THE RIGHTS OF OFFICIAL LANGUAGE MINORITY COMMUNITIES IN CANADA

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ABSTRACT

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This thesis explores the meaning and content of s. 41 of the Official Languages Act of Canada, which imposes certain duties on all federal institutions towards French- and English-language minority communities. While vitally important as a component of Canada's language rights archictecture, the nature and content of s. 41 as a legal norm remain woefully unclear. The immediate aim is to determine: (1) whether s. 41 confers a right to specific measures in particular cases; (2) whether such rights are individual or collective; and (3) if collective, what sort of interests are protected.

Section 41 presents a number of interpretive challenges. First, it uses terminology which is undefined in the Act and yet has no self-evident meaning. Thus, the nature of the primary legal subject, 'linguistic minority communities' (LMCs), is unclear, as are the nature of the protected interests, 'vitality' and 'development'. Second, the interpretive principles developed by the case-law for official language rights rely on a conceptual framework that is vague and under-theorized. Key components of that framework, like the concept of a necessary link between language and culture, have yet to be fully explored, either in the case-law or in legal scholarship. This presents an acute problem in the case of s. 41, where the content of these concepts will likely prove dispositive.

In order to grapple with these challenges, this thesis develops an account of language rights as collective rights. Drawing on the philosophical literature and existing case-law, I argue that LMCs should be conceived of as collectivities rather than mere aggregates of individuals, and that a number of language rights, such as s. 41 of the OLA, and ss. 16.1 and 23 of the Charter, aim to protect the collective interests of these collectivities. I then define some of these interests from both an empirical and a normative perspective. I conclude by arguing that s. 41 of the OLA protects an 'autonomy interest', which both prohibits federal institutions from interfering with existing LMC autonomy, and provides a basis for claiming enhancements to that autonomy, within the confines of the statutory mandate of the institution in question.

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CONTENTS

TABLE OF ABBREVIATIONS AND SHORT FORMS

AG	Attorney-General of Canada
B&B Commission	Royal Commission on Bilingualism and Biculturalism
BCCA	British Columbia Court of Appeal
Charter	Canadian Charter of Rights and Freedoms
CLRS	Canadian language rights system
ECRML	European Charter for Regional and Minority Languages
EWCA	Court of Appeal for England and Wales
FCFA	Fédération des communautés francophones et acadiennes
FLSA	French Language Services Act
JCPC	Judicial Committee of the Privy Council
LMC	Linguistic minority community
Manitoba CA	Manitoba Court of Appeal
MFC	Minority francophone community
NB Equality Act	An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick
NBCA	New Brunswick Court of Appeal
NBOLA	Official Languages Act of New Brunswick
NS Sup Ct	Superior Court of Nova Scotia
OCA	Ontario Court of Appeal
OLA	Official Languages Act of Canada
OLMC	Official language minority community
Ont Sup Ct	Superior Court of Ontario
QCCA	Quebec Court of Appeal
SCC	Supreme Court of Canada
SCOTUS	Supreme Court of the United States

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CHAPTER 1 INTRODUCTION

1.1 General overview

This is a study of Part VII of the federal Official Languages Act of Canada ('OLA'), entitled 'Advancement of English and French'.[1] More specifically, this thesis explores the protections afforded to official language minority communities (OLMCs) by section 41 of the Act. The English text[2] of the Act provides as follows:

> **41.** (1) The Government of Canada is committed to
>
> (a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and
>
> (b) fostering the full recognition and use of both English and French in Canadian society.
>
> (2) Every federal institution has the duty to ensure that positive measures are taken for the implementation of the commitments under subsection (1). For greater certainty, this implementation shall be carried out while respecting the jurisdiction and powers of the provinces.[3]

Part VII is a critical component of Canada's language rights architecture, not least because it currently provides the legislative basis for over $ 1.1 billion in spending by the federal government aimed at supporting OLMCs.[4] Yet until very recently, s. 41 was viewed as non-justiciable by a range of influential actors,

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[1] Official Languages Act, RSC 1985, c 31 (4th Supp).

[2] Under s. 133 of the Constitution Act, 1867 and s. 18 of the Constitution Act, 1982, all federal statutes must be enacted in both English and French, and both versions are equally authoritative. In some cases—if one version is ambiguous, or if there is an inconsistency between the two—courts must compare the two versions in order to determine the correct meaning: *R v Daoust* [2004] 1 SCR 217, paras. 26-31. As we shall see, there is undoubtedly real ambiguity in both versions of s. 41. However, the differences between them are minimal, and have no direct bearing on the argument I advance in this thesis. Given space constraints, I will therefore only be referring to the English version.

[3] See Appendix A for the full text of s. 41.

[4] Heritage Canada, *Education, Immigration, Communities: Roadmap for Canada's Official Languages, 2013-2018* (Government of Canada 2013) 1.

including the federal Department of Justice, a view that was ultimately accepted by the Federal Court of Appeal.[5] As a result, while considered important from a public policy standpoint, s. 41 initially received little attention as a legal norm.

In 2005, Part VII was amended to override this interpretation and make s. 41 clearly 'executory'. Members of the public now have the unequivocal right to apply to the Federal Court for a wide range of legal remedies when that provision has been violated.[6] Nevertheless, the content of s. 41 as a legal norm remains poorly understood. Very few cases involving s. 41 have ever reached the courts (both before and after the 2005 amendments), and existing judgments offer contradictory guidance on issues of fundamental importance.[7] In addition, there is a dearth of academic commentary on the subject. While the implementation of Part VII has been examined by the Commissioner for Official Languages[8] and the Senate,[9] and from the perspective of other disciplines, such as politics, sociology, and public policy and administration,[10] detailed analyses by legal scholars are fairly thin on the ground.[11]

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[5] *Forum des maires de la Péninsule acadienne v Canada (Food Inspection Agency)* 2004 FCA 263. See also : *Procureur général des Territoires du Nord-Ouest c Fédération Franco-Ténoise* 2008 NWTCA 5, paras. 346-7.

[6] Section 77(1), OLA.

[7] For instance, compare *Picard v Commissioner of Patents* 2010 FC 86 and *Fédération des communautés francophones et acadienne du Canada v Canada (Attorney General)* 2010 FC 999.

[8] The Commissioner's office will often commission studies by outside specialists. The following have looked closely at Part VII and related issues : Jean-Claude Le Blanc and others, 'A Blueprint for Action: Implementing Part VII of the Official Languages Act.' (Office of the Commissioner of Official Languages 1996); Linda Cardinal and Marie-Ève Hudon, 'The Governance of Canada's Official Language Minorities [Electronic Resource]: A Preliminary Study' (Office of the Commissioner of Official Languages 2001); Marc Johnson and Paule Doucet, 'A Sharper View: Evaluating the Vitality of Official Language Minority Communities: Report to the Commissioner for Official Languages of Canada' (Commissioner of Official Languages 2006).

[9] 'Implementation of Part VII of the Official Languages Act: We Can Still Do Better. Report of the Standing Senate Committee on Official Languages' (Senate of Canada 2010).

[10] See, for instance : Martin Normand, 'L'autonomie eu égard à la mise en oeuvre de la partie VII de la Loi sur les langues officielles' [2012] Minorités linguistiques et société 229, 240; Linda Cardinal and others, 'Apprendre à travailler autrement: la gouvernance partagée et le développement des communautés minoritaires de langue officielle au Canada' (Chaire de recherche sur la francophonie et les politiques publiques, Université d'Ottawa 2005) 24; Linda Cardinal, Stéphane Lang and Anik Sauvé, 'Les minorités francophones hors Québec et la gouvernance des langues officielles : portrait et

The aim of this thesis is to begin filling this gap by offering a detailed analysis of s. 41 from a legal perspective. There are two main benefits to such an exercise. Firstly, and most obviously, it will help to further clarify the content and scope of the rights and/or obligations created by that provision, and provide some guidance to interested parties. Secondly, though just as importantly, it provides an opportunity to explore a number of important conceptual and theoretical questions relating to language rights in Canada that are currently under-examined.

1.2 The challenge of interpreting s. 41 of the OLA

The wording of s. 41 makes it very challenging to interpret properly. Many of its key terms, like the concept of a 'linguistic minority community', or that of 'vitality', are undefined in the Act, even though their meaning is far from obvious. This problem is compounded by the fact these terms are largely unique to Part VII of

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enjeux' [2008] Francophonies d'Amérique 209, 213; Stéphanie Chouinard, 'The Rise of Non-Territorial Autonomy in Canada: Towards a Doctrine of Institutional Completeness in the Domain of Minority Language Rights' (2014) 13 Ethnopolitics 141, 153–154; Éric Forgues and Mario Paris, 'Impact de l'intervention de l'État sur les communautés minoritaires de langue officielle' [2005] Francophonies d'Amérique 161, 161; Rodrigue Landry, Éric Forgues and Christophe Traisnel, 'Autonomie culturelle, gouvernance et communautés francophones en situation minoritaire au canada' (2010) 29 Politique et Sociétés 110–111; Rodrigue Landry, 'Autonomie culturelle, cultures sociétales et vitalité des communautés de langue officielle en situation minoritaire au Canada' [2012] Minorités linguistiques et société 159, 173; Rémi Léger, 'La nouvelle gouvernance des langues officielles au Canada : entre exigences et circonstances' (2013) 56 Canadian Public Administration 414, 418–419.

[11] A few legal scholars have undertaken a direct analysis of the legal effects of Part VII of the OLA : Ingride Roy, 'Les diverses solutions « intégratives » et « autonomistes » offertes aux communautés de langue officielle du Canada pour préserver et développer leur spécificité' [2012] Minorités linguistiques et société 115, 133–138; Michel Doucet, 'La partie VII de la Loi sur les langues officielles du Canada: une victoire à la Pyrrhus ou un réel progrès' (2007) 9 Rev. CL Francais 31; Serge Rousselle, 'Modifications a la Partie VII de la Loi sur les langues officielles: L'obligation de consulter' (2007) 9 Rev. CL Francais 183; Michel Bastarache and Andréa Ouellet, 'La portée juridique de la partie VII de la Loi sur les langues officielles du Canada'; Michel Doucet, 'La décision judiciaire qui ne sera jamais rendue: l'abolition du programme de contestation judiciaire du canada et la Partie VII de la Loi sur les langues officielles' (2008) 10 Rev. CL Francais 27. Its potential effects are also mentioned in passing in a few other places : Pierre Foucher, 'Autonomie des communautés francophones minoritaires du Canada: Le point de vue du droit' [2012] Minorités linguistiques et société 108; Michel Bastarache and others, 'Au-delà des nombres: le droit du public canadien à des services fédéraux dans la langue officielle de son choix' (2011) 35 Man. LJ 14, 47; Francois Larocque, Mark Power and Maxine Vincelette, 'Élargissement du concept d'obligation fiduciaire au profit des communautés de langue française en situation minoritaire dans leurs relations avec l'État' (2012) 63 UNBLJ 370, 413.

the OLA in the realm of statutory law.[12] That being said, they are closely related, and at times identical, to terms that often turn up in the broader language rights case-law. The latter is considerably more developed than that dealing with s. 41 specifically, and therefore offers some guidance on the meaning of these concepts from a juridical standpoint.

Unfortunately, however, the available *explicit* guidance is somewhat limited, as the meaning of many key terms remains unclear. Since the Canadian Charter of Rights and Freedoms (hereinafter 'the Charter') was adopted in 1982, the courts have developed a number of principles that must be applied when interpreting 'language rights', or, more specifically, what I call the Canadian language rights system (CLRS).[13] Taken together, these principles give direction as to the nature, purpose, and justification of official language rights in Canadian law, and therefore offer some guidance on how to interpret s. 41 of the OLA. However, many of these interpretive tenets, like the notion that 'any broad guarantee of language rights … cannot be separated from a concern for the culture associated with the language',[14] or that the purpose of language rights is 'to assist official language minorities in preserving their cultural identity' and ensure the 'preservation and development of official language communities'[15], are vague or polysemous from a legal perspective.

So far, the lack of clarity in this regard has not been perceived as a serious problem, likely because many language rights have a reasonably clear core meaning,

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[12] Section 16.1 of the Charter refers to the English and French 'linguistic communities' of New Brunswick, which appears to be a close analogue to the concept used in the OLA. There is little case-law under s. 16.1, but a helpful discussion can be found in *Charlebois c Mowat* 2001 NBCA 117, paras. 62-80.

[13] The CLRS is a network of constitutional and statutory norms that regulate the status of Canada's two official languages and the rights of the public vis-à-vis various public institutions. The CLRS is highly complex and cannot be described succinctly. See Chapter 2, section 3, for a more detailed explanation.

[14] *Mahe v Alberta* [1990] 1 SCR 342 (SCC), p. 362.

[15] *R v Beaulac* [1999] 1 SCR 768, paras. 25, 34.

supplemented by detailed guidance from the case-law on specific issues of practical concern.[16] Semi-theoretical statements like those above serve mainly (though not exclusively) to resolve ambiguities in the controlling legal text by providing a justification for adopting a liberal and generous interpretation. However, a provision like s. 41, with its direct reference to linguistic 'communities' and their overall 'vitality', places concepts like 'culture', 'community' and 'identity' at the heart of the analysis. Defining the content of s. 41 as a legal norm requires a more detailed account of these concepts than the case-law or academic commentary presently offers.

1.3 Basic aims of the thesis

For a number of reasons, a comprehensive account of s. 41 is presently out of reach. To begin with, Part VII applies to all federal departments and agencies across the entire spectrum of federal jurisdiction, meaning that the potential range of requirements that might flow from it is simply staggering. Furthermore, there is hardly any case-law pertaining to s. 41, and so the courts' experience in dealing with it is very limited. Under such circumstances, the most one can reasonably hope to accomplish is to scout out the key features of the legal terrain. Accordingly, my thesis will focus on two main questions, both of which are pressing and yet largely unresolved: (1) What is the legal effect of s. 41? (2) What is the nature of OLMCs as legal subjects, and what interests of theirs are protected? I explain these questions in more detail below.

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[16] In the education context, for instance, the potential impact of these interpretive statements is quite substantial, and their vagueness could pose a serious problem. However, the case-law under s. 23 has developed a number of more 'concrete' principles, such as the proposition that s. 23 includes a collective right to management and control of educational institutions in relation to a range of enumerated activities. This proposition is founded on the more abstract theoretical statement quoted above, which links language and culture. However, as it provides very clear guidance on the resolution of practical controversies, it is almost never necessary to resort to its underlying principles.

1.3.1 The legal effect of s. 41

In one important respect, the debate over the legal effect of s. 41 has already been settled. Parliament acted in 2005 to clarify the meaning of that provision, which now explicitly imposes a 'duty' on all federal institutions to take 'positive measures' in furtherance of the overarching commitment contained in s. 41(1).[17] The same package of amendments also made Part VII subject to the judicial remedy set out in Part X of the OLA, meaning that the Federal Court is now empowered to grant any relief it deems 'appropriate and just under the circumstances' for violations of s. 41—the same power granted to sanction Charter rights.[18] The possibility of treating s. 41 as merely 'declaratory' or aspirational, as was once done, is now clearly foreclosed.

However, what type of constraints or entitlements might flow from the new wording is not yet clear. One possibility, suggested by the phrasing of s. 41(2), is that the choice of means for fulfilling the duty is left to the discretion of the federal government. Were that to be the case, the standard constraints imposed by administrative law would certainly apply, but the scope of the executive's freedom would be quite substantial, and one would most likely be precluded from claiming that any specific rights (whether individual or collective) arise from s. 41. Indeed, the Attorney General of Canada has thus far taken the position that this provision merely confers an open-ended discretion on the federal government as a whole, and that it does not give rise to 'precise obligations' which might empower the courts to order the adoption of 'specific measures' in particular cases.[19]

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[17] See Appendix A.

[18] Sections 77(1) and 77(4) of the OLA and s. 24(1) of the Charter.

[19] *Picard* (n 7), para. 61. See also: *FCFA v Canada* (n 7), para. 5.

That being said, the fact that this duty is now subject to judicial scrutiny on the same basis as other provisions of the OLA—many of which are held to spell out language *rights* despite being phrased in terms of duties[20]—cuts against this impression. Indeed, the clear intention of the drafters of the 2005 amendments was to ensure that members of the public (or the Commissioner for Official Languages) could more easily call on the courts to scrutinize the adequacy of executive action under s. 41 than was possible under the traditional administrative law framework.[21] What is more, in at least one case the Federal Court rejected the notion that s. 41 does not confer a right to specific measures in particular cases, although the issue was not examined at great length.[22] Thus, some important questions remain unresolved. Does s. 41 create a right or merely a duty to exercise a broad discretionary power? If the latter, to what extent—and by what factors—are federal institutions constrained in carrying this duty out? If the former, what is the content of the putative right(s)?

1.3.2 The nature and interests of OLMCs as legal subjects

The murkiness surrounding the nature of s. 41 as a legal norm is both partly caused, and compounded by, the wording of the overarching commitment—to 'enhance the vitality' and 'support the development' of 'linguistic minority communities'. This commitment uses terminology unique to Part VII of the OLA (at least in the realm of statute law), the meaning of which has not been thoroughly

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[20] Consider for example *Devinat v Canada (Immigration and Refugee Board)* [2000] 2 FCR 212, in which the Federal Court of Appeal treats s. 22 of the OLA as a 'right'. See also *Beaulac* (n 15).

[21] See the comments of Senator Gauthier in presenting his bill to amend s. 41: Senate of Canada, 'Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. First Session: Thirty-Seventh Parliament, 2001. Issue No. 23: Bill S-32, An Act to Amend the Official Languages Act (Fostering of English and French)' 15. A more detailed discussion of this issue will be had in Chapter 2.

[22] *Picard* (n 7).

considered by the courts. Yet these same terms hold the key to defining the underlying purpose of s. 41 as well as what constitutes a 'positive measure', making their indeterminacy a serious hurdle to interpretation.

The Supreme Court has been clear that constitutional rights, including language rights, must be given a broad and purposive interpretation.[23] While s. 41 is not itself a constitutional norm, it is nevertheless contained in a quasi-constitutional statute whose purpose is to implement various Charter rights and values, and so it must be construed in that light.[24] Since the evident purpose of Part VII is to protect OLMCs—especially minority francophone communities, which are particularly vulnerable—a genuinely purposive interpretation must start with these communities themselves. What are they, and why do they need the benefit of a provision such as s. 41? Only once these questions are answered can one hope to resolve the other ambiguities regarding the legal effect of s. 41.

1.4 Methodology

1.4.1 The limits of purely doctrinal analysis

As my ultimate aim is to offer an interpretation of s. 41 that would be persuasive in a court of law—that is, one that speaks to the 'internal' point of view in legal discourse [25] —my analysis begins with the standard tools of statutory interpretation, the cornerstone of which in Canada is Driedger's Modern Principle,[26]

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[23] *Beaulac* (n 15). , para. 25.

[24] *Thibodeau v Air Canada* 2014 SCC 67, para. 112.

[25] RA Posner, 'Legal Scholarship Today' [2002] Harvard law review 1314, 1315; Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 Law Quarterly Review 632, 633.

[26] '[T]he words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament': *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, para. 108; *Rizzo & Rizzo Shoes Ltd (Re)* [1998] 1 SCR 27, para. 21; Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed , LexisNexis 2008) 1.

as well as the supplementary rules of interpretation applicable to language rights provisions and quasi-constitutional statutes. This mode of inquiry is most clearly in evidence in Chapter 3, in which I explore the nature of s. 41 as a legal norm.

However, as I noted above, applying these rules to Part VII of the OLA quickly reveals the limits of existing case-law in this regard. The conceptual vocabulary of Canadian language rights law, as it presently stands, is too imprecise to provide sufficiently clear answers to the questions I wish to answer. Put another way, pure doctrinal analysis is incapable of making the content of s. 41 fully intelligible, as that content is defined in relation to concepts that are presently opaque to doctrinal analysis. In order to overcome this problem, I have drawn from non-legal sources in order to fashion a set of concepts that can provide a greater degree of specificity to the content of s. 41.

1.4.2 Blending a top-down and bottom-up approach

My methodology lies somewhere in between what Réaume describes as the 'top-down' and 'bottom-up' approaches to legal theory and legal development.[27] A bottom-up approach takes as its starting point existing judgments about specific cases. It seeks to articulate principles that best explain these judgments, and then use them as a basis for deciding novel cases on an incremental basis. A top-down approach, by contrast, operates in the opposite direction. It aims to develop a comprehensive set of rules grounded in a general (abstract) theory, and then apply these rules to resolve individual cases. Each approach corresponds, schematically, to a different institutional setting. Courts—which in the common law tradition possess their own

[27] Denise G Reaume, 'Of Pigeonholes and Principles: A Reconsideration of Discrimination Law' (2002) 40 Osgoode Hall LJ 113.

law-making power—typically proceed using a bottom-up approach. Legislatures, by contrast, tend to follow a top-down methodology.

While this dichotomy is modeled on differing institutional approaches to law-making, it can also be used to describe an important distinction between the differing theoretical postures one might take towards the law from an academic perspective. Thus, a bottom-up approach is aligned with the Blackstonian tradition, while the top-down method more closely resembles the Benthamite approach.[28] A bottom-up posture would seek to identify the moral commitments already embedded in the law, articulate principles that best explain those commitments, and then use those principles to fill gaps, resolve novel cases, or critique anomalous or erroneous judgments. A top-down posture, by contrast, would begin with a commitment to a certain moral theory, use that theory as a basis for articulating specific rules, and then compare those rules to existing law in order to assess its adequacy.

Given my stated aim—to interpret s. 41 as an existing legal norm operating in an area with a considerable body of case-law—a bottom-up posture seems most appropriate. However, the nature of this particular subject-matter makes it difficult to follow this approach. A bottom-up methodology presupposes that the case-law provides a set of 'data-points' sufficiently dense to provide a real constraint on theoretical modeling. That is, it assumes that it will be possible to determine, with reasonable confidence, that theory X does in fact provide a superior explanation for existing judgments than theories Y or Z.[29] However, in the case of the CLRS, the case-law is not sufficiently developed to allow for a strict adherence to this approach. For instance, the concept of a language-culture link, to which I alluded above, has not

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[28] ibid 116.

[29] On this point, consider : Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' [2005] The American Journal of Comparative Law 125, 131–132; McCrudden (n 25) 634.

been used in a sufficiently large number of cases to enable us, based solely on that evidence, to conclude that there exists one specific core meaning of this term.

Given this, it seems both necessary and defensible to incorporate elements of 'top-down' theorizing into the process. This can be illustrated once again by using the concept of a language-culture link. That concept clearly has an empirical vocation, and its origins in fact lie in the considerable social science evidence relied upon by the courts in the controlling cases.[30] It therefore seems sensible to explicate it using the more fulsome and sophisticated conceptual vocabulary of the relevant social sciences, and to rely on the latter's understanding of the connection between language and culture when attempting to infer what legal requirements might flow from it.[31] To do otherwise would, as Grammond puts it, be tantamount to 'playing with empty boxes'.[32] In doing so, however, the aim should be, as much as possible, to remain faithful to (or at least consistent with) the 'patterns of normative understanding' already present in the case-law.[33] As Alexy puts it, these patterns

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[30] In *Mahe* (n 14), Dickson CJ relied heavily on the empirical research and conclusions of the Royal Commission on Bilingualism and Biculturalism to justify his assertion that language rights exist to protect both language and culture. Over time, this trend has merely intensified. As Larocque, Power and Bossé note, '[i]t is clear that the nature of constitutional litigation has evolved to a point where it is now almost unthinkable to expect a court to decide language rights cases without consulting or hearing evidence from experts.' Mark C Power, Francois Larocque and Darius Bosse, 'Constitutional Litigation, the Adversarial System and Some of Its Adverse Effects' (2012) 17 Review of Constitutional Studies 1, 21.

[31] On this note, see the summary of Chapter 4 below.

[32] Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (McGill-Queen's Press - MQUP 2009), p. xii. A different approach does exist in other legal traditions, most notably in France, where 'law is largely cut loose from its context, and societal problems are exclusively worded as 'legal' problems, that should be 'solved' without taking into account anything that is not 'law'': Mark van Hoecke, 'Preface' in Mark van Hoecke (ed), *Methodologies of legal research : what kind of method for what kind of discipline?* (Hart Publishing 2013), vii. However, that is not representative of the Canadian public law tradition, in which social science evidence is regularly relied upon when construing constitutional rights. See for example: *Canada (Attorney General) v Bedford* [2013] 3 SCR 1101.; *Solski (Tutor of) v Quebec (Attorney General)* [2005] 1 SCR 201, para. 5.

[33] McCrudden (n 25) 634.

establish a number of 'fixed points' which define or at least constrain the scope of the legally possible.[34]

1.4.3 Non-legal sources

On the whole, my borrowing from non-legal materials will come from three main sources, each of which reflects a different aspect of the problem posed by interpreting s. 41: (1) individual vs collective rights; (2) the drivers of linguistic behaviour; (3) the meaning of equality in a language rights context.

1.4.3.1 Individual vs. collective rights

As I explain in Chapters 2 and 4, one question that must be answered is whether s. 41 protects individual or group interests. However, existing analysis of the 'collective' dimension of language rights in the case-law is fairly rudimentary. I have therefore borrowed from the philosophical literature dealing with collective rights and social ontology, which has a more fully developed conceptual repertoire with respect to these issues, in order to better describe the range of interpretive possibilities offered by s. 41. This same vocabulary can also be used to better explicate the implicit conceptual commitments found in the case-law dealing with the collective aspect of language rights. (For a more detailed discussion of this facet of my methodology, see Chapter 4).

1.4.3.2 The drivers of linguistic behaviour

Language policy and language rights raise very complex empirical issues. If one is to faithfully carry out the task of developing a purposive interpretation of

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[34] Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 2.

language rights, one must have a solid grasp of the empirical realities underlying the mischief they are meant to address.[35] This is especially true of a provision explicitly attempting to protect the 'vitality' and 'development' of linguistic communities. As I noted above, some of these issues have already been discussed by the courts, but their account of them is insufficiently developed. In order to arrive at an adequate understanding of the forces driving linguistic behaviour, I have had to rely on the relevant branches of the social sciences, of which the most important are sociolinguistics, sociology and, to a certain extent, anthropology. These issues are canvassed in greater detail in Chapters 4 and 5.

1.4.3.3 Equality in a language rights context

As with all other parts of the CLRS,[36] the underlying purpose of s. 41 is to advance the principle of substantive equality between English and French.[37] In other words, language rights in Canada do not exist merely to bring about changes in the sociolinguistic environment for their own sake. They are motivated by a deeper normative commitment to equality between the two largest linguistic communities of Canada, of which OLMCs are merely an extension.[38]

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[35] See, for example, Pierre Foucher, 'Droits et lois linguistiques: le droit au service du Canada français' [2008] L'espace francophone en milieu minoritaire au Canada: nouveaux enjeux, nouvelles mobilisations, Montréal, Fides 463, 494.

[36] *Beaulac* (n 15), para. 22.

[37] Sections 2(a) and 2(b) of the *Official Languages Act*. A fuller implementation of the principle of equality was also an important underlying motivation behind the introduction of the 2005 amendments to Part VII. See the comments of Senator Gauthier : Senate of Canada, 'Legal and Constitutional Affairs, Issue 23' (n 21) 7–9. See also the original draft of the bill, which included a direct reference to s. 16(1) of the Charter : An Act to amend the Official Languages Act (fostering of English and French) 2001 [S-32].

[38] Preamble, OLA. See Appendix A.

But what does this mean in practice? Equality is a very broad concept, and one that is relative by nature.[39] To ask whether two people or two communities are 'equal' in the abstract would be meaningless. One needs to specify the quality, the good or the social context in relation to which equality is to be measured (what Griffiths calls the 'domain' of equality)[40] before propositions regarding it can be intelligible. This means that any particular definition of equality will necessarily be parasitic upon a broader normative framework that specifies which kinds or areas of similitude are morally relevant.[41]

Describing the normative foundations of the CLRS is no easy task. For one thing, the system cannot be reduced to a single purpose or justification, as it pursues multiple goals simultaneously, each of which is justified in somewhat different terms.[42] Furthermore, statutory and constitutional references to equality tend to express what Sunstein calls 'incompletely theorized agreement',[43] and the case-law has done relatively little to clarify its meaning. In order to fill this gap, I have borrowed from the normative literature on language rights and minority rights. My aim has been to identify domains of equality that seem justifiable from a normative standpoint, and which either have some basis in existing law, or which are broadly consistent with it (for more on this point, see the summary of Chapter 7 below).

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[39] William B Griffith, 'Equality and Egalitarianism: Framing the Contemporary Debate' (1994) 7 Can. JL & Jurisprudence 5, 7.

[40] ibid 8.

[41] Cf. ibid 9; Ronald Dworkin, *Taking Rights Seriously* (Paperback edition, Bloomsbury Academic 2013) 224.

[42] Vanessa Gruben, 'Language Rights in Canada: A Theoretical Approach' in Joseph Eliot Magnet (ed), *Official Languages of Canada: new essays* (LexisNexis Canada 2008) 108–109.

[43] Cass R Sunstein, 'Incompletely Theorized Agreements' (1995) 108 Harvard Law Review 1733.

1.5 Chapter plan

Before launching into a detailed analysis of s. 41 and the issues I have just raised, I begin by providing the reader with some relevant background information (Chapter 2). This chapter offers a brief overview of certain key concepts from the language rights literature, as well as a potted history of the CLRS up to the 1988 reforms to the OLA and the first enactment of s. 41 (but leaving out the 2005 amendments, which will be dealt with in Chapter 3). The overall aim is to enable the reader to situate s. 41 both historically and in relation to the broader spectrum of language rights measures.

Chapter 3 begins the analysis of s. 41 in earnest. The aim here is to tackle one particular aspect of the s. 41 puzzle, namely, the nature of s. 41 as a legal norm. Given how little case-law presently exists, the type and extent of legal constraints flowing form that provision remain unclear, a problem compounded by the very broad language used by Parliament. By using two conflicting cases on the matter as a counter-point, I attempt to sketch out the most plausible theories as to the legal structure of s. 41: (1) that it confers a very wide discretion (what I call the Holistic Thesis), and (2) that it imposes precise obligations (the Casuistic Thesis). Then, drawing on the legislative history of the 2005 amendments and the relevant principles of interpretation, I argue in favour of the latter approach.

Chapter 4 begins the process of tackling one of the central conceptual questions regarding s. 41—which also applies to s. 16.1 of the Charter—namely, how the term 'linguistic community' should be defined. Drawing from philosophical works on political theory and social ontology, I sketch out the two main possibilities, which I label 'sets' and 'collectivities'. I then argue that a wide range of social phenomena can be discussed in a meaningful way only by using the 'vocabulary of

collectivities', ie a vocabulary that acknowledges the existence of social objects other than individuals, such as collectivities, and briefly examine how the case-law has been willing to acknowledge this in dealing with the right to freedom of association. In Chapter 5, I build upon this conceptual framework to argue that 'linguistic minority communities' should be viewed as collectivities rather than a mere aggregate of individuals (ie a set), and that s. 41 therefore protects collective interests and collective rights. More specifically, I argue that existing case-law on related topics, especially s. 23 of the Charter, supports the view that such groups should be conceptualized as collectivities.

Chapter 6 continues down this same path, aiming to show that the vocabulary of collectivities is indispensable for grappling with the realities of language and linguistic behaviour. Focussing on the concept of 'assimilation', which is a key concept in the language rights case-law, I explore how linguistic behaviour—including the transition from being X-dominant to Y-dominant—is determined by a range of social-structural factors that escape individual control and defy description using the vocabulary of individuals. I also examine how the courts have in fact been willing to engage on that level and recognize the need for legal intervention aimed directly at this social-structural level.

In Chapter 7, I begin to explore the implications that this theoretical framework has with respect to the types of measures that federal institutions ought to adopt pursuant to s. 41 of the OLA, using the concept of substantive equality as a lens. Equality between English and French is one of the foundational tenets of the CLRS, and all language rights must be interpreted in keeping with its demands. As I will explain, however, specifying the content of equality requires a much broader discussion of the basic normative aims of language rights. Through my exploration of

various normative accounts and their potential relationship to the case-law, I develop two distinct concepts of equality that can be used as general sign-posts in interpreting s. 41: equality-as-viability and equality-as-fairness.

Finally, in Chapter 8, I once again examine the demands of s. 41 in detail, with the benefit of the preceeding analysis. Using the question of autonomy as a case-study, I consider how OLMCs might formulate claims for specific measures based on the legal architecture I sketched out in Chapter 3 and the various types of legally recognized interests I explored in Chapters 4 to 7. I conclude that s. 41 does in fact protect an 'autonomy interest' and that, in a range of different circumstances, OLMCs can claim legal protections for their collective autonomy, including 'positive' enhancements through state action.

CHAPTER 2 BACKGROUND

2.1 Introduction

Before diving into the weeds of s. 41 and the language rights case-law, it is worth first taking a step back to consider, in very broad strokes, the origins and evolution of the CLRS. Doing so will not only provide much-needed context, but also serve to introduce certain themes that run through the entire thesis.

As a preliminary matter, I will briefly outline some of the key concepts used in discussing language rights. As a category of legal measures, 'language rights' are in fact very diverse, which can easily lead to analytical confusion. It will therefore be useful to break this category down a bit further in order to tease out some of the key ramifications in this particular family tree.

I will then sketch out the origins of the CLRS, which lie in the first hundred years of British rule over what is now Canada. While that period may seem remote from present-day concerns, in many ways the measures adopted between 1763 and 1867 set the tone for what Francophones would come to expect (or at least aspire to) in terms of legal and constitutional accommodations in the second half of the twentieth century. Moreover, the legal and intellectual legacy of Canada's early struggles continue to influence the language rights case-law—as we will see, for instance, in Chapter 6, when discussing the juridical concept of 'assimilation'.

In the final section of this chapter, I will leap ahead to the 1960s and the genesis of the current version of the CLRS, including s. 41 of the OLA. It may seem as though I am skipping over a great deal of history by moving abruptly from the British North America Act, 1867 (now known as the Constitution Act, 1867) to the work of the Royal Commission on Bilingualism and Biculturalism. And indeed I

am—although certain historical events from the intervening period will be referred to at various points in this thesis. However, quite aside from limitations as to space, I believe this approach makes the most sense. The legal measures that comprise the CLRS were primarily adopted during these two periods. The intervening time was largely characterized by constitutional stasis and the legislative repression and forced assimilation of Francophones. While the current system was designed as a reaction to the events of this period, from a legal standpoint there is little from that time which remains, save the memory of inequality and linguistic oppression that informs the present-day case-law.

2.2 Key language rights concepts

2.2.1 The diversity of language rights

The term 'language rights' can be somewhat confusing, as it is used to designate a broad spectrum of legal norms and public policies, many of which have contradictory justifications and objectives. Despite the claim made by some SCC judges that language rights are 'peculiar to Canada',[44] the last seventy years have in fact seen the proliferation of measures at both the national and international levels aiming to regulate the use of language, in either the public or the private sphere. By one estimate, at least 157 states have some provisions relating to language in their constitution.[45] And, according to UNESCO, there are 44 international documents that 'pertain to linguistic rights'.[46] However, not all countries or treaties take the same

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[44] *MacDonald v City of Montreal* [1986] 1 SCR 460, para. 117.

[45] R Dunbar, 'Minority Language Rights in International Law' (2001) 50 *Int'l & Comp. L. Q.* 90, 90.

[46] UNESCO - Management of Social Transformations Clearing House, 'Linguistic Rights - International Legal Instruments' <http://www.unesco.org/most/ln2int.htm> accessed 6 January 2016.

approach or pursue the same goals.[47] Because of this, it would in fact be more accurate to describe the relevant phenomenon as 'language policy regimes', as not all of them provide rights in the traditional sense.

To manage this diversity, the scholarly literature has developed a number of typologies for sorting language policy regimes. The three most commonly used such typologies are built around simple dichotomies: tolerance vs. promotion,[48] personality vs. territoriality,[49] and individual vs collective rights. These dichotomies overlap to some extent, but they are not inherently connected, and they focus on different features of language policy regimes. As general schematics, they provide a helpful way of sorting through some of the permutations that such regimes can exhibit. They have been analysed in detail elsewhere and so need not detain us long here, but it will be useful to provide a brief definition of each.

2.2.2 Tolerance vs. promotion

Broadly speaking, tolerance rights are those that protect individuals from state interference with their private language choices. The right to speak any language in the home or in civil society more generally is the paradigm case of a tolerance right.

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[47] Xabier Arzoz, 'The Nature of Language Rights' (2009) 15 European Public Law 541, 32.

[48] The origins of this dichotomy are usually traced back to the work of German linguist Heinz Kloss : Heinz Kloss, *The American Bilingual Tradition.* (Newbury House 1977) 21–22. It has been widely applied in language rights scholarship. See for example : Robert Dunbar, 'Minority Language Rights in International Law' (2001) 50 International and comparative law quarterly 90, 91–92; Arzoz (n 47) 5; Lauri Malksoo, 'Language Rights in International Law: Why the Phoenix Is Still in the Ashes' (1998) 12 Fla. J. Int'l L. 431, 441; L Green, 'Are Language Rights Fundamental' (1987) 25 Osgoode Hall LJ 639, 660.

[49] See generally : Kennet McRae, 'The Principle of Territoriality and the Principle of Personality in Multilingual States' (1975) 1975 International Journal of the Sociology of Language 33; Kenneth McRoberts, 'Making Canada Bilingual: Illusions and Delusions of Federal Language Policy' in David P Shugarman, Reginald Whitaker and Donald V Smiley (eds), *Federalism and political community : essays in honour of Donald Smiley* (Broadview Press 1989); JA Laponce, *Languages and Their Territories* (University of Toronto Press 1987); Denise Réaume, 'Beyond Personality: The Territorial and Personal Principles of Language Policy Reconsidered' in Will Kymlicka and Alan Patten (eds), *Language rights and political theory* (Oxford University Press 2003).

Regimes of this kind essentially protect a sphere of 'negative' liberty. Little in the way of positive state action is required, except perhaps in combating social prejudice against speakers of a minority language.[50] Promotion rights, by contrast, are characterized by the fact that they impose (often substantial) 'positive' duties on the state to act. As the label suggests, promotion rights aim to encourage the use of a given language and enlist the aid of state machinery to this end.

2.2.3 Personality vs. territoriality

Another common way to classify language policy regimes is based on the nature of that regime's jurisdiction. A territorial approach to rights is one where an individual's rights are determined based on geographic location. A personal approach, by contrast, is one where a person's identity is the primary factor in determining which rights they may assert. Although neither category corresponds to a specific policy on language, some generalizations can be made on the basis of this distinction. For instance, policies that are territorial in nature generally favour unilingualism within defined geographic units.[51]

This is not to say that only monolingual states exhibit territorial language policies. Some multilingual states, like Belgium, take a territorial approach at the local level while favouring multiple languages at the regional or federal level.[52] Nevertheless, territorial policies often aim at converting a multilingual population into a unilingual one, or at least to establish one language as clearly predominant. By

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[50] Ruth Rubio-Marin, 'Language Rights: Exploring the Competing Rationales' in Will Kymlicka and Alan Patten (eds), *Language rights and political theory* (Oxford University Press 2003) 54.

[51] McRoberts (n 49) 153.

[52] Wilfried Swenden, 'Personality versus Territoriality: Belgium and the Framework Convention for the Protection of National Minorities' (2002) 2 European Yearbook of Minority Issues 331, 335.

contrast, policies based on the personality principle tend to be friendlier towards continued bi- or multilingualism.[53]

2.2.4 Individual vs. collective rights

Language rights are often analysed in terms of individual and collective (or group) rights.[54] These concepts are reasonably familiar to legal discourse, but as the distinction will be a major theme of this thesis, it is worth exploring it in greater detail. However, since the issue of group or collective rights will be the primary focus of Chapter 4, I will keep my remarks here quite brief.

Group rights have tended to be controversial in the West, especially since World War II.[55] Nevertheless, language policy makes a discussion of group rights necessary for at least two reasons. First, as I will explore in greater detail in Chapters 5 and 6, language is by its very nature both an individual and a collective phenomenon, one which it is impossible to address without using what I describe in Chapter 4 as the 'vocabulary of collectivities'. Second, a discussion of group rights is inevitable because many existing legal or constitutional language rights are in actual fact group rights, controversy notwithstanding. For instance, minority language

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[53] Réaume, 'Beyond Personality: The Territorial and Personal Principles of Language Policy Reconsidered' (n 49) 271.

[54] Denise Réaume, 'Individuals, Groups, and Rights to Public Goods' (1988) 38 The University of Toronto Law Journal 1; Denise Réaume, 'The Group Right to Linguistic Security: Whose Right, What Duties?' in Judith Baker (ed), *Group rights* (University of Toronto Press 1994).

[55] Although in recent years an influential school of thought has emerged, building on the pioneering work of Will Kymlicka, which holds that group rights are consistent with the liberal tradition and its overarching concern for individual autonomy. For an overview of this debate, see: Will Kymlicka, *Multicultural Citizenship : A Liberal Theory of Minority Rights* (Clarendon Press 1995) 49–74; Eric J Mitnick, 'Three Models of Group-Differentiated Rights' (2003) 35 Columbia Human Rights Law Review 215. See also : Ingride Roy, *Vers un droit de participation des minorités à la vie de l'État? Évolution du droit international et pratique des États* (Montreal: Wilson & Lafleur 2006) 83–86.

education rights in Canada are routinely and explicitly described as collective rights by the Supreme Court.[56]

In the academic literature, the label of 'individual' language rights is often applied to universal rights that intersect with language, like freedom of speech.[57] Viewed in this way, the category of individual language rights therefore largely overlaps with that of tolerance rights. Most of the basic civil and political rights protected under international law, as well as by many state constitutions, fall into this category. They are often described as universal rights because of their lack of identity-based restrictions. In the Canadian context, ss. 2 and 7-15 of the Charter are the paradigm case of individual constitutional rights.

At the other end of the spectrum we find collective rights, which are rights that vest in and are exercised by groups or collectivities. (As I will explain in Chapter 4, I prefer to use the term collectivity in this context, as it more naturally captures certain important features of a linguistic minority like the minority Francophone communities of Canada (MFCs)). The rights of a state under international law are the paradigm case of collective rights, but we might also point to certain rights granted to indigenous peoples under the UN Declaration on the Rights of Indigenous Peoples as a further example.[58] Collective rights typically require that the collectivity in question be institutionally embodied to some degree. Those institutions will, as a practical matter, exercise the collectivity's rights, which are conceptually distinct from the rights of its individual members.

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[56] See: *Arsenault-Cameron v Prince Edward Island* [2000] 1 SCR 3, at para. 29.

[57] A Patten and W Kymlicka, 'Introduction: Language Rights and Political Theory: Context, Issues, and Approaches', *Language rights and political theory* (2003) 30.

[58] Alexandra Xanthaki, *Indigenous Rights and United Nations Standards : Self-Determination, Culture and Land* (Cambridge University Press 2007) 107.

Finally, somewhere between individual and collective rights are 'group-differentiated' rights, a term popularized by Will Kymlicka. In Kymlicka's work, the main purpose of introducing this new category was to capture some important subtleties that arise in any discussion of group rights as a result of the interplay between *moral* rights and *legal* ones. For example, Kymlicka often argues in favour of collective legal rights (like self-government rights, cultural or 'polyethnic' rights, and special representation rights) on the basis of individual moral rights.[59] Peter Jones has made the reverse claim, namely that an individual legal right can be based on a collective moral right, as in the case of the individual right to hunt and fish on ancestral lands held by members of some aboriginal groups.[60] In either case, what matters is that a right is granted or recognized because of the existence of a group, regardless of what form the corresponding legal right might take. For my part, I find the concept unnecessarily confusing, especially in a work of legal theory where it is often necessary to move from the legal to the moral realm and back again. Instead, I will simply attempt to be clear about which level of discourse I am engaging with at any point in time.

2.2.5 The value of typologies

The analytical traction provided by each of these typologies is fairly limited, given that they rely on very broad categories.[61] However, they do make it easier to discuss such a diversified phenomenon as language policy. They also succeed in

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[59] Kymlicka, *Multicultural Citizenship* (n 55) 75. See also generally : Eric J Mitnick, *Rights, Groups, and Self-Invention : Group-Differentiated Rights in Liberal Theory* (Ashgate 2006).

[60] Jones gives the example of the collective rights of an indigenous community giving rise to individual legal rights to hunt and fish. P Jones, 'Group Rights and Group Oppression' (1999) 7 Journal of Political Philosophy 353, 355.

[61] See, for instance, Rubio-Marin's critique of the tolerance/promotion framework: Rubio-Marin (n 50) 55.

highlighting some important inflection points within the range of possible regimes, which in turn suggest a number of questions one should ask when interpreting a 'language rights' measure like s. 41. For instance, while the nature of s. 41 as a promotion-oriented measure is scarcely in doubt, it remains to be seen whether it is structured along personal or territorial lines, and whether it protects individual or collective interests. This latter point will be of critical importance in the years ahead, as the courts will inevitably be faced with claims framed in the language of collective rights, demanding remedies with far-reaching implications for federal policy.

2.3 The genesis and key features of the CLRS

2.3.1 Defining the CLRS

As I noted earlier, s. 41 of the OLA is embedded within a wider network of constitutional and statutory norms, which I have labelled the 'Canadian language rights system' (CLRS) for ease of reference. The courts have tended to treat the various components of this system as comprising something like an integrated whole, and so s. 41 cannot be properly interpreted without some sense of how that whole is structured.

Broadly speaking, the CLRS regulates the status of Canada's two official languages and the rights of the public vis-à-vis various public institutions. The CLRS is highly complex and cannot be described succinctly, but its primary components are: (1) constitutional provisions dealing explicitly with language rights, such as s. 133 of the Constitution Act, 1867, s. 23 of the Manitoba Act, 1870 and ss. 16-23 of the Charter; (2) the federal Official Languages Act; (3) the federal division of powers; (4) various provincial statutes dealing with language rights and/or language policy, like Quebec's Charter of the French Language (better known amongst English-speakers as

'Bill 101'), Ontario's French Language Services Act ('FLSA'), or the Official Languages Act of New Brunswick; and (5) certain unwritten constitutional principles.

These various components apply to differing levels of jurisdiction and cover a broad range of subject-matters, making them difficult to summarize. Nevertheless, a nexus of sorts binds them all to one another, in that they tend to be interpreted on the basis of the same set of specialized interpretive principles. These principles were largely developed in response to the new language rights measures enacted through the Charter in 1982. Despite some early disagreements over the proper way to interpret these rights, the courts now generally seek to interpret them in a consistent way.[62] Furthermore, virtually all statutes conferring language rights on English and French-speakers are construed as an exercise of the power entrenched in s. 16(3) of the Charter to 'to advance the equality of status or use of English and French'. As a result, statuory language rights, like those found in the OLA or the FLSA, are analysed using the same interpretive framework as their constitutional brethren.

More broadly still, the elements of the CLRS has been characterized by the courts as instantiations of broader unwritten principles that form the structural core of the Canadian constitution.[63] This helps to further bind all such measures to a unified interpretive and theoretical framework. The most obviously relevant of these unwritten principles is the principle of minority protection, which has been linked to various provincial and federal language rights. However, the principle of federalism

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[62] I say 'generally' because there have at times been inconsistencies in the interpretive approach taken by the court to different constitutional rights, as when the 'political compromise doctrine' developed in *Société des Acadiens du Nouveau-Brunswick Inc v Association of Parents for Fairness in Education* [1986] 1 SCR 549. coexisted with the purposive and liberal approach outlined in *Mahe* (n 2) . However, these inconsistencies have since been (more or less) resolved. See: *Beaulac* (n 1), paras. 13-25.

[63] See generally: *Reference re Secession of Quebec* [1998] 2 SCR 217.

also plays an important role in framing the courts' understanding of the CLRS.[64] In part, it does so by shaping the scope of rights like s. 23 of the Charter, which operate as a carve-out from the otherwise untrammeled discretion of provincial legislatures with respect to education policy. On a deeper level, however, one which is not often remarked upon, the *idea* of federalism (as opposed to the actual federal arrangements set out in the Constitution) has influenced the conceptual framework through which the courts have approached certain language rights issues.

There are two main aspects of federalism that have seeped into the language rights case-law. One of these is the principle of subsidiarity, which holds that decision-making ought to be delegated to those closest to the people affected by the decision. The other is the notion of co-ordinate levels of government, which entails that each level will be assigned its particular areas of jurisdiction, in which it enjoys full autonomy. In a federal system, these principles are combined to produce the basic distribution of powers between the central and regional governments. While in some cases, like Australia, federalism is adopted primarily out of administrative expediency, in others, like Canada, these principles are adopted because the political community wishes to formally recognize and preserve certain of its constituent elements, like a national minority.

While the concepts of subsidiarity and autonomy are most commonly linked to the federal division of powers set out in ss. 91 to 95 of the Constitution Act, 1867, they also play an important—if often unseen—role in shaping the courts' understanding of many language rights. As I explore further in the coming chapters, one of the underlying goals of the CLRS is to enshrine and facilitate an 'equal

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[64] See, for example, *Solski* (n 32). para 6 : 'the presence of two distinct language communities in Canada and the desire to reserve an important place for them in Canadian life constitute one of the foundations of the federal system that was created in 1867'.

partnership' between the country's two largest linguistic communities, including their minority off-shoots in the various provinces (the Anglophone community in Quebec, and MFCs elsewhere). In various contexts, this notion of a partnership has translated into a commitment to preserving the institutional autonomy of these minorities.[65] This commitment is most clearly embodied in ss. 16.1 and 23 of the Charter, each of which carves out a sphere of autonomy for the minority and insulates it from provincial (or, less importantly, federal) interference. In Chapter 8, I will return to this theme and explore how MFC aspirations to autonomy intersect with s. 41 of the OLA as a legal norm.

In the balance of this chapter, however, I will provide a short overview of the development of the CLRS, with a view to sketching out the historical origins of these ideas. As I alluded to at the outset, from a purely legal standpoint, the CLRS developed in two main phases: (1) the period running from the Conquest of 1763 to the Constitution Act, 1867, and (2) from the establishment of the B&B Commission to the reform of the OLA 1988. The final major step in the history of s. 41 of the OLA, the 2005 amendments, will be dealt with in the following chapter, when I examine in much greater detail its nature as a legal norm.

2.3.2 From the Conquest to the *Constitutional Act, 1791*

The origins of the CLRS lie in Britain's approach to governing the former French colonies over which it won control at the close of the Seven Years' War,

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[65] For instance, the SCC has ruled that the principles of constitutionalism and the rule of law are intended, amongst other things, 'to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority': *Secession Reference* (n 63), para. 74. That reference also includes aboriginal groups, whose cultural identity and autonomy is also protected by the Constitution.

especially in its efforts to prevent the *Canadiens*[66] from joining with the thirteen rebellious colonies to the south. It is worth examining British policy during this time in some detail, as it laid the foundation for later constitutional developments that coalesced into the CLRS.

Britain conquered what is now Central and Eastern Canada during the first half of the eighteenth century, and acquired formal control through the Treaty of Paris of 1763. The first major constitutional instrument promulgated by Britain after taking control was the Royal Proclamation of 1763, which in fact remains part of the Canadian constitution.[67] The Proclamation was intended to reshape the legal and institutional landscape of the colony more to Britain's liking. The ultimate aim was to make the colony hospitable to British settlement, which at the time was expected to occur on a large scale. Accordingly, the English language and the Protestant faith

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[66] The label applied to francophone Canadians has evolved over the centuries and usage has not always been consistent. At the time of the British conquest, the term *Canadien* was dominant. Eventually, anglophones born in Canada also began to identify as 'Canadian' and so the term evolved to *Canadien français* (French Canadian) in opposition to *Canadien anglais* (English Canadian) or simply 'les Anglais'. During the Quiet Revolution (1960s), many French Canadians in Quebec took to calling themselves *Québécois*, in order to reframe the parameters of their identity to coincide with that province (thus making them a majority people, rather than a minority). Amongst the younger generations, that usage is now dominant, although the term *Canadien français* has not entirely disappeared.

[67] It is important here to distinguish between two senses of the word 'constitution'. In a broad sense, the word refers to all instruments, norms and principles that define the sources of public (ie state) power and regulate its use. In a more limited sense, it refers to any document bearing the official title of 'constitution'. In some countries, like the United States, the rules governing state power have been codified in a single authoritative document, known as 'the' constitution. In others, however, like the United Kingdom, the constitution is made up of a collection of statutes and conventions. None of these bears the label 'constitution', but it is common to describe them as such, as in Dicey's famous *Introduction to the Study of the Law of the Constitution* (1885). Canada lies somewhere in between these two models. 'The Constitution of Canada' is a defined term in the Constitution Act, 1982, not least because having a specific definition is necessary in order to give effect to the supremacy clause. However, as Hogg points out, that term is too narrow to fully capture the full reality of Canadian constitutional law, as it excludes a number of important documents, including the Royal Proclamation of 1763. The latter is referred to in section 25 of the Constitution Act, 1982, and certain aspects of it—such as aboriginal rights—have been constitutionalised by s. 35 of that same instrument (see: Henri Brun, Guy Tremblay and Eugénie Brouillet, Droit constitutionnel (6e édition, Éditions Yvon Blais 2014) 134), but it is not listed in the schedule that enumerates the documents that make up 'the Constitution of Canada' for the purposes of s. 52. Nevertheless, elements of the Proclamation not related to aboriginal rights remain in force (see for example: ibid). In light of this, it can be considered part of the broader constitution of Canada, in a manner analogous to the Supreme Court Act. See generally: Peter W Hogg, *Constitutional Law of Canada.* (5th ed, Carswell 2007) 9–12.

were given official status, and the new government was empowered to enact laws and statutes 'as near as may be agreeable to the Laws of England, and under such Regulations and Restrictions as are used in other Colonies'.[68] As a result, all Catholics were excluded from holding public office in the new Province, and the existing system of French law was (officially at least) displaced.[69]

Religion and to some extent culture were the main target of these measures, rather than language. Distrust of Catholics and Catholicism were a significant theme in 17th and 18th Century British politics and national identity, and played an important role in colonial policy, both in Ireland and in North America.[70] While the French language was widely used by the elite and in diplomacy, the culture of Continental France was often deprecated, especially in contrast to 'superior' British political values. Thus, in a statement typical of prevailing attitudes in Britain, one jurist defended the Proclamation on the grounds that the *Canadiens* (ie those inhabitants of French origin) were unsuited to taking part in the government of the colony, 'bigoted, as they are, to the Popist religion, unacquainted with, and hitherto prejudiced against, the laws and customs of England … [and] almost universally ignorant of the English language, so as to be incapable to debating in it.'[71] Language, as such, was a factor, but it remained secondary to what might be described as socio-political or socio-cultural considerations.

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[68] Cited in M Martel and M Pâquet, *Langue et politique au Canada et au Québec: une synthèse historique* (Boréal 2010) 38.

[69] E Brouillet, *La négation de la nation: l'identité culturelle québécoise et le fédéralisme canadien* (Septentrion 2006) 108.

[70] Martel and Pâquet (n 68) 31–36. For a detailed discussion of the role of religion in the development of English national identity in the early modern period, see : Liah Greenfeld, *Nationalism : Five Roads to Modernity* (Harvard University Press 1992) 29–87.

[71] Martel and Pâquet (n 68) 38.

Predictably, these aspects of the Proclamation were met with resistance by the *Canadiens*.[72] Moreover, it eventually became clear that the hoped-for mass-settlement of the newly-acquired territory by British colonists would not occur, and that the population would remain predominantly French or *Canadien* for some time.[73] Mindful of the growing discontent in the southern (ie American) colonies, the British Parliament adopted the Quebec Act, 1774. This Act repealed those portions of the Proclamation that excluded Catholics from public office, and restored the legal privileges the Church had enjoyed prior to 1763. It also guaranteed freedom of worship to all Catholics, an issue that had been somewhat in doubt under the Proclamation. Finally, the new Act reinstated French law in civil matters.

The differences between the Royal Proclamation and the Quebec Act of 1774 were quite profound. Over the course of 200 years of French colonization, a sizeable and institutionally complete society had taken shape in New France. The Proclamation had attempted to sweep this aside in order to make way for a British colony that would eventually absorb the existing inhabitants and displace their social order with its own. The Act of 1774 represented the abandonment of this project, at least for the time being, and restored a range of legal and religious institutions from the *ancien régime* on which the distinct French-speaking society depended.[74]

Further changes to this system were made by the Constitutional Act, 1791. Following the end of the American Revolution, a large number of Americans who had been loyal to the Crown during the conflict relocated to those North American

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[72] Brouillet (n 69) 113.

[73] Ramsay Cook, 'Language Policy and the Glossophagic State' in David Schneiderman (ed), *Language and the State: The Law and Politics of Identity/Langue et état: droit, politique et identité* (Yvon Blais 1991) 74; Raymond Breton, *Ethnic Relations in Canada: Institutional Dynamics* (Jeffrey G Reitz ed, McGill-Queen's University Press 2005) 82.

[74] Breton, *Ethnic Relations in Canada* (n 73) 82–83.

territories that remained under British control (ie Canada). This led to a number of political problems, not least of which was the fact that many Loyalists objected to being subject to French law in private and civil matters. In order to remedy this, the Act split the colony in two. The Constitutional Act, 1791 created two new colonies, with the border between them being the Ottawa River; the portion to the east would be known as Lower Canada (what is now Quebec), that to the west as Upper Canada (now Ontario). French civil law and other concessions granted in the Quebec Act, 1774 remained in place in Lower Canada, but Upper Canada—to which most of the Loyalists had relocated—received English law. Each colony was to be governed separately under the new arrangements, thus meeting Loyalist demands for control of their own legislative assembly.[75] To this day, the boundary established by the Constitutional Act, 1791 marks the transition from a predominantly French-speaking area to a mainly English-speaking one.

Edmund Burke, in his speeches to Parliament during the debates on the new Act, captured well the underlying logic of the split. He condemned the *status quo ante*, in which Anglo-American colonists were governed by the same laws and institutions as the *Canadiens*, on the grounds that 'an attempt to join people dissimilar in law, language, and manners' was 'highly absurd', and he argued that Parliament should '[l]et the [French] Canadians have a constitution formed upon the principles of Canadians, and Englishmen upon the principles of Englishmen'.[76] In other words, each group was entitled to live by its own 'law, language, and manner' and ought to be left free to do so under institutions of their own.

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[75] Brouillet (n 69) 112.

[76] Martel and Pâquet (n 68) 43–44.

