

# The Promise of Canada's Official-Languages Declaration

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Je souhaite que sur cette lancée, notre pays accède également à la maturité politique. Qu'il devienne en plénitude ce qu'il ne devrait jamais cesser d'être dans le cœur et dans l'esprit des Canadiens: [...] *un Canada tirant force et fierté de sa vocation bilingue.*<sup>1</sup>

– Pierre Elliott Trudeau, Prime Minister of Canada  
at the Proclamation Ceremony of the coming into force of the  
Constitution Act, 1982

## I. INTRODUCTION

Section 16 of the *Canadian Charter of Rights and Freedoms*,<sup>2</sup> being the first section under the heading “Official Languages of Canada”, captures the vision promoted in Trudeau’s Proclamation Speech of April 17, 1982. It provides:

16.(1) *Official languages of Canada* — English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

16.(1) *Langues officielles du Canada* — Le français et l’anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

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<sup>1</sup> Remarks at the Proclamation Ceremony (April 17, 1982): <<http://www.collectionscanada.ca/premiersministres/h4-4024-f.html>> (emphasis added).

<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

(2) *Official languages of New Brunswick* — English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) *Advancement of status and use* — Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

(2) *Langues officielles du Nouveau-Brunswick* — Le français et l'anglais sont les langues officielles du Nouveau-Brunswick; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions de la Législature et du gouvernement du Nouveau-Brunswick.

(3) *Progression vers l'égalité* — La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais.

No doubt, at the time of their pronouncement Trudeau's words were more an aspiration than a reflection of fact. Section 16 and the other language provisions of the Charter were designed to match vision and reality. Yet, the *force et fierté* that Canada has derived from the affirmation of official bilingualism and equality of French and English rest principally in the symbolic and rhetorical aspects of the declaration of Canada's official bilingualism. From the perspective of constitutional practice, section 16 has served as little more than a reference in passing brought in support of an already decided point. In short, with some proud exceptions, section 16 has been lying dormant since 1982.

This paper considers the full promise of section 16 of the Charter. I argue that section 16 requires a re-interpretation of sections 17 to 19 of the Charter.<sup>3</sup> These sections have been read narrowly, in the light of section 133 of the *Constitution Act, 1867*,<sup>4</sup> on the now discredited

<sup>3</sup> *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, s. 17(1) ("Everyone has the right to use English or French in any debates and other proceedings of Parliament"); s. 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"); s. 19(1) ("Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament").

<sup>4</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 133:

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

understanding that the bilingualism aspirations of the Constitution are strictly limited. I also argue that section 16 is a mandatory provision and that it contains a residuum that is not exhausted by the language rights sections that follow it. Section 16 refers to “Canada”. I argue that this reference extends beyond the “institutions of the Parliament and government of Canada”, and that federal public servants in Canada have the right to work in the official language of choice.

I focus on subsections 16(1) and 16(3). Subsection 16(2) is addressed to New Brunswick — Canada’s only officially bilingual province. That said, much of the analysis will be equally applicable, by analogy, to the Province of New Brunswick,<sup>5</sup> with the following caveat: New Brunswick’s obligations under the Charter may be greater in scope and intensity than those of the federal authority given the constitutional status accorded to its French and English linguistic communities.<sup>6</sup> A justification of this claim will not be undertaken in this paper.<sup>7</sup>

This paper begins, in Part II, by exploring the philosophy of official bilingualism and equality of status. In Part III, the various components of subsection 16(1) are reviewed. I argue that the affirmation of official languages and equality of status are mandatory and have important consequences for the scope and intensity of official bilingualism in Canada. In Part IV, I review the various roles attributed to subsection 16(3) and explore its relationship to subsection 16(1).

At the outset, it is important to highlight that section 16 has never been considered by the Supreme Court of Canada on its own merits,

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

<sup>5</sup> The consequences and modalities of constitutional official bilingualism may differ as between the federal and provincial authorities, as well as between provinces, on account of the principle of federalism: see *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at 777-78 (S.C.C.); *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, 2005 SCC 14, at para. 5 (S.C.C.).

<sup>6</sup> Reliance is placed on s. 16.1 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 in *Charlebois v. Moncton (City)*, [2001] N.B.J. No. 480, 242 N.B.R. (2d) 259 (N.B.C.A.) to distinguish *Blaikie v. Quebec (Attorney General)*, [1981] S.C.J. No. 30, [1981] 1 S.C.R. 312 (S.C.C.) [hereinafter “*Blaikie (no. 2)*”] and to read “statutes” as including municipal by-laws.

<sup>7</sup> Among the many avenues for reflection on this point, consider the suggestion that the federal authority has a heightened responsibility in New Brunswick because of its bilingual status. For a case considering this view, see *Société des acadiens et acadiennes du Nouveau-Brunswick v. Canada*, [2005] F.C.J. No. 1587, 2005 FC 1172 (F.C.T.D.). See also *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, 2005 SCC 74, at para. 38 (S.C.C.).

although Parliament has devoted considerable attention to it.<sup>8</sup> The only case to have devoted any sustained attention to section 16 is *Société des Acadiens du Nouveau-Brunswick*,<sup>9</sup> where the Supreme Court adopted a restrictive reading of language rights according to a political compromise doctrine. This interpretive approach has since been rejected,<sup>10</sup> but section 16 has yet to be revisited. This paper undertakes this task and articulates a vision of section 16 *à l'image d'un Canada tirant sa force et fierté de sa vocation bilingue*.

## II. THE PHILOSOPHY OF SECTION 16 OF THE CANADIAN CHARTER

Until 1982, Canada did not have — at either the legislative or constitutional level — an overarching statement of principle with respect to French and English. Neither the *Constitution Act, 1867*<sup>11</sup> nor any other constitutional instrument addressed Canada's official language status prior to 1982.<sup>12</sup> It was not until 1969 with the adoption of the federal *Official Languages Act*<sup>13</sup> that official language status was granted to French and English in matters relating to the authority of Parliament. But because federal authority is limited, the *Official Languages Act 1969* provided a number of delimited language rights for matters within federal jurisdiction.

### 1. The Strength of Constitutional Commitment

In 1982, the Charter departed from this tradition. The Charter entrenched a general commitment to official bilingualism at the constitutional level.

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<sup>8</sup> See Warren J. Newman, "La Loi sur les langues officielles et la reconnaissance constitutionnelle et législative des droits linguistiques aux Canada" (2006) 31 S.C.L.R. (2d) 635.

<sup>9</sup> *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.).

<sup>10</sup> See *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] 1 S.C.R. 3 (S.C.C.); *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563 (S.C.C.) (Bastarache J., dissenting).  
<sup>11</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>12</sup> Henri Brun & Guy Tremblay, *Droit constitutionnel*, 4th ed. (Cowansville, Qc.: Éditions Yvon Blais, 2002), at 829. Reference could be made to the pre-1867 *Act of Union, 1840* (U.K.), 3-4 Vict., c. 35, which made English the official language of laws and the legislative process.

<sup>13</sup> R.S.C. 1970, c. O-2 [hereinafter "*Official Languages Act 1969*"], replaced by the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) [hereinafter "*Official Languages Act 1988*"].

The importance of the language provisions of the Charter can be evaluated, albeit with appropriate caution, from their relationship to the notwithstanding clause and the amendment formula. Unlike most other Charter guarantees, the language rights at sections 16 to 23 are excluded from section 33: legislatures cannot legislate “notwithstanding” guaranteed language rights.<sup>14</sup> As pertains to amending the Charter’s language rights, the consent of Parliament and of the legislative assembly of *every* province are required for any amendment respecting “the use of the English or the French language”.<sup>15</sup> By requiring unanimity among Canada’s legislative assemblies before subsection 16(1) can be amended, the language provisions of the Charter can be understood to promote pan-Canadian identity.<sup>16</sup> Reference should also be made to section 43 of the *Constitution Act, 1982*,<sup>17</sup> which permits a province — with the consent of both Houses of Parliament — constitutionally to affirm itself officially bilingual. In 1993, New Brunswick relied on this provision to declare the equality of its English and French linguistic communities.<sup>18</sup>

Despite the importance of section 16 and the other language rights of the Charter, the Supreme Court did not immediately endorse an important role for language at the constitutional level. When the Supreme Court first interpreted section 16, it presumed that language rights were the product of political negotiation and compromise. On this basis, the Court confused a restrictive and narrow role for the judiciary with a restrained interpretation of language rights.<sup>19</sup> The affirmation that

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<sup>14</sup> Of course, s. 33 is not limited to cases where the legislature chooses to ignore 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; it may also be used where the legislature disagrees, reasonably and in good faith, with the Supreme Court on the meaning of the Charter: see J. Waldron, “Some Models of Dialogue Between Judges and Legislators” (2004) 23 S.C.L.R. (2d) 7, at 36.

<sup>15</sup> Section 41 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>16</sup> José Woehrling & André Tremblay, “Les dispositions de la Charte relatives aux langues officielles (articles 16 à 22)”, in Gerald-A. Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham, ON: LexisNexis Canada, 2005) note, at 1037-38, that the three sets of rights excluded from s. 33 — democratic rights, mobility rights and language rights — were understood by the promoters of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, and Prime Minister Trudeau in particular, as playing a central role in the affirmation of pan-Canadian identity.

<sup>17</sup> Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>18</sup> *Constitution Amendment Proclamation, 1993 (New Brunswick Act)*. This amendment procedure would equally allow a province to abolish, attenuate, enhance or fully commit to bilingual status with the consent of both Houses of Parliament.

<sup>19</sup> *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 578 (S.C.C.) (Beetz J.).

the language provisions of the Charter are the fruit of political compromise either is a statement so obvious that it needs no mention or,<sup>20</sup> as was the case, is an unjustified basis for denying the political promise of the language guarantees of the Charter.<sup>21</sup> For the Supreme Court, language rights were distinct in kind from so-called “universal” rights (such as the fundamental freedoms of section 2) and therefore warranted a restrictive interpretation. The advancement of language rights was for the political process and not for the judicial process. Relying on the “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*”, Beetz J. in *Société des Acadiens* reasoned that if the provinces “were told that the scheme provided by ss. 16 to 22 of the *Charter* was [interpreted by the courts to be] inherently dynamic and progressive”, they would have “no means to know with relative precision what it was that they were opting into”.<sup>22</sup>

This reasoning is disingenuous. Reading down the scope and significance of the Charter’s language rights in the name of maintaining a role for the political process denied language rights their priority in the Canadian legal landscape. As will be reviewed below, an expansive understanding of constitutional rights should not be equated to an expansive role for the judiciary. In addition, a concern for the “relative precision” of Charter rights has not resulted in a restrained interpretation of other Charter rights. Consider, for example, the “dynamic and progressive” interpretation given by the Supreme Court to section 7’s “principles of fundamental justice”.<sup>23</sup> Most importantly, the narrow approach to language rights promoted by Beetz J. disappointed the people of Canada who *had* opted in. It violated their expectations that the language rights of the Charter would be “a fundamental tool for the preservation and

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<sup>20</sup> On constitutions being constantly subject to political renegotiating, see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

<sup>21</sup> For an analysis of the political compromise doctrine, see Luc Huppé, “Droit constitutionnel — Article 16 de la Charte 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 140ff and Leslie Green, “Are Language Rights Fundamental?” (1987) 25 Osgoode Hall L.J. 639, at 669.

