THE PROMISE OF CANADA'S DECLARATION OF OFFICIAL LANGUAGES*

Grégoire Charles N. Webber**
DPhil candidate, Balliol College, University of Oxford
Trudeau Scholar, Pierre Elliott Trudeau Foundation

The abstract can be found at the end of the article.
El resum és al final de l'article.

Table of contents

Introduction
I. The Philosophy of Section 16 of the *Canadian Charter*
A. The Strength of Constitutional Commitment
B. *Un article de principe*
II. The Constitution of Official Bilingualism
A. A Mandatory Constitutional Provision
B. Official Language Status
C. Equality of Status
D. Right to Work in Either Official Language
III. Some Brief Remarks on Subsection 16(3)
Conclusion

> «*Je souhaite que sur cette lancée, notre pays accède également à la maturité politique. Qu'il devienne en plénitude ce qu'il ne devrait jamais cesser d'être dans le coeur et dans l'esprit des Canadiens:* [...] un Canada tirant force et fierté de sa vocation bilingue.»[1]
>
> Pierre Elliott Trudeau, Prime Minister of Canada
> at the Proclamation Ceremony of the coming into force of the Constitution Act, 1982

* This is a modified version of a paper published in Joseph E. Magnet (ed.), *Official Languages of Canada* (2nd ed.) (LexisNexis Butterworths, forthcoming 2007). I thank Joseph Magnet and LexisNexis Butterworths for the permission to publish with the Revista de Llengua i Dret.

** B.C.L., LL.B. (McGill). I am indebted to many people who helped me struggle with the ideas explored in this paper. I wish to thank Marie-Joie Brady, François Chevrette, Vanessa Gruben, Kate Hofmeyr, Daniel Jutras, Roderick Macdonald, Michel Paradis, Danielle Pinard, Christine Ruest, and Stephen Scott. The generous support of the Trudeau Foundation and le F.Q.R.S.C. is graciously acknowledged.

1. Remarks at the Proclamation Ceremony (17 April 1982): www.collectionscanada.ca/premiersministres/h4-4024-f.html [emphasis added].

INTRODUCTION

Being the first section of the *Canadian Charter of Rights and Freedoms*[2] under the heading «Official Languages of Canada», section 16 captures the vision promoted in Trudeau's Proclamation Speech of 17 April 1982. Section 16 reads as follows:

> 16. [Official languages of Canada] (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.
>
> [Official languages of New Brunswick] (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.
>
> [Advancement of status and use] (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

> 16. [Langues officielles du Canada] (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.
>
> [Langues officielles du Nouveau-Brunswick] (2) Le français et l'anglais sont les langues officielles du Nouveau-Brunswick; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions de la Législature et du gouvernement du Nouveau-Brunswick.
>
> [Progression vers l'égalité] (3) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais.

If Trudeau's words were more an aspiration than a reflection of fact at the time, section 16 has done too little to date to marry vision and reality. The *force et fierté* that Canada has derived from the affirmation of official bilingualism and equality of French and English rest principally in the symbolic and rhetorical aspects of section 16. From the perspective of constitutional practice, section 16 has been little more than a reference in passing brought in support of an already decided point. In short, with some proud exceptions, section 16 has been lying dormant since 1982. In this paper, it is proposed that its promise be fulfilled. To this end, it will be argued that section 16 mandates a re-interpretation of sections 17 to 19, which were read in light of sec-

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

tion 133 of the *Constitution Act, 1867*[3] on the basis of a narrow understanding of the bilingualism aspirations of the Constitution; that section 16 is a mandatory provision with a residual character such that it is not exhausted by the sections that follow it; that the reference to «Canada» should be read as broader than the reference to «institutions of the Parliament and government of Canada»; and that it guarantees public servants in Canada the right to work in the official language of choice.

This paper proceeds as follows. In Part I, I explore the philosophy of official bilingualism and equality of status. In Part II, the various components of subsection 16(1) are reviewed and it is argued that the affirmation of official languages and equality of status are mandatory and have important consequences for the scope and intensity of official bilingualism in Canada. In Part III, I review subsection 16(3) and explore its relationship to subsection 16(1).

Before turning to Part I, it is important to highlight that section 16 has never been considered by the Supreme Court of Canada on its own merits, although Parliament has devoted considerable attention to it.[4] The only case to have devoted any sustained attention to section 16 is *Société des Acadiens du Nouveau-Brunswick*,[5] where the Supreme Court adopted a restrictive reading of language rights according to a political compromise doctrine. Since this interpretive approach has begun to lose

3. *Constitution Act, 1867*, 30 & 31 Vict., U.K., c. 3, s. 133, reprinted in R.S.C. (1985), App. II, No. 5. The section provides:

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

4. See Warren J. Newman, «La *Loi sur les langues officielles* et la reconnaissance constitutionnelle et législative des droits linguistiques aux Canada» (2006) 31 Supreme Court L. Rev. (2d) 635. An English version is available at: Warren J. Newman, «The *Official Languages Act* and the Constitutional and Legislative Recognition of Language Rights in Canada» in Colin Williams (ed.), *Language and Governance* (Cardiff: University of Wales Press, [forthcoming]).

5. *Société des Acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549.

ground,[6] we must return to section 16 and examine it again; we must articulate a vision of section 16 *à l'image d'un Canada tirant sa force et fierté de sa vocation bilingue*.

I. The Philosophy of Section 16 of the *Canadian Charter*

In this Part, I begin by reviewing (A) the promise that the affirmation of official languages and equality of status aimed to bring about before examining (B) the role of section 16 as the philosophical cornerstone for the *Charter*'s subsequent language provisions.

A. *The Strength of Constitutional Commitment*

Section 16 marks a departure from the philosophy governing language provisions in the Canadian Constitution prior to 1982. Neither the *Constitution Act, 1867* nor the other constitutional instruments addressed Canada's official language status.[7] It was not until 1969, with the adoption of the federal *Official Languages Act*,[8] that official language status was granted to French and English in matters related to the authority of Parliament. Because of the constitutional limitations on the jurisdiction of the federal government, the *Official Languages Act 1969* provided a delimited number of language rights and protections in matters under federal jurisdiction. Until 1982, Canada did not have – at either the legislative or constitutional level – an overarching statement of principle with respect to French and English.

By promoting a general commitment to official bilingualism – rather than to some of its features (as found in section 133 of the *Constitution Act, 1867*[9]) – to the constitutional level, the image of Canada was re-constituted and affirmed as a bilingual country in 1982. The importance attached to

6. If it has not been altogether rejected: *R. v. Beaulac*, [1999] 1 S.C.R. 768; *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3; *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563 (Bastarache J., dissenting).

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

8. R.S.C. 1970, c. O-2 [*Official Languages Act 1969*], replaced by the *Official Languages Act*, R.S. 1985, c. 31 (4th Supp.) [*Official Languages Act 1988*].

9. *Supra* note 3.

this new status, and to the other language provisions that follow section 16, can be perceived from the relationship of the language provisions of the *Charter* to the notwithstanding clause[10] and the amendment formula.[11] First, the legislature may not legislate «notwithstanding» the language rights guaranteed by the *Charter* as sections 16 to 23 are excluded from the scope of section 33.[12] Second, the consent of Parliament and the legislative assembly of *every* province is required for any amendment respecting «the use of the English or the French language».[13] By requiring unanimity among Canada's legislatures before subsection 16(1) can be amended, the affirmation of Canada's official languages and their equality of status can be understood as contributing to and promoting pan-Canadian identity.[14] The statement of principle in section 16 is that all Canadians may look to the federal authority, everywhere in Canada, as respecting and promoting bilingualism. Reference must also be made to section 43 of the *Constitution Act, 1982*, which permits a province – with the consent of Parliament – constitutionally to affirm itself officially bilingual; New Brunswick did so in 1982.[15] Despite the importance of section 16 and the other language rights of the *Charter*, the Supreme Court did not immediately endorse an important role for language at the constitutional level.

The Supreme Court's first interpretation of section 16 was undertaken in the light of an understanding of political negotiation and compromise

10. *Charter*, s. 33(1): «Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.»

11. The general procedure for amending the Constitution requires «resolutions of the Senate and House of Commons» and «resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces» (*Constitution Act, 1982*, s. 38).

12. Of course, section 33 is not limited to cases where the legislature chooses to ignore the *Charter*; it may also be used where the legislature disagrees, reasonably and in good faith, with the Supreme Court on the meaning of the *Charter*: see J Waldron «Some Models of Dialogue Between Judges and Legislators» (2004) 23 Supreme Court L.Rev. (2d) 7 at 36.

13. *Constitution Act, 1982*, s. 41(*c*).

14. José Woehrling and André Tremblay, «Les dispositions de la Charte relatives aux langues officielles (articles 16 à 22)» at 1037-38 note that the three sets of rights excluded from section 33 – democratic rights, mobility rights, and language rights – were understood by the promoters of the *Charter*, and Prime Minister Trudeau in particular, as playing a central role in the affirmation of pan-Canadian identity.

