Re-conceptualizing and Re-imagining Canada: Opening Doors for Aboriginal Language Rights

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Les langues autochtones ont été oubliées dans le droit constitutionnel canadien. De toutes les langues autochtones en usage au Canada, il est admis que trois seulement pourraient survivre à l'extinction. Une nouvelle conception du Canada à partir des narrations autochtones est proposée. Puis une nouvelle image du Canada est présentée à partir de la jurisprudence entourant les droits de la communauté francophone. Il est proposé d'ouvrir la porte à la reconnaissance des droits linguistiques des autochtones à partir des principes de démocratie, de fédéralisme et de protection des minorités. C'est à cette condition que la véritable égalité sera atteinte.

I. INTRODUCTION

Aboriginal cultures and languages existed long before Canada became Canada.[1] For centuries Aboriginal peoples maintained their languages as a result of strong ties to the culture. These cultural ties were reflected in formal and informal constitutions between Indigenous nations, communities, elders and families through traditional teachings, stories, art, confederacies, wampum belts, and treaties. An integral factor in these associations includes the languages. Aboriginal languages have been the vehicles used to express cultural values that governed community, family and nation relationships for centuries. The vitality of

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1 *Calder v. British Columbia (Attorney General),* [1973] S.C.R. 313, 34 D.L.R. (3d) 145.

Aboriginal languages was, however, impacted by a more recent association with Canada. Although Canada developed constitutional agreements to protect and recognize other cultures and languages, the same treatment was not provided to Aboriginal peoples.[2] In fact, assimilation characterized Canada's relationship with Aboriginal peoples.[3] As a result, it is estimated that of the 53 original Aboriginal languages, only three may survive in a substantial way, into the foreseeable future: Cree, Ojibway and Inuktitut.[4]

This paper will provide legal and normative considerations for Aboriginal language rights in Canada in three ways. First, *re-conceptualizing* Canada through two narratives will illustrate the harm resulting from Canada's treatment of Aboriginal languages and cultures. Then, *re-imagining* Canada with Aboriginal languages rights will be explored within the jurisprudence of French language cases. Finally, *opening doors* for Aboriginal language rights in Canadian constitutionalism will be discussed.

II. Re-conceptualizing Canada

A. Cultural Harm Narratives

Re-conceptualizing Canada's foundations as well as the inhumane treatment used to prevent Aboriginal peoples from practising their cultures and from speaking their languages is a national journey yet to be taken. The following narratives demonstrate my family's complicated relationship to the Cree language and culture. But it is critical that other Aboriginal peoples' narratives are shared across Canada. This chapter in Canadian history is yet to be heard by Aboriginal families, communities and children that have been impacted by the cultural harm resulting from assimilation policies.

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2 *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [hereinafter "*Secession Reference*"].

3 *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, S. Prov. C. 1857, 20 Vict., c. 26; *An Act respecting Civilization and Enfranchisement of certain Indians*, C.S.C. 1859, 22 Vict., c. 9.

4 This is a conservative estimate. There may be up to 70 languages, depending on how they are counted. See Canada, The Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 6 (Ottawa: Canada Communications Group, 1996), at 604-607.

The experiences of my grandfather, the late John Young, demonstrate an intergenerational spiraling impact of harm. The narrative of my stepfather, the late Walter McKenzie, illustrates the impact and the implications of *no* legislative protection for Aboriginal languages in Canada.

1. *John Young*

John Young was a very dignified, strong and determined man. But his life was not easy. He raised 16 children as a trapper and the family's survival depended on the animals he trapped and hunted, and the berries picked in the spring and summer. Their cultural and physical survival was dependent on raising the children with Cree values. These cultural values were passed onto my grandfather through his parents. He described them as kind, loving people. They taught him to be respectful to human beings and to never be dishonest. They also taught him to be hard working. But when he was young, he was removed from his parents' care and sent to a residential school seven miles away from the community of the Pas, Manitoba. He was only allowed to go home once or twice a month during the school year.