<sup>22</sup> *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 579 (S.C.C.).

<sup>23</sup> See *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

protection of [the] official language communities” of Canada.<sup>24</sup> It is regrettable that the Supreme Court in *Société des Acadiens* did not pay greater heed to the dissenting opinion of Dickson C.J.C., wherein he correctly explained that section 16 “provides a strong indicator of the purpose of the language guarantees in the *Charter*”.<sup>25</sup> In the light of this first interpretation of section 16 by the Supreme Court — an interpretation that remained in favour in our final court of appeal until 1999 — one is led to conclude with Huppé that if Canada’s official languages gained anything by being positioned in the *Charter*, “c’est bien la certitude de ne devoir demeurer désormais que cet absolu qu’on enchâsse par idéalisme mais qui s’évanouit lorsqu’on légifère”.<sup>26</sup>

A decade after *Société des Acadiens*, the Supreme Court accepted that it had erred in its approach to language rights. The Court recognized that constitutional negotiations are in essence about compromise and “that [this] does not render them unprincipled”.<sup>27</sup> Matters as important to Canadian identity as official bilingualism warrant respect and command attachment. To this end, the Court, legislatures, and Canadians have come to understand, albeit at times with much reluctance, that language rights are a part of the Canadian constitutional culture devoted to protecting minorities,<sup>28</sup> are a special instantiation of equality,<sup>29</sup> and are an essential component of the personal autonomy of the individual “dont le plein épanouissement passe par son nécessaire enracinement dans une communauté culturelle et linguistique particulière”.<sup>30</sup> Hence, even if section 16 is acknowledged to be the fruit of political compromise, the reason for this compromise should be fully appreciated. As Foucher comments:

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

<sup>25</sup> *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549, at 565 (S.C.C.) (Dickson C.J.C.).

<sup>26</sup> Luc Huppé, “Droit constitutionnel — Article 16 de la Charte 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 130.

<sup>27</sup> *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 80 (S.C.C.).

<sup>28</sup> *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

<sup>29</sup> *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342 (S.C.C.); *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 15, [2005] 1 S.C.R. 238 (S.C.C.).

<sup>30</sup> José Woehrling & André Tremblay, “Les dispositions de la Charte relatives aux langues officielles (articles 16 à 22)”, in Gérald-A. Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham, ON: LexisNexis Canada, 2005), at 1050.

[I]l n'y a pas lieu de comparer le compromis de 1867 avec celui de 1982, car les circonstances donnant lieu à ce compromis ne sont pas les mêmes. En 1867, le Canada n'avait pas adopté de loi sur les langues officielles, le Nouveau-Brunswick n'avait pas de loi sur l'égalité des communautés linguistiques, le Manitoba n'avait pas agi en violation de l'article 23 de sa loi constitutive pendant près de cent ans; on ne savait pas encore que l'article 93 de la *Loi constitutionnelle de 1867* ne protégeait pas les droits linguistiques.<sup>31</sup>

Section 16 and the other language provisions should be understood as contributing to the remedying of past injustices. Although this frame of reference was extended relatively quickly to section 23 minority language education rights,<sup>32</sup> it took some time before it informed the other language rights of the Charter.<sup>33</sup>

Sections 16, 20, and 23 reveal the increased constitutional importance given to language by the Charter. Unlike sections 17, 18, and 19, which were inspired by section 133 of the *Constitution Act, 1867*,<sup>34</sup> sections 16, 20 and 23 are new additions to the Constitution. Together, they reflected a shift in the philosophy of language rights in the Constitution — a shift that, properly understood, extended to sections 17 to 19 of the Charter. Unfortunately, the similarities between section 133 of the *Constitution Act, 1867* and sections 17 to 19 of the Charter led the Supreme Court to overlook the important difference in context in which these two sets of language guarantees find themselves. Critically, the Court failed to appreciate that while section 133 alone speaks to language rights in the *Constitution Act, 1867*, sections 17 to 19 are encompassed within the Charter's heading "Official Languages of Canada". Ignoring this difference, the Supreme Court extended the interpretation given to section 133 of the *Constitution Act, 1867* to sections 17 to 19 of the Charter.<sup>35</sup>

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<sup>31</sup> Pierre Foucher, "L'interprétation des droits linguistiques constitutionnels par la Cour suprême du Canada" (1987) 19 Ottawa L. Rev. 380, at 396.

<sup>32</sup> See *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342 (S.C.C.).

<sup>33</sup> That is, until *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 25 (S.C.C.): "Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada" (emphasis in original). 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, at 567 (Dickson C.J.C.).

<sup>34</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>35</sup> *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 571-72 (S.C.C.) (Beetz J.), but see Dickson C.J.C. at 561; *R. v. Mercure*, [1988] S.C.J. No. 11, [1988] 1 S.C.R. 234, at 272 (S.C.C.).

Yet, the Supreme Court of Canada itself outlined the interpretative framework for expanding the interpretation of sections 17 to 19 of the Charter. In *MacDonald*, the Court justified the restrictive interpretation of section 133 of the *Constitution Act, 1867*<sup>36</sup> on this basis:

... *Section 133 has not introduced a comprehensive scheme or system of official bilingualism, even potentially, but a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism at the option of the speaker in Parliamentary debates and at the option of the speaker, writer or issuer in judicial proceedings or processes.*

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*This incomplete but precise scheme is a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union.*<sup>37</sup>

(emphasis added)

Following this reasoning, if the *Constitution Act, 1867*<sup>38</sup> had included a “comprehensive scheme” or a general affirmation of official bilingualism, section 133 would have been interpreted differently.<sup>39</sup> On this basis, given that sections 17 to 19 of the Charter follow section 16’s affirmation of official bilingualism, their interpretation should be more expansive than the interpretation given to section 133. The affirmation of official bilingualism and equality of the French and English languages in section 16 should be appreciated as correcting the lacunae of the Constitution’s language provisions and as mandating a robust interpretation of sections 17 to 19. In this light, I follow Huppé in reasoning: “Si l’effet de l’article 16 se borne à servir d’écho à ce que proclame l’article 133, il devient inutile, puisque cette dernière disposition jouissait déjà

<sup>36</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>37</sup> *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 496 (S.C.C.). See also *Jones v. New Brunswick (Attorney General)*, [1974] S.C.J. No. 91, [1975] 2 S.C.R. 182, at 193 (S.C.C.); *Reference re Manitoba Language Rights*, [1992] S.C.J. No. 2, [1992] 1 S.C.R. 212, at 222 (S.C.C.).

<sup>38</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>39</sup> See *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549, at 565 (S.C.C.) (Dickson C.J.C.). Some interpretations of s. 133, *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, proceeded on a premise similar to this one: see, e.g., *Blaikie v. Quebec (Attorney General)*, [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016 (S.C.C.) [hereinafter “*Blaikie no. 1*”] and *Blaikie (no. 2)*, [1981] S.C.J. No. 30, [1981] 1 S.C.R. 312 (S.C.C.).

du statut protégé de norme constitutionnelle. Le législateur, et à plus forte raison le constituant, ne parle pas pour rien dire.”<sup>40</sup>

As will be argued below, we should read sections 17 to 23 of the Charter as though the words “for greater certainty” prefaced them. Sections 17 to 23 specify some — and only some — of the features of section 16. Assuming that the constituent authorities were familiar with the reasoning advanced in *MacDonald*, the decision to affirm “English and French are the official languages of Canada” should suggest that section 16 endorses a constitutional policy of official bilingualism beyond the topical guarantees outlined in sections 17 to 23.

It is undeniably true that Canada’s language rights are the product of political negotiation and compromise. In this respect, they are distinctly Canadian. Yet, this should not arouse our surprise. As F.R. Scott, member of the Royal Commission on Bilingualism and Biculturalism, commented: “[E]very country that has a language problem, attempts to solve it in its own way. *There are no universal rules*, except perhaps the rule that language rights must be respected if you are to have domestic peace.”<sup>41</sup> The distinctive character of Canada’s language rights should not counsel us to shy away from them. Rather, we should follow the philosophy of language rights outlined in *Reference re Secession of Quebec*<sup>42</sup> and *R. v. Beaulac*<sup>43</sup> and embrace language rights as *Canada’s* response to *Canada’s* situation.

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<sup>40</sup> Luc Huppé, “Droit constitutionnel — Article 16 de la Charte 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 136. 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, at 565 (S.C.C.) (Dickson C.J.C.): “Whether s. 16 is visionary, declaratory or substantive in nature, it is an important interpretive aid in construing the other language provisions of the *Charter*.” See also at 565 (Dickson C.J.C.) and at 612 (Wilson J.), and Denise G. Réaume, “Official-Language Rights: Intrinsic Value and the Protection of Difference” in Will Kymlicka & Wayne Norman, *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 245, at 261-62.

<sup>41</sup> F.R. Scott, “Language Rights and Language Policy in Canada” (1970-71) 4 Manitoba L.J. 243, at 249-50 (emphasis added). See also Alan Patten & Will Kymlicka, “Introduction: Language Rights and Political Theory: Context, Issues, and Approaches” in Will Kymlicka & Alan Patten, eds., *Language Rights and Political Theory* (Oxford: Oxford University Press, 2003), at 35.

<sup>42</sup> [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

<sup>43</sup> [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.).

## 2. Un article de principe

Section 16 of the Charter has a residual content that mandates an expansive reading of the language provisions that follow it. I will maintain that section 16 is to sections 17 to 23<sup>44</sup> as section 7 is to sections 8 to 14. In other words, sections 17 to 23 are illustrations of the principle of official bilingualism affirmed in section 16, much like sections 8 to 14 are illustrations of the principles of fundamental justice affirmed in section 7. And just as the scope and intensity of section 7 is not exhausted by sections 8 to 14, nor is the scope and intensity of section 16 exhausted by sections 17 to 23.

We should recognize that affirming two languages as official languages does not determine a particular language policy. There is no obvious specification of language rights. Yet, it would be erroneous to suppose that no language policy is mandated.<sup>45</sup> It should be an obvious point that official bilingualism ought to mean something and that the Constitution should not be assumed to speak in vain. In teasing out an official bilingualism language policy, we may be guided by Patten and Kymlicka, who survey “a number of different domains in which language policy choices get made”:<sup>46</sup>

- the use of language in the internal workings of the public service, both with respect to communication between employees and between officials and employees;

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<sup>44</sup> The minority-language education guarantee resides under its own heading (“Minority Language Educational Rights”) and is formulated in relatively precise terms. Though s. 23 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, is clearly a central component of Canada’s official bilingualism policy and could have been included under the heading “Official Languages of Canada”, the following considerations could explain its position under a different heading: it is the only language provision applicable to the federal authority and *all* provinces (except for s. 16(3)) and s. 23 is restricted to members of certain specified groups, unlike ss. 16 to 20, which are the rights of all Canadians irrespective of their mother tongue or their parents’ *parcours scolaire*.