15. This procedure would equally allow a province to abolish, attenuate, enhance, or fully commit to bilingual status with the consent of Parliament.

that mandated a restrictive and narrow role for the judiciary, which it confused for a restrictive and narrow role for language rights.[16]

The affirmation that the language provisions of the *Charter* are the fruit of political compromise is either a statement so obvious that it needs no mention[17] or, as was the case, an unjustified basis for denying the political promise contained in the language guarantees of the *Charter*.[18] For the Supreme Court, language rights were distinct in kind from so-called «universal» rights and therefore warranted a more restrictive interpretation; their growth was for the political process and not a proper subject of judicial interpretation. Relying on the «public knowledge that some provinces other than New Brunswick – and apart from Quebec and Manitoba – were expected ultimately to opt into the constitutional scheme or part of the constitutional scheme prescribed by ss. 16 to 22 of the *Charter*», Beetz J. in *Société des Acadiens* reasoned that if the provinces «were told that the scheme provided by ss. 16 to 22 of the *Charter* was [interpreted by the courts to be] inherently dynamic and progressive», they would have «no means to know with relative precision what it was that they were opting into».[19]

This approach was disingenuous. First, reading down the scope and significance of the *Charter*'s language rights in the name of maintaining the role of the political process denied language rights their priority and importance in the legal landscape of Canada. As we will review below, an expansive understanding of constitutional rights need not be equated with an expansive role for the judiciary. Moreover, a restrictive interpretation of language rights is contrary to the claim – sustained by the fact the language rights are withdrawn from the notwithstanding clause of the *Charter* and are not subject to the general constitutional amendment formula – that this is one negotiated political compromise that was not in-

16. *Société des Acadiens*, [1986] 1 S.C.R. 549 at 578 (Beetz J.).

17. On Constitutions being constantly subject to political renegotiating, see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995). On the political compromises surrounding the patriation of the Canadian Constitution in 1982, see R.A. Macdonald, «Postscript and Prelude – The Jurisprudence of the Charter: Eight Theses» (1982) 4 Supreme Court L. Rev. 321.

18. For an analysis of the political compromise doctrine, see Luc Huppé, «Droit constitutionnel—Article 16 de la Charte des droits et libertés—Égalité de Statut des Langues Officielles—Une Intention ou une Obligation?: *Société des Acadiens* c. *Association of Parents*» (1988) 67 Can. Bar Rev. 128 at 140ff and Leslie Green «Are Language Rights Fundamental?» (1987) 25 Osgoode Hall L.J. 639 at 669.

19. *Société des Acadiens*, [1986] 1 S.C.R. 549 at 579.

tended to be open to *re*-negotiation through the political process in the short- to mid-term.[20]

Second, a concern for the «relative precision» of *Charter* rights has not had currency in justifying a narrow constitutional interpretation of other *Charter* rights. Consider, for example, the «dynamic and progressive» interpretation given by the Supreme Court to section 7's «principles of fundamental justice».[21]

Third and most importantly, the narrow approach to language rights promoted by Beetz J. disappointed the people of Canada and New Brunswick who *had* opted in. It violated their expectations that the language rights of the *Charter* would be «a fundamental tool for the preservation and protection of [the] official language communities»[22] of Canada and New Brunswick. It is regretful that the Supreme Court in *Société des Acadiens* did not pay greater heed to the reflection of Dickson C.J., dissenting in that case, that section 16 «provides a strong indicator of the purpose of the language guarantees in the *Charter*»:[23] namely, a manifest commitment by the governments of Canada and New Brunswick to official bilingualism and equality of status within their jurisdictions.

In the light of this first interpretation of section 16 by the Supreme Court – an interpretation that remained in favour until 1999 – one was led to conclude with Huppé that if Canada's official languages gained anything by being positioned in the *Charter* «c'est bien la certitude de ne devoir demeurer désormais que cet absolu qu'on enchâsse par idéalisme mais qui s'évanouit lorsqu'on légifère.»[24] It is this gulf between the promise of section 16 and its actualization on which this paper focuses.

Almost twenty years after *Société des Acadiens*, the Supreme Court accepted that it had erred in its approach to language rights. It recognized that constitutional negotiations are in essence about compromise and yet,

20. This claim must be qualified by (1) the need to interpret the language provisions, which requires important political choices to be made, (2) the fact that the negotiated compromise of 1982 was achieved without the consent of the Parti Québécois government of Quebec, and (3) the constitutional re-negotiations at Meech Lake (1987-1990) and Charlottetown (1992).

21. See *Reference re Motor Vehicle Act*, [1985] 2 S.C.R. 486.

22. *R. v. Beaulac*, [1999] 1 S.C.R. 768 at [25].

23. *Société des Acadiens*, [1986] 1 S.C.R. 549 at 565 (Dickson C.J.).

24. Luc Huppé, «Droit constitutionnel—Article 16 de la Charte des droits et libertés—Égalité de Statut des Langues Officielles—Une Intention ou une Obligation?: *Société des Acadiens* c. *Association of Parents*» (1988) 67 Can. Bar Rev. 128 at 130.

«that does not render them unprincipled».[25] Matters as important to Canadian identity as official bilingualism warrant respect and command attachment. To this end, the Court, legislatures, and Canadians have all understood language rights as a part of the Canadian constitutional culture devoted to protecting minorities,[26] as a special instantiation of equality,[27] and as promoting the personal autonomy of the individual, «dont le plein épanouissement passe par son nécessaire enracinement dans une communauté culturelle et linguistique particulière.»[28] Hence, even if section 16 is acknowledged to be the fruit of political compromise, the reason for this compromise must be fully appreciated. As Foucher comments:

> il n'y a pas lieu de comparer le compromis de 1867 avec celui de 1982, car les circonstances donnant lieu à ce compromis ne sont pas les mêmes. En 1867, le Canada n'avait pas adopté de loi sur les langues officielles, le Nouveau-Brunswick n'avait pas de loi sur l'égalité des communautés linguistiques, le Manitoba n'avait pas agi en violation de l'article 23 de sa loi constitutive pendant près de cent ans; on ne savait pas encore que l'article 93 de la *Loi constitutionnelle de 1867* ne protégeait pas les droits linguistiques.[29]

Section 16 and the other language provisions must be interpreted as contributing to the remedying of past injustices. This frame of reference for interpretation was extended early on to section 23 minority language rights[30] but not to sections 16 to 20.[31]

Beyond the recognition of the importance of the commitment to official languages undertaken through political compromise, sections 16, 20, and 23 are important indicators of a shift in the constitutional consideration given to language with the *Charter*. Unlike sections 17, 18, and 19 which were inspired by section 133 of the *Constitution Act, 1867*, sections

25. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at [80].

26. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

27. *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 238.

28. José Woehrling and André Tremblay, «Les dispositions de la Charte relatives aux langues officielles (articles 16 à 22)» at 1050.

29. Pierre Foucher, «L'interprétation des droits linguistiques constitutionnels par la Cour suprême du Canada» (1987) 19 Ottawa L. Rev. 380 at 396.

30. e.g. *Mahe v. Alberta*, [1990] 1 S.C.R. 342.

31. That is, until *R. v. Beaulac*, [1999] 1 S.C.R. 768 at [25]: «Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada» (emphasis in original). See also *Société des Acadiens*, [1986] 1 S.C.R. 549 at 567 (Dickson C.J.).

16, 20 and 23 were new to the Constitution. They reflected a shift in the importance of language. Unfortunately, the similarity between section 133 and sections 17 to 19 led the Supreme Court to overlook the important difference in context in which these two sets of language guarantees find themselves. Critically, section 133 was alone in the *Constitution Act, 1867* in speaking to language rights whereas sections 17 to 19 are encompassed under the *Charter*'s heading «Official Languages of Canada». Ignoring these important differences, the Supreme Court concluded that the interpretation to be given to sections 17 to 19 ought to be the same as that given to section 133 of the *Constitution Act, 1867*.[32] The following statement from the Supreme Court in *MacDonald* illustrates why this approach is erroneous:

> *Section 133 has not introduced a comprehensive scheme or system of official bilingualism, even potentially, but a limited form of compulsory bilingualism* at the legislative level, combined with an even more limited form of optional unilingualism at the option of the speaker in Parliamentary debates and at the option of the speaker, writer or issuer in judicial proceedings or processes.
>
> [...]
>
> *This incomplete but precise scheme is a constitutional minimum* which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union.[33]

This dicta suggests that if the *Constitution Act, 1867* included a «comprehensive scheme» or a general affirmation of official bilingualism, a different interpretation would be mandated. In such a case, the guarantees in section 133 of the *Constitution Act, 1867* would have been read, not as particular and delimited rights shy of a comprehensive policy of official bilingualism, but rather as features of a more general policy of official bilingualism and language equality.[34] This, to my mind, is how the language rights of the *Charter* ought to be approached. Given that sections 17 to 19 of the *Charter* follow

32. *Société des Acadiens*, [1986] 1 S.C.R. 549 at 571-72 (Beetz J.); *R. v. Mercure*, [1988] 1 S.C.R. 234 at [53].