While calling the scheme of the Constitutional Act, 1791 'self-government' in the modern sense would be going too far, given the actual structure of colonial government (which left considerable power in the hands of imperial appointees), the policy was clearly to provide *distinct* government to each group. We can therefore see here the genesis of the principle that relations between the two major language groups should be managed in large part through autonomy.

2.3.3 Lord Durham's Report and the BNA

The overall impact of these developments was analysed in detail by Lord Durham a few decades later in his (in)famous report. Durham's analysis of the situation is helpful in understanding why the roots of the CLRS in fact lie with British policy during this time. Moreover, the fact that his recommendations (which amounted to a complete reversal of this policy) were in the end resoundingly rejected highlights a number of key facts regarding the underlying logic of Canada's constitutional architecture as it relates to the two largest language groups.

Durham was sent by the British government to its colonies of Upper and Lower Canada in 1838 to investigate the causes of two rebellions that took place the year before. Arriving in Lower Canada, Durham was taken aback by the extent to which the social structure of the colony was determined by what today would be called ethnocultural factors, and the apparent instability this created. In his report to the imperial government in London, he wrote that it would be 'difficult for [them] to comprehend the intensity of the hatred which the difference of language, of law, and of manners, creates between those who inhabit the same village, and are citizens of

the same state.'[77] In his view, this situation could not be allowed to persist, and so he set about finding a permanent solution to the problem.

Durham's analysis of the situation was that British policy had erred by encouraging, rather than suppressing, the distinct nationality of the *Canadien* population in the Quebec Act, 1774 and the Constitutional Act, 1791. The reasons for this choice of policy had been strategic rather than moral:

> [T]he conquest of Canada was almost immediately followed by the commencement of those discontents which ended in the independence of the United Provinces. From that period, the colonial policy of this country appears to have undergone a complete change. To prevent the further dismemberment of the Empire became the primary object with our statesmen; and an especial anxiety was exhibited to adopt every expedient which appeared calculated to prevent the remaining North American Colonies from following the example of successful revolt. Unfortunately the distinct national character of the French inhabitants of Canada, and their ancient hostility to the people of New England, presented the easiest and most obvious line of demarcation. To isolate the inhabitants of the British from those of the revolted Colonies, became the policy of the Government; and the nationality of the French Canadians was therefore cultivated, as a means of perpetual and entire separation from their neighbours.[78]

Of course, the effect of this policy was not limited to relations between the *Canadiens* and their southern neighbours. The sense of 'entire separation' promoted by British policy also affected the *Canadiens*' perception of British migrants to Canada. In particular, the creation of an elected assembly in Lower Canada dominated by the *Canadiens* cemented their feeling of 'nationality' and increased their resistance to the idea of assimilating into the British language, culture and institutions. According to Durham, this sense of national identity lay at the heart of Lower Canada's political troubles, as it placed the majority of the population—and

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[77] Quoted in Graham Fraser, *Sorry, I Don't Speak French: Confronting the Canadian Crisis That Won't Go Away* (Douglas Gibson Books 2009) 15.

[78] Gerald M Craig, *Lord Durham's Report : An Abridgement of Report on the Affairs of British North America* (McClelland and Stewart 1963) 48 (emphasis added).

thus the elected assembly—at odds with the economic elite and the executive council, dominated by British merchants and imperialists. Thus, he wrote that

> I expected to find a contest between a government and a people: I found two nations warring in the bosom of a single state: I found a struggle, not of principles, but of races; and I perceived that it would be idle to attempt any amelioration of laws or institutions until we could first succeed in terminating the deadly animosity that now separates the inhabitants of Lower Canada into the hostile divisions of French and English.

In Durham's view, the only solution was to remove the symbolic and institutional support for this distinct sense of nationality, which would cause the French Canadians to assimilate into the English-speaking majority:

> A plan by which it is proposed to ensure the tranquil government of Lower Canada, must include in itself the means of putting an end to the agitation of national disputes in the legislature, by settling, and once and for ever, the national character of the Province. I entertain no doubts as to the national character which must be given to Lower Canada; it must be that of the British Empire...[79]

Nevertheless, Durham's policy prescription was rejected—first in practice, and later in law. Although the legislatures of Upper and Lower Canada were formally unified in the wake of his report, a *modus vivendi* quickly took shape amongst key political actors according to which the affairs of the two erstwhile provinces were dealt with exclusively by members elected from their respective territories. This was, in effect, a form of consociational democracy.[80]

The upshot of this new constitutional convention was to transform what was, on paper, a centralized legislative union into a *de facto* federation,[81] with separate

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[79] ibid 146 (emphasis added).

[80] Kenneth McRoberts, *Misconceiving Canada : The Struggle for National Unity* (Oxford University Press 1997) 58; Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (Yale University Press 1977).

[81] Brouillet (n 69) 117.

ministers for each region on questions of local concern, like education,[82] and *de facto* separate heads of government for each geographic 'section'.[83] In the end, the net result of these practices was to prevent (or at least severely inhibit) the adoption of policies that would accelerate the assimilation of the *Canadiens* or otherwise undermine their institutional and cultural vitality and distinctiveness. This *de facto* federalism was later transformed into a formal federation, coupled with language rights, in the British North America Act, 1867.

2.3.4 The implications of rejecting Durham's model

That Durham's policy was resisted and eventually rejected by local actors, and that this ultimately led to the adoption of federalism and a restoration of language rights, had a number of implications for the way in which the Canadian state has come to be conceived, on both a political and a legal level. This in turn has had an impact on the SCC's constitutional theory and its interpretation of language rights. However, in order to appreciate the extent to which this is the case, it is necessary to take a step back and consider some of the broader trends affecting the development of the modern state during this time, especially as it relates to language.

The modern state, and with it modern political theory, has had a long and fraught relationship with language policy. Beginning in the late eighteenth century, policies of assimilation (sometimes described as linguistic consolidation) came to be considered the norm, and the assumptions that guided these policies often survive to this day. For instance, in 2009, a Kurdish parliamentarian defied the prohibition on

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[82] Martel and Pâquet (n 68) 55.

[83] Brouillet (n 69) 120–121; Sujit Choudhry, 'Does the World Need More Canada? The Politics of the Canadian Model in Constitutional Politics and Political Theory' (2007) 5 International Journal of Constitutional Law 606, 615.

speaking Kurdish in the Turkish legislature, prompting the following protest from the general secretary of the National Action Party: 'The most important quality of a society that makes it a nation is language … If you destroy the language unity, you meant to have destroyed the unity and togetherness of the nation itself.'[84]

Part of the reason for this association between political and linguistic unity is that the modern state, and the political theory to support it, developed hand in hand *with* language policy. Political consolidation was frequently accompanied by linguistic unification, so much so that the very nature of what constitutes the paradigm case of a political community came to be premised on the existence of a certain socio-cultural order, giving rise to the concept of a 'nation-state'.

The underlying causes of this trend are complex and largely outside the scope of this thesis.[85] Suffice it to say here that the obstacles to political control created by linguistic diversity, combined with the ideals of social organization pursued by many modernist thinkers, together produced a concept of the state that was deeply intertwined with certain expectations regarding the cultural composition of the underlying social order.[86] Because of this, it came to be widely assumed that one of the tasks of any state was to manage the socio-cultural substrate over which it ruled—in large part through education policy—in order to produce the requisite convergence

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[84] Quoted from the *New York Times* in Sujit Choudhry, 'Managing Linguistic Nationalism through Constitutional Design: Lessons from South Asia' (2009) 7 International journal of constitutional law 577. The current version of the article on the NYT website does not provide this specific quote, but a similar one: '"The most important quality of a society that makes it a nation is language," said Cihan Pacaci, the general secretary of the National Action Party'. Sabrina Tavernise, 'Kurd's Speech Defies Turkish Taboo' *The New York Times* (25 February 2009) <http://www.nytimes.com/2009/02/25/world/europe/25turkey.html> accessed 1 January 2014.

[85] For a good overview, see : Bhikhu C Parekh, *Rethinking Multiculturalism : Cultural Diversity and Political Theory* (Harvard University Press 2000) 179–185.

[86] James C Scott, *Seeing like a State : How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press 1998) 72.

between national and political boundaries.[87] As Ernest Gellner once wrote, 'modern man tends to take the centralized state (and, more specifically, the centralized national state) for granted', which is why '[t]he monopoly of legitimate education is now more important, more central than is the monopoly of legitimate violence.'[88]

This way of thinking was quite evident in British political thought during Lord Durham's time, even (or especially)[89] amongst progressive thinkers. John Stuart Mill famously noted that

> [f]ree institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, <u>especially if they read and speak different languages</u>, the united public opinion, necessary to the working of representative government, cannot exist. The influences which form opinions and decide political acts are different in the different sections of the country. An altogether different set of leaders have the confidence of one part of the country and of another… The same incidents, the same acts, the same system of government, affect them in different ways; and each fears more injury to itself from the other nationalities than from the common arbiter, the state. Their mutual antipathies are generally much stronger than jealousy of the government.[90]

These considerations led Mill to endorse a policy of 'absorption', whereby the more culturally 'backward' pockets of a country's population would be encouraged or

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[87] Stacy Churchill, 'The Decline of the Nation-State and the Education of National Minorities' (1996) 42 International Review of Education 265, 269; Stephen May, *Language and Minority Rights : Ethnicity, Nationalism and the Politics of Language* (Longman 2001) 91.

[88] Ernest Gellner, *Nations and Nationalism* (2nd ed, Blackwell 2006) 5–6, 34. See also: Hurst Hannum, 'The Concept and Definition of Minorities' in Marc Weller (ed), *Universal Minority Rights* (Oxford University Press 2007) 50–1.

[89] Linguistic consolidation is often promoted as a means of achieving equality and political accountability. As Pierre Coulombe notes: 'Democratic theory warns us that allowing diverse cultures and languages to thrive can cause division among the citizenry and thus be an obstacle to the full participation of all in public life. In this view, the assimilation of linguistic minorities should not be seen as a moral offence, but rather as part of a democratization process. The promotion of one common public language responds to the need for social cohesion and integration.' Pierre Coulombe, 'Federalist Language Policies: The Cases of Canada and Spain' in Alain-G Gagnon and James Tully (eds), *Multinational democracies* (Cambridge University Press 2001) 243.

[90] John Stuart Mill, *On Liberty; And, Other Essays* (Oxford University Press 1991) 433 (emphasis added).

compelled to abandon their language and integrate into the more civilized culture of the dominant group.[91]

Durham's proposal for assimilation through legislative union sought to apply these principles to Canada. By rejecting those proposals, the leading political actors of the day elected to forge a different path, one that assumed and accepted that sociocultural diversity—at least in relation to the *Canadiens*—would continue as a basic feature of the social landscape. In time, these same actors agreed upon specific constitutional arrangements—like federalism, the language rights enshrined in s. 133 of the Constitution Act, 1867 and s. 23 of the Manitoba Act, 1870, and the protections for denominational schools under s. 93 of the Constitution Act, 1867—for the purpose of protecting and promoting key aspects of that diversity.

In short, language rights in Canada were, from the very outset, about more than merely tolerating linguistic non-conformity. They were statements about the nature and composition of the political community as a whole. As Sujit Choudhry puts it, they are one of 'the … instruments Canada employs to realize the ideal implied when nation and state are not treated as synonymous'.[92]

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[91] 'Experience proves that it is possible for one nationality to merge and be absorbed in another: and when it was originally an inferior and more backward portion of the human race the absorption is greatly to its advantage. Nobody can suppose that it is not more beneficial to a Breton, or a Basque of French Navarre, to be brought into the current of the ideas and feelings of a highly civilised and cultivated people — to be a member of the French nationality, admitted on equal terms to all the privileges of French citizenship, sharing the advantages of French protection, and the dignity and prestige of French power — than to sulk on his own rocks, the half-savage relic of past times, revolving in his own little mental orbit, without participation or interest in the general movement of the world. The same remark applies to the Welshman or the Scottish Highlander as members of the British nation.' ibid 431.

[92] Choudhry (n 83) 610.

2.3.5 The B&B Commission and the birth of the OLA

Unfortunately, despite their auspicious beginnings, constitutional language rights would be slowly eroded through legislative and judicial action for almost a hundred years after the Constitution Act, 1867. Section 93 of the Act, which had been understood to protect the French-speaking minority in Ontario, was ignored by provincial legislators and then gutted by the Judicial Committee of the Privy Council.[93] Section 23 of the Manitoba Act, 1870 was (unlawfully) overturned by the provincial legislature.[94] Various measures were adopted throughout the English-majority provinces to restrict and eliminate French-language education and culture. The federal government, for its part, offered services in French only grudgingly, if at all.[95]

Eventually, Francophone dissatisfaction came to a head in the 1950s and 60s, which saw the growth of a strong independence movement in Quebec. As a result of this political thunderbolt, the CLRS underwent some radical changes. These changes resulted in large part from the recommendations of the Royal Commission on Bilingualism and Biculturalism, sometimes known as the Laurendeau-Dunton Commission ('the B&B Commission' for short).[96] The Commission was established in 1963 in response to what was widely perceived to be a 'crisis of legitimacy' facing

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[93] *RC Separate School Trustees v Mackell* [1917] AC 62. (Judicial Committee of the Privy Council). On the history of s. 93 more generally, see : Pierre Foucher, 'Le Règlement 17 devant la justice. Les aléas d'une protection constitutionnelle.' in Michel Bock and François Charbonneau (eds), *Le siècle du Règlement 17* (Prise de parole 2015).

[94] See generally : *Re Manitoba Language Rights* [1985] 1 SCR 721.

[95] For instance, social insurance cheques were at first issued in English only, and it took 20 years before the government would accept to print them systematically in both languages : Martel and Pâquet (n 68) 109–111.

[96] For an excellent overview of the Commission's work and its aftermath, see: McRae, Kenneth, 'Official Bilingualism: From the 1960s to the 1990s' in John Edwards (ed), *Language in Canada* (Cambridge University Press 1998).

the Canadian state as a result of the rising tide of French Canadian/Quebec nationalism.[97] The federal government of the day, led by Lester B Pearson, believed that addressing the 'language issue' was central to resolving that crisis—or at least to reinforcing the state's legitimacy—and so established the Commission to investigate the problem and its underlying causes and, if necessary, to propose constitutional reforms.

The Commission went on to articulate a vision for reform that was intended to address the problems facing French in Canada, the root cause of which was the state of linguistic and cultural inequality in which the French-speaking community found itself. According to the Commission, this inequality existed at a number of different levels, including public policy, the delivery of public services, and economic activity. The overarching principle guiding the formulation of the Commission's recommendations was thus the principle of linguistic and cultural equality.[98]

The Commission's reports have had a far-reaching and lasting influence on the law in this area. Its recommendations led to the Official Languages Act, 1969 ('the 1969 OLA'), which for the first time imposed explicit legal obligations on the federal government to provide services in French. They also formed the basis for certain constitutional amendments made in 1982, when the Charter was adopted. (Indeed, ss. 16 to 23 of the Charter, over one third of its operative provisions, deal with official language rights). And, as we will see in later chapters, the Commission's analysis of the 'language issue' continues to permeate judicial thinking on the matter to this day.

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[97] Fraser (n 77).

[98] 'Report of the Royal Commission on Bilingualism and Biculturalism. Book I: The Official Languages' (1967), xxxix.

2.3.6 The 1988 reform: recognizing linguistic minority communities

While the 1969 OLA was a major step forward at the time, by the mid-1980s it was in need of reform. In 1988, the Act underwent a major overhaul so as to bring it into conformity with the Charter, and to remedy various defects that had become apparent since the Act was first adopted.[99] Aside from giving the OLA a more coherent and clearly articulated structure, the three most important innovations of the reform were the addition of a paramountcy clause (s. 82), the introduction of a judicial remedy modelled on s. 24 of the Charter (s. 77), and the provisions of Part VII, which gave legal recognition to minority linguistic communities and imposed an obligation on federal institutions to support their 'vitality' and 'development'.

The OLA 1969 had very little to say about the role of the federal government in supporting official language minorities, and this was the subject of criticism.[100] The 1969 Act had reflected the Trudeau government's bias towards individual rights, and so offered no explicit recognition of the collective dimension of the language issue. The Mulroney government, which developed the 1988 reform package, wished to depart from this approach on a number of fronts. Most notably, its 1987 constitutional reform package, known as the Meech Lake Accords, contained a recognition of the collective aspects of the language issue, in the form of the famous 'distinct society' clause, which stated that 'Quebec constitutes within Canada a distinct society'.[101] Although merely an interpretive provision that would have had a

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[99] See the comments of the Minister of Justice in presenting the bill for a second reading: Library of Parliament, 'House of Commons Debates, 33rd Parliament, 2nd Session, Official Report: Vol. 10' (Queen's Printer for Canada 1987) 12705.

[100] Michel Bastarache, 'Pour une nouvelle Loi sur les langues officielles du Canada' (1988) 19 Rev. Gen. 203, 204.

[101] Peter W Hogg, *Meech Lake Constitutional Accord Annotated* (Carswell 1988); McRoberts (n 80) 193.

limited practical impact, this was intended and widely understood as a form of acknowledgment of the national character of the linguistic community centred on Quebec, and thus a species of collective right.[102]

The new OLA, which was drafted during the same period as the Accords were being negotiated, was intended to reflect this understanding of Canada and extend its legal ramifications beyond Quebec.[103] Prime Minister Mulroney, in a letter to Cabinet, had indicated that it was 'vital' (in French, *'primordial'*) that all federal ministries and agencies contribute to the development and flourishing of official language minority communities (OLMCs), i.e. communities of official language speakers whose first language is different from that of the majority in their province.[104] This commitment was legally entrenched through various amendments to the OLA.

The new version of the Act explicitly stated that one of its three overarching purposes was to 'support the development of English and French linguistic minority communities'.[105] Furthermore, a new set of provisions, set out in Part VII, was added to deal explicitly with OLMCs. Section 41 of the new act stated that 'The Government of Canada is committed to … enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development'. Amongst other things, this was intended to offer explicit recognition

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[102] Linda Cardinal, 'Collective Rights in Canada: A Critical and Bibliographical Study' (2001) 12 Nat'l J. Const. L. 165, 168.

[103] Michael Behiels, *Canada's Francophone Minority Communities : Constitutional Renewal and the Winning of School Governance* (McGill-Queen's University Press 2005) 283.

[104] Quoted in Doucet, 'La partie VII de la Loi sur les langues officielles du Canada' (n 11) 64.

[105] Section 2, OLA.

to official language minority *communities* in a manner analogous to the recognition granted to Quebec as a 'distinct society'.[106]

2.3.7 The original section 41: no enforcement mechanism

While Part VII was viewed as an important step forward, it was from the outset deeply flawed. Most notably, there was serious doubt as to whether it was justiciable and legally enforceable. For instance, while the bill was in committee, the Secretary of State had asserted that Part VII spoke the 'language of encouragement' rather than the 'language of command'.[107] Indeed, s. 41 did not outline any specific obligations. Section 42 merely stated that the executive 'shall encourage and promote a coordinated approach to the implementation by federal institutions of the commitments set out in section 41', and s. 43 provided only that the Heritage Minister 'shall take such measures as that Minister considers appropriate to advance the equality of status and use of English and French in Canadian society'.

Based on this language, it would indeed be very challenging to argue that federal institutions were under any legal obligation to undertake (or refrain from undertaking) any particular action. Some leading scholars did take the view that Part VII created self-executing obligations.[108] However, the Department of Justice, which is responsible for advising all federal institutions on their legal obligations, took the position that it was not justiciable. And when the matter ultimately found its way before the courts, they favoured the more conservative view and declared Part VII

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[106] Normand (n 10) 230; Donald J Savoie and others, 'Collectivités minoritaires de langues officielles : promouvoir un objectif gouvernemental.' (Patrimoine canadien 1998).

[107] Linda Cardinal, 'Review of Bill S-3 - Presented to the Standing Committee on Official Languages of the House of Commons' (2005) 4.

[108] Doucet, 'La partie VII de la Loi sur les langues officielles du Canada' (n 11) 65–68. See also Bastarache and Ouellet (n 11), cited in Cardinal, 'Review of Bill S-3 - Presented to the Standing Committee on Official Languages of the House of Commons' (n 107) 5.

(more specifically, s. 41 of the OLA) to be judicially unenforceable.[109] The main reason given for this was that Part VII was not listed among the substantive provisions subject to judicial remedies under the OLA. At best, a complaint could be filed with the Official Languages Commissioner, who was reduced to using the powers of persuasion on the executive or Parliament.

As I will explain in much greater detail in Chapter 3, immediately after this decision was handed down, Parliament amended the OLA so as to make s. 41 both executory and enforceable.[110] The text of s. 41 was altered to include a new subsection 41(2), which imposes an explicit 'duty' on federal institutions to take 'positive measures' to carry out the commitment found in subsection 41(1). No such reference to a duty existed in the original version, which had contributed to the FCA ruling that the provision was only declaratory in nature. Furthermore, Part VII was added to the list of provisions that could form the basis of an application to the Federal Court for a judicial remedy. Since these modifications, there is no longer any doubt that s. 41 imposes enforceable obligations on the federal government.[111] Of course, as I explained in the Introduction, what those obligations consist of has yet to be determined.

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[109] *Forum des maires* (n 5), paras 38, 46. This case concerned a decision by the Canadian Food Inspection Agency to reorganize itself in a way viewed to be detrimental to the Acadian community in Shippagan (located in the Acadian peninsula in New Brunswick), by, *inter alia*, eliminating or relocating a number of positions. The Commissioner of Official Languages had, after investigation, concluded that there was (amongst other things) a violation of Part VII of the OLA. The trial judge granted the application. The grounds of that decision appear to have been somewhat unclear, but before the Federal Court of Appeal, there was substantial debate over whether, and to what extent, judicial relief was available in an application brought under s. 41. Décary JA concluded that no application could be made under s. 77(1) of the OLA, as Part VII of the Act was not listed therein as a possible basis for the exercise of the OLA's specialized judicial remedy. He further concluded that no application for judicial review could be made under s. 18.1 of the Federal Courts Act, because s. 41 was 'simply a policy commitment' (para. 38) and 'that it does not create any right or duty that could at this point be enforced by the courts, by any procedure whatsoever' (para. 46).

[110] *DesRochers v Canada (Industry)* 2009 1 SCR 194, para. 20.

[111] *ibid,* para. 18 ; *FCFA v Canada* (n 7), para. 39

CHAPTER 3 THE NATURE OF S. 41 AS A LEGAL NORM

3.1 Introduction

An important threshold question with respect to s. 41 has to do with the nature and extent of the constraints it imposes on federal institutions, as these are not immediately apparent from the text of the provision. Section 41(1) sets out a 'commitment' to supporting the vitality and development of OLMCs, while s. 41(2) states that all federal institutions have a 'duty' to take 'positive measures' to implement that commitment.[112] What this implies from a legal standpoint is quite unclear.

Thus far, the Attorney General of Canada has taken the position that s. 41 merely confers an open-ended discretion on the federal government as a whole, and that it does not give rise to 'precise obligations' which might empower the courts to order the adoption of 'specific measures' in particular cases.[113] This argument, which echoes the approach taken by the courts to s. 41 before the 2005 amendments (when it was held to be merely declaratory, and thus non-justiciable),[114] has met with some

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[112] See Appendix A for the full text of s. 41.

[113] *Picard* (n 7), para. 61. In that case, an application was brought against the Patent Office and the Commissioner of Patents alleging that the failure to translate all patents approved by the Commissioner was a breach of Parts II, III, IV and VII the OLA. The court declined to rule that patents must be translated *in toto*, holding that, while they are in some sense an official document, patents are nevertheless exempted from the bilingualism requirements imposed on federal laws and regulations or federal communications because they are primarily issued by private persons and merely endorsed by the Commissioner of Patents after the fact. However, the court found that the Patent Office was nevertheless required under Part VII of the Act to consider the impact of its policies on the broader vitality of the French language as a vehicle for scientific research. Tremblay-Lamer J took note of the fact that the failure to provide any translation of patents meant that Francophone inventors had, in practice, to operate almost entirely in English, and that—perhaps as a result of this—few patents were ever issued in French. She therefore held that the Commissioner's failure to take steps to provide sufficient materials in French was a violation of the duty under subsection 41(2) of the OLA and ordered that all patent abstracts be translated.

[114] *Forum des maires* (n 5), paras 38, 46.

success.[115] On the other hand, given that the very purpose of those amendments was to overturn the pre-2005 case-law on the matter, it seems incongruous to interpret s. 41 as doing nothing but conferring a purely discretionary power. Indeed, at least one Federal Court judge has rejected the AG's interpretation.[116] In light of this conflicting case-law, it seems important to explore the question more thoroughly.

In this chapter, I will argue that the AG's approach is untenable and ought to be rejected, on two distinct levels. First, section 41 must necessarily be read as imposing a distinct obligation on each federal institution, rather than a single general obligation on the federal government as a whole. Second, s. 41 can give rise to an obligation to adopt specific measures in particular circumstances, the nature and content of which will be dictated by the statutory mandate of the federal institution at issue. Although the language employed by Parliament may appear, when read in isolation, somewhat indeterminate, and thus seem to confer a very broad discretion on federal institutions, properly interpreted it does in fact impose specific obligations. I illustrate this by considering the case of Statistics Canada ('StatsCan'), whose obligations were at issue in *Fédération des communautés francophones et acadienne du Canada v. Canada (Attorney General)*.[117] I argue that this case was wrongly decided, and that the court ought to have granted the order sought by the applicant.

The questions raised by the AG's argument, and by the interpretation of s. 41 more generally, are highly complex, and so I attempt to proceed systematically. First,

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[115] In *Picard* (n 7), the argument was rejected, but it was accepted in *FCFA v Canada* (n 7). On this point, see also Canada (Commissioner of Official Languages) v CBC (n 8), especially paras 41 and 57-66 (overturned on appeal for other reasons, 2015 CAF 251). The case ultimately did not turn on a ruling with respect to the specific nature and content of the obligations flowing from s. 41, but Martineau J considers the issue at some length. Although his initial position, stated at para. 41, resembles that of the AG in *Picard* and *FCFA*, as the analysis develops he arrives at a view much closer to the one being advocated in this chapter, and for similar reasons.

[116] *Picard* (n 7).

[117] *FCFA v Canada* (n 7).

I address a basic conceptual question, namely, whether s. 41 creates a 'right' or merely imposes an 'obligation' **(Section 2)**. I argue that s. 41 is best thought of as a right, in light of the enforcement mechanisms provided. Next, I attempt to map out the structure of s. 41 as a legal norm **(Section 3)**. There is a fundamental ambiguity in this respect, and so I describe the two possibilities, which I label the Holistic Thesis and the Casuistic Thesis. I then explore the basic implications of each in somewhat greater detail **(Section 4)**, by considering the varying types of legal constraints placed on administrative action in other contexts. Having done this, I argue that the Casuistic Thesis provides the best framework for interpreting s. 41 **(Section 5)**. My argument is built on two pillars: (1) the legislative history of the 2005 amendments, and (2) the tenets of the language rights interpretive paradigm. Finally, I consider the example of StatsCan, which I use to illustrate how the Casuistic Thesis might operate in practice **(Section 6)**. This case-study also provides a further argument in favour of that approach.

3.2 Rights vs duties

3.2.1 Absolute and relative obligations

At first blush, it may seem that the most obvious question to ask is whether Part VII can be said to create any 'rights'. Section 41 is described as a 'language rights' provision by those who support an expansive interpretation.[118] Others, who wish to limit its legal effects, deny that it creates or entrenches any rights, and assert that it merely imposes an 'obligation' on the federal government.[119] The upshot, according

[118] See, for instance : Rousselle (n 11) 184; Roy, 'Les diverses solutions « intégratives » et « autonomistes » offertes aux communautés de langue officielle du Canada pour préserver et développer leur spécificité' (n 11) 135.

[119] *Picard* (n 7), para. 59.

to the latter view, is that the implementation of s. 41 is entirely a matter of executive discretion, as it does not confer an entitlement to 'specific measures'.[120] The claim that s. 41 creates a right, by contrast, would seem to imply the existence of just such an entitlement. Thus, a great deal would appear to turn on the question of whether or not s. 41 can be said to create any 'rights'.

The argument for saying that s. 41 does not create rights trades on a familiar distinction between rights and duties. While these are often connected in practice, they are conceptually distinct.[121] Though rights necessarily imply the existence of a correlative duty,[122] the opposite is not always true. Duties can exist which are not grounded in a right, and which do not give rise to one.[123]

This distinction is often framed in procedural terms. Hart, for instance, argued that 'it is … characteristic of those laws that confer rights (as distinguished from those that only impose obligations) that the obligation to perform the corresponding duty is made by law to depend on the choice of the individual who is said to have the right or the choice of some person authorized to act on his behalf.'[124] Austin, for his part, distinguished between 'absolute' obligations and 'relative' ones, only the latter of which had a correlative right.[125]

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[120] *ibid,* para. 51.

[121] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 210.

[122] See, for example, ibid 166. Judicial endorsements of this view can be found in *Beaulac* (n 15), para. 20, and Wilson J's dissent in *MacDonald* (n 44), para. 159.

[123] Leslie Green, 'Two Views of Collective Rights' (1991) 4 Can. JL & Jurisprudence 315, 317.

[124] Herbert Lionel Adolphus Hart, 'Definition and Theory in Jurisprudence' (1954) 70 Law Quarterly Review 37, 35.

[125] 'A relative obligation is incumbent upon one party, and correlates with a right residing in another party. Changing the expression, a relative obligation corresponds or answers to a right, or implies, and is implied by, a Right. Where an obligation is absolute, there is no right with which it correlates. There is no right to which it corresponds or answers. It neither implies, nor is implied by a right.' John Austin, *Lectures on Jurisprudence, Or, The Philosophy of Positive Law [Electronic Resource]* (5th ed / and edited by Robert Campbell, JMurray 1885) 347.

Given that section 41(2) is, on its face, framed as a duty, we might legitimately ask whether it falls within the category of Austin's 'absolute' obligations, or whether it is, instead, a rights-creating norm. By asserting that s. 41 merely creates an 'obligation' and not a 'right', the Attorney-General in *Picard* was clearly invoking this kind of distinction. However, the OLA itself provides a ready answer to this question. Since 2005, Part VII is subject to judicial enforcement by individual petition. Any party with standing to bring a claim to Federal Court under Part X of the Act can apply for a remedy if s. 41(2) has been breached. Insofar as the distinction between absolute and relative obligations consists in the ability of individuals to enforce them directly, it seems clear that the duty imposed by s. 41(2) is relative, and therefore has one or more correlative rights.[126] As Bentham noted, '[w]hat you have a right to have me made do, is that which I am liable according to law upon a requisition made on your behalf to be punished for not doing'.[127]

In other words, given that the distinction between 'absolute' and 'relative' obligations is largely procedural in nature,[128] the OLA is unambiguous. Under the relevant rules set out in Part X, members of the group that s. 41 is intended to benefit (OLMCs) have standing to enforce violations of the duty it imposes in court. While that standing is not exclusive, exclusivity of standing is not itself a necessary property

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[126] Consider the recent comments of the Supreme Court in *Newfoundland and Labrador v AbitibiBowater Inc* [2012] 3 SCR 443. (para. 46): 'Whether, in the regulatory context, an obligation always entails the existence of a correlative right has been discussed by a number of scholars. Various theories of rights have been put forward… However, because the Province issued the orders in this case, it would be recognized as a creditor in respect of a right no matter which of these theories was applied. As interesting as the discussion may be, therefore, I do not need to consider which theory should prevail. The real question is not to whom the obligation is owed, as this question is answered by the statute, which determines who can require that it be discharged.' (emphasis added)

[127] Cited in : Hart (n 124) 34.

[128] Alexy (n 34) 112.

of rights,[129] and so this distinction seems of little significance. On this level at least, the distinction asserted by the Attorney General in *Picard* amounts to little more than a 'verbal controversy'.[130]

3.2.2 Subjective rights and public interest standing

Nevertheless, there is a further wrinkle to this question, which has to do with the relationship between the rules on standing and the existence of a right. The rules on standing under Part X of the OLA are exceptionally broad, to the point of potentially blurring the line between absolute and relative obligations in a way that has some possible implications for the interpretation of s. 41.

An application to the Federal Court for a judicial remedy can be made by any person who has filed a complaint about the issue with the Commissioner of Official Languages.[131] A complaint to the Commissioner, for its part, can be made 'by any person or group of persons, whether or not they speak, or represent a group speaking, the official language the status or use of which is at issue'.[132] Because the rule specifies that the complainant need not speak the language at issue, a person need not be directly affected by the putative violation in order to file a complaint.[133] Anyone

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[129] Consider the holding in *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, where the Supreme Court of Canada stated that any person may challenge the constitutionality of a law under the Charter when they are the subject of enforcement proceedings under that law, even if they themselves are incapable of bearing or enjoying the right allegedly being violated. The fact that Big M Drug Mart, as a corporation, might not itself directly benefit from s. 2 (freedom of religion), but could still obtain enforcement of that provision, does not prevent it from being described as a right.

[130] John W (John William) Salmond, *Salmond on Jurisprudence.* (11th ed by Glanville Williams, Sweet & Maxwell 1957) 265.

[131] Section 77(1), OLA.

[132] Section 58(2) of the OLA.

[133] *Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency*, 2004 FCA 263, para. 18.

with knowledge of a breach may initiate proceedings before the Commissioner and, ultimately, before the Federal Court.

Thus, the OLA in effect grants public interest standing[134] to all members of the public, whether as individuals or as a group.[135] This may arguably have some relevance to the question of whether or not s. 41 creates a right.

The paradigm case of an 'absolute', non-rights-creating obligation is a duty imposed by a penal statute, the enforcement of which is left entirely to public authorities. While all members of the public are *beneficiaries* of the duty, it cannot be said to confer on them a subjective right.[136] A similar example would be the duty to refrain from committing a public nuisance, which is a duty towards 'the public at large' or 'indeterminate portions of the public' which does not give rise to a correlative individual right.[137]

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[134] The concept of public interest standing is defined as follows: 'if there is a serious justiciable issue as to the law's invalidity, "a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court"': *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524, para. 18, citing *Minister of Justice of Canada v. Borowski,* [1981] 2 S.C.R. 575. Interestingly, s. 58(2) of the OLA appears to be even more liberal than this, as it does not (on its face at least) impose any requirement that the applicant demonstrate that there is no other reasonable and effective way in which the issue may be brought to the courts.

[135] On a related issue, see: *Canada (Commissioner of Official Languages) v. Canada (Department of Justice),* 2001 FCT 239 (CanLII), paras. 95-102. In proceedings initiated under Part X of the OLA, both the Commissioner of Official Languages and the complainant made arguments based on the Charter, which is not expressly listed as a basis for an application to the Federal Court under Part X. Nevertheless, both were granted public interest standing to make those arguments.

[136] Consider this example, which Alexy uses to illustrate this point: 'The law which introduces a protectionist import duty in the interest of certain industries is to the *advantage* of workers in those industries, it *supports* them and *protects* them in their work, and yet it does not grant them any *rights*. All there is, is a *reflex-effect*, a relationship which bears great similarity to a right, but which must therefore be distinguished all the more carefully from it': Translation of a German case, R. v. Ihering, *Geist des römischen Rechts auf den versichiedenen Stufen seiner Entwicklung*, part 3, 5th ed. (Leipzig, 1906), cited in Alexy (n 34) 112.

[137] John W (John William) Salmond, *Salmond on Jurisprudence.* (11th ed by Glanville Williams, Sweet & Maxwell 1957) 265, cited by Wilson J in *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, para. 156.

If, then, the rules on standing under the OLA are meant to empower individuals as agents of the public as a whole, rather than subjective rights-holders, this might plausibly have some bearing on the interpretation of provisions like s. 41, which are described in terms of duties rather than rights. One might say that duties imposed on federal institutions (as opposed to measures that explicitly confer a subjective right, like s. 4(1) of the OLA[138]) exist to serve the public interest, rather than to protect individual rights. This reading of the Act could be reinforced by highlighting the role afforded the Commissioner, both in the initial complaints process and later in the judicial context, where he is empowered to prosecute, with the benefit of public funds, claims initiated by private complainants.[139] The Commissioner, as a public official carrying out a statutory mandate, is bound to act in the public interest.[140]

In response, one could of course seek to recast the above examples of absolute obligations in the language of rights. One might say that 'the public', as a whole, is granted a right—the right to be free from nuisances—and that the representative or agent of the public, the state, is granted the power to exercise that right. Viewed in these terms, the conceptual distinction between an absolute and a relative obligation appears to dissolve, making it irrelevant as a matter of statutory interpretation.

Nevertheless, an important distinction arguably remains—the distinction, that is, between a duty corresponding to a 'privately' enforceable right and one that does not vest a right in any determinate person other than the state. If a legal right vests in

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[138] '4. (1) English and French are the official languages of Parliament, and everyone has the right to use either of those languages in any debates and other proceedings of Parliament'.

[139] See s. 78 of the OLA.

[140] The Commissioner has a 'social mission of such broad scope': *Lavigne c Canada (Commissariat aux langues officielles)* [2002] 2 RCS 773, para. 35. See also : *Canada (Commissioner of Official Languages) v. Canada (Department of Justice),* 2001 FCT 239 (CanLII), paras. 95-102.

the state as a stand-in for the public at large, this might be because the underlying moral right is collective in nature, meaning that individuals, as such, have no subjective claim to the right.

We can illustrate this possibility by using Raz's concept of a collective right. Raz asserts that there exists a certain class of goods, public goods, to which no individual right can exist.[141] Examples include the existence of a cultured society, or self-determination. Although individuals may have an interest in securing access to such goods, that interest is not sufficient to justify the imposition of a duty to provide them, as the interference with other interests that this would entail is too great.[142] However, the collective interest of the public at large may be enough to validate these intrusions.[143]

Whether or not this is an adequate account of collective rights as a general matter,[144] there are certainly cases in which it holds true. It therefore serves to demonstrate that the existence of a public duty to provide a good, grounded in a right belonging to the public as a whole, does not imply the existence of an individual right to that particular good. Moreover, as Raz also points out, rights-based public duties do not exhaust the range of cases in which there are 'absolute' duties, given that

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[141] 'A good is a public good in a certain society if and only if the distribution of its benefits in that society is not subject to voluntary control by anyone other than each potential beneficiary controlling his share of the benefits.' Raz (n 121) 198. This definition essentially mirrors the one used by economists, who define a public good as non-exclusionary and non-rival. On this point, see Réaume, 'Individuals, Groups, and Rights to Public Goods' (n 54) 3.

[142] According to Raz, given the nature of a collective good, providing it 'affects the life and imposes constraints on the activities of the bulk of the population, in matters which deeply affect them.' Raz (n 121) 203.

[143] ibid 208.

[144] And it may not be : Réaume, 'Individuals, Groups, and Rights to Public Goods' (n 54) 6; Dwight G Newman, *Community and Collective Rights : A Theoretical Framework for Rights Held by Groups* (Hart 2011) 76.Réaume, 'Individuals, Groups, and Rights to Public Goods' (n 53) 6; Dwight G Newman, *Community and Collective Rights : A Theoretical Framework for Rights Held by Groups* (Hart 2011) 76.

duties can be justified on grounds other than rights.[145] In other words, a public duty could be justified on the basis of some other moral consideration having nothing to do with rights, which would also obviate any claim that there exists a subjective moral right to its performance.

Based on this line of thought, one might attempt to argue that the s. 41 duty, while enforceable by way of 'private' petition, does not correspond to any (individual or collective) subjective moral right. Of course, the immediate impact of such a claim is likely to be quite mitigated. The s. 41 duty is explicitly framed in terms of the interests of OLMCs, rather than the public at large, for the obligations of federal institutions are defined in terms of the vitality and development of these communities. A court will have no choice but to consider those interests, whatever they are. Nevertheless, it would still be possible for one to argue that the s. 41 duty is *justified* on the basis of a general public interest, rather than OLMC interests, even though its content is defined in terms of the latter. This could in principle have some impact on the way in which the duty is interpreted.

There is in fact some precedent for such an approach under international law. For instance, the European Charter for Regional and Minority Languages (ECRML) was conceived, not as a minority rights treaty, but as an instrument for protecting a cultural heritage belonging to all member states of the Council of Europe. The ECRML is described both in official documents and in academic commentary as following a 'cultural approach', because it is focused on the preservation of languages and not linguistic minorities.[146] When the treaty was first drafted in the early 1980's,

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[145]Raz (n 121) 210.

[146] As the Explanatory Report states, 'the charter's overriding purpose is cultural. It is designed to protect and promote regional or minority languages as a threatened aspect of Europe's cultural

it was believed that the goal of protecting endangered languages would be better served by this approach, rather than one revolving around individual or collective rights for minority language speakers.[147] Minorities, as such, were thought to be adequately protected by the existing human rights framework,[148] and the conventional wisdom at the time was that a rights-centered approach to altering state language policy would fail to gain any traction, given the widespread perception that robust minority-specific rights are a threat to political stability.[149] It was hoped that a charter centered on protecting cultural diversity, rather than minorities, might avoid this pitfall, while still providing substantial protection for the languages concerned.[150]

The underlying premise of the cultural approach is that cultural diversity constitutes an *asset,* the value of which redounds to the benefit of society as a whole, not just the individual members of a minority whose cultural or linguistic particularities are the target of special protective measures. It is therefore analogous to the logic underpinning environmental protection in most states.[151] Though measures intended to protect a particular aspect of the environment, like a beautiful lake, may benefit some individuals more than others (ie those living closest to the

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heritage... not linguistic minorities'. Council of Europe, 'Explanatory Report to the European Charter for Regional or Minority Languages' (1992) European Treaty Series-148, paras. 10-11.

[147] S Gramstad, 'The Charter's Monitoring Mechanism: A Practical Perspective', *Minority language protection in Europe: Into a new decade* (Council of Europe Publishing 2010) 29.

[148] Council of Europe, 'Framework Convention for the Protection of National Minorities and Explanatory Report' (Council of Europe 1995) H (95) 10, para. 2.

[149] This perception was largely a legacy of the Minorities Treaties system put in place between the first and second world wars. The rights created by those treaties were widely thought to have contributed significantly to the destabilization of the European political order. Kymlicka, *Multicultural Citizenship* (n 55) 57–58.

[150] Secretary General of the Council of Europe, 'Application of the European Charter for Regional or Minority Languages - Biennial Report by the Secretary General to the Parliamentary Assembly' (Parliamentary Assembly of the Council of Europe 2007) Doc. 11442.: 'The Charter's departure from the traditional approach of protecting ethnic groups, preferring instead to emphasize the protection and promotion of their languages, was aimed also at those States that claim to have no national minorities.'

[151] Jean-Marie Woehrling, *The European Charter for Regional or Minority Languages : A Critical Commentary* (Council of Europe 2005) 20.

lake), the underlying purpose or justification for the regulation is the view that all those who inhabit that jurisdiction benefit in some way from its continued existence. Similarly, under the 'cultural approach', cultural diversity is seen as benefiting all those who can or do come in contact with it, whether or not they themselves happen to be 'practitioners' of a protected culture.[152]

Although the CLRS clearly does not adhere to this approach in a wholesale way, there are some points of similarity between it and the ECRLM. For instance, one of the purposes of the OLA is to protect the English and French *languages*, as such, quite apart from any specific legal rights that might be created for individuals or groups. As Part VII as a whole is entitled 'Advancement of English and French', it seems logical to think that s. 41(2) has some connection with this objective, and that its measures might in fact be justified in terms of a broader public interest in maintaining OLMCs.[153] Furthermore, the courts have on occasion emphasized the importance of language rights provisions to the political stability of Canada as a whole, making them a matter of general rather than merely special interest.[154]

If one were to conclude that the s. 41 duty is justified by a general public interest rather than a special one, this could in principle have some impact on the extent of that duty. It is certainly conceivable that there might be situations in which the public interest in the vitality of OLMCs is markedly less intense than that of these

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[152] See, for example: François Grin, 'Combining Immigrant and Autochtonous Language Rights: A Territorial Approach to Multilingualism' in Robert Phillipson, Mart Rannut and Tove Skutnabb-Kangas (eds), *Linguistic human rights : overcoming linguistic discrimination* (De Gruyter 1994) 34.

[153] In fact, s. 41(1)(b) of the OLA states that the Government of Canada is committed to 'fostering the full recognition and use of both English and French in Canadian society.'

[154] '[R]ights regarding the English and French languages … are basic to the continued viability of the nation', *R v Mercure* [1988] 1 SCR 234, p. 269, recently reiterated in *Thibodeau* (n 24), para. 4. The OCA made similar comments in a related case: 'No doubt with a view to the future strength and unity of the country, [the Charter] has made provision for minority language education rights', *Reference re Education Act of Ontario and Minority Language Education Rights* 1984 CarswellOnt 533 (OCA), para. 80.

groups themselves. More generally, the public interest might be satisfied by smaller and less vibrant linguistic minorities than OLMCs themselves would prefer. If the s. 41 duty were held to be grounded in a public interest, and not the subjective interest of OLMCs, this could therefore result in a lower threshold of protection. By contrast, to say that the duty is justified by an underlying right of OLMCs is to create a presumption that general considerations of public interest are not a sufficient reason to override or minimize it.[155] Rights violations are assumed to be exceptional and place a heavy burden on governments seeking to justify them.[156]

This is an important question, but for the moment it can be set aside. While the *intensity* of the s. 41 duty may vary in some cases depending of which of these two modes of justification one adopts, its basic structure as a legal norm is unaffected by them. Either way, it remains the case that the s. 41 duty is directly enforceable by its putative beneficiaries, and thus constitutes—from a legal standpoint, if not necessarily a normative one—a subjective right. The debate over its content therefore cannot turn on the distinction between an absolute and a relative obligation, as Parliament has clearly opted to establish the latter.

3.3 The structure of the s. 41(2) duty: precise vs general obligations

The true controversy, it seems to me, has to do not with the right/duty dichotomy, but with another aspect of the AG's argument, namely, whether s. 41(2) can be said to impose any 'precise obligations', such that a complainant would be

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[155] In *Canada (Commissioner of Official Languages) v CBC* 2014 FC 849, at para. 42 (overturned on appeal for other reasons, 2015 CAF 251), Martineau J made this very point with respect to s. 41, albeit without describing it as being justified by an underlying right.

[156] Cf. *R v Oakes* [1986] 1 SCR 103, para. 66; *Mercure* (n 154), pp. 267-268.

entitled to 'specific measures' of some kind.[157] Whether or not the AG's position is correct on this point does not depend upon whether one characterizes the duty set out in s. 41(2) as being 'relative' or 'absolute', as this distinction is irrelevant here. It is perfectly coherent to say that a duty, while enforceable by private (i.e. non-governmental) parties, is minimalistic, at least insofar as its justiciable content is concerned.[158]

On the AG's reading of it, s. 41(2) imposes a unitary and indivisible obligation on the federal government as a whole, and leaves the choice of means for fulfilling it entirely to the government's discretion. A court seized of a complaint under s. 41 must therefore

> have regard to all of the government's activities in respect of official languages, while giving great deference to the government's discretionary choices. In particular, that deference should be expressed in reluctance to order or direct the expenditure of public funds, a matter within the authority of elected representatives.[159]

In short, if some part of the federal government is taking measures to support the vitality and development of OLMCs, there can be no breach of s. 41 in any particular case, even if the specific institution against whom the complaint has been brought has taken no action whatsoever. As a result, Part VII cannot be said to impose precise obligations on particular institutions, and no party is entitled to request that the court order specific measures of any kind, other than those flowing from the generally applicable rules of administrative law.[160]

This interpretation in fact consists of two distinct claims: that the s. 41(2) duty is (1) unitary, rather than manifold; and (2) binary, rather than complex. Each of these

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[157] *Picard* (n 7), para. 61.

[158] There may of course also be political consequences, which are not within the power of the courts to enforce: *Re: Resolution to amend the Constitution* [1981] 1 SCR 753.

[159] *Picard* (n 7), para. 60.

[160] *ibid,* para. 61.

claims is mistaken, although explaining why is more straightforward for the first than it is for the second. In the remainder of this section, I will explore these distinctions in an attempt to map out the range of possible interpretations we might place on s. 41(2). I conclude that there are two basic schemas that one could apply when interpreting that provision, which I label the Holistic Thesis and the Casuistic Thesis.

3.3.1 A unitary or manifold obligation?

The assertion that s. 41(2) imposes a *single* duty on the *entire* federal government, viewed as a unified whole, is clearly mistaken. For one thing, this notion is squarely at odds with the language of s. 41(2) itself, which states that '[e]very federal institution has the duty' to take the requisite measures. The obligation is framed in terms of individual federal institutions, suggesting that each of them has a free-standing duty towards OLMCs. If Parliament had intended for the obligation to apply to the federal government as a whole, it would have used the term 'Government of Canada', which appears elsewhere in the Act.[161] In fact, 'federal institution' is itself a defined term with a much narrower meaning than 'Government of Canada', as it refers to sub-components of the latter.[162] The clear implication of using 'federal institution' is therefore that each *part* of the government has its own obligations under Part VII of the Act.

This reading is reinforced by s. 42 of the OLA, which states that the Minister of Heritage must 'encourage and promote a coordinated approach to the implementation by federal institutions of the commitments set out in section 41'. If

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[161] For example, s. 10: '10. (1) The Government of Canada shall take all possible measures to ensure that any treaty or convention between Canada and one or more other states is authenticated in both official languages.'

[162] Section 3(1), OLA.

the AG's view were correct, and the s. 41(2) duty applied to the federal government as a whole, the latter could, if it wished, channel all s. 41 programs and measures through a single department. However, Parliament's choice to impose a duty on Heritage Canada to coordinate activities across the federal government makes sense only if one assumes that each federal institution is expected to take measures in furtherance of s. 41 on its own initiative. The AG's interpretation would therefore render s. 42 entirely superfluous. The better view is to recognize, as Martineau J did in *Canada (Commissioner of Official Languages) v CBC*, that

> in a singular manner, Part VII of the OLA expresses the will of Parliament to place the federal apparatus at the service of a larger societal project that will encompass and surpass it, namely, the advent of a Canada that fully recognizes the equality of English and French, and in which official language minorities flourish. Bringing such an ambitious project to fruition will require a comprehensive, coordinated and a necessarily polycentric approach.[163]

3.3.2 A binary or complex duty?

The other component of the AG's position—that the s. 41(2) duty amounts to nothing more than a requirement to do something rather than nothing—is on firmer ground from a textual standpoint. The wording of s. 41(2) does not, on its face, appear to dictate the use of any particular measure.[164] It is therefore not patently unreasonable to believe that federal institutions enjoy substantial discretion in selecting the means for carrying out their duties under that provision. Like all discretionary power, it would be limited (a point I will discuss further below), but there is some force to the argument that s. 41 does not, as a general matter, impose

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[163] *Canada (Commissioner of Official Languages) v CBC* 2014 FC 849, para. 37 (overturned on appeal for other reasons, 2015 CAF 251).

[164] For ease of reference, here is the language of that provision once again: 'Every federal institution has the duty to ensure that positive measures are taken for the implementation of the commitments under subsection (1)'.

'specific obligations', if by that one means an obligation to take a particular measure in specific circumstances.

How are we to determine if this view is correct? The answer might be thought to lie in the concept of discretion itself. De Smith, Woolf, and Jowell define discretion this way: 'The legal concept of discretion implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty'.[165] Furthermore, discretion is widely understood to include the possibility of choosing inaction as a course of conduct.[166] One could argue, therefore, that the use of the word 'duty' in s. 41(2) indicates the absence of discretion. A certain course of conduct is *mandated*, and inaction is not a legitimate option. However, this does not do much to clarify the situation. Duties and discretion can and frequently do coexist.[167] A trial judge has a duty to render a decision on the factual allegations made by the plaintiff, but she also has discretion in deciding whether to retain the testimony of a particular witness. Thus, in relation to s. 41(2), one might plausibly say that federal institutions have discretion in selecting among the possible 'positive measures' they might adopt, but that they have a duty to make a choice, inaction being ruled out as a legitimate course of conduct. This is perfectly consistent with the AG's view (although it offers us no particular reason to adopt it).

Given the wording of s. 41(2), it seems difficult to deny that federal institutions enjoy *some* measure of discretion. The real question is therefore what constraints are placed on that discretion by s. 41 as a whole. Is it really plausible to

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[165] Harry Woolf, *Judicial Review of Administrative Action* (5th ed / The Rt Hon The Lord Woolf, Jeffrey Jowell ; assistant editor: AP Le Sueur, Sweet & Maxwell 1995) 296, cited in Patrice Garant, *Droit Administratif. 5ième Édition.* (Yvon Blais 2004) 199.

[166] Patrice Garant, *Droit Administratif. 5ième Édition.* (Yvon Blais 2004) 199.

[167] CF Forsyth, *Administrative Law* (10th ed, Oxford University Press 2009) 196.

think that the only legal constraint imposed on the executive by s. 41(2) is the obligation to refrain from total inaction?

The strongest argument for this reading would consist in pointing out that the reference to 'positive measures' is indeterminate, which suggests, when read in isolation, that Parliament intended to leave the choice of which measures to adopt to the discretion of federal institutions themselves. But statutory language cannot be read in isolation, or without giving any thought to the underlying purpose of the provision. In that vein, one must keep in mind that s. 41(2) applies to all federal institutions, of which there are several dozen operating in countless different fields. As the Supreme Court has noted before, it is important that public law standards provide flexibility when they apply to 'the full galaxy of federal decision-makers … who operate in different decision-making environments under different statutes with distinct grants of decision-making powers'[168]. Given this, the indeterminate character of the expression used to denote the substantive content of the s. 41(2) duty could simply flow from the fact that Parliament sought to impose a generic duty on a highly disparate range of entities.

3.3.3 Two dimensions of constraint

Before attempting to resolve this question, it is worth breaking down the 'problem of constraint' a bit further. There would seem to be at least two axes along which the legal constraints on s. 41(2) discretion must operate. The first is the eligibility of a given measure, while the second is its sufficiency. By eligibility, I am referring to whether or not a particular measure counts as a 'positive measure' within the meaning of s. 41. Sufficiency, by contrast, refers to the question of whether the

[168] *Canada (Citizenship and Immigration) v Khosa* [2009] 1 SCR 339, paras. 28, 33.

measures taken by a given institution are enough to discharge its duty under s. 41(2). Constraints can be said to exist along each of these fronts, regardless of one's ultimate position on the question we are examining here—ie whether s. 41(2) imposes 'precise obligations' to take 'specific measures'. Even if one accepts the binary reading of s. 41(2) defended by the AG in *Picard*, the 'something', in order to count as such, must meet some criterion for eligibility, and it must be non-trivial to count as genuine action.[169]

3.3.3.1 The Holistic Thesis

Focussing on the question of sufficiency, we might say, broadly speaking, that there are two possible competing theories as to the *structure* of that criterion. One theory, derived from the AG's position in *Picard*—though modified to take into account the untenability of the 'unitary thesis', as outlined above—would be that federal institutions have a holistic duty to take positive measures (the 'Holistic Thesis'). That is, each institution would have a duty to take positive measures, the choice of which would be left entirely to its discretion, subject only to a standard of reasonableness,[170] to be applied in the aggregate. No one would be entitled to apply to the Federal Court for an order requiring a federal institution to take this or that specific action; at most, one could obtain a declaration that the institution had failed to adopt sufficient measures.[171] This would appear to be the holding in *FCFA*.[172]

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[169] During the Senate hearings on the 2005 amendments, the lawyers for the Department of Justice conceded that a decision to spend only $1 on OLMC programs could be quashed on grounds of irrationality or unreasonableness: Senate of Canada, 'Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. First Session: Thirty-Seventh Parliament, 2001-02. Issue No. 27: Bill S-32, An Act to Amend the Official Languages Act (Fostering of English and French)' 18.

[170] See note 169.

[171] In light of recent judgments, it would be difficult, in the context of a such a duty, to obtain anything in the way of a mandatory order from the courts. Given the very open-ended nature of the duty, the only sensible relief would be a structural order of the sort issued in *Doucet-Boudreau v Nova Scotia*

3.3.3.2 The Casuistic Thesis

The alternative theory would be that the criterion of sufficiency is more targeted than this. Under this theory, *individual* measures or actions could be assessed by the courts for their sufficiency, as well as the overall package of measures adopted by the institution as a whole. This in turn would imply (or rather presume) that there exist obligations to act in particular circumstances or contexts (the 'Casuistic Thesis'). This broadly reflects the holding in *Picard*.

3.3.3.3 Structure vs. content of the norm

As I noted above, the two Theses are competing theories regarding the *structure* of the sufficiency criterion. Defining the content of that criterion is a much more complicated task. For now, we can say that, regardless of the theory one adopts as to the structure of the sufficiency requirement, its content will be intimately connected to the question of *eligibility*. In order to constitute a 'positive measure' within the meaning of s. 41(2), a measure must 'enhance the vitality' and/or 'support the development' of OLMCs (hereinafter, for ease of reference, referred to collectively as 'enhance the vitality'). Under the Holistic Thesis, a federal institution has discharged its s. 41(2) duty if it has adopted measures that make a reasonable contribution to the vitality of OLMCs. Under the Casuistic Thesis, institutions may face precise obligations to enhance the vitality in specific ways, and/or through a

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(Minister of Education) [2003] 3 SCR 3. Yet in a recent case under the OLA, the Supreme Court struck down a structural order granted by the Federal Court for lack of clarity: *Thibodeau* (n 24), paras. 119-132. Given the comparative specificity of the legal obligations at issue in that case relative to those flowing from the Holistic Thesis, it seems highly unlikely that any structural order defensible in terms of the latter would pass muster with the courts.

[172] See note 115.

specific level of commitment. Defining those obligations can only be done on a case-by-case basis.

A full statement of the content of s. 41(2) will therefore require that we define the terms 'linguistic minority community', 'vitality' and 'development'. The attempt to do so will take up a significant part of this thesis. However, my aim in this chapter is merely to explicate the basic structure of s. 41 as a legal norm, and so I will put those issues to one side for the moment. In the following section, I want to examine a bit more closely the nature of the legal constraints flowing from the Two Theses. In the final section, I will outline the reasons why I believe only the latter offers a defensible interpretation of s. 41.

3.4 The nature of s. 41(2) as a legal norm

How are we to decide which of the Two Theses is correct? Ultimately, this ambiguity will have to be resolved using sources outside s. 41 itself, mainly the Parliamentary debates leading to the 2005 amendments and the principles of interpretation applicable to language rights laws. However, before turning to those sources, it would be helpful to spell out in somewhat greater detail the possibilities available when interpreting s. 41(2) based on the text alone. More specifically, I would like to consider the nature of the legal constraints flowing from the two Theses.

