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# The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?

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Most of the constitutionalized language rights in Canada have received a large and liberal interpretation. In contrast, the constitutional right to use either official language in the courts has been categorized as a "political compromise right" and interpreted narrowly to the point of being ineffective.

Recently, a majority of the Supreme Court rejected the political compromise doctrine in *R. v. Beaulac*. It is hoped that this decision will result in a broader interpretation of the right to use English or French before the courts. A restrictive interpretation of the right, however, is also dictated by its having been characterized as a negative liberty, and this aspect of the past case law was not overruled by *Beaulac*.

In part, the negative liberty interpretation of the right to use either official language in the courts stems from the fear that to adopt a positive right approach would result in an irresolvable conflict between interacting holders of the same right. A positive interpretation of the right is possible, however, if corresponding duties are imposed not on individuals, but on the state.

In order to support a broad and positive interpretation of language use rights in the courts, as well as in the provision of government services, what is needed is an understanding of their purpose that goes beyond effective communication, that is, not one based on a natural justice rationale. To counter the tendency to construe the purpose of language rights in wholly instrumental terms, we need an account of such rights that recognizes the intrinsic value to a minority official language community of the use of its language. While *Beaulac* moves us significantly in the right direction, the Supreme Court failed to articulate fully why the use of a particular language is important to a community.

La plupart des droits linguistiques constitutionnalisés ont été interprétés de manière large et libérale. Toutefois, le droit constitutionnel d'utiliser une des langues officielles dans les cours a été classifié comme un «droit de compromis politique» et interprété de manière restrictive le rendant ainsi inefficace. Une majorité des juges de la Cour suprême a récemment rejeté la doctrine de compromis politique dans *R. c. Beaulac*. Cette décision présage l'adoption d'une interprétation plus ouverte du droit d'utiliser le français ou l'anglais dans les cours. Une interprétation restreinte du droit a également été dictée par sa caractérisation de liberté négative ; *Beaulac* n'a cependant pas annulé cet aspect de la jurisprudence antérieure.

L'interprétation de la liberté négative du droit d'utiliser une des langues officielles dans les cours relève, en partie, de la peur voulant que l'adoption d'une approche de droit positif résulterait en un conflit impossible à résoudre entre les détenteurs d'un même droit. Une interprétation positive du droit est toutefois possible si les devoirs correspondants sont imposés à l'état et non à l'individu.

Une compréhension des objectifs allant au-delà de la communication effective, c'est-à-dire non fondée sur un ratio de justice naturelle, est nécessaire afin d'appuyer une interprétation large et positive des droits linguistiques dans les litiges ainsi que dans les prestations des services gouvernementaux. Pour contrecarrer la tendance qui explique les objectifs des droits linguistiques en des termes instrumentaux, nous avons besoin d'un compte rendu de ces droits reconnaissant la valeur intrinsèque de l'utilisation de la langue pour une communauté dont la langue est une langue officielle minoritaire. Alors que *Beaulac* nous conduit dans la bonne direction, la Cour suprême n'a su expliquer pourquoi l'utilisation d'une langue particulière est importante pour une communauté.

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## Introduction

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## Introduction

The Canadian regime of constitutionalized language rights covers four contexts of interaction between people and the state: the enactment and publication of laws (section 133 of the *Constitution Act, 1867*<sup>1</sup> and section 18 of the *Canadian Charter of Rights and Freedoms*<sup>2</sup>), the provision of public schooling (section 23 of the *Charter*), the use of the official languages in the courts (section 133 of the *Constitution Act, 1867* and section 19 of the *Charter*), and in the provision of government services (section 20 of the *Charter*). As the scope and meaning of these rights has taken shape, there has been a marked contrast in treatment between, on the one hand, the right to the bilingual enactment of laws and the right to minority language education, and, on the other hand, the right to the use of either language in the courts. The former have received a large and liberal interpretation in keeping with the general approach to *Charter* rights<sup>3</sup> the latter was characterized by the Supreme Court of Canada as a “political compromise right” and for that reason was approached with interpretive caution.<sup>4</sup> This produced an extremely narrow articulation of the right to use either official language before the courts, rendering it virtually useless to litigants. There has been no shortage of academic criticism of the “political compromise right” label and the restrictive attitude toward rights interpretation it has spawned.<sup>5</sup> Recently, in *R v.*

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<sup>1</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>2</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>3</sup> *Manitoba (A.G.) v. Forest*, [1979] 2 S.C.R. 1032, 101 D.L.R. (3d) 385; *Quebec (A.G.) v. Blaikie* (No. 1), [1979] 2 S.C.R. 1016, 101 D.L.R. (3d) 394; *Quebec (A.G.) v. Blaikie* (No. 2), [1981] 1 S.C.R. 312, 123 D.L.R. (3d) 15; *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1 [hereinafter *Manitoba Language Reference* cited to S.C.R.]; *Mahé v. Alberta*, [1990] 1 S.C.R. 342, 68 D.L.R. (4th) 69 [hereinafter *Mahé* cited to S.C.R.]; *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3, 181 D.L.R. (4th) 1 [hereinafter *Arsenault-Cameron*]; *Abbey v. Essex County Board of Education* (1999), 42 O.R. (3d) 481, 169 D.L.R. (4th) 451 (C.A.); *Conseil des écoles séparées catholiques romaines de Dufferin et Peel v. Ontario (Ministre de l'éducation et de la formation)* (1996), 30 O.R. (3d) 681, 136 D.L.R. (4th) 704 (Gen. Div.); *Colin v. Québec (Commission d'appel sur la langue d'enseignement)*, [1995] R.J.Q. 1478 (Sup. Ct.).

<sup>4</sup> *MacDonald v. Montreal (City of)*, [1986] 1 S.C.R. 460, 27 D.L.R. (4th) 321 [hereinafter *MacDonald* cited to S.C.R.]; *Société des Acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, 27 D.L.R. (4th) 406 [hereinafter *Société des Acadiens* cited to S.C.R.]; *Bilodeau v. Manitoba (A.G.)*, [1986] 1 S.C.R. 449, 27 D.L.R. (4th) 39. These cases will be referred to as “the trilogy”, following Bastarache J. in *R v. Beaulac*, [1999] 1 S.C.R. 768 at paras. 16-17, 173 D.L.R. (4th) 193 [hereinafter *Beaulac*].

<sup>5</sup> L. Green & D. Réaume, “Second-Class Rights? Principle and Compromise in the Charter” (1990) 13 Dal. L.J. 564. See also P. Foucher, “L'interprétation des droits linguistiques constitutionnels par la Cour suprême du Canada” (1987) 19 Ottawa L. Rev. 381; B. Pelletier, “Bilan des droits linguistiques

*Beaulac*, the Supreme Court has responded to the criticism and reconsidered some of its thinking.<sup>6</sup>

A majority of the Supreme Court has now declared that being based on political compromise does not usefully distinguish language rights from many other *Charter* rights,<sup>7</sup> and that such a genesis has no normative repercussions in understanding the import of a rights-granting provision.<sup>8</sup> This is a welcome step away from the restrictive approach adopted in the trilogy of *MacDonald*, *Société des Acadiens*, and *Bilodeau*,<sup>9</sup> and sparks hope that the right to use either official language before the courts may soon be granted the same generosity enjoyed both by other language rights and by *Charter* rights more generally. Though *Beaulac* takes a step in the right direction, the job is not yet finished. While Bastarache J., writing for the majority, concentrates on undermining the political compromise doctrine, there is more to the Court's earlier analysis of language use rights in the courts than the idea that political compromise rights deserve a restrictive interpretation—more, that is, pulling those judgments in the direction of a narrow interpretation of the rights.<sup>10</sup>

The main obstacle in the trilogy to a robust interpretation of language use rights is the construction of the right as a mere negative liberty not to be interfered with in one's choice of official language before the courts. The generally restrictive attitude flowing from the characterization of language rights as compromise rights provided one reason for construing the right as a negative liberty. Equally powerful, though, was the argument that any other interpretation would give rise to irresolvable conflicts between rights holders. Although *Beaulac* appears to eschew the negative liberty interpretation altogether, the case did not allow for a comprehensive critique of the reasoning in the trilogy originally leading to that interpretation—hence, the trilogy has not been explicitly overruled. In this article, I first demonstrate why *Beaulac* does not expunge fully the negative conceptualization of language use rights. In the second part, my objective is to continue the critique of the trilogy in an effort to undermine the remaining ground of the decisions, wiping the slate completely clean for a new start.

The tendency to locate the conservative pull in language rights jurisprudence exclusively in the political compromise doctrine also characterizes Bastarache J.'s main critique of the lower court decisions in *Beaulac*, which is similarly incomplete. In the

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au Canada" (1995) 55 R. du B. 611; A. Riddell, "À la recherche du temps perdu: la Cour suprême et l'interprétation des droits linguistiques constitutionnels dans les années 80" (1988) 29 C. de D. 829.

<sup>6</sup> *Beaulac*, *supra* note 4.

<sup>7</sup> *Ibid.* at para. 24; see also *Arsenault-Cameron*, *supra* note 3 at para. 27.

<sup>8</sup> *Beaulac*, *ibid.* at paras. 24-25.

<sup>9</sup> See *supra* note 4.

