The evidence, a royal proclamation, could establish that language rights belonging to the residents of the North-West Territories were impliedly entrenched, as part of the terms and conditions upon which the North-West Territories were admitted into

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

129 See *Language Act*, S.S. 1988-89, c. L-6.1, s. 13 and *Languages Act*, S.A. 1988, c. L-7.5, s. 7.

130 *Alberta v. Lefebvre*, [1993] A.J. No. 94, 135 A.R. 338 (Alta. C.A.).

131 *R. v. Rottiers*, [1995] S.J. No. 421, 134 Sask. R. 152 (Sask. C.A.).

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

133 W.H. McConnell, "Bilingualism on the Prairies: The Constitutional Status of French Saskatchewan" (1989) 53(1) Sask. L.R. 143.

134 S.C. 1905, c. 42.

135 W.H. McConnell, "Bilingualism on the Prairies: The Constitutional Status of French Saskatchewan" (1989) 53(1) Sask. L.R. 143, at 149.

136 W.H. McConnell, "Bilingualism on the Prairies: The Constitutional Status of French Saskatchewan" (1989) 53(1) Sask. L.R. 143, at 148.

137 [2007] A.J. No. 449, 2007 ABQB 262 (Alta. Q.B.).

138 R.S.A. 2000, c. L-6 (originally enacted in 1988 — *Languages Act*, S.A. 1988, c. L-7.5).

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

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

the Dominion of Canada in 1870.[141] If this is the case, an argument could be made that the Province of Alberta was prohibited from unilaterally repealing the language guarantees contained in section 110.

The *Caron*[142] case will likely hinge on these two new issues, that is to say, the legal effect of the proclamation and of the unwritten constitutional principle of minority protection. A positive decision in this case would undoubtedly strengthen language rights for official-language minority communities in Saskatchewan and Alberta.

V. CONCLUSION

The language guarantees contained in Canada's constitutional documents are vital to the protection and promotion of the official-language minority communities of this country. For languages to survive, and for minority-language groups to develop and flourish, they must hold a place and enjoy a visible status in the public sphere.

In understanding the constitutional guarantees for official languages in the legislative process, emphasis must be placed on the purpose of these provisions, which is to give members of the official-language minority opportunities to partake in public life in their language, by means of access to and participation in the laws and legislative process. This is best achieved by giving language provisions a broad and purposive interpretation, in accordance with the method set out in *R. v. Beaulac*.[143]

The New Brunswick Court of Appeal's decision in *Charlebois v. Moncton (City)*[144] represents a turning point in the interpretation of constitutional guarantees for official languages in the legislative process, notably by confirming the application of the interpretive principles from *R. v. Beaulac*[145] to constitutional language provisions. Although *Charlebois v. Moncton* dealt with the requirement to enact, print and publish by-laws in both official languages, it is likely that the courts will apply a similar purposive analysis to the right to use either official language in legislative debates and proceedings, and recognize a constitutional right to be understood by other participants through the use of simultaneous interpretation. This generous and purposive interpretation of language

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141 *Rupert's Land and North-Western Territory Order* (1870), reprinted in R.S.C. 1985, App. II, No. 9.

142 [2007] A.J. No. 449, 2007 ABQB 262 (Alta. Q.B.).

143 [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.).

144 [2001] N.B.J. No. 480, 2001 NBCA 117, 242 N.B.R. (2d) 259 (N.B.C.A.).

145 [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.).

rights advocated in recent times by the Supreme Court of Canada, in view of advancing the principles of equality and the protection of minorities, will help to fully achieve the purposes of guarantees for official languages in the legislative process.