While all legal norms have in common that they count as reasons for action in the context of the legal system,[173] it is often necessary to distinguish between different types of legal norms, because their effect on judicial decision-making can vary. In this vein, Sunstein has outlined a typology of legal constraints on discretion, which will be helpful in thinking through the options presented by s. 41(2). Four of

[173] Alexy (n 34) 45.

Sunstein's categories are of particular interest to us here: rules, standards, factors and principles.[174]

3.4.1 Rules

According to Sunstein, a rule can be defined as 'the full or nearly full before-the-fact assignment of legal entitlements, or the complete or nearly complete before-the-fact specifications of legal outcomes'.[175] In other words, the aim of a rule is to specify the content of the law as much as possible in advance of particular cases, leaving very little to the judgment of individual decision-makers. Thus, a speed limit is the paradigm case of a rule. In the purest of cases, rules require only that one ascertain the facts, as the law is already known.[176] Rules will of course usually be justified by some principle or policy consideration. However, the latter tend to be much broader than the rule itself. One might therefore add that a rule 'captures the background principle or policy in a form that from then on operates independently'.[177] As a result, it can be over- or under-inclusive relative to the underlying policy or principle.

3.4.2 Standards

Standards, by contrast, are somewhat more open-textured than rules. Standards are norms that rely on terms whose meaning is indeterminate, i.e. which cannot be known fully in advance: for example, a requirement that conduct be

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[174] Sunsein also lists rules with exclusions, presumptions, guidelines and analogies as part of his typology. However, those categories are not relevant here. See generally: Cass R Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press 1996) 21–33.

[175] ibid 22.

[176] ibid.

[177] Kathleen M Sullivan, 'Foreword: The Justices of Rules and Standards' (1992) 106 Harv. L. Rev. 22, 58.

'reasonable', or that guilt be proved 'beyond a reasonable doubt'.[178] The content of standards must therefore be established casuistically, because their concrete requirements cannot be stated fully in the abstract.[179] As a result of this, a standard 'tends to collapse decision-making back into the direct application of the background principle or policy to a fact situation'.[180] Nevertheless, standards are like rules in that they have a binary character, and are 'always either fulfilled or not'.[181]

3.4.3 Factors

In some cases, however, the legal constraints on discretion do not have such a binary character. Instead, the legislator has enumerated a list of factors that must be considered, and on which any decision must ultimately be based, without intending to draw any particular line. This type of approach is especially common in administrative law.[182] A factor-based norm requires the decision-maker to engage in what Sunstein calls 'weighing',[183] or what is sometimes called 'balancing'.[184] Although the relevant considerations have been stipulated in advance, their relative importance can only be assessed on a case-by-case basis. Because of this, factors

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[178] Sunstein (n 174) 27.

[179] Compare the above examples of a standard with the rule stating that one may not drive faster than 100km/h on the highway. The content of that requirement does not require any appreciation of the particular circumstances of individual cases. (Whether or not there are valid excuses is a different question).

[180] Sullivan (n 177) 58.

[181] Alexy (n 34) 46. Alexy makes this statement in reference to 'rules', but his concept of a rule is broader than Sunstein's and encompasses what the latter calls a standard.

[182] See, for example, *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur* [2003] 2 SCR 504, para. 41; *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, paras. 21-28.

[183] Sunstein (n 174) 28.

[184] Sullivan (n 177) 60.

tend to produce a 'range' of possible outcomes, rather than stipulating a binary evaluation.[185]

Despite this fundamental difference, factors and standards are closely connected in that the content of standards is often defined in terms of various factors, which is why standards are generally difficult to define with any precision in the abstract. In other words, a decision-by-factors *can* be structured in a binary way—but this need not be the case. For instance, the limits on regulatory power are often structured using a list of factors, which constrain the decision-making *process* leading up to the enacting of regulations, without imposing a binary determination as to the validity of the content of the final decision.[186] Unfortunately, this feature of regulatory power is easily obscured by the fact that regulations are subject to review on the basis of 'reasonableness', which appears to indicate that there is, in fact, a binary norm in operation. But describing the adoption of the regulations (as opposed to the decision to quash them) as the *application* of a standard would be misleading, and so the distinction is an important one.

3.4.4 Principles

Finally, principles, as legal norms, are 'both deeper and more general legal rules'.[187] As Sunstein uses the term, its meaning is somewhat flexible. A principle can be a proposition that *justifies* a rule or set of rules—e.g. the principle that one ought to keep one's promises is held to justify many of the rules of contract law.

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[185] For example, consider *Dunsmuir v New Brunswick* [2008] 1 SCR 190, para. 47.

[186] In this vein, consider ss. 3 and 5 of the Broadcasting Act, SC 1991, c 11, which define the factors on which the regulatory power of the Canadian Radio-television and Telecommunications Commissions must be exercised. See generally: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168* [2012] 3 SCR 489, paras. 14-33.

[187] Sunstein (n 174) 30.

Principles in this sense generally do not offer a direct or concrete resolution to specific cases, but may serve to guide the interpretation of applicable rules. On the other hand, the term principle can also be used to describe 'explicitly formulated' propositions that, rather than justifying a rule, bear directly on the resolution of a case as a relevant factor (eg the principle that laws ought to be interpreted as non-retroactive, if possible).[188] Although they apply directly, they do not constitute rules, because they function as factors of variable weight.

In Sunstein's view, what both examples have in common is that they are norms that 'bear on cases without disposing of them'.[189] Sunstein is also careful to distinguish between this concept of a principle, and propositions that are often described as 'principles' in legal parlance, but in fact function as standards, like the 'principle' that discrimination on the basis of race is presumptively invalid. For the sake of clarity, I will refer to the first kind of principle as a 'justificatory principle', the second as an 'operative principle', with the third being simply a species of standard.

3.4.5 Situating the Two Theses

Prima facie, neither of the two Theses can be described as incorporating a rule, even a complex one. Regardless of the construction one places upon the substantive terms of the s. 41(2) duty—ie 'linguistic minority community', 'vitality', 'development'—it does not seem plausible to think that this provision amounts to a 'full or nearly full before-the-fact assignment of legal entitlements'. Subsequent case-law could of course change this by defining the duty in very specific and technical

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[188] ibid 31.

[189] ibid.

ways, but that is not the present state of the law, nor does such an outcome seem very likely. This leaves standards and factors as the primary candidates for describing the content of s. 41(2).

The Holistic Thesis, for its part, suggests that any constraints on discretion flowing from s. 41(2) consist in a series of factors, rather than a standard. Recall that the Holistic Thesis asserts that each institution has a duty to take positive measures, the choice of which is left entirely to its discretion, subject only to a standard of reasonableness, to be applied in the aggregate. This structure is not compatible with the existence of a standard. A standard, by its nature, is a normative proposition that one *applies* to a given set of facts, in order to produce what is, ostensibly at least, a pre-determined outcome. The content of a standard may be impossible to define in the absence of detailed facts, but once those are known, it effectively operates as a rule, determining the legal outcome. The Holistic Thesis, by contrast, does not suggest that the s. 41(2) decision-maker is called upon to apply a single proposition to determine the correct outcome. Rather, it implies the existence of Hohfeldian power[190]—federal institutions are granted a legal capacity or ability, which can be used to produce a wide array of legally acceptable outcomes. A legal power must of course have limits, both in terms of the *types* of measures it authorizes and the *reasons* for which it can be exercised. However, any limits on the types of measures a federal institution can take do not flow from s. 41 so much as its home statute. That leaves the reasons for decision as the main purview of s. 41.

Constraints on the types of reasons a decision-maker can use to justify a particular choice generally take the form of a prescribed list of 'relevant' factors, as I

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[190] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning : And Other Legal Essays* (Yale University Press 1923) 50–60.

noted above. Such factors can both specify what is a relevant consideration and what is a *necessary* one, for it is often the case that a 'factors constraint' requires the decision-maker not merely to pick and choose considerations à la carte, but also to consider each one and weigh it against the others. However, factors do not set out a rule or standard to be applied. Rather, they are best thought of as defining the building blocks out of which a range of lawful actions can be constructed. Those actions will ultimately be subject to judicial review on grounds of reasonableness, which is itself a standard, but that does not imply that federal institutions are subject to a standard specific to s. 41 of the OLA. It is important not to conflate the decision of a reviewing court and that of the original decision-maker, each of which involve the exercise of a different power.

The Casuistic Thesis, on the other hand, suggests that s. 41 incorporates at least one standard. Recall that, under this theory, individual measures or actions could be assessed by the courts for their sufficiency. In *Picard*, for instance, the Federal Court ruled that, having decided to make patents available online, the Patent Commissioner had an obligation under s. 41 of the OLA to translate the abstracts of those patents in order to ensure that francophone inventors were not forced to assimilate by having to conduct all of their research in English.[191] Thus, the specific decision not to translate the patent abstracts was subject to review on the basis of a standard emanating from s. 41. The content of that standard could not be specified until the Patent Commissioner had made the decision to publish all patents online, but once those facts were established, a 'precise obligation' crystalized, entitling the court to order the adoption of 'specific measures'.

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[191] *Picard* (n 7), paras. 58, 65-67.

3.5 Section 41 as a standard

Now that we have a clearer picture of the interpretive choices available and what they imply by way of legal constraints on executive action, it is time to resolve the ambiguity and decide which of the Two Theses provides the best fit for s. 41(2). In this section, I will advance two arguments as to why the Casuistic Thesis is the better option. First, drawing on the legislative history of the 2005 amendments, I will show that the Casuistic Thesis provides the best description of what Parliament intended to achieve by enacting them. Second, I will argue that the principles of the language rights interpretive paradigm strongly favour the casuistic approach.

3.5.1 The legislative history of the 2005 amendments

Although s. 41 was originally enacted in 1988 as part of a total overhaul of the OLA, the Parliamentary debates on that bill provide very little information about how Part VII was understood from a legal perspective. In fact, a comprehensive study of these debates has shown that there were virtually no questions regarding Part VII when the 1988 OLA reform bill was in committee.[192] As a result, the committee hearings on Gauthier's various amendment bills are the main source of information regarding Parliament's understanding of s. 41, both before and after the 2005 changes.

Before delving into those debates, however, it is necessary to consider the nature and structure of the old s. 41. The legislative changes that ultimately became the 2005 amendments were motivated by the way in which the old s. 41 had been interpreted, first by the Department of Justice and then later by the courts. Thus, in

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[192] In fact, the only questions came from Senator Gauthier himself, who was an MP at the time. See the testimony of Professor Linda Cardinal before the House of Commons while the 2005 amendments were being studied : House of Commons of Canada, 'Standing Committee on Official Languages, Evidence, Vol. 42, 1st Session, 38th Parliament (2004-2005)' (2005) 2.

order to understand what Parliament sought to accomplish by amending Part VII, we must first define what it was that it sought to reject.

3.5.1.1 The old s. 41: a justificatory principle

There is no doubt that the old s. 41 was less restrictive than its current incarnation.[193] While the 1988 OLA reform bill was in committee, the Secretary of State asserted that the original Part VII spoke the 'language of encouragement' rather than the 'language of command'.[194] Later, both the Department of Justice and the courts concluded that it was merely 'declaratory' and not 'executory'.

In fact, based on the definitive court ruling on the matter, it might even be argued that the old s. 41 had no legal content whatsoever. The Federal Court of Appeal stated that this provision did 'not create any right or duty that could at this point be enforced by the courts, by any procedure whatsoever'.[195] Given the context and the categorical way in which this statement was phrased, it could be taken to mean that even judicial review of executive action taken under the auspices of s. 41, based on general principles of administrative law, would be impossible.[196] If that were the case, s. 41 would effectively have no legal content to speak of.

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[193] The text of the old version read as follows :

'41. The Government of Canada is committed to

(a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and

(b) fostering the full recognition and use of both English and French in Canadian society.'

[194] Cardinal, 'Review of Bill S-3 - Presented to the Standing Committee on Official Languages of the House of Commons' (n 107) 4.

[195] *Forum des maires* (n 5), para. 46.

[196] Although the application was held to have been made under the remedial provisions of the OLA, the court did consider the possibility that an application for judicial review could be made to enforce provisions not included within the scope of the OLA's own remedial power. *ibid,* para. 32.

However, it seems unlikely that the FCA meant to go quite this far. Although it never clearly stated what it took the legal effect of s. 41 to be, it would appear as though the court viewed this provision as an example of what I called above a 'justificatory principle'. The court seemed to think that s. 41 was analogous to s. 2 of the OLA and s. 16(1) of the Charter, in that it established a broad principle on which subsequent, more detailed measures would be based.[197] On this reading, although the old s. 41 did not constrain the executive's freedom to act, much less require that specific measures be taken, it could be said to provide legislative authorization to take measures with a view to enhancing the vitality of OLMCs.[198] Accordingly, federal institutions whose mandate did not explicitly refer to such matters could have relied on the old s. 41 in order to justify an exercise of their discretionary powers in a manner intended to have that effect.

Nevertheless, even with this more generous reading of the FCA's reasons, s. 41 provided little if anything in the way of legal constraints. Based on that view, the most one could possibly argue is that federal institutions had an obligation to consider the vitality of OLMCs as part of their decision-making process—thus, that it constituted a 'factor' limiting their discretion. Yet even this would be difficult to establish, given that, in the original wording, s. 41 stated only that the 'Government of

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[197] The court quoted at length from a passage in *Beaulac* (n 15). in which Bastarache J explores the legal foundations of the principle of substantive equality in language rights law. The FCA highlighted a specific statement dealing with s. 16(1) of the Charter and s. 2 of the OLA, apparently with the intention of suggesting that s. 41 played the same function as these provisions, i.e. to establish a principle on which subsequent, more detailed measures would be based. *Forum des maires* (n 5), para. 41.

[198] This line of analysis is of course premised on the notion that s. 2 of the OLA, or s. 16(1) of the Charter, have no distinct substantive content of their own, as the FCA appears to have thought. There is certainly case-law supporting this view (see : *Association des Gens de l'Air du Québec Inc, et al v Minister of Transport (Canada)* [1977] 2 FC 22., although that reading is by no means obviously correct (see Le Dain JA's (as he then was) reasons in *Assn des gens de l'air du Quebec Inc v Canada (Minister of Transport)* [1978] 2 FC 371 (FCA). On the question of whether s. 16 of the Charter has any substantive content, see generally: Grégoire Webber, 'The Promise of Canada's Official-Languages Declaration' in Joseph Eliot Magnet (ed), *Official Languages of Canada: new essays* (LexisNexis Canada 2008).

Canada' was committed to enhancing the vitality of OLMCs, and made no mention of individual federal institutions.[199]

It is interesting to note however that the Department of Justice seemed willing, initially at least, to accept that s. 41 might have more of a binding effect than this. In their testimony before the Senate Committee charged with examining Senator Gauthier's original draft amendments, DoJ officials suggested that s. 41 might well impose some obligation to act. Furthermore, asked to comment on a hypothetical scenario in which the federal government budgeted only one dollar for Part VII measures, their response was to say that there would be an administrative law remedy available in such a case, as a decision of this kind could be characterized as irrational.[200] That position appears to have been abandoned by the time the issue reached the courts. However, had it been sustained, the old s. 41 would have resembled the Holistic Thesis, with the caveat that the duty to act might have fallen on the government as a whole, rather than individual federal institutions. This will be relevant when it comes to determining which of the Two Theses best describes what the 2005 amendments were meant to accomplish.

3.5.1.2 The Senate hearings: making s. 41 enforceable on a case-by-case basis

Senator Gauthier first presented a bill to amend Part VII in 2001. The reason for the amendments was twofold: (1) dissatisfaction with the way in which the old s. 41 had been implemented by the federal government, a problem partly attributed to the wording of the original text; and (2) concern that the provision would be treated as

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[199] See note 193.

[200] Senate of Canada, 'Legal and Constitutional Affairs, Issue 27' (n 169) 18.

unenforceable by the courts.[201] As a result, there was a lively debate in committee over the precise nature of the old s. 41 as a legal norm, and the consequences (if any) of adopting Gauthier's bill.[202] These discussions provide a reasonably clear picture of what Parliament sought to accomplish by enacting the 2005 amendments.

In my view, the Casuistic Thesis provides the best description of what the committee and the various witnesses it heard from expected the 'new and improved' s. 41 to achieve. A detailed summary of the discussion would be tedious and require too much space, but the dominant themes most relevant to us here can be described as follows:

a. Was the old s. 41 executory or declaratory? If so, what would Gauthier's amendment change?

b. The lack of clarity in what was expected/required of federal institutions, and the lack of certainty and predictability in OLMC funding and programs;

c. Comparisons with ss. 23 and 16.1 of the Charter

3.5.1.2.1 Executory, not declaratory

One of the main topics of discussion was the question of whether the old s. 41 was executory or merely declaratory, and if the latter, what might be needed to correct this. Although some leading scholars had argued that the old s. 41 created a 'self-

[201] While the FCA's ruling in *Forum des maires*—which was to be the definitive statement on the matter—would not come until 2004, there was already one judgment holding that the old Part VII did not give rise to a judicial remedy. *Canada (Commissioner of Official Languages) v Canada (Department of Justice)* 2001 FCT 239, paras. 88-90.

[202] The Senate Standing Committee on Legal and Constitutional Affairs held extensive hearings on the bill and heard from roughly 30 witnesses, including the Department of Justice, the Commissioner for Official Languages, Heritage Canada, the FCFA, the Law Reform Commission of Canada, the leading expert on statutory interpretation, Prof Ruth Sullivan, and a range of experts on language rights.

executing' obligation—i.e. one that was enforceable through the courts[203] —the majority view before the Senate committee was that it was merely declaratory. As a result, the ultimate purpose of Gauthier's amendments became to correct this flaw and ensure that OLMCs had access to meaningful court oversight of the way in which s. 41 was implemented.

One member of the committee who was also a well-known constitutional scholar, Senator Beaudoin, sought to capture the difference between the legal effect of the 'pathological' version of s. 41 and the underlying ideal using the concept of 'directory' versus 'mandatory' statutes.[204] In Anglo-Canadian law, there is a general distinction between 'statutory provisions that are mandatory in the sense that failure to comply with them will lead to invalidity of the Act in question, and directory, in the sense that failure to comply will not necessarily lead to such invalidity.'[205] In the case of s. 23 of the Manitoba Act, for instance, this distinction had been used by the Manitoba Court of Appeal to excuse its decision not to declare null and void acts of the legislature not passed in both English and French, as it characterized the bilingualism requirement as directory and not mandatory.[206] Senator Beaudoin

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[203] See, for example, Bastarache and Ouellet (n 11), which was referred to during the hearings.

[204] Beaudoin referred to the argument made by the Manitoba Court of Appeal that British law maintained a distinction between 'directory' and 'mandatory' statutes, and that s. 23 was of the former, and not the latter, category: *Forest v Manitoba (Attorney General)* [1979] 4 WWR 229 (Manitoba CA), para. 47.

[205] *Reference re Language Rights Under s 23 of Manitoba Act, 1870 and s 133 of Constitution Act, 1867* [1985] 1 SCR 721, para. 38, citing *Montreal Street Railway Co v Normandin* [1917] AC 170 (JCPC), at pp. 174-75. See also : Sullivan (n 26) 78. Interestingly, the OLA 1969 was described by the Supreme Court of Canada as a 'directory' statute in *Minister of Justice (Can) v Borowski* [1981] 2 SCR 575, p. 580, in the context of a discussion about standing. Specifically, the court noted that in the case of a 'directory' statute, which was neither 'regulatory' nor 'penal', there would never be enforcement procedures undertaken against individual citizens, meaning that the only way to challenge the constitutional validity of the law was through a grant of public interest standing. Thus, in this context at least, the notion that a statute is 'directory' does not imply that it does not create binding obligations, but merely constitutes a statement regarding the subject of those obligations (i.e. the state, rather than private persons).

[206] *Forest v. Manitoba (Attorney General)* (n 204), para. 47. As Senator Beaudoin pointed out, this decision was later overturned by the Supreme Court. See note 213 below.

argued that s. 41 was (or ought to be) 'mandatory' in this sense. Thus, he appears to have been implying that it should impose one or more conditions precedent on the *validity* of executive decisions.[207]

What those conditions might be, Beaudoin never specified. However, some indications can be found in the brief of the FCFA, which was then under discussion and to which Beaudoin was reacting.[208] For instance, the FCFA suggested that federal institutions had (or would have, pursuant to the proposed amendments) an obligation to ensure that the policy development process would, from the very outset, consider the needs of OLMCs as distinct from those of the majority. Policies and programs were (and often still are) generally developed using a framework based on the needs of the majority.[209] By contrast, the role of s. 41, according to the FCFA, is to ensure that federal policies reflect a more appropriate vision of Canadian society:

> une société pluraliste qui réunit deux communautés de langue officielle et au sein de laquelle les francophones qui vivent à l'extérieur du Québec ne sont pas des citoyens de second plan; une société qui reconnaît aux francophones qui y vivent en situation minoritaire le droit quasi constitutionnel de se développer et de s'épanouir dans leur langue. Ce qui signifie, au bas mot, qu'ils puissent profiter des politiques et des programmes fédéraux aussi pleinement que leurs concitoyens anglophones.[210]

This view implies that s. 41 should impose a duty on federal institutions to ensure that OLMCs benefit from federal policies and programs equally, and that the latter support their ability to develop and flourish as minority language communities. It also implies, in the FCFA's view, that the federal government has a broader obligation to develop a 'global action plan' to ensure that the various policies being adopted are

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[207] See generally : *Reference re Manitoba Language Rights* (n 205), paras. 37-42.

[208] Fédération des communautés francophones et acadienne du Canada, 'Mémoire Présenté Au Comité Sénatorial Permanent Aux Affaires Juridiques et Constitutionnelles Au Sujet Du Projet de Loi S-32: Loi Modifiant La Loi Sur Les Langues Officielles (Promotion Du Français et de L'anglais)'.

[209] See for example : *DesRochers v. Canada (Industry)* (n 110).

[210] Fédération des communautés francophones et acadienne du Canada (n 208) 11.

mutually re-inforcing and are responsive to the real needs of OLMCs.[211] As neither of these obligations could be fulfilled without appropriate consultation with OLMC representatives, there would also be a duty to consult.[212]

Beaudoin in fact believed (at the time) that the old s. 41 was executory.[213] While others on the committee shared this view, including Senators Gauthier, Rivest and Joyal, that position was far from unanimous. Professors Sullivan[214] and Magnet,[215] along with the Department of Justice[216] and the Commissioner for Official Languages,[217] amongst others, all argued that the old s. 41 was in all likelihood merely declaratory, and would require substantial amendment—along the lines proposed by Gauthier's bill—to become legally binding.

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[211] On this point, see also the testimony of the President of Law Reform Commission, Nathalie DesRosiers, who stated that 'the draft amendment to section 41 clearly addresses the issue of whether a community has the ability to decide its own fate': Senate of Canada, 'Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. First Session: Thirty-Seventh Parliament, 2001-02. Issue No. 28: Bill S-32, An Act to Amend the Official Languages Act (Fostering of English and French)' 19.

[212] See generally : Fédération des communautés francophones et acadienne du Canada (n 208) 7–10.

[213] Beaudoin compared s. 41 to s. 23 of the Manitoba Act: Senate of Canada, 'Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. First Session: Thirty-Seventh Parliament, 2001-02. Issue No. 25: Bill S-32, An Act to Amend the Official Languages Act (Fostering of English and French)' 16. This provision had long been ignored by the provincial legislature, but was ultimately held to be binding by the Supreme Court, which declared all Manitoba laws enacted since 1890 invalid as a result. The issue arose because the Manitoba Official Language Act, passed in 1890, required that only English be used before the courts and the legislature of the province. However, section 23 of the Manitoba Act, 1870, which had created the province out of a portion of the North West Territories, imposed the exact same requirements as s. 133 of the BNA on the provincial legislature and courts. An initial ruling that s. 23 was binding, and that its requirements needed to be met in order for a statute to be constitutionally valid, was rendered in *Attorney General of Manitoba v Forest* [1979] 2 SCR 1032. In a later decision, *Reference re Manitoba Language Rights* (n 205), the Supreme Court declared all Manitoba laws enacted since 1890 to be of no force or effect, though it suspended its declaration of invalidity for one year.

[214] Senate of Canada, 'Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. First Session: Thirty-Seventh Parliament, 2001-02. Issue No. 29: Bill S-32, An Act to Amend the Official Languages Act (Fostering of English and French)' 12.

[215] ibid 6.

[216] '[A] commitment is not necessarily of the same order as a justiciable right or duty.' Senate of Canada, 'Legal and Constitutional Affairs, Issue 27' (n 169) 7–9. Newman also compared s. 41 to the Multiculturalism Act, which does not contain a justiciable duty : ibid 17.

[217] Senate of Canada, 'Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. First Session: Thirty-Seventh Parliament, 2001. Issue No. 26: Bill S-32, An Act to Amend the Official Languages Act (Fostering of English and French)' 6–7.

Senator Bryden, former Minister of Justice of New Brunswick, shared this view, and his comments are instructive with respect to the legal consequences of adopting the 2005 amendments. Responding to the suggestion made by Senator Beaudoin that Gauthier's bill would merely 'clarify' the pre-existing legal content of s. 41, Bryden stated that the amendments would 'dramatically change the obligations of the Government of Canada', given that the old s. 41 did not in fact contain any legal obligations.[218] To illustrate this, he argued that, under the proposed amendments, if the federal government were to create a cultural centre in Calgary under the auspices of Part VII, the francophone community of Saskatoon would have a right to demand one as well. The new s. 41, in other words, would provide 'a commitment not just to enhancing but ensuring that these types of institutions appear.'[219] It would therefore be 'a considerable undertaking that has significant implications.'[220]

In the final analysis, the clear impression one is left with after reading through the transcripts of the hearings is that, regardless of their views on the extent to which the old s. 41 was legally binding, all agreed that the amendments under discussion would impose substantial and fairly specific obligations on the federal government, and open the door to active involvement by the courts in supervising their implementation. This is perhaps demonstrated most elegantly by the testimony of Warren Newman on behalf of the DoJ, which reads like an inverted roadmap to the new s. 41.

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[218] ibid 20.

[219] ibid.

[220] ibid.

Newman sought to convince the committee that the old s. 41 was not judicially enforceable, and advanced several points to support this claim. Highlighting the fact that s. 41 spoke only of 'commitment', he explained that 'a commitment is not necessarily of the same order as a justiciable right or duty',[221] noting:

> If Parliament had wanted to create an obligation or a right, why did it not word the act that way? In Parts IV and V, for example, the words ''it is the duty of federal institutions'' or ''it is the duty of the Government of Canada'' were used at least 14 times. Why did it insist on using the term ''commitment''?[222]

Newman further added that, if Parliament had meant to create a duty, it would have included s. 41 under the judicial remedy found in Part X of the OLA. Because it did not, and because s. 41 spoke only of a 'commitment' and not a 'duty', the courts would not be justified in conducting 'a fastidious exercise of second-guessing political decisions allocating resources, as long as decision-makers act reasonably, in accordance with the values that underlie our Constitution.'[223] Beyond these minimal constraints of administrative law, the only remedy for a failure to respect the spirit of Part VII would be political in nature.[224]

Newman in fact defended this approach as being appropriate given what he took to be Part VII's aims, claiming that 'Part VII is eminently ''political'' in the most noble sense of the term'.[225] But it cannot be overlooked that the 2005 amendments explicitly counteract every one of his points. The reference to a 'commitment' has been supplemented by the clear imposition of a 'duty', which is now judicially enforceable under Part X. Parliament has evidently rejected the

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[221] Senate of Canada, 'Legal and Constitutional Affairs, Issue 27' (n 169) 7.

[222] ibid 8.

[223] ibid 7.

[224] Newman compared the Official Languages Commissioner to the Auditor General, citing *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)* [1989] 2 SCR 49, para. 59.

[225] Senate of Canada, 'Legal and Constitutional Affairs, Issue 27' (n 169) 8–9.

premise that the Commissioner of Official Languages can provide the oversight needed to ensure that Part VII is properly implemented. In short, s. 41 has become much more *juridical* in nature.

The point-and-counterpoint between Newman's interpretation of the old s. 41 and the text of the new version has some obvious implications for the discussion underway here. Clearly, Newman's vision for the old s. 41 corresponds to the Holistic Thesis—minimal judicial review on grounds of reasonableness, with substantial deference to the executive in the exercise of its discretion. If the purpose of the new s. 41 was to repudiate that vision—as seems clear from the changes that were ultimately adopted—then the Holistic Thesis cannot be the proper framework for conceptualizing the structure of the s. 41(2) duty. The Casuistic Thesis, by contrast, is capable of accommodating the intent of these changes, and provides a workable structure for the types of constraints that the committee and the various witnesses clearly expected to follow from the adoption of the amendments.

3.5.1.2.2 Clarity, certainty and predictability

This reading of the 2005 amendments is reinforced by another major theme in the committee's deliberations, namely, the lack of clarity in what was expected of federal institutions. The murkiness of the old s. 41 led to, or at least compounded, a lack of certainty and predictability with respect to funding and programs for OLMCs. This was considered to be a serious problem, one that the amendments were intended to address.

According to the Commissioner for Official Languages, Dyane Adam, despite some initially promising moves by the government in the early years following the enactment of the OLA 1988, there had been a lack of real progress with respect to the

implementation of Part VII, and '[a]mbiguity surrounding the scope of section 41 is certainly largely to blame.'[226] The resulting 'stasis' was severely problematic, with the Commissioner concluding that '[w]e still have a long way to go before reaching the point where we can say that we are living up to our commitments under Part VII.'[227] She therefore urged that steps be taken to clarify the 'binding' nature of the s. 41 commitment, including legislative amendments.[228]

The Commissioner proposed a number of amendments to Gauthier's bill, all of which were ultimately adopted in one form or another. One proposal was for the addition of what eventually became s. 41(2): 'Federal institutions shall ensure that concrete steps are taken to fulfil [sic] this commitment.' Another was to include Part VII under the judicial remedy set out in Part X of the Act, which Gauthier's original bill did not do. The evident aim of these proposals was to enable OLMCs to overcome executive 'stasis', while at the same time involve the courts more deeply in the process of defining the content of Part VII obligations.

An example of the consequences flowing from the lack of clarity in s. 41 was given by Senator Gauthier, and his comments in this connection are quite suggestive with respect to what his amendments were expected to achieve from a legal standpoint. Gauthier raised the fact that he had initiated judicial review proceedings against a decision of the Canadian Radio-Television and Telecommunications Commission (CRTC), which had refused to order broadcasters in Quebec to include a French-language channel produced in Ontario (TFO) in their cable packages. Doing so would have substantially expanded the TFO audience and strengthened it as an

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[226] Senate of Canada, 'Legal and Constitutional Affairs, Issue 26' (n 217) 5.

[227] ibid 5–6.

[228] ibid 6.

institution (as well as improving awareness within Québec that francophone communities continue to exist outside its borders, a fact that is often unknown to Quebecers).[229] However, Gauthier's application failed, and the decision was allowed to stand. Before the committee, Gauthier stated his belief that the amendment being considered would enable an interested party to successfully challenge this decision as a failure of the CRTC's duty under Part VII.[230] Again, only the Casuistic Thesis is consistent with such an outcome.

The lack of clarity in what was expected of federal institutions was compounded by a lack of certainty regarding the legal status of those measures actually adopted pursuant to s. 41. A number of programs had in fact been put in place since 1988, along with substantial financial support, but as the FCFA noted, '[s]uch measures depend entirely too often on the authority in power, always under the threat of sinking into oblivion with the departure of those who launch them'.[231] Not only did this create problems on a case-by-case basis, it also prevented the development of a comprehensive development policy of the sort demanded by OLMCs. Such a policy would be impossible to implement without 'putting an end to the precariousness of past achievements, and to guarantee a certain durability, if not continuity, of support programs intended to help francophone communities.'[232] The only solution was a more rigorous legal framework to constrain and discipline executive action in these areas. The FCFA therefore proposed amendments very

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[229] Senate of Canada, 'Legal and Constitutional Affairs, Issue 23' (n 21) 10. On francophone Quebeckers' lack of awareness regarding francophones outside the province, see for example : Jean-Benoît Nadeau, 'Les cinq francophonies' *Le Devoir* (Montréal) <http://www.ledevoir.com/societe/actualites-en-societe/431271/les-cinq-francophonies> accessed 10 February 2015.

[230] Senate of Canada, 'Legal and Constitutional Affairs, Issue 23' (n 21) 26–27.

[231] Senate of Canada, 'Legal and Constitutional Affairs, Issue 25' (n 213) 14.

[232] ibid.

similar to those put forward by the Commissioner—i.e. imposing a specific duty on federal institutions to take all 'necessary measures', backed by a judicial enforcement mechanism.[233]

One of the ways in which these proposed amendments might contribute to greater stability was suggested by the Law Reform Commission of Canada. The President of the Commission, Nathalie DesRosiers,[234] discussed at great length the potential impact of the Montfort decision on the way in which the proposed amendments would be interpreted by the courts.[235] Specifically, she argued that the effect of the Ontario Court of Appeal's decision in that case was to recognize a 'ratchet' principle of sorts that would protect minority institutions which depended on governmental support.

The notion of a 'ratcheting' effect had first been suggested as a possible means of interpreting s. 16(3) of the Charter.[236] The lawyers for Montfort Hospital had argued that the effect of this provision was to constitutionalize any legislation whose purpose was to advance the equality of English and French in Canadian society, such as the FLSA, or at least any rights created by such legislation. That argument was rejected by the Ontario Court of Appeal, which held that the purpose of s. 16(3) was merely to protect such legislation from attack on constitutional grounds—for instance,

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[233] Fédération des communautés francophones et acadienne du Canada (n 208) 6.

[234] DesRosiers, a law professor, went on to be President of the Canadian Civil Liberties Association and Dean of both the Civil Law and Common Law faculties at the University of Ottawa (at different times).

[235] Senate of Canada, 'Legal and Constitutional Affairs, Issue 28' (n 211) 17. In the Montfort decision, the Ontario Court of Appeal struck down a decision to close a major French-language hospital in Ottawa. The case is discussed at greater length in Chapter 6, section 6.3.3. See : *Lalonde v Ontario (Commission de restructuration des services de santé)* 2001 CarswellOnt 4275 (ONCA).

[236] 'Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.'

under s. 15 of the Charter (non-discrimination)[237]—and not to elevate it to a constitutional level in its own right.

However, as DesRosiers pointed out, another aspect of the OCA's decision had the effect of recognizing a variation on the ratchet principle. The court held that, when exercising a discretionary power vis-à-vis a minority institution such as Montfort, a governmental body was constrained by the unwritten constitutional principle of the protection of minorities, as articulated by the Supreme Court in the *Secession Reference*.[238] Given the great importance of institutions to the vitality of Canada's French-language minority, this meant that governmental support for such institutions could only be reduced or altered for the most compelling of reasons, and only after having first consulted with the minority to ensure that the detrimental impact of the interference was both necessary and, if so, minimized. In short, designating a minority institution for support under the mechanisms of the FLSA had a 'ratcheting' effect, through the operation of this unwritten principle.

DesRosiers went on to suggest that the same logic would apply to measures taken under the amended s. 41 of the OLA.[239] Even though a federal institution might have some discretion in selecting which measures to adopt, and thus whether or not to support a specific minority institution in a particular way, once that support had been granted, it could not be withdrawn except under the conditions stipulated in the

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[237] In effect, the OCA held that s. 16(3) merely entrenched the principle affirmed by the Supreme Court of Canada in *Jones v AG of New Brunswick* [1975] 2 SCR 182, where it held that s. 133 of the Constitution Act, 1867 represents a 'floor' rather than a 'ceiling' on language rights, meaning that Parliament or the provincial legislatures are free to expand upon its protections.

[238] *Secession Reference* (n 63), paras. 79-82.

[239] In fact, DesRosiers even went so far as to argue that passing the amendments was a constitutional duty pursuant to the unwritten principle of minority protection: Senate of Canada, 'Legal and Constitutional Affairs, Issue 28' (n 211) 21.

OCA's ruling in *Lalonde*. If that were the case, then s. 41 would indeed provide greater stability and predictability for OLMC organizations.

3.5.1.2.3 Comparisons with ss. 23 and 16.1 of the Charter

A final point worth highlighting in the present context are the frequent comparisons to ss. 16.1 and 23 of the Charter. Section 41 was viewed by many participants as being (or as being supposed to be, under the proposed amendments) analogous to those provisions. This sheds some further light on both the structure that s. 41 was expected to have as a legal norm, as well as its substantive scope.

Section 16.1 of the Charter was added in 1993, for the purpose of constitutionalizing the Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick ('NB Equality Act'), first adopted in 1981. As its title suggests, the Act granted recognition not only to two official languages, but to two linguistic communities. It guaranteed both communities equal rights and privileges, 'and in particular their right to distinct institutions within which cultural, educational and social activities may be carried on.'[240] It further specified that in the allocation of public resources, policies and programs, the government of New Brunswick must promote 'the cultural, economic, educational and social development of the official linguistic communities'.[241]

In presenting his bill to amend s. 41, Gauthier explicitly stated that its wording was based directly on the NB Equality Act.[242] He explained that, in his view, the

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[240] Section 2, NB Equality Act.

[241] Section 3, NB Equality Act. This idea can be read into s. 41 via the principle of substantive equality : 'once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner', *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624. See also : *Beaulac* (n 15), para. 24.

[242] Cited in : Senate of Canada, 'Legal and Constitutional Affairs, Issue 23' (n 21) 7. Gauthier had initially wanted to include the concept of 'positive measures', which is found in the NBEA, but was

purpose of s. 41 of the OLA was, like the NB Equality Act, to entrench the concept of linguistic 'duality', which he contrasted with 'bilingualism'.[243] The point of this distinction was to highlight the fact that languages are embedded in a deeper social reality, and that protecting languages means protecting that social reality. Language rights are thus not simply concerned with facilitating communication, but also—even primarily—with recognizing, respecting and promoting a certain social structure, in which both English and French can flourish. In short, the prevention of assimilation is, according to Gauthier, one of the primary aims of s. 41.[244] This requires, amongst other things, that the role of institutions in maintaining that social structure be recognized and protected.[245]

Similar comments were made by a number of other participants.[246] For instance, Senator Rivest drew a contrast between the individual rights found in other parts of the OLA and Part VII, which was intended to have a collective—and thus an *institutional*—focus:

> Part VII is not the Official Languages Act as it is normally understood. The Official Languages Act gives linguistic equality in Canada to individuals. The courts and the Commissioner of Official Languages can easily sanction those who contravene it.
>
> Reference is made to support measures for community activity. Over the years, we have realized that linguistic equality and linguistic duality do not only apply to individuals and can only be supported and viable if they are based on dynamic minority communities. This is the spirit in which programs — very few programs — have been developed.

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advised against it, and so it was not in his original draft of the bill. However, that wording eventually found its way into the final version that was enacted in 2005.

[243] ibid 6–7.

[244] ibid 8.

[245] ibid 14.

[246] Senator Bryden : ibid 31. Julius Grey : Senate of Canada, 'Legal and Constitutional Affairs, Issue 29' (n 214) 10. DesRosiers : Senate of Canada, 'Legal and Constitutional Affairs, Issue 28' (n 211) 26. Minister of Heritage : Senate of Canada, 'Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. First Session: Thirty-Seventh Parliament, 2001-02. Issue No. 31: Bill S-32, An Act to Amend the Official Languages Act (Fostering of English and French)' 47.

> …We have realized that the phenomenon of the assimilation of minority groups in Canada cannot be countered merely by granting individual rights. In order for the minority communities to be able to survive, there must be institutions. We came to this conclusion because in the Constitution, Quebec was given rights for anglophones, such as schools, for example. This was then extended to the rest of Canada and francophones can count on such school networks. In Quebec, this was extended to social services.[247]

The comparison to s. 23 at the end of this passage suggests that what was being sought in amending s. 41 was to create, amongst other things, a legal entitlement to federal assistance in developing and maintaining the institutional infrastructure needed for OLMCs to survive. The comparison is also revealing in other respects, as it provides some indication as to how the committee understood the relationship between legal constraints and discretion in this context.

Section 23 of the Charter combines a definite right with substantial executive and legislative discretion.[248] In *Mahe*, the SCC noted that s. 23 must be interpreted as giving the provinces considerable discretion with respect to the 'institutional means' for achieving its underlying objective.[249] Provinces have, aside from the obligations imposed by s. 23 of the Charter and s. 93 of the Constitution Act, 1867, complete discretion in the management of their education systems. This can lead to substantial variation from one jurisdiction to the next, as provinces vary considerably in terms of size, linguistic and cultural makeup, history, population density and wealth. In light of this, the SCC concluded that s. 23 rights must be interpreted in a way that allows

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[247] This is the missing section of the quote: 'The point raised by Senator Gauthier, and very frequently raised by the reports of the different commissioners of official languages is that the departments and federal government organizations have a very negligent attitude towards minority language community needs in Canada, whether it be anglophones in Quebec or francophones outside Quebec. We often receive reports about the efforts of the departments to implement Part VII of the Official Languages Act. These reports are ridiculous. They are completely lacking in conviction'. Senate of Canada, 'Legal and Constitutional Affairs, Issue 23' (n 21) 30. For more on the concept of 'linguistic behaviour' and its connection to institutions, see Chapter 5.

[248] Consider the exchange between Senator Joyal and the DoJ during the committee hearings : Senate of Canada, 'Legal and Constitutional Affairs, Issue 27' (n 169) 18–19.

[249] Garant (n 165) 201.

sufficient leeway to the provinces in selecting the means by which to meet their constitutional obligations. That does not mean that the provinces are completely unfettered in their choice of education policy, for they must still establish education systems that respect the core entitlements enshrined in s. 23. However, those entitlements are framed in terms of broad principles, the specific meaning of which can easily vary from one context to another, and which can be satisfied through a variety of institutional mechanisms.

If we interpret s. 41(2) through the lens of s. 23, this enables us to explain the apparent indeterminacy of its wording while still holding to the view that it was meant to impose 'precise obligations'. As the courts have recognized in other contexts, it is important that a standard provide flexibility when it applies to 'the full galaxy of federal decision-makers … who operate in different decision-making environments under different statutes with distinct grants of decision-making powers.'[250] Given that the clear intent of Parliament in amending Part VII was to make it judicially enforceable, it seems reasonable to infer that the operative duty was pitched at a high level of abstraction, not to confer a broad and relatively untrammelled discretion insulated from judicial review, but rather to enable the courts to adapt the requirements of s. 41 to the mission and purpose of the federal institution at issue, thereby providing a degree of flexibility analogous to that found in s. 23.[251]

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[250] *Canada (Citizenship and Immigration) v. Khosa* (n 168), paras 28, 33.

[251] Consider the following comments from the Director of Government Policy Analysis in the Office of the Commissioner for Official Languages: 'One can wonder, for example, if the federal government and the Department of Canadian Heritage, perhaps because of its legal mandate, have done enough to meet the stated commitments [in s. 41 of the OLA]. This is the kind of question that must be raised to ensure that section 23 of the Charter, which provides for the right to instruction in the minority language, be fully upheld everywhere in the country. Has the federal government done everything it possibly can to comply with this provision? The issue is very complex and does not lend itself to the same type of implementing regulations as institutional bilingualism. Therefore, considerable thought must be given to how one can frame the spirit, parameters, implementation terms and management systems required so that each federal institution, incapable when taken alone of achieving the stated

3.5.2 Applying the language rights interpretive paradigm

Thus, the evidence from the Senate committee hearings where the new s. 41 was developed strongly suggests that the Casuistic Thesis offers a better description of what Parliament hoped to achieve with the 2005 amendments. This reading is further supported by the relevant principles of statutory interpretation.

As I noted in the introduction to this thesis, the courts have developed a specific set of interpretive principles applicable to language rights. At one time, there was a great deal of controversy surrounding the proper approach to interpreting such rights. The history of that debate has been recounted elsewhere, and I will not rehearse it here.[252] Suffice it to say that the conflicting lines of case-law have now been reconciled—or rather, one of them has been effectively overturned—and a single unified approach prevails. This approach might be said to consist of five key tenets: (1) courts must give language rights a liberal and purposive interpretation; which means, amongst other things, that (2) these rights must always be interpreted 'in a manner consistent with the preservation and development of official language communities in Canada' and their respective cultures; (3) language rights protect a right to substantive equality; (4) they establish a norm, not an accommodation; and (5) they are 'remedial' in nature, meaning that they are intended to reverse past harms as well as prevent or correct future ones.[253]

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aims of section 41, can contribute to the process based on its mandate, programs, resources and sphere of influence.' Senate of Canada, 'Legal and Constitutional Affairs, Issue 26' (n 217) 14.

[252] See, for instance : Alyssa Tomkins, 'Does Beaulac Reorient Judicial Bilingualism?' in Joseph Eliot Magnet (ed), *Official Languages of Canada: new essays* (LexisNexis Canada 2008); Denise Réaume, 'Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?' (2001) 47 McGill Law Journal 593; A Riddell, 'À la recherche du temps perdu: la Cour suprême et l'interprétation des droits linguistiques constitutionnels dans les années 80' (1988) 29 C. de D. 829.

[253] *Beaulac* (n 15), paras. 13-25.

A plausible if weak case can be made that the Holistic Thesis is consistent with these principles. While the Holistic Thesis requires greater deference to the policy-making judgment of the executive and would limit the availability of judicial remedies to cases of irrationality on the part of decision-makers, it might be argued that this approach is preferable given the underlying aims of Part VII, which are inherently and insurmountably 'political'. At least one leading expert on language rights,[254] as well as the Department of Justice, have argued along these lines.

Indeed, as the Supreme Court has noted, when the purpose and role 'of the decision-maker are conceived not primarily in terms of establishing rights between parties, or as entitlements, but rather as a delicate balancing of different constituencies, then the appropriateness of court supervision diminishes.'[255] The Casuistic Thesis, by imposing more granular requirements capable of dictating a specific course of conduct by a federal institution, might be said to overly 'judicialize' s. 41, distorting the nature of the exercise and involving the courts too deeply in a decision-making process far outside their institutional competence.[256] This reading is supported by the fact that the 2005 amendments also conferred on the Governor in Council the power to enact regulations 'prescribing the manner in which any duties of [federal] institutions under [Part VII] are to be carried out.'[257]

That being said, the regulations were intended to be complimentary to the judicial enforcement mechanism, not a condition precedent upon its exercise.[258]

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[254] House of Commons of Canada (n 192) 3.

[255] *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, para. 36.

[256] This point was made by, amongst others, the Minister of Justice before the House of Commons Standing Committee on Official Languages when the amendments were being considered: House of Commons of Canada, 'Standing Committee on Official Languages, Evidence, Vol. 28, 1st Session, 38th Parliament (2004-2005)' (2005) 8.

[257] Section 41(3), OLA.

[258] House of Commons of Canada (n 256) 7.

Moreover, it seems very hard to square the Holistic Thesis with the overall purpose of the amendments, as revealed by the discussions in committee. The evidence in fact suggests that Parliament desired greater judicial involvement and oversight because federal institutions were, left to their own devices, incapable of implementing Part VII commitments in a satisfactory way. And, as Martineau J noted in *Canada (Commissioner of Official Languages) v CBC* specifically in relation to s. 41 of the OLA, there is an 'exception to the non-justiciability of political issues is when Parliament itself demonstrated intent for certain actions by the government or a federal institution to be examined by an independent third party'.[259]

This is particularly important in light of tenet (5), which holds that language rights provisions are deemed to have a remedial purpose. It may be, as Linda Cardinal has argued, that achieving the objectives of Part VII would be easiest if the courts were kept at arms' length, so that policy-makers might deliberate free of the sword of Damocles-like threat of judicial oversight.[260] However, that is only true to the extent that there exists the necessary political will to pursue those objectives in a serious way. Too often, as the Supreme Court has recognized, governments take a passive approach to language issues, assigning them a low priority, meaning that absent the threat—or indeed, the aggressive use—of judicial remedies, many a language right would remain a dead letter.[261] Given that broad dissatisfaction amongst OLMCs with the way in which the original Part VII had been implemented was a major driving force behind the amendments, it seems more sensible to conclude that Parliament desired more rather than less judicial involvement.

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[259] *Canada (Commissioner of Official Languages) v CBC* 2014 FC 849, at para. 63 (overturned on appeal for other reasons, 2015 CAF 251).

[260] House of Commons of Canada (n 192) 3.

[261] *Doucet-Boudreau v. Nova Scotia (Minister of Education)* (n 171), paras. 38-40.

To put this in somewhat more theoretical terms, we might say that this is a prime instance of what Jacob Levy calls 'counter-balancing'. In cases where a state has a natural tendency to commit a certain type of injustice, justice may require that the constitution[262] include certain features that 'lean against' this tendency, even if they are not strictly required by justice in their own right.[263] An example of such measures are self-government rights, which are often necessary as a prophylactic against oppression regardless of their inherent moral value. In fact, Levy gives the example of partial control over the education system, like that provided by s. 23 (as interpreted by the Supreme Court), as an illustration.[264]

The tendency towards injustice need not be wilful. As Dickson CJ noted in *Mahe*, while majorities often neglect the concerns of the minority, '[s]uch neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which [governmental] practices may influence the language and culture of the minority.'[265] Nevertheless, it is a reality that must be dealt with. While the proposed solution may involve some degree of overreach of the sort that Cardinal fears, as Levy notes, '[c]onstitutional engineers have only relatively blunt tools at their disposals, at least when compared with the fine work done distinguishing philosophical theories.'[266]

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[262] Although the OLA is not part of the Constitution of Canada in the technical sense, it is clearly part of the broader 'constitution' with which political theorists are concerned, i.e. 'a set of norms (rules, principles or values) creating, structuring, and possibly defining the limits of, government power or authority': Wil Waluchow, 'Constitutionalism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2014, 2014).

[263] Jacob T Levy, 'Language Rights, Literacy, and the Modern State' in Will Kymlicka and Alan Patten (eds), *Language rights and political theory* (Oxford University Press 2003) 244.

[264] ibid. On the issue of s. 23, see Chapter 5.

[265] *Mahe* (n 14), p. 372.

[266] Levy (n 263) 247.

Given the tendency towards inaction under the old s. 41, and the extreme difficulty of reversing sociolinguistic harms like assimilation, Part VII would appear to be a strong candidate for a measure of counter-balancing. In light of the problems identified by Parliament with respect to the old s. 41, only the Casuistic Thesis seems apt to ensure that the new s. 41 can play such a role.

3.6 The example of Statistics Canada

Thus far, the discussion has been highly conceptual. I have been concerned with exploring certain issues related to the basic structure of s. 41 as a legal norm, so as to better define the range of circumstances in which it might plausibly be said to impose some justiciable constraint on executive action. While much remains to be said about s. 41 as a whole—especially with respect to the eligibility and sufficiency criteria, each of which turns on the definition one gives to the concept of the vitality of a linguistic minority community—it is possible to illustrate in more detail how the Casuistic Thesis might operate in practice. In order to do so, I turn now to the decision of the Federal Court in *Fédération des communautés francophones et acadienne du Canada v. Canada (Attorney General)*,[267] which I believe was—in light of the foregoing—wrongly decided. My analysis of this provides both an illustration of the Casuistic Thesis in practice, as well as a further argument in its favour.

3.6.1 Case background

The issue in that case was whether the federal government's decision to abolish the mandatory long-form census (in which a randomly selected subset of the population was required, under threat of legal penalty, to fill out a more detailed

[267] *FCFA v Canada* (n 7).

census questionnaire) contravened Part VII of the OLA. It was widely argued at the time—including by the head of Statistics Canada, who resigned in protest over the decision[268]—that the long form census needed to be mandatory in order to produce accurate and reliable data on a range of social and economic phenomena.[269] The applicant, the FCFA, argued that because accurate census data was essential both to ascertaining the number of francophones in a given area—and thus to determining a range of government obligations that explicitly depend on numbers—and to the on-going study of OLMC vitality and development (a necessary precondition to pinpointing targets for action and setting priorities, as well as rational policy-making more generally), the decision to make the long form census voluntary would directly undermine the ability of federal institutions to carry out their mandate under Part VII of the OLA.

There was much debate, conducted largely through expert evidence, over the impact of the changes to the reliability and usefulness of future census data, with Boivin J opting for a Solomonic course of action and refusing to make a determination on the issue. He rested his decision instead on his reading of s. 41(2) of the OLA:

> Part VII of the Act – and specifically subsection 41(2) – does not in any way compel the government to collect any data whatsoever by means of the census. As a result, it does not, a fortiori, in any way require that data be collected by means of a mandatory long-form questionnaire. In fact, no provision of Part VII of the Act, or any other part of that Act – or, in fact, any part of the Charter – requires that data be collected by means of the census as the sine qua non of the rights it protects.[270]

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[268] Steven Chase and Tavia Grant, 'Statistics Canada Chief Falls on Sword over Census' *The Globe and Mail* (21 July 2010) <http://www.theglobeandmail.com/news/politics/statistics-canada-chief-falls-on-sword-over-census/article1320915/> accessed 16 November 2014.

[269] These fears now appear to have been confirmed: Tavia Grant, 'Scrapping of Long-Form Census Causing Long-Term Issues for Business' *The Globe and Mail* (6 February 2015) <http://www.theglobeandmail.com/report-on-business/scrapping-of-long-form-census-causing-long-term-issues-for-business-groups/article22846497/> accessed 14 February 2015.

[270] *FCFA v Canada* (n 7), para. 40.

Boivin J went on to note that, in the past, the Governor in Council had proceeded by way of regulation when he wished to impose a specific methodology for counting the number of French and English speakers for the purposes of the OLA. The lack of such a regulation adopted under s. 41(3) indicated that Part VII imposed no requirements in this regard.

3.6.2 Analysis

There are many problems with Boivin J's reasoning here. The first has to do with his way of framing the relationship between language rights and census methodology. Boivin J advances a very general proposition, namely, that no part of the CLRS, including the Charter, imposes an obligation to collect data by means of a census. This is very clearly wrong. Numerous language rights provisions—ss. 20 and 23 of the Charter, for instance—specifically incorporate a numerical threshold for the crystallization of certain rights. While they do not stipulate the use of a particular methodology, such as the long-form census in use prior to 2010, they do impose a duty on the government to carry out an accurate and reliable count of the population, without which its primary obligations cannot be fulfilled. While the government clearly enjoys some discretion in this respect, any method chosen by it to perform that duty must be reasonable, i.e. rationally capable of achieving the desired goal.[271] If a particular methodology (or type of methodology) were the only way of producing sufficient and reliable statistical data in a given context, the government would be required, as a corollary to its primary obligation, to employ that method.[272] Similarly,

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[271] *Dunsmuir* (n 185), para. 46; *Baker* (n 182), para. 63; *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 ER 680 (EWCA).

[272] For example, in 2006 the federal government carried out a special study on the vitality of OLMCs (Survey on the Vitality of Official-Language Minorities). This study was conducted based on the data

if a particular method were selected that was demonstrably incapable of producing complete and accurate data, the decision to employ it could be quashed.[273]

Some language rights, like s. 23 of the Charter, might conceivably be satisfied by a relatively straightforward head-count of the population based on strictly linguistic factors (i.e. first language learned and still spoken), although this seems highly unlikely.[274] In any event, the nature of the duty imposed by Part VII of the OLA requires that federal institutions have access to a much more comprehensive statistical portrait of OLMCs so as to determine the proper course of action. An institution can 'enhance' the vitality or support the development of an OLMC only if it has access to reliable information regarding those communities.[275] If, therefore, the long-form census were the only viable means (amongst those being considered) to produce such a portrait, Part VII would, as a corollary to the main obligation, impose a duty on Statistics Canada to employ it.

Boivin J sought to buttress his reasoning by pointing out that no regulations had been adopted under s. 41(3) stipulating the use of a particular statistical method, as was done under the general regulations adopted for the purposes of Part IV of the

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produced by the long-form census. See : http://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&SDDS=5099 (verified on 12 September 2015).

[273] See for instance : *Doucet v Canada* 2004 FC 1444 (FC).

[274] It seems doubtful to me that it would, given that the Supreme Court has repeatedly construed the mandate contained in s. 23 as including a broader concern for the minority community's linguistic and cultural vitality. These are issues that can only be adequately addressed if one has a 'thicker' dataset regarding the sociological composition and structure of the rights-bearing community.

[275] Indeed, StatsCan itself has taken this position in its dealings with the Official Languages Commissioner. For instance, in the context of a complaint regarding the methodology used under the Part IV regulations to determine the number of minority language speakers in a given area for the purposes of offering services to the public, StatsCan informed the Commissioner that, in order to respect its obligations under s. 41 of the Act, it undertook numerous analyses of sociolinguistic statistics. Commissariat aux langues officielles du Canada, 'Rôles et obligations relativement au Règlement sur les langues officielles - communications avec le public et prestation des services: Secrétariat du Conseil du trésor et Statistique Canada. Rapport préliminaire d'enquête - janvier 2015.' (2015) 10.

Act.[276] Yet his observations in this respect are both irrelevant and completely unfounded. They are irrelevant because if, properly construed, s. 41(2) imposes a duty to produce accurate and complete statistical data, restrictions as to methodology necessarily flow from this. The fact that the Governor-in-Council has not exercised its power to make regulations under s. 41(3) is immaterial, as this decision can have no impact on the content of a free-standing statutory duty.

Boivin J's comments are also unfounded, in that there is no evidence whatsoever that Parliament intended the matter to be regulated exclusively by way of subsequent regulation. As I noted above, Part VII regulations were meant to complement the inherently justiciable content of the s. 41(2) duty, not replace it. Indeed, were one to hold otherwise, s. 41(2) would become a dead letter, as to this day no regulations have been adopted under s. 41(3). While considered important to the ultimate effectiveness of Part VII, there was never any suggestion that these regulations were to be the only proper means for implementing the s. 41(2) duty.

In fact, one could support this reading using the text of s. 41(3). The latter states only that the Governor in Council 'may' adopt such regulations, which, arguably, indicates that Parliament wished to leave the cabinet free to refrain from doing so if it wished.[277] If, *arguendo*, regulations were necessary to transform s. 41(2) into a set of binding and justiciable obligations, this would mean that the existence of these obligations would be left entirely to the discretion of cabinet. Not only is that contrary to the explicit language of s. 41(2), which clearly imposes a duty,

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[276] 'It must be noted that the Official Languages Act does not prescribe any obligations that require the government to use a specific methodology such as the mandatory long-form questionnaire census. In fact, when Parliament wishes to proceed in such a way, it does so by way of regulations'. *FCFA v Canada* (n 7), para. 42.

