

Implementing language rights in court: the role of the court interpreter in South Africa

N. C. Steytler

INTRODUCTION

When citizens deal with state institutions language rights are often a source of conflict. The courts – the state institutions which par excellence do their business in public – are important forums where the reality of language rights or their absence are put on display. The criminal courts are of particular interest because citizens' contact with the law is most often through these institutions. Moreover, the contact is one of conflict that sets the citizen against the state.

The recognition of more than two official languages is on the agenda (cf. ANC 1990, article 5(5)). This will entitle citizens to use a number of languages as of right in courts. However, for administrative purposes, one or more languages may be designated as languages in which court proceedings must be recorded. For example, the ANC draft bill of rights proposes that one or more languages 'may be designated to be used for defined purposes at the national level or in any region or area where it is widely used' (article 5(7)). In our multilingual society, communication in court across language barriers will remain the rule rather than the exception. This process will increase in importance, however, because of the legal recognition of more official languages. An essential prerequisite for

effective communication and for effective language rights will be court interpreters.

The recognition of new official languages will not necessarily change current law and court practice. Effective communication with the accused is a prerequisite for a fair trial and interpreters appear in the majority of criminal cases.

The Magistrates' Court Act 32 of 1944 places the onus on a magistrate to call a competent interpreter if he is of the opinion that the accused is not sufficiently conversant in the language in which the evidence is given, irrespective of whether it is one of the official languages (section 6(2)). The same position prevails in the Supreme Court. These legal rules may be of such importance that they may well be included in a bill of rights, as was done in the European Convention on Human Rights (article 6(3)(a)), as one of the procedural rights of an accused person (Pollack & Corsellis 1990).

The interpreter's formal task is unambiguous: to translate accurately, comprehensively and without bias all communications in court in a language which the accused can understand (*S v Mzo* 1980(1) SA 538 (C) 539E; *S v Mafu* 1978(1) SA 454 (C). See generally Channon 1982). The role of the interpreter is thus to facilitate communication when one party is not conversant with the court language. He delivers an expert service and assumes a neutral position in the contest between the parties. In the words of Channon (1982:23):

A good court interpreter must have the ability to translate faithfully without adding to the questions asked or the answers given. He must be completely impartial and take no personal interest in the outcome of the case and remain unaffected by anything seen or heard.

In South Africa most accused in court require interpreters, a practice which is likely to continue in the future. This is of particular significance for undefended accused, who constitute almost 90 per cent of all accused today, a figure that may not change dramatically in the future. Because of the absence of a lawyer, the undefended accused who are not conversant with the court language are thus almost exclusively dependent on interpreters for their understanding of their rights and participation in the trial.

Language rights (as well the principle of a fair trial) will be undermined by poor interpretation. Because of the crucial role of interpreters, their functions should not be regarded as unproblematic. It will be argued that poor translation routinely occurs and will continue to occur, because the structural influences on interpreters militate against the adequate performance of their task. This argument will be illustrated in the light of

research done on the operation of interpreters in a lower court in South Africa.

METHODOLOGY

During July 1985 an observational study of interpreters was embarked upon in the magistrates' and regional courts in Durban. This study was part of a larger project which investigated the operation of the lower courts (Steytler 1987). The aim of the study was not to record statistically the accuracy and extent of interpretation, but to examine patterns of inaccurate translation. This research was exploratory and thus calls for further more detailed research. The writer and Zulu-speaking law students, armed with a structured questionnaire, observed 12 interpreters on a rotating basis. All communications in English and Zulu at the same trial were recorded and subsequently compared. A total of 100 cases where an interpreter was used were recorded. A case with the suffix 'DC' indicates that it was a district court case, and the suffix 'RC' a regional court case. In all cases the interpreter translated from Afrikaans and English to Zulu and vice versa. All the accused were unrepresented. Many appeared to be uneducated persons. The rules of court conduct seemed quite alien to them and they had a minimal idea of any of their legal rights (cf. Robertson 1981:73).

TRANSLATION

There are difficulties inherent in translating from one language to another (Viljoen 1992). The translation of legal concepts, closely tied to the texture and tone of a particular language, encounters additional difficulties (Grossfield 1986, Newman 1987). A particular legal concept may also be unknown in another language. It is therefore inevitable that the process of translation itself will involve a loss of meaning (Viljoen 1992:69).

Apart from these intractable difficulties, inaccurate translation may also be the result of an inadequate grasp of one of the languages, poor training, or even simple carelessness. In all of these cases inaccurate translation can have very negative consequences for an accused person. Case 18 DC will serve as an illustration of such an instance. The interpreter was required to translate to an accused, who has pleaded not guilty, his right to address the court on the merits of the evidence.

Magistrate: Anything to say before the court pronounces judgement?

Interpreter (in Zulu): Anything to say before the end of the matter?

Accused (in Zulu): I ask the court to impose a light sentence and I will never be found in error again.

Because of an inaccurate and consequently misleading translation, the accused assumed that the end of the matter meant the imposition of a sentence. This confusion resulted in his 'admission' of guilt, whether real or merely as a show of contrition. The effect of such an 'admission' could have been disastrous. If the court harboured any doubts about the accused's guilt, then such an admission would have provided the necessary confirmation and conviction would inevitably follow.

Omitting to translate all of the information can also have dire consequences. For example, the translation of legally complex sentences did not always receive meticulous care. Interpreters in the district court often translated the provisions of a suspended sentence in a haphazard way. At times the length of the suspension of the sentence was omitted, sometimes even the entire suspended sentence. The dire consequences of these omissions for accused persons are obvious.

The inaccurate translation was not merely random. Definite patterns of translations emerged which were closely linked to the structural position of the interpreter in court. His or her position as a court official, interacting with other court officials of high status (the magistrate and prosecutor), militates against the fulfilment of his or her formal task, namely to translate fully, accurately and without bias as far as possible.

It will be argued that the court interpreter does not necessarily interpret his or her role as simply being a conduit pipe for verbal information, but often redefines his role as a team player in the court proceedings who facilitates the successful completion of a case. At various times the interpreter may thus play the role of the court orderly, a lawyer, the magistrate, the prosecutor and even a jury.

THE INTERPRETER AS COURT ORDERLY

One of the main functions of the court orderly in the district court is the physical management of accused persons in and out of the dock. The majority of accused will be in the dock only for a short while, either because it is their first court appearance or because their case will be remanded. The first task of the day is therefore the quick and efficient dispatch of cases which have not been set down for trial. In the present study large numbers of accused waited in the cells below the court room and they were dispatched with haste and efficiency. The remand procedure exhibited a great measure of cooperation between the court orderly,

the interpreter, the prosecutor and the magistrate. The prosecutor called the names of the accused, the court orderly arranged the accused in the correct order on the steps leading up to the court room, and the interpreter checked the name of the accused and organised the movement of accused in and out of the dock. The prosecutor requested a remand and almost without exception it was granted by the magistrate without further discussion. The magistrates hardly ever invited the accused to state his view on the matter and merely informed them of the remand date and the reason for the remand.

The interpreters approached the proceedings in the same expeditious way. As a rule, they would only translate the court order – the date to which the proceedings were remanded. Neither the application nor the reason for it was interpreted. Although it was obvious even to an observer who was not familiar with Zulu that the accused were not kept informed, the court did not instruct interpreters to translate all the verbal exchanges to the accused. In fact, the interpreters' conduct merely reflected the lack of interest displayed by the court in involving the accused in its deliberations.

The interpretation of the bail proceedings was similarly influenced by the way in which the proceedings were conducted by the magistrate. When the question of bail was raised, magistrates did not routinely conduct an enquiry to establish whether the accused should be released on bail by questioning either the accused or the prosecutor. The court seldom sought further information from prosecutors on their reasons for objecting to bail, and little information was elicited from the accused on their suitability for release.

The approach of the magistrates to the bail proceedings was also reflected in the attitude of some of the interpreters who, by their conduct, ensured the efficient completion of the proceedings. In an extreme case (Case 87 DC) an interpreter refused to translate the accused's application for bail.

The case was remanded for sentence and both the prosecutor and magistrate failed to initiate bail. The accused then spoke to the interpreter:

Accused (Zulu): Please ask for payment so that I will be out.

Interpreter (Zulu): That is not my business. Go down! (indicating towards the cells).

This conversation was not translated and the magistrate did not instruct the interpreter to interpret it.

The accused were seldom informed by the interpreters when the prosecutors opposed bail and for what reason. Case 78 DC illustrates such an instance.

After applying for a remand, the prosecutor said the following:

Prosecutor: Since the accused has no fixed abode and no fixed address the State is opposed to bail being granted.

Interpreter (in Zulu): You have no fixed abode and no address and the court will not give you bail.

The interpreter, fully conscious of the fact that the court would grant the prosecutor's request, transformed an allegation by the state into a court order and thus, by confronting the accused with a *fait accompli*, effectively precluded his participation and terminated the proceedings.

Finally, the determination of an appropriate amount of bail, taking into consideration the resources of the accused and the likelihood of his absconding, did not receive much of the court's attention. This inevitably led to a failure to individualise the bail amount to suit the accused's pocket. Some interpreters also incorporated this approach into their translation practice. In Case 45 DC the accused, when he was informed that bail was fixed at R100 said:

Accused (Zulu): There is no one to pay such money for me.

Interpreter (Zulu): Go down, don't tell me that, just go down! (indicating the cells below).

The accused's problem was not translated to the court and the magistrate did not insist that the interpreter disclose what had been said.

The efficient and speedy completion of remand proceedings before the real work of the court starts, the pleas and hearing of evidence, required close cooperation from all the court actors concerned. Some interpreters played the role of court orderly, in that they assisted in the flow of accused persons through the dock. The task at hand was interpreted not as translating the proceedings fully (from which the accused was in any event excluded), but as conveying the conclusion of the brief proceedings: the remand date and bail amount. In this the interpreters exhibited a realistic cynicism about their task: they translated what was necessary and omitted the rest. In fact this was the role the court defined for them by not demanding full translation of all communications between the prosecutor and the bench.

THE INTERPRETER AS LAWYER

Shlesinger observes that interlingual interpretation is often perceived as including intercultural mediation (Shlesinger 1988:148). Where the source text contains a culture-bound referent, the interpreter must decide 'whether to explain it or make do with either a foreignism or an approximate target language equivalent' (Schlesinger 1988:149). In translating legal communications, legal concepts may be seen as legal culture-bound referents. The court interpreter is thus called upon to decide how to convey these legal concepts.

This choice is particularly pronounced during plea proceedings because they are the most legalistic and hence the least comprehensible to the undefended accused. To formulate a charge the prosecutor must transform an everyday event to fit into the legal structures of a criminal offence. To plead to the charge the accused must reduce his perception and assessment of that event to a single simplified legal response. By the artificiality of their construction, both the charge and the pleas are far removed from the understanding of most accused persons and belong to the domain of the legal practitioner. The lawyer's function is to translate the charge to his client and to formulate a response in terms of the permissible legal pleas. When undefended accused were involved, the interpreter often played the role of the lawyer, deviating from literal translation to bridge the gap between legalese and lay persons' language.

The charge was usually framed in terms of the essential legal requirements of the offence, while the factual allegations on which the charge was based were kept to a minimum. The prosecutor usually read out the charge fully, including all references to acts and sections of acts, but did not reveal the factual allegations to which the accused had to respond. Interpreters did not exhibit the same measure of formalism as the prosecutors, but conveyed to the accused only the bare essentials. They related only the legal aspects of the charge without using the precise and sometimes incomprehensible language of the charge sheet. They thus conveyed to the accused only what was intelligible to him. Any reference to a section of an act was replaced by 'the law', robbery with aggravating circumstances merely became robbery (Case 2 RC), a precise quantity of dagga expressed in grams became either a 'little' or a 'lot' (Case 45 DC), and difficult concepts such as 'proof on the balance of probabilities' were omitted altogether (Case 76 DC). At times, however, this reductionist process led to the wrong translation of the charge. In Case 89 DC the accused was charged with being in possession of property which had possibly been stolen and for which he was unable to give a satisfactory

account (section 36 of Act 62 of 1955). The interpreter simplified the charge to: 'You have been found in possession of stolen property', to which the accused's confused reply was: 'I did not steal it.'

