Equality Versus Non-Discrimination: Which Are We Striving for and Which Is the Attainable Goal?

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L'auteure passe en revue les concepts d'égalité et de non-discrimination tels qu'appliqués dans le contexte des droits linguistique au Canada. La poursuite de l'égalité de statut et de privilèges des deux langues officielles et de la non-discrimination à l'endroit des francophones et des anglophones se fonde en effet sur des valeurs qui sont a priori distinctes.

I. INTRODUCTION

The principles of equality and non-discrimination are fundamental to our democratic State. Indeed, they are the very bedrock on which human rights legislation is built. While these two concepts are inextricably intertwined within Canadian legal culture, they are not, in fact, identical; the former refers to a positive condition and the latter to a negative one. Consequently, when stated as an objective or goal, they may lead to different policy approaches and to different substantive protection.

In an effort to advance and ensure the principle of equality, various human rights instruments have enumerated certain grounds on which discrimination is prohibited. Historically, the prohibition of discrimination on the basis of language has been fundamental to the promotion of the principle of equality. This is because language is so much more than words. As Higgins aptly explains:

> An individual's language is the means whereby they understand and conceptualize the world around them and whereby they have meaningful communication with their fellow beings. To deprive a

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> person of their right to use their own language is to deprive them of one of the basic characteristics by which they define themselves. To discriminate on the ground of language is to discriminate against what can be considered to be at the very core of the human being — the vehicle of reasoning and communication.[1]

It is for this reason that various domestic constitutions and statutes have sought to protect language rights under the principles of equality and non-discrimination.

In this paper, I will examine the concepts of equality and non-discrimination and the relationship between them, both generally and within the context of language rights. I will then examine the language protections afforded within the Canadian constitutional, federal, provincial and territorial jurisdictions. As experience has shown, the implementation of equality guarantees respecting languages requires substantial commitment — political and financial — by governments. Accordingly, I argue that the likelihood of effective implementation of general guarantees of equality is increased where governments signal their commitment by rendering those guarantees more concrete in specific ordinary legislation. That is, the abstract principle of equality requires some assistance in being translated into material outcomes. Finally, I will consider whether, and which of, our statutory and/or constitutional protections lend themselves to the pursuit of equality of the official languages versus non-discrimination towards English-speakers or French-speakers.[2]

II. The Concepts of Equality and Non-Discrimination

Before examining the various constitutional and statutory protections surrounding the official languages, the concepts of equality and non-discrimination must be briefly considered. When discussing the concept of equality, at least the substantive view of equality that has

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1 Noelle Higgins, "The Right to Equality and Non-Discrimination with Regard to Language" (2003) 10:1 Murdoch U.E.J.L., at para. 1. Note, too, that the Supreme Court of Canada adopted a sociologically rich view of the role of language — as opposed to the view that language is a transparent means of conveying data — in *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712.

2 Some of the material in this paper has been borrowed from my recent work, "The Principle of Equality of the Official Languages" in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc: Yvon Blais, 2004), at 601.

been adopted in Canada, it is important to distinguish between equal treatment and identical treatment. To treat everyone identically can mean treating unequals equally which can have just as negative consequences as treating equals unequally.[3] For true equality to exist, it is the end result that must be considered. True equality must therefore involve recognizing differences and treating different groups differently so that they will have the opportunity to achieve the same result.

This brings us to the issue of non-discrimination. It is important to consider that the recognition of differences or distinctions between groups can potentially, but not necessarily, amount to discrimination. It is widely accepted that not all distinctions are discriminatory. Indeed, differences between citizens must be taken into account by a State when implementing a language policy to ensure true equality. In essence, discrimination occurs, either directly or indirectly, when a distinction is made on irrelevant or arbitrary grounds.

