

10-1-1990

Second Class Rights? Principles and Compromise in the Charter

Denise G. Réaume
University of Toronto

Leslie J. M Green
Osgoode Hall Law School

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Civil Rights and Discrimination Commons](#), and the [Human Rights Law Commons](#)

Recommended Citation

Denise G. Réaume and Leslie J. M Green, "Second Class Rights? Principles and Compromise in the Charter" (1990) 13:2 Dal LJ 564.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

I. *Dividing the Charter*

Minority language rights are both historically and politically central to the Canadian constitution. It is also commonly supposed that they are fundamental rights, rooted in principle, and deserving generous interpretation by the courts.¹ For a time, it seemed that the Supreme Court of Canada shared this view. In the *Manitoba Language Reference*, for example, they said that "The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity."² In *Mercure v. A.G. of Saskatchewan* they reiterated: "It can hardly be gainsaid that language is profoundly anchored in the human condition. Not surprisingly, language rights are a well-known species of human rights and should be approached accordingly"³

In other significant decisions, however, these approving words have been qualified. A foreshadowing of the change in judicial attitude came in the Supreme Court's description of minority-language education rights in *Attorney General of Quebec v. Quebec Association of Protestant School Boards*:

"Section 23 of the Charter is not, like other provisions in that constitutional document, of the kind generally found in such charters and declarations of fundamental rights. It is not a codification of essential, pre-existing and more or less universal rights that are being confirmed and perhaps clarified, extended or amended, and which, most importantly, are being given a new primacy and inviolability by their entrenchment in the supreme law of the land. The special provisions of s. 23 of the Charter

*Leslie Green, Associate Professor, Osgoode Hall Law School and Department of Philosophy, York University.

**Denise Réaume, Associate Professor, Faculty of Law, University of Toronto.

***We are grateful to the Human Rights Law Fund of the Department of Justice, Ottawa, and to the Connaught Programme In Legal Theory and Public Policy at the University of Toronto, and to the Centre for Research on Public Law and Public Policy at Osgoode Hall Law School, York University, for their financial support of this project. The opinions expressed are solely those of the authors.

1. As does, for example, the Ontario Court of Appeal: *Reference Re Minority Education Language Rights* (1984), 10 D.L.R. (4th) 491.

2. *Reference Re Manitoba Language Rights* (1985), 19 D.L.R. (4th) 1 at 19.

3. (1988), 48 D.L.R. (4th) 1, at 57.

make it a unique set of constitutional provisions, quite peculiar to Canada.⁴

The easy slide from the halo of 'uniqueness' to the shadow of 'peculiarity' in describing Canada's language rights portended a change in view. It came in *MacDonald v. The City of Montreal* with the notion that these rights are founded in a 'compromise'.⁵ Beetz, J., for the majority, rejects the appellant's argument that s. 133 of the Constitution Act, 1867 contains a scheme of language rights which could be elaborated through judicial interpretation. Instead, he emphasizes the limited nature of s. 133 and describes this "incomplete but precise scheme" as "a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union."⁶ He concludes that "it is not open to the courts, under the guise of interpretation to improve upon, supplement, or amend this constitutional compromise."⁷

In *Société des Acadiens du Nouveau-Brunswick v. Minority Language School Board No. 50*,⁸ (handed down at the same time) Beetz, J. extends the new view to the *Charter* and gives an argument which purports to underpin it. He now finds two distinct classes of rights in the *Charter* and proposes a different interpretative policy with respect to each of them. First-class or 'seminal' rights are those founded in principle. Second-class rights are founded only in a political compromise among competing groups:

Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in s. 7 of the *Charter*, are so broad as to call for frequent judicial determination.

Language rights, on the other hand, although some of them have been enlarged and incorporated into the *Charter*, remain nonetheless founded on political compromise.

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

4. (1984), 10 D.L.R. (4th) 321, at 331; [1984] S.C.R. 25 at 66. Hereafter referred to as *Québec Protestant School Boards*.

5. [1986] 1 S.C.R. 460.

6. *Ibid.*, at 496.

7. *Ibid.*

8. *Société des Acadiens du Nouveau-Brunswick v. Minority Language School Board No. 50 and Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549 at 578; 66 N.R. 173 at 188.

judicial interpretation. But, in my opinion, the court should approach them with more restraint than they would in construing legal rights.⁹

In summary, the revised view holds: (1) There are two classes of constitutional rights — first-class or principle-based rights and second-class or compromise-based rights. (2) The nature of compromise rights is such as to mandate judicial restraint in their interpretation. (3) Language rights are compromise rights. Thus, the court develops a special, more restrictive rule for interpretation which is to be applied *when* compromise rights are at issue, and *because* compromise rights are at issue.¹⁰ It is not merely that language rights all fortuitously happen to deserve an exceptional treatment; their supposed basis in a compromise warrants it.

The new view makes the Court's other remarks about language rights being a 'well-known species of human rights' and 'grounded in the essential role that language plays in human existence, development and dignity' sound idle — part of what Bagehot would have called the 'dignified' rather than 'efficient' aspects of a constitution. What matters about these well-known human rights, the Court now says, is that they are rooted in nothing more than a political compromise, and one which it is not open to the courts to revise or amend.

The new view is a troubling one, not merely because it is, as we shall argue, unsatisfactory as a piece of legal reasoning. It is also troubling because the Court's division of the Charter into first-class and second-class rights, those which should be generously and those which should be restrictively interpreted, is general in character. As such, it could easily infect other aspects of the Charter, ultimately subverting their beneficial purposes. It therefore clearly merits the closest scholarly scrutiny.

It might be argued that if the Court thinks that language rights are not founded in principle,¹¹ the most direct critique would be to show that, on the contrary, they are.¹² But that would leave open the possibility that,

9. *Ibid.*, at 578.

10. The rule is applied in *Mahé v. The Queen* (1987), 42 D.L.R. (4th) at 531, *Commission des École Fransaskoises Inc v. Saskatchewan*, [1988] 3 W.W.R. 354 at 364; *Reference re Minority Language Educational Rights (P.E.I.)* (1988), 69 Nfld. and P.E.I. R. 236; 211 A.P.R. 236 at 244-5.

11. This way of construing the distinction best explains Beetz, J.'s comments. However, someone might argue that even if language rights are based in principle, they also have a further element of compromise which is itself enough to justify a more restrained approach. Unlike Beetz, J.'s view, this one does not assume the that distinction between compromise and principled rights is exclusive. Nevertheless, most of our arguments concerning the accuracy and rationality of the distinction would apply equally to this version.

12. For some elements of a direct argument see L. Green, "Are Language Rights Fundamental?" (1987), 25 *Osgoode Hall L. J.* 1; and L. Green and D. Réaume, 'Education and Linguistic Security' in the Charter (1989), 34 *McGill L.J.* 777.

while the Court puts language rights in the wrong class, the division of the Charter into two classes nonetheless remains sound. In any case, the Court's own argument is an indirect one: it does not show that there can be no principled basis for language rights. Instead, it picks out features of language rights which it assumes to be a sign of their less principled nature. Examining these features, we argue that the division cannot be drawn in a plausible way and that it does not support the interpretative consequences which the Court draws from it.

II. *Constitutional Interpretation*

Interpretative policies have a number of functions in adjudication, the most important of which is to guide discretionary choice. Legal norms, it is generally accepted, may be indefinite in their application because legislators either intentionally or unintentionally left room for choice among different readings.¹³ So called 'canons' of interpretation may not eliminate discretion in judicial reasoning, but they do guide its exercise by colouring the initial sense of what the candidate interpretations are, and by directing choice among them. These canons are of course self-embracing: they are no more self-interpreting than any other legal rule. Moreover, as different interpretative policies are available to cope with uncertainty, it is open to debate and ultimately decision which are most appropriate in a newly developing area of law. The language rights recently entrenched in the Charter, and those older language provisions that have only recently given rise to much litigation, form one such area.