In a large number of cases no charge was interpreted for the accused, and the interpreter simply asked the accused whether or not he was guilty. In Case 54 DC the prosecutor read out the following charge:

The charge against the accused is that he contravened section 2(b) of Act 41 of 1971 read with section 10(3) in that on [date] at or near Warwick Avenue in the district of Durban he had wrongfully and unlawfully in his possession a prohibited dependence-producing substance, to wit a small quantity of dagga. How do you plead?

Interpreter (Zulu): Do you find yourself guilty or not?

Accused (Zulu): I do have a case against me.

Interpreter (English): I plead guilty.

The interpreter perceived the charge as being so formalistic that conveying it to the accused would not contribute to his understanding of it. He therefore made a very rational decision to omit the translation of the charge altogether. The charge disclosed no more than would have been known to the accused through his dealings with the police.

The accused is then required to enter a plea in response to the charge. The prosecutors usually presented the choice as follows: 'Do you plead guilty or not guilty?' In many cases the accused's response to the charge did not fit the slot of guilty or not guilty. Some interpreters, however, regarded it as their duty to convert that response into a legally recognised plea although it did not convey the gist of what the accused said. In Case 3 RC, the translation of the accused's response into a neat legal plea resulted in amplification and distortion of its original meaning.

The accused, a 22-year-old Zulu-speaking male, was charged with housebreaking with the intention to steal and theft. The charge was fully translated to him.

Accused (Zulu): I did have the goods in my custody.

Interpreter (English): I understand the charge against me and plead guilty.

Not only was the translation inaccurate, but it also ascribed to the accused a knowledge of the legal requirements of the offence of house-breaking and the admission of facts not acknowledged. Similarly, in many

cases additional comments, such as 'guilty but I ...' were never conveyed to the court.

These problems of interpretation may be partly because the plea of guilty is a legal term, an equivalent of which has not been fully developed in the Zulu language. More important, however, is the interpreter's perception of his role at this stage as being to transform laymen's responses into a legal term. The pleading stage requires the simplification of the conflict to guilty or not guilty. This artificiality was not understood by most accused but the interpreter, conscious of the intended goal, adapted his role to facilitate its achievement.

The interpreter translated legalese (the charge) into a factual statement and the factual statement by the accused into legalese (the plea). The evidence seems to suggest that the role definition at this stage was to help the process along to the next stage of the proceedings.

The role of the interpreter as surveyor of legal knowledge, however, was situation bound. The explanation of rights, which he knew would not make much sense to the accused, and the exercise of which were not critical for the steady progression of the trial, was not approached with much enthusiasm.

After a plea of not guilty the magistrate may asked the accused whether he or she wishes to disclose the basis of his or her defence (section 115 Act 51 of 1977). At the same time the accused must be informed of his right to remain silent (*S v Evans* 1981 (4) SA 52 (C)). The interpreter did not assist in making these provisions more comprehensible to the accused. Following the example of a number of magistrates, he seemed to view the explanation of rights as a mere formality. A more cynical view would be that an unintelligible explanation of a right would render that right inoperative for the accused. In this instance, the failure to exercise the right to be silent must benefit the prosecution because any statement an accused makes at this stage can only be used against him. The explanation was thus given as quickly as possible and hence was often incomprehensible. One Zulu-speaking court observer had great difficulty in following the translation of the explanation and remarked that the interpreter 'went off like a tape recorder singing a song' (Case 6 RC).

In any event it was difficult to explain to the accused that they may indicate the basis of a defence but not relate their full story. The difficulty that the accused persons experienced in grasping this legal distinction is well illustrated by Case 42 DC.

Magistrate: Do you wish to disclose the basis of your defence?

Interpreter (Zulu): Can you tell the court the reasons for your plea of not guilty?

Accused (Zulu): I can narrate the incident.

Interpreter (Zulu): They do not say narrate it. Do you have anything to say?

The accused thereupon started to narrate his story.

Interpreter (Zulu): You may talk until sunset but this will not help you. Tell me why do you plead not guilty?

Eventually the interpreter gave up the attempt to extract only the basis of his defence and allowed the accused to relate his story.

This tendency to explain rights in a formalistic and sometimes rushed manner was also evident at later stages of the trial. In a number of cases the explanation of the accused's right to cross-examine was given so quickly by the interpreter that even the Zulu-speaking court observers could not follow it.

Throughout the translation process an interpreter is bound to assess the listener's ability to make sense of what is being interpreted (cf. Shlesinger 1988:149). If the listener is experiencing difficulties, it is within the interpreter's discretion whether or not to accommodate him or her. In the courtroom the interpreter may therefore seek to accommodate the accused by mediating incomprehensible legalese. In the study, however, attempts at accommodation were linked to the interpreter's assessment of the usefulness of the information to be conveyed. This occurred on a few occasions when the accused's right of cross-examination was interpreted. In one case the interpreter supplemented the terse information of the magistrate that 'you may cross-examine the witness', with the following advice: 'You may leave it [questioning] now, but you will never get another time. They will think you agree with them' (Case 3 RC). Again, in explaining the accused's right to give evidence in mitigation of sentence, one interpreter also independently advised the accused on the purpose of mitigation and told him to state his circumstances 'so that the court does not impose a harsh sentence on you' (Case 18 RC).

Where the interpreter considered that the information was of no value to the accused, he either went through the motions by mumbling the legalese in an unintelligible fashion, or omitted it totally. Legal rights which the accused could not fully appreciate were given short shrift. The legal arguments given by the prosecutor in his closing address, to which the illiterate accused could not possibly respond, were often omitted. In

Case 76 DC the prosecutor gave a detailed argument in support of a conviction but all that the accused heard was that 'the prosecutor wants the court to find you guilty'. This practice was widespread, forcing the court in some instances to instruct the interpreter to translate the address.

THE INTERPRETER AS MAGISTRATE

It has been shown in other studies that the interpreter plays an active role in court 'staking out an own coercive role' (Viljoen 1992:68, relying on Berk-Seligson 1990). It was found that the interpreter has a degree of control over the production of evidence by prompting witnesses to speak and even silencing them when there may be an objection to their evidence (Viljoen 1992). The task of controlling witnesses, which falls properly within the domain of the presiding judicial officer, is thus routinely usurped by interpreters who pre-empt judicial intervention. In our study interpreters also acted as magistrates throughout the trial.

After an accused has pleaded guilty, the magistrate is obliged to question him to ascertain whether he admits every element and allegation contained in the charge (section 112(1)(b) Act 51 of 1977). In the cases studied, judicial officers single-mindedly questioned accused to establish the factual basis for their pleas. The interpreters also attempted to assist and independently tried to extract information from the accused and to clarify ambiguities in answers. Where the court put leading questions to cover all the elements of the offence, however, the interpreters also followed this hasty approach. In Case 34 RC the accused pleaded guilty to a charge of theft and after the regional magistrate had established the *actus reus* through a number of leading questions, he asked:

Magistrate: Did you know it was wrong?

Interpreter: Wanazi ukuthi ku-wrong? (Do you know it is wrong?)

The accused murmured a few words which were not an answer to the question.

The interpreter in a high tone demanded in Zulu: 'Yes or no?', to which the accused meekly replied. 'Yes'.

After a plea of guilty the magistrate may ask the accused whether he wishes to indicate the basis of his defence. Although magistrates often said that they did not wish to hear the full story of the accused, few actually stopped the accused after the basis of his defence became apparent from his statement. Interpreters, following the example set by some magis-

trates, frequently elicited independently further information from the accused. Case 35 DC illustrates this point.

On a charge of contravening the Dangerous Weapons Act, the accused pleaded not guilty.

Magistrate: Do you wish to disclose the basis of your defence? You may remain silent.

Interpreter (Zulu): You may state reasons for your plea but you need not tell me the whole story. You may say nothing if you like.

Accused (Zulu): I did not point a firearm, it was a knife.

Interpreter (Zulu): Is that all? Is there anything else?

The accused then narrated the whole story which the interpreter translated until the magistrate eventually intervened when the accused became side-tracked.

During the state case, the interpreter, familiar with the basic rules of evidence pertaining to confessions and hearsay, in some cases played the role of the judicial officer by excluding inadmissible evidence. In Case 14 RC the interpreter interrupted a black policeman's testimony with the advice: 'Don't tell us what he reported to you, but what you did.'

When it came to the accused's turn to cross-examine state witnesses, magistrates sometimes sought to curtail the accused's questioning by exerting some pressure on him to conduct his questioning in an expeditious manner. One magistrate was quick to ask the accused, as soon as there was a pause after an answer, 'Any further questions?' The accused was then compelled to respond immediately to the question which might have interrupted his train of thought in respect of a possible question. If he did not have a question ready – which was bound to happen as a result of the interruption – he would be forced to say no. By ostensibly allowing the accused a free hand in questioning, and even affirming his right, the magistrate effectively terminated the questioning.

The same technique was frequently employed by interpreters acting independently of the court. One interpreter continually asked the accused after every question, 'Have you finished?' By raising his voice and asking, 'Do you still have other questions?', the interpreter often terminated the accused's attempts at cross-examination. At times the interpreter would also act as an informal screen for the accused's questions. In Case 17 RC the interpreter refused to translate a question: 'You have asked that already, ask another question.' In Case 50 DC the accused said in Zulu during cross-examination: 'The witness does not tell the truth.' The inter-

preter omitted to translate that and merely asked the accused whether he had further questions. The response was in the negative and the court heard, 'No further questions'.

At the sentencing stage, magistrates are compelled to inform the accused of their right to put mitigating evidence before the court and, should they fail to do so, conduct an enquiry into the accused's personal circumstances. Interpreters, fully aware of the court's duties, often preempted the court's enquiry by performing that task themselves. In Case 80 DC the interpreter added to the magistrate's terse question, 'Anything to say in mitigation', the following advice: '[For example] things like you are working, you are the sole supporter of your kids, family, etc.' On numerous occasions the interpreter also prompted the accused to mention further mitigating factors. By prompting the accused to relate his personal circumstances the interpreters asked those questions which the court invariably would have put to determine factors which the accused failed to mention.

One interpreter on occasion even assumed the censorious role of the magistrate. In Case 77 DC he took the liberty of replacing the interpretation of the sentence with a moral lecture. The accused, convicted of the possession of dagga, was sentenced to six months' imprisonment suspended for five years on the usual conditions. The interpreter translated it to the accused as follows: 'You rascal, free yourself away from the Satan, but if you pay no attention to what I tell you, we'll call you and we'll say come and serve your sentence because you are stubborn, you rascal.'

THE INTERPRETER AS PROSECUTOR

In the previous section the independent persona of the interpreter was clearly illustrated. As an active participant in the proceedings the interpreter, Berk-Seligson remarks, does not perform a neutral role (1990:155). It is apparent from these examples that in our study some interpreters definitely sided with the prosecution against the accused. During the cross-examination of the accused, for example, the bias of some interpreters was most noticeable. Throughout their translation of the accused's testimony, they commented negatively on his credibility, sometimes subtly, often blatantly. The conduct of an interpreter in Case 23 RC represented an extreme version of this practice. A black accused, aged 25, faced a charge of rape. When he was cross-examined by the prosecutor, the interpreter commented directly on the proceedings through the manner of his translation of the questions and answers. When the prosecutor asked a good question (according to the interpreter), the interpreter would smile,

turn to the accused, intensify the atmosphere by moving closer and then pounce the question on the accused. When the accused attempted to answer, he would, with great mimicry, hold his hand to his ear, then smile broadly, bemused by the stupidity of the answer, and translate it in a belittling fashion. At times he would even burst out laughing at the accused's answers. Both the prosecutor and the regional magistrate enjoyed the interpreter's antics and seemed to accept his assessment of the credibility of the witness. Not only was the interpreter translating, he was giving his interpretation of the value of the evidence as well. He became in effect the jury, passing judgment on the credibility of the accused's evidence.

It is more than likely that judicial officers, aware of the communication difficulties which linguistic and cultural differences produce, may rely on the interpreter for an authoritative judgment upon which to base their assessment of the credibility of Zulu-speaking witnesses. The interpreter, bridging the language barrier, also mediates the cultural divide for the white magistrate. The interpreters were not always detached and impartial observers, however. They were part of the state machinery and some exhibited a definite pro-prosecution bias which made the objectivity of such assessments dubious.

