Institutional Reform: Maintenance Claims and Equality for Canada's Official-Language Minorities

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I. Language Rights as Equality Rights

Canada's constitutional development has searched for appropriate mechanisms to regulate the cohabitation of two powerful language communities in a single state. Canada's federal system was born out of necessity to grant self-government to the French linguistic community in Quebec.[1] Today, Canadian constitutional evolution occurs where additional communities, particularly the Aboriginal peoples, present urgent demands for greater autonomy.

Canada's federal system operates on territorial and personal bases. It may also be characterized according to whether jurisdiction extends to multiple sectors or is limited to one sector. At the territorial level, the federal system grants the French- and English-speaking language

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1 [B]ut . . . we found that such a [legislative union] was impracticable. In the first place, it would not meet the assent of the people of Lower Canada, because they felt that in their peculiar position — being in a minority, with a different language, nationality, and religion from the majority . . . their institutions and their laws might be assailed . . . So that those who were, like myself, in favour of a Legislative Union, were obliged to modify their views and accept the project of a Federal Union as the only scheme practicable. . . .

Speech of Sir John A. Macdonald on the motion to adopt the Quebec Resolutions, as reprinted in H.E. Egerton and W.L. Grant, *Canadian Constitutional Development* (Toronto: Musson Book, 1907), at 362-63. It must be noted that Canada's federal system is increasingly reflecting the multinational character of the country as existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and given effect by the judiciary and as negotiations regarding new agreements bear fruit.

communities self-government in respect to local matters.[2] Local self-government promises that the language communities can protect their language and culture, each in its own special way.[3] In the seminal *Reference re Secession of Quebec*, the Supreme Court of Canada explained:

> The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the *Union Act, 1840* (U.K.), 3-4 Vict., c. 35, had not been satisfactory. The 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. It also made provision for certain guaranteed representation within the federal Parliament itself.
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> Federalism was also welcomed by Nova Scotia and New Brunswick, both of which also affirmed their will to protect their individual cultures and their autonomy over local matters. All new provinces joining the federation sought to achieve similar objectives, which are no less vigorously pursued by the provinces and territories as we approach the new millennium.[4]

While the federal system is principally organized on a territorial basis, the boundaries of the provincial governments are not perfectly

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[2] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 92-93, 95, reprinted in R.S.C. 1985, App. II, No. 5.

[3] Self-government in relation to local matters has also been granted to certain Aboriginal communities, for instance in the territory of Nunavut. See *Nunavut Act*, S.C. 1993, c. 28, ss. 23, 25-27.

[4] [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 59-60 (S.C.C.). Regarding the success of the French-speaking majority in Quebec in resisting assimilation pressures, see R.Y. Bourhis, "Reversing Language Shift in Quebec" in J.A. Fishman, ed., *Can Threatened Languages Be Saved?* (Cleveland, England: Multilingual Matters, 2001). Nunavut is set to use the principle of federalism to facilitate the pursuit of collective goals of a cultural and linguistic minority which forms the majority in the territory. See Government of Nunavut, *Proposed Inuit Language Protection Bill* and *Proposed Official Languages Bill*, introduced in the Fourth Session of the Second Legislative Assembly of Nunavut by the Honourable Minister of Culture, Language, Education and Youth as tabled documents on March 28, 2007.

congruent with the language communities. Accordingly, Canada has entrenched special constitutional mechanisms to protect the French-speaking national minority of Quebec, and the English and French linguistic minorities in the provinces and territories. Some mechanisms predate Confederation, others were created in 1867, and still others were developed in 1982 and in 1993.

Canada protects these sub-national groups by allowing them to establish and maintain separate institutions.[5] Two of these institutions amount to a form of non-territorial self-government in the education sector.[6]

It is inaccurate to describe Canadian federalism in bipolar terms. This discounts the increasingly important role of municipal governments.[7] While these governments are not constitutionally entrenched,[8] new powers are increasingly devolved to them.[9] Courts treat the decisions of locally elected officials with deference,[10] and take a broad, purposive view of municipal powers.[11]

As well, the linguistic communities exercise constitutional power through other institutions. Section 23 of the *Canadian Charter of Rights and Freedoms*[12] carved government powers out of the plenary grant of

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[5] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, ss. 93, 133; ss. 16-23 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.

[6] Statutory sectoral self-government has also been granted to some Aboriginal communities. See for instance *The Education Act for Cree, Inuit and Naskapi Native Persons*, R.S.Q. c. I-14, Parts X-XI, and the regulations made thereunder.

[7] Some French or English communities, although they constitute a minority in their province or territory, form a majority at the municipal level. Others are able to exert considerable influence at that level. See for example *Canadians for Language Fairness v. Ottawa (City)*, [2006] O.J. No. 3970 (Ont. S.C.J.); City of Clarence-Rockland, By-law No. 2005-12, *Règlement pour régir les enseignes permanentes, les enseignes temporaires et les panneaux publicitaires installés sur le territoire de la Cité de Clarence-Rockland* (January 10, 2005), s. 20(3).

[8] See for example *Baie D'Urfé (Ville) c. Québec (Procureur général)*, [2001] J.Q. No. 2954, [2001] R.J.Q. 1589 (Que. S.C.), affd [2001] J.Q. No. 4821 (Que. C.A.), leave to appeal to S.C.C. refused [2001] C.S.C.R. no 524 (S.C.C.).

[9] See, for example, *Stronger City of Toronto for a Stronger Ontario Act, 2006*, S.O. 2006, c. 11, ss. 6, 8; *Municipal Act, 2001*, S.O. 2001, c. 25, s. 11; *Municipal Government Act*, R.S.A. 2000, c. M-26, ss. 7-9.

[10] *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] S.C.J. No. 14, [2000] 1 S.C.R. 342 (S.C.C.); *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] S.C.J. No. 42, [2001] 2 S.C.R. 241 (S.C.C.); *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] S.C.J. No. 19, [2004] 1 S.C.R. 485 (S.C.C.).

[11] This marks a change with the past: see the restrictive view evident in, for example, *Verdun (City) v. Sun Oil Co.*, [1952] 1 S.C.R. 222, at 228 (S.C.C.).

[12] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11.

authority the *Constitution Act, 1867* grants to the legislatures in relation to education and vested these in the linguistic communities.[13] Where the French- and English-speaking communities are a minority in a province or territory, their school boards, acting through elected representatives, are granted exclusive control over all aspects of minority education pertaining to linguistic and cultural concerns.[14] As Nicolas Rouleau explains in "Section 23 of the Charter: Minority-Language Education Rights", elsewhere in this volume, the official-language minorities have exclusive authority to make decisions regarding minority-language instruction and facilities, including those pertaining to the expenditure of funds provided for such instruction and facilities, the location of such facilities, the appointment and direction of those responsible for the administration of such instruction and facilities, the establishment of educational programs and the recruitment and assignment of teachers and other personnel. This development is nascent, is growing in significance, and has an impact that varies considerably across the country.[15]

The result of these trends is that Canada's federal system is increasingly moving away from the bipolar model, towards a multipolar one characterized by very complex arrangements.

A complex model of equality between groups has been set out elsewhere by Professor Magnet.[16] According to this model, equality claims should be categorized according to whether they are non-discrimination claims, adaptive claims or maintenance claims. The first category intends to overcome discrimination by eradicating barriers that obstruct the participation of all in society. Adaptive claims are made by persons who want to participate fully in society but who face barriers which cannot be dismantled and who therefore require assistance to adapt. Maintenance claims are quite different:

> Maintenance claims are advanced by subnational groups that want to maintain intact, indefinitely into the future, the distinguishing features

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[13] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 93.

[14] Subject to conditions and qualifications, see *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, at 377 (S.C.C.); *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1, [2000] 1 S.C.R. 3 (S.C.C.).

[15] See M. Power & P. Foucher, "Language Rights and Education" in M. Bastarache, ed., *Language Rights in Canada*, 2d ed. (Conwansville, Qc.: Yvon Blais, 2004).

[16] J.E. Magnet, *Modern Constitutionalism: Identity, Equality and Democracy* (Markham, ON: LexisNexis Canada, 2004), ch. 6.

> of identity that bind them together as a distinctive society. These groups are interior nations, not like France or Argentina, but nations nevertheless. They are bound together by language, religion, the experience of colonization, a shared history of a life lived in common — particularly a life tinged by oppression or other defining historical experience, that hardens community identity. These communities claim the right to establish and maintain segregated institutions where the common communal life can be carried on, and reproduced in succeeding generations. They claim protection from the forces of mass economy and culture that erode their languages and cultures, and assimilate them into the undifferentiated mass of the surrounding society. Unlike the immigrant communities, they do not want to integrate into pan-Canadian institutions, which they fear as cauldrons of assimilation. Their demand is for institutions of their own — jurisdiction, governance machinery, public enterprise, land, schools, health services and more. They want to maintain their ancient cultures, not dissolve them into the mass of Canadian mainstream.[17]

Maintenance claims are a very specific type of equality claim. Non-discrimination and adaptive claims are claims on behalf of individuals for full participation in society. By contrast, maintenance claims premise a form of communal separation with autonomy granted to communal authorities. Proponents of maintenance claims demand separated institutions where their minority community can participate fully in their own cultures, relatively isolated from contact with the majority and the resulting pressures contact brings to assimilate.[18]

Professor Magnet's work showed that Canada experiences maintenance claims from four different communities: the national minority of Quebec, French and English linguistic minorities in the provinces and territories, certain denominational communities and Aboriginal peoples. Professor Magnet explicated four principal reasons why these communities make maintenance claims. First, these communities believe they require separate institutions or partitioning of pan-societal institutions to protect them from assimilating forces created by languages and cultures in contact. Second, possessing their own institutions helps sub-national groups protect their status when the state makes efforts to build a national culture. Third, maintenance claims help

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[17] J.E. Magnet, *Modern Constitutionalism: Identity, Equality and Democracy* (Markham, ON: LexisNexis Canada, 2004), at 224-27.

[18] Professor Magnet set out this novel theory in detail in J.E. Magnet, *Modern Constitutionalism: Identity, Equality and Democracy* (Markham, ON: LexisNexis Canada, 2004), at 228.

to counteract detrimental impacts on minority cultures caused by the globalization of mass culture and the dominance of the English language. Lastly, erosion of communities and cultures from various other causes gives rise to maintenance claims in reaction.[19]

The fundamental purpose of maintenance claims is to provide sub-national groups with adequate means to perpetuate their communities, languages and cultures. When these means are obtained — normally in the form of segregated institutions with varying degrees of autonomy and public power — equality between groups is achieved.[20] Put another way,

> equality between groups means that interior nations and groups analogous thereto must be enabled to persist and survive by an endowment of institutional support proportioned to their necessities.[21]

In Canada, language rights intend to preserve both official languages and their cultures.[22] Language rights impact on the future of minority-language communities. The exercise of minority-language rights brings into play a unique collective aspect even though the rights are usually granted to individuals.[23] This is why some insist that language rights are *collective rights*. They point out that these rights can only be exercised by people who belong to a group, and that sometimes only the group (and not individual group members) can exercise the right.[24] Others say "these rights are not primarily described as

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[19] J.E. Magnet, *Modern Constitutionalism: Identity, Equality and Democracy* (Markham, ON: LexisNexis Canada, 2004), at 228-30.

