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**The Relationship Between Human Rights  
and Language Rights**

Maxwell Yalden<sup>[1]</sup>

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Jean Beetz will be remembered as an eminent scholar and as a distinctive voice in the interpretation of constitutional doctrine that profoundly affects the lives of Canadians. The characteristics of his legal thinking faithfully mirrored the character of the man: conscientious, sophisticated, and unfailingly sensitive to the larger social context in which his opinions were delivered. He has sometimes been accused of being unduly mechanistic or lacking the creative flair of some of his colleagues. For my part, I have found his contribution to be consistently animated by a strong sense of contemporary practicality, but tempered with a fundamental respect for the necessary distinctions between law and social policy.

Nowhere is this more true than in his discussion of rights and freedoms. His opinions, both academic and judicial, are consistently concerned with finding a line that acknowledges the prior claims of fundamental rights but also recognizes the decentralization of powers in Canada, the jurisdictional distinctions that are part of our history and the sovereignty of elected parliaments at both levels of government. He clearly foresaw, for instance, the risk that an entrenched Charter of Rights might encourage the judiciary to overrule rather than to oversee the policies established by elected representatives. But he could also see that a truly national Charter might enable judges, fairly and honourably, to mitigate some of the strains that arise from competing claims to jurisdiction over rights and freedoms.

Of particular interest to this writer is Justice Beetz's thinking in the areas of human rights and language rights. It is not simply the depth of his knowledge in both these areas that commands respect, but his

unwavering ability to make what he perceives to be the necessary distinctions between the two. One may not always find oneself in full agreement with him on the points of legal interpretation that are at issue, but one cannot fail to appreciate the seriousness with which those issues are canvassed or the way one's attention is painstakingly directed to the difficult legal and political choices involved.

Many people have wrestled with the question where and how language rights should fit within the overall scheme of human rights. One need only consider the Canadian case to see that this question is much more than a mere conceptual problem. It bears directly and intimately on how we lead our personal lives and on the relative equality of the relations we maintain with the state and with society at large. It is a question on which it is all but impossible for Canadians not to hold strong views, and it is one on which Justice Beetz had more than usual to say. In the following pages, I want to review just a few of the more important Supreme Court of Canada decisions that speak to this question and to consider, so far as I can, how those decisions jibe with the international and national framework of rights within which Canada seeks to work.

Perhaps the most succinct and provocative statements on this matter was delivered by Justice Beetz when, writing for the majority of the Court in *Société des Acadiens du Nouveau-Brunswick*, he expressed the view that "[w]hile legal rights as well as language rights belong to the category of fundamental rights [...] language rights [...] are based on political compromise, [while] legal rights tend to be seminal in nature because they are rooted in principle"[\[2\]](#). This statement of course makes manifest a view that is generally consistent with Jean Beetz's approach to the entire constitutional nexus surrounding language rights in this country. It also reflects a concern not to substitute creative judicial interpretation for the necessary impurities of the political process. It is in that context, and in honour of his memory, that I propose to consider several broad questions.

„ Is there a basis in international law for regarding language rights as being "conceptually different" from more "seminal" human rights, and to that extent somehow subordinate to or contingent upon those more basic rights?

„ How has our understanding of this relationship between two sets of rights found expression in Canadian theory and practice?

„ What can we learn from Supreme Court decisions that were either written by Jean Beetz, or in which he concurred, when it comes to making practical choices between the relative claims of different species of rights?

## **I. THE EVIDENCE OF INTERNATIONAL AND NATIONAL INSTRUMENTS**

It has been said that the philosophy and practice of human rights in our time is rooted in three main interrelated principles: the equality of all human beings before the law; the precept of non-discrimination on the basis of identifiable human characteristics; and the principle of self-determination. These are the same principles that underlie the *United Nations Charter*[\[3\]](#), the *Universal Declaration of Human Rights*[\[4\]](#) and the International Covenants on Economic, Social and Cultural Rights[\[5\]](#), on Civil and Political Rights[\[6\]](#), and on the Elimination of All Forms of Racial Discrimination[\[7\]](#).