[277] 'The Governor in Council may make regulations in respect of federal institutions, other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer or office of the Conflict of Interest and Ethics Commissioner, prescribing the manner in which any duties of those institutions under this Part are to be carried out.' Section 41(3), OLA.

it would lead to an absurd result, given the purpose that Parliament hoped to achieve in enacting the 2005 amendments—namely, to ensure that s. 41 was binding and justiciable in its own right. One might counter this argument by claiming that 'may' should be interpreted as meaning 'shall' in this case,[278] and that the cabinet has a duty to enact said regulations. That might arguably obviate the conflict outlined above, but it would still conflict with the understanding that prevailed during the Parliamentary debates, in addition to being a highly strained interpretation of the statute in this particular case.

3.6.3 Section 41: a beam refracting through different institutional prisms

Taking a step back, what can be said about the obligations of Statistics Canada under s. 41(2)? What sort of 'positive measure' can such a department be expected to take to enhance the vitality of OLMCs and support their development? A statutory body can only adopt such measures as are contemplated in its enabling legislation. StatsCan could not simply make an unconditional donation of money to the FCFA, nor fund the operations of francophone theatre groups in Saskatchewan, because these actions are not within its statutory powers. Section 41(2) must therefore be read harmoniously with the legislative framework of each institution, such that it produces obligations that are consistent with the mission and character of that institution.[279] This is no doubt why Part VII, unlike other parts of the OLA, does not benefit from the 'primacy' clause found in s. 82 of the Act. Given its very broad ambit, imbuing it

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[278] There is some precedent for this: *R v Johnson* [2003] 2 SCR 357.

[279] *Thibodeau* (n 24), para. 112.

with the power to override all other statutes would have created a great deal of legal chaos.

The starting point for a correct analysis of s. 41 in individual cases must therefore be the statutory mandate of the federal institution in question. According to s. 3 of the Statistics Act, StatsCan has the duty to, *inter alia*:

> (a) to collect, compile, analyse, abstract and publish statistical information relating to the commercial, industrial, financial, social, economic and general activities and condition of the people;
>
> …
>
> (c) to take the census of population of Canada and the census of agriculture of Canada as provided in this Act;
>
> …
>
> (e) generally, to promote and develop integrated social and economic statistics pertaining to the whole of Canada and to each of the provinces thereof and to coordinate plans for the integration of those statistics.

Its duty to take positive measures under s. 41(2) of the OLA should therefore be construed in light of these overarching institutional obligations. StatsCan must, at a minimum, take *some* action within the context of its general activities to enhance the vitality of OLMCs. But, in light of its statutory framework, its contribution can *only* be one of producing statistical information regarding these communities. Furthermore, certain types of activities may be *necessary* in light of the institution's statutory mandate, as I explained above.

The question then of course is: *how far* does this obligation extend? How do we know when Statscan has discharged its obligations under Part VII of the OLA? It is difficult to say much more on the topic at this juncture, as there remain too many unknowns. First of all, the obligation at issue can only be described as what I have called a standard, and so this question cannot be answered in the abstract. The extent of the obligation can only be specified with a complete factual matrix. But secondly,

and perhaps more importantly, significant aspects of s. 41 itself remain to clarified. As I indicated above, the content of the standard(s) flowing from the Casuistic Thesis is defined in relation to certain terms which remain undefined: linguistic minority community, vitality, and development. In the absence of a workable definition for these terms, s. 41 is doomed to remain hopelessly vague as a legal norm. Developing a better understanding of them is therefore a priority, and will take up the better part of this thesis.

3.7 Conclusion

In this chapter, I set out to analyse the content of s. 41 as a legal norm. In doing so, I determined that there were two aspects of the norm that required clarification: (1) its basic structure, with respect to the types of constraints it imposed on federal action, and (2) the substantive content of those constraints. So far, only the first of these has been addressed.

With respect to issue (1), I argued that s. 41 should be interpreted in accordance with the Casuistic Thesis, meaning that it is capable of imposing 'precise obligations' entitling OLMCs to 'specific measures' in particular cases. However, I also argued that, because of the breadth of circumstances to which it applies, and the need to accommodate the legislative mandate of many different federal institutions, s. 41 can only be read as a 'standard', not a rule. Standards are legal norms whose precise content cannot be specified fully in advance, unlike a rule, thus requiring case-by-case adjudication. While being indeterminate to a certain degree, such norms are capable of generating obligations to do (or not do) specific things, under the right conditions. For instance, I argued that Statistics Canada is under a duty to generate the statistical data needed in order for public institutions to fully comply with their

language rights obligations. In some cases, there may be a range of possible decisions that will satisfy this obligation, while in others it may that only one course of action is acceptable.

What remains to be explored is the substantive content of s. 41. What does it mean to 'enhance the vitality' or 'support the development' of a 'linguistic minority community'? Indeed, what *is* a linguistic minority community in the first place? In the next chapter, I will explore this last question further.

CHAPTER 4 THE CONCEPT OF A LINGUISTIC COMMUNITY

4.1 Introduction

As I noted in the last chapter, the substantive content of s. 41 is defined in relation to certain properties and interests of linguistic minority communities, designated by the concepts of 'vitality' and 'development'. Unfortunately, however, the term 'linguistic minority community' is not defined in the Act, and its meaning is far from clear.[280] Therefore, in order for my analysis to proceed, it will be necessary to attempt a definition of LMCs as a legal subject and further explore what these references to their vitality and development might mean as a practical matter.

An important threshold question in this context is whether s. 41 should be viewed as protecting individual or group interests. Broadly speaking, the word 'community' can be interpreted in one of two ways: (1) as designating a collective entity of some kind, or (2) as nothing more than a '*façon de parler*', that is, a way of labelling a certain class of individuals based on their linguistic competency and geographic location.[281] As I will explain in a moment, there are plausible reasons in support of either option when it comes to s. 41.

My aim in this chapter is merely to set out some preliminary considerations that must inform the analysis of which option to prefer. That is, I wish to explore in a more general way the conceptual distinction between community *qua* label for an aggregate of individuals and community *qua* collective entity, as well as the circumstances in which it is appropriate to use one or the other approach to conceptualizing a group of people. In later chapters (especially Chapters 5 and 6) I

[280] Joseph Eliot Magnet, *Modern Constitutionalism: Identity, Equality and Democracy* (Markham, Ont: LexisNexis Butterworths 2004) 166–9; Gruben (n 42) 91–92.

[281] Cf. Raz (n 121) 208.

will argue that the word 'community' in s. 41 (and in cognate provisions, like s. 16.1 of the Charter)[282] should in fact be interpreted in sense (1)—or more specifically, as referring to a *collectivity*, a term I will define below.

The discussion in this chapter will be largely philosophical in nature. While terms like 'group', 'collectivity' and 'community' are sometimes used by the courts in a language rights context, and although we can infer something from the usage they make of them, these concepts are never explicitly defined. It will therefore be helpful to engage in some basic conceptual analysis and explore the range of interpretive possibilities before turning to the case-law itself, which I do in Chapters 4 and 5. To borrow from Bamforth, Malik and O'Cinneide, rephrasing slightly:

> [T]he meaning which ... judges give to key concepts, and the consequent boundaries which they draw around terms such as ['linguistic minority community'] will depend in part on theoretical and extra-legal notions of these concepts. Clarity about the meaning of these concepts will be necessary for any critical understanding of their use in legal doctrine.[283]

To assist in this effort, I have chosen to borrow from the philosophical literature dealing with collective rights and social ontology, which has a much more sophisticated conceptual repertoire with respect to these issues than the existing case-law or doctrinal commentary.

Collectivities and collective rights (or 'groups' and 'group rights') have generated a substantial literature, and I do not purport to offer an exhaustive discussion of this very complex philosophical topic here. My foremost aim is not to argue for or against collective moral rights from a normative standpoint, but rather to

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[282] '16.1. (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.'

[283] Nicholas Bamforth, *Discrimination Law : Theory and Context, Text and Materials* (Sweet & Maxwell 2008) 171.

use this literature to assist in outlining the conceptual choices available when interpreting the term 'community' from a legal perspective. Nevertheless, it will be necessary to take a position on certain questions, such as whether the concept of a collectivity is coherent and defensible. In point of fact, I believe that this concept is indispensable to explaining the social world, as well as key facets of the language rights case-law, as I hope to show in subsequent chapters.

4.2 The OLA and collective rights

The concept of an LMC makes its first appearance in the preamble to the OLA, which states, amongst other things, that they are 'an integral part of the two official language communities of Canada'. This statement tells us two things: first, that Canada as a whole is—from the standpoint of the OLA at least—composed of two linguistic communities; and second, that LMCs are components of these wider communities. Official language communities are pan-Canadian phenomena not restricted to any one province. LMCs, it would therefore seem, derive their legal status and rights not from their own attributes as free-standing communities, but as members of these broader entities.

The question remains, however, as to how the term 'community' ought to be understood in this context—more specifically, as to whether the reference should be interpreted as indicating that s. 41 protects 'group' or 'collective' interests, as opposed to individual ones. As I noted in Chapter 3, there were no questions regarding Part VII when the 1988 OLA reform bill was in committee,[284] and so there is little evidence about how that term was originally understood. Similarly,

[284] See the testimony of Professor Linda Cardinal before the House of Commons while the 2005 amendments were being studied : House of Commons of Canada (n 192) 2.

discussion of Senator Gauthier's various amendment bills from 2001 to 2005 focussed on the nature of s. 41 as a legal norm, and there was virtually no discussion of how the concept of a linguistic community ought to be defined.

Some observers have assumed that s. 41 protects only collective interests or rights.[285] However, there is a strong current—one might even say tradition—in Canadian political culture that rejects the notion of collective rights for ethnic, national, cultural or linguistic groups.[286] Indeed, for many the cardinal virtue of the language rights system put in place by the Trudeau government from 1969 to 1982 was its (apparently) exclusive focus on individual rights.[287] Kenneth McRoberts, for instance, argues that Trudeau's approach was well received by the English-Canadian intelligentsia, especially in Ontario, for this reason. He notes that

> by promising to respond to French-Canadian discontent in terms of language rights to be held by individuals, wherever they may be in Canada, it avoided the

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[285] For instance, well-known human rights and constitutional lawyer Julius Grey criticized s. 41 for not including any protection for individual rights and suggested amending it on that basis: Senate of Canada, 'Legal and Constitutional Affairs, Issue 29' (n 214) 10.

[286] For example, consider the very strong terms in which the Chief Justice of the Quebec Superior Court condemned the notion that s. 23 of the Charter protects collective rather than individual rights: 'Quebec argues [that] a collective right implies that it was established in the interest of and for the benefit of the collectivity, and not for each of its members. The limitation on this collective right may well involve the loss of the right by certain members of the collectivity, but the right is not denied to the group as a whole: it is simply limited. The court is amazed, to use a euphemism, to hear this argument from a government which prides itself in maintaining in America the flame of French civilization with its promotion of spiritual values and its traditional respect for liberty. In fact, Quebec's argument is based on a totalitarian conception of society to which the court does not subscribe. Human beings are, to us, of 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 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 -- even if certain political initiatives seem at times to come dangerously close to it -- and this court will not honour it with its approval. Every individual in Canada should enjoy his rights to the full.' *Quebec Assn of Protestant School Boards v Quebec (Attorney General) (No 2)* [1982] CS 673 (Qc Sup Ct), at paras. 186-9 (Deschênes C.J.S.C.).

[287] André Burelle, *Le Mal canadien: essai de diagnostic et esquisse d'une thérapie* (Fides 1995) 65 and ff. See also : Pierre Elliott Trudeau, 'La nouvelle trahison des clercs' (1961) 35 Cité libre 3. For a more recent flare-up of this debate, consider the resignation of a leading member of cabinet over the Quebec 'nationhood' resolution in 2006 : Canwest News Service, 'Harper Government Loses Minister over Quebec 'nation' Resolution' *Vancouver Sun*.

> hoary notion of collective rights which so offended English-Canadian political culture, even if it seemed so natural to Quebec francophones.[288]

This tension between what we might loosely call 'individualist' and 'collectivist' approaches to language rights was still very much a factor when the 1988 OLA reform bill was being debated in Parliament. As I noted in Chapter 2, the 1988 reform was a companion-piece to the constitutional amendments proposed by the Mulroney government as a means of enticing the government of Quebec to ratify the Constitution.[289] The 'distinct society' clause contained in the Meech Lake Accords was widely viewed as a species of collective right for Quebec francophones, and many were therefore opposed to it on those grounds. Opposition to the Accords spilled over into the debate concerning the proposed reforms to the OLA, with many resisting any expansion of official language rights whatsoever, which were often decried as another form of group right.

Because of this, the distinction between individual and collective language rights was considered important when the 1988 OLA reform bill was being debated in Parliament. A good illustration of this can be found in the following statement made by Lloyd Axworthy, a leading figure in the Liberal Party and future Foreign Minister, in the House of Commons during the debates:

> The Government to which I belonged enacted the Official Languages Act of 1969. At that time, there was a clear distinction made that the protection and enhancement of official languages was in no way a qualification of the multicultural fact of Canada. The two could live side by side because in fact, when talking about language rights, we were talking about individual rights, not group rights. Individual rights are the rights of Canadians.
>
> Mistakes are made at times. I refer with some trepidation to the Meech Lake Accord which advances the concept that we are now establishing group rights in Canada, that rights are established according to one's collectivity, according to

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[288] McRoberts (n 49) 161. See also : McRoberts (n 80) 115–117.

[289] See the comments of the Minister of Justice in presenting the bill for a second reading in the House of Commons : Library of Parliament (n 99) 12705.

> the group to which one belongs, not according to the fact that one is an individual who happens to speak French or English. That in itself must be looked at as a trend to be treated with some wariness. As long as we were able to assert the principle of language rights as individual rights it did not damage or begin to infringe upon the concept of cultural rights as we have come to understand them and use them in this country. I believe that has been one of the successful formulas which has resulted in the majority of western Canadians supporting and promoting the enhancement and protection of language rights across Canada as a Canadian issue. If we find ourselves straying from that very successful formula of ensuring individual rights we could be opening up an avenue of further dispute and conflict.[290]

Thus, Axworthy was clearly opposed to any kind of collective language right, which he considered both unwise and inconsistent with the system put in place by his party while in power. However, he nevertheless went on to defend the OLA reform bill presented by the Progressive Conservative government of Brian Mulroney (which included the original version of s. 41), on the grounds that it was 'very much in keeping with the precedent, the body of law, and the judgment of past Parliaments'[291], ie as being a bill that provided for individual rather than collective rights. Although the Mulroney government was on the whole more favourably disposed towards the idea of collective language rights, much of the opposition to the latter in fact came from within the Progressive Conservative caucus. As a result, the Parliamentary debates are at best equivocal on the extent to which this concept was expected to inform the interpretation of the newly reformed OLA.

In light of this, we must ask ourselves whether s. 41 should be read as a measure directed at 'individual' or 'group' interests, and what this distinction implies. The question has both academic and practical importance, as a number of the

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[290] Library of Parliament, 'House of Commons Debates, 33rd Parliament, 2nd Session, Official Report, Vol. 11' (Queen's Printer for Canada 1988) 13448.

[291] ibid.

measures demanded by official language minority community (OLMC) [292] organizations under the auspices of Part VII of the OLA would be very difficult to justify using only the vocabulary of individual rights. For instance, as I will discuss further in Chapter 8, it has been argued that s. 41 imposes an obligation on the federal government to consult with OLMCs before making decisions that may affect their interests.[293] Based on this line of thought, recent changes to federal immigration policy, which eliminated a program encouraging immigration by French-speakers to minority francophone communities (MFCs) (whose birth-rate is currently too low to be self-sustaining, even without assimilation) without any prior consultation, have recently been challenged by the Fédération des communautés francophones et acadiennes du Canada (FCFA) before the Official Languages Commissioner as a violation of Part VII.[294] It is very difficult to conceive of this putative duty to consult as being owed to individuals rather than groups, and as protecting individual interests, rather than group ones.[295] Claims that federal institutions have a duty under s. 41 to support and enhance the autonomy of MFCs—which I will also discuss in Chapter 8—are similarly predicated upon the contention that Part VII protects group interests.[296]

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[292] Both here and in following chapters, I will refer interchangeably to OLMCs and LMCs, which are the same thing. When I wish to deal specifically with Francophone communities, I will use the term minority francophone community (MFC).

[293] See generally : Rousselle (n 11).

[294] Paul Gaboury, 'Un «recul majeur» pour l'immigration francophone, affirme la FCFA' *Le Droit* (Ottawa, 16 September 2014) <http://www.lapresse.ca/le-droit/politique/federale/201409/16/01-4800684-un-recul-majeur-pour-limmigration-francophone-affirme-la-fcfa.php> accessed 31 December 2014.

[295] The claim that there is such a duty appears to be premised on an analogy with the duty to consult aboriginal peoples in relation to matters affecting their constitutionally protected rights. See for instance : Rousselle (n 11) 188. In the aboriginal law context, that duty clearly flows from collective rights: *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, para. 62.

[296] Normand (n 10) 237.

4.3 Sets and collectivities

What, then, is the distinction between individual and group interests, and what does a commitment to protecting the latter involve? While the distinction between the two may appear obvious, in reality it conceals a dense tangle of complex conceptual problems.

As a preliminary matter, any discussion of 'group' or 'collective' rights has to grapple with the problem of how to distinguish between collections of people that can have such rights, and those that cannot.[297] Even those who argue in favour of collective rights do not claim that any assemblage of human beings is a candidate for such rights. As a result, a variety of different conceptual frameworks have been proposed to deal with this issue. In light of present purposes, I have chosen to adopt the framework recently outlined by Dwight Newman, who distinguishes between a 'set' and a 'collectivity'. I believe that Newman's way of formulating the distinction provides the best fit with the wording and structure of s. 41 of the OLA, as well as the relevant case-law. However, it will be helpful to survey some of the other approaches first, as this will help us to get a better grasp of the underlying problem that Newman's account helps to solve.

One way of articulating the distinction between the different types of groups, adopted by David Miller, is to differentiate between a 'category' and a 'group'. A

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[297] Consider, for example: Nick Barber, *The Constitutional State* (OUP Oxford 2010) 25–30; Newman, *Community and Collective Rights* (n 144); Darlene M Johnston, 'Native Rights as Collective Rights: A Question of Group Self-Preservation' (1989) 2 Can. JL & Jurisprudence 19; Owen M Fiss, 'Groups and the Equal Protection Clause' [1976] Philosophy & Public Affairs 107, 148; Richard Thompson Ford, 'Unnatural Groups: A Reaction to Owen Fiss's "Groups and the Equal Protection Clause"' (2003) 2 Issues in Legal Scholarship; Michael McDonald, 'Collective Rights and Tyranny' (1986) 56 University of Ottawa Quarterly 115; Carol C Gould, 'Group Rights and Social Ontology' (1996) 28 Philosophical Forum 73, 73; Joseph Raz and Avishai Margalit, 'National Self-Determination' in Will Kymlicka (ed), *The Rights of Minority Cultures* (Oxford University Press 1995) 81–85; Réaume, 'The Group Right to Linguistic Security: Whose Right, What Duties?' (n 54). See also: Cardinal, 'Collective Rights in Canada' (n 102) 169.

category, on this usage, is a collection of all those people who fit a particular description (eg redheads), whereas a group is a collection of people who, in addition to sharing a particular characteristic, understand themselves to be members of a distinct group because of this.[298] Under Miller's account, other traits commonly found in groups and/or suggested as necessary prerequisites to the existence of group rights, such as a degree of 'collective organisation',[299] are helpful in establishing specific claims, but not essential, at least from a conceptual standpoint.[300] In Miller's view, the only essential characteristic of a 'group' is that its members share a subjective sense of identification. Because of this, the line between a category and a group can be somewhat blurry, because transition from one state to the other is quite possible: 'Very often what turns a category of people into a group proper is the experience of oppression or discrimination: smokers will remain a category until forced by draconian anti-smoking laws to take political action, for example'.[301]

A similar conceptual framework, used by Iris Marion Young, amongst others,[302] distinguishes between 'simpl[e] collections of people', on the one hand, and 'social groups', which are 'more fundamentally intertwined with the identities of the people described as belonging to them.'[303] Social groups are 'differentiated from at least one other group by cultural forms, practices or way of life.'[304] For example, the sexual division of labour has, historically, created social groups of men and women. Group

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[298] David Miller, 'Group Rights, Human Rights and Citizenship' (2002) 10 European Journal of Philosophy 178, 178.

[299] Cf. Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 185 : '"the people" exist *qua* people only when institutional arrangements of governing are established'; Barber (n 297) 31–33.

[300] Miller (n 298) 179.

[301] ibid.

[302] For instance, Fiss uses similar terminology : Fiss (n 297) 148.

[303] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 43.

[304] ibid.

membership and identification arises through 'the encounter and interaction between social collectivities that experience some differences in their way of life and forms of association'.[305] This means that '[g]roup meanings partially constitute people's identities in terms of the cultural forms, social situation, and history that group members know as theirs'.[306] In other words, a social group is understood as possessing certain characteristics that are distinct from, and prior to, those of its individual members. Groups cannot be viewed as wholly separate from individuals (as Fichte saw nations, for instance),[307] but nor are they simply 'arbitrary classifications': '[g]roups are real not as substances, but as forms of social relations'.[308]

Rights can track both categories and groups. For instance, the unemployed, a category, have a right to certain benefits that is defined in terms of the category's central characteristic. However, as Miller points out, the difference between groups and categories has an impact on the way in which rights for either of them will be justified. Group rights are typically justified by relying on claims that the existence of the group is itself morally significant. For example, members of groups tend to be concerned about their co-members and wish them to enjoy the same rights as they do, such that they will 'suffer vicariously' if others are deprived of those rights. They also tend to be concerned about the preservation of the group, whose continued existence is valuable or important

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[305] ibid.

[306] ibid 44.

[307] Craig J Calhoun, *Nations Matter : Culture, History, and the Cosmopolitan Dream* (Routledge 2007) 71. On this point, see also : David Miller, *On Nationality* (Clarendon Press 1995) 17.

[308] Young (n 303) 44. Young in fact distinguishes between social groups, on the one hand, and 'aggregates' and 'associations', on the other. The former effectively corresponds to what Miller calls a 'category', as outlined above. The latter concept refers to a formal institution like a political party or a church. Young rejects the association model for conceptualizing social groups because it is premised upon—or at least shares a strong affinity with—a contractual view of social relations, one which asserts that individuals are ontologically prior to the collective. This may be accurate in the case of some or even all associations, but it cannot, according to Young, be generalized to all social groups, which often define important aspects of an individual's identity prior to their being able to exercise any independent choice. ibid 44–45.

in some way. Category-based rights, by contrast, are justified primarily with reference to the way in which the definitional trait affects individual well-being, and the existence of the category, as such, is not a relevant consideration in making that assessment.[309] (It should be noted that Miller does not, in this context, distinguish between different species of group rights,[310] which, as I noted in Chapter 2, may from a legal standpoint vest or be exercised either at the individual or collective level. His chief concern is with the status and justification of such rights, which he defines simply as 'a right ascribed to the members of a particular group and not to others).'[311]

While I have no particular objection to the respective ways in which Miller and Young formulate the distinction between groups and categories, both strike me as incomplete from a conceptual standpoint if one's primary interest is in defining the conditions under which group rights might be said to exist, especially rights that vest at the collective level. Young's concept of a social group, or Miller's concept of a group, do not quite put their finger on why it is that groups should be treated as analytically distinct from individuals when reasoning about rights. Why should the fact that a number of people share the belief that they are members of a group generate an entirely different class of rights? Why are these beliefs different from other individual beliefs, such that they cannot be protected in the same way? From a language rights standpoint, we might ask: why does the fact that someone believes they are a member of a linguistic 'group', rather than merely a category of persons with mastery of language X, generate a different set of language rights? Young's concept of a social group is somewhat 'thicker', and so does not suffer from this problem to the same extent. As a 'form of

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[309] Miller (n 298) 179.

[310] ibid 178.

[311] ibid.

social relation', there is something about social groups that defies analysis at a purely individual level. Unfortunately, Young does not explore the issue any further than this.

These weaknesses are the main reason why I find the framework outlined by Dwight Newman more helpful.[312] Rather than 'categories' and 'groups', Newman draws a distinction between a 'set' and a 'collectivity'. A set is a collection of persons, whose identity is determined solely and exclusively by those of the specific persons that comprise it. In this context, 'identity' refers to the properties of the collection, that which makes it what it is and not something else. Thus, a set is a collection of persons whose properties would necessarily change if one were to remove one or more of its members, or add another. It would cease to be collection A, and become collection B.

A collectivity, by contrast, is 'a collection of persons such that one would still identify it as the same collectivity were some or all of the included persons to change and such that the included persons properly identify themselves non-trivially as members of this collectivity'.[313] In other words, the properties of a collectivity are not *reducible* to those of its individual members. Because of this, Newman argues, a collectivity can have interests that are distinct from those of its individual members. A collectivity's well-being, *qua* collectivity, can go better or worse, and so a collectivity can have interests. These interests can form the basis for an argument for collective rights.[314]

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[312] Newman, *Community and Collective Rights* (n 144). It is worth noting that Newman himself views his framework as being consistent with Young and Miller's: ibid 48–51.

[313] Newman, *Community and Collective Rights* (n 144) 4.

[314] Newman's aim is to develop an argument for collective rights that is consistent with what Raz calls the humanistic principle, which states that the well-being of individual human beings is of 'ultimate concern': ibid 11. Because of this, he has developed a theory that explains why the interests of collectivities are of moral concern. This theory rests on the premise that the well-being of a collectivity (such as a state, a corporation, or a hockey team) is—through the mechanism of supervenience—connected to, and has an impact upon, the well-being of its individual members. Thus, even if one is committed to the view that individual well-being is the ultimate ground upon which moral arguments must rest (as opposed to a view

It is easy to see how this framework can be helpful in understanding the interpretive options presented by s. 41 of the OLA. If the term 'linguistic minority community' were defined as a set, it would function as nothing more than a label for the collection of individuals that happen to share a particular trait (as Mr. Axworthy put it, the 'fact that one is an individual who happens to speak French or English').[315] The traits—and therefore the interests—of the 'community' would be identical to those of the individuals that comprise the set, and s. 41 would have to be interpreted in light of this.

On the other hand, the term 'community' could also be read as designating a collectivity. In that case, a 'linguistic minority community' would be presumed to possess some traits—and therefore, potentially, certain interests—that are distinct from (that is to say, not reducible to) those of its individual members. If one were to adopt this line, s. 41 would have to be interpreted as protecting at least some collective interests. To do otherwise would render Parliament's choice to use the term 'community' superfluous.

It must also be said that Newman's account offers an appropriate framework for explicating rules and principles of Canadian law, as it centers on interests, rather than choice or agency, as some theories of rights do.[316] The Supreme Court has repeatedly made clear that Charter rights, including language rights, are to be understood from an interest-based perspective.[317] Furthermore, Canadian law does not, as a general

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in which collectivities can have independent moral standing), the interests of collectivities are still morally relevant, and can be used to justify collective rights.

[315] Library of Parliament (n 290) 13448.

[316] Anthony Ellis, 'Minority Rights and the Preservation of Languages' (2005) 80 Philosophy 199, 200; Newman, *Community and Collective Rights* (n 144) 33–34; Green (n 123) 318–320.

[317] *Big M Drug Mart* (n 129), para. 116: 'The meaning of a right or freedom guaranteed by the Charter [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it was meant to protect'. And *Hunter v Southam Inc* [1984] 2 SCR

matter, make the possession of rights contingent upon the possession of sentience or agency. A human being benefits from Charter rights or other legal rights from the moment they acquire personhood until death, though by means of various provisions relating to the age of majority, guardianship, incapacity etc the *exercise* of those rights might be left to others.

4.4 Collectivities and emergent properties

Newman's account provides an elegant way of conceptualizing the morally significant difference between 'categories' and 'groups'. But what does it mean in practice to say that the properties of a collectivity are irreducible to those of its individual members? After all, collectivities are made up of individuals. How can it come to pass that a collection of persons should develop an existence of its own? Is such a concept even coherent?

I believe that it is. Broadly put, the reason has to do with the nature of reasoning about society and social phenomena like teams, ethnic communities, nations and the like. Although such collectivities are on some level made up of individuals, there are many circumstances in which the collectivity is 'ineliminable (having an indispensable role, taken in practical terms, in an adequate description) in our understanding of what is going on'.[318] As Graham puts it: 'an incredibly large portion of what we wish to describe would simply disappear if we denied ourselves

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145, para. 20: 'Since the proper approach to the interpretation of the Charter of Rights and Freedoms is a purposive one, before it is possible to assess the reasonableness or unreasonableness of the impact of a search or of a statute authorizing a search, it is first necessary to specify the purpose underlying s. 8: in other words, to delineate the nature of the interests it is meant to protect.' For a more recent restatement, see: *Divito v Canada (Public Safety and Emergency Preparedness)* 2013 SCC 47, para. 19.

[318] Newman, *Community and Collective Rights* (n 144) 38.

the vocabulary of collectivities.'[319] In other words, if we eliminate collectivities from our normative discourse, we are left to work with an impoverished and much cruder representation of reality, and our moral judgments will suffer as a result.[320]

The very same point applies to statutory interpretation. If one *were* to choose to interpret 'linguistic minority community' as designating a collectivity rather than a set, this would likely be because one had concluded that some portion of what Parliament sought to capture with the word 'community' would be left out by adopting the opposite view (for instance, because some key aspect of the social problem it sought to address cannot be described using only the vocabulary of individuals). In point of fact, this is precisely the argument I intend to advance in this thesis.

But why is it that collectivities are ineliminable from social reasoning? A collective rights skeptic would surely insist on the opposite, that there is nothing but individuals—or, in the words of Margaret Thatcher, that 'there is no such thing as society'.[321] Such a skeptic could rely on the ample literature in the social sciences defending methodological individualism.[322] While this is not the place to offer a comprehensive refutation of that approach, which would in any case exceed the

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[319] Keith Graham, 'Collective Responsibility' in Ton van den Beld (ed), *Moral Responsibility and Ontology* (Springer Netherlands 2000) 55. Raz and Margalit make a similar observation: '[i]t makes sense to talk of a group's prospering or declining', and although '[t]he group may flourish if its culture prospers… this need not mean that the lot of its members or anyone else has improved'. One may hold that the value of a group's interests is determined by its value to individuals, but '[t]here is no a priori way of correlating group interest with that of its members or of other individuals. It depends on the circumstances': Raz and Margalit (n 297) 87.

[320] Cf. Anthony Ellis, 'Minority Rights and the Preservation of Languages' (2005) 80 Philosophy 199, 204, restating a view he disagrees with.

[321] Donald J Savoie, *Court Government and the Collapse of Accountability in Canada and the United Kingdom* (University of Toronto Press 2008) 76.

[322] See generally: Joseph Heath, 'Methodological Individualism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2011) <http://plato.stanford.edu/archives/spr2011/entries/methodological-individualism/> accessed 4 April 2012.

author's capabilities, it will nonetheless be useful to provide a brief defence of the claim that it is necessary to rely on the vocabulary of collectivities in certain circumstances.

4.4.1 Emergent properties

One might say that the main difference between a set and a collectivity consists in the fact that a collectivity possesses one or more *emergent properties*, whereas a set has none. An emergent property is a property of a complex system that cannot be reduced to (or described in terms of) properties of its individual components.[323] For instance, the properties of an organ, like the stomach, cannot be reduced to the properties of the individual cells from which it is comprised. Those properties arise (or 'emerge') from the complex interaction of many millions of different types of cells on both a structural and a biochemical level. In turn, many if not most of the functions of the stomach within the human organism can only be described in terms of those emergent features, not the properties of individual stomach cells.

Indeed, human beings are themselves emergent phenomena. We are entities whose properties cannot be described merely in terms of the properties of their components, like organs, cells or molecules.[324] What is more, human beings create and live in complex social systems structured around even larger entities, such as labour unions, corporations, religions, ethnic groups, nations and states, which are emergent phenomena in their own right. These entities emerge from (or are constituted by) a complex web of individual interactions, and so they have an existence that is in some

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[323] See generally : Timothy O'Connor and Hong Yu Wong, 'Emergent Properties' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2012, 2012).

[324] On that point, consider Réaume's argument that individual agency is just as much a product of definition as collective agency : Réaume, 'The Group Right to Linguistic Security: Whose Right, What Duties?' (n 54) 125.

sense separate from that of the individuals that comprise them.[325] For instance, Great Britain continues to exist from one decade to the next, even though by the end of 100 years virtually every single individual that once comprised it has died or moved away.

There are different theories regarding the nature of emergent properties, some which view them as an epistemological artefact—the result of inherent limits to our knowledge of complex systems—and others which hold to an ontological conception of emergence, and that view emergent properties as a real thing-in-the-world.[326] The disagreements between these views are important but need not detain us here, because in the case of social phenomena, like collectivities, the distinction between the two effectively collapses.

In part, this is because the question is to all intents and purposes moot. Collectivities are defined in large part by the beliefs that people hold about them, and about their place within them. Thus, from the standpoint of practical reason or legal theory, the question of whether the concept of an organisation, like the state of Great Britain, describes a metaphysically real thing or merely arises from the need to make the behaviour of a vastly complex system intelligible, is unimportant, given that the idea of the state-as-thing-in-this-world forms the basis for a great many choices people make.[327]

The real question is thus whether or not people *assume* that a collectivity exists for the purposes of deciding how to act in certain circumstances (as we will see in Chapter 6, this is a significant factor in linguistic behaviour). To the extent that they

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[325] On this point, see : Gould (n 297) 74–75.

[326] O'Connor and Wong (n 323).

[327] For instance, Loughlin argues that the origins of Western public law lie in the attempt by medieval churchmen and early modern constitutional theorists to grapple with the (seemingly) paradoxical dichotomy between the Church (or the kingdom) as an assemblage of individuals, on the one hand, and as an entity distinct from its membership—extending through time and space in ways that no individual person ever could—on the other. Loughlin (n 299) 29.

do, it exists as an object of discourse and reason.[328] For instance, the assumption that the Canadian state is an entity distinct from the person of the monarch, with its own interests that are not reducible to those of the Queen, underpins a very wide range of behaviours and norms. The rights of the state are not rights of any one individual, although they may be exercised by individuals in their capacity as state officials. Nor do they emerge necessarily from the aggregation of recognized individual rights. The very concept of the state presupposes a certain type of political structure and social order, neither of which can be adequately described in terms of the interaction of individuals.[329] One must discuss them at the level of the system, or not at all.

4.4.2 Emergence and social reality

Some theorists object to this way of thinking, as it involves reifying the collectivity, which 'fundamentally' is comprised of individuals. But as Cooper and Brubaker note,

> Reification is a social process, not only an intellectual practice. As such, it is central to the politics of "ethnicity, "race," "nation," and other putative "identities." Analysts of this kind of politics should seek to account for this process of reification. We should seek to explain the processes and mechanisms through which what has been called the "political fiction" of the "nation"- or of the "ethnic group," "race," or other putative "identity"- can crystallize, at certain moments, as a powerful, compelling reality.[330]

The fact that nations (or collectivities more generally) can be both 'fiction' and 'reality' is a very important one, and bears dwelling upon. That this is even possible stems from a peculiar facet of the nature of human society. Understanding

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[328] In this vein, consider Hart's discussion of 'the juristic controversy over the nature of corporate personality': Hart (n 124) 36–39.

[329] Consider, for instance, the example of a country's seat at the UN: Peter Jones, *Rights* (Macmillan 1994) 183.

[330] Rogers Brubaker and Frederick Cooper, 'Beyond "Identity"' (2000) 29 Theory and Society 1, 5.

this facet is critical to understanding why the vocabulary of collectivities is coherent and necessary to moral and legal discourse.

According to John Searle, what we think of or refer to as 'society' is in fact a complex and layered system of 'social-institutional facts'. Examples of such facts include money, the US constitution, the University of Oxford, or the fact that I am a Canadian citizen.[331] It is impossible to describe social reality without reference to these social-institutional facts, of which collectivities are one species. However, to see why this is the case, it is necessary to explain Searle's argument in more detail.

Searle argues that social-institutional reality has a basic logical structure, and that this structure can be described in terms of three 'primitives' (ie fundamental components): collective intentionality, the assignment of function, and constitutive rules and procedures.[332] Collective intentionality is the capacity of human beings (as well as some animals) to cooperate and share attitudes or beliefs with others. This state corresponds to statements like 'we believe' or 'we desire'.[333] Collective intentionality (which corresponds to what many people mean by the term 'inter-subjectivity') is indispensable to any theory of social activities, which involve doing something as part of a larger enterprise (eg playing the violin part in a symphony).

The second primitive, the assignment of functions, is the capacity of humans (and again some animals) to ascribe functions to objects, where this function does not result from any inherent property of the object, but rather collective assignment. For example, a group of people can transform a log into a 'bench' by assigning it that function.

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[331] John R Searle, 'Social Ontology Some Basic Principles' (2006) 6 Anthropological Theory 12, 12–16.

[332] ibid 16.

[333] ibid.

The third primitive, constitutive rules and procedures, is a species of this last phenomenon, but with a special twist. In the case of the log becoming a bench, the assignment of function depends upon (though does not directly result from) the physical properties of the log; it could not serve as a bench unless it could be sat upon. However, humans (but not animals) also have the ability to assign functions to objects that have no relationship to their physical properties. Searle uses the following example to illustrate this. Imagine that a town has built a wall around its dwellings. This wall has a function related to its physical properties, namely, to keep marauders at bay (the second primitive). Now imagine that, over many centuries, the wall has decayed such that all that is left is a line in the ground. Yet despite this, the people of the town continue to treat it as a *boundary*, something that must not be crossed under normal circumstances. In this case, the object (the ruins of the wall) has a function that is unrelated to its physical properties.

That function (acting as a boundary) is the product of collective agreement about the function—or, more broadly, the *meaning*[334]—of the stones that litter the ground. This agreement is made possible by the existence of language, which is why other animals are incapable of engaging in it. This very same process can assign a status or meaning to any type of object, including human beings, who come to play social roles—Prime Minister, lieutenant, football player, DPhil student.[335] In any given society, these status functions will typically stand for a cluster of rights, obligations, authorizations etc (what Searle calls 'deontic powers').[336] These

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[334] For a broader overview of interpretive approaches to social science, see : Ted Benton, *Philosophy of Social Science : The Philosophical Foundations of Social Thought* (Palgrave 2001). See also : Charles Taylor, *Philosophy and the Human Sciences* (Cambridge University Press 1985).

[335] For a discussion of the way in which this process shapes, even constitutes, individual identity and agency, see: Taylor (n 334) 8.

[336] Searle (n 331) 16–18.

functions, and the deontic powers to which they are associated, can exist only insofar as they are represented as existing in linguistic (ie symbolic) terms. The status and functions of 'Oxford DPhil student', for example, exist only because there is a discursive community that has agreed to stipulate that such a thing exists.

What is crucial for our purposes is that explaining this type of behaviour—such as the townspeople's decision to treat the ruins as a boundary—without reference to the symbolic object would be impossible. It is the fact that there exists a shared symbolic representation vis-à-vis the ruins of the wall that gives it its reality, ie makes it a factor in human behaviour. We must therefore be able to name and discuss these representations if we are to understand what the townspeople are doing. The very same point can be made with respect to a collectivity, like a city or a nation. In this vein, consider Calhoun's observation that

> nationalism is a discursive formation that gives shape to the modern world. It is a way of talking, writing and thinking about the basic units of culture, politics and belonging that helps to constitute nations as real and powerful dimensions of social life. Nations do not exist 'objectively' before they exist discursively.[337]

In other words, nations consist in a shared set of linguistic representations. They are a species of social-institutional fact.

4.4.3 Social-institutional facts and legal theory

Searle's account of social reality can be very useful in the context of moral and legal theory. For instance, it provides a good explanation for Waldron's claim that some goods are inherently non-individualisable.[338] Waldron argues that '[s]ome goods are not privately enjoyable because to enjoy them one must be doing so in the

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[337] Calhoun (n 307) 27.

[338] Jeremy Waldron, 'The Primacy of Justice' (2003) 9 Legal Theory 269, 284.

company of others and with the assurance that they are enjoying them as well'.[339] He uses the example of 'conviviality' at a dinner party, the existence of which depends upon the belief that others are also experiencing the moment in a similar fashion. Conviviality in this sense is clearly an example of what Searle calls collective intentionality, the first primitive in the logical structure of society. Searle would no doubt argue, correctly, that something in the nature of Waldron's conviviality is an experience that can be shared by many animals, not just humans. But one can extend the example outward, as Waldron does, to encompass more complex collective goods, such as culture, which depend upon the second and third primitives.[340]

The same point might be made about Réaume's concept of a participatory good, which she uses as a basis for arguing in favour of the existence of collective language rights.[341] Participatory goods are 'activities that not only require many in order to produce the good but are valuable only because of the joint involvement of many. The publicity of production itself is part of what is valued—the good *is* the participation'.[342] Participatory goods, especially those that depend upon the existence of constitutive rules and procedures, like a cultured society, or a language community,[343] are clearly a species of social-institutional fact.

In fact, this provides us with an elegant account of why it is that the properties of collectivities are irreducible to those of their individual members. Collectivities are a form of social-institutional reality brought into being through the use of language.

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[339] Jeremy Waldron, 'Rights, Public Choice and Communal Goods', *Legal Theory Workshop Series* (Faculty of Law, University of Toronto 1985) 14. Cited in : Pierre A Coulombe, *Language Rights in French Canada* (Peter Lang 1995) 20.

[340] Waldron (n 338) 284.

[341] See generally : Réaume, 'The Group Right to Linguistic Security: Whose Right, What Duties?' (n 54).

[342] Réaume, 'Individuals, Groups, and Rights to Public Goods' (n 54) 10.

[343] Réaume, 'The Group Right to Linguistic Security: Whose Right, What Duties?' (n 54) 127.

Social-institutional facts *consist in* a certain set of collectively shared linguistic representations, and thus constitute emergent properties of a specific social system. In the case of collectivities, like a state, these representations have a certain propositional content which is not defined in terms of individuals, but in relation to 'collective forms'.[344] They would literally cease to exist (or at least fundamentally change) if they were not thought or conceived of in those terms. Consequently, if one were to eliminate the concept of collectivities from normative or legal discourse, one would lose the ability to reason about them in a meaningful way. Any interests or rights a collectivity might possess can only be conceived of and described at the level of the collectivity. Though there is in most cases a clear relationship between the latter and the interests of individual members, this does not make the collectivity and its members consubstantial.

4.5 Emergent properties and the law

The foregoing discussion is, I think, potentially very useful for understanding the courts' attempts to grapple with certain legal problems relating to complex social phenomena. An excellent example of this comes from the Supreme Court of Canada's recent case-law dealing with freedom of association.[345] In these cases, the court has had to grapple with the problem of how to define the nature and extent of constitutional protection for collective or 'associational' activities, while being constrained by (and attempting to avoid overturning) a long line of cases that defined freedom of association as an individual right.

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[344] Newman, *Community and Collective Rights* (n 144) 38.

[345] *Ontario (Attorney General) v Fraser* [2011] 2 SCR 3; *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia* [2007] 2 SCR 391; *Dunmore v Ontario (Attorney General)* [2001] 3 SCR 1016.

Before *Dunmore* (2001),[346] the case-law had generally adhered to a form of methodological individualism, meaning that it conceptualized the content of the s. 2(d) right strictly in terms of individual capacities and interests.[347] In other words, the Supreme Court had tended to view s. 2(d) associations as sets. However, over time it had gradually become clear that this way of thinking about freedom of association made it difficult or even impossible to describe critical aspects of what the right was intuitively thought to protect. In its more recent decisions, the court has therefore begun to develop a vocabulary that enables it to apprehend and describe the emergent properties of s. 2(d) associations (though not using that term of course), resulting in significant changes to the law.

In *Dunmore*,[348] for instance, the Supreme Court recognized that groups or associations are 'qualitatively' different from individuals, and that s. 2(d) protects more than what can strictly be described as individual rights. It is worth quoting the majority reasons of Bastarache J in full on this point, partly for their use of the term 'collectivity', which is suggestive in light of present purposes, as well as for the explicit connection they draw to the concept of a linguistic community:

> 17 As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members. Thus, for example, a language community cannot be

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[346] *Dunmore* (n 345).

[347] The leading cases were known as 'the Trilogy': *Reference re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313; *PSAC v Canada* [1987] 1 SCR 424; *RWDSU v Saskatchewan* [1987] 1 SCR 460. The key holdings of these cases were later restated by Sopinka J in *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)* [1990] 2 SCR 367 367.: (1) 's. 2(*d*) protects the freedom to establish, belong to and maintain an association'; (2) 's. 2(*d*) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association'; (3) 's. 2(*d*) protects the exercise in association of the constitutional rights and freedoms of individuals'; and (4) 's. 2(*d*) protects the exercise in association of the lawful rights of individuals' (p. 402).

[348] *Dunmore* (n 345), para 16.

> nurtured if the law protects only the individual's right to speak …. Similar reasoning applies, albeit in a limited fashion, to the freedom to organize: because trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of individuals". Rather, the law must recognize that certain union activities -- making collective representations to an employer, adopting a majority political platform, federating with other unions -- may be central to freedom of association even though they are inconceivable on the individual level.

The 'qualitative' difference between what Bastarache J calls a collectivity and an individual (or, by implication, a mere set of individuals) can be described as the presence of emergent properties. Each type of 'association' he lists is not simply an aggregate, but rather gives rise to new phenomena or possesses distinct qualities. The latter cannot be described using the language of individuals and individual rights, as they are 'inconceivable' on this level. Yet to ignore them would unjustifiably impoverish our understanding of what the right to freedom of association is meant to protect, and so s. 2(d) analysis must move beyond the rigid methodological individualism imposed by the Labour Trilogy.[349]

As I will explain further in Chapters 5 and 6, a very similar line of argument can be applied to many language rights. It would be impossible to describe much of what these rights are intended to accomplish without resorting to the vocabulary of collectivities. The case-law dealing with language rights claims since 1982 shows that, although the text of most language rights was deliberately formulated in terms of individual rights, the courts have been unable to make sense of them in these terms, resorting instead to the vocabulary of collectivities in order to render their purpose and aims intelligible. This can be seen, for example, in the SCC's decision to link the concept of language to that of 'culture' when interpreting s. 23 of the Charter, as well as in the courts' treatment of topics like 'assimilation'. In such cases, there is a clear

[349] See note 347.

(if often unstated) acknowledgement that the rights at issue aim to protect something that is 'qualitatively different' from the individual interests of members of the minority language group. That is why in so many cases the courts have been willing to protect or confer institutional autonomy on the minority. As I will explain further on, the emergent properties of a linguistic community that make it important and valuable depend upon the existence of an institutional infrastructure. Protecting the community, *qua* collectivity, means protecting its institutions.

4.6 Conclusion

To recap: I have argued that the term 'community' used in s. 41 of the OLA can be conceptualized as either a set or a collectivity. The difference between the two is that a set is a simple aggregate of individuals with no distinct properties of its own, while a collectivity exhibits emergent properties that cannot be described solely in terms of individual actions and traits. The particular type of emergent property possessed by collectivities can be described as a 'social-institutional fact', which *consists in* a certain set of collectively shared linguistic representations regarding the collectivity.

I have further argued that this conceptual vocabulary enables us to explain, on a conceptual level, certain aspects of recent decisions by the Supreme Court of Canada dealing with freedom of association. In particular, its helps us understand why, beginning with *Dunmore*, the court felt it necessary to employ the vocabulary of collectivities to define the scope of s. 2(d) protection. Associations are not merely (or at least not limited to) sets of individuals engaged in a similar activity as free-standing monads, but can also be complex systems giving rise to emergent properties, ie distinct social-institutional facts with a bearing on individual interests.

The conclusion to be drawn from this is that, from a doctrinal perspective, it is appropriate to use the vocabulary of collectivities when interpreting a constitutional or statutory text, if and when to refrain from doing so would cause one to lose the ability to describe significant aspects of the subject at hand. As I hope to show in the following two chapters, this means that the term 'community' used in s. 41 of the OLA should be interpreted as designating a collectivity, rather than a set.

CHAPTER 5 LMCs AS COLLECTIVITIES (1): THE ARGUMENT FROM S. 23 OF THE CHARTER

5.1 Introduction

5.1.1 The meaning of 'linguistic minority community'

In the previous chapter, I argued that the term 'community' can be conceptualized as referring either to a set or to a collectivity. The question now is which of these should be applied to the reference to 'communities' in s. 41 of the OLA. In the following two chapters, I argue that it is. I also explore what might be said about the nature of that collectivity and what interests might be captured by terms like 'vitality' and 'development'.

However, as I noted earlier, there is very little case-law dealing specifically with s. 41 of the OLA, and none of it squarely considers the meaning of the term 'linguistic minority community'. When that question inevitably arises, the courts will have to look elsewhere for guidance. One of the main sources will undoubtedly be the case-law under s. 23 of the Charter,[350] which applies to the same subset of the population.[351] In this chapter, I explore what the s. 23 case-law can tell us about how

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[350] See Appendix B for the full text of s. 23.

[351] The territorial and demographic scope of these provisions is very similar. Section 23 applies to the 'English or French linguistic minority population of the province' in which the rights-bearer resides. Section 41, though it uses different terminology, appears to target the same group. While the text does not say so explicitly, it seems clear that the term 'linguistic minority community' must be defined using provinces as the primary unit of analysis. This is a necessary implication of the wording used, which refers to *English* linguistic minority communities as well as *French* ones. As an English-speaking community can only be in the minority in Québec, one must infer that the unit of analysis is the province, rather than the country as a whole. If it were the latter, there could be no English linguistic minority communities. It is possible, of course, to designate a smaller unit of analysis, such as a region or a municipality. If one were to do that, there might well be areas in Ontario and New Brunswick with an English-speaking 'linguistic minority community' and areas of Quebec with a French-speaking one. However, there is no reason to think that this is what the drafters had in mind, nor is this how the term has been interpreted by the various stakeholders.

Thus, a 'minority community' is an official language group whose language is not that of the majority in its province of residence, which has effectively the same general boundaries as the group of s. 23 rights-holders.

s. 41 of the OLA should be interpreted. More specifically, I argue that, based on this case-law, the s. 41 concept of a 'linguistic minority community' should be interpreted as referring to a collectivity, and not a set.

However, making this argument is not entirely straightforward. Although s. 23 has been explicitly held to confer 'collective' rights on s. 23 rights-holders,[352] the theoretical basis for that conclusion is not fully stated in the case-law. While there is clearly some account of the nature of the group being protected by s. 23 and the purpose of that protection, the court is somewhat vague when describing it. Reconstructing that account sufficiently to be helpful in relation to the questions that interest us here will require substantial work.

5.1.2 *Mahe* and the language-culture link

The leading case in this context is *Mahe*,[353] in which the Supreme Court of Canada held that s. 23 rights-holders have a collective right to 'management and control' of minority language schools created pursuant to s. 23 of the Charter. The key conceptual move in the court's argument was to posit the existence of a link between language—the explicit subject of s. 23 protection—and culture, which is mentioned nowhere in the text of that provision. Unfortunately, while the conclusion that s. 23 protects collective rights clearly rests on that assertion, the court never explains what it means by 'culture', and it says relatively little about why the existence of such a link should count as a reason to interpret s. 23 as conferring collective rights. Developing a more fulsome account of the nature of the language-

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[351] Given this overlap, it is to be expected that the case-law under s. 23 of the Charter will at some point be used to inform the interpretation of s. 41 of the OLA.

[352] *Arsenault-Cameron* (n 56), paras. 27-29; *Doucet-Boudreau v. Nova Scotia (Minister of Education)* (n 171), para. 28; *Solski* (n 32), para. 5;

[353] *Mahe* (n 14).

culture link will therefore be the central task of this chapter. Not only will this provide us with a better sense of the reasons for thinking that the body of s. 23 rights-holders is a collectivity, it will give us some clues as to the nature of that collectivity and what its most significant interests are.

My argument here will be that, based on the *Mahe* court's analysis and other relevant cases, the body of s. 23 rights-holders can usefully be thought of as an ethnic group,[354] as that term is used in the social sciences. On a descriptive level, this concept enables us to account for the way in which the court connects language, culture and identity. On a conceptual level, it accounts for the conclusion that s. 23 protects both individual and collective rights.

Simply put, an ethnic group is a form of social organization, and therefore possesses emergent properties. It is, in other words, a collectivity. Using ethnicity as an analytical framework therefore enables us to understand why the SCC felt that the body of s. 23 rights holders should not be thought of merely as an aggregate of individuals who happen to share, from the standpoint of an objective observer, a particular trait (eg knowledge of French). As members of an ethnic group, s. 23 rights-holders are viewed as existing or participating in a form of social organization, whose existence and well-being affects the interests of its members in various ways. Because of this, that social organization is just as important to the meaning and purpose of s. 23 as individual linguistic competency.

The court does not itself use the concept of ethnicity. However, I will explain why it is nonetheless appropriate to use ethnicity theory as an aid in explicating the reasons in *Mahe*, and why the B&B Commission's reticence to use it in its reports

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[354] The concept of an ethnic group is closely related to that of a nation or a national minority. As I explain in section 5.3.5 of this chapter, I have chosen not to dwell on the differences between them—which can be important—as they are not critical to the questions I am attempting to answer here.

(which were cited by the court as a source for the concept of a language-culture link) should not deter us here. I will also briefly touch on the question of whether it is important to distinguish between an ethnic group and a nation in this context, as it relates to minority francophone communities (MFCs). Finally, I will consider the way in which the ethnic group concept enables us to account for other aspects of the court's reasoning in this and other language rights cases, specifically, the role of historical injustices in shaping the content of present-day rights.

5.2 *Mahe*

5.2.1 Overview

The *Mahe* case arose from a dispute between parents in Edmonton and the Alberta government over whether or not s. 23 provided them with a collective right to 'management and control' of the French-language schools then being set up for their children. More specifically, the parents claimed they were entitled to a separate school board through which to administer French-language schools.

The wording of s. 23,[355] which makes no explicit reference to management or to any other collective right, appeared to favour Alberta's interpretation, which was that the provision dealt merely with the language of instruction and conferred no rights with respect to institutional control. Nevertheless, as in the recent cases dealing with freedom of association, which I discussed in the last chapter, the court took what appeared at first glance to be an individual right and infused it with a collective dimension by peering behind the text and grappling with the social reality underlying the right in question. The court seems to have felt that the best way—perhaps the

[355] See Appendix B.

only way—to truly make sense of s. 23, given its origins and purpose, was to read it as giving rise to both individual and collective rights protecting both individual and collective interests. In short, the court felt it needed to use the vocabulary of collectivities in order to avoid losing the ability to describe significant aspects of what s. 23 was meant to accomplish.

The court's most relevant conclusions (for present purposes) can be restated as follows: (1) the collection of s. 23 rights-holders is not simply an aggregate of individuals along lines of linguistic competency, but rather a historically rooted community embodied in institutions and complex social networks, and possessing a shared identity; (2) section 23 rights (and, by extension, other language rights) exist to protect interests that *derive from membership* in that community, including the interest in the continued existence of the community itself; these interests include, but are by no means limited to, interests in effective communication with public bodies; (3) at least in the education context, but quite possibly elsewhere, the effective protection of those interests is best achieved by means of institutional autonomy; (4) insofar as they protect community interests, language rights have a collective dimension, meaning that the same provision can simultaneously confer both individual and collective rights.[356]

From the standpoint of constitutional interpretation, these four conclusions hinged on the court's decision to posit the existence of a legally and morally significant link between 'language'—the explicit subject of s. 23 protection—and what the court refers to as the 'culture' connected to that language. By assuming the existence of such a link, the court was able to considerably broaden the range of interests that qualify for s. 23 protection. The new range included (but was not

[356] These conclusions can all be found, whether explicitly or implicitly, in Dickson CJ's reasons in *Mahe* (n 14). However, they are formulated more explicitly in later decisions that build on the framework developed in *Mahe*, most notably *Beaulac* (n 15).

limited to) the collective interests of the cultural community to which s. 23 rights-holders are presumed to belong.

That such a strategy was even available was because of certain latent ambiguities in the text of s. 23. That ambiguity might be said to exist on two different levels. The first (and for present purposes, the least important) level was the ambiguity regarding whether or not s. 23 had anything to say with respect to institutional control. Alberta claimed that it was silent on the matter (and therefore should be presumed not to interfere with provincial freedom of action), but there was some evidence to the contrary, albeit relatively little.[357] The second and more important ambiguity had to do with the meaning of the word 'language'.

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[357] The parents argued that the right to 'facilities' included not only a right to separate schools (where numbers were sufficiently great), but also a collective right to administer these schools through a distinct school board under the exclusive control the minority. Alberta, for its part, maintained that the right to a 'facility' could not be held to encompass a right to 'management and control', and that the word denoted nothing more than a separate physical structure to house minority-language educational activities.

If one were to read the text in isolation, Alberta's view might appear to be the correct one. Section 23(3)(b) merely describes a right to have one's children 'receive' education in dedicated facilities; it is silent on the question of school governance. Furthermore, s. 23 rights vest in 'citizens', which gives them the appearance of being individual rights. Putting these two ideas together, one could easily conclude that s. 23 does not confer a right to management and control over minority language schools. Such a right would necessarily be a collective right, because it is not the sort of right that individuals are able to exercise by themselves. School governance can only be accomplished through formal institutional structures, and so a right to management and control therefore implies a right to decision-making power within (or over) those institutional structures. That, in turn, would require the existence of an institutionally embodied collectivity capable of exercising that power. However, s. 23 makes no explicit mention of collectivities or collective action of this kind. The only obvious reference to anything of the sort is the term 'linguistic minority population of the province' used in s. 23(1). But while the word 'population' could be interpreted as referring to a structured community, it reads more naturally as a reference to an aggregate of individuals (i.e. a set). (For instance, compare the use of 'population' in s. 23 with the reference to aboriginal and Métis 'peoples' in s. 35 of the Constitution Act, 1982).

