

THE CHARTER AS A BILINGUAL INSTRUMENT

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For 115 years Canadian constitutional documents were enacted in English only. This changed with the coming into force of the Constitution Act, 1982 in a bilingual format, each version being equally authoritative. To date this fundamental change has been largely ignored by lawyers and jurists in approaching interpretation of the Act, particularly The Canadian Charter of Rights and Freedoms. The author demonstrates this omission and suggests a proper approach to bilingual constitutional interpretation.

Pendant 115 ans, les actes constitutionnels canadiens ont été promulgués en anglais seulement. Cette situation a changé avec la Loi constitutionnelle de 1982, promulguée sous forme bilingue, les versions française et anglaise ayant toutes deux force de loi. En interprétant cette loi et en particulier la Charte canadienne des droits et libertés, avocats et juristes ont jusqu'ici fait peu de cas de ce changement fondamental. Le but de l'auteur est de le démontrer et de proposer une façon correcte d'interpréter les textes constitutionnels en se servant des deux versions.

Since proclamation of the Constitution Act 1982,¹ attention has focussed primarily on the substantive content of the rights entrenched by the Canadian Charter of Rights and Freedoms.² But the proclamation did more than merely amend the Canadian Constitution by entrenching rights and providing an amending formula, it transformed the Constitution from a unilingual to a bilingual basic law. It is intended in this article to demonstrate a pervasive non-appreciation of this bilingual nature and to suggest a proper interpretative approach consistent with that nature.

Canadian constitutional instruments have suffered a schizophrenic existence, being on the one hand mere statutes of the British Parliament and on the other the Constitution of Canada. As a statute, the legislation necessarily conformed to British Parliamentary practice, a most important feature of which is the language of legislation. The fundamental Canadian constitutional instrument, the British North America Act, 1867³ and its amendments were drafted, passed the required three readings in both the British House of Commons and House of Lords, and received royal

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¹ Constitution Act, 1982, enacted by Canada Act 1982, (U.K.) 1982, c.11, Schedule B.

² *Ibid.*, Part I.

³ 30 & 31 Vict., c.3.

assent in one language—English.⁴ A French language version of the 1867 Act was prepared and included in the 1867 Statuts de Canada⁵ but that enjoyed the status, not of an official, authentic version, but rather that of a mere translation. The 1867 Act and its amendments, being single language documents, were accordingly silent as to official or authentic language versions. Only the English language versions existed in law, and thus no English-French version discrepancies could arise.

In 1982, the Canada Act⁶ also passed the various stages of the British Parliament in one language. A French language version was, however, appended as Schedule A to the Act and was declared in section 3 to have “the same authority *in Canada* as the English version”.⁷ This unilingual British statute enacted as Schedule B a document revolutionary in Canadian constitutional law, The Constitution Act, 1982. It is revolutionary not only because Part I contains the Canadian Charter of Rights and Freedoms, but because section 57 provides:

The English and French versions of this Act are equally authoritative.

Les versions française et anglaise de la présente loi ont également force de loi.

The Constitution Act, 1982 also makes provision for the bilingualization of other Canadian constitutional documents by mandating the preparation and then proclamation of French language versions of such Acts, each version to be “equally authoritative”.⁸

Having the basic law in two languages is a new constitutional experience for Canada and raises several questions. Can the true meaning of the Constitution be properly ascertained by reference to one language version in disregard of the other? If not, is it necessary to construe both language versions at all times or only where there is an ambiguity? Further, will it be necessary to re-evaluate 120 years of judicial decisions on the Constitution Act, 1867 in light of any discrepancies found in the new language versions to be proclaimed? The Constitution Act, 1982 itself provides no express solution to these concerns. It states merely the neutral principle that both language versions are “equally authoritative”. No rules are given for resolving a discrepancy in meaning between the two versions, no readily operative clues are given as to how the true meaning is to be found.

That Canadian lawyers and jurists must appreciate the bilingual nature of our Constitution and the importance of that factor in construing consti-

⁴ Recognizing but ignoring the Norman French phrasing of assent: “La Reyne le veult”.

⁵ Now found in R.S.C. 1970, Appendix 5.

⁶ *Supra*, footnote 1.

⁷ Emphasis added.

⁸ *Supra*, footnote 1, ss. 55, 56.

tutional provisions is self evident. For failure to do so is to deny the basic fact that the expression of Canadian constitutional principles is a bilingual expression. To refer to only one language version may result in failure to properly ascertain the true meaning of the Constitution where possible discrepancies of language exist between the two versions. The proper approach, it is suggested, is to refer to both language versions of the provisions in issue, resolve any discrepancies of meaning and then apply the true meaning so ascertained from both versions. Absent a finding of equivalency between versions, it would seem improper to apply one language version of a provision in disregard of the other and would open up the possibility of variant results where a discrepancy between versions exists. Further, in order to ascertain the existence of a discrepancy, one must be capable of comprehending both language versions. This raises the question of the competence of unilingual lawyers and jurists to properly construe the Constitution.⁹

Unfortunately, the treatment of the initial Charter appeals by the Supreme Court of Canada betrays an apparent failure to give full recognition to the bilingual nature of the Constitution. Of these cases, *Southam Inc. v. Hunter*¹⁰ best illustrates the problem. In *Southam*, the corporate respondent challenged the validity of an authorization given by the Director of Investigation and Research of the Federal Combines Investigation Branch to named officers to enter and examine documents at the respondent's premises in Edmonton. The challenge was founded on section 8 of the Charter which reads:

Everyone has the right to be secure against unreasonable search or seizure.

Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

Prima facie differences between the two versions are readily apparent: the nature of the protection is against "unreasonable" action in English but "abusive" action in French, and the subject activity is "search or seizure" in English but "les fouilles, les perquisitions ou les saisies" in French. "Abusive" which conveys the meaning, "excessive", "undue" or "unauthorized"¹¹ is not a true cognate of its English correspondent

⁹ For the right of a presiding judge to use an interpreter, see *Robin v. Collège de Saint Boniface*, [1985] 1 W.W.R. 249, (1984), 30 Man. R. (2d) 50 (Man. C.A.).

¹⁰ [1984] 2 S.C.R. 145. The Official Languages Act, R.S.C. 1970, c.0-2, s.5(1) requires that "All final decisions, orders and judgments, including any reasons therefor. . . shall be issued in both official languages. . .". The Act does not provide for an authentic text or rules for resolving conflicts between versions of such instruments. The rules provided apply only to "enactments" as defined.

¹¹ J. Jéraute, *Vocabulaire Français—Anglais et Anglais—Français de Termes et Locutions Juridiques* (1953), p. 10. See also Th. A. Quemner, *Dictionnaire Juridique* (1976), p. 14: "Abuser: to misuse, to deceive, to act improperly"; P. Robert, *Dictionnaire Alphabetique et Analogique de la Langue Française* (1982), p. 9: "Abusif(ive): qui

"unreasonable", though the semantic fields of both words overlap and may be taken as expressing in context an intended equivalency of meaning. "Fouilles", as a search, is apparently broader in meaning than "perquisitions" since it extends to persons and premises, while the latter word refers to a premises search.¹² That both words are used is, no doubt, to provide certainty as to person *and* premises searches. On the other hand, the English word "search" is a neutral word covering both persons and premises. The scope of the subject activity may therefore be considered co-extensive.

Dickson C.J.C. delivered the reasons for decision of the Supreme Court. The English version of the reasons for decision sets out section 8 and proceeds to discuss authoritatively "unreasonable search and seizure" with reference, *inter alia*, to American and British judicial precedents. In the French version of the judgment, Dickson, C.J.C. discussed, appropriately, "les fouilles, les perquisitions ou les saisies abusives". All reads smoothly and without apparent difficulty unless one reads both English and French versions of the reasons, for it is clear that there is an equation of "unreasonable search and seizure", with "les fouilles, les perquisitions ou les saisies abusives". It is an implicit equation, whether made by the court or a translator is unknown. An individual reading only the French version would understandably believe that the Supreme Court was considering the technical wording of the French version of section 8. However, if one accepts as a basic assumption that the judgment of Dickson C.J.C. was prepared in his first language, English, then the judgment is a consideration of the English version alone. Our French reading lawyer or jurist may have been misled.

Supportive indications of this supposition are to be found in the two versions of the judgment produced by the court. At no point in the reasons does Dickson C.J.C. expressly equate the two language versions of section 8 of the Charter. In each version, only the version of section 8 in that language is reproduced. What are made equivalents are the words "unreasonable" and "abusive", while, it may be noted, "reasonable" is rendered "raisonnable" in the French version of the judgment. Perhaps the clearest illustration of this problem is found in the quotation of the Fourth Amendment of the United States Constitution which in the English version reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

constitute un abus. V. excessif, immodéré, mauvais". See also: H. Bénac, *Dictionnaire des Synonymes* (1956); L. Bélisle, *Dictionnaire Nord-Américain de la Langue Française* (1979).

¹² *Ibid.*, Jéraute, p. 124: "domiciliary or house search"; Quemner, p. 188 "perquisitionner—to make, conduct a search (of premises, etc.)". See also Ministry of the Attorney General of Ontario, *Lexique Anglais-Français du Droit en Ontario* (1982), p. 107.

be violated. . .".¹³ The French version of the judgment replaces the phrase "unreasonable searches and seizures" by the Charter phrase "les fouilles, les perquisitions ou les saisies abusives".¹⁴ This interchange of words between versions is constant throughout the two language versions of the judgment. The following are further examples of this transposition:

It is clear that the meaning of "unreasonable" cannot be determined . . .

Il est clair qu'on ne peut pas déterminer le sens de mot "abusives" . . .¹⁵

The guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation.

