Equality between Linguistic Communities in Canada

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Les droits linguistiques au Canada s'appuient sur un fondement d'égalité des deux communautés de langue officielle. Après avoir identifié les membres qui font partie de ces communautés, un exercice qui n'est pas toujours évident, l'auteur insiste sur l'adoption de mesures qui permettent d'atteindre cette égalité, en particulier pour la francophonie canadienne. Après plus d'un siècle de silence, les tribunaux ont épousé cette vision égalitaire et il importe que leur message aux autorités gouvernementales soit sans équivoque à cet égard.

I. New Beginning

For the first 100 years of Canada's existence, the courts were silent about the development of the country's linguistic communities. The courts offered no vision of Canada's unique heritage, no doctrine to manage its duality, and no useful remedies for grievances voiced by Canada's official language communities. In schools and other institutions where the linguistic communities came into contact, the linguistic communities experienced repeated and sometimes severe conflict. Canada's courts seemed unable to moderate this conflict, and in many instances made it worse.[1]

At the beginning of the 1980s, the constitution makers intervened with new official languages concepts.[2] The courts responded briefly,

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1 See generally Joseph Eliot Magnet, *Official Languages of Canada: Perspectives from Law, Policy and the Future* (Cowansville, Qc: Yvon Blais, 1995), at 13*ff*.

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 16-23.

with doctrine and cautious remedies.[3] In 1986, this activity came to a halt in most sectors,[4] education excluded.

Many of the people who have contributed to this volume worked hard to forge a new consensus. The authors collected together in this volume are some of Canada's leading activists. They and others convinced Canada's constitution makers, legislators and even, finally, the courts that language rights are important, that they are part of Canada's soul, that they are more than dispute resolution mechanisms, that language rights embody the best of Canada's proud traditions and are worthy of development. And so, swirling in the wake of the activists' endeavours, Canada's courts, legislatures and public administration made new efforts to re-invigorate language rights, and to pursue with renewed determination the equality between Canada's linguistic communities such rights promised.

Many of the militants have been very clear about the purpose of constitutionally based language rights.[5] They have consistently sounded

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[3] See, *e.g.*, *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1.

[4] The Supreme Court's dealings with minority language cases in the mid to late 1980s reveal a judicial reluctance to push for increased equality between the English and French languages in Canada. In *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, 27 D.L.R. (4th) 321 [hereinafter "*MacDonald*"], the Court held that a unilingual summons issued by the Municipal Court of Montreal to an Anglophone did not infringe the appellant's fundamental rights as an English speaker under s. 133 of the *Constitution Act, 1867*. Although the Court acknowledged that the English and French languages had to be equal with regard to each other, and in a preferential position with respect to all other languages (a proposition that is clearly stated in s. 16 of the Charter), a majority of the Court was unwilling to achieve this goal by extending the equality ethic deep into the operation of governmental institutions. Nor were the judges prepared to allow the courts "to act as instruments of change" in relations between the language communities. Instead, a majority of the Court downgraded constitutional language rights to a "constitutional minimum," and stigmatized them as "limited." Similarly, in *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549, 27 D.L.R. (4th) 406 [hereinafter "*Société des Acadiens v. Assn. of Parents*"], a majority of the Court held that the language rights in the Charter only guarantee the right to *speak* to a court in French, not the right to be *understood* in French. The Court conferred language rights on the state, which citizens had to respect, rather than the other way around. In the view of the Court, if there were to be an advancement towards language equality, this would have to come from the legislature, not the courts.

[5] See, *e.g.*, the following publications (not meant to be a comprehensive bibliography): Gérald-A. Beaudoin, "La protection de la langue française au Canada" (1988) 19 R.G.D. 479; François Boileau, "Equality of the Official Languages in Canada" (1999) 14:2 Can. H.R. Found. Newsl. 16; André Braën, "Bilingualism and Legislation" in Michel Bastarache, ed., *Language Rights in Canada* (Cowansville, Qc: Yvon Blais, 1987), at 65; A. Braën, "L'action en dommages et la violation des droits linguistiques" (1990) 21 R.G.D. 473; A. Braën, "L'interprétation judiciaire des droits linguistiques au Canada et l'affaire *Beaulac*" (1998) 29 R.G.D. 379; Linda Cardinal,

these themes: linguistic and cultural survival, community development, equality.[6]