<sup>45</sup> Peter W. Hogg states erroneously that “[i]t is not clear what, *if any*, practical consequences flow from official status”: *Constitutional Law of Canada* (updated looseleaf version) (Scarborough: Thomson-Carswell), at 53-21 (footnote omitted, emphasis added). For a similar view, see André Tremblay, “Les droits linguistiques (Articles 16 à 23)” in Gérard-A. Beaudoin & Walter S. Tarnopolsky, eds., *Charte canadienne des droits et libertés* (Montreal: Wilson et Lafleur, 1982) 559, at 566, and José Woehrling & André Tremblay, “Les dispositions de la Charte relatives aux langues officielles (articles 16 à 22)”, in Gérard-A. Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham, ON: LexisNexis Canada, 2005), at 1067-68.

<sup>46</sup> Alan Patten & Will Kymlicka, “Introduction: Language Rights and Political Theory: Context, Issues, and Approaches” in Will Kymlicka & Alan Patten, eds., *Language Rights and Political Theory* (Oxford: Oxford University Press, 2003), at 16-25.

- the use of language in the offering and communication of public services by the government to the public;
- the use of language before the courts;
- the use of language in the legislative assembly;
- the language of education;
- private language use;
- the consideration given to language in matters of immigration and naturalization;
- the consideration given to language in enlarging the state.

Although Patten and Kymlicka do not specifically address the question of the language of legislation, it is obvious that this also forms part of a language policy.

Patten and Kymlicka also list “official language declarations” as a domain of language policy, stating that such declarations “typically have both a substantive and a symbolic aspect”.<sup>47</sup> Without denying the great symbolic importance of section 16, I focus in this part on the substantive aspect of the affirmation of official languages in section 16. I contend that declaring a language to be official — as section 16 does for French and English — creates the presumption that the state has a *responsibility* to articulate a language policy with respect to each of the domains identified by Patten and Kymlicka. This is a “presumption” rather than an “imperative”; other considerations may counter it.<sup>48</sup> A brief review of sections 17 to 23 illustrates that the Charter addresses many of the domains surveyed by Patten and Kymlicka, although some are left to the residual character of section 16.

Section 17 addresses language policy in the proceedings of Parliament and section 18 does so with respect to the inner workings and enactments of Parliament. Section 19 addresses the use of language in courts established by Parliament and section 20 addresses communications by

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<sup>47</sup> Alan Patten & Will Kymlicka, “Introduction: Language Rights and Political Theory: Context, Issues, and Approaches”, in Will Kymlicka & Alan Patten, eds., *Language Rights and Political Theory* (Oxford: Oxford University Press, 2003), at 25.

<sup>48</sup> For example, the federal authority may be prevented from legislating in a domain of provincial jurisdiction. Related to this and taking the example of freedom of expression, the State’s role in the domain of private language use may be limited by the guarantee of freedom of expression in s. 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

the public with federal institutions. The language policy of public education is outlined in section 23. In Part III below, I argue that the right to work in the official language of choice is guaranteed by the affirmation of equality of status in subsection 16(1). As to private language use and immigration, naturalization, and state enlargement, the Charter contains no specific language provisions on point. But section 16 should be interpreted to extend to these considerations. Indeed, Canada's legislative policies extend to these topics: consider the bilingualism requirements incumbent on the private airline Air Canada<sup>49</sup> (private language use) and the consideration given to knowledge of official languages in applications for immigration and naturalization.<sup>50</sup>

What, then, is the relationship between section 16 and the language sections that follow it? Beyond the role of section 16 in interpreting sections 17 to 23, I contend that section 16 serves two residual functions: it can increase the *scope* of the constitutional consequences of official bilingualism and it can increase the *intensity* of specified obligations under official bilingualism. The distinction between scope and intensity may be easy to discern in some cases: for example, increasing the requirements of official bilingualism to the workings of the Royal Canadian Mounted Police in all its operations, even when enforcing provincial law, is a question of *scope*, whereas narrowly reading the restrictions in section 20 so as to increase the instances of official bilingualism in communications with the public is a question of *intensity*. In other cases, the distinction between scope and intensity is more difficult to discern: for example, is extending to regulations the obligation to enact statutes in both French and English better understood as extending the scope of legislative bilingualism to the executive or as increasing the intensity of bilingualism for matters falling under the legislative authority of Parliament?<sup>51</sup>

Focusing here on scope, section 16 can play a role where the other language provisions of the Charter are silent. I contend that section 16 extends Parliament's obligations for official bilingualism in debates and proceedings (section 17) to ensuring simultaneous translation so that all

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<sup>49</sup> *Air Canada Public Participation Act*, R.S.C. 1985, c. 35 (4th Supp.), s. 10.

<sup>50</sup> *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 3. I leave aside the question of enlargement, though we could refer to the constituting instruments of the Provinces of Manitoba, Saskatchewan and Alberta, where one can find provisions similar to s. 133 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>51</sup> See *Blaikie (no. 1)*, [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016 (S.C.C.) and *Blaikie (no. 2)*, [1981] S.C.J. No. 30, [1981] 1 S.C.R. 312 (S.C.C.).

Members of Parliament can be understood in their official language choice.<sup>52</sup> It furthermore requires that if Parliament's debates and proceedings are broadcast to the public, they are available in both official languages.<sup>53</sup> Likewise, the federal government prints and publishes much more than Parliament's "statutes, records and journals" (section 18); all official government publications should be available in both official languages.<sup>54</sup> Moreover, as the Supreme Court has recognized, all legislation (including regulations) should be *enacted*, rather than merely printed and published, in both official languages.<sup>55</sup> Merely to translate an enactment from English to French (or vice versa) is to deny the equality of status of English and French throughout the stages of adopting a bill, including the first, second, and third readings and the study of a bill in committee. The right to "use" either English or French in a court established by Parliament (section 19) should, in the name of official bilingualism, be extended to the right of an accused to receive disclosure in the official language of choice.<sup>56</sup> Furthermore, section 16 should be read as creating a duty on the state to communicate a summons in both official languages.<sup>57</sup>

Focusing now on intensity, restrictions of "significant demand" and "nature of the office" to the right to communicate with federal institutions (section 20) should be read in a manner that promotes official bilingualism. Given the statement of equality of French and English in section 16, the presumption should be in favour of bilingual services. Before withholding bilingual services, government should demonstrate *both* the absence of a sufficient demand *and* that the nature of the office is such that it would not be unreasonable to fail to offer bilingual services.<sup>58</sup> Moreover, in

<sup>52</sup> See *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 4(2). Compare with *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at para. 67 (S.C.C.).

<sup>53</sup> See *Quigley v. Canada (House of Commons)*, [2003] 1 F.C. 132 (F.C.T.D.).

<sup>54</sup> See *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), ss. 11-12.

<sup>55</sup> *Blaikie (no. 1)*, [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016, at 1022 (S.C.C.). See also *Blaikie (no. 2)*, [1981] S.C.J. No. 30, [1981] 1 S.C.R. 312 (S.C.C.); *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.); *Reference re Manitoba Language Rights*, [1992] S.C.J. No. 2, [1992] 1 S.C.R. 212 (S.C.C.); *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 6.

<sup>56</sup> *Contra R. v. Rodrigue*, [1994] Y.J. No. 113, 91 C.C.C. (3d) 455 (Y.T.S.C.), affd [1994] Y.J. No. 178 (Y.T.C.A.).

<sup>57</sup> Compare *Blaikie (no. 1)*, [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016, at 1030 (S.C.C.); *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460 (S.C.C.); *R. v. Cross*, [1998] R.J.Q. 2587 (Que. C.A.); *R. v. Montour*, [1998] J.Q. no 2630 (Que. C.A.). Consider the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 19.

<sup>58</sup> For the government's interpretation of these requirements, see the *Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48.

furtherance of a presumption favouring bilingual services, the government should only be heard to offer a justification for non-bilingual services after a period of “active offer”.<sup>59</sup> Citizens should bear no burden of proof: the presumption of bilingual services should be in their favour. What is more, I maintain that the principle of equality in subsection 16(1) should require a minimum of bilingual services in all federal institutions, such that no Canadian should be told that communicating in the other official language is the only way to receive services. Federal offices with full bilingual services should coordinate with less bilingual offices so that the delay in responding to the query of a Canadian is the only significant difference between a fully bilingual office and one that is not. For example, citizens communicating with the Canada Revenue Agency at a unilingual office should be able to receive an answer to their query in their official language of choice, even if they can only formulate their query to the office staff in the other official language. This reading of section 20 draws on the “sliding scale” approach developed under section 23 of the Charter.<sup>60</sup>

These are but some examples of the residual role that section 16 should be understood to play. To those who argue that this interpretation subverts the specificity of sections 17 to 23, two answers are available. First, reference should be had to section 7 and to the role accorded to it despite the specificity of sections 8 to 14 of the Charter. Second, to understand constitutional official bilingualism as restricted to sections 17 to 23 is to reduce section 16 to a preamble-like declaration for what follows. Section 16 is too general to justify reading it as such. To this end, I cannot agree with Woehrling and Tremblay that “la déclaration formelle du statut de langue officielle *n’ajoutera rien*, comme tel, aux dispositions prévoyant de façon spécifique les conséquences de ce statut en termes de droits pour les individus et d’obligations corrélatives pour la puissance publique”.<sup>61</sup> My reading of section 16 is inspired by the

<sup>59</sup> *R. v. Gauthreau*, [1989] N.B.J. No. 1005 (N.B.Q.B.), revd on other grounds [1990] N.B.J. No. 860, 109 N.B.R. (2d) 54 (N.B.C.A.). See also the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 28 (though “active offer” follows only after a duty of bilingual services is established).

<sup>60</sup> See *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, at para. 39 (S.C.C.).

<sup>61</sup> José Woehrling & André Tremblay, “Les dispositions de la Charte relatives aux langues officielles (articles 16 à 22)”, in Gérald-A. Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham, ON: LexisNexis Canada, 2005), at 1067-68 (emphasis added).

“analogous grounds” reading of section 15.<sup>62</sup> Sections 17 to 23 do not close the categories of activity (the sites) to be covered, nor do they exhaust the procedural and structural possibilities for achieving the goals of section 16 (the modes). That is, the modes and sites of section 16 are as infinitely expansible as technology permits us to communicate in multiple ways (modes) and as the changing roles of government permit it to pursue its objectives with new institutions and tools of governance (sites).

Properly understood, section 16 prevents one from interpreting the language provisions of the Charter as specific instances of an incomplete language policy. Properly understood, it requires all constitutional language provisions to be read as promoting a comprehensive constitutional policy of official bilingualism. In this respect, the “watertight compartments” approach developed in some Courts of Appeal should be rejected.<sup>63</sup> For example, it should not follow that because the issuance of a speeding ticket is part of a “court proceeding” (section 19) that it *cannot equally* be considered a “service to the public” (section 20).<sup>64</sup> One should embrace an expansive interpretation of all language rights and see to it that conflicts are resolved in the spirit of official bilingualism and — taking direction from subsection 16(3) — in favour of what would “advance the equality of status or use of English and French”.<sup>65</sup>

The interpretation of section 16 here endorsed is not innovative: Parliament’s *Official Languages Act 1988*<sup>66</sup> guarantees much of what is outlined above. I suggest that Parliament’s Act represents a generous and correct interpretation of the Charter’s official bilingualism. It should not be forgotten that the Supreme Court holds no monopoly in interpreting the Constitution and that Parliament has positioned itself as a more aggressive defender of language rights than the Supreme Court.