Le garantie de protection contre les fouilles, les perquisitions et les saisies *abusives* ne vise qu'une attente *raisonnable*.¹⁶

It is suggested that such interchange of different language version terminology is inherently inappropriate in the absence of a finding of equivalency. The absence of such a finding, when coupled with the assumption that the actual judgment was prepared in English, suggests that the precise constitutional language of the French version of section 8 may not have been considered by the court; but the use of the French wording of the section in the French version of the judgment gives the impression that it was in fact the basis of the reasoning. It is not suggested that the result in *Southam* would have been different if the French language version had received proper consideration. What is suggested is that the court should have first expressly examined both language versions for consistency of meaning before proceeding to apply the constitutional provision to the case at bar. To do anything less is to create constitutional jurisprudence with a unilingual foundation for a bilingual Constitution. There exists, after all, not two constitutional principles in section 8 of the Charter—one in English, one in French—but rather one constitutional principle expressed in two languages.

In deciding *Southam*, the Alberta Court of Appeal,¹⁷ reproducing only the English version in the English language reasons for decision, similarly made no comment on possible discrepancies in the two language versions of section 8 and likewise did not explicitly recognize the existence of two language versions. However, at trial¹⁸ Cavanagh J. did recognize the bilingual nature of the Constitution by reproducing both language versions of section 8 in his English language judgment and made an express finding, after submission of counsel, that there was no

¹³ *Supra*, footnote 10, at p. 158.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, at p. 155.

¹⁶ *Ibid.*, at p. 159.

¹⁷ *Southam Inc. v. Hunter et al.* (1983), 147 D.L.R. (3d) 420, [1983] 3 W.W.R. 385, 4 C.R.R. 368 (Alta. C.A.).

¹⁸ (1982), 136 D.L.R. (3d) 133, [1982] 4 W.W.R. 673, (1982), 2 C.R.R. 264 (Alta. Q.B.).

conflict between the versions, with both "fouille" and "perquisition" and "search" meaning "search".¹⁹ Having made reference to various dictionaries as to the meanings of "fouille" and "perquisition", Cavanagh J. concluded:²⁰

Having regard to all of that I then say that I accept the word "fouille" in s. 8 as having to do with searches of the person and the word "perquisition" as having to do with searches of a place while the English word covers both senses. I therefore find no conflict between the French and the English versions of s.8. Both have to do with searches by officials of the state, whether of a person or of a place.

This, it is submitted, is the proper approach to the interpretation of a bilingual constitutional document.

*Law Society of Upper Canada v. Skapinker*²¹ reflects the same erroneous approach to the Charter as *Southam*. In *Skapinker*, a legally trained immigrant challenged provisions of the Ontario Law Society Act,²² which required citizenship or status as a British subject as a qualification for admission to the Bar, as being violative of the mobility sections of the Charter, particularly section 6(2)(b). In delivering the reasons for decision of the Supreme Court, Estey J. also merely reproduced the language version of section 6 appropriate to the language version of the reasons. Again, on the assumption that English is the first language of Estey J., we assume that English is the language version in which section 6 was actually considered. It was the section heading which was found to be critical to the construction of section 6(2)(b) as determinative of which of three variant meanings to attribute to the provisions. In English, the heading is simply "Mobility Rights". In French, however, the heading is the more instructive: "Liberté de circulation et d'établissement". At no point in the judgment does Estey J. expressly equate the two expressions. One may speculate that he intellectually equated the two versions of the section heading by imparting to the word "mobility" a sense not only of movement but additionally of settlement, an extension justified by the French version's "établissement". Such a determination of equivalency or even of construction of an ambiguous English version by the more precise French version should have been expressly made. In its absence, one is left with the ordinary meaning of "mobility" as the accepted sense of the word as perhaps the sense in which Estey J. expressed himself. At each point where the phrase "mobility rights" is employed in the English version of the judgment one finds its technical French language corresponding provision, "Liberté de circulation et d'établissement", employed in the French version. For example, Estey J. writes:

¹⁹ *Ibid.*, at pp. 136 (D.L.R.), 677 (W.W.R.), 268 (C.R.R.).

²⁰ *Ibid.*, at pp. 137-138 (D.L.R.), 678 (W.W.R.), 269 (C.R.R.).

²¹ [1984] 1 S.C.R. 357, (1984), 53 N.R. 169.

²² R.S.O. 1980, c.223.

In a constitutional document relating to personal rights and freedoms, the expression "Mobility Rights" must mean rights of the person to move about, within and outside the national boundaries.

Dans un texte constitutionnel relatif aux droits et libertés de la personne, l'expression "Liberté de circulation et d'établissement" doit s'entendre des droits d'une personne de se déplacer à l'intérieur et à l'extérieur des frontières nationales.²³

Subclause (a) is pure mobility.

L'alinéa a) a vraiment trait à la liberté de circulation et d'établissement.²⁴

The two offices of the word "mobility" reflected in the two illustrations should be noted. In the first, it is part of the actual heading to section 6; in the second, it is as an ordinary word. On both occasions, the French version of the judgment employs the complete phrase, "Liberté de circulation et d'établissement".

In view of the assistance the court found in the heading "Mobility Rights" in construing the true intent and meaning of section 6(2)(b), it is to be regretted that proper regard was not accorded the French language heading "Liberté de circulation et d'établissement". This is all the more so because of the English language foundation of the judgment. The definition of "mobility rights" offered by Estey J. and quoted above contains no element of settlement, it is limited in scope to movement. It was perhaps the motion or action implicit in the word "mobility" which truly influenced the court, an implication rendered perhaps less secure in the French version by the inclusion of "Liberté . . . d'établissement".