<sup>10</sup> Bastarache J. is not the only one to focus heavily on the political compromise doctrine as the culprit in the trilogy. See Foucher, *supra* note 5; Pelletier, *supra* note 5; Riddell, *supra* note 5.

third part of the article, I try to fill the gaps. The problem is not merely a restrictive interpretive attitude, but a particularly impoverished understanding of the purpose of language rights. *Beaulac* involves a statutory scheme—the *Criminal Code* provisions governing the language of trials<sup>11</sup>—designed to supplement constitutional language rights. Bastarache J. criticizes the lower courts for conflating the right to use one's preferred official language with natural justice or fair trial rights.<sup>12</sup> This approach has often limited official language rights to circumstances in which the plaintiff would otherwise be unable to understand the proceedings, since the linguistic aspect of the right to a fair trial extends only to ensuring adequate comprehension. Bastarache J. treats the political compromise doctrine as the explanation for why judges might interpret the rights conferred by the *Criminal Code* in this narrow way. Yet the natural justice approach is wrong in a deeper and more complex way than merely displaying a cautious tendency to read the right to the use of one's own language narrowly. The reduction of official language rights to the natural justice rationale falls into the trap of treating language as nothing more than an instrument of communication. Consequently, this approach construes the purpose of language rights in wholly instrumental terms. In rejecting the natural justice approach, Bastarache J. gestures towards an alternative account. I try to develop this argument through my account of the abstract right to linguistic security to which concrete official language protections give shape.<sup>13</sup>

Both burying the political compromise doctrine and dispelling an instrumental conception of the purpose of official language rights should not only affect minority language litigants' access to the courts, but also set the stage for the interpretation of the right to government services in either language. We may refer to the citizen's right to dictate the official language of interaction in the courts (and tribunals) and the provision of government services as "language use rights", distinguishing between the two contexts as necessary. As shall become clear, much of the litigation to date has used the jurisprudence with respect to language use rights in the courts as the starting point for analysis of section 20 of the *Charter*, governing government services. In particular, the instrumentalist interpretation of language use rights has been common in cases involving access to government services; revealing its inadequacies should also put this case law on a more sound track. Yet there has been little litigation so far in this last context—some trial and court of appeal activity, but no pronouncements by

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<sup>11</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 530.

<sup>12</sup> *Beaulac*, *supra* note 4 at para. 41.

<sup>13</sup> This critique of the natural justice approach and the development of an alternative builds upon the argument presented in D.G. Réaume, "Official-Language Rights: Intrinsic Value and the Protection of Difference" in W. Kymlicka & W. Norman, eds., *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 245 [hereinafter Réaume, "Official-Language Rights"]. My focus here is on demonstrating how the shortcomings of an approach based on effective communication have materialized in the case law on section 20 of the *Charter*, and examining the emergence of the competing approach in the cases, culminating in *Beaulac*.

the Supreme Court. As these cases wend their way through the system, it is important for the development of a sound approach that the shadow of the early cases on official language use in the courts be fully dispelled.

### I. Political Compromise, Restraint, and Negative Rights: Separating the Threads

A determining factor in the quality of protection offered by official language rights is whether they are crafted as negative liberties or rather as provisions imposing positive obligations on others, especially state actors. The trilogy raised this fundamental question in the context of the right to use either official language before the courts. The choice was between interpreting this right as a mere injunction against prohibiting litigants from using a particular language or as requiring positive action to ensure that the courtroom environment makes the litigant feel linguistically at home. In the trilogy, the Supreme Court announced what sounded like a general philosophy with respect to language rights—the political compromise doctrine—that would justify a restrictive approach to the interpretive task, which in turn led them to a negative construction of the relevant aspects of section 133 of the *Constitution Act, 1867* and section 19 of the *Charter*. In contrast, *Beaulac* rejects the political compromise doctrine and its interpretive implications. It does not follow, however, that a negative liberty interpretation is untenable for any of the language rights. Hence, the negative liberty construction of language use rights in litigation has not yet been ruled out.

Critics of the trilogy were quick to point out that its policy of restraint was inconsistent with the robust and generous interpretation that had already been accorded to language rights in other areas;<sup>14</sup> the new approach gave rise to fears of future re-trenchment from earlier rights gains.<sup>15</sup> These fears were somewhat alleviated by *Mahé*, in which the Court declined to interpret the minority language education rights narrowly despite their genesis in a political compromise.<sup>16</sup> Since then the Court has also extended its analysis of language rights in the legislative context in a way consistent with its original generous approach, seemingly oblivious to the general doctrine of restraint advocated in the trilogy.<sup>17</sup> There is, therefore, an apparent inconsistency between the Court's generous interpretive method in some contexts and restrictive method in others. In *Beaulac*, Bastarache J. makes this his jumping-off point in criticizing a general policy of interpretative restraint for language rights. Yet he infers from the conclusion that language rights should not automatically attract a narrow in-

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<sup>14</sup> Foucher, *supra* note 5; Pelletier, *supra* note 5.

<sup>15</sup> See M. Bastarache, "Language Rights in the Supreme Court of Canada: The Perspective of Chief Justice Brian Dickson" (1991) 20 Man. L.J. 392 at 402; Foucher, *ibid.*

<sup>16</sup> *Mahé*, *supra* note 3 at 364-65.

<sup>17</sup> *Manitoba Language Reference*, *supra* note 3.

terpretation that they “are not negative rights, or passive rights; they can only be enjoyed if the means are provided.”<sup>18</sup> This sounds like a rejection not only of the political compromise doctrine and its interpretive implications, but also of the characterization in the trilogy of the section 133 litigation right as a negative liberty. But that would be too hasty. Bastarache J.’s argument tends to conflate the policy of restrictive interpretation with the characterization of a right as merely negative—to treat them as equivalent interpretive moves—so that rejection of the former means rejection of the latter. This masks an important distinction between the provisions at stake in the trilogy and in *Beaulac*, and misses part of the reason for the adoption of a negative liberty approach in the trilogy.

In a case like *MacDonald*, the restraint approach does lead to a negative liberty interpretation, but the relationship between the two ideas is more complex than Bastarache J. makes it out to be in *Beaulac*. When the very issue to be decided is whether a provision imposes positive obligations or merely accords a negative liberty, a restrictive interpretive approach dictates the latter—the negative liberty version is the more restrictive of the two options. But one can interpret narrowly without adopting a negative liberty construction, and one can sometimes embrace a negative liberty approach while rejecting the philosophy of interpretive restraint. The two issues are conceptually independent, even though they may occasionally overlap. The trilogy held that a policy of interpretive restraint was a reason, perhaps sufficient reason, to adopt a negative construction; it was not the only reason. Conversely, treating a right as a negative liberty is one way of interpreting it restrictively, but it is not the only means or even always an available one. Indeed, most of the language rights provisions *cannot* be interpreted as negative liberties. Section 133 of the *Constitution Act, 1867* clearly imposes positive obligations on Parliament to enact legislation in both languages; section 23 of the *Charter* requires much more than forbearance from interfering in private choices about language of education; section 20 of the *Charter* requires that government service providers speak and understand whichever official language the recipient chooses. More and less restrictive interpretations of these provisions can be tendered, but no amount of restraint can turn them into negative liberties.

Given the independence of the two issues—whether to interpret negatively, and whether to interpret restrictively—there is no *logical* inconsistency in the pattern of Supreme Court judgments before *Beaulac*. The jurisprudence discloses the narrower, negative liberty interpretation when a provision is ambiguous on precisely whether it affords a negative or positive right, while provisions that clearly impose positive obligations are treated with the generosity customarily accorded to human rights. A view that there is no justification for reading clear positive rights as narrowly as possible is consistent with the view that there is some reason to read ambiguous provisions as

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<sup>18</sup> *Beaulac*, *supra* note 4 at para. 20.

negative liberties. Thus, a uniform policy of restrictive interpretation may be wrong, without fatally undermining the idea that language use rights in litigation are mere negative or "passive" rights.

Further, *Beaulac* did not provide an appropriate context for a categorical rejection of a negative liberty approach. The case dealt with section 530 of the *Criminal Code*, which establishes the right of accused persons to choose between French and English as the language of trial, a provision that clearly imposes positive obligations on government. Faced with the question of whether to read these rights generously or narrowly, and given that the Court had accorded a generous interpretation to every other positive right in the language area to come before it, Bastarache J. was quite right to criticize the lower courts' narrow interpretive approach in *Beaulac*. The mere fact that this right to language choice is statutory rather than constitutional is no reason to deviate from the generosity recommended in the constitutional jurisprudence. From this we can glean nothing about whether some language rights (in particular section 133 and section 19) should be construed as negative liberties. Section 530 of the *Criminal Code* could be interpreted narrowly or restrictively; Bastarache J. correctly argues that it should not be. It could not have been interpreted as a negative liberty. One does not need to reject a negative liberty approach as a matter of conceptual or substantive principle to support this conclusion. Bastarache J.'s apparent categorical rejection of a negative liberty interpretation of any of the language rights is *obiter dictum*. Thus, it remains an open question whether the negative liberty approach to the constitutionally-based language use rights in the courts is appropriate.

So far, I have merely argued that there is no logical inconsistency between the trilogy and the other language rights cases considered by the Supreme Court. There is therefore no reason to assume that the rejection of the political compromise doctrine and its gospel of restrictive interpretation will suffice to dislodge the negative liberty approach to language use rights before the courts. In order to explain the Court's cautious adoption of a negative liberty interpretation in one context, despite the generous approach taken elsewhere, we should look to see whether there is independent reason for the negative liberty interpretation in the former. Indeed, such an argument is offered by the Court in the trilogy: to adopt a positive right interpretation of the official language use rights in the courts would result in endemic, irresolvable conflict between interacting holders of the same right, a problem avoided by the negative liberty interpretation. Thus, in order comprehensively to undermine the latter interpretation, it is necessary to refute the rights conflict argument. To that task, I now turn.