The interpretative rule proposed for language rights should be understood as an exception to the general rule for constitutional interpretation established in the leading Supreme Court cases of *Southam Inc. v. Hunter*¹⁴ and *R. v. Big M Drug Mart Ltd.*¹⁵ According to the general rule, interpretation is to be *dynamic*, in the sense that it is capable of adjusting constitutional doctrines to changing social circumstances and, at least where fundamental rights are at issue, it is also to be *purposive*, attending to and extending the deeper aims of the provision in a way which maximally promotes the relevant interest of its intended beneficiaries.

In *Southam*, Dickson, J. (as he then was) elaborated the dynamic aspect when he invoked Viscount Sankey's famous words that the

13. See, e.g. H. Kelsen, *The Pure Theory of Law* (Berkeley: University of California Press, 1967), tr. M. Knight, at 349, H.L.A. Hart, *The Concept of Law*, (Oxford: Clarendon Press, 1961) at 121-132.

14. (1984), 9 C.R.R. 355; 11 D.L.R. (4th) 641.

15. (1985), 13 C.R.R. 64.

constitution must be a “living tree capable of growth and expansion” deserving of a “large and liberal interpretation” rather than a “narrow and technical construction”. Dickson, J. noted that because a constitution must provide a continuing framework for testing the legitimate exercise of governmental power and for protecting rights and liberties “It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.”¹⁶

The purposive aspect was outlined in *Big M.*, again by Dickson, C.J.C. Recognizing that *Charter* rights are intended to confer benefits on citizens, he held that they must be analyzed “in the light of the interest it was meant to protect.” More specifically:

[T]his analysis is to be undertaken, and the purpose of the right of freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection.¹⁷

Of course, in one weak sense *all* legislation should be interpreted purposively,¹⁸ and the Court did not mean to suggest otherwise. The present point is in fact a stronger one: in the constitutional context, where important benefits are intended to be conferred on citizens, rights-granting provisions should be interpreted *generously*, that is, so as to promote the imputed beneficial purpose as much as possible within the constraints of settled law. On this view, constitutional rights should not be understood as minimal concessions wrested from an unwilling government nor should the government be permitted to exploit inevitable loopholes to avoid its obligations. Individuals are to get the ‘full benefit’ of the *Charter*’s protection.

We pause here to forestall one possible misunderstanding. To speak of a ‘generous’ or ‘liberal’ interpretation might appear to suggest that it is one which permits the court to extend the language beyond what would be required by a correct interpretation of the constitution (for instance, one bound by the intent of the framers). That would be a mistake. The correct interpretative policy itself sets the only legally relevant benchmark there can be for judging whether a given interpretation *is* in fact correct.

16. *Supra* note 14 at 364.

17. *Supra* note 15, at 103.

18. *Heydon’s Case* (1584), 3 Co. Rep. at 7a; 76 E.R. 637: an interpretation must seek to identify the mischief that the statute attempted to remedy.

It is notorious that one must always appeal to some further theory in order to construct the 'intention' or 'purpose' behind some provision.¹⁹ It is therefore a confusion to think that the dynamic-purposive rule directs courts to extend rights beyond what a provision 'really' means. It would be better to say that the rule tries to settle, as far as any rule can, what the provision will mean. The dynamic-purposive rule is of course as much open to scrutiny and criticism as any other interpretative policy; but that criticism must amount to something more substantial than the empty incantation that it betrays the real meaning of the provisions which it interprets.

How, then does the new rule differ from the general one? Above we noted that, in *MacDonald*, Beetz, J. said that it is not open to the courts to "improve upon, supplement, or amend" s. 133. In *Société des Acadiens*, he further warned the courts to pause "before they decide to act as instruments of change with respect to language rights". In the *Reference re Minority Language Rights (P.E.I.)*, the Court of Appeal drew from these judgments the general interpretative principle that "the court should be cautious before changing rights arising out of political compromise."²⁰ But these admonitions to caution and restraint are themselves quite elusive. In one sense they are unobjectionable. Of course it is not up to the courts to change rights or amend the constitution. But that is not a special interpretative theory. Courts have only limited institutional capacity for policy development and therefore should generally move cautiously, whether in constitutional, statutory, or common-law adjudication. In interpreting compromise rights, the courts should not usurp the role of legislators or framers of a constitution. But that is just because they should not usurp those roles at all. The Supreme Court evidently does not take the new policy in this platitudinous way; they think it offers real guidance in the decisions in question.

The precise character and weight of the new policy, however, gets surprisingly short shrift in these crucial judgments. Any analysis must therefore be in some measure reconstructive. In that spirit, let us begin with Beetz, J.'s suggestion that the Court should approach compromise rights with "more restraint" than they would in construing legal rights. How does this differ from the normal dynamic-purposive rule? At first glance it seems to be a complete rejection of it.²¹ At the very least,

19. See R. Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), chap. 2.

20. (1988), 69 Nfld. & P.E.I.R. 236; 211 A.P.R. 236, at 246.

21. That is how it has been seen by e.g. J.E. Magnet, "Canada's System of Official Bilingualism: Constitutional Guarantees for the Legislative Process" (1986), 18 *Ottawa L. Rev.* 227, at 232 note 9.

however, it cannot embody a rejection of the dynamic aspect of the normal rule. That aspect was not in play in *Société des Acadiens*. The appellant association did not argue that in view of *changed* social or factual circumstances the right to use one's language in court now requires extension or modification. After all, the right protected by s. 19(2) of the *Charter* was entrenched only in 1982. Social circumstances could hardly have changed enough in those four years to require further development of the law. Even if we look back to s. 133 (which s. 19(2) merely extends to New Brunswick), nothing has changed in Canadian society to support the view that while in 1867 the right to use French or English did not comprise the right to be understood by any reasonable means, it must now be interpreted to include that right. Thus the new rule should not be taken to suspend the dynamic aspect of the general rule in interpreting compromise rights. Indeed, the Court could not do so without overruling its own decision in *Blaikie (Nos. 1 and 2)*.²² In that case, the Supreme Court decided that delegated legislation, in view of its increased importance, is covered by the language guarantees of s. 133, thus interpreting the concept of an "Act" to include delegated legislation. At the same time, they interpreted the concept of a "court" to include administrative tribunals exercising judicial functions. The Court's reasoning here is quite plausible. The machinery of government, including the judicial system, has changed in ways unanticipated in 1867 and the requirements of s. 133 must be allowed to keep pace with these changes. But these decisions can be reached only by invoking the dynamic principle.

If the dynamic aspect of the general rule remains intact, then the main change must be directed at the purposive aspect.²³ In these decisions there is, in fact, very little discussion of purpose at all, suggesting that the fact of compromise displaces or weakens the importance of the normal indicia of purpose. This might lead one to suppose that the revised view is a literalist or 'plain-meaning' policy of interpretation. It is true that in *MacDonald Beetz, J.* held that the appellant's argument that s. 133 entitled him to a bilingual summons was inconsistent with the plain meaning of the words 'either French or English'. In *Société des Acadiens*, however, the Court had to determine whether the right to 'use' a language

22. *Blaikie v. A.G. Québec*, [1979] 2 S.C.R. 1016, and *A.G. Que. v. Blaikie*, (No.2), [1981] 1 S.C.R. 312, 123 D.L.R. (3d) 15.

23. This provides only an uneasy accommodation between *Société des Acadiens* and *Blaikie*, for application of the dynamic principle is itself often informed by considerations of legislative purpose. It allows the courts to expand the scope of a rule to keep pace with changing social or other circumstances. But appeal to the purpose of the rule is needed to provide guidance as to whether a given change justifies an extension and if so how far.

before the courts included a right to be understood in that language by the court. It found that it did not. Despite suggestions to the contrary, however, this conclusion cannot be reached by appeal to the plain meaning of the word 'use'. That word must be interpreted in the context of the phrase 'use a language' and its cognates. But there are contexts in which this does comprise being understood²⁴ and the Court did not in any case offer the sort of argument necessary to establish the contrary. Perhaps sensing this, the Alberta Court of Appeal had to rewrite the constitution in order to bring the Supreme Court's holding under the scope of the plain-meaning rule: the Alberta Court described them as having held that the right to '*speak*' a language does not include the right to be understood in it.²⁵ But of course the Supreme Court did not hold that, because the constitution does *not* guarantee the right to speak; it guarantees the more general right to use. That is why the issue arises in the first place.