[20] J.E. Magnet, *Modern Constitutionalism: Identity, Equality and Democracy* (Markham, ON: LexisNexis Canada, 2004), at 237. See generally J.E. Magnet, "Equality between Linguistic Communities in Canada" in A. Braën, P. Foucher & Y. Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Canada, 2006).

[21] J.E. Magnet, *Modern Constitutionalism: Identity, Equality and Democracy* (Markham, ON: LexisNexis Canada, 2004), at 244.

[22] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, at paras. 4-7 (S.C.C.).

[23] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3, at para. 28 (S.C.C.).

[24] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, at para. 23 (S.C.C.). See, for example, ss. 1, 20(1), 23, 24 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; *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), Parts IV-V, and *Official Languages (Communications with and Services to the Public) Regulations*, S.O.R./92-48; *Official Languages Act*, R.S.N.B., c. O-0.5, ss. 35-41; *French Language Services Act*, R.S.P.E.I. 1988, c. F-15.1, s. 7; *Languages Act*, R.S.Y. 2002, c. 133, ss. 6, 9; *Official Languages Act*, R.S.N.W.T. 1988, c. O-1, ss. 11, 32(1); *French Language Services Act*, R.S.O. 1990, c. F.32, ss. 5(1), 7 ("*FLSA*"). For instance, regarding the *FLSA*, contrast *Lalonde v. Ontario (Health Services*

collective rights, even though they presuppose that a language community is present to benefit from their exercise."[25] They argue from the formulation of certain language rights, which designate an individual as the rights bearer or subject, with the right arising under certain conditions, including that the individual belongs "to specific categories of rights holders".[26]

It remains unclear whether, or the extent to which, describing language rights as social and collective rights, or as individual and civil rights, is analytically helpful, or juridically useful.[27]

Maintenance claims have long characterized Canadian constitutional development. Canada adapted the traditional territorial federal system to the special requirements of linguistic, denominational and Aboriginal minorities. The thesis of Canada's legal framework as concerns its sub-national groups is that these groups require adequate means to perpetuate their societies, communities, cultures, languages or religions. The means of perpetuation amount to some form of autonomy, generally to establishment of institutions under the minority community's control.

Canada's constitution makers have been enthusiastic consumers of the idea of giving effect to claims for autonomy and separate institutions throughout Canadian history. Nevertheless, Canada's overall experience with maintenance claims is unsatisfactory.[28] Maintenance claims are meant to facilitate different sub-national communities to cohabit in a single state. Autonomy and separate institutions seek to make conflict between these groups more manageable, and to offer public procedures providing for more satisfactory and longer-lasting conflict resolution. Canada's experience with maintenance claims usually yielded opposite results, with significant, recent exceptions. When local conflicts push Canadian minorities to assert maintenance claims in court, those conflicts are generally exacerbated. Hostility increases. Minorities

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Restructuring Commission), [2001] O.J. No. 4767, 56 O.R. (3d) 505 (Ont. C.A.) and *Giroux v. Ontario (Ministry of Consumer and Business Services)*, [2005] O.J. No. 2569, 75 O.R. (3d) 759 (Ont. Div. Ct.).

[25] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, at para. 23 (S.C.C.).

[26] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, at para. 23 (S.C.C.).

[27] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, at para. 33 (S.C.C.).

[28] Much has occurred regarding the administration of collective rights in Canada since the publication of J.E. Magnet, *Official Languages of Canada: Perspectives from Law, Policy and the Future* (Cowansville, Qc.: Yvon Blais, 1995), ch. 8.

usually lose their cases. Victories usually come at tremendous social, political and economic costs.[29] The experience is often traumatic for the minority community and regularly produces effects which linger over long periods.

This pattern is observed throughout Canadian history, and is especially true for the linguistic minorities. Many recurrent conflicts over schools have not been resolved successfully through litigation. Clashes between the linguistic communities with respect to participation in the legislatures, courts and government administration reveal a similar pattern. The Canadian experience suggests that maintenance claims often fail to produce stable management of linguistic conflict.

We must note the possibility of a recent change, since the Supreme Court of Canada's 1998 decision in *R. v. Beaulac*.[30] It is too early to calculate whether that apparent change in judicial attitude will make significant changes on the ground for minority communities. Different attitudes about that appear in the various papers in this volume.

We would also be remiss not to heed at the outset the particular equilibrium struck in the province of New Brunswick. It is the only jurisdiction where the English and French linguistic communities have equality of status and equal rights and privileges vis-à-vis both the federal and provincial governments. The French and English linguistic communities of New Brunswick enjoy the right to distinct educational institutions and such distinct cultural institutions as are necessary for their preservation and promotion.[31] Subsection 16.1(1) of the Charter

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[29] Regarding the saga of *Lalonde v. Ontario (Health Services Restructuring Commission)*, [1999] O.J. No. 4488, 48 O.R. (3d) 50 (Ont. Div. Ct.), affd [2001] O.J. No. 4767, 56 O.R. (3d) 505 (Ont. C.A.), see M. Gratton, *Montfort, la lutte d'un peuple* (Ottawa: Centre franco-ontarien de ressources pédagogiques, 2003). For a history of the entrenchment and implementation of s. 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, see M. Behiels, *Canada's Francophone Minority Communities Constitutional Renewal and the Winning of School Governance* (Montreal: McGill-Queen's University Press, 2005). Regarding the epic legal battle of the French-speaking community of the Northwest Territories for its survival, see *Fédération franco-ténoise v. Canada*, [2001] F.C.J. No. 1093, [2001] 3 F.C. 641 (F.C.A.), revg [2001] F.C.J. No. 1430, [2001] 1 F.C. 241 (F.C.T.D.). Further, see *Fédération franco-ténoise v. Canada (Procureure générale)*, [2006] N.W.T.J. No. 32 (N.W.T.S.C.), under appeal, and [2002] N.W.T.J. No. 110 (N.W.T.S.C.); [2005] N.W.T.J. No. 76 (N.W.T.S.C.); [2005] N.W.T.J. No. 77 (N.W.T.S.C.); [2005] N.W.T.J. No. 78 (N.W.T.S.C.); [2005] N.W.T.J. No. 99 (N.W.T.C.A.); [2005] N.W.T.J. No. 100 (N.W.T.C.A.).

[30] [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.).

[31] Section 16.1 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, was added by the *Constitution Amendment, 1993 (New Brunswick)*, S.I./93-54. See also *Charlebois v. Moncton (City)*, [2001] N.B.J. No. 480, 242 N.B.R. (2d) 259, at para. 16 (N.B.C.A.); *R. v. McGraw*, [2007] N.B.J. No. 271, 304 N.B.R. (2d) 371, at para. 35 (N.B.C.A.). See also *An Act Recognizing the*

sets out a principle of general application within the province of New Brunswick and is binding on Parliament and the federal government in the same way as the other general provisions of the Charter.[32] Moreover, New Brunswick is the only Canadian jurisdiction in which language rights in respect of services are not territorially confined.[33] For these reasons, the path towards the advancement of the equality of status and use of English and French is unique in New Brunswick.

However, it would be incorrect to conclude that maintenance claims litigation works better in New Brunswick. Despite the formal legal equality it enjoys, the French-speaking community remains a demographic, social and political minority in the province, subject to assimilation. Collective rights litigation has not reversed the impacts this causes, nor has the provincial government been a neutral actor in respect of the linguistic equilibrium in New Brunswick.[34]

II. Equality Rights of Linguistic Minorities in Canadian Courts

There are few language rights cases that official-language minorities have won.[35] This is particularly the case before *R. v.*

Equality of the Two Official Linguistic Communities in New Brunswick, S.N.B. 1981, c. O-1.1; regarding the collective aspects of this Act, see New Brunswick, *Journal of Debates of the Legislative Assembly of New Brunswick*, 1981 Sess., (10 July 1981), at 6091; (16 July 1981), at 6644, 6656.

[32] Section 32(1) 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; and see *Société des Acadiens et Acadiennes du Nouveau-Brunswick v. Canada*, [2005] F.C.J. No. 1587, 2005 FC 1172, at para. 54 (F.C.), overturned but not on this point by [2006] F.C.J. No. 805, 2006 FCA 196, leave to appeal to S.C.C. granted [2006] C.S.C.R. no 309 (S.C.C.).

[33] Section 20(2) 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.

[34] This is evidenced, *inter alia*, by the positions advanced by the Attorney General for New Brunswick in a number of cases regarding the status and rights of the French and English communities. See, for example, the factum of the Attorney General for New Brunswick, intervenor, in *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563 (S.C.C.).

[35] See *Winnipeg (City) v. Barrett*, [1892] A.C. 445 (P.C.); *Trustees of the Roman Catholic Separate Schools for Ottawa v. Mackell*, [1917] A.C. 62 (P.C.); *Roman Catholic Separate School Trustees for Tiny v. The King*, [1928] A.C. 363 (P.C.); *Robin v. Collège de St-Boniface*, [1984] M.J. No. 192, 15 D.L.R. (4th) 198 (Man. C.A.); *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 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.); *Baie D'Urfé (Ville) v. Québec (Procureur général)*, [2001] J.Q. No. 2954, [2001] R.J.Q. 1589 (Que. S.C.), affd [2001] J.Q. no 4821, [2001] R.J.Q. 2520 (Que. C.A.), leave to appeal to S.C.C. refused [2001] C.S.C.R. no 524 (S.C.C.); *Chubbs v. Newfoundland and Labrador*, [2004] N.J. No. 174, 237 Nfld. & P.E.I.R. 146 (Nfld. S.C.T.D.); *Forum des maires de la Péninsule*

Beaulac.[36] *Société des Acadiens du Nouveau-Brunswick v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*[37] shows how bad things can get. The Supreme Court of Canada concluded that the Charter's official-language sections should be read as "permitting the litigant to use the language he or she understands but allowing those [government officials] dealing with him or her to use the language he or she does not understand".[38] In *MacDonald v. Montreal (City)*, Justice Wilson reflected on this conclusion and wondered, cuttingly, "[what] kind of linguistic protection would that be?"[39] The point to note is that the Supreme Court of Canada's ruling transformed a guarantee for minority-language communities to use their own language into a right for the majority, acting through the legislature or administration, to deal with minority-language communities in the language of the majority. The problem continued to smoulder in the courts,[40] spurred enactment of legislation which did not solve the issue and persists to this day.[41]

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acadienne v. Canada (Canadian Food Inspection Agency), [2004] F.C.J. No. 1235, 2004 FCA 263 (F.C.A.), leave to appeal to S.C.C. granted [2004] C.S.C.R. no 449 (S.C.C.), then withdrawn, [2005] S.C.J. No. 85, 2005 SCC 85 (S.C.C.); *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563 (S.C.C.); *Giroux v. Ontario (Ministry of Consumer and Business Services)*, [2005] O.J. No. 1279 (Ont. S.C.J.) and [2005] S.C.J. No. 2569, 75 O.R. (3d) 759 (Ont. Div. Ct.), leave to appeal to C.A. refused, leave to appeal to S.C.C. refused; *Desrochers v. Canada (Industry)*, [2005] F.C.J. No. 1218, 2005 FC 987 (F.C.), revd [2006] F.C.J. No. 1777, 2006 FCA 374 (Fed. C.A.), leave to appeal to S.C.C. granted [2007] C.S.C.R. no 27 (S.C.C.); *Société des Acadiens et Acadiennes du Nouveau-Brunswick c. Canada*, [2006] F.C.J. No. 805, 2006 FCA 196 (F.C.A.), leave to appeal to S.C.C. granted [2006] C.S.C.R. no 309 (S.C.C.). Some cases regarding Aboriginal rights have had more success, for instance regarding Aboriginal title, which is seen as a collective right in land. See *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.); *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 (S.C.C.); *R. v. Gladstone*, [1996] S.C.J. No. 79, [1996] 2 S.C.R. 723 (S.C.C.). See generally J. Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38 U.B.C. L. Rev. 285; J. Borrows, "Constitutional Law from a First Nation Perspective: Self-government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1; P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

[36] [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.).