## II. Managing Conflict between Positive Rights: Individual versus Institutional Perspectives

Looking at the complete picture of language use rights articulated in the trilogy, we can identify two elements: who holds the right, and what kind of right is held. The plaintiffs in these cases were arguing for the interpretation of the right as a comprehensive language use right<sup>19</sup>—the right to speak, understand, and be understood. This interpretation necessarily involved seeing the right as giving rise to positive obligations on others. In response, the Supreme Court limited the right to a *speaker's* right to *non-interference*,<sup>20</sup> offering two main arguments. The first argument was that the right to *understand* official communications would be inconsistent with the text of section 133, thus supporting the conclusion that the right to use either official language belongs to speakers, not recipients of communications. The second argument attempted to proceed by *reductio ad absurdum* against the inclusion of a right to be understood. It supported the negative interpretation of the right by arguing that a positive interpretation would be internally inconsistent since it would give rise to conflicts between right-holders.<sup>21</sup> Both arguments are flawed; for present purposes, however, I

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<sup>19</sup> Réaume, "Official-Language Rights", *supra* note 13 at 254.

<sup>20</sup> It is worth noting in passing that these two questions tended to be conflated such that a particular answer to the former itself determines the answer to the latter. Beetz J. assumes in *MacDonald*, *supra* note 4, that the right to "use" either language refers exclusively to its active use rather than including its passive use. That is, he argues that the right is held only by speakers, including those communicating to the court in writing, in the official context of litigation, and not by recipients of official communications. He infers from this that the duty correlative to this right is the negative one of non-interference. This does not invariably follow. That the speaker is the sole right holder does not dictate that the right must always be construed negatively. It is possible to argue that only the speaker's rights are recognized, but that this includes the right to be understood, entailing positive obligations against others, as well as the right to speak unimpeded, requiring only non-interference from others.

This confusion likely arose out of the fact that in *MacDonald* the appellant was arguing not for the right to be understood, but the right to understand. In his case, confining the right to the speaker does mean that the appellant can impose no positive duty on officials. Here the relevant speaker was the issuer of the summons. In arguing that only the speaker holds the right, it follows that MacDonald could not, as a recipient, have a right to receive the communication in his own language. MacDonald's only rights were as speaker in his communications with the court. But as speaker in his own right, any possible right to be understood would not have availed him. The issuer of the summons, as right-holder, could simply waive the right to be understood by the recipient. Thus the same result is achieved as if the duty were characterized as negative, but it is unnecessary so to characterize it. The argument that the right is merely a negative one is crucial to *Société des Acadiens*, *supra* note 4, in which the appellants were arguing for a right to be understood. But this result does not inevitably follow from the necessary bases of the conclusion in *MacDonald*. Thus if the right to use either official language is to be characterized as negative, there must be a further reason for doing so; it does not necessarily follow from the conclusion that only speakers hold the right.

<sup>21</sup> The negative right conclusion also supports the attribution of the right only to speakers because a right in recipients would frequently require positive action to accommodate it. That is, there is no way

am primarily concerned to illustrate the defects of the *reductio* argument grounded in the threat of pervasive rights conflict.<sup>22</sup>

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to make sense of a recipient's right as a mere right not to be interfered with in understanding a communication.

<sup>22</sup> Briefly, the textual argument for confining the right to speakers can be outlined and criticized as follows: Beetz J. argued in *MacDonald*, *supra* note 4, that extending the right beyond speakers would mean that where s. 133 actually says *either* English or French *may* be used it must mean *both* English and French *must* be used. Given the impossibility of the issuer of the summons knowing what the language of the recipient was, the summons would have to be issued in both languages to cover either possibility.

This argument is fueled by the assumption that a summons issued in the wrong language would be absolutely null and void. Even Wilson J., while disagreeing with the majority on the requirements of s. 133, accepted the argument that a summons that is not in the accused's language would be invalid (*MacDonald*, *ibid.* at 544-46). Elsewhere I have criticized the tendency to treat invalidation as the appropriate remedy for a violation of the government's duty to live up to its linguistic obligations. See D. Réaume, "Language, Rights, Remedies, and the Rule of Law" (1988) 1 C.J.L.J. 35. If we reject the assumption that the unilingual summons must be invalid if it violates s. 133, the argument that the plaintiff's position requires the redrafting of s. 133 collapses. Instead we should say that a summons issued in one language is perfectly valid, and requires the accused to present himself or herself in court. If, however, the section confers a right to receive communications in one's own language, the state is in violation of its constitutional duty until the accused is provided with an English version of the summons. The state can therefore be required to rectify this violation by providing a copy of the summons in the recipient's language once the need for it becomes evident. If this procedure still fails, the issuance could be compelled by the normal means of a mandatory order. To say that once such a request is made the state has an obligation to fulfil it, does not convert a choice of language into a requirement that both languages always be used.

Even if one accepted invalidation as the appropriate remedy for the violation of the right argued for in *MacDonald*, Beetz J. is wrong to suggest that this illegitimately turns a rule that *either* language *may* be used into one that *both must* be used. The requirement that both languages be used results not from the statute, but from contingent facts about the world. Beetz J. is assuming that knowledge of the recipient's language will be unavailable, so that the most sensible thing to do would be to issue the summons in both languages. This depends on there being a reasonable chance that the recipient's language will be other than the one the issuer would have chosen to use. This may indeed be true in Montreal which has a large anglophone minority. However, should a case involve the issuance of a summons in a small rural town in Quebec, in which the issuer knew that everyone's mother tongue was French, there would be no practical requirement to issue the summons in English as well.

The fallacy in Beetz J.'s argument is in thinking that practical obligations that flow from the conjunction of a law and certain factual circumstances must be construed as legal obligations—that is, as obligations arising out of the relevant law itself. If factual circumstances are such that it is uncertain whether an anglophone or a francophone will receive a certain summons, and the recipient has a right to receive it in his or her own language, there are practical reasons for sending it in both languages. However, this is no reason to say that this reads into the Constitution a legal obligation to send the summons in both languages. The requirement is merely one of practical necessity flowing from the fact that in certain factual circumstances there is only one way to live up to the obligation. That there

In *MacDonald* it was argued that affording a recipient the comprehensive right to use his or her own language would necessarily deprive a speaker of the right to choose which official language to use.<sup>23</sup> The logic of this argument could then easily be extended to the situation in *Société des Acadiens* to conclude that granting the right to be understood would likewise deprive other participants of their right to choose. It would therefore be absurd to include in section 133 the right to receive communications or to be understood in one's own official language—to do so would result in constant irreconcilable conflicts. Rather, the right must be interpreted as one not to be interfered with in the use of one's language of choice. A litigant cannot be prevented from speaking to the court or filing documents in either language, but that choice need not be positively accommodated.

The argument relies crucially on the reduction of the state to its individual officers and the assumption that the right is held against those individuals *qua* individuals. Only on this assumption does a positive interpretation lead to conflict between individuals. Implicitly rejected is the idea that the *state* may have duties beyond those of the individuals who carry out its functions. An individualistic paradigm arises out of the argument in *MacDonald* that section 133 rights must mean the same in both their parliamentary and judicial contexts:

[T]he essential words of s. 133 are the same with respect to the language of Parliamentary debates and to the language of court proceedings and should receive the same construction. It is clear that the rights preserved in Parliamentary debates are those of the speaker only. Those who listen to the speaker cannot have a right to be addressed in the language of their choice without defeating the speaker's own right to use the language of his choice and making the constitutional provisions nonsensical. Also, the speaker might be unilingual and find it impossible to address his listeners in the language of their choice. Furthermore, the choice of the listeners might vary, making it impossible to accommodate each of them. The use of interpreters or simultaneous translation which, in any event, has nothing to do with s. 133, would not meet the essential thrust of appellant's submission that he has the right to be addressed in the language of his choice by *the very person* or body who is purporting to address him.<sup>24</sup>

In this passage, there are only individuals in sight; any suggested means of making it possible for speakers of different official languages to get along is rejected as contrary to the essence of the positive rights conception of the claim. The problem is easily transferred to the courtroom—imagine a francophone litigant insisting on a comprehensive language use right against an anglophone litigant. The only way conflict

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is no legal obligation to send the summons in both languages is demonstrated by the fact that a unilingual summons which happens to be in the language of the recipient would be unchallengeable.

<sup>23</sup> *Supra* note 4 at 483.

<sup>24</sup> *Ibid.* [emphasis added].

could be avoided is if one could be guaranteed that one need only ever be involved in litigation with people in one's own language group. Every other participant in a trial—judge, lawyer, witness, jury member—is then treated as being in exactly the same position as one of the litigants, multiplying many times over the potential for conflict between comprehensive language use rights.

Yet this reduction of all the players to the status of private individuals makes little sense when talking about interactions in a context wholly bound up with institutional organizations under state control. Rather, the trilogy has the paradigm and derivative cases backwards: the central target of language use rights is not other individual speakers, but certain institutions of the state (that is, the courts and the legislature) and only derivatively, if at all, individuals who happen to find themselves simultaneously in the same courtroom. Even the negative liberty to speak the official language of one's choice is not usefully thought of as a right held against individuals. No individual has the power to prohibit another from speaking a certain language, not even a judge, considered as an individual. Only the state, through legislation or in otherwise regulating its institutions, can forbid or prevent the use of any particular language or require any other. Prohibitions against certain languages or requirements to use a particular language are accomplished either through legislation or a rule of court. Without such backing, even the judge would be powerless to prevent an individual from speaking whatever language he or she chooses, short of using coercion or force, which would be independently wrong. Hence, one does not need section 133 to protect one's right to speak French or English in front of a judge considered as an individual, any more than one needs a specific right to wear one's hair short rather than long; one only needs the general right to protection against violence and coercion.

Thus, in the first instance, even the bare liberty to speak French or English is held against the state and its institutions, and imposes on the state a duty not to use its legislative power to restrict the use of these two languages. So far, this duty is merely a negative one not to interfere with language choice. But once we shift our focus to the *state* as the primary bearer of obligations to protect language rights, we are free to consider whether other duties, including positive ones, might fairly be imposed on *it* and its institutions. That is, we can consider whether the right can be extended to the right to be understood through imposing duties on the state rather than reciprocal obligations on other trial participants. This perspective avoids the kind of apparently irreconcilable conflicts that led Beetz J. in *MacDonald* to reject a positive interpretation of the right under section 133. Beetz J. seems to have been sidetracked into a debate about whether the state has rights under section 133,<sup>25</sup> when the real question is what duties it is fair to impose in pursuit of the protections that section 133 has at its core.