THE INTERPRETER'S POSITION IN THE COURT HIERARCHY

The way in which the interpreters, characters in their own right (Viljoen 1992:69), exercised their discretion was strongly influenced by their position in the courtroom hierarchy. They were subordinate to the prosecutor and magistrate, superordinate to the accused and their approach towards witnesses was dependent on who was in the witness box.

Their middle-range position in the hierarchy was evident from the way in which they regulated the flow of communications. To facilitate consecutive translation, communications should be given in short sections interspaced with pauses. The interpreter is patently in the best position to determine the length of communication sections and pauses required to translate them adequately. It is thus up to the interpreter to decide whether to intervene and interrupt a communication for this purpose (Shlesinger 1988:152).

Interpreters were very reluctant to interrupt a communication from a magistrate or prosecutor, but showed little hesitation in stopping a black witness or accused. One of the most serious defects in the interpreters' practice was their failure, almost without exception, to translate the ques-

tions put by prosecutors and the magistrates to English- or Afrikaans-speaking witnesses. When such a witness was asked a question, he would answer immediately. The interpreter, without being granted or demanding the opportunity of translating the question, would interpret only the answer of the witness. When a magistrate intervened during the examination-in-chief, this resulted in two conversations being conducted with the witness at the same time. In the end the interpreter, unable to cope with the rapid verbal exchanges, would give up translating the dialogue altogether.

In Case 20 RC the regional magistrate, interjecting during the prosecutor's examination-in-chief of the district surgeon, conducted a long dialogue with the district surgeon about a *post mortem* report at such a speed that the interpreter could not translate a word of it. There followed a rapid exchange of questions and answers between the prosecutor and the same witness which were also not interpreted. In the end the interpreter was totally confused, and consequently translated the following exchange incorrectly. The prosecutor asked the district surgeon whether the cause of death was the neck injury to the deceased. The latter replied: 'This is probable when the neck has been twisted in an unnatural way.' The interpreter's translation into Zulu was: 'The neck, it is said, you twisted in an unnatural fashion', at which the accused immediately, and not without good cause, exclaimed: 'I never did it! I deny that!'

The information which the accused eventually received in these cases was thus often a grossly distorted version of the English-speaking witness's testimony. The importance of this partial translation cannot be ignored because, as Rumpole of the Old Bailey wryly commented: 'You know what we always say in Court? Listen to the questions. The questions are so much more important than the answers' (Mortimer 1981:120). An answer unaccompanied by the question may be unintelligible and even misleading. The interpreters never stopped the witness, usually a white person in a position of some authority, from answering the question before it was translated. The magistrate never came to his assistance either, although it was blatantly obvious even to any non-Zulu speaker that the accused was hearing only half of what was said. With more than half of the first state witnesses being English- or Afrikaans-speaking, the overall effect of this partial translation would have been grave indeed.

The same often happened when the judgment had to be translated to the accused. The interpreters were not always given the opportunity by the magistrate of translating properly, and were often compelled to interpret simultaneously with the magistrate's delivery of his judgment. They

were not given a chance to catch up with what was being said and did not seek to remedy this by interrupting the court's speech.

On the other hand, the interpreters asserted their position of power and authority over black witnesses and accused, not hesitating to stop them in mid-sentence. At times they even expressed their authority in physical terms by forcibly pushing obstinate accused out of the dock and down the stairs to the cells below. The interpreters, who (except one) were black, did little to disturb the courtroom and societal hierarchy.

THE INTERPRETER AS TEAM PLAYER

The evidence suggests that the interpreters were actors or personae in their own right, far removed from being a mere conduit pipe as their legal mandate would have it. The development of an own persona, furthermore, was facilitated by the large measure of autonomy his position enjoyed. The very nature of the interpreter's position with sole access to two different language worlds created autonomy. With regard to the accuracy of his translations he fell outside the immediate control of the court personnel, who were not conversant in the African language used in court.

There was also very little prospect of control over this aspect of the interpreter's performance. The administrative control by the Department of Justice over the quality of interpretation was extremely limited. After an interpreter has successfully completed a course in interpretation, he or she is examined only once every 12 to 15 months by a chief court interpreter who spends one day in his or her court (Department of Justice 1984). No steps were taken to establish a system in the courtroom by which the accuracy of the translation could be controlled. Control through review proceedings was also extremely difficult. For the purposes of the court record, only the words spoken in English or Afrikaans were tape-recorded, and the Zulu spoken by the accused and the interpreter was omitted. Any form of *ex post facto* control over the correctness of translation was thus impossible.

The boundaries of autonomy were further extended by the lack of control over the completeness of the interpretation. The magistrates could have ensured that the interpreter translated all communications but little attempt was made to enforce this basic prerequisite of the interpreter's task. The judicial officers' failure to ensure adequate translation was primarily a function of their own attitude towards the relevant proceedings, which in turn was a product of the relevant legal rules or their absence (cf.

McBarnet 1983). Where the court, for example, was not obliged to bring the accused routinely into the bail or remand decision-making processes, it did not insist upon translation of the prosecutor's request for remands or objections to bail or even the accused's own comments or requests.

Within this sphere of autonomy, the interpreter did not act in a neutral fashion. His role as an impartial officer of the court was compromised by his position as a member of the team of court officials whose daily task was the processing and disposal of the cases on the court roll. Before the court proceedings observed in this study commenced, the interpreter entered in the court book the cases for the day, interviewed state witnesses for the prosecutor and, in some instances, ascertained the pleas of the accused. When the court was in session, he called the accused and the witnesses, and managed the movement of the accused in and out of the dock. Where he was allocated to a specific court for a lengthy period of time, he soon developed a good working relationship with the prosecutor. Thus the interpreter did not, as his function demands, stand apart from the prosecution; instead, as an integral part of the state machinery, he became susceptible to its ideology and, in turn, reproduced it.

As a member of the court team, the interpreter assumed a specific position in the court hierarchy and, in accordance with his qualifications and task, was ranked below the judicial officer and the prosecutor. His subservient position as 'ranked' court official was reflected in the way he related to the other court participants.

The interpreters' position as a cog in the court machinery, and their subservient role in it, facilitated their internalisation of the values and attitudes of their court superiors. This inevitably compromised their impartiality and the resultant bias was evident in what they chose to translate and the manner in which they did it. In performing their task the interpreters not only interpreted the language of the court but also translated into practice the court's ambivalent attitude towards the undefended accused and the principles of a fair trial.

The result was that undefended accused, confronted with a foreign language, could not cross the language barrier effectively, and were routinely denied their right to a fair trial. In the future this may also constitute a denial of a person's language rights. Whatever approach one takes, the denial of the right to communicate can only invoke a grave sense of injustice.

In sum, this research reaffirms an obvious sociological point: the legal recognition of language rights will be of no avail if cognisance is not taken

of the social structure and processes within which the rights are likely to operate. The research highlights the contradiction that rights may be effectively undermined by the very structures and processes which are created and responsible for their enforcement. Rights, including language rights, will thus remain paper tigers if there is no clear understanding of the social structures which may undercut them and attempts are not made to address those very structural influences.

TOWARDS BETTER INTERPRETATION

To secure the right to a fair trial and any language rights an accused may have, in the first place it is important to curtail the area of relative autonomy of the interpreter. Although the interpreter will always have discretion in how he or she interprets, the boundaries of discretion can and should be narrowed. The following steps could be taken. First, all communications in courts should be recorded (Viljoen 1992, Bates 1991:60). At present only what is said in the two official languages is recorded.

This militates against any form of *ex post facto* control over an interpreter. A full record of the proceedings can thus be used both for appeal purposes and, even more important, for effective administrative control. Second, the appointment of magistrates conversant with African languages should exert a beneficial influence on the accuracy of interpretation. Third, since interpreters follow the conduct and attitudes of the magistrates faithfully, a change in the magistrate's conduct is equally essential. One of the methods will be changes in the legal rules which will prompt them to pay more attention to the due process rights of accused persons (Steytler 1988). Fourth, the provision of legal representation to indigent accused would assist greatly in making the enforcement of language rights effective. A legal practitioner who is not even versed in the language of his client may do much to ensure that at least all of the communications are translated and that legal concepts are accurately and intelligibly conveyed.

Tighter control over interpreters will not necessarily lead to accurate or impartial translation because their subservient position in the courtroom hierarchy often militates against the pursuit of those objectives. The second strategy should be to assert the structural independence and professionalism of interpreters. The training of interpreters should receive high priority (Pollack & Corsellis 1990) and should emphasise the professional and independent nature of their task. At the same time interpreters should be taken out of the sphere of influence of the prosecutors. Structural independence within the courtroom situation may be difficult to

achieve given the status hierarchy in court and the tendency to be drawn into the courtroom team.

References

- ANC 1990. Constitutional Committee. *A bill of rights of a new South Africa*. Bellville: Centre of Development Studies.
- Bates, D. L. 1991. Maori language: some observations upon its use in criminal proceedings. *New Zealand Law Journal*, 55.
- Berk-Seligson, S. 1990. Bilingual court proceedings: the role of the court interpreter. In J. N. Levi A. G. Walker (eds), *Language in the judicial process*. New York: Plenum.
- Channon, O. V. 1982. *The role of the court interpreter*. London: Sweet & Maxwell.
- Department of Justice 1984. *Reports of the Department of Justice*, 1 July 1983 – 30 June 1984.
- Grossfeld, B. Literature, language and the law. *De Jure*, 217.
- McBarnet, D. J. 1983. *Conviction: law, the state and the construction of justice*. London: Macmillan.
- Mortimer, J. 1981. *Rumpole for the defence*. London: Penguin.
- Newman, E. 1987. Reflections on race and the law of evidence. In Rycroft *et al.* (eds), *Race and the law*. Cape Town: Juta.
- Pollack, K. & Corsellis, A. 1990. Non-English speakers and the criminal justice system. *New Law Journal*, 1634.
- Robertson, M. K. 1981. Preventive legal education. LLM thesis, University of Natal.
- Shlesinger, M. 1987. Interpreter latitude vs due process. Simultaneous and consecutive interpretation in multi-lingual trials. In S. Tirkkonen-Candit (ed.), *Empirical research in translation and intercultural studies*. Tuebingen: Gunter Narr Verlag.
- Steytler, N. C. 1987. The undefended accused on trial: justice in the lower courts. PhD thesis, University of Natal.
- Steytler, N. C. 1988. *The undefended accused on trial*. Cape Town: Juta.
- Viljoen, F. 1992. Look who's talking, in the courtroom too! *South African Law Journal*, 64.

Language in Canadian public law

Julius H. Grey

INTRODUCTION

Canada was the product of bilingualism from the start. It would be anachronistic to try to work modern ideas of bilingualism, multiculturalism or constitutional law into historical developments of the eighteenth or nineteenth century, but it is impossible to ignore the fact that the existence of the French language and population had great importance in preventing the absorption of Canada into the United States during the Revolution and that, subsequently, the English governor and the imperial authorities frequently favoured the French group, enabling it to survive the crucial years until 1840.¹

History, of course, is not an exact science. Those who attended English schools in Quebec thirty years ago learned of the gallant and generous conquerors such as General Murray, who saved a forlorn conquered nation. Those who attended French schools learned of a valiant nation which, for a hundred years, resisted an oppressive and often cruel occupier. One gets different viewpoints from Canadian nationalists such as Creighton, Quebec moderates like Garneau, Quebec nationalists such as Groulx and Brunet and outside observers such as Parkman.² That is as it should be. Each generation and each political tendency must reinvent history, not to falsify the facts but to rearrange them.³ However, what one can say with confidence is that one of the fundamental facts which have permitted Canada to survive, even if, at times, it weakened its internal unity, was the presence of both languages, inside and outside Quebec.

The years of crisis, 1840–1867, which started with the one clear attempt to destroy Quebec, the Durham Report,⁴ and ended with Confederation, consecrated forever the French nature of Quebec and as its consequence the bilingualism of all of Canada. Other basic features of modern Canada have been added since, for instance multiculturalism, the Charter, and the social programmes, but no one can seriously dispute the linguistic duality as one of the anchors of Canadian distinctiveness.⁵

This point was made by as strong a Quebec nationalist as Henri Bourassa. In *The French language and future of our race*⁶ he said:

Not only does the maintaining of the French language offer no danger to the religious and national unity of the country but I am sure that the preservation and expansion of the French language in each of the English provinces in Canada is the only positive moral guarantee of both the unity of the Canadian confederation and the maintaining of the British institutions in Canada.