Article I of the *United Nations Charter* expresses the fundamental purposes of that organization. They include the achievement of international cooperation "[...] in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion [...]" This and other goals are further elaborated in the Universal Declaration, which, among other things, states that:

*Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (Article 2)*

*All are equal before the law and are entitled without any discrimination to equal protection of the law. (Article 7)*

*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. (Article 10)*

*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. (Article 19)*

*Everyone has the right to freedom of peaceful assembly and association. (Article 20)*

*1. Everyone has the right to education [... and]  
3. Parents have a prior right to choose the kind of education that shall be given to their children. (Article 26)*

One should also include Article 4 of the *International Covenant on Economic, Social and Cultural Rights*, which asserts that:

*The State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.*

Finally, Article 27 of the *International Covenant on Civil and Political Rights* reads as follows:

*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to practise and profess their own religion, or to use their own language.*

Canada is a signatory of all the international instruments mentioned above. But before we examine more closely how they have been given effect in the Canadian context, it may be worth noting some of the

conceptual tensions that already exist among various parts of the international schema themselves. It is by now almost a commonplace of human rights discussion, for instance, that there is at the very least a semantic problem involved in reconciling such expressions as "*Everyone* is entitled to *all* [...]" without distinction of *any kind* [...]" and "Everyone is entitled *in full equality* [...]" with the recognition of the rights of racial, religious, cultural and linguistic *minorities*. In other words, it is recognized that *special measures* may be required for minority protection and, conversely, that *legal limitations* may need to be imposed on some individuals or groups in the interests of the "general welfare of a democratic society".

My point is not that these somewhat conflicting notions of equality, selective promotion and necessary limitation invalidate one another, but rather that, even at this high level of abstraction, it is understood that the three great human rights concepts of equality, non-discrimination and self-determination need to be read together, and with a fine sense of contemporary context, in order to yield any kind of tolerable harmony among competing interests or conflicting freedoms. Hence, for instance, it has become a central article of human rights law in Canada that identical treatment for all individuals may not correspond to true equality of treatment, i.e., that some may need to be treated differently in order that all may be treated equally. I believe that at least some of the judgements that I have come to associate with Jean Beetz's name may provide us with eminent examples of how that may be done.

## II. HUMAN RIGHTS AND LANGUAGE RIGHTS IN THE CANADIAN SETTING

In 1988, writing for the majority in the *Mercure* case, Justice La Forest provided a brief account of the Canadian situation when he pointed out that:

*While s. 110 [of the North-West Territories Act] governs procedural matters, it does not serve merely procedural ends. It embodies procedural rules that give rights to individuals. The courts have treated laws giving expression to human rights as being of an almost constitutional nature. Repeal of such laws requires "clear legislative pronouncement". Language rights are a well-known species of human rights and should be approached accordingly.* [8]

Two aspects of this *locus classicus* of Supreme Court doctrine are worth underlining. The first is, of course, that language rights are a "species" of human rights and thereby deserving of quasi-constitutional protection. The second is somewhat more ambiguous and ironic, for the *Mercure* decision held, in effect, two things: that section 110 required that the laws of Saskatchewan be enacted, printed and published in both English and French; but that section 110 did *not* thereby require that Father *Mercure* be issued a speeding ticket in French, as he had maintained over many years.

The first intuitive reaction of many observers to this apparent anomaly is to question the underlying purpose of official bilingualism if it cannot provide some specific protection to interested individuals in their relationships with the state. To unravel this mystery, we need to examine the nature and scope of language rights as they apply in Canada and then to consider in more detail some of the cases that speak specifically to the question.

If we look again at the references to language and related matters in the international context outlined above, we will be struck by two basic notions:

1. that, insofar as fundamental rights and freedoms are concerned, language is one of the grounds on which ratifying states agree not to discriminate; and
2. that, insofar as inter-group relations are concerned, linguistic minorities must not be denied the right to use their own language.

