Language Rights in Canada: A Theoretical Approach

Vanessa Gruben*

I. INTRODUCTION

Language rights in Canada have a long and tumultuous history.[1] The published accounts focus on the English- and French-language communities. The extensive language rights scheme entrenched in sections 16 to 20 and 23 of the Charter intends to promote equality between the English and French languages,[2] what may be called "linguistic duality". Linguistic duality is also found in Canada's *Official Languages Act*.[3] One of the express purposes of the *Official Languages Act* is to support the development of English and French linguistic minority communities as well as to advance the equality of status and use of the English and French languages within Canadian society. Linguistic duality, and more specifically achieving equality of these two language communities, may appear to be the sole focus of language rights and policy in Canada, but that is inaccurate. Language rights and policy in Canada are more complex. Canada's language policy[4] provides asymmetric protection to those French- and English-language communities that live as minorities in the provinces. This makes for considerable complexity as these communities differ remarkably one from another.

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* Assistant Professor, Faculty of Law, University of Ottawa. The author would like to thank Justice Michel Bastarache, Professor Joseph Magnet, Toby Moneit, Owen Rees, Christine Ruest and Grégoire Webber for their comments on earlier drafts.

1 Joseph Magnet, *Official Languages of Canada* (Cowansville, Qc.: Yvon Blais, 1995); Joseph Eliot Magnet, *Modern Constitutionalism* (Markham, ON: LexisNexis Canada, 2004), at 145-50; Michael Behiels, *Quebec Since 1800* (Toronto: Irwin Publishers, 2002); and Michael Behiels, *Canada's Francophone Minority Communities* (Montreal: McGill-Queen's University Press, 2004).

2 *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.

3 R.S.C. 1985, c. 31 (4th Supp.), s. 2(b).

4 The phrase "Canada's language policy" often refers to federal, provincial and territorial language policies. However, the focus of this essay is on federal policies and the relevant constitutional provisions.

The concept of "linguistic community" itself is complex and contestable in Canada.[5] Further, Canada's language policy also extends to allophone communities and to certain Aboriginal language communities. This adds further layers of complexity, and potential for conflict. Thus, a comprehensive examination of language rights in Canada also requires a consideration of allophone and Aboriginal language communities.

This paper explores the theoretical frameworks underlying language policy in Canada. It describes the principal theoretical frameworks that have been proposed by various scholars and examines how these have been implemented in working mechanisms to protect minority-language communities in Canada. In Part II, I review the various theoretical justifications or normative frameworks that justify protection of minority language rights generally. In Part III, I describe different models and mechanisms that states may employ to protect minority language rights. In Part IV, I show why there is no single theory of language rights in Canada.[6] I explain how Canada's language policy is underpinned by many justifications which have evolved over time, under different policy imperatives, since Confederation. Central to this explanation is how the treatment of French minority-language communities evolved from nation-building to the protection of linguistic human rights and the preservation of linguistic diversity. I endeavour to show that the principal objective is not simply linguistic security but linguistic survival. In Part V, I also briefly address Canada's language policy vis-à-vis non-official language minorities. This essay is not intended to be exhaustive. It is meant to examine the principal theories that have been advanced and to examine their practical application in the Canadian context.

II. Why Do States Protect Minority Languages?

Patten and Kymlicka identify several contexts that sparked renewed interest in questions of language policy.[7] These include democratization

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5 Joseph Magnet, *Modern Constitutionalism* (Markham, ON: LexisNexis Canada, 2004), at 166-69.

6 This is due, in part, to the fact that different language policies are pursued by Parliament and the various provincial legislatures.

7 Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 1. Unlike Patten & Kymlicka's text, this essay is not intended to be a work of political theory.

of Eastern Europe,[8] ongoing unresolved ethnolinguistic conflicts in Western countries,[9] increased immigration to North America and Europe[10] and the formation of transnational unions such as the European Union.[11] There is also increasing awareness that languages are disappearing.[12] Up to 90 per cent of the world's languages are now considered "endangered". Indigenous languages especially are threatened.[13]

These developments have prompted a global discussion about the protection of minority-language communities. Several normative theories that justify states to protect minority languages are offered.[14] Three popular theories are: protecting linguistic human rights, nation-building and preserving linguistic diversity.[15] The first theory analogizes minority language rights to traditional human rights, like the freedom of

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8 Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 3.

9 Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 4.

10 Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 7.

11 Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 9.

12 Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 10. See also Boutros Boutros-Ghali, "Preface" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2004), at vii.

13 Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 10.

14 Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003) provide an excellent discussion of these various theories; Michel Bastarache, "Introduction" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville Qc.: Yvon Blais, 2004).

15 These theoretical justifications or normative frameworks are advanced by Patten & Kymlicka: Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003). They also cite "benign neglect" as an approach to language rights which is not addressed here (at 32). These justifications are consistent with three intellectual paradigms driving the international law relating to minorities articulated by Athanasia Spiliopoulou Akermark, "Justifications of Minority Protection in International Law", in *International Human Rights*, vol. 30 (Hague: Kluwer Law International, 1997). See also Robert Dunbar, "Preserving and Promoting Linguistic Diversity: Perspectives from International and European Law" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006) 65, at 66.

expression, and posits that minority language rights warrant protection as such. The second theory conceives of minority language rights as necessary to foster a strong national identity and to preserve the peace and security of the state. The third theory argues that linguistic diversity, like biodiversity, is inherently valuable and should be protected from extinction.

These justifications or normative theories are interconnected. They share the basic premise that language is intimately connected to culture. Before I examine their application in the Canadian context, a closer discussion of each is warranted.

1. Language Rights as Human Rights

The first justification for the protection of minority languages is a theory of linguistic human rights. In essence, language rights should be protected because they are fundamental human rights.[16] A theory of linguistic human rights has problems. This is in part because of the limitations of human rights concepts. Partly they are caused by tension between the human rights of the individual and the minority rights of communities.[17] As a result, it is unlikely that a human rights framework alone provides a sufficient justification or coherent theory of language rights. Rather, it may shortchange the communal protection that minority-language communities require.

What are human rights? The definition of human rights is contentious.[18] Human rights are generally understood to be universal norms that establish basic standards of treatment enjoyed by all people.[19] Human rights are meant to protect fundamental interests.

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[16] An exhaustive discussion of the definition of human rights is beyond the scope of this essay. The question of whether human rights doctrine may evolve in a direction which fits more comfortably with the protection of minorities is an important question that is not answered here.

[17] See generally James Crawford, "Right of Self-Determination in International Law" in Philip Alston, ed., *Peoples' Rights* (New York: Oxford University Press, 2001) 7, at 15; Peter Leuprecht, "Minority Rights Revisited: New Glimpses of an Old Issue" in Philip Alston, ed., *Peoples' Rights* (New York: Oxford University Press, 2001), at 111.

[18] See, *e.g.*, Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2d ed. (New York: Oxford University Press, 2000), at 367, discussing the universality criterion of human rights.

[19] Various criteria have been proposed by numerous scholars. Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 33 endorse the following definition: "Human rights represent a widely, if not universally, accepted normative standard that has the great advantage of being partially integrated

Based on these criteria, the extent to which language rights can be protected as human rights depends on whether language is fundamental to the individual or in relation with society. It also depends on whether it is possible to develop universal norms to protect an individual's language choice. It is difficult to ascribe universal norms because languages are used by language communities, and there is great diversity among language communities. In minority contexts, their various circumstances and needs dictate a highly tailored approach. The difficulty of establishing universal language rights is also evident in the international context.

(a) Language Is Fundamental

Language is fundamental to individuals and communities in two ways: first, as a tool of communication (instrumental); and, second, as a marker of one's attachment to one's cultural group (expressive or intrinsic).[20]

The instrumental dimension of language is the most commonly recognized and the easiest to articulate. As an instrument of communication, language is necessary for an individual to interact with others and to operate within society.

Language is more than a means of communication; it is a fundamental expression of identity and culture.[21] Language has value as a "marker of identity, a cultural inheritance and a concrete expression of community".[22]

(b) Universal Norms

Both dimensions of language, instrumental and expressive, are subject to universal norms. This is most evident in international human

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into international legal practice." MacMillan offers three criteria based on Maurice Cranston's definition of a human right: (1) practicability; (2) paramount importance; (3) universality: C. Michael MacMillan, *The Practice of Language Rights in Canada* (Toronto: University of Toronto Press, 1998), at 16. These criteria of human rights have been contested. The most contentious appears to be the universality criterion: see, *e.g.*, Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2d ed. (New York: Oxford University Press, 2000), at 367.

[20] Leslie Green, "Are Language Rights Fundamental?" (1987) 25 Osgoode Hall L.J. 639, at 658-59.

[21] The importance of language as part of one's cultural identity was acknowledged by the Supreme Court of Canada in *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 34 (S.C.C.). See also Michel Bastarache, "Introduction" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville Qc.: Yvon Blais, 2004), at 7.

[22] Leslie Green, "Are Language Rights Fundamental?" (1987) 25 Osgoode Hall L.J. 639, at 659.

rights instruments.[23] Many of these instruments broadly protect language rights. The universal norms they endorse offer limited protection to individuals and communities. These instruments usually protect the right to non-discrimination on the basis of language. Generally, they do not require the state to take positive measures necessary to protect and promote linguistic minorities. Because of this limitation, it is difficult to rest a comprehensive theory of language rights on the human rights justification alone.

The right not to be discriminated against on the basis of language is protected in three principal human rights instruments: the *Universal Declaration of Human Rights* ("*UDHR*"),[24] the *International Covenant on Civil and Political Rights* ("*ICCPR*"),[25] and the *International Covenant on Economic, Social and Cultural Rights* ("*ICESCR*").[26] This right to non-discrimination is limited in scope and primarily protects linguistic minorities against policies of assimilation.[27]

Language is the express subject of article 2 of the *Universal Declaration of Human Rights*, which prohibits states from drawing a distinction on the basis of language:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.[28]

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[23] In this section, international instruments are referred to in order to demonstrate that it is difficult to ascribe universal norms in respect of language. Of course, international law is an important mechanism to protect language rights.