Another, more general consideration, also supports the view that the revised rule cannot simply be the plain meaning rule. It is helpful to appeal to the plain meaning of some provision only when it is univocal, or at least univocal when constrained by a requirement of consistency with settled law. These conditions are rarely met in constitutional cases of the present sort. In any serious case about the interpretation of a constitutional provision, it is far too late to appeal to the plain or literal meaning of the disputed words. The fact of dispute normally indicates that the meaning is not so plain. The alternative pretence is often little more than a rhetorical decoration of a decision taken on other grounds, and does not reveal the basis for the particular interpretation, or show whether it should be broad or narrow. Moreover, where plain meaning does settle an interpretative point, there is no room for the distinction between compromise and principled rights, or similar interpretative policies. If the plain, uncontroversial meaning settles the case, then the fact that the right is based on compromise can scarcely reverse it.

We therefore maintain that the revised rule for compromise rights must be both compatible with the dynamic principle and different from the plain meaning rule. We take its force to be this:

When interpreting a provision of the Constitution that protects a compromise right, resolve any indeterminacy by adopting that interpretation which is permitted by the dynamic principle, is consistent

24. Suppose one asks a travel agent, 'Is English used in Malta?'. If he replies 'Yes' thereby intending only 'You can speak it if you like, though no one may understand you' he would not be being literal-minded but simply devious.

25. *Mahé, supra*, note 10, at 533.

with settled law, and which is minimally beneficial to the intended beneficiary of the right.

In applying this rule, the Court cannot therefore decide, for example, that s. 133 imposes no obligations whatever on Parliament. That would not be consistent with settled law. Nor can it decide that 'act' does not include delegated legislation, for that is inconsistent with the dynamic principle. But within the remaining room for interpretation, the revised rule recommends choosing the one which, while benefiting the right-holder, does so to the least degree.

The contrast between this and the usual dynamic-purposive approach therefore lies in the fact that the revised rule excludes the principle of generosity or maximal benefit to the right-holder. Just how much less than maximal benefit it requires is unclear. First, some cases suggest that it requires the interpretation which gives minimum benefit to the right-holder. In *MacDonald* and *Société des Acadiens*, the majority concluded that the constitutional right to use English or French amounts to a bare liberty to use the language and a right that one's words enter the official record in that language.²⁶ Any narrower interpretation would have obliterated the right altogether. Second, if the revised rule does not recommend the minimum benefit, it is hard to see how it offers much help, for between minimum and maximum benefit there is indefinite room for dispute. Third, the minimum benefit principle makes sense of the underlying view that these rights are based on a delicate compromise which must not be upset. Finally, as we shall see, the less-but-not-least benefit version is in any case liable to the same objections as the stronger version.

In general, then, the revised rule is the normal rule for Charter interpretation, but without the principle of generosity to citizens. Whether it should on that ground be called 'ungenerous' depends on one's view of the aims of the *Charter*. Because rights impose on others duties to promote or protect the interest which grounds the right, the revised rule can be understood as one of greater generosity to those who normally bear duties. To read rights less generously is, after all, to read legislative and bureaucratic powers more generously, that is, to preserve the authority or freedom of officials. One who thought that the overarching purpose of the *Charter* was not to benefit citizens but rather facilitate governance could thus regard it as *more* generous than the standard dynamic-purposive rule. The choice of terminology is itself of

26. It must include the latter or else the official language guarantees give French and English minorities nothing which is not already guaranteed by the rights to freedom of expression and a fair trial.

no importance. We shall therefore refer to it indifferently as a 'restrictive' or 'narrower' rule.

III. *Criteria of Appraisal*

Is the revised rule an attractive one? Is it soundly applied to what the Court calls compromise rights? In addressing these questions we first make explicit certain assumptions and criteria of assessment.

We assume that the cases in question raise serious issues, that they are not merely frivolous cases in which litigants are 'trying on' far-fetched or foolish arguments. We also assume that they are beyond the reach of plain meaning doctrines and that they call for the exercise of discretionary choice guided by sound interpretative policies. Finally, we assume that the Court's analysis must give plausible and consistent results, at least in its post-Charter jurisprudence, except when it has clearly chosen to over-rule itself.

On this footing, three criteria for appraising the new interpretative policy follow quite directly from the judgments themselves. The policy is soundly based on the distinction between principle and compromise only if the following conditions are all met:

(i) *Coherence*: The distinction between compromise and principled rights must be consistent if it is to have any interpretative bite at all. By consistency we understand that the classification must be an *exclusive* one. It must pick out some feature of one group of rights which is not held by another, or there would be no rationale for treating them differently.²⁷

(ii) *Accuracy*: The distinction must also be accurate in the sense that it materially divides the *Charter* as the Court intends. That is, a particular interpretation of the division must classify the rights in the way that Beetz, J. suggests: by locating at least the legal rights in the 'principled' category and at least the language rights in the 'compromise' category. Since these are the paradigms of the two categories, a classification which, for instance, led to the conclusion that some legal rights are really only compromise rights, or that some language rights are in fact principled, would be unacceptable. Notice also that this is logically distinct from the first criterion. The distinction between principle and compromise may be perfectly coherent and yet the Court may have put the particular rights in the wrong categories. In requiring accuracy as well as coherence, we are

27. We shall not, however, make the additional assumption, plausible on the face of it, that the classification is also *exhaustive*. We shall not, that is, assume that every Charter provision, or even every rights-granting provision, is either a compromise or principled right. Perhaps some are neither. The judgments leave the question open.

assuming that such an error would call into question not only the application of the distinction, but also its rationale.

(iii) *Rationality*: Since the division of the *Charter* is meant to support a *difference* of interpretative approach with respect to each category, it must be drawn in such a way as to suggest some rational justification for this difference of treatment. Consider an example. The section numbers of the legal rights provisions are all smaller than those of the language rights provisions. This gives a coherent and accurate division of the rights into two groups. But no one could think that this fact warrants a different interpretative policy with respect to each group; it is completely irrelevant. For it to be rational, the distinction must track some features which can plausibly be held to justify a difference of approach.

These then are the minimal criteria by which to judge the new policy. Let us now see to what extent the distinction expressed in *Société des Acadiens* and elaborated elsewhere can meet them.

IV. *The Idea of a Compromise*

Although it refers to an 'essential difference' between principled and compromise rights, Beetz, J.'s judgment is disappointingly unperspicuous as to what this difference consists in, and other courts seem no better able to explain it. The cases suggest at least four competing versions of the distinction. These are not separately stated, but they are distinguishable, and entail quite different ways of defending the new interpretative policy. They may be expressed briefly by the following polarities: abstract vs. concrete, natural vs. conventional, universal vs. local, and general vs. special rights.

1. *Abstract vs. Concrete*

One palpable difference between language rights and many other rights entrenched in the *Charter* lies in their verbal expression. If one compares, for example, the terse and direct language of, e.g. s. 8 ('Everyone has the right to be secure against unreasonable search or seizure.') with the more complex and convoluted language of s. 23, one is immediately struck by the greater explicitness of the latter. In the Alberta Court of Appeal judgment in *Mahé*, Kerans, J.A. regarded this as a salient aspect of the distinction. He described the traditional civil liberties as expressing in an 'offhand' [sic] way, 'profound and traditional idea[s],' in contrast to the 'peculiar' and 'precise' language of s. 23.

