

Caron, Carter, and Bedford at the Supreme Court of Canada: Society Can Change But History Will Always Stay the Same

Nicolas M. Rouleau

Appellate and constitutional litigator in Toronto

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/sclr>



Part of the [Law Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Rouleau, Nicolas M.. "Caron, Carter, and Bedford at the Supreme Court of Canada: Society Can Change But History Will Always Stay the Same." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 76. (2016).
<https://digitalcommons.osgoode.yorku.ca/sclr/vol76/iss1/12>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

***Caron, Carter and Bedford* at the Supreme Court of Canada: Society Can Change But History Will Always Stay the Same**

Nicolas M. Rouleau*

I. INTRODUCTION

Good facts make good law. And at the Supreme Court of Canada, good social and legislative facts can change the law. Between December 2013 and November 2015, the Supreme Court released *Bedford*,¹ *Carter*,² and *Caron*,³ three decisions that ruled on the same three constitutional issues the Court had ruled on 20 to 30 years earlier. In the *Prostitution Reference*,⁴ *Rodriguez*,⁵ and *Mercure*,⁶ the “first versions” of each case, the Court had refused to find in favour of the claimants. Neither the factual records nor the interpretation of the relevant provisions allowed the Court to establish the existence of their constitutional rights.

* Appellate and constitutional litigator in Toronto. I would like to thank the participants and organizers of the Osgoode Law School annual Constitutional Cases Conference and the SCLR reviewer for their comments on an earlier draft of this article.

¹ *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 48 (S.C.C.), varg [2012] O.J. No. 1296 (Ont. C.A.) [hereinafter “*Bedford*, SCC”].

² *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 42 (S.C.C.), revg [2013] B.C.J. No. 2227 (B.C.C.A.) [hereinafter “*Carter*, SCC”].

³ *Caron v. Alberta*, [2015] S.C.J. No. 56, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 82 (S.C.C.), affg [2014] A.J. No. 174 (Alta. C.A.) [hereinafter “*Caron*, SCC”].

⁴ *Reference re Criminal Code, Canada, ss. 193 and 195.1(1)(c)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.), affg [1987] M.J. No. 453 (Man. C.A.) [hereinafter “*Prostitution Reference*, SCC”].

⁵ *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.), affg [1993] B.C.J. No. 461 (B.C.C.A.) [hereinafter “*Rodriguez*”].

⁶ *R. v. Mercure*, [1988] S.C.J. No. 11, [1988] 1 S.C.R. 234 (S.C.C.), revg [1985] S.J. No. 766 (Sask. C.A.) [hereinafter “*Mercure*, SCC”].

In *Bedford*, *Carter* and *Caron*, new claimants took new kicks at the can. At trial in these cases, the claimants took advantage of recent favourable legal developments. More importantly, they filed heaps of new historical and social science evidence in support of their claims. Seizing upon this new evidence, the trial judges in the cases made findings of social and legislative facts — “that is, facts about society at large, established by complex social science evidence”⁷ — that convinced them to overturn the existing Supreme Court precedents.

On appeal, the Supreme Court was asked to determine whether the trial judges’ factual and legal conclusions could indeed overrule the Court’s previous holdings. In two of those cases, *Bedford* and *Carter*, the Court upheld the trial results and granted the claims, holding that a lower court can revisit the decision of a higher court “if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate”.⁸ Importantly, the Court professed itself constrained by the trial judges’ findings of social and legislative facts.

In the third case, *Caron*, the Court ignored the trial judge’s findings of social and legislative fact and instead emphasized the “important element of context to bear in mind that if the appellants are right, the result reached by the Court in *Mercure* is clearly wrong. The stability of our constitutional law counsels against accepting such a proposition too readily.”⁹ It dismissed the claim.

Part II of this article reviews the Court’s decisions in the *Prostitution Reference/Bedford*, *Rodriguez/Carter*, and *Mercure/Caron* cases. In each of these pairs, the Supreme Court’s commitment to deference on social and legislative facts was tested on a claim to overturn one of its precedents. In only two of these pairs, however, did the Supreme Court defer to the trial judge.

Part III examines two reasons why the Court may have refused to defer to the trial judge in *Caron*. First, the case brought back to the surface the Supreme Court’s underlying unease with minority-language rights. While the Court has affirmed that constitutional language rights are to be interpreted broadly and purposively, like other constitutional rights, the Court has consistently refused to do so outside of the limited

⁷ *Bedford*, SCC, *supra*, note 1, at para. 48.

⁸ *Id.*, at para. 42.

⁹ *Caron*, SCC, *supra*, note 3, at para. 82.

section 23 Charter¹⁰ context. Expanding the right to legislative bilingualism is left to the political sphere. Second, the historical facts at play in *Caron* are different from the usual social and legislative facts considered by the Court. Social and legislative facts are used to bring constitutional legal norms more in line with society; historical facts, on the other hand, are used to undermine the modern-day societal and constitutional understanding. The Court is therefore more inclined to accept new social facts than new historical facts.

II. ONE OF THESE IS NOT LIKE THE OTHER

1. Prostitution

(a) 1990 — *The Prostitution Reference*

In the *Prostitution Reference*, in 1990, the Supreme Court debated for the first time the constitutionality of two prohibitions related to prostitution: the prohibition on bawdy-houses and the prohibition on communicating in public to engage in prostitution or obtain the services of a prostitute.¹¹ Specifically, the Court assessed whether they infringed sections 2(b) and 7 of the Charter.

The matter arose as a reference through the Manitoba Court of Appeal; it thus had no trial record. In any event, a record may not have mattered. As Monnin C.J.M. insisted, “[t]he issue is so simple and plain that it does not require numerous volumes of transcripts of testimony from social scientists, behavioural experts or moralists for that matter, and clogged dockets to reach a sane and reasonable conclusion on that single issue”. The four other justices agreed. Only Philp J.A. referred to any social and legislative facts about prostitution — vague platitudes pulled out of thin air. The court resoundingly confirmed the constitutionality of the two prohibitions. For Monnin C.J.M., section 7 of the Charter had “absolutely nothing to do with prostitution”. Neither did section 2(b): “I must express my astonishment and surprise that some counsel and even some courts would so think. That argument only serves to trivialize

¹⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter “Charter”].

¹¹ *Prostitution Reference*, SCC, *supra*, note 4.

the great concept of the Charter.” The other justices were no kinder in their assessments of the merits.¹²

The Supreme Court dismissed the appeal and upheld the constitutionality of the prohibitions. Writing for the majority on section 7 of the Charter, Dickson C.J.C. agreed that the prohibitions could deprive individuals of their liberty and security of the person upon conviction, by imprisoning them. While he agreed that “vagueness” should be recognized as a principle of fundamental justice, the prohibitions at issue were not “so vague as to violate the requirement that the criminal law be clear”. Given the benefit of judicial interpretation, the meaning of “prostitution”, “keeps” a bawdy-house, “communicate”, and “attempts to communicate” could be discerned in advance. Chief Justice Dickson also agreed that the prohibition on communications infringed section 2(b) of the Charter, but found it was justified under section 1.¹³

(b) 2013 — *Bedford*

The Ancient Greeks believed that history was cyclical. At the Supreme Court, one cycle lasts just over 20 years. In 2013, the Court once again addressed the constitutionality of the regime surrounding prostitution in *Canada (Attorney General) v. Bedford*.¹⁴ Only this time, it came to the opposite conclusion. It considered the constitutionality of the prohibitions on bawdy-houses and communication in public, like in the *Prostitution Reference*, as well as the prohibition on living on the avails of prostitution. Unlike in the *Prostitution Reference*, the matter was brought by application and included the benefit of a full record below. The social climate surrounding prostitution had also significantly changed.

Justice Himel of the Ontario Superior Court heard the application. She eschewed the approach of the Manitoba Court of Appeal 20 years earlier, taking full advantage of her mandate as finder of facts. She produced a 541-paragraph decision that referred to over 120 cases, 20 statutes and 36 academic authorities and reports. She examined the legislative history of prostitution in Canada and throughout the world,

¹² *Reference re Criminal Code (Canada) ss. 193 and 195.1(1)(c)*, [1987] M.J. No. 453, 49 Man. R. (2d) 1 (Man. C.A.), affd [1990] S.C.J. No. 52 (S.C.C.).

¹³ *Prostitution Reference*, SCC, *supra*, note 4, at 1140-41 and 1156-61.

¹⁴ *Bedford*, SCC, *supra*, note 1.

reports on the experiences of prostitutes, the harm faced by prostitutes, and more. She found that:

- (1) Prostitutes are at a high risk of being the victims of physical violence. Street prostitutes, particularly, are “largely the most vulnerable prostitutes” and “face an alarming amount of violence”.
- (2) Working “in-call” from a fixed indoor location is the safest way to sell sex.
- (3) Prostitutes can increase safety by screening clients at an early stage of a potential transaction and discussing financial terms and use of condoms or safe houses in advance, by working indoors and using monitoring such as closed-circuit television or audio-monitoring, by hiring an assistant, a bodyguard, a driver, or others, and by working in familiar areas where they are supported by friends and regular customers.
- (4) The prohibitions force prostitutes to decide between their liberty and their security of the person.¹⁵

Justice Himel found that the prohibitions at issue deprived the applicants of their liberty and security of the person. Relying on her factual findings and new legal developments, she overturned the Supreme Court’s *Prostitution Reference*. The deprivations of the applicants’ liberty and security of the person were not in accordance with the principles of fundamental justice. The prohibition against bawdy-houses was overbroad. The prohibition against living on the avails of prostitution was arbitrary, overbroad and grossly disproportionate. The prohibition on communicating for the purposes of prostitution was grossly disproportionate. The section 7 breach was not justified under section 1 of the Charter.¹⁶

The Supreme Court of Canada agreed with Himel J., finding a breach of the applicants’ Charter rights. First, it addressed her decision to overturn the Supreme Court’s *Prostitution Reference*. The Court clarified that there exist two situations where a trial court can reconsider settled rulings of higher courts: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that

¹⁵ *Bedford v. Canada (Attorney General)*, [2010] O.J. No. 4057, 2010 ONSC 4264, at paras. 300, 301, 331, 361-362, 421, 427, 432, and 502 (Ont. S.C.J.), *var*d [2012] O.J. No. 1296 (Ont. C.A.) [hereinafter “*Bedford*, application”].

¹⁶ *Id.*, at paras. 445-507. Also see *Bedford*, SCC, *supra*, note 1, at paras. 19-24.

“fundamentally shifts the parameters of the debate”.¹⁷ Both situations existed in this case.

Second, the Court clarified that contrary to a previous holding of the Court, findings of social and legislative fact were now entitled to deference on appeal.¹⁸

Finally, addressing section 7, the Court linked Himel J.’s findings of social and legislative fact to every step of its analysis. The prohibition on communications to engage in prostitution, for example, affected the applicants’ security of the person by not allowing prostitutes “to screen prospective clients for intoxication or propensity to violence, which can reduce the risks that they face”.¹⁹ This prohibition was grossly disproportionate to its object of removing the nuisance of prostitution from the streets (and therefore in violation of a principle of fundamental justice) because, as the application judge found, “the ability to screen clients was an ‘essential tool’ to avoiding violent or drunken clients”.²⁰ The Court criticized the Court of Appeal in the case for “erroneously substitut[ing] its assessment of the evidence for that of the application judge... This was linked to its error, discussed above, in according too little deference to the application judge on findings of social and legislative facts.”²¹

2. Assisted Suicide

(a) 1993 — *Rodriguez*

The early 1990s were momentous times for the Supreme Court on complex social issues. A few years after the *Prostitution Reference*, the Court tackled the issue of assisted suicide in *Rodriguez v. British Columbia (Attorney General)*. Sue Rodriguez, a 42-year-old mother, suffered from Lou Gehrig’s disease. Her condition was rapidly deteriorating and she would soon lose the ability to swallow, speak, walk, move her body without assistance and breathe without a respirator. Her life expectancy was between two and 14 months. She wished for a doctor to assist her in dying when she was no longer able to enjoy life, at the time of

¹⁷ *Bedford*, SCC, *supra*, note 1, at para. 42.

¹⁸ *Id.*, at para. 49.

¹⁹ *Id.*, at para. 69.

²⁰ *Id.*, at para. 148; also see paras. 63, 64, 66, 67, 69, 70, 71, 72, 86, 134, 148 and 155.

²¹ *Id.*, at para. 154.

her choosing. She applied to the court for an order that section 241(b) of the *Criminal Code*,²² which prohibits the giving of assistance to commit suicide, be declared invalid on the ground that it infringed her section 7 Charter right.²³

Justice Melvin, the trial judge, found that the state had not restricted Ms. Rodriguez's right to life. While her illness "may restrict her ability to implement her decisions", this did not "amount to an infringement of a right to life, liberty or security of the person by the state".²⁴ Section 241(b) did not breach section 7, 12, or 15(1) of the Charter.

The Supreme Court of Canada agreed with Ms. Rodriguez that section 241(b) contributed to her distress by preventing her "from managing her death in the circumstances which she fears will occur". The resultant loss of autonomy, physical pain and psychological distress deprived Ms. Rodriguez of her security of the person under section 7. As established by the Court in prior cases, the section 7 concept of security of the person "encompass[es] a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress".²⁵

However, the majority found that this deprivation was in accordance with the principles of fundamental justice. Justice Sopinka extensively reviewed the history of the provisions, the right to refuse medical care at the end of life, the legislation of other countries, and the official positions of various medical associations, which argued against decriminalizing assisted suicide. He concluded from his review that there existed a widespread acceptance of a moral or ethical distinction between passive and active euthanasia; a lack of any "halfway Measure" that could protect the vulnerable; and a "substantial consensus" in Western countries that a blanket prohibition was necessary to protect against the slippery slope. Therefore, to the extent there existed any consensus on the issue, it was that "human life must be respected and we must be careful not to undermine the institutions that protect it". The blanket prohibition was neither arbitrary nor unfair and did not violate the principles of

²² R.S.C. 1985, c. C-46.

²³ *Rodriguez*, *supra*, note 5, at 530-31.

²⁴ *Id.*, at 534.

²⁵ *Id.*, at 584 and 587-89.

fundamental justice.²⁶ The majority also found no violation of section 12 of the Charter.

On section 15(1) of the Charter, while the majority assumed a breach (as found in Lamer C.J.C.'s dissent), it found this breach was "clearly saved under s. 1". Specifically, the "substantial consensus" among western countries, medical organizations and the Law Reform Commission established that the protection of individuals against the control of others over their lives was best achieved through a blanket prohibition against assisted suicide without exception.²⁷

(b) 2015 — *Carter*

The Ancient Greeks were onto something. Just as prostitution returned before the Court in 2010, assisted suicide returned in 2015. The adjudicative facts in *Carter v. Canada (Attorney General)* were "very similar" to the facts in *Rodriguez*. Ms. Taylor, like Ms. Rodriguez, was dying of Lou Gehrig's disease. She, like Ms. Rodriguez, wanted the right to seek a physician's assistance in dying when her suffering became intolerable and challenged the constitutionality of section 241(b) of the *Criminal Code*.²⁸

The social and legislative facts, however, were quite different. As found at trial by Smith J.:

- (1) The preponderance of evidence from ethicists is that "there is no ethical distinction between physician-assisted death and other end-of-life practices whose outcome is highly likely to be death".
- (2) There is a strong consensus that physician-assisted dying would be ethical with respect to a "competent, informed, voluntary adult patient who is grievously ill and suffering symptoms that cannot be alleviated", and where the assistance is "clearly consistent with the patient's wishes and best interests, and in order to relieve suffering".
- (3) Evidence from countries with regimes that permit physician-assisted dying revealed that "predicted abuse and disproportionate impact on vulnerable populations has not materialized".

²⁶ *Id.*, at 596-605 and 608.

²⁷ *Id.*, at 613.

²⁸ *Carter*, SCC, *supra*, note 2, at para. 42.

- (4) There are qualified Canadian physicians who would find it ethical to assist a patient in dying if that act were not prohibited by law.
- (5) Physicians are capable of reliably assessing patient competence, including in the context of life-and-death decisions, and the risks of physician-assisted death “can be identified and very substantially minimized through a carefully-designed system” that imposes strict limits that are scrupulously monitored and enforced.²⁹

Justice Smith concluded that this new evidence, as well as the development of the section 7 principles of gross disproportionality and overbreadth, which had not been identified at the time of the decision in *Rodriguez*,³⁰ permitted her to reconsider the constitutionality on the prohibition on physician-assisted dying.³¹ She relied on this new evidence of social and legislative facts to overturn the Supreme Court’s precedent, concluding that the prohibition deprived the applicants of their rights to life, to liberty and to security of the person. This deprivation was not in accordance with the principle of overbreadth, since the evidence showed that a system with properly designed and administered safeguards offered a less restrictive means of reaching the government’s objective. Nor was it in accordance with the principle of gross disproportionality. The breach of section 7 could not be justified under section 1.³²

Like in *Bedford*, the Supreme Court upheld the trial judge’s decision to overturn its precedent in *Rodriguez*, largely on the basis of the new social and legislative facts found by the trial court and developments in the law since *Rodriguez*. On the legal issue, the Court accepted that the law relating to overbreadth and gross disproportionality “had materially advanced since *Rodriguez*”.³³

On the evidentiary issue, the record at trial contained evidence that, if accepted, was capable of undermining each of the majority’s factual conclusions in *Rodriguez*. While the object of section 241(b) is to

²⁹ *Carter v. Canada (Attorney General)*, [2012] B.C.J. No. 1196, 2012 BCSC 886, at paras. 319, 335, 358, 684, 798, 815, 831, 843, and 883 (B.C.S.C.), revd [2013] B.C.J. No. 2227 (B.C.C.A.) [hereinafter “*Carter*, trial”]

³⁰ The principle of overbreadth was identified in *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761, at 790-94 (S.C.C.), affg [1992] B.C.J. No. 2596 (B.C.C.A.), and the principle of gross disproportionality was fleshed out in *R. v. Marmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 143 (S.C.C.), affg [2000] B.C.J. No. 1095 (B.C.C.A.).

³¹ See *Carter*, SCC, *supra*, note 2, at para. 28.

³² *Carter*, trial, *supra*, note 29, at paras. 1281-1283, 1367, 1378-1383.

³³ *Carter*, SCC, *supra*, note 2, at paras. 44-46.

“prevent[] vulnerable persons from being induced to commit suicide at a time of weakness”, the evidence revealed that “the law catches people outside this class”, that is who are not vulnerable. According to the Court, “[i]t follows that the limitation on their rights is in at least some cases not connected to the objective of protecting *vulnerable* persons”. In addition, at the section 1 stage, the new evidence of social and legislative facts demonstrated that the blanket prohibition against assisted-suicide in section 241(b) was not minimally impairing. Evidence from “scientists, medical practitioners, and others who were familiar with end-of-life decision-making in Canada and abroad” confirmed that a permissive regime “with properly designed and administered safeguards” could protect vulnerable people from abuse and error. Properly qualified and experienced physicians were able “to reliably assess patient competence and voluntariness” to ensure that these patients were truly consenting to die.³⁴

In response to the Attorney General of Canada’s argument that the trial judge made a palpable and overriding error in concluding that safeguards would minimize the risk associated with assisted dying, the Supreme Court stated simply that “[i]n our view, Canada has not established that the trial judge’s conclusion on this point is unsupported, arbitrary, insufficiently precise or otherwise in error. At most, Canada’s criticisms amount to ‘pointing out conflicting evidence’, which is not sufficient to establish a palpable and overriding error We see no reason to reject the conclusions drawn by the trial judge. They were reasonable and open to her on the record.” In response to anecdotal examples of cases abroad meant to show that Canada would descend the slippery slope into euthanasia and condoned murder, the Supreme Court noted “anecdotal examples of systems that work well. The resolution of the issue before us falls to be resolved not by competing anecdotes, but by the evidence. The trial judge, after an exhaustive review of the evidence, rejected the argument that adoption of a regulatory regime would initiate a descent down a slippery slope into homicide.”³⁵

Churchill stated that “those who fail to learn from history are doomed to repeat it”. Although the Supreme Court had dismissed similar constitutional challenges in the *Prostitution Reference* and *Rodriguez*, the applicants *Carter* and *Bedford* learned from history. They ensured to put before the Court a record sufficient to prove their harm and suffering,

³⁴ *Id.*, at paras. 47, 73-78, 86, and 104-107.

³⁵ *Id.*, at paras. 109 and 120.

as well as the social and legislative facts necessary to prove the incoherence of the legislative regime that brought about this harm. Once the trial judges decided to strike down the prostitution and assisted-suicide regimes, and in light of the Supreme Court's own doctrine that findings of social and legislative facts warrant deference, the results in *Carter* and *Bedford* at the Supreme Court appeared preordained.

3. Legislative Bilingualism

(a) 1988 — *Mercure*

The story of a constitutional right to legislative bilingualism in Alberta and Saskatchewan begins in much the same way. In 1988, in *R. v. Mercure*, the Supreme Court of Canada was asked to decide whether the right to legislative bilingualism in section 110 of the *North-West Territories Act*³⁶ applied in Saskatchewan (and in Alberta, since both provinces were in a similar position) and, if it did, whether it was a constitutional right.³⁷ Section 110 provides as follows:

110. Either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of such Assembly; and all ordinances made under this Act shall be printed in both those languages ...³⁸

At trial, without the benefit of social and legislative evidence, Deshaye P.C.J. concluded that section 110 still applied in Saskatchewan; however, its scope was restricted: while litigants could address the court in French and be provided with an interpreter, statutes were not required to be printed in French.³⁹

Writing for the majority in the Supreme Court of Canada, La Forest J. agreed with Deshaye P.C.J., that section 110 had been in effect in Saskatchewan since its inception (though the province had never respected it); and that section 110 continued in operation in the province to this day. On a plain reading of its terms, section 110 entitled a litigant

³⁶ R.S.C. 1886, c. 50.

³⁷ *Mercure*, SCC, *supra*, note 6, at 247-48.

³⁸ *North-West Territories Act*, *supra*, note 36, at s. 110.

³⁹ *Mercure v. Saskatchewan*, [1981] S.J. No. 978, [1981] 4 W.W.R. 435, at paras. 10-23 (Sask. Prov. Ct.), *affid* [1985] S.J. No. 766 (Sask. C.A.).

to speak French before the courts in Saskatchewan, but not to be understood. It also required Saskatchewan's statutes to be enacted, printed, and published in English and French. Section 110 was not a constitutional provision, however, meaning that the legislature could repeal it through an ordinary Act: "Parliament knew full well how to [constitutionally] entrench a provision if it wished to do so, namely, by expressly providing for language rights in the *Saskatchewan Act* as it did in the case of s. 23 of the *Manitoba Act, 1870*".⁴⁰

While of the opinion that this case could be "resolved simply by the application of the ordinary principles of statutory construction", La Forest J. performed perfunctory additional research of social and legislative facts to support his reasoning. He was criticized for doing so by Estey J., who noted in his dissent that the record before the Court did not include these "historical opinions and comments". Justice Estey did appear to envision, however, that section 110 of the *North-West Territories Act* could be elevated to constitutional status if there existed a proper "factual" and "statutory" base to warrant this conclusion.⁴¹

(b) 2015 — *Caron*

Just as the Ancient Greeks would have predicted, this proper factual and statutory base was placed before the Court two decades later, with the hearing of *Caron v. Alberta* in 2015.⁴² At issue in this case, like in *Mercure*, was the constitutionality of legislative bilingualism in Saskatchewan and Alberta.⁴³ This time, however, following the parallels established in *Bedford* and *Carter*, the case was argued on a full trial record, with ample evidence of social and legislative facts and in the context of a new legal framework.

In *Mercure*, the claimant had argued that section 110 of the *North-West Territories Act* was a constitutional provision. In *Caron*, however, the claimant argued that as early as 1867, Parliament promised the Francophone Métis it would provide for legislative bilingualism in all the

⁴⁰ *Mercure*, SCC, *supra*, note 6, at 255 and 257-71.

⁴¹ *Id.*, at 248 (La Forest J.) and 294-95, 321 and 325 (Estey J., *dissenting*).

⁴² I acted as counsel for the Fédération des associations de juristes d'expression française de common law inc., an intervener before the Supreme Court on the case, which argued in favour of a constitutional right to legislative bilingualism.

⁴³ *Caron* concerned Alberta's constitutional obligations while *Mercure* concerned Saskatchewan's, but the historical and legislative framework surrounding the creation of both provinces was almost identical.

territories covering modern-day Saskatchewan and Alberta, as a way to ensure peaceful annexation of these territories. The British and Canadian governments then constitutionally entrenched this promise in the 1870 *Rupert's Land and North-Western Territory Order* and in the 1869 *Royal Proclamation*.⁴⁴

The legal context relating to language rights had significantly evolved since *Mercure*. *Mercure* continued a line of cases in the late 1980s that interpreted language rights restrictively.⁴⁵ In *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, the leading case in this line, the Supreme Court indicated that language rights were a limited and precise group of rights resulting from “political compromise”. They were unlike the “legal rights ... expressed in s. 7 of the *Charter*” and should therefore be interpreted with “restraint”. Progression towards equality of official languages was a goal to be pursued only through the legislative process, not the courts.⁴⁶

This restrictive interpretation of language rights was decisively overturned in 1999 by the Supreme Court in *R. v. Beaulac*. Writing for the majority, Bastarache J. confirmed that like all other constitutional rights, language rights must in all cases be interpreted purposively. To the extent *Société des Acadiens* stood for a restrictive interpretation of language rights, “it is to be rejected”.⁴⁷

Between 1988 and 2015, the legal landscape also evolved in one other important respect. In *Mercure*, the Court had rejected the suggestion that section 110 of the *North-West Territories Act* had been implicitly entrenched, noting that “Parliament knew full well how to [constitutionally] entrench a provision if it wished to do so”.⁴⁸ In later decisions such as the *Nadon* decision and the *Senate Reference*, however, the Court came to accept that even where Parliament failed to expressly constitutionally entrench a provision, the provision might implicitly be

⁴⁴ *Caron*, SCC, *supra*, note 3, at paras. 1-3; *R. c. Caron*, [2008] A.J. No. 855, 2008 ABPC 232, at paras. 531-532 (Alta. Prov. Ct.), rev'd [2009] A.J. No. 1468 (Alta. Q.B.) [hereinafter “*Caron*, trial”].

⁴⁵ Alan Riddell, “À la recherche du temps perdu : la Cour suprême et l'interprétation des droits linguistiques constitutionnels dans les années 80” (1988) 29 C. de D. 829, at 840-51.

⁴⁶ *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549, at paras. 12, 63-65, and 68-70 (S.C.C.), aff'd [1984] N.B.J. No. 139 (N.B.C.A.) [hereinafter “*Société des Acadiens*”]; also see *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 16 (S.C.C.), rev'd [1997] B.C.J. No. 2379 (B.C.C.A.) [hereinafter “*Beaulac*”].

⁴⁷ *Beaulac*, *id.*, at paras. 24-25.

⁴⁸ *Mercure*, SCC, *supra*, note 6, at 271.

constitutionally entrenched in instances where the historical, social, and philosophical context favoured entrenchment.⁴⁹

The most significant change since *Mercure*, however, was the factual-historical record that the claimants in *Caron* put before the Court. As a result, unlike in *Mercure*, the trial court in *Caron* was able to extensively assess the historical facts surrounding the purchase of Rupert's Land and the creation of the North-West Territories — *i.e.*, the “context” required in modern-day constitutional interpretation. Justice Wenden heard at trial the evidence of eight experts in history, sociology, sociolinguistics and political science. The trial lasted 89 days and resulted in 9,164 pages of transcripts, 93 exhibits, and a 575-paragraph decision. Justice Wenden made several findings of social and legislative facts:

- (1) On December 16 and 17, 1867, preparing for its eventual annexation of Rupert's Land and the North-West Territories [together, the “Territories”], Parliament presented an address to the Queen, in which it undertook to “provide that the legal rights of any corporation, company, or individual within the same shall be respected” [the “1867 Address”].⁵⁰ The content of these rights was not fleshed out.
- (2) As annexation approached, Canada indicated it could accept transfer only if “quiet possession can be given”. Negotiations with the Métis were required to ensure that they would join Canada willingly and would not scale up the ongoing political uprising.⁵¹
- (3) The delegates for the Territories agreed that legislative bilingualism was a non-negotiable condition of their entry into Canada.⁵² They never wavered.
- (4) Representatives of the British and Canadian governments did not consider legislative bilingualism anywhere in the Territories to be contentious, and consistently promised it to the delegates. Governor General John Young issued a *Royal Proclamation* in 1869, stating

⁴⁹ *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21, [2014] 1 S.C.R. 433, at paras. 19 and 76-103 (S.C.C.) [hereinafter “*Nadon*”]; *Reference re Senate Reform*, [2014] S.C.J. No. 32, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 25 (S.C.C.) [hereinafter “*Senate Reference*”].

⁵⁰ *Caron*, trial, *supra*, note 44, at para. 492.

⁵¹ *Id.*, at paras. 462-463; also see *Caron*, SCC, *supra*, note 3, at paras. 179-183 (*dissent*).

⁵² *Id.*, at paras. 267-275; also see *Caron*, SCC, *supra*, note 3, at paras. 168-178 (*dissent*).

that upon annexation, “all your civil and religious rights and privileges will be respected”. The *Royal Proclamation* was issued at the order of the Queen in order to reassure the inhabitants that their language rights including legislative and judicial bilingualism would be respected, and thereby quell unrest in the territories. As Canadian representative Donald Smith explained to the delegates, the propriety of legislative bilingualism “is so evident that it will unquestionably be provided for”.⁵³

- (5) Conversely, there was no evidence that demands for legislative bilingualism anywhere in the Territories was ever opposed, or that the delegates somehow accepted the institution of legislative bilingualism in Manitoba only. Nor would it have made sense, seeing as French was the “Language of the Country” and a language of the Assiniboia Council and Court throughout the Territories (not only in the Red River Colony). Language rights throughout the Territories were accepted as a given.⁵⁴
- (6) Immediately after annexation, the entire Territories continued to be governed bilingually. In 1877, the existing practice of legislative bilingualism was codified in section 110 of *The North-West Territories Act*.⁵⁵

Ultimately, Wenden J. concluded that in light of the historical context, the civil and religious rights guaranteed by the 1869 *Royal Proclamation*, including legislative bilingualism, were constitutionally protected.

The majority of the Supreme Court disagreed, finding no constitutional right to legislative bilingualism: “It has never been the case in our constitutional history that a right to legislative bilingualism was constitutionalized by inference through the vehicle of the words ‘legal rights’. The words in the *1867 Address* cannot support a constitutional guarantee of legislative bilingualism in the province of Alberta. Parliament knew how to entrench language rights and did so in the *Manitoba Act, 1870* but not in the *1867 Address*.” Unlike in *Bedford* and *Carter*, the

⁵³ *Id.*, at paras. 383, 396 and 429-488; also see *Caron*, SCC, *supra*, note 3, at paras. 184-195 (*dissent*).

⁵⁴ *Id.*, at paras. 78, 89, 132, 144-167, and 487; also see *Caron*, SCC, *supra*, note 3, at paras. 149-164 and 212 (*dissent*).

⁵⁵ *Id.*, at paras. 323-367; also see *Caron*, SCC, *supra*, note 3, at paras. 196-205 (*dissent*).

majority of the Court emphasized the “important element of context to bear in mind that if the appellants are right, the result reached by the Court in *Mercurie* is clearly wrong. The stability of our constitutional law counsels against accepting such a proposition too readily.”⁵⁶

The majority purported to “take no issue with the factual findings of the provincial court judge” — only with his legal conclusions. In reality, the majority found its own facts:

- (1) The representatives of the Territories never considered that the promise to respect “legal rights” referred to linguistic rights.
- (2) Parliamentary debates show that the promise to respect legal rights in the *1867 Address* did not refer to linguistic rights.
- (3) Contemporary evidence shows that the parties thought that linguistic rights were addressed in the *Manitoba Act, 1870* but not in the *1870 Order*.
- (4) There is no evidence that the *1867 Address* embodied the compromise reached in 1870.
- (5) The events following annexation show that no one involved thought there had been any guarantee of legislative bilingualism in 1870.
- (6) Read in context, the *Royal Proclamation* did not contain a promise to guarantee legislative bilingualism.⁵⁷

These are findings of social and legislative fact, and they all directly contradicted the findings of the trial judge.⁵⁸

The dissent, on the other hand, would have confirmed the trial judge’s findings of fact and found a constitutional right to legislative bilingualism. Emphasizing that the Constitution must be interpreted “in light of its historical, philosophical and linguistic context”, the dissent explained that, “[i]n short, the historical record clearly shows that there was an agreement to protect legislative bilingualism throughout the annexed territories. This agreement was constitutionally enshrined in

⁵⁶ *Caron*, SCC, *supra*, note 3, at paras. 82 and 103.

⁵⁷ *Caron*, SCC, *supra*, note 3, at paras. 50-80, 85-99.

⁵⁸ Two of the judges in the six-member majority were unilingual Anglophones. They agreed to overturn the findings of fact of a French-language decision, based mostly on a French-language record.

the *Rupert's Land and North-Western Territory Order*... — which incorporated the *1867 Address* — as is confirmed by the events of that period.”⁵⁹

III. PLUS ÇA CHANGE: BACK TO A RESTRICTIVE INTERPRETATION OF LANGUAGE RIGHTS

The Supreme Court has traditionally accorded deference to the trial judge's findings on the “adjudicative” facts of a case — “who did what, where, when, how and with what motive or intent”.⁶⁰ Prior to *Bedford*, however, this deference did not extend to the assessment of “social and legislative” facts in a case. These types of facts arise in the law-making process and require the legislature or a court “to assess complex social science evidence and to draw general conclusions concerning the effect of legal rules on human behaviour”.⁶¹ They are the facts involved “in deciding questions of law or policy”.⁶² As McLachlin J. (as she then was) explained in *RJR-MacDonald*, “appellate courts are not bound by the trial judge's findings in respect of social science evidence”.⁶³

This broad discretion in the treatment of social and legislative facts meant that litigants and commentators were “basically left in the dark as to how social facts actually find their way into judicial reasoning”.⁶⁴ In the words of Danielle Pinard, facts were:

... refused, ignored, called for, wished for, found in evidence, not found in evidence, imagined, invented, assumed, judicially noticed, reasoned, or taken for granted. They are treated in an unpredictable

⁵⁹ *Caron*, SCC, *supra*, note 3, at paras. 115-119 and 141.

⁶⁰ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199, at para. 79 (S.C.C.) (*per* La Forest J., *dissenting* but not on this point), *revg* [1993] J.Q. no 1 (Que. C.A.) [hereinafter “*RJR-MacDonald*”], citing John Hagan, “Can Social Science Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation” in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987), at 215.

⁶¹ *Id.*, at para. 79 (*per* La Forest J., *dissenting* but not on this point); also see Ann Woolhandler, “Rethinking the Judicial Reception of Legislative Facts” (1988) 41 Vand. L. Rev. 111, at 114 and 123.

⁶² John Monahan & Laurens Walker, “Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law” (1986) 134:3 U. Pa. L. Rev. 477, at 483. Monahan and Walker define social and legislative facts as opposed to adjudicative facts, which “pertain specifically to the case at bar”.

⁶³ *RJR-MacDonald*, *supra*, note 60, at para. 141; also see para. 79 (*per* La Forest J., *dissenting* but not on this point).

⁶⁴ Danielle Pinard, “Institutional Boundaries and Judicial Review — Some Thoughts on How the Court is Going About Its Business: Desperately Seeking Coherence” (2004) 25 S.C.L.R. 213, at 218.

way. And yet they are extremely useful, for their presence or their absence, and their uncertainty or their insufficiency is used to justify judgments. It is not the fault of the law, it is not the fault of the judges, it is the fault of the facts.⁶⁵

The Court allegedly sought to change this approach in *Bedford*, eliminating the distinction between “adjudicative” and “social and legislative” facts and according full deference to the trial judge’s findings of social and legislative facts in constitutional challenges. By allowing the trial judge to overturn a Supreme Court precedent in that case, the Court strongly signalled that trial judges would be empowered to support their reasoning using social and legislative facts derived from the social sciences. Ideally, this meant that litigants could look forward to more predictability, transparency and fairness in both trial and Supreme Court constitutional decisions. If experts have the science to help judges make better decisions, why not let them use it?

Carter confirmed the Court’s new deferential and empirical approach.

In *Caron*, however, the Court ignored this new approach. The Court claims that the trial judge’s factual findings were ultimately irrelevant to the result, which came down to the fact that “Parliament knew how to entrench language rights”, but chose not to do so.⁶⁶ But this assumes a formalistic interpretation of constitutional rights, which the Court no longer favours. In the *Senate Reference*, for example, the Court noted that “[t]he rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts.”⁶⁷ In *Nadon*, the Court explained that the Court must review the “political and social consensus at the time” to determine whether a right is “an essential part of Canada’s constitutional architecture”.⁶⁸ This is what the trial judge did in *Caron*, finding that legislative bilingualism was without a doubt part of the political and social consensus at the time. A broad interpretation of the *1867 Address* and the *Royal Proclamation*, particularly in light of the historical context, certainly suggested that civil rights included legislative bilingualism. So why was *Caron* any different from these cases, let alone the two section 7 Charter cases discussed above?

⁶⁵ *Id.*, at 215-16.

⁶⁶ *Caron*, SCC, *supra*, note 3, at para. 103.

⁶⁷ *Senate Reference*, *supra*, note 49, at para. 25.

⁶⁸ *Nadon*, *supra*, note 49, at para. 100.

A first possibility is the Court's continued underlying unease with language rights. In *Société des Acadiens*, the Court promoted a restrictive interpretation of language rights, which resulted from "political compromise", as opposed to the "legal rights ... expressed in s. 7 of the Charter".⁶⁹ The Supreme Court formally resiled from this position in *Beaulac*, accepting that "[l]anguage rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada." In that case, attempting once and for all to place language rights on equal footing with other constitutional rights, Bastarache J. noted that "a political compromise also led to the adoption of ss. 7 and 15 of the Charter." He explained that "there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of official language communities."⁷⁰

Justice Bastarache only succeeded in part. The Court has adopted an expansive interpretation of language rights in the context of minority-language education under section 23 of the Charter.⁷¹ But in other language rights contexts, *Beaulac* has not held up to its promise. Heard a few years after *Beaulac*, *Charlebois v. Saint John (City)* reverted to a restrictive and formalistic interpretation of language rights (with Bastarache J. in dissent), deciding that Charter values have no role to play in the interpretation of the quasi-constitutional *Official Languages Act* unless the Act contains ambiguities.⁷² Likewise, in *Conseil scolaire francophone*, the Court dismissed the possibility that the official language rights enshrined in the Charter could implicitly modify restrictive pre-Charter language provisions.⁷³ Neither institutional nor

⁶⁹ *Société des Acadiens*, *supra*, note 46, at paras. 12, 63-65 and 70.

⁷⁰ *Beaulac*, *supra*, note 46, at paras. 20 and 24-25.

⁷¹ See, e.g., *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342 (S.C.C.), revg [1987] A.J. No. 709 (Alta. C.A.) [hereinafter "*Mahe*"], *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] S.C.J. No. 26, [1993] 1 S.C.R. 839 (S.C.C.), revg [1990] M.J. No. 68 (Man. C.A.), *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1, 2000 SCC 1, [2000] 1 S.C.R. 3 (S.C.C.), revg [1998] P.E.I.J. No. 38 (P.E.I.C.A.), *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62, [2003] 3 S.C.R. 3 (S.C.C.), revg [2001] N.S.J. No. 240 (N.S.C.A.), *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, [2015] S.C.J. No. 21, 2015 SCC 21, [2015] 2 S.C.R. 139 (S.C.C.), revg [2014] B.C.J. No. 155 (B.C.C.A.).

⁷² *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, 2005 SCC 74, [2005] 3 S.C.R. 563, at para. 24 (S.C.C.), affg [2004] N.B.J. No. 237 (N.B.C.A.).

⁷³ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2013] S.C.J. No. 42, 2013 SCC 42, [2013] 2 S.C.R. 774 (S.C.C.), affg [2012] B.C.J. No. 1301 (B.C.C.A.) [hereinafter "*Conseil scolaire francophone*"].

legislative bilingualism since *Beaulac* have benefited from the broad and purposive interpretation to which they are apparently entitled.

The majority in *Caron* states that “linguistic rights have always been dealt with expressly from the beginning of our constitutional history”.⁷⁴ This statement is clearly wrong. For example, the Court now accepts that the right to instruction under section 23 of the Charter includes an implied right for the minority-community to manage their own educational facilities.⁷⁵ More troubling, however, is that this discourse attempts to set language rights apart from other constitutional rights, to be interpreted more restrictively. This is the approach ostensibly rejected in *Beaulac*.

The majority also argues that the creation of rights is different from the interpretation of rights: “The Court must generously interpret constitutional linguistic rights, not create them.”⁷⁶ But at issue in *Caron* was the interpretation of the promise in the *1867 Address*, which had undeniably been incorporated into the *1870 Rupert’s Land and North-Western Territory Order* (a constitutional document). And in any event, on the Court’s own recent jurisprudence, there’s little foundation for a clear-cut distinction between the creation and the interpretation of constitutional rights. In the mishmash of written documents and unwritten principles that create the Canadian constitutional architecture, it is not always clear whether a right or guarantee has been implicitly constitutionalized. That very issue requires a broad and purposive assessment of the historical and philosophical context of the provision.

To interpret the scope of legislative and institutional bilingualism, the Court might also be expected to consider the constitutional principle for the protection of minorities. In the *Reference re Secession of Quebec*, the Court explained that “the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation ... The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.” The principle ought also to be “invested with a powerful normative force”.⁷⁷ Yet instead of drawing upon this principle to interpret language rights, the Court has often held up the principle of

⁷⁴ *Caron*, SCC, *supra*, note 3, at para. 40.

⁷⁵ *Mahe*, *supra*, note 71, at 368-73.

⁷⁶ *Caron*, SCC, *supra*, note 3, at para. 38.

⁷⁷ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 54 and 81 (S.C.C.).

“federalism” into its path. In *Conseil scolaire francophone*, the Court noted that “while it is true that the *Charter* reflects the importance of language rights, it also reflects the importance of respect for the constitutional powers of the provinces ... [I]t is not inconsistent with *Charter* values for the British Columbia legislature to restrict the language of court proceedings in the province to English.”⁷⁸ In *Caron*, the Court similarly noted that “[w]e ... cannot ... allow the pursuit of language rights to trample on areas of clear provincial legislative jurisdiction.”⁷⁹

Why has the principle of federalism consistently trumped the principle for the protection of minorities? Perhaps because the Court wants to ensure that new constitutional rights will not be created with limited territorial application. While the Supreme Court has proved itself willing to significantly expand (if not outright create) rights of universal application — for example in the context of s. 7, 15, or 23 — it has been much less inclined to create rights that apply in only one or two provinces. That said, it is particularly ironic that the principle of federalism was used as a bulwark against the principle for the protection of minorities in *Caron*, since the evidence accepted by the trial judge revealed that the Francophone Métis in the Territories would not have accepted to join the Canadian confederation without a firm belief that their language rights would be protected. If the principle for the protection of minorities cannot prevail in *Caron* — a case about the value of a historical promise to a minority-language group in order to secure its willingness to join the Canadian confederation — it seems difficult to envision a situation where the Court will grant it normative force. The irony is extended because the Constitution does not even expressly award to the provinces jurisdiction over language; rather this jurisdiction is an implicit corollary of their power to manage their other express fields of jurisdiction. Yet according to the Court, only an express constitutional provision could modify the province’s implicit power over language.

While the Court in the Charter era has increasingly relied on “context” to resolve constitutional claims,⁸⁰ this context is unwelcome in the interpretation of legislative and institutional bilingualism. What is left

⁷⁸ *Conseil scolaire francophone*, *supra*, note 73, at para. 56.

⁷⁹ *Caron*, SCC, *supra*, note 3, at para. 6.

⁸⁰ A. Wayne MacKay, “Evolving Fundamental Principles and Merging Public Law Silos: The Reshaping of Canada’s Constitutional Landscape” in Stéphane Beaulac & Errol Mendes, *Canadian Charter of Rights and Freedoms*, 5th ed. (Toronto: LexisNexis Canada, 2013) 83, at 104-105.

is a dry, formal and strictly textual approach, one where social and legislative facts are irrelevant. Unless a constitutional provision clearly sets out a language obligation for government, the courts have no role to play. As the Court explained it in *Société des Acadiens*, progression towards equality of official languages is a goal to be pursued through the legislative process only, not the courts.⁸¹ This approach is reminiscent of the way the courts refused to protect minority-language education rights between Confederation and the turn of the 20th century because they were not expressly provided.⁸²

While this restrictive approach also calls to mind some criticisms of the Court's interpretation of Aboriginal rights,⁸³ this may be changing. Indeed, in *Daniels v. Canada (Indian Affairs and Northern Development)*, the Court expansively interpreted section 91(24) of the *Constitution Act, 1867*, using the historical, philosophical, and linguistic contexts "to establish that 'Indians' in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and Métis".⁸⁴ Paradoxically, the "historical" and "philosophical" context used by the trial judge (and accepted by the Supreme Court) in *Daniels* was the same as in *Caron*, that is, the understanding that a good relationship with the Métis, who occupied much of the Territories pre-annexation, "was required" for the Canadian government to realize its goals.⁸⁵ While this context led to an expansive interpretation of the Constitution in *Daniels*, it did not in *Caron* (which came out a mere five months earlier). The Court determined that the Canadian government's promise to the Métis (the promise to "honour the obligations" inherited from Britain)⁸⁶ in *Daniels* had constitutional value; yet its language promises to the Métis in *Caron* did not.

⁸¹ *Société des Acadiens*, *supra*, note 46, at paras. 68-69.

⁸² Nicolas M. Rouleau, "Section 23 of the Charter: Minority-Language Education Rights" (2008) 39 S.C.L.R. (2d) 261, at 266-70.

⁸³ For example, see Kent McNeil & David Yarrow, "Has Constitutional Recognition of Aboriginal Rights Adversely Affected their Definition?" (2007) 37 S.C.L.R. (2d) 177 (arguing that the focus on specificity, integrality, and history limits the scope of Aboriginal rights); Grace Li Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver, B.C.: University of British Columbia Press, 2011), at 139 (arguing that "the Court suffered from selective blindness, especially when it came to protecting traditional Indigenous concepts of jurisdiction, territorial authority, and self-determination").

⁸⁴ *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] S.C.J. No. 12, 2016 SCC 12, at para. 19 (S.C.C.), varg [2014] F.C.J. No. 383 (F.C.A.) [hereinafter "*Daniels*"]; *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

⁸⁵ *Id.*, at para. 25.

⁸⁶ *Id.*, at para. 5.

A second possible reason for the Supreme Court's refusal to defer to trial facts in *Caron* is a discomfort with the use of "historical facts" to grant, expand, or reinterpret constitutional rights. In *Bedford*, the Court described social and legislative facts as "facts about society at large, established by complex social science evidence".⁸⁷ It is clear that this definition in theory encompasses the historical facts found by the trial judge in *Caron*, for example the decision of the British to issue the 1869 *Royal Proclamation* to reassure the inhabitants of the Territories that their language rights would be respected and thereby quell unrest, or the understanding of the delegates of the inhabitants of the Territories (and not just the Red River Colony) that legislative bilingualism was a non-negotiable condition of their entry into Canada.⁸⁸

Yet it is undeniable that historical facts are different and used for different purposes in constitutional challenges than other social and legislative facts. Typically, social and legislative facts are used by the Court to provide a window into society's beliefs and status or destabilize current assumptions at that moment in time.⁸⁹ For example, sociologists generate evidence to assess how a particular criminal law "is actually implemented in particular situations" or how a criminal justice system "can reproduce or create social inequality". The result is an "attempt to situate phenomena in their social, cultural, and political environs, and to a lesser extent in their historical and economic contexts".⁹⁰

In the *Prostitution Reference*, the Court used social facts about morality and the "nuisances" caused by public solicitation of prostitutes.⁹¹ In *Rodriguez*, it referred to the lack of any "halfway Measure" that could protect the vulnerable if assisted-suicide was decriminalized and the widespread acceptance of a moral or ethical distinction between passive and active euthanasia.⁹² These social facts reflected the evidence available to the Court at the time; they probably also reflected where society stood on these issues.

By the time *Bedford* and *Carter* came around, society had changed. At trial in *Bedford*, Himel J. thoroughly canvassed enormous quantities

⁸⁷ *Bedford*, SCC, *supra*, note 1, at para. 48.

⁸⁸ *Caron*, trial, *supra*, note 44, at paras. 267-275, 396, and 429-488.

⁸⁹ Bernard E. Harcourt, *et al.*, "Seeing Crime and Punishment through a Sociological Lens: Contributions, Practices, and the Future" (2005) 19 U. Chicago Legal F. 289, at 302.

⁹⁰ *Id.*, at 295-96.

⁹¹ *Prostitution Reference*, SCC, *supra*, note 4, at 1134-35 (*per* Dickson C.J.C.) and 1191-95 (*per* Lamer J. (as he then was), *concurring*).

⁹² *Rodriguez*, *supra*, note 5, at 596-605 and 608.

of social science evidence produced since the *Prostitution Reference* had been decided in 1990 that allowed her to reframe the issue in a different way. She noted, for example, that “[a]lthough undoubtedly present in 1990, the issue of harm faced by prostitutes is forefront in the present case, and supported by two decades of new research”.⁹³ In *Carter*, Smith J. noted that the societal consensus on end-of-life practices in Canada and the world had changed. Furthermore, evidence from other countries with assisted-suicide revealed that “predicted abuse and disproportionate impact on vulnerable populations has not materialized”.⁹⁴ This new empirical evidence confirmed to the trial judges that society had changed in a way that warranted expanding section 7 Charter rights. For the Supreme Court, these findings of fact were reliable as objective indicators, since the trial judges had sat through numerous days of trial with numerous expert witnesses from opposite perspectives. The evidence was used to bring constitutional legal norms in line with society’s beliefs and mores.

Historical facts hold these characteristics to an extent. But unlike other social sciences facts, they are not necessarily used to place phenomena within their modern-day social, cultural and political environs, or to bring constitutional norms in line with society’s beliefs. Rather, they are used to expand the class of community-based constitutional rights based on political compromises, such as those of linguistic minorities and First Nations. They do so by undermining the modern-day constitutional understanding (and, generally, the privileged status of the majority), with reference to the social, cultural and political environs of the past. Historical facts don’t lead judges to say: “Society has evolved so let’s change the law.” They lead judges to say: “We had it all wrong in the first place so let’s change the law.” Where the majority of society does not agree it “had it all wrong in the first place”, however, it becomes difficult for a judge to use a revisionary understanding of history to change the law.⁹⁵

⁹³ *Bedford*, application, *supra*, note 15, at para. 71.

⁹⁴ *Carter*, trial, *supra*, note 29, at para. 684.

⁹⁵ For a review of the relationship between history and the establishment of Aboriginal title rights, see Paul G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press, 2011), particularly Chapter 5. McHugh also points out difficulties with the use of historical evidence in court. Also see Arthur J. Ray, *Aboriginal Rights Claims and the Making and Remaking of History* (Montreal and Kingston: McGill-Queen’s University Press, 2016), particularly Chapters 3, 7, and 8.

In *Caron*, the historical evidence established that although our current constitutional understanding treats Alberta as constitutionally unilingual (and has treated Alberta as such for its entire existence), it is historically wrong: when Canada annexed the Territories, it guaranteed legislative bilingualism to its Francophone community. Today's Franco-Albertan community, although small in number, ought to have the same privileged status as the Anglophone majority. This is an easy argument for Franco-Albertans to accept, but much more difficult for Anglo-Albertans, particularly where the express constitutional provisions suggest otherwise. Likewise, in some Aboriginal cases, historical facts are used to show that today's land use and distribution is the product of a flawed understanding of the historical relationship between Aboriginals and non-Aboriginals. For Aboriginal communities, this argument is appealing; but for non-Aboriginal communities, accepting this argument has potentially dramatic consequences.⁹⁶

It may be for this reason that, outside the section 23 Charter context, the Supreme Court grants historically-based Francophone claims only where there also exists an express and clear legal provision establishing the minority's constitutional right. This was the case in the *Reference re Manitoba Language Rights*, where the Supreme Court accepted that an express constitutional provision mandating legislative bilingualism in Manitoba did in fact mandate legislative bilingualism in Manitoba.⁹⁷ (The fact a Supreme Court of Canada decision was even needed on this basic issue reveals a lot about the uphill task that less obvious Francophone claims may face.) In *Caron*, where the historical facts sought to prove the existence of an implicit constitutional right, the Court was not comfortable deferring to the facts and granting the claim.

It is easier to overturn a decision, like in *Bedford* or *Carter*, because the social and legislative facts show that society has changed, than it is to overturn a decision, like in *Caron*, because the historical facts show that society had it wrong and continues to have it wrong. This is true particularly where, like in *Caron*, the right to legislative bilingualism in Alberta had already been effectively extinct for over a century. The Court perceives its job as fixing today's inequities, not as ensuring

⁹⁶ In fact, McHugh, *id.*, Chapters 3 and 5, notes that while historical facts were critical to establish the modern day conception of Aboriginal title, the last several years of litigation have not seen the expected breakthroughs, despite the development of an entire industry devoted to the determination of historical facts.

⁹⁷ *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.).

that 100-year-old long-forgotten promises are reinstated. Paraphrasing the Court, this last objective is better left to the political sphere. Sadly, in *Caron*, it became easier to deny the existence of a constitutional language right because this right had historically been ignored.⁹⁸

IV. CONCLUSION

The Supreme Court's increased reliance on social sciences evidence has made constitutional litigation more expensive for litigants. A trial with competing experts from sociology, psychology and history is more expensive than a trial without this evidence. However, by forcing appeal courts to defer to all of the trial judge's factual conclusions, including conclusions of social and legislative fact, the Court has also sought to make justice more transparent and predictable. The trade-off may be worth it if it results in better decision-making.

The *Caron* decision suggests that these goals are still aspirational, and that the Court will continue to interpret its own social and legislative facts in some instances. In *Caron*, the Court did not defer to trial facts, presumably because it could not agree with the result — it's easier to defer on issues of social rights than on issues of minority-language bilingualism in Alberta. But if the Court's new approach to deference is to survive, the Court will need to defer even in cases where it disagrees with the legal implications. Otherwise, litigation will be at once more expensive and less predictable.

⁹⁸ Conversely, in *Daniels*, *supra*, note 84, the Court may have come to a different conclusion largely because the federal government had historically legislated over the Métis as "Indians" and had appeared to do so in the belief it was acting within its constitutional authority (at paras. 27-33).