He went on:⁷

There are some Anglo-Canadians who honestly believe that since the English language is the language of the mother country, it should also be the colony's. They seem to forget this very important fact: that the English language is the language not only of England, *but also the United States* (own italics).

It is submitted that, for Canada's continued independent existence from the United States, the presence of French throughout the country, its predominance in Quebec and its absolute equality in Federal institutions is an unconditional requirement. Without this, nine provinces would slide imperceptibly into the United States, with all that this implies.⁸ The tenth, Quebec, would become a closed, narrow society, much like that desired by Groulx,⁹ which would be forced by economic difficulties to give up much of its undoubted social progress of the last fifty years. If one is to prevent this triumph of old-fashioned nationalism, it is essential to preserve not only French in the rest of Canada, but English in Quebec. The French but partly English nature of Quebec society is one of the best guarantees against a successful attempt to revise traditional xenophobic Quebec nationalism. It follows that there are three major pillars of Canadian language policy and therefore language law:

- The bilingualism of federal institutions
- The preservation and promotion of French outside Quebec
- The preservation and promotion of English in Quebec

Each of these must be dealt with separately.

THE BILINGUALISM OF FEDERAL INSTITUTIONS

Section 133 and similar provisions

The British North America Act contained only a limited guarantee of bilingualism in section 133. This section reads as follows:

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 the 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 Court of Quebec.

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

Because of the confusion which existed in the mind of many Quebecois between language, culture and religion, the guarantees of religious education in section 93 were seen by many as language guarantees. They were indeed in Quebec, both because of the economic position of the English minority and because all Protestants tended to be English.¹⁰ In the rest of the country, this 'guarantee' turned out to be a cruel illusion.¹¹

The Manitoba Act contained guarantees similar to section 133. These were repealed by the English majority less than thirty years later¹² and then reinstated by the Supreme Court of Canada in recent years¹³ when it was too late to restore effective bilingualism to the province.

No guarantees were given to the large Acadian population of New Brunswick but the 1982 amendments to the constitution did promulgate total bilingualism for the province and, at least in large portions of New Brunswick, this has proven effective.¹⁴

The protection of French was thus quite limited in 1867, although the creation of the province of Quebec with a massive French majority went a long way towards overcoming the constitutional weakness. Even in Parliament and in the Supreme Court in its early years the use of French was far less widespread than now.¹⁵ In part, this may have been because of the closed, religious nature of Quebec society which was little interested in the world outside it. But the main reason was undoubtedly the dominance of English in Quebec's cities and economic life. For instance, Quebec City at confederation was 40 per cent English.¹⁶ Montreal had an English ma-

jority.¹⁷ Thus, while section 133 continued the use of French in the federal apparatus, it was certainly not nearly so effective in this as it was in protecting English in Quebec. Mallory was clearly right when he wrote:¹⁸

It needs to be remembered that the BNA Act has never been a very effective protector of the rights deemed necessary by French-speaking Canadians for their survival as a distinct group.

He went on to use the example of the withdrawal of the Manitoba rights which were similarly drafted¹⁹ to illustrate the fragility of French rights in the first century of Canada's existence.

It is easy to attempt to lay the blame entirely on the country's English majority. However, one must keep in mind the fluid and sensible nature of history²⁰ and avoid simplistic generalisation. The lack of a French industrial or commercial base can be viewed in many different ways. Certainly no one can blame the English for living in large numbers in Quebec's largest cities. Orange and imperialist sentiment was undeniably present.²¹ Each historian will have to interpret the weakness of the protection of French in his own way.

Today, the protection has been rendered effective by a new vigour in the interpretation of Act 133,²² by the adoption in 1969 of an Official Languages Act, creating equality for the two languages in Federal institutions and by the new constitutional guarantees of 1982.

The courts have firstly declared null and void Quebec's attempt to do away with section 133.²³ It follows that the federal government would be powerless to take away protection from French or English.

The Supreme Court has stated that every part of a statute, including citations and annexes, must be bilingual.²⁴ The constitution was applied to every enactment of a truly public nature, including subordinate legislation,²⁵ but it does not apply to more private subordinate legislation (e.g. municipal by-laws).

It follows that in the federal sphere, all governmental regulations have to be bilingual. With respect to courts, it is of course not necessary for every procedure to be bilingual. That would be cumbersome beyond belief.²⁶ Bilingualism simply means that every person is entitled to speak or write either language before federal or Quebec courts and is presumed to be understood.²⁷ For administrative reasons, in certain cities the Federal Court has required that a lawyer wishing to speak French should give advance notice. It is submitted that the enforcement of that rule (i.e. ordering him to proceed in English in the absence of advance notice) would be flagrantly unconstitutional.²⁸

With the exception, perhaps, of the rule excluding municipal by-laws, the courts have interpreted section 133 wisely, on the one hand guarding against subtle encroachments and, on the other refusing to turn it into an obstacle to legal process.²⁹

The notion of what is connected to 'government regulation' can certainly give rise to debate as to detail, but no area of law can ever be codified so as to be entirely free of ambiguity and a constant level of discussion is probably a healthy sign. However, it can no longer be argued that section 133 is an empty shell and does not provide protection. It is by and large effective both with respect to English in Quebec and French in the rest of the country.³⁰

A minor problem affecting the application of section 133 arises with respect to the weight of the English and French version of law. Under federal law, they are unquestionably equal as they are in situations where no mention is made of any distinction.³¹ In such circumstances if the two versions differ, one interprets to best effect the intent of the legislator or, more felicitously to bring about a greater degree of justice and harmony with basic laws, such as the Charter.³²

But what if the legislator specifically gives priority to one language? This is what happened in Quebec in 1974 when the Interpretation Act was amended to include section 40.1 which directs the use of the French version in cases of irreconcilable discrepancies.

The scope of this is rather narrow. Not only must there be a discrepancy but all the other rules of reconciling the texts must fail. Nevertheless, this appears to be a back-door attempt to dilute section 133. It relegates the English text to auxiliary status, always suspect if it differs in any way from the French.

In Côté, *Interpretations of legislation*, 3rd ed.³³ we read the following comment on section 40.1:

The constitutional validity of this enactment is questionable, considering the requirement of equality of the two languages stated in section 133 of the *Constitution Act 1867*. Furthermore, the provision is not as absolute as it may appear, and should be read in conjunction with section 1 of the *Interpretation Act*. It is applicable only if the purpose, the context or the provisions of the statute being construed do not conflict with the application of section 40.1. Practically speaking, its weight is comparable to that of a presumption of intent, and it should only be relied upon when ordinary rules of interpretation are unable

to provide an acceptable solution to differences in the French and English versions.

While Côté's solution – favouring the version closest to the previous law – appears unduly conservative,³⁴ there is little doubt that his constitutional doubts are sound.

Unfortunately, in *Gagnon v Southam Inc.*,³⁵ Mailhot J. A. said:³⁶

One should exercise caution as regards the title of the English version of the law which appears to have been the grounds for the judge's decision, because it contains the words 'public inquiries' which are not part of French or English legislation. In the light of these circumstances, if there is any ambiguity, one should obviously apply article 40.1 of the Law of Interpretation and the French text should prevail.

The explanation of this seemingly sweeping approval unclouded by any doubt whatsoever may be that notice of a constitutional contestation was not given under section 95 of the Code of Civil Procedure. In any case, the decision cannot be seen as in any way convincing. No argument is advanced, indeed the problems are not mentioned. There is apparent inconsistency with the Supreme Court Manitoba decisions.³⁷ Either we assume Mailhot J. A. properly applied the presumption of validity to the absence of contestation and thus set no precedent, or she decided an important question *per incuriam*. The issue remains open, with invalidation as the likely result.³⁸

Apart from this, and from minor disputes around regulating instruments, the effect of section 133 is generally settled and generally satisfactory.³⁹

A curious dispute arose recently with respect to section 133 and section 530.1e of the Criminal Code guaranteeing a trial in English or French if the accused so chooses.

If a trial in English is chosen, may the crown prosecutor speak French as part of his rights under section 133, so long as the accused is provided with an interpreter? Mr Justice Benjamin Greenberg said he can in *The Queen v Cross*.⁴⁰ A few weeks later, Mr Justice Tannenbaum came to the opposite conclusion in *The Queen v Montour*.⁴¹

While both judgments are well researched and cogent, this writer agrees strongly with Mr Justice Tannenbaum for several reasons. First, it is difficult to see the Crown, which is equally French and English, as claiming language rights. Second, the right to an interpreter is one which belongs to any accused, even if he speaks a language totally foreign to

Canada. Surely, a right to a trial in English or French must mean somewhat more than that. Third, the result of Mr Justice Greenberg's judgment would be that the English or French accused would have fewer rights in Quebec, New Brunswick, and Manitoba – precisely where language rights were most protected – than in other parts of Canada where section 133 or its equivalent is not in force. It would follow that the prosecutor's convenience must yield to the accused's rights.⁴²

The Official Languages Act

Even if section 133 is an important and effective protection, it is not sufficient to protect French in the federal government since it applies only to Parliament and the courts. In part, French was largely ignored for the first hundred years of Canada's existence. In 1970, Sabourin writes:⁴³

Although there has been bilingualism in Canada for a long time, it must be remembered that it is only in the last ten years or so that the idea of biculturalism has strongly spread. The general dissatisfaction on the part of French Canadians with regard to federal institutions and in the anglophone provinces is also not a recent phenomenon. But the 'peaceful revolution of Quebec' and a general awareness on the part of the French Canadians in the face of growing assimilation, immigration that has relentlessly played into the hands of the anglophone element, as well as the desire of a large number of English Canadians to support the bicultural nature of the country in order to better resist Americanisation, and finally the desire of numerous leaders to ensure a form of parity between the 'two founding peoples' in Canadian political life, has pushed (Ottawa) some provinces, Ontario and New Brunswick in particular, and the political parties, to once again take an interest in the problems created by the cultural duality.

Despite the right since 1882 to sit public service examinations in French⁴⁴ and despite the presence of a few francophones at all times, until the 1960s the institutions of the government of Canada were foreign territory to French-speaking Canadians.⁴⁵

The result of all these problems was the passage of The Official Languages Act in 1969. This law did not make Canada totally bilingual either. Indeed it applied only to matters within the federal powers and had no constitutional character. What it did do was make English and French completely equal as Canada's official languages and guaranteed, to some extent, bilingual services for the population.

The law was consistent with the Trudeau government's ideology of building a bilingual country. The reason why total bilingualism even in federal services was not immediately possible was a practical one. Who was to dispense these services? And for whom? The policy was adopted to expand the use of French across Canada, and especially in Ottawa, but the initial targets were 'bilingual districts' where at least 10 per cent of the population belonged primarily to the minority language.

In 1988 a new Act extended the right to services but still stopped short of total bilingualism, although it spelled out the need to promote as well as maintain the minority languages. It also reinforced the powers of the Commissioner of Official Languages and provided a remedy in the Federal Court for those who do not get redress through the Commissioner's office.

The first Official Languages Act was challenged by the former President of the Exchequer Court, Mr Justice Thorson, and by Mayor Jones of Moncton. After winning an important victory on *locus standi*,⁴⁶ the attackers were soundly defeated on the merits.⁴⁷ The validity of the decision to grant equal status to French was now beyond all doubt.

The Official Languages Act did not immediately receive the type of generous interpretation which was no doubt intended by the Trudeau government. Despite a good start in *Joyal v Air Canada*,⁴⁸ a more cautious view, strongly coloured by fear of impractical results, emerged in the Federal Court in the politically seminal case of *Association des gens de l'air*.⁴⁹

Nevertheless, the spirit of the enactment did lead to some judicial victories for those pursuing a vigorous promotion of bilingualism.⁵⁰

Far more significant was the practical effect of this law. One may be fully satisfied with the results of the Trudeau policies⁵¹ or not be, but it is impossible to doubt that the public service, at least in Ottawa, has become substantially bilingual and open to francophones.⁵² Indeed, a distressing English backlash against bilingualism has been gaining ground during the Mulroney years. It is seen in the growth of the Reform Party, the CORE party in New Brunswick, the pronouncements of many politicians, notably Alberta's Premier Getty, and strident criticism of the new Official Languages Act. This backlash is proof of considerable success of the Trudeau-era policy of making the federal institution functionally bilingual.