This difference between kinds of language is, of course, poorly expressed as a distinction between 'offhand' and 'precise' provisions. Section 8 is not a slapdash, casual, or badly drafted section. The point is that the notion of reasonableness leaves open many doors. It is, we might

say, an abstract as opposed to concrete term, one which invites judgment and about which disagreement is to be expected. But this does not show that s. 8 is an offhand provision, or that the framers failed to put precisely what they meant. It shows that they meant only to prohibit searches and seizures in as much as they are unreasonable and to leave the concrete application of that abstract standard to the courts. It is therefore no objection that the courts may come to apply it in ways unforeseen to the framers, or with which they would have disagreed. Had they meant to prohibit specific forms of search and seizure they could have done so, and the fact that they did not is itself significant.

Is this version of the distinction a coherent one? How can we tell whether some rights-granting provision is to be counted abstract or concrete? We cannot gauge it by anything as crude as the *length* of the section in question, for there is the prior question of how to individuate rights within the *Charter*. A long section may not indicate a concretely specified right, but a sequence or cluster of related rights, each of them abstract. For instance, s. 11 (rights in criminal proceedings) is longer and more detailed than s. 6 (mobility rights), but it is in fact more abstract than it. In s. 11, the rights are defined in terms of 'unreasonable delay', 'reasonable bail', and an 'impartial tribunal'. The briefer s. 6 defines the scope of mobility rights much more concretely. The difficulty in classifying rights according to this version lies in the fact that abstraction is a term most appropriately applied to parts of provisions rather than to whole provisions or sets of provisions.²⁸ Thus, provisions may contain mixed abstract and concrete language. For example, the right to 'use French or English' concretely specifies two languages, but leaves room for interpretation about what is included in their 'use'. Similarly, s. 8 prohibits 'unreasonable search or seizure' thus governing fairly concrete actions by the abstract attributive term 'unreasonable'. This suggests that we must further specify the respect in which abstractness is relevant in order to make the distinction coherent. We must either confine it to a term or phrase, or determine what amount of overall concreteness in its terms would warrant classifying a whole provision as concrete. Assuming for sake of argument that some overall index of concreteness is possible, let us go on to consider the accuracy of the distinction in either of these forms.

Can it be said that all the language provisions are more concrete than all the legal rights? The Constitution includes the provision that the

28. One should also note that abstraction is a matter of degree. For simplicity, we therefore take the new interpretative rule to mean that provisions which are clearly concrete deserve a narrower reading.

French and English languages have 'equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada' (s. 16 (1)); and that any member of the public has the right to services in English or French from certain institutions where there is 'significant demand' or it is 'reasonable' with regard to the 'nature' of the office (s. 20). This language is as abstract as that found in many legal rights. On the other hand, one of the legal rights entitles people 'except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment of the offence is imprisonment for five years or a more severe punishment' (s. 11(f)). That is as concrete as anything in the language rights. Thus, this version of the distinction fails to classify the *Charter* as the Court intends it should. At the most, one could say that those rights that are concretely as opposed to abstractly drawn deserve a different interpretative approach. But that will apply within the language rights as well as between language rights and legal rights.

And what of its rationality? Is concreteness an appropriate ground for restrictive interpretation? It might be said that in interpreting a concrete provision, courts simply have less room to manoeuvre because the drafters wanted them to have less room to manoeuvre. That is fine as far as it goes; but 'less room' does not go so far as to mean 'no room'. The courts obviously may not subvert the concrete terms used. They may not, for instance, accord to someone who is neither a native speaker nor educated in the minority language the right to have her children educated in that language even if she has become fluent in that language and has always cherished the dream of having her children speak it fluently. That is ruled out by s. 23. Nor may the courts use s. 8 to justify awarding damages against the police for harassment, since that is not a kind of search or seizure. But no special interpretative theory is needed to justify these conclusions. Where a proposed interpretation cannot be brought within the actual wording at all, then the courts may not entertain it, however reasonable it might otherwise be. Here, however, we are not dealing with cases in which the competing interpretations are wholly implausible. We are considering cases in which such concrete language as there is still leaves room for genuine dispute.

If the argument from concreteness is not merely a surreptitious and inappropriate appeal to plain meaning then it must be understood differently. Two positions seem possible. First, if the distinction is applied with respect to a particular term or phrase, one might argue that whenever a concrete term is used, it must be read narrowly. But again, while concrete language may be intended to exclude some interpretations, it need not exclude all. To infer that it does would be to deprive

drafters of a valuable tool, for it would mean that they could not use concrete terminology unless they intended a restrictive interpretation of it. This presents the drafter with an undesirable and perhaps impossible, task: whenever using concrete language, she must try to anticipate all the circumstances to which it might apply, determine whether a restrictive interpretation would be appropriate and, if not, try to incorporate a form of words which would exclude it. There are many cases in which this kind of foresight is impossible, and many more in which a concrete determination is better left to those who have the benefit of detailed argument on the issue. The legislator's time might be better spent than in trying to make every term as concrete as is possible.

The eligibility criteria of s. 23 which refer to citizens 'whose first language learned and still understood' is that of the minority, provides an example. This is more concrete than if the qualifier had simply been 'first language'. The actual version excludes some whom the courts would otherwise have had the discretion to include, i.e. those who no longer understand their first language. However, what it means to 'still understand' a language can cover a wide gamut from a rudimentary comprehension to complete fluency. Normally the drafters intend such indeterminacy to be resolved by the courts according to what seems reasonable in the cases that arise and in light of detailed argument. The restrictive rule amounts to a general policy, pursued in quarantine from such arguments, that the broader possible meanings must be automatically eliminated from consideration. But there is no basis for such a policy; no general reason for thinking that the broad meaning of 'still understood' can always be eliminated out of hand.²⁹ One could have even less confidence in the judgment that the broader meanings of *every* concrete term should always be excluded. The result is that interpretations may be eliminated which, if the arguments had been considered, might have been judged the most reasonable in the circumstances.

In fact, concrete language has legislative uses which have nothing to do with the appropriateness of restrictive interpretation. Why, for example, would one choose the concrete eligibility criteria of s. 23 over some more abstract wording such as "members of the minority language community within each province"? Must it be to indicate that *remaining* uncertainties

29. It might be argued that the generosity aspect of the normal rule of interpretation for constitutional rights also embodies a general policy which would be better settled on a case-by-case basis. However, this policy is reasonable in light of the fact that these rights are designed to protect important interests of citizens. The point here is that the Court has offered no reason which distinguishes language rights. It certainly cannot lie in the mere use of concrete language.

are to be resolved by restricting access? On the contrary, the concrete language may have been chosen for the pragmatic reason of limiting litigation over who is included. That desire may itself have been in the service of generosity to right holders, to reduce the opportunity for stalling tactics on the part of unsympathetic provincial governments. Where, despite such efforts, litigation is necessary, the presence of concrete language tells us nothing further about how it should be resolved.

A different attempt to make sense of the abstract/concrete distinction would be to count as 'concrete' only whole provisions in which there is a certain degree of concrete language. This deals with mixed provisions by treating the concreteness of some terms as contagious, thus dictating a restrictive interpretation of even the abstract elements. But this too fails the rationality test. Although a provision must be read as a whole, that cannot establish in advance that the appropriate outcome of a holistic reading must be an ungenerous one. If a more restrictive interpretation of the concrete terms themselves cannot be justified, still less can the fact of their concreteness dictate a restrictive interpretation of the abstract features of a provision. For example, the fact that the eligibility criteria of s. 23 are quite concrete cannot justify giving a narrow interpretation to the concept of 'instruction'. We must therefore abandon the first interpretation of the 'essential difference' and look elsewhere.

2. *Natural vs. Conventional*

Some jurisprudential theories incorporate a distinction between rights that are natural and those that are conventional, historical, or artificial.

This distinction may well have had some unarticulated influence on the courts. In *Québec Protestant School Boards*, for example, the Supreme Court contrasts language rights with 'essential, pre-existing' rights and, in *Société des Acadiens*, with 'seminal' rights. These terms resonate quite strongly with the notion of natural rights. What, however, can they mean?