Are these propositions mutually compatible and, if so, how? The answer that is provided by the Canadian case is that yes, they are compatible. However, this compatibility depends on there being some reasonable and democratic delimitation of how, where and when individuals or groups may exercise their basic right (a) *vis-à-vis* the state and (b) *vis-à-vis* other competing rights.

In Canada, for historical reasons that I do not need to rehearse, two languages, English and French, have been given what Justice Beetz has called "a preferential position over all other languages"<sup>[9]</sup>. In other words, such language rights as may be said to exist in this country come in two sizes: on the one hand, we have the fundamental right of all Canadians, whether their mother tongue be Croatian or Cantonese, freely to use their own particular language in either their personal and intra-group relations or, *in certain prescribed situations*, when dealing with governmental authorities. Over and above that, however, stand such linguistic rights as are specifically conferred upon the users of English, French and (at least in the Yukon and the Northwest Territories) certain aboriginal languages, by virtue of either their constitutionally protected character or their unique claims to quasi-constitutional protection. These latter rights are not available to those language groups (Welsh, Italian, Vietnamese or whatever) whose language has not been formally granted official status.

If this looks to be a situation in which some languages, *qua* languages, are more equal than others, one must acknowledge that this is indeed the case. But one must immediately add that this is not in itself inconsistent with the theory of rights proclaimed in the Universal Declaration or, for that matter, with the situation that obtains in virtually every nation throughout the world. The permitted "inequality" is essentially that between the entire class of natural languages, of which there are many thousands, and official languages, of which there are necessarily far fewer. Official languages, as their name suggests, are by definition languages that enjoy a privileged position in the administrative workings of the state. Whether they owe that preferred status to circumstances of political history, linguistic demography or both is immaterial for our purposes. What concerns us here is to observe that the rights of English-speakers and French-speakers in Canada are generally of a different order from those of the speakers of other languages and that this fact, in itself, can lead to understandable confusion about where these different orders of rights begin and end.

To take the most obvious example, the state not only has a clear interest in ensuring, but also a duty to ensure, that its citizens are adequately informed about the laws and programs that affect their personal and professional lives. This often leads states to proclaim that one or more widely used languages are official languages for purposes of government communication and to provide less formal means whereby monolingual speakers of non-official languages can nevertheless communicate with or receive services from state authorities. Thus, in Canada, a person who is unable to understand the official languages of government communication, English and French, may nevertheless seek official assistance in obtaining, say, a translation into Vietnamese. Should that person be accused of a criminal offence, he may also be provided with the services of an interpreter to enable him to understand the charge and the proceedings.

These questions were discussed at length in a *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* prepared by Francesco Capotorti for the United Nations in 1977, at a time when that BODY BGCOLOR="#FFFFFF" was giving particular thought to the principles contained in Article 27 of the *International Covenant on Civil and Political Rights*. Drawing upon contributions from many member states, Capotorti noted, among other things:

, that "*the symbolic value of language as a means of group identification makes languages politically and socially very strategic [...]*" and hence "*a prime element in the struggle for national unity*";

, that "*a just equilibrium must be found between these linguistic requirements in order to safeguard the fundamental rights of the persons belonging to the various linguistic groups as well as the interests of the nation as a whole*";

, that "[...] *the designation of one language as the official language may be in certain circumstances a source of constant controversy since it may upset the political balance between various population groups [...]*";

, that "[...] *on the other hand, it may be totally impracticable, in particular countries where numerous languages are spoken, to recognize all of them as official languages, if only in view of the financial cost that such a solution would involve*".[\[10\]](#)

The distinction that is involved here features prominently in several of the Supreme Court decisions of interest to us. It is therefore worth stressing again that, however difficult it may be in practice to square all the interests involved, the distinction itself does not, *from the human rights perspective*, inherently offend against the three essential principles of equality of treatment before the law, the prohibitions on racial, ethnic or language discrimination, or the right of self-determination. Insofar as there is unquestionably a differentiation involved among the natural languages that happen to be spoken in a particular state, such differentiation is saved from the stigma of improper discrimination by two things: it does not, on the face of it, prevent the speakers of non-official languages from enjoying other basic rights; and the institution of official languages is internationally accepted as a legal limitation whose overriding purpose is to promote "the general welfare in a democratic society".