[37] [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549 (S.C.C.).

[38] This is the characterization of Justice Wilson, who concurred in the result only: *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 540 (S.C.C.).

[39] [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, at 540 (S.C.C.).

[40] See, for example, *R. v. Mercure*, [1988] S.C.J. No. 11, [1988] 1 S.C.R. 234 (S.C.C.); *R. v. Paquette*, [1990] S.C.J. No. 99, [1990] 2 S.C.R. 1103 (S.C.C.); *R. v. Cross and Lazore*, Quebec S.C. (Terrebonne), No. 700-01-000009-013, April 15, 1991 (Que. S.C.); *R. v. Monture*, Quebec S.C. (Terrebonne), No. 700-01-000491-913, May 2, 1991 (Que. S.C.).

[41] *Criminal Code*, R.S.C. 1985, c. C-46, s. 530.1(d)-(e); *Canada (Commissioner of Official Languages) v. Canada (Department of Justice)*, [2001] F.C.J. No. 431, at paras. 177-183 (F.C.T.D.);

Even in those cases minorities won, they often failed to achieve their objectives in the aftermath.[42] The problem which gave rise to litigation was not resolved and did not go away. This record must give pause to those who propose to accommodate linguistic minorities (or other sub-national groups) by granting them constitutional collective rights. This strategy has so far failed to be a principal reconciler of linguistic tension in Canada.

The Supreme Court of Canada's historical difficulty with the theory and administration of constitutional rights draws attention to a larger and more general hostility of the Canadian judicial system towards the maintenance claims of minority communities. In *Quebec Assn. of Protestant School Boards v. Quebec (Attorney General)*, the Superior Court considered Quebec's argument that minority-language educational rights guaranteed by section 23 of the Charter were collective rights established in the interest and for the benefit of the Anglo-Quebec minority. Quebec argued that while the educational provisions of the *Charter of the French language* completely denied rights for some individual anglophones, these stipulations only limited, but did not completely deny, the collective right of the anglophone minority. The Superior Court's reaction to Quebec's submission signals caution to those who would rely primarily on collective rights to protect the semi-autonomous status of minority communities:

> Quebec's argument puts forward a totalitarian view of society to which the Court does not subscribe. Human beings are, to us, of

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R. c. Schneider, [2004] N.S.J. No. 315, 226 N.S.R. (2d) 110 (N.S.C.A.); *R. v. Beauvillier*, [1998] S.J. No. 625 (Sask. Q.B.); *R. v. Potvin*, [2004] O.J. No. 2550, 69 O.R. (3d) 641 (Ont. C.A.). See also *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), ss. 16, 18-19. See also *Official Languages Act*, R.S.N.B., c. O-0.5, ss. 18-23; *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 126(2)1.

[42] Consider for instance *Pellant v. Hébert*, St. Boniface Co. Ct., March 9, 1892, reported at (1981), 12 R.G.D. 242; *Bertrand v. Dussault*, St. Boniface Co. Ct., January 30, 1909, reported at (1977), 77 D.L.R. (3d) 458; *Forest v. Manitoba (Attorney General)*, [1979] S.C.J. No. 86, [1979] 2 S.C.R. 1032 (S.C.C.); *Reference re Manitoba Language Rights (Man.)*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.); *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 70, [1985] 2 S.C.R. 347 (S.C.C.) (the minorities won these cases, but their language rights were not implemented at all, or not fully implemented); *Re Manitoba Language Rights Order*, [1990] S.C.J. No. 142, [1990] 3 S.C.R. 1417 (S.C.C.); *Reference re Manitoba Language Rights*, [1992] S.C.J. No. 2, [1992] 1 S.C.R. 212 (S.C.C.) (these cases became necessary to deal with the unimplemented rights); *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342 (S.C.C.) (the rights were declared but many governments still have not implemented certain rights despite subsequent litigation); *Chubbs v. Newfoundland and Labrador*, [2004] N.J. No. 174, 237 Nfld. & P.E.I.R. 146 (Nfld. S.C.T.D.); *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201 (S.C.C.). In *Brophy v. Manitoba (Attorney General)*, [1895] A.C. 202 (P.C.), the political system took over from the courts. The religious and language entitlements of the Manitoba francophones continued to be eroded for the next 20 years.

> paramount importance and nothing should be allowed to diminish the respect due to them. Other societies place the collectivity above the individual. They use the Kolkhoze[43] steam-roller and see merit only in the collective result even if some individuals are left by the wayside in the process.
>
> This concept of society has never taken root here . . . and this court will not honour it with its approval.[44]

This ruling attracted sharp criticism from commentators: "[L]a conclusion ne découle pas des prémisses".[45] Some journalists were more blunt: "On doit donc regretter que le juge Deschênes ait, par certains de ses propos, contribué à embrouiller davantage dans l'opinion publique des concepts juridiques qui, bien compris, peuvent pourtant favoriser l'avènement d'une plus grande justice."[46]

Despite the sometimes hostile reaction some courts have towards the concept of group rights, there are recent noteworthy developments. In *Quebec (Attorney General) v. Greater Hull School Board*,[47] the Supreme Court of Canada considered whether school tax legislation in Quebec was offensive to entrenched denominational rights.[48] The Court ruled that section 93 of the *Constitution Act, 1867*[49] gave a "right or power of local self-government to denominational schools" and that "the rights contemplated by s. 93(1) . . . may be characterised as 'collective rights'". The Supreme Court added:

> What the characterization does suggest, however, is that it is the interests of the class of persons or community as a whole in

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43 A form of collective farming in the Soviet Union.

44 *Quebec Assn. of Protestant School Boards v. Quebec (Attorney General)*, [1982] C.S. 673, 140 D.L.R. (3d) 33, at 64 (Que. S.C.), affd, [1984] S.C.J. No. 31, [1984] 2 S.C.R. 66 (S.C.C.). The Supreme Court of Canada made no reference to the quoted remark of the Superior Court.

45 P. Carignan, "De la notion de droit collectif et de son application en matière scolaire au Québec" (1984) 18 R.J.T. 1, at 97. See also M. McDonald, "Collective Rights: The Canada and Quebec Clauses" (Lecture at the International Association for Legal and Social Philosophy Meeting, May 31, 1983), at 33 [unpublished].

46 J.-P. Proulx, "Droits individuels et droits collectifs" *Le Devoir* [de Montréal] (October 2, 1982) Cahier 1, at 17.

47 [1984] S.C.J. No. 61, [1984] 2 S.C.R. 575 (S.C.C.).

48 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 93, as it read before the entrenchment of s. 93A by the *Constitution Amendment, 1997 (Quebec)*, S.I./97-141.

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

> denominational education that is to be looked at and not the interests of the individual ratepayer.[50]

Viewed in that light, Quebec's taxing procedure was deemed offensive to subsection 93(1) of the *Constitution Act, 1867*.[51]

In *Reference re an Act to Amend the Education Act*,[52] the Court of Appeal for Ontario described the language and denominational rights in sections 93 and 133 of the *Constitution Act, 1867*,[53] and sections 16 to 23 of the Charter as a "small bill of rights". These provisions, said the Court, "constitute a major difference from a bill of rights such as that of the United States, which is based on individual rights".[54] The Court continued:

> Collective or group rights, such as those concerning language and those concerning certain denominations to separate schools, are asserted by individuals or groups of individuals *because of* their membership in the protected group. Individual rights are asserted equally by everyone, *despite* membership in certain ascertainable groups. Collective rights protect certain groups and not others. To that extent, they are an exception from the equality rights provided equally to everyone . . .
>
> To apply this to s. 93, it is necessary to recognize that provision for the rights of Protestants and Roman Catholics to separate schools became part of 'a small bill of rights' as a basic compact of Confederation.[55]

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50 *Quebec (Attorney General) v. Greater Hull School Board*, [1984] S.C.J. No. 61, [1984] 2 S.C.R. 575, at 599 (S.C.C.).

51 The Supreme Court of Canada added in *Quebec (Attorney General) v. Hull (Greater School Board)*, [1984] S.C.J. No. 61, [1984] 2 S.C.R. 575, at 599-600 (S.C.C.):

> While the requirement of approval by referendum for taxation beyond [a] severely limited amount may be said to enlarge the democratic rights of the individual member of the class and to be a measure for the protection of his or her pocketbook, it is a measure or requirement which, because of its costs and uncertainty of outcome as indicated in the evidence, is prejudicial to the effective management of denominational schools in the interests of the class as a whole. . . . What is in issue here is . . . the effective power of school commissioners and trustees to provide for and manage denominational schools in the interests of the class.

52 [1986] O.J. No. 2355, 53 O.R. (2d) 513 (Ont. C.A.), affd *Reference re Bill 30*, [1987] S.C.J. No. 44, [1987] S.C.R. 1148 (S.C.C.).

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

54 [1986] O.J. No. 2355, 53 O.R. (2d) 513, at 566 (Ont. C.A.) affd *Reference re Bill 30*, [1987] S.C.J. No. 44, [1987] S.C.R. 1148 (S.C.C.).

55 *Reference re an Act to Amend the Education Act*, [1986] O.J. No. 2355, 53 O.R. (2d) 513, at 566-67 (Ont. C.A.), affd *Reference re Bill 30*, [1987] S.C.J. No. 44, [1987] S.C.R. 1148 (S.C.C.).

Previously, in *Société des Acadiens du Nouveau-Brunswick v. Minority Language School Board No. 50*, the New Brunswick Court of Queen's Bench commented on the individual/collective rights distinction. The Court considered amendments to legislation[56] which provided for the creation of separate French and English school systems to replace the existing bilingual system. The litigation involved a minority-language school board which accepted francophone students into its regular English program, and also permitted francophone students to enrol in its French immersion program designed for anglophones. The Court observed that New Brunswick abolished bilingual schools because they promoted assimilation, and thus harmed the linguistic minority children and the minority community. Bilingual schools led to "degeneration of the mother tongue [producing a] mixture common to colonized or assimilated peoples".[57] Counsel submitted that the impugned legislation advanced the interest of the francophone community by requiring that all francophone students be educated in the French system. The Court asked:

> [H]as the legislator declared that collective rights are to take precedence over the individual rights of the parents? Furthermore, did the legislator intend to take away the parent's right to place their children in the school system of their choice?[58]

Counsel's submission was rejected because it presented difficulties with respect to mixed families, assimilated francophones, and anglophones which the legislator seemed not to have considered.