In the absence of any overt reference to powers of governance or collective agency, the balance of the *prima facie* textual evidence would therefore appear to lie against the conclusion that s. 23 includes a right to management and control. Nevertheless, there is some textual evidence to support a different conclusion, and so the issue was not entirely clear-cut, even from this narrow perspective. For instance, the French text of s. 23(3) refers to 'établissements d'enseignement de la minorité'. As the Ontario Court of Appeal had already noted, the phrase 'de la minorité', literally translated, means 'of the minority', and suggests a degree of possession or control (*Reference re Education Act of Ontario and Minority Language Education Rights* (n 154). In addition, the term 'la minorité' can be more easily read as a reference to the minority as a collectivity than can its English counterpart ('population of the minority'). Finally, in French, the word 'établissement' means more than a simple physical structure, denoting instead an institution in its sociological as well as physical dimensions. In fact, the legislative history of s. 23 shows that the drafters had deliberately replaced the word 'installation' (which denotes a physical

5.2.2 The ambiguity of s. 23 and the competing interpretive paradigms

On the one hand, a language is a code, comprised of arbitrary symbols, whose purpose we might describe, after Bourdieu, as being to satisfy the 'technical requirements of communication'.[358] It is, in other words, merely a mechanism for recording and transmitting information. On the other hand, language is a central feature of human society, arguably the most important one. And in multilingual societies, it will often be a defining feature of the social landscape. As the Supreme Court had already noted in *Ford*:

> language is not merely a *means* of interpersonal communication and influence. It is not merely a *carrier* of content, whether latent or manifest. Language itself *is* content, a reference for loyalties and animosities, an indicator of social statuses and personal relationships, a marker of situations and topics as well as of the societal goals and the large-scale value-laden arenas of interaction that typify every speech community.[359]

In short, language can serve as a boundary marker between different social groups or communities. When it does so, it tends to be associated with a wide range of practices, beliefs, traditions, habits and social networks, and any discussion of it will typically concern a range of goods over and above the technical requirements of communication.

This ambiguity in the word 'language' created an opportunity when it came to interpreting s. 23. One could, as Alberta suggested, argue that s. 23 mandated the use of a certain linguistic code in education, and nothing more. Or, one could instead conclude

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structure) with 'établissement' for this very reason (*ibid.* Also, Rolande Faucher, in her biography of Jean-Robert Gauthier, a leading Franco-Ontarian politician, describes how Gauthier managed to convince the then-Minister of Justice, Jean Chrétien, to change the wording of the French text from 'installation' to 'établissement', specifically because the latter had a broader meaning encompassing what in English we might describe as 'institutions over governance', such as a school board: Rolande Faucher, *Jean-Robert Gauthier: 'Convaincre sans Révolution et sans Haine'* (Prise de parole 2008)).

[358] '[L]es besoins techniques de la communication' : Pierre Bourdieu, *Langage et pouvoir symbolique* (Fayard 2001) 74.

[359] *Ford v Quebec (Attorney General)* [1988] 2 SCR 712, para. 42, quoting Joshua A Fishman, *The Sociology of Language : An Interdisciplinary Social Science Approach to Language in Society* (Newbury House Publishers 1972) 4.

that the right protected interests deriving from the sociological factors outlined above, and interpret it accordingly.

At the time, the correct choice was by no means a foregone conclusion. Faced with the ambiguities outlined above, the Supreme Court could have adopted a strategy of interpreting s. 23 'restrictively', as it had done with other language rights in the recent past. Earlier that decade, the court had resolved a series of similar ambiguities in language rights provisions by selecting the narrower of two possible interpretations. Had it taken a similar interpretive stance in *Mahe*, Alberta's position would almost certainly have been adopted. Yet it chose not to do so, and the difference between the two approaches is quite instructive.

In the years immediately preceding *Mahe,* the court heard a cluster of cases dealing with language use in a judicial context[360] (these cases are hereinafter referred to as 'the Trilogy').[361] In these cases, the central issue was whether a constitutional right to *use* French or English in a courtroom included the right to be *understood* in that language. The text of the relevant provisions, all of which were very similar, appeared ambiguous on that point. Yet in each case, a majority of the court concluded that the rights in question ought to be interpreted restrictively, and held that they did not include the right to be understood.[362]

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[360] Specifically, s. 133 of the Constitution Act, 1867*,* s. 23 of the Manitoba Act, 1870, s. 19 of the Charter, and s. 110 of the North-West Territories Act. Each of these provisions had virtually identical wording. Section 19(2) of the *Charter* provides that 'Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick'. Each of the other provisions uses this basic wording, only with reference to the relevant jurisdiction.

[361] There were in fact four cases dealing with this issue, but the first three are the most important: *MacDonald* (n 44); *Société des Acadiens* (n 62); *Bilodeau v Attorney General of Manitoba* [1986] 1 SCR 449. As these are widely referred to as 'the Trilogy', I will adopt that practice here, but include the decision in *Mercure* (n 154). as part of this group.

[362] The final case in the series, *Mercure* (n 154), is slightly different in this respect. Although La Forest J purported to be applying the holding from the Trilogy, he nonetheless found that, under s. 110 of the Saskatchewan Act, one had the right to have one's representations be included in the court record in their original form. As Réaume has pointed out, this is in fact inconsistent with the notion that one

The basis for these decisions was the assertion that the relevant language rights were the product of a 'political compromise'.[363] According to this line of thought, language rights, which are supposedly 'peculiar to Canada', are not based on principle, 'and lack the universality, generality and fluidity of basic rights'.[364] Unlike other *Charter* rights, such as the right to security of person, language rights are not 'seminal in nature'.[365] As a result, 'courts should pause before they decide to act as instruments of change' when applying them.[366] Thus, when faced with ambiguity, the courts should always adopt the more restrictive of the two interpretations, as this would least disturb existing practices. Even though dissenting judges pointed out that this interpretation would, in the cases at bar, clearly strip the right of all useful content, the majority was undeterred.

The flaws of the 'political compromise' doctrine have been extensively canvassed elsewhere[367] and need not be rehearsed here (although we will briefly return to the point in Chapter 7 when discussing the concept of equality). What matters for present purposes is that, had this method been applied in *Mahe*, it almost certainly would have resulted in a decision to rule in favour of Alberta's interpretation, which, whatever its other merits, was certainly the narrower of the two on offer. However, the court instead opted to develop a purposive interpretation, i.e. to

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does not have the right to be understood, because in order for one's oral representations to be transcribed, at least one person present must be able to understand them (Denise Réaume, 'Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?' (2001) 47 McGill Law Journal 593, 611). In fact, La Forest's reasons are also inconsistent with the Trilogy in a more general way, given that he asserts that '[l]anguage rights are a well-known species of human rights and should be approached accordingly': *ibid 237.*

[363] *MacDonald* (n 44); *Société des Acadiens* (n 62); *Bilodeau* (n 361).

[364] *MacDonald* (n 44), para. 117.

[365] *Société des Acadiens* (n 62), para. 63.

[366] *ibid,* para. 65.

[367] Green (n 48); Réaume, 'Demise of the Political Compromise Doctrine' (n 252).

place the text of s. 23 in a broader social, historical and philosophical context.[368] This meant that use of the word 'language' in s. 23 was, in effect, treated as a symbol or stand-in for a more complex set of social and political realities:

> The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.
>
> My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.[369]

Dickson CJ, writing for a unanimous court, went on to conclude that in light of this broader purpose, s. 23 must be interpreted as granting the minority a right to management and control of the educational institutions operating under its auspices. He reasoned that '[s]uch management and control is vital to ensure that their language and culture flourish ... because a variety of management issues in education, e.g., curricula, hiring, expenditures, can affect linguistic and cultural concerns'.[370]

The key difference between the *Mahe* approach and the Trilogy was the court's willingness in the former case to consider the social reality within which the right at issue was meant to operate. In the Trilogy, Wilson J had forcefully argued in dissent that, the purpose of language being to communicate, a right to use a given language in court necessarily implied the right to be understood. Beetz J, writing for the majority, had ignored the social dimensions of language use and instead applied a form of rigid

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[368] *Big M Drug Mart* (n 129), at p. 344.

[369] *Mahe* (n 14), p. 362. See also the references to the report of the B&B Commission on pp. 362-363. The Commission's statements on this front were even more expansive.

[370] *ibid,* pp. 371-372.

logical analysis to the text of the provisions, interpreting them as protecting nothing more than a sphere of negative liberty.[371] The *Mahe* court, by asserting the existence of a link between language and culture, and—more importantly—by proclaiming that any right aiming to protect the first must necessarily protect the second, rejected the Trilogy's approach, instead holding that the social functions of language were of paramount importance in understanding the content of s. 23.

5.2.3 What is culture, and why is it relevant?

However, as I noted at the outset, Dickson CJ never fully explains what he means by the word 'culture' or 'cultural concerns', or why their connection to language should have the implications for s. 23 that he claims it does. This can be very confusing, because on any common sense understanding of the term, s. 23 rights-holders—whether Francophone or Anglophone—are a culturally heterogeneous group. For instance, any definition of culture will almost certainly include religion, and yet Francophones are—despite the general predominance of Catholicism amongst this group, at least until relatively recently—religiously diverse. How then can one speak of 'the' culture associated with the French language?

This very point was raised by O'Sullivan JA of the Manitoba Court of Appeal in a related case decided shortly before the SCC judgment in *Mahe*, leading him to reach the opposite conclusion from the one Dickson CJ would ultimately adopt. In the *Reference*

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[371] An important factor in Beetz J's reasoning was the fact that s. 133 of the Constitution Act, 1867 applied to both Parliament and the courts. The way in which the provision was drafted makes it seem, at first glance at least, that there is only a single rule which applied to both institutions. Since the notion that there exists a right to be understood in the language of one's choice in Parliament is nonsensical (at least in 1867, when simultaneous translation was technologically impossible), it follows (according to Beetz J) that s. 133 must be interpreted as protecting only the right to speak it. However, a purposive interpretation, like that proposed by Wilson J, would have distinguished between the two types of institutions, as well as eliminated certain other logical (if unrealistic and somewhat bizarre) inferences made by Beetz J, such as the notion that judges were meant to be afforded the same rights as members of the public. See generally: *MacDonald* (n 44), paras. 58 to 85 (and especially 60-63).

re Public Schools Act (Manitoba), the Manitoba Court of Appeal had rejected the idea that s. 23 conferred a group right to management and control. In his concurring majority reasons, O'Sullivan JA offered perhaps the clearest contrast to the SCC's judgment in *Mahe*. Examining these reasons helps to illustrate some of the potential problems with the *Mahe* approach.

O'Sullivan JA concluded that s. 23 does not confer any group rights, because '[i]ts provisions are guarantees given to individuals even though they contemplate the exercise of those rights through group action.'[372] The main reason given for this was that s. 23 protects only language, not culture. It therefore entitled individuals to receive education through the medium of a particular language, and nothing else.

O'Sullivan JA was certainly aware of the 'cultural' argument that Dickson CJ would eventually adopt, as it was made by the Francophone groups in both cases. But he noted that the concept of culture had crept into the legal argument by way of references to the reports of the B&B Commission. For O'Sullivan, this was a fatal flaw. The Commission had articulated a vision of language rights premised on a commitment to both bilingualism and biculturalism. O'Sullivan JA claimed that this framework had been decisively repudiated, and that

> [t]here is no such thing as the French-Canadian culture just as there is no such thing as the English-Canadian culture. In accordance with the liberal tradition in Canada, governments are not concerned about official cultural values. What has been protected by s. 23 of the Charter is the language of the minority, not the culture of the minority. Granted that language is part of culture, it by no means follows that language is a determinative of culture. It is not the case that there is one Francophone culture and a multiplicity of anglophone cultures. The Constitution recognizes that there may be more than one Francophone culture.[373]

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[372] *Reference re Public Schools Act (Manitoba)* [1990] 2 WWR 289 (Manitoba CA), para. 180.

[373] *ibid,* para. 184.

In O'Sullivan's view, the argument for a language-culture link was premised on a 'principle of monoculturalism as applied to the French-speaking people of Canada'.[374] This principle was explicitly repudiated by s. 27 of the Charter,[375] which enshrines the principle of multiculturalism. Given this, he concluded that s. 23 must be viewed simply as an individual right to the use of French as the medium of communication in schools, rather than a safeguard for any common cultural interests, of which there were none. To put it in terms of the set/collectivity framework, O'Sullivan JA believed that the French-language 'community', such as it was, and more specifically the body of s. 23 rights-holders, amounted to a set rather than a collectivity.

O'Sullivan's arguments were a confusing blend of liberal theory and sociological analysis, and there is much to dislike about them (such as his characterization of French schools as 'ghettos'[376]), but there is also a sense in which he was clearly correct. The aggregate of all French-speakers in Canada doubtless harbours a number of 'cultural' divisions or dissimilarities. As O'Sullivan JA himself points out, some Francophones are Catholic, while others are not.[377] If religion is part of culture, then this fact conclusively disproves the theory that Francophones are 'mono-cultural', if by that one means that all Francophones share exactly the same culture in all respects. And if, as O'Sullivan JA claims, the language-culture link proposed by the lawyers for the French-speaking minority (and endorsed, ultimately, by Dickson CJ in *Mahe*) presumes, or requires in order to be coherent, that s. 23

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[374] *ibid,* para. 185-6.

[375] *ibid,* para. 185-6.

[376] *ibid,* para. 160.

[377] In fact, much of his concern about the threat of officially-sanctioned 'monoculturalism' could likely be traced back to his evident concern for the rights of Catholic parents under s. 93, which he was careful to argue were not subsumed by s. 23.

rights-holders be mono-cultural, then the argument that s. 23 protects both language and culture must be rejected.

However, the fact that s. 23 rights-holders are not *monolithically* mono-cultural does not necessarily imply that there is no link between language and culture, or that the scope of language rights cannot or should not extend to matters beyond the 'technical requirements of communication'. That French-speakers are culturally diverse to a certain extent does not necessarily mean that there is no common culture whatsoever, or that the social functions of language are extraneous to constitutional language rights. Indeed, given that language is itself a part of culture, as O'Sullivan JA concedes, there is evidently *some* degree of commonality. Not only is the language itself, *qua* code meeting the 'technical requirements of communication', a shared element of culture, it also serves as a vector for other aspects of culture, which will 'piggy-back' on a language wherever it goes. O'Sullivan's argument, while premised on a true observation, would seem to be self-refuting.

Nevertheless, pointing that out does little to clarify the situation. If some culture is shared but not all of it, then which parts of culture constitute 'the' culture associated with the French language for the purposes of s. 23? There are hints at an answer in *Mahe*, but in order to make sense of them, it is necessary to drill deeper, and further develop our understanding of the role that culture—especially cultural differences—plays in shaping the social landscape.

5.3 Language, culture, ethnicity and identity

5.3.1 Culture and identity in a diverse society: the concept of an ethnic group

As I noted above, the word culture has been defined in a wide variety of ways over the years. In some contexts it is used to designate gradations of knowledge or social sophistication (as when we say that someone is 'cultured' or 'uncultured') while in others it can refer to such mundane things as cuisine and mode of dress. What is being adverted to in *Mahe*, however, is both deeper and broader than that. Bhiku Parekh's definition seems closer to the mark: culture is a 'historically created system of meaning and significance or, what comes to the same thing, a system of beliefs and practices in terms of which a group of human beings understand, regulate and structure their individual and collective lives.'[378] This is quite similar to the classic definition proposed by the anthropologist E.B. Tylor, and which is still more or less in use today: 'that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.'[379]

However, both of those definitions refer to something quite comprehensive. How are we to understand the role and importance culture in a country like Canada, where a large number of such belief systems share the same social and political space,

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[378] Parekh (n 85) 143.

[379] Edward B (Edward Burnett) Tylor, *The Origins of Culture* (Harper & Row 1958) 1. Tylor's early attempt at a definition has held up remarkably well over time. Anthropologists today see culture as being defined by two key aspects: first, it 'comprises those human traits that are learned and learnable and are therefore passed on socially and mentally, rather than biologically;' second, 'culture is in some sense a "complex whole"'; (Thomas J (Thomas Jefferson) Barfield, *The Dictionary of Anthropology* (Blackwell 1997) 98–99.) Put another way, culture is the set 'beliefs or rules of behaviour (or perhaps more generally as knowledge about the world) that are passed on from one individual to another by some form of social learning (including teaching)'; (Louise Barrett, RIM (Robin Ian MacDonald) Dunbar and John Lycett, *Human Evolutionary Psychology* (Palgrave 2002) 352).

often with some degree of overlap? This is where the concept of a 'cultural identity', on which Dickson CJ also relies, becomes important. Presumably, one's cultural identity stems from membership in one cultural group, rather than another, which can have an impact on the course of one's life in a variety of ways. But how does a cultural identity develop, and how does it work? And if Francophones are culturally diverse in the way suggested by O'Sullivan JA, is it even coherent to speak of a single cultural identity shared by all French-speaking persons in a given province, or across Canada? Put another way, can cultural communities be comprised of culturally diverse individuals? And, just as importantly for present purposes, how are we to conceive of such an assemblage of persons? Is it a set, or a collectivity?

When social scientists analyse the relationship between cultural traits (like language) and social structure, especially in diverse societies, they commonly do so through the concept of ethnicity.[380] In everyday language, the word 'ethnic' is often used in a pejorative way, or as designating only minority or foreign groups.[381] However, as a category of social analysis,[382] it can be applied to a wide range of social groups, including both majorities and minorities. In the social sciences, it is first and foremost a descriptive concept which denotes a particular form or pattern of

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[380] It should be noted that these issues are also frequently examined through the lens of 'nationality' or nations. Ethnic groups and nations are closely related concepts, and many contemporary theorists would classify nations as a sub-category of ethnic groups, one in which politics plays an explicit and especially prominent role. The distinction may be important, as I will discuss further on, but it need not detain us for the moment.

[381] May (n 87) 20. In the Canadian context, as Breton points out, this has largely resulted from the fact that the dominant ethnic group, the English, appropriated a very large proportion of the society's institutional system and succeeded in defining itself as 'non-ethnic'. Thus, the widespread ideology of an ethnicity-free society is grounded in the ascendency of one particular ethnic group, which lost sight of its ethnic characteristics. This explains why so many people find it impossible to think of 'English Canada' as an ethnic collectivity, while having no such difficulty in the case of 'French Canada' : Raymond Breton, 'The Structure of Relationships Between Ethnic Collectivities' in Leo Driedger (ed), *The Canadian Ethnic Mosaic: A Quest for Identity* (McClelland and Stewart 1978) 67–68.

[382] On the distinction between categories of social practice and those of social analysis, see generally : Brubaker and Cooper (n 330).

social organization in which cultural traits play a defining role.[383] In that sense, ethnicity theory can be of great help to us here, as it provides an account of the way in which cultural differences acquire social and psychological importance, which in turn can be of assistance in understanding (and, ultimately, defending) the conclusions reached in *Mahe*.[384]

5.3.2 Culture and ethnic boundaries

For a long time, cultural differences were assumed to produce hard social boundaries. At least until the late 1960s, 'most anthropologists … thought, at least implicitly, that the world could be described usefully as a discontinuous array of entities called societies, each with its internally shared culture.'[385] This view had taken root because it was widely believed that societies functioned more or less like watertight compartments, and it was assumed that each societal compartment would contain its own unique combination of cultural traits. As a result, 'it would follow that there are discrete groups of people, i.e. ethnic units, to correspond to each culture.'[386] (There was also, in the very early days, an assumption that such groups shared a common ancestry or genetic heritage, but that notion was conclusively dispelled through the work of Franz Boas and others). These groups exhibited a sense

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[383] Steve Fenton, *Ethnicity* (2nd ed, Polity 2010) 112. Outside the social sciences, ethnicity is often misunderstood or seen in a negative light—at least when it manifests in a Western context, where it is routinely depicted as atavistic or primitive —and the term 'ethnic' has pejorative connotations in many contexts, especially in liberal-democratic political debates, where its frequent association with a notion of bloodlines or genetic kinship make it vaguely distasteful, even sinister (Grammond (n 32) 14–15.)

[384] Using the concept of ethnicity to analyse the legal categories of s. 23 has been suggested by Grammond, amongst others. However, his focus was on the definition of individual identity by legal means, rather than the definition of s. 23 rights-holders as a group. See : Grammond (n 32) 150–188.

[385] Fredrik Barth, 'Introduction' in Fredrik Barth (ed), *Ethnic groups and boundaries : the social organization of culture difference* (Waveland 1998) 5.

[386] ibid 9.

of shared interests and solidarity, and tended to cooperate in various social and political endeavours.

This postulate was not only useful from a taxonomical perspective; it had theoretical implications as well. The presumed overlap between cultural and social boundaries implied that cultural similarity was the basis for, or cause of, communal or social solidarity. Accordingly, it was widely believed that the distribution of ethnic identities could be inferred from objectively observable patterns in the cultural landscape. Early academic studies of ethnic groups therefore tended to define their unit of analysis with reference to what we might describe as the 'breaks' in this objective cultural landscape.[387] That is, the existence of (or boundaries to) an ethnic group would be determined according to the presence or absence of a certain cultural content in the population under study, as determined by the outside observer.

The legacy of this theory lives on to this day, for instance in Canadian aboriginal law. The 'distinctive culture' test[388] developed by the Supreme Court in order to ascertain the existence of aboriginal rights under s. 35 of the *Constitution Act, 1982* is reminiscent of this approach.[389] It also appears as though something quite like this idea was the cause of O'Sullivan JA's discomfort with the concept of 'biculturalism'. He appears to have believed that biculturalism implied or was premised upon the existence of *parallel mono-cultures*, each inhabiting a distinct social silo. As this did not correspond to observable reality, and as it was moreover repugnant to his version of liberal theory, according to which there ought not to be 'official' cultures, he dismissed the idea as a basis for interpreting s. 23.

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[387] ibid 9–11.

[388] *R v Van der Peet* [1996] 2 SCR 507.

[389] Michael Asch, 'Judicial Conceptualization of Culture after Delgamuukw and Van Der Peet, The' (1999) 5 Review of Constitutional Studies 119, 129.

Ironically, despite its widespread currency outside the social sciences, the assumptions underlying the 'watertight compartments' theory of ethnicity have long since been abandoned in the face of overwhelming evidence that cultural boundaries and social ones do not in fact necessarily coincide. The pioneering work of E.R. Leach,[390] amongst others, made the view of ethnic groups as 'culture-bearing units' untenable.[391] In fact, many ethnic groups or 'tribes' that had at one point been assumed to be culturally homogeneous were, upon closer investigation, revealed not to be. While these groups exhibited a sense of community or solidarity, thus making them behave to some degree as a social unit, this did not always coincide with a pattern of cultural similarity, let alone uniformity. That in turn revealed that cultural similarity, as such, could not explain the presence or emergence of an ethnic identity, insofar as the latter consisted in a sense of communal belonging and loyalty.[392] 'Culture', as a comprehensive analytical unit, was fatally undermined.[393]

In the late 1960s, a new approach, one that effectively now dominates the field, was proposed by Fredrik Barth.[394] Barth replaced the previous view of ethnic groups as 'culture-bearing units' with the concept of ethnicity as a *mode of social*

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[390] See generally: Edmund Ronald Leach, *Political Systems of Highland Burma : A Study of Kachin Social Structure* (Athlone Press 1970).

[391] Barfield (n 379) 152.

[392] Thomas Hylland Eriksen, *Ethnicity and Nationalism* (2nd ed , Pluto 2002) 28–29.

[393] The problems inherent in the old approach were beautifully illustrated by Michael Moerman's 1965 study of the Lue people of Thailand. Moerman set out to answer the following question: 'Who are the Lue?' And at the outset, he adopted the standard approach based on 'objective' (i.e. observer-constructed) criteria. But he quickly realized that this approach could not yield a satisfying answer to the question he had posed. Moerman's research had revealed that the standard 'objective' boundary markers, like politics, language or culture, did not strongly correlate with one another, meaning that 'the units delimited by one criterion do not coincide with the units delimited by another.' Furthermore, when asked directly what defined them as a group, individual Lue would often list cultural traits they shared with neighbouring ethnic groups. In short, from an 'objective' standpoint, nothing about the Lue was culturally distinctive. Moerman was forced to conclude that '[s]omeone is Lue by virtue of believing and calling himself Lue and of acting in ways that validate his Lueness.' Michael Moerman, 'Ethnic Identification in a Complex Civilization: Who Are the Lue?' (1965) 67 American anthropologist 1215, 1215.

[394] Eriksen (n 392) 121; Barfield (n 379) 152.

organization, one that is not inherently linked to any particular cultural content. On this view, an ethnic group is defined by an effective social boundary maintained by members of the group through a process of 'self-ascription'. Although *presumed* cultural differences play a key role in delimiting such boundaries on a psychological level, the actual relationship between specific cultural attributes and ethnic boundaries is not fixed or rigid. Cultural traits function as 'overt signals or signs' of difference, but different attributes are salient in different contexts.[395] Quite often, these cultural differences exist side by side with numerous cultural similarities, which are simply downplayed as part of the process of boundary-maintenance.

In other words, cultural traits do not by themselves determine or cause the boundary. The group itself emerges from the *belief* that its members are similar to each other in certain important respects, regardless of the precise degree to which that is actually the case.[396] The process is in fact very similar to the one outlined by Benedict Anderson to explain the emergence of 'national' communities, which he argues are largely 'imagined' on the basis of (real or assumed) cultural similarities.[397] And we can see the influence of this model on Miller's definition of 'group', discussed in Chapter 4.[398] Thus, on the Barthian view, there is no *necessary* relationship between the presence of a particular cultural difference (like religion or dress) and the existence of an ethnic boundary.[399] Which cultural traits become incorporated into a boundary is driven by contextual factors.

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[395] Eriksen (n 392) 22–25.

[396] See the description of Moerman's work on the Lue at 393.

[397] See: Benedict Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism* (Rev ed , London ; Verso 2006).

[398] Miller (n 298) 178.

[399] Parekh describes something similar when he refers to the distinction between the 'cultural' and 'communal' dimensions of a cultural community: Parekh (n 85) 154–155.

This change in the way ethnicity is understood was largely brought about by shifting the observer's point of view from the outside to the inside. As mentioned above, students of ethnicity had—up to this point—used primarily 'objective' traits, like differences in dress, language, religion or diet, as criteria for determining the boundary between ethnic groups. In other words, ethnic groups, as analytical units, were primarily constructed from the *outside*, by the observer, based on what he or she thought was relevant. Little attention was paid to what members of these groups subjectively believed about their own identities or the membership of the community as a whole. By contrast, Barth argued that these beliefs, and the cultural material they referred to, were the very 'stuff' of ethnicity. What all ethnic groups appeared to have in common, including the seemingly culture-less Lue,[400] was that they used ethnic identities 'to categorize themselves and others for the purposes of interaction.'[401] In circumstances where such behaviour occurred, the cultural traits which defined the boundary between ethnic categories were 'socially relevant', while others remained irrelevant, regardless of how important they might appear from an 'objective' perspective. [402]

Ethnicity, on this account, is fundamentally relational. Being first and foremost a process of boundary-maintenance, the creation of ethnic categories requires the presence of two or more groups that view themselves as culturally distinct in some relevant way.[403] A band of hunter-gatherers living in complete

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[400] For a discussion of the Lue, see note 393.

[401] Barth (n 385) 14.

[402] Accordingly, '[i]t makes no difference how dissimilar members may be in their overt behaviour—if they say they are A, in contrast to another cognate category B, they are willing to be treated and let their own behaviour be interpreted and judged as A's and not B's; in other words, they declare their allegiance to the shared culture of A's': ibid 15.

[403] Joshua A Fishman, 'Language and Ethnicity: The View from within' in Florian Coulmas (ed), *The handbook of sociolinguistics* (Basil Blackwell 1997) 329.

isolation cannot be an ethnic group because it has no concept of cultural difference. Only when a group comes into contact with other communities following different customs and patterns of behaviour can it develop the dual sense of *alterity* and *identity* which constitutes the ethnic boundary. Put another way, ethnicity is the result of a 'dialectical' process.[404] This means that ethnic groups are a species of what Young calls a 'social group', as they arise through 'the encounter and interaction between social collectivities that experience some differences in their way of life and forms of association'.[405]

Thus, O'Sullivan's sociological assumptions would appear to be badly mistaken. While the Francophone community may harbour within it considerable diversity, it can still give rise to a common cultural (i.e. ethnic) identity, provided that its members share the belief that such a group exists and that membership is socially relevant in certain contexts. There is no need to assume that all members of the community share the same mono-culture. All that is required, in order for this reading of s. 23 to make sense, is that official language minorities, like MFCs, believe and act as though they are members of a community, which is symbolized—if not exhausted by—the French language.

On this view, the purpose of asserting a link between language and 'culture' or 'cultural identity' is primarily to signal that the language at issue is being discussed and protected in its capacity as an element of social organization, rather than merely an individual trait. Terms like 'culture' or 'cultural concerns' do not refer to any specific *element* of culture being protected, like a practice or belief deemed particular to that group. Their purpose is not, in other words, to subject the content of s. 23 rights to something like the 'distinctive culture' test applied to aboriginal rights, where a practice,

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[404] Joane Nagel, 'Constructing Ethnicity: Creating and Recreating Ethnic Identity and Culture' (1994) 41 Social Problems 152, 154.

[405] Young (n 303) 43.

tradition or custom must be shown to have been 'integral' to what made an aboriginal culture distinctive at the time when Crown sovereignty was first acquired.[406] Rather, they serve to indicate that s. 23 protects a collectivity, which was granted institutional autonomy for the purpose of protecting its ability to control the content of its culture—and thus protect its existence.

Of course, this is true only up to a point. The provinces retain their general jurisdiction over education, and have the right to define certain aspects of the curriculum. Nevertheless, it is significant that the right is structured in the opposite way to the aboriginal rights protected by s. 35 of the *Constitution Act, 1982*. By granting the s. 23 minority institutional autonomy, the SCC effectively created a presumption that a wide range of activities will intersect with 'cultural concerns', and the onus is largely on the province to justify limitations on the minority's decision-making power. With respect to aboriginal rights, by contrast, it is the aboriginal group that must demonstrate its entitlement to each individual practice or activity on the basis of its cultural significance. That approach has been heavily criticized, and I do not mean to defend it here.[407] I use it merely to illustrate an important facet of the conceptual architecture of s. 23 rights.

5.3.3 Language, culture and identity in *Mahe*

Dickson CJ did not openly rely on the concept of ethnicity in *Mahe*, but there are various ways in which his discussion of culture and identity amongst official language groups converges on the account outlined above. For instance, a key component of his

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[406] *Van der Peet* (n 388), paras. 44-45.

[407] See generally : Asch (n 389); Neil Vallance, 'The Misuse of "Culture" by the Supreme Court of Canada' in Avigail I Eisenberg (ed), *Diversity and Equality: The Changing Framework of Freedom in Canada* (UBC Press 2007).

argument that language rights also protect the associated culture is the following statement, taken from the SCC's earlier decision in *Ford*: 'Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the Charter of the French Language itself indicates, a means by which a people may express its cultural identity'.[408] In making this claim, the *Ford* court had based itself on the notion, borrowed from sociolinguist Joshua Fishman, that language is 'a reference for loyalties and animosities, an indicator of social statuses and personal relationships'.[409] This bears a striking resemblance to the role played by cultural traits in the context of an ethnic boundary.

A further virtue of ethnicity theory in this context is that it enables us to explain why 'cultural identity', as such, should have an impact on the scope of s. 23. This is because identity is one of the principal mechanisms by which the well-being of a collectivity can impinge upon that of its individual members. Consequently, to state that a right protects a cultural identity is to claim that it protects at least some of the interests of the collectivity associated with that identity. If that collectivity is an ethnic group, that provides us some indication as to the types of interests that might be protected. However, this requires a bit of unpacking.

Identity is a notoriously difficult concept,[410] especially in legal analysis,[411] and so one must proceed cautiously when dealing with it. Nevertheless, I believe we can say that ethnic identity is, in the language of Chapter 4, a 'social-institutional fact'. Recall

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[408] *Ford* (n 359), para. 40.

[409] *ibid,* para. 42.

[410] See generally : Brubaker and Cooper (n 330).

[411] Avigail I Eisenberg, *Reasons of Identity : A Normative Guide to the Political and Legal Assessment of Identity Claims* (Oxford University Press 2009) 19. See also: Neil Vallance, 'The Misuse of "Culture" by the Supreme Court of Canada' in Avigail Eisenberg (ed), *Diversity and Equality: The Changing Framework of Freedom in Canada* (UBC Press 2006).

that collectivities, as social-institutional facts, *consist in* a certain set of collectively shared linguistic representations. Ethnic identities—being grounded in some concept of an ethnic group—are just such a form of collective linguistic representation, relating to the structure of the social world. As Greenfeld and Eastwood note:

> At the level of the individual, identity can be understood as an aspect of one's cognitive map that concerns the configuration and structure of one's self in relation to the social world. The cognitive map is the image of the social order held by a given social actor, and is differentiated into a variety of subcomponents: images of the broader social order, conscious and semi-conscious expectations of behavioural norms, conceptions of morality and justice, and so forth. Identity is an aspect, rather than a subcomponent, of the cognitive map due to its inextricable connection to most of the components of the cognitive map itself. One's identity is bound up with one's image of the world, one's ethical outlook, and so forth. There is, for this very reason, a human need for identity that is tightly connected to the human need for order more generally.[412]

Thus, identities are formed through the process of interacting with the social order. This means that ethnic identities, like culture more broadly, can be understood as an emergent property of social systems. They are constructed from the 'intersubjective universe of meaning' that all humans inhabit, meaning that they are symbolic in nature, and thus depend upon communication and exchange to exist.[413] While identities can be analysed at the psychological level, they can only be made intelligible with reference to the 'publicly manufactured common troughs' from which they are constructed.[414] Put another way, identities are, at root, 'discursive formations' that give shape to the world.[415]

Considerations like these would appear to be at work in Dickson CJ's reasons, as when he states the following: 'Language is more than a mere means of

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[412] Liah Greenfeld and Jonathan Eastwood, 'National Identity' in Carles Boix and Susan Carol Stokes (eds), *The Oxford handbook of comparative politics* (Oxford University Press 2007) 256.

[413] ibid.

[414] ibid.

[415] Calhoun (n 307) 27.

communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them' (emphasis added).[416] Indeed, according to Dickson CJ, the fact that language is so strongly connected to identity—and therefore to a vision of the social universe—means that the purpose of s. 23 schools 'must be to provide for members of the minority an education appropriate to their linguistic and cultural identity'.[417]

The link between education, language and identity here is critical. In a modern context, public education is the only viable means for a culture to reproduce itself from one generation to the next. If, *ex hypothesi*, the purpose of education rights is to protect a cultural identity, then their goal is in fact to promote the survival of the cultural group on which that identity is premised.[418] This would help explain why a concern for the 'culture' of the group and its identity would lead the SCC to the conclusion that the minority must be provided with collective control over the education being provided in s. 23 schools. The minority is best placed to determine what does or should define it as a collectivity, and what is required to preserve it. If one's goal is to ensure the survival and flourishing of the group, or at least equality of opportunity in pursuing those goals, it must be given control over those activities most critical to its ongoing existence as a collectivity.

In light of this, we might restate Dickson CJ's point in the following way: from the perspective of a s. 23 analysis, language is significant not only as a means of communication, but as a feature of the social landscape, ie as a component of Canadian

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[416] *Mahe* (n 14), p. 362 (emphasis added).

[417] *ibid,* p. 362.

[418] As Appiah notes: 'If our selves are embedded in social forms … it might be impossible to treat individuals with equal respect without somehow coming to terms with those social forms.' Anthony Appiah, *The Ethics of Identity* (Princeton University Press 2005) 73.

social structure. The two official languages operate as markers for a salient social boundary between two ethnic groups, each of which has distinct collective interests that are partly embodied in and symbolized by, though not limited to, their respective languages.[419] This is, I think, a clearer way of framing the SCC's holding in *Mahe*.[420]

The persuasiveness of this reading can be further emphasized by comparing the *Mahe* court's understanding of the purpose of minority language education rights to that of the US Supreme Court (SCOTUS) in *Lau v Nichols*.[421] In that case, SCOTUS held that 1800 Chinese-speaking children with little knowledge of English could not be compelled to enrol in an English-only public education system and that some measure of special accommodation—which might include bilingual education—was required. In effect, the court stated that these children had a right to minority language education. However, the court's ultimate and unquestioned goal was to ensure that those children did eventually enter the English-speaking mainstream and that their cultural and linguistic distinctiveness would gradually dissolve into the American 'melting-pot'.[422] Thus, special accommodation was merely a stepping-stone to the English-only mainstream, rather than a mechanism for preserving a parallel socio-cultural system. A similar goal was pursued by the Johnson Administration, which obtained passage of

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[419] This phenomenon is sometimes referred to by sociologists as 'ethnic segmentation' : 'Societies are segmented insofar as they exhibit, to a greater or lesser degree, 1) enclosure of social networks along ethnic lines ; and 2) "a social structure compartmentalized into analogous, parallel, non-complementary but distinguishable sets of institutions"'. Breton, 'The Structure of Relationships Between Ethnic Collectivities' (n 381) 57.

[420] It also has the virtue of being consistent with Dickson CJ's earlier judgments, in which this general approach was just emerging. As Dickson CJ himself had noted in his dissent in an earlier case, Société des Acadiens: '[t]hough couched in individualistic terms, language rights, by their very nature, are intimately and profoundly social'. *Société des Acadiens* (n 62), para. 25. If language rights are 'social', it is because of the long history of struggle between the two largest linguistic collectivities for political and social power.

[421] *Lau v Nichols* 414 US 563 (SCOTUS).

[422] As Justice Blackmun noted: 'We may only guess as to why [the children] have had no exposure to English in their preschool years. Earlier generations of American ethnic groups have overcome the language barrier by earnest parental endeavor or by the hard fact of being pushed out of the family or community nest and into the realities of broader experience': *ibid,* 572.

the Bilingual Education Act (1968). The Act was aimed at Spanish-speakers and provided voluntary funding to school districts seeking to establish programs tailored to students with very weak English-language skills.[423]

By contrast, the *Mahe* court felt the need to draw attention to the role that s. 23 schools play as community centres for official language minorities, providing a location where members of the 'minority community can meet and facilities which they can use to express their culture'.[424] In effect, the court was stating that the interests protected by s. 23 extends beyond those of s. 23 rights-holders as individuals, and includes to a certain extent the entire community,[425] whose existence, as a feature of Canadian society, is itself the subject of s. 23 protection.[426] This was later made more explicit in *Arsenault-Cameron*, where the Supreme Court held that '[i]t is clearly necessary to take into account … the importance of official language minority schools to the development of the official language community' and that one of the purposes of s. 23 was 'providing

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[423] See generally : Jonathan D Haft, 'Assuring Equal Educational Opportunity for Language-Minority Students: Bilingual Education and the Equal Educational Opportunity Act of 1974' (1983) 18 Colum. JL & Soc. Probs. 209.

[424] *Mahe* (n 14), p. 362 (emphasis original, citations omitted).

[425] On that note, consider this passage from a decision dealing with constitutional rights to denominational schools : 'I would also agree that the rights contemplated by s. 93(1) of the Constitution Act, 1867, may be characterized as "collective rights" … [A]lthough such characterization does not necessarily by itself yield obvious answers to the issues that arise under this provision of the Constitution, [w]hat the characterization does suggest, however, is that it is the interests of the class of persons or community as a whole in denominational education that is to be looked at and not the interests of the individual ratepayer': *AG (Que) v Greater Hull School Board* [1984] 2 SCR 575, para. 84.

[426] 'Historically, separate or denominational boards have been the principal bulwarks of minority language education in the absence of any provision for minority representation and authority within public or common school boards. Such independent boards constitute, for the minority, institutions which it can consider its own with all this entails in terms of opportunity of working in its own language and of sharing a common culture, interests and understanding and being afforded the fullest measure of representation and control. These are particularly important in setting overall priorities and responding to the special educational needs of the minority': *Mahe* (n 14), p. 373.

the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced'.[427]

5.3.4 Culture and ethnicity in the B&B Commission reports

Before moving on from this point, it is important to note that the concept of a language-culture link in *Mahe* was drawn in part from the B&B Commission reports. This is relevant because the approach I am advocating here might appear to be at odds with those reports, and thus with Dickson CJ's reasons themselves, given that the Commission explicitly considered, and rejected, ethnicity as 'basic principle for shaping society' or a foundation for its recommendations (which were ultimately the inspiration for s. 23).[428] However, I do not consider this to be a problem, as it seems to me that the constructivist conception of ethnicity outlined above is in fact consistent with the conceptual superstructure of the Commission's reports, even if the terminology I have been using does not quite line up with the Commission's.

It is important to recall that the Commission's reports were published nearly 50 years ago now. The first report and its famous 'blue pages', where culture is most extensively discussed, came out shortly before Barth published his seminal essay on ethnic boundaries. Because of this, the Commission's definition of ethnicity is, unsurprisingly, something of a halfway house between the older definitions, which emphasized the role of ancestry and bloodlines, and the more relational conception that now predominates amongst social scientists. Although the Commission was clearly aware of emerging research supporting a relational theory of ethnicity,[429] it nevertheless

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[427] *Arsenault-Cameron* (n 56), para. 27.

[428] 'Report of the Royal Commission on Bilingualism and Biculturalism. Book I: The Official Languages' (n 98), xxiii.

[429] ibid.

felt bound to a definition in which notions of ancestry were predominant. Drawing distinctions on that basis seemed both morally odious and practically unworkable, and so it set the concept aside.[430]

The Commission preferred instead to use the concept of 'cultures', which in any event was the primary focus of its terms of reference. However, it went on to develop a theory of Canada's 'primary cultures' (i.e. Anglophone and Francophone) that seems very similar to the constructivist conception of an ethnic group. In the Commission's view, participation in either of the 'principal cultures' was generally viewed as requiring knowledge of the relevant language, which therefore functioned as an effective boundary for each group.[431] But the Commission was careful to note that the two cultures 'are not watertight compartments; they are evolving and constantly borrowing from each other'.[432] It also observed that any given culture 'must not be confused with a particular system of thought', such as a particular religion.[433] Finally, the Commission was at pains to explain that individuals of the same cultural group can vary considerably in terms of the manner and degree to which they participate in that culture, owing to a range of geographic and educational factors, and because of their varied origins.[434] In fact, a person could lose this seemingly defining characteristic of group membership and yet still identify with it: 'Thus, in certain regions of the Maritime Provinces, many Acadians who have lost their language have retained Acadian characteristics and even an Acadian identity.'[435] Thus, the Commission's cultural groups were not perfectly

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[430] ibid.

[431] ibid, xxxiii.

[432] ibid, xxxi.

[433] ibid.

[434] ibid, xxxii-xxxiii.

[435] ibid, xxxvii.

homogeneous—even if there was a common core shared by most members—and individuals could blend traits from many cultures while still belonging to one in particular.

Because of this, I do not believe that the account I have outlined above is inconsistent with the Commission's account, or the passages of Dickson CJ's reasons they inspired. By contrast, contemporary ethnicity theory has the advantage of 50 years of further research. It also provides a ready conceptual bridge to other branches of sociological research with direct relevance to language rights, like the research into the drivers of linguistic behavior (ie sociolinguistics). As we will see in the following chapter, a critical concept in this respect is 'ethnolinguistic vitality', which helps to explain the causes of minority language survival or decay. This research has heavily influenced later language rights cases, which provides a further reason to view ethnicity as an appropriate framework in this context.

5.3.5 Minority francophone communities: ethnic group or national minority?

One final issue to be considered in this connection is whether or not MFCs can be described, empirically speaking, as an ethnic group, or whether instead they should be described as a national minority, either as a free-standing nation or as a branch of a broader French-speaking nation centered on Quebec. For instance, in a famous article, sociologist Joseph-Yvon Thériault argued that MFCs lie somewhere 'between' an ethnic group and a nation.[436] It might therefore be argued that this distinction has some implications for the types or extent of rights that MFCs can claim.

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[436] J Yvon Thériault, 'Entre la nation et l'ethnie : Sociologie, société et communautés minoritaires francophones' (1994) 26 Sociologie et sociétés. See also: Landry, Forgues and Traisnel (n 10) 91.

According to Thériault, both nations and ethnic groups are '*communautés de destin*' ('communities of destiny'), by which he means that their members share a specific vision or representation of the world based on a putative shared experience. The main difference between the two types of communities lies in the degree of 'historicity' that they exhibit, by which he means their capacity for self-consciousness and their ability to take action upon themselves. Nations typically possess a large and sophisticated institutional apparatus through which to understand and shape their development as communities (up to and including political institutions), whereas ethnic groups do not.[437] In this vein, Thériault labels MFCs as neither ethnic nor national, but '*nationalitaire*'. I can find no exact translation in English, but the term denotes a group with aspirations and social-institutional capabilities similar in kind to those of a nation, but which are limited in their reach by the group's size, geographic dispersion, and degree of institutional completeness.[438]

This question is both interesting and important, but its implications for the issues I am attempting to address here are limited. To my mind, the primary value of the ethnic group concept in this context is that it provides us with an account of what it means to say that language and culture are intrinsically linked, and that to protect a language is to protect the 'cultural identity' associated with that language. To say that the body of s. 23 rights holders is an 'ethnic group' is to say that it is not merely an aggregate of individuals who happen to share, from the standpoint of an objective observer, a particular trait (e.g. knowledge of French), but that they participate in a form of social organization, in which their particular language happens to play an

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[437] Thériault, 'Entre la nation et l'ethnie' (n 436) 19–20.

[438] ibid 22. On the issue of institutional completeness, see the discussion of ethnolinguistic vitality in Chapter 6, section 6.2.3.

important part. Thus, if I might put it this way, it is the structural properties of the ethnic group concept—the way in which it enables us to draw the link between individual cultural traits and the existence of a collectivity—that are of greatest value here, rather than the label itself, or the degrees of separation between different varieties of such collectivities.

From a legal perspective, at least at the present juncture, there is very little difference between the concept of an ethnic group and that of a 'national minority'. These labels are sometimes used in legal discourse—especially under international law—as though they refer to different things, but as a practical matter the law tends to completely elide the distinction between an 'ethnic' and a 'national' minority.[439] For instance, the UN Declaration on Rights of Persons Belonging to National, or Ethnic, Religious and Linguistic Minorities uses both terms in its title, but it does not define the various categories of protected groups, nor does it differentiate between them in the legal protections it offers. The same is true of the Council of Europe's Framework Convention on the Protection of National Minorities, which does not define its target beneficiary even though it protects only the one type of group. Indeed, the most widely used definition of 'minority', proposed by Francesco Capotorti in 1977, does not distinguish between the different categories.[440]

In short, from the standpoint of the questions I seek to address here, it is not clear that a great deal turns on the distinction between 'ethnicity' and 'nationality'. In both cases, there exist certain collective interests associated with the group which

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[439] See generally: Hannum (n 88).

[440] Francesco Capotorti, 'Study on the Rights of Persons Belonging to Ethnic, Religious, and Linguistic Minorities' (United Nations 1979) E/CN.4/Sub.2/384/Rev.1, para. 568.

require legal protection. What those interests are will largely be a function of context.[441]

Of course, those working in political theory often place great stock in the difference between each type of group. Will Kymlicka has famously developed a theory of minority rights that draws a sharp distinction between 'national' minorities and 'ethnic' ones[442] (and that theory has in turn been criticized by those who feel that MFCs are not accounted for properly by such a stark dichotomy).[443] But regardless of their merits, Kymlicka's distinctions are very fact-specific. For instance, his concept of an ethnic group is a stylised rendering of the experience of non-British and non-French immigrant groups in Canada and the United States, and is not representative of ethnicity generally. Because of this, I do not believe we need be overly concerned here with the implications of his account.[444] Moreover, even if the distinction between ethnicity and nationhood might ultimately be relevant to the wider debate concerning the rights of official language communities in Canada, for the purposes of this thesis it is not necessary to dwell on them.

5.4 The need to account for the historical continuity of interests

Before concluding this chapter, I would like to consider one final piece of evidence for my claim that *Mahe* should be read as conceptualizing s. 23 rights-holders as a collectivity, namely, the role of historical injustices in shaping the court's interpretation. This evidence does not flow from the application of the ethnic

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[441] I explore this point in greater detail in Chapter 7.

[442] Kymlicka, *Multicultural Citizenship* (n 55) 10–11.

[443] Johanne Poirier, 'Autonomie politique et minorités francophones du Canada : Réflexions sur un angle mort de la typologie classique de Will Kymlicka' [2012] Minorités linguistiques et société, Linguistic Minorities and Society 73–80.

[444] Indeed, Kymlicka himself appears to concede this : Will Kymlicka, 'A New Deal for OLMC's?: Three Challenges' [2012] Minorités linguistiques et société 248, 251.

group/nation framework I argued for above, although it is consistent with it, given the role that historical narrative typically plays in ethnic or national identity. While not critical to establishing my central claim in this chapter, this point will have some implications for the discussion of equality I will undertake in Chapter 7, and so it is worth taking the time to explain it here.

Before *Mahe* was decided, the SCC had, in keeping with the canons of statutory interpretation, already decided that s. 23 must be interpreted as a remedial provision.[445] This meant that in order to properly construe its content, one had first to identify the 'mischief' it was meant to resolve. The issue of how to define that mischief was considered at some length in *Quebec Association of Protestant School Boards* (*QAPSB*), one of the first s. 23 cases to reach the SCC.[446] In effect, the court concluded that one purpose of s. 23 was to repair historic injustices committed against French Canadians in the context of education policy.

In that case, the court was being forced to grapple with the inter-temporal effects of the Charter and had to determine whether it applied to statutes enacted prior to its entry into force. The case arose as a challenge to certain provisions of the Charter of the French Language (enacted in 1976) ('CFL'), a provincial statute in Quebec intended to promote the vitality of French through a variety of mechanisms. One of the tools the CFL employed was a restriction on access to publicly-funded English-

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[445] In addition to the specific historical context surrounding minority language education in Canada, the decision to characterize s. 23 as 'remedial' carried with it certain consequences pursuant to existing principles of statutory interpretation. As noted by the Ontario Court of Appeal in *Reference re Education Act of Ontario and Minority Language Education Rights* (n 154).: 'The notion that "remedial" laws should be given "beneficial" or "liberal" treatment, with the broader rather than the narrower interpretation being adopted the case of ambiguity, is very deeply rooted in Anglo-Canadian legal tradition.' On the role of historical narrative in shaping the law, see: David Greener, 'The Transformative Power of the Legal Narrative' in FL Morton (ed), *Law, politics and the judicial process in Canada* (3rd ed, University of Calgary Press 2001) 409. See also: Clifford Geertz, *Local Knowledge : Further Essays in Interpretive Anthropology* (3rd ed , Basic Books 2000).

[446] *Quebec Association of Protestant School Boards* [1984] 2 SCR 66.

language schooling, the availability of which was limited to a single class of people, namely the children of persons having been educated in English in the province of Quebec (sometimes referred to as the 'Quebec clause'). The effect of this restriction was to prevent parents having moved to Quebec from elsewhere (including other parts of Canada) from sending their children to an English-language school. Because it applied to Canadians citizens, and not only recent immigrants, such a limitation was quite clearly inconsistent with s. 23 of the Charter. However, the CFL predated the Charter, and so there was some disagreement as to whether the latter could be used to invalidate the former.

In determining how the two instruments should interact, the Court opted to be guided by the underlying purpose sought by the framers in enacting s. 23. That in turn led the court to consider the history of political conflict and governmental oppression that had frequently characterized this area of public policy.[447] More specifically, the court referred to a series of tempestuous battles over the role of language in public life and the nature of the Canadian political community, the result of which had often been the adoption of policies with a strongly negative impact on the linguistic vitality of minority language groups.

For instance, the court referred to Regulation 17, a measure which effectively banned French-language education in Ontario for a time in the early 20th Century. This policy was the fruit of a broader strategy orchestrated by British-Canadian nationalists intent upon transforming Canada into a thoroughly British and English-speaking society tightly woven into the fabric of imperial institutions and identity.[448]

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[447] *ibid,* at p. 79.

[448] 'Historically, nation building in its symbolic-cultural dimension was oriented toward the construction of a British-type of society in Canada. This was to be reflected in the cultural character of the political, religious, educational, and other public institutions, in the language of society, in the

Similar limitations had been enacted in other English-majority provinces,[449] making it very difficult for French Canadians living there to have their children educated in French.[450] A powerful illustration of this can be found in a later decision, *Arsenault-Cameron v. Prince Edward Island*, which cites the following passage from a newspaper article published in the 1860s:

> the French inhabitants of the Island have no right to expect to be educated in the French language—they have no claims upon the government—they are the descendants of prisoners of war who secreted themselves in the woods of the Island, and of the neighbouring provinces… we, on the grounds of national policy, object to the encouragement of French schools.[451]

The *Mahe* Court inferred from such elements of political and historical context that one of the mischiefs s. 23 was meant to remedy was the history and legacy of provincial over-reach and abuse of power in setting education policy. A similar approach had already been adopted by the Ontario Court of Appeal in *Reference Re Education Act of Ontario and Minority Language Education Rights* (1984) ('*Ontario Education Reference*').[452] Indeed, the historical narrative was even more developed in that case, reaching all the way back to the beginnings of British rule in the 1760s.[453] In *Mahe*, Dickson CJ drew on both *QAPSB* and the *Ontario Education*

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customs, mores, and way of life, and in the symbols used to represent the society and its people. In that sense, English-Canadian nationalism was just as ethnic or cultural as French-Canadian nationalism, although both revealed considerable differences in content. The prevailing normative model called for the coincidence of nation and state. It was Unitarian and oriented toward cultural homogeneity. The attempts by other groups such as the Ukrainians and the French to maintain their own language and culture and to build their own sub-societies seemed to threaten the British model of cultural unity sought for in this country'. Raymond Breton, 'Symbolic Resources and Status Inequality' in Jeffrey G Reitz (ed), *Ethnic Relations in Canada: Institutional Dynamics* (McGill-Queen's University Press) 62. For a discussion of education policy as an ideological tool, see : Jacqueline Mowbray, *Linguistic Justice : International Law and Language Policy* (Oxford University Press 2012) 16–17.

[449] See, for example, *Forest v. Manitoba (Attorney General)* (n 204), paras. 44-45.

[450] The court also referred to the CFL in this vein, which, although intended to shore up the long-term viability of French, nevertheless cut the ties between English-speakers inside and outside Quebec, thereby weakening the vitality of the anglo-Quebecker community. Grammond (n 32) 160.

[451] *Arsenault-Cameron* (n 56), para. 36.

[452] *Reference re Education Act of Ontario and Minority Language Education Rights* (n 154).

[453] *ibid,* in particular Part III of the decision.

Reference when framing the purpose of s. 23, using these decisions to buttress his claim that one of its main objectives was to restore an equitable sociolinguistic balance upset by assimilationist provincial language policies. He concluded that 'history reveals that s. 23 was designed to correct, on a national scale, the progressive erosion of minority official language groups and to give effect to the concept of the 'equal partnership' of the two official language groups in the context of education'.[454]

History had thus become central to the SCC's understanding of s. 23. However, it is essentially impossible to account for this aspect of the court's reasoning unless one uses the vocabulary of collectivities. If nothing else, the reference to 'groups' engaged in a 'partnership' is very suggestive—although one could perhaps explain this away as a simple metaphor.[455] Dickson CJ's reliance on historical wrongs, however, is much more difficult to explain away. The clear implication of stating that the purpose of a right is to remedy a historical wrong is that there exists a present-day interest in the righting of that old injustice. Yet few or no s. 23 rights-holders were alive when Regulation 17 (for instance) was enacted by the Ontario government. How then could they be said to have an individual interest in repairing the injustice wrought by that measure?

One could, in theory, attempt to demonstrate that their present-day individual interests are adversely affected by the legacy of measures like Regulation 17, inasmuch as it makes it more difficult for them to enjoy some purely individual interest in language.[456] But that was not the primary thrust of Dickson CJ's argument

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[454] See also *Mahe* (n 14), p. 372, where history is invoked when defining the content of 'management and control'.

[455] Although again, this was a reference to the B&B Commission reports, which very much define the Franco-Canadian community as a collectivity extending through time.

[456] A variation of Green's concept of 'linguistic security' might be adapted in this way. See : Green (n 48) 658–660.

(or, indeed, of the one put forward in *QAPSB* and the *Ontario Education Reference*). Rather, the implication of his statements appears to be that there is a direct interest in righting the injustice wrought by these policies because of their effect on 'minority official language groups'. If we conceive of the latter as collectivities, then it is a simple matter to explain how that interest survived despite the change in the individual membership of the groups, as we saw in Chapter 4. If, however, we define them as sets, Dickson CJ's argument is much more difficult to understand.

5.5 Conclusion

In this chapter, I have argued not only that the body of s. 23 rights-holders is a collectivity, but that it is a specific kind of collectivity. Section 23 exists to protect what we might call, after the social sciences, an ethnic group, although one that is not culturally monolithic. Describing the body of s. 23 rights-holders in this way enables us to make sense of Dickson CJ's reasons in *Mahe*, as well as subsequent s. 23 cases, and provides a clear conceptual foundation for s. 23 collective rights. Insofar as s. 41 of the OLA is held to protect the same group as s. 23 of the Charter, this suggests that the concept of a 'linguistic minority community' ought to be interpreted as a collectivity.

Conceptualizing s. 23 and s. 41 rights-holders in this way also presents other advantages, which I will begin to explore in the following chapter. Ethnic groups are, fundamentally, a form of social organization. This framework therefore holds out the possibility of offering some guidance on the ways in which language affects social life, and by which it is affected in turn by broader sociological conditions. As I alluded to above, sociolinguistics has in fact developed a concept of 'ethnolinguistic vitality', which offers a means of understanding the relationship between social-structural conditions and linguistic behaviour, including the propensity of languages to survive or

disappear over time. Community and identity, it turns out, are essential to linguistic vitality.

This of course offers a further point of convergence between the account I am developing here and the language-rights case-law. An important tenet of that case-law is that that language rights exist to prevent 'assimilation'. As I will explain in the following chapter, the available research indicates that assimilation should not be conceptualized simply as a property or behaviour of individuals, but also as a social-structural process affecting collectivities. This not only provides additional support for the view that the CLRS should, as a general matter, be interpreted as protecting the interests of linguistic collectivities as well as those of individuals, but will also further sharpen our understanding of the empirical foundations for many of the interests that language rights in fact aim to protect.

CHAPTER 6 LMCs AS COLLECTIVITIES (2): THE ARGUMENT FROM ASSIMILATION

6.1 Introduction

6.1.1 Assimilation as a juridical concept

In the last chapter, I noted that, when used in the language rights case-law, terms like 'culture' or 'cultural concerns' do not refer to any specific *element* of culture being protected, but are primarily used to signal that the language at issue is being discussed in its capacity as a component of social organization. However, that is not to say that specific practices or activities are not important. A linguistic community like the ones at issue here depends upon more than the language skills of its individual members. Such communities are emergent properties arising from very complex patterns of behaviour and social interaction. These patterns consist of, or crystalise around, specific cultural traits or practices, especially those that have become institutionalised in some way. Protecting specific elements of culture can therefore be quite important on a practical level. Accordingly, I will now examine in greater detail some of what makes a linguistic community tick, and what can cause a language to flourish or decay over time.