"Collective Rights in Canada: A Critical and Bibliographical Study" (2001) 12 N.J.C.L. 165-73, 210-26; Marc Cousineau, "L'Affaire Montfort, l'article 15 de la Charte et le droit de la communauté franco-ontarienne à ses institutions" (1997-1998) 29 Rev. D. Ottawa 369; M. Cousineau, "Le Renvoi sur la sécession du Québec : la résurrection des droits linguistiques au Québec" (1999) 11 R.N.D.C. 147; Michel Doucet, "Les droits linguistiques : une nouvelle règle d'interprétation" (2000) 16:3 Bulletin des avocats 1; Michel Doucet, "Une révision de la règle d'interprétation dans l'affaire *Société des Acadiens* : [*Beaulac c. La Reine*]" (1999) 16:1 Bulletin des avocats 4; Michel Doucet, "Le concept de l'égalité dans l'arrêt *Lalonde et al. c. Commission de restructuration des services de santé*" (2002) 4 R.C.L.F. 273; Michel Doucet, "Les droits linguistiques : une nouvelle trilogie" (2000) 49 R.D.U.N.B. 3; Pierre Foucher, *Constitutional Guarantees and Linguistic School Boards in Québec* (Montréal: McGill University, Office of Research on Educational Policy, 1997); Pierre Foucher, "Droits linguistiques : à l'image des cercles concentriques" (1992) 41 R.D.U.N.B. 171; Victor C. Goldbloom, "Language Equality in Canada: A Delicate Balance" (1998) 47 U.N.B.L.J. 177; David J. Heller, "Language Bias in the Criminal Justice System" (1995) 37 Crim. L.Q. 344; Richard J. Joy, *Canada's Official Languages* (Toronto: University of Toronto Press, 1992); Errol Mendes, "Two Solitudes, Freedom of Expression and Collective Linguistic Rights in Canada: A Case Study of the Ford Decision" (1992) 1 N.J.C.L. 283; Denise Réaume, "Education and Linguistic Security in the Charter" (1989) 34 McGill L.J. 777; Denise Réaume, "The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?" (2002) 47 McGill L.J. 593; Stephen A. Scott, "*Mercure v. The Queen*, Language Rights and Legislative Interpretation" in Rebecca Johnson *et al.*, eds., *Gérard V. La Forest at the Supreme Court of Canada 1985-1997* (Winnipeg: Faculty of Law, University of Manitoba, 2000), at 327; Jean-Marie Woehrling, "Minority Cultural and Linguistic Rights and Equality Rights in the Canadian Charter of Rights and Freedoms" (1985) 31 McGill L.J. 50; Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc: Yvon Blais, 2004); Joseph E. Magnet, *Modern Constitutionalism: Identity, Equality, and Democracy* (Markham, Ont.: LexisNexis Butterworths, 2004).

[6] Eventually, the courts followed suit, and made these ideas part of constitutional doctrine. See, *e.g.*, *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193 at para. 20 [hereinafter "*Beaulac*"]: "the objective of protecting official language minorities ... is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided"; *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1, [2000] 1 S.C.R. 3, 181 D.L.R. (4th) 1 [hereinafter "*Arsenault-Cameron*"] ("It is clearly necessary to take into account the importance of language and culture in the context of instruction as well as the importance of official language minority schools to the development of the official language community when examining the actions of the government in dealing with the request for services" at para. 27); *Lalonde v. Ontario (Health Services Restructuring Commission)*, [1999] O.J. No. 4488, 181 D.L.R. (4th) 263 (Div. Ct.), affd [2001] O.J. No. 4767, 4768, 56 O.R. (3d) 505, 208 D.L.R. (4th) 577 (C.A.) [hereinafter "*Lalonde*"] :

> Language is not only a tool of communication but also an essential ingredient in the existence, the development and the human dignity of any individual. The French language is the key cultural component of the Franco-Ontarian community. ... Like other minority communities, Franco-Ontarians rely heavily on the strong presence of institutions in a wide variety of social activities for their preservation. These institutions have been built gradually over a long period of time. They are not only providers of vital French language services but are symbols reflecting the vitality and relevance of the Franco-Ontarian community in public life in Ontario and Canada. The disappearance or substantial decrease of such an institution has a negative impact on the ability of the community to survive. (pp. 273 and 290 D.L.R. (Div. Ct.)).