It must be acknowledged, however, that the court did in fact deal with a discrepancy in the two language versions in determining the scope of section 6(2)(b). The presence of the conjunctive "and" in the English version, but its absence in the French version, was noted by Estey J. He concluded, in the English version of his judgment:²⁵

The presence of the conjunctive "and" in the English version is not sufficient . . . to link (a) to (b) so as to create a single right. Conversely, the absence of the conjunctive link in the French language version is not sufficient to separate the two clauses completely . . . [I]f only one right is created by subs. (2), then a division into paras. (a) and (b) is superfluous. Moreover, this suggested interpretation of s. 6(2) is inconsistent with s. 6(3), which subjects the "rights specified in subsection (2)" to certain limitations.

Accordingly, section 6(2)(b) was construed by ignoring the conjunctive "and" in the English version and imparting a mobility feature to the

²³ *Supra*, footnote 21, at pp. 377 (S.C.R.), 194 (N.R.).

²⁴ *Ibid.*, at pp. 378 (S.C.R.), 194 (N.R.). This quotation continues (in the English version of the judgment): "It speaks of moving to any province and of residing in any province". In so stating, however, Estey J. merely summarizes the content of s.6(2)(a). In context, this quotation does not alter the sense of "mobility" as used by Estey J. to necessarily include "settlement", especially in light of his definition of "mobility rights"; see text *supra*, footnote 23.

²⁵ *Ibid.*, at pp. 378 (S.C.R.), 195 (N.R.). The emphasis is in the original.

rights created by the section in accordance with the true intent and purpose as indicated by the heading "Mobility Rights".

Finally, it should be noted with respect to *Skapinker* that at neither the High Court nor the Court of Appeal levels was there discussion in the reasons for decision of the learned judges of the problem, or of the assistance to be gained in the proper construction of the mobility provisions by recognition of their bilingual nature.²⁶

*Attorney General of Quebec v. Quebec Association of Protestant School Boards*²⁷ is a *per curiam* judgment of the Supreme Court of Canada and, though delivered in two language versions, sets forth the appropriate Charter provisions in the language appropriate to that language version. This is the same flawed format noted in *Southam* and *Skapinker*. As in those judgments, there is no explicit equating of the two language versions of section 23 of the Charter, the section in issue. As well, because of the purposive approach adopted by the Supreme Court in determining the unconstitutionality of Quebec's language of education provisions in the Charter of the French Language,²⁸ there is no detailed examination of the technical language of the Charter as in *Southam* and *Skapinker* and thus no consideration of possible discrepancies in language.

At the Quebec Court of Appeal level,²⁹ the brief reasons for decision in *Protestant School Boards* followed the unilingual approach, involving merely the reproduction of the French language version of section 23 without comparison or commentary on the other language version. However, at the Superior Court level,³⁰ Deschênes C.J.S.C. adopted an approach more in keeping with the bilingual nature of the constitutional provisions in issue.

In the Superior Court, on a motion for a declaratory judgment, Deschênes C.J.S.C., first examined the question of procedure in terms of section 24 of the Charter. He reproduced sub-section (1) in both language versions:³¹

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

²⁶ *Re Skapinker* (1982), 137 D.L.R. (3d) 666, 38 O.R. (2d) 116 (Ont. H.C.); (1983), 3 C.R.R. 211 (Ont. C.A.).

²⁷ [1984] 2 S.C.R. 66, (1984), 54 N.R. 196.

²⁸ R.S.Q. 1977, c.C-11.

²⁹ *Québec Association of Protestant School Boards v. Attorney-General of Quebec* (No. 2) (1983), 1 D.L.R. (4th) 573, [1983] C.A. 77 (Que. C.A.).

³⁰ (1982), 140 D.L.R. (3d) 33, [1982] C.S. 673, (1982), 3 C.R.R. 114 (Que. S.C.). The D.L.R. and C.R.R. reports are translations into English.

³¹ *Ibid.*, at pp. 677 (C.S.), 121 (C.R.R.). The D.L.R. report sets out only the English version: see p. 39.

24(1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Deschênes C.J.S.C. then examined the two versions for discrepancies. He noted that the word "remedy" in the English version is wider in meaning than "réparation" in the French version.³² Without attempting to resolve this apparent discrepancy, Deschênes C.J.S.C. merely proceeded to hold that a declaratory action was not inappropriate as relief in the matter before the court. Such relief, it was stated, does no "violence to the text."³³ It is implicit that the declaratory judgment was found to be included in the narrower term "réparation" and therefore *ipso facto* within the scope of "remedy" in section 24. Attention then focussed on the words "have been infringed" in the English version, words which carry the implication of a past rather than prospective violation of Charter rights. Despite that implication, Deschênes C.J.S.C., relying in part on the views of Professor Hogg,³⁴ decided that the section extended to the future as well as the past. Deschênes C.J.S.C. then referred to section 57, the "equally authoritative provision of the Charter", before examining the French wording of the section. The relevant words in the French version are "victime de violation ou de négation des droits ou des libertés". This was found, without explanation, to be wider than its English equivalent and not expressly limited to past violations. Deschênes C.J.S.C. merely stated: "This phrase can also be applied to the future without doing violence to the text".³⁵ By so holding, the court ignored the point that for there to be a "victime de violation ou de négation des droits ou libertés", there had to be a violation of a right or freedom, an argument that would of course be supported by the past tense of the English version. Ignoring this "chicken and egg" dilemma allowed Deschênes C.J.S.C. to find the result desired.