The complex dynamic by which a language decays is often referred to in Canada as 'assimilation'. That term is pervasive in both public and scholarly discussions of language rights, and the word appears in at least 50 language rights cases.[457] Indeed, a key principle developed by the courts is that language rights exist to prevent or reverse assimilation, making it vitally important to the way in which these rights are interpreted. However, while the notion that the prevention of assimilation underpins the CLRS is trite law, the courts have never clearly defined it, and no one appears to have yet

[457] This count includes cognate terms like 'erosion'.

undertaken a systematic analysis of the meaning of 'assimilation' from a legal standpoint. A principal task of this chapter will therefore be to develop a more detailed account of what assimilation consists of, why it happens, and what implications this might have for the scope of language rights protection.

Assimilation can easily be thought of as a characteristic or a behavior of individuals, like when we discuss the extent to which an immigrant has 'assimilated' into the culture of her new home. In a linguistic context, such an individualistic conception of assimilation would lead one to focus on the acquisition (or loss) of linguistic competency at the individual level. Thus, we might say that there is assimilation when an individual gradually stops using her native language in favour of another one. Were the juridical concept of assimilation to be defined in a similar way, this would tend to support a reading of language rights as being primarily intended to protect individual linguistic autonomy. However, existing research on the topic by sociolinguists indicates that assimilation is not simply a question of individual choice, but rather a product of wider social conditions that escape individual control. This research suggests that the term should in fact be understood as denoting (amongst other things) a social-structural process operating at the level of collectivities.

There are good reasons for adopting the conclusions of sociolinguistic research in this regard. Although it is now a juridical concept, having been incorporated into the interpretative framework of language rights, the term 'assimilation' clearly has an empirical vocation. What's more, the courts have—perhaps unsurprisingly—shown a great willingness to incorporate sociolinguistic research into their legal analysis. As Power, Larocque and Bossé recently noted, such evidence is now so frequently used that '[i]t is clear that the nature of constitutional litigation has evolved to a point where it is now almost unthinkable to expect a court to decide language rights cases

without consulting or hearing evidence from experts'.[458] Because of this, any sensible account of 'assimilation' *qua* juridical concept must be informed by a solid grasp of the underlying empirical realities.

6.1.2 Overview of chapter

The argument I make in this chapter can be briefly summarized here. Although, like all social phenomena, assimilation manifests at the level of individual behaviour, it is in reality the product of a collective process.[459] Linguistic behaviour is to a large extent driven by one's social identity as well as one's beliefs regarding the status, distribution, size and vitality of the various linguistic communities present in one's social environment. Assimilation itself can therefore be described as the process whereby the *institutional* and *psychological* ties that connect an individual to her linguistic community are weakened and eventually dissolved, leading that individual to shift from being X-dominant to Y-dominant.

If the purpose of language rights is to prevent assimilation, this can only mean that the language rights system, taken as a whole, must be read as an attempt to *reinforce* the psychological and institutional ties that assimilation seeks to unravel. The specific means available for achieving this are quite varied, but in the aggregate they must operate on both the individual and the collective level in order to be effective. In other words, the purpose of language rights is not merely to ensure that individuals are given the opportunity to use a particular linguistic code for the purposes of the 'technical requirements of communication' when interacting with the

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[458] Power, Larocque and Bosse (n 30) 20.

[459] For a lengthier discussion of the relationship between individuals and collective or social phenomena, see Chapter 4.

state. Rather, their aim is to reshape the psychosocial relationship of the population as a whole to the designated languages.

6.2 The view from sociolinguistics

6.2.1 What is assimilation? Preliminary thoughts

What, precisely, is assimilation? Since the courts do not define the word, a logical first step is to consult the dictionary. The primary definition given by the OED is this: 'The action of making or becoming like; the state of being like; similarity, resemblance, likeness.' The dictionary of the *Académie française* defines it this way: 'The action of making, or presenting as being, similar or identical, either by comparison or through integration'.[460] We can therefore say that the general meaning is essentially identical in either language. However, this gains us little. Given the complexity of human beings, what does it mean to say that one person is 'like' another? Such a statement, in order to be intelligible, requires that one first have a specific metric or feature in mind, if only implicitly. What then is the relevant feature underlying references to 'assimilation' in the language rights context?

The answer to this question might seem obvious: the relevant feature is knowledge of language 'X'. But this definition quickly runs aground. On this usage, one might say that children, by learning English, are 'assimilated' into the set of 'English-speakers', because they are 'like' them in being able to speak English. This seems sensible enough. But what are we to make of people who speak two languages? Can it be said that a Danish person, having learned English in school, has 'assimilated' into the English language? What of Birgitte Nyborg, the fictional Prime

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[460] Personal translation : '*Action de rendre ou de présenter comme semblable ou identique, par comparaison ou par intégration*'.

Minister in the popular Danish drama *Borgen*, who speaks both English and French fluently, in addition to Danish? Has she assimilated into both French and English? What then is her relationship to Danish? Should her position as Prime Minister of Denmark not play some role in how we understand that relationship? Does the fact that her partner is British matter at all? More broadly, does assimilation into one language imply de-assimilation from another, or is it possible to be assimilated to two languages at once?

The question is problematic in relation to language because bi- or multi-lingualism is a common feature of individuals or even whole communities. Minority language speakers typically speak at least one other language, usually the politically or culturally dominant language in their state or region. If 'assimilation' occurs simply by virtue of having learned another language, then the overwhelming majority of French speakers in Canada outside Quebec, and large numbers of francophone Quebeckers, have already been assimilated. However, this is not how the concept is normally understood and applied. While those who use the term may not reflect upon its deeper meaning consciously, statements about 'assimilation' typically involve claims or assumptions regarding a much broader social reality than mere individual competency in a particular language.[461]

6.2.2 Language transfer and language shift

One approach to the issue, adopted by Statistics Canada in its analysis of census data, is to focus on changes in patterns of linguistic behaviour. StatsCan,

[461] Consider for instance Article 32 of the Copenhagen Document: Council on Security and Cooperation in Europe, 'Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE'.

which has deliberately shied away from using the term 'assimilation',[462] employs a metric it calls 'language transfer', which refers to 'the use of a language most often at home which is different from the mother tongue'.[463] Mother tongue, in this context, means the first language learned by a person in chronological terms, although it may no longer be their dominant language in many, or even all, contexts. According to StatsCan, language transfer is 'often a harbinger of future change. The language spoken most often at home is generally the language transmitted to the children as their mother tongue'.[464]

Assimilation, in this context, would therefore be a composite phenomenon, resulting from the interaction between a number of different choices or behaviours. The proximate cause would be the fact that a given individual—often because their life partner speaks another language—rarely uses their mother tongue at home. Since language use by one's family during childhood is critical to linguistic socialization and capacity-building, and thus tends to heavily influence linguistic behaviour later in life, children growing up in such households are less likely to use the domestically non-dominant language as adults, even if they have learned it while growing up. Over the course of a few generations, this process can result in the complete abandonment of a language by a given family. If the total number of speakers being lost in this way exceeds that of newcomers adopting the language, the population of that language group will diminish over time, eventually disappearing altogether.

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[462] Senate of Canada, 'Proceedings of the Standing Senate Committee on Official Languages. Second Session: Forty-First Parliament, 2013-14. Issue 9: Bill S-205, An Act to Amend the Official Languages Act (Communications with and Services to the Public)' (2014) 122.

[463] Statistics Canada, '2006 Census: The Evolving Linguistic Portrait, 2006 Census: Interprovincial Migration by Francophones' <http://www12.statcan.ca/census-recensement/2006/as-sa/97-555/p8-eng.cfm> accessed 8 January 2016.

[464] ibid.

This seems closer to what most people have in mind when discussing 'assimilation' in the Canadian context: the disappearance of a given linguistic or cultural trait from the social landscape. Unfortunately, the language transfer model is fairly crude, for it considers only changes at the individual level, and says little about the underlying forces that drive people to behave in this way. A related concept, 'language shift', developed as part of a broader theoretical framework by the sociolinguist Joshua Fishman, offers greater insight into what causes language transfer to occur.

In Fishman's terminology, language shift occurs when members of a non-dominant linguistic group 'shift' to using the dominant language over a period of several generations.[465] In many instances, this will involve minority language speakers shifting to a majority language, but the process can occur in the opposite direction in societies stratified along sociolinguistic lines—that is, where a linguistic minority occupies a dominant position in the political, economic or cultural spheres (as was the case with Quebec anglophones until the 1970s).[466]

As the term implies, language shift is not a sudden alteration in linguistic behaviour, but a slow process of accretion that usually accelerates as it advances.[467] It typically unfolds in three main stages. The first is a state known as 'diglossia', in which members of the minority or non-dominant group feel pressure to use the dominant language, especially in public or formal settings. The dominant language is thus a 'high' language, with the minority one being relegated to the private sphere. A state of diglossia is often reinforced by the use of the dominant language in the

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[465] Joshua A Fishman, *Reversing Language Shift : Theoretical and Empirical Foundations of Assistance to Threatened Languages* (Multilingual Matters 1991) 1.

[466] ibid 293.

[467] Fishman has developed an eight-point scale to describe the various stages of language shift. ibid 87–109.

delivery of public services, in education, and in the public sphere more generally. The net result of this state of affairs is to reduce the usefulness of the minority language, making it less attractive as an investment of cognitive resources.

This leads to the second phase, that of 'bilingualism', which in Fishman's usage denotes a situation in which there are decreasing numbers of minority language speakers and diminishing fluency amongst the younger generation, who use the language much less. This further exacerbates the underlying driver of linguistic change, which is the lesser usefulness of the minority language. In the final stage, the minority language is entirely replaced by the dominant language, with vestigial or 'folkloric' knowledge of certain words or expressions remaining.

Fishman's concept of language shift thus provides a more granular account of the process by which the population of a language group decreases over time. It also reframes the question of linguistic behaviour in terms of both individual and collective factors. Fishman's analysis draws our attention to certain *structural* features of the social landscape that heavily influence the decisions people make regarding which languages to learn and speak.

6.2.3 Ethnolinguistic vitality

The role of these structural factors is nicely captured by the concept of 'ethnolinguistic vitality' used in contemporary sociolinguistic research. It is now widely accepted in the social sciences that linguistic behaviour is closely connected to ethnic identity.[468] That connection has a strong bearing on the phenomenon of

[468] See generally : Joshua A Fishman, 'The Role of Ethnicity in Language Maintenance and Language Shift' in Stephan Thernstrom (ed), *Harvard encyclopedia of American ethnic groups* (Belknap Press of Harvard University 1980). As Fishman notes elsewhere, '[t]hat there should be some link between language and ethnicity is obvious, since the major symbolic system of the human species must be

language transfer or language shift, which the concept of ethnolinguistic vitality is meant to capture.

The transition from one language to another is what sociolinguists refer to as an 'inter-group phenomenon', as it occurs only in situations where two language groups share a given social space, creating opportunities for competition or conflict.[469] Because of this, 'cognitive processes relating to social categorization, identity, comparison, attitude formation, attribution, and second-language acquisition (among many others) have an important part to play' in shaping the overall linguistic dynamic within that social space.[470] In other words, one's ethnic identity, and one's perceptions regarding the place of one's ethnic group in the social world, will have a strong impact on the 'linguistic strategies' one adopts (i.e. decisions regarding which language to use where, when, in what accent or dialect, and how many resources to devote to language acquisition or development).

However, just as ethnicity is itself relational and contextual, the connection between ethnic identity and linguistic behaviour is quite variable. Sometimes the members of a linguistic minority will converge on the majority language, while in other cases they will not. The conceptual model of ethnolinguistic vitality (hereinafter 'EV') was first developed by Giles, Bourhis and Taylor in an attempt to capture the set of variables that explain why it is that, in some cases, members of a

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associated with the perceived dimensions of human aggregation': Fishman, 'Language and Ethnicity: The View from within' (n 403) 329.

[469] Howard Giles and Patricia Johnson, 'Ethnolinguistic Identity Theory: A Social Psychological Approach to Language Maintenance' (1987) 1987 International Journal of the Sociology of Language 69.

[470] ibid.

minority group tend to adopt the majority language, while in others they do not.[471] These variables tend to be structural or collective in nature, meaning that individual linguistic behaviour is, in the aggregate, the product of what we might describe as a social determinism.[472]

As defined by Giles et al., EV is a feature of groups, not individuals, and results from the interaction of several structural factors that influence the probability that a group will behave as a distinct and active entity in a context of inter-group contact—meaning, as a practical matter, that its members will tend to accentuate their ethnolinguistic characteristics rather than attenuate them. The original model identified three primary variables (or rather, categories of variables): group status, demographics, and institutional support. Group status is a function of social, economic and linguistic prestige enjoyed by the community. Demographic variables are primarily those relating to geographic concentration and relative size within a given territory, but can also include fertility and mortality rates, endogamy and exogamy rates, as well as geographic mobility.

Institutional support is determined by the degree and extent of informal and formal group representation in social institutions. It is closely related to (and in fact inspired by) the concept of 'institutional completeness' developed by sociologist Raymond Breton, which refers to the capacity of an ethnic community to provide the services required by its members, such as education, work, food, clothing, medical care or social assistance, as well as to offer employment and social micro-

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[471] Howard Giles, Richard Bourhis and Donald M Taylor, 'Toward a Theory of Language in Ethnic Group Relations' in Howard Giles (ed), *Language, ethnicity and intergroup relations* (Academic Press 1977). Se also: Giles and Johnson (n 469).

[472] Landry (n 10) 162.

environments in which their language is the dominant one.[473] The more a group possesses distinct institutions which it controls, or the more it can influence major social institutions, the greater will be its vitality and thus the higher will be the likelihood of its language being used.

According to the EV model, the overall vitality of a group is the product of the interaction of these three types of variables. Put succinctly, high-status groups that are densely settled and institutionally complete will maintain their own language and retain a distinct identity, while groups with low EV will tend to cease using their own language and assimilate into the dominant group.[474]

Thus, the EV model states that the existence of a group identity expressed and embodied by an institutional infrastructure—as well as the status of that identity—are, aside from raw demographics, the primary factors in language maintenance and linguistic reproduction by minority groups. At any given point in time, a person's linguistic behaviour is determined by the environment in which they were first socialized and the environment in which they now operate.[475]

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[473] R Breton, 'Institutional Completeness of Ethnic Communities and the Personal Relations of Immigrants' [1964] American Journal of Sociology 193; Richard J Joy, *Languages in Conflict : The Canadian Experience* (McClelland and Stewart 1972); Leo Driedger, 'Maintenance of Urban Ethnic Boundaries: The French in St. Boniface' (1979) 20 The Sociological Quarterly 89; Sheldon Goldenberg and Valerie A Haines, 'Social Networks and Institutional Completeness: From Territory to Ties' (1992) 17 The Canadian Journal of Sociology / Cahiers canadiens de sociologie 301.

[474] Something like the concept of ethnolinguistic vitality underpins certain aspects of education funding in Ontario. Some funding allocations are based in part on an 'assimilation factor', which provides funds inversely proportionate to the degree of local dominance by French. Thus, areas where less than 10% of the population are francophone would see funding multiplied by a factor of 1.5, while those where they are 50% or more would see it multiplied by 0.5. See for example: Section 31, Grants for Student Needs - Legislative Grants for the 2012-2013 School Board Fiscal Year, O Reg 136/12, adopted under Education Act, RSO 1990, c E.2.

[475] It is important to note that contemporary research employing the EV framework has also come to rely on the concept of *subjective* ethnolinguistic vitality. Further empirical research revealed that subjective perceptions regarding EV variables can be just as important in determining individual and collective behaviour as objective reality. In short, the belief that a group has a high degree of EV will itself contribute to increasing its vitality: Rodrigue Landry and Réal Allard, 'Ethnolinguistic Vitality: A Viable Construct' (1994) 108 International Journal of the Sociology of Language.

Linguistic behaviour is therefore a function both of a person's individual language skills *and* the structure of the social spaces she inhabits, as well as her beliefs about those spaces. These skills and beliefs will have been gradually fashioned by the lived experience of that person within the network of her linguistic contacts. Those experiences will themselves have been determined by the relative vitality of the community to which she belongs. Because of this, there is a powerful feedback loop between the social environment, on the one hand, and individual psychology as it pertains to language use, on the other.[476]

6.2.4 Assimilation as a collective process

All of this leads us to a number of preliminary conclusions. First, assimilation should not be conceptualized simply as a property or behaviour of individuals. When language transfer occurs, and when it leads to inter-generational language shift (ie language loss), this arises from the interaction between an individual's material, psychological and cognitive needs and the broader social structure in which she is operating. Although, like all social phenomena, it manifests at the level of individual behaviour, language transfer is in reality the product of a collective process. An individual who emigrates permanently to another country that speaks a different language is likely to adopt that language over the course of her lifetime—is likely, in other words, to assimilate. She may speak her native language to her children, but absent educational services in her mother tongue, or other social opportunities to use it, their competency is likely to be very limited. Partly because of this, and partly because of the language's low social valence, their psychological and cognitive

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[476] Anne Gilbert and others, 'L'environnement et la vitalité communautaire des minorités francophones: vers un modèle conceptuel' [2005] Francophonies d'Amérique 53.

interest in maintaining the language will also be low, meaning that they are unlikely to speak it to their own children. Indeed, this is the dominant pattern amongst non-anglophone and non-francophone immigrants to Canada. By contrast, a member of an institutionally embodied community living within its historical territory is much more likely to retain her language, use it in various settings, and pass it on to her children.

Assimilation is thus a two-sided coin. One the one hand, it can be described as the process whereby the institutional and psychological ties that connect an individual to her linguistic community are weakened and eventually dissolved, leading that individual to shift from being X-dominant to Y-dominant. On the other hand, one might equally say that assimilation is the process whereby such ties are created in the first place, as in childhood, or when an immigrant begins to integrate into a new host society.[477]

This helps to resolve the problem identified at the outset of this section, namely, whether mere knowledge of a language is sufficient to constitute assimilation. The answer is no. Assimilation is a complex psychological process whereby a person becomes a member of a sociocultural community, or gradually transfers to a different one. The process involves the creation (or transformation) of a belief structure regarding which language to use, where, and when, as well as a subjective sense of belonging. That process is itself largely driven by the interaction between individual traits and structural factors in the social environment.[478] Of course, the 'environment' of individuals is not limited to their immediate neighbourhood, but also includes their

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[477] In this connection, consider for example the evidence of sociolinguist Angéline Martel retained by the court in *Arsenault-Cameron v. Prince Edward Island*, 1997 CarswellPEI 6, [1997] P.E.I.J. No. 7, at para. 56, and the court's comments on her recommendations for education reform at paras. 61 and 62.

[478] Gilbert and others (n 476) 53.

workplace, places of training and education, sports, entertainment and other recreational venues, stores and other places of commerce, each of which constitutes a node around which their linguistic interactions crystalize. These nodes are themselves linked by the individuals that frequent them, which brings them into contact with one another, creating 'vectors' or 'corridors' for the transmission of influence—that is, ideas or representations of the social world, cultural norms, and a sense of solidarity.[479]

Assimilation, then, cannot be reduced to raw linguistic competency, nor can it be fully described in terms of individual linguistic behaviour. The latter is the outward manifestation of a set of psychological realities deeply entwined with one's sense of place and community. Given this, it easy to see why 'language shift' accelerates as the process advances. The more a linguistic community's social-institutional nexus weakens, the less prominent that community will be in its members' representations of the social world, and the less likely they will be to use the language, demand services in it, or teach it to their children.

6.3 Assimilation and the law

While rarely assembled together in a systematic way as part of a court's legal analysis, the ideas outlined above can be found peppered throughout the language rights case-law. For instance, a more or less complete, if very succinct, endorsement of the EV model can be found in *Assn. des parents francophones de la Colombie Britannique v. British Columbia*, a case dealing with the community's right to management and control under s. 23 of the Charter:

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[479] ibid 55–56.

> British Columbia Francophones are a linguistic minority in a vulnerable position. The 1996 census concludes that the assimilation of Francophones in this province remains the highest in Canada, tied with Saskatchewan. This is so despite an increase in the absolute number of Francophones since the last census. These facts demonstrate that if the Francophone community is to survive and be strong, they will require continued institutional resources directed to reinforcing their identity and enhancing the value of their language and culture in British Columbia.[480]

All three of the main EV variables can be found here: group status ('the value of their language and culture in British Columbia'), demographics (the small relative size of the Francophone population), and institutional support (the need for 'continued institutional resources'). More recently, the EV model—as presented by expert witnesses—was described in some detail and explicitly endorsed by the Supreme Court of the North West Territories in *Fédération franco-ténoise c. Canada (Procureur général)*.[481]

References to the main EV variables are especially common in decisions emphasizing that s. 23 of the Charter protects a right to homogeneous French-language schools, ie schools in which French is the dominant language both institutionally and as the medium of education. Such schools are strongly preferred to mixed or 'immersion' schools, in which both French and English might be used in equal measure and/or which children from the majority group are allowed to attend in order to learn the minority language. The psychosocial dynamics and network effects of a linguistically homogeneous institutional setting have been held by the courts to

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[480] *Assn des parents francophones de la Colombie Britannique v British Columbia* 1998 CanLII 3969 (BC Sup Ct), para. 23.

[481] *Fédération franco-ténoise c Canada (Procureur général)* 2006 NWTSC 20, paras. 592-622, 625. The same was done, in somewhat less detail, in *Association des Parents ayants droit de Yellowknife et al c Procureur Général des Territoires du Nord-Ouest et al* 2012 NWTSC 43, paras. 51-59, based on testimony from the same expert, Dr. Rodrigue Landry. However, the latter decision was overturned on appeal: *Northwest Territories (Attorney General) v Association des parents ayants droit de Yellowknife* 2015 NWTCA 2 (leave to appeal to the SCC denied: 2015 CanLII 69437).

be especially important to halting or reversing assimilation in vulnerable Francophone populations.[482]

In the balance of this chapter, I would like to explore in greater detail the way in which the courts have engaged with three specific aspects or implications of the EV model, namely: (1) that assimilation is not simply a matter of personal choice, but rather is caused by social-structural factors beyond individual control; (2) that, among these, the psychosocial relationship to language is an especially important factor; and (3) that institutions contribute to linguistic vitality on both a 'functional' and a 'symbolic' level. I choose to focus on these points for at least two reasons. First, because they are critical to the underlying conceptual architecture of the CLRS and yet remain poorly understood by legal discourse. Second, because they are particularly important to understanding the rationale behind certain types of collective rights claims made by MFCs, and which are likely to come to the forefront as litigation under s. 41 of the OLA begins in earnest.

6.3.1 Assimilation is not simply a matter of personal choice

It is perhaps no surprise that the courts have been quite ready to acknowledge—in their own way—that assimilation is not simply the product of individual choice in a free market of linguistic options. Nevertheless, the point bears exploring in some depth, as it has considerable implications for the discussion to come regarding the nature of substantive equality in a language rights context, and the sort of collective rights that OLMCs can plausibly claim under s. 41.

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[482] See, for example : *Gosselin (Tutor of) v Quebec (Attorney General)* [2005] 1 SCR 238, para. 31; *Arsenault-Cameron v Prince Edward Island* [1997] PEIJ No. 7 (PEI Sup Ct), paras. 61-62; *Perron v Perron* 2012 ONCA 811 (OCA), paras. 18-21, 28-29; *Doucet-Boudreau v Nova Scotia (Department of Education)* [2000] NSJ No. 191 (NS Sup Ct), paras. 89-90, 93, 204-206; *Société des Acadiens du Nouveau-Brunswick Inc v New Brunswick Minority Language School Board No 50* 48 NBR (2d) 361 (NB Sup Ct), para. 34.

For the sake of simplicity, I will concentrate on a single case, the *Ontario Education Reference* (1984),[483] a reference to the OCA on the question of whether existing provincial legislation was compatible with the (at the time, recently-enacted) Charter. The court's reasons in that case engage quite thoroughly with the fact that assimilation is caused by social-structural factors beyond individual control, and thus provide a good illustration of how the courts have been willing to acknowledge the role of these factors. Moreover, while not often directly cited today, the *Reference* had a strong influence on a number of other courts then grappling with how to interpret s. 23, including, ultimately, the SCC in *Mahe*, making it a particularly important decision in the overall development of the law in this area.

In the *Reference*, the OCA held (as the SCC later would) that the purpose of s. 23 was to halt and reverse the 'assimilation' of MFCs. The term is never defined, and so its meaning emerges first and foremost from the historical narrative sketched out by the court in its attempt to pin down the underlying objective behind the decision to constitutionalize official language education rights in 1982. That narrative makes it quite clear that assimilation is not simply a matter of individual language choice or a statistical artefact generated by aggregating individual choices. Rather, it is a much broader phenomenon in which the institutional and cognitive foundations of a distinct social order are being eroded.

The starting point for the court's historical narrative is itself highly suggestive. That narrative is anchored in the Quebec Act, 1774 and the changes it brought to the legal and institutional environment imposed by the Royal Proclamation of 1763. As I already explored these developments in Chapter 2, I will not rehearse them here. Suffice it to say that the OCA described the Proclamation as a 'legislative effort at

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[483] *Reference re Education Act of Ontario and Minority Language Education Rights* (n 154).

assimilation',[484] and then immediately contrasted it with the Quebec Act, 1774, which, by contrast, 'laid down a new principle of empire "when it was conceded that the French Canadians could be British without becoming English"'.[485]

The decision to begin the historical narrative here, and to frame the discussion of assimilation in terms of the contrast between these two instruments, is quite striking. As I explained in Chapter 2, the Proclamation and the Quebec Act, 1774 stake out two distant poles in the spectrum of possible language policies. The first aimed at the total absorption of *Canadien* society and culture, while the second sought to ensure their survival as a means of preventing the *Canadiens* from joining up with the American colonies to the south. In neither case was this understood to be a matter of individual choice. Both policies were aimed at the broader political, legal and institutional foundations of *Canadien* society, what Durham described as its distinct 'nationality'.

That the court anchored its purposive analysis of s. 23 to the differences between these two instruments is one indication that it understood the purpose of s. 23 as being to buttress the structural foundations of the Francophone community. This theme was then further developed as the historical narrative unfolded. Thus, the court highlighted the direct causal relationship between Franco-Ontarians' loss of institutional autonomy in education and their rapid assimilation.[486] That loss, which occurred chiefly in the period between the 1860s and the 1920s, also resulted from a broader movement in social and public policy aimed at transforming Canada into an

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[484] *ibid,* para. 44.

[485] *ibid,* para. 44. In making this statement, the court was relying on the work of Mason Wade, which has since come under heavy criticism: Power, Larocque and Bosse (n 30) 28–29. Nevertheless, this particular point appears consistent with current historical scholarship.

[486] *Reference re Education Act of Ontario and Minority Language Education Rights* (n 154), paras. 131, 133.

ethnically homogeneous outpost of British society.[487] The goals of that movement were analogous in many respects to what the Royal Proclamation had sought to achieve.

The most notorious of these policies in Ontario was Regulation 17, which effectively banned the use of French in public schools in the province. As the OCA notes, that policy was the brainchild of a 1912 report by a special commission, which recommended the 'official assimilation of francophone children into the English school system'.[488] That recommendation was the logical conclusion of findings made by an earlier commission, which had complained that 'anti-British religion and history were being taught in French public elementary schools' and that 'a low standard of English was being imparted'.[489] Put another way, the institutional autonomy of the Francophone school system was contributing to the preservation of a social boundary between the French and English communities, and that boundary stood in the way of the desired social order, in which there would be only one (English-speaking) community.

In short, the phenomenon that the word 'assimilation' was meant to designate was the product of a deliberate policy aiming to break down the institutional and social-symbolic discursive formations that sustained the ethnolinguistic boundary between French Canadians and the English-speaking majority. Because of this, the OCA concluded that s. 23 needed to be interpreted in such a way as to confer on the

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[487] 'Historically, nation building in its symbolic-cultural dimension was oriented toward the construction of a British-type of society in Canada. This was to be reflected in the cultural character of the political, religious, educational, and other public institutions, in the language of society, in the customs, mores, and way of life, and in the symbols used to represent the society and its people. In that sense, English-Canadian nationalism was just as ethnic or cultural as French-Canadian nationalism, although both revealed considerable differences in content.' Breton, 'Symbolic Resources and Status Inequality' (n 448) 62.

[488] *Reference re Education Act of Ontario and Minority Language Education Rights* (n 154), para. 58.

[489] *ibid,* para. 56.

French-speaking minority those rights that would enable it to preserve or rebuild its institutional and social-symbolic foundations. This was one of the main reasons why the court concluded—six years before *Mahe*, on which it had a decisive influence—that s. 23 included a right to management and control of minority language schools.

6.3.2 Psychosocial attitudes to language: the symbolic order of society

As I noted above, one of the main determinants of ethnolinguistic vitality is the relative status of the group's language. There are some obvious ways in which the law can affect the relative position of a language in society, such as granting it official status. But the social status of a language depends upon much more than whether or not the label 'official' is applied to it. The state is but one actor in society (albeit a powerful one), and it is not directly present in all of the 'fields'[490] from which the status of a language is derived.

As we will see in a moment, the courts have in fact been alive to this reality, at least in certain contexts. However, in order to fully appreciate the nature of the problem, and the significance of what the courts have done, it is necessary to examine more closely the ultimate source of group status, what sociologists refer to as the symbolic order of society.

The symbolic order is comprised of and/or determines the values and norms that govern interactions within a given social space, and thus controls the allocation of status to individuals and groups. All societies consist in some sense in a symbolic order of this kind. As Breton puts it:

> The formation of societies consists, at one level, in the construction of a symbolic order. This construction entails, first, the definition of a collective identity which, with time, becomes articulated in a system of ideas as to who

[490] Cf. Bourdieu (n 358).

> we are as a people. This identity is represented in the multiplicity of symbols surrounding the rituals of public life, the functioning of institutions, and the public celebration of events, groups and individuals.[491]

The symbolic order, while being a collective phenomenon, also manifests (and to some degree resides in) individual identities. According to Greenfeld and Eastwood, whose definition of identity I cited in Chapter 5, a person's identity consists of a 'cognitive map' regarding one's place in the social world, and is thus 'the image of the social order'.[492] Identities are therefore a reflection and a constituent element of the symbolic order of society, which is itself an emergent phenomenon arising from the patterns of social interaction caused by, and embodied in, such individual cognitive maps.

The symbolic order gives rise to—or is the field of action for—what Bourdieu calls 'symbolic power', ie power over, and flowing from, the means of symbolic production. Bourdieu illustrates this using the language policy of post-Revolutionary France, which declared French to be the sole official language of the Republic. As only a relatively small minority of the population even spoke French at the time,[493] this was intended above all as an instrument for shaping the symbolic order of the new political society then under construction. The revolutionary intelligentsia imposed its own dialect and idioms—ie bourgeois Parisian French—as the only legitimate language of the state. In doing so, it sought to secure for itself greater influence over the machinery of government, and also ensured that succeeding generations would be 'produced' in its cultural mould, thereby unifying the linguistic

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[491] Breton, 'Symbolic Resources and Status Inequality' (n 448) 59.

[492] Greenfeld and Eastwood (n 412) 256.

[493] Abbé Grégoire's estimate in 1790 placed the figure of those who spoke French with any fluency at no more than 10%. French was the dialect of the region around Paris and had thus long been the language of royal power, but most people spoke other languages or dialects which were not mutually intelligible (or only partly so). See generally: Stephen May, *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language* (2nd ed, Routledge 2012) 166–167.

and cultural space governed by the new political institutions.[494] To borrow Eugen Weber's famous phrase, they turned (*patois*-speaking) peasants into Frenchmen.[495]

This was, in effect, what both the Royal Proclamation and Lord Durham's legislative union sought to achieve. By decreeing that English—as the only language of politics and law—would have a near-monopoly on symbolic power, the British expected that the *Canadiens* would naturally gravitate towards it and become good British subjects in their own right. Regulation 17 had a similar aim. It sought to use the education system as a way of rearranging the symbolic order of Franco-Ontarian society in such a way as to downgrade the prestige and usefulness of French language and culture, limit its capacity for self-reproduction, and thus bring about linguistic and cultural consolidation (i.e. assimilation into the British Canadian social system).

However, politics is not the only source of symbolic power. In a market-based society, business is responsible for vast amounts of symbolic production through the form of advertising and other sorts of commercial speech. This presents a major challenge for French in Canada, which is a tiny minority within the broader English-speaking North American market. The lack of economies of scale makes certain cultural products, like books and television programs, inherently more expensive. And the rigid cost-benefit analysis imposed by the marketplace makes businesses

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[494] 'L'imposition de la langue légitime contre les idiomes et les patois fait partie des stratégies politiques destinées à assurer l'éternisation des acquis de la Révolution par la production et la reproduction de l'homme nouveau… Il serait naïf d'imputer la politique d'unification linguistique aux seuls besoins techniques de la communication entre les différentes parties du territoire et, notamment, entre Paris et la province, ou d'y voir le produit direct d'un centralisme étatique décidé à écraser les 'particularismes locaux'. Le conflit entre le français de l'intelligentsia révolutionnaire et les idiomes ou les patois est un conflit pour le pouvoir symbolique qui a pour enjeu la *formation* ou la *ré-formation* des structures mentales. Bref, il ne s'agit pas seulement de communiquer mais de faire reconnaître un nouveau discours d'autorité, avec son nouveau vocabulaire politique, ses termes d'adresse et de référence, ses métaphores, ses euphémismes et la représentation du monde social qu'il véhicule et qui, parce qu'elle est liée aux intérêts nouveaux de groupes nouveaux, est indicible dans les parlers locaux façonnés par des usages liés aux intérêts spécifiques des groupes paysans' : Bourdieu (n 358) 74.

[495] Eugen Weber, *Peasants into Frenchmen : The Modernization of Rural France, 1870-1914* (Stanford University Press 1976).

reluctant to use more than one language in their signs and advertising. At times or in places where French has suffered from low social status,[496] these market imperatives have combined to deprive the Francophone community of a major source of symbolic power and capital.

Because of this, the courts have been willing to countenance legal interventions intended to buttress the symbolic power of French in this sphere, even though this involves imposing certain limits on individuals' freedom of speech. In *Ford*, for instance, the SCC partially upheld the constitutionality of Quebec's Charter of the French Language (CFL), the overarching aim of which was to make French the common language of the public sphere.[497] The court's reasoning under the s. 1 analysis shows that it was willing to countenance the idea that legislative intervention may be necessary in order to alter the symbolic order of society for the purpose of supporting a minority language.

The CFL was held to violate the right to freedom of expression, protected by s. 2(b) of the Charter. Certain provisions of the CFL restricted or eliminated the ability of businesses to use a language other than French in commercial signage. Despite the fact that French was the first language of over 80% of the population, English was very often the only language used in commercial signs, especially in

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[496] Until the 1970s, French suffered from low socio-economic status, even in Québec, where it is spoken by a large majority of the population (consider *Ford v Quebec (Attorney General)* 1988 2 SCR 712, para. 72; see generally: 'Report of the Royal Commission on Bilingualism and Biculturalism - Book III: The Work World' (Government of Canada 1969)). Since the enactment of the Charter of the French Language in Québec, the situation has changed considerably, although English continues to benefit from the prestige and benefits associated with its majority status both in Canada in the United States. Elsewhere in Canada, French continues to struggle to make its presence felt in the marketplace (André Leclerc, 'Nouvelle économie et développement: les enjeux de l'intégration à l'économie pour la francophonie canadienne' in Joseph Yvon Thériault, Anne Gilbert and Linda Cardinal (eds), *L'espace francophone en milieu minoritaire: nouveaux enjeux, nouvelles mobilistions* (Fides 2008) 241. Even in Ottawa, the seat of the officially bilingual federal government, French is rarely seen on commercial signs outside certain neighbourhoods with very high concentrations of Francophones.

[497] *Ford* (n 359).

Montreal and western Quebec, even by businesses owned by Francophones. One of the aims of the CFL was to force an adjustment in the relative predominance of English and French in this context. However, the court ruled that a restriction on the language one could use was a violation of freedom of speech, as one's choice of language is itself a form of expression.

Nevertheless, the court was willing to uphold a measure of this kind[498] as being a reasonable limit on s. 2(b) rights under s. 1 of the Charter. The Quebec government had sought to justify the violation on the grounds that it was necessary in order to ensure the continued vitality of the French language. To this end, it submitted a large quantity of sociolinguistic research regarding the vulnerability of the French language in Canada. The focus of concern was what it called the '*visage linguistique*' of Quebec (literally, its 'linguistic face'), which was disproportionately English in the private/commercial sphere. This phenomenon, it was argued, was both a symptom and a cause of a social hierarchy in which English was predominant, being the language of social and economic success. As a result, immigrants overwhelmingly chose to assimilate into the minority English-speaking community, rather than the majority French-speaking one, and Francophones learned English in large numbers while anglophones remained unilingual.[499] In other words, the ethnolinguistic vitality of the French-speaking community was being diminished by the fact that the social status of its language and the degree of institutional support it

[498] I say 'of this kind' because the actual restrictions contained in the CFL were struck down for being overbroad. The court ruled that a law requiring the use of French, even one that required French to be predominant in all commercial signs, would pass muster under s. 1. However, it held that a total ban on the use of other languages was unnecessary to achieve the objectives the CFL sought to attain: *Ford v Quebec (Attorney General)* 1988 2 SCR 712, para. 73.

[499] *Ford* (n 359), para. 72.

enjoyed (especially in the private economy) were too low. In the long term, this threatened the very survival of that community.[500]

Based on this evidence, the SCC concluded that the CFL had a serious and legitimate objective, thus meeting the first prong of the proportionality test.[501] That aim, of course, was the prevention of assimilation. More specifically, the court held that it was legitimate for the government to intervene in the way it had because 'the reality of Quebec society is communicated through the "visage linguistique"'.[502] Put another way, the 'linguistic face' of Quebec was an important indicator of the symbolic order of society, which, in its present form, was not configured in such a way as to provide sufficient symbolic resources (or, to use Bourdieu's term, 'symbolic capital') to the French-speaking community. The prevention of assimilation, in other words, required intervention on a macro-social or collective level, as it could not be described as a consequence of free individual choice.[503] As the Supreme Court itself put it in a later case, citing the underlying themes of the *Ford*

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[500] The birth-rate amongst Francophones had collapsed to below replacement level in the 1960s, while immigrants, who represented a growing share of population growth, overwhelmingly chose to integrate into the English-speaking social system and send their children to English schools. If these trends were maintained, the province would eventually reach a tipping point beyond which the French language would no longer be viable. These same factors had been identified by Camille Laurin, the minister responsible for drafting the CFL, in his white paper that accompanied Bill 101 : 'Si l'évolution démographique du Québec se maintient, les Québécois francophones seront de moins en moins nombreux; Les immigrants marquent une forte tendance à s'intégrer au groupe minoritaire anglophone; Dans l'entreprise, le français est, dans une très large mesure, la langue des petits emplois et des faibles revenus; L'anglais est la langue des affaires; La Confédération canadienne défavorise les francophones, notamment au Québec; Beaucoup de Québécois sont insatisfaits de la qualité de la langue française au Québec; Nos attitudes collectives sont ambiguës; Pourtant existe une volonté de redressement.' Quoted in Jean Claude Corbeil, *L'embarras des langues: origine, conception et évolution de la politique linguistique québécoise* (Québec Amérique 2007) 181.

[501] *Ford* (n 359), para. 73. The court ultimately struck down the provisions in question, on the grounds that a total ban on the use of English was disproportionate and unnecessary. It suggested instead a measure that would require both the presence and the 'marked' predominance of French in all signs, while allowing the use of other languages. Quebec at first invoked the notwithstanding clause to preserve the CFL in its original form, but eventually amended the CFL to reflect the court's proposal.

[502] *ibid,* para. 73.

[503] One could also describe the court's reasoning in terms of collective rights. See, for example : Réaume, 'The Group Right to Linguistic Security: Whose Right, What Duties?' (n 54) 135.

decision: 'These legislative schemes govern situations in which not only individual rights, but also the existence of language communities and the manner in which those communities perceive their future, are in issue'.[504]

A very similar set of issues was raised in *Galganov v. Russell (Township)*, nearly 25 years later.[505] In this case, an Ontario township had adopted a municipal by-law requiring all commercial signs to be in both English and French. As in *Ford*, he Ontario Court of Appeal held that the by-law breached the right to freedom of expression, but that the measure was justified under s. 1. It held that the by-law was 'a symbolic recognition of the equality of the French and English languages and cultures', which, amongst other things, 'indicates that the French language has value in the community outside of schools and family life', and would therefore promote the use of French, which was otherwise quite vulnerable.[506]

The effect of this decision is to reinforce the notion that language rights measures [507] should be understood, amongst other things, as alterations to, or safeguards regarding, the symbolic order of society. The fact that such measures are, seemingly at least, insulated from Charter scrutiny,[508] is a further indication of the

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[504] The court went on to add: 'Owing to the existence of these two levels of social and legal relationships, the establishment of rules to govern language rights is a sensitive issue. First, the members of the minority communities and their families, in every province and territory, must be given the opportunity to achieve their personal aspirations. Second, on the collective level, these language issues are related to the development and existence of the English-speaking minority in Quebec and the French-speaking minorities elsewhere in Canada'. *Solski* (n 32), paras. 4-5.

[505] *Galganov v Russell (Township)* 2012 ONCA 410 (OCA), paras. 35, 38.

[506] *ibid,* paras. 35, 38.

[507] I describe the by-law as a language rights measure, even though it did not create any actionable language rights as such, because it is clearly aimed at protecting a vulnerable linguistic community. Furthermore, as (per the trial judge) an exercise of the Charter s. 16(3) power, it forms part of the broader CLRS, as I defined it in the introduction to this thesis.

[508] The trial judge arguably held that the measure was insulated from Charter scrutiny on freedom of speech or other grounds, as it was held to be an exercise of the power conferred by s. 16(3) of the Charter. The latter provides that '[n]othing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French'. In Lalonde, which I will discuss in greater detail below, the Ontario Court of Appeal had held that the effect of the effect of s.

fundamental importance of these symbolic concerns. In this context, it is interesting to note that one can file a complaint about the 'status' an official language is afforded within or by a federal institution with Official Languages Commissioner, which can lead, ultimately, to an application for a judicial remedy before the Federal Court.[509]

6.3.3 Institutions and linguistic vitality

The symbolic dimension of language policy also explains much of the emphasis placed on institutions in the case-law. As I outlined above, institutions are a critical component in the ethnolinguistic vitality of any linguistic community. The latter's degree of institutional completeness will be a major determining factor in its ability to sustain itself over time. However, institutions make at least two distinct, legally recognized contributions to linguistic vitality: (1) as *loci* for the use or teaching of the language, they contribute on what might be described as a 'functional' level; and (2) as symbols of the community, they are themselves constituent elements of the symbolic order in their own right.

This idea is present in much of the s. 23 case-law, but received its most explicit and forceful articulation in *Lalonde v. Ontario (Commission de restructuration des services de santé)*, where the sociological properties of institutions and their relationship to constitutional principles were analysed at considerable length.[510] The case arose as a challenge to a decision by the Health Services

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16(3) was to protect legislative measures pursuing its stated objective from scrutiny under the Charter. If, as the trial judge held, and as seems quite evident, the by-law in question benefits from s. 16(3) protection, then it would be completely unnecessary to engage in the s. 1 analysis, for an exercise of the power conferred by s. 16(3) cannot, by definition, breach a Charter right, whether under s. 2(b) or s. 15 (equality rights)

[509] Section 58(2) of the OLA.

[510] *Lalonde v Ontario (Commission de restructuration des services de santé)* 1999 CarswellOnt 4167 (Ont Div Ct); *Lalonde (appeal)* (n 235).

Restructuring Commission to close (or, later, to radically downsize) an important French-language hospital in Ottawa (Montfort) in order to save money. Both the Divisional Court and the OCA struck down this decision as being contrary to the unwritten constitutional principle of the protection of minorities, which was held to prohibit unwarranted interference with MFC institutions.[511]

In both sets of reasons, we see assimilation described as a collective process resulting from weak ethnolinguistic vitality, which in turn is caused by the gradual unraveling of the institutional networks needed to sustain it.[512] We also see the value of major institutions like Montfort Hospital described both in terms of their direct or immediate sociolinguistic footprint, and of their impact upon the way in which members of the Franco-Ontarian community conceive of the symbolic order of society.[513] Finally, we see language rights defined not only as discrete legal entitlements bearing upon the means of communication, but as the embodiment—or perhaps an epiphenomenon of—deeper structural features of the Canadian constitution,[514] which define the political community as a composite of (at least) two language groups, neither of which has a legitimate monopoly on the symbolic capital of the shared political unit.

Much of this, especially the first two points, is stated quite plainly in both judgments, which, for present purposes, also had the great merit of being based upon substantial expert evidence relating to the sociological and sociolinguistic

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[511] The case arose out of a judicial review application requesting that the Divisional Court quash a decision of the Health Services Restructuring Commission, an entity set up to restructure the province's entire health care system following major cuts to federal transfer payments that put a great deal of pressure on provincial budgets. As part of its cost-cutting measures, the Commission had wanted to close down Montfort Hospital, the only entirely (i.e. linguistically homogeneous) French-language hospital outside Quebec, or at least drastically reduce it in size.

[512] *Lalonde (Div Ct)* (n 510), para. 14-15.

[513] *ibid,* para. 66-7; *Lalonde (appeal)* (n 235), paras. 69-71.

[514] *Lalonde (Div Ct)* (n 510), para. 68; *Lalonde (appeal)* (n 235), paras. 79-88, 103-114, 125.

characteristics of Montfort. Because of this, the details of the court's reasoning need not be rehearsed here. However, the last point requires some further explanation.

The decision in *Lalonde* has attracted attention even outside language rights circles for its extensive reliance on unwritten constitutional principles—specifically, the principle of respect for and protection of minorities.[515] Unwritten principles are a long-standing feature of the Canadian constitution, but they were given particularly detailed and authoritative expression by the Supreme Court in the *Reference re Secession of Quebec,*[516] which was decided at around the same time the legal strategy for *Lalonde* was being developed. However, they had not often been used as a free-standing basis to strike down administrative action, being viewed primarily as an aid to constitutional interpretation. The ruling in *Lalonde* was therefore noteworthy as one of the first major instances of this occurring.[517]

For present purposes, the most interesting aspect of the Court of Appeal's decision was the way in which it conceived of the relationship between the unwritten principle of minority protection and the broader CLRS. The government of Ontario had argued that the FLSA and the Charter set out a 'complete code' of language rights, and that the Applicants were essentially asking the court to create new constitutional rights out of whole cloth. On this view, the unwritten constitutional principle of minority protection was effectively defined or exhausted by those minority rights that had been constitutionally recognized, and could therefore not be

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[515] See, for example : Jean LeClair, 'Canada's Unfathomable Unwritten Constitutional Principles' 27 Queen's Law Journal 389, 413–416.

[516] *Secession Reference* (n 63).

[517] LeClair (n 515) 413. On the one hand, they were used to inform the limits on the government's statutory power under the French Language Services Act to reduce the number of services offered in French by institutions protected by the Act (*Lalonde (appeal)* (n 235), paras. 127-169). On the other, they were held to restrict the otherwise very broad discretion of the Commission under its enabling statute (*ibid,* paras. 170-187).

used to extend them. However, the court conceived of the relationship in a different way. Its position was that legal and constitutional language rights are a sort of epiphenomenon, being the expression and result of a deeper commitment—which takes the form of an unwritten structural principle of the constitution.

While some of the content of that commitment can be inferred from its textual instantiations, the latter do not constitute a boundary on the extent of its normative force. In more prosaic terms, we might restate this as meaning that, insofar as the unwritten constitutional principle has a direct legal effect (as in the case at bar), the meaning and scope of that principle are not limited by the fact there exists a list of textually enumerated rights elsewhere.[518] The logic is in a sense analogous to that employed by the US Supreme Court in *Griswold v. Connecticut*,[519] in which certain textually embodied constitutional rights were held to be the instantiation of an underlying yet unstated right to privacy.

Viewed in this way, unwritten constitutional principles form a bedrock of sorts, providing a foundation for understanding the ultimate function and purpose of textually expressed legal and constitutional rights. As the Court of Appeal put it, 'the

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[518] Consider, for instance, the way in which the Superior Court relied on this unwritten principle to buttress its interpretation of municipal law and the FLSA in *Canadians for Language Fairness v Ottawa (City)* 2006 CarswellOnt 6075, para. 81 : 'The Applicant argues that Ontario is not a bilingual province. While that is correct, the preservation of the rights of minorities, including the protection of French language and culture was a central concern in the Confederation bargain. The respect and protection of minority rights within this country was made clear by the Supreme Court of Canada in *Secession Reference* (n 63). at para. 81: "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".'

[519] *Griswold v Connecticut* 381 US 479 (SCOTUS).

principle of respect for and protection of minorities is a fundamental structural feature of the Canadian Constitution that both explains and transcends the minority rights that are specifically guaranteed in the constitutional text'.[520]

In light of this, it is especially interesting that the court placed so much emphasis on the importance of institutions, and institutional autonomy, when describing the content of that principle:

> We agree with the Divisional Court … that the language and culture of the francophone minority in Ontario "hold a special place in the Canadian fabric as one of the founding cultural communities of Canada and as one of the two official language groups whose rights are entrenched in the Constitution". If implemented, the Commission's directions would greatly impair Montfort's role as an important linguistic, cultural and educational institution, vital to the minority francophone population of Ontario. This would be contrary to the fundamental constitutional principle of respect for and protection of minorities.[521]

The importance of institutions had of course been recognized before on numerous occasions, especially in the context of s. 23 litigation. What is noteworthy about the OCA's statements in *Lalonde*, however, is that they suggest that the existence of a Francophone institutional network is embedded in the very superstructure of the Canadian constitutional system as a fundamental value.[522] This has potentially far-reaching implications for the interpretation of certain language rights, such as ss. 16.1 and 20 of the Charter, or s. 41 of the OLA, as it suggests that exercises of public power governed by those provisions must be respectful and even supportive of that network and the symbolic capital it embodies.

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[520] *Lalonde (appeal)* (n 235), para. 114 (emphasis added).

[521] *ibid,* para. 181 (emphasis added).

[522] Indeed, that would seem to be a logical implication of the Supreme Court's comments regarding the origins and *raison d'être* of the federal principle in the Constitution.

6.4 Conclusion

My aim in this chapter was two-fold: (1) to further reinforce my claim that a meaningful discussion of language rights requires that we use the vocabulary of collectivitilles, by (2) showing that linguistic behaviour is driven to a significant degree by collective or social-structural factors that cannot be reduced to individual choice. This also had the added virtue of fleshing out the constituent elements of a linguistic community from an empirical standpoint, which provides some insight into the collective interests that do or should benefit from legal protection under the CLRS. The concept of assimilation provided the ideal entry-point for this discussion, for it is both a key concept in the language rights case-law, and a critically important phenomenon to the survival and flourishing of language groups.

At this point, the major elements of my doctrinal and empirical account of linguistic minority communities are largely complete. I turn now to the final piece of the s. 41 puzzle, namely, the normative principle of substantive equality. I will explore what equality means in the context of the CLRS, and how this might affect the interpretation of s. 41 going forward.

CHAPTER 7 EQUALITY FOR LINGUISTIC MINORITY COMMUNITIES

7.1 Introduction

7.1.1 The need for a concept of equality

As the controversy surrounding the 'political compromise' doctrine showed, the normative basis ascribed to language rights can and will have a far-reaching impact on their interpretation.[523] For present purposes, the normative concept most urgently in need of explication is the concept of (prescriptive) substantive equality, as it applies to a language rights context. As with all other parts of the CLRS,[524] the underlying purpose of s. 41 is to advance the principle of substantive equality between English and French.[525] Language rights in Canada do not exist merely to bring about changes in the sociolinguistic environment for their own sake, or as the price of political peace and stability. They are motivated by a deeper normative commitment to equality between the two largest linguistic communities. The duty to take positive measures to enhance the vitality of OLMCs pursuant to s. 41 of the OLA is merely an instantiation of this broader commitment.

While this much may be evident, what this sort of equality means in practice, however, is far from clear. Equality is a very broad concept, and one that is both comparative and contextual by nature, such that it has no inherent or necessary

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[523] See Chapter 5, section 5.2.2.

[524] *Beaulac* (n 15), para. 22. See Chapter 2 for a thorough discussion of the interpretive principles applicable to language rights.

[525] Ss. 2(a) and 2(b) of the Official Languages Act. A fuller implementation of the principle of equality was also an important underlying motivation behind the introduction of the 2005 amendments to Part VII. See the comments of Senator Gauthier : Senate of Canada, 'Legal and Constitutional Affairs, Issue 23' (n 21) 7–9. See also the original draft of the bill, which included a direct reference to s. 16(1) of the Charter : Jean-Robert Gauthier An Act to amend the Official Languages Act (fostering of English and French) (n 37).

content.[526] As McLachlin CJ has noted, '[t]he language of equality is so open and general that it is difficult to assign it precise legal meaning.'[527]

Indeed, to ask whether two people or two communities are 'equal' in the abstract would be meaningless. One must first specify a quality, a good or a social context in relation to which equality is to be measured in order for propositions regarding it to be intelligible.[528] In other words, one must identify what some call the 'domain'[529] or the 'space'[530] of equality before one can give it real meaning. This implies that any particular definition of equality will necessarily be parasitic upon a broader normative framework that specifies which types or areas of similitude are considered morally salient.[531]

Equality is usually said to be either 'formal' or 'substantive'. Formal equality refers to equality of treatment, while substantive equality typically implies some sort of equality of results—meaning, as a practical matter, that the state may be required to provide differentiated rather than identical treatment. At one time, it might have been said that the language rights case-law employed both a formal and a substantive conception of equality, depending on the context. The Trilogy took a strictly formal approach to construing language rights in a judicial and legislative setting, while the *Mahe* line of cases relied on a more substantive, results-oriented conception of

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[526] Griffith (n 39) 7.

[527] Beverly McLachlin, 'Equality: The Most Difficult Right' (2001) 14 Sup. Ct. L. Rev. 17, 17.

[528] 'Formal and proportional equality is simply a conceptual schema. It needs to be made precise — i.e, its open variables need to be filled out. The formal postulate remains quite empty as long as it remains unclear when or through what features two or more persons or cases should be considered equal.' Stefan Gosepath, 'Equality' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2011, 2011). See also: Michel Doucet, 'Le concept de l'égalite dans l'arrêt Lalonde et al c. Commission de restructuration des services de santé' (2001) 4 Revue de la Common Law en Francais 273, 277.

[529] Griffith (n 39) 8.

[530] Amartya Sen, *The Idea of Justice* (Belknap Press of Harvard University Press 2009) 292.

[531] Cf. Griffith (n 39) 9; McLachlin (n 527) 20.

education rights. Since *Beaulac*, however, the SCC has held that language rights are subject to a single, unified conception of equality, which must be analysed from a substantive perspective in keeping with the standard applicable in general discrimination law.[532] Language rights must therefore be interpreted with a view to the social context in which they are meant to operate, and which they are intended to alter.

The question remains, however, as to which elements of social context are morally relevant, and why. That question is particularly pressing in the context of s. 41, given the broad range of circumstances to which it applies. Discussion of these issues in the case-law and Parliamentary debates has been quite limited. On their own, these materials are incapable of generating a satisfactory account of equality in a language rights context. Scholarly analysis dealing specifically with equality under the CLRS is also quite limited.[533] Indeed, not long ago, one of the leading scholars on language rights in Canada lamented the near-total absence of serious theoretical work on these rights.[534]

Language policy and language rights raise a complex tangle of normative issues, a comprehensive account of which is beyond the scope of this study. However, as I just explained, some engagement with the topic is both necessary and desirable. In order to develop the rudiments of such an account, I have turned to the

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[532] *Beaulac* (n 15), para. 22; *DesRochers v. Canada (Industry)* (n 110), para. 31.

[533] A few articles have been published on the topic, but none which examines the question at issue here in a systematic way. : François Boileau, 'L'égalité du français et de l'anglais via le développement des communautés' in André Braën, Pierre Foucher and Yves Le Bouthillier (eds), *Languages, constitutionalism and minorities = langues, constitutionnalisme et minorités* (LexisNexis Butterworths 2006); Bastarache, Michel, 'Le principe d'égalité des langues officielles' in Michel Bastarache (ed), *Les droits linguistiques au Canada, 3ième édition* (Yvon Blais 2013); Michel Bastarache, 'L'Égalite réele des communautes de langue officielle du Canada' (2005) 7 Rev. CL Francais 7; Doucet, 'Le concept de l'égalite dans l'arrêt Lalonde et al c. Commission de restructuration des services de santé' (n 528).

[534] Michel Doucet, 'Pourquoi une langue mérite-t-elle une protection constitutionnelle ou législative' (2009) 11 Rev. CL Francais 55, 55.

philosophical literature on the normative foundations of language rights. As was the case with the issues I dealt with in Chapter 3, the philosophical literature provides a richer conceptual vocabulary than is found in the case-law alone, one which enables us to think more clearly about the justification of language rights and the types of goods they are meant to secure. Using these tools, we can better describe the 'patterns of normative understanding' already present in the case-law,[535] and, if necessary, supplement or complete them.

7.1.2 Focusing on collectivities

Describing the normative foundations of the CLRS as a whole is no easy task. For one thing, the system cannot be reduced to a single purpose or justification, as it pursues multiple goals simultaneously, each of which is justified in somewhat different terms.[536] To take only the most obvious example, the free speech rights guaranteed by s. 2(b) of the Charter, which are a species of language right, are very different from the broad self-government rights enjoyed by Quebec, or even the more limited forms of autonomy embedded in ss. 16.1 and s. 23 of the Charter. In each case, the 'ideal of equality'[537] being pursued is somewhat different. Attempting to reduce the CLRS to a single conception of equality would therefore be a fool's errand.

However, for present purposes we are chiefly concerned with equality in the context of s. 41,[538] which, I have argued, protects the collective rights of OLMCs.

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[535] McCrudden (n 25) 634.

[536] Gruben (n 42) 108–109.

[537] Griffith (n 39) 7.

[538] To the extent that s. 41 provides a guarantee of equality, logically that protection cannot be exhausted by rights enshrined elsewhere. This is implicit in the existing case-law. In *Picard* (n 7), the Fedearl Court held that s. 41 imposed duties on the Commissioner of Patents that were additional to any obligation the latter might have under Part II and Part IV of the OLA. In *DesRochers v. Canada (Industry)* (n 110), the Supreme Court held that the requirements of substantive equality under s. 22 of the OLA (Part IV) and s. 41 were distinct and non-overlapping (see in particular paras. 63-64).