McKean aptly described the components of true equality and the relationship between equality and non-discrimination in the following manner:

> It will be seen that under international law the concept of equality of individuals includes two contemporary notions: (1) the principle of non-discrimination, which is a negative aspect of equality designed to prohibit differentiation on irrelevant, arbitrary or unreasonable grounds; and (2) the principle of protection or special measures, designed to achieve "positive" equality.[4]

He expanded on this thesis, in the context of a minorities treaty, saying that:

> Some commentators have taken too narrow a view of the meaning of equality in that they seem to believe that equality means merely the prevention of discrimination, and that positive protection therefore gives more than equal rights to minorities. But ... such treaties required equality in fact, not merely formal equality or "ostensible legal equality in the sense of the absence of discrimination in the words of the law." This being so, the denial of special protection to minorities may deny equality of treatment ... "Equality in law" no

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3 See Higgins, *supra*, note 1, at para. 3.

4 Warwick McKean, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1983), at 8.

longer means purely formal or absolute equality, but relative equality, which often requires differential treatment.[5]

From this brief discussion, it is clear that the principles of and relationship between equality and non-discrimination are complex. Within the context of language rights, these principles are no clearer. Indeed, securing equality of the official languages and preventing discrimination on the basis of language has proven to be a confusing and often contradictory endeavour in Canadian constitutional and statutory law.

III. The Idea of Equality within Canadian Language Rights

A striking feature of much of the language rights jurisprudence is the implicit, if not explicit, reliance upon some concept of equality. In Canada, the Supreme Court has held that language rights are a species of fundamental rights. While the impetus for recognition of language rights may have originally been historical bargaining, cultural security of minority language groups is now recognized as central to Canadian democracy.[6] Indeed, if these rights influence our understanding and definition of modern democratic principles, they have to be fundamental. Such recognition should, in turn, influence our understanding of the principle of equality.

We speak of equal rights to use English and French in certain circumstances under section 133 of the *Constitution Act, 1867*;[7] of opportunity to participate in debates of Parliament on an equal basis; of equality of French and English versions of legislation in certain jurisdictions; of equality of access to certain institutions; and of equal rights to communicate with and receive services from such institutions in English and French. Implicit recognition of the principle of equality of the official languages arose out of *Blaikie v. Quebec (Attorney General)*,[8] when the Supreme Court of Canada was called upon to interpret section 133. In *Reference re Manitoba Language Rights*,[9] in which section 23 of the *Manitoba Act, 1870* was at issue, the Supreme Court of Canada characterized its earlier decision in *Blaikie No. 1* as follows:

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5 *Id.*, at 51.

6 *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217.

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

8 [1979] 2 S.C.R. 1016 [hereinafter "*Blaikie No. 1*"].

9 [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721.

> To summarize, *Blaikie No. 1* stands for the proposition that s. 133 of the *Constitution Act, 1867* requires (i) simultaneous enactment of legislation in both English and French, and (ii) equal authority and status for both the English and the French versions. Nothing less would adequately preserve the linguistic guarantees of those sections or ensure that the law was equally accessible to Francophones and Anglophones alike.[10]

In what follows, I will examine the specific provisions relating to language and attempt to classify these provisions in relation to the higher principle of equality and the more modest principle of non-discrimination.

IV. The Canadian Charter of Rights and Freedoms

A. Subsection 15(1)

The starting point for any exploration of equality in Canadian public law must be subsection 15(1) of the *Canadian Charter of Rights and Freedoms*,[11] which reads as follows:

> 15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination, and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Subsection 15(1) explicitly incorporates both concepts of equality and non-discrimination. First, it articulates the principle of equality in that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law. The subsection goes on to incorporate the principle of non-discrimination as a qualifier to these four rights. While this overview cannot be exhaustive, a few remarks on the scope of subsection 15(1) are particularly relevant to our discussion of language and equality.

By its very terms and use of the phrase "in particular," subsection 15(1) does not create a closed list of prohibited grounds of discrimination. The Supreme Court has accepted that "analogous grounds" may

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10 *Id.*, at 776.

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

also serve as the basis for a successful claim of discrimination. To date, the equality guarantee has been held to include the analogous grounds of citizenship,[12] marital status,[13] sexual orientation[14] and off-reserve residence for Aboriginal persons.[15]

Second, the prohibited discrimination may either be direct, when the law is discriminatory on its face, or indirect, in the sense that without any distinction on the face of the law and absent pernicious legislative intent, there can still be discrimination where government action generates effects that disproportionately disadvantage some people and where the basis for that disadvantage is an enumerated or analogous ground. The methodology for assessing a section 15 claim is set out in *Law v. Canada (Minister of Employment and Immigration)*,[16] and is focussed on specific contextual factors. These factors, although not exhaustive, are: (1) pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group at issue; (2) the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity or circumstances of the claimant or others; (3) the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and (4) the nature and scope of the interest affected by the impugned law. None of the factors is determinative and there is no need to prove intent; systemic discrimination is prohibited, provided it meets these criteria.