We find these ideas scattered throughout the constitutional and quasi-constitutional texts that entrench the status of Canada's official languages and create rights for the official languages communities. Both the Canadian Charter[7] and the federal *Official Languages Act*[8] require the equality of status and use of the English and French languages within Canadian society. These texts are talking about Canada's linguistic communities. They are requiring that the English and French linguistic communities be equal.

II. The English and French Linguistic Communities

What exactly does it mean to say that the English and French linguistic communities should be equal to each other? To explore this question we will have to go a little deeper into some fundamental concepts.

First, what exactly are the English and French linguistic communities? There are hints dispersed throughout the Constitution. Parts of the Constitution reference the English and French languages in federal institutions;[9] other parts reference the English and French languages in Manitoba, Quebec and New Brunswick institutions.[10] One provision speaks of the English and French linguistic minorities in a province;[11] another treats the English linguistic community and the French linguistic community in New Brunswick.[12]

The diversity of constitutional concepts reflects demographic and political facts. English and French are simultaneously majority and minority languages in Canada. If we look at it from a provincial point of view, we see nine French linguistic minorities, and one English linguistic minority. Each provincial minority is seemingly complete as a community. It enjoys its own institutions and network of constitutional, statutory and acquired rights; has its own political lobby; receives core funding from the federal government; has its own traditions, history,

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7 *Supra*, note 2, s. 16.

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

9 *Canadian Charter of Rights and Freedoms*, *supra*, note 2, ss. 16-20; *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 133, reprinted in R.S.C. 1985, App. II, No. 5.

10 *Canadian Charter of Rights and Freedoms*, *id.*, s. 16; *Manitoba Act, 1870*, 33 Vict., c. 3 (Canada), s. 23; *Constitution Act 1867*, *id.*

11 *Canadian Charter of Rights and Freedoms*, *id.*, s. 23.

12 *Id.*, s. 16.1.

memories and vision of the future. Looking at it from the provincial point of view, however, does not reveal the whole picture. While seemingly complete as communities, each provincial minority is in reality a fragment. There is a larger whole of which each provincial community is a part. The English-speaking community of Quebec has its own history, traditions, vision and rights, but none of this would exist in anything remotely resembling its present form were it not for the fact that English-speaking Quebeckers are an important fragment of the larger English-speaking community of Canada. So too, the proud Franco-Manitoban community has its own history, traditions, vision and rights,[13] but it is equally true that none of this would exist in its present form were it not for the fact that the Franco-Manitoban community is a fragment of the larger French-speaking community of Canada.

III. La francophonie canadienne

Some think the reason for Franco-Manitoban status is because of the presence of Quebec in the Federation — that the threat of secession by Quebec gives the Franco-Manitobans a power their numbers would not otherwise merit. This view does not capture the whole picture. The reason for Franco-Manitoban status is because the Franco-Manitoban community is a fragment that is part of a larger whole, which also includes Quebec. That larger whole is *la francophonie canadienne*, the French-speaking community of Canada. It is the larger whole, *la francophonie canadienne*, which gives power to its fragments, not Quebec. Quebec, itself, is a fragment.

The concepts of the whole — *la francophonie canadienne* — and the fragments (Franco-Manitobans, Franco-Ontarians and "Québécois") make matters somewhat complex. Governments have obligations to provide for the well-being and vitality of the linguistic communities. An illness at the level of a fragment may require intervention by provincial

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[13] See, *e.g.*, *États généraux de la francophonie manitobaine* (Winnipeg: Société franco-manitobaine, 1986); Donatien Frémont, *Les Français dans l'Ouest canadien* (Saint-Boniface, MB: Éditions du blé, pour la société historique de Saint-Boniface, 1980); Antoine Gaborieau, *À l'écoute des Franco-Manitobains* (Saint-Boniface, MB: Éditions des Plaines, 1985); Cornelius J. Jaenen, *Glimpses of the Franco-Manitoban Community* (Winnipeg: University of Winnipeg Press, 1976); Liliane Rodriguez, *Mots d'hier, mots d'aujourd'hui* (Saint-Boniface, MB: Éditions des Plaines, 1984); Roger E. Turenne, *Mon pays noir sur blanc: regards sur le Manitoba français* (Saint-Boniface, MB: Éditions du Blé, 1981).