That these justifications are not immediately or automatically acceptable to all is natural enough. It also explains why so many key cases in Canadian judicial history have centered on the problematic linguistic relationship between the citizen and the institutions of government. In response to my first question ,, whether there is a basis in international law for regarding language rights as being *for certain purposes* subordinate to or contingent on more basic or seminal human rights ,, the answer seems to be that there is indeed warrant for such a conceptual distinction, at least with respect to particular languages in particular situations. The relationship between language rights and other rights or interests depends in the last resort on the circumstances in which, and the purpose for which, those rights were granted.

In other words, the right to use one's own tongue, whether at home or in public, is fundamental and inalienable, so long as it does not clash with other legal requirements, and can be administratively accommodated by the public authorities. The right to use an *official* language is circumscribed in different ways and for somewhat different reasons. To that extent it is not of the same order as the more fundamental right to use whatever language one is most at home in. To answer the question how such

balancing of rights has been worked out in Canadian practice, we must turn to several cases that came before the Supreme Court of Canada between 1984 and 1988, which by their very nature brought into question the linguistic balancing act that has been so prominent a part of Canada's history. The cases that I have in mind are the *Reference re Manitoba Language Rights*<sup>[11]</sup>; *MacDonald v. City of Montreal*<sup>[12]</sup>; *Mercure v. Saskatchewan*<sup>[13]</sup>; *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*<sup>[14]</sup>; and *Ford v. Quebec (Attorney General)*<sup>[15]</sup>.

### III. THE PRACTICAL APPLICATION OF CONSTITUTIONAL LANGUAGE RIGHTS IN CANADA

Although all five cases were decided in the post-Charter era, their resolution by the Supreme Court was as much a reflection of the Court's sense of Canada's political evolution as it was of the rights and freedoms that were freshly enunciated in the Charter. This, indeed, turned out to be the crux of the matter in four of the cases: how far one could properly rely on either the letter or the spirit of the Charter when deciding the practical question of who may or may not do what to whom, and who may be required to do what, and for whom, in language matters. The exception was the 1984 *Manitoba Reference*<sup>[16]</sup>, where the Court was simply asked to decide whether the requirements of section 23 of the *Manitoba Act, 1870* (respecting the use of both English and French in the provincial legislature, laws, court and official records) were mandatory, and, if so, what the implications were for the largely unilingual English tradition that had prevailed in Manitoba since 1890. In effect, the Supreme Court ruled unanimously (i.e. with the concurrence of Jean Beetz) that those requirements were mandatory but that "the invalid current Acts of the Legislature" that were the result of the improper unilingual tradition would "be deemed valid" until the situation could be corrected, in order to avoid creating "a legal vacuum". In this instance, therefore, the constitutional principle of the rule of law had to be given official precedence over immediate recognition of an official language right that had been violated for several decades.

The questions before the Court in *MacDonald* and *Mercure* both stemmed from traffic tickets that were issued unilingually in a language that was not the language of the recipient. Both boiled down to the claim that this violated a constitutionally protected language right. As I noted earlier, *Mercure* also raised the question whether the provincial Act under which Father Mercure was charged was itself valid insofar as it had been published only in English, in violation of section 110 of the *North-West Territories Act*. In the event, the Court found that, when Parliament established the province of Saskatchewan out of the North-West Territories, it provided for the continuation of such pre-existing laws as were not inconsistent with the *Saskatchewan Act* and that this effectively included section 110. Unhappily, however, the Court's conclusion was of little practical service to Father Mercure since it also found that section 110 did *not* entitle him to receive the impugned speeding summons in French.