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<sup>25</sup> *Ibid.* at 484.

Although the Supreme Court undoubtedly thought that it was simplifying section 133 analysis and avoiding future problems by giving the provision a negative liberty interpretation, the individualistic focus has since given rise to difficulties that ought to make the Court reconsider the entire approach. The chickens came home to roost in two cases coming out of Quebec involving claims by accused persons to a trial in English, as granted by section 530 of the *Criminal Code*. Recall that section 530 seeks to do what the Supreme Court has consistently encouraged Parliament to do,<sup>26</sup> namely, to create more comprehensive schemes facilitating the use of the two official languages beyond the minimal protections constitutionalized in section 133. Pursuant to the *Criminal Code* scheme, once an accused person has applied for an order directing that his or her trial be conducted in a particular official language and the order has been granted, section 530.1 dictates that “the accused has a right to have a prosecutor who speaks” that language. In *R. v. Cross*<sup>27</sup> and *R. v. Montour*,<sup>28</sup> the accused applied for an order directing the trials to be conducted in English, thus triggering the right to a prosecutor who speaks English. The Crown prosecutors in each case indicated a desire to use French rather than English during the trial whenever the jury was absent. When the accused countered that this was inconsistent with section 530.1, the Crown prosecutors challenged its constitutionality as violating their rights as persons under section 133. Their argument, of course, is perfectly consistent with the spirit of the analysis of section 133 in the trilogy, in particular the exclusive focus on individuals. After all, prosecutors are undoubtedly among the many “persons” who have their own right to use either official language under section 133. Had the argument been accepted, it would have effectively turned section 133 from a floor into a ceiling.

The implications of this would have been dramatic. The federal government has moved in other ways to improve access to the criminal justice system for members of both official language communities. For example, as Greenberg J. notes in *Cross*, although the constitutionality of subsection 841(3) of the *Criminal Code*, which prescribes the use of bilingual charge forms, has not been challenged, in light of the inclusion of officials issuing summonses in the category of those enjoying section 133 rights, it might well have been.<sup>29</sup> Similarly, the federal *Official Languages Act*<sup>30</sup> imposes obligations on government agents to adapt to the language choice of private litigants. The *Official Languages of New Brunswick Act*<sup>31</sup> does likewise. All these schemes<sup>32</sup> would have been vulnerable to attack had the constitutional challenges in

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<sup>26</sup> *Jones v. New Brunswick (A.G.)* (1974), [1975] 2 S.C.R. 182 at 192-95, 45 D.L.R. (3d) 583.

<sup>27</sup> [1991] R.J.Q. 1430, 76 C.C.C. (3d) 445 (Sup. Ct.) [hereinafter *Cross* cited to R.J.Q.].

<sup>28</sup> [1991] R.J.Q. 1470, [1991] A.Q. No. 800 (Sup. Ct.), online: QL (AQ).

<sup>29</sup> *Supra* note 27 at 1446.

<sup>30</sup> R.S.C. 1985 (4th Supp.), c. 31, Part III.

<sup>31</sup> R.S.N.B. 1973, c. O-1.

<sup>32</sup> For a comprehensive survey of the various measures put in place across Canada to provide access to the courts in either official language, see the study by the Commissioner of Official Languages, *The*

*Cross* and *Montour* succeeded. In all these areas, it would be difficult, if not impossible, to supplement the provisions of section 133.

Fortunately, a means was found to salvage section 530.1, one that avoided reconsidering the constitutional analysis in the trilogy. Disagreement between the two trial judges on the constitutional issue sent the matter up to the Quebec Court of Appeal in *R. v. Cross*.<sup>33</sup> In line with the reasoning of Tannenbaum J. in the lower court in *Montour*, section 530.1 was interpreted in the *Cross* appeal as imposing an obligation not on a prosecutor individually to speak a particular language, which would contradict the prosecutor's section 133 right to choice of official language, but on the Attorney General to assign to each case a prosecutor who is able and willing to use the language of the accused. This interpretation shifts the focus away from the individuals in the courtroom to the authority that has the power to organize the courts so as to determine which individuals end up together in which courtroom. Imposing the obligation on the state to manage things so that individual rights do not come into conflict entirely undercuts the argument in the trilogy that positive obligations would lead to irreconcilable conflict. Yet this solution could have been employed to interpret section 133 itself; this would have avoided the attack on the *Criminal Code* provisions altogether and would have secured more meaningful access to the judicial system for members of minority official language communities.

This solution is fully transferable to the constitutional context. While section 133 gives all persons participating in a trial the same official language use right, no judge has a right to be assigned to a particular case—an anglophone judge has no right to sit on a case that involves francophone litigants and *vice versa*. Rather, if the right is held against the state instead of against the individual judge, a comprehensive language use right can be met through requiring the state to assign a judge to each case who is willing and able to fulfill the litigants' right to be understood in his or her language. Similarly, no state officer can claim the right to issue a particular summons.<sup>34</sup> A right to receive communications in one's own language can be met by requiring the state to

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*Equitable Use of English and French Before the Courts in Canada* (Ottawa: Minister of Supply and Services Canada, 1995).

<sup>33</sup> [1998] R.J.Q. 2587, 165 D.L.R. (4th) 288 (C.A.).

<sup>34</sup> Nor, as noticed by Wilson J. in *MacDonald*, does it violate the right of the issuer of the summons to use French that the state also arranges an English translation to be provided to the recipient (*supra* note 4 at 539-40). Wilson J.'s insight would also have enabled the court to reach a different conclusion in *Pilote v. L'Hôpital Bellechasse de Montréal*, [1994] R.J.Q. 2431, 119 D.L.R. (4th) 657 (C.A.), in which a litigant's claim to the right to receive an authenticated translation of a judgment in a civil action was rejected on the ground that any such entitlement would be inconsistent with the judge's right under s. 133 to use the language of his or her choice in writing the judgment. This ruling would properly defeat any claim that the judge must write in the litigant's preferred language, but it is only if one is in the grip of a paradigm that sees only individuals interacting in a courtroom that it has any power against the claim to receive an official translation.

organize the work of its officers so that those summonses that should be issued in French are issued by francophones and those that should be issued in English are issued by anglophones, or those that should be issued in both languages are translated. Only if it were impossible or unjustifiable to organize the judicial system so that only those interactions take place that do not violate language rights would it be necessary to read down the content of the right to avoid conflict.<sup>35</sup> Although it was not necessary to challenge the trilogy's interpretation of section 133 in order for the Quebec Court of Appeal to decide *Cross*, the case would have given the Supreme Court a valuable opportunity to reconsider its approach in light of the perverse dynamic released by its individualistic focus. The Attorney General of Quebec, however, withdrew its application for leave to appeal the decision in *Cross*, thereby denying the Court a chance to revisit the issue.<sup>36</sup>

The Court of Appeal's approach in *Cross* preserves the legislative schemes implemented since the trilogy to fill the void left by the minimalist interpretation of constitutional language use rights. The existence of these schemes also reduces the incentive on litigants to press for a full-scale reconsideration of the trilogy. As long as there are statutory schemes providing for choice of official language in the courts, the practical consequences of the trilogy are muted. There might seem to be, then, less urgency to revisit the constitutional question. There is still reason, however, to hope that an opportunity may present itself for a reconsideration of section 133 and section 19. To begin with, statutory regimes are entirely subject to the political process, and may therefore be repealed with impunity. This is unlikely at the federal level or in New Brunswick, but the political climate is less consistently inclined to minority interests in Manitoba and Quebec.<sup>37</sup> More significantly, in the absence of a constitutional norm against which to test these schemes—and section 133 on its current interpretation is scarcely any test at all—members of the public must make do with whichever scheme is in place. The Commissioner of Official Languages has demonstrated the

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<sup>35</sup> The Commissioner of Official Languages' study (*supra* note 32) illustrates a wide array of institutional structures and arrangements designed to enable members of the public to choose the language of interaction with court officials without engendering conflict.

<sup>36</sup> [1998] S.C.C.A. No. 526, online: QL (SCCA).

<sup>37</sup> For a brief description of the history of provincial antipathy toward the interests of the official language minority in Manitoba and Quebec, see J.E. Magnet, *Official Languages of Canada* (Cowansville, Qc.: Yvon Blais, 1995) at 15-21, 35-40. For a more extensive discussion of the climate in Quebec, see R. Wardhaugh, *Language and Nationhood: The Canadian Experience* (Vancouver: New Star Books, 1983) c. 4 at 85ff; M.V. Levine, *The Reconquest of Montreal: Language Policy and Social Change in a Bilingual City* (Philadelphia: Temple University Press, 1990). For a fuller account of the track record of Manitoba, see the essays in the special issue of the *Manitoba Law Journal* entitled "The French-Language Crisis in Manitoba", especially J. Duncan, "Introduction" (1986) 15 Man. L.J. 251; G.H.A. Mackintosh, "Heading Off *Bilodeau*: Attempting Constitutional Amendment" (1986) 15 Man. L.J. 271.

unevenness of protection across the country, even in jurisdictions governed by section 133 or its sister provisions.<sup>38</sup> In particular, access to the courts in English in Quebec is assured largely as a result of the high level of personal bilingualism in the legal profession, rather than because of systems put in place by the provincial government.<sup>39</sup> Should this level of individual commitment to bilingualism wane in the future, there is no guarantee that a backup set of arrangements would be created. On the current reading of section 133, the minority would have virtually no protection.

It remains to consider the form of interaction that Beetz J. regarded as the paradigm in *MacDonald*—that between two private litigants. Can their language use rights, in the comprehensive sense, be reconciled? There are two ways to do so.