[24] *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

[25] *International Covenant on Civil and Political Rights*, December 19, 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force March 23, 1976).

[26] *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force January 3, 1976, accession by Canada May 19, 1976).

[27] Robert Dunbar, "Preserving and Promoting Linguistic Diversity: Perspectives from International and European Law" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006) 65, at 75.

[28] *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, at art. 2.

The *ICCPR* contains a very specific article, article 27, which pertains to language. Article 27 states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[29]

The Human Rights Committee ("Committee") responsible for the enforcement of these rights provides additional guidance regarding the nature and scope of these rights but has not offered a set of universally applicable norms. The Committee's General Comment endorses an expansive interpretation of article 27 of the *ICCPR*.[30] Although article 27 is expressed in negative terms, the Committee notes that the state is under an obligation to adopt positive measures to protect the minority group. The Committee, however, has not elaborated what these positive measures entail.

Article 2(2) of the *ICESCR* reads:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[31]

Language rights also fall under the purview of article 15 of the *ICESCR*, which guarantees an individual's right to take part in cultural life.[32]

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[29] *International Covenant on Civil and Political Rights*, December 19, 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force March 23, 1976).

[30] *General Comment No. 23: The Rights of Minorities (Art. 27)*, UN HRCOR (1994), U.N. Doc. HRI\GEN\1\Rev.1 (1994), at paras. 6.1-6.2 [hereinafter "*General Comment No. 23*"].

[31] *International Covenant on Civil and Political Rights*, December 19, 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force March 23, 1976).

[32] *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force January 3, 1976, accession by Canada May 19, 1976), at art. 15:

> 1. The States Parties to the present Covenant recognize the right of everyone:
> (a) To take part in cultural life;
> (b) To enjoy the benefits of scientific progress and its applications;
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
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> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

Many international human rights instruments provide every individual with the right to the assistance of an interpreter in criminal proceedings.[33] Article 14(3)(f) of the *ICCPR* protects the right of every individual to an interpreter to ensure that the accused can understand and respond to the allegations against him. These rights are often referred to as "language rights" but are distinguishable from the rights protected in article 27.[34] Indeed, it is arguable that these rights are not language rights at all because the cultural component is absent.

Thus, even where there is a clear willingness to robustly protect minority communities, it is difficult if not impossible to establish universal norms.[35] This has been confirmed by a number of writers.[36] Two reasons have been advanced to explain why it is difficult to establish a set of robust universal standards for language. First, each minority-language community is unique. Communities differ in terms of geographical location, size, historical origin and degree of language shift or loss. One common set of standards cannot satisfy the unique needs of each linguistic minority. Patten and Kymlicka explain that "[t]he only sorts of language rights that can be defined in this universal way are minimal rights, primarily tolerance rights plus a few very modest

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[33] Ruth Rubio-Marín, "Language Rights: Exploring the Competing Rationales" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003) 52, at 62.

[34] *General Comment No. 23: The Rights of Minorities (Art. 27)*, UN HRCOR (1994), U.N. Doc. HRI\GEN\1\Rev.1 (1994), at para. 5.3.

[35] Other non-binding international human rights instruments offer more rigorous protection for minority language rights. However, they also fall short of establishing universal rights for minority language communities. The *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. res. 47/135, 47 U.N. GAOR Supp. (No. 49), at 210, U.N. Doc. A/47/49 (1992) establishes rights for members of minority-language communities and imposes corresponding obligations on states to preserve and promote these minority-language communities. The *Minorities Declaration*, however, establishes few specific rights and duties. The *Universal Declaration of Linguistic Rights* adopted by UNESCO offers more extensive protection of minority languages: *Universal Declaration on Linguistic Rights*, UNESCO (June 9, 1996), online: UNESCO <http://www.unesco.org/cpp/uk/declarations/linguistic.pdf.>. However, it does not establish a set of universal norms in respect of language. It establishes different rights for national linguistic minorities (language communities) and immigrant linguistic minorities (language groups). The latter receive significantly less protection than the former. Although each of these rights is fundamental, they do not fit well within the traditional definition of "universal" human rights.

[36] Lauri Mälksoo, "Language Rights in International Law: Why the Phoenix Is Still in the Ashes" (1998-2000) 12 Fla. J. Int'l L. 431, at 465. See also Robert Dunbar, "Preserving and Promoting Linguistic Diversity: Perspectives from International and European Law" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006), at 76; "Introduction" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville Qc.: Yvon Blais, 2004), at 10.

promotion or accommodation rights".[37] Second, the human rights approach fails "to confront the fact that language policies inevitably involve privileging a limited set of languages".[38] All states function in a limited number of languages, which are thus privileged in various ways over other languages spoken on the state's territory.

Under the human rights paradigm, with its universality criterion, this becomes problematic. Privileging the languages of certain national minorities — an essential accommodation many states must make — is also problematic. The human rights paradigm can firmly protect against policies of assimilation. It can prohibit discrimination on the basis of language and can protect limited instrumental language rights. These minimal standards are important. However, the basic thrust of the current human rights framework does not easily encompass endowing national minority communities with robust linguistic minority rights. Other justifications offer more comprehensive accounts of minority language rights.

2. Language Rights Are Necessary to Foster National Unity and Preserve Peace

A second theoretical justification advanced for protecting minority languages is to promote peaceful coexistence of minority and majority communities. To achieve this end, the state may grant minority-language communities certain rights intended to protect and promote their communities. In some states, language plays an important role in the nation-building process. Patten and Kymlicka observe that "[a] successful nation-building project can help to ensure that language no longer serves to separate citizens into distinct and mutually antagonistic groups, but would become one of the defining bonds of a common identity".[39]

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[37] Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 35.

[38] Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 36.

[39] Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 39. See also Stephen Tierney, "Reflections on the Evolution of Language Rights" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006) 1, at 6, who argues that "state language is an essential (in many ways *the* essential)

Under this rubric some states have adopted assimilationist language policies. Assimilationist language policies, which designate the dominant language as the language of the state, are justified as necessary for the efficient and effective operation of the state.[40] These states believe that peace and stability will be better promoted in the long term by creating greater commonality in the body politic.[41]

There has been a marked shift away from these traditional notions of linguistic and cultural assimilation. Many states now consider language diversity to be a mechanism to preserve peace and foster national unity. It is apparent that in order to keep the multinational state together, acceptance and protection of difference is necessary.[42] Policies of linguistic homogenization may fuel nationalist conflict. The imposition of a common state language can generate deep resentment when it denies members of minority-language communities access to public institutions.[43]

That language accommodation is an essential element of nation-building is evidenced by the fact that language claims are frequently part of demands by national minorities within society, including in Canada. In these situations, Patten and Kymlicka argue that "the best way to promote a common identity ... may be to adopt policies that recognize and institutionalize a degree of national and linguistic difference".[44] It may also explain, in part, why non-discrimination

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functional device which allows for the development of an effectively functioning collective polity within which citizens can communicate with one another".

[40] Patten & Kymlicka identify two arguments advanced in support of a state common language policy. First, "a nation-building policy that seeks to integrate speakers of less widely spoken language into the majority language community can enhance social mobility by offering new options and opportunities to people raised in minority language communities": Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches", in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 39. Second, "a common language has been seen as essential to democracy.": Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 39.

[41] Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 38.

[42] Ruth Rubio-Marín, "Language Rights: Exploring the Competing Rationales", in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003) at 53.

[43] Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 13.

[44] Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 41.

provisions pertaining to language are embraced within international human rights instruments.

3. Language Rights Are Necessary to Preserve Linguistic Diversity

Preserving linguistic diversity is a third theoretical justification for protecting minority language rights.[45] It gathers strength from the movement to protect biodiversity, to which it is often compared. Linguistic and cultural diversity is not invoked as frequently as are human rights or nation-building as justifications for protecting minority languages; still it is "gaining prominence".[46]

Linguistic and cultural diversity are inextricably linked because language is a foundation of culture. In *Reference re Manitoba Language Rights* the Supreme Court of Canada made this important observation:

> The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.[47]

Language also has intrinsic value as a manifestation of a community's culture. Professor Réaume explains:

> The creation and development of a complex human good such as a language community is a work of enormous creativity. It is intrinsically valuable to its members as such. To deny the value of others' language is to insult their community. It is to treat the creative way of life that

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[45] Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 42; Michel Bastarache, "Introduction" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville Qc.: Yvon Blais, 2004), at 5; Lauri Mälksoo, "Language Rights in International Law: Why the Phoenix Is Still in the Ashes" (1998-2000) 12 Fla. J. Int'l L. 431, at 444; Robert Dunbar, "Preserving and Promoting Linguistic Diversity: Perspectives from International and European Law" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006).

[46] Robert Dunbar, "Preserving and Promoting Linguistic Diversity: Perspectives from International and European Law" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006), at 76-77.

[47] [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, at 744 (S.C.C.).

> one community has fashioned for itself as less worthy of respect than that of another.[48]

It follows that preserving cultural diversity involves preserving, promoting and enhancing linguistic diversity.

The importance of preserving linguistic and cultural diversity has been the topic of numerous colloquia, seminars and conferences and is discussed extensively in articles, conference papers and international instruments, including the UNESCO *Universal Declaration on Cultural Diversity*.[49] The writers advance different rationales to support the centrality of linguistic and cultural diversity in human development.[50] First, the loss of linguistic and cultural diversity, like the loss of biodiversity, will have devastating effects on the human species because diversity is valuable itself.[51] The advancement and development of humanity is fostered by different experiences and perspectives. Second, linguistic diversity is important because languages are intrinsically valuable. They are manifestations of creativity and house a community's history and culture.[52] Third, the preservation of linguistic diversity is important

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[48] Denise Réaume, "Beyond *Person*ality: The Territorial and Personal Principles of Language Policy Reconsidered" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003) 271, at 290.

