

*FRENCH / ENGLISH
DISCREPANCIES
IN THE
CANADIAN CHARTER OF RIGHTS & FREEDOMS**
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The *Canadian Charter of Rights and Freedoms*¹ is, like most constitutional documents, written in highly general terms. The effect of this is that many provisions are ambiguous, and that protection afforded to certain rights by the *Charter* will depend chiefly on the interpretation our courts will give to the document. These problems of interpretation have fascinated academics and practitioners alike, as is shown by the numerous seminars on the new *Constitution Act, 1982* sponsored by the Canadian Institute for the Administration of Justice, the bar associations of various provinces and other organizations.

It is uncertain whether all the standard tools of statutory interpretation can be used to interpret the provisions of the *Charter*. One must keep in mind that this document is more than ordinary statute law, it is part of the "supreme law of Canada"², the *Constitution of Canada*, to which all other laws are inferior. Some academics have argued that this, among other things, is a reason for adopting a wide interpretative approach to the *Charter*.³ The Judicial Committee of the Privy Council in several cases,⁴ including *Minister of Home Affairs v. Fisher*⁵, has made statements in that direction concerning constitutional documents. In the latter case Lord Wilberforce stated that constitutional documents

... call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.⁶

However, there is always the real risk of having the courts back away from an activist approach and lapse into a conservative interpretation of the *Charter*. The fear of breaking new ground or creating limitless horizons may lead the courts to choose the narrow interpretative approach.

One tool which will be extremely important in interpreting the *Charter*, whether a broad or a narrow approach is taken, will be the comparison of the French and the English versions. According to s. 57 of the *Constitution Act, 1982*, both are equally authoritative. However, as is the case with most bilingual texts, some differences exist between the English and the French versions. Occasionally words in one language may reflect the basic meaning of

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1. *Constitution Act, 1982* Part 1.

2. *Id.*, s. 52(1).

3. See generally: Dale Gibson, "Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations" in *Canadian Charter of Rights and Freedoms: Commentary*. (W. Tarnopolsky ed.) (to be published in 1982 by Carswell); W.S. Tarnopolsky, *The New Charter of Rights and Freedoms: An Overview* (unpublished paper, 1982).

4. *Edwards v. A.G. of Canada*, [1930] A.C. 124 (P.C.); *British Coal v. The King*, [1935] A.C. 500 (P.C.); *A.G. Ont. v. A.G. Canada*, [1947] A.C. 127 (P.C.).

5. [1979] 3 All E.R. 21 (P.C.).

6. *Id.*, at 25.

the other version, but also carry one or more additional connotations. This creates narrow and wide versions of the same law. The courts then have to "read-up" or "read-down" one version or the other depending on whether the expansive or restrictive approach to constitutional documents is preferred. In other circumstances one of the versions may be utterly ambiguous, but the other may be clearer, and may assist the courts to an adequate understanding of the provision in question. Since 1967 many of the problems of language differences in federal bilingual legislation have been dealt with according to the *Official Languages Act*,⁷ which sets out rules of interpretation in case of conflicts between the two official versions. This statute is probably inapplicable to the *Charter*, however, as no mere statute can purport to modify or set guidelines for the interpretation of a constitutional document unless adopted through the mechanism of a constitutional amendment.

R.M. Beaupré has studied the way in which courts operate when faced with language differences in bilingual statutes.⁸ From the data he gathered he deduced that when courts, in construing a section of a statute, are faced with two alternative interpretations, A and B, according to one language version and only interpretation A according to the other version, A will normally be chosen as the correct meaning of the section. This is sometimes called the "Common meaning" approach. It will always lead to the narrower of the competing interpretations. If the common interpretation A is deficient for some reason, however, then the interpretation applicable to only one language may be chosen. In other words, Beaupré cautions, one should be dubious of formulae which give fast and ready answers, especially if they will always lead to the narrow interpretation of a provision. In explaining discrepancies in bilingual statutes Mr. Justice Pratte of the Supreme Court of Canada said that one should not prefer the narrower meaning of one of the two versions if the broader meaning seems to run with the intent of the legislation.⁹

The following discussion will attempt to raise some of the major discrepancies between the French and the English versions of the *Charter* and, where possible, to offer solutions leading to the reconciliation of the two official versions. The author will also try to explain the meaning of some of the more ambiguous provisions by using cross-references between the French and the English versions.

Section 1

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits *prescribed by law* ...

La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une *règle de droit*, dans des limites qui soient raisonnables ...

7. R.S.C. 1970, c. 0-7, s.8.

8. R.M. Beaupré, *Construing Bilingual Legislation in Canada* (1981). See also Gibson, *Supra* n. 2 re the charter in particular.

9. *The Queen v. Compagnie Immobilière BCN Ltée.* [1979] 1 S.C.R. 865 at 871-2.

In the English text a difficulty arises because one is not certain what is meant by the phrase "prescribed by law". According to Hogg¹⁰ the phrase would include statutes enacted by a federal or provincial legislative body but not regulations or rulings of tribunals in prior cases. He also expresses the opinion that:

"... a provincial censorship law, giving a tribunal the authority to censor movies, but not stipulating the criteria upon which the tribunal was to act, could probably not be described as a limit on free speech (set out in s. 2(b) of the *Charter*) which is 'prescribed by law'."¹¹

It has also been questioned whether "prescribed by law" includes, in addition to statute law, the common law.¹² The argument against including common law is that it is not "prescribed" in the manner of a statute. The latter is promulgated, while the former is unwritten and evolves over time through cumulative judicial decisions.

The French version of the *Charter* does not afford any solution to the problem posed by Hogg, but it does offer assistance in solving the second problem mentioned above. In French "règle de droit" does not seem to have a meaning as ambiguous as "prescribed by law". Larousse¹³ defines "droit" as "toutes lois et dispositions" and "dispositions" as including "les points que règle un arrêt" (i.e.: the *ratio* of cases). The addition of the word "règle" does not connote anything more than an identifiable rule of "droit" from either statute law or judge-made law. Furthermore the French text does not employ the word "lois" which would have excluded the common law, but used instead the more expansive expression "règle de droit". Thus the French version would appear to include common law as well as statute law. This gives us an indication of the scope of the English phrase "prescribed by law".

Section 2(a)

Everyone has the following fundamental freedoms:

(a) freedom of *conscience* and religion;

Chacun a les libertés fondamentales suivantes:

(a) liberté de *conscience* et de religion;

The problem with these two similar-looking words is that both may have two meanings. In French, "conscience" is commonly used, as in English, to mean the inner feeling by which people judge right from wrong and the morality of their acts. But an equally common meaning in French is the feeling that people have of themselves and of their existence, or in other words, consciousness.¹⁴ Looking solely at the French version of the *Charter*, one could say that both meanings can apply. Read in the context of the "libertés fondamentales ... de conscience et de religion", the first definition of conscience fits in with "religion" and thus is certainly valid. It could be argued that

10. Peter Hogg. "The Canada Act Annotated" in *Canadian Charter of Rights and Freedoms: Commentary*. (W. Tamopolsky ed.) (to be published in 1982 by Carswell).

11. *Ibid.*

12. Howard F. Morton. "Charter of Rights, Section 1" in *Implementation of Charter of Rights: Draft Commentaries*. (unpublished collection of papers by the provincial and federal prosecutors) 11-12.

13. *Lexis. Dictionnaire de la langue française*. (1975).

14. *Ibid.*

“conscience” in the sense of consciousness also fits, since it could involve matters such as sedation by drugs or surgical procedures like frontal lobotomy.

The usual meaning of the English word “conscience” is the same as the first meaning attributed to it in French. Based on the common construction approach to interpretation this would be the favoured meaning. But, one should not overlook the fact that the second meaning, though possibly archaic, is still documented as an alternative meaning in English.¹⁵ The implications of “freedom of consciousness” could be so dramatic that the judiciary may want to adopt the commonly used English meaning only. But as mentioned previously¹⁶ we are dealing here with a constitutional document, for which the common construction approach will not always be appropriate.

Section 2(b)

Everyone has the following fundamental freedoms:

Chacun a les libertés fondamentales suivantes:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and *other media of communication*;

(b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des *autres moyens de communication*;

If section 2(b) is seen as giving to all freedom of thought, belief, opinion and expression (hereinafter referred to as freedom of speech and mind) “including” as examples the freedom of the press and other media of communication, no problem occurs. But if section 2(b) is read as first giving individuals freedom of speech and mind and secondly (but separately) adding the freedom of mass communication, a problem may occur, since “media of communication” may not mean the same thing as “moyens de communication”.

The phrase “media of communication” although referring to any medium, has the special connotation in English of mass communication: radio, television, newspapers and magazines. However, in the French version “moyens de communication” has been used. This expression does not have the connotations associated with the English phrase. It encompasses not only the mass media, but all possible means of communication including mail, telephone and short wave. Furthermore, the deliberate avoidance of the word “media”, a word accepted in the French language,¹⁷ seems to indicate that the more expansive view was intended.

Section 3

Every citizen of Canada *has the right* to vote in an election of members of the House of Commons or of a legislative assembly and *to be qualified for membership* therein.

Tout citoyen canadien a le droit de vote et *est éligible aux élections* législatives fédérales ou provinciales.

15. Webster's New Twentieth Century Dictionary of the English Language (2nd ed. 1979).

The Random House Dictionary of the English Language (1966).

16. *Supra* n. 9 and associated text.

17. Media is defined as: technique de diffusion de la culture de masse telles la radio, la télévision, la presse écrite, etc... *Supra* n. 13.

The French version is a categorical statement that all Canadian citizens are eligible, without further conditions, to run for election. The English version is more restrictive and ambiguous as it says that one has the right to “be qualified for membership” in the House of Commons or a legislative assembly. In other words, everyone has the right to attempt to gain the necessary qualifications to become a member of the bodies mentioned. This seems to leave the door open to a legislative body that wants to impose certain conditions or standards on the citizen before allowing that citizen to run for election. For example, prisoners do not now have the right to run in elections¹⁸; in other words, it is a condition for qualification to stand for election to the House of Commons that one not be a prisoner. The English text of Section 3 might permit the retention of this restriction, while the more generous French version could be read (subject to Section 1, of course) as prohibiting such restrictions.

This section will be a sensitive area for the courts as it affects the only political input of many people. To avoid being charged with manipulating the size of the electorate, courts may be tempted to interpret the section in conformity with actual political realities, rather than to mold the electoral process to fit the section. This would avoid controversy and assure a continuous flow in the electoral process. If they choose this approach the English text will serve their purpose better than the French.

legislative assembly

élections législatives ... provinciales

In English, “legislative assembly” has in the past been used to denote the main provincial law makers — the provincial legislature.¹⁹ It could be argued, however, that any assembly which legislates is a legislative assembly. This could include municipal governments or school districts exercising subordinate legislative powers. Furthermore, the deliberate avoidance of the term “provincial legislative assembly” may be an indication that the scope was to be wider than just “provincial legislature”.

The French version strengthens this argument a little. It doesn’t even refer to the expression “legislative assembly”²⁰ but rather refers to “*élections législatives ... provinciales*”. This vague phrase can be interpreted as including all provincial level elections including local ones.

Section 6(2)(a)

Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit:

(a) *to move to and take up residence in any province;*

(a) *de se déplacer dans tout le pays et d’établir leur résidence dans toute province;*

18. See: *Canada Elections Act* R.S.C. 1970, c. 14, s. 21(1) (h) and *The Elections Act* S.M. 1980, c. 67, s. 52.

19. See: *The Legislative Assembly Act* R.S.M., c. 141 s. 1 where Legislative Assembly is used as an equivalent of Legislature of Manitoba. *The Constitution Act, 1867* used the term to refer to the provincial legislative body in unicameral provinces and to the elected legislative bodies in bi-cameral provinces: see Sections 69 and 70, for example.

20. As in section 4(1) & (2) where the words “*assemblées législatives*” are used.

In the French version one is allowed to move across the entire country ("le pays"), while in the English version one is merely permitted to move to "any province". Linguistically speaking, there is a difference between "province" and "pays" even though "province" is to be read as including the Yukon and the North-West Territories.²¹

There may also be a legal difference if parts of Canada exist which do not fall within any province or either named territory. This could include such areas as Sable Island²², or artificial islands created in territorial waters.²³ In fact, anything in territorial waters, while technically part of the country, is probably not part of a province. Seen in this light there is a contradiction in the two versions and it seems to the author that the wider French version should be adopted since the definition of the word "province" in Section 30 indicates an attempt to include the whole country.

Independent of the above problem emerges a second possibility of controversy. The English version says "to move to ... any province", implying that one can move from province to province without barrier. But the expression "to move to" is destination-oriented. For example, a Canadian citizen would clearly have the right to move to Alberta from Manitoba but could possibly be restricted in Saskatchewan, a province he is not "moving to" but simply crossing.

The French text says "se déplacer dans tout le pays", an expression more akin to "travelling across the country" than "moving to a province". According to the French version it would be easier to argue that any barriers impeding travel in any direction within the country are clearly a violation of that right. Furthermore, the use of "pays" would not limit the right to inter-provincial movement but would also cover intra-provincial travel.

Section 6(3)

The rights specified in subsection (2) are subject to...	Les droits mentionnés au paragraphe (2) sont subordonnés...
(b) any laws providing for <i>reasonable residency requirements</i> as a qualification for the receipt of publicly provided social services.	(b) aux lois prévoyant de <i>justes conditions</i> de résidence en vue de l'obtention des services sociaux publics.

The word "reasonable" in English poses a particular problem to the construction of French legislation, as it connotes such a wide range of concept. Bulletin no. 87 of the *Guide de rédaction législative française*²⁴ points out that

21. *Supra* n. 1 s. 30.

22. There is a good deal of controversy over whether Sable Island is part of Nova Scotia. Nova Scotians look upon the Island as theirs and residents of the Island are allowed to vote in Nova Scotian elections, but there is lack of clear decisive authority stating that it is part of that province. In fact, Schedule 3 of the *Constitution Act, 1867* gives the federal government property over Sable Island. A spokesman for the Ministry of Energy, Mines and Resources in Ottawa told the author on June 14, 1982 that the issue was looked upon by the federal government as not conclusively settled.

It should be noted however, that the issue may be resolved by viewing Sable Island as part of the province of Nova Scotia though at the same time subject to federal laws, as is the case with national parks.

23. For example, the floating hotels which accompany drilling rigs or Esso's new artificially created drilling islands. Issungnak Island, the first of these artificial islands to be created, was built by moving sediment to the desired location.

24. Federal government publication released on April 15, 1980 by the Office of the Secretary of State.

the word "reasonable" in English translates as "raisonnable" but that in many situations, because of the way the French language functions and the way the sentence is structured, only a close equivalent may be found. Usually however, the closest French equivalent is a narrower word. It must be chosen carefully by the legislator and even when great care has been exercised and the translation is the closest possible, the clause may not convey the exact meaning conveyed by "reasonable" in English.

In the case at hand, "reasonable" is put alongside "juste". *Lexis*²⁵ gives the definition of "juste" as "conforme au droit, à la justice: équitable". Thus the word is heavily imbued with a sense of moral justice and fairness while "reasonable" which may include a similar meaning, also connotes some elements of reason and rationality in addition to fairness. Thus what might be "reasonable" might not be "juste".

For example, assume that Manitoba has a no-fee medicare system, while all other provinces do not. Assume also that Manitoba requires a 6-month residency requirement before qualifying for this service in order to prevent out-of-province people from coming in for a month or so and receiving medical treatment here without contributing to the plan. Objectively speaking, this may be a "reasonable" requirement, since only residents pay taxes to the government returning the services. However, if Mr. X moves to Manitoba intending to become a full-fledged Manitoban, but requires major surgery after only 5 months in the province, it could be said that the residency requirement is not "juste" for X in his particular situation. This subtle distinction may be important.

Section 8

Everyone has the right to be secure against unreasonable search or seizure. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

The word "search" in English can be read as referring to searches of premises, or searches of a person, or both.²⁶ Given this range of possibilities, the door is open for the courts to restrict the wording to one type of search and not the other. For example, one might have the right to be protected from unreasonable searches of premises but denied protection from unreasonable searches effected on the person. Clarification of the extent one should give to the word "search" would have to await judicial interpretation.

However, if we refer to the French version this problem is rapidly resolved. There two words are used as the equivalent for "search". When the action effectuated is a "perquisition", it is limited to the search of a given area or premise, and does not extend to the person.²⁷ "Fouilles", on the other hand, may mean either the search of premises or of a person or both²⁸, thus including

25. *Supra* n. 13.

26. *Ibid.* In *Harrap's Standard English and French Dictionary* (1962), Part 1, "perquisition" is translated as house-search and "perquisitionner" as to conduct a search in premises.

27. *Supra* n. 13.

28. *Ibid.*

in its meaning "perquisition". However, given that the word "perquisition" is already used in this section, it would be absurd to say that "fouilles" is restricted to premises. This would be a useless duplication of words. Thus the use of both "perquisitions" and "fouilles" side-by-side indicates an attempt to encompass searches of the person and of premises and could hardly be read any differently. For consistency, therefore, "search" in the English version would have to take its expanded meaning.

unreasonable

abusives

Here again the problem arises because of the presence of the word "unreasonable." In French, the equivalent "abusives" connotes the meanings excessive, unnecessary or unduly repetitive. It may require an element of wilfulness or recklessness. It limits quite clearly the types of searches or seizures which may be effected. "Unreasonable" leaves open the possible reasons why something would be unreasonable. It may not be affected by the motivation of the person who is searching or seizing. Besides including the connotations of "abusives", the English word may also include that for which no valid reason or justification can be shown. The English is much wider, therefore, allowing for a greater possibility that a particular search or seizure may be found inconsistent with Section 8.

Section 10(b)

Everyone has the right on arrest or detention...

Chacun a le droit, en cas d'arrestation ou détention...

(b) *to retain and instruct* counsel without delay and to be informed of that right;

(b) *d'avoir recours sans délai à l'assistance* d'un avocat et d'être informé de ce droit;

In the English version "retain and instruct" are two precise acts which may be performed by a person on arrest or detention. They imply positive steps to be taken or foregone by the person arrested.

In the French version "avoir recours à l'assistance" does not require a positive act of retaining and instructing a lawyer. The more general French phrase means that a person has the right to be assisted or helped by a lawyer "sans délai", implying that a lawyer might have to be provided to the arrested individual without request.

Furthermore, "l'assistance" is much broader with respect to the lawyer's role. While in the English text the lawyer is a passive actor who is merely retained and instructed, in the French text the lawyer is impliedly active in helping or assisting the accused. While retaining and instructing a lawyer over the phone may be good enough for the English text, it will not satisfy the French text, which requires some positive role, such as counselling, or at least being present. It should be noted that no limitations have been set on "assistance", and that this lack of qualification could mean that the detainee has the right to be assisted at all relevant times. This could extend to all interrogations following detention. If the French text is followed, police practices will therefore have to be altered substantially.

counsel

avocat

It should briefly be noted that "counsel" is wide enough to be capable of referring "to both lawyer and other adviser".²⁹ However, the French version uses the word "avocat", a word capable of meaning only lawyer. No other adviser can be implied. Where the French word "avocat" is put side by side with the English word "counsel" in a criminal context it will probably be held that "counsel" shall be given the restrictive meaning of lawyer.³⁰ In this setting the narrower "common" meaning may well be the more consistent with the liberty of the subject.

Section 11(a)

Any person charged with an offence has the right

(a) to be informed without *unreasonable delay* of the specific offence;

Tout inculpé a le droit:

(a) d'être informé sans *délai anormal* de l'infraction précise qu'on lui reproche;

Here again the problem occurs because of the wide scope of the English word "unreasonable." The French version could have used "raisonnable" and phrased the sentence in a positive fashion, such as "dans un délai raisonnable" instead of "sans délai anormal", but the negative version has been preferred, and the word "anormal" used. The word defines a more precise sphere roughly equal to the English word "abnormal". In *Lexis*³¹ the French term is defined as "qui est contraire à l'ordre habituel, qui s'écarte des règles ou usages habituels". Therefore, depending on how the words are viewed something could be "anormal" without being "unreasonable".

For example, assume that it normally takes one-half hour to inform a person charged of the specific offence. After a riot, several hundred persons are arrested, and it takes several hours or possibly a whole day before X, one of the individuals charged, is informed of the specific offence because of the large volume of arrests made. Surely the delay is "anormal" as it is "contraire à l'ordre habituel", but given the circumstances, it may not be seen as unreasonable. On the other hand, lengthy delay may be customary on the part of a particular police department in certain types of situations, but such delay, though "normal" would not necessarily be "reasonable."

Section 16(3)

Nothing in this Charter limits the authority of Parliament or a legislature to *advance* the equality of status or use of English and French.

La présente charte ne limite pas le pouvoir du Parlement et des législatures de *favoriser la progression* vers l'égalité de statut ou d'usage du français et de l'anglais.

"Favoriser la progression" may imply more than simply "advancing" a cause; it involves an element of favouritism over other causes. It may imply holding back other programmes in order to support progress towards equality of the official languages. It could be read as meaning that the *Charter* does not

29. *Olavarria v. Minister of Manpower*, [1973] F.C. 1035 at 1037 (C.A.).

30. *Id.*, at 1036.

31. *Supra* n. 13.

prevent elected bodies making discriminatory laws which promote equality of French and English to the disadvantage of other linguistic groups. "Advance", on the other hand is more vague and does not seem to connote favouritism. It should be remembered that Section 27 requires the *Charter* to be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." That provision, coupled with the controversy that would be created by giving full operation to the French text, indicates that the English version is likely to be chosen.

Section 24(1)

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy ...

Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation

...

A problem of usage emerges when the two words "court" and "tribunal" are used side by side. The problem may be illustrated by asking whether Section 24 permits an application to an administrative tribunal. This problem was faced, in a rather different context, by Mayrand J. in *La Commission des droits de la personne v. A. — G. for Canada*³². The issue in that case was whether a section of the *Federal Court Act* authorizing the withholding of certain evidence concerning matters of state from a "court" (English)/"tribunal" (French) applied to a provincial Human Rights Commission. Mayrand J. held that the Commission was covered by the section. In the course of doing so he pointed out that both "court" and "tribunal" are capable of various meanings. Both could, on the broadest interpretation, designate all adjudicative bodies, whatever their scope or jurisdiction. This might, for example, be the meaning of "court" in Section 92(14) of the *British North America Act*.³³ Where there is an intention to limit the scope of the terms the legislators often add a modifying adjective³⁴, or a preliminary definition³⁵. The *Charter* provides no such limiting language, so one may conclude that the broad meaning should be given.

This conclusion is easier to reach on the basis of the French text than of the English, because, as Mr. Justice Mayrand pointed out,³⁶ "tribunal" is used in French to designate any adjudicative body, and "cour" to refer to particular courts.³⁷ In France the term "tribunal" is sometimes used in the proper name of purely judicial bodies,³⁸ but this is not common in Canada, and in both countries "tribunal" is usually used to designate an administrative or quasi-judicial adjudicative body.³⁹ The English word "court" is, by contrast, normally restricted in legal usage to completely judicial bodies.

32. [1978] C.A. 67 (Que. C.A.) (hereinafter referred to as *Commission des droits de la personne*).

33. Now the *Constitutional Act, 1867*.

34. For example "superior court"; see: *Judges Act*, R.S.C. 1970, c. J-1, s. 2.

35. See: *Fugitive Offenders Act*, R.S.C. 1970, c. F-32, s.2.

36. *Supra* n. 32 at 71.

37. For example: Cour du Banc de la Reine; Cour testamentaire.

38. For example: tribunal de police; tribunal des grandes instances.

39. Such as "tribunal administratif".

Given the desirability of interpreting remedial measures like the *Charter* "liberally," there is reason to believe that, as in the *Commission des droits de la personne* case, the broader meaning suggested by the French text will prevail.

Section 24(2)

Where, in *proceedings* under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Lorsque, dans une *instance* visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

"Proceedings" in English may have two meanings. These may be either the entire series of acts going from the commencement of litigation to the rendering of a judgment, or simply a particular interlocutory step in the course of the litigation. In this setting the difference is important, because if the first meaning prevails it may be necessary to launch a distinct new action in order to obtain relief under Section 24(1), whereas if the latter interpretation is accepted it may only be necessary to make an interlocutory motion in the course of on-going litigation.

The French version says "instance", which the Centre de traduction et de terminologie juridique⁴⁰ and *Lexis*⁴¹ both define as "serie d'actes de procédures allant de la demande en justice jusqu'au jugement". Internal court proceedings are termed "délibération" in French. In light of the more precise French wording, it appears that s. 24(2) refers to the institution of a separate suit rather than to a mere interlocutory motion. If this is so, the procedural ramifications are very serious.

... would bring the administration of justice into disrepute ... est susceptible de déconsidérer l'administration de la justice

The English phrase states categorically that evidence that *would* bring the administration of justice into disrepute should be excluded. The adverse impact must be clear and unequivocal. The French version states that one only needs to show that the evidence "est susceptible" of bringing the administration of justice into disrepute. "Susceptible" does not imply certainty, or even probability, but merely possibility. Thus based on the French version it could be argued that all that needs to be shown is a shadow of doubt: the possibility that the administration of justice *could* fall into disrepute. The significance of this important new constitutional protection depends to a large extent on whether the English or French text is preferred by the courts.

40. The center is part of the University of Moncton. It has recently put out a volume entitled *Vocabulary of the Common Law*. (1980) which was consulted here.

41. *Supra* n. 13.

Section 52(1)

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of *no force or effect*.

La Constitution du Canada est la loi suprême du Canada; elle rend *inopérantes* les dispositions incompatibles de toute autre règle de droit.

Section 52 of the *Constitution Act, 1982*, although not a part of the *Charter*, should be examined, as it affects laws which are found to be incompatible or inconsistent with the *Charter*.

The problematic phrase in this section is “no force or effect”. It can be interpreted as meaning one of two things; either that a law inconsistent with the *Charter* is terminated and no longer exists, which is a type of implied repeal, or that that law is merely held in abeyance. In terms of results, either interpretation leads to the law not being enforced. A problem would arise, however, if a provision in the *Charter*, which is inconsistent with a particular law were repealed by an amendment, or suspended by a “notwithstanding” clause under Section 33. According to the first interpretation, the previously inconsistent law would remain a nullity, but according to the second interpretation, that law would spring back into force.

In the French version, the word “*inopérantes*” is used. According to *Lexis*⁴² it means “*qui n’opère pas, qui n’agit pas*”. It does not imply nullity, but rather lack of operation at a given moment. The French version read with the English section would therefore give more weight to the “abeyance” theory. Thus if the *Charter* were repealed or amended, past unconstitutional statutes may spring back into effect. It should be noted that the opinion of the team of legal translators at the provincial translation office, based on the English and French versions, also tended to favour the “abeyance” theory.⁴³

However, the final determination of the effect of s.52(1) will probably hinge on more than its linguistic components and although the “abeyance” theory is favoured by the language used, policy questions may require the adoption of the “implied repeal” theory.

The discrepancies between the English and the French versions of the *Charter* and the interpretation possibilities presented here are only a few of the many problems arising in interpreting both versions of the *Charter*. As various cases come up, more discrepancies will become apparent and the innovative practitioner will be able to capitalize on them. It is hoped that the courts will also recognize the usefulness of comparing both official versions as an expedient and efficient method of finding the true meaning to attach to the provisions of the *Charter*.

42. *Ibid.*

43. This was the opinion of Dominique Cau, a Quebec lawyer now with the Manitoba Provincial Translation Office, in May 1982.