An argument by counsel for the Attorney General of Quebec, on an "ends" versus "means" distinction in section 1 of the Charter, was also decided by Deschênes C.J.S.C. by reference to both language versions. Section 1 is as follows:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

³² *Ibid.*

³³ *Ibid.*, at pp. 42 (D.L.R.), 679 (C.S.), 124 (C.R.R.).

³⁴ *Ibid.*, at pp. 42 (D.L.R.), 678 (C.S.), 123-124 (C.R.R.), quoting from the manuscript version of P. Hogg, *Canada Act 1982 Annotated* (1982). The work as published does not appear to lend as much support to the position taken by Deschênes C.J.S.; see p. 65.

³⁵ *Ibid.*, at pp. 42 (D.L.R.), 679 (C.S.), 124 (C.R.R.).

La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Counsels' argument that "justification" connoted "ends", and "limits" the "means", was rejected by Deschênes C.J.S.C. He stated:³⁶

If Parliament had wanted to make a distinction between ends and means in the application of the burden of proof, it certainly would have drafted s. 1 of the Charter differently. The French version makes it difficult to accept the distinction proposed by Quebec; the English version, even more compact, makes this conclusion impossible . . .

Thus counsels' general proposition on a divided burden of proof under section 1, that the government must carry the burden as to "limits" and the applicant as to "means", was not accepted. In rejecting the argument Deschênes C.J.S.C. accepted the interpretation of section 1 consistent with both language versions and inconsistent with neither.

The final use of the bilingual nature of the Charter by Deschênes C.J.S.C. was in dealing with the argument that under section 1 it might be possible to "limit", but never to "deny" rights. He did, however, deal with the matter fairly summarily. It was merely stated that both language versions were "exactly to the same effect"³⁷ in allowing only limitation but not denial of guaranteed rights.

Additional to the Supreme Court of Canada cases discussed, a perusal of the 412 cases reported to the date of writing in the Canadian Rights Reporter³⁸ series clearly demonstrates the widespread lack of recognition accorded the bilingual nature of the Charter and the Constitution Act, 1982. Only five cases (in addition to those discussed above) acknowledge the bilingual format of the constitutional provisions in issue by, at the minimum, reproducing both, or by discussing variances between language versions.

In *R. v. Vermette*,³⁹ Greenberg J.S.C. did not reproduce the two language versions of the Charter in issue but did consider the true object and purpose of section 24(1) as reflected in the English, "such remedy as the court considers appropriate and just in the circumstances", and in the French, "la réparation que le tribunal estime convenable et juste eu égard aux circonstances". Observing that "'remedy' seems broader than the

³⁶ *Ibid.*, at pp. 58 (D.L.R.), 688 (C.S.), 138 (C.R.R.).

³⁷ *Ibid.*, at pp. 59 (D.L.R.), 689 (C.S.), 140 (C.R.R.).

³⁸ That is, up to and including Part Two of Volume Eleven.

³⁹ (1982), 3 C.R.R. 12 (Que. S.C.); affirmed [1984] C.A. 466 without discussion of the language of the Charter; notice of appeal to Supreme Court filed [1984] S.C. Bulletin 875.

⁴⁰ *Ibid.*, at p. 28.

word 'réparation' in the French version',⁴⁰ Greenberg J.S.C. then referred to the "equally authoritative" proviso in section 57 of the Charter and to the Official Languages Act,⁴¹ section 8(2)(d), which mandates that preference be given to the meaning that "best ensures the attainment of [the] objects" of the legislation. Having made these bare references but without further comment, Greenberg J.S.C. concluded:⁴²

Therefore it is more in the sense of the English word "remedy" that this Court considers it must interpret and apply s. 24(1) of the Charter in the case at bar.

Applications by the accused Royal Canadian Mounted Police officer for a stay of proceedings, after an initial mistrial, due to adverse comments by the Premier of Quebec in the Assembly, were then allowed.

In *Jamieson v. The Queen*,⁴³ Durand J.S.C. dealt with an application for a declaration that an accused need not comply, prior to actual conviction, with the Identification of Criminals Act.⁴⁴ In his reasons for judgment dismissing the application, Durand J.S.C. consistently reproduced sections 7, 9, 11(c), (d) and 1 of the Charter in both language versions prior to his consideration of the principles involved. Only once, however, was overt mention made of equivalency between the language versions, but even then, perhaps not so much as language versions than as legal concepts. Referring to section 7, Durand J.S.C. stated:⁴⁵

It is also established that the words "fundamental justice—justice fondamentale" are synonymous with "natural justice—justice naturelle".