The New Brunswick Court did not clearly decide whether, as submitted, the school provisions were "collective" rights, designed to protect the equality of the French linguistic community. The tenor of its remarks suggests a rejection of this view. This seems to be the reason why it held that parents had a large measure of choice in deciding to which school system they would send their children. Had the Court decided that the school provisions were collective rights of the minority

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[56] *Schools Act*, R.S.N.B. 1973, c. S-5; *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. O-1 (repealed). The Court of Queen's Bench also considered *An Act recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, S.N.B. 1981, c. O-1.1, which affirms "the equality of status and equal rights and privileges" of the English and French linguistic communities.

[57] *Société des Acadiens du Nouveau-Brunswick v. Minority Language School Board No. 50*, [1983] N.B.J. No. 245, 48 N.B.R. (2d) 361, at 381 (N.B.Q.B.).

[58] *Société des Acadiens du Nouveau-Brunswick v. Minority Language School Board No. 50*, [1983] N.B.J. No. 245, 48 N.B.R. (2d) 361, at 397 (N.B.Q.B.).

linguistic community, it may have felt constrained to limit the ability of parents to choose school systems.

The Court recognized that an *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick* concerned linguistic communities; there was nothing in the Act dealing with individual rights.[59] The Court concluded that parents did not require choice of a school system to give effect to the Act. Parental autonomy was subject to the child being competent in the main language of the school. The limit to parental autonomy stems from the collective rights idiom of the Act which intends to benefit linguistic communities and advance their equality, notwithstanding contrary claims asserted by individuals. The collective rights idiom elevates the rights of the community to protect the language spoken in its schools over the claimed freedom of individuals to choose a school system without regard to the child's language competence.

In *Solski*,[60] the Supreme Court of Canada considered subsection 73(2) of the *Charter of the French language*[61] in light of section 23 of the Canadian Charter. Subsection 73(2) provides that a child is not eligible for public instruction in English in Quebec if the child has not completed the "major part" of his or her education in English. Was the "major part" requirement of subsection 73(2) consistent with the Canadian Charter? This was the issue litigated in *Solski*. The Supreme Court of Canada explained that section 23 of the Canadian Charter provides a comprehensive code of minority-language education rights which affords a special status to minority English- or French-language communities.[62] Section 23 aims to promote substantive equality between language communities. However, some individuals will qualify under section 23 of the Charter without belonging to "the minority". Subsection 23(2) of the Charter "applies without regard to the fact that qualified parents or children may not be French or English, or may not speak those languages at home, despite the fact that the ultimate goal of s. 23 is to protect and promote minority language communities".[63]

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59 S.N.B. 1981, c. O-1.1; *Société des Acadiens du Nouveau-Brunswick v. Minority Language School Board No. 50*, [1983] N.B.J. No. 245, 48 N.B.R. (2d) 361, at 401 (N.B.Q.B.).

60 *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201 (S.C.C.).

61 R.S.Q. c. C-11.

62 *Charter of the French language*, R.S.Q. c. C-11; *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, at para. 20 (S.C.C.).

63 *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. 14, [2005] 1 S.C.R. 201, at para. 31 (S.C.C.).

Section 23 is remedial. Children who qualify under it are neither required to have a working knowledge of the minority language, nor to be members of a cultural group which speaks the minority language.[64] The controlling question in determining entitlement under subsection 23(2) focuses on one's affiliation with the official minority-language community.

The Supreme Court of Canada read down the impugned provision of the provincial education scheme. It explained that the strict mathematical approach mandated by the Minister of Education failed to deal fairly with many persons. It lacked flexibility. The scheme may have excluded a child from education vital to maintaining his or her connection with the minority community and culture. It ignored too many relevant factors in the assessment of a child's overall attachment to the minority community.[65] Among these were the time spent in an education program and the stage of education at which the choice of language of instruction was made. The Supreme Court emphasized that subsection 23(2) of the Charter must be interpreted so as to facilitate the reintegration of children who have been isolated from the cultural group which the minority school is designed to develop.[66]

Solski signals openness to the idea that language rights are primarily vehicles to implement equality for linguistic groups. True, language rights are cast in a form that ostensibly benefits individuals. That this is so did not prevent the Supreme Court from delving into the collective aspects of the right and using the collective aspects to expound the right into novel areas.

This development originates in the *Reference re Secession of Quebec*[67] and *R. v. Beaulac*.[68] The Supreme Court of Canada there elaborated upon two fundamental principles impacting equality between groups. The first is the principle of federalism, which facilitates the maintenance claims of cultural and linguistic minorities. The principle of federalism has played a role of considerable importance in the

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[64] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, at para. 33 (S.C.C.).

[65] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, at para. 37 (S.C.C.).

[66] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, at para. 44 (S.C.C.).

[67] [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C).

[68] [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.).

interpretation of the written provisions of the Constitution.[69] The second foundational principle is that of the protection of minorities. The Supreme Court of Canada explained

> that the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the *Charter*'s provisions for the protection of minority rights. . . .
>
> The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the *Charter*. Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation . . . Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.[70]

R. v. Beaulac is also seminal for sub-national groups. *Beaulac* considered section 530 of the *Criminal Code*, which grants the right to be tried by a judge and jury which speak the official language chosen by the accused. The Supreme Court of Canada recognized a linguistic community assumes a life of its own and develops needs and priorities that differ from those of its individual members. Linguistic communities will not be nurtured if the law protects only the individual's right to speak.[71] Language rights "must in all cases be interpreted purposively", said the Court. Accordingly, they must be interpreted "in a manner consistent with the preservation and development of official language communities in Canada".[72]

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69 *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 55-60 (S.C.C.).

70 *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 79-82 (S.C.C.).

71 *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 20 (S.C.C.).

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

The *Beaulac* rule overturns the broken precedents of the 1980s.[73] It is principled.[74] *Beaulac* governs situations implicating the language rights of individuals and also the rights of minority communities.[75] *Beaulac* shows that language rights are "a fundamental tool for the preservation and protection of official language communities",[76] and that the rights of these communities "are basic to the continued viability of the nation".[77]

The principles confirmed in *Reference re Secession of Quebec*[78] and *R. v. Beaulac*[79] have revivified collective rights litigation in Canada. Official-language minority communities have won collective rights cases.[80] Some of the cases are of great significance.

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[73] *Société des Acadiens du Nouveau-Brunswick 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 579-80 (S.C.C.); *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460 (S.C.C.) (these cases ruled that as language rights were the product of political compromises, they should be interpreted restrictively).

[74] Words in acts should be read in context, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: E.A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), at 87; *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, at para. 23 (S.C.C.); *Lalonde v. Ontario (Health Services Restructuring Commission)*, [2001] O.J. No. 4767, 56 O.R. (3d) 505, at paras. 137, 140 (Ont. C.A.).

[75] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, at paras. 4-7 (S.C.C.).

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

[77] *R. v. Mercure*, [1988] S.C.J. No. 11, [1988] 1 S.C.R. 234, at para. 46 (S.C.C.); *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] S.C.J. No. 55, [2002] 2 S.C.R. 773, at para. 22 (S.C.C.).

[78] [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

[79] [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.).

[80] See, for example, *Quebec (Attorney General) v. Quebec Assn. of Protestant School Boards*, [1984] S.C.J. No. 31, [1984] 2 S.C.R. 66 (S.C.C.); *Marchand v. Simcoe County Board of Education*, [1986] O.J. No. 714, 29 D.L.R. (4th) 596 (Ont. H.C.J.); *Marchand v. Simcoe County Board of Education (No. 2)*, [1987] O.J. No. 949, 44 D.L.R. (4th) 171 (Ont. H.C.J.); *Lavoie v. Nova Scotia (Attorney General)*, [1988] N.S.J. No. 57, 47 D.L.R. (4th) 586 (N.S. S.C.T.D.); *Assoc. française des conseils scolaires de l'Ontario v. Ontario*, [1988] O.J. No. 1762, 66 O.R. (2d) 599 (Ont. C.A.); *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342 (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 (S.C.C.); *Conseil des écoles séparées catholiques romaines de Dufferin et Peel v. Ontario (Ministre de l'Éducation et de la Formation)*, [1996] O.J. No. 2476, 30 O.R. (3d) 681 (Ont. Div. Ct.), affd [1996] O.J. No. 2564, 30 O.R. (3d) 686 (Ont. C.A.); *Assoc. des parents francophones de la Colombie-Britannique v. British Columbia*, [1998] B.C.J. No. 2727, 167 D.L.R. (4th) 534 (B.C.S.C.); *Conseil scolaire fransaskois de Zénon Park v. Saskatchewan*, [1999] S.J. No. 494, [1999] 3 W.W.R. 743 (Sask. Q.B.), affd [1999] S.J. No. 552, [1999] 12 W.W.R. 742 (Sask. C.A.); *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1, [2000] 1 S.C.R. 3 (S.C.C.); *Canada (Commissioner of Official Languages) v. Canada (Department of Justice)*, [2001] F.C.J. No. 431, 2001 FCT 239 (F.C.T.D.); *Charlebois v. Moncton (City)*, [2001] N.B.J. No. 480, 242 N.B.R. (2d) 259 (N.B.C.A.); *Quigley v. Canada (House of Commons)*, [2002] F.C.J. No. 858, [2003] 1 F.C. 132 (F.C.T.D.); *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003]

In the education sector the Charter guarantees French and English linguistic-minority communities exclusive control over all of the aspects of minority primary and secondary education which pertain to linguistic and cultural concerns.[81] In *Arsenault-Cameron v. Prince Edward Island*, a Minister of Education's decision was invalidated because it fettered the minority school board's exclusive right of management.[82] In that case, the court ruled the Minister was without power to impose his own criteria, nor could he substitute his decision for that of the school board simply because he was of the view that the school board's decision was not a good one.

Another significant education case challenged the delay in funding the construction of a school due to a government moratorium on new capital projects.[83] The court ruled that the open-ended moratorium infringed section 23 of the Charter and ordered the government to disburse millions of dollars for the immediate construction of a new high school.

Perhaps the high-water mark in the recent wave of collective rights litigation is *Lalonde v. Ontario (Health Services Restructuring Commission)*.[84] The French-speaking community challenged the legality

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S.C.J. No. 63, [2003] 3 S.C.R. 3 (S.C.C.); *Doucet v. Canada*, [2004] F.C.J. No. 1813, 2004 FC 1444 (F.C.); *Raîche v. Canada (Attorney General)*, [2004] F.C.J. No. 839, 2004 FC 679 (F.C.); *Assoc. des parents ayants droit de Yellowknife v. Canada (Procureur général)*, [2005] N.W.T.J. No. 56 (N.W.T.S.C.); *Fédération Franco-Ténoise v. Canada (Attorney General)*, [2006] N.W.T.J. No. 33 (N.W.T.S.C.); *Thibodeau v. Air Canada*, [2005] F.C.J. No. 1395, 2005 FC 1156 and [2005] F.C.J. No. 2001, 2005 FC 1621 (F.C.), affd [2007] F.C.J. No. 404, 2007 FCA 115 (F.C.A.); *R. c. Rémillard*, [2005] M.J. No. 212 (Man. Prov. Ct.).