<sup>62</sup> The presence of enumerated grounds of discrimination in s. 15 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 does not preclude the recognition of additional grounds of discrimination.

<sup>63</sup> Hogg also holds this view: “These subss. (1) and (2) of s. 16 are probably not addressed to communications between government and the public, because that topic is addressed by s. 20” (Peter W. Hogg, *Constitutional Law of Canada* (updated looseleaf version) (Scarborough: Thomson-Carswell), at 53-21).

<sup>64</sup> *Contra R. v. Simard*, [1995] O.J. No. 4975, 27 O.R. (3d) 116 (Ont. C.A.).

<sup>65</sup> See *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, at para. 36 (S.C.C.) (Bastarache J., dissenting): “[T]he 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.”

<sup>66</sup> R.S.C. 1985, c. 31 (4th Supp.).

### III. SUBSECTION 16(1): THE CONSTITUTION OF OFFICIAL BILINGUALISM

Subsection 16(1) should be read as a mandatory constitutional provision and the reference to “Canada” should be read more broadly than the reference to the “institutions of the Parliament and government of Canada”. Moreover, the right to work in the federal public service in either official language should be understood to be constitutionally guaranteed by subsection 16(1). These claims are defended below.

#### 1. A Mandatory Constitutional Provision

Generally speaking, there are two schools of thought with respect to section 16. The first understands the section as an abstract, preamble-like provision that articulates an objective or general goal, the parameters of which are exhausted by the sections that follow it. The second understands the section as a fundamental and autonomous principle in the constitutional affirmation of official bilingualism. I favour the second understanding and view section 16 as the heart of the Charter’s official language guarantees. To demonstrate why this understanding is correct, I challenge the arguments in favour of the first school of thought and make out a case in favour of the alternative understanding.

The argument that subsection 16(1) should be read as no more than a declaration of principle focuses principally on its wording. Though subsection 16(1) has received scant judicial attention, section 2 of the *Official Languages Act 1969*<sup>67</sup> contains similar wording and has received judicial consideration. It reads:

2. 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.

Though the wording of section 16 of the Charter and section 2 of the *Official Languages Act 1969*<sup>68</sup> is different, for present purposes the similarity is sufficient to review the reasoning of appellate courts.

In *Assoc. des Gens de l’Air du Québec Inc. v. Lang*, the government’s decision to restrict the use of French in air traffic control as a measure to

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<sup>67</sup> R.S.C. 1970, c. O-2.

<sup>68</sup> R.S.C. 1970, c. O-2.

promote safety by reducing difficulties associated with bilingual communication was challenged.<sup>69</sup> It was claimed that this decision was contrary to the equality of French and English affirmed in section 2 of the *Official Languages Act 1969*.<sup>70</sup> Judging that the equality provided at section 2 could not be “absolute equality, since this would imply, among other things, that the two languages were used with equal frequency”, Pratte J.A. concluded for the Federal Court of Appeal that the section required no more than “a relative equality requiring only that in identical circumstances the two languages receive the same treatment”.<sup>71</sup> Though this fallacious reasoning did not deny the mandatory character of section 2, it restricted the meaning of equality to a point of no consequence. In *Air Canada v. Joyal*, the Quebec Court of Appeal reasoned that when section 2 of the *Official Languages Act 1969* is interpreted in the context of the Act as a whole, it cannot be read as providing a right enforceable by the courts.<sup>72</sup> Rather, it falls to the Commissioner for Official Languages and the political process more generally to be guided by the equality of French and English.

Though not necessarily articulated as such, three principal arguments were relied on in support of the view that section 2 of the *Official Languages Act 1969*<sup>73</sup> is a statement of principle without mandatory force: (a) the absence of a specified right-holder; (b) the indeterminacy of the features of official bilingualism; and (c) the role of the judiciary.

*Absence of a specified right-holder.* Subsection 16(1) speaks not of a right-holder as such, but affirms the status, rights and privileges of the English and French *languages*. Though this formulation differs from the formulation of the Charter’s fundamental freedoms (“Everyone”), the right to vote and mobility rights (“Every citizen of Canada”), legal rights (“Everyone”, “Any person charged”, “A party or witness”), equality rights (“Every individual”), and minority language educational rights (“Citizens of Canada”), the absence of a specified right-holder is not foreign to Canadian constitutional rights. The very guarantee of all rights and freedoms in the Charter is formulated in the affirmative (section 1: “The *Canadian Charter of Rights and Freedoms* guarantees ...”), the sitting of Parliament is written in the imperative (section 5: “There

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<sup>69</sup> [1978] F.C.J. No. 35, [1978] 2 F.C. 371 (F.C.A.).

<sup>70</sup> R.S.C. 1970, c. O-2.

<sup>71</sup> *Assoc. des Gens de l’Air du Québec Inc. v. Lang*, [1978] F.C.J. No. 35, [1978] 2 F.C. 371, at 376 (F.C.A.).

<sup>72</sup> *Air Canada v. Joyal*, [1982] C.A. 39 (Que. C.A.).

<sup>73</sup> R.S.C. 1970, c. O-2.

shall be a sitting of Parliament”), and Aboriginal and treaty rights are “recognized and affirmed” (section 35). In short, the absence of a specified right-holder in subsection 16(1) does not imply that the section is merely declaratory. Though there may be difficulties with respect to standing,<sup>74</sup> these difficulties are not dissimilar to those that face courts with respect to the other constitutional rights listed above or in cases of public interest standing. Below, I argue that the absence of reference to “Anglophones” and “Francophones” or “English-Canadians” and “French-Canadians” can be understood as a decision by the drafters of the Charter to encompass all Canadians, thereby making Canada’s duality *linguistic* rather than *cultural*.<sup>75</sup>

*Indeterminacy of consequences.* Although section 16 does not specify what consequences flow from the affirmation of official bilingualism, it does not follow that nothing follows. The courts may, rightly, be hesitant to specify the features of official bilingualism, but judicial restraint should be distinguished from narrow constitutional interpretation. Indeed, I take Parliament’s *Official Languages Act 1988*<sup>76</sup> as an instantiation of the legislature’s responsibility to interpret the Constitution and to specify the meaning and consequences of the official languages policy set out in sections 16 and following of the Charter.

*The role of the judiciary.* The courts’ concern for the importance of the political process in the exposition of official bilingualism should be embraced. It is true that “the legitimacy of the policy on official bilingualism is contingent upon the quality of the public deliberations that produce it”.<sup>77</sup> In this light, courts should articulate remedies that promote public deliberation and political responsibility and that avoid determining the outcomes of such political engagement. The role of the courts under the Constitution should not be confused with the scope of the Constitution itself, so that a court’s unwillingness to participate in an area of legal debate implies that constitutional guarantees relevant to that area are of less importance. Rather, a generous interpretation of language rights may be reconciled with a delimited judicial role if a court declares

<sup>74</sup> For example, do I act “in right of the French language” when I claim that the status of the French language in a given institution is unequal to the status of the English language?

<sup>75</sup> This is not to deny the relationship between language and culture (see, e.g., *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, at para. 32 (S.C.C.)); rather, it is to recognize a difference between, e.g., French-Canadians and other French-speaking Canadians.

<sup>76</sup> R.S.C. 1985, c. 31 (4th Supp.).

<sup>77</sup> Pierre A. Coulombe, “Citizenship and Official Bilingualism in Canada” in Will Kymlicka & Wayne Norman, *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000), at 286.

that the government is constitutionally responsible for specifying the features of a comprehensive language policy.

*On Constitutions.* The Constitution calls for an interpretative approach that reflects its status in the legal and political order of Canada. As a consequence, even if subsection 16(1) of the Charter were identical to section 2 of the *Official Languages Act 1969*,<sup>78</sup> it would not follow that it should receive the same interpretation. The purposes of both provisions differ. The *Official Languages Act 1969* sought, *inter alia*, to increase the place of francophones in the federal public service, to increase the provision of governmental services in French, and to make French one of the two working languages in the federal public service. The Charter's language provisions purposes are more encompassing, and aim "to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population".<sup>79</sup> In addition, positioning a provision in a Constitution rather than in legislation warrants the interpretive approach applicable to Constitutions. As a case in point, the *Canadian Bill of Rights*<sup>80</sup> did not determine the scope of many of the rights guaranteed in the Charter despite the similarity of wording of several provisions.<sup>81</sup> On the particular question of the mandatory character of constitutional provisions, "[t]here is no authority in Canada for applying the mandatory/directory doctrine to constitutional provisions."<sup>82</sup> On this basis, much of the legal-technical reasoning relied on by appellate courts under section 2 of the *Official Languages Act 1969* is unavailable under section 16 of the Charter.<sup>83</sup>

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<sup>78</sup> R.S.C. 1970, c. O-2.

<sup>79</sup> *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, at para. 31 (S.C.C.). This reference was made in relation to s. 23, though it is applicable, in large measure, to the other language provisions 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.

<sup>80</sup> R.S.C. 1985, App. III.

<sup>81</sup> See *Law Society of Upper Canada v. Skapinker*, [1984] S.C.J. No. 18, [1984] 1 S.C.R. 357 (S.C.C.).

<sup>82</sup> *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, at 742, 742-43 (S.C.C.); *Bilodeau v. Manitoba (Attorney General)*, [1986] S.C.J. No. 27, [1986] 1 S.C.R. 449 (S.C.C.); Luc Huppé, "Droit constitutionnel — Article 16 de la Charte des droits et libertés — Égalité de Statut des Langues Officielles — Une Intention ou une Obligation?: *Société des Acadiens c. Association de Parents*" (1988) 67 Can. Bar Rev. 128, at 133.

<sup>83</sup> See Joseph Eliot Magnet, "The Charter's Official Language Provisions: The Implications of Entrenched Bilingualism" (1982) 4 S.C.L.R. 163, at 178.

## 2. Official-Language Status

Thus far, I have referred to subsection 16(1)'s affirmation of official languages and equality of status without speaking to how they interact. I now examine how both halves of section 16 work in concert, and propose that the reference to official languages should be read as separate from the reference to equality of status. I aim to demonstrate that the reference to "Canada" in the first half of subsection 16(1) should be given a wider meaning than the reference to "institutions of the Parliament and government of Canada" in the second half. This argument requires a comparison both official language versions of subsection 16(1) of the Charter:<sup>84</sup>

English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

This subsection contains two verbs ("are" and "have"; "sont" and "ont") that predicate two separate objects ("official languages" and "equality of status and equal rights and privileges"; "langues officielles" and "statut et ... droits et privilèges égaux"), which in turn are given independent scope by two distinct prepositional phrases ("of Canada" and "in all institutions of the Parliament and government of Canada"; "du Canada" and "dans les institutions du Parlement et du gouvernement du Canada"). The English version of subsection 16(1) uses the conjunction "and". The French version divides the first half from the second with a semi-colon. Both "and" and the semi-colon function grammatically to compound what could otherwise be two independent sentences. In neither case is a relative clause employed (such as "which have" or "qui ont") to indicate subordination between the statements. The separation between both halves is made especially clear in the French version, which even repeats the subject ("ils"), making the semi-colon grammatically transposable with a period, so that the English version of subsection 16(1) could equally be stated as:

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<sup>84</sup> On the importance of reading both versions of bilingual legislation, see Roderick A. Macdonald, "Legal Bilingualism" (1997) 42 McGill L.J. 119.