33. *MacDonald v. Montreal*, [1986] 1 S.C.R. 460, at [103] and [104] (emphasis added). See also *Jones v. New Brunswick*, [1975] 2 S.C.R. 182 at 193; *Reference re Manitoba Language Rights (No. 2)*, [1992] 1 S.C.R. 212 at 222.

34. See *Société des Acadiens*, [1986] 1 S.C.R. 549 at 565 (Dickson C.J.). Some interpretations of s. 133, *Constitution Act, 1867* proceeded on a premise similar to this one: see e.g. *Quebec v. Blaikie (no. 1)*, [1979] 2 S.C.R. 1016 and *Quebec v. Blaikie (no. 2)*, [1981] 1 S.C.R. 312.

section 16's affirmation of official bilingualism, their interpretation ought to differ from the interpretation given to section 133. The affirmation of official bilingualism and equality of the French and English languages in section 16 must be appreciated as correcting the lacunae of the Constitution's language provisions and as mandating an interpretation of sections 17 to 19 that is more robust than the interpretation accorded to section 133. In this light, I follow Huppé when he reasons: «Si l'effet de l'article 16 se borne à servir d'écho à ce que proclame l'article 133, il devient inutile, puisque cette dernière disposition jouissait déjà du statut protégé de norme constitutionnelle. Le législateur, et à plus forte raison le constituant, ne parle pas pour rien dire».[35] The interpretation given to sections 17 to 19 in the light of section 133 of the *Constitution Act, 1867* must be revisited on this account.[36]

Moreover, as is argued below, the promise of section 16 requires that we read sections 17 to 23 as though the words «for greater certainty» prefaced them; in other words, sections 17 to 23 specify some – and only some – of the features of section 16. Assuming that the constituent authorities were familiar with the reasoning advanced in *MacDonald*, the decision constitutionally to affirm «English and French are the official languages of Canada» in unqualified language suggests that section 16 should play a role not only in endorsing a constitutional policy of official bilingualism, but more importantly – and critically – in promoting it beyond the topical guarantees that follow in sections 17 to 23.

It is undeniably true that Canada's language rights are the product of political negotiation and compromise. In this respect, they are distinctly Canadian. Yet, this should not arouse our surprise. As F.R. Scott, member of the Royal Commission on Bilingualism and Biculturalism, commented: «every country that has a language problem, attempts to solve it *in its own way. There are no universal rules*, except perhaps the rule that language rights must be respected if you are to have domestic peace.»[37] The distinc-

35. Luc Huppé, «Droit constitutionnel—Article 16 de la Charte des droits et libertés—Égalité de Statut des Langues Officielles—Une Intention ou une Obligation?: *Société des Acadiens* c. *Association of Parents*» (1988) 67 Can. Bar Rev. 128 at 136.

36. *Société des Acadiens*, [1986] 1 S.C.R. 549 at 565 (Dickson C.J.): «Whether s. 16 is visionary, declaratory or substantive in nature, it is an important interpretive aid in construing the other language provisions of the *Charter*».

37. F.R. Scott, «Language Rights and Language Policy in Canada» (1970-71) 4 Manitoba L.J. 243, at 249-50 [emphasis added]. See also Alan Patten and Will Kymlicka, «Introduction: Language Rights and Political Theory: Context, Issues, and Approaches» 1 in Will Kymlicka and Alan Patten (eds), *Language Rights and Political Theory* (New York: Oxford University Press, 2003) at 35.

tive character of our language rights should not counsel us to read them as less deserving than «universal» rights; we must embrace Canadian language rights *à la canadienne*; as *our* response to *our* situation.

B. *Un article de principe*

Under this heading, it is argued that section 16 of the *Charter*, being the first section under the heading «Official Languages of Canada», has a residual character and mandates an expansive reading of the language provisions that follow it.[38] I will maintain that sections 17 to 23 are illustrations of the principle of official bilingualism encapsulated in section 16 and that the scope and intensity of section 16 is not exhausted by sections 17 to 23.

We must begin by recognizing that affirming two languages as official languages leaves underspecified what consequences follow. There is no obvious specification of language rights; sections 16 and following are distinctively Canadian responses to the call for language rights. However, even if the constitutional affirmation of official bilingualism does not comprehensively determine what policies (constitutional or legislative) ought to follow, it is nonetheless erroneous to maintain that no policies are man-

38. The minority language education guarantee resides under its own heading («Minority Language Educational Rights») and is formulated in relatively precise terms:

> 23. (1) Citizens of Canada
> (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
> (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,
> have the right to have their children receive primary and secondary school instruction in that language in that province. [...]

Though section 23 is clearly a central component of Canada's official bilingualism policy and could have been included under the heading «Official Languages of Canada», the following considerations could explain its position under a different heading. It is the only language provision applicable to the federal authority and *all* provinces; the other provisions (except for s. 16(3) reviewed below) – for the time being – apply only to the federal authority and New Brunswick. Moreover, section 23 is restricted to members of certain specified groups unlike sections 16 to 20, which are the rights of all Canadians irrespective of their mother tongue or their parents' *parcours scolaire*.

dated or required.[39] It should be an obvious point that official bilingualism ought to mean something; we should not presume the Constitution to speak in silence. In teasing out the questions that official bilingualism ought to direct us to ask, we may be guided by the reflections of Patten and Kymlicka who survey «a number of different domains in which language policy choices get made»:[40]

- The use of language in the internal workings of the public service, both with respect to communication between employees and between officials and employees;
- The use of language in the offering and communication of public services by the government to the public;
- The use of language before the courts;
- The use of language in the legislative assembly;
- The language of education;
- Private language use;
- The consideration given to language in matters of immigration and naturalization;
- The consideration given to language in enlarging the State.

Though Patten and Kymlicka do not specifically address the question of the language of legislation, this also forms part of a language policy as does, in a vague sense, the image of the State (see Part II, heading B).

Patten and Kymlicka also list «official language declarations» as a domain of language policy, stating that such declarations «typically have both a substantive and a symbolic aspect.»[41] Without denying the great symbolic importance of section 16, my focus in this part is on the substantive aspect of the affirmation of official languages in section 16. My con-

39. Peter W. Hogg states erroneously that «[i]t is not clear what, *if any*, practical consequences flow from official status» (*Constitutional Law of Canada* (updated looseleaf version) at 53-21, [footnote omitted, emphasis added]). For a similar view, see André Tremblay, «Les droits linguistiques (Articles 16 à 23)» in Gérald-A. Beaudoin and Walter S. Tarnopolsky (eds), *Charte canadienne des droits et libertés* (Montreal: Wilson et Lafleur, 1982) 559 at 566 and José Woehrling and André Tremblay, «Les dispositions de la Charte relatives aux langues officielles (articles 16 à 22)» at 1067-68.

40. Alan Patten and Will Kymlicka, «Introduction: Language Rights and Political Theory: Context, Issues, and Approaches» at 16-25.

41. Alan Patten and Will Kymlicka, «Introduction: Language Rights and Political Theory: Context, Issues, and Approaches» at 25.

tention is that declaring a language to be official – as section 16 does for French and English – creates the presumption that the State has a *duty* (and, correspondingly, the citizen has a *right* against the State) to articulate a language policy with respect to each of the domains identified by Patten and Kymlicka. This is a «presumption» rather than an «imperative» because other considerations may counter it.[42] A brief review of sections 17 to 23 will illustrate that the *Charter* addresses many of the domains surveyed by Patten and Kymlicka, though some are left to the residual character of section 16.

Section 17[43] addresses the language policy in the proceedings of Parliament and section 18[44] does so with respect to the inner workings and enactments of Parliament. Section 19[45] addresses the use of language in courts established by Parliament and section 20[46] addresses communications by the public with federal institutions. The language policy of public education is outlined in section 23. Although Patten and Kymlicka do not identify the use of language in the public service as a domain in which language policy choices get made, in Part II, heading D, I argue that the right to work in the official language of choice is guaranteed by the affirmation of equality of status in subsection 16(1). As to private language use and immigration, naturalization, and State enlargement, the *Charter* contains no specific language provisions on point. It is my contention that section 16 must be interpreted to extend to these considerations. Indeed, Canada's legislative policies extend to these topics: let us consider the bilingualism

42. E.g., the federal authority may be prevented from legislating in a domain of provincial jurisdiction. Related to this and taking the example of freedom of expression, the State's role in the domain of private language use may be limited by the guarantee of freedom of expression in *Charter*, s. 2(*b*).

43. *Charter*, s. 17(1): «Everyone has the right to use English or French in any debates and other proceedings of Parliament.»

44. *Charter*, s. 18(1): «The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.»

45. *Charter*, s. 19(1): «Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.»