First, one might argue that the only duties arising out of section 133 are imposed on the state, not on individuals. Whatever one considers to be the point of the protection of language use in official contexts, it is clear that it was no part of the framers' intention to require personal bilingualism of individual Canadians. Members of each community are free to decide to what extent they wish to learn the other official language. But each community should have confidence that its members can deal with key government agencies in their own language. It is the government's responsibility to foster the linguistic security of both communities. Thus, it is not up to individual members of each community to provide this protection to individual members of the other community.

This approach automatically eliminates the possibility of conflict between the rights of two litigants. It redirects our attention from the relationship between them to the relationship between each of them and the institution of the court. It is perfectly possible for a court to respect the rights of each without violating the rights of either. In the case of a trial involving one anglophone and one francophone, this would require the appointment of a bilingual judge to preside. The right of each to understand the other is also held against the state, not against the other litigant. It must therefore be satisfied by the best means available to the state—through the provision of interpreters for each.<sup>40</sup>

Second, another means of defusing the *reductio* argument would be to interpret the comprehensive right as a *prima facie* right that must be qualified when it conflicts with the rights of others. That a right held against other individuals must be qualified in these circumstances does not justify reducing it to the nub of a negative liberty to speak. Qualifying rights, limiting their full benefits in particular instances, is a familiar feature of constitutional thinking. In the *Charter*, this possibility is enshrined in

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<sup>38</sup> *Supra* note 32.

<sup>39</sup> *Ibid.* at 75-83.

<sup>40</sup> As the Commissioner of Official Languages (*ibid.* at 69ff) demonstrates, these are the sorts of arrangements that have been introduced in several jurisdictions.



section 1, but even section 133 could be read in a way that allows for managing the possibility of conflict, especially when the qualifications concerned are those required for the sake of another member of the public equally entitled to linguistic choice.

The individualistic focus imposed by the trilogy has also bedeviled discussions of the relationship between sections 17, 18, 19, and 20 of the *Charter*, meant to update section 133 and extend its protections to New Brunswick. The problem has appeared most clearly in cases considering the relationship between the section 133 language use right governing the courts or its *Charter* parallel in section 19, and section 20 of the *Charter*, guaranteeing access to government services in one's choice of official language. In an attempt to avoid the straightjacket imposed by the trilogy, litigants have argued that the issuing of a ticket or the laying of an information in a criminal charge is a "service" covered by section 20.<sup>41</sup> The advantage of section 20, of course, is that it clearly imposes positive obligations; it cannot be construed in a purely negative fashion. The application of section 20 in these cases has commonly been rejected on the grounds that if issuing a ticket is properly considered a process emanating from a court, it falls exclusively under section 19 or section 133 (as the case may be), and not under section 20.<sup>42</sup> Lacourcière J., speaking for the Ontario Court of Appeal in *Simard*, articulates the emerging mindset: "These sections [sections 16 to 20 of the *Charter*] cover distinct and watertight compartments of parliamentary, judicial and governmental activities of the federal state. ... The information in the present case is of a judicial nature and s. 20(1) has no application to it since it is not an activity of the federal state."<sup>43</sup>

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<sup>41</sup> See *R. v. St. Jean* (1986), 2 Y.R. 116, [1987] N.W.T.R. 118 (S.C.) [hereinafter *St. Jean*]; *R. v. Gautreau* (1989), 101 N.B.R. (2d) 1 (Q.B. (T.D.)) [hereinafter *Gautreau* (Q.B. (T.D.))], rev'd (1990), 109 N.B.R. (2d) 54, 60 C.C.C. (3d) 332 (C.A.) [hereinafter *Gautreau* (C.A.)]; *R. v. Boutin*, [1992] O.J. No. 3733 (Prov. Div.), online: QL (OJ) [hereinafter *Boutin*]; *R. v. Simard* (1995), 27 O.R. (3d) 116, 105 C.C.C. (3d) 461 (C.A.) [hereinafter *Simard* cited to O.R.]. The same argument was also relied on in *R. v. Boudreau* (1989), 103 N.B.R. (2d) 104 (Q.B. (T.D.)), rev'd (1990), 107 N.B.R. (2d) 298, 59 C.C.C. (3d) 436 (C.A.) [hereinafter *Boudreau*], although the issue there was not the language in which a ticket should be issued, but rather whether a breath analysis certificate that is not in the accused's language is admissible as evidence.

<sup>42</sup> The force given to this argument in determining the outcome in a case varies from case to case. In *St. Jean*, *ibid.*, it was subordinate to the argument that the activities of the Yukon Territorial government are not those of the federal Parliament or government so as to make s. 20 applicable; in *Boutin*, *ibid.*, it was coupled with the argument that the term "services" refers to information and assistance that are to the citizen's advantage, rather than reprimands imposed by the government, such as the issuing of a ticket; in *Simard*, *ibid.* at 126, the argument that anything that is covered by s. 19 cannot fall under s. 20 was sufficient to defeat the s. 20 claim.

<sup>43</sup> *Simard*, *ibid.* In support of this conclusion, Lacourcière J. cites *R. v. Rodrigue* (1994), 91 C.C.C. (3d) 455, [1994] Y.J. No. 113 (S.C.), online: QL (YJ), a case in which the claim that the disclosure of documents in the accused's official language was covered by s. 20 was rejected. An appeal to the

This need to fit each situation exclusively under section 19 or section 20 flows from the fear that the two sections might otherwise conflict with one another. This concern makes sense, however, only if one accepts an individualistic foundation of language use rights in the courts. Section 20 clearly imposes positive obligations on governments to provide services in the language of choice of the recipient of those services, privileging the recipient's choice of language over that of the government agent. If services related to a judicial proceeding were regarded as section 20 services, the section 20 duty on service providers to use the citizen's language would conflict with the government agent's individual right under sections 133 or 19 to use her or his own language. In other words, to uphold the recipient's section 20 right would violate the provider's section 19 or section 133 right. Conflict can be avoided between the two sections only if they cover watertight compartments of judicial and governmental activities, at least as long as official language use rights in the courts are interpreted individually.

If the individualistic focus of language use rights is abandoned, however, all these conflicts dissolve—one's right to have one's official language used can be fulfilled without denying any other individual's comparable right, by imposing duties not on individual service providers, but on governments to organize the delivery of services so that they can be provided by persons willing to use the recipient's language. Any situation that related to a judicial proceeding, but could not be construed as a service would fall exclusively under section 19; any situation that involved a service unrelated to judicial proceedings would have to be regulated by section 20; but any case involving a service provided in the context of a judicial proceeding could be classified indifferently under section 19 or section 20. A seamless web of language protections might emerge instead of a senseless game of classifying claims into the right watertight compartment.

We have seen that the argument for interpreting language use rights as negative liberties relies as much on a reduction of the state to the individuals who act for it as it does on the restrictive interpretation approach flowing from the political compromise doctrine. Once the focus on individuals is abandoned, it becomes clear that the argument that only a negative interpretation will avoid conflict between rights collapses. Indeed, the austere approach exhibited in the trilogy has since been implicitly rejected by the Supreme Court itself in *R. v. Mercure*,<sup>44</sup> precisely through the reliance on this shift from imposing duties on individuals to imposing them on institutions. There, La Forest J. held, for the majority, that the right to use one's language includes the right

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Yukon Territory Court of Appeal was rejected on the ground that no appeal lies from the trial judge's decision on such a matter: (1994), 53 B.C.A.C. 275, 95 C.C.C. (3d) 129 (Y. C.A.). Leave to appeal to the Supreme Court of Canada was denied without reasons: [1995] S.C.C.A. No. 83, online: QL (SCCA).

<sup>44</sup> [1988] 1 S.C.R. 234, 48 D.L.R. (4th) 1.

that one's representations be included in the court record in their original form. This holding makes nonsense of the claim that the right provides no guarantee that one be understood, and hence of the claim that the right is a purely negative one not to be interfered with. In order to record each participant's representations in his or her own official language, at least one person must be present in court who can understand what each says. At a minimum, one has a positive right to be understood by a court reporter. This right potentially gives rise to the same kind of conflict as between a litigant and judge who speak different languages. The resolution of this problem not only requires an affirmative interpretation of the section, it also requires that the right be construed as giving rise to obligations against the state (not against particular individuals) and against officials assigning particular court reporters to particular cases (not against individual court reporters).

So far this argument merely demonstrates that an individualistic focus and the resulting negative interpretation of language use rights is not necessary. The right to use English or French could be interpreted as a comprehensive use right, but should it be? This depends on what we take to be the point of protecting the ability to use one's own official language in court. The root of all the ungenerous tendencies exhibited in the trilogy—both the restrictive interpretation approach and the adoption of a negative liberty interpretation—is, of course, the characterization of language rights as political compromise rights. Although the judgments in the trilogy do little to flesh out this notion, the general picture is clear enough: the inclusion of these provisions in the constitution reflects a political power struggle between two interest groups, as a result of which one side mustered enough power to insist on a provision that it wanted. On this understanding of compromise, the only normative foundation for the compromise provision is the raw political power of the interest group capable of forcing its inclusion. The implication is that the "other side", in this instance the majority language community, would have been perfectly justified in imposing the exclusive use of its language in the judicial system if it had been able to get away with it politically.<sup>45</sup> A narrow and negative interpretation of language use rights flows easily from such a picture. To ground a different interpretation, what is needed is a different vision. In *Beaulac*, Bastarache J. opens the door to just such a vision.

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<sup>45</sup> For a fuller analysis of this conception of political compromise, see Réaume, "Official-Language Rights", *supra* note 13 at 258-59.