In *R. v. Dubois*,⁴⁶ the Alberta Court of Appeal had to determine whether section 13 of the Charter prohibited use by the Crown at a new trial of testimony by the accused given at the original trial. Kerans J.A., for the court, set out section 13 in both language versions and then proceeded to discuss the accused's argument as to the scope of the English word "proceedings" and the French word "procédures". It was argued by counsel that "procédure" properly translated into English as the narrow concept "trial".⁴⁷ However, this was rejected by Kerans J.A. who, after noting that Petit Robert decried the proffered meaning as "an anglicism and to be deprecated",⁴⁸ accepted as a definition of "procédure": "Manner of proceeding legally; the series of formalities which should be

⁴¹ R.S.C. 1970, c.O-2.

⁴² *Supra*, footnote 39, at p. 29.

⁴³ (1982), 3 C.R.R. 193 (Que. S.C.).

⁴⁴ R.S.C. 1970, c.I-1.

⁴⁵ *Supra*, footnote 43, at p. 201.

⁴⁶ [1984] 3 W.W.R. 594, (1984), 9 C.R.R. 61 (Alta. C.A.). The decision of the Court of Appeal was reversed by the Supreme Court of Canada, but the latter court did not deal with the issue discussed in the text: [1986] 1 W.W.R. 193 (S.C.C.).

⁴⁷ *Ibid.*, at pp. 598 (W.W.R.), 64 (C.R.R.).

⁴⁸ *Ibid.*

performed".⁴⁹ Thus both the English and French versions were found to be somewhat vague as referring either to "the compendium of steps which comprise an action, or any step in that action".⁵⁰ An examination of the historic scope of the principle involved, plus the absurdity of the narrower definition preventing use of such testimony even on appeal, led Kerans J.A. to adopt the broader approach as consistent with the true meaning and intent of the provision.

In *Marchand v. Simcoe County Board of Education*,⁵¹ Hughes J. denied an application for an interim injunction regarding the provision by the defendant school board of minority language shop classes. In so doing, he acknowledged the reminder by counsel for the applicant that both language versions of section 23 of the Charter, the section in issue, were official and took note of an alleged difference in meaning between the two versions of section 23(3)(b), which alone was reproduced in both language versions. The opening words of sub-section (3) and paragraph (b) read as follows:

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

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

(3) Le droit reconnu aux citoyens canadiens par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d'une province:

(b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d'enseignement de la minorité linguistique financés sur les fonds publics.

Accepting that the alleged right to separate "buildings" more easily existed under the French word "établissements" than the English "facilities", Hughes J. did not find it necessary to resolve the discrepancy. Instead the issue was left to the subsequent trial of the claim.

Finally, in *Reference re Education Act of Ontario*,⁵² the Ontario Court of Appeal, in a *per curiam* judgment, considered the provisions of the provincial Education Act⁵³ in terms of compliance or conformity with the minority language education rights in section 23 of the Charter. In so doing, the court set forth the two language versions of section 23,⁵⁴ and proceeded to examine alleged discrepancies in wording. The second ques-

⁴⁹ *Ibid.*, at pp. 598 (W.W.R.), 64-65 (C.R.R.).

⁵⁰ *Ibid.*, at pp. 598 (W.W.R.), 65 (C.R.R.).

⁵¹ (1984), 10 C.R.R. 169 (Ont. H.C.).

⁵² (1984), 47 O.R. (2d) 1, 11 C.R.R. 17 (Ont. C.A.).

⁵³ R.S.O. 1980, c.129.

⁵⁴ *Supra*, footnote 52, at pp. 26 (O.R.), 39 (C.R.R.).

tion that was referred to the court asked whether minority language groups have a right to "manage and control" their own classes of instruction and educational facilities. In approaching this question the court set out the following statement of principles:⁵⁵

Since, by s.57 of the *Constitution Act, 1982*,

57. The English and French versions of this Act are equally authoritative.

The first question to be considered is whether either the expression "minority language educational facilities" or the expression "établissement d'enseignement de la minorité linguistique" is broad enough to comprehend the right to manage and control. If neither is broad enough, that would end the matter. If both are, that, too, would determine the issue. The third possibility is that one version is broad enough and the other may not be. In that case, would one have to choose whether to apply the narrower version or the more generous one.

Following a review of submitted English and French definitions of terms, the court accepted that the English version of section 23(3)(b) was ambiguous in allowing two alternative meanings, the word "minority" having the office of: (a) a descriptive adjective to the word "language", or (b) a possessive adjective meaning the "language educational facilities of the minority".⁵⁶ This ambiguity was resolved in favour of the latter meaning, in large measure, by reference to the French version which was determined to be possessive.⁵⁷ The right to "manage and control" educational facilities was therefore determined to be implicit in section 23, and was further found to be supported by an examination of the "purpose" or "mischief" reflecting the true intent of the provision. The Court of Appeal therefore found the second possibility in its statement of principles, set out above, was applicable, that is that both language versions accorded the alleged right. However, it also decided that, assuming the third possibility, the inconsistency could be resolved and a similar result arrived at by an appeal to the "purpose" or "mischief" approach.