[81] *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, at 377 (S.C.C.); *Arsenault-Cameron v. Prince Edward Island*, [2002] S.C.J. No. 1, [2000] 1 S.C.R. 3, at paras. 43-51 (S.C.C.).

[82] *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1, [2000] 1 S.C.R. 3, at para. 55 (S.C.C.).

[83] *Conseil des écoles séparées catholiques romaines de Dufferin et Peel v. Ontario (Ministre de l'Éducation et de la Formation)*, [1996] O.J. No. 2476, 30 O.R. (3d) 681 (Ont. Div. Ct.), affd, [1996] O.J. No. 2564, 30 O.R. (3d) 686 (Ont. C.A.). The lower court set the tone with these remarks:

> The right of citizens of Canada to have their children educated in what is called, conveniently and popularly, a "minority" language is a right constitutionally protected by s. 23 of the Canadian Charter of Rights and Freedoms. A democratically elected government may in most cases and quite properly determine what in its view are "the services we value most". If it is wrong in that determination it answers at the ballot box. In a climate of job loss, welfare cuts and general reduction of government services it is not difficult to imagine that a capital expenditure of over $10 million for an improved French language secondary school might not qualify as a service that "we value most", supposing that the "we" referred to therein is the non-Francophone majority. It is to avoid such a result that we have constitutionally protected rights.

[84] [1999] O.J. No. 4488, 48 O.R. (3d) 50 (Ont. Div. Ct.), affd [2001] O.J. No. 4767, 56 O.R. (3d) 505, at paras. 69-76, 127-87 (Ont. C.A.).

of government decisions which first would have closed, and later significantly downgraded, the only French-language teaching hospital in Ontario. The Ontario courts held that the decisions were illegal because they violated the *French Language Services Act*.[85] The requirements of this scheme were interpreted purposefully. None of the conditions which might have justified a limitation to the right to receive services in French had been met. Interestingly, the Court of Appeal for Ontario also quashed the decisions on the ground that, contrary to the constitutional principle of respect for and protection of minorities, the decision-maker had failed to consider adequately the linguistic and cultural significance of the hospital for the survival of the French-speaking minority. The Divisional Court had already concluded that

> [t]here is, and always has been since Confederation, a constitutional imperative for the protection and preservation of francophone minority rights — including, in our view, the right to have at least minimal institutions necessary to feed and nurture the continued existence and vitality of their language and culture. While there may be debate about the full extent of the particular services to be provided, a fundamentally francophone hospital in Ontario of the nature of Montfort is included in the package of such protection and preservation, in our view.[86]

Seen in proper context, *Lalonde v. Ontario* is a maintenance claim advanced by Ontario's French-speaking minority for an institution that is essential to the community's cultural survival.

This jurisprudence allows us to synthesize the following propositions about maintenance claims by linguistic minorities. Language rights differ significantly from individual rights, and involve distinct, if not novel, doctrines for their successful administration. With some exceptions, language rights elevate group security above individual freedom by protecting groups rather than individuals. Some rights create special limited autonomy for these groups by granting them the power to manage or control separate institutions.

It is possible to isolate a more general principle. Maintenance claims by linguistic minorities are designed to guarantee minority group survival by granting language communities autonomy over certain

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[85] R.S.O. 1990, c. F.32.

[86] *Lalonde v. Ontario (Health Services Restructuring Commission)*, [1999] O.J. No. 4488, 48 O.R. (3d) 50, at para. 83 (Ont. Div. Ct.). Regarding the role of government in protecting and transmitting a minority language, see *Fédération franco-ténoise v. Canada (Procureure générale)*, [2006] N.W.T.J. No. 32, at paras. 599, 600, 613 (N.W.T.S.C.), under appeal.

specific institutions which allow the communities to flourish, free from majority interference. Lawyers in future cases need to develop the proper evidence to bring this aspect out, and to present appropriate legal argument to assist Canadian courts to appreciate the special purposes of maintenance claims.

Maintenance claims are fragile, since they stand in sharp contrast to the individualistic urges flowing from most Charter sections.[87] Special care and diligent advocacy is necessary to protect their communal aspects from fading in the bright light cast by the civil liberties theories inhabiting the Charter.

Equality between linguistic communities requires majority acceptance of reasonable maintenance claims from minority communities that guarantee minorities autonomy over institutions crucial to their survival.

Certain maintenance claims are implemented by a grant of collective rights. These premise litigation, usually during periods of high conflict and local resentment towards minority groups. Judges are not immune from the local feeling. Overheated periods place courts in a difficult position. Courts have a natural desire to keep peace in the Canadian family, sometimes, as the broken precedents of the 1980s showed, by restrictively interpreting minority rights. Proper management of collective rights requires strong doctrine to help courts resist this tendency.

Courts have inherent institutional limits. In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*,[88] after finding a violation of section 23 of the Charter, the trial judge retained jurisdiction to hear reports on the status of the efforts of the respondent province and school board to use their "best efforts" to provide school facilities and programmes by set dates. The appeal focused on whether this remedy was appropriate and just in the circumstances.

The Supreme Court of Canada recognized that section 23 of the Charter "places positive obligations on governments to mobilize resources and enact legislation for the development of major institutional

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87 *Contra*: see, *inter alia*, *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016, at para. 17 (S.C.C.) (regarding the freedom of association guaranteed by s. 2(d) 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 also *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158 (S.C.C.) and *Raîche v. Canada (Attorney General)*, [2004] F.C.J. No. 839, 2004 FC 679 (F.C.) (regarding the right to vote guaranteed by s. 3 of the Charter and variances in size of voter populations among constituencies).

88 [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3 (S.C.C.).

structures".[89] It also recognized that minority language education rights are particularly vulnerable to government delay or inaction as a result of their "numbers warrant" requirement:

> For every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation which carries the risk that numbers might cease to "warrant". Thus, particular entitlements afforded under s. 23 can be suspended, for so long as the numbers cease to warrant, by the very cultural erosion against which s. 23 was designed to guard. In practical, though not legal, terms, such suspensions may well be permanent. If delay is tolerated, governments could potentially avoid the duties imposed upon them by s. 23 through their own failure to implement the rights vigilantly. The affirmative promise contained in s. 23 of the Charter and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected. ...[90]

The Supreme Court of Canada identified certain broad considerations that judges should bear in mind when evaluating the appropriateness of a potential remedy. One such consideration is that appropriate and just remedies "must employ means that are legitimate within the framework of our constitutional democracy", that is to say that "a court ordering a Charter remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary."[91] Judges must also bear in mind that a remedy for a breach of the *Charter* should be a

> judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.[92]

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[89] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3, at para. 28 (S.C.C.).

[90] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3, at paras. 29, 94 (S.C.C.). The Supreme Court of Canada was unanimous on this issue.

[91] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3, at para. 56 (S.C.C.).

[92] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3, at para. 57 (S.C.C.).

The Supreme Court approved the trial judge's remedy as appropriate and just.

Collective rights litigation is adversarial. It pits minority communities against the majority, often in a bitter struggle for minority survival. In order to fight the battle, linguistic minority groups have to retain lawyers, sometimes from the majority's élite. Even in cases where minority groups succeed at trial, promises and court orders sometimes go unenforced because of government intransigence, delay or inaction.[93] This means that more trips to court are required. The experience is alienating and frustrating. The minority's resources and strength as a community are diminished. The events regularly leave bitter divisions between factions within the minority group who are tempted to turn their forces on each other.[94] It seems that this is a structural feature of collective rights litigation.

Nor are these difficulties with collective rights litigation unique to the Canadian experience. They are also present in Europe, in South Asia, and elsewhere in the Americas. In the United States, for instance, constitutional protection for the newly freed slaves lay dormant in the Constitution for over 100 years. The community was unable to benefit from the 14th Amendment Equal Protection until the federal administration took aggressive action through federal entities to change Southern institutions.

Any overall assessment of Canada's collective rights will wallow in a mostly unhappy history of minority-language communities. Canada has been weakened by ineffective machinery to protect linguistic minorities from aroused majorities. A long hard look at legal history will caution prudence in relying on collective rights litigation as the

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[93] For example, *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3 (S.C.C.), where the government did not deny the existence or content of the parents' rights but rather failed to prioritize those rights and delayed fulfilling its obligations, despite clear reports showing that assimilation was "reaching critical levels". See also *Pellant v. Hébert*, St. Boniface Co. Ct., March 9, 1892, reported at (1981), 12 R.G.D. 242 and *Bertrand v. Dussault*, St. Boniface Co. Ct., January 30, 1909, reported at (1977), 77 D.L.R. (3d) 458, which ruled Manitoba's *Official Language Act* unconstitutional. In 1976, after a third such ruling in *R. v. Forest* (1976), 74 D.L.R. (3d) 704 (Man. Cty. Ct.), the Attorney General of Manitoba stated "The Crown does not accept the ruling of the Court with respect to the constitutionality of the *Official Language Act*": see *Re Forest and Registrar of Court of Appeal of Manitoba*, [1977] M.J. No. 106, 77 D.L.R. (3d) 445 (Man. C.A.).

[94] The authors are speaking from experience as legal counsel for several minority groups, Professor Magnet since the language difficulties of the late 1970s, Mr. Power since more recently. The strains described above have been observed to erode internal cohesiveness of some minority groups, sometimes leaving them exhausted, fearful, insular and resentful.

primary machinery to protect linguistic minorities, or as a driver of significant political change.

III. Towards Equality of French and English Minority Communities

In view of Canada's 100-plus years of experience with maintenance claims, it is wise to investigate other or additional methods to promote the equality of language minorities and assist them to flourish.

It would be best if constitutional structures required as little alteration as possible to implement suggested measures, lest one risk advocating change in the utopic sense.

State-funded bodies independent of the government and elected representatives may provide a complementary mechanism to advance and safeguard equality between linguistic communities. There are several language "commissioners" in the country. Only the federal Office of the Commissioner of Official Languages has thus far succeeded in making a significant contribution to the linguistic and cultural security of minority communities.[95] The independent federal Commissioner of Official Languages has proved to be a formidable force in promoting equality for linguistic minorities, investigating complaints, preparing or commissioning important reports, lobbying, proposing new policies and suggesting legislative amendments. The Commissioner may seek leave to intervene in any adjudicative proceeding relating to the status or use of English or French, and may apply to a court for a remedy in relation to a complaint or appear before a court on behalf of others. The Commissioner's main role is to ensure the protection and flourishing of minority communities by improving existing, shared institutions.

Progress could be made towards equality between Canada's linguistic communities by altering the decision-making processes of certain institutions. It would be helpful to recognize in certain institutional mandates, officially and explicitly, the legitimate linguistic and cultural interests of minority communities.

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[95] See *Official Languages Act*, R.S.C. 1985 c. 31 (4th Supp.), Parts IX-X. See, generally, online: Office of the Commissioner of Official Languages <www.ocol-clo.gc.ca>. In contrast, see *Official Languages Act*, S.N.B. 2002, c. O-0.5, s. 43; *Official Languages Act*, R.S.N.W.T. 1988, c. O-1, Part II; *French Language Services Act*, R.S.O. 1990, F.32, ss. 12.1-12.6. Regarding the record of the Languages Commissioner of the Northwest Territories, see *Fédération franco-ténoise v. Canada (Procureure générale)*, [2006] N.W.T.J. No. 32 (N.W.T.S.C.), under appeal.