[49] UN ESCOR, 31st Sess. (2001), online: United Nations Educational, Scientific and Cultural Organization <http://portal.unesco.org/culture/ en/ev.php@URL_ID=13031&URL_DO=DO_TOPIC&URL_SECTION=201.html>. Numerous studies and papers regarding the preservation, promotion and enhancement of linguistic and cultural diversity can be found online: UNESCO <http://portal.unesco.org/culture/en/ev.php-URL_ID=12899&URL_DO=DO_TOPIC&URL_SECTION=201.html>. For academic commentary see: David F. Marshall & Roseann D. Gonzalez, "Why We Should be Concerned About Language Rights: Language Rights as Human Rights from An Ecological Perspective" in David Schneiderman, ed., *Language and the State: The Law and Politics of Identity* (Cowansville, Qc.: Yvon Blais, 1991) 289. See also Robert Dunbar, "Preserving and Promoting Linguistic Diversity: Perspectives from International and European Law" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006).

[50] Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 44-46. Andrew Dalby, *Languages in Danger: How Language Loss Threatens our Future* (Basingstoke: Picador, 2001).

[51] Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 44. Diversity is valuable because it makes for a more interesting and dynamic world, which in turn has many benefits. See generally Idil Boran, "Global Linguistic Diversity, Public Goods, and the Principle of Fairness" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 189.

[52] Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 45.

because language is essential to the individual's and community's sense of identity.[53] This sense of identity and language is enjoyed by dominant-language speakers, and should also be enjoyed by minority-language speakers as well.[54]

The protection of minority languages as a means to preserve cultural diversity appears to demand a rigorous regime to protect the survival, rather than the security, of a particular linguistic community. The distinction between "linguistic survival" and "linguistic security" was articulated by Green in his seminal article, "Are Language Rights Fundamental?"[55] The difference between these two objectives is that linguistic survival is interested in the preservation of a particular language and culture over time whereas linguistic security is interested in the ability to use a particular language in the present rather than the future.[56] Many of the tools required to ensure the survival of a minority-language community impose significant burdens on the state. Some of the conditions to ensure linguistic survival, such as demographics, are beyond the state's control.

The protection of linguistic and cultural diversity as a rationale for minority language rights is becoming more popular. This may be due to the rapid rate of globalization and the tendency towards linguistic homogeneity, in commerce, trade and cultural development, which contributes to the rapid disappearance of minority languages. Accordingly, there are now several international instruments whose objective is to preserve linguistic and cultural diversity. Most notable are the UNESCO *Universal Declaration on Cultural Diversity*[57] and the UNESCO *Convention for the Safeguarding of Intangible Cultural Heritage*.[58]

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[53] Patten & Kymlicka also advance a fourth rationale, nation-building, which is discussed in the preceding section.

[54] Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 46.

[55] Leslie Green, "Are Language Rights Fundamental?" (1987) 25 Osgoode Hall L.J. 639. See also Denise Réaume, "The Constitutional Protection of Language: Survival or Security" in David Schneiderman, ed., *Language and the State: The Law and Politics of Identity* (Cowansville, Qc.: Yvon Blais, 1991).

[56] Leslie Green, "Are Language Rights Fundamental?" (1987) 25 Osgoode Hall L.J. 639, at 653, 658. In a sense, linguistic security is necessary to ensure linguistic survival because the protection of the right to use in the present is critical to ensuring a language will survive.

[57] UN ESCOR, 31st Sess (2001), online: United Nations Educational, Scientific and Cultural Organization <http://portal.unesco.org/culture/en/ev.php@URL_ID=13031&URL_DO=DO_TOPIC&URL_SECTION= 201.html>.

[58] UN ESCOR, 32d Sess., online: United Nations Educational, Scientific and Cultural Organization <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>.

There are also several European instruments which promote linguistic and cultural diversity.[59] Yet we still "face the difficult questions of which cultures and how much diversity".[60] This rationale can only apply to a limited number of languages.

In summary, three theoretical justifications or normative frameworks have been articulated in respect of the justification of minority language rights: linguistic human rights, nation-building and protection of linguistic and cultural diversity. These are important because they shape the nature and scope of the language rights accorded to linguistic minorities. Before examining the application of these theoretical frameworks in the Canadian context, I discuss the mechanisms employed by states to implement these objectives.

III. How Do States Protect Minority Languages?

States employ many mechanisms to protect and promote minority languages. The choice of means depends on the theoretical justification the state seeks to pursue. States can protect minority-language communities by constitutional, legislative or policy instruments.[61] States can adopt negative or positive rights-conferring instruments. States can offer protection based on personality or territoriality or both at the same time. States can designate certain languages to be official. A brief summary of these mechanisms for protecting minority-language communities is presented here for the purpose of examining their application in the Canadian context.[62]

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[59] Robert Dunbar, "Preserving and Promoting Linguistic Diversity: Perspectives from International and European Law", in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006) 65, at 77.

[60] Robert Dunbar, "Preserving and Promoting Linguistic Diversity: Perspectives from International and European Law", in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006) 65, at 79.

[61] States can also choose to protect language rights at the international level. This essay focuses on domestic mechanisms. For a discussion of international instruments see Robert Dunbar, "Preserving and Promoting Linguistic Diversity: Perspectives from International and European Law" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006) 65.

[62] For a more detailed discussion of these mechanisms see Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003).

1. Constitutional Rights, Legislation, Policy

States regulate language through constitutional, legislative or policy instruments. Constitutions provide "an exhaustive legal framework for [a] system of government".[63] Constitutions are symbolically important because they establish the fundamental norms of a country. Constitutions are also substantively important because their norms are controlling no matter the changes that occur in demography or social conditions; they are subject to a broad and purposive interpretation;[64] and they are difficult to amend.[65] The state can also regulate language through legislation and executive policy. These are the most common mechanisms states use to regulate language. Executive policies vary from broad statements outlining goals and objectives to narrow action plans, often *ad hoc*, vis-à-vis minority-language communities.

2. Tolerance and Promotion-oriented Language Rights

Language rights protections may be distinguished by whether they are tolerance or promotion-oriented. This distinction was first articulated by Kloss, primarily to determine the level of entitlements for immigrant and national language groups.[66] This distinction is similar to that drawn between negative and positive rights. Tolerance-oriented rights are a form of negative rights where the government is precluded from interfering with language use. In other words, the state tolerates an individual's language choice. The right to non-discrimination on the basis of language discussed above is a tolerance-oriented right.

Promotion-oriented rights are rights that impose a duty on the state to take action vis-à-vis a particular linguistic minority. The right to a court proceeding in the language of one's choice is a promotion-oriented right. The right to publicly funded education in the minority language is

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63 *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 32 (S.C.C.). That is not to say that they are maxima.

64 *Edwards v. Canada (Attorney General)*, [1930] A.C. 114, at 136 (P.C.); *Blaikie v. Quebec (Attorney General)*, [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016, at 1029 (S.C.C.) (referring specifically to the interpretation of language rights).

65 This is certainly the case in Canada: Robert Leckey & André Braën, "Bilingualism and Legislation" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2004) 37, at 49.

66 Heinz Kloss, *Language Rights of Immigrant Groups* (1971) International Migration Review 5, at 250-68. For a discussion of Kloss, see C. Michael MacMillan, *The Practice of Language Rights in Canada* (Toronto: University of Toronto Press, 1998), at 13.

a promotion-oriented right. Promotion-oriented rights require the state to take steps to preserve, promote and enhance the minority-language community. States may do this by integrating the minority language into public institutions such as legislatures and courts.

MacMillan divides promotion-oriented rights into "weak" and "strong" categories.[67] A weak-promotion model "refers to actions taken to ensure that a language can be sustained and in some measure encouraged".[68] The right to communicate with government in the language of one's own choice is a weak-promotion right. A strong-promotion right "aims to ensure that individuals can live their lives in their own language".[69] The right to work in one's own language is a strong-promotion right. MacMillan identifies Quebec's *Charter of the French language* as one instrument which guarantees such rights.[70]

3. Protection of Expressive (Non-Instrumental) Language Rights

Rubio-Marín criticizes the tolerance and promotion-oriented approach to language rights.[71] She proposes instead a three-tier typology of language policy based on the expressive value of language. Her typology rests on the premise that language rights are cultural protections to be exercised collectively.

Rubio-Marín's first type includes those rights where the state and its institutions accommodate language minorities in practical and symbolic ways.[72] There are numerous mechanisms for doing this. Examples include designating a minority language as "official" or entrenching a right to interact with public institutions in the minority language. Rubio-Marín's

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[67] C. Michael MacMillan, *The Practice of Language Rights in Canada* (Toronto: University of Toronto Press, 1998).

[68] C. Michael MacMillan, *The Practice of Language Rights in Canada* (Toronto: University of Toronto Press, 1998).

[69] C. Michael MacMillan, *The Practice of Language Rights in Canada* (Toronto: University of Toronto Press, 1998).

[70] C. Michael MacMillan, *The Practice of Language Rights in Canada* (Toronto: University of Toronto Press, 1998), although the *Charter of the French language*, R.S.Q. c. C-11 only protects the right to work in French, which is the majority language in Quebec, and restricts the right to work in other languages.

[71] Ruth Rubio-Marín, "Language Rights: Exploring the Competing Rationales" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 55.

[72] Ruth Rubio-Marín, "Language Rights: Exploring the Competing Rationales" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 58.

second type confers the power of self-government upon the language minority so as to enable the members of the minority to protect their own linguistic environment.[73] These rights permit linguistic minorities to influence immigration in order to protect the linguistic minority. Rubio-Marín's third type of language rights are rights that permit the linguistic minority to defend itself against the pressures of assimilation.[74] One example is public funding to promote the use of minority languages in the media.

4. Individual versus Collective Rights

Minority language rights may also be differentiated on the basis of whether they are exercised individually or collectively.[75] The collective protection of minority language rights is based on the nature of language as a communal activity and its connection to culture. To maintain a linguistic community, more than individual rights are required. Professor Réaume explains:

> It is in and through participation with others in the creation and sustaining of a language, and the cultural forms it is used to create, that value is created. That larger enterprise should take centre stage in the analysis. A language is sustained as countless individual acts of participation cumulate and conjoin as lives are lived. Tolerating each of them individually is relatively easy, but not enough. Creating the conditions under which a community, as a whole, can carry on and even flourish is a very different project.[76]

Patten and Kymlicka identify three factors that may distinguish individual from collective rights.[77] First, individual rights are held by

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[73] Ruth Rubio-Marín, "Language Rights: Exploring the Competing Rationales" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 59.