⁵⁵ *Ibid.*, at pp. 34 (O.R.), 47 (C.R.R.).

⁵⁶ *Ibid.*, at pp. 37 (O.R.), 50 (C.R.R.).

⁵⁷ The phrase "minority language educational facilities/établissements d'enseignement de la minorité linguistique" did not appear in Bill C-60, the 1978 federal proposals to amend the Constitution. The English version of the then proposed s.21 referred to "the right to have his or her children receive their schooling. . . in or by means of facilities that are provided in that area out of public funds. . .". The 1980 proposed Resolution contained the phrase in the English version, "to warrant the provision in that area of minority language educational facilities", but the French version read "où le nombre des enfants de ces citoyens justifie la mise sur pied, au moyen de fonds publics, d'installation d'enseignement dans cette langue". The French version was altered during the proceedings of the Special Joint Committee on the Constitution of Canada to broaden the scope of the provision to include facilities beyond mere buildings. The discussion at the Committee level is also clear in intending to include a right to separate management and control. See Canada, Special Joint Committee on the Constitution of Canada 1st Sess., 32nd Parl., 38-107-11 (Jan. 15, 1981), 48-108-11 (Jan. 29, 1981). The French version would have been rendered descriptive by an alteration to read "de la langue minoritaire".

Setting aside any concern as to the correctness of the resolution of English-French discrepancies, the cases discussed should amply illustrate the problem under discussion. Firstly, there is the absolute paucity of cases where the courts expressly deal with both language versions of the Charter. Unless, like the Supreme Court, they are implicitly equating the two language versions of the Charter, this suggests that lawyers and judges are treating the Charter in one language only without regard to the other "equally authoritative" text. Secondly, it would appear that consideration of both language versions has been found appropriate only where Charter language rights are in issue or where a Francophone party is involved. Given that the issue is thus "forced" in such cases and the general lack of appreciation of the bilingual nature of the Charter, one may well question the capacity of lawyers and judges to deal properly with a bilingual constitutional instrument. Further, the advantage of a bilingual capability may well allow achievement of the result desired whether by the lawyer presenting the argument or the judge delivering judgment.

The interpretation of a bilingual text should be approached in general no differently than that of an unilingual text as the primary interpretative goal is to achieve the meaning that best accords with the objects of the legislation. Thus the federal Official Languages Act⁵⁸ provides as a general principle in section 8(2)(d):

. . . if the two versions of the enactment differ . . . preference shall be given to the version that, according to the true spirit, intent and meaning of the enactment, best ensures the attainment of its objects.

Though not strictly applicable to the interpretation of the Constitution Act, 1982, the Official Languages Act does provide an applicable approach and is therefore instructive.

One author who extensively reviewed the Canadian precedents presented the following formulation of general rules⁵⁹ reflecting approaches to resolving language version discrepancies:

$$A^e + B^e + A^f \text{ ————— } A$$

$$A_o^e + B^e + A_o^f \text{ ————— } B$$

$$A^e + B^e + A^f + C^f \text{ — } A$$

In these formulations "A", "B" and "C" represent possible interpretations of the provision in issue; "e" and "f" indicate either English or French versions; and "o" indicates an objectionable or inappropriate interpretation. Thus, in the first formulation, the interpretation A common to both language versions is the accepted proper interpretation. In

⁵⁸ *Supra*, footnote 41.

⁵⁹ R.M. Beaupré, *Construing Bilingual Legislation in Canada* (1981), p. 125. For a good example, see *R. v. Voisine* (1984), 57 N.B.R. (2d) 38 (Q.B.), per Daigle J.

the second formulation, interpretation A is objectionable in both the English and French versions as being perhaps inconsistent with the purposes of the legislation, leaving B, the English alternative, as the proper interpretation. In the third formulation, interpretation A is the interpretation common to both versions, where both have different alternatives, and accordingly is the proper interpretation to be taken as reflective of the true object of the legislation.

Of the Charter cases discussed, only *R. v. Dubois*⁶⁰ and *Reference re Education Act of Ontario*⁶¹ would seem to fit into the formulations, specifically the first one: "A^e + B^e + A^f — A". The judgments in *R. v. Vermette*⁶² and of Deschênes C.J.S.C. in *Protestant School Boards*⁶³ indicate rather an intuitive acceptance of one meaning over another without adequate explanation.

The approach of the Official Languages Act is also that of international law as enunciated in the Vienna Convention on the Law of Treaties 1969.⁶⁴ The Convention mandates the resolution of discrepancies between authenticated versions of a treaty by an appeal to the "meaning which best reconciles the texts, having regard to the object and purpose of the treaty".⁶⁵ This approach is conditioned on the discrepancy not being resolved by use of general rules of good faith and context or the use of supplementary materials such as *travaux préparatoires*. Thus, consistent with the Official Languages Act approach, objectionable interpretations of both language versions are set aside and where an ambiguity still remains, the objects and purposes approach is utilized to resolve the

⁶⁰ *Supra*, footnote 46.

⁶¹ *Supra*, footnote 52.

⁶² *Supra*, footnote 39.