instrumentalities at that level. To respond appropriately to the needs of a provincial community requires particularized and targeted intervention in each provincial case. A new development which threatens the vitality of the whole may require a very dissimilar intervention by a federal instrumentality.

A good example of a threat at the level of a fragment occurred in the case of Hôpital Montfort, a hospital in Ottawa that provides medical services in the French language, mainly to members of the Franco-Ontarian community of Eastern Ontario. In the late 1990s, Ontario planned to close Hôpital Montfort due to a restructuring of Ontario's hospital system. The appropriate intervention was at the provincial level by requiring the Restructuring Commission to take account of the security and vitality of the Franco-Ontarian community in the hospital restructuring exercise.

A good example of a measure designed to promote vitality of the whole occurred with renovation of the *Official Languages Act* in 1988, which required action at the federal level. As we will shortly see, there may be other threats to, or opportunities for, advancement towards equality of the linguistic communities that will require joint action between the federal and provincial authorities. We will have to examine at that point how the Constitution deals with situations for which the most efficacious response would be active co-ordination between governmental efforts.

IV. Equality, Vitality and Advancement

With respect to each other, the Constitution ordains that the English and French languages are equal.[14] Equality is a comparative concept.[15] This implies that the status of the French language must be compared against something. Clearly it is to be compared against the English language, and vice versa, but the question as to what constitutes the appropriate unit of the English language for comparison is subtle. For some purposes, the status of a fragment is to be compared against another

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[14] *MacDonald*, *supra*, note 4, at 500 S.C.R.: "Not only are the English and French languages placed in a position of equality, they are also given a preferential position over all other languages." See also the *Canadian Charter of Rights and Freedoms*, *supra*, note 2, subs. 16(1).

[15] *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1.

fragment. This would be appropriate where an illness appears in one fragment and other fragments have vitality and possess the tools necessary to insure survival intact into the future in a healthy condition. For other purposes the status of the whole is to be compared against the whole. This would be appropriate where either the English speaking community of Canada or *la francophonie canadienne* is affected by events that significantly depreciate the status of either. Anything that affects the relative position of one, affects the position of the other. The languages must be equal; governments have duties to maintain the balance between the languages and their communities.

Equality must work together with vitality and advancement. Two fragments cannot be allowed to run down together in tandem under the banner of equality. The English and French linguistic communities at the level of the fragments and also at the level of the whole must remain vital, as well as equal; the linguistic communities at both levels, as fragments and as wholes, must be advanced to healthy conditions.

V. Positive Measures towards Equality, Vitality and Advancement

If we make these distinctions, it becomes easier to apply the new constitutional understandings of cultural vitality, community development and equality. As the recent jurisprudence has taught,[16] governments have obligations to provide for the well-being and vitality of the linguistic communities. These are positive obligations, requiring active governmental measures to advance the official languages communities, to take care that the linguistic communities have vitality, and to ensure that the communities are or become equal.

The English and French languages have "equality of status" and "equal rights and privileges as to their use in all institutions of the Parliament and government of Canada."[17] The linguistic communities have constitutional rights to be advanced to and maintained in a condition of equality. The balance between the linguistic communities must be maintained, but each linguistic community must also have vitality. French has to be compared against English; if the status of English changes by

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16 *Beaulac*, *supra*, note 6; *Arsenault-Cameron*, *supra*, note 6.

17 *Canadian Charter of Rights and Freedoms*, *supra*, note 2, s. 16; *Official Languages Act*, *supra*, note 8, preamble.

world demographic forces, it may be that the status of French must be changed too, notwithstanding that this would require positive governmental measures.