[74] Ruth Rubio-Marín, "Language Rights: Exploring the Competing Rationales" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 59.

[75] See Joseph Eliot Magnet & Mark C. Power, "Institutional Reform: Maintenance Claims and Equality for Canada's Official-Language Minorities", in this volume.

[76] Denise Réaume, "Language Rights: Constitutional Misfits or Real Rights" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006) 201, at 215.

[77] Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues and Approaches" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003), at 30-31. This distinction between

every person regardless of the language group to which the individual belongs, whereas collective rights require membership in a designated group. Second, unlike individual rights, collective rights may be subject to conditions of sufficient demand or numbers warranting. Third, the bearer of the right may be an individual or a community: only collective rights, such as the right to school governance, are exercisable by a collectivity.

5. Designation of Minority Language as Official

Designating a minority language as official provides symbolic recognition and substantive rights to linguistic minorities. Importantly, an official language model may confer certain substantive rights on the linguistic minority that are enforceable against the state.

State recognition of the minority-language community is an important affirmation of the linguistic minority within the larger society. The affirmation may have deep juridical consequences, as certain official-language models establish some form of equality between the official languages.

6. Territoriality versus Personality Model[78]

Under a territoriality model, language rights are conferred on individuals and communities within specific territories in the state. Outside these territories, the rights are not exercisable. The territorial model is often found in federal states. Belgium and Switzerland, for example, have different linguistic regions. By contrast, a personality model confers language rights on individuals and communities wherever they are located in the state.

IV. The Protection of Linguistic Minorities in Canada

The protection of minority-language communities in Canada is a mosaic of different safeguards intended to achieve distinct objectives.

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minority language rights as individual rights and collective rights raises a number of questions such as whether individual and collective rights conflict which are not addressed in this essay.

[78] For a description and criticism of this distinction, see Denise Réaume, "Beyond Personality: The Territorial and Personal Principles of Language Policy Reconsidered" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003) 271.

This Part examines the protection of Canada's minority official-language communities, and provides an overview of the federal mechanisms protecting language rights in Canada and the theories that justify them. It illustrates that there is no single theory of language rights in Canada.

The theoretical justification for protecting minority official-language communities has evolved since Confederation. There has been a concomitant evolution of the mechanisms used by the state to protect these minority official-language communities. Whereas nation-building was the original objective of Canada's language policy, theoretical justifications now include protection of linguistic human rights and the preservation of linguistic diversity.

1. English- and French-Language Communities

At the apex of Canada's language policy are the French- and English-language communities. There are two principal reasons why these language communities are the focus of Canada's language policy: state recognition of both languages and cultures was necessary for the creation of the Canadian state at the time of Confederation and these languages represent Canada's two largest language communities.[79]

Since Confederation, the federal government has justified minority language rights on different grounds and has employed different mechanisms to protect the English and French linguistic minorities. Aspects of all three theoretical justifications are now evident in Canada's language policy vis-à-vis English and French linguistic minorities. The shift to linguistic human rights is illustrated in the recognition that language is fundamental. It is also evident in Canada's participation in the protection of language rights in various human rights instruments. The jurisprudence also evinces a shift from ensuring linguistic security to preserving the survival of minority official-language communities.

The most significant shift in Canada's model of protection was from a weak promotion-oriented model of constitutional rights to a more rigorous promotion-oriented model of constitutional rights in the Charter. The current model is a mix of instrumental and non-instrumental language

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[79] *Mother Tongue, 2001 Counts for Both Sexes, for Canada, Provinces and Territories*, online: Statistics Canada, <http://www12.statcan.ca/english/census01/products/highlight/LanguageComposition/Page.cfm?Lang=E&Geo=PR&View=1a&Table=1a&StartRec=1&Sort=2&B1=Counts&B2=Both>. See also Denise Réaume, "Language Rights: Constitutional Misfits or Real Rights" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006) 201, at 216.

rights. Some rights are based on territoriality, others on personality. Some offer individual protection, while others are to be enjoyed collectively.

The constitutional protection of the French- and English-language communities is complemented by legislative mechanisms as well as robust language policies. Although this evolution has generally benefited minority official-language communities, the current regime falls short of achieving its stated objectives.

(a) Confederation: Canada Is Founded on Two Languages

The origin of Canada's bilingualism policy is rooted in nation-building. Canada's bilingual character was recognized at the time of Confederation by the *Constitution Act, 1867*.[80] Prior to the adoption of the *Constitution Act, 1867*, a policy of assimilation had been promoted. Lord Durham proposed that linguistic homogeneity was necessary to unify and build the nation; a constitutional provision was introduced in 1840 to achieve that goal.[81] The formal policy of assimilation quickly gave way to recognition and protection of French- and English-language minority communities. This was adopted constitutionally at the time of Confederation. It was intensified legislatively and administratively in the 1970s, and partially constitutionalized in 1982. All this was intended to promote political stability and to preserve the unity of the Canadian state.[82]

At the time of Confederation, the federal government adopted a weak promotion-oriented model of language rights. Language was protected in three ways. First, the Constitution explicitly accorded certain rights to use English and French, most notably in both the federal and Quebec legislatures and courts. Section 133 of the *Constitution Act, 1867*[83] requires the use of English and French in the Records, Journals

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[80] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[81] *Union Act, 1840* (U.K.), 3 & 4 Vict., c. 35, art. XLI. See Ramsay Cook, "Language Policy and the Glossophagic State" in David Schneiderman, ed., *Language and the State: The Law and Politics of Identity* (Cowansville, Qc.:Yvon Blais, 1991) 73, at 74-75. The Report reasserted the policy of assimilation for the purpose of establishing peace between the "two nations warring in the bosom of a single state". Notably, this was not the only pre-Confederation structure. Others also existed and not all promoted unilingualism. For a detailed history, see Gil Rémillard, *Le fédéralisme canadien: éléments constitutionnels de formation et d'évolution* (Montreal: Quebec-Amerique, 1980). For a brief history of the development of bilingualism and legislation see Robert Leckey & André Braën, "Bilingualism and Legislation" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2004) 37, at 43-46.

[82] See generally Michael Behiels, *Canada's Francophone Minority Communities* (Montreal: McGill-Queen's University Press, 2004).

[83] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

and Debates of Parliament and the Legislature of Quebec. Second, section 93 of the *Constitution Act, 1867*, which governs religion and education, was thought to offer some protection to minority languages. This did not work out as planned.[84] Third, the Constitution created a federal state which afforded greater autonomy to the francophone minority in Quebec. As the Supreme Court of Canada explained in *Reference re Secession of Quebec*: "[t]he federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867*, in such a way as to promote their language and culture."[85]

The rights entrenched in the *Constitution Act, 1867*[86] have been described by the Supreme Court as "rudimentary".[87] They did little to protect the minority French-language communities outside of Quebec in the years following Confederation; they certainly did not protect, promote or enhance minority-language communities. The lack of protection was exacerbated by the fact that the provinces were generally left to adopt whatever language policy they chose.[88] This, together with other factors, fuelled much provincial conflict between Canada's

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[84] Peter W. Hogg, *Constitutional Law in Canada*, looseleaf (Scarborough: Thomson Canada, 1997), at para 53.8. Hogg explains:

> ... s. 93 prohibits the provincial Legislatures from prejudicially affecting ... "any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union." If, therefore, a particular language of instruction was a right or privilege of denominational schools in a particular province at the time of confederation (or admission), then the province would be disabled from compelling the denominational schools to instruct in a different language.

Nevertheless, the Judicial Committee of the Privy Council in *Ottawa Separate School Trustees v. Mackell*, [1917] A.C. 62, at 69 (J.C.P.C.) concluded that s. 93 only protected the "classes of persons determined according to religious belief, and not according to race or language". This had a profound impact on minority-language education: Joseph Magnet, *Official Languages of Canada* (Cowansville, Qc.: Yvon Blais, 1995); Joseph Eliot Magnet, *Modern Constitutionalism* (Markham, ON: LexisNexis Canada, 2004), at 205; Mark C. Power, "Language Rights and Education" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2004) 365, at 377.

[85] [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 59 (S.C.C.).

[86] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[87] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, 2005 SCC 14, [2005] 1 S.C.R. 201, at para. 4 (S.C.C.).

[88] With the exception of Manitoba, Quebec, the Northwest Territories, Saskatchewan and Alberta.

linguistic communities.[89] Not surprisingly, Canada's French-language minority communities in many regions of Canada continued to decline following Confederation.[90]

(b) The Renewal of Francophone Minority Communities

A re-evaluation of Quebec's place in Confederation, popularly known as "the Quiet Revolution", prompted a national crisis and an evaluation of Canada's minority-language policies.[91] In response, Canada established the Royal Commission on Bilingualism and Biculturalism ("B&B Commission"), with a mandate to

> inquire into and report upon the existing state of bilingualism and biculturalism in Canada and to recommend what steps should be taken to develop the Canadian Confederation on the basis of an equal partnership between the two founding races, taking into account the contribution made by the other ethnic groups to the cultural enrichment of Canada and the measures that should be taken to safeguard that contribution.[92]

The B&B Commission produced the most detailed discussion of linguistic communities and linguistic relations in Canadian history. The B&B Commission pointed out a crisis among minority francophone communities.[93] It made several far-reaching recommendations.[94] One of the Commission's recommendations was that English and French be designated as Canada's official languages. This recommendation ultimately led to the *Official Languages Act*.[95]

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[89] Professor Magnet argues that provincial language conflict is motivated by five structural dimensions of the Canadian federation: Joseph Magnet, *Official Languages of Canada* (Cowansville, Qc.: Yvon Blais, 1995); Joseph Eliot Magnet, *Modern Constitutionalism* (Markham, ON: LexisNexis Canada, 2004), at 146ff.