This is the policy underlying Part VII of the federal *Official Languages Act*.[96] Part VII codifies the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada, to support and assist their development and to foster the full recognition and use of both English and French in Canadian society.[97] The judiciary prevented implementation of this mandate. The Federal Court of Appeal concluded that the prescription "does not create any right or duty that could at this point be enforced by the courts, by any procedure whatsoever".[98] Facing no sanction in the courts, federal institutions demonstrated tremendous difficulty, and at times ineptitude, in efforts to take the interests of minority communities into systematic consideration.

Parliament responded by making its commitment towards the French and English linguistic minority communities explicitly justiciable.[99] It remains to be seen whether the judiciary will provide appropriate sanctions. Discussing the historical context which led to the entrenchment of section 23 of the Charter, the Supreme Court of Canada explained that:

> minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which . . . practices may influence the language and culture of the minority.[100]

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96 R.S.C. 1985, c. 31 (4th Supp.).

97 *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 41(1). See, *inter alia*, House of Commons Debates (February 8, 1988), at 12704-06. The Prime Minister of Canada had this to say in July 1987: "Il est donc primordial que tous les ministères et organismes fédéraux contribuent au développement et à l'épanouissement de ces communautés minoritaires et qu'ils tiennent compte de leurs besoins et intérêts dans l'élaboration de leurs politiques et la mise en œuvre de leurs programmes.": Commissioner of Official Languages, *1988 Annual Report*, at 19. The *French Language Services Act*, R.S.O. 1990, c. F.32 has a similar objective: see *Lalonde v. Ontario (Health Services Restructuring Commission)*, [2001] O.J. No. 4767, 56 O.R. (3d) 505, at paras. 127-69 (Ont. C.A.).

98 *Forum des maires de la Péninsule acadienne v. Canada (Canadian Food Inspection Agency)*, [2004] F.C.J. No. 1235, 2004 FCA 263, at para. 46 (F.C.A.), leave to appeal to S.C.C. granted [2004] C.S.C.R. no 449 (S.C.C.), then withdrawn, [2005] S.C.J. No. 85, 2005 SCC 85 (S.C.C.). *Contra*: *Raîche v. Canada (Attorney General)*, [2004] F.C.J. No. 839, 2004 FC 679, at paras. 83-104 (F.C.); *Professional Institute of the Public Service v. Canada*, [1993] F.C.J. No. 57, [1993] 2 F.C. 90, at 108-109 (F.C.T.D.).

99 *An Act to amend the Official Languages Act (promotion of English and French)*, S.C. 2005, c. 41.

100 *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, at para. 52 (S.C.C.).

The experience of linguistic minority communities in Canada and elsewhere strongly suggests that internalizing minority interests in majority decision-making processes cannot suffice to guarantee linguistic and cultural security.

Can Canada create an autonomous institutional infrastructure to nurture the development of linguistic minority communities? Some argue that the future of sub-national groups turns on the completeness of their network of homogeneous institutions.[101] Canada's constitutional development has seen the creation of robust minority institutions before. The Quebec and Nunavut governments and legislatures were created and vested with self-governing powers to promote flourishing of minority French and Inuit communities. These are the most successful Canadian examples of devolving power to linguistic and cultural minorities in order to enhance their security and capacity to develop in their own particular way. The constitutional structure of the French-speaking minority is mirrored at the federal level by dual central institutions comprising substantial Quebec representation in the House of Commons, Senate, Supreme Court of Canada and the public service of Canada. These measures are in accordance with an important principle of federalism by which, generally speaking, "federal systems have been most successful where the . . . units have reflected, or have been reorganized to reflect, as far as possible, the most fundamental regional interests within the society."[102] However, the Quebec and Nunavut models are not easily transposable to the context of small, dispersed linguistic minority communities in Canada.

The institutional infrastructure considered here would go well beyond the constitutional provisions presently in place. The chief value of Canada's collective rights tradition is the recognition that minorities require a degree of institutional completeness and autonomy to counterbalance the forces of assimilation, and to check the majority's excesses during heated periods. Canada has traditionally created

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[101] See the burgeoning literature which followed R. Breton, "Institutional Completeness of Ethnic Communities and Personal Relations of Immigrants" (1964) 70 American Journal of Sociology 193. See also R. Bernard, *À la défense de Montfort* (Gatineau, Quebec: Le Nordir, 2000); *Lalonde v. Ontario (Health Services Restructuring Commission)*, [2001] O.J. No. 4767, 56 O.R. (3d) 505, at paras. 69-75 (Ont. C.A.). While homogeneity in certain institutions is necessary, minority communities may nevertheless thrive within shared institutions, where their position is adequately protected. Such protection is often inadequate or absent. See for instance the antiquated *University of Ottawa Act, 1965*, S.O. 1965, c. 137.

[102] R.L. Watts, *Multicultural Societies and Federalism* (Ottawa: Queen's Printer, 1970) (Studies of the Royal Commission on Bilingualism and Biculturalism, No. 8), at 86.

institutional autonomy for sub-national groups with greater or lesser degrees of self-government. Maintenance claims are part of that tradition. The problems with the design of Canadian language rights appear to result from inadequate or largely untested mechanisms for the protection of minority institutions. Too heavy a reliance on the courts for the first line of defence against majority interference has already been alluded to.

Close examination of Canada's language rights system reveals further defects. Many minority institutions are insufficiently autonomous. Others do not enjoy adequate legal protection. Some are too tightly integrated into majority institutions in the overarching structures of the higher levels of government.

Significant progress has been made in the education sector. However, in many jurisdictions, initial decisions on funding and curriculum content for minority-language schools still rest with the provincial or territorial governments. Many structures are relatively centralized and do not reflect the law and the theory regarding equality between linguistic communities in the education sector. Thus, linguistic minorities, if aggrieved by government decisions on these matters, are on the defensive, able only to submit to the court process, which sometimes disappoints.

The Supreme Court of Canada recognized that linguistic minorities have an "exclusive authority to make decisions relating to the minority language instruction and facilities".[103] Nevertheless, difficult, costly and divisive litigation has ensued in almost every jurisdiction of the country. Linguistic minorities have had to contest the nature of the grant of exclusive authority and its implementation, the right to instructional facilities and its implementation, and the right to access such facilities. Pressed to decide financially significant claims from public funds and cognizant of stiff resistance from elected officials,[104] the judiciary has sometimes hesitated to fully vest exclusive control over primary and secondary instruction in linguistic minorities.

Chubbs v. Newfoundland and Labrador[105] considered whether the number of children in a Labrador community located near the Quebec border warranted the provision of a separate school in Newfoundland

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[103] *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, at 377 (S.C.C.).

[104] See, for example, M. Dunne, "Trudeau spurs language debate" *Telegraph-Tribune* (Saint John) (May 5, 2007) A1, A9.

[105] [2004] N.J. No. 174, 237 Nfld. & P.E.I.R. 146 (Nfld. S.C.T.D.).

and Labrador. The province argued that a school was not warranted because it had concluded an arrangement with Quebec that provided for Newfoundland students to be transported daily to Quebec to receive instruction in the French language. The Superior Court of Newfoundland and Labrador concluded that, had the province created a school for the students in Labrador, it would have been inferior to the arrangement then in place. The Court placed no weight on the fact that the minority community, through its elected representatives, had studied the issue, including the proposed arrangement, and decided against having their children bused daily into another province. The reasons of the Superior Court read as though only the decision of the provincial Minister of Education was worthy of judicial respect.

In *East Central Francophone Education Authority v. Alberta (Minister of Infrastructure)*,[106] an Alberta francophone school board applied for judicial review of the provincial government's refusal to grant funding for the construction of a new school facility in a historically francophone community. Responding counsel requested that the school board's application be converted into an action. The school board resisted, citing the reasonableness, transparency and legitimacy of the school board's decision-making process. The school board also referred to the Supreme Court of Canada's recognition of its exclusive authority to make decisions relating to minority-language facilities, including expenditures of funds provided for such facilities.[107] The Court of Queen's Bench of Alberta agreed to convert the application into an action. The Court commented that "[TRANSLATION] it wasn't because a judge of the Supreme Court of Canada has said that section 23 [of the Charter] includes a right of management and control that [the Court of Queen's Bench] will issue a blank cheque for the construction of a new school."[108]

The school board asked the judiciary to approve its decision-making process in respect of a matter falling squarely within its jurisdiction. The Court's hyperbole raises questions about underlying attitudes towards minority autonomy in separate institutions, which is the core of maintenance claims.

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[106] Court of Queen's Bench of Alberta No. 0503-03615. The motion was heard in Edmonton on May 26, 2005. The parties ultimately reached a settlement.

[107] *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, at 377 (S.C.C.).

[108] *East Central Francophone Education Authority v. Alberta (Minister of Infrastructure)*, Court of Queen's Bench of Alberta No. 0503-03615.

Better than reliance on judicial supervision of collective rights would be if the self-governing institutions were themselves more truly autonomous and their borders made more impermeable to majority interference. This would require decentralization or multiplication of functions in overarching government structures. If this were done, the minority could more easily avoid the courts while still enjoying the institutional autonomy contemplated by the maintenance claims theory. The minority community's resources would be developed as the group became more self-reliant and more responsible for exercising authority over its own affairs. Enhancement of institutional autonomy would be a potent means to guarantee for minority communities the security required to achieve the substantive equality between linguistic communities promised to them in the collective rights provisions of the Charter.

What, specifically, would be included in an adequate institutional infrastructure designed for minority group preservation? Some may wish to consider the following: (1) mechanisms through which the group can interact with other groups, particularly the dominant or governing groups in the society (*i.e.*, political structures); (2) economic structures to dampen the assimilating pressures exerted by the mainstream economy; (3) mechanisms for the protection and promotion of the group's beliefs (*i.e.*, minority-language educational institutions and linguistic associations); (4) mechanisms of group definition (*i.e.*, a measure of control over membership); (5) defensive mechanisms able to restrict the group's members from exposure to alternative norms, values and practices (similar to the control over access to English-language instruction exercised by the majority in Quebec). Some measures will be more easily accepted by the majority and minority communities than others. Canadians generally accept the necessity of some external protections for minority communities in order to rectify disadvantages or vulnerabilities.[109] However, Canadians also generally embrace the idea that one should ultimately decide whether to identify as a member of a minority community and generally loathe restrictions within minority communities.

Examples might serve to illustrate the diversity of forms in which minority institutional autonomy may be manifested. Guaranteed representation in legislative bodies for linguistic communities,

[109] See, for example, W. Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995), at 152-72.

redrawing of territorial boundaries to create linguistic majorities, or funding for political lobbies such as the Fédération des communautés francophones et acadienne du Canada are accepted political structures which enhance the dual heritage of present-day Canadians. Economic initiatives justified by the duality principle could include the establishment of French language hospitals and post-secondary institutions.[110]

Administrative autonomy could take many forms. The federal or provincial legislatures could share power with or devolve power to locally elected bodies.[111] As mentioned elsewhere, elected representatives of minority communities already enjoy exclusive constitutional powers to make various decisions in respect of primary and secondary instruction. New Brunswick's French-speaking minority benefits from section 16.1 of the Charter, which gives it the right to distinct institutions at all levels of education, as well as such distinct cultural institutions as are necessary for its preservation and promotion. The potential ramifications of these rights have yet to be fully explored.