Parliament and the legislatures are under a duty to advance the linguistic communities to a condition of equality and vitality. Parliament has primary responsibility for maintaining the balance between the linguistic communities considered as a whole — for maintaining the balance between *la francophonie canadienne* and the English linguistic community of Canada. The provincial legislatures have primary responsibility for maintaining the balance between the provincial fragments of *la francophonie canadienne* and the provincial English-speaking majorities (it is a French-speaking majority in Quebec).

What measures are constitutionally required? This depends on analysis of the situation and of the kind of problem that has arisen. None of the provincial official language minorities are thriving in all respects. In certain cases they experience severe challenges. Interestingly, each provincial minority is at a different stage of development. The measures that are required to keep communities vital must be targeted to the specific stage of development of each community. This allows for particularized, focused intervention to be prodded by the courts specific to stages of development and advancing needs of different linguistic situations. To consider the example of Hôpital Montfort: the courts in this case disrupted the Restructuring Commission's disregard of linguistic concerns with a scatter-shot of concepts tailored to the specific needs of the Franco-Ontarian community. The court's analysis focused on the particularized needs of the Franco-Ontarians, on what was specifically necessary for the vitality of their community.

But what happens where it is necessary to co-operate in order to achieve the objective of an equal balance between *la francophonie canadienne* and the English-speaking community? Does the Constitution ordain that Parliament and the legislatures must take co-operative measures and if so, how is this to work?

VI. Implications of the Worldwide Growth of English

It is not difficult to see how co-ordinated governmental action to protect equality, vitality and advancement of the linguistic communities may be desirable. Any phenomenon which significantly affects one language is likely to affect the other, since the constitutional require-

ment for equality depends on comparison. Since proclamation of the Charter in 1982, the status of the English language has undergone a dramatic worldwide revolution. English has intensified its position as the *lingua franca* of the world, to an extent unparalleled in history. English dominates as the language of science, business, technology, education and international affairs. English has actually been adopted as the official and unofficial language of many nationalities — by design, by assimilation, by the effect of languages in contact, which have all intensified as a result of the transportation and communications revolutions. To illustrate the extent of the worldwide spread of English, an international conference was recently held in Russia, hosted by a Russian institution, paid for by a German foundation, organized by German and Russian personnel, to which were invited representatives of Russia, successor states of the former Soviet Union, and former Soviet bloc Eastern European countries. There was one representative of an English-speaking country out of 200 people in attendance. The working language of the conference was English. There was no translation.

It seems hard to believe that this dramatic rise in the use and status of English worldwide has not had a significant impact on the use of French in Canada. Exactly how the balance between the linguistic communities in Canada has been affected by the worldwide growth in English is of course a complicated question, requiring complicated demonstration. But leaving these important details aside, it seems safe to conclude that the dramatic advance of English worldwide has affected the balance between Canada's linguistic communities.

May it be that the balance has been affected to such an extent as to bring into relevance the constitutional principle of equality between the two languages and the constitutional imperative of governmental action to maintain equality between the English and French languages? As we have seen, the two languages have equal rights and privileges as to their use, and the linguistic communities have rights to be advanced to and maintained in a condition of equality. French has to be compared to English, and if English changes, it may be that *la francophonie canadienne* must also be changed by positive measures, so that the balance between the two languages is maintained. Parliament and the legislatures are under a duty to advance the French language considered as a whole — considered as the language of *la francophonie canadienne* — so that the balance within Canada stays in harmony, notwithstanding dramatic worldwide events affecting English. Parliament and the legislatures have affirmative duties to maintain that balance and to insure

that *la francophonie canadienne* retains its vitality. Possibly by renovating the *Official Languages Act* in 1988, Parliament made a good start on fulfilling this obligation. Possibly more must be done to be fully responsive to the constitutional imperatives for positive action in pursuit of equality, vitality and advancement.

VII. Positive Measures and Co-operative Action

Where advancement and maintenance of linguistic equality in Canada requires active intervention by government, there is a further question: which government must act? The question of which government must act depends on an analysis of the situation and on the kind of problem that has developed in that situation. If the problem is at the level of the fragment only, it may be that only the provincial government is constitutionally obliged to respond. If the problem is at the level of the whole, it may be that the federal government alone is constitutionally required to respond. When we consider the issues raised by the growing worldwide domination of the English language in important spheres of science, economy, technology and business, it may be that the problem transcends classification at these levels, and we have entered into a unique situation.