Third, it is crucial to note that subsection 15(1) only prohibits distinctions that are discriminatory in purpose or effect. As explained above, not every distinction drawn on the basis of an enumerated or analogous ground will amount to discrimination. The Supreme Court clearly articulated this conclusion in *Law*. It is only a distinction on the basis of an enumerated or analogous ground that undermines the human dignity of the claimant,[17] as determined according to several contextual factors, that amounts to discrimination. According to the fourth contextual factor identified in *Law*, the nature of the interest affected, a distinc-

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12 *Law Society of British Columbia v. Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 [hereinafter "*Andrews*"].

13 *Miron v. Trudel*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418.

14 *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513.

15 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203.

16 [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 [hereinafter "*Law*"].

17 See *Law*, *id.*, at para. 53 for Iacobucci J.'s description of the concept of "dignity."

tion drawn on the basis of an enumerated or analogous ground is more likely to amount to discrimination where what is at stake is access to democratic participation or an important social institution.[18]

Fourth, and as explained above, the concept of equality is substantive, not formal. It is not enough to treat all persons or all similarly situated persons equally if they have different needs. Indeed, treating persons equally when their needs differ can itself constitute discrimination.[19] The guarantee of equal benefit under the law means that once government begins providing a benefit, it must do so equally and without discrimination, delivering substantively the same benefit to everyone.[20] Once government has taken positive action respecting certain persons, further positive action in respect of others may be required to avoid discrimination.[21]

Having set out this background, we turn to questions of language in relation to the principles of equality and non-discrimination. Since language is not an enumerated ground under subsection 15(1), the question becomes: Is it an analogous ground? While the Superior Court of Quebec has found *mother tongue* to be an analogous ground,[22] no court has yet recognized *language* as an analogous ground. Some commentators believe that language should be so recognized.[23] The conclusion that language is an analogous ground would lead to varying effects. It would clearly be useful for attacking a facially discriminatory law, for example, a law that imposed a burden upon persons on the basis of their language in a way that infringed their human dignity. It would also likely provide a basis for attacking a law that imposed, intentionally or not,

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[18] See, *e.g.*, *Halpern v. Canada (Attorney General)*, [2003] O.J. No. 2268, 65 O.R. (3d) 161 (C.A.).

[19] See, *e.g.*, *Andrews*, *supra*, note 12; *Eaton v. Brant County Board of Education*, [1996] S.C.J. No. 98, [1997] 1 S.C.R. 241.

[20] *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624.

[21] For example, in *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493, it was found to be discriminatory to legislate, in a provincial human rights statute, to prohibit discrimination on the basis of a long list of grounds that intentionally excluded sexual orientation.

[22] See *R. c. Entreprises W.F.H. ltée*, [2000] J.Q. no 1165, [2000] R.J.Q. 1222, at 1250 (Sup. Ct.), aff'd [2001] J.Q. no 5021, [2001] R.J.Q. 2557 (C.A.), leave to appeal refused with costs on 12 December 2002.

[23] Peter W. Hogg, *Constitutional Law of Canada*, 4th ed., vol. 2 looseleaf (Scarborough Ont.: Thomson, 1997), at §52-50, n. 219; Henri Brun & Guy Tremblay, *Droit constitutionnel*, 4th ed. (Cowansville, Qc.: Yvon Blais, 2002), at 855.

adverse effects on persons on the basis of language.[24] However, with the verdict still out on whether language is an analogous ground under subsection 15(1), claimants of discrimination on the basis of language are not guaranteed the protection afforded under subsection 15(1).