Those institutions that have been created are still establishing themselves. The federal, provincial and territorial governments are cautious about devolving power. Federal funding earmarked for primary and secondary instruction in the minority language continues to be channelled through provincial and territorial ministries of education. In time, it may prove to be sound policy to broaden the jurisdiction of existing school boards to areas such as pre-school education[112] and community health care.

Within existing Canadian governmental structures, the principle of administrative autonomy may be effectuated by a realignment of the boundaries of local government units, as was done when establishing school boards controlled by elected representatives of the minority communities. Local government units could be organized on the basis of

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[110] Consider Ontario's decision to do away with bilingual colleges of applied arts and technology and create homogeneous French-language colleges: O. Reg. 34/03, s. 3, made under the *Ontario Colleges of Applied Arts and Technology Act, 2002*, S.O. 2002, c. 8, Schedule F. Regarding the necessity in Western Canada of a major French-language research university, see J.E. Magnet, *The Future of Official Language Minorities* (1986) 27 C. de D. 189, at 201.

[111] In Hungary, for instance, minorities have a constitutional right to establish local and national self-governments: see *Act No. LXXVII of 1993 on the Rights of National and Ethnic Minorities* (Hungary). For a comparative study of the United Kingdom, Spain and Canada, see S. Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004).

[112] This is already occurring in some Canadian jurisdictions.

linguistically distinct populations. Units so constituted could be granted enhanced powers.

Another form of administrative autonomy calls for the decentralization of the national administration by the creation of regional offices staffed by national officers, but having the power to implement distinct regional policies. This has proved to be surprisingly difficult to achieve in New Brunswick. In that province, the Royal Canadian Mounted Police ("RCMP") acts as the provincial police force pursuant to an agreement between the governments of New Brunswick and Canada. Both governments benefit from economies of scale which result from this arrangement. The Federal Court of Appeal ruled that the RCMP need not provide services in both official languages under subsection 20(2) of the Charter, as do all other institutions providing provincial services, because the RCMP nominally remains at all times a federal institution.[113] A flexible approach to federalism, one that gives effect to New Brunswick's constitutional distinctiveness, would lead to a different result.

A last example of administrative autonomy is the creation of community development authorities.[114] Various aspects of the community support system could be devolved to these groups. Canada already has some experience with such institutions in both the public and private domains, with community groups being given responsibility and funding to administer colleges, libraries, museums, health and social welfare systems and the like. This model allows for a more flexible implementation in cases where ethnically distinct groups lack territorial concentration.

Desrochers v. Canada (Industry)[115] shows how difficult institutional autonomy is to achieve under court supervision of constitutional collective rights. *Desrochers* concerned breaches of obligations to provide services in French of equal quality to the services provided in English. The French-speaking minority was frustrated with the lack and poor quality of services in French of the local, federally funded, "anglo-

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[113] *Société des Acadiens et Acadiennes du Nouveau-Brunswick c. Canada*, [2005] F.C.J. No. 1587, 2005 FC 1172 (F.C.), revd [2006] F.C.J. No. 805, 2006 FCA 196 (F.C.A.), leave to appeal to S.C.C. granted [2006] C.S.C.R. no 309 (S.C.C.).

[114] Regarding the oversight of health care services in French in Ontario, see *French Language Health Services Advisory Council*, O. Reg. 162/07, made under the *Local Health System Integration Act, 2006*, S.O. 2006, c. 4.

[115] [2005] F.C.J. No. 1218, 2005 FC 987 (F.C.), revd [2006] F.C.J. No. 1777 (F.C.A.), leave to appeal to S.C.C. granted [2007] C.S.C.R. no 27 (S.C.C.).

dominant" organization providing strategic community economic planning services, support to small and medium-sized businesses and access to business capital. In response, the French-speaking community created its own economic development organization to enable its members to resist assimilation. This minority community organization enjoyed considerable success with the francophone community and its services were retained numerous times. The case challenged the government decision to cut funding to the organization. The claim was rejected. The courts found that a federal institution is not required by the *Official Languages Act*[116] to take into account the cultural needs of a minority language community in establishing services that are intended for them.[117]

Expanding their network of institutions and strengthening institutional autonomy is the most important way to promote the flourishing of linguistic minorities. The Court of Appeal for Ontario echoed this sentiment in relation to educational institutions in *Reference re Minority Language Education Rights*[118] when it quoted the *Symons Report*:

> The French language school provides a setting within which the Francophone students will have a better opportunity to come to know and to understand and to strengthen and develop their own culture and heritage . . . the school occupies a central role in the cultural life of the linguistic community . . . s. 23(3)(b) [of the Charter] should be interpreted to mean that minority language children must receive their instruction in facilities in which the educational environment will be that of the linguistic minority. Only then can the facilities reasonably be said to reflect the minority culture and appertain to the minority.[119]

If sufficiently extensive and autonomous, a constitutionally protected network of institutions is probably the best mechanism to provide linguistic minorities with the tools of self-protection and community development. An autonomous infrastructure should overcome the

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

[117] *Desrochers v. Canada (Industry)*, [2005] S.C.J. No. 1218, 2005 FC 987 (F.C.), affd [2006] F.C.J. No. 1777, 2006 FCA 374 (F.C.A.), leave to appeal to S.C.C. granted [2007] C.S.C.R. no 27 (S.C.C.). Note, however, the suggestion by the Federal Court of Appeal that a similar claim may succeed if made under the *Department of Industry Act*, S.C. 1995, c. 1, ss. 8-9. See *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.).

[118] *Reference re Education Act (Ontario); Reference re Minority Language Education Rights*, [1984] O.J. No. 3260, 47 O.R. (2d) 1 (Ont. C.A.).

[119] *Report of the Ministerial Commission on French Language Secondary Education* (1972), at 13-5.

disadvantages repeatedly encountered in high-stakes collective rights litigation.

The theory of equality between groups[120] encourages the creation of quasi-autonomous administrative structures with a view to promote the flourishing of linguistic minorities. Development of doctrine around this theory will help to show where, and under what circumstances, quasi-autonomous administrative structures under the control of linguistic minorities are warranted. The goal of this effort is to provide linguistic minorities with the capacity to perpetuate themselves, and to flourish according to their particular perception of their own needs.

International law norms, and the international system for the protection of minorities, pay high regard to administrative autonomy as an important means of guaranteeing the well-being of sub-national groups. The Versailles Treaty with Poland of June 28, 1919 served as a model for the post-First World War treaties that contained protections for minorities. This treaty guaranteed to Polish nationals belonging to racial, religious or linguistic minorities the right, at their own expense, to establish, manage and control charitable, religious and social institutions, schools and other educational establishments. Within these institutions, the minorities were guaranteed the right to use their own language and freely exercise their religious precepts. Where the minority was especially concentrated, it was granted special, additional rights with respect to language.[121]

In the *Minority Schools in Albania* case, the Permanent Court of International Justice explained the central thrust of the international system for the protection of minorities at that time:

> The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time *preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.*[122] (emphasis added)

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[120] The theory was first laid out in Joseph Eliot Magnet, *Modern Constitutionalism: Identity, Equality and Democracy* (Markham, ON: LexisNexis Canada, 2006), ch. 6, "Equality Between Groups".

[121] *Minority Schools in Albania* (1934), P.C.I.J. (Ser. A/B) No. 63. See also *Rights of the Minorities in Upper Silesia (Minority Schools)* (1928), P.C.I.J. (Ser. A) No. 12. See generally Y. Dinstein, *Collective Human Rights of Peoples and Minorities* (1976) 25 I.C.L.Q. 102, at 115.

[122] *Minority Schools in Albania* (1934), P.C.I.J. (Ser. A/B) No. 63, at 17.

The Permanent Court of International Justice continued:

> In order to attain this object, two things are regarded as particularly necessary, and have formed the subject of provisions in these treaties.
>
> The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the state.
>
> The second is *to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.*
>
> *The two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions and were consequently compelled to renounce that which constitutes the very essence of its being a minority.*[123] (emphasis added)

The *Minority Schools in Albania* case suggests that administrative autonomy with respect to institutions of central importance to the preservation and maintenance of minorities is an obligation imposed by the international law system. It is this system, and this ancillary obligation, which was codified in article 27 of the *International Covenant on Civil and Political Rights*,[124] which was itself the precursor of section 27 of the Charter. Accordingly, maintenance claims to autonomy over institutions essential to group survival and development are increasingly occupying minority communities and, gradually, gaining support from those charged with interpreting and applying the Charter.

IV. Some Problems with Maintenance Claims

1. Minimum Standards

Roughly half of the Charter's sections are inspired by an ideal of individual dignity. A strong belief in the creative capabilities of individuals, and that unleashing individual initiative will advance the good life, is at the heart of Canadian constitutional commitments

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[123] *Minority Schools in Albania* (1934), P.C.I.J. (Ser. A/B) No. 63, at 17.

[124] December 19, 1966, 999 U.N.T.S. 171 (entered into force March 23,1976, accession by Canada May 19,1976).

regarding the freedom of individuals to form and hold ideas, to receive and consider the ideas of others, to express beliefs, to act on them, to assemble and associate together to practise or advocate beliefs of all kinds, and to be free of prejudicial distinctions.

The Charter also guarantees individual freedoms: the right to reject beliefs or orthodoxies of all kinds, to refuse to express or consider an idea, to decline to act on any belief or to assemble or associate in furtherance of it, to reject orthodox practices, and to be free of prejudicial discrimination because of refusal to conform to orthodoxy. The Charter expresses the axiomatic belief of Canadians that an inquiring mind, the capacity to communicate in new ways with others, to grow and to develop through exposure to new ideas, practices, and associations are important ingredients in discovery, progress and fulfillment.

Commitment to a Charter-based system requires that exercise of governmental powers respect fundamental individual freedoms and personal liberty, norms of due process, and equality between individuals. This is one important reason why the Charter was created in the first place: to restrain the power of majorities, acting through government, from oppressing individuals.

The Charter also recognizes the special requirements of linguistic minorities for autonomy. Group autonomy means group power. Group power has the potential to invade individual freedoms and oppress individual group members. The collective rights in the Charter vest a degree of governmental power in linguistic minorities. Does the power of autonomous linguistic communities revivify possibilities for oppressing individuals within the linguistic group?

The Charter requires that governments observe minimum standards of respect for individual autonomy when exercising power. Where government devolves powers to groups, the requirement to observe minimum standards of respect for personal liberty should follow.

Therein lies a source of conflict. If groups must respect the same high standards of individual autonomy as government, their basis for existence may be compromised. This is why minority-language educational institutions are allowed to refuse access to those students who do not possess adequate language competence in the language and whose parents are not otherwise entitled to instruction in the minority

language.[125] The traditions of the minority-language community are sufficiently important to justify overriding non-conforming, constitutionally protected individual rights. This is the principle underlying the jurisprudence regarding denominational schools, where certain religious traditions and values take precedence over an individual teacher's non-conforming behaviour.[126]

The idea that the Charter precepts of individual autonomy may be diminished at the hands of autonomous linguistic minorities should not shock.[127] The constitution makers exempted from the Charter's full impact certain rights which advance equality between groups. Sections 1, 16, 16.1, 21, 22, 23, 25, 29, 35(4) and 37.1(4) of the *Constitution Act, 1982*[128] preserve or further the equality of linguistic minorities, Aboriginal peoples and denominational groups from dilution by individual rights claimed under the Charter.