The Charter

The Official Languages Act was a tremendous achievement, but it was still not enough. First, it was not constitutional and could be revoked at any time. Second, it could be interpreted in the narrow way pioneered by the Federal Court.⁵³

The protection of minority languages⁵⁴ was further enhanced by the adoption of sections 16–22 of the Canadian Charter of Rights and Freedoms. Apart from extending protection to New Brunswick, this change guaranteed constitutionally the original equality of English and French, and extended the notion of progress towards true equality. Finally, the principle of bilingual services was enshrined, though still within limits of demand as nature of the office. Fortunately section 33 permitting legislative derogation from the Charter did not apply to these provisions.

One would think that inclusions in the Charter would open language rights to the generous interpretation of constitutional rights applicable in constitutional matters.⁵⁵ Many decisions have done so.⁵⁶

Foucher wrote speaking of section 23:⁵⁷

It has now been established that the Canadian Charter of Rights and Freedoms, in its entirety, should be given a broad, liberal, generous interpretation reflecting the priority that the constitutional text should have and the wish to not be limited to the letter of the law. In the case of language rights, in general, the Supreme Court has made its position known in the dismissal of the language rights in Manitoba case, when it clearly linked language rights to human dignity and to the needs of living in society, to the equal access of francophones and anglophones to the law, to the courts and to the legislative body. It also confirmed the fundamental duty of the courts in enforcing respect for these guarantees. As concerns article 23 of the Canadian Charter of Rights and Freedoms in particular, both the Supreme Court of Quebec and the Appeal Court of Ontario and the Cour de Banc de la Reine de l'Alberta adopted this liberal and generous approach. A liberal interpretation of article 23 in this context does not mean that its scope must be broadened in order to see a desire to protect the rights of the majority; it indicates that it must be made to play a real role of guarantor of minority rights.

Too literal, niggling and restrictive a reading could certainly favour compromise, which does occur in certain provinces: francophones for French immersion, bilingual classes in mixed schools, negation of any form of administration other than by means of a consultative commit-

tee. These compromises are not in accordance with the interpretation that should be that of article 23. The various limits and the appeals to reason stemming from the provincial governments cannot be allowed to succeed in reducing article 23 to a mere banality. Otherwise the minorities who are desperately trying to survive, especially in the regions where they are weakest, will rightfully doubt the real value of the constitutional guarantees, which will only represent illusions for them.

However, in another article written with Professor Tremblay, Professor Bastarache expressed apprehensions about Supreme Court jurisprudence in the period 1985–1986.⁵⁸

The *MacDonald*⁵⁹ and *Bilodeau*⁶⁰ cases can be explained by common sense. The limitations on language rights in these cases appear sensible and rational. The serious problem is Mr Justice Beetz's decision of *Société des Acadiens*.⁶¹

After quoting *MacDonald*⁶² to the effect that language rights are not fundamental but are based on a political compromise, he states the following:⁶³

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

Such an attitude of judicial restraint is in my view compatible with s. 16 of the Charter, the introductory section of the part entitled 'official Languages of Canada'.

In a concurring judgment, Chief Justice Dickson adopts the new liberal policy of interpretation. Therefore, the restrictive remarks of Beetz J. were not necessary for the decision.

The negative side of Beetz's judgment cannot be downplayed. In *Language Rights in the Supreme Court of Canada*,⁶⁴ Marc M. Monnin writes:

Me Bastarache singled out for particular criticism the subsequent decisions of the Supreme Court of Canada in *Société des Acadiens* and *MacDonald v Montreal*, referring to them as 'a shocking reversal in the reasoning of the Court'. He noted with a certain amount of apprehen-

sion the remarks of Mr Justice Beetz for the majority in that decision that language rights are not as important as legal rights. A strong dissent was expressed by Mr Justice Dickson and Madame Justice Wilson in *Société des Acadiens* constituted a reversal of the more liberal interpretations taken in previous language rights decisions.

Michel Bastarache writes in the same issue.⁶⁵

A shocking reversal in the reasoning of the Court occurred however in 1986 in the *McDonald v Ville de Montreal* and *Société des Acadiens de Nouveau-Brunswick v Association of Parents for Fairness in Education* decisions. In the majority decisions delivered by Mr Justice Beetz, the Court declared that section 16(1) of the *Charter* does not establish a right to equality of official languages, but rather provides for a goal which is to be reached through the provisions of sections 17 to 20 of the *Charter* and especially through new language rights to be introduced by provincial legislatures. It is true that the Court did not deal in a definitive way with the scope of section 16(1) in these cases. It did, nevertheless, refuse to make use of section 16(1) to further the rights described in section 19(3), which deals with the right to use the language of one's choice before the courts of New Brunswick. Mr Justice Beetz held that the right to use the French or the English language in all proceedings which is based on section 19(2) is identical to that found in section 133 of the *Constitution Act, 1867*, and that it is a right which belongs to the individual but creates no corresponding obligation on the state or anyone else to whom these proceedings are addressed. This it seems to me is contrary to the findings in *Blaikie (#2)* that rules of Court must be bilingual to ensure equal access to the courts in both French and English.

Subsequent judgments have reverted to the generous interpretation, at least of section 23.⁶⁶ One must therefore conclude either that section 23 is to be interpreted generously but not sections 16–22 or that *Société des Acadiens*⁶⁷ or at least its dicta on interpretation constituted an unfortunate error and should be considered a minority view. The last possibility is far more attractive.

It is true that services in English and French are not quite so universal as values as freedom of expression and of association. But in the Canadian context, they are as fundamental. If the *Charter* had brought in total, immediate equality then some limitations in unilingual areas might have been attractive for practical reasons. But the *Charter* is so limited in scope that any doubt should be resolved in favour of the minority. *Société des Acadiens*⁶⁸ was altogether too cautious and too timorous.

In conclusion, the Charter provides a number of protections, notably security against repeal of the Official Languages Act. In terms of services, it could prove to be a significant catalyst provided Beetz is not followed⁶⁹ and there is reason to think he will not be.⁷⁰

The total effect of section 133, the Official Languages Act and the Charter is to provide a limited but effective bilingualism in federal institutions. The pariah state of French in the first century of our country is definitely behind us, even if some work remains to be done and if a backlash must be defused.

PROMOTION AND PRESERVATION OF FRENCH OUTSIDE QUEBEC

One of the most shameful episodes in Canadian history is the attempt to destroy French-speaking communities outside Quebec. Starting with the harsh treatment of the Acadians in the 1750s, a series of measures was undertaken with an idea to making Canada outside Quebec English only.

Once again, one-sided interpretations of history are dangerous. The Supreme Court, in the *Manitoba Reference*,⁷¹ drew attention to the legal cases which had invalidated the 1890 Act which revoked French rights in 1892 and 1909. The temper of the times was such that these laws were simply ignored.⁷² After losing the Manitoba battles, in practice if not in theory, the focus of the battle for French shifted to Ontario, where a long and tragic confrontation occurred over Resolution 17 which abolished French Catholic schools.⁷³

The entire history of Ontario law is found in Re Education Act.⁷⁴ The history is not so one-sided as many Quebec nationalists would have it. For instance, speaking of Egerton Ryerson⁷⁵ the Court said:⁷⁶

During his tenure, he proposed no restriction on the language of instruction. Indeed, he went further and, in 1851, arranged the passage of a regulation allowing for 'the exclusive use of French (or German) in any of the schools of Upper Canada'. In 1857, he stated in a letter dated April, 24th, '... that as French is the recognized language of the country, as well as English, it is quite proper and lawful for the trustees to allow both languages to be taught in their school to children whose parents may desire them to learn both'. (*French Language Public Secondary Schools in Ontario*, Report for Cultural and Educational Subcommittee of the Ontario Advisory Committee on Confederation, October, 1967, as quoted in the Bériault Report: app. 'c' A.C.F.O., No. 3; N.D.P., No. 1.)

However, the Court went on to note 'the severe setbacks' suffered by French in the period 1880–1920.⁷⁷ The culmination came just before World War One:⁷⁸

In 1912–1913, Reg. 17 was passed. Pursuant to its terms, English was to be the only language of instruction after grades 1 and 2. French might be taught in the later grades, but for no more than one hour per day. This Draconian measure represented the lowest ebb of French language education in Ontario. Officially, it remained in force until 1944 although, in practice, it was circumvented in various ways after 1920 (app. 'c', A.C.F.O., No. 16), following an unsuccessful constitutional challenge which reached the Privy Council; *Ottawa Separate School Trustees v Mackell* (1916), 32 D.L.R.1, [1917] A.C. 62.

The situation improved only in the 1960s.⁷⁹ The improvement was noted by Sabourin.⁸⁰ It has been continued since.

The improvement reached its highest level in New Brunswick which is now constitutionally bilingual, with total equality at least before the law.⁸¹ Ontario also legislated substantially to improve the lot of French in the administration, the schools and the courts.⁸² However, Ontario stopped short of total bilingualism.⁸³

Other provinces also legislated with respect to French schools, often in reaction to the Charter.⁸⁴ There was also some legislation intended to cut down the effect of court judgments.⁸⁵

French rights, at least for someone accused of an offence, were substantially improved by the federal Official Languages Act.⁸⁶

Undoubtedly the most important achievement was section 23 of the Charter.⁸⁷ If French had been waning in Canada before the revival of the 1960s it was largely for lack of educational opportunities.⁸⁸

It was essential that section 23 be generously interpreted and that the 'numbers permitting' limit be restricted to true cases of lack of demand. This has in fact happened.⁸⁹

In *Re Education Act*⁹⁰ we read:

This Court has recognized that the Charter must be given a broad and liberal interpretation. It has stated that the Charter should not be stultified 'by narrow technical literal interpretations without regard to its background and purpose': *Re Southam Inc. and The Queen* (No 1)(1983) 41 O.R. (2d) 113 at 1. 123, 146 D.L.R. (3d) 408 at p. 418, 3 C.C.C. (3d) 515. Section 23 of the Charter particularly must be given such a liberal interpretation for it enacts new rights and in effect creates a

code which establishes minority language education rights for the nation.

In getting away from the restrictiveness of *La Société des Acadiens*,⁹¹ Chief Justice Dickson said in *Mahé*:⁹²

I do not believe that these words support the proposition that s. 23 should be given a particularly narrow construction, or that its remedial purposes should be ignored.

What this implies, in practice, is the failure of any schemes to set too high a requirement for 'numbers permitting'. It has also prevented the delegation to school boards of the discretion to determine arbitrarily when the numbers permit French instruction.⁹³ The latter case, as well as the Ontario defence,⁹⁴ makes it clear that the minority groups are entitled to participate and to some extent control their institution.

*Mahé*⁹⁵ shows that the 'numbers permit' test applies separately to different issues of degree of control. Chief Justice Dickson left the greatest possible degree of flexibility with the following remarks:⁹⁶

It is not possible to give an exact description of what is required in every case in order to ensure that the minority language group has control over those aspects of minority language education which pertain to or have an effect upon minority language and culture. Imposing a specific form of educational system in the multitude of different circumstances which exist across Canada would be unrealistic and self-defeating. The problems with mandating 'specific modalities' have been recognized by all of the courts in Canada which have considered s. 23. At this stage of early development of s. 23 jurisprudence, the appropriate response for the courts is to describe in general terms the requirements mandated. It is up to the public authorities to satisfy these general requirements. Where there are alternative ways of satisfying the requirements, the public authorities may choose the means of fulfilling their duties. In some instances this approach may result in further litigation to determine whether the general requirements mandated by the court have been implemented. I see no way to avoid this result, as the alternative of a uniform detailed order runs the real risk of imposing impractical solutions. Section 23 is a new type of legal right in Canada and thus requires new responses from the courts.

In arriving at a general description of the sort of management and control mandated by s. 23, I have borrowed heavily from the statements of Purvis J. and Kerans J. A. in the Alberta courts as well as

from statements by the Ontario Court of Appeal in Reference Re Education Act of Ontario, *supra*. The views of these courts show an appreciation of the various considerations involved in ensuring that the minority language group has control over the aspects of minority language education which pertain to or have an effect upon minority language and culture.