Does subsection 15(1) confer a right to language equality which is distinct from the right to non-discrimination, or are these two concepts inextricably linked by the word "without"? Almost 20 years ago, Woehrling took the view that if subsection 15(1) guarantees the right to equality generally, it then prohibits any irrational distinction between individuals, including distinctions based on language.[25] However, Woehrling also recognized that if the meaning of equality was subordinate to that of non-discrimination, an infringement of the right to equality would only arise if a distinction were discriminatory, as opposed to being simply irrational.[26] It is this latter comment that has been borne out by judicial practice.

Furthermore, it is unlikely that subsection 15(1) will ever protect the right to the use of one of the official languages, *per se*, or will found official recognition and entitlement to the use of any or all languages. Indeed, it seems unlikely that subsection 15(1) will ever advance substantive equality of languages or language groups.[27] This is because the official language guarantees set out in sections 16 to 23 have been viewed as special protections embodying their own internal principle of equality, and because these protections are so specific in terms of defining which languages are protected and which activities of government are captured. Furthermore, subsection 15(1) may not be seen to apply if the issue is the equality of languages, and not of persons.

B. Sections 16 to 23 of the Charter

It is unnecessary to refer to subsection 15(1) in order to claim that the language guarantees under sections 16 to 23 of the Charter must

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[24] However, there are a couple of cases, for example the Quebec municipal merger case, where courts have failed to keep in mind the possibility of adverse-effects discrimination on the basis of language. See *Baie D'Urfé (Ville) c. Québec (Procureur général)*, [2001] J.Q. no 4821, [2001] R.J.Q. 2520 (C.A.), leave to appeal refused with costs on 7 December 2001.

[25] José Woehrling, "L'article 15(1) de la Charte canadienne des droits et libertés et la langue" (1985) 30 McGill L.J. 266, at 275.

[26] *Id.*, at 277.

[27] See Vaz, *supra*, note 2, at 616, n. 53.

reflect a general right to equality. In other words, independent of section 15, sections 16 to 23 are predicated upon a notion of equality of French and English.[28] Several observations are in order.

We begin with section 16, which formally recognizes the principle of equality of the two official languages of Canada. Subsections 16(1) and 16(2) declare that English and French are the official languages of Canada and of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada, and of the legislature and government of New Brunswick, respectively. Whether these subsections are symbolic expressions of aspiration or conferrals of enforceable rights is yet to be judicially determined. We believe that section 16 gives rise to independent enforceable obligations, specifically, that the usage of both languages must be guaranteed within public institutions.

In addition to affirming existing principles, subsection 16(3) clarifies that other Charter provisions do not limit the power of any level of government to adopt a law that favours the progression towards equality between the two official languages. In doing this, subsection 16(3) has formalized the principle of advancement or progression of the equality, status and use of the official languages of Canada as first articulated in *Jones v. New Brunswick (Attorney General)*,[29] and then invoked by the Court again in *MacDonald v. Montreal (City)*[30] and *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch.*[31]

In 1993, section 16.1 was added to the Charter, by means of a bilateral amendment made under the amending formula in section 43 of the *Constitution Act, 1982*. Section 16.1 recognizes the equality of status and equal rights and privileges of the English and French linguistic communities of New Brunswick and their institutions. Does section 16.1's concept of substantive equality impose any positive obligation on

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28 This is significant when one considers that a legislature may avoid the application of s. 15 by recourse to the s. 33 notwithstanding clause. By contrast, language rights entrenched in ss. 16 to 23 of the Charter are not subject to the override power.

29 [1975] 2 S.C.R. 182.

30 [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460.

31 [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549. In *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at 791, Bastarache J., writing for the majority, noted that the principle of advancement under subs. 16(3) does not exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada.

the part of the New Brunswick government to advance the equality and status of linguistic groups? This inquiry raises interesting questions about what it means for groups to be equal or to have equality *as groups*. We know that the *Official Languages Act*[32] of New Brunswick grants equality of status to the two official languages, but what does it mean to grant equality of status to the two linguistic communities? The equality of two groups in relation to one another, as groups, would seem to be much more difficult to bring about or to measure than, say, equality of access by individuals to a particular institution or service. When simultaneous translation is provided in a legislature, or laws are enacted, printed and published in both English and French, a speaker of either language is treated equally to a speaker of the other. But that says nothing about the status of one linguistic and cultural group vis-à-vis the other.