⁶³ *Supra*, footnote 30.

⁶⁴ United Nations, Reports of the International Law Commission Draft Articles on the Law of Treaties and Commentaries, 1966 (1967), 61 A.J.I.L. 248, at p. 361 *et seq.*

⁶⁵ Art. 33:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application [of general rules of good faith and context, and use of supplementary materials such as *travaux préparatoires* per articles 31 and 32] does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

discrepancy of meaning between language versions. Of the cases presented, the third "possibility" discussed by the Ontario Court of Appeal in *Reference re Education Act of Ontario*⁶⁶ best illustrates this resolution technique.

It should be noted that this bilingual approach to treaty interpretation as a model for the Canadian constitution is much preferable to the former international law general principle as stated by Oppenheim:⁶⁷

... if a treaty is concluded in two languages and there is a discrepancy between the meaning of the two different texts, each party is only bound by the text in its own language.

Such a rule is unthinkable for a bilingual national constitution.

One should note as well that the suggested approach is consistent with that of the European Court of Human Rights in interpreting and applying the European Convention on Human Rights. In *Wemhoff v. Federal Republic of Germany*⁶⁸ the court dealt with the issue of whether the right, accorded by article 5(3) of the Convention, "to trial within a reasonable time", referred merely to the commencement of trial or extended to judgment. The court clearly applied the formula "A^e + B^e + A^f — A".⁶⁹

But while the English text permits two interpretations the French version, which is of equal authority, allows only one. According to it the obligation to release an accused person within a reasonable time continues until that person has been "jugée", that is until the day of the judgment that terminates the trial. Moreover, he must be released "pendant la procédure", a very broad expression which indubitably covers both the trial and the investigation.

Thus confronted with two versions of a treaty which are equally authentic but not exactly the same the Court must, following established international law precedents, interpret them in a way that will reconcile them as far as possible.

The Constitution Act, 1982, containing the Canadian Charter of Rights and Freedoms, must necessarily alter our initial approach to its interpretation because of its bilingual nature. One cannot stress enough the conclusion of one author regarding bilingual statute construction: "[the] initial step [must be] a comparative reading of both official versions . . .".⁷⁰ That author, with respect, only got it half right for he added qualifications, for example that one should read both versions only when there are "practical problems of application or its meaning is subject to some doubt".⁷¹ It is suggested, however, that these qualifications

⁶⁶ *Supra*, footnote 52.

⁶⁷ L. Oppenheim, *International Law* (7th ed. by H. Lauterpacht, 1948), p. 862.

⁶⁸ (1968), 1 E.H.R.R. 55.

⁶⁹ *Ibid.*, at pp. 74-75.

⁷⁰ Beaupré, *op. cit.*, footnote 53. See also, J.D. Honsberger, *Bilingualism in Canadian Statutes* (1965), 43 Can. Bar Rev. 314, at p. 332.

⁷¹ *Ibid.*

must of necessity be ignored and the general commandment followed universally, for how can one recognize a problem of ambiguity or interpretation unless one in fact reads both versions of the provision in issue? It is imperative that the bilingual nature of our constitutional provisions be recognized. The truth of this assertion can be easily demonstrated. If a unilingual statute containing only one section provided "A, B, C" and continued "in other words, but with equal authority, X, Y, Z", could one confidently construe the legislation by reading only the "A, B, C" portion of the section? Is it not abundantly clear that both must be read? It is in this respect that the Supreme Court has compounded the neglect by failing to explicitly equate the language versions before it and by delivering unilingual versions of judgments in both French and English interposing technical Charter terms. The Supreme Court is not alone. Such a general oversight, whether by counsel in their presentation to courts or by courts in their opinions, must change. A small step in this direction has been taken by the Supreme Court in *Operation Dismantle Inc. v. The Queen*.⁷² Dickson C.J.C., in delivering the judgment of the majority, reproduced both English and French versions of Charter section 7 in issue. There is no discussion of the two versions beyond this bare recognition that they exist. It is a beginning.

Neglect of the bilingual nature of the Charter can only be justified by lower courts if there has been a pronouncement by the appellate courts of equation of meaning between two language versions of the Charter and other constitutional instruments as they become available. Anything less is to construe only half of the law. And even then, true construction of constitutional provisions and application to the case at bar should require some attention to both language versions. Language is imprecise. It conveys ideas and concepts. Thus even where equation of versions has been proclaimed by the Supreme Court, further argument on language conflicts would not be forestalled. For surely the court would merely be stating that in the context at bar the two language versions are equivalent. The normal limits of *stare decisis vis-à-vis* the true *ratio decidendi* would apply. As a final point, it might be argued that courts are passive instruments of justice and that legal arguments are to be presented by counsel. If counsel do not acknowledge both language versions of a provision, why should the court? The answer must be founded upon the importance of the Constitution as the basic law of the land, which imposes upon the courts, especially the Supreme Court, the added responsibility of construing properly constitutional provisions in equally authoritative fashion in the two official languages.

To appreciate fully constitutional law in Canada may well require full comprehension of both official languages. This conclusion is inescapable.

⁷² [1985] 1 S.C.R. 441.