46. *Charter*, s. 20(1): «(1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.»

requirements incumbent on the private airline Air Canada[47] (private language use) and the consideration given to knowledge of official languages in immigration applications (immigration and naturalization)[48].[49]

What, then, is the relationship of section 16 to the language sections that follow it? Beyond the role of section 16 in interpreting sections 17 to 23 (see heading A, above), I contend that section 16 serves two residual functions: it can increase the *scope* of the constitutional consequences of official bilingualism and it can increase the *intensity* of specified obligations under official bilingualism. The distinction between scope and intensity may be easy to discern in some cases: for example, increasing the requirements of official bilingualism to the workings of the Royal Canadian Mounted Police (the federal police force) in all its operations, even when asked to enforce provincial law, is a question of *scope*,[50] whereas narrowly reading the limitations in section 20 so as to increase the instances of official bilingualism in communications with the public is a question of *intensity*. In other cases, the distinction between scope and intensity will be more difficult to discern: for example, is extending to regulations the obligation to enact statutes in both French and English better understood as expanding the scope of legislative bilingualism to the executive or as increasing the intensity of bilingualism for matters falling under the legislative authority of Parliament?[51]

Focusing here on scope, section 16 can play a role where the other language provisions of the *Charter* are silent. To my mind, section 16 extends Parliament's obligations for official bilingualism in debates and proceedings (section 17) to ensuring simultaneous translation so that all Members of Parliament can be understood in their official language choice.[52] It furthermore requires that where Parliament's debates and proceedings are broadcast to the public, they are available in both official languages.[53] Likewise, the federal government prints and publishes much more than Par-

47. *Air Canada Public Participation Act*, R.S., 1985, c. 35 (4th Supp.), s. 10.

48. *Immigration and Refugee Protection Act*, 2001, c. 27, s. 3.

49. I leave aside the question of enlargement, though we could refer to the constituting instruments of the provinces of Manitoba, Saskatchewan, and Alberta, where one can find provisions similar to s. 133 of the *Constitution Act, 1867*.

50. See *R. v. Doucet*, [2003] N.S.J. no. 516; *Doucet v. Canada*, [2004] F.C.J. No. 1813 (F.C.T.D.).

51. See *Quebec v. Blaikie (no. 1)*, [1979] 2 S.C.R. 1016 and *Quebec v. Blaikie (no. 2)*, [1981] 1 S.C.R. 312.

52. See *Official Languages Act 1988*, s. 4(2).

53. See discussion in *Quigley v. Canada (House of Commons)*, [2003] 1 F.C. 132 (T.D.).

liament's «statutes, records and journals» (section 18); all official government publications should be available in both official languages.[54] Moreover, as the Supreme Court has recognized, all legislation (including regulations) must be *enacted*, rather than merely printed and published, in both official languages.[55] To translate an enactment from English to French (or vice versa) is to deny the equality of status of English and French throughout the stages of adopting a bill, including the first, second, and third readings and the study of a bill in committee. The right to «use» either English or French in a court established by Parliament (section 19) must, in the name of official bilingualism, be extended to the right of an accused to receive disclosure in the official language of choice.[56] Furthermore, section 16 should be read as creating a duty on the State to communicate a summons in both official languages.[57]

Focusing now on intensity, limitations of «significant demand» and «nature of the office» to the right to communicate with federal institutions (section 20) ought to be interpreted in a manner that promotes official bilingualism.[58] The presumption must be in favour of bilingual services given the statement of equality of French and English in section 16. Government ought to demonstrate *both* the absence of a sufficient demand *and* that the nature of the office are such that it would not be unreasonable to withhold bilingual services before doing so.[59] Moreover, in furtherance of the presumption in favour of bilingual services, the government should only be heard to offer a justification for non-bilingual services after a period of «active offer» of bilingual services.[60] Citizens should bear no burden of proof:

54. See *Official Languages Act 1988*, ss. 11-12.

55. *Quebec v. Blaikie (no. 1)*, [1979] 2 S.C.R. 1016 at 1022: «What is required to be printed and published in both languages is described as «Acts» and texts do not become «Acts» without enactment.»

56. See contra *R. v. Rodrigue* (1994), 91 C.C.C. (3d) 455 (Y.T.S.C.).

57. Contra *Quebec v. Blaikie (no. 1)*, [1979] 2 S.C.R. 1016 at 1030; *MacDonald v. Montreal*, [1986] 1 S.C.R. 460 where the right to use English or French is read as extending to the individual agents of the State rather than as requiring institutional bilingualism.

58. See Wilson J. in *Société des Acadiens*, [1986] 1 S.C.R. 549 at 620: «If I am correct in my characterization of s. 16(1) as constitutionalizing a societal commitment to growth, then presumably our understanding of what is significant and what is reasonable under present conditions will evolve at a pace commensurate with social change.»

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

60. *R. v. Gautreau*, [1989] N.B.J. No. 1005 (N.B.Q.B., T.D.) *per* Richard C.J. (rev'd on other grounds: (1990), 109 N.B.R. (2d) 54). See also *Official Languages Act 1988*, s. 28 (though «active offer» follows only after a duty of bilingual services is established).

the presumption of bilingual services is in their favour. What is more, I maintain that the principle of equality in subsection 16(1) requires that there be a minimum of bilingual services in all federal institutions, such that no Canadian ought to be told that communicating in the other official language is the only way to receive services. Federal offices with full bilingual services ought to coordinate with less bilingual offices so that the delay in responding to the query of a Canadian ought to be the only significant difference between a fully bilingual office and one that is not.

These are but some examples of the residual role that section 16 should be understood to play. To those that would argue that this interpretation subverts the specificity of sections 17 to 23, we must respond that section 16 is too general to justify reading it as though it was limited to no more than the features of official bilingualism that follow it in sections 17 to 23.[61] To this end, I cannot agree with Woehrling and Tremblay that «la déclaration formelle du statut de langue officielle *n'ajoutera rien*, comme tel, aux dispositions prévoyant de façon spécifique les conséquences de ce statut en termes de droits pour les individus et d'obligations corrélatives pour la puissance publique».[62] Rather, sections 17 to 23 do not close the categories of activity (the sites) to be covered, nor do they exhaust the procedural and structural possibilities for achieving the goals of section 16 (the modes). That is, the modes and sites of section 16 are as expansible as technology permits us to communicate in multiple ways (modes) and as the changing roles of government permit it to pursue its objectives with new institutions and tools of governance (sites).

Section 16 does not permit us to interpret the language provisions of the *Charter* as though they were specific instances of an incomplete language policy. It requires that all constitutional language provisions be read as promoting a comprehensive constitutional policy of official bilingualism. In this respect, the «watertight compartments» approach developed in some Courts of Appeal must be rejected.[63] It ought not to follow that *because* the issuance of a speeding ticket is part of a «court proceeding» and

61. See Henri Brun and Guy Tremblay, *Droit constitutionnel*, 4th ed. (Cowansville, Que.: Éditions Yvon Blais, 2002) at 835.

62. José Woehrling and André Tremblay, «Les dispositions de la Charte relatives aux langues officielles (articles 16 à 22)» at 1067-68 (emphasis added).

63. Hogg also holds this view: «These subss. (1) and (2) of s. 16 are probably not addressed to communications between government and the public, because that topic is addressed by s. 20» (Peter W. Hogg, *Constitutional Law of Canada* (updated looseleaf version), p. 53-21).

therefore falls under section 19, it *cannot equally* be considered a «service to the public» under section 20.[64] This is not to say that the issuance of a speeding ticket is a «service to the public» under section 20; however, this question ought to be determined on its merits. Rather than avoid conflict by defining rights narrowly, we should embrace an expansive interpretation of all language rights and see to it that conflicts are resolved in the spirit of official bilingualism and – taking our direction from subsection 16(3) – in favour of what would «advance the equality of status or use of English and French».[65]

Before turning to Part II, it is important to highlight that the interpretation of section 16 that is here endorsed is not innovative: Parliament's *Official Languages Act 1988* guarantees much of what has been outlined above. I suggest that Parliament's *Act* represents a generous and correct interpretation of the *Charter*'s official bilingualism. We must not forget that the Supreme Court holds no monopoly in interpreting the Constitution; indeed, Parliament has positioned itself as a more aggressive defender of language rights than the Supreme Court.

II. The Constitution of Official Bilingualism

In this Part, I argue that subsection 16(1) is not merely a declaratory principle but a mandatory constitutional provision (heading A). Under heading B, subsection 16(1) is read as containing two distinct yet related halves and the focus will be on the first half. It will be argued that the reference to «Canada» must be read more broadly than the reference to the «institutions of the Parliament and government of Canada». Under heading C, the reference to the equality of French and English in the second half of subsection 16(1) is explored and, under heading D, I argue that the right to work in the federal public service in either official language is guaranteed by the second half of subsection 16(1).

64. Contra *R. v. Simard* (1995), 27 O.R. (3d) 97 (Ont. C.A.).

65. See *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563 at [36] (Bastarache J., dissenting): «[T]he first step is not to read down the protections to eliminate inconsistencies, but to make sense of the overall regime in light of the constitutional imperative of approaching language rights purposefully, with a view to advancing the principles of equality and protection of minorities.»