Sections 17 to 23, the remaining language provisions in the Charter,[33] prescribe a variety of rights, including the right to use English and French in the legislative process; within the judicial system; in communicating with and receiving services from the government; within the private realm; and in education. In some cases, the right is circumscribed by demand, nature of the office in question or other criteria. While sections 17 to 23 do not incorporate the language of equality, they represent a clear effort to promote the equality of both official languages of Canada within the federal sphere. With the exception of New Brunswick, discussed below, the provinces and territories have yet to adopt such constitutional guarantees.

V. Federal, Provincial and Territorial Legislation

A. The Preamble, Section 2 and Part VII of the Federal *Official Languages Act*

Three of the 10 provisions of the Preamble to the *Official Languages Act*[34] are exclusively devoted to the equality and advancement of the English and French languages and to their respective linguistic

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32 S.N.B. 2002, c. O-0.5.

33 Sections 17 to 23 are examined in detail in Chapters 2 to 6 of Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, QC: Yvon Blais, 2004).

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

communities. In addition, the two substantive paragraphs in section 2, which set out the purpose of the Act, ensure respect for English and French as the official languages of Canada; secure equality of status and equal rights and privileges as to their use in all federal institutions; support the development of English and French linguistic minority communities; and generally advance the equality of status and use of the English and French languages within Canadian society.

Part VII of the Act is entitled *Advancement of English and French* and represents a significant legislative initiative. The general purpose of Part VII is to preserve the two official languages and cultures of Canada and to promote as much as possible the vitality of official language communities that do not enjoy a majority status in the provinces and territories of Canada. Part VII is an extension of subsection 16(1) of the Charter, which provides that "English and French are the official languages of Canada" and as such, "have equality of status and equal rights and privileges as to their use *in all institutions* of the Parliament and government of Canada" (emphasis added).

B. New Brunswick

In recent history, successive governments in the province of New Brunswick have enacted language rights legislation and entrenched language rights in the Constitution. The following is a summary of the legislative initiatives taken by successive governments in New Brunswick in the past 25 years.

- The province pioneered by enacting in 1969 the *Official Languages of New Brunswick Act*,[35] which recognizes that the English and French languages possess and enjoy equality of status and equal rights and privileges in all matters within the jurisdiction of the province and provides for the exercise of specific language rights.
- In 1981, the provincial government enacted *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Bruns-*

[35] R.S.N.B. 1973, c. O-1, which has since been replaced by the *Official Languages Act*, S.N.B. 2002, c. O-0.5.

wick.[36] This Act officially recognizes the existence and equality of the two official linguistic communities.

- The following year, when the federal government was proceeding to patriate the Canadian Constitution and enact the *Canadian Charter of Rights and Freedoms*, the New Brunswick government had certain languages rights entrenched in the Charter; these rights apply specifically to the institutions of the legislature and government of New Brunswick. These language rights are contained in subsections 16(2) and 20(2) of the Charter.
- Finally, in 1993, by way of constitutional amendment under section 43 of the *Constitution Act, 1982*, the provincial government constitutionalized the principles of *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick* that the Legislative Assembly passed in 1981. This became section 16.1 of the Charter and contains a declaration that the English and French linguistic communities are equal, defines the role of preserving and promoting the equality of the official linguistic communities and specifically confers this role on the legislature and government of New Brunswick.

These legislative initiatives have led to New Brunswick's unique status as the only officially bilingual province in Canada. Indeed, the constitutional principle of the equality of official languages and the equality of the two official linguistic communities and of their right to distinct institutions is the linchpin of New Brunswick's regime of language guarantees.

C. Quebec

Quebec is home to the most comprehensive language law in Canada: the *Charter of the French language* [Bill 101].[37] The *Charter of the French language* establishes a regime in which French is the official language; other languages, including English, are authorized by way of exception, either upon permission or as a result of particular circumstances. Starting from the position that French-speakers constitute a

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36 S.N.B. 1981, c. O-1.1.