English and French are the official languages of Canada. They have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Subsection 16(1) could have been drafted to read: "English and French are the official languages and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada." This would have made clear that the official languages affirmation operated only with respect to the "institutions of the Parliament and government of Canada". Alternatively, the constituent authorities could have specified "Canada" to mean only Parliament and Government of Canada. An obvious example was before them; section 2 of the *Official Languages Act 1969*<sup>85</sup> provides:

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. (emphasis added)

L'anglais et le français sont les langues officielles du Canada pour tout ce qui relève du Parlement et du gouvernement du Canada; elles ont un statut, des droits et des privilèges égaux quant à leur emploi dans toutes les institutions du Parlement et du gouvernement du Canada. (je souligne)

In this case, the section restricts the scope of "Canada" to Parliament and the Government of Canada. Section 16 does not do so.

Many resist reading "Canada" more broadly than the "institutions of the Parliament and government of Canada". Some assume that it is restricted to the federal authorities without explaining why this should be so.<sup>86</sup> Others, recognizing the difference in formulation between section 2 of the *Official Languages Act 1969*<sup>87</sup> and subsection 16(1) of the Charter, nonetheless conclude that the latter provision should be read as though the words "for all purposes of the Parliament and Government of Canada" followed "Canada".<sup>88</sup> In what follows, I outline

<sup>85</sup> R.S.C. 1970, c. O-2.

<sup>86</sup> See, e.g., *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 616 (S.C.C.) (Wilson J.); André Braën, "Language Rights" in Michel Bastarache, ed., *Language Rights in Canada* (Montreal: Yvon Blais, 1987), at 49.

<sup>87</sup> R.S.C. 1970, c. O-2.

<sup>88</sup> See, e.g., André Tremblay, "Les droits linguistiques (Articles 16 à 22)" in Gérald-A. Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 3d ed. (Toronto: Carswell, 1996) 15-1, at 15-8; José Woehrling & André Tremblay, "Les dispositions de la Charte

what would be some consequences of reading “Canada” more broadly. But first, a brief word on the meaning of the expression “institutions of the Parliament and government of Canada” in section 16.

It is no understatement that “institutions” is a difficult juristic concept.<sup>89</sup> The expression “institutions of the Parliament and government of Canada” is used in sections 16 and 20, whereas the expressions “Parliament” (sections 17 and 18) and “court established by Parliament” (section 19) are used in other language provisions. Unlike paragraph 32(1)(a) (“Application of the Charter”) which refers to the “Parliament and government of Canada”,<sup>90</sup> the expression “institutions of the Parliament and government of Canada” in sections 16 and 20 has not received much judicial attention. For some, the fact that subsection 16(1) specifies “institutions of” means that it should be constructed more narrowly than subsection 32.<sup>91</sup> For others, the difference is of no consequence and both sections should receive the same reading.<sup>92</sup> I propose that the reference to “institutions” in subsection 16(1) specifies that the obligation of linguistic equality is primarily one of institutional, rather than personal, responsibility. This interpretation overcomes the restrictive interpretation adopted by Beetz J. in 1986, which focused on conflicts between the rights of individuals.<sup>93</sup> By interpreting language rights as the right of a speaker and extending this right to all potential speakers, Beetz J. reasoned that one speaker could not impose language choice on another speaker. Accordingly, Beetz J. reasoned that language rights permitted speakers to speak but not to be understood (at least, without the aid of a translator). By focusing on the obligation of the “institution” to be bilingual, this conflict largely dissipates: “[i]nstitutional bilingualism is achieved when rights are granted to the public and

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relatives aux langues officielles (articles 16 à 22)”, in Gérald-A. Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham, ON: LexisNexis Canada, 2005), at 1033.

<sup>89</sup> Roderick A. Macdonald provides a helpful analysis in “Les Vieilles Gardes. Hypothèses sur l’émergence des normes, l’internormativité et le désordre à travers une typologie des institutions normatives” in Jean-Guy Belley, ed., *Le droit soluble : contributions québécoises à l’étude de l’internormativité* (Paris: L.G.D.J., 1996).

<sup>90</sup> Section 32(1)(a) 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.

<sup>91</sup> Peter W. Hogg, *Constitutional Law of Canada* (updated looseleaf version) (Scarborough: Thomson-Carswell), at 53-21, note 107.

<sup>92</sup> Henri Brun & Guy Tremblay, *Droit constitutionnel*, 4th ed. (Cowansville, Qc.: Éditions Yvon Blais, 2002), at 844.

<sup>93</sup> *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. 28, [1986] 1 S.C.R. 549 (S.C.C.) and *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460 (S.C.C.).

corresponding obligations are imposed on institutions. ... No rights are given as such to institutions.”<sup>94</sup> To this end, sections 16 and 20 should be read as requiring institutions to be structured so as to satisfy the requirements of official bilingualism and the equality of French and English.

Given the partial overlap between subsection 16(1) and section 32 — both refer to the “Parliament and government of Canada” — the jurisprudence under section 32 could aid the application of subsection 16(1), especially with respect to the delegation of government functions.<sup>95</sup> By way of illustration, federal departments, governmental bodies, administrative bodies, Crown corporations, the R.C.M.P., Canada Post, and (more controversially) the Territories are all subject to subsection 16(1).<sup>96</sup> The relevant question should not be what form institutions traditionally assume, but rather what governance functions should be assumed by government institutions. A willingness to approach the question outside the paradigm of institutional form has guided the Court in some of its section 32 interpretations.<sup>97</sup> It should also guide the interpretation of section 16.<sup>98</sup>

In passing, I note that the Supreme Court’s conclusion that the judiciary is not a branch of government for the purposes of section 32 of the Charter is contradicted by section 19, which applies to courts established by Parliament.<sup>99</sup> It would be curious to conclude that the Charter does not apply to a body specifically targeted by the Charter.

<sup>94</sup> *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, at para. 36 (S.C.C.).

<sup>95</sup> *Charlebois v. Moncton (City)*, [2001] N.B.J. No. 480, 242 N.B.R. (2d) 259 (N.B.C.A.) relies on case law under s. 32 to interpret s. 16(2) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. See also *Charlebois v. Saint John (City)*, [2004] N.B.J. No. 287, 2004 NBCA 49, at para. 24 (N.B.C.A.); *Canada (Commissioner of Official Languages) v. Canada (Department of Justice)*, [2001] F.C.J. No. 431 (F.C.T.D.); and *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 25.

<sup>96</sup> Contrast with *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 3; *R. v. St. Jean*, [1986] Y.J. No. 76, 2 Y.R. 116 (Y.T.S.C.).

<sup>97</sup> See, e.g., *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229 (S.C.C.); *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] S.C.J. No. 124, [1990] 3 S.C.R. 570 (S.C.C.); *Harrison v. University of British Columbia*, [1990] S.C.J. No. 123, [1990] 3 S.C.R. 451 (S.C.C.).

<sup>98</sup> Though not a s. 16 case, the majority’s interpretation in *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563 (S.C.C.) of “institution” in the New Brunswick *Official Language Act*, S.N.B. 2002, c. O-0.5, ss. 1 and 22, discloses a narrow appreciation of “institution” for the purposes of official bilingualism.

<sup>99</sup> Contrast *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573, at 598 (S.C.C.): “the word ‘government’ is used in s. 32 of the *Charter* in the sense of the executive government of Canada and the Provinces” with *Société des Acadiens du Nouveau-Brunswick*

How should one read the expression “Canada” in section 16 if “Canada” embraces more than the “institutions of the Parliament and government of Canada”? It should be acknowledged from the outset that “Canada” should not be read so broadly as to include the provincial authorities, as subsection 16(2) of the Charter (“Official languages of New Brunswick”) and the simplified amendment procedure at section 43 of the *Constitution Act, 1982*<sup>100</sup> make clear. Given that the Constitution specifically addresses the official language status of one province and allows the other provinces to amend the Constitution in the same way, to read “Canada” as speaking to all provinces would be to subvert this specification and amendment procedure. But the expression “Canada” can encompass much beyond the provinces, as the following discussion seeks to outline.

*Office of the Governor General of Canada and of the Prime Minister of Canada.* In her parliamentary capacity, the Governor General of Canada is part of the “institution of the Parliament” as that expression is used in subsection 16(1).<sup>101</sup> In addition, the Governor General, as an officer within the government of Canada, is part of all “institutions of the government of Canada”. However, the Governor General (as the Queen’s representative) is also the Canadian Head of State.<sup>102</sup> To borrow the language of section 20 of the Charter, the “nature” of the Office representing our Head of State requires that it be officially bilingual. Similarly, the Office of the Prime Minister, as the head of the Canadian Federation, should also be officially bilingual.

*The Seat of the Government of Canada.* Ottawa is the national capital<sup>103</sup> and a matter of national concern.<sup>104</sup> The lack of bilingualism in the City of Ottawa is what F.R. Scott correctly recognized as “an anomaly that must be ended if the concept of equal partnership is to be given real

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*Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549, at 565 (S.C.C.) (Dickson C.J.C.): “In my opinion, ‘all institutions of ... government’ includes judicial bodies or courts.”

<sup>100</sup> Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>101</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 17, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>102</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 9-10, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>103</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 16, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>104</sup> *Munro v. Canada (National Capital Commission)*, [1966] S.C.J. No. 46, [1966] S.C.R. 663 (S.C.C.).

as well as symbolic meaning”.<sup>105</sup> As the home of all Canadians, the national capital should fulfil the affirmation of official bilingualism in section 16.<sup>106</sup> Official bilingualism should cross jurisdictional boundaries and affect the status of the municipality of Ottawa. In the national capital, the state — municipal, provincial, or federal — should be a model of official bilingualism.

*The Supreme Court of Canada.* The language provisions of the Charter already speak to the Supreme Court of Canada. As a court established by Parliament,<sup>107</sup> “[e]ither English or French may be used by any person in, or in any pleading in or process issuing from” the Supreme Court. However, section 19 has not been interpreted by the Supreme Court as guaranteeing the right to be understood. It is only through the door of natural justice that an interpreter is legally required.<sup>108</sup> Parliament, in 2002, corrected this narrow construction and modified the *Official Languages Act 1988* to require that “every judge or other officer who hears ... proceedings is able to understand [the official language or languages chosen by the parties] without the assistance of an interpreter”.<sup>109</sup> Yet, the *Official Languages Act 1988* expressly excludes the Supreme Court of Canada from this duty.<sup>110</sup> At the apex of the Canadian judicial system and as the final court of appeal in all matters, the Supreme Court is more than a “federal institution”; it is a Canadian institution. Parties should be entitled to address themselves, and to be understood directly, in their official language of choice. The use of an interpreter strikes at the status of the Supreme Court in a bilingual country. As Roderick Macdonald explains,

[t]he reason why it is important to be able to argue before a court in one’s own language owes much to the rhetorical power of language. ... [I]f a judgment is the rhetorical act of convincing, its presentational

<sup>105</sup> F.R. Scott, “Language Rights and Language Policy in Canada” (1970-71) 4 *Manitoba L.J.* 243, at 252.