What we need here then is an account of the moral valence of linguistic communities, and of *minority* communities in particular, which will enable us to pinpoint which aspects of a community's existence are relevant to an equality analysis. We can therefore eliminate accounts that do not give significant weight to group rights, or which argue against them.[539] We can also eliminate theories that promote 'tolerance' as opposed to 'promotion' rights—i.e. forms of 'benign neglect'[540], which would simply leave linguistic groups to their own devices. Section 41 clearly aims to promote the use of official languages, rather than merely tolerate them.

7.1.3 The moral valence of linguistic communities

Normative theories of rights are typically grouped into two different categories: interest-based theories and agency theories.[541] Agency theories (or 'will' theories) hold that a subject has rights insofar as it has protected choices, meaning that such theories require the subject to be sentient and to possess agency—that is, to be (in James Griffin's terminology) a 'normative agent'.[542] Interest theories, by contrast, hold that the function of rights is to protect or advance one's interests, ie to improve one's circumstances in some way. Under an interest theory of rights, agency or even sentience is not a prerequisite to holding rights.

Thus, a preliminary question one might legitimately ask is whether the moral valence of OLMCs is (or should be) grounded in the collective *agency* or the

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[539] Sabine Riedel, 'Minorités nationales en Europe et protection des droits de l'Homme : un enjeu pour l'élargissement' (2002) 67 Politique étrangère 647; Julius Grey, 'Equality Rights: An Analysis' Canadian Bar Review.

[540] Patten and Kymlicka (n 57) 32; Kymlicka, *Multicultural Citizenship* (n 55) 108–115.

[541] Ellis (n 316) 200; Newman, *Community and Collective Rights* (n 144) 33–34.

[542] Griffin for instance accepts the logical implication of this that feotuses, infants, and certain mentally defective adults do not have rights. James Griffin, *On Human Rights* (Oxford University Press 2008) 94–95.

collective *interests* of the community. However, as I noted in Chapter 4, the Supreme Court has repeatedly stated that language rights must be understood from an interest-based perspective,[543] and so I will focus on accounts that share this view.

I have already laid much of the conceptual groundwork for an interest-based account of collective language rights in Chapter 4. There, I argued that, from a conceptual standpoint, collectivities have an identity which is distinct from, and non-reducible to, that of their individual members. If that premise is accepted, there should be no objection to the general proposition that collectivities also have distinct interests. It is clearly possible for a collectivity's existence to go better or worse, depending on the circumstances. For example, an event might occur which would fatally disrupt some key relationship on which the collectivity's existence *qua* distinct entity depends. However, while this explains why the concept of collective interests is coherent, it does not tell us whether they are morally significant.

Broadly speaking, the moral relevance of communities can be thought of in two ways. One is to assign the community moral priority over the individual, whose interests are thereby subordinated to those of the group. 'Strong' communitarian or nationalist accounts will sometimes speak in these terms, often assuming (either explicitly or implicitly) that the community is ontologically prior to the individual.

The other way corresponds to what Raz calls the humanistic principle, which holds that the well-being of individuals is of ultimate concern.[544] On this view,

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[543] *Big M Drug Mart* (n 129), para. 116: 'The meaning of a right or freedom guaranteed by the Charter [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it was meant to protect'. And *Hunter v. Southam Inc.* (n 317), para. 20: 'Since the proper approach to the interpretation of the Charter of Rights and Freedoms is a purposive one, before it is possible to assess the reasonableness or unreasonableness of the impact of a search or of a statute authorizing a search, it is first necessary to specify the purpose underlying s. 8: in other words, to delineate the nature of the interests it is meant to protect.' For a more recent restatement, see: *Divito v. Canada (Public Safety and Emergency Preparedness)* (n 317), para. 19.

[544] Raz (n 121) 194.

collectivities are morally valuable insofar as they contribute to individual well-being. That is not to say that the interests of collectivities can be described in terms of (and thus reduced to) the interests of individuals, merely that the well-being of a collectivity is itself of moral concern only because, and only to the extent to which, it contributes to the well-being of its members. This means that we must be able to *justify* our decision to treat a given collectivity as a rights-bearing entity *in terms of* its contribution to individual well-being. It *does not* imply that the interests of the collectivity are necessarily the same as, or analogous to, those of its individual members *qua* individuals.[545] It also leaves open the possibility that certain collective interests might take priority over individual ones, if the contribution of the collective good to individual well-being is sufficiently important.[546]

In this chapter, I have chosen to adopt the humanistic principle. While this is not the place to offer a complete defence of that approach, a brief explanation of this decision seems appropriate.

It might be thought that something like a 'strong' communitarian account is a plausible candidate as an explanatory framework for the moral foundations of Canadian constitutional law. As others have noted, Canadian law and politics have been more attuned to, and solicitous towards, the many ways in which collective goods contribute to individual well-being than, say, the United States.[547] For instance, in its constitutional proposals put forward in the lead-up to the 1992 Charlottetown Accords, the federal government made the following statement:

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[545] On this note, see the discussion of the freedom of association case-law in Chapter 3.

[546] Newman, *Community and Collective Rights* (n 144) 109–113.

[547] Robert Charles Vipond, *Liberty and Community : Canadian Federalism and the Failure of the Constitution* (State University of New York Press 1991). See also: Joseph H Carens, *Culture, Citizenship, and Community : A Contextual Exploration of Justice as Evenhandedness* (Oxford University Press 2000) 5.

> In the Canadian experience, it has not been enough to protect only universal individual rights. Here, the Constitution and ordinary laws also protect other rights accorded to individuals as members of certain communities. This accommodation of both types of rights makes our Constitution unique and reflects the Canadian value of equality that accommodates difference. The fact that community rights exist alongside individual rights in our Constitution goes to the very heart of what Canada is all about.[548]

Later, the same document states that 'respect for the rights of its citizens and constituent communities as set forth in the Canadian Charter of Rights and Freedoms' is a basic value of the Canadian constitution.[549]

Nevertheless, as I discussed in Chapter 4, moral individualism remains a powerful current in Canadian legal thought, and is clearly central to the Charter itself. While most would accept that individual rights can be curtailed in pursuit of the common good, they would nonetheless reject the proposition that society or communities are, as a general matter, paramount over the individual. This explains why, for instance, the CLRS contains little in the way of measures intended to coerce private persons, and why those that do—like certain aspects of Quebec's Charter of the French Language—are the most controversial. Many if not most of the language rights provisions that concern us here, like ss. 20 and 23 of the Charter, have at their core a right to individual choice, even if they recognize that certain collective or institutional structures must be in place for that choice to be meaningful.

In short, it seems to me that the humanistic principle is more consistent with the political and legal culture of Canada than a 'strong' communitarian account, which would imbue certain communities with intrinsic, free-standing value. While collectivities are, as a general matter, indispensable to human existence and therefore

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[548] Canada, *Shaping Canada's Future Together : Proposals* (Minister of Supply and Services Canada 1991) 3.

[549] Ibid 10 (emphasis added). See also : Will Kymlicka, 'Individual and Community Rights' in Judith Baker (ed), *Group rights* (University of Toronto Press 1994).

require protection, we should not lose sight of the fact that their value consists in the way that they *contribute* to and enrich that existence, which is experienced at (if not necessarily always conceived in terms of) the individual level. It is not impossible for an emergent phenomenon to have moral priority over its constituent parts—indeed, human consciousness itself is a case point. However, it seems implausible to me, and in any case at odds with the basic structure of Canadian legal thought, that human collectivities should be viewed as foundational to moral value in this way. The *staatsvolk* is not conscious in its own right.

7.1.4 Two concepts of equality

Accordingly, I will assume in this chapter that the interests of OLMCs are morally significant because of the way in which linguistic communities contribute to individual well-being. Nevertheless, in order to define equality in the context of s. 41, we need some account of what that contribution is, and how disparities between the majority and the minority are likely to affect it. The range of ways in which membership in a linguistic community can affect individual well-being is potentially quite vast, which is one of the reasons why one finds a wide diversity of approaches in the normative literature on language policy. In order to keep the discussion manageable, I will anchor my analysis to the language of s. 41 itself, which singles out two key dimensions of OLMC well-being for protection: 'vitality' and 'development'. These terms are the priority from an interpretive standpoint, and so it is logical to start with them.

In the balance of this chapter, I will develop two conceptions of equality, each of which corresponds to one of these terms. For 'vitality', I will outline a concept of

equality-as-viability. For 'development', I will describe a principle of equality-as-fairness.

Simply put, equality-as-viability holds that the sociolinguistic footprint of the state should be, at the very least, neutral as between both communities, meaning that it should not unduly favour one over the other in its effects on ethnolinguistic vitality. In fact, I will go somewhat further than this, and argue that true equality in this domain requires that federal institutions contribute, within the confines of their mandate and to the extent of their resources, to *increasing* the vitality of vulnerable OLMCs, who will rarely achieve a state approximating linguistic stability without significant governmental support.

Equality-as-fairness, for its part, holds that the distribution of public goods, *over and above pure sociolinguistic goods*, must be substantively equal. This would imply, for instance, that federal institutions have an obligation to design policies and programs in such a way as to ensure that the minority will derive an equal benefit, in proportionate terms, to that conferred on the majority. It would also imply that federal institutions have an obligation to adopt a policy-making and delivery system that *ensures* such an outcome.

7.1.5 Overview of chapter

As I just explained, my overall aim in this chapter is to develop two concepts of equality: equality-as-viability, and equality-as-fairness. However, the following discussion is not explicitly structured around these principles. Instead, they emerge gradually from my exploration of various normative accounts of language rights and the issues they raise.

I begin by examining a school of thought, referred to variously as 'language rights as human rights' or 'linguistic human rights', which has attracted substantial scholarly attention, especially at the international level **(section 7.2)**. Scholars operating under this rubric take as their premise that robust language rights can be justified using the idiom and normative framework of universal human rights. While this approach has obvious rhetorical advantages, I conclude that it does not fit well with the CLRS.

I then turn to a popular family of theoretical accounts, which, following Alan Patten,[550] I label the 'context of choice' approach **(section 7.3)**. These accounts, of which Kymlicka's is the best-known,[551] emphasize the connection between individual autonomy and cultural frameworks (including language). Their central claim is that all persons are entitled to a culture that offers an adequate range of life options, and that certain minorities are entitled to cultural rights, which serve to protect the viability of their culture as an adequate context of choice. From the perspective of these accounts, the effect of state actions on the viability of minority cultures becomes the key reference point for determining which rights or other measures must be adopted. This leads me to introduce the concept of equality-as-viability as a means of understanding the commitment to substantive equality under the CLRS.

However, I go on to observe that the dominant argument under this rubric provides a flawed or incomplete basis for measures like s. 41 of the OLA **(section 7.4)**. MFCs do not fit very well within Kymlicka's concept of a 'societal culture', and the instrumental logic of his argument is considerably weakened when applied to groups like them. In response to this challenge, I explore the value of non-

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[550] Alan Patten, 'Survey Article: The Justification of Minority Language Rights*' (2009) 17 Journal of Political Philosophy 102, 110–111.

[551] See generally : Kymlicka, *Multicultural Citizenship* (n 55).

comprehensive (i.e non-societal) cultures, which rests to a significant degree on the intrinsic value of one's own language and culture. In the end, I conclude that the context of choice framework is a promising candidate for explaining or elaborating upon the normative commitments of the CLRS, as described by the case-law, but that it needs to be supplemented by the recognition—or at least a greater emphasis on the fact—that the value of the linguistic 'choices' at issue is not only instrumental, but also intrinsic.

That being said, by expanding the range of this framework to include non-societal cultures, I open the door to another problem, namely, the question of limits. If non-societal cultures provide a context of choice worthy of legal protection, does that not mean that the state has an equal obligation towards all such cultures within its borders? If so, how does one account for the fact that the CLRS protects only two languages? Although the issue could be skirted by resorting to an argument from authority, in **section 7.5** I argue that the choice of a limited number of official languages can be defended, and does not render those rights unprincipled (ie lacking a moral foundation). The key to this is to recognize that legal rights have what David Miller describes as different 'levels of justification', and that a moral right can be fundamental in the context of one political community while not being universal or universalizable.

Having settled the main issues as to the foundations of equality-as-viability, I then turn to the definition of viability itself (**section 7.6)**. From an empirical standpoint, the needs of viability can be defined with the aid of 'ethnolinguistic vitality', which I discussed in Chapter 6. However, some scholars contend that there is a morally significant distinction between different conceptions of viability, viability-as-security and viability-as-survival. I explore the distinction, and conclude

that there is no meaningful difference between the two, or that at the very least the reasons offered for dismissing the moral relevance of the survival interest are misguided.

Finally, I briefly consider the *distributive* dimension of linguistic equality, which tends to be overlooked by accounts more focussed on the contributions of culture-as-such (**section 7.7**). Distributive inequality can track linguistic or cultural boundaries without being directly attributable to linguistic or cultural causes. This appears to be a significant feature of the CLRS concept of equality, and thus needs to be distinguished from equality-as-viability. I label this additional dimension of linguistic equality 'equality-as-fairness', and explore its relationship to equality-as-viability by analyzing the case of *DesRochers v. Industry (Canada)*,[552] in which equality receives its most thorough analysis outside the s. 23 Charter context. The discussion here sets the stage for a more in-depth examination of how the two concepts of equality might shape the interpretation of s. 41 itself, especially as it relates to the question of autonomy, which will be the subject of the final chapter.

7.2 Language rights as human rights (linguistic human rights)

A popular way of justifying demands for language rights is to frame the latter as instantiations of broader human rights, whose moral status is firmly established. This strategy is often referred to as the 'linguistic human rights' (LHR) approach. LHR is in fact a fairly diverse school of thought, but holds in common that significant language rights are implied by existing universal human rights, or that they should be added to the roster of such rights.[553] Approaches that fit this heading are quite varied,

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[552] *DesRochers v. Canada (Industry)* (n 110).

[553] Robert Phillipson, *Linguistic Imperialism* (Oxford University Press 1992) 93–98.

but authors operating under this rubric typically assert that language is a fundamental component of individual identity and welfare and merits protection on this basis.[554] This would make language rights part and parcel of the broader struggle for basic equality.

Efforts in this vein have often focused on international law, with a view either to encouraging a more expansive interpretation of existing human rights treaties,[555] or to developing new instruments focused squarely on the issue of language rights, either in isolation[556] or as part of a broader framework of minority rights.[557] The influence of this approach can be observed in instruments like the Framework Convention for the Protection of National Minorities or the (1992) UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, the preambles of which attempt to ground minority rights (including language rights) on the broader human rights framework.

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[554] See, for example: Joseph P Gromacki, 'Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights, The' (1991) 32 Va. J. Int'l L. 515; Robert Phillipson, Mart Rannut and Tove Skutnabb-Kangas, *Linguistic Human Rights : Overcoming Linguistic Discrimination* (De Gruyter 1994); Fernand de Varennes, *Language, Minorities and Human Rights* (Martinus Nijhoff 1996); Malksoo (n 48); Fernand de Varennes, 'Language Rights as an Integral Part of Human Rights' (2001) 3 International Journal on Multicultural Societies 15; Christian E Michaud, 'Ethique et droits linguistiques' (2004) 6 Rev. CL Francais 267.

[555] See, for example, the following report, which concludes that Article 27 of the ICCPR should be interpreted as imposing a positive obligation on states to promote minority languages: Capotorti (n 440). In a similar vein, see the UN Human Rights Committee's General Comment on Article 27: '6.2. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group': UN Human Rights Committee, 'General Comment No. 23: The Rights of Minorities (Art. 27)' (1994) CCPR/C/21/Rev.1/Add.5.

[556] See, for example: UNESCO World Conference on Linguistic Rights, 'Universal Declaration on Linguistic Rights'.

[557] See, for example, Council on Security and Cooperation in Europe (n 461), or the Council of Europe's Framework Convention for the Protection of National Minorities (Council of Europe (n 148).) both of which include explicit commitments to protect minority languages as part of a broader effort at progressive development of the existing human rights framework.

The attraction of human rights discourse to proponents of minority language rights is quite understandable. Human rights offer a broadly accepted normative framework whose status and conceptual toolkit can be leveraged to great effect. Though historically human rights originated within national legal systems, they are now the object of numerous and highly-developed legal instruments at the international level with a wide range of enforcement mechanisms. Human rights discourse therefore provides a convenient and potentially highly persuasive medium for the development and propagation of language rights in new jurisdictions or spheres of activity.

Moreover, this strategy offers a means of overcoming the political stigma from which minority rights occasionally suffer. Such rights are frequently seen or portrayed as constituting a new 'generation' of rights distinct from 'traditional' human rights. By insisting that language rights are merely an instantiation of existing and commonly accepted human rights, proponents of greater protection for minority languages can make their claims appear somewhat banal, and therefore less threatening. Such a strategy also enables them to overcome the mistaken assumption that only minorities can have language rights.[558] As one group of authors puts it:

> Linguistic rights should be considered basic human rights. Linguistic majorities, speakers of a dominant language, usually enjoy all those linguistic human rights which can be seen as fundamental, regardless of how they are defined. Most linguistic minorities do not enjoy these rights…[559]

However, as Kymlicka and Patten note, proponents of this approach are trapped between the paucity of references to real language rights in existing human rights treaties, which mostly provide tolerance-based protections, and the nature of the

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[558] de Varennes (n 554) 16.

[559] Robert Phillipson, Mart Rannut and Tove Skutnabb-Kangas, 'Introduction', *Linguistic human rights : overcoming linguistic discrimination* (De Gruyter 1994) 1–2.

problem they want to address, which often requires more aggressive promotion-oriented strategies.[560] As Skutnabb-Kangas et al. concede, the issue they are responding to 'needs to be seen in the light of the political reality of unequal access to power. Most linguistic majorities seem reluctant to grant 'their' minorities rights, especially linguistic or cultural rights, because they would rather see their minorities assimilated'.[561] Yet for that very reason, existing international norms have been structured in such a way as to make genuine progress on this front very difficult. Moreover, as Tierney notes, and as I will explore further below, it is very difficult 'to conceive of language issues through the concept of rights—at least insofar as they are presented as universal human rights'.[562] It therefore seems unlikely that international legal norms framed in universal terms will have much practical effect in the promotion of language rights.[563]

As far as present purposes are concerned, a theory of substantive equality constructed on the basis of general human rights is likely to provide little guidance when interpreting s. 41 of the OLA. The post-WWII human rights framework was simply not constructed to accommodate or respond to the sorts of collective concerns to which that provision speaks,[564] despite recent attempts to read a collective dimension into certain human rights provisions, like Article 27 of the ICCPR.[565]

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[560] Patten and Kymlicka (n 57) 33–4.

[561] Phillipson, Rannut and Skutnabb-Kangas (n 559) 3.

[562] Stephen Tierney, 'Reflections on the Evolution of Language Rights' in André Braën, Pierre Foucher and Yves Le Bouthillier (eds), *Languages, constitutionalism and minorities* (LexisNexis Butterworths 2006) 10.

[563] ibid 24.

[564] I Roy, *Vers Un Droit de Participation Des Minorités À La Vie de l'État* (Montreal: Wilson & Lafleur 2006) 83–85; Tierney (n 562) 16–7.

[565] See, for example, the UNHCR General Comment on Article 27: '6.2. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their

Indeed, within the Canadian context, the second phase of the CLRS was explicitly intended as a step *beyond* human rights. The B&B Commission, which explored the concept of equality at some length, began its analysis with basic human rights, such as those expressed in the Universal Declaration of Human Rights and the Canadian Bill of Rights,[566] stating that denial of these rights along linguistic lines would constitute a breach of equality and would therefore be wrongful.[567] However, it quickly noted that this was not a common occurrence, as it was (indeed, still is) with African Americans in the United States, and that members of the two official language groups typically took these rights for granted, even in 1967. The Commission believed that its mandate was therefore to look beyond this basic level of protection and to define equality in different terms. It went on to do so at both the individual and the 'community' (i.e. collective) level, and the language rights regime it proposed, which eventually gave rise to the CLRS, reflects that broader theoretical framework.

This is why the courts—even those inclined to be very generous in their interpretation of language rights—have tended to perceive a barrier between general

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culture and language and to practise their religion, in community with the other members of the group' (emphasis added) UN Human Rights Committee (n 555). Similar comments were made more recently by the Committee's independent expert on minority issues, who, in discussing the 1992 UN Declaration on the Rights of Minorities, stated the following: 'The independent expert also takes note of the collective nature of minority rights. This holds importance for the promotion and protection of minority identity and visibility, for the informed collective participation of these groups in decisions that affect their rights and resources, and for securing collective claims to linguistically and culturally appropriate education, land and other shared assets. While the Declaration on the Rights of Minorities examines rights that may be claimed by individual members of minority communities, those claims will often require the State to ensure the existence or identity of the group as a whole' (emphasis added). Gay McDougall, 'Specific Groups and Individuals: Minorities. Report of the Independent Expert on Minority Issues' (United Nations Economic and Social Council Commission on Human Rights 2006) E/CN.4/2006/74 10, para. 27. In discussing Article 27 of the ICCPR, she adds (at para. 38): 'The independent expert notes that, in situations where deeply entrenched societal inequalities have taken root, States may have the legal obligation to take affirmative measures to secure the adequate advancement of minority groups'.

[566] A statutory predecessor to the Charter that applied only at the federal level.

[567] 'Report of the Royal Commission on Bilingualism and Biculturalism. Book I: The Official Languages' (n 98), xl.

Charter equality rights, like s. 15, and language rights.[568] As Dickson CJ noted in *Mahe*:

> A notion of equality between Canada's official language groups is obviously present in s. 23. Beyond this, however, the section is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada. As the Attorney General for Ontario observes, it would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to "every individual".[569]

In fact, the true precedent for the CLRS under international law is more likely to be found in the Minority Treaties system put in place between the two world wars.[570] The drafters of the Minorities Treaties believed 'that fairness was not possible if minorities were forced to renounce their cultural identity, or if it were lost through neglect', and that 'a simple reliance on basic political rights would not be sufficient to protect all important values, including those on an individual level'.[571] Thus, in the famous Albanian schools case, the Permanent Court of International Justice stated that '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 as a minority'.[572] The post-1945 system of universal rights, by contrast, was intended as a repudiation of this

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[568] Some commentators have been very critical of this approach. See for instance : Warren Newman, 'Understanding Language Rights, Equality and the Charter: Towards a Comprehensive Theory of Constitutional Interpretation' (2004) 15 National Journal of Constitutional Law 363, 385–6. However, for the reasons outlined in section 4v below, I do not share this view.

[569] *Mahe* (n 14), p. 369. See also: *Lalonde (appeal)* (n 235), paras. 96-102.

[570] Joel E Oestreich, 'Liberal Theory and Minority Group Rights' (1999) 21 Human Rights Quarterly 108, 112.

[571] ibid.

[572] *Minority Schools in Albania: Advisory Opinion of April 6th, 1935(Series A/B, Fascicule No 64)* 1935 AW Sijthoff 76 (Permanent Court of International Justice) 17. In the same passage, the court describes the aim of the Minorities Treaties as being 'to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics'.

approach, which seemed at the time to countenance the collectivist mind-set from which the horrors of Nazism and fascism sprang forth.

7.3 Equality as cultural viability

For present purposes, a more promising avenue is to be found in the family of theoretical accounts that Alan Patten labels the 'context of choice' approach.[573] The attraction of such accounts is two-fold. First, they resonate quite strongly with the normative framework sketched out by the B&B Commission when designing the CLRS, in particular its definition of equality. Second, they provide a robust justification for collective legal rights, largely because of their sociologically informed account of cultural dynamics, meaning that they fit well with the analytical framework developed in this thesis.

Context of choice approaches—whether the B&B's or more recent academic accounts—tend to focus on the role of language and culture as environments that enable certain types of activities or choices. As such, they are very concerned with the structural conditions that enable language and culture to fulfil this role effectively. These conditions are often captured using the concept of 'viability', a term I will employ myself as a shorthand. As the following discussion will reveal, there are obvious parallels between viability in this sense and the notion of sociolinguistic/ethnolinguistic 'vitality' I explored in Chapter 6, and which anchors the first half of the s. 41 commitment. This makes the 'context of choice' framework a useful tool in thinking through the normative underpinnings of this area of the law.

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[573] Patten (n 550) 110.

7.3.1 The B&B Commission: setting the tone

As I noted above, the B&B Commission first examined the concept of equality through the lens of the human rights framework, but concluded that it was not up to the task of describing the needs of justice in relation to Canada's two major language groups. While still retaining individual equality as its guiding star, it opted to delve deeper into the relationship between individual flourishing and social structure. Taking note of the important role that language and culture play in shaping the range of opportunities and options that an individual has in life, it defined individual equality as meaning 'essentially that everybody has the same access to the various benefits of a society without being hindered by his [or her] cultural identity'.[574]

The Commission went on to note that this cannot be achieved through rules of non-discrimination alone. In order to be equal on this level, individuals must have the ability to engage as full members of society without needing to renounce their cultural traits—i.e. without needing to adopt those of another group. This requires that the analytical focus be shifted away from the individual and towards social institutions, which are the portals through which individuals enter society and which mediate their interactions with it:

> Social relationships, particularly in the world of labour, in consumer life, and in political life, are increasingly shaped by social institutions which, so to speak, interpose themselves between individuals and impose on them a certain pattern of action. Interpersonal and intergroup relations, therefore, are often the result of institutional structures which mesh like the gears of a social mechanism to bring groups into contact.[575]

In the end, the Commission concluded that a pre-condition of genuine equality was the existence of a 'distinct society', an 'autonomous society' or a 'complete

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[574] ibid, xl.

[575] ibid, xl-xli.

society' in which individuals could operate without needing to abandon their language and culture.[576] Equality exists only if the individual is 'able to find, at all levels of human activity, a setting which will permit him to develop, to express himself, and to create in accordance with his own culture.'[577]

This way of framing the issue led the Commission to examine equality from the point of view of collectivities.[578] While the Commission did not use this precise terminology, it is fair to say that, in its view, linguistic communities are collectivities, meaning that their status and well-being can only be properly analysed at the collective level. Thus, the Commission argued that equality requires that each community have 'the means to progress within its culture and to express that culture';[579] that they must both 'feel that as a linguistic and cultural group they share in the direction of economic life';[580] and that, from a political standpoint, they must either have the possibility of choosing their own institutions or of participating fully in making decisions within a shared framework, i.e. they must enjoy an adequate 'degree of self-determination'.[581]

Much of the Commission's attention was therefore focused on what we might call the question of viability. The central task that the Commission set for itself, from a research perspective, was to ascertain whether, and under what conditions, each language might be said to have 'the means to live'.[582] The status and survival of each

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[576] ibid, xxxiii, xliii.

[577] ibid, xli.

[578] ibid, xliii. For a definition of the concept of a collectivity, see Chapter 4.

[579] 'Report of the Royal Commission on Bilingualism and Biculturalism. Book I: The Official Languages' (n 98), xliv.

[580] Ibid, xliv.

[581] Ibid, xlv.

[582] Ibid, xxviii.

language was considered important because, at root, 'a common language is the expression of a community of interests,'[583] which are directly affected by the vitality of that language;[584] and also because 'any community which is governed through the medium of a language other than its own has usually felt itself to some extent disenfranchised'.[585]

The Commission therefore defined the ultimate aim of its research agenda as being to propose a framework (labeled 'biculturalism') that would secure 'the opportunity of each [linguistic community] to exist and flourish'.[586] As a practical matter, this meant that the Commission viewed its task as being 'to establish whether both cultures possess the distinct institutions they need, whether they are properly represented within the principle common institutions, and whether persons who participate in each of them have the opportunity to conserve and to express their own culture.'[587] Any recommendations it would make would be aimed at filling any gaps in the current public policy regime, such as by granting a constitutional right to minority language education, or to receive all public services and communications from the federal government in French.

7.3.2 Culture as a context of choice

The Commission's thinking on these issues, which has frequently shaped the interpretation of language rights by the courts,[588] offers some useful guidance on the meaning of equality in this context. Amongst other things, it suggests that the

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[583] Ibid, xxix.

[584] Ibid, xxxv.

[585] Ibid, xxix, quoting from a study prepared by Ronald Watts for the Commission.

[586] Ibid, xxxiv.

[587] Ibid, xxxiv.

[588] See, for instance, *Beaulac* (n 15); *Mahe* (n 14).

morally significant interests of individuals that relate to language (or 'linguistic interests' for short) cannot be properly grasped, let alone protected, without taking into account the social-structural contexts out of which they emerge.

Considerable theoretical work has been done since the Commission released its reports—much of it by the 'Canadian school' of political theory[589]—which develops these insights much further. A popular and influential approach—one which, in practice, bears a striking resemblance to the Commission's basic framework—is to argue that minority language and cultural rights are necessary to secure a basic 'context of choice' without which individual autonomy cannot be exercised.

There are different versions of the 'context of choice' argument, but, though somewhat distinct from one another, they all share a strong family resemblance. Probably the best-known and most influential[590] version is the one developed by Will Kymlicka, who sought to articulate a justification for group-specific collective cultural rights consistent with liberal principles,[591] though similar arguments have been advanced by others.[592]

Most versions of the argument take as their starting point the claim that individual autonomy and cultural context are intimately linked. In order for

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[589] Choudhry (n 83) 608. See also R Léger, 'Justice and Official Languages in Canada' (2012) 4.

[590] Poirier (n 443) 73; Roy, *Vers Un Droit de Participation Des Minorités À La Vie de l'État* (n 564) 117. Kymlicka's work has even been described as a 'cottage industry of liberal multiculturalism from which governments are ever-ready to purchase wisdom' : Dwight G Newman, 'Liberalist Multiculturalism and Will Kymlicka's Uneasy Relation with Religious Pluralism' (2003) 64 Bijdragen 265, 266.

[591] See generally: Kymlicka, *Multicultural Citizenship* (n 55) 82–93.

[592] See for example Green and Réaume's concept of 'linguistic security' : Denise Réaume and Leslie Green, 'Education and Linguistic Security in the Charter' (1988) 34 McGill LJ 777, 782. Parekh has noted the similarity between Raz and Kymlicka's accounts : Parekh (n 85) 100. He offers his own version which builds on theirs : ibid 114–141.

individuals to exercise meaningful autonomy, they must have access to an adequate range of options with respect to certain key areas of human activity. As Raz notes,

> [i]f having an autonomous life is an ultimate value, then having a sufficient range of acceptable options is of intrinsic value, for it is constitutive of an autonomous life that it is lived in circumstances where acceptable alternatives are present. The alternatives must be acceptable if the life is to be autonomous.[593]

As Raz goes on to add, the existence of options depends in part upon 'the existence of certain social conditions.'[594] For instance, to be an architect is not merely to be engaged in the design and construction of buildings; rather, 'an architect is one who belongs to a socially recognized profession.'[595] In other words, the position of architect is a social-institutional fact.[596] In the absence of the social and institutional conditions required for this profession to exist, one cannot choose to be an architect.

Because of this, the range of choices one has depends upon one's cultural context. Cultures supply 'a shared vocabulary of tradition and convention', which define the meaning of social practices.[597] As Kymlicka notes, '[u]nderstanding … cultural narratives is a precondition of making intelligent judgments about how to lead our lives.'[598] This means that individual autonomy can only be exercised if one has access to a cultural context that supplies an adequate range of options. For members of the majority culture, this is usually a trivial matter and hardly given a second thought. But members of minority cultures sometimes face obstacles in this respect, as their native culture will often lack the means to supply the necessary range

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[593] Raz (n 121) 205.

[594] ibid.

[595] ibid 204.

[596] See Chapter 4, section 4.4.2.

[597] Kymlicka (n 12) 83, citing Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 231.

[598] Kymlicka, *Multicultural Citizenship* (n 55) 83.

of options, forcing them either to assimilate into the majority culture or accept a diminished set of choices.

7.3.3 Inequality of viability

The causes of that state of affairs can be complex, but often it results from the fact that the majority culture enjoys disproportionate support from major social institutions, which effectively place their thumb on the scale of ethnolinguistic vitality. This inequality means that the minority is systematically disadvantaged in the enjoyment of a wide range of goods and opportunities.[599] Given that learning and adapting to a new language and culture is difficult, time-consuming, and likely to result in lasting disadvantages relative to native-speakers, a situation in which a person is forced to do so will be a serious obstacle to individual autonomy, one that unfairly afflicts the minority and not the majority.[600] The state therefore has an obligation to rectify this inequality by taking steps to support the viability of the minority culture.

It is important to note that, while the overall approach is justified in terms of individual interests, the inequality itself must be understood at least in part at the collective level. What we are dealing with, fundamentally, are social-institutional facts—the relative power and status of two (or more) collectivities, and their degree of institutional completeness. To be sure, the individual members of each collectivity have, by virtue of this membership, an interest in the well-being of the collectivity. But, as I explored in Chapter 4, attempting to frame the social-institutional inequality of the collectivity *directly* in terms of individual interests strains the boundaries of

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[599] ibid 126.

[600] ibid 85–86.

intelligibility, because the attributes of a collectivity cannot be properly described using only the vocabulary of individuals. Moreover, given that s. 41 of the OLA, like s. 16.1 of the Charter, places the collectivity itself squarely at center stage of the legal analysis, it is best to think of viability in this context as a collective interest vesting in the collectivity, which contributes to individual well-being through its existence. Indeed, the case-law itself appears to demand as much, given that '[l]anguage rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada' (emphasis original).[601]

The measures required to correct the injustices stemming from inequality of viability can be quite varied, and will, in keeping with the dual nature of the interests involved, operate at both the individual and collective level. For instance, the state can provide individual rights vis-à-vis shared public institutions, like Part V of the OLA, which regulates employment opportunities in the federal civil service.[602] But the state can (and likely must) also take measures aimed at supporting the minority culture's own ability to provide a range of opportunities. Such measures will aim to protect that culture from 'structural debasement or decay' through the (otherwise overwhelming) influence of the majority, so that it remains viable as a distinct culture,[603] as the requirement that s. 23 Charter schools be linguistically homogeneous

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[601] *Beaulac* (n 15), para. 25 ; *Caron v Alberta* 2015 SCC 56, para. 35.

[602] Part V deals with the language of work in the federal civil service. Its purpose is to ensure that both francophones and anglophones have access to employment opportunities, and that the latter are distributed in a fair and proportional manner as between both linguistic communities. Of course, some positions, such as those involving dealing with the public, or mid- and upper-management, are generally subject to bilingualism requirements, so as to respect the language rights of the public, on the one hand, and unilingual civil servants, on the other.

[603] Kymlicka, *Multicultural Citizenship* (n 55) 83.

aims to do.[604] But they can also be 'remedial', in that they attempt build up or supply the minority with institutional support mechanisms that it does not currently possess, either because it lost them or (as in the case of some aboriginal societies) had never developed them in the first place.

On the whole, what this entails as a practical matter is largely a function of context, given that the socio-structural vulnerabilities of the minority will vary from one place to another.[605] However, the Canadian experience suggests that a commitment to viability will often require a thoroughgoing reassessment of the policy development and delivery framework. Such frameworks can favour the majority, or disadvantage the minority, in a variety of subtle and sometimes invisible ways. As Dickson CJ noted in *Mahe*, even a well-intentioned majority will inevitably (if often unintentionally) neglect the concerns of the minority: 'the majority cannot be expected to understand and appreciate all of the diverse ways in which [governmental] practices may influence the language and culture of the minority.'[606]

A recent example, which fortunately did not require litigation, illustrates this quite well. In 2014, the government of Ontario changed its policy for allocating funding to schools for special and high-needs children. The new policy was in many respects the very model of scientific, evidence-based policy-making. Nevertheless, having been developed by an institution dominated by the majority (the Ministry of

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[604] See note 482 above.

[605] Kymlicka identifies a few likely candidates: territorial autonomy, veto powers, guaranteed representation rights, land claims, and language rights: Kymlicka, *Multicultural Citizenship* (n 55) 109. Of course, these do not exhaust the range of possible measures. Jacob Levy has produced a somewhat more comprehensive taxonomy of collective rights demanded by cultural minorities: Jacob T Levy, 'Classifying Cultural Rights' in Ian Shapiro and Will Kymlicka (eds), *Ethnicity and group rights* (New York University Press 1997). Not all of these will necessarily be viable candidates based on a context of choice account, because some of them involve allowing the group to restrict the freedom of its members in ways that are potentially incompatible with the broadly liberal underpinnings of that approach : Kymlicka, *Multicultural Citizenship* (n 55) 152.

[606] *Mahe* (n 14), p. 372.

Education), the new method completely failed to account for the many important ways in which the francophone minority differs from the majority, both in its sociological profile and in its access to mental health and other services outside the education system. The result was a potentially catastrophic cut in funding for certain Francophone school boards in Northern Ontario. Fortunately, once the issue was brought to the Ministry's attention, it quickly took steps to develop a parallel policy-making framework to ensure that the minority's right to equal quality education was not compromised.[607]

What makes this particularly relevant to the subject at hand is that the risk to the Francophone community was not simply that of being provided with sub-standard services. One of the school boards' concerns was that, if the cuts went through, parents with children in need of additional support systems would turn away from the French system and instead enrol them in an English-language school, where such services would be more readily available. That would represent a permanent loss for the community, which already struggles with high rates of assimilation, and has difficulty convincing all s. 23 rights-holders to send their children to French-language schools.[608] Thus, the provision of sub-standard services had the potential to cause serious detriment to the viability of the minority community.

This 'comparative attractiveness' issue is a perennial one in s 23 litigation, as Francophone schools often struggle to provide attractive educational opportunities with the funding provided to them by governments unaware (or uncaring of) the additional challenges posed by delivering full educational services in a minority

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[607] This information comes from the author, who was directly involved in advising the affected school boards on their constitutional rights.

[608] Mark Power, 'Les droits linguistiques en matière d'éducation' in Michel Bastarache (ed), *Les droits linguistiques au Canada, 3ième édition* (Yvon Blais 2013) 738.

language. The courts have repeatedly held that, in order to respect the principle of substantive equality, minority language schools must offer services that are of high enough quality to ensure that members of the minority will not be tempted to send their children to a majority language school.[609] This will mean, for instance, that minority language schools cannot be funded on the same per-capita cost-effectiveness basis as majority language schools. Many minority schools will have fewer students than their local majority counterparts, meaning that the cost of certain services and facilities (like a gymnasium) cannot be spread out as much. In effect, the level of service required 'may be somewhat more than equal because it must be provided "in a manner consistent with the preservation and enhancement" of the French heritage'.[610]

7.3.4 Societal cultures

An account such as this might seem to imply a fairly radical and potentially destabilizing fragmentation of political power, given the number of cultural minorities found in most countries, especially those with high rates of immigration. However, not all minority cultures can make a valid claim to such measures on this basis. In a modern context, only some cultures are capable of providing a 'context of choice' broad enough to serve as a distinct locus of individual autonomy. Kymlicka refers to

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[609] See : *Reference re Public Schools Act (Man), s 79(3), (4) and (7),* [1993] 1 SCR 839.; *Arsenault-Cameron* (n 56).; *Assoc des parents ayants droit de Yellowknife c Territories du Nord-Ouest (Procureur général)* 2012 CarswellNWT 103 (NWT Sup Ct) (rev'd on other grounds in *Assn des Parents ayants droit de Yellowknife c Territoires du Nord-Ouest (Procureur général)* 2015 NWTCA 2 (NWT CA)), paras. 58-583; *Association des parents de l'école Rose-des-vents v Colombie-Britannique (Éducation)* [2015] 2 SCR 139, paras. 34-35.

[610] See: *Lavoie v Nova Scotia (Attorney General)* 1989 CarswellNS 601 (NS CA), para. 71 (emphasis added). See also: *Association des parents de l'école Rose-des-vents v. Colombie-Britannique (Éducation)* (n 609), paras. 32-33.

these as 'societal cultures',[611] though terms like 'pervasive culture' have also been used.[612]

A societal culture is 'a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres.'[613] Such cultures are 'societal' because 'they involve not just shared memories and values, but also common institutions and practices… [F]or a culture to be embodied in social life means that it must be institutionally embodied.'[614] The majority culture in most states will constitute a societal culture, but so will a number of minority cultures. In those cases where the minority culture is (or has the potential to be) capable of providing an adequate context of choice, its members will have a morally significant interest in its protection.

However, this points to a potential problem with the context of choice account as it relates to s. 41 of the OLA. In cases where the minority culture does not have the potential to provide an adequate substitute for the majority culture in terms of options and opportunities, or where members of the minority are already conversant in the dominant culture, the interest in minority rights is much less compelling, and arguably disappears altogether.[615] As I will discuss further below, this is potentially problematic when one tries to apply the concept to MFCs.

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[611] Kymlicka, *Multicultural Citizenship* (n 55) 76.

[612] Raz and Margalit (n 297) 82.

[613] Kymlicka, *Multicultural Citizenship* (n 55) 76.

[614] ibid 78.

[615] Carens (n 547) 63.

7.4 The value of non-comprehensive cultural contexts

7.4.1 Justifying the protection of a particular language

A fundamental problem with Kymlicka's account, at least as far as present purposes are concerned, is that it merely explains the value of having access to *a* culture, not the value of one's own particular culture.[616] The same problem affects some of the more theoretical statements by the SCC on the matter, like this one, which has been cited frequently by scholars and later judgments:

> The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.[617]

While true, this does not support an argument for the right to use any particular language. It merely asserts that humans need access to *a* language in order to participate fully in society.

When it comes to Quebec, this does not present much of a problem. The majority of Quebec's population is French-speaking and unilingual.[618] In other words, Quebec provides a viable francophone societal culture, and most of its francophone residents would face very steep costs if required to shift to using English. Thus, the only language capable of providing Franco-Quebeckers with an adequate context of choice without imposing a substantial burden is their own native language.

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[616] Newman, *Community and Collective Rights* (n 144) 75.

[617] *Re Manitoba Language Rights* (n 94), para. 46.

[618] Based on 2011 census data, out of a total population of 7,815,955, 4,047,175 Quebeckers speak only French : Statistics Canada, 'Population by Knowledge of Official Language, by Province and Territory (2011 Census)' (13 February 2013) <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo15-eng.htm> accessed 15 May 2016.

But that is not true of all Francophones across Canada. MFCs generally exhibit very high levels of bilingualism, and their numbers are often—depending on the location—too low for there to be a genuine francophone societal culture.[619] Because of this, members of an MFC tend to be highly integrated into the dominant (anglophone) societal culture, especially on the economic front, while maintaining a parallel set of institutions in certain spheres. It therefore cannot be said that their native language is the only means by which they might access a full context of choice, since they already have full access to the majority culture.

Given that s. 41 of the OLA, like s. 23 of the Charter, is directly targeted at groups whose culture does not rise to the 'societal' standard (at least where they live), this makes the context of choice approach problematic as an account of the normative foundations of these rights. However, there are at least two ways to respond to this problem, which in fact are mutually reinforcing. One is to emphasize that one's language and culture have both instrumental and intrinsic value. The other is to point

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[619] Certain regions of Ontario and New Brunswick might plausibly be said to provide such an environment, but in most of the country that is not the case. It is important to recall here that Kymlicka's definition of a societal culture is very demanding—it is a territorially concentrated culture which provides its members with meaningful ways of life across the full range of human activities: Kymlicka, *Multicultural Citizenship* (n 55) 76. In most parts of the country outside the so-called 'bilingual belt' (which runs through northern and eastern Ontario, southern Québec and New Brunswick), the range of activities available in French is very limited. Even within that region, living within a French-only 'silo' would generally be exceedingly difficult for all but a minority of Francophones.

This of course raises the difficult question of how one should draw the boundaries of a societal culture. Even in places where such a culture undoubtedly exists (like Québec), the full range of activities will not be available in a single place (with the exception perhaps of one or two major cities), and so individuals would be required to move in order to take part in them (for instance, moving to the capital to take a position in the civil service). If one can move from Rimouski to Montreal for that purpose and still be part of or within the Francophone societal culture of Québec, why would that not also be true for someone moving from Sturgeon Falls (which is roughly the same distance, but in a different province)? And if Sturgeon Falls must be included, why not St-Boniface (Manitoba) or Zénon Park (Saskatchewan)? Space constraints prevent me from exploring that issue in any great depth here, but suffice it to say that the geographic divisions between most MFCs and Québec (which simultaneously operate on a physical, political, psychosocial and socio-economic level) warrant treating them as somewhat separate entities with respect to the questions at issue here. On this point, consider Léger (n 589) 109–116, especially 112-113.

to out that a cultural context does not lose all its value simply because it is not comprehensive enough to meet the standard of a societal culture.

7.4.2 The intrinsic value of language

A serious weakness of the context of choice argument is that it seems to ascribe only instrumental value to language. For instance, as many scholars have noted, Kymlicka's argument appears to treat language and culture primarily as means to an end, and depends greatly on the putative costs of assimilation.[620] This is problematic. An instrumental approach assumes that a person's interest in it can be reduced to a common denominator and therefore subjected to a mechanical cost-benefit analysis.[621] Language, in other words, amounts to a fungible good. But as Réaume points out, this way of viewing things rests on a deeply impoverished conception of the value of language.[622] It also provides little or no support for the actual rights demanded by their advocates, namely, 'rights to the maintenance of cultural difference rather than merely to assistance in integrating into the society's dominant practices.'[623]

Réaume advocates instead for what she calls a human rights account of the interests associated with language. Such an account—which must be distinguished from the 'linguistic human rights' approach discussed above—would side-step 'the logic of instrumentalism and aggregation' in much the same way that human rights

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[620] See, for example : Newman, *Community and Collective Rights* (n 144) 75.

[621] Denise Réaume, 'Language Rights: Constitutional Misfits or Real Rights' in André Braën, Pierre Foucher and Yves Le Bouthillier (eds), *Languages, constitutionalism and minorities = langues, constitutionnalisme et minorités* (LexisNexis Butterworths 2006) 202.

[622] ibid.

[623] Denise Réaume, 'Official-Language Rights: Intrinsic Value and the Protection of Difference' in Will Kymlicka and WJ Norman (eds), *Citizenship in diverse societies [electronic resource]* (Oxford University Press 2000) 245–6.

are mostly immune to arguments based on general utility or the common good.[624] This can be accomplished if one recognizes the intrinsic value of a language to its speakers, making the protection of that particular language the focus of attention.[625]

In Réaume's view, what truly motivates people's desire to protect the usefulness of their language is the fact that they attribute intrinsic value to it, independent of its utility.[626] Any specific language is important to its speakers because it is their creation, a 'collective accomplishment'.[627] This makes one's particular language inherently valuable because '[p]articipation in these kinds of communal forms of human creativity is an intrinsic part of the value of human life'.[628]

Réaume's 'intrinsic value' approach has been criticized for appearing to imply that languages themselves would have moral priority over their speakers.[629] But that concern seems misplaced. It is important to distinguish here between the concepts of *inherent* and *ultimate* value. As Raz points out, a good can be non-ultimate and yet non-instrumental. An instrumental good is one that is good only because of its consequences. An inherent good, by contrast, is a constituent good, ie a good which makes possible a certain form of life, which itself is of ultimate value. Raz gives the example of a work of art, which makes possible a life enriched by the experience of art. The value of art in this context does not derive from the consequences it brings about, and so its value is not instrumental, but rather inherent, and yet ultimately still

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[624] Réaume, 'Language Rights: Constitutional Misfits or Real Rights' (n 621) 203.

[625] ibid 211.

[626] Réaume, 'Official-Language Rights: Intrinsic Value and the Protection of Difference' (n 623) 251. In a similar vein, Green refers to the 'expressive' value of one's language: Green (n 48) 658–659.

[627] Réaume, 'Language Rights: Constitutional Misfits or Real Rights' (n 621) 214.

[628] Réaume, 'Official-Language Rights: Intrinsic Value and the Protection of Difference' (n 623) 251.

[629] Daniel Weinstock, 'The Antinomy of Language Policy' in Will Kymlicka and Alan Patten (eds), *Language rights and political theory* (Oxford University Press 2003) 255.

grounded in its contribution to individual flourishing.[630] Language, and culture more generally, can thus be conceived of as an inherent good without necessarily giving it priority over individuals.[631]

7.4.3 Non-comprehensive cultural contexts

One way of describing the implications of an intrinsic value approach is to say that language and culture represent a form of social or collective capital belonging to the group and its members.[632] The loss of that capital is still a loss even if the group retains the ability to 'purchase' minimally adequate life options by means of the majority culture. This can be illustrated by way of analogy to the rules on specific performance under contract law. Ordinarily, specific performance is not available as a remedy, because damages are assumed to be capable of making the aggrieved party whole again. However, the courts have recognized that, in some cases, the only way to achieve that goal is to provide that party with the specific object it bargained for, because its unique properties cannot be obtained elsewhere through a market transaction. Similarly, as each culture is unique, the ability to live a life enriched by it

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[630] Raz (n 121) 200–1.

[631] It is worth noting here why Réaume feels that Kymlicka's argument cannot be saved from the charge of instrumentality this way. She argues that while Kymlicka's approach may appear to support the view that culture has intrinsic value—given that it is presented as a logical precondition to having a context of choice, which is itself viewed as intrinsically good—she concludes that this is an illusion, as it only applies in the abstract, not to particular languages: Réaume, 'Official-Language Rights: Intrinsic Value and the Protection of Difference' (n 623) 246. The response to this criticism, she notes, is usually to focus on the difficulty involved in changing cultures, but this in fact weakens the argument, as it shifts the focus to a cost-benefit analysis, which in many cases will appear to favour language shift: ibid 249. This would appear to be main thrust of the argument set out in Philippe Van Parijs, *Linguistic Justice for Europe and for the World* (OUP 2011).

[632] Interestingly, Statistics Canada, in testimony before the Senate, has borrowed Bourdieu's notion of 'social capital' to describe the nature of 'vitality' as set out in s. 41 of the OLA: Senate of Canada, 'Proceedings of the Standing Senate Committee on Official Languages. Second Session: Forty-First Parliament, 2013-14. Issue 9: Bill S-205, An Act to Amend the Official Languages Act (Communications with and Services to the Public)' (n 462) 122–3.

is irreplaceable, even if some of what a culture generically provides can be obtained by other means.

On that note, it is worth observing here that Kymlicka's argument can in fact be reconciled with a 'thicker' understanding of the value of language and culture. Though it is fairly common to interpret his claims as being based primarily on the *costs* of leaving one's own culture behind and adopting a new one,[633] the argument made in *Multicultural Citizenship* is not solely a cost-benefit analysis. Kymlicka makes a great deal of the fact that human beings are deeply resistant to abandoning their culture or their primary community, going so far as to say that 'the causes of this attachment lie deep in the human condition, tied up with the way humans as cultural creatures need to make sense of their world'.[634] He argues that, in light of the strength of this apparently fundamental and largely involuntary attachment, it would be unreasonable to expect members of a cultural minority simply to give up or accept the loss of their culture.[635]

Although one could try to shoehorn this argument into the logic of costs and benefits, Kymlicka's claim seems in reality to be that there is something inherently wrongful in demanding that an individual or a group abandon their culture, or that they acquiesce in political arrangements that will bring about that result. In short, this is a claim based on the inherent value of culture to individuals, rather than its instrumental value as a mechanism for gaining access to a sufficient range of options. Thus, despite the contrary assumption made by many theorists, I believe it is possible

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[633] See, for example : Réaume, 'Official-Language Rights: Intrinsic Value and the Protection of Difference' (n 623) 246; Newman, *Community and Collective Rights* (n 144) 75; Patten (n 550) 113; Carens (n 547) 55.

[634] Kymlicka, *Multicultural Citizenship* (n 55) 90.

[635] 'Leaving one's culture, while possible, is best seen as renouncing something to which one is reasonably entitled. This is a claim, not about the limits of human possibility, but about reasonable expectations' : ibid 86.

to adapt Kymlicka's argument to defend the granting of language rights to minorities that do not constitute a complete societal culture.

While a non-societal culture may not provide a full context of choice, it still provides options and meanings that the majority culture cannot supply. It can therefore be argued that respect for the autonomy of members of a minority culture demands protection for this more limited, but non-overlapping, context of choice. There does not appear to be any reason why a context of choice must necessarily be comprehensive in order to be morally significant.[636] Indeed, the view that non-societally complete cultures provide valuable choices is arguably more consistent with a commitment to multiculturalism than Kymlicka's account, which comes perilously close to endorsing the sort of mono-cultural nation-statism it sets out to (partially) undermine.[637]

We can further clarify the value of non-comprehensive cultures by dwelling for a moment on the fact that autonomy is not a purely abstract phenomenon. Kymlicka's liberal vocabulary of 'options' and 'choices', which suggests that one is dealing with a fungible good, can be somewhat misleading, as it implies the existence of an agent standing removed to some degree from the object under discussion, what Michael Sandel describes as an 'antecedently situated self' that is 'unconstrained by an order of value antecedently given'.[638] However, autonomy does not exist *outside* one's social context, but rather *in relation* to it.

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[636] Carens (n 547) 63.

[637] See, for example: ibid 64–69.

[638] Michael J Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press 1982) 147. Quoted in Johnston (n 297) 20.

Because of this, there can be no standard unit, an 'autile', that one could tally in order to determine whether a person or culture meets some stipulated minimum.[639] The relative value of the options afforded by a given culture will be the product of context. Arguably, moral judgment itself is impossible without social attachments, which create the normative space in which such judgment can be exercised.[640] But even without going this far, we can recognize that, as a factual matter, a person's sense of what is good and valuable—the way in which she ascribes meaning to her experiences and the world around her—will in part be determined by her cultural experience and attachments. Accordingly, cultural 'options' should not be viewed simply as interchangeable entries in the ledger of autonomy, and there is no reason to dismiss out of hand the value of non-comprehensive cultures, even if they offer a more limited range of goods.[641]

In a way, this brings us back full circle to the discussion I began in Chapter 5, in which I explored the connections between s. 23 Charter rights and identity. Language and culture are not simply free-standing goods that one can place on a shelf

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[639] See for instance: Parekh (n 85) 144. Indeed, some leading liberal accounts have renounced the possibility of using a single standard in this way. For instance, Isaiah Berlin argued that '[t]o look upon life as affording a plurality of values, equally genuine, equally ultimate, above all equally objective; incapable, therefore, of being ordered in a timeless hierarchy, or judged in terms of some one absolute standard.' Quoted in: Martha Nussbaum, 'Perfectionist Liberalism and Political Liberalism' in Flavio Comim and Martha Nussbaum (eds), *Capabilities, gender, equality : towards fundamental entitlements* (Cambridge University Press 2014) 23.

[640] Sandel goes so far as to say that 'a person incapable of constitutive attachments' is 'a person wholly without character, without moral depth', Christian Bay calls 'a cripple of a man' : Sandel (n 638) 179. Quoted in Johnston (n 297) 20.

[641] Parekh makes a similar point when criticizing 'moral monism', a family of moral theories that assume the existence of a universal human nature. In order to lead the good life, it is argued, one must first understand this human nature. Parekh rejects this view, arguing that '[h]uman beings are culturally embedded, and a culture not only gives a distinct tone and structure to shared human capacities but also develops new ones of its own. Since cultures mediate and reconstitute human nature in their own different ways, on vision of the good life can be based on an abstract conception of human nature alone… The idea that different ways of life can be graded is equally untenable. It presupposes that a way of life can be reduced to a single value or principle, that all such values or principles can in turn be reduced to, and measured in terms of, a single master value or principle, and that the good can be defined and determined independently of the agents involved. No way of life can be based on one value alone.' Parekh (n 370) 47–48.

and consume at will. They are bound up, through one's identity, with the very structure of the social world and one's daily experience of it. That has a number of serious implications for individual psychology and well-being. Membership in a group defines one's place in society, and also provides 'a social basis, emotional energy and a measure of stability and objectivity' to one's identity.[642] Because of this, individuals have a powerful interest in obtaining recognition for their identities and constitutive cultures, which are deserving of equal respect.[643] (Indeed, this is clearly a driving force behind many demands for legal measures that would alter the symbolic order of society, which I discussed in Chapter 6). Insofar as this identity flows from membership in a collectivity, the collective interests of the latter (such as linguistic viability) have a direct and substantial bearing on individual well-being.

7.4.4 Conclusion: context of choice 'plus'

In sum, I believe the context of choice framework is a promising candidate for explaining or elaborating upon the normative commitments of the CLRS, as described by the case-law, but that it needs to be supplemented by the recognition—or at least a greater emphasis on the fact—that the value of the linguistic 'choices' at issue is not only instrumental, but also intrinsic. The importance of having continued access to the options or way of life presented by one's culture cannot be measured according to a generic standard based on the 'adequacy' of the sum total of options available to members of the group. Rather, the culture itself is inherently valuable, both as a forum for decision-making and as the life-blood of the community that sustains its members' sense of identity.

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[642] ibid 156.

[643] Charles Taylor, Amy Gutmann and Jürgen Habermas, *Multiculturalism : Examining the Politics of Recognition* (Princeton University Press 1994) 42.

Adjusted in this way, the context of choice account provides a workable explanation for what the CLRS aims to achieve from a moral standpoint. However, by expanding the range of this framework to include non-societal cultures, I have opened the door to another problem, which the concept of societal culture initially solved, namely, the question of limits. If non-societal cultures provide a context of choice worthy of legal protection, does that not mean that the state has an equal obligation towards all such cultures within its borders? [644] If so, how does one account for the fact that the CLRS protects only two languages?

7.5 Universal vs contextual approaches: citizenship rights

7.5.1 Special rights and universal morality

Aside from English and French, there are dozens of languages spoken in Canada.[645] Many of these are aboriginal languages, while others were brought into the country by more recent waves of immigrants. Given that the CLRS protects only two languages, one might legitimately ask whether it is even sensible to view such rights as 'principled' (ie morally grounded), or whether we should not instead simply recognize that they are the product of political horse-trading, a 'political compromise' as it were between the two largest and most powerful linguistic groups.

Of course, given that my aim is to speak to the internal perspective on law, I could simply invoke the argument from authority and treat the matter as settled. The SCC has held that language rights are—despite being, from a historical perspective,

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[644] Alan Patten, 'Who Should Have Official Language Rights?' in André Braën, Pierre Foucher and Yves Le Bouthillier (eds), *Languages, constitutionalism and minorities = langues, constitutionnalisme et minorités* (LexisNexis Butterworths 2006) 237.