In my view, the measure of management and control required by s. 23 of the Charter may, depending on the number of students to be served, warrant an independent school board. Where numbers do not warrant granting this maximum level of management and control, however, they may nonetheless be sufficient to require linguistic minority representation on an existing school board.

The expression 'sliding scale of rights'⁹⁷ illustrates the absence of dogma or any form of rigidity.

The courts have also wisely held that section 23 rights are individual rights⁹⁸ and have eschewed any collectivist vision.⁹⁹ The purpose of the Charter is to help members of minority language groups, not to classify citizens in language corporations. For instance, it is clear that many citizens will have rights to education in both languages under section 23.¹⁰⁰

On a different note, outside francophones have also benefited substantially from the growing bilingualism of federal institutions. This has brought French broadcasting and services to areas where they would not normally have penetrated.

The conclusion is that, while much remains to be done, there has been substantial improvement in facilities available in French across the country. Pierre Trudeau's idea of a bilingual Canada has not been realised,¹⁰¹ but the progress is solid and nothing justifies the apparent desertion of the ideal by many Canadians during the Mulroney years.¹⁰²

THE PROBLEM OF ENGLISH IN QUEBEC

The issues

Quebec nationalists never tire of describing the conditions of the 'best-treated minority in the world'. Undoubtedly, the English minority does have institutional facilities, such as hospitals, schools and universities, which are unavailable to francophones outside Quebec. Does this make the minority the best-treated in Canada, let alone the world?

In another article this author expressed his views as follows:¹⁰³

English speakers of Quebec have registered a strong protest against their treatment in Quebec by voting for the Equality Party. They are clearly both dissatisfied and angry.

Yet Quebec nationalists frequently boast that the English-speaking community is the world's 'best treated minority' and that the claims of injustice toward it are both preposterous and presumptuous. This type of assertion is always suspect. Generosity is more convincing when the recipients rather than the dispensers proclaim it. It is also very difficult to establish which of the countless minorities in the world is the best-treated.

The very word 'generosity' suggests a problem when applied to citizens who are supposed to be equal in every way. However, even with these initial doubts, the nationalists' assertion deserves some analysis. As soon as one begins to consider it, one sees that it is partly defensible and partly not.

What is unquestionably true is that institutionally, English Quebec is better equipped than most minorities and certainly better than any other in Canada. It has three universities, numerous hospitals, constitutionally guaranteed school boards, newspapers, radio, television, and so on. It is easier to be unilingual English in Quebec and survive than to be unilingual French anywhere in the country with the possible exception of parts of New Brunswick.

One point which mitigates against Quebec's merit is that these institutions are not the fruit of a conscious act of tolerance. They were established by the minority at a time when it was the dominant force and was, for a long period, the majority in Montreal.

Nor can present-day grants to English institutions be credited to the majority. The minority pays taxes like everyone else. Giving it a portion of the services is justice and not generosity.

Most devastating for Quebec's claim of generosity is its 20-year battle to diminish the role and scope of the English institutions.

English universities are always more hurt than others by financial cutbacks. Bill 191 closed access to English schools to many persons, including anglophones from other provinces, and it took the Canadian Charter to restore the rights of most Canadians.

Most important, Quebec decided quite deliberately to reduce the proportion of anglophones in the population by passing legislation

such as Bill 101. It has been quite successful in this goal, although the nationalists still repeat the worn slogan that French is in peril.

Despite all of this and despite the very serious questions which can be raised as to Quebec's future intentions, it is clear that the institutional structures of the English community are indeed good and that, at best, the minority would be justified in lobbying to keep them but not in complaining about them.

Where individual rights are concerned, the picture is starkly different. Not only is the English minority not the best-treated in the world but, it can be argued, all minorities in Quebec are, on the whole, worse treated than minorities elsewhere in Canada.

A similar view is expressed by Ramsey Cook in reviewing Mordecai Richler's book¹⁰⁴ for the *Montreal Gazette*.¹⁰⁵ Mr Cook says:

Though the English-speaking minority in Quebec continues to enjoy rights that are the envy of most francophone minorities outside Quebec, those rights have been restricted. Who would not be uneasy in a province with a premier who boasted that he had taken away civil rights of some citizens in overriding the Supreme Court's decision that the Quebec Charter protected outdoor commercial signs in English? Here Richler is on solid ground: the main consequence of restrictive language laws is the depressing exodus of young, often bilingual, non-francophones from the province. Does that benefit Quebec? Had Richler paid less attention to anti-semitism and more to Bills 101 and 178, his indictment would have been more effective, forcing his critics into defending the language laws rather than arguing about the relevance of Groulx's name on a Metro station. Even those who have conceded that Richler was at least partly right about Bill 178 have stopped short of urging changes. The negative response to Greta Chamber's recommendations about admission of English-speaking immigrants to English-language schools is a sad case in point.

Richler himself makes very similar points, in the language of the writer rather than the historian.¹⁰⁶

Exactly the same doubt about the happy state of the English minority, in appropriately sober tone, is found in the Supreme Court judgment of *Association of Protestant School Boards*:¹⁰⁷

Although the fate reserved to the English language as a language of instruction had generally been more advantageous in Quebec than the fate reserved to the French language in the other provinces, Quebec seems nevertheless to have been the only province where

there was then this tendency to limit the benefits conferred on the language of the minority. In the other provinces at the time, either the earlier situation had remained unchanged, at least so far as legislation was concerned, as in Newfoundland and British Columbia which have no legislation on the language of instruction, or else relatively recent statutes had been adopted improving the situation of the linguistic minority, as in New Brunswick, Nova Scotia and Prince Edward Island.

It appears beyond doubt that in the period 1760–1960 the English minority set up an unusually good network of institutions,¹⁰⁸ many of which have been publicly funded or underfunded since 1960.

Quebec, or at least Montreal, also functioned in a bilingual fashion until the early 1970s. However, it is important to remember that Montreal was majority English or half English for a large part of the nineteenth century¹⁰⁹ and that even today more than a third of the urban community is non-French. Despite Quebec's attempts to make it French only, Montreal is still functionally bilingual. The view of many minority members that the period prior to 1974 was a golden age of bilingualism is difficult to justify, however. Section 133 applied then as it does now. Apart from that, the two societies were not so much bilingual as separate.¹¹⁰

The majority of francophones lived in French and encountered English, if at all, only at work. The English minority lived as though its main areas of concentration were in Ontario, not Quebec. This state of affairs was made easy by the fact that the language groups lived in different areas of Montreal.

The Quiet Revolution started in the 1940s rather than in the 1960s, with the growth of a French urban intelligentsia and a corresponding fall in the birth rate.¹¹¹ This led to some concern about the fact that all immigrants tended to join the English minority. This writer has already conceded some rationality to this argument. In *Options* he wrote:¹¹²

The second, more serious, nationalist argument is based on immigration. Unlike Spain or Eastern Europe, Canada is a land of immigration. In the first half of the century, almost all immigrants adopted English as their Canadian language. Once Quebec's birthrate fell to normal, modern standards in the 1960s, it could be argued that, in the long run, French Quebecois could become a minority.

This argument has some merit. That is why the one aspect of Quebec's legislation that can be rationally justified is imposing French school on immigrants. This does not justify the restriction on the

teaching of English in French schools, or the attempt to limit the freedom of Canadian citizens, both French and English. However, there is little doubt that a law could have been drafted which would have been compelling and would have placed immigrants in French schools, at least until their naturalization.

However, after the initial reforms of the Quiet Revolution which were welcomed as much by many anglophones as by francophones, the Revolution turned away from reform and towards classic nationalism, towards advancing the careers of Roy's Jean Lévesques¹¹³ over their English or immigrant counterparts through nationalist legislation and even more nationalist attitudes.

The result has been a proliferation of language laws, fundamentally Bill 22, Bill 101, Bill 178 and all of the legislation and subordinate legislation designed to give them effect. These will be discussed in some detail.

Another result, less amenable to legal analysis, has been the exclusion of the English-speakers from the public sector¹¹⁴ and the tendency of many of them to leave *Quebec Association of Protestant School Board Com.*¹¹⁵ Quebec deposited a demographic study by M. Paillé which openly referred to the diminution in the percentage of the minority as one of the successes of Bill 101. However, the classic nationalist response has been to deny or to blame the minority for this phenomenon.¹¹⁶

Under growing pressure, Quebec set up a taskforce on English education, headed by Montreal journalist and McGill Chancellor Gretta Chambers. The report of the taskforce confirmed the weakness of the minority, its decline, its lack of representation.¹¹⁷ Although some of the report's less controversial proposals might bear fruit, the major suggestion – the dilution of the clearly unnecessary restrictions of Bill 101 with respect to access to English schools – has been endorsed by almost no francophones.

While opposition to Bill 178, prohibiting English commercial signs is common among all segments of the population,¹¹⁸ changing the law also appears to be extremely difficult. Any weakening of the language legislation immediately arouses a loud lobby which, in the face of all evidence, persists in seeing English as dominant and French as threatened.¹¹⁹

It is thus evident that, for political reasons, only the courts can assist the minority. Most political ventures¹²⁰ are not viable in a system where politicians study polls and always fear potential majority reactions more than minority ones. The situation is similar¹²¹ to the one in the field of civil rights in the United States forty years ago. Purely majoritarian political

theory, weak as it is in any case, is simply inapplicable to situations in which emotions such as nationalism or racism are present. The political process helps one side or the other.¹²² Courts necessarily play the role of arbiter and protector. This is their natural and proper role. It is in that context that one need evaluate what the courts have done since 1974.¹²³

The laws and the jurisprudence

Bill 22 of 1971 had as its effect the creation of a unilingual French state, with certain exceptions and within a bilingual Federal structure.

The constitutional validity of this cannot be questioned since *La Chaussure Brown's* and *Devine*.¹²⁴ In the Court of Appeal,¹²⁵ a minority composed of Paré and Montgomery had suggested that language, not being a power given to the province under section 92 of the BNA Act, was not properly a provincial field of legislation at all, save in certain cases ancillary to section 92 powers. The majority and the Supreme Court refused to accept this and this position is no longer arguable.¹²⁶ It has been established that Quebec has lawfully declared French to be its official language and that no way exists to obtain a blanket annulment of Bill 101.

Bill 22 restricted access to English schools and made the use of French compulsory, though not exclusive in many areas of public, and even private, life.¹²⁷ Bill 101 restricted more drastically access to English schools, attempted to do away with section 133 in Quebec courts, made French the exclusive language of municipalities and commercial advertising and, to a large extent, labour relations and professions. It created vague obligations to offer services in French at all levels, for instance in stores and restaurants (section 5).

In both cases, regulations were authorised to supply many of the details which the legislation did not spell out.

Bill 178 essentially exempted from the operation of the Canadian and Quebec Charters, the public sign portions of the law in answer to *La Chaussure Brown's*.¹²⁸ It also offered some rather insignificant expansion of the right to use English in certain cases.¹²⁹ It was manifestly an attempt to reverse jurisprudence favourable to the minority.

Many Quebec nationalists have complained about the minority's successes before the courts and have even blamed section 96 of the Constitution Act, which provides for federal nomination of judges.¹³⁰

In fact, Quebec won the major constitutional battle.¹³¹ The courts have been even-handed in accordance with their duty. However, the one-sided-

ness of Quebec (a characteristic of nationalism everywhere), has pushed it into policies which naturally attracted judicial review and the minority has indeed won a number of cases.

The issues which have arisen have been of several types:

- Purely constitutional
- Charter
- Interpretation of the law
- Administrative law

Purely constitutional cases

The only purely constitutional case won by the minority was *Blaikie*.¹³² A fair reading of the constitution could lead to no other result and it is difficult to understand any of the recriminations which followed this rather innocuous and obvious decision.

Pure constitutional law would also apply to any attempt to restrain the use of trademarks or, if submitted, names of federal corporations, or operations of purely federal types of enterprises.¹³³ Once again, the importance for Quebec nationalists is not easy to fathom.