<sup>106</sup> Consider *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 22(a) (duty of all federal institutions in the National Capital Region to ensure that any member of the public can communicate with and obtain available services in either official language).

<sup>107</sup> *Supreme Court Act*, R.S.C. 1985, c. S-26, enacted pursuant to s. 101 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>108</sup> *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.) (Beetz J.). Contrast with the judgments of Dickson C.J.C. and Wilson J.

<sup>109</sup> *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 16(1).

<sup>110</sup> *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 16(1): “Every federal court, other than the Supreme Court of Canada ...”.

elements are equally important. The process of argumentation in law is more than a process of rational justification; it is also a process of presentational dialogue.<sup>111</sup>

I contend that section 16 of the Charter renders unconstitutional the exception for the Supreme Court in the *Official Languages Act 1988*<sup>112</sup> and that it should be read as obliging the government to nominate judges able to understand parties in either official language. In the same vein, section 16 should be read as obliging the Court to hear cases in panels which are able to understand the parties directly, unaided by translation. This conclusion is the only one consistent with the Supreme Court's own affirmation that "[w]here institutional bilingualism in the courts is provided for, it refers to *equal access to services of equal quality* for members of both official language communities in Canada".<sup>113</sup>

*The Constitutional Courts of Canada.* Section 96 courts, as they are commonly referred to, are the only courts provided for by the Canadian Constitution.<sup>114</sup> Other courts, be they courts of appeal, provincial courts, or the Federal Court of Canada, are authorized by the Constitution but are not expressly created thereby.<sup>115</sup> I propose that section 96 courts should be recognized as the courts of "Canada",<sup>116</sup> despite being provincially constituted courts, the judges of which are appointed by the Governor General. Being the courts of Canada, section 96 courts should have an obligation of institutional bilingualism. This would not impose many, if any, additional obligations on the judiciary given that an accused person already has the right to a trial in the official language of choice anywhere in Canada.<sup>117</sup> As such, section 96 courts are already institutionally structured to extend this right to all court proceedings.<sup>118</sup>

<sup>111</sup> Roderick A. Macdonald, "Legal Bilingualism" (1997) 42 McGill L.J. 119, at 139 (footnote omitted).

<sup>112</sup> R.S.C. 1985, c. 31 (4th Supp.).

<sup>113</sup> *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 22 (S.C.C.) (emphasis added).

<sup>114</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 96, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>115</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 92(14), 101, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>116</sup> The expression "Court of Canada" is found in *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 133, reprinted in R.S.C. 1985, App. II, No. 5, to specify federally created courts. I use it here to mean the courts provided for by the Canadian Constitution.

<sup>117</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 530.

<sup>118</sup> I follow A. Braën, "L'interprétation judiciaire des droits linguistiques au Canada et l'affaire *Beaulac*" (1998) 29 R.D.G. 379, at 408, in thinking: "On imagine mal dans un tel contexte comment une province pourrait alors s'opposer à une telle demande d'extension des droits linguistiques."

Conscripted section 96 courts, such as the bankruptcy court, the divorce court and the unified family court are no exception to the argument developed here. Further consideration should be given to whether this reasoning extends to the appointment of a section 96 judge to federal and provincial Royal Commissions and arbitration hearings, to take two examples.

*Other Institutions of Canada.* On the basis of the admittedly vague idea of “Canadian institution” developed here, there are a number of institutions which, though they may justifiably be understood as “federal”, should — by virtue of their importance for the Canadian State — be understood to be institutions of Canada. On this basis, they should be included within the scope of subsection 16(1) despite not, or in addition to, being “institutions of the Parliament and government of Canada”. Included within this list would be the Bank of Canada, the Canadian Armed Forces, and Foreign Diplomatic Offices. Taking the last example, Canadians abroad should be able to communicate with an embassy or High Commission *despite* the fact that subsection 20(1) of the Charter applies only to “[a]ny member of the public *in Canada*”.<sup>119</sup> Moreover, the activities of the State of Canada in the international arena should be conducted in the spirit of official bilingualism, as recognized by the Parliament of Canada: “The Government of Canada shall take all possible measures to ensure that any treaty or convention between Canada and one or more other states is authenticated in both official languages.”<sup>120</sup> Returning to the domestic scene, entrepreneurs involved in public-private partnerships and franchisees exercising governmental functions could be included within the concept of a “Canadian institution” for the purposes of section 16.

These proposals are not revolutionary. Many require no more than conferring constitutional status on an ongoing practice, while others offer constitutional incentive for political decisions that should have been taken long ago.

I have not specified the modalities and specific consequences of extending the meaning of “Canada” in subsection 16(1) beyond “institutions of the Parliament and government of Canada”. The argument for an official bilingualism policy having been presented, if accepted it would be incumbent on the relevant authorities to provide the features

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<sup>119</sup> See *Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48, s. 10(a).

<sup>120</sup> *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 10(1).

of such a policy. Instead of asking the courts to read the Constitution as though it contained a blueprint for a comprehensive policy of official bilingualism, we should read the Constitution as identifying the priority of official bilingualism and as requiring legislative authorities to articulate a policy.

### 3. Equality of Status

Subsection 16(1) avoids the concepts of minority or majority. There is no qualifier of “significant demand”, “reasonable” in the circumstances, or “where the number ... so warrants”. It is the French and English *languages* and not the French and English linguistic *communities* that are posited as equal.<sup>121</sup> No Canadian requires membership in an official language community in order to claim the rights guaranteed by sections 16 to 20. Moreover, it is not for the State to inquire as to the linguistic membership of the individual. From the State’s perspective, the individual may make use of either official language (or both of them).<sup>122</sup> The duality of section 16 is linguistic, not cultural.

The designation of languages as official “involves a degree of equality” between the official languages.<sup>123</sup> The equality of the official languages signifies a shift away from the framework of reasonable accommodation. As Bastarache J. explained in *Beaulac*, “the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation”.<sup>124</sup> This equality framework contrasts sharply with an approach that provides special accommodation to persons lacking “sufficient proficiency in th[e] normal language”.<sup>125</sup> In this way, a person is entitled to make use of and be understood

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<sup>121</sup> Contrast *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, s. 16.1(1): “The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.”

<sup>122</sup> *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 56 (S.C.C.).

<sup>123</sup> Alan Patten & Will Kymlicka, “Introduction: Language Rights and Political Theory: Context, Issues, and Approaches” in Will Kymlicka & Allan Patten, eds., *Language Rights and Political Theory* (Oxford: Oxford University Press, 2003), at 28.

<sup>124</sup> *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 24 (S.C.C.).

<sup>125</sup> Alan Patten & Will Kymlicka, “Introduction: Language Rights and Political Theory: Context, Issues, and Approaches” in Will Kymlicka & Allan Patten, eds., *Language Rights and Political Theory* (Oxford: Oxford University Press, 2003), at 28.

directly when using either official language, irrespective of that person's ability to speak the other official language.

The equality of Canada's official languages is a status afforded to two languages over others in Canada, a "privilege" as that term is used in sections 16, 21 and 22. In this respect, section 15 should not be used to modify the status accorded to French and English, both because "[a]ll parts of the Constitution must be read together"<sup>126</sup> and, perhaps more importantly, because the language provisions of the Charter "could also be viewed not as an 'exception' to equality guarantees but as their fulfilment in the case of linguistic minorities".<sup>127</sup> Of course, it should not follow that language is not an analogous ground under section 15.<sup>128</sup> The circumstances of inequality between languages (or, in the terminology of section 15, a person discriminated against because of language choice) are potentially wider than the guarantees provided for in sections 16 to 23.

#### 4. Right to Work in Either Official Language

Under subsection 16(1), federal public servants should have the right to work in the official language of choice.<sup>129</sup> Though this right could be derived from the official language status accorded to French and English, it is also clearly anchored in the "equality of status and equal rights and privileges" of both languages in all institutions of the Parliament and government of Canada. Because the federal public service cannot be considered part of "the public", subsection 20(1) does not ground this right.

<sup>126</sup> See *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 15, [2005] 1 S.C.R. 238, 2005 SCC 15, at para. 2 (S.C.C.).

<sup>127</sup> *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1, [2000] 1 S.C.R. 3, at para. 31 (S.C.C.) (the quote refers to s. 23, its logic extends to ss. 16-20).

<sup>128</sup> See *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 22 (S.C.C.): "Equality does not have a lesser meaning in matters of language."

<sup>129</sup> See Joseph E. Magnet, "The Charter's Official Languages Provisions: The Implications of Entrenched Bilingualism" (1982) 4 S.C.L.R. 163, at 172; Peter W. Hogg, *Constitutional Law of Canada* (updated looseleaf version) (Scarborough: Thomson-Carswell), at 53-21 to 53-22; André Tremblay, "L'interprétation des dispositions constitutionnelles relatives aux droits linguistiques" (1983) 13 Man. L.J. 651, at 654; André Braën, "Language Rights" in Michel Bastarache, ed., *Language Rights in Canada* (Montreal: Yvon Blais, 1987), at 48. Justice Le Dain in *Assoc. des Gens de l'Air du Québec Inc. v. Lang*, [1978] F.C.J. No. 35, [1978] 2 F.C. 371, at 379 (F.C.A.) recognized this same right in *Official Languages Act*, R.S.C. 1970, c. O-2, s. 2. It would appear that Parliament does not recognize this as a right guaranteed by the Constitution, but recognizes it as desirable nonetheless: see *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), preamble and ss. 34ff.

A critical mass of official language speakers is required to make real the right to work in either official language. The right to work in French in the federal public service would be of little consequence if there were only one French-speaker. In consequence, the right to work in an official language should require that both official languages have “equitable or proportional representation”.<sup>130</sup> To this end, the *Official Languages Act* 1988 provides that “work environments of the institution [should be] conducive to the effective use of both official languages”.<sup>131</sup> The accommodation of one language or systematic predomination of another should be avoided. If the reality in the federal public service is short on this count, this should be acknowledged explicitly and, to the extent possible, the deficit corrected. It may be that in some regions of Canada, it will be difficult to establish a critical mass of official language workers. In these circumstances, it will fall on the State to justify the limitation of this right under section 1 of the Charter.

The right to work in an official language is independent of the right of a member of the public to communicate with a federal institution in the official language of choice. Nevertheless, there is an important correlation between both rights. The right guaranteed in subsection 20(1) requires that federal institutions be bilingual to the extent required to communicate with the public in both official languages. In this way, a conflict of rights appears to exist when a member of the public communicates with a federal institution in English, relying on his or her subsection 20(1) right, and all the public servants of that institution choose to work in French, relying on their section 16(1) right.<sup>132</sup> Yet, once the supposed conflict is understood as being between a member of the public and a State *institution*, the conflict largely dissipates: the institution is under a duty to be bilingual, without requiring that every public servant that communicates with the public be bilingual. The resolution of this conflict is addressed in part by ensuring that

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<sup>130</sup> André Braën, “Language Rights” in Michel Bastarache, ed., *Language Rights in Canada* (Montreal: Yvon Blais, 1987), at 48.