### III. Animating Language Use Rights: Why Does It Matter What Language Government Uses with Its Citizens?

#### A. *The Effective Communication Rationale: Its Promise and Limits*

In search of a new vision, we might naturally think to look first to the arguments advanced by advocates of a more generous understanding of language use rights. The obvious starting point is the arguments of the plaintiffs in the cases that form the trilogy. This model sought to draw a conceptual link between language rights and the principles of natural justice that require effective mutual comprehension to ensure the fairness of a trial. I call this the “official language/fair trial” approach. It was an ingenious but fatally flawed attempt to read life into the rather dry wording of section 133.

The potential and the pitfalls of the natural justice or fair trial approach to interpreting language rights became evident in the cases following the trilogy, including *Beaulac* itself. These cases have arisen both under section 20 of the *Charter* and under section 530 of the *Criminal Code*. The reliance on “fair trial” values has been tenable in both contexts because the section 20 cases have largely been ones in which a member of the public has argued that police activities or other official conduct tangential to a trial are government services. So a trial, with respect to which there are fairness rights, is in the picture in all these cases. Interestingly, despite the majority’s firm assertion in the trilogy that fair trial rights and language rights are entirely conceptually distinct, the attempt to link them to produce an official language version of fair trial rights that enlarged access to the courts in both languages continued to be made in the cases, and even met with some success. These cases show that the strategy of linking the two sorts of rights was not completely wrong-headed from the point of view of expanding language rights. In almost as many cases, however, the effective communication rationale underlying natural justice was used to deny a claimant the use of his or her preferred official language. In these cases, attempting to draw on natural justice ended up leading to a narrow interpretation of language rights. It is this twist that reveals the weakness of the official language/fair trial approach.

The right to choose the language of a criminal trial, as provided by section 530 of the *Criminal Code*, and the right to government services in one’s choice of official language clearly envision the imposition of positive obligations on the government; however, it remains a matter of interpretation whether these obligations are to be construed expansively or stingily. It may be the case that some lower courts have been misled by the language of political compromise in the trilogy into adopting a generally restrictive approach to the interpretation of these rights merely because they oc-

copy the same context—official language use in a judicial context<sup>46</sup>—as the right in issue in the trilogy. As we have seen, however, it should have given courts pause that the Supreme Court has treated other positive language rights on par with other fundamental *Charter* rights as deserving of a large and liberal interpretation. It is worth asking, as with the negative rights interpretation adopted in the trilogy, whether there is another line of thought that has been pushing courts in the direction of a restrictive interpretation of these positive language use rights. Although the idea that language rights necessarily deserve a restrictive interpretation has sometimes influenced courts, I will argue that the most restrictive judgments are also driven by a recognition that the natural justice rationale cannot do the rights-enlarging work that has been cut out for it in the official language/fair trial approach. Lacking a better understanding of the point of language rights, these courts have fallen back on a literal and therefore narrow interpretation of the positive rights at hand. The result has been the diminution of the official languages to mere instruments in the service of effective communication.

Mutual comprehension between court and litigant—or between member of the public and government service provider—is important to fairness not only instrumentally, not simply as a means to its end, but rather, because it partly constitutes the fairness of such interactions. This is what makes comprehension so fundamental an aspect of natural justice. Presumably it was this deep attribution of constitutional value<sup>47</sup> that the plaintiffs in the trilogy were trying to latch onto, to make some of it rub off on language rights. However, although effective mutual comprehension takes place through language, it does not require the joint use of any particular language. Fairness requires effective mutual comprehension, but natural justice is indifferent as to whether that takes place through the use of the state agent's preferred official language, with whatever assistance is necessary for those who speak another language, or through the use of the individual's language, with whatever changes are necessary in institutional organization. Yet it is the use of a *particular* language—the official language preferred by a given claimant—that official language use rights protect.

From the point of view of natural justice, the use of French rather than English or vice versa is only *instrumentally* related to the end of securing fairness. As instrument, though, the use of a particular language is subject to being tested according to efficiency criteria—if it is considerably easier to have a trial in the majority language and provide assistance through interpreters to the minority language speakers, this may be preferred to the greater trouble and expense of providing the infrastructure necessary to facilitate holding trials in the minority language. A fortiori, making a bi-

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<sup>46</sup> This way of phrasing the context allows us to capture both cases falling under s. 133 or parallel provisions—the official language use in the courts provisions proper—and those involving the provision of government services related to the operation of a trial.

<sup>47</sup> See Beetz J.'s description of the fundamental nature of comprehension in securing a fair trial in *MacDonald*, *supra* note 4 at 499-500.

lingual minority language speaker accommodate to the state actor's language is more convenient than reorganizing resources to provide services in that individual's language. The natural justice requirement of effective communication itself is silent on the choice between these alternatives, leaving administrative convenience free reign. Thus Beetz J. was right in *MacDonald* to insist upon the conceptual distinctness of natural justice principles and language rights.<sup>48</sup> Something more than natural justice is necessary to breathe life into official language use rights to avoid their taking on an instrumentalist cast.

The official language/fair trial approach is an effort to read the right generously, but the cases ultimately engage in a kind of fiction.<sup>49</sup> The accused having indicated his or her preference for a trial in the minority official language, it is simply deemed that the particular accommodation sought<sup>50</sup> best conduces to sound comprehension and hence serves natural justice; given the importance of comprehension to a fair trial, it follows that the accommodation should be made. The fiction consists in treating the choice of one official language as a declaration of incapacity in the other, or at least declining to pay very close attention to how well the accused might be able to function in the other official language. When the fiction is operating at full power, a statement about the importance of comprehension is followed in the next breath by an assertion that it does not matter that the accused in fact understood what was said or written in the other official language; the accused is entitled in the name of fairness to the communication in his or her own official language. In the case of an accused person who is unilingual, hitching language rights onto the star of natural justice can assist a claimant. But the effective communication rationale begins to wear thin in cases in which it is evident that the accused is bilingual. The ultimate recognition of the fictional quality of the rationale has been its undoing.

A good example of the operation of the fiction and the tension it creates within a judgment is found in *Boutin*.<sup>51</sup> The case involved the propriety, for purposes of section 530 of the *Criminal Code*, of filling out an information in English rather than French, as preferred by the accused. Khawly J. clearly grounds the decision in natural justice

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<sup>48</sup> *Ibid.* at 500-501.

<sup>49</sup> This approach can be seen at work in *R. v. Forsey* (1994), 95 C.C.C. (3d) 354, [1994] Q.J. No. 1144 (Sup. Ct.), online: QL (QJ) [hereinafter *Forsey*]; *Beaudoin v. Canada (Minister of National Health and Welfare)*, [1993] 3 F.C. 518, 155 N.R. 298 (C.A.) [hereinafter *Beaudoin*]; *Boutin*, *supra* note 41; *Simard*, *supra* note 41; *Boudreau*, *supra* note 41.

<sup>50</sup> These cases have mostly arisen under s. 530 of the *Criminal Code*, and involve an array of arguments about how far the right to a trial in one's own language extends. In some, the issue is whether one is entitled to have the information or charge drafted in one's language, in others whether disclosure or a preliminary hearing is part of the trial, in others whether co-accused should be tried separately in order to enable each to be tried in his or her own language.

<sup>51</sup> *Supra* note 41.

principles, noting that understanding and being understood are essential aspects of fundamental justice. This sits uneasily with his dismissal of the Crown's argument that the fact that the accused communicated with the police without difficulty in English at the time of his arrest shows that he was not prejudiced by the filling out of the information in English. The fictional quality of the effective communication rationale becomes more evident when Khawly J. goes on to hold that even if section 530 does not provide the right to one's choice of official language in the information, such a right does arise out of sections 7 and 11 of the *Charter*—that is, out of the fair trial rights provisions themselves. But, of course, were the accused's language anything other than French, it is clear that his fair trial right to be informed of the nature of the charges against him in *his* language would be conditional upon his inability adequately to understand English. Khawly J. concludes that in light of the *Criminal Code* and *Charter* provisions, it is reasonable to require the Crown to fill out an information in French when the accused has indicated his or her choice of trial in French. That may indeed be reasonable, but it is hard to see how it is required by the traditional natural justice concern to ensure effective communication.

A further tension within the *Boutin* approach is revealed at the remedies stage, as realized in *Simard*, in which the Ontario Court of Appeal considered the same question—whether one has a right to an information filled out in one's own official language.<sup>52</sup> In *Boutin*, Khawly J. declared the information null and void because it was not produced in the official language of the accused—this despite the Crown's having made available a translation of the information at the start of the trial. In *Simard*, the court refused to nullify a unilingual information; rather, it held that the oral provision of a translation of the information at the accused's arraignment was sufficient to give him notice of the content of the charges against him. The Court imposed the additional burden on the Crown of providing a written translation upon request, but this seems to have been just a gratuitous act of kindness. The point is that the fair trial rationale of ensuring effective comprehension by the accused clearly extends to making sure somehow that the accused receives relevant information in his or her official language of choice, but this requirement is met by providing a translation of the information when asked for it, or no later than by the start of the trial. It takes a different purpose for the language use rights to justify *nullifying* an information because it was not filled out in the right language if the Crown later corrects that defect by communicating its contents to the accused in his or her language. Khawly J., in *Boutin*, is disposed to be generous to minority official language rights claimants, but does not have an account of the underlying point of these provisions that would truly take them beyond the requirements of the provision of a fair trial.

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<sup>52</sup> It is interesting to note that *Simard*, *supra* note 41, involved an appeal from a trial decision by Khawly J. in which he followed his own decision in *Boutin*, *ibid.*

The understanding of language rights in these cases is informed by the same rationale underlying the right to a fair trial—effective communication. How far the rights provide language protection that goes beyond that rationale depends on how vigorously the fiction is held to; the cases range from those in which the claimant was in fact unilingual,<sup>53</sup> to claimants labouring under some degree of handicap operating in their dispreferred language,<sup>54</sup> to cases in which the actual language competence of the claimant is studiously avoided,<sup>55</sup> and finally to those, like *Boutin*, in which competence in the dispreferred official language is mysteriously declared irrelevant. In most of these cases, the effective communication rationale is in fact doing all or almost all the work, but sometimes the judge takes the opportunity to wax on a bit about the importance of respecting the accused's choice of the language of trial, as though it were that choice per se that demanded accommodation.<sup>56</sup> In *Boutin*, something more than the protection of effective communication is going on, but it is masked rather than explained by the claim that the accused is just being assured a fair trial.