[90] Joseph Magnet, *Official Languages of Canada* (Cowansville, Qc.: Yvon Blais, 1995); Joseph Eliot Magnet, *Modern Constitutionalism* (Markham, ON: LexisNexis Canada, 2004), at 145.

[91] For a discussion of this renaissance see Michael Behiels, *Canada's Francophone Minority Communities* (Montreal: McGill-Queen's University Press, 2004), at 3ff.

[92] *Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Information Canada, 1971), at xxi.

[93] *Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Information Canada, 1971), at 24, 69.

[94] *Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Information Canada, 1971), at 147-49.

[95] R.S.C. 1970, c. O-2.

The *Official Languages Act*[96] was the first legislative instrument to designate French and English as Canada's official languages. Not only did official-language status afford symbolic status to the French language, it also afforded substantive protection to minority French-language communities. The Act institutionalized bilingualism at the federal level through legislative machinery, and also by establishing the Commissioner of Official Languages. Professor Magnet described the institutionalization of the conflict between the French- and English-language communities:

> The official languages policy creates institutional machinery to channel overheated linguistic issues into manageable procedures. The machinery routes linguistic conflict into institutional pathways where the conflict may be blunted, moderated and controlled by bureaucratic and judicial adjustments. The institutional machinery presupposes that linguistic issues can be successfully resolved, or at least confined, and intends that linguistic conflict not be allowed to spread, and threaten the entente cordiale between the language communities.[97]

It soon became evident, however, that the *Official Languages Act*[98] would have little real impact and that the designation of French and English as the two official languages of Canada offered little protection. The Act provided a minimal level of linguistic security to certain well-defined minority language groups. As a result, it was harshly criticized in a 1977 report entitled *Les héritiers de Lord Durham*, characterized as a "damning indictment of past and present federal and provincial government policies and programs, respecting the rapidly advancing assimilation of those communities".[99]

Two shortcomings of the Act are of particular significance. First, the original *Official Langages Act*[100] was based on a territorial model whereby the services of the federal government were available in either official language in the National Capital Region and in certain designated

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96 R.S.C. 1970, c. O-2.

97 Joseph Magnet, *Official Languages of Canada* (Cowansville, Qc.: Yvon Blais, 1995), at 73.

98 R.S.C. 1970, c. O-2.

99 Michael Behiels, *Canada's Francophone Minority Communities* (Montreal: McGill-Queen's University Press, 2004), at 29.

100 R.S.C. 1970, c. O-2.

bilingual districts.[101] Minority-language communities outside these areas received little support or recognition. Réaume explained that "while it is true that there is a geographical concentration to language use, speakers of a language often do not group themselves neatly".[102] Second, the very nature of the Act as a federal legislative instrument reflected a major shortcoming of Canada's language policy during this period — the conspicuous absence of provincial recognition or protection of French linguistic minorities. To implement a minority-language policy successfully, the support of the provinces appears to be crucial as they hold jurisdiction in many areas that impact minority-language use.[103]

During this period, Quebec established its own framework of language protections culminating in the *Charter of the French language*, enacted in 1977.[104] The *Charter of the French language* affirmed the primacy of French. Although it appeared that Canada's language policy was moving away from the territorial principle to the personality principle, the language provisions enacted in Quebec firmly established a territorial model of language protection in Canada which now competes with the personality principle.

(c) The Charter: A Marked Shift in the Protection of Minority-Language Rights

The watershed in Canada for French and English minority-language communities was the entrenchment of language rights in the Charter.[105] Sections 16 to 23 of the Charter explicitly establish language rights for

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[101] Richard Goreham, *The Principles of Individual Choice and Territoriality in the Implementation of Language Rights: A Report Submitted to the Commission of Official Languages* (Canada: March, 1994).

[102] Denise Réaume, "Language Rights: Constitutional Misfits or Real Rights" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006) 201, at 204.

[103] *Jones v. New Brunswick (Attorney General)*, [1974] S.C.J. No 91, [1975] 2 S.C.R. 182 (S.C.C.). However, this jurisdictional question is quite complex. For a discussion of the potential jurisdictional issues especially in light of s. 16 of the *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, see Joseph Eliot Magnet, *Modern Constitutionalism* (Markham, ON: LexisNexis Canada, 2004), at 163-65. See also Peter W. Hogg, *Constitutional Law in Canada*, looseleaf (Scarborough: Thomson Canada, 1997), at para. 53.2.

[104] S.Q. 1977, c. 5.

[105] Michel Bastarache, "Introduction" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville Qc.: Yvon Blais, 2004), at 23. Justice Bastarache also provides a brief history of the inclusion of language rights in the *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.

Canada's English- and French-language speakers.[106] These provisions reflect a shift in both the justification and mechanism for protecting Canada's official minority-language communities. Although the nation-building theory of language rights continues to influence Canada's language policy, language rights in Canada are also premised on a theory of linguistic human rights and the preservation of linguistic diversity. The entrenchment of substantive language rights and guarantee of equality of status of official languages marks a shift from legislative to constitutional, from individual to collective and from weak promotion-oriented rights to strong promotion-oriented rights.

The constitutional entrenchment of language rights has hardened the protection of minority languages against whims of the legislature. The exceptional importance of this is signified by the fact that language rights are immune from override under the notwithstanding clause.[107] It is also important that constitutional provisions are subject to a broad and purposive interpretation by courts. In recent years, the Supreme Court of Canada has played a leading role in articulating and advancing the theory of language rights in Canada.[108]

Sections 16 to 23 of the Charter also deepened the federal commitment to a personality model that began with the *Constitution Act, 1867*.[109] The personality model is not complete, even at the federal level. Remnants of the territorial model remain in two principal areas at the federal level: provision of government services and minority-language education rights. Both rights require satisfying a numerical threshold to become

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[106] As is discussed below, other sections of the *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, address language rights of allophone and Aboriginal communities.

[107] Section 33 of the *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.

[108] The Court in a trilogy of cases advocated a narrow approach of language rights: *MacDonald v. Montreal (City)*, [1986] S.C.J. No 28, [1986] 1 S.C.R. 460 (S.C.C.); *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549 (S.C.C.); *Bilodeau v. Manitoba (Attorney General)*, [1986] S.C.J. No. 27, [1986] 1 S.C.R. 449 (S.C.C.). There was a marked shift in approach starting in *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.). The importance of the courts to the development of language rights has been affirmed by Parliament who provided funding through the Court Challenges Program. The Court Challenges Program was launched in 1970. The objective of the Court Challenges Program was "to help official-language communities in a minority setting to take legal action to clarify and affirm their language rights": Marie-Eve Hudon and Marion Menard, "The Role of the Courts in the Recognition of Language Rights" Library of Parliament (February 14, 2006, PRB 05-57E), online: Library of Parliament <http://www.parl.gc.ca/information/library/PRBpubs/prb0557-e.htm>.

[109] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. The shift towards a personality model also continued with s. 530 of the *Criminal Code*, R.S.C. 1985, c. C-46.

activated.[110] A territorial model has also persisted because these provisions do not exhaustively regulate language rights in Canada. By virtue of Canada's federal system, the provinces also regulate language. Only one province, New Brunswick, is officially bilingual. Thus, the territoriality principle has persisted because of differing approaches in various provinces.[111]

The Charter protects both individual and collective language rights. The right to use either English or French in court, which is exercisable by individuals, is an example of individual rights protection. Minority-language education rights are both individual rights and collective rights. The rights attach to individuals who are members of a specific group, and also vest powers of management and control in minority-language communities.[112]

The Charter offers rigorous substantive protection to minority-language communities through promotion-oriented rights. Minority-language education rights, which compel state action to establish minority-language educational regimes, are a good example.[113]

The Charter also affirms the equality of the official languages at section 16. This principle remains to be elaborated in the jurisprudence.[114] In *Beaulac*, Bastarache J. held that subsection 16(3) formalizes the principle of advancement of the official languages, of which section

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[110] With respect to the right to receive available services from any head or central office of an institution of the Parliament or government of Canada in English or French, a "significant demand" requirement was imposed (s. 20). Similarly, s. 23 minority-language education rights were only applicable "where numbers warrant".

[111] See for example, Quebec's *Charter of the French language*, S.Q. 1977, c. 5. Section 59 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 provides that s. 23(1)(a) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, which establishes minority-language education rights, does not apply in Quebec. As a result, s. 59 limits the class of rights holders in Quebec to those described in s. 23(1)(b) and 23(2).

[112] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, 2005 SCC 14, [2005] 1 S.C.R. 201, at para. 23 (S.C.C.); *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, at 369, 372-73 (S.C.C.); *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] S.C.J. No. 26, [1993] 1 S.C.R. 839, at 854 (S.C.C.). For a discussion of the right to management and control, see Mark C. Power, "Language Rights and Education" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2004) 365, at 411-17.

[113] Section 23 of the *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.

[114] *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549, at 618-19 (S.C.C.) (Wilson J. in dissent); *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.). See also *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4768, 56 O.R. (3d) 505. (Ont. C.A.).

530 of the *Criminal Code*[115] is an example. The principle of advancement "does not however exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada".[116] In *Lalonde*, the Court of Appeal concluded that the purpose of subsection 16(3) is to shield legislative matters from challenge on the basis of discrimination; it is not a rights-conferring provision.[117] As Grégoire Webber notes in another essay in this volume, section 16 has significant potential to impact language rights in Canada.[118]

(d) The Evolution of the Theoretical Framework of Official-Language Rights

Judicial interpretation of the Charter's language provisions reveals much about their theoretical underpinnings. The Supreme Court of Canada has identified the principal rationales as remedying past harm to minority communities[119] as well as protecting and promoting the cultural vitality of minority-language communities.[120] These are dramatic innovations in language rights theory.

Protecting language and culture has become a central concern of modern courts and certain bureaucracies, principally the Official Languages Commissioner. This goal reflects a second justification for minority language rights in Canada: the preservation of linguistic and cultural diversity. The Court has explicitly recognized that "language rights cannot be separated from a concern for the culture associated with the language".[121] To preserve linguistic and cultural diversity, the Court has

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[115] R.S.C. 1985, c. C-46.