[645] Based on 2011 census data, there are over 200 languages spoken in Canada from 23 major language families : Statistics Canada, 'Immigrant Languages in Canada' (24 October 2012) <http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-314-x/98-314-x2011003_2-eng.cfm> accessed 15 May 2016.

the product of negotiation and political compromise—based on principle, the most important of which is substantive equality.[646] It would therefore be sufficient, at least in the context of a discussion taking place from within the internal perspective, to identify morally significant linguistic interests for which the majority enjoys protection, and to which the minority is therefore also entitled. That these claims cannot be universalized would not be sufficient reason to reject them in a court of law. In a similar vein, I might adopt Leslie Green's position, which is to say that specific rights granted to particular groups do not lose their moral basis simply because other groups have yet to be granted such rights—assuming of course that the granting of those rights does not itself cause further prejudice to the excluded groups.[647]

However, neither of those approaches is very satisfying, not least because the case-law clearly seems to imbue the decision to grant language rights to the Francophone community *specifically* as being morally justified.[648] If the aim is to account for the 'patterns of normative understanding' found in the case-law,[649] we need some explanation for this. As it happens, I believe there is a more satisfying way of dealing with this concern, one which in fact helps to further clarify some of the major interpretive controversies over language rights since 1982.

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[646] *Secession Reference* (n 63), para. 80; *Beaulac* (n 15), para. 24.

[647] Green (n 48) 665.

[648] For instance, as the Divisional Court in Lalonde said: 'the "minority protection" argument in this case is strengthened and fed by the reality that the minority in question is a francophone minority, whose culture and language hold a special place in the Canadian fabric as one of the founding cultural communities of Canada': *Lalonde (Div Ct)* (n 510), para. 73.

[649] McCrudden (n 25) 634.

7.5.2 Different levels of justification

The difficulty posed by the narrowness of the CLRS can be resolved simply enough by acknowledging that legal rights can be justified in different ways, and that a legal right can be morally justified without necessarily corresponding to a universal moral right.[650] David Miller, for instance, identifies three primary types of legal rights, based on the nature of their justification: human rights, justified legal rights, and citizenship rights.[651] Human rights are '(a) grounded in features of personhood that human beings everywhere share; and (b) specified by their function in protecting the basic interests of persons, such as personal security, freedom of thought and bodily movement, and so forth'.[652] Justified legal rights, by contrast, are legal rights granted on the basis of some policy consideration, which may be nothing more than a balance of interests, rather than a moral right.[653] Finally, citizenship rights are rights that flow from membership in a specific political community. Within that community they can be viewed as morally fundamental, but their content and configuration will be determined by the terms on which that community is founded.[654]

The concept of citizenship rights provides a means of explaining why it is that specific cultural communities can claim particular rights vis-à-vis their own states that may not correspond to any universal right. The notion captures a widely shared intuition that some portion of the content of political morality is necessarily local in origin, and

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[650] Miller (n 298) 181.

[651] ibid.

[652] Miller adds that human rights are rights whose 'justification appeals to facts about human beings whose relevance cannot be denied'. ibid 181–182.

[653] Jeff King makes a similar distinction, as between what he calls 'social human rights' and 'social citizenship rights': Jeff King, *Judging Social Rights* (Cambridge University Press 2012) 18–19.

[654] Miller (n 298) 182. On this point, consider the concurring reasons of Wilson J in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at para. 122, where, in discussing the meaning of 'principles of fundamental justice' (as found in s. 7 of the Charter), she notes that 'We know what "fundamental principles" are. They are the basic, bedrock principles that underpin a system.'

shaped by the distinctive historical experience of each particular society.[655] Borrowing from Joseph Carens' notion of justice as 'even-handedness', we might say that principles of political justice—and therefore rights—are partly defined by context.[656] The circumstances of history can justify the provision of certain goods on a limited basis that otherwise might appear discriminatory. For example, one can justify financial transfers to African Americans as a response to the legacy of slavery, even though other individuals or groups being left out are similarly situated from an economic standpoint.

Of course, one might legitimately ask how far this can go. For instance, can citizenship rights actively derogate from or limit human rights? That question arises in the aboriginal law context, for instance, where band councils can impose membership controls that violate general principles of gender equality.[657] Space constraints prevent me from examining this question in any detail, but the problem here is not really with the contextual aspect of the justification for those rights, so much as the nature of the rights themselves. Self-government rights are collective rights, and necessarily carry with them the power to limit the freedom of individual members. Whether or not the powers of government can be used in a manner that

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[655] Green appears to share this intuition, given the two-stage process he outlines for the justification of official language rights. History and context play a leading role in the factors he lists as being relevant to the ulimate determination as to which languages merit protection : Green (n 48) 664–665. Similarly, Patten has argued that established minority languages have a special claim on a state's resources relative to immigrant languages : Patten (n 644) 247. See also : Linda Cardinal, 'Langue, droit et politique: la théorie libérale et le débat sur les langues minoritaires' in André Braën, Pierre Foucher and Yves Le Bouthillier (eds), *Languages, constitutionalism and minorities = langues, constitutionnalisme et minorités* (LexisNexis Butterworths 2006) 222–3; Kymlicka, *Multicultural Citizenship* (n 55) 116–120; Doucet, 'Pourquoi une langue mérite-t-elle une protection constitutionnelle ou législative' (n 534) 62.

[656] Carens (n 547) 3. Jacob Levy makes a similar point when he notes that 'a state's avowed self-understanding acquires normative force of its own': Levy (n 263) 247. See also: Tierney (n 562) 10–11.

[657] Sébastien Grammond, *Terms of Coexistence : Indigenous Peoples and Canadian Law* (Carswell, Thomson Reuters Canada 2013) 408–409.

violates human rights—be it by a band council or a sovereign state—is itself largely a matter of context and proportionality. The same basic test would presumably apply to any other type of citizenship right that allowed or implied a departure from a more generic human rights standard.

7.5.3 Citizenship rights and the political compromise doctrine

If the CLRS is viewed as being made up primarily of citizenship rights, the apparent tension between its beginnings as a 'political compromise' and the exalted status language rights now enjoy in the case-law can largely be resolved. I would say that such rights enshrine certain principles *born of compromise*. These principles emerged from good faith negotations over how to remedy an injustice which threatened the survival of the community, in a manner that was fair and legitimate under the circumstances.[658] They are specific to Canada because the circumstances that gave rise to them are not universal, but they are both morally grounded and fundamental, because they underpin the very legitimacy of the Canadian state.

This way of viewing things provides what I think is a helpful way to understand the intuition behind Beetz J's reasons in the Trilogy.[659] His thinking appears to have been driven by the sense that language rights are contextual in nature, and that their justification is derived from a specific set of circumstances, meaning that ignoring their

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[658] As one judge recently put it : 'From its genesis, Canada brings to the world a unique history and culture of cooperation and tolerance. It is rooted in the commitment of French and English people, who had earlier been separated by geography, a history of divisive disputes, language and culture, to live together, to work together and to share the resources of a new nation. Section 23 restates a fundamental part of that commitment relating to language and culture and acknowledges the vision and faith of our nation's pioneers. Our distinct place in the world's family of nations is dependent on governments honouring the commitment entered into more than two centuries ago which has been reaffirmed by this generation of Canadians through the enactment of particular provisions of the Canadian Charter of Rights and Freedoms': *Assn des Parents Francophones (Colombie-Britannique) v British Columbia* 27 BCLR (3d) 83 (BC Sup Ct), para. 24; cited with approval in *Association des parents de l'école Rose-des-vents v. Colombie-Britannique (Éducation)* (n 609), para. 24.

[659] *MacDonald* (n 44); *Société des Acadiens* (n 62); *Bilodeau* (n 361).

contextual origins risks doing violence to their principled underpinnings. Where he erred, on the other hand, was in holding that this places them lower on the hierarchy of rights, below 'seminal' rights, and deprives them of a moral foundation. As La Forest J saw in *Mercure*,[660] and as the SCC would state even more unequivocally in the *Secession Reference*,[661] language rights are no less fundamental than other Charter rights that simply happen to be universal in nature.

This also explains why, as Dickson CJ held in *Mahe*, the courts must be willing to 'breath life' into the compromise expressed in these rights.[662] As Sunstein notes, the decision to enshrine a principle of equality in the constitution typically represents an incompletely theorized agreement.[663] It would therefore be a mistake to assume that the drafters turned their minds to every detail of the mechanics of how that principle is to operate in practice. And one should be mindful, when spelling out the implications of this commitment to linguistic equality, that one party to the compromise has at all times been substantially weaker than the other.[664] The courts should therefore not be too ready to use textual details as a pretext for limiting the rights enjoyed by the minority, as the SCC did in the Trilogy. On the contrary, they should, as in *Mahe*, read those details in the way most favourable to the weaker party.

That being said, even if language rights are fundamental in their importance to Canada—'basic to the viability of the nation', as La Forest put it in *Mercure*—the SCC has occasionally erred in extending the concept of 'fundamentality' too far, apparently

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[660] *Mercure* (n 154), p. 268.

[661] *Secession Reference* (n 63), para. 80.

[662] *Mahe* (n 14), p. 365.

[663] Sunstein (n 43).

[664] Réaume, 'Official-Language Rights: Intrinsic Value and the Protection of Difference' (n 623) 260.

lumping language rights in with other, universal, human rights.[665] As I noted above, while some of the Canadian language rights system might be described as an extension of basic human rights, much of it goes well beyond the range of protections traditionally offered under this rubric. Indeed, there is a clear difference between the basis of universal human rights and the Charter's language rights, which it would be pointless, even disingenuous, to deny. Acknowledging that difference does not weaken the case for language rights, but instead allows us to understand it more clearly. There is great value in that, as a lack of clarity on this point continues to lead to some highly questionable reasoning by the courts.[666]

7.6 Linguistic viability: security or survival?

If, as I have argued, language rights should be viewed as resting, at least in part, on a principle of equality-as-viability, the question then becomes: what is 'viability' and what is needed to support it. Of course, in the last chapter I outlined the concept of ethnolinguistic vitality, which captures many of the variables underpinning viability from an empirical standpoint and provides considerable practical guidance. However, from a normative standpoint, viability can be understood in somewhat different ways, and some argue that these differences have serious implications for the types of measures it might justify.

Borrowing from Alan Patten, we might describe the two main conceptions of viability as the (1) 'end-state' and (2) 'procedural' approaches.[667] The end-state

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[665] *Mercure* (n 154), p. 268.

[666] Consider the discussion of language rights in *Baie d'Urfé (Ville) c Québec (Procureur général)* 2001 CarswellQue 2349 (QC CA), paras. 127-45, where the distinction between language rights and 'fundamental rights', as well as the concept of a 'political compromise', were resurrected. See also: *Doucet v. Canada* (n 273), para. 72.

[667] Patten (n 535), 115, 120. See also : Patten and Kymlicka (n 57) 48–51.

conception defines viability in terms of a specific linguistic outcome, like maintaining the relative or absolute size of a linguistic community, i.e. ensuring its survival. The procedural conception, by contrast, is focused on ensuring that the social process which determines the availability of linguistic options does not unfairly benefit one language over another, but stops short of committing to ensure the survival of the linguistic community.

The viability of a linguistic community is perhaps most naturally defined in terms of its ability to survive over the medium or longer term. A language that is rapidly declining in use and expected to disappear within a few generations can hardly be described as 'viable'. Moreover, a linguistic community whose survival is in serious doubt is very unlikely to possess the institutional network needed to provide a fully adequate context of choice.

In spite of this, however, those who support the context of choice argument for language rights often disagree that linguistic survival is a relevant consideration. More specifically, they tend to reject the view that there can be a *right* to linguistic survival as such. Patten, for instance, rejects what he calls 'end-state arguments' as a general matter, on the grounds that they are incoherent.[668] In his view, different options compete with each other all the time, and there may be no way of arranging social institutions in such a way as to guarantee the flourishing of every particular set of options that is currently valued by a group of people. In fact, some options (like sexual promiscuity) are trapped in a zero-sum game with others (conservative Catholicism or Islam), making it impossible to achieve that goal. Similarly, it is impossible to protect every language, 'and thus the mere fact that under some institutional arrangement a particular group's language is not doing well is not

[668] Patten (n 550) 117.

sufficient to warrant a complaint grounding a right on the part of members of the group.'[669] The most one can reasonably expect is that one's language not be treated unfairly relative others. The conditions of fairness, however, may not be sufficient to ensure survival.

Leslie Green raises a similar objection, arguing that the interest of a language group in surviving over time is not a sound basis on which to ground language rights.[670] According to Green, the notion of a 'survival interest' typifies the arguments advanced by minority francophone communities outside Quebec and by the overwhelming majority of demographers and socio-linguists working in this area.[671] Although he acknowledges that human beings have a legitimate interest in cultural survival, Green concludes that this interest is not 'of great moral concern'.[672]

Green offers two main reasons for this. First, as a future-oriented interest, the survival interest must be discounted back to present value.[673] The interest of a living person in the continued existence of their language community two or three centuries hence is quite remote. Moreover, given that languages change over time, it is unclear that a person living today would value the language spoken by the descendants of their community in the distant future: 'Would Chaucer have cared about the language we now speak or, more absurdly still, would the author of *Beowulf*?'[674]

The second reason for dismissing the survival interest stems from the impractical or intrusive nature of the measures needed to guarantee linguistic survival.

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[669] ibid.

[670] Green (n 48) 656.

[671] ibid 653.

[672] ibid 656.

[673] ibid 656–7.

[674] ibid 657.

Linguistic behaviour is complex and has many determinants over and above whether or not one has the ability to use it in public or receive government services in it. Furthermore, any attempt to control these (such as rates of endogamy) is likely to conflict with other moral interests. A regime based on protecting the survival interest is therefore unworkable.

While both of these points are fair, so far as they go, there are some serious problems with Green's overall argument here, and with the rejection of linguistic survival as a consideration more generally. However, to make this clear we must first consider Green's alternative to the 'survival interest', what both he and Réaume call the 'security interest'.[675]

As Green explains it, individuals have an interest in linguistic security that is sufficient to justify language rights. This security interest consists in the interest of members of a language group in having the ability to flourish and use their language with dignity. This interest has both 'instrumental' and 'expressive' dimensions. It is instrumental in that the ability of a person to flourish is determined to large extent by the linguistic environment in which they must operate and the degree to which they master the various idioms used therein (i.e. it defines their context of choice). It is expressive in that a person's connection to their native language often transcends the purely pragmatic: 'most people feel an attachment to their mother tongue which cannot be reduced merely to its utility in communication: it is for them a marker of identity, a cultural inheritance and a concrete expression of community'.[676] Because of the complexity of the security interest, and the way in which it intersects with both

[675] Réaume, 'The Group Right to Linguistic Security: Whose Right, What Duties?' (n 54).

[676] Green (n 48) 659.

private and public goods, Green argues that we should think of it 'not as a single good, but as a structurally complex cluster of goods'.[677]

Unlike the survival interest, however, the security interest is present-oriented. It represents the 'value of the human relations and interactions which a shared linguistic culture makes possible.'[678] While these interactions do extend through multiple generations, they are not indefinite, with a horizon that 'coincides for each person with the boundary set by the likely possibilities of direct communication.'[679] For the vast majority of people, and with present levels of technology, that would mean a limit of roughly four generations. The survival interest, by contrast, is 'of potentially indefinite extent; it may include the desire to see the use of one's language continue in perpetuity.'[680]

On a purely conceptual level, the distinction between the survival and security interests appears sound. However, it runs into serious difficulties when one attempts to determine what it would mean in practice. For instance, Green concludes that any policy aiming to secure 'linguistic survival' is necessarily suspect because the means required to achieve this end are so invasive.[681] However, he does little to distinguish, on a practical level, between the requirements of such a policy and one aiming merely at linguistic security.

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[677] ibid 660.

[678] ibid 658.

[679] ibid.

[680] ibid 656. Levy makes a similar distinction. He identifies a type of language right, which he labels 'present-tense rights', which arise from the present-day interests of living minority language speakers. These rights can amount to 'permanent' rights if they are sufficient to stabilize the language community (which may happen if it is large enough and provides enough opportunities), but that is not their aim. But they will sometimes be transitional rights, slowing and easing the shift from one language to another: Ibid 242.

[681] ibid 657.

In fact, there seems to be little daylight between the two concepts in this respect. Green defines the state of linguistic security as being 'the knowledge that one's language group may flourish and that one may use the language with dignity'.[682] It is difficult to see how this would differ, at any given point in time, from a situation in which *survival* is the likely outcome, for it is hard to believe that anyone would think their language group was 'flourishing' if it were currently on a path to eventual disappearance within a few generations, no matter the economic or cultural opportunities available to them in the present.[683]

Furthermore, as we saw in Chapter 6, ethnolinguistic vitality is to a large degree the product of subjective perceptions regarding the status and vitality of the group's language.[684] The overarching historical narratives that define a community have a direct impact on the psychology and linguistic behaviour of present-day individuals.[685] If an established narrative gives rise to the perception that the community has a low status, or is doomed to extinction, this will contribute to assimilation by discouraging individuals from investing resources in its language. Linguistic security may thus require, as a practical matter, the belief that survival is likely, or at least possible.

In this respect, Green's point about Chaucer largely misses the mark. In keeping with a constructivist account of ethnicity, as discussed in Chapter 5, one must distinguish between the language and the community that speaks it. Even though

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[682] ibid 658.

[683] See generally: Bertjan Doosje, 'Commitment and Intergroup Behavior' in Naomi Ellemers, Russell Spears and Bertjan Doosje (eds), *Social identity : context, commitment, content* (Blackwell 1999). In fact, Green and Réaume seem to concede this point in a different article: Réaume and Green (n 592) 781–782.

[684] Réal Allard and Rodrigue Landry, 'Subjective Ethnolinguistic Vitality: A Comparison of Two Measures' (1994) 108 International Journal of the Sociology of Language.

[685] Gilbert and others (n 476).

Chaucer may not have cared about (or at least not had a significant interest in) the manner in which his language would evolve over many centuries, this nonchalance likely did not extend to the fate of his ethno-linguistic community, the English people (insofar as such a concept existed at the time).[686] Indeed, the present-day English people claim Chaucer as one of their own despite the large differences between his language and their modern idiom.

It is in the nature of social identity for one's collectivity to be connected to—in fact, premised upon—a historical narrative of some kind, through which the existence of the group is explained and its future defined (or at least imagined).[687] As Newman notes, '[t]hrough our traditions, we live out an intertemporal community with our forebears and our descendants, thereby fulfilling an important interest individuals have in the endurance of their efforts.'[688] While some social groups may dream of one day ceasing to exist—for instance, groups denied the right to fully integrate into mainstream society on the basis of their identity, which is in fact largely *defined* by the experience of exclusion—that is typically not the case of ethnolinguistic collectivities like Canada's two official language communities.

Given the inter-temporal nature of such communities, it seems impossible to separate one's present-day interests in the well-being of one's community from either its past or its (imagined) future.[689] At the very least, this appears to be the

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[686] Chaucer himself lived over a century before the full crystalization of English nationalism, but the 'Chaucerian revival' played an important role in 16th Century nationalist discourse/patriotism. Greenfeld (n 70) 43.

[687] For instance, historical narrative is often viewed as a defining characteristic of 'indigeneity', ie indigenous identity. Grammond (n 657) 10. See also Yael Tamir, *Liberal Nationalism* (Princeton University Press 1993) 79. From a psychological perspective, identity and narrative appear to be inseparable, and together explain and determine the motivational importance of current events: Jordan B Peterson, *Maps of Meaning : The Architecture of Belief* (Routledge 1999) 22–26.

[688] Newman, *Community and Collective Rights* (n 144) 124.

[689] Kymlicka's approach, for instance, appears to take this for granted. His analysis is based on a triptych of sociological types : national minorities, aboriginal groups, and ethnic minorities (i.e.

unequivocal view of the case-law on the matter. The role afforded historical injustice in the interpretation of the CLRS, which I discussed in Chapter 5, shows the degree to which past mistreatment continues to shape current-day rights.[690] And, as the SCC has recognized, the CLRS governs 'situations in which not only individual rights, but also the existence of language communities and the manner in which those communities perceive their future, are in issue'.[691]

Objections to the survival interest on grounds of cost or intrusiveness seem similarly misguided.[692] There is no reason to presume, *a priori*, that an actor who values linguistic survival would not also seek to balance that goal with other values and interests. In fact, it is a commonplace that fundamental rights must be interpreted and enforced in light of a range of interests and values and that conflicts may arise.[693] It is important to distinguish between the proposition that the *interest* in linguistic survival can serve as a ground for certain rights that will *contribute* to that survival, and the claim that there is a *right to* linguistic survival. The latter may in fact be untenable for the reasons Green, Patten and Réaume outline, but that is not a reason to side-line the survival interest altogether, any more than the need to impose certain limits on individual freedom provides a reason to dismiss the interest in autonomy.

That being said, it is important to recognize that there are in fact serious practical obstacles to the survival of minority languages, and that the moral

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descendents of recent immigrants). In the case of both national minorities and aboriginal groups, a history of forcible integration through conquest or colonization is an important factor in favour of granting them extensive rights. See for example: Kymlicka, *Multicultural Citizenship* (n 55) 40. Since Green accepts the moral relevance of identity-based interests within his 'security interest' framework (Green (n 97) 659) it is at the very least inconsistent not to take this into account.

[690] See the discussion in Chapter 4, section 4: 'The need to account for the historical continuity of interests'.

[691] *Solski* (n 32), para. 4 (emphasis added).

[692] Green (n 48) 657; Patten (n 550) 117; Réaume and Green (n 592) 780–781.

[693] *Saskatchewan (Human Rights Commission) v Whatcott* [2013] 1 SCR 467, para. 66.

implications of language transfer or language death are not always clear-cut. For instance, the process of linguistic consolidation or assimilation can take place for reasons other than unjust or coercive government policy. Some of the pressures towards consolidation or assimilation 'arise spontaneously' with the advent of literacy in a given society.[694] Literacy requires a much greater investment than merely becoming conversant in a language. Thus, in a world where literacy is the norm, there is significant downward pressure on the number of languages any one person can know. Literacy also limits the number of languages that can be learned in a given region, and causes the spectrum of dialects to collapse into hard linguistic boundaries, as these dialects converge on a few discrete 'standard' forms of language.[695]

Far from being universally lamented, this process will often be viewed as increasing social and economic mobility and even improving democratic accountability, on the grounds that a common language and a shared national identity are necessary for democratic politics to function effectively.[696] As a result, the number of languages that can realistically be expected to survive from a global perspective has been dramatically reduced by the spread of modernity and the concomitant normalization of literacy.[697] Securing linguistic survival for some groups may in fact be impossible, or so costly as to be unjustifiable.

However, that does not appear to be the case for MFCs, at least not yet. French is a written language, and offers substantial advantages within the broader Canadian social ecosystem, as the tremendous popularity of French immersion programs with anglophone parents attests. Moreover, the case-law has repeatedly

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[694] Levy (n 263) 230.

[695] ibid 231–2.

[696] ibid 233. See also: Coulombe (n 89) 243.

[697] Weinstock (n 1) 257–8.

stated that the 'preservation' of OLMCs, and their protection from 'erosion' or assimilation, are primary objectives of the CLRS.[698] This vision continues to shape public policy in important ways, such as the Ontario government's recent commitment to ensuring that Francophones constitute 5% of all immigrants to the province, in a bid to maintain demographic parity.[699] In light of this, it seems important to retain the concept of a survival interest when construing the scope of s. 41 of the OLA.

7.7 Equality as fairness between collectivities

7.7.1 Moving beyond language per se

Before concluding, it is necessary to deal with one final point, which has to do with the relevance of non-linguistic or non-cultural considerations. In the normative literature dealing specifically with language rights (as opposed to minorities more generally), there is a tendency to view questions of fairness or equality solely through a linguistic lens. Yet while it is certainly important to identify the goods residing in, or mediated by, language and culture *per se*, it is also the case that substantial inequalities in the distribution of goods frequently track linguistic or cultural boundaries without necessarily being directly explicable in terms of language and culture. As Tierney notes, an excessive focus on specifically 'linguistic' interests can lead one to misunderstand or overlook much of what is genuinely at stake for communities demanding language rights. He argues that we should instead situate

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[698] Johnston argues that the Canadian system of collective rights is designed to guarantee group survival: Johnston (n 297) 26. Yoram Dinstein argues that international law affords all minorities the right to self-perservation: Yoram Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 International and Comparative Law Quarterly 103, 118.

[699] Philippe Orfali, 'francophone: «passez de la parole aux actes», demande Boileau' *La Presse* (7 November 2013) <http://www.lapresse.ca/le-droit/politique/201311/07/01-4708110-immigration-francophone-passez-de-la-parole-aux-actes-demande-boileau.php> accessed 25 February 2015.

language rights within the broader rubric of the 'politics of language', which 'encapsulates the extent to which language is often part of a broader set of political claims and, in particular, the ways in which language claims are tied closely to wider constitutional aspirations of sub-state national groups.[700]

In other words, sociolinguistic impacts are not the only issue. There is a distributive aspect to language and cultural rights which is only partly captured by the notion of culture as a context of choice. As we saw in Chapter 2, one of the main motivating factors underlying the B&B Commission's proposals—which in fact gave them much of their moral weight and urgency—was the fact that, at the time, French Canadians were severely disadvantaged in socio-economic terms, and not merely socio-linguistic ones. For instance, its research showed that those of French Canadian origin earned only 64% of the average income for a person of British descent, and ranked 12th out of 14 ethnic groups in Quebec in terms of income.[701] The weakness and progressive erosion of French was to a large degree the consequence of the English-speaking society's quasi-monopoly on various key goods, which impelled large numbers of francophones to assimilate as the means to a better life. Assimilation was, in a sense, the canary in the coal mine for a much broader range of injustices.

It is of course possible to distinguish analytically between language *stricto sensu* and the broader distributive features of the social system. Nevertheless, in practice debates about language policy and language rights overlap substantially with questions relating to resource allocation, because linguistic injustice is often accompanied by other forms of unfairness suffered by the minority. Theoretical

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[700] Tierney (n 562) 3–4.

[701] 'Report of the Royal Commission on Bilingualism and Biculturalism - Book III: The Work World' (n 496) 23.

accounts less focused on language as such, and more concerned with the rights of 'nations' or 'peoples', often do a better job of engaging with this dimension of fairness.[702]

Space does not permit me to explore these questions in great detail here. However, it is important to point out that questions of general distributive equality are very much relevant to the meaning of s. 41 of the OLA. Insofar as the latter is meant to protect a right to equality, the domain of that equality should not be limited to strictly sociolinguistic concerns.

In Chapter 4, I discussed how Parliament, in drafting s. 41 and the 2005 amendments, was concerned with more than simply providing the opportunity to use an official language when interacting with the state. Section 41 was viewed as a federal analogue to section 16.1 of the Charter and the NB Equality Act. The latter stipulates that in 'the allocation of public resources', the government of New Brunswick must promote 'the cultural, economic, educational and social development of the official linguistic communities'.[703] This is a clear reference to distributive concerns, and one which extends well beyond sociolinguistic impacts. That the drafters of s. 41 (both pre- and post-2005 amendments) perceived a close link between Part VII and the NB Equality Act therefore suggests that the reference to OLMC 'development' in s. 41 was meant to advert to broader questions of distributive justice.

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[702] For instance, Kymlicka argues that minority groups ought to have the right to engage in nation-building of their own, because majorities cannot realistically be expected (nor indeed properly be requested) to abandon their nation-building efforts. Patten (n 550) 124. While nation-building may be an effective means of protecting a language, and is therefore sometimes appropriated by arguments focused narrowly on linguistic matters, as a political project it tends to be much broader in scope.

[703] This idea can be read into s. 41 via the principle of substantive equality : 'once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner', *Eldridge* (n 241). See also : *Beaulac* (n 15), para. 24.

In fact, such an argument was strongly hinted at in the *DesRochers* case, which dealt with the role of linguistic communities in the design of local economic development policies.[704] It is worth examining that case in some detail here, for at least two reasons. First, it highlights the fact that sociolinguistic factors can overlap with distributive ones in ways that make them hard to neatly separate. And second, as the SCC decision that engages most deeply with the demands of equality outside a s. 23 Charter context, it provides a useful testing ground for the ideas developed thus far regarding the nature of equality in a language rights context, as well as a chance to reflect on some of the challenges MFCs face in establishing the existence of inequality.

7.7.2 DesRochers: a clash of two equalities

At issue in *Desrochers* was whether a community economic development program in central Ontario had been implemented in a manner consistent with the federal government's duty to provide services of 'equal quality' in both English and French under s. 20 of the Charter and Part IV of the OLA.[705] The crux of the problem was that, despite having hired French-speaking personnel and having made efforts to be more welcoming to francophone business interests, the agency set up by Industry Canada for that region was still failing to reach the francophone community and had

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[704] *DesRochers v. Canada (Industry)* (n 110).

[705] In setting up the program in a region known as Huronia (a region bordering on Lake Huron north-west of Toronto with a substantial francophone population), Industry Canada had failed to offer even the most basic of services in French, leading members of the local francophone community to set up their own (independently funded) economic development agency, known as CALDECH. Eventually, having been made aware of its failure, Industry Canada agreed to fund CALDECH on an interim basis while it made changes to its program. However, these changes proved insufficient, and CALDECH's backers felt that the local agency created by Industry Canada to run the program remained insensitive to the needs of the francophone community. CALDECH therefore initiated proceedings under the Charter and the OLA, asking that Industry Canada be ordered to provide it with a stable revenue stream as the de facto service provider to the francophone population, and that it be compensated for services rendered during the years before Industry had agreed to fund it on an interim basis.

yet to develop a single project with a French-speaking business person. By contrast, a local agency (CALDECH) set up by the francophone community under the leadership of Mr. DesRochers had succeeded in creating dozens of projects.

The plaintiffs' basic allegations, which were effectively accepted by Industry Canada, were as follows:

> The French from the Huronia region are different than the English majority because, inter alia, they: (i) have less economic power in the region; (ii) have fewer jobs and a higher unemployment rate; (iii) have fewer institutions that are their own and are less likely to live in their mother tongue; (iv) are less likely to work in their mother tongue; (v) are subject to a rate of assimilation of more than 67%; (vi) live in a region where historically Francophones have been persecuted; and (vii) have a culture which is different. Accordingly, in terms of community economic development, the needs of the French in the Huronia region are different than those of their English peers.[706]

From a legal standpoint, the gravamen of the claim was that a bilingual institution, which would, there as in most parts of Ontario, necessarily be Anglo-dominant, could not meet those needs, whereas a Francophone institution like CALDECH could.[707] The right to equal services therefore included, under those particular circumstances, the right to differentiated services.

Importantly, however, equality was being invoked in relation to the quality of the services themselves. There was no serious attempt to argue that Industry's policy was causing or contributing to assimilation—in other words, the plaintiffs were not complaining of a sociolinguistic harm. Rather, their claim was that the *distributive* impact of Industry's policy framework was unequal because of the sociolinguistic characteristics of the minority. It was supported in this claim by the Official Languages Commissioner, which argued that the principle of substantive equality

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[706] *Desrochers v Canada (Industry)* 2005 FC 987 (FC), para. 64.

[707] Thus, Mr. DesRochers had stated that '[w]hen both services are offered, it is only a translation. It does not reflect our cultural values, our approach. And that CALDECH has developed an approach culturally sensitive to the Francophones and that explains why we have fifty or so initiatives'. *ibid,* para. 69.

recognized in *Beaulac* implied that the government had a duty 'to take the necessary steps to ensure that Francophones are considered equal partners with Anglophones in regional economic development' as well as 'in the provision of equal economic development services'.[708]

For its part, the government did not dispute the factual allegations listed above, but instead rested its case on the proposition that Part IV of the OLA protected specifically linguistic interests and nothing else. In its view, Part IV did not impose an obligation to deliver services in different ways, even if the francophone and anglophone communities had different needs. Federal institutions were merely required to be bilingual—i.e. to have the ability to communicate with the public in both languages—in those cases specified under Part IV and its attendant regulations.

The trial judge effectively endorsed the government's view of Part IV,[709] although he went on to suggest that the analysis under Part VII might be somewhat different, and that funding organizations like CALDECH could well be a means of fulfilling the obligations imposed by s. 41. Indeed, one could easily argue that, even though the failings of Industry Canada's agency were not directly causing socilinguistic harm to the minority, it was failing to take the necessary measures within its power to support the Francophone community's viability, as a concept of equality-as-viability would require. However, the trial judge emphasized that it

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[708] *Desrochers v Canada (Industry)* [2007] 3 FCR 3 (FCA), para. 38.

[709] 'It may well be that a great number of Francophones prefer to deal with CALDECH, which has had greater success in reaching out to the French-speaking community. North Simcoe is not only required to deal with the French-speaking community, but also to pay attention to needs of women, youth and First Nations. I think the applicants are reading too much into sections 22 and 25 of the Official Languages Act. Without in any way segregating language from culture, I cannot agree that equal service requires that an institution be run by the official language minority, be it French in Ontario or English in Quebec. One could not make that a requirement of Industry Canada itself. Section 22 of the Official Languages Act requires a federal institution to communicate in both languages and to render equal service in both languages.' *Desrochers (first instance)* (n 706), para. 72.

would beyond his power 'to tell Industry Canada how to organize itself', as Part VII was not (at the time) enforceable.[710]

The Federal Court of Appeal upheld the trial judge's interpretation of equality, holding that it applied to the communicative aspect of service delivery, and not the content of the service.[711] As we will see shortly, however, the SCC adopted a different conception of equality for its interpretation of Part IV, overruling the lower courts on this point. In effect, it held that the FC and FCA had adopted a formal conception of equality, contrary to the prevailing approach in language rights law.

7.7.3 The intersection between sociolinguistic and distributive goods

Before the SCC, the plaintiffs sought to frame the lower court decisions as being squarely at odds with the principles outlined in *Beaulac*. In the latter case, the SCC had emphasized that language rights are meant to establish a norm, rather than a right to some form of accommodation. The public good that is the subject of a language right must be offered to the minority on the same basis as it is to the majority, not as an *ad hoc* addition cobbled together on the fly. Mr. DesRochers argued that 'a community economic development service that is tailored to the needs of the majority and is merely offered to the minority in its language amounts at best to accommodation',[712] and that it therefore violated the principle set out in *Beaulac*.

What Mr. DesRochers sought to achieve, in effect, was to convince the court that, for the purposes of equality under s. 20 of the Charter (and its statutory

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[710] *ibid,* para. 74.

[711] 'Part IV of the OLA provides for equal linguistic access to regional economic development services in Ontario, and not access to equal regional economic development services'; furthermore, it 'does not grant any right of participation in the definition of the content of those programs'. *Desrochers (FCA)* (n 708), para. 33-4.

[712] *DesRochers v. Canada (Industry)* (n 110), para. 47.

counterpart, s. 22 of the OLA), the word 'language' did not refer merely to the 'technical requirements of communication',[713] as though the content of the service existed prior to, and independently of, any broader socio-cultural framework. Instead, 'language' in this context should be read in light of the language-culture link recognized elsewhere in the case-law, namely, in its capacity as an element of social organization, rather than merely an individual trait (as we saw in Chapters 5 and 6).

In the context of s. 20 of the Charter, this requires giving some consideration to the way in which public service design and delivery can result, unwittingly perhaps, in the unequal distribution of goods between the majority and the minority. This is especially true given that CLRS rights are intended to be 'remedial' of past wrongs, meaning that they are meant to act as a counterweight that inhibits further injustice and assists in repairing past harms.[714] As Rousseau famously noted, '[i]t is just because the force of things tends always to destroy equality, that the force of legislation should tend always to uphold it.'[715]

Determining whether services of 'equal quality' are being offered to both linguistic communities with reference only to whether both languages are used to communicate is analogous to saying that one can have the right to 'use' one's language in court even if no one there understands it. In other words, it completely hollows out the right.[716] Securing the ability to employ one's language to fulfil the technical requirements of communication is but one aspect of s. 20 Charter rights, which exist to ensure that both communities benefit equally from public services.[717]

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[713] Bourdieu (n 358).

[714] See the discussion on Levy's notion of 'counterbalancing' in section 3.5.2.

[715] Quoted in Carens (n 547) 11.

[716] See generally: Réaume, 'Demise of the Political Compromise Doctrine' (n 252).

[717] Boileau (n 533) 613.

Communication is of course an important facet of that objective, but does not exhaust it. Indeed, to hold otherwise would render superfluous the distinction between 'communications' and 'services' which is found in both s. 20 of the Charter and s. 22 of the OLA.[718]

In *DesRochers,* the Supreme Court endorsed a conception of equality consistent with the one I just described, though of course not using precisely these terms:

> It seems clear to me that the respondents are correct to say that the principle under s. 20(1) of the Charter and Part IV of the OLA of linguistic equality in the provision of government services involves a guarantee in relation to the services provided by the federal institution. However, it is not entirely accurate to say that linguistic equality in the provision of services cannot include access to services with distinct content. Depending on the nature of the service in question, it is possible that substantive equality will not result from the development and implementation of identical services for each language community. The content of the principle of linguistic equality in government services is not necessarily uniform. It must be defined in light of the nature and purpose of the service in question.[719]

Given that the purpose of the service in question was community economic development, it followed that the minority had the right to participate in both its development and implementation.[720]

It is tempting to speculate that the court's conclusions in this respect were influenced by the fact that Parliament had, between the filing of the complaint and the hearing at the SCC, enacted the 2005 amendments, making Part VII executory. Both the trial court and the court of appeal had acknowledged that Part VII might serve as a legal foundation for the conception of equality being advocated by Mr. DesRochers,

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[718] A bill is currently before the Senate, Bill S-205, that would clarify this. It is unclear whether this is desirable, however, as its very existence implies that the distinction is not already present in s. 20 of the Charter, which could be problematic in future cases, especially if the Bill is passed and then later repealed.

[719] *DesRochers v. Canada (Industry)* (n 110), para. 51.

[720] *ibid,* para. 53.

were it executory. Even though the 2005 amendments were non-retroactive, and thus not directly pertinent to the case at bar, it was (and is) extremely likely that Part IV obligations will in future cases be construed or indeed litigated in conjunction with those arising under Part VII. At the very least, Part VII's existence as an enforceable legal duty makes the acontextual, formal conception of equality adopted by the lower courts seem out of place.

Unfortunately for CALDECH, however, the spectre of a future Part VII challenge likely cut both ways. For, despite overturning the lower courts on the definition of 'equal quality', the SCC reached the same conclusion as them, and refused to grant the funding order requested. It appears that, much like the lower courts, the SCC felt that the gravamen of Mr. DesRochers' claim pertained to Part VII and not to Part IV.[721] At the very least, it seems to have thought that the evidence could not sustain a claim under s. 22 of the OLA, although it likely would have been sufficient for s. 41. While the court appeared convinced that the measures requested by Mr. DesRochers—continued funding of CALDECH as a parallel service delivery mechanism for the francophone community—would enhance the vitality and support the development of the local OLMC, it was not persuaded that the services were in reality unequal, even using a substantive conception of equality.

7.7.4 Inequality and causality

In fact, the court's approach on the latter point is potentially very worrying for future cases. Charron J reasoned that the very success of CALDECH might itself be the cause of Industry Canada's failure to reach francophones, and concluded that 'the apparent disparity in results between the two language communities does not support

[721] See especially *ibid,* para. 63.

a conclusion that the services were of unequal quality'.[722] This conclusion presents two related problems. First, it appears to penalize the minority for having been pro-active in mitigating the harm being suffered by its community. Any efforts of this kind will inevitably complicate the causal picture when it comes to determining the reasons for a federal institution's failure to reach the minority, meaning that the only way to succeed in court would be to do nothing and suffer the inequality to continue until such time as an adequate record exists. That seems both unjust and highly unrealistic, and ultimately inconsistent with the 'positive' dimension of institutional language rights described in *Beaulac*, which places the burden on *government*, not private citizens, to be proactive in meeting its obligations.[723]

Second, the conclusion that a disparity in results would not be sufficient to discharge the burden of proof is also problematic, and for similar reasons. While it is true, as the court noted, that the success or failure of such a program can depend on a range of factors, and that inequality of results does not necessarily imply that the service being provided is itself unequal, it is unreasonable to place the burden of dispelling that doubt on the plaintiff, rather than the state. If the plaintiff has adduced evidence that amounts to a *prima facie* demonstration of unequal treatment, the onus should be on the state to demonstrate that this inequality results from extraneous factors beyond its control and for which it has no obligation to compensate. In the case at bar, the federal government did not lead any evidence to the contrary, and in fact accepted the key allegations of the plaintiff, resting its defence instead on a purely legal argument (which was ultimately rejected). If a claim could not succeed under those circumstances, it is difficult to imagine a situation in which it would.

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[722] *ibid,* para. 62.

[723] *Beaulac* (n 15), para. 24.

7.8 Conclusion

In this chapter, I have sought to develop an account of substantive equality that is responsive to the language of s. 41 (with its concern for 'vitality' and 'development'), consistent with the 'patterns of normative understanding' already present in the case-law, and defensible in light of the philosophical literature on minority language and cultural rights. There is doubtless a very great deal that remains to be said on the topic, but the two concepts of equality I have fashioned here—equality-as-viability and equality-as-fairness—provide enough guidance to pursue an informed exploration of some of s. 41's potential range of applications, which I will undertake in the following (and final) chapter.

CHAPTER 8 SECTION 41 AND THE AUTONOMY INTEREST

8.1 Introduction

The discussion in the preceding chapters has opened up a number of interesting avenues with respect to the possible legal effects of s. 41 of the OLA. For instance, one area where these ideas could be developed further would be in the realm of immigration policy. As I briefly noted in Chapter 4, recent changes to federal immigration policy, which eliminated a program encouraging immigration by French-speakers to MFCs (whose birth-rate is currently too low to be self-sustaining, even without assimilation), have recently been challenged by the FCFA before the Commissioner of Official Languages as a violation of Part VII.[724] While there can likely be no individual right to a specific immigration policy, one could—drawing on the account I have developed in this thesis—easily argue that s. 41 imposes on the government an obligation to pursue a policy that serves the collective interests of MFCs in ethnolinguistic vitality and substantive equality. On a practical level, this might take the form of a policy aimed at stabilizing francophone population at a certain level, in proportionate terms, as it is otherwise currently shrinking.[725]

Another issue worth exploring would be the implications of my account for the National Capital Commission (NCC), which administers an area known as the National Capital Region—essentially Ottawa and surrounding areas in both Ontario and Québec—under the National Capital Act. The NCC has a broad mandate to take measures to ensure 'that the nature and character of the seat of the Government of

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[724] Gaboury (n 294).

[725] Ontario appears to be pursuing this approach voluntarily. Orfali (n 699).

Canada may be in accordance with its national significance'.[726] Based on the account developed in this thesis, one might argue that the NCC—which is a federal institution within the meaning of the OLA—has an obligation under s. 41 to use its powers in order to increase the use and visibility of French in Ottawa's private sector, especially the service industry. As the current Commissioner of Official Languages once noted, '[w]alking on the streets of Ottawa, shopping in its stores, eating in its restaurants, or dealing with its public institutions, one hears French often. But Ottawa's streetscape, its visual environment, its commercial face, is overwhelmingly English Only'.[727] As we saw in Chapter 6, this is detrimental to the vitality of the local French-speaking community (as well as being highly dissonant with Ottawa's role as the national capital). One might therefore argue that he NCC, which owns a substantial amount of commercial real estate in the area, has a duty to leverage this to increase the use and visibility of French in the private sector.

Examples such as this could likely be found for every federal institution. However, in light of space constraints, I would like to use this final chapter to explore an overarching issue that cuts across institutional boundaries, namely, the relationship between s. 41 and OLMC autonomy. There are at least two reasons for doing so. Firstly, in recent years, the question of autonomy has made its way to the forefront of academic debate on the CLRS,[728] especially as MFCs look to consolidate the gains of

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[726] Section 10, National Capital Act, RSC 1985, c N-4.

[727] Fraser (n 77) 163.

[728] A growing number of studies have been published on the question of MFC autonomy and its relationship to langauge rights, in a variety of disciplines. See, for example : Linda Cardinal and Eloísa González Hidalgo, 'L'autonomie des minorités francophones hors Québec au regard du débat sur les minorités nationales et les minorités ethniques' [2012] Minorités linguistiques et société 51; Éric Forgues, 'Le partenariat des communautés francophones en situation minoritaire avec l'État: Frein ou tremplin à l'autonomie ?' [2012] Minorités linguistiques et société 180; Éric Forgues, 'Autonomie, vitalité et identité des communautés en situation minoritaire : Proposition d'un cadre conceptuel' [2010] International Journal of Canadian Studies 183; Foucher, 'Autonomie des communautés francophones minoritaires du Canada' (n 11); Landry (n 10); Rodrigue Landry, 'Au-delà de l'école : le

the post-1982 legal environment.[729] And as I noted in the Introduction to this thesis, the concept of autonomy—or closely related issues like consultation, participation and shared governance—has often been linked to s. 41, especially since the 2005 amendments.[730] However, these issues have largely been explored by non-lawyers, meaning that the discussion thus far has, understandably, been hampered somewhat by the lack of a juridical framework on which to hang any claims that might be advanced in this regard. A legally-based exploration of the topic would thus be quite timely.

Secondly, the issue offers an ideal testing ground for some of the legal implications of the ideas developed in this thesis as it relates to ethnolinguistic collectivities, in at least two different ways. On one level, as I outlined in Chapters 5 and 6, some degree of autonomy—at least in the form of distinct institutions—is a necessary constituent element of any such collectivity, and a key determinant of its ethnolinguistic vitality. Insofar as s. 41 aims to protect the collective interests of

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projet politique de l'autonomie culturelle' [2008] Francophonies d'Amérique 149; Normand (n 10); André Magord, 'Aux fondements de l'autonomie: Réflexion sur les liens organiques entre autonomie et émancipation au sein des CLOSM, à la lumière du cas de l'Acadie du Nouveau-Brunswick' [2012] Minorités linguistiques et société 145; J Poirier, 'Au-delà des droits linguistiques et du fédéralisme classique: favoriser l'autonomie institutionnelle des francophonies minoritaires du Canada' [2008] L'espace francophone en milieu minoritaire: Nouveaux enjeux, nouvelles mobilisations; Poirier (n 443); Joseph Yvon Thériault, 'Le difficile chemin de l'autonomie' [2012] Minorités linguistiques et société 37; Rousselle (n 11); Chouinard (n 10); Edmund A Aunger, 'Dispersed Minorities and Segmental Autonomy: French-language School Boards in Canada' (1996) 2 Nationalism and Ethnic Politics 191; Rodrigue Landry, Réal Allard and Kenneth Deveau, 'Bilingual Schooling of the Canadian Francophone Minority: A Cultural Autonomy Model' (2007) 2007 International Journal of the Sociology of Language; Denise G Réaume, 'Justice between Cultures: Autonomy and the Protection of Cultural Affiliation' (1995) 29 University of British Columbia Law Review 117.

[729] For an excellent overview of MFC efforts in this direction over the last 40 years, see : Léger (n 589) 120–158.

[730] Foucher, 'Autonomie des communautés francophones minoritaires du Canada' (n 11) 108; Normand (n 10) 240; Bastarache and others (n 11) 47; Richard Y Bourhis and Rodrigue Landry, *The Vitality of the English-Speaking Communities of Quebec: From Community Decline to Revival* (Centre d'études ethniques des universités montréalaises, Université de Montréal 2008) 182; Cardinal and others (n 10) 24; Cardinal, Lang and Sauvé (n 10) 213; Chouinard (n 10) 153–154; Forgues and Paris (n 10) 161; Landry, Forgues and Traisnel (n 10) 110–111; Landry (n 10) 173; Léger (n 10) 418–419; Roy, 'Les diverses solutions « intégratives » et « autonomistes » offertes aux communautés de langue officielle du Canada pour préserver et développer leur spécificité' (n 11) 133–138.

OLMCs, their interest in autonomy should therefore logically stand in the very front ranks.

On another level, autonomy offers an effective way to manage some of the dizzying complexities these communities present from a legal standpoint. As I explored at some length in Chapter 5, there is a substantial degree of fluidity or indeterminacy when it comes to ethnicity and ethnic groups. Unlike a state, which has a clearly defined, all-encompassing and hierarchical institutional structure, making it easy to identify, an ethnic group is more of a palimpsest of overlapping social networks and institutions which are not necessarily integrated into a unified and coherent configuration overseen by some recognized authority. This makes describing the make-up and interests of an ethnic community very challenging, especially to outsiders. That challenge has in turn tended to make autonomy very attractive to cultural minorities, as it places those questions in the hands of the community itself, rather than an outside actor. In a similar vein, a grant of autonomy—insofar as it takes the shape of a specified institutional form (like a school board)—has the added virtue of making the community itself easier to identify and interact with.

While autonomy has long been a central feature of s. 23 Charter litigation, it has generally not—with a few exceptions, like the Montfort hospital case[731]—been placed squarely before the courts outside that context. Nevertheless, the question of autonomy is being raised with increasing frequency in contests between OLMC actors and governments, and in some cases has now reached the courts. For instance, in New Brunswick, a battle is shaping up over the question of whether the francophone community is entitled under s. 16.1 of the Charter to an autonomous health-care

[731] *Lalonde (appeal)* (n 235); *Lalonde (Div Ct)* (n 510).

system, and what autonomy might mean in such a resource-intensive field.[732] Similarly, in Manitoba, the Société franco-manitobaine (SFM) is challenging the regulations enacted under Part IV of the OLA, which define who counts as a francophone for the purposes of measuring 'demand' for French-language services under s. 22 of the Act and s. 20 of the Charter.[733] That challenge, which is grounded partly in s. 41, is largely a struggle over who should be entitled to define who qualifies for membership in the community, which is an important facet of autonomy.[734]

A number of scholars have raised the possibility that s. 41 might offer some protection for OLMC autonomy, but views as to how far this might go are divided. Some, like Normand, argue that Part VII provides a framework through which the federal government *could* take steps to support or increase OLMC autonomy, but conclude that s. 41 does not impose a systematic obligation on federal institutions to do so.[735] Others, like Foucher, seem willing to countenance a more assertive line, arguing that s. 41 could evolve into a right to some degree of autonomy.[736]

In this chapter, I will argue in favour of the latter view. Based on the framework developed in this thesis, there are several distinct ways in which s. 41 can

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[732] For an overview of the issues, see: Hubert Dupuis, 'Des institutions de santé pour les francophones et le droit de les gérer' (*Acadie Nouvelle*) <http://www.acadienouvelle.com/mon-opinion/2012/05/04/des-institutions-de-sante-pour-les-francophones-et-le-droit-de-les-gerer/> accessed 8 January 2016. The current battle is in fact the second phase of an earlier struggle which resulted in a settlement leading to the creation of two autonomous health authorities, one anglophone and one francophone. See Part 3, Regional Health Authorities Act, RSNB 2011, c 217.

[733] *Société Franco-manitobaine v Procureur général du Canada et al* Docket T-310-15 (FC).

[734] See generally: Grammond (n 32) 39–50. A related contest is playing out under s. 23 of the Charter, as minorities in the Yukon and Saskatchewan attempt to secure the right to admit the children of non-rights holders to their schools as a means of boosting enrolment and growing their communities. See for instance: *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)* [2015] 2 SCR 282.

[735] Normand (n 10) 240.

[736] Foucher, 'Autonomie des communautés francophones minoritaires du Canada' (n 11) 108.

be said to provide legally enforceable protection to the 'autonomy interest' of OLMCs. My analysis will proceed in two main steps. First, for the sake of clarity, I will define in greater detail what I mean by 'autonomy', which I have so far been using as something of an umbrella term for what are, in reality, at least two distinct phenomena. Having done that, I will then examine how autonomy interacts with s. 41 as a legal norm, and how one might structure a claim to legal protection for autonomy-related interests based on that provision.

8.2 Two concepts of autonomy

Autonomy, as a general matter, refers to the power of self-regulation, whether at an individual or collective level. Evidently there are many possible variations of this,[737] and space does not to permit me to fully canvass them here. Nevertheless, to facilitate the following discussion it is important to distinguish between two different types or senses of autonomy. More specifically, I wish to distinguish between cultural autonomy and political autonomy (which includes so-called 'administrative' or 'functional' autonomy).

8.2.1 Cultural autonomy

Cultural autonomy, as I use the term here, denotes a sociological phenomenon. I borrow the term from Joshua Fishman, who developed the concept as part of his attempt to identify the necessary prerequisites to reversing language shift.[738]

As part of this effort, Fishman outlined a typology of disadvantages faced by minority languages, which he called the 'Graded Intergenerational Disruption Scale'.

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[737] Michael Tkacik, 'Characteristics of Forms of Autonomy' (2008) 15 International Journal on Minority and Group Rights 2.

[738] Fishman, *Reversing Language Shift* (n 465).

The scale is organized along a spectrum, running from stage 8, in which a language is vestigial and its only users are socially isolated and elderly, to stage 1, where the language is used in a range of higher level educational, occupational, governmental and media contexts.[739] Fishman describes this latter stage as 'cultural autonomy', because speakers of the language and—perhaps more importantly—institutions that use it, exercise control over such activities, ensuring that they take place in that language.[740] Fishman's concept of cultural autonomy is closely related to Breton's concept of institutional completeness, and the more recent sociolinguistic concept of ethnolinguistic vitality, which I explored in Chapter 6.

The term cultural autonomy is often used by scholars to describe the aspirations of MFCs in Canada, whose hopes of gaining political autonomy are inherently limited.[741] A desire to ensure the survival of French as a language is an element of this aspiration, but the concern is broader than purely linguistic considerations and extends to the existence of MFCs as a distinct form of social organization, ie a collectivity in the nature of an ethnic or national community. Part of what these communities seek is what Touraine labelled 'historicity', which is the capability of a society to take action upon itself.[742] This phenomenon is related to what Joseph Yvon Thériault describes as the ability to 'faire société' (literally, 'to make society'). This latter concept denotes a process through which a cultural collectivity develops an autonomous civil society that, while not based on a shared

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[739] ibid 88–109.

[740] ibid 107.

[741] See, for example : Landry (n 10); Landry, Forgues and Traisnel (n 10).

[742] Alain Touraine, *Production de la société* (Seuil 1973). Quoted in Éric Forgues, 'La gouvernance des communautés francophones en situation minoritaire et le partenariat avec l'État' 29 Politique et Sociétés 71, 84. In that connection, consider the notion of '*prise en charge*' or 'taking control' promoted by the FCFA : 'Dessein 2000: pour un espace francophone : rapport final' (La Fédération des communautés francophones et acadienne du Canada 1992) 11–13.

and proprietary political space, nevertheless exhibits a degree of coordination and/or internal regulation.[743]

Admittedly, using the word 'autonomy' in this connection can be somewhat confusing. Cultural autonomy *à la* Fishman is a multi-faceted phenomenon existing on multiple levels simultaneously. To use the terminology developed in Chapter 4, it is an emergent property of complex social and institutional networks, and would defy any attempt at control or representation by a single entity short of outright totalitarianism, and likely not even then. Thus, autonomy in this context does not imply the existence of any particular agent vested with a comprehensive power of self-regulation. Rather, it is meant to denote a sociological artefact; namely, a state of affairs in which a cultural collectivity exhibits a substantial degree of socio-cultural distinctiveness and non-subordination. Of course, one should not put too fine a point on the notion of distinctiveness, as this can easily lead one back into a Herderian world of societies as watertight 'culture-bearing units',[744] as I discussed in Chapter 5. However, the above description is sufficient for our present need, which is merely to distinguish between different species of autonomy at a very high level of abstraction.

8.2.2 Political autonomy

In contrast to cultural autonomy, 'political' autonomy usually refers to a form of political power conferred on a specified agent. States are the paradigm case of autonomous political agents. They are autonomous because they are 'sovereign', meaning that they are not subordinated to any other normative or regulatory power.

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[743] JY Thériault, *Faire société: société civile et espaces francophones* (Prise de parole 2007) 8.

[744] Wimmer accuses Kymlicka of this very mistake : Andreas Wimmer, *Ethnic Boundary Making : Institutions, Power, Networks* (Oxford University Press 2013) 20. Consider also the vehement criticism attracted by the SCC's 'distinctive culture' test under aboriginal law : Asch (n 389); Vallance (n 411).

This type of autonomy is much more familiar to legal discourse than the cultural variety described above because its boundaries are generally defined by law and policed by the courts.

As I explored to some extent in the last chapter, autonomy is one of the primary means used or promoted to achieve equality for cultural or national minorities.[745] Many minorities aspire to possess a state of their own—meaning a state in which they form a majority of the population and which they can therefore (in theory) control. However, states are territorial in nature, meaning that not all minorities can plausibly aspire to this model of self-regulation. Geographically concentrated minorities can sometimes aspire to achieving statehood, but in many cases they are too small, or the various ethnic or national groups are so imbricated that full separation is either impossible or undesirable. Dispersed minorities, for their part, generally cannot aspire to statehood outside of a context of colonial domination, like apartheid South Africa.

To overcome this problem, a number of alternative forms of political autonomy have been proposed as a means of enabling minorities to control certain matters of crucial importance to them. These subtypes of political autonomy are often referred to as 'functional' or 'administrative' autonomy.[746] Federalism is a particularly well-known example of partial autonomy, although it is not always based on the need to accommodate ethnic, cultural or national minorities (eg Australia). A closely related model is consociation, of which federalism is sometimes said to be

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[745] See, for example : OSCE High Commissioner on National Minorities, 'The Lund Recommendations on the Effective Participation of National Minorities in Public Life and Explanatory Note' (Organisation for Security and Cooperation in Europe 1999) 10.

[746] Tkacik (n 737) 371.

merely a sub-species.[747] Consociational democracies generally respect four key principles: (1) executive power-sharing, (2) autonomy or self-government of constituent parts, (3) proportionality, and (4) veto rights.[748]

The consociational model has deep roots in Canada. As I mentioned in Chapter 2, between 1848 ad 1867 the United Province of Canada effectively functioned under a consociation agreement, with *de facto* autonomy for the regions of Upper and Lower Canada, a convention of executive power-sharing between *Canadien* and British-Canadian politicians (including dual prime ministers), and an ethnic veto over matters of 'national' importance.[749] In many respects, this system continued for several decades after the new federal constitution was adopted. For example, when the decision to create a national broadcaster was made in the 1930s, distinct English-language (CBC) and French-language (Radio-Canada) entities were created.[750] The administrative and insitutional duality imposed on New Brunswick by s. 16.1 of the Charter is a further example of this model at work.

Yet another variant of partial political autonomy is 'national cultural autonomy', which has also been described as a species of consociation.[751] As that label is somewhat confusing here, I will refer to it as NCA for the sake of clarity. NCA is a form of political decentralization that devolves control over certain matters of cultural importance, like education or broadcasting, to ethnic/national/cultural

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[747