In this situation, it is unlikely that all necessary measures can be accomplished by either the provincial or federal governments acting alone. It is more likely that a panoply of measures is required, some by the provincial governments, and others by Parliament. It is also likely that to be fully effective, active co-operation between governments will be necessary.

Canada's Constitution requires that some regulatory intentions, if they are to be accomplished at all, must be accomplished by co-operative action.[18] Where, as in the field of official languages, positive

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[18] *Reference re Agricultural Products Marketing Act 1970 (Canada)*, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257, *per* Pigeon J. [cited to S.C.R.] quoting Rand J. in *Reference re Farm Products Marketing Act (Ontario)*, [1957] S.C.R. 198, 7 D.L.R. (2d) 257 ("trade regulation by a Province or the Dominion acting alone, related to local or external trade respectively, before the segregation of products or manufactures of each class is reached, is impracticable, with the only effective means open, apart from conditional regulation, being that of co-operative action [...]", at 1295). See also *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] S.C.J. No. 29, [2000] 1 S.C.R. 703, 186 D.L.R. (4th) 1; *Lavoie v. Canada*, [2002] S.C.J. No. 24, [2002] 1 S.C.R. 769, 210 D.L.R. (4th) 193; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1.

measures are constitutionally obligatory, an interesting question is raised about joint co-operative action. Assuming that a court can order each responsible legislature to take action, there seems to be no good reason why the court cannot also order harmonized or co-ordinated action as part of the constitutionally required response. Where it is necessary to co-operate to maintain the vitality of the whole or a fragment of either of the linguistic communities, it seems reasonable to conclude that the Constitution requires that Parliament and the legislatures shall co-operatively take the appropriate measures. The techniques of constitutionally required co-ordination will flow from analysis of the situation, on the kinds of problems that have developed in that situation and the most efficacious means of responding to those problems.

VIII. Positive Measures and Federalism

The question of which government must act also depends on Canadian federalism. The federal division of powers with respect to languages was first explored in *Jones v. New Brunswick (Attorney General)*.[19] *Jones* is well known, but much misunderstood. Many have assumed that *Jones* limits federal authority to intervene in defence of official language communities because, they say, the Supreme Court enforced a rigid division of powers between Parliament and the provinces in relation to language.[20] This interpretation of *Jones* is open to question.

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[19] [1975] 2 S.C.R. 182, 45 D.L.R. (3d) 583 [hereinafter "*Jones*"].

[20] Peter Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985), explained *Jones* this way, at 804-806:

> Language is not an independent matter of legislation (or constitutional value) ... the criteria to enact a law affecting language is divided between the two levels of government by reference to criteria other than the impact of law upon language. On this basis a law prescribing that a particular language or languages must or may be used in certain situations will be classified for constitutional purposes not as a law in relation to language, but as a law in relation to the institutions or activities that the provision covers ... for constitutional purposes language is ancillary to the purpose for which it is used, and a language law is for constitutional purposes a law in relation to the institutions or activities to which the law applies.

When Professor Hogg says that "language," as a constitutional subject matter, has both provincial and federal "aspects" he means that Ottawa is responsible for certain subjects, for example, criminal procedure; the provinces are responsible for other subjects, for example, commerce in the province. Ottawa or the provinces may regulate the language aspect of these subjects by virtue of their authority over the subject.

Jones was a constitutional challenge to certain provisions in the 1969 *Official Languages Act*. The Court commented that there were federal and provincial "aspects" of language, and that those aspects provided federal and provincial authorities with separate opportunities to regulate language. However, as the Court observed, no question was raised about the power of Parliament to give equal status to English and French throughout Canada in respect of any activity within exclusive provincial competence.[21] The importance of *Jones* is that it upheld the *Official Languages Act* as a federal addition to (what were then conceived as) the minimum language rights in the Constitution. *Jones* should be appreciated in light of the fact that the Supreme Court has never invalidated a federal or provincial statute that regulated language on grounds of the division of powers, despite having been asked to do so.[22]

Are certain writers nevertheless correct that the Supreme Court would invalidate federal efforts if Ottawa acted to bring some or all provincial linguistic minorities to a properly understood condition of equality? The Court's observation in *Jones*, and subsequent decisions,[23] that language can be an "aspect" of other constitutional matters, is not meant to be a complete statement of the constitutional division of legislative powers. There is more to it.[24]

Jones was decided seven years before the Charter brought expanded language rights into being at the constitutional level. *Jones* predates section 16 of the Charter. We now know from *Beaulac*[25] and *Arsenault-*

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21 *Jones*, *supra*, note 19, at 187 S.C.R., *per* Laskin J.