[116] *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 22 (S.C.C.).

[117] *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4768, 56 O.R. (3d) 505, at paras. 92-93, 95 (Ont. C.A.).

[118] See Grégoire Charles N. Webber, "The Promise of Canada's Official Languages Declaration", in this volume. See also Joseph Magnet, *Official Languages of Canada* (Cowansville, Qc.: Yvon Blais, 1995); Joseph Eliot Magnet, *Modern Constitutionalism* (Markham, ON: LexisNexis Canada, 2004), at 165-66.

[119] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 27 (S.C.C.).

[120] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, 2005 SCC 14, [2005] 1 S.C.R. 201, at paras. 3-7 (S.C.C.). These objectives are also found in the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.); *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] S.C.J. No. 55, 2002 SCC 53, [2002] 2 S.C.R. 201, at para. 22 (S.C.C.).

[121] *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1, 2000 SCC 1, [2000] 1 S.C.R. 3, at para. 26 (S.C.C.). See also *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, 2005 SCC 14, [2005] 1 S.C.R. 201, at para. 7 (S.C.C.); *Lavigne v. Canada (Office of*

highlighted the necessity of ensuring the *survival* of minority official-language communities.

The Court's commitment to the overarching goal of linguistic survival may be seen from consideration of *Beaulac*, the seminal case on the proper interpretive approach to language rights. Bastarache J. explained:

> Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; see *Reference re Public Schools Act (Man.)*, *supra*, at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick*, *supra*, at pp. 579-80, stands for a restrictive interpretation of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that *language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply.* (emphasis added)[122]

Thus, all language rights must be interpreted in order to achieve the goal of preserving and promoting linguistic and cultural diversity.

Beaulac's commitment to protect the vitality of minority-language communities plays out in the Supreme Court's minority-language education cases.[123] In *Solski*, the Court explained:

> The very presence of s. 23 in the *Canadian Charter* attests to the recognition, in our country's Constitution, of the essential role played by the two official languages in the formation of Canada and in the country's contemporary life (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC

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the Commissioner of Official Languages), [2002] S.C.J. No. 55, 2002 SCC 53, [2002] 2 S.C.R. 201, at paras. 22, 63 (S.C.C.).

[122] *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 25 (S.C.C.).

[123] "Minority language education rights are the means by which the goals of linguistic and cultural preservation are achieved": *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 26 (S.C.C.). See also *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] S.C.J. No. 26, [1993] 1 S.C.R. 839, at 849-50 (S.C.C.); *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, 2005 SCC 14, [2005] 1 S.C.R. 201, at para. 3 (S.C.C.) ("[m]inority language education is a requisite tool to encourage linguistic and cultural vitality. Not only do minority schools provide basic language education, they also act as community centres where the members of the minority can meet to express their culture.") and para. 23 ("[s]ection 23 is clearly meant to protect and preserve both official languages and the cultures they embrace through Canada; its application will of necessity affect the future of minority language communities").

> 53, at para. 22). *It also confirms that the need and desire to ensure that language communities continue to exist and develop represented one of the primary objectives of the language rights scheme that has gradually been implemented in Canada.*
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> .....
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> Any broad *guarantee of language rights attests to a fundamental respect for and interest in the cultures that are expressed by the protected languages...* Thus, the recognition of rights to minority language instruction contributes to the preservation of the minority language and culture, as well as of the minority group itself. (emphasis added)[124]

The cases show the Supreme Court has made linguistic survival a key goal of Canada's language policy.[125]

The Court of Appeal for Ontario also affirmed as a language policy goal the importance of linguistic survival for the Franco-Ontarian minority.[126] In *Lalonde* the Court of Appeal considered whether the Montfort hospital, an Ontario francophone hospital, was protected from closure by the Ontario government. The Court of Appeal concluded that the government had failed "to give serious weight and consideration to the importance of Montfort as an institution to the survival of the Franco-Ontarian minority".[127] In reaching this conclusion, the Court of Appeal relied on many sources, including the unwritten constitutional principle of protection for minorities.[128] It confirmed the Divisional Court's finding that hospitals are important institutions for propagating cultural identity.[129]

The importance of preserving linguistic and cultural diversity is clearly evident in the *Official Languages Act*, which enjoys quasi-

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[124] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, 2005 SCC 14, [2005] 1 S.C.R. 201, at paras. 6-7 (S.C.C.).

[125] This shift away from linguistic security is likely a welcome one for many: Leslie Green, "Are Language Rights Fundamental?" (1987) 25 Osgoode Hall L.J. 639; Denise Réaume, "The Constitutional Protection of Language: Survival or Security" in David Schneiderman, ed., *Language and the State: The Law and Politics of Identity* (Cowansville, Qc.: Yvon Blais, 1991).

[126] *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4768, 56 O.R. (3d) 505 (Ont. C.A.).

[127] *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4768, 56 O.R. (3d) 505, at para. 188 (Ont. C.A.).

[128] *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4768, 56 O.R. (3d) 505, at para. 125 (Ont. C.A.).

[129] *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2001] O.J. No. 4768, 56 O.R. (3d) 505, at paras. 69-71 (Ont. C.A.).

constitutional status.[130] Subsection 41(2) of the *Official Languages Act*[131] requires federal institutions to take "positive measures" for enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development.

The federal government has also developed a range of policies to achieve linguistic duality. The Action Plan for Official Languages is most notable.[132] The Action Plan is a policy statement issued by the federal government for the purpose of strengthening the *Official Languages Act*. The Action Plan is administered by the Minister for Official Languages. The principal areas the Action Plan targets are education, community service and the public service.[133] By these measures, the Action Plan intends to ensure the linguistic survival of the minority official-language communities in Canada and to promote their vitality.[134] Survival of linguistic minorities is necessary because "[m]inority official language communities have always nurtured our linguistic duality and have made a strong contribution to our linguistic and cultural diversity".[135]

A third justification is evident in the jurisprudence: the protection of linguistic human rights. The two hallmarks of human rights, fundamental importance and universality, are both present in the protection of minority official-language rights. The Supreme Court affirmed the fundamental importance of language in its jurisprudence.[136] In *Ford v. Quebec*, the Court observed that language is "the means by which the individual

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[130] R.S.C. 1985, c. 31 (4th Supp.). The Supreme Court of Canada affirmed the quasi-constitutional status of the Act in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] S.C.J. No. 55, 2002 SCC 53, [2002] 2 S.C.R. 201, at para. 23 (S.C.C.).

[131] R.S.C. 1985, c. 31 (4th Supp.).

[132] See, for example, the address of Dyane Adam, Commissioner of Official Languages, who emphasized the importance of the future of minority-language communities in Canada: Dyane Adam, "Linguistic Equality: A Great Partnership" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006), at 687.

[133] *The Action Plan for Official Languages*, online: <http://www.pco-bcp.gc.ca/olo/index.asp?lang=eng8page=action>, at para. 1.3.

[134] *The Action Plan for Official Languages*, online: <http://www.pco-bcp.gc.ca/olo/index.asp?lang=eng8page=action>, at para. 1.1.

[135] *The Action Plan for Official Languages*, online: <http://www.pco-bcp.gc.ca/olo/index.asp?lang=eng8page=action>, at para. 1.1.2.

[136] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 79-82 (S.C.C.); *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.); and *R. v. Mercure*, [1988] S.C.J. No. 11, [1988] 1 S.C.R. 234 (S.C.C.).

expresses his or her personal identity and sense of individuality".[137] Language rights are necessary to ensure that members of the linguistic minority are "given the opportunity to achieve their personal aspirations".[138] Canada has affirmed the universality of certain language rights through its ratification of the two principal international human rights instruments.[139] In particular, Canada signed on to the right to non-discrimination on the basis of language.

Nation-building remains an essential justification for the protection and promotion of minority language rights. Linguistic duality is an important part of that enterprise, and has become embedded in our collective identity as Canadians. This has been confirmed in both judicial and legislative fora. The Supreme Court recently stated that "[t]he constitutional protection of minority language rights is necessary for the promotion of robust and vital minority language communities which are essential for Canada to flourish as a bilingual country".[140] The Action Plan is rooted in the preservation of cultural diversity and also in recognition that "linguistic duality is an important aspect of our Canadian heritage".[141]

That nation-building continues to underpin Canada's language policy is illustrated in the Court's affirmation that language rights are intended, in part, to remedy past harms. This is true of section 530 of the *Criminal Code*, which is "remedial".[142] Similarly, section 23 of the Charter "is based on the true purpose of redressing past injustices" committed against Canada's minority official-language communities.[143] In this respect,

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[137] *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at 748-49 (S.C.C.). Justice Bastarache notes that both individual and collective language rights are fundamental: Michel Bastarache, "Introduction" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville Qc.: Yvon Blais, 2004), at 8.

[138] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, 2005 SCC 14, [2005] 1 S.C.R. 201, at para. 5 (S.C.C.).

[139] *International Covenant on Civil and Political Rights*, December 19, 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force March 23, 1976); *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force January 3, 1976, accession by Canada May 19, 1976).

[140] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, 2005 SCC 14, [2005] 1 S.C.R. 201, at para. 2 (S.C.C.).

[141] *The Action Plan for Official Languages*, online: <http://www.pco-bcp.gc.ca/olo/index.asp?lang=eng8page=action>, at para. 1.1.

[142] *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 23 (S.C.C.).

[143] *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1, 2000 SCC 1, [2000] 1 S.C.R. 3, at para. 27 (S.C.C.). See also *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 27 (S.C.C.).

language rights promote peace and security between Canada's two principal linguistic groups.