The reasons for this judgment were made emphatically clear by Justice Beetz in his majority decision in *MacDonald v. City of Montreal*. The facts of the case were much as in *Mercure* except that Mr. MacDonald had received his speeding ticket in French. As a result, he argued that this violated his rights as an English-speaking person under section 133 of the *Constitution Act, 1867*<sup>[17]</sup>, which, in addition to requiring that the laws, records and journals of both the Canadian and Quebec legislatures be published in both English and French, says that:

[...] *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.*

According to Mr. MacDonald and the various intervenors who supported his view, the purpose of this part of section 133 was to ensure to speakers of English in Quebec (and French elsewhere in Canada) the right to receive court documents in their preferred official language. This argument had been rejected by the lower courts, and the Supreme Court agreed to hear the case because there was "a risk that a question of major constitutional importance might otherwise be put beyond the possibility of review by this Court". At issue, it seemed, was the plain meaning of section 133, which the Supreme Court had already declared, in the two *Blaikie* [18] decisions of 1979 and 1981, to be permissive, versus the contention that the choice of English or French was intended to be exercised by the citizen, not the courts, which were clearly institutions of the state.

What is remarkable in Justice Beetz's closely argued judgment is that, while he is not altogether unsympathetic to the proposition that rights, including language rights, are by their nature conferred on individual citizens or their linguistic communities, he cannot reconcile that proposition with the "right" as formulated in section 133 or with the *Blaikie* decisions. Indeed, he is severe on the appellant's contention that, where the state is a party to the proceedings, the Constitution gives anglophones and francophones the right to be summoned before a court by a document issued in their own language.

*The appellant's main submission is not bolstered by his reference to the "State". Whether or not the State is a person or has rights under s. 133, it was held in Blaikie No. 1 that the option to use either language under this section extends to the courts themselves in documents emanating from them or issued under their name or under their authority. [19]*

To the obvious objection that the effect of defining the option this broadly may be to prevent citizens from understanding the charge against them, Justice Beetz provides an answer in six points.

1. Where section 133 requires the use of both English and French (for example, in the publication of parliamentary debates), it unequivocally says so.
2. *What th[e] historical record demonstrates is that the Fathers of Confederation were quite familiar with the old and thorny problem of language rights [20]; in short, they knew what they wanted to say and they said it.*
3. No interpretation of a constitutional provision, however broad, liberal, purposive or remedial, can have the effect of giving to a text a meaning which it cannot reasonably bear and which would even express the converse of what it says.
4. *It should be stated [...] that compliance with s. 133, as this section provides for a minimum constitutional protection of language rights, may very well fall short of the requirements of natural justice and procedural fairness. [21]*
5. *[The] common law right to a fair hearing [...] is a fundamental right deeply and firmly embedded in the very fabric of the Canadian legal system. [22]*
6. *It would constitute an error either to import the requirements of natural justice into the*

*language rights of s. 133 [...], or vice versa, or to relate one type of right to the other under the pretext of re-enforcing both or either of them.*[\[23\]](#)

The judgment goes on to point out that Canada's language rights, while constitutionally protected, are "peculiar to Canada. They are based on a political compromise rather than on principle and lack the universality, generality and fluidity of basic rights resulting from the rules of natural justice"[\[24\]](#).

Whatever one's personal sympathies may be, there is no doubt in my mind that Justice Beetz's decision in *MacDonald* is correct in law. Somewhat more problematic is the question where it leaves language rights in the pecking order of human rights. As I read this decision, it says that, whether in Canada or elsewhere, *all* languages may enjoy certain rights either insofar as they are exercised within the particular language community or insofar as they are consistent with other basic rights such as those of natural justice. Moreover, these language rights are on a par with other fundamental rights such as freedom of speech. Where other language rights, like those which attach to English and French in Canada, are conferred by laws, they must be considered to be a political supplement to those other more fundamental language rights. They therefore remain more pliable, alterable and, in the last resort, contingent upon the basic rights that are entailed by equality of treatment. In other words, it may be possible for reasons of state to confer certain preferential rights on English and French in Canada, but they cannot thereby automatically claim rights as to their use which are not specifically granted by law,, and which are not, of course, available to other languages or language groups.