Faced with a bilingual accused person or other litigant, however, some judges have not been able to resist the temptation to look behind the fiction that a person's choice of language of trial is indicative of language competence. This typically leads the court to deny the language right claim on the ground that if the claimant was able to understand the communication in issue, even if it was not in his or her preferred official language, the claimant has suffered no irreparable harm. This has happened most often in the New Brunswick cases under section 20 of the *Charter*,<sup>57</sup> although it was the British Columbia Court of Appeal's use of the argument in the context of the section 530 right to language choice in *Beaulac* that brought the issue to the Supreme Court's attention.

A good example of this reasoning is that of Deschênes J. in the trial decision in *Boudreau*, who carefully separates natural justice arguments from language rights claims by pointing out that the accused "never claimed not to understand the substance of the document written in the other official language and everything indicated

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<sup>53</sup> *Forsey*, *supra* note 49.

<sup>54</sup> *Beaudoin*, *supra* note 49.

<sup>55</sup> For example, the New Brunswick Court of Appeal in *Boudreau* (C.A.), *supra* note 41, makes no reference to whether the accused was able to understand the breath analysis certificate that the Crown sought to admit into evidence in English despite the trial judge's explicit reliance on the fact that the accused was bilingual in order to reject the claim. *Simard*, *supra* note 41, might be put in this same category, holding as it does that it is up to the claimant to decide whether he or she needs something translated.

<sup>56</sup> See *Forsey*, *supra* note 49; *Boudreau* (C.A.), *ibid.*; *Beaudoin*, *supra* note 49; *Simard*, *ibid.*

<sup>57</sup> See *Boudreau* (Q.B. (T.D.)), *supra* note 41; *R. v. Robinson* (1992), 127 N.B.R. (2d) 271 (Q.B. (T.D.)); *R. v. Bastarache* (1992), 128 N.B.R. (2d) 217 (Q.B. (T.D.)); *R. v. Haché* (1993), 139 N.B.R. (2d) 81, 1 M.V.R. (3d) 172 (C.A.), Ayles J.A. [hereinafter *Haché* cited to N.B.R.]; *R. v. Mahaney* (2000), 226 N.B.R. (2d) 54 (Q.B. (T.D.)).



that his *only* aim was to maintain that his linguistic rights as a New Brunswick Acadian were infringed ...”<sup>58</sup> But while these judges understand the limitations of the effective communication rationale, they are unable to see any independent rationale for dealing with an individual in his or her own official language. So blinkered, any particular language is necessarily reduced to a mere instrument in attaining the end of effective communication. Use of the minority official language can then be assessed according to whether it is the best means, all things considered, to that end. Unspoken in these cases, because it is glaringly obvious, is the knowledge that this calculation is unlikely to come out in favour of the minority official language speaker. After all, if the claimant is able to speak the official’s language, while the state would have to go to trouble and expense to arrange things to provide a service in the minority language, the balance of convenience seems clearly to lie on the side of proceeding in the majority language. Even more absurd will appear the claim that a ticket should be invalidated or a breath analysis certificate not be admitted into evidence—that would result in the acquittal of a clearly guilty party when the accused was perfectly capable of understanding the contents of the offending document.

In the absence of an independent rationale for official language use rights beyond effective communication, the result of strictly adhering to the limits of natural justice is a sort of reduction of language rights to a minor extension of natural justice rights. On this approach, whenever a question arises of how generously or narrowly to read the official language protections, the fact that natural justice is not infringed by the refusal to extend protections can be used as a reason not to extend them.

### ***B. Beyond Effective Communication: Seeing Intrinsic Value in Mother Tongue Language Use***

While it is clear that these last cases can see no point in language rights beyond effective communication, the official language/fair trial approach takes us little further, and for that reason its generosity toward minority official language claimants is fragile. Construing language rights as tied to the value of effective communication, whether in an effort at generosity or to confine their scope, is understandable. The value of language is easily thought of instrumentally—as a means of communication, a way of getting the other “stuff” of life done. One’s language *is* an instrument in this sense. But just as important, it has intrinsic value as a cultural inheritance and part of an ongoing way of life. Participation in communal forms of human creativity such as language is an intrinsic part of the value of human life. The particular linguistic or cultural form it takes for a particular group of people has intrinsic value *for them* because it is *their* creation. This value of language, as a manifestation of human creativ-

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<sup>58</sup> Boudreau (Q.B. (T.D.)), *ibid.* at 112 [emphasis added].

ity with which its speakers identify, is the key to understanding the claim to its protection.

Recognition of this value requires the creation of a minimal threshold of security that people can enjoy as members of a linguistic group.<sup>59</sup> Linguistic security requires not only that the use of one's language not be made a ground of liability or otherwise publicly denigrated, but also that the instrumental usefulness of the language be supported, not merely for the sake of other ends considered extrinsically, but out of respect for the intrinsic value of a life lived within a particular linguistic milieu. This second component, in turn, involves both facilitating a substantial array of contexts for the use of the language and ensuring that the instrumental use of the language for extrinsic purposes is not disrupted—that is, that use of the language is not rendered unduly detrimental to the pursuit of other ends. The flourishing of a minority linguistic group includes its participation in public life in its language. The various concrete rights in the constitution implementing linguistic security can be seen to advance simultaneously the intrinsic and instrumental interests in language. Each set represents an important sphere of activity valuable independently of the language in which it is conducted—political institutions, government services, education, and the judicial system.

This understanding both makes sense of the areas of life covered by constitutional language protections and provides a foundation for their interpretation in hard cases. It is fitting that the constitution should seek to make the most important aspects of the country's political institutions accessible to minority official language communities. The ability to live one's life in one's own language is thereby importantly expanded to include interaction with government agencies and participation in political institutions, including the courts. Insofar as this interaction has instrumental value—improving one's ability to win one's court case, for example—communication in one's own language obviously serves this instrumental purpose. More important, the operation of public institutions in a minority official language advances the intrinsic expressive interest in language use by making the state and its institutions full participants in the life of the community, and the members of the group full participants in public life. Thus, the importance to a community's self-respect, and hence to its linguistic security, of access to public institutions is enormous, even though many of its members will never end up before a court.

Recognition of this intrinsic value in the ability of minority official language communities to use their own language in court and in interaction with government

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<sup>59</sup> See L. Green, "Are Language Rights Fundamental?" (1987) 25 *Osgoode Hall L.J.* 639 at 658; D. Réaume & L. Green, "Education and Linguistic Security in the *Charter*" (1989) 34 *McGill L.J.* 777 at 779-85; D.G. Réaume, "The Constitutional Protection of Language: Survival or Security?" in D. Schneiderman, ed., *Language and the State: The Law and Politics of Identity* (Cowansville, Qc.: Yvon Blais, 1991) 37 at 45.

service providers argues in favour of requiring the government to meet its responsibilities in a spirit of full participation in the linguistic life of both official language communities. From this springs the argument for interpreting these rights positively rather than as a mere right not to be interfered with in the use of the minority official language. The linguistic security of a community means that there must be full communication in that language within the community. If government is to be a part of this community, it must be prepared to communicate with the community's members in their own language. The more fully this is realized, the more the minority can feel comfortable with these institutions as representative of their linguistic community, and the more they can feel that public institutions are open to them, belong to them. If official participation in the linguistic life of the minority is too grudging or artificial this will cut off the minority from a crucial aspect of social life. Because of the range of benefits—instrumental and non-instrumental—that can accrue in this way, linguistic security is best fulfilled if government services, including judicial services, are organized within minority official language communities so that they are provided largely by members of that community.<sup>60</sup>

Understanding the intrinsic value to a linguistic community of the use of its language also provides a basis for articulating a point for language use rights that goes beyond effective communication. The intrinsic importance of its language to a community explains why members of the public stopped by a police officer might want to insist on the use of their language even if they have no trouble understanding the officer, and why the constitution should support them in so insisting. The affirmation of the value of their linguistic heritage can be more important even than getting an unpleasant episode over as quickly as possible by going along with the police officer's choice of language.

Only a very few judgments prior to *Beaulac* glimpsed this deeper value of language choice in the context of judicial or government services.<sup>61</sup> Angers J.A., in *Haché*, states clearly that official language use rights are grounded in something more than the importance of communication.<sup>62</sup> Richard C.J.Q.B., in *Gautreau*, characterizes the issue of the admissibility of breathalyzer test results when the police have failed to

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<sup>60</sup> A similar conclusion is suggested by M. Bastarache & A. Tremblay, "Language Rights" in G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989) 653 at 672-74.

<sup>61</sup> The list of judgments going beyond effective communication to articulate a rationale for language rights would include (in addition to *Haché*, *supra* note 57, Angers J.A. and Rice J.A., and *Gautreau* (Q.B. (T.D.)), *supra* note 41, discussed below): *R. v. Saulnier* (1989), 90 N.S.R. (2d) 77, [1989] N.S.J. No. 131 (Co. Ct.), online: QL (NSJ); *R. v. Deveaux* (1999), 181 N.S.R. (2d) 81, [1999] N.S.J. No. 477 (S.C.), online: QL (NSJ); *Chiasson v. Chiasson* (1999), 222 N.B.R. (2d) 233, 44 C.P.C. (4th) 276 (C.A.). However, these last three cases required little creativity or interpretive generosity to decide the issue in the litigant's favour, hence the discussion of the rationale is brief.