Thus, there appears to be no single overarching justification for the protection of minority official-language communities in Canada. The conferral of minority-language rights for the purpose of promoting linguistic survival of a minority-language community is consistent with nation-building, protecting linguistic human rights and preserving linguistic diversity. It is for all of these reasons that French and English minority-language communities continue to be the principal focus of Canada's language policy.[144]

(e) Future Steps

The evolution of language rights in Canada has generally benefited minority official-language communities, but in an asymmetrical manner. This asymmetry may be explained, in part, by the fact that there is no unified approach to minority official-language communities at the federal level. As I have demonstrated, there is no single justification or mechanism that governs the protection of minority-language communities federally. Although this essay does not consider provincial language policy, other authors demonstrate that asymmetry is exacerbated by the heterogeneity of provincial language policies, where protection of minority official-language communities differs widely from province to province.[145] Does this asymmetrical protection benefit minority-language communities? Should we strive for a single normative theory? Do the current mechanisms realize the theoretical justifications? These are important questions that require careful consideration in the design and implementation of Canada's language policy.

The objectives of Canada's language scheme are laudable. However, there appears to be a disconnect between theory and application.

To implement the theoretical frameworks of nation-building, human rights and linguistic and cultural diversity, improvement is required in

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[144] In my view, the fact that these two language communities are protected on the basis that they are a "critical mass of speakers of that language" is a secondary rationale that should not, in and of itself, justify a particular type of language rights protection: Denise Réaume, "Language Rights: Constitutional Misfits or Real Rights" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006) 201, at 216.

[145] See, generally, Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2004). Each chapter of the text reviews and highlights the different approaches taken by the provincial legislatures vis-à-vis official language minorities.

three areas. First, to ensure linguistic survival, the state must accord stronger promotion-oriented rights to official-language minority communities. For example, greater protection of the language of work in both the private and public sectors is required. In addition, communities require language rights that will permit them to defend themselves against the pressures of assimilation. As Rubio-Marín suggests, one way to achieve this objective is to offer public funding to promote the use of minority languages in the media.[146] Second, the assymetric protection of Canada's English and French minority-language communities must be better balanced. The asymmetry reflects and responds to the uniqueness of Canada's official-language minorities. Nevertheless, as other authors in this volume have noted, more robust protection is necessary to ensure the survival of official minority-language communities.[147] As in New Brunswick, provincial legislatures should strive to entrench official bilingualism and offer constitutional protection to minority official-language communities. However, any approach must recognize the special situation of Quebec, the only province with a francophone majority. The third important step necessary to ensure the linguistic duality of the country is to promote bilingualism among Canadian citizens through second-language instruction.[148]

V. CANADA'S OTHER LINGUISTIC COMMUNITIES

The principal focus of Canada's language policy is English- and French-language communities, but Canada's language policy is not restricted to English and French communities. Canada's other linguistic and cultural communities are also recognized in Canada's Constitution. Section 22 of the Charter explicitly preserves existing and legal or customary rights or privileges with respect to other languages.[149] Section

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[146] Ruth Rubio-Marín, "Language Rights: Exploring the Competing Rationales" in Alan Patten & Will Kymlicka, eds., *Language Rights and Political Theory* (New York: Oxford University Press, 2003) 52, at 59.

[147] See Grégoire Charles N. Webber, "The Promise of Canada's Official Languages Declaration", and Christine Ruest, "Constitutional Guarantees for Official Languages in the Legislative Process", in this volume.

[148] There is evidence that second-language instruction is waning in Canada: Office of the Commissioner of Official Languages, *2006-2007 Annual Report* (Ottawa: Public Works and Government Services, 2007), at ix.

[149] *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. Section 22 states "[n]othing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed

22 also permits the creation of new language rights for non-official language communities, including Aboriginal language communities.[150] Section 27 requires that the Charter be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians".[151] Section 35 of the *Constitution Act, 1982* constitutionally protects the "existing aboriginal and treaty rights" of Canada's Aboriginal peoples.[152] As is discussed below, section 35 likely protects Aboriginal language rights.

That French- and English-language communities are not the sole focus of Canada's language policy is evident in federal legislation.[153] The *Official Languages Act* and the *Canadian Multiculturalism Act* affirm section 22 of the Charter.[154] Both explicitly recognize the importance of preserving and enhancing the use of languages other than English and French while strengthening the status and use of the official languages.[155] As a result, the *Official Languages Act* is not to be interpreted in a manner inconsistent with the preservation and enhancement of languages other than English or French.[156]

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either before or after the coming into force of this Charter with respect to any language that is not English or French."

150 Emmanuel Didier, "The Private Law of Language" in Michel Bastarache, *et al.*, *Language Rights in Canada* (Cowansville, Qc.: Yvon-Blais, 1987) 313, at 324-25. See also Leslie Green, "Are Language Rights Fundamental?" (1987) 25 Osgoode Hall L.J. 639, at 665-66.

151 *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.

152 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

153 This section focuses on the federal *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) and *Canadian Multiculturalism Act*, R.S.C. 1985, c. 24 (4th Supp.). Provincial versions also exist but are not discussed in this essay.

154 *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) at s. 83(1) states: "Nothing in this Act abrogates or derogates from any legal or customary right acquired or enjoyed either before or after the coming into force of this Act with respect to any language that is not English or French." The *Canadian Multiculturalism Act*, R.S.C. 1985, c. 24 (4th Supp.) states: "AND WHEREAS the Constitution of Canada and the *Official Languages Act* provide that English and French are the official languages of Canada and neither abrogates nor derogates from any rights or privileges acquired or enjoyed with respect to any other language." The Preamble also affirms Canada's international commitments under the *International Covenant on Civil and Political Rights*, December 19, 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force March 23, 1976): "AND WHEREAS Canada is a party to ... the *International Covenant on Civil and Political Rights*, which Covenant provides that persons belonging to ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practise their own religion or to use their own language."

155 *Canadian Multiculturalism Act*, R.S.C. 1985, c. 24 (4th Supp.), s. 3(1)(i) and *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (Preamble).

156 *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 83(2).

A complex framework of federal and provincial instruments governs non-official language communities in Canada. I will identify a few of the most prominent instruments to illustrate that no single theory or model appears to underpin Canada's language policy in respect of allophone and Aboriginal communities. All theories are implicated to varying degrees.

1. Allophone Communities

A human rights approach is evident in sections 14, 15, 22 and 27 of the Charter. These sections acknowledge the fundamental nature of language and seek to entrench many of the universal norms established in international human rights instruments.[157] In addition to sections 22 and 27, allophones have two principal constitutional language rights at the federal level: the right to non-discrimination and the right to an interpreter in a criminal trial. These rights apply to all linguistic minorities, not simply English- and French-language speakers. These rights reflect the universal norms guaranteed to all individuals in international human rights instruments.

The right not to be discriminated against on the basis of language is likely protected under section 15 of the Charter. While language is not an enumerated ground of discrimination,[158] it likely is an analogous ground.[159] This is because language is explicitly recognized as a ground of non-discrimination in several international human rights instruments[160] and Canada is a party to each of these conventions. Since Canada is

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[157] As mentioned, Canada's commitment to these international obligations is also explicitly recognized in the Preamble to the *Canadian Multiculturalism Act*, R.S.C. 1985, c. 24 (4th Supp.).

[158] Nicole Vaz, "The Principle of Equality of the Official Languages" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2004) 601, at 613. Although this discussion arises in the context of official languages, the rationale applies equally to any language. Vaz notes that language may be linked to the enumerated ground of national or ethnic origin on the basis of the decision of the Permanent Court of International Justice in *Advisory Opinion on Minority Schools in Albania*, April 6, 1935, Series A/B P.C.I.J. 4 p. 117.

[159] Nicole Vaz, "The Principle of Equality of the Official Languages" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2004) 601.

[160] *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71; *International Covenant on Civil and Political Rights*, December 19, 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force March 23, 1976); *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force January 3, 1976, accession by Canada May 19, 1976).

assumed to respect its international obligations, it is likely that language is a ground of discrimination under section 15.[161]

Section 14 of the Charter provides every individual with a right to an interpreter in criminal trials. In the Canadian context, there is some uncertainty as to whether this is properly classified as a "language" right. In *R. v. Beaulac*, the Court noted the "complete distinctiveness of language rights and trial fairness".[162] These categories of rights differ in their origin and their objective. Official language rights are intricately connected to preserving culture and the collective identity of sub-national communities, whereas the right to an interpreter is intended to ensure procedural fairness. The right to an interpreter is concerned only with the instrumental dimension of language. In the international context, this right is classified as a language right because it pertains to language.[163]

Nation-building and preserving linguistic diversity also appear to underlie Canada's language policy. Both the Charter and the *Canadian Multiculturalism Act* affirm Canada's multicultural heritage and its policy of "multicultural accommodation".[164] Canada has declared itself to be more than a bilingual, bicultural country; it is multicultural as well. Section 3 of the *Canadian Multiculturalism Act* declares that it is a policy of the federal government to "preserve and enhance the use of languages other than English and French, while strengthening the status and use of the official languages of Canada".[165] This is because of "the importance of preserving and enhancing the multicultural heritage of Canadians".[166] The Government of Canada has a policy to take measures to "facilitate the acquisition, retention and use of all languages that contribute to the multicultural heritage of Canada".[167]

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[161] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.). See generally Gibran van Ert, *Using International Law in Canadian Courts* (Hague: Kluwer Law International, 2002).

[162] *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 41 (S.C.C.).

[163] *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71; Fernand de Varennes, *Language, Minorities and Human Rights* (Hague: Kluwer Law International, 1996).

[164] Joseph Eliot Magnet, *Modern Constitutionalism* (Markham, ON: LexisNexis Canada, 2004), at 217.

[165] *Canadian Multiculturalism Act*, R.S.C. 1985, c. 24 (4th Supp.). The Preamble, in part, states: "AND WHEREAS the Constitution of Canada and the *Official Languages Act* provide that English and French are the official languages of Canada and neither abrogates nor derogates from any rights or privileges acquired or enjoyed with respect to any other language."

[166] *Canadian Multiculturalism Act*, R.S.C. 1985, c. 24 (4th Supp.), Preamble.

[167] *Canadian Multiculturalism Act*, R.S.C. 1985, c. 24 (4th Supp.), s. 5(1)(f).