<sup>131</sup> *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 35(1)(a).

<sup>132</sup> See *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 574ff (S.C.C.). Denise G. Réaume offers an excellent analysis in “The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?” (2002) 47 McGill L.J. 593, at 601ff.

institutions communicating with the public have a critical mass of official language speakers.<sup>133</sup>

Despite structuring an institution so as to minimize conflict with section 20, there could remain conflict in individual cases.<sup>134</sup> Where circumstances are such that a public servant will be requested to communicate with the public in both official languages, the right of that public servant to work in the official language of choice should come second. The language requirements in some federal employment reflect this. I gather that it is following this line of reasoning that Parliament provided that in the event of any inconsistency between Part IV (“Communications with and Services to the Public”) and Part V (“Language of Work”), Part IV prevails.<sup>135</sup>

#### IV. SUBSECTION 16(3): PROGRESSION TO EQUALITY

Subsection 16(3) is the only provision under the heading “Official Languages of Canada” to apply to the federal authority and to *all* the provinces. The argument proposed by some for reading subsection 16(3) as speaking only to those provinces that affirm English and French as official languages is unconvincing. In order to be valid, this argument would have to read subsection 16(3) as seeking only to correct the consequences of “formal equality” outlined in subsections 16(1) and 16(2). This should be rejected.<sup>136</sup>

The Supreme Court has affirmed that “substantive equality is the correct norm to apply in Canadian law”.<sup>137</sup> Just as the equality jurisprudence under subsection 15(1) has adopted substantive equality as the correct

<sup>133</sup> Analogously, see the discussion of the institutional responsibility of the Crown under s. 530, *Criminal Code*, R.S.C. 1985, c. C-46, in *R. v. Cross*, [1998] Q.J. No. 2629, [1998] R.J.Q. 2587, at para. 40 (Que. C.A.); *R. v. Noiseux*, [1999] J.Q. no 507, [1999] R.J.Q. 704 (Que. C.A.).

<sup>134</sup> See *Schreiber v. Canada*, [1999] F.C.J. No. 1576 (F.C.T.D.), affd [2000] F.C.J. No. 2053 (F.C.A.) for a discussion of this conflict. Nicole Vaz and Pierre Foucher are too quick to affirm that: “Once the individualistic focus upon agents of the State is abandoned, however, *the potential conflict dissolves*.” (“The Right to Receive Public Services in Either Official Language” in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2004), at 294 (footnote omitted, emphasis added)).

<sup>135</sup> *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 31.

<sup>136</sup> I do not intend to enter the debate as to how to understand the relationship between formal and substantive equality. The following discussion can rest on an understanding of substantive equality as an exception to formal equality or on an understanding that both are different conceptions of equality.

<sup>137</sup> See *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 22 (S.C.C.); *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1, [2000] 1 S.C.R. 3, at para. 31 (S.C.C.).

norm, so should subsection 16(1) jurisprudence. In addition, subsection 16(3) specifies “Nothing in this Charter” rather than “Nothing in this section” or “part”; as a result, it reaches beyond sections 16 to 20. For example, subsection 16(3) shields legislative measures against challenge on the basis of freedom of expression. It is thus that the Quebec Court of Appeal, relying on subsection 16(3) and section 1 of the Charter, affirmed the constitutionality of Quebec’s *Charter of the French language*.<sup>138</sup> Moreover, given the ambition of the subsection — the progression to equality of French and English — it should be extended to all provinces. For example, Ontario’s *French Language Services Act*<sup>139</sup> has quasi-constitutional status, in part due to subsection 16(3).<sup>140</sup>

The idea that subsection 16(3) dampens the intensity of subsection 16(1) should be rejected. One should avoid an interpretation of mutual modification whereby the legislative progression of one language — in the name of promoting the equal status of both languages *per* subsection 16(3) — is necessarily inconsistent with subsection 16(1).<sup>141</sup> In other words, a policy favouring the employment of French-language speakers in the federal public service could be justified as a fulfilment of the requirements of official bilingualism *per* subsection 16(1), even if it could also be justified as a measure advancing the status and use of French in the federal public service *per* subsection 16(3).

Turning to the purpose of the subsection, progression can be understood as a question of scope (for example, extending official bilingualism into Ontario) as well as a question of intensity (for example, what more can be done in the name of official bilingualism under subsection 16(1)). With this in mind, there is a slight difference between the English and French versions of subsection 16(3) that warrants consideration:

Nothing in this Charter limits the authority of Parliament or a legislature to *advance the equality* of status or use of English and French. (emphasis added)

La présente charte ne limite pas le pouvoir du Parlement et des législatures de *favoriser la progression vers l'égalité* de statut ou d'usage du français et de l'anglais. (je souligne)

<sup>138</sup> *R. v. Entreprises W.F.H. ltée*, [2001] Q.J. No. 5021, at para. 102-103 (Que. C.A.). The judgment addresses only s. 58 of the *Charter of the French language*, R.S.Q. c. C-11.

<sup>139</sup> S.O. 1990, c. F.32.

<sup>140</sup> *R. v. Crête*, [1991] O.J. No. 2823 (Ont. C.J., Prov. Div.).

<sup>141</sup> See *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 24 (S.C.C.).

The French “favoriser la progression vers l'égalité” suggests that progress is required, whereas the English “advance the equality” need not suggest as much.<sup>142</sup> Contrary to subsection 16(1) which affirms the co-equal *de jure* status of Canada's two official languages, subsection 16(3) could be read as hinting at the *de facto* inequality of Canada's two languages. However, by avoiding the concepts of minority and majority, subsection 16(3) does not crystallize the current *de facto* status. In this respect, one should read subsection 16(3) in the same manner as the “affirmative action programs” provisions of the equality rights section and of the mobility rights section.<sup>143</sup> Like those provisions, the ambition of subsection 16(3) should be to become obsolete. One should promote the status of equality between persons, between provinces and between Canada's official languages. Subsections 16(1) and 16(3) aim to work in concert, the former informing the latter, in marrying principle and practice and in seeking to satisfy the promise of the negotiated compromise of 1982.

Subsection 16(3) has been accorded and denied several roles, which are reviewed in turn.

*Confirmation of the Jones decision.* In 1975, the Supreme Court ruled in *Jones* that what section 133 of the *Constitution Act, 1867*<sup>144</sup> “gives may not be diminished” and that so long as the section is being respected, nothing prevents a legislative body from conferring additional rights or privileges or imposing additional obligations respecting the use of English and French.<sup>145</sup> In *Société des Acadiens*, Beetz J. mentioned in passing that subsection 16(3) codified the rule in *Jones*,<sup>146</sup> an opinion shared by Bastarache J. in *Beaulac*.<sup>147</sup>

This assessment is inaccurate. *Jones* was decided under section 133 of the *Constitution Act, 1867*,<sup>148</sup> whereas subsection 16(3) follows subsections 16(1) and 16(2). Section 16 sets out a comprehensive bilingualism

<sup>142</sup> Compare: *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 para. 144 (S.C.C.) (Wilson J.) where “advances” is interpreted as meaning that consequences of official bilingualism “represent the goal rather than the present reality”.

<sup>143</sup> Sections 15(2) and 6(4) 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.

<sup>144</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>145</sup> *Jones v. New Brunswick (Attorney General)*, [1974] S.C.J. No. 91, [1975] 2 S.C.R. 182, at 192 (S.C.C.).

<sup>146</sup> *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 579 (S.C.C.) (Beetz J.); see also Dickson C.J., at 561.

<sup>147</sup> *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 24 (S.C.C.).

<sup>148</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

policy. In this sense, for the federal and New Brunswick authorities, it is more accurate to read subsection 16(3) as confirming the role of the legislature in the articulation of a comprehensive policy of official bilingualism and the equality of status of English and French as envisaged by the Constitution; that is, in articulating “the unfinished edifice of fundamental language rights”.<sup>149</sup> In this way, it is more accurate to say that subsection 16(3) affirms that political responsibility is required to fulfil the promise of the Charter’s language sections rather than to say that it affirms political responsibility where the Charter is silent.

The Court has been too quick to reference subsection 16(3) whenever legislation confers a language right. For example, in *Beaulac*, Bastarache J. held that section 530 of the *Criminal Code*<sup>150</sup> as well as the *Official Languages Act 1988*<sup>151</sup> “constitute an example of the advancement of language rights through legislative means provided for in s. 16(3) of the *Charter*”.<sup>152</sup> This statement is overbroad. Section 530 of the *Criminal Code* and some parts of the *Official Languages Act 1988* are better understood as fulfilling part of the legislature’s responsibility to fulfil its constitutional obligation to articulate a comprehensive official languages policy.<sup>153</sup>

While it could be said that reading subsection 16(3) as confirming the *Jones* approach is valid for Quebec and Manitoba, which remain in much the same position as pertains language rights pre- and post-Charter,<sup>154</sup> even this is not entirely accurate. Subsection 16(3) does not have legal effect beyond the Charter and therefore does not, strictly speaking, confirm the rule in *Jones* since section 133 is part of the *Constitution Act*,

<sup>149</sup> *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 23 (S.C.C.).

<sup>150</sup> R.S.C. 1985, c. C-46.

<sup>151</sup> R.S.C. 1985, c. 31 (4th Supp.).

<sup>152</sup> *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 22 (S.C.C.). See also Bastarache J. in *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, 2005 SCC 74, at para. 38 (S.C.C.) with respect to the New Brunswick *Official Languages Act*, S.N.B. 2002, c. O-0.5. The quasi-constitutional status of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) has been recognized in numerous cases; see, e.g., *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] S.C.J. No. 55, [2002] 2 S.C.R. 773 (S.C.C.); *Canada (Attorney General) v. Viola*, [1990] F.C.J. No. 1052, [1991] 1 F.C. 373, at 386 (F.C.A.).

<sup>153</sup> See *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] S.C.J. No. 55, [2002] 2 S.C.R. 773, at para. 21 (S.C.C.) (Gonthier J.): the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) is “a significant legislative response to the obligation imposed by the Constitution of Canada in respect of bilingualism in Canada. ... The fact that the *Official Languages Act* is a legislative measure taken in order to fulfil the constitutional duty in respect of bilingualism is not in doubt.”

<sup>154</sup> By virtue of s. 133, *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 and s. 23, *Manitoba Act, 1870*, S.C. 1870, c. 3, respectively.

1867.<sup>155</sup> As for the other provincial authorities not subject to language obligations (beyond section 23 of the Charter), the role of subsection 16(3) confirms that recourse to measures promoting the status and use of French and English are constitutional.