22 See, *e.g.*, *Devine v. Quebec (Attorney General)*, [1988] S.C.J. No. 89, [1988] 2 S.C.R. 790, 55 D.L.R. (4th) 641.

23 *Id.*

24 It is uncontroversial that the federal government can make direct grants to provincially created institutions to enable them to deliver bilingual services. It is also uncontroversial that Ottawa can enact framework legislation, like the *Canada Health Act*, that establishes minimum conditions for the delivery of provincial services in provincially established institutions, such as hospitals, and enforce Ottawa's authority with financial penalties. Either of these mechanisms would enable the federal authority to set linguistic conditions beyond the "aspect doctrine" to which Professor Hogg refers. Therefore, although the "aspect doctrine" explains how we arrive at a divided constitutional jurisdiction over language, it cannot be that the "aspect doctrine" is the only available justification for federal language legislation or measures.

25 *Beaulac*, *supra*, note 6 (an individual charged under the *Criminal Code* has the right to be tried in either official language).

Cameron[26] that the constitutional language rights are incorrectly perceived as a "minimum" or as "limited." This language in *Jones*, and this concept in the rulings of 1986,[27] were false starts and are now dead letters. Language rights are to be read *purposively*, "consistent with the preservation of official language communities in Canada," *purposively*, "to assist official language minorities in preserving their cultural identity."[28] The *Official Languages Act* now contains section 41, a quasi-constitutional commitment of the federal government to do just that. In light of *Jones*, which invited enactment of this provision, it would be extravagant to suggest that section 41 is unconstitutional; extravagant, moreover, because section 41 of the *Official Languages Act* is Parliament's implementation of the constitutional guarantee in section 16 of the Charter. So this quasi-constitutional provision, as well as the foundational guarantee it implements, must also be read purposively. This means that the federal authorities are entitled to intervene progressively to enhance the vitality of minority language communities throughout Canada. *Beaulac*, *Lavigne*[29] and their progeny teach that federal intervention to aid progress towards substantive equality, with tools appropriate to the stage of development reached by a particular linguistic minority, is appropriate and constitutionally valid. Perhaps it is also constitutionally required.

Constitutionally required? How can it be constitutionally required that any authority legislate to protect the vitality of a provincial minority? The grants of constitutional power in sections 91 to 95 of the *Constitution Act, 1867* are permissive: discretionary authority to legislate. How can anything be required? To answer this question, it is helpful to consider other minority rights provisions of Canada's Constitution. Section 93 of the *Constitution Act, 1867* confers exclusive legislative jurisdiction in relation to education on the provincial legislatures, but includes special authorization for federal education legislation to protect

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[26] *Arsenault-Cameron*, *supra*, note 6 ("Section 23 of the *Charter* mandates that provincial governments do whatever is practically possible to preserve and promote minority language education.").

[27] *MacDonald*; *Société des Acadiens v. Assn. of Parents*, *supra*, note 4.

[28] *Beaulac*, *supra*, note 6.

[29] *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] S.C.J. No. 55, [2002] 2 S.C.R. 773, at paras. 21-23, 214 D.L.R. (4th) 1.

denominational minorities.[30] In the *Secession Reference*,[31] the Supreme Court made clear that this specific federal power to legislate "reflects a broader principle related to the protection of minority rights," which appears "in the *Charter's* provisions." The Ontario courts, in the *Montfort*[32] decision, applied this broader principle to protect the security of the French language minority of Ontario, and prevent injustice to it.