Canada preserves cultural diversity through education policy as well. Although education programming for non-official language communities falls under provincial jurisdiction, the federal government indirectly influences provincial education programming.[168] There is a complex scheme of provincial education programming for certain allophone linguistic communities. Professor Magnet explains:

> Programming support is provided for schools in the languages of these communities. To take an example, British Columbia has some 150 organisations which are involved in heritage languages teaching, which goes on in 150 schools and embraces 18 000 students. In Alberta, an amalgamation of institutions offer 500 teachers serving 5000 students in 30 languages, including bilingual Ukrainian institutions at the elementary level.[169]

Education is vital to linguistic communities. The federal government's support of these education programs, albeit indirect, promotes and preserves linguistic and cultural diversity in Canada.

2. Aboriginal Communities

A complex web of constitutional, legislative and policy instruments exists at the federal, provincial and territorial levels. As with official language and allophone communities, each theoretical justification underpins Canada's federal Aboriginal language policy.

A rich diversity of Aboriginal languages exists in Canada today. Approximately 61 Aboriginal languages and dialects are spoken in Canada.[170] The language communities are experiencing varying degrees of language loss. Some are nearing extinction, while others are more widely spoken.[171] The 2001 Census reveals that the three most common

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[168] Joseph Eliot Magnet, "Framework for Multicultural Education: Canada" (1999) 12 R.Q.D.I. 55, at 62. Professor Magnet observes that the federal government's influence on education policy results, in part, from fiscal transfers.

[169] Joseph Eliot Magnet, "Framework for Multicultural Education: Canada" (1999) 12 R.Q.D.I. 55, at 61.

[170] Task Force on Aboriginal Languages and Cultures, *Towards a New Beginning*, online: Task Force on Aboriginal Languages and Culture <http://www.aboriginallanguagestaskforce.ca/pdf/foundrpt_e.pdf>, at 33.

[171] Task Force on Aboriginal Languages and Cultures, *Towards a New Beginning*, online: Task Force on Aboriginal Languages and Culture <http://www.aboriginallanguagestaskforce.ca/pdf/foundrpt_e.pdf>, at 33. See also Raymond Samuels II, ed., *Toward a Native-Canadian Equal Rights Amendment: Replacing the current Official Languages and Indian Acts in favour of a rejuvenated Constitutional framework for the preservation and promotion of aboriginal languages and cultures* (Kanata: Agora Cosmopolitan, 2003), at 15-18.

Aboriginal languages are Cree, Ojibway and Inuktitut.[172] Although some are used more widely than others, each language is intricately connected to Aboriginal culture.

Aboriginal languages are intricately connected to the cultures and ancestral linkage of Aboriginal peoples.[173] This connection has been described as follows:

> The Aboriginal languages were given by the Creator as an integral part of life. Embodied in Aboriginal languages is our unique relationship to the Creator, our attitudes, beliefs, values and the fundamental notion of what is truth. Aboriginal language is an asset to one's own education, formal and informal. Aboriginal language contributes to greater pride in the history and culture of the community: greater involvement and interest of parents in the education of their children, and greater respect for Elders. Language is the principal means by which culture is accumulated, shared and transmitted from generation to generation. The key to identity and retention of culture is one's ancestral language.[174]

The ongoing erosion of Aboriginal languages and cultures has prompted the federal, territorial and certain provincial governments to take action to preserve the linguistic and cultural diversity of Canada's Aboriginal peoples. Action has also been motivated by the fundamental nature of language to Aboriginal people and by a desire to heal the relationship between Aboriginal people and Canada.

Aboriginal language rights are likely protected by virtue of section 35 of the *Constitution Act, 1982*.[175] The Supreme Court of Canada has not considered whether section 35 includes Aboriginal language rights. Nevertheless, there are compelling legal arguments that section 35 includes the protection and promotion of Aboriginal languages, including the right to education.[176]

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[172] Statistics Canada, *2001 Census: Profile of languages in Canada: English, French and many others*, online: Statistics Canada <http://www12.statcan.ca/english/census01/Products/Analytic/companion/lang/canada.cfm#aboriginal>.

[173] Raymond Samuels II, ed., *Toward a Native-Canadian Equal Rights Amendment: Replacing the current Official Languages and Indian Acts in favour of a rejuvenated Constitutional framework for the preservation and promotion of aboriginal languages and cultures* (Kanata: Agora Cosmopolitan, 2003), at 19.

[174] Task Force on Aboriginal Languages and Cultures, *Towards a New Beginning*, online: Task Force on Aboriginal Languages and Culture <http://www.aboriginallanguagestaskforce.ca/pdf/foundrpt_e.pdf>, at 21, citing the late Elder Eli Taylor of the Sioux Nation.

[175] Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[176] See generally, David Leitch, "Canada's Native Languages: The Right of First Nations to Educate Their Children in Their Own Languages" (2006) Const. Forum 107; Fernand de Varennes, "L'article 35 de la *Loi constitutionelle de 1982* et la protection des droits linguistiques des peuples

In addition, several federal programs are designed to protect and promote Aboriginal languages. There are a number of block funding arrangements between Aboriginal communities and various branches of the federal government, including the Department of Indian Affairs and Northern Development and Canadian Heritage, in respect of Aboriginal languages. There are ongoing efforts to improve Canada's Aboriginal language policy. In 2002, the Minister of Canadian Heritage created the Task Force to "propose a national strategy to preserve, revitalize and promote First Nation, Inuit and Metis languages and cultures".[177]

Aboriginal-language education is publicly funded in Nova Scotia, British Columbia and Quebec, as a result of federal and provincial cooperation.[178] Public funding of education reflects the federal government's intention to build a positive relationship with Aboriginal-language communities. It also demonstrates the federal government's commitment to the continued vitality of Aboriginal-language communities in Canada.

Several important questions concerning Aboriginal language policy merit closer consideration than is possible here. Should Aboriginal languages be declared Canada's official languages along with English and French? Aboriginal languages currently enjoy official-language status in two territories.[179] Should Aboriginal languages receive the same

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autochtones" (1994) 4 N.J.C.L. 265; Brian Slattery, "Aboriginal Language Rights" in David Schneiderman, ed., *Language and the State: The Law and Politics of Identity* (Cowansville, Qc.: Yvon Blais, 1991) 369. Although some disagree that the right extends to publicly funded education: Jeffrey Richston, "La Protection Juridique des Langues Autochtones au Canada" in Paul Pupier & José Woehrling, *Language and Law: Proceedings of the First Conference of the International Institution of Comparative Linguistic Law* (Montreal: Wilson & Lafleur, 1989) 259, at 268.

[177] Task Force on Aboriginal Languages and Cultures, *Towards a New Beginning*, online: Task Force on Aboriginal Languages and Culture <http://www.aboriginallanguagestaskforce.ca/pdf/foundrpt_e.pdf>, at i.

[178] In Nova Scotia, by virtue of the *Mi'kmaq Education Act*, S.C. 1998, c. 24; *Mi'kmaq Education Act*, S.N.S. 1998, c. 17. In British Columbia by virtue of the *Nisga'a Final Agreement Act*, S.C. 2000, c. 7; *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2; *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27; and *Sechelt Indian Government District Enabling Act*, R.S.B.C. 1996, c. 416. In Quebec by virtue of the *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c. 18; the *Act Respecting Cree, Inuit and Naskapi Native Persons*, R.S.Q. c. A-33.1; and the *Charter of the French language*, S.Q. 1977, c. 5.

[179] The Northwest Territories *Official Languages Act* designates "Chipewyan, Cree, English, French, Gwich'in, Inuinnaqtun, Inuktitut, Inuvialuktun, North Slavey, South Slavey and Taîchô" as official languages: R.S.N.W.T. 1988, c. O-1. s. 4 (as am.). The Northwest Territories *Official Languages Act* is incorporated into Nunavut law by virtue of ss. 29 and 38 of the *Nunavut Act*, S.C. 1993, c. 28. Nunavut tabled a new *Official Languages Act* in June 2007 which offers greater protection than the Northwest Territories *Official Languages Act*. There is a rich history to the development of this legislation, which is beyond the scope of this essay. Aboriginal languages are not designated official languages in the Yukon. However, there is recognition in the *Languages*

substantive protection, both constitutional and legislative, as minority official-language communities?[180] Or should there be tailored protection for each linguistic community?

VI. Conclusion

Canada's language policy is multifaceted. Official-language minority communities have rights established at Confederation, under a nation-building paradigm, that have evolved to reflect today new norms of linguistic human rights and preservation of linguistic and cultural diversity.

Allophones and Aboriginal peoples also form an essential part of Canada's linguistic mosaic. Canada has evolved multifaceted language policies vis-à-vis these communities.

Although theoretical frameworks are a useful analytical tool, this paper has demonstrated that no single theory or model applies to the protection of minority-language communities in Canada. There are many advantages to a multifaceted language policy. A multifaceted language policy offers significant flexibility. A language policy underpinned by multiple theories and embracing different mechanisms is also more realistic given the politics underlying linguistic conflicts in Canada.[181] Although work remains to be done, a multifaceted policy appears to have benefited each of Canada's linguistic-minority communities.

Act, R.S.Y. 2002, c. 133, s. 1 of "the significance of aboriginal languages in the Yukon and wishes to take appropriate measures to preserve, develop and enhance those languages in the Yukon".

[180] Professor Fontaine has urged the federal government to extend the same level of protection to Aboriginal languages as to French and English minority-language communities: Lorena Sekwan Fontaine, "Re-conceptualizing and Re-imagining Canada: Opening Doors for Aboriginal Language Rights" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006) 309, at 309. See also Raymond Samuels II, ed., *Toward a Native-Canadian Equal Rights Amendment: Replacing the current Official Languages and Indian Acts in favour of a rejuvenated Constitutional framework for the preservation and promotion of aboriginal languages and cultures* (Kanata: Agora Cosmopolitan, 2003).

[181] Joseph Eliot Magnet, *Modern Constitutionalism* (Markham, ON: LexisNexis Canada, 2004), at 146-49.