In interpreting this distinction we must bear in mind that all *Charter* rights are, *qua* positive law, conventional. That they are entrenched at all, and in their present forms, is wholly a matter of artifice. In *Québec Protestant School Boards* the Court seems to notice this, saying that in some provisions of the Constitution 'essential, pre-existing' rights are 'being confirmed and perhaps clarified, extended, or amended'. Every provision of the *Charter* has a history. It protects 'freedom of thought, belief, opinion and expression' rather than 'freedom of speech'; it secures the right to 'the equal protection and equal benefit of the law' rather than 'equal protection of the law'. These words represent constitutional

choices whose genesis and force is well-known. If these are principled rights because they are based in pre-existing, natural rights, then that is consistent with them having a history: *qua* moral rights they are natural; *qua* legal rights they are conventional.

But perhaps the distinction is meant not to signify the existence of a history, but of a particular kind of history, for example, one drenched in political struggles or self-interest. Once again, this is a feature of most positive law:

Most fundamental democratic rights — from Magna Carta to the Declaration of the Rights of Man — had seedy pasts. They were conceded reluctantly and only after protracted political battles and compromises in which ideology had greater power than theory. Cynicism and scepticism about the Charter is often bred of more attention to pedigree than to principle. Had Magna Carta been concluded under a system of representative government, the glare of lights, and the whirl of video-recorders, we would no doubt regard it too as a mere political compromise. But the historical pedigree of some provision cannot repudiate its justifications. The thought that it does is based on a fallacy: one cannot show that some law is not rooted in principle simply by showing that other and less noble considerations moved its proponents.³⁰

The distinction must therefore refer to the *justification* for a legal right; that is why history is relevant. A constitutional right need not have an immaculate conception in order to be founded in principle. It need only have a principled justification. The distinction between principled and compromise rights can therefore only be made at this level.

How should the distinction be drawn? Must a principled justification be based on natural rights as opposed to some other kind of moral principle? That would yield a coherent distinction, since any constitutional right either can or cannot be justified by appeal to natural rights. But is it accurate? Are all legal rights natural in this sense? The presumption of innocence (s. 11 (d)) might seem so, but what of the right, in s. 11(f), 'except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment'? The right to a jury trial is well entrenched in our legal culture, and supported by good reasons. But would it violate a moral right of individuals to establish a new legal system without this practice?

Would this rationally justify any difference in interpretative posture? Perhaps the thought is this. If a legal right protects a natural right, then the direction of purposive development is given by the correct

30. Green, *supra* note 12, at 8.

philosophical theory of the right in question; it can therefore draw energy from beyond the law to drive the development of law.³¹ A purely historical right, being the creature of law, has no such external power-supply and therefore cannot be extended at all. The argument fails because the fact that some *Charter* right is not grounded in a pre-existing natural right does not show that there are no other urgent, moral reasons that pre-exist it, justify its enactment, and direct its further development. There may be, for example, powerful arguments of general welfare or the public interest behind some *Charter* provision.

A clue to the real basis of this distinction may lie in the claim that principled rights are 'pre-existing'. It makes no sense to interpret this merely to mean existing previously in non-fundamental law. Prior to the *Charter* every province had some regime governing, e.g., minority language education. The rights and liberties so provided were, of course, typically *different* from those guaranteed in the *Charter*, but they were not on that account any less 'pre-existing' than the pre-*Charter* rights to, say, freedom of religion or the right to be presumed innocent. The distinction is also irrational because the historical accident of the date of entrenchment could not have the proposed interpretative consequences. This leads to the conclusion that principled rights are those which are pre-existing with respect to *all* positive law, that they are natural *rather than* purely conventional rights.

This draws the distinction between those legal rights which have independent moral justification of whatever sort, and those which have none.³² This distinction might well justify a restrictive reading of a particular historical right. If one thought that a right in positive law had no moral justification *whatever*, and that it should never have been enacted in the first place, then one might try to contain the damage by reading it down. For example, apartheid is morally abhorrent and a South African judge might therefore wish to read restrictively the rules implementing it. The judicial duty to maintain a reasonable degree of consistency in the law is not, it is true, limited to those cases in which the law is perfect. To secure expectations, minimize inconsistency, and ensure fairness among litigants, less-than-ideal principles should sometimes be extended. But no one thinks that applies to irrational or deeply unjust

31. This is suggested by the French text of Beetz J.'s remark: 'A la différence des droits linguistiques qui sont fondés sur un compromis politique, les garanties juridiques tendent à être de nature plus féconde parce qu'elles se fondent sur les principes.' *Supra* note 9.

32. It is logically possible to draw an exclusive distinction between those rights that are purely natural and those that have some historical element. However, since all legal rights have a history this distinction cannot possibly be accurate and thus will not be considered further.

principles. At some point, the usual rationales for extending the spirit of the law into unregulated cases must give out.³³

Could this be the notion that underlies this reading of the distinction? Is it plausible to assimilate the language rights in the Canadian constitution to, let us say, South Africa's Group Areas Act? If the Supreme Court thought so then we would be owed some argument. But of course, the Court does not think that, because it regards language rights as a well-known species of human rights, founded in human dignity, and so forth. The view that morally abhorrent legal rights should be read restrictively has no application here whatever.

3. *Universal vs. Local*

A third version is partly related to the last. In *Québec Protestant School Boards*, the Court says that minority language education guarantees are not 'of the kind generally found in such charters'; they are 'special', 'unique', or 'peculiar' to Canada, in contrast to the 'more or less universal' character of other *Charter* rights. The relation to the second version is this: it is commonly supposed that natural rights are also universal rights.³⁴ The point is sometimes put by saying that they are rights which everyone has just in virtue of being human, although that does not seem an especially perspicuous account of their ground. Does the local, non-universal character of language rights establish that they should be read restrictively?

First we need to introduce a qualification. In the purely logical sense of the term, the language rights are indeed universal in form for they are expressed without reference, explicit or covert, to particular individuals. They apply to *all* persons who fall within a certain class. But that is not what the courts have in mind when they describe them as 'special', 'unique', and 'peculiar'. They mean that their form is determined by local conditions and needs that are not present in all countries or at all times.

The idea that language rights are peculiar to Canada might therefore simply mean that not all countries provide for the constitutional protection of language. On this view, the distinction amounts to one between those rights which are widely recognized and those which are not. This is coherent; but is it accurate? Are language rights, unlike legal rights, not widely recognized? In fact, Canada is not peculiar in this respect at all. Language rights are recognized in many different

33. See J. Raz, "Professor Dworkin's Theory of Rights" (1978), 26 *Pol. Stud.* 123, at 133-37.

34. See, e.g. M. Cranston, "Human Rights, Real and Supposed", in D.D. Raphael, ed., *Political Theory and the Rights of Man* (London: Macmillan, 1967), at 49-51.

constitutions³⁵ and to some extent even in public international law.³⁶ Moreover, many countries do not even recognize the core legal rights which the Court does take to be founded on principle.

This casts doubt also on the rationality of this version. Of what possible relevance could it be to our practices that other countries may be deficient in theirs? Even if Canada were *unique* in protecting minority language use, this would not itself show our practices to be merely local customs, for it is equally consistent with the hypothesis that Canada better protects fundamental rights than do other countries. Furthermore, even if language rights were local and peculiar, inherently Canadian rather than universal, why would that give *Canadian* courts reason to interpret them narrowly? Would this policy seem plausible in other analogous cases, such as the right which only Canadian citizens have to vote in Canada; or the right which only Canadian citizens and permanent residents have to interprovincial mobility; or the right which only aboriginal peoples have to the unabrogated recognition of existing treaties? These are all inherently local. It is difficult to see any sense in interpreting them narrowly on that ground.

Of course, only a very few constitutions give special status to *French and English*. Perhaps this is the peculiarity which distinguishes the Canadian language provisions — they make essential reference to local social facts whereas universal rights do not. But that can hardly be thought relevant. It would be absurd to think that, if minority language rights have a principled foundation, it must lie in the natural right to speak French or English. If so, practically every country in the world is subject to the cruelest of linguistic tyrannies. The specific content of language rights must be, in every regime, conditioned by the linguistic demography of the society in question. The ‘peculiarity’ of Canada’s arrangements is thus of a decidedly normal kind.