The "conceptual difference" that was so carefully expounded in *MacDonald* occurred with a different slant in *Ford v. Quebec*. The issue in this case, however, was not whether an individual anglophone or francophone had the right to be dealt with in his own language, but whether the use of English in commercial signage in Quebec constituted "freedom of expression" as guaranteed by section 2(b) of the Canadian Charter and section 3 of the Quebec Charter; and, if so, whether the exclusion of English imposed by section 58 of the *Charter of the French Language*[\[25\]](#) (Bill 101) was justifiable as a "reasonable limit" under either Charter.

At the heart of this question, of course, lies the power of the Quebec government not merely to make French the official language of the province but to go one or several steps beyond that by requiring that only French be used in linguistic transactions that do not normally fall within the scope of official-language use. Interestingly enough, the justification offered for Bill 101's insistence on a *visage linguistique* for the Province in general, is rooted in the human rights concept that minority language communities may be entitled to special protection (Article 27 of the *International Covenant on Civil and Political Rights*). In effect, *Ford*[\[26\]](#) pitted the human rights premise of the *Charter of the French Language* against the human rights premise of section 3 of Quebec's own *Charter of Rights and Freedoms*. More specifically, the Supreme Court was asked to decide, *inter alia*:

„ whether so-called "commercial expression" (for example display of a sign in a shop front) is protected by freedom of expression provisions, and, if so,

„ whether that freedom could legitimately be restricted (in the manner of Bill 101) by virtue of section 9.1 of the Quebec Charter, which says:

*9.1 In exercising his fundamental freedoms and rights, a person shall maintain a proper regard*

*for democratic values, public order, and the general well-being of the citizens of Quebec.*

*In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.*

In the event, as we know, the Court concluded that the human right at issue was indeed the freedom to express oneself in the language of one's choice (and not, by implication, some more restricted language right that is specific only to particular languages and contexts) and that, insofar as Bill 101 effectively nullified that freedom, it could not be saved by section 9.1 of the Quebec Charter. Indeed, the Court could not find any "sound basis on which commercial expression" could be excluded from the freedom of expression provisions of either Charter. As a result, the judgment finally boiled down to a confrontation between the legitimate powers of the Quebec government, acting on behalf of an otherwise endangered language (French), to override the claims of all other languages (including English) to be used in ways that would enable individuals to make informed economic choices.

In this case, the fundamental claims of natural languages were seen by the Court as taking precedence over the claims of a specific linguistic community. It found that the legitimate legislative objective of promoting French in Quebec, however important, was "nevertheless outweighed by the abridgement of rights". In other words, while the two rights-based goals did not cancel each other out, their proper exercise had to meet a "proportionality test". "[The] fundamental freedoms and rights guaranteed by the Quebec Charter are not absolute but relative." However, "the government has the onus of demonstrating on a balance of probabilities that the impugned means are proportional to the object sought". This it had failed to do. The significance of the *Ford* decision therefore lies in confirming that, in the event of a conflict between a *fundamental* language right and an *official* language right, even one that pertains to the general interest of the (majority) community, the latter right must infringe as little as possible upon the basic right that belongs to each and every citizen.

As readers will be aware, the relevant section of the *Charter of French Language* (section 58) was amended in 1989 by Bill 178, (a) to overcome the difficulty that the Supreme Court had identified and (b) to protect the revised section 58 by means of the "notwithstanding" provisions of both the Canadian and Quebec Charters. The efficacy of this proceeding has recently been challenged by a decision of the United Nations Human Rights Committee. On 31 March, 1993, in response to submissions by three English-speaking Quebeckers, the Committee concluded that:

*A State may choose one or more official languages, but it may not exclude outside the spheres of public life, the freedom to express oneself in a certain language.*

It therefore held that section 58 of the *Charter of the French Language*, as amended by Bill 178, violated article 19, paragraph 2 of the *International Covenant on Civil and Political Rights*, which reads:

*Everyone shall have the right to freedom of expression: this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

Although the source of the dispute in *Société des Acadiens v. Association of Parents* was the question whether a minority language school board in New Brunswick was entitled to offer French immersion programs to French-speaking students in its English schools, the principal issue before the Supreme Court was whether section 19(2) of the Canadian Charter<sup>[27]</sup> gives a party the right to be heard by a New Brunswick court "the member or members of which are capable of understanding the proceedings, the evidence and the arguments, written and oral, regardless of the official language used by the parties"<sup>[28]</sup>.