Charter cases

Constitution in the form of the Charter is obviously involved whenever a law as sweeping as Bill 22, or even more, Bill 101, attempts to limit individual freedom. The obvious lines of defence for civil libertarians are freedom of expression and the rules prohibiting discrimination. Both of these basic principles were held to be violated by Bill 101 in *La Chaussure Brown's*.¹³⁴

On freedom of expression, the Court refused to limit the concept to political discourse and held that it applied to commercial expression. This was subsequently reiterated several times.¹³⁵ There could be nothing more dangerous than the making of this kind of distinction which would make any repression of free expression save in direct politics at least arguably legitimate. The Court concluded at pp. 766–767:

Given the earlier pronouncements of this Court to effect that the rights and freedoms guaranteed in the Canadian *Charter* should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s.2(b) of the *Charter*. It is worth noting that the courts below applied a

similar generous and broad interpretation to include commercial expression within the protection of freedom of expression contained in s.3 of the Quebec *Charter*. Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, and important aspect of individual self-fulfilment and personal autonomy. The Court accordingly rejects the view that commercial expression serves no individual or societal value in a free and democratic society and for this reason is undeserving of any constitutional protection.

On the subject of the section 1 justification¹³⁶ the Court also concluded against the government. At p. 780 we read:¹³⁷

Thus, whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French *visage linguistique* in Quebec and therefore justified under the Quebec *Charter* and the Canadian *Charter*, requiring the exclusive use of French not been so justified. French could be required in addition to any other language or it could be required to have greater visibility than that accorded to other languages. Such measures would ensure that the '*visage linguistique*' reflected the demography of Quebec: the predominant language is French. This reality should be communicated to all citizens and non-citizens alike, irrespective of their mother tongue. But exclusivity for the French language has not survived the scrutiny of a proportionality test and does not reflect the reality of Quebec society. Accordingly, we are of the view that the limit imposed on freedom of expression by s.58 of the *Charter of the French Language* respecting the exclusive use of French on public signs and posters and in commercial advertising is not justified under s. 9.1 of the Quebec *Charter* in like measure, the limit imposed on freedom of expression by s. 69 of the *Charter of the French Language* respecting the exclusive use of the French version of a firm name is not justified under either s. 9.1 of the Quebec *Charter* or s. 1 of the Canadian *Charter*.

The issue of discrimination was more delicate. Bill 101 applies to everyone, francophones as much as anglophones. Under a strictly formalistic view of discrimination it would not qualify.¹³⁸ However, under the Charter, formalism has not been in fashion.¹³⁹ The Court said at p. 787:¹⁴⁰

With these observations in mind, we turn to the question whether s. 58 infringes s. 10. It purports, as was said by the Superior Court and the Court of Appeal, to apply to everyone, regardless of their lan-

guage of use, the requirement of the exclusive use of French. It has the effect, however, of impinging differentially on different classes of persons according to their language of use. Francophones are permitted to use their language of use while anglophones and other non-francophones are prohibited from doing so. Does this differential effect constitute a distinction based on language within the meaning of s. 10 of the Quebec *Charter*? In this Court's opinion it does. Section 58 of the *Charter of the French Language*, because of its differential effect or impact on persons according to their language of use, creates a distinction between such persons based on language of use. It is then necessary to consider whether this distinction has the effect of nullifying or impairing the right to full and equal recognition and exercise of a human right of freedom recognized by the Quebec *Charter*. The human right or freedom in issue in this case is the freedom to express oneself in the language of one's choice, which has been held to be recognized by s. 3 of the Quebec *Charter*. In this case the limit imposed on that right was not a justifiable one under s. 9.1 of the Quebec *Charter*. The distinction based on language of use created by s. 58 of the *Charter of the French Language* thus has the effect of nullifying the right to full and equal recognition and exercise of this freedom. Section 58 is therefore also of no force or effect as infringing s. 10 of the Quebec *Charter*. The same conclusion must apply to s. 69 of the *Charter of the French Language*. We note that since one of the respondents, Valerie Ford, is an individual and not a corporation, it is unnecessary in this case to decide whether corporations are entitled to claim the benefit of equality guarantees and we do not do so.

It is to be noted that the decision was formally decided under the Quebec Charter of Rights and Freedoms, even though the Court noted that both Charters were applicable. Although the provincial Charter can be modified at any time, so long as it subsists the effects are similar to that of the Canadian Charter. The Supreme Court has enunciated rules of generous interpretation rather like the ones applicable to the Charter.¹⁴¹

The Quebec Charter of Rights specifically prohibits discrimination as to language. Although on the facts of the case, Quebec won *Forget v AG Que*,¹⁴² all the dicta on the law in the judgment of Lamer were favourable to the minority in giving a generous interpretation to linguistic discrimination.

Further, *City of Lachine v Burton*¹⁴³ confirmed the principle of generosity to members of the minority in interpreting the Quebec Charter.

It would make sense that when a Charter of Rights is adopted and is publicised as particularly far-reaching and avant-garde in its effects as the Quebec Charter was, the courts should be activist in using it.

Quebec's main hope in restraining the use of the Charter was to characterise language rights as 'collective' rather than individual. It is irrational to view freedom of expression or equal treatment as collective. However, if any area of the law could be characterised in this way, it was section 23. This was the thrust of Quebec's defence in *Quebec Association of Protestant School Boards*.¹⁴⁴ The courts rightly rejected this approach as a negation of the very concept of individual rights.¹⁴⁵ In the first instance judgment,¹⁴⁶ Deschênes compared this type of theory to Soviet collective agriculture. It is certain that no easier way exists to render the Charter useless and to open the door to group claims to rights or to protection from rights under section 1 otherwise.¹⁴⁷

Once the 'collective rights' heresy is resolved, the predominance of the Canadian Charter over Bill 101 cannot be seen as any more controversial than the upholding of section 133.¹⁴⁸ The Court was not unfair to Quebec. It would have had to engage in truly sophistic legal gymnastics to allow Quebec to triumph.

Notes

- 1 This view can be seen not only in main-stream works such as Mason Wade, *The French Canadian 1760-1967*, Toronto: Macmillan, 1968, but also in rabid nationalist works such as those of Abbe Groulx who credits providence rather than the English with sparing Quebec from the social revolutions of America and France.
- 2 Parkman, one of the great historians of Quebec, writing from the vantage point of Boston, combines admiration for French Canada with an understanding of the weakness and retrograde nature of New France and the economic advantages of the Conquest.
- 3 See Stern (ed.), *The varieties of history*, New York: Meridian Books, 1960.
- 4 See Francis, Jones and Smith, *Origins of Canada history to confederation*, Toronto: Holt Rinehart and Winter of Canada, 1988, at pp. 252-253.
- 5 There is now a current of English Canadian consciousness which believes that English Canada could flourish as a separate identity without Quebec. This current is epitomised by the Reform Party, even if the party's programme does not put this so bluntly. This author simply cannot take this seriously.

- 6 Henri Bourassa, *The French language and the future of our race*, in Cook (ed.), *French Canadian Nationalism*, Toronto: Macmillan, 1975 at p. 141. The reference to 'British institutions' sounds archaic today. This entry was written in 1912.
- 7 *Ibid.* p. 141.
- 8 At least for the foreseeable future, this means extreme economic liberalism, which is anathema to most Canadians.
- 9 It is interesting to note that in his essay extolling Quebec nationhood, 'And our distressed brethren' in *French Canadian nationalism* supra, fn. 6 at p. 202, J. M. R. Villeneuve starts with the notion of a 'French and Catholic state' and compares it (p. 213) to 'Poland, Tyrol, Trentino, Latvia, Croatia or the Balkans'. It is not hard to see that such a state could be a less open society than today's Quebec. Nor can many serious Quebecois wish their land to resemble 'Tyrol, Trentino, Latvia, Croatia, the Balkans or even Poland'.
- 10 This was so despite the definition of 'Protestant' as every religion save the Roman Catholic. See *Hirsch v Protestant School Board* [1928] AC 200.
- 11 See infra fn. 73.
- 12 See Official Language Act 1890.
- 13 *Reference re Sec. 23 of the Manitoba Act* [1985] 1 SCR 721, *Bilodeau v AG Manitoba* [1986] 1 SCR 449. See also *Mercure v The Queen* [1988] 48 DLR 4th 1 (SCC) the situation in Saskatchewan.
- 14 Although it has produced an ugly backlash shown by the success of the anti-French CORE party which became the official opposition after the 1991 elections.
- 15 It is difficult to find judgments on subjects other than pure civil law drafted in French in the early days of the Court.
- 16 Mason Wade, *op. cit.*, p. 333.
- 17 *Ibid.*, p. 334.
- 18 Mallory, *The structure of Canadian government*, Toronto: Macmillan, 1975 at p. 397.
- 19 See supra fn. 12.
- 20 See supra fn. 3.
- 21 In Mason Wade, *op. cit.*, we read at p. 636 on the Ontario School crisis: 'Dr J. W. Edwards of Toronto, a Conservative Orangeman, argued that the French language be driven out of Ontario.'
- 22 Developed by the courts in response to Quebec's attempt to limit its operation in Quebec.

- 23 *AG Que v Blaikie et al.* [1979] 2 SCR 1016.
- 24 *AG Que v Collier* [1990] 66 DIR 4th 474. See confirming 23 DIR 4th 339 (Que. CA).
- 25 *AG Que v Blaikie no 2.* [1981] 2 SCR 312.
- 26 In *MacDonald v City of Montreal* [1986] 1 SCR 460, the Supreme Court wisely held that a traffic ticket in Montreal did not have to be bilingual.
- 27 Must there be bilingual judges or is an interpreter sufficient? This issue arises more with respect to the right to a trial in French than section 133 which clearly simply authorises the use of either language. For instance, nothing forces a Speaker of the House to speak a language other than his own even when dealing with members speaking the other language. However, the new Official Languages Act modifies this considerably. See *infra* fn. 40, 41, 42.
- 28 If the court could not proceed, it would have to *adjourn* to another date.
- 29 This does not mean that bilingualism must give way to economy. There is no doubt that bilingualism entails some expense and that most of it (e.g. translation of all Supreme Court and Federal Court judgments, simultaneous interpreters at the Supreme Court) is amply justified. What one must avoid is needless or foolish expense which benefits no one or which gives purely formal and unnecessary protection to very doubtful rights. Such expense would provide ammunition for opponents of bilingualism.
- 30 See *Beaupré Interprétation de la législation bilingue* Montreal, 1980, which illustrates the now established equality between the two languages in legislation. However, see *infra* fn. 35 about the threat to that equality from Quebec rules of interpretation giving priority to French.
- 31 For example Quebec during the first century of the Civil Code.
- 32 See *Beaupré*, *supra*, fn. 30.
- 33 Côte, *Interpretations of legislation*, 3rd ed., at p. 274.
- 34 This author prefers the solutions most consistent with justice and fundamental principles of law.
- 35 *Gagnon v Southam Inc.* [1989] RJQ 1145.
- 36 *Ibid.*, p. 1152.
- 37 Especially *Re Sec. 23 of the Manitoba Act*, *supra*, fn. 13.
- 38 An example of the desirable attitude is to be found in *Nima (Oriental Rug Bazaar) v McInnes* (1989) 2 WWR 634 (BCSC).
- 39 This right is found also in the new Official Languages Act.
- 40 *The Queen v Cross et al.* [1991] RJQ 1430.

- 41 *The Queen v Montour* [1991] RJQ 1470.
- 42 However, a judge may render judgment in the language of his choice: *Pilote v Corporation de l'Hôpital de Bellechasse* [1988] RJQ 380 aff'd JE 89-1438. This is a reasonable result because the decision no longer involves statements the accused may wish to challenge, save in appeal, and a translation can be prepared in plenty of time for an appeal. It appears also that the right to a trial in French or English may be compromised if two accused of different language are tried together. The trial is then bilingual *La Reine v Castillo Garcia* [1990] RJQ 2312 (Que. SC) This remains highly arguable.
- 43 Sabourin (directeur), *Le système politique du Canada*, Ottawa, 1970 at p. 417.
- 44 Mallory, *The structure of Canadian government*, Toronto, 1971, at p. 176.
- 45 See Kwavnick, French Canadians and the Civil Service of Canada, *Canadian Public Administration* 1x no. 1., p. 97 cited in Mallory, supra, fn. 44.
- 46 *Thorson v AG Canada* [1975] 1 SCR 138.
- 47 *Jones v AG New Brunswick* [1975] 2 SCR 182.
- 48 *Joyal v Air Canada* [1976] CS 1211. Deschênes C. J.
- 49 *Association des gens de l'air de Quebec Inc. v Lang* [1977] 2 FC 22 aff'd [1978] 2 FC 371.
- The struggle for the use of French in air traffic control mobilised nationalist opinion in Quebec and contributed to the PQ victory in 1976.
- 50 See for instance *Gingras v The Queen* [1990] 2 FC 68 (FCTD). It is to be noted that the constitutional arguments failed in that case and only the administrative ones succeeded.
- 51 As this author is.
- 52 See articles by Lysianne Gagnon in *La Presse*.
- 53 See *Association des gens de l'air*, supra, fn. 49.
- 54 Usually French, but sometimes English in Quebec.
- 55 *Minister of Home Affairs v Fisher* [1979] 3 All ER 21 (PC); *Edwards v AG Canada* [1930] AC 124 (PC).
- 56 See *Reference re Sec. 23* supra, fn. 13, *Quebec Association of Protestant School Board v AG Que* [1984] 2 SCR 6.
- 57 Foucher, Les Droits linguistique en matière scolaire, in Bastarache et al., *Les droits linguistiques au Canada* at pp. 277-278.
- 58 Tremblay and Bastarache, Les Droits linguistiques, in Beaudoin-Ratushny, *La Charte*, at p. 737.