Nor can this distinction accurately classify the *Charter* rights. The right ‘not to be found guilty on account of any act or omission unless, at the time of the act of omission, it constituted an offence under Canadian or international law . . .’ (s.11 (g)) is peculiar in the same way and for the same reasons: it refers to social facts peculiar to Canada. Perhaps it will be objected that it simply makes concrete, in a way appropriate to

35. See G. Héraud, “Le Statut des Langues dans Les Différents Etats, et en Particulier en Europe” (1980), 4 *Language Problems and Planning* 195. For an exhaustive survey, see G. Turi, *Les Dispositions juridico-constitutionnelles de 147 états en matières de politique linguistique*. Québec: Centre International de recherche sur le bilinguisme, 1977.

36. *International Covenant on Civil and Political Rights*, s.2. 19 December 1966, 1007 U.N.T.S. 172.

Canadian society, a right to which people are universally entitled: *nulla poena sine lege*? By contrast, language rights do not grant *everyone* the right to use his or her mother tongue in certain settings or to have his or her children educated in it. These rights are accorded only to certain French and English speakers.³⁷ Does this justify a restrictive approach?

First, the distinction between rights which apply to everyone and those which do not is inaccurate for these purposes. Although the legal rights do tend to protect everyone, the right to an interpreter (s. 14) is guaranteed only to parties and witnesses to a proceeding rather than to all participants. Furthermore, other fundamental rights do not apply universally. The right to vote is limited to Canadian citizens over a certain age. The reasons for some kind of age qualification are so widely accepted that they are rarely made explicit. Yet they do not give rise to any suggestion that voting rights be subject to a restrictive interpretation. The mere fact that a right applies only to a subset of all Canadians cannot rationally ground a difference in interpretative policy. Therefore, the objection cannot merely be that two specific language groups are mentioned, because it is possible to think of certain general and universal descriptions which those groups satisfy, and which might figure in a justification for their special rights. It may, of course have been a mistake to protect them by name rather than description (e.g. 'the largest viable language groups'), for that means that development must take place through constitutional amendment rather than interpretation.³⁸ Perhaps this brings us to the heart of the matter.

Could it be said that language rights are peculiar because they *unjustly* deny universal entitlement? The argument would have to be that the *Charter* wrongly gives special protection to only two language groups and that in consequence their rights should be contained through a restrictive interpretation. It would make little difference whether the class of beneficiaries was unjustly defined through a over narrow general description or through explicitly listing certain groups. But is that sufficient to warrant restrictive interpretation of existing official language

37. There is however a sense in which at least s. 133 is universal in that it allows *anyone* to use either French or English in the courts and legislature. But the purpose of the provisions is clearly to allow native speakers of French and English to use their respective mother tongues. For practical reasons it was necessary to be more specific about this in the definition of the education rights, but the objective is much the same.

38. Something like this may have been behind the comment of Kerans, J.A., in *Mahé* that, "One significance...of the existence of a compromise is that the words chosen will very possibly express a limit on a right that is arbitrary, and perhaps a little strange." *Supra*, note 10, at 533. Yet it is commonly conceded that the age of majority is to some extent arbitrary, and that would not justify a narrow reading of the right to vote.

rights? It would not, because the argument that a language group deserves special protection is not based on the fact that other groups have it, but that they need it and can make use of it. The grounds of entitlement are noncomparative. The wrong, if any, which the existing regime of language rights does to speakers of non-official languages cannot be made good by restricting the rights of official language minorities, any more than the wrong done to those under twenty-one could have been redressed by limiting the voting rights of those over twenty. Once again, the policy of containing injustice seems ill-suited to justify this policy of restrictive interpretation.

4. *General vs. Special*

The three versions of the distinction so far considered have all failed to meet the criteria of appraisal. Perhaps that is because none of them assigned special importance to a notion that permeates most of the judgments under scrutiny here. Language rights are said to be founded in some kind of *compromise* and for that reason to be exempt from the normal rule for constitutional interpretation. What might this amount to?

It may help to introduce a distinction, well-known in jurisprudence and political theory, between general and special rights. Some rights are held to exist independently of any special relationships that may exist among people while others depend inherently on such relationships. The right not to be assaulted, for example, holds against everyone; it is general in character. In contrast, the right to have one's roof repaired holds only against someone who has entered an agreement to do so. Promises, contracts, social roles, and family relationships are among the many ways in which such special rights and duties can be acquired. The regime of language rights in Canada may thus be interpreted as a compromise in this sense: it flows from a special relation — a constitutional agreement — and as such gives rise to special rights. The political relationships thereby created do not instantiate general rights held by everyone in the world or even by all Canadians; they are a specifically defined regime created by parties to the constitutional agreement. In interpreting these special rights, the argument continues, courts must proceed with caution rather than generosity. They are no more entitled to amend the social contract than they are to improve a commercial contract.

This is perhaps the most challenging and interesting interpretation of the distinction at issue. It is also a politically fraught one. Whether the 1987 constitutional settlement is better understood as a pact among independent provinces or an act of the Westminster Parliament is a hoary problem of constitutional history. The sense in which the 1982 Charter is a *bargain* is also open to doubt: one of the parties refused to agree to

it and the Courts held that such agreement was not necessary to its validity.³⁹ And then there are the famous puzzles about how an agreement made in the past by others can bind us today.

Although these problems are real, they are not the only obstacle in the path of this version of the distinction. If the courts wish to distinguish compromise rights from principled rights, they cannot do so on the footing that the constitution *as a whole* is a kind of bargain. For if it is, then any provision that is grounded in general rights would also be grounded in the special rights accruing under it⁴⁰ and there would be no basis for distinguishing among different provisions of the same contract.

Perhaps it is the scope of the compromise that is relevant. Although all constitutional rights are part of an agreement, they were not all bargained over in the same way. Someone might say that the entrenchment of the legal rights in the *Charter* came about through agreement, but that the content of those rights was not itself settled by compromise. By contrast, other rights were crystallized through bargaining in the literal sense: the parties haggled over the terms, each willing to concede only as much of its ideal position as necessary to secure a deal which it regarded as a net improvement. In these cases not only the fact of entrenchment, but also the content of the rights reflects the bargaining power and strategies of the parties. Something like this may have been contemplated by the Alberta Court of Appeal in *Mahé*, which said that s. 23 must be a compromise right because “[n]o subject has created more political controversy in Canadian history than minority educational rights”.⁴¹

That reading will draw a coherent line, but it will not fall where the Court intends it should. Some of the language rights, such as s. 20 guaranteeing the right to receive federal government services in the official language of one’s choice, did not arise in that way. Since the provinces had no stake in this provision, and the federal government actively promoted it, it was not a matter for bargaining. Nor can New Brunswick’s willing extension of s. 133 to its own institutions be understood as the outcome of a bargain. Even the controversial education rights enjoyed a measure of agreement in principle as far back as the

39. A similar point was made by L. Huppé in a case comment on *Société des Acadiens* (1988), 67 *Can. B. Rev.* 128, at 140.

40. There is no paradox in rights or duties having more than one source. A witness who promises to tell the truth has both the general duty of fidelity which binds everyone and also the special duty flowing from the oath.

41. *Supra*, note 10, at 532. This thought has interesting implications. If controversy about the form or content of a right later warrants a restrictive reading, then those who have reservations have incentive to contest the point in order to secure by interpretation what they could not secure by bargaining.