*Confirmation that extending official language rights is not discriminatory.* Shielding legislative measures from a discrimination challenge is an important feature of subsection 16(3).<sup>156</sup> Yet, the relationship between the equality provision of the Charter and subsection 16(3) has been analyzed inconsistently by Canadian courts. This is illustrated by the case law on section 530 of the *Criminal Code*.<sup>157</sup> In 1986, the Supreme Court narrowly interpreted the right to use either French or English before the courts created by Parliament and the courts of Quebec, New Brunswick and Manitoba.<sup>158</sup> In response, Parliament enacted section 530, granting to all accused persons the right to use the official language (or languages) of choice and to be understood by a judge and jury in that language (or those languages) without the assistance of an interpreter. Recognizing that there would be some delay in institutionalizing this right in some parts of the country and rather than waiting for the right to be available everywhere before making it available anywhere, Parliament decided to phase in the right province by province. Persons accused of a crime in those provinces where the right had not yet been actualized argued, on the basis of section 15 of the Charter, that they were being discriminated against as compared to accused persons in other provinces where the right was actualized. Several courts, having concluded that section 530 of the *Criminal Code* advanced the status of English and French in Canada, took the view that subsection 16(3) shielded section 530 from any discrimination challenge.<sup>159</sup>

<sup>155</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>156</sup> *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 505, at para. 92 (Ont. C.A.). For a similar provision serving a similar role, see s. 29 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, and the discussion in *Adler v. Ontario*, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609 (S.C.C.).

<sup>157</sup> R.S.C. 1985, c. C-46.

<sup>158</sup> *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460 (S.C.C.); *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549 (S.C.C.); *Bilodeau v. Manitoba (Attorney General)*, [1986] S.C.J. No. 27, [1986] 1 S.C.R. 449 (S.C.C.).

<sup>159</sup> See *R. v. Paré*, [1986] B.C.J. No. 832, 31 C.C.C. (3d) 260 (B.C.S.C.) and, though less clearly based on s. 16(3), *Ringuette v. Canada (Attorney General)*, [1987] N.J. No. 166, 63 Nfld. & P.E.I.R. 126 (Nfld. C.A.).

The better view — shared by other courts<sup>160</sup> — was to recognize that the section 15 challenge was not to the privileged position given to French and English as compared to other languages. Rather, the challenge was to the unavailability for all accused persons of the favourable treatment to Canada's official languages. The section 15 argument did not seek to constrain the authority of Parliament to favour the progression towards equality of English and French; rather, it sought to ensure that, in advancing towards equality, Parliament did not formulate an underinclusive plan. Now, this does not suggest that Parliament was wrong in seeking to implement section 530 in stages. It suggests only that the discriminatory application should be justified. Such justification could be made out by stating that the *status quo* is temporary and that the institutionalization of bilingualism is underway with all deliberate speed.<sup>161</sup>

In discussing the “shielding” role of subsection 16(3), the courts have failed to notice the slight difference between the two language versions. The English version could be read as requiring success in the pursuit (Is equality being “advanced” or not?), whereas the French version reads more as a means-based criterion (Are the legislative measures aimed at favouring the progression towards equality?). The better approach is reflected in the French version, given that many policy initiatives aim at long-term benefits. It would be unfortunate to read subsection 16(3) as speaking only to short-term benefits susceptible of ready results. Unless legislatures are shown to be acting in bad faith, one should hesitate to conclude that a legislative measure that aims at advancing the equality of French and English in Canada fails to do so.

*Confirmation that formal equality is not the norm.* In mirroring subsections 6(4) and 15(2) of the Charter, subsection 16(3) specifies that formal equality is not the decisive norm in evaluating the relationship between Canada's official languages.

*Does not impose obligations for legislative action.* The negative formulation of subsection 16(3) (“Nothing in this Charter limits ...”) suggests that it does not require legislatures to promote the equality of French and English. However, subsection 16(3) does highlight the role

<sup>160</sup> See *Reference re Use of French in Criminal Proceedings in Saskatchewan*, [1987] S.J. No. 490, 58 Sask. R. 161 (Sask. C.A.); *Canada v. Paquette*, [1987] A.J. No. 1033 (Alta. C.A.). See also André Tremblay & Michel Bastarache, “Les droits linguistiques (Articles 16 à 23)” in Gérald-A. Beaudoin & Edward Ratushny, eds., *Charte canadienne des droits et libertés*, 2d ed. (Montreal: Wilson et Lafleur, 1989), at 746-47.

<sup>161</sup> This is the approach taken in *Canada v. Paquette*, [1987] A.J. No. 1033 (Alta. C.A.); *Reference re Use of French in Criminal Proceedings in Saskatchewan*, [1987] S.J. No. 490, 58 Sask. R. 161 (Sask. C.A.).

that can (and should) be played by all legislative bodies in promoting French and English. One should read subsection 16(3) as affirming political responsibility over Canada's official languages. Subsection 16(3) is an injunction to fulfil the constitutional ambition of official bilingualism, though it does not specify positive obligations. Moreover, subsection 16(3) does not delimit the areas where progression to equality should be pursued, leaving to legislatures the discretion to regulate, for example, either the public or private spheres, or both. In this sense, the legislature may assume obligations that the Charter does not expressly require of it.

*Does not serve as a "ratchet" principle.* Where a legislature acts to promote the equality of Canada's official languages under subsection 16(3), it is not — strictly speaking — required to maintain that position. In *Lalonde*, the Ontario Court of Appeal held that subsection 16(3) does not "constitutionalize" those legislative measures that seek to do what that subsection authorizes.<sup>162</sup> That said, once a legislature moves in the direction of subsection 16(3), there are impediments to backtracking. Subsection 16(3) confers on initiatives that promote the equality of French and English the status of quasi-constitutional legislation, and withdrawing those initiatives requires — at the very least — a clear expression of legislative change.<sup>163</sup>

## V. CONCLUSION

I have proposed an interpretation of section 16 that takes it beyond the realm of symbolic declaration to that of substantive constitutional provision. In conclusion, I raise some points with respect to the institutional considerations resulting from this proposed reading.

In *Société des Acadiens*, Beetz J. concluded that courts had little role to play in articulating the Charter's language rights, it being clear

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<sup>162</sup> *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4767, 56 O.R. (3d) 505, at para. 91-95 (Ont. C.A.). See also *Baie D'Urfé (Ville) c. Québec (Procureur général)*, [2001] J.Q. no 4821 (Que. C.A.).

<sup>163</sup> For example, the following reasoning would not be valid: "I cannot believe that in proclaiming the equality of French and English ... Parliament intended to limit the power of the Minister of Transport to issue regulations that he deemed necessary to ensure the safety of air navigation.": *Assoc. des Gens de l'Air du Québec Inc. v. Lang*, [1978] F.C.J. No. 35, [1978] 2 F.C. 371, at 377 (F.C.A.). See *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 82 (primacy status accorded to Parts I to V over other enactments). See also Joseph Eliot Magnet, *Modern Constitutionalism: Identity, Equality and Democracy* (Markham, ON: LexisNexis Canada, 2004), at 206, where a different reading of the ratchet principle is proposed: "government may not retreat from measures that repair governmentally inflicted damage to communities".

from the pedigree of language rights (negotiated compromise) and the formulation of subsection 16(3) that the political process was the forum for promoting language rights. Even if one disagrees with the premises of Beetz J.'s reasoning, one should not deny the force of his conclusion. History teaches us that undue reliance on the Canadian judiciary for the protection of language rights will not lead us in the direction of an expansive understanding of official bilingualism.<sup>164</sup> Though legislatures are by no means credited with a shining record of language protection and promotion,<sup>165</sup> we should not forget that it was the political process that yielded the *Official Languages Act 1969*,<sup>166</sup> its renewal in 1988, and section 16 of the Charter. It is equally the political process that corrected many of the restrictive interpretations given by the Supreme Court under section 133 of the *Constitution Act, 1867*<sup>167</sup> and sections 17 to 19 of the Charter. Quite irrespective of which institution will be understood by history to have contributed more to the development of language rights in Canada, one fact is undeniable: the political branches have more tools than the judiciary.<sup>168</sup> The importance of the political process in the promotion of official bilingualism is undeniable and the legitimacy of official bilingualism and equality of status of English and French is contingent on political support.<sup>169</sup>

The arguments developed above do not seek to transfer political debate into the judicial arena. I am a firm adherent of the view that "the

<sup>164</sup> See, e.g., *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.); *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460 (S.C.C.); *Bilodeau v. Manitoba (Attorney General)*, [1986] S.C.J. No. 27, [1986] 1 S.C.R. 449 (S.C.C.); *Ottawa Roman Catholic Separate School Trustees v. Mackell*, [1917] A.C. 62 (J.C.P.C.). There are important exceptions: *Blaikie (no. 1)*, [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016 (S.C.C.); *Blaikie (no. 2)*, [1981] S.C.J. No. 30, [1981] 1 S.C.R. 312 (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. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.).

<sup>165</sup> Consider *An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba, 1890* (Man.), c. 14.

<sup>166</sup> R.S.C. 1970, c. O-2.

<sup>167</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>168</sup> For a list of non-judicial monitoring bodies or offices created by the political branches in order to improve the status of language rights, see G.C.N. Webber, "Monitoring Language Policies — Commentary" (2005) University of Ottawa, online: <<http://www.socialsciences.uottawa.ca/crfpp/pdf/debat/Webber.pdf>>, at 5. The list includes the Royal Commission on Bilingualism and Biculturalism, the Minister Responsible for Official Languages and the Commissioner for Official Languages.

<sup>169</sup> On the importance of the federal political process in particular, see Joseph Eliot Magnet, *Modern Constitutionalism: Identity, Equality and Democracy* (Markham, ON: LexisNexis Canada, 2004), at 165-66, where he proposes that federal authorities have the constitutional jurisdiction "to intervene progressively to enhance the vitality of minority language communities throughout Canada" (at 165).

failure of any monitoring process [including judicial review] is not in its inability to bind the political process; rather, its failure lies in its inability to facilitate, engage, and empower the latter".<sup>170</sup> The role of the judiciary may remain necessary so long as the political process fails to articulate a robust programme of official bilingualism. The court should be understood as a forum for justification, where the legislature may be called upon to demonstrate the justification of its official language policies. The court should evaluate the sufficiency of the reasons offered in justification and, should it find that the legislature's reasons fail to justify the policy, declare so and order the legislature to re-formulate its policy. This shift in the understanding of the relationship between court and legislature could appease some of the worries articulated by Beetz J. in 1986 while divorcing judicial restraint from restrained constitutional construction.

In conclusion, it is with some concern that I read the words of Pierre Elliott Trudeau, spoken in 1967, and still find them *à propos*: "I believe that we require a broader definition and more extensive guarantees in the matter of recognition of the two official languages."<sup>171</sup> The reading of section 16 that is here proposed seeks to answer Trudeau's call.

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<sup>170</sup> G.C.N. Webber, "Monitoring Language Policies – Commentary" (2005) University of Ottawa, online: <<http://www.socialsciences.uottawa.ca/crfpp/pdf/debat/webber.pdf>>, at 6.

<sup>171</sup> Pierre Elliott Trudeau, "A Constitutional Declaration of Rights" [An address to the 49th Annual Meeting of the Canadian Bar Association, September 4, 1967] in Pierre Elliott Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan of Canada, 1968), at 55-56.