A. *A Mandatory Constitutional Provision*

There are two schools of thought with respect to the role of section 16.[66] The first understands the section as an abstract, preamble-like provision which articulates an objective or general goal, the parameters of which are exhausted by the sections that follow it. The second understands the section as a fundamental and autonomous principle in the constitutional affirmation of official bilingualism. I favour the second understanding and view section 16 as the heart of the *Charter*'s official language guarantees. To demonstrate why this understanding is the correct one, I will challenge the arguments in favour of the first school of thought and make out a case in favour of the alternative understanding. Under heading B, C, and D, I review some possible consequences of adopting this approach.

The argument limiting subsection 16(1) to being no more than a declaration of principle focuses principally on its wording. Three principal arguments are relied on in support of the view that official bilingualism is a statement of principle without mandatory force: the absence of a specified right-holder; the indeterminacy of the features of official bilingualism; and the role of the judiciary. I will review these arguments in turn and explain why a different approach is required for section 16(1) of the *Charter*.

Absence of a specified right-holder. Subsection 16(1) speaks not of a right-holder as such, but affirms the status, rights, and privileges of the English and French *languages*. Though this formulation differs from the formulation of fundamental freedoms («Everyone»), the right to vote and mobility rights («Every citizen of Canada»), legal rights («Everyone», «Any person charged», «A party or witness»), equality rights («Every individual»), and minority language educational rights («Citizens of Canada»), it is not foreign to constitutional rights in Canada. The very guarantee of all rights and freedoms in the *Constitution Act, 1982* is formulated in the affirmative (section 1: «The *Canadian Charter of Rights and Freedoms* guarantees ...»), the sitting of Parliament is written in the imperative (section 5: «There shall be a sitting of Parliament»), and aboriginal and treaty rights are «recognized and affirmed» (section 35). In short, the absence of a specified right-holder in subsection 16(1) should not lead one to conclude that the section is merely declaratory. Though there may be difficulties with respect to standing (for example, do I act «in right of the French language» when I claim that the sta-

66. See André Tremblay, «Les droits linguistiques (Articles 16 à 22)» 15-1 in Gérald-A. Beaudoin and Errol Mendes (eds), *Canadian Charter of Rights and Freedoms* (3rd ed) (Toronto: Carswell, 1996) at 15-12.

tus of French in a given institution is unequal to that of English?), these difficulties are not dissimilar to those that face courts with respect to the other constitutional rights listed above or in cases of public interest standing.[67] Under heading C, it is argued that the absence of reference to «Anglophones» and «Francophones» or «English-Canadians» and «French-Canadians» could be understood as a decision by the drafters of the *Charter* to encompass all Canadians, i.e. making Canada's duality *linguistic* rather than *cultural*.[68] In sum, so long as it is recognized that section 16 imposes a duty on the State, the corresponding beneficiary of that duty – the right-holder – should not be denied the recognition of the constitutional force of language rights.

Indeterminacy of consequences. Above, we distinguished indeterminate consequences from the absence of consequences (Part I, heading B). Although the affirmation of official bilingualism does not specify, in and of itself, what is entailed, it does not follow that nothing is entailed. The courts may, rightly, be hesitant to specify the features of official bilingualism. Yet, judicial restraint must be distinguished from narrow constitutional interpretation. Indeed, I take Parliament's *Official Languages Act 1988* as an instantiation of the legislature's responsibility to interpret the Constitution and to specify the meaning of sections 16 and following of the *Charter*.

Institutional considerations. The courts' concern for the importance of the political process in the exposition of official bilingualism should be embraced. It is true that «the legitimacy of the policy on official bilingualism is contingent upon the quality of the public deliberations that produce it»,[69] and in this light, courts should articulate remedies that promote public deliberation and political responsibility and that avoid determining the outcomes of such political engagement. The role of the courts under the Constitution ought not to be confused with the scope of the Constitution itself, such that a court's unwillingness to participate in an area of legal debate (for reasons of competence or other) implies that constitutional guarantees relevant to that area are narrowly construed. Rather, an appropriate way to reconcile a generous interpretation of language rights with a limited judicial role is for a court to make a declaration that the govern-

67. See José Woehrling and André Tremblay, «Les dispositions de la Charte relatives aux langues officielles (articles 16 à 22)» at 1070.

68. This is not to deny the relationship between language and culture (see e.g. *Mahe v. Alberta*, [1990] 1 S.C.R. 342 at [32]); rather, it is to affirm a distinction between, e.g., French-Canadians and French-speaking Canadians (a point taken up under heading C).

69. Pierre A. Coulombe, «Citizenship and Official Bilingualism in Canada» 273 in Will Kymlicka and Wayne Norman, *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) at 286.

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

Having reviewed the arguments in favour of reading section 16 as merely declaratory and having articulated a case in favour of reading it as mandatory, I now turn to consider the consequences of reading subsection 16(1) as mandatory.

B. *Official Language Status*

Thus far, I have referred to the affirmation of official languages and equality of status in subsection 16(1) without speaking to how they interact, except that they work in concert in informing the philosophy of section 16 and the interpretation of the *Charter*'s language provisions. Under this heading, I maintain that both halves of section 16 work in concert, while proposing that the reference to official languages be read as separate from the reference to equality of status. My aim is to demonstrate that the reference to «Canada» in the first half of subsection 16(1) should be given a wider meaning than the reference to «institutions of the Parliament and government of Canada» in the second half. This argument requires that we compare both official language versions of subsection 16(1) of the *Charter*:[70]

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

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

This subsection contains two verbs («are» and «have»; «sont» and «ont») that predicate two separate objects («official languages» and «equality of status and equal rights and privileges»; «langues officielles» and «statut et [...] droits et privilèges égaux»), which in turn are given individual scope by two distinct prepositional phrases («of Canada» and «in all institutions of the Parliament and government of Canada»; «du Canada» and «dans les institutions du Parlement et du gouvernement du Canada»).

The English version of subsection 16(1) uses the conjunction «and»; the French version divides the first half from the second with a semi-colon.

70. On the importance of reading both versions of bilingual legislation, see Roderick A. Macdonald, «Legal Bilingualism» (1997) 42 McGill L.J. 119.

Both «and» and the semi-colon function grammatically to compound what could otherwise be two independent sentences. In neither case is a relative clause employed (i.e. «which have» or «qui ont») to indicate subordination between the statements. The separation between both halves is made especially clear in the French version which even repeats the subject («ils»), making the semi-colon grammatically transposable with a period, so that the English version of subsection 16(1) could equally be stated as:

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

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

> The English and French languages are the official languages of Canada for all purposes of the Parliament and Government of Canada, and possess and enjoy equality of status and equal rights and privileges as to their use in all the institutions of the Parliament and Government of Canada. [Emphasis added]

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

In this case, the section limits the scope of «Canada» to Parliament and the Government of Canada. Section 16 does not so limit the scope of «Canada».

Many resist reading «Canada» more broadly than the «institutions of the Parliament and government of Canada». Some assume that it is limited to the federal authorities without explaining why this should be so,[71] whilst

71. See e.g. *Société des Acadiens*, [1986] 1 S.C.R. 549 at 616 (Wilson J.); André Braën, «Language Rights» in Michel Bastarache (ed.), *Language Rights in Canada* (Montreal: Yvon Blais, 1987) 1 at 49.

others, recognizing the difference in formulation between section 2 of the *Official Languages Act 1969* and subsection 16(1) of the *Charter*, nonetheless conclude that the latter provision ought to be read as though the words «for all purposes of the Parliament and Government of Canada» followed «Canada».[72] In what follows, I outline what would be some consequences of reading «Canada» more broadly. But first, a brief word on the meaning of the expression «institutions of the Parliament and government of Canada» in section 16.

It is no understatement that «institutions» is a difficult juristic concept.[73] The expression «institutions of the Parliament and government of Canada» is used in sections 16 and 20, whereas the expressions «Parliament» (sections 17 and 18) and «court established by Parliament» (section 19) are used in other language provisions. Unlike paragraph 32(1)(*a*) («Application of the Charter») which refers to the «Parliament and government of Canada»,[74] the expression «institutions of the Parliament and government of Canada» in sections 16 and 20 has not received much judicial attention.[75] I propose to read the reference to «institutions» as specifying that the obligation of linguistic equality is primarily one of institutional, rather than personal, responsibility. This interpretation overcomes the restrictive interpretation adopted by the Supreme Court in 1986, which focussed on conflicts between the rights of individuals.[76] By interpreting language rights as the right of a speaker to not be interfered with in language choice and extending this right to all potential speakers, the Court rea-

72. See, e.g. André Tremblay, «Les droits linguistiques (Articles 16 à 22)» in Gérald-A. Beaudoin and Errol Mendes (eds), *Canadian Charter of Rights and Freedoms* (3rd ed) (Toronto: Carswell, 1996) 15-1 at 15-8; José Woehrling and André Tremblay, «Les dispositions de la Charte relatives aux langues officielles (articles 16 à 22)» at 1033.