Victoria conference of 1971. Nor can it be claimed, on the other hand, that the legal rights all enjoyed unanimous agreement. It was, of course, different parties who struggled over the correct balance between efficiency and fairness in criminal procedure, or between collective security and individual rights, but it was a bargaining process nonetheless. No doubt, for example, the representatives of law enforcement interests had a different perspective on the scope of the right to retain and instruct counsel than did those of the defense bar. And what of the explicit compromises which constitute federalism itself, beginning with the very division of powers? Those resulted from bargains if anything did, but they do not attract a restrictive theory of interpretation. Indeed, appeal to the basic purposes and principles of federalism has frequently led to a generous interpretation of a certain powers.⁴²

Waiving such objections, we may ask whether the fact that the content of some right was subject to compromise somehow justifies a general restrictive approach to the extent that the courts must hesitate, as Beetz, J. says, before acting 'as instruments of change'. It is true that courts lack a general power to void or vary special rights created by agreement. They have only a limited power to do so in accordance with a set of consideration determined by law: when, for instance, the agreement was tainted by mistake, or duress, or serious unfairness of bargaining power. An analogue of the limits to that power is appealed to here. The compromise struck is of such importance that the power to alter it must be very closely reigned in. Short of historical developments required by the dynamic principle, it is to be enforced and not set aside.

The analogy is misleading, however, for we are here considering not the power to *set aside* or change the terms of an agreement, but the sort of interpretative policy that is appropriate to understanding its terms where they are clear and settling them where they are not. One cannot argue in this way: because the language rights result from a bargain they must be strictly enforced, and because they must be strictly enforced they must be narrowly interpreted. That is a confusion. What should be strictly enforced is the *correct* interpretation of the terms and, where that is uncertain, the *best* development of them. The new interpretative policy says that with respect to compromise rights the best development is the least development. But that proposition must be justified, and one cannot

42. The Privy Council's tendency to interpret provincial powers generously has been much discussed. See P. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985), at 89; A. Cairns, "The Judicial Committee and Its Critics" (1971), 4 *Can. J. Pol. Sci.* 301. Occasionally federal powers have received similar treatment. See, e.g., Hogg's discussion of the *Anti-Inflation Reference*, [1976] 2 S.C.R. 373, at 388-90.

do so in the vernacular of strict enforcement. The terms of any compromise may be uncertain or incomplete, and to the courts falls the task of finally settling what they will mean. But the courts cannot appeal to the fact that the task is theirs in order to justify their reading; *independent* reasons are needed for that.

What reasons might one have for generally preferring a restrictive interpretation of unclear terms? It is hard to imagine. Perhaps the thought is this. If a certain right is purely special, if it would not exist apart from the relationship that created it, then uncertainties involving its application must be resolved solely by appeal to features of that relationship. When the relationship in question is a kind of compromise, then the courts should resolve any uncertainties by trying to mimic the process of compromise itself. They may only ask: if the parties had explicitly considered this matter how would they have settled it? The settlement would surely have favoured those with the most bargaining power which, in the case of minority rights, is normally the majority. Hence, a general interpretative policy which seeks to mimic the process of compromise will read majority powers — legislative discretion — widely and minority rights restrictively.

This is surely an odd theory. It is far from obvious that uncertainties about special rights should be resolved only by appeal to special relations. That sounds like jurisprudential homeopathy: like cures like. The fact that a special relationship leaves gaps may only show that the parties were unable to reach agreement with respect to the matters at issue except on the principle that they should be left to the courts. That establishes that the courts have been given the power to settle it. But to be given a power does not show that one has been given a reason to exercise it in a particular way. And consider the difficulties in even attempting to apply the suggested test. First, how does one identify the parties to the compromise? Is it the minority and the majority? Or is it the two levels of government? Or two cultural majorities? Second, how does it fix their ideal positions? On what evidence does one rely to establish their aims: the views of ministers? Pressure groups? The public? And third, how does it gauge their relative bargaining power: by a general index? Issue by issue?

We put these questions, not just to suggest that the historical facts are “shrouded in ambiguity”,⁴³ or that they would carry us far beyond the modest weight the Court usually gives to legislative history,⁴⁴ but to

43. *Reference re Section 94(2) of the B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at 512, *per* Lamer, J.

44. *Ibid.*, at 507-509, *per* Lamer, J.

identify the conceptual difficulties involved in the notion of a compromise. The problems are not simply of the form: who were the parties, what were they after, what was their bargaining power? They are: what does it *mean* to be a party? what *counts* as its position? how does one *measure* its bargaining power. The scope for controversy at every level deprives us of any reason to expect that a policy of restrictive interpretation would be the one generally favoured. What antecedent reason is there to suppose that this herculean thought experiment will normally give results that warrant restricting the right and thus that one need not go through it each time but merely settle abstractly and in advance a special interpretative rule.

Moreover, notice how odd this theory is when compared to the reasoning that courts normally apply in construing uncertain terms of ordinary agreements. No one suggests that disputed contractual terms should always be read narrowly against the party they would otherwise favour. What would that even mean? Any reading will favour one party or the other. On the contrary, courts typically seek a reasonable, fair, or equitable solution in light of what the parties did agree to. That is, they apply substantive criteria rather than a settled policy.

The obscurity of the notion of a compromise, and the lack of fit between it and any rationale for a restrictive reading, becomes manifest in certain lower court judgments which struggle to apply the new rule. In *Mahé v. The Queen*,⁴⁵ the Alberta Court of Appeal felt bound by *Société des Acadiens* and *MacDonald* to apply the classification to the minority education language rights. The judgment is worth quoting at length:

The compromise expressed in s. 23 is between those, both anglophone and francophone, who say that matters of educational policy are best handled at the provincial level, and those who say that some language rights must be entrenched. As a result, The Charter does not embrace any particular modality of education. It leaves all that to the province in exercise of its constitutional mandate, which is a compromise reflecting one side of a political question. . . . At the same time, interpretation must also reflect the *other* side of the political question. An historical viewpoint commands that one recognize that the first purpose of the section is to prevent assimilation of one language group or the other in any part of Canada, and at least in that limited way enhance a society in which the two languages acknowledged by s. 16 of the Charter to have pre-eminent status shall continue to be used. . . . I conclude that the two ideas reflected in s. 23 are to offer strong rights to the s. 23 group to prevent assimilation and foster the growth of both official languages everywhere in Canada and, at the same time, interfere as little as possible with provincial legislative

45. *Supra*, note 10.

jurisdiction over educational institutions. To the extent that these ideas conflict, s. 23 is a compromise.⁴⁶

The fruits of confusion are here at their ripest. We are told that language rights mark a compromise between legislative sovereignty and entrenched rights. Yet in the absence of entrenched rights some level of government has full jurisdiction over any possible issue. Thus every constitutional right is a compromise between those who think such matters should be left to the discretion of legislators and bureaucrats and those who support some form of judicial protection. We are also told that these ideas conflict, and because they do citizen's rights should be read restrictively. That is, we are told that a sound interpretation must reflect both sides of a political dispute and yet systematically favour one of them. Of such crooked timber what straight thing can be made?

Perhaps it is significant that characterizing s. 23 as a compromise right did not in this case lead either court to choose the narrowest possible interpretation of the contested provisions. This is especially clear with respect to the issue of whether managerial control is included in the educational facilities guaranteed by s. 23. Since this is not explicitly covered, one might have expected a restrictive interpretation to deny its inclusion. However, both courts were persuaded by the Ontario Court of Appeal in *Reference re Education Act of Ontario and Minority Language Education Rights*⁴⁷ that such a right exists. This despite the fact that the *Ontario Reference*, decided before *Société des Acadiens* and *MacDonald*, explicitly adopts the normal dynamic-purposive rule of interpretation in arriving at its conclusion.

Underlying this final interpretation of Beetz J.'s 'essential difference' lies a platitude: the courts cannot amend the constitution under the guise of interpreting it. But that is true simply because the courts cannot amend the constitution at all. It is not as if dynamic-purposive interpretation gives them a general power to amend the constitution with respect to principled rights, while the new rule deprives them of that power with respect to compromise rights. Courts are always to be guided by the Constitution and may only exercise their limited powers of development in applying it. That gives no reason to suppose that these powers should be more limited with respect to certain rights than others.

V. *Second Thoughts About the Second Class*

We have found the two classes of constitutional rights to be elusive: no

46. *Supra*, at 533-535. This reasoning was adopted in Prince Edward Island in *Reference re Minority Language Educational Rights (P.E.I.)*, *Supra*, note 20.