<sup>62</sup> *Haché*, *ibid.* at 86.

give the accused an option as to the language of their interaction as something that “specifically affects the lives, the spirit and aspirations of all the inhabitants of New Brunswick.”<sup>63</sup> This assertion was made despite there being no reason to believe that Gautreau had not understood the demands of the police officer. Rather, arguing that the police have a duty to be proactive and offer linguistic choice to members of the public to satisfy section 20, Richard C.J.Q.B. declares, “It is a question of dignity, pride and mutual respect of individuals in society.”<sup>64</sup> These remarks indicate not only a generous attitude toward the interpretation of section 20, but reveal that it is grounded in a deeper understanding of the importance to members of a minority community of the use of their language in dealing with public officials. The point is certainly not merely to make oneself understood, but rather to be recognized as a member of a community—identified linguistically—that is of equal importance to, equally deserving of respect as, and equally entitled to conduct life in its language as, the majority community.

The judgment of Bastarache J. in *Beaulac* pushes this line of analysis much further and gives it the imprimatur of a majority of the Supreme Court. The judgment is rooted in the declaration in section 16 of the *Charter* that French and English have equal status. This notion of equality, declares Bastarache J., must be given substantive meaning as it is in other constitutional contexts.<sup>65</sup> This is a clear departure from the stifling formalism of the Beetz line of analysis in the trilogy, which held that it is sufficient that speakers of both languages be equally free to speak their language in court;<sup>66</sup> whether anyone understood them or not was another, irrelevant, matter. Bastarache J. clearly sees that to treat the use of the majority language as the norm, with provision for the minority language considered a favour sometimes grudgingly provided for litigants, is inconsistent with equal status, considered as a substantive value. It is this view that the majority language is the norm that leads judges and officials to regard language rights as expendable in the interests of administrative convenience and as unnecessary if the claimant is capable of using the majority language. Instead, Bastarache J.’s vision is of a dual linguistic norm, with the system being capable of operating equally well in both languages, switching at the behest of claimants.<sup>67</sup> This clearly requires institutional planning—it cannot be accomplished by waiting for a request for services to come along and then muddling through as best one can given the existing resources. It also requires that government conduct itself as though it is linguistically a part of both official language communities.

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<sup>63</sup> *Supra* note 41 at 33. Richard C.J.Q.B. was overruled by the Court of Appeal on jurisdictional grounds, see *Gautreau* (C.A.), *supra* note 41.

<sup>64</sup> *Gautreau* (Q.B. (T.D.)), *supra* note 41 at 28.

<sup>65</sup> *Beaulac*, *supra* note 4 at para. 22.

<sup>66</sup> See *Société des Acadiens*, *supra* note 4 at 580.

<sup>67</sup> *Beaulac*, *supra* note 4 at para. 39.

*Beaulac* goes a long way toward correcting the tendency to see official language rights as designed only to facilitate communication. However, there remains a touch of instrumentalist reasoning in Bastarache J.'s analysis that is unnecessary, and potentially counterproductive to establishing a new footing for the interpretation of official language use rights. The purpose of language rights, whether constitutional or statutory, is variably described in *Beaulac* as to foster the "preservation and development"<sup>68</sup> or the "preservation and protection of official language communities,"<sup>69</sup> or to "assist official language minorities in preserving their cultural identity."<sup>70</sup> This can be read as setting up a means-end relationship between language use protections and the preservation of minority official language communities. The end envisaged is certainly a richer one than that of merely facilitating effective communication, but as long as the relationship between it and official language protections is understood instrumentally there is a danger that arguments will be made that a given protection need not be observed in a particular case because it would not serve, or is unnecessary to, the proffered end. Understood instrumentally, for example, access to the courts in one's own official language is unlikely to have much impact on the "preservation" of a linguistic minority. Most people never come into contact with the judicial system; indeed, most people try not to come in contact with the judicial system, especially the criminal justice system. If there is an instrumental connection between access to courts and the health of an official language community it is at best remote and extremely hard to measure.

This tendency to fall back on language that has an instrumentalist cast is understandable. After all, the very fact that the dominant mode of constitutional interpretation is said to be "purposive" pulls in the direction of thinking of the connection between rights protections and underlying objectives in an instrumentalist vein. This approach may not distort the interpretation of other rights-granting provisions insofar as the courts instinctively understand the intrinsic value of the underlying interests and the constitutive relationship between particular concrete protections and those underlying interests. The problem is, of course, that the courts have tended not to understand the interest in the use of one's official language in a similar light and have been at a loss to ascribe to language protections any meaningful relationship to the sorts of values that constitutions typically voice. Even in cases in which the Supreme Court has been most generous in its ascription of purpose to language rights, its thinking has displayed something of the same problems that I have identified in the context of language use rights in the courts.

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<sup>68</sup> *Ibid.* at para. 25.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.* at para. 34.

To begin with, when a deep and rich importance has been attributed to language use, the argument really only works with reference to language in the abstract. In the *Manitoba Language Reference*, for example, the Court said:

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.<sup>71</sup>

All this is true, but it tells us about the value of language in the abstract, rather than about the value of a particular language to those who happen to speak it.<sup>72</sup> Human development and dignity can be fostered, bridges built to form community, in *any* language. The use of a particular language is not constitutive of these ends, not a necessary condition of their achievement, but merely one of the linguistic means available to their achievement.

This analysis of the underlying rationale of language rights exhibits the same problem as with arguing that a litigant should be able to use one language rather than another in court because comprehension is crucial to the fairness of the proceedings. The flaw in the argument only becomes apparent should circumstances present themselves in which it is clear that the underlying objective can be met through the use of a language other than that for which protection is claimed. In the context at issue in the *Manitoba Language Reference*—Manitoba's failure to enact and publish its laws in both languages—this possibility is obscured. One might argue that the use of French in particular is only one means of “delineating the rights and duties [people] hold in respect of one another” so that they “may live in society”, but the implications of so converting French into an instrument in pursuit of such ends stood to obliterate any right to the use of French altogether rather than merely pull toward a narrow interpretation of the provision. After all, Franco-Manitobans could conceptualize their social world in terms of rights and duties in English, if only they would assimilate to the English language. It may even be true that, assessed according to utilitarian criteria, it would make more sense to put resources into facilitating such assimilation rather than into the bilingual enactment of laws. The implications of seeing the merely instrumental connection of any particular language to human goods that language in the abstract makes possible so radically undermine any notion of minority protection that the logic of the argument was not pursued in the *Manitoba Language Reference*.

In other contexts, most notably that of minority language education rights, the Court has been more openly instrumentalist in its reasoning, but again the context is

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<sup>71</sup> *Manitoba Language Reference*, *supra* note 3 at 744.

<sup>72</sup> Green, *supra* note 59 at 650-51.

such that this militates in favour of a generous reading of the right rather than a restrictive one. In *Mahé*, the Court describes section 23 this way:

The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.<sup>73</sup>

Here, of course, what is said to be the underlying objective (one echoed in *Beaulac*)—the preservation and promotion of minority official language communities—is a much larger and more generous purpose than effective communication between service seeker and service provider, but education is clearly seen as an instrument toward this end. So far, this has not stood in the way of a generous interpretation of the right for two reasons: first, the stated end itself implicitly assumes that the distinct existence of the minority community is an independent good; second, education is such a significant causal precondition of the continued existence of a community that it almost attains the status of logically necessary condition. Under these circumstances, opportunities may be rare for a province to argue that a particularly generous implication of section 23 argued for by parents should be rejected because it is not the sole means available for minority preservation. Both of these factors were missing in the discussion of language use rights in the courts and government services until *Beaulac*. Whatever purpose had been attributed to these language use rights did not acknowledge the good of the distinct existence of minority language communities or the independent value of a life lived within each of the official language communities. Also, use of the minority language is not the sole means available to achieve the purpose of these rights as long as it is understood to be effective communication.

Unless this impoverished, instrumentalist understanding of language protections is corrected at the root, it will continue to be an uphill battle to get genuinely equal access to judicial and government services for minority official language communities, and other language rights may be vulnerable to erosion in the future. Understood in accordance with the picture that I have presented here of the intrinsic connection of linguistic security to a community's sense of itself and its continued health, however, the specific language use protections that make up linguistic security are given a deeper, explicitly non-instrumental connection to the underlying purpose of fostering linguistic flourishing of minority communities. The decision in *Beaulac* moves us in this direction. Bastarache J. assumes, however, that the use of their own language is important to members of a linguistic minority rather than fully articulating why this is so. The interpretation of language protections will be set on a sound footing only once

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<sup>73</sup> *Mahé*, *supra* note 3 at 362.

these protections are understood to be grounded in the fact that the use of a particular language in key public settings is partly constitutive of a full life in that language, which in turn is of intrinsic value to members of that community as an expression of the communal accomplishment that is the community's language and culture.

## Conclusion

With the judgment in *Beaulac* we may now hope that the political compromise doctrine has been well and truly laid to rest. This destroys one of the two pillars supporting the narrow interpretation of language use rights in the trilogy. I have argued that the second pillar is the individualistic conception of those rights. This conception grounds the trilogy's argument that the right to use French or English before the courts must be interpreted negatively in order to avoid endemic conflict. If we understand section 133 and section 19 not as regulating interactions between individuals but those between the state and its citizens, this concern is eliminated and there is no further impediment to giving language use rights a positive rights interpretation. Still, we need more of an animating vision of the point of language use rights to make sense of a positive rights interpretation. I have argued in support of Bastarache J.'s view that the effective communication rationale is too thin to do the job. This has been amply demonstrated by the way the arguments have unfolded in the government services cases. Instead we must understand language as the expression of a way of life of a community such that its members regard their language not merely as a means to an end but as an intrinsically valuable end in its own right. From this perspective, making interaction with government actors as linguistically easy for the minority as it is for the majority is only what is necessary to secure the equal right to participate in society.

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