Considering the "broader principle" adverted to in the *Secession Reference*, it becomes possible to understand section 16 of the Charter as recognizing a federal jurisdiction to protect official language minorities, concurrent with the provinces, that has always been part of Canada's Constitution. Both Ottawa and the provinces have always had concurrent legislative jurisdiction to make minority communities secure, and enhance their vitality — including minority language communities. Section 16 of the Charter goes beyond discretionary authority. It subjects the power to protect the well-being and vitality of the linguistic communities to a duty. Existing constitutional authority in relation to official language communities is coupled to constitutional imperative — an obligation — progressively and in stages, to restore the well-being, protect the security, and enhance the vitality of official language communities and their languages so that they will be fully equal with their counterparts.

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30 *Constitution Act, 1867*, *supra*, note 9, ss. 93(3) and (4). During the 1890s Manitoba school controversy, Ottawa was prepared to use this power to enact remedial legislation to govern provincially created schools (the relevant Manitoba power is at *Manitoba Act 1870*, s. 22(3)). Similar authority exists in relation to Ontario and Quebec schools. In the *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 79 and 80, 161 D.L.R. (4th) 385, [hereinafter "*Secession Reference*"], the Supreme Court observed that these mechanisms are simply manifestations of "a broader principle related to the protection of minority rights." If the narrower principle authorizes federal legislation to protect denominational minorities, the broader principle must authorize federal legislation to protect official language minority communities.

It is true that, much earlier in our history, our courts and Parliament failed to come to the aid of certain minority language and denominational communities. In *Tiny Roman Catholic Separate School Trustees v. The King*, [1928] A.C. 363, at 389, 3 D.L.R. 753, the Judicial Committee said that the Constitution only promised a minimum of denominational rights. This permitted the province to "hamper the freedom of the Roman Catholics in their denominational schools" or subject them to "injustice." Sixty years later, the modern Supreme Court overthrew this doctrine: *Reference Re Bill 30, an Act to Amend the Education Act (Ontario)*, [1987] S.C.J. No. 44, [1987] 1 S.C.R. 1148, 40 D.L.R. (4th) 18. Ten years later in the *Secession Reference* the Court explained that our Constitution's protection of denominational minorities from being "submerged or assimilated" is a reflection of "the broader principle."

31 *Secession Reference*, *id.*

32 *Lalonde*, *supra*, note 6.

A purposive exposition of Ottawa's official languages obligations would shed light on what these appropriate measures are in each instance: for the French minority communities in Calgary, in St. Boniface and for the English minority communities in Quebec. This is important work that should be carried out in partnership between the public, the courts and the administration, respectful of the roles and traditions of each. Communities, perhaps with governmental assistance, should develop the capability to investigate thoroughly the areas where their security and well-being are threatened, and imagine solutions for all irritations, large and small. The public administration must ensure that progressive measures are taken to implement full equality. Courts must measure the government's progress with a principled and purposive constitutional exposition, and correct government's progress with effective remedies, including institutional reforms, where found wanting.

These imperatives do not exist in a federal vacuum. There are roles and responsibilities appropriate to each level of government in marching the linguistic communities to equality and protecting their vitality. Neither does the federal distribution of powers absolve the federal or provincial authorities from constitutional responsibility. Federal and provincial authorities are responsible — constitutionally obligated — to intervene as appropriate to advance towards substantive equality between the linguistic communities. The federal distribution of powers does not transform constitutional imperative into constitutional discretion.

IX. Conclusion

The new understandings, which the language activists have forged through their efforts, are intended to protect and promote official language communities. These principles are likely to be fundamental to the next generation. Official language communities should be protected against the assimilating forces of linguistic demography and their immersion in a culture not completely their own which grinds their communities down. The means for doing this is building institutions through which minority language and culture may be propagated. Through the understandings our activists have forged, courts can now reach into the institutional framework through which official minority culture and communities are propagated and stimulate their development so as to promote the advancement and equality of the official language communities of Canada. The courts are newly armed with a mandate to prescribe

positive acting measures to ensure community survival, specific to different stages of development. Courts have jurisdiction to superintend these measures to ensure that they are followed. Courts can set out a vision and doctrine that will send a strong message to governments to act positively to actualize the promise of linguistic and cultural survival, community development and equality so many have worked so hard to achieve.