47. *Supra* note 1.

version of the distinction is coherent, accurate, and rationally supports the new interpretative policy. Although there can be no doubt that the courts thought the distinction between compromise and principled rights to be a useful one and that they turned to it, not in a flight of theoretical fancy, but only to sort out a concrete problem, it is uncertain whether it was needed even in those cases in which it is most promiscuously displayed. It was certainly idle in *Macdonald*. All members of the Court, except Wilson, J., thought that the appellant's argument was not consistent with the wording of s. 133 and so was not even a candidate for interpretation. The reasons for this had nothing to do with s. 133's status as a compromise right. The majority simply thought that it is impossible to accord a citizen the right to receive a summons in the official language of his choice without at the same time denying the issuer of that summons the right to use the official language of *his* choice. That argument is unsound, but that is not relevant here.⁴⁸ The important point is that anyone who believes, as the majority did, that it *is* sound already has sufficient reason for rejecting the appellant's argument, without invoking any special rule of interpretation. And, once one has decided to treat the right to use a language as little more than a bare liberty then the conclusion in *Société des Acadiens* follows without appeal to the notion of compromise at all.

Likewise, the conclusion in *Mahé* is in fact independent of the distinction invoked. To hold that a provincial legislature has the power to determine the particular way in which it satisfies its obligations under s. 23 does not depend on the fact, if it be one, that those obligations result from some compromise. No single regime is required simply because the *Charter* requirements are sufficiently abstract that a variety of regimes will satisfy them. But principled rights are no different on that score. No single and uniform set of procedures are mandated by the right of an accused person to retain and instruct counsel. Within the *Charter* constraints, provinces may secure that right in a variety of ways. These decisions can therefore be understood, even if not endorsed, without reliance on the dubious distinction between principled and compromise rights and without the attendant interpretative policy.

There may already be some indication that the Supreme Court has itself begun to realize this and to have second thoughts about the

48. For the conflict of rights to emerge one needs the further assumption that the issuer of a summons has a right to issue a *particular* summons. But it is normally thought that a government has the power to organize the administration of justice so that those who wish to issue summonses only in, e.g., French, can do so.

innovation. Its status seems doubtful after *Reference re An Act to Amend the Education Act (Ontario)*.⁴⁹ The majority opinion of Wilson J. mentions it only to claim that it does not preclude a purposive interpretation of s. 93. Wilson J.'s curt analysis reduces the new rule to a platitude: "While due regard must be paid not to give a provision which reflects a political compromise too wide an interpretation, it must still be open to the court to breathe life into a compromise that is clearly expressed. The contextual background of s. 93 is being reviewed in these reasons not for the purpose of enlarging upon the compromise, but in order to confirm its precise content."⁵⁰ Thus, rights based in compromise should not be interpreted too widely, and not too narrowly either. No doubt. But neither should rights based on principle. What is needed is some way to tell what *counts* as wrongly enlarging the compromise. Wilson, J.'s judgment breathes life into the compromise by effectively smothering the new interpretative policy. The purposive dimension of interpretation is revived and no alternative account of the new policy is suggested.

In *Ford v. A.G. Québec*⁵¹ the Supreme Court moves even further from the compromise rule. It rejects the argument of the Attorney General of Quebec that choice of language should not be protected by freedom of expression because to do so would expand the regime of language rights, thus upsetting the compromise. In reply, the Court distinguishes official language rights from rights to freedom of expression by borrowing from *MacDonald* and *Société des Acadiens* the idea that language rights have "their own special historical, political, and constitutional basis".⁵² This basis is now described afresh:

The central unifying feature of all of the language rights given explicit recognition in the Constitution of Canada is that they pertain to governmental institutions and for the most part they oblige the government to provide for, or at least tolerate, the use of both official languages. In this sense they are more akin to rights, properly understood, than freedoms. They grant entitlement to a specific benefit from the government or in relation to one's dealing with the government. Correspondingly the government is obliged to provide certain services or benefits in both languages or at least permit use of either language by persons conducting certain affairs with the government.⁵³

The same theme is pursued in the Supreme Court's decision in *Mahé v. The Queen in Right of Alberta*:

49. (1987), 40 D.L.R. (4th) 18.

50. *Ibid.*, at 44.

51. (1988), 54 D.L.R. (4th) 577 (S.C.C.).

52. *Ibid.*, at 606.

53. *Ibid.*

Beetz J.'s warning that courts should be careful in interpreting language rights is a sound one. Section 23 provides a perfect example of why such caution is advisable. The provision provides for a novel form of legal right, quite different from the type of legal rights which courts have traditionally dealt with. Both its genesis and its form are evidence of the unusual nature of s. 23. Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures.⁵⁴

There is no mention of compromises here, and no clear indication whether this is meant to supplement or supplant the distinction between compromise and principle. This analysis certainly appears to have little in common with any of the versions we have been able to detect in the earlier cases.

The nerve of this account is the distinction between rights imposing on government obligations to facilitate or permit an activity and liberties which bind everyone and are protected only by disabilities on legislation. The distinction between 'rights' and 'freedoms' is somewhat obscure, since many constitutionally protected freedoms do impose positive obligations on government. The legal rights of the *Charter* certainly cannot be understood as bare liberties. Section 11(d), for example, requires the state to provide the necessary mechanisms for a fair trial before a public tribunal. It is not satisfied by the government refraining from prohibiting fair trials. The right to an interpreter (s. 14) requires the government to provide services, and not merely refrain from prohibiting the use of interpreters. The same is true of the democratic rights. The right to vote cannot be satisfied by merely refraining from preventing people from voting. It requires the establishment and regulation of a complex and expensive electoral system.

Nor does this distinction add any further support to the new interpretative policy. Indeed, one might think that entrenched rights to government services should be interpreted generously precisely because those services *are* so important. To read them narrowly will, of course, reduce the burden on governments. But it is obscure why courts should wish to do that in interpreting provisions which give explicit priority to certain kinds of interests. It is after all the importance of the citizen's interest in the benefit that *grounds* or *justifies* the imposition of the duty on others. That is precisely what rights are.⁵⁵ The interests underlying entrenched rights are typically those which a society regards as so vital that they impose duties of their own account, without having to wait on reinforcing considerations of popularity, efficiency, etc. Perhaps if the

54. [1990] 1 S.C.R. 342 at 365.

55. See J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1988), p. 165-168.

constitution were so tragically and obviously mistaken about the importance of those interests then a policy of containment would fall within the legitimate scope of the judicial role. But as we have said, the Supreme Court gives no indication that it supports that view, and much that it rejects it.⁵⁶

The Supreme Court's latest pronouncement, in *Mahé*, follows the approach of Wilson J. in Reference Re Bill 30 in tempering the interpretive policy introduced in *MacDonald*. Having accepted Beetz J.'s warning, the Court nevertheless concludes that "this does not mean that courts should not "breathe life" into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose."⁵⁷ In view of the deficiencies of the distinction and the new interpretative policy, these signs of reconsideration are welcome. We have found no account which coherently and accurately divides the constitution as the courts intend, and which rationally supports the new interpretative policy. There is an irony here, because the distinction began as an attempt by the Court to define limits to its own interpretative power, limits which would make sense of the distinction between interpreting a constitution and amending it. In fact, the suggestion that the *Charter* contains two classes of rights comes as close as anything does to being a constitutional amendment.

56. *Manitoba Language Rights Reference*, *supra*, note 2; *Mercure*, *supra*, note 3.

57. *Supra*, note 54 at 365. There is, however, cause to worry about the import of the description of the purpose of s. 23 as "expressed". Wilson J., too, refers to compromises that are clearly expressed. This leaves open the opportunity to divide provisions into those with clearly expressed purposes and those lacking such clarity or explicitness, leaving the latter vulnerable to the restrictive interpretative policy. This, of course, begs the question of what counts as an expressed purpose, a question that is itself a matter of interpretation. Hence the restrictive policy may still be preserved by interpretive sleight of hand.