37 R.S.Q., c. C-11.

majority occupying the territory of Quebec, this Charter arguably does not confer language rights in the usual way of protecting a minority group.[38] Those language rights in Quebec that relate to linguistic minorities are based more on the need for non-discrimination and tolerance, a limited form of protection of individual rights,[39] than for equality of language groups, as is the case in federal institutions. The inequality of legal status of the French and English languages in Quebec serves as a background as we turn to Quebec's *Charter of human rights and freedoms*.[40] Section 10 starts: "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on ..." and then goes on to list a number of grounds, including "language." Section 10 also reads: "Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right."

Section 10, on the whole, promises protection for every person against discriminatory distinctions on the basis of language. Unfortunately, cases like *Forget v. Quebec (Attorney General)*,[41] *Ford v. Quebec (Attorney General)*,[42] *Devine v. Quebec (Attorney General)*,[43] *Hôpital Reine Élizabeth de Montréal c. Québec (ministre de la Santé et des Services sociaux)*,[44] and *Baie D'Urfé (Ville) c. Québec (Procureur général)*[45] illustrate that language is a characteristic that is intimately connected with one's culture and identity and when courts are not open to indirect discrimination, or characterize a distinction on superficial characteristics, then language claims under section 10 of the *Charter of human rights and freedoms* will be all the more difficult to substantiate.[46]

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38 The analysis would be quite different if one was, instead, starting from the position that this group of French-speakers constituted a minority within the Canadian context.

39 Leslie Green, "Are Language Rights Fundamental?" (1987) 25 Osgoode Hall L.J. 639, at 660.

40 R.S.Q., c. C-12.

41 [1988] S.C.J. No. 68, [1988] 2 S.C.R. 90.

42 [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712.

43 [1988] S.C.J. No. 89, [1988] 2 S.C.R. 790.

44 [1996] A.Q. no 3406, [1996] R.J.Q. 2804 (C.A.).

45 *Supra*, note 24.

46 In many of these cases, language was named as a required skill under employment circumstances. While in this light, language could be seen as a merit-based distinction, it is important to remember that it is a distinction that government itself created.

D. The Territories

The purpose of the Northwest Territories' (the "NWT") *Official Languages Act*,[47] and its underlying principles, are expressed in its preamble and include providing legal protection for the languages of the NWT; recognizing the multilingual nature of the NWT; recognizing that the Aboriginal people of the NWT, speaking Aboriginal languages, make it a distinct society within Canada; assisting in preserving the cultures of the NWT; recognizing French and establishing it as an official language; and granting equal rights and privileges, as defined in the Act and regulations, regarding the use of all official languages in institutions of government. Section 8 then provides that, to the extent and in the manner provided for in this Act and any regulations thereunder, the official languages of the Territories, namely, English, French and six Aboriginal languages,[48] have equality of status and equal rights and privileges as to their use in all institutions of the Legislative Assembly and Government of the Territories. The same provisions apply in Nunavut.[49]

By contrast, subsection 1(1) of Yukon's *Languages Act*[50] recognizes English and French as the official languages of Canada and accepts that measures set out in the Act constitute important steps towards implementation of the equality of status of French and English. Unlike its counterpart in the NWT, subsection 1(3) recognizes the significance of Aboriginal languages in the Yukon and wishes to take appropriate measures to preserve, develop, and enhance those languages in the Yukon. It is immediately apparent, from its text and tone, that the guarantees accorded by Yukon's *Languages Act* are directed towards English and French and are considerably less generous with regard to Aboriginal languages than the guarantees conferred in the same domain under the NWT statute.

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47 R.S.N.W.T. 1988, c. O-1.

48 *An Act to Amend the Official Languages Act, No. 3*, S.N.W.T. 2003, c. 23, s. 5 (received Royal Assent 10 October 2003) provides that Chipewyan, Cree, English, French, Gwich'in, Inuinnaqtun, Inuktitut, Inuvialuktun, North Slavey, South Slavey and Tlichô are the official languages.

49 Section 29 of the *Nunavut Act*, S.C. 1993, c. 28, as am. by S.C. 1998, c. 15, s. 4, declares that the ordinances of the Northwest Territories and the laws made under them that have not been repealed are duplicated to the extent that they can apply in relation to Nunavut, with any modifications that the circumstances require. The duplicates are deemed to be the laws of the Legislature of Nunavut.