In the present context, what is of interest in the judgment rendered by the Court is that Justice Beetz, while concurring with Chief Justice Dickson and Justice Wilson on a party's right to be heard „ and understood „ in either English or French in a New Brunswick court, differed from them in defining the nature of that right, or perhaps one should say of those rights. The difference may seem to be immaterial to the outcome, but it remains of fundamental interest to determine whether a person's right to be *understood* by the court „, by whatever means „, is in itself part of the language rights conferred by section 19(2) of the *Charter* or merely consequent upon the right to a fair hearing.

As I understand them, Justices Dickson and Wilson, while continuing to acknowledge that language rights are "conceptually distinct from fair hearing rights", felt that in this instance there was indeed a necessary overlap between the two in that, to paraphrase the then Chief Justice, the Charter aims "primarily to recognize the rights and freedoms of individuals *vis-à-vis* the State", and the language right conferred on individuals by section 19(2) would effectively be meaningless if the right to use a language did not also imply the right to be understood.

Justice Beetz, for his part, was firm in maintaining that "the rights guaranteed by section 19(2) of the Charter are of the same nature and scope as those guaranteed by section 133 of the *Constitution Act, 1867*", and do not in themselves provide any guarantee that the individual must be understood. For Justice Beetz, this superficially perverse conclusion was much more than a matter of semantics or common sense; it rested ultimately on the distinction between language rights and legal rights. The importance of the distinction did not lie so much in the particular outcome as in the judicial consequences.

*This essential difference between the two types of rights dictates a distinct judicial approach with respect to each [and ...] the courts should pause before they decide to act as instruments of change with respect to language rights.*<sup>[29]</sup>

At the centre of this distinction there is another no less important distinction between the rights we may enjoy as individual speakers of *any* language and rights such as are granted only with respect to the use of particular (for example official) languages in specific contexts. The official equality that is conferred on English and French by section 16 of the Charter does not, by definition, partake of the same kind of fundamentality that is guaranteed to speakers of all languages by the *Universal Declaration of Human Rights*. Which brings me to my final question: what is the lesson to be learned from these decisions in adjudicating the claims of different species of rights?

#### **IV. ADJUDICATING AMONG DIFFERENT SPECIES OF RIGHTS**

I cannot leave *Société des Acadiens* without expressing some regret that the Supreme Court was not asked to address itself to the underlying issue whether an English school should be permitted to offer French immersion classes to francophone children. While one can understand and sympathize with the actual outcome (which prohibited that practice), one also cannot help wondering how the Court might have related that decision to article 26 of the *Universal Declaration*, which states that parents "have a prior right to choose the kind of education that shall be given to their children".

It is the particularity of human language itself that makes it such a problematic domain for the determination of rights. As Ronald Dworkin has put it, the "center of a community's essential structure is its shared language. A language is neither a private nor a public good as these are technically defined; it is inherently social, as these are not [...]"<sup>[30]</sup>. On the basis of the decisions that I have reviewed above, I would have to conclude that language use, language communities and language rights will continue to vex Canada's judicial system for the foreseeable future. The reason arises from the personal, political and judicial interplay of four rights-related principles:

1. a primordial right to use *whatever* language one is most familiar within domestic and a more restricted number of public contexts;
2. a right to choose one's own linguistic associations and, again within publicly defined limits, those of one's children;
3. one's right as a member of a particular linguistic community to pursue the legitimate protection and promotion of that community, subject always to respecting the previous two principles; and
4. one's right to enjoy a particular language regime *vis-à-vis* the institutions of the state, a right that derives from the official language laws or policies of that state.