2. Inclusion and Exclusion

Defining the boundaries of groups raises difficult problems.[129] This is especially so where the group enjoys or seeks government-derived powers or benefits. A high regard for group autonomy suggests investment of substantial powers of self-definition in groups. Self-definition normally occurs by individuals self-identifying. In most instances, if an individual has sufficient knowledge of an official language to be understood by another person, he or she will be able to assert rights in respect of that language.[130] Regarding this point in the

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125 *Gosselin (Tuteur of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 15, [2005] 1 S.C.R. 238 (S.C.C.).

126 *Caldwell v. St. Thomas Aquinas High School*, [1984] S.C.J. No. 62, [1984] 2 S.C.R. 603 (S.C.C.).

127 Nevertheless, the idea does shock some. Paragraphs (1) to (4) of s. 93 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 no longer apply to Quebec: *Constitution Act, 1867*, s. 93A, added by the *Constitution Amendment, 1997 (Quebec)*, S.I./97-141. Some in Ontario would prefer that paras. (1) to (4) of s. 93 of the *Constitution Act, 1867* no longer apply in that province, or that primary and secondary instruction be provided out of public funds to other denominational groups.

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

129 Regarding French speakers, see for instance *Canadians for Language Fairness v. Ottawa (City)*, [2006] O.J. No. 3970 (Ont. S.C.J.). Regarding Aboriginal groups, see for instance *Sawridge Band v. Canada*, Opening Statement of the Congress of Aboriginal Peoples, online: <http://www.constitutional-law.net/Sawridge.doc>; *R. v. Powley*, [2003] S.C.J. No. 43, [2003] 2 S.C.R. 207 (S.C.C.).

130 *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 34 (S.C.C.).

context of language rights under the *Criminal Code*,[131] the Supreme Court of Canada said:

> The language of the accused is very personal in nature; it is an important part of his or her cultural identity. The accused must therefore be afforded the right to make a choice between the two official languages based on his or her subjective ties with the language itself. The principles upon which the language right is founded, the fact that the basic right is absolute, the requirement of equality with regard to the provision of services in both official languages of Canada and the substantive nature of the right all point to the freedom of Canadians to freely assert which official language is their own language.[132]

Where the group enjoys powers or distributes entitlements derived from government, the government has interests in ensuring that the group uses its power of self-definition reasonably. Government has a legitimate interest in ensuring that the group neither excludes nor includes individuals for irrational or abusive purposes. Equally, where government devolves power upon groups, government has an interest in requiring that the power of self-definition not be used oppressively to extend the group's boundaries to include objecting individuals.

The problems associated with group definition may be illustrated by examples. In *Société des Acadiens du Nouveau-Brunswick v. Minority Language School Board No. 50*,[133] the Court of Queen's Bench of New Brunswick rejected the submission that all francophones must be educated in the French school system. The Court declined to define what groups of persons comprise the "francophone" collectivity.[134] Such categorizations posed difficulties: what would be done with mixed families or assimilated francophones?

In *Robin v. Collège de St-Boniface*,[135] the Court of Appeal for Manitoba examined what capacities a judge must possess in order to conduct a trial in French. In dissent, Monnin C.J. stated:

> For the purposes of a trial in French, it is not essential that the person presiding at it be able to express himself/herself either orally or in

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131 R.S.C. 1985, c. C-46.

132 *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 34 (S.C.C.).

133 [1983] N.B.J. No. 245, 48 N.B.R. (2d) 361 (N.B.Q.B.).

134 Also in the education context, consider *Official Language Act*, S.Q. 1974, c. 6, s. 49.

135 [1984] M.J. No. 192, 30 Man. R. (2d) 50 (Man. C.A.), leave to appeal to S.C.C. refused (1986), 44 Man. R. (2d) 80*n* (S.C.C.).

> writing in that language. It is preferable but not necessary. But in my view it is essential that he or she be able to understand fully and freely — without the help of an interpreter — the various documents offered as exhibits and the testimony of the witnesses.[136]

This conclusion was but one of several options available. The number of permutations gives a sense of the definitional obstacles.

A final example involves the categories of entitlement under subsections 23(1) and (2) of the Charter. Nowhere does the Charter define what is meant by the expression "first language learned and still understood", found in subsection 23(1)(a), nor the threshold required for entitlement under subsections 23(1)(b) and 23(2). These are constitutional concepts of some subtlety, given that languages are learned in a variety of ways, including, for some, simultaneously. It would seem reasonable that self-definition should be the norm for determining access to instruction in the minority language.

Such is the case in Ontario, where provincial legislation incorporates by reference the categories of entitlement set out in section 23 of the Charter.[137] With the exception of Quebec, little guidance is normally given regarding who qualifies for instruction in the minority language.[138] Education officials have discretion to decide who is a person whose "first language learned and still understood" is French, and therefore entitled to the benefits of minority-language education. While school boards always have a financial interest in admitting a greater number of students, it has been alleged by some that school officials sometimes use their power to privilege certain persons over others, to the detriment, for instance, of more recent immigrants to the country. These are examples of a group using its power of self-definition in a discriminatory manner. Certain individuals are excluded for irrational or abusive purposes. In Canada, the French language lives in a pluralist mosaic of ethnic and national origins. All French-speaking communities are equally deserving of the benefits and protection of the proposed institutional infrastructure; none should be excluded for

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[136] *Robin v. Collège de St-Boniface*, [1984] M.J. No. 192, 30 Man R. (2d) 50 (Man. C.A.), leave to appeal to S.C.C. refused (1986), 44 Man. R. (2d) *80n* (S.C.C.).

[137] *Education Act*, R.S.O. 1990, c. E.2, s. 1 ("French-language rights holder"; "French-speaking person").

[138] But see *Education Act, 1995*, S.S. 1995, c. E-0.2, s. 144; *Public Schools Act*, C.C.S.M. c. P250, s. 21.1 ("entitled person"). These requirements are likely inconsistent with s. 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.

prejudicial reasons. Thus far, the problems have not warranted significant clarification by legislators as to who qualifies for instruction in the minority language.

Considerations unique to Quebec have justified external review of a declaration of entitlement under section 23 of the Charter. In Quebec, entitlement under subsection 23(2) is determined through a contextual analysis of the "parcours scolaire" of a student.[139] Minorities often lose, however, when the majority insists on having a say with respect to membership. In addition to the cases at the margins of any contextual analysis, aggressive governmental pursuit of nation-building objectives sometimes leads to dramatic and unreasonable "solutions" for minorities.[140]

There are obvious problems associated with group power to include or exclude would-be group adherents or dissenters.[141] Both government and the minority-language communities have interests in where the boundaries of group power are drawn. Notwithstanding the government's interest, the power of self-definition is crucial to the security of linguistic groups. This consideration justifies *prima facie* self-definitional power for linguistic minorities. Minority power to self-define should not be disturbed lightly.

Problems arise when linguistic communities utilize their power of self-definition in an abusive, irrational or discriminatory manner. The significant questions therefore relate to the limits of this power. How far may government interfere? How far may groups forcibly include objecting members? It seems reasonable that governments should

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[139] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201 (S.C.C.).

[140] *Quebec (Attorney General) v. Quebec Assn. of Protestant School Boards*, [1984] S.C.J. No. 31, [1984] 2 S.C.R. 66 (S.C.C.); *N. (H.) c. Tribunal administratif du Quebec*, [2004] Q.J. No. 9812 (Que. S.C.), revd *N. (H.) c. Québec (Ministre de l'Éducation)*, [2007] J.Q. no 9410 (Que. C.A.), leave to appeal to the S.C.C. sought. The latter case concerns s. 3 of *An Act to Amend the Charter of the French language*, S.Q. 2002, c. 28, which provides that instruction received in a private unsubsidized English school in Quebec is to be disregarded in the determination of eligibility for public instruction in English in Quebec. The constitutionality of this limitation is suspect. As the English-speaking minority waits for a legal challenge to make its way through the courts, the limitation is wreaking havoc on the minority's network of educational institutions.

[141] Another question is whether one permanently adopts one language over another. The Supreme Court of Canada appears to take for granted that one does such a thing. See *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201, at para. 42 (S.C.C.). There are a number of individuals who do not identify with only one language or language group. This development has had an impact on the language questions asked in the Statistics Canada censuses. See also M. Aquilino, "Qui suis-je ? Identité linguistique et exclusion des non ayants-droit par l'article 23 de la *Charte*" (2007) 38 Ottawa L.R. 65.

possess a reserve power to check irresponsible uses of group exclusionary practices or powers in cases where membership in the group entitles individuals to significant governmentally derived powers or benefits.

V. CONCLUSION

Canadian history teaches that judicial enforcement of collective rights has been inadequate to the intended purposes of protecting and developing linguistic minorities. Until recently, minority-language communities have usually lost collective rights cases. Even when minority-language communities win legal battles, they sometimes lose the ensuing political war. Collective rights litigation places heavy burdens on minority communities. The game has rarely been worth the candle.

Still, since 1990, minority-language communities have made significant progress towards equality. They have improved results in court. Possibly a sea change has occurred. Possibly the principles of duality, protection of minorities and autonomy for linguistic communities will grow in strength. Possibly the courts will develop new, revivified doctrine to administer maintenance claims. Possibly the judges will become enthusiastic partners with government to develop linguistic communities. Possibly the courts will reverse their 140-year-old history of impotence to manage linguistic community relations.

We hope so. Prudence dictates that linguistic minorities not allow their legal victories to lull them into a false sense of security. The more likely source of communal protection and development is an extended and more autonomous institutional infrastructure under minority-language community control. The achievement of this at the administrative, legislative and constitutional levels is where the communities should deploy their major efforts. Their institutional networks remain vastly incomplete and insufficiently autonomous.

The potential ramifications of the principles propounded in *Mahe v. Alberta*,[142] *Arsenault-Cameron v. Prince Edward Island*[143] and *Lalonde v. Ontario (Health Services Restructuring Commission)*[144] have certainly not been fully leveraged. Minority communities would do well to focus

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142 [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342 (S.C.C.).

143 [2000] S.C.J. No. 1, [2000] 1 S.C.R. 3 (S.C.C.).

144 [2001] O.J. No. 4767, 56 O.R. (3d) 505 (Ont. C.A.).

on consolidating and extending these gains. They should learn from history that judicial enforcement of language rights, when working well, plays a secondary, supplemental and educational role. The courts ought not to be relied on as a primary regulator of community relations or a principal guarantor of cultural security.

It would be wise for courts, constitution makers and minority communities to give greater attention to extending the network of autonomous institutions committed to linguistic minority control and deepening aspects of minority autonomy. This is a difficult and laborious path of constitutional development, which will require imagination, openness and a willingness to try new things. This game is worth the candle. It is the most promising path to arrive at an enhanced sense of Canadian national spirit which most of us find utterly worth preserving.