50 R.S.Y. 2002, c. 133.

E. The Remaining Jurisdictions

In contrast, most of the remaining jurisdictions have enacted language legislation which includes a provision stating that nothing in the Act limits the authority of the legislature to advance the equality of status and use of French and English,[51] limits the use of the English or French language outside of the application of the Act,[52] or prevents the legislature from providing additional rights to those provided for in the Act.[53] While such measures represent a step in the right direction, the negative wording renders them at least one step behind the positive declarations noted above. Moreover, the absence of legislative policy that expresses that further measures are desirable ranks these statutes far below even an unenforceable statement of aspiration which has at least symbolic validating power regarding language minorities.

VI. CONCLUSION

However intertwined the principles of equality and non-discrimination appear to be, they embody distinct values and criteria. Accordingly, when stated as an objective or goal, they may lead to different substantive protection. As McKean explained, non-discrimination is designed to prohibit differentiation on irrelevant, arbitrary or unreasonable grounds. In essence, it is the "negative" aspect of equality. In the context of language rights, Quebec's statutory regime clearly embodies this lesser objective. Equality, on the other hand, is much more than the mere prevention of discrimination. It is more than formal equality which treats all individuals the same way, regardless of any disparities in power or opportunity. True equality requires equality in fact and in result. It requires positive protection and positive measures and accounts for the inherent or systemic differences between groups. The language provisions within the *Canadian Charter of Rights and Freedoms* offer a clear example of an effort on the part of the federal gov-

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[51] *Official Languages Act*, S.N.B. 2002, c. O-0.5, s. 5; *Languages Act*, R.S.Y. 2002, c. 133, s. 2 [also applicable to a Yukon Aboriginal language].

[52] *French Language Services Act*, R.S.O. 1990, c. F.32, s. 6; *French Language Services Act*, S.P.E.I. 1999, c. 13, s. 4.

[53] *City of Winnipeg Charter*, S.M. 2002, c. 39, s. 452(2); *Official Languages Act*, R.S.N.W.T. 1988, c. O-1, s. 13; *Languages Act*, R.S.Y. 2002, c. 133, s. 8 [also applicable to a Yukon Aboriginal language].

ernment and the government of New Brunswick to promote the equality of both official languages of Canada. Indeed, sections 16 to 23 are predicated upon a notion of equality of French and English.

As I suggested at the beginning of this paper, the most effective equality guarantees are those that government has embodied or has specifically included in its ordinary legislation. In practical terms, it is perhaps translation into the "soft law" of government handbooks and internal directives that is the most critical in terms of implementation, although it is difficult to measure the effect of such instruments, and thus we tend to gravitate towards pure law itself and the litigation to which it leads. Indeed, the more these guarantees apply to and govern the day-to-day lives of Canadians, the more they will safeguard against discrimination, and the closer we will get to achieving our goal. On the whole, the Canadian landscape is much more encouraging than it had been two decades ago. In our view, the principle of equality will continue to play an important role in interpreting language guarantees included in the Constitution and in the various statutory provisions. This conclusion flows from the Supreme Court of Canada's recent adoption of a generous and liberal approach to the interpretation of language rights in *R. v. Beaulac*.[54]

Nancy Fraser has argued that the left has lost its way to a certain extent by shifting its attention from the pursuit of redistribution to the pursuit of recognition. Identity politics, she argues, detracts from the effort to secure a more equitable distribution of material resources.[55] The example of language rights in Canada — a context in which legal recognition entails the expenditure of resources in terms of government services and the building of institutions — shows an intimate linking of recognition and redistribution. Future discussions about the principle of equality will undoubtedly reflect the contemporary concept and understanding of social justice. The need to guarantee the survival of, and accord respect to, official language communities — necessitating as it does the government expenditures just noted — will continue to justify some deviation from the principle of equality. Possibly the most difficult task will involve balancing the need for greater judicial intervention in these matters against the need to respect the role of legislatures.

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54 *Supra*, note 31.

55 Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (London: Routledge, 1997), c. 1.