- 59 At *MacDonald* supra, fn. 26.
- 60 *Bilodeau*, supra, fn. 13.
- 61 *Sociétés des Acadiens de Nouveau Brunswick v Association of Parents* [1986] 1 SCR 549.
- 62 *MacDonald*, supra, fn. 26.
- 63 *Société des Acadiens*, supra, fn. 61 at p. 578.
- 64 Monnin, Language rights in the Supreme Court of Canada; a comment (1992), *Manitoba Law Journal* 406 at p. 408.
- 65 Bastarache, Language rights in the supreme court of Canada: the perspective of Chief Justice Dickson (1992), *Manitoba Law Journal* 392 at pp. 396–397. This writer is less critical of *McDonald* but considers *Société des Acadiens* unacceptable. On the other hand, unlike Bastarache, he believes Beetz J.'s remarks are obviously outdated and are not part of the current law.

For a strong criticism of the 'incoherence' of Beetz's judgment in *Société des Acadiens* supra, fn. 61, see Proujiner, Les Enjeux politiques de l'intervention juridique en matière linguistique, in Poupier et Woehrling (eds), *Langue et droit/Language and law*, Montreal, 1988, at p. 103. Several other authors we cited there to the same effect. But this writer hesitates to accept Prof. Proujiner's description of language law as having a 'nature sociale, collective'. There are such elements in it, but individual rights are more important as an element.

See also De Witte, Droits fondamentaux et protection de la diversité linguistique, in Poupier et Woehrling, *op. cit.*, at p. 85.

- 66 *Reference re Minority Language Educational Rights* (1988) 49 DLR 4th 499 (PEICA), *Reference re Public Schools Act* (1990) 67 DLR 4th 488 (Man. CA) aff'd SCC 1992, *Mahé et al. v The Queen* (1990) 1 SCR 342.
- 67 *Société des Acadiens*, supra, fn. 61.
- 68 *Ibid.*
- 69 *Ibid.*
- 70 See Tremblay and Bastarache, *op. cit.*, supra, fn. 58 at pp. 742–744, and Bastarache, supra, fn. 65 with this writer's comment.
- 71 *Reference re Sec. 23*, supra, fn. 13 at pp. 732–734.
- 72 An interesting analogy arises with the infamous article 127 of the Quebec Code of Civil Procedures which prohibited marriage between persons of different religions. In *Despatie v Tremblay* [1921] 1 AC 702 the Privy Council interpreted this article in an innocuous way. The strength of the ultra-catholic

- party in Quebec was such that this decision was simply ignored until the 1970s.
- 73 See Mason Wade, *op. cit.*, chapter XI.
- 74 *Re Education Act* (1984) 10 DIR 4th 491 (Ont. CA) at p. 506–517.
- 75 Superintendent of schools 1844–1876.
- 76 *Re Education Act*, *supra*, fn. 74 at p. 509.
- 77 *Ibid.*, pp. 510–511.
- 78 *Ibid.* at p. 511.
- 79 *Ibid.* p. 512 and following.
- 80 Sabourin, *op. cit.*, *supra*, fn. 43.
- 81 See sections 16–22 of the Charter. New Brunswick is the only fully bilingual province.
- 82 See Ontario statutes. See Michael Wood, *Chronique de la législation. Le bilinguisme législatif en Ontario: la situation actuelle* [1990] RGD 139.
- 83 The Liberals and especially the NDP, when in opposition, had evoked the possibility of official bilingualism. However, the political pressure proved too strong when these parties took office. Nevertheless, this author persists in the belief that a declaration of bilingualism in Ontario would go a long way in defusing the constitutional crisis.
- 84 *Reference re Public Schools Act* approved by SCC, *supra*, fn. 66, and *Reference re School Act* (PEI), *supra*, fn. 66.
- 85 This happened in Manitoba and Saskatchewan.
- 86 See section 104 and following.
- 87 Section 23 reads as follows:
- (1) [Language of instruction] Citizens of Canada.
 - (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
 - (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.
 - (2) [Continuity of language instruction]

Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) [Application where numbers warrant]

The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Note that section 23(1a) is not in force in Quebec.

88 See Grey, French is in no danger in Quebec, *Policy Options*, September 1991, for this writer's view that once a free and compulsory education system is in place, a language is quite secure unless it faces direct persecution.

89 See Foucher, *supra*, fn. 57.

90 *Re Education Act* at p. 518.

91 *La Société des Acadiens*, *supra*, fn. 61.

92 *Mahé*, *supra*, fn. 66 at p. 364. See also *Laurie v AG Nova Scotia* [1989] 91 NSR (2d) 184 (NSCA).

93 *The Reference Re School Act*, PEI *supra*, fn. 66 is particularly clear.

94 *Re Education Act* *supra*, fn. 74.

95 *Mahé*, *supra*, fn. 92.

96 *Ibid.* pp. 376-377.

97 *Ibid.* pp. 365-367.

98 *AG Que v Quebec Association of Protestant School Boards* [1984] 2 SCR 66.

99 For this writer's negative views of any concept of collective rights see Grey, Equality rights: an analysis (1988), 19 *Revue de Droit de l'Université de Sherbrooke* 183.

100 Mixed couples; persons with English native language but French education and vice versa; persons educated in a fully bilingual way. This last part is presently under advisement in Quebec in *Paparelli v AG Que* 500-05-011542-881. It is to be hoped that a generous ruling is made.

- 101 And it still faced angry rednecked opposition.
- 102 It is, of course, true that French-speaking Canadians outside Quebec must know English for a successful career. However, this cannot be seen as either unjust or unduly demanding. Many English Quebecois who face the fact that knowing French, while less essential, still does not give them full equality because they are not 'pure laine' could legitimately feel that their situation is worse.
- 103 Grey, Anglos as the best-treated minority doesn't add up, *The Gazette*, 3 October 1989.
- 104 Mordecai Richler, *Oh Canada! Oh Quebec*, Penguin, 1992.
- 105 Russell Cook, Review of 'Oh Canada! Oh Quebec', *The Gazette*, 21 March 1992.
- 106 Richler, *op. cit.*, fn. 104. It is, of course, necessary to separate satire from strict reporting in the work and to downplay the somewhat exaggerated stress on anti-Semitism. The major points made by Mr Richler are very persuasive.
- 107 *AG Que v Quebec Protestant school boards*, *supra*, fn. 98 at p. 81–82.
- 108 Except for CEGEPS (junior colleges) established in the 1960s for all of Quebec, it is difficult to find English institutions created by the majority.
- 109 Wade, *op. cit.*, *supra*, fn. 16.
- 110 Article 127 of the Civil Code even restricted marriage between persons of different religion to a certain extent.
- 111 The character of Jean Lévesque in Gabrielle Roy's *Bonheur d'Occasion* is a harbinger of the 1960s and 1970s.
- 112 Grey, *Options*, *op. cit.*, fn. 88 at p. 18.
- 113 *Bonheur d'Occasion*, *supra*, fn. 111. A particularly powerful scene is one describing Jean Lévesque's mixture of envy, hate and desire for English Westmount.
- 114 Before 1960 the Quebec public sector was also almost totally French but it was insignificant as a portion of the economy. At that time the English had a clear advantage in the public sector. Now the private sector has been opened to the francophones who, through the various laws, were given an opportunity to succeed. This was viewed as justifiable by past injustice and no doubt was. But the corresponding opening of the expanding public sector to the minority was not part of the programme.
- 115 *Quebec Association of Protestant School Boards*, *supra*, fn. 98 at all levels of the courts. The government exhibits were unusually frank. 116

See Jean-Pierre Proulx, *L'Exode des jeunes anglophones*, *Le Devoir*, 22 January 1992. Although Proulx admits the bilingualism of young anglophones, he still

cannot see the majority's role in creating the disadvantages under which young anglophones live. See also *The Gazette's* scathing report on minorities in the employ of Montreal and Montreal's Urban Community. *The Gazette*, 16 November 1991.

- 117 *Taskforce on English education*, Report, 12 February 1992.
- 118 *La Presse* editorialists have been clear and forceful about this.
- 119 It is ironic that anyone can seriously view the battered and declining minority as a threat to anyone.
- 120 Unless, like the Charter of Rights and Freedoms of 1982 they originate in Ottawa.
- 121 Though not nearly as drastic.
- 122 Where there is universal suffrage – the majority.
- 123 It follows that those who complain about judges frustrating the elected assemblies in such circumstances are wrong. *This is their proper function in this type of conjuncture.*
- 124 *AG Que v La Chaussure Brown's Inc.* [1988] 2 SCR 712; *Devine v AG Que* [1980] 2 SCR 790.
- 125 *AG Que v La Chaussure Brown's* [1987] RJQ 80.
- 126 The minority opinion proposes an attractive result and a quick end to Quebec's language battles, but it could not succeed politically. Courts can protect minorities and frustrate majorities, but they cannot, without risking their prestige and their ability to provide redress, take positions totally out of line with social realities.
- 127 Contracts of adhesion, public signs.
- 128 *AG Que v La Chaussure Brown's* supra, fn. 124.
- 129 Evidently, the liberal government was attempting to sell its law as a compromise. The subsequent successes of the Equality Party showed that no one was deceived.
- 130 Quebec's insistence on input into the nominations to the Supreme Court as one of its constitutional objectives is clearly a manifestation of this. See infra, fn. 178 for an example of nationalist criticism of the Court.
- 131 See supra, fn. 124, 125 where the legality of language legislation *in principle* is established.
- 132 *AG Que v Blaikie no. 1*, supra, fn. 23. The subsequent cases dealing with the limits of section 133 were also constitutional.
- 133 Federal not by incorporation but because of the nature of the activities.

- 134 *AG Que v La Chaussure Brown's* supra, fn. 124.
- 135 *Irwin Toys v AG Que* [1989] 1 SCR 927; *Rocket v Royal College of Dentists of Ontario* [1990] 2 SCR 232.
- 136 The most frequently cited precedent on this is *R v Oakes* [1986] 1 SCR 103.
- 137 *La Chaussure Brown's*, supra, fn. 124. at p. 780.
- 138 The lower courts had not applied discrimination provisions.
- 139 See *R v Hayden* [1983] 3 DLR (Man. CA) 4th 361, *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.
- 140 *La Chaussure Brown's* supra, fn. 124 at p. 787.
- 141 *Action Travail Femmes v CNR* [1987] 1 SCR 1114 esp. at pp. 1133–1134. *Re Winnipeg School Division no. 1 v Craton* [1985] 2 SCR 150, *Commission des Droits de la Personne v Ville de Brossard* [1988] 2 SCR 279.
- 142 *Forget v AG Que* [1988] 2 SCR 90.
- 143 *City of Lachine v Commission des Droits de la Personne et al.* [1989] RJQ 17 (Que CA).
- 144 *Quebec Association of Protestant School Boards*, supra, fn. 98.
- 145 Grey, Equality rights: an analysis (1988), 19 *Revue de droit Université de Sherbrooke* 183, esp. 190–201.
- 146 [1989] CS 673.
- 147 The Quebec Attorney General's factum in *Quebec Association of Protestant School Boards* supra is interesting reading on collective rights. The authorities cited are often from countries we would not see as models for minority protection (e.g. India, African countries, Israel).
- 148 *Blaikie, no. 1*, supra, fn. 23.