It might be argued, even on the basis of the rather slender evidence of a handful of Supreme Court decisions, that conflicts will most typically arise along the divide that falls between number 1 and 2 and numbers 3 and 4, i.e. between the basic exercise of individual language rights that are either given or chosen and such constraints as may be imposed in the name of either public order or political and cultural cohesion.

There is no doubt in my mind that, in a modern state like Canada, and given its particular linguistic history, the forces that favour the official promotion and use of certain languages, either for reasons of administrative expediency or cultural conservation, will inevitably weigh on the freedom to use and choose one's own language without fear of discrimination. Seen in this light, what are ordinarily described as language rights in Canada (i.e. *official* languages rights) are not altogether a sub-species of the right to equal treatment that is granted each and every language user. Rather, they tend to be rights which stem either from government's need to facilitate communication and maintain cohesion, or from the desire to accommodate large minority-language populations, or both. To that extent, I can concur with Justice Beetz that the courts would be well advised to "exercise restraint in their interpretation of language rights provisions". Such official-language provisions as we have come to prescribe by law in this country are not on the same plane as the more fundamental rights that can be found in the *Universal Declaration*. They are, on the whole, more akin to the essentially collectivist propositions expressed in article 26 of the *Universal Declaration* and article 27 of the *Covenant on Civil and Political Rights*.

And in the end, how does one adjudicate among these potentially opposed rights? Here again I would conclude with Justice Beetz that official language rights, *taken as such*, are by their nature political compromises rather than fundamental human rights and should be interpreted accordingly. One might wish that this were not the case or that the political claims that are made on behalf of English, French or any other linguistic claimants in the Canadian hierarchy were on a par with, and of the same essential nature, as the rights claimed for speakers of all natural languages. But it just is not so.

In conclusion, I am grateful to Jean Beetz for this as many other things: that he kept squarely before us the extent of our public compromises with respect to language use and language preference. The judgments that we make in that regard, both individually and collectively, are not the fruits of an untrammelled respect for individual freedoms; and this needs to be said. To what extent they may be reasonably justified "for the purpose of promoting the general welfare in a democratic society" is not, as the Court might say, something that need be decided here. But if I have learned anything from re-reading the above decisions it is the need to treat claims advanced under the banner of "the general welfare" with caution, especially when they threaten to differentiate among natural languages in ways that set the scene in a potentially discriminatory way.

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[1] Chief Commissioner, Canadian Human Rights Commission.

[2] *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, at 578.

[3] [1945] Can. T.S. no 7.

[4] U.N. Doc. A/810, 1948, at p. 71.

[5] [1976] Can. T.S. no 46.

[6] [1976] Can. T.S. no 47.

[7] [1969] 660 U.N.T.S. 195, no 9464; [1970] Can. T.S. no 28.

[8] *R. v. Mercure*, [1988] 1 S.C.R. 234, at 237.

[9] *McDonald v. City of Montreal*, [1986] 1 S.C.R. 460.

[10] Francesco CAPOTORTI, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, New York, United Nations, 1977.

[11] [1985] 1 S.C.R. 721.

[12] *Supra*, note 8.

[13] *Supra*, note 7.

[14] *Supra*, note 1.

[15] [1988] 2 S.C.R. 712.

[16] *Supra*, note 10.

[17] 30 & 31 Vict, U.K., c. 3.

[18] *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016; *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312.

[19] *Supra*, note 8, at 484.

[20] *Id.*, at 492.

[21] *Id.*, at 498.

[22] *Id.*, at 499.

[23] *Id.*, at 500.

[24] *Id.*

[25] R.S.Q., c. C-11.

[26] *Supra*, note 14.

[27] Section 19(2) provides as follows: "Either English or French may be used by any person in, or pleading or process insuing from any court of New Brunswick".

[28] *Supra*, note 1, at 571.

[29] *Supra*, note 1, at 552-553.

[30] Ronald DWORKIN, "Can a Liberal State Support Art?", in *A Matter of Principle*, Cambridge, Massachussets, Harvard University Press, 1985, at p. 230.