In the school he witnessed many teary eyed children who were lonely for their parents. He also recalled children who were constantly hungry because they were not properly fed. He could never understand the lack of care and respect for the children. He did not understand how children could be left to starve while the adults in charge of the school had plenty to eat. Some children would snare rabbits late in the evening to stave off starvation. My grandfather recalled that as a result of his experiences at the residential school, he lost touch with the values his parents taught him. He once said:

> I was aware that nobody there at the school loved me as my parents did. We were all left to ourselves, to protect ourselves in any way we could. This is where I strayed from the path of my parent's teachings. I also lost respect for the dignity of human beings. It was all because the people there, the staff didn't treat us very well. There was absolutely

> nobody there that I could trust or who loved us. This is where I put aside the teachings of my parents.[5]

He said he never believed he was a good person because on many occasions he had to steal food to survive and learned to lie and use foul language for protection. His ability to speak his native language was also impaired.

My grandfather was punished every time he spoke Cree. He said that the person administering the strap would say, "Thou shalt not speak Cree" with each strap. Normally he was strapped at least 21 times followed by 21 statements of, "Thou shalt not speak Cree." Despite this abuse, my grandfather held onto the language. He said the main reason for which he held onto the language was because the residential school was located near the community where everyone spoke Cree. When he returned home he had to speak Cree because barely anyone in the community knew how to speak English. Still, the minute he stepped foot into the school, he was punished for speaking Cree.

After my grandfather left the school and had a family of his own, he ensured that his children could speak Cree. They also attended residential schools, but when he saw that they were losing their ability to speak and understand Cree, my grandfather decided to take them, a few at a time, onto the family trap-line. Though it was unlikely anyone would find them on the trap-line, it was a substantial risk. During this time, it was mandatory that Aboriginal children attend a residential school. If parents did not comply, they could face a fine, be imprisoned, or both. Despite these possible consequences, my grandfather took these risks so that he could immerse his children in the Cree language and values. Still, this was not an easy task given the children were sent far away from the community, and there was no guarantee his efforts would be successful. Despite these obstacles, his efforts ensured that all his children remained fluent Cree speakers.

One regret my grandfather expressed is that by the time he had children, he felt he had nothing substantial to pass onto them. He believed this was the reason why he did not teach them his parents' traditional ways.[6] My grandfather spoke of traditional practices that focused on

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[5] N. Rosalyn Ing, "The Effects of Residential Schools on Native Child-Rearing Practice" (1991) 18 Canadian Journal Native Education Supplement (Special Issue) 65, at 90 (original interview in Cree later translated into English).

[6] *Id.*, at 95.

raising children. For example, people in the community never neglected their children or left them unattended. Someone was always responsible for looking after them. Siblings would help parents if they had to leave their children behind.

Aboriginal peoples raised their children according to how they were taught watching their parents. This was a traditional cultural practice. But when the non-Aboriginal education system was introduced, my grandfather said that Aboriginal peoples became very confused. The elders did what they could to help preserve the culture, but it was hard when the children were taken away from the community and were not around to learn the traditional ways. In fact, they were taught to be ashamed of their cultural identity. Leaving children in the community is now common, but my grandfather said that this was a learned behaviour and a direct result of losing connection to the culture.

My grandfather said the only example he was able to pass onto his children was to work hard, earn a living to support their families and to speak Cree. However, because of the abuse his children experienced, they subconsciously associated the culture and language with shame and fear. They were beaten whenever they spoke Cree. They were also made to feel ashamed of their Cree identity and were often referred to as "dirty savages." My grandfather said: "My children learned their lessons well about Cree not being important, and in turn did not teach their children. This is where new childrearing patterns began to emerge."[7] Shame overshadowed their lives, and they believed their children would be better off speaking English and French. Despite the fact that my generation (the grandchildren) did not learn our language, my grandfather continued to speak Cree until he passed away.