73. Roderick A. Macdonald provides a helpful analysis in «Les Vieilles Gardes. Hypothèses sur l'émergence des normes, l'internormativité et le désordre à travers une typologie des institutions normatives» 233 in Jean-Guy Belley (ed.), *Le droit soluble: contributions québécoises à l'étude de l'internomativité* (Paris: L.G.D.J., 1996).

74. *Charter*, s. 32(1)(a): «This Charter applies to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories».

75. But see the discussions in José Woehrling and André Tremblay, «Les dispositions de la Charte relatives aux langues officielles (articles 16 à 22)» at 1087-88; Peter W. Hogg, *Constitutional Law of Canada* (updated looseleaf version) at 53-21, note 107; Henri Brun and Guy Tremblay *Droit constitutionnel*, 4th ed. (Cowansville, Que.: Éditions Yvon Blais, 2002) at 844.

76. *Société des Acadiens*, [1986] 1 S.C.R. 549 and *MacDonald v. Montreal*, [1986] 1 S.C.R. 460.

soned that one speaker could not seek to impose on another speaker a language choice. In other words, the Court reasoned that language rights permitted speakers to speak but not to be understood. Alternatively, by focussing on the obligation of the «institution» to be bilingual, this conflict largely dissipates: «[i]nstitutional bilingualism is achieved when rights are granted to the public and corresponding obligations are imposed on institutions [...]. No rights are given as such to institutions.»[77] To this end, sections 16 and 20 require that institutions be structured so as to satisfy the requirements of official bilingualism and the equality of French and English.

Given the partial overlap between subsection 16(1) and section 32, the jurisprudence under section 32 will assist in determining the application of subsection 16(1), especially with respect to the delegation of government functions.[78] By way of illustration, federal departments, governmental bodies, administrative bodies, Crown corporations, the R.C.M.P., Canada Post, and – more controversially – the Territories are all subject to subsection 16(1).[79] The relevant question is not what form institutions traditionally assume, but rather what governance functions ought to be assumed by government institutions. A willingness to approach the question outside the paradigm of institutional form has guided the Court in some of its section 32 interpretations.[80] It should also guide the interpretation of section 16.[81]

How, then, is «Canada» to be interpreted if it is to be read more broadly than «institutions of the Parliament and government of Canada»? It must first be acknowledged that «Canada» is not to be read as including the provincial authorities, as subsection 16(2) of the *Charter* («Official languages of New Brunswick») and the simplified amendment procedure at

77. *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563 at [36].

78. See *Moncton v. Charlebois*, [2001] N.B.J. No. 480, 242 N.B.R. (2d) 259 (N.B.C.A.) and *Official Languages Act 1988*, s. 25.

79. See, e.g. Nicole Vaz and Pierre Foucher, «The Right to Receive Public Services in Either Official Language» 251 in Michel Bastarache (ed.), *Language Rights in Canada* 2nd ed. (Cowansville, Que.: Yvon Blais, 2004) at 273-74, 351ff.

80. See e.g. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451.

81. Though not a s. 16 case, the majority's interpretation in *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563 of «institution» in the New Brunswick *Official Language Act*, S.N.B. 2002, c. O-0.5, ss. 1 and 22, discloses a narrow appreciation of «institution» for the purposes of official bilingualism.

section 43 of the *Constitution Act, 1982* make clear. The following discussion of the meaning of «Canada» seeks only to set the groundwork for a more complete answer.

Office of the Governor General of Canada and of the Prime Minister of Canada. In her parliamentary capacity, the Governor General of Canada part of the «institution of the Parliament» as that expression is used in subsection 16(1).[82] In addition, the Governor General, as an officer within the government of Canada, is part of «all institutions of the government of Canada». However, the Governor General is also the Canadian Head of State.[83] To employ the language of section 20, the «nature» of the Office representing the Head of State of Canada requires that it be officially bilingual. Similarly, the Office of the Prime Minister, as the head of the Canadian Federation, should also be officially bilingual.

The Seat of the Government of Canada. Ottawa is the national capital[84] and a matter of national concern.[85] The lack of bilingualism in the City of Ottawa is what F.R. Scott aptly recognized as «an anomaly that must be ended if the concept of equal partnership is to be given real as well as symbolic meaning.»[86] As the home of all Canadians, the national capital must fulfil the affirmation of official bilingualism in section 16.[87] Official bilingualism must cross jurisdictional boundaries and affect the status of the municipality of Ottawa. In the national capital, the State – municipal, provincial, and federal – should be a model of official bilingualism.

The Supreme Court of Canada. The language provisions of the *Charter* already speak to the Supreme Court of Canada. As a court established by Parliament,[88] «either English or French may be used by any person in, or in any pleading in or process issuing from» the Supreme Court. However, section 19 has not been interpreted by the Supreme Court as guaranteeing

82. *Constitution Act, 1867*, s. 17: «There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.»

83. *Constitution Act, 1867*, ss. 9-10.

84. *Constitution Act, 1867*, s. 16: «Until the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa.»

85. *Munro v. Canada*, [1966] S.C.R. 663.

86. F.R. Scott, «Language Rights and Language Policy in Canada» (1970-71) 4 Manitoba L.J. 243 at 252.

87. Consider *Official Languages Act*, s. 22(a) (duty of all federal institutions in the National Capital Region to ensure that any member of the public can communicate with and obtain available services in either official language).

88. *Supreme Court Act*, R.S.C. 1985, c. S-26, enacted under the authority granted to Parliament by the *Constitution Act, 1867*, s. 101.

the right to be understood. It is only through the door of natural justice that an interpreter is legally required.[89] Parliament, in 2002, corrected this narrow construction and modified the *Official Languages Act 1988* to require that «every judge or other officer who hears [...] proceedings is able to understand [the official language or languages chosen by the parties] without the assistance of an interpreter».[90] Yet, the *Official Languages Act 1988* expressly excludes the Supreme Court of Canada from this duty.[91] At the apex of the Canadian judicial system as the final court of appeal in all matters, the Supreme Court is more than a «federal institution»; it is a Canadian institution. Parties ought to be entitled to address themselves, and to be understood directly, in their official language of choice. The use of an interpreter strikes at the status of the Supreme Court in a bilingual country. As explains Roderick Macdonald: «The reason why it is important to be able to argue before a court in one's own language owes much to the rhetorical power of language. [...] If a judgment is the rhetorical act of convincing, its presentational elements are equally important. The process of argumentation in law is more than a process of rational justification; it is also a process of presentational dialogue.»[92]

I contend that section 16 of the *Charter* renders unconstitutional the exception for the Supreme Court in the *Official Languages Act 1988* and obliges the government to nominate judges able to understand parties in either official language or obliges the Court to hear cases in panels able to understand the parties directly. This conclusion is the only one consistent with the Supreme Court's own affirmation that «where institutional bilingualism in the courts is provided for, it refers to *equal access to services of equal quality* for members of both official language communities in Canada.»[93]

The Constitutional Courts of Canada. Section 96 courts, as they are commonly referred to, are the only courts provided for by the Canadian Constitution.[94] Other courts, be they courts of appeal, provincial courts, or the Federal Court of Canada, are authorized by the Constitution but are

89. *Société des Acadiens*, [1986] 1 S.C.R. 549 (Beetz J.). Contrast with the judgments of Dickson C.J. (esp. at 563-64, 566) and Wilson J.

90. *Official Languages Act 1988*, s. 16(1).

91. *Official Languages Act 1988*, s. 16(1): «Every federal court, *other than the Supreme Court of Canada*, [...]» [emphasis added].

92. Roderick A. Macdonald, «Legal Bilingualism» (1997) 42 McGill L.J. 119 at 139 [footnote omitted].

93. *R. v. Beaulac*, [1999] 1 S.C.R. 768 at [22] (emphasis added).

94. *Constitution Act, 1867*, s. 96.

not expressly created thereby.[95] I propose that section 96 courts be recognized as the courts of «Canada»,[96] despite being provincially-constituted courts the judges of which are appointed by the Governor General. Being the courts of Canada, section 96 courts have an obligation of institutional bilingualism. This would not impose many, if any, additional obligations on the judiciary given that an accused person already has the right to a trial in the official language of choice anywhere in Canada.[97] As such, section 96 courts are already institutionally structured to extend this right to all court proceedings.[98] Conscripted section 96 courts, such as the bankruptcy court, the divorce court, and the unified family court are no exception to the argument developed here. Further consideration should be given to whether this reasoning extends to the appointment of a section 96 judge to federal and provincial Royal Commissions and arbitration hearings, to take two examples.

Other Institutions of Canada. Following the admittedly vague idea of «Canadian institution» developed above, there are a number of institutions which, though they may properly be understood as «federal», are – by virtue of their importance to the Canadian State – equally understood as institutions of Canada. As such, they are included within the scope of subsection 16(1) despite not, or in addition to, being «institutions of the Parliament and government of Canada». Included within this list would be the Bank of Canada, the Canadian Armed Forces, and Foreign Diplomatic Offices. Taking the last example, Canadians abroad ought to be able to communicate with an Embassy or High Commission *despite* the fact that subsection 20(1) of the *Charter* is limited to «any member of the public *in Canada*».[99] Moreover, the activities of the State of Canada in the international arena must be conducted in the spirit of official bilingualism, as affirmed by the Parliament of Canada: «The Government of Canada shall take all possible measures to ensure that any treaty or convention between

95. *Constitution Act, 1867*, ss. 92(14), 101.

96. The expression «Court of Canada» is found in *Constitution Act, 1867*, s. 133, to specify federally-created courts. I use it here to mean the courts provided for by the Canadian Constitution.

97. *Criminal Code*, R.S.C. 1985, c. C-46, s. 530.

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

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

Canada and one or more other states is authenticated in both official languages.»[100] To this end, Canada should insist that international arbitration to which it is a party be conducted in both French and English.

Returning to the domestic scene, entrepreneurs involved in public-private partnerships and franchisees exercising governmental functions could be included within the concept of a «Canadian institution» for the purposes of section 16.

These preliminary proposals as to how to read the reference to «Canada» in section 16 are not revolutionary. Many would require no more than conferring constitutional status on an on-going practice; others would offer constitutional incentive to political decisions that ought, but as of yet have failed, to be taken. I have not specified the modalities and specific consequences of extending the meaning of «Canada» in subsection 16(1) beyond «institutions of the Parliament and government of Canada». The argument for an official bilingualism policy having been presented, if accepted it would be incumbent on the relevant authorities to provide the features of such a policy. The courts, should they be called upon, could act as the reviewers of the justificatory reasons offered by these authorities for their choices in fulfilling their constitutional mandate. Instead of asking the courts to read the Constitution as though it contained a blueprint for a comprehensive policy of official bilingualism, we should read the Constitution as identifying the priority of official bilingualism and as requiring legislative authorities to articulate a policy. The role of the court, according to this understanding, is to evaluate the legislative reasons in justification of a policy choice, and not to substitute and to provide an alternative policy.[101] To my mind, this approach would further acknowledge the structural force of Canada's two languages on the political landscape of Canada.

C. *Equality of Status*

Subsection 16(1) avoids the concepts of minority or majority. There is no qualifier of «significant demand», «reasonable» in the circumstances, or «where the number [...] so warrants» as found in sections 20 and 23 of the *Charter*. It is the French and English *languages* and not the French and

100. *Official Languages Act 1988*, s. 10(1).

101. For a similar approach, see *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick; Ontario Judges' Assn. v. Ontario; Bodner v. Alberta; Conférence des juges du Québec v. Quebec; Minc v. Quebec*, [2005] 2 S.C.R. 286.

English linguistic *communities* that are posited as equal.[102] No Canadian requires membership in an official language community in order to claim the rights guaranteed by sections 16 to 20. Moreover, it is not for the State to inquire as to the linguistic membership of the individual; from the State's perspective, the individual may make use of either official language (or both of them).[103] As noted above, the duality of section 16 is linguistic, not cultural.

The equality of both official languages signifies a shift away from the framework of reasonable accommodation. As Bastarache J. explains in *Beaulac*, «the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation.»[104] In contrast to an approach that provides special accommodation to people who «lack sufficient proficiency in the normal language», the designation of certain languages as official «involves a degree of equality» between the official languages.[105] Unlike the special accommodations approach, a person is entitled to make use of and be understood when using either official language, irrespective of that person's ability to speak the other official language. In this respect, the approach taken by the Supreme Court to the use of an official language in court proceedings is wrong: accommodating an official language through the use of an interpreter – rather than guaranteeing the right to be understood directly – denies that official language the full equality guaranteed by subsection 16(1).[106]

The equality of Canada's official languages is a status afforded to two languages over others in Canada; a «privilege» as that term is used in sec-

102. Contrast *Charter*, s. 16.1(1): «The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.»

103. *R. v. Beaulac*, [1999] 1 S.C.R. 768 at [56]: «Absent evidence that the accused does not speak the language chosen, an accused is free to make his or her choice of the official language».

104. *R. v. Beaulac*, [1999] 1 S.C.R. 768 at [24].

105. Alan Patten and Will Kymlicka, «Introduction: Language Rights and Political Theory: Context, Issues, and Approaches» 1 at 28.

106. Compare *MacDonald v. Montreal*, [1986] 1 S.C.R. 460 and *Société des Acadiens*, [1986] 1 S.C.R. 549 with *R. v. Beaulac*, [1999] 1 S.C.R. 768. This is not to deny the importance of interpreters in the promotion of official languages in Canada.

107. *Charter*, s. 15(1): «Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.»

tions 16, 21 and 22. In this respect, section 15[107] cannot be used to modify the status accorded to French and English, both because «all parts of the Constitution must be read together»[108] and, perhaps more importantly, because the language provisions of the *Charter* «could also be viewed not as an "exception" to equality guarantees but as their fulfilment in the case of linguistic minorities».[109]

We now turn to consider a particular manifestation of equality in the institutions of the Parliament and government of Canada.

D. *Right to Work in Either Official Language*

I share the view that subsection 16(1) confers on federal public servants the right to work in the official language of their choice.[110] Though this right could be a derivative of the official language status accorded to French and English, it is clearly anchored in the «equality of status and equal rights and privileges» of both languages in all institutions of the Parliament and government of Canada. Because the federal public service cannot be considered part of «the public», subsection 20(1) does not ground this right.

Though a public servant has the right to work in the official language of choice irrespective of numbers, a critical mass of official language speakers is required to make real the right to work in either official language. Indeed, the right to work in French in the federal public service would be of little consequence if there was only one French-speaker. As a result, the right to work in an official language should require that both official languages have «equitable or proportional representa-

108. See *Gosselin (Tutor of) v. Quebec (Attorney General)* [2005] 1 S.C.R. 238 at [2].

109. *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3 at [31] (the quote refers to s. 23, though I extend its logic to ss. 16-20).

110. See Joseph E. Magnet, «The *Charter*'s Official Languages Provisions: The Implications of Entrenched Bilingualism» (1982) 4 Supreme Court L. Rev. 163 at 172; Peter W. Hogg, *Constitutional Law of Canada* (updated looseleaf version) at 53-21 to 53-22; André Tremblay «L'interprétation des dispositions constitutionnelles relatives aux droits linguistiques» (1983) 13 Man. L.J. 651 at 654; André Braën, «Language Rights» 1 in Michel Bastarache (ed.), *Language Rights in Canada* (Montreal: Yvon Blais, 1987) at 48. Le Dain J.A. in *Gens de l'Air du Québec v. Lang*, [1978] 2 F.C. 371 (F.C.A.) at 379 recognized this same right in *Official Languages Act 1969*, s. 2. Parliament does not recognize this as a right guaranteed by the Constitution, but recognizes it as desirable nonetheless: see *Official Languages Act 1988*, preamble and ss. 34ff.

tion».[111] To this end, the *Official Languages Act 1988* provides that «work environments of the institution [should be] conducive to the effective use of both official languages».[112] It may be that in some regions of Canada, it will be difficult to establish a critical mass of official language workers. In these circumstances, it will fall on the State to justify the limitation of this right.[113]

The right to work in an official language is independent of the right of a member of the public to communicate with a federal institution in the official language of choice; nevertheless, there is a correlation between both rights. The right guaranteed in subsection 20(1) requires that federal institutions be bilingual to the extent required to communicate with the public in both official languages. Should a member of the public communicate with a federal institution in English and all the public servants of that institution choose to work in French, there is a conflict of rights. However, it is important to avoid viewing this conflict as it was presented by the Supreme Court in *Société des Acadiens*.[114] The State must not be equated with its individual representatives; this could yield a conflict between the right of a member of the public under subsection 20(1) and the right of the public servant under subsection 16(1). Rather, once the conflict is understood as being between a member of the public and a State *institution*, it largely dissipates: the institution is under a duty to be bilingual, without requiring that every public servant that communicates with the public be bilingual. The resolution of this conflict of rights is partially addressed by ensuring that institutions communicating with the public have a critical mass of official language speakers.

111. André Braën, «Language Rights» in Michel Bastarache (ed.), *Language Rights in Canada* (Montreal: Yvon Blais, 1987) 1 at 48. See also *R. v. Beaulac*, [1999] 1 S.C.R. 768 at [20]: «Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided.»

112. *Official Languages Act 1988*, s. 35(1)(a).

113. See *Charter*, s.1: «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.»

114. *Société des Acadiens*, [1986] 1 S.C.R. 549 at 574ff. Denise G. Réaume offers an excellent analysis in «The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?» (2002) 47 McGill L.J. 593 at 601ff. See also Nicole Vaz and Pierre Foucher, «The Right to Receive Public Services in Either Official Language» 251 in Michel Bastarache (ed.), *Language Rights in Canada* 2nd ed. (Cowansville, Que.: Yvon Blais, 2004) at 294.

III. Some Brief Remarks on Subsection 16(3)

Subsection 16(3) is the only provision under the heading «Official Languages of Canada» to apply to the federal authority and *all* the provinces. Given that it specifies «Nothing in this Charter» rather than «Nothing in this section» or «part», the subsection's ethos is applicable to the entire *Charter*, and not only to section 16 or sections 16 to 20. For example, subsection 16(3) shields legislative measures against challenge on the basis of freedom of expression. It was thus that the Quebec Court of Appeal affirmed, on the basis of subsection 16(3) and section 1 and citing the vulnerability of the French language, the constitutionality of Quebec's *Charter of the French Language*.[115] Moreover, given the ambition of the subsection – the progression to equality of French and English –, it should be extended to all provinces. For example, Ontario's *French Language Services Act*[116] has been recognized as having quasi-constitutional status, in part due to subsection 16(3).[117]

Turning to the subsection's purpose, progression can be understood as a question of scope (for example, extending official bilingualism into Ontario) as well as a question of intensity (what further developments are possible, even where subsection 16(1) applies). With this in mind, there is a slight difference between the English and French versions of subsection 16(3) that warrants consideration:

Nothing in this Charter limits the authority of Parliament or a legislature to <u>advance the equality</u> of status or use of English and French. [Emphasis added]	La présente charte ne limite pas le pouvoir du Parlement et des législatures de <u>favoriser la progression vers l'égalité</u> de statut ou d'usage du français et de l'anglais. [je souligne]

The French «favoriser la progression vers l'égalité» suggests that progression is needed, whereas the English «advance the equality» need not suggest as much.[118] Contrary to subsection 16(1) which affirms the coequal *de jure* status of Canada's two official languages, subsection 16(3)

115. *R. v. Entreprises W.F.H.*, [2001] Q.J. No 5021 (Que. C.A.) at [102]-[103]. The judgment addresses only s. 58 of the *Charter of the French Language*.

116. S.O. 1990, c. F-32.

117. *R. v. Crète*, [1991] O.J. No. 2823 (Ont. C.J., Prov. Div.).

118. Compare: *Société des Acadiens*, [1986] 1 S.C.R. 549 at 619 (Wilson J.) where «advances» is interpreted as meaning that consequences of official bilingualism «represent the goal rather than the present reality».

could be read as hinting at the *de facto* inequality of Canada's two languages. However, it avoids the concepts of minority and majority and therefore does not crystallize the factual status of the relationship between both languages. I read subsection 16(3) in the same manner as the «affirmative action programs» provisions in the equality rights section[119] and in the mobility rights section.[120] Like those provisions, the ambition of subsection 16(3) must be to become obsolete. We should aspire to the status of equality between persons, provinces, and Canada's official languages. Subsections 16(1) and 16(3) aim to work in concert, the former informing the latter, in marrying principle and practice, seeking to satisfy the promise of the negotiated compromise of 1982.

Conclusion

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

In *Société des Acadiens*, the Supreme Court concluded that courts had little role to play in articulating of the *Charter*'s language rights, it being clear from the pedigree of language rights (negotiated compromise) and the formulation of subsection 16(3) that the political process was the forum for promoting language rights. Even if we disagree with the premises of the Court's reasoning, we should not deny the force of the conclusion. History teaches us that undue reliance on the Canadian judiciary for the protection of language rights will not lead us in the direction of an expansive understanding of official bilingualism.[121] Though legislatures are by no means credited with a shining record of language protection and promotion,[122] we

119. *Charter*, s. 15(2).

120. *Charter*, s. 6(4).

121. See, e.g. *Société des Acadiens*, [1986] 1 S.C.R. 549; *MacDonald v. Montreal*, [1986] 1 S.C.R. 460; *Bilodeau v. Manitoba*, [1986] 1 S.C.R. 449; *Ottawa Roman Catholic Separate School Trustees v. Mackell* [1917] A.C. 62 (J.C.P.C.). There are important exceptions: *Quebec v. Blaikie (no. 1)*, [1979] 2 S.C.R. 1016; *Quebec v. Blaikie (no. 2)*, [1981] 1 S.C.R. 312; *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

122. Consider *An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba, 1890* (Man.), c. 14 and the refusal by the federal executive to exercise the power of disallowance: see François Chevrette and Herbert Marx, *Droit constitutionnel: Notes et jurisprudence* (Montreal: P.U.M., 1982) at 1586.

must not forget that it was the political process that yielded the *Official Languages Act 1969*, its renewal in 1988, and section 16 of the *Charter*. It is equally the political process that corrected many of the restrictive interpretations given by the Supreme Court under section 133 of the *Constitution Act, 1867* and sections 17 to 19 of the *Charter*. Quite irrespective of which institution will be understood by history to have contributed more to the development of language rights in Canada, one fact is undeniable: the political branches have more tools than the judiciary.[123] The importance of the political process in the promotion of official bilingualism is undeniable. Beyond the constitutional status of section 16, it remains that the legitimacy of official bilingualism and equality of status of English and French is contingent on political support.

The arguments developed above do not aim to transfer political debate into the arena of the courts. I am a firm adherent to the view that «the failure of any monitoring process [including judicial review] is not in its inability to bind the political process; rather, its failure lies in its inability to facilitate, engage, and empower the latter.»[124] The role of the judiciary will remain necessary so long as the political process fails to articulate a robust programme of official bilingualism. The court should be understood as a forum of justification, where the legislature, when called upon by a citizen, demonstrates the justification of its official language policies.[125] The court should evaluate the sufficiency of the reasons offered in justification and, should it find that the legislature's reasons fail to justify the policy, declare so and order the legislature to re-formulate its policy. This shift in the understanding of the relationship between court and legislature could appease some of the worries articulated by the Supreme Court in 1986 whilst divorcing judicial restraint from restrained constitutional construction.

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

124. G.C.N. Webber, «Monitoring Language Policies – Commentary» at 6. See also David D. Laitin and Rob Reich, «A Liberal Democratic Approach to Language Justice» in Will Kymlicka and Alan Patten (eds), *Language Rights and Political Theory* (New York: Oxford University Press, 2003) 80 at 102ff.

125. Of course, the first forum of justification is the parliamentary chamber.

To bring this paper to a close, it is with some concern that I read the words of Pierre Elliott Trudeau, spoken in 1967, and still find them *à propos*: «I believe that we require a broader definition and more extensive guarantees in the matter of recognition of the two official languages.»[126] The reading of section 16 that is here proposed seeks to answer Trudeau's call.

—abstract / resum—

THE PROMISE OF CANADA'S DECLARATION OF OFFICIAL LANGUAGES

Grégoire Charles N. WEBBER

The *Canadian Charter of Rights and Freedoms* guarantees, at section 16, that French and English are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada. The Supreme Court of Canada would appear to see little potential in the affirmation of Canada's official languages. Several commentators agree, dismissing the guarantee as no more than symbolic. A different reading of section 16 is proposed here, embracing the promise of official bilingualism in Canada and outlining some of the consequences that follow from Canada's constitutional commitment to this declaration.

Among the different proposals outlined in the paper, it is suggested that the affirmation of French and English as the official languages of Canada is a prescriptive constitutional guarantee

LA PROMESA FORMULADA PER LA DECLARACIÓ DE LLENGÜES OFICIALS DEL CANADÀ

Grégoire Charles N. WEBBER

La Carta de Drets i Llibertats del Canadà garanteix, a l'article 16, que tant el francès com l'anglès són les llengües oficials del Canadà i que gaudeixen d'un estatus idèntic i dels mateixos drets i privilegis quant al seu ús a totes les institucions del Parlament i del Govern del Canadà. Aparentment, el Tribunal Suprem del Canadà aprecia un potencial reduït en la declaració de les llengües oficials canadenques. Diversos comentaristes s'hi mostren d'acord, i rebutgen la garantia com un simple símbol. En aquest article es proposa una interpretació diferent de l'article 16, una interpretació que fa seva la promesa del bilingüisme oficial al Canadà i que esbossa algunes de les repercussions derivades del compromís constitucional canadenc amb aquesta declaració.

Entre les diferents propostes descrites a l'article, se suggereix que l'afirma-

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

and not merely a declaratory one; that it mandates an expansive reading of some of the more topical language rights that follow it; that it fills in the lacunae necessary for a comprehensive official languages policy; and imposes on the legislature rather than the court the responsibility for articulating such a comprehensive policy.

In short, this paper explores how an aggressive interpretation of section 16 of the *Canadian Charter* can assist in promoting the promise of Canada's commitment to official bilingualism.

ció del francès i l'anglès com a llengües oficials del Canadà és una garantia constitucional preceptiva i no una simple declaració que: obliga a una interpretació completa d'alguns dels drets lingüístics més actuals que se'n deriven; cobreix les llacunes que s'han d'omplir per arribar a una política lingüística oficial exhaustiva, i imposa sobre el poder legislatiu, en lloc del judicial, la responsabilitat de coordinar aquesta política.

Dit d'una manera més breu, aquest article explora com pot contribuir una interpretació agressiva de l'article 16 de la Carta del Canadà a promoure la promesa del compromís canadenc amb el bilingüisme oficial.