2. *Walter McKenzie*

My stepfather, Walter McKenzie, also grew up in a family of Cree speakers. The family was blessed with incredibly talented artists. My stepfather cherished the land he grew up on and later displayed this love in his art. When he was at home, he said his life was full. He also said there were no boundaries between the land and the culture. They were interrelated, and the relationship to the land was very much alive in the

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[7] *Id.*, at 93.

Cree language when he was growing up. Speaking Cree was an integral part of his identity.

When my stepfather was young, he was sent off to a residential school hundreds of miles away from his parents and from the land he grew up on. When he arrived at the school he only understood Cree. He did not understand English; still, the nuns and priests in charge of the school beat him every time spoke Cree. In addition to outright physical abuse, he was often neglected.

One day, he was left in the nursing area because he was ill. The school caught fire but no one came to find him. An Aboriginal student remembered seeing my stepfather in the nursing area earlier and ran into the burning building to make sure he was not still there. It was a good thing the student returned: my stepfather was trapped in the school and would not have survived the fire had the student not gone to look for him. In adulthood, he rarely talked about the scar on his leg that he acquired from the fire, but he always talked about the emotional scars that impacted his sense of belonging, dignity and self-worth. This deep cultural shame influenced the manner in which he raised his children.

My stepfather said he never spoke Cree to me partially because of the shame he felt. At first he never articulated the source of the shame, but a few years ago he said it was a result of his residential school experiences. He often spoke to me with a heavy heart, saying, "there are so many things I cannot express to you in English because there are only Cree words to describe what I am feeling." The shame clung to my stepfather for the duration of his life, but it also became part of my reality.

I feel very ashamed that I cannot understand my family when they communicate in our language. It is like an invisible curtain has been hung between my cultural identity and my life. I was never able communicate with my grandparents, and I have never been able to listen to cultural teachings in my language and understand them. I feel disconnected from my aunts, uncles and the elders of our community because I cannot communicate with them in Cree.

Abuse is yet another negative impact from the residential school system. It was prevalent in my home. Destructive behaviours plagued my family in my early life. I have discussed the abuse with many of my cousins. Some of us have disclosed thoughts of suicide that many of us felt growing up. We have talked about the shame. We have also talked about the confusion regarding abusive family behaviour. Tragically last December, one of my cousins committed suicide, and it has hurt my

family deeply. It is evident that we still have a long way to go in dealing with our experiences.

The impact from the abuses experienced in the schools continues to harm many Aboriginal families. The cultural damage that was inflicted upon my stepfather prompted him to file a claim against the government. Sadly, my stepfather passed away before his residential school claim was settled. A few weeks prior to his death, he told me his claim was important to him because he wanted recognition that he was harmed, and he wanted something done to ensure that the Cree culture and language would be protected from further destruction. His lawyer informed him that there was no legal precedent for compensating for cultural harm, and that this part of his claim likely be unsuccessful.

B. Cultural Harm

Despite the profound and widespread intergenerational cultural harm that Canada's assimilation policy has caused Aboriginal peoples, there remains inadequate law to protect Aboriginal languages and cultures. As a result, there is no redress for any harm done to the cultures and the languages. Many elders, including my grandfather and my stepfather, have said that restoration of our languages is key to heal from legacy of the residential schools and Canada's assimilation policy.

An important lesson my grandfather left my family is "You will know your identity if you can speak your language."[8] He mentioned that traditional ways were imparted through storytelling for children, and although it is possible to learn the cultural values in English, he said learning them in Cree is better: "When we speak English it's like we are helping ourselves to lose the ability to speak Cree and when we don't teach our children the teachings in Cree, we help to destroy our culture."[9]

C. The Storm

My grandfather described the destruction of the Cree language and culture as a storm he hoped would soon pass. He mentioned the restoration process would be slow and would occur when young people learn the

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[8] *Id.*, at 94.

[9] *Id.*, at 92.

cultural values: "Aboriginal peoples need to go back and hang onto the things, which served the people well. This includes speaking Cree." Once that happens, he said "Aboriginal peoples would be able to find themselves again." To my grandfather, the most crucial obligation Aboriginal peoples have is to learn to speak Cree. He said:

> If Aboriginal peoples lose the ability to speak their languages, they will find it difficult to convince new peoples that arrive into Canada they are Aboriginal. Many people come from different countries into Canada and if Aboriginal peoples can't speak their languages, people may think we come from somewhere else, but if we speak our language, no one will be able to say that we are not Aboriginal peoples.

III. Re-imagining Canada

Part of Canada's collective experience is based on foundational principles of building and sustaining relationships.[10] One can only imagine how culturally rich Canada would be with 53 flourishing Aboriginal languages. The cultural diversity would be immense. Although Canada's past experience portrays inequality with respect to Aboriginal languages and cultures, re-imagining how things could be in Canada, or should be, can guide future relationships. Examining the jurisprudence of the French language provides a good foundation to re-imagine Aboriginal cultures and languages as an integral part of Canada's constitutional identity and experience.

A. French Language Jurisprudence

The courts treat constitutional recognition and protection of language as a fundamental human right.[11] In *Lalonde*, the Supreme Court of Canada held that language rights were the result of "...'political compromise' and should be approached with judicial restraint."[12] In recent case law, this narrow approach has been abandoned. As a result,

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[10] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, United Kingdom: Cambridge University Press, 1995).

[11] *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4768, 208 D.L.R. (4th) 577, 56 O.R. (3d) 505 (C.A.), at para. 132 [hereinafter "*Lalonde*"].

[12] *Id.*, at para. 132.

many critical values expressed in the French language jurisprudence exist such that, "Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them."[13] Language is the essence of a person's human "existence, development and dignity."[14] It is important to a worldview.[15] Language is also described as an integral part of a person's identity[16] and provides a connection to community and ancestral lineage.

These principles are just as applicable to Aboriginal languages. With a more open approach, Aboriginal languages may have greater weight because Canadian law recognizes that French language rights are a fundamental part of the French culture. The right to language is also recognized as a human right because it is integral to the survival of a peoples' culture.

Many Aboriginal language speakers have told me that Aboriginal peoples may only give true cultural expression to the oral history of this land, and the unique relationship Aboriginal peoples have to the land, through their own language. When I sit and listen to Aboriginal teachings translated into English, I realize (by the frustration and long pauses of the translator) that the narratives provide description of the traditional teachings that can only be expressed in the original languages. Elders have repeatedly told me that the description of the values are embedded in the manner through which they are expressed in the language. Through personal experiences, I have observed that children learning to speak their language provides them with a sense of belonging, self-esteem and cultural integrity. Language *is* cultural integrity.

Although Aboriginal language rights are not expressly recognized in Canadian law, the French language rights cases provide precedent for the importance of legislative recognition, and protection to ensure the culture is not assimilated.

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13 *Id.*, at para. 134.
14 *Id.*, at para. 133.
15 *Id.*, at para. 134.
16 *Id.*

B. Institutions and Services

The French language rights cases describe legislation as an important legitimizing factor for allocating resources to schools and services to protect the francophone community against assimilation. The Supreme Court of Canada also describes the importance of education as a vehicle to prevent assimilation:

> ...[T]he protection of minority religious education rights was a central consideration in the negotiations leading to Confederation. In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated.[17]

Aboriginal communities have experienced assimilation. Legislation could assist in redressing the harm, and help legitimize the type of resources required to ensure Aboriginal languages are restored.

The French community has shown that institutions and services are essential to the survival and vitality of the culture. Services and institutions are also important in affirming and providing an expression of cultural identity and sense of belonging.[18] An excerpt from the April 1997 response of the District Health Council of Eastern Ontario to the Commission stated:

> The *French Language Services Act* (FLS) is designed to help preserve the French language and culture in Ontario well into the future. It also acknowledges the desire of the francophone community to have the long-standing contribution of their language and culture recognized. Health services in French are essential to the development of the francophone community and to the recognition of its full and equal partnership. A community becomes assimilated when its language and culture are invisible to its won members and to society in general.[19]

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17 *Secession Reference, supra*, note 2, at para. 79.

18 *Lalonde, supra*, note 11, at para. 7. Further, the Court stated:
...[B]eyond the health care and educational needs of the francophone minority. Monfort, they say, is an institution that embodies and evokes the French presence in Ontario. It asserted that the French speaking minority population is constantly faced with the threat of assimilation... *institutions are essential to the survival and vitality of this community ... for the affirmation and expression of cultural identity and sense of belonging.* (emphasis added.)

19 Cited in *Lalonde, supra*, note 11, at para. 33.

The jurisprudence from these cases demonstrate that institutions are an important part of maintaining the life of the language, and "serve as a means of expressing and affirming cultural identity."[20] Aboriginal peoples seek similar consideration for Aboriginal languages.

IV. Opening Doors for Aboriginal Language Rights

A. Unwritten Principles

For over 100 years Canada has not been open to promoting or supporting Aboriginal language rights. The treatment of Aboriginal peoples' languages are part and parcel of colonialism. Recently, Canada affirmed its commitment to protect "aboriginal, equality, legal and language rights."[21] Quoting the *Declaration on Friendly Relations*, the Supreme Court of Canada recognized that one of the purposes of self-determination is "To bring a speedy end to colonization, having due regard to the freely expressed will of the people concerned."[22] Further, as explained in the *Secession Reference*:

> The "promise" of s. 35 ... recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right, or as part of the larger concern with minorities, reflects an important underlying constitutional value.[23]

Although Aboriginal language rights have never been expressly recognized in Canada's Constitution, it is recognized as one of the "unwritten principles" of the Constitution that has normative legal force.[24]

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[20] *Lalonde*, *supra*, note 11, at para. 69.

[21] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35(1). ("The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.")

[22] As cited in *Secession Reference, supra*, note 2, at para. 133.

[23] *Id.*, at para. 82.

[24] *Lalonde*, *supra*, note 11, at para. 117. Referring to the *Provincial Judges Reference* the court held that these "organizing principles" in the Constitution's preamble "invites the courts to turn those principles into the premises of a constitutional argument that culminates in filling of gaps in the express terms of the constitutional text." This ensures the protection of all the necessary and essential attributes of this vital structural feature of the Constitution.

In *Lalonde*, the Supreme Court of Canada drew on Professor Robin Elliot's distinction of the use of unwritten principles:[25]

> "As independent bases upon which to impugn the validity of legislation" and their use "as aids to interpretation or otherwise to assist in the resolution of constitutional issues." Professor Elliot suggests that when used to impugn the validity of legislation or government action, the unwritten principles "*can fairly be said to be generated by necessary implication from the text of the Constitution*" (emphasis in original). On this theory, when the organizing principles give rise to rights capable of impugning the validity of legislation, they *are* grounded in the text of the Constitution. Although not expressly stated by the Constitution's text, such rights are immanent in the text when it is understood and interpreted in a proper and complete legal, historical, and political context. When used in this way, the unwritten or organizing principles allow the courts to unlock the full meaning of the Constitution and to flesh out its terms...[26]

According to Professor Elliot's analysis, unwritten principles of Aboriginal language rights can be generated by necessary implication of Canada's Constitution, which provide constitutional guarantees to certain cultures from assimilation. This constitutional principle was flushed out when the Supreme Court of Canada was approached to give an opinion as to whether Quebec had a legal right to secede from Canada. A brief overview of federalism, democracy, and the protection of minorities will follow.

B. Federalism, the Protection of Minorities and Democracy

Federalism is described as a harmonization of cultural diversity. The "original framers" of the Canada's Constitution recognized the possibility of assimilating minority cultures if they were not legally protected.[27] The intent was to emulate the harmonization for the general welfare of the various cultures into the *Constitution Act, 1867*.[28] An explicit example of this is when the province of Quebec was conferred the jurisdic-

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[25] Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can. Bar Rev. 67, at 83-86.

[26] *Lalonde*, *supra*, note 11, at para. 118.

[27] *Secession Reference*, *supra*, note 2, at para. 79.

[28] *Id.*, at para. 43.

tional authority to promote the French language and culture.[29] Quebec acquired this authority to ensure the French culture was honoured and remained a part of Canada. Additionally, democracy is described as an embodiment of respect for human rights and cultural dignity of the person and is reflected in Canada's commitment to social justice, and equality.[30] These principles combined represent a legal and political commitment to protect and promote cultures that were, and continue to be, essential to individuals and Canadian society.[31]

The fate of Aboriginal languages rests on the shoulders of Aboriginal and Canadian leaders in addition to the people who must make the effort to learn the languages. A recent decision of the Ontario Court of Appeal confirmed that unwritten principles could be afforded substantive legal obligations and enforceable rights:

> Fundamental constitutional values have normative legal force. Even if the text of the Constitution falls short of creating specific constitutionally enforceable right, the values of the Constitution must be considered in assessing the validity or legality of actions taken by government. This is a long-established principle of our law.[32]

The unwritten principles of the Canada's Constitution provide a legal opportunity to open doors for Aboriginal language rights. There are important legal and moral obligations to ensure that Aboriginal languages survive and flourish. Aboriginal peoples' cultural integrity is dependent on the fate of their languages. Aboriginal languages are also an important part of Canadian culture and identity.

V. CONCLUSION

Canada has embraced human rights principles that can be used to re-conceptualize its foundations while re-imagining the country to include Aboriginal languages. In their respective languages, Aboriginal peoples utilized birch bark scrolls, sand teachings, ceremonies, stories, songs and petroglyphs, among others to convey constitutional principles that governed the relationships of the people. These principles are part of

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29 *Id.*, at para. 59.

30 *Id.*, at paras. 64–67.

31 *Id.*, at para. 64.

32 *Lalonde*, *supra*, note 11, at para. 174.

history but are also important to Canadian constitutional relationships today.

Aboriginal languages equally deserve to be recognized in a similar fashion as the French language, which enjoys a constitutional guarantee to ensure that the French language and culture are not affected by assimilation. Other relevant written and unwritten principles to recall:

- Canada's Constitution recognizes, affirms and protects a range of cultures;
- *Constitution Act, 1867* recognized minority cultures would be assimilated if they were not legally protected;
- Democracy and federalism are part of Canada's constitutional tradition, an embodiment of respect for human rights and cultural dignity of the person:
    - Reflect Canada's commitment to social justice, equality and to accommodate a variety of cultures;[33]
    - A harmonization of cultural diversity; and,
    - A legal and political commitment to protect and promote the culture of minorities that continue to be essential to individuals and Canadian society.

In addition to these constitutional cultural principles are the conclusions drawn from Aboriginal peoples' cultural harm narratives. The message from the elders is that if Aboriginal peoples cannot speak their Aboriginal languages, cultural identities will be damaged or lost. Residential school survivors seek recognition that Aboriginal languages and cultures were harmed in the residential school system and want to be guaranteed that the languages will be protected and promoted for future generations.

These Canadian and Aboriginal principles are equally deserving of recognition and can influence future relationships. For centuries Aboriginal peoples maintained their languages as a result of strong cultural ties. These cultural ties were reflected in formal and informal constitutions between Indigenous nations, communities, elders and families through traditional teachings, stories, art, confederacies, wampum belts,

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[33] *Secession Reference*, *supra*, note 2, at paras. 64–67.

and treaties. A central factor of these associations included an undisputable right to preserve and protect cultures and fundamental respect for the languages. There is an opportunity for Canada to open its constitutional doors to Aboriginal languages while re-entering into intercultural relationships based on respect and dignity. It is only through this re-imagining and re-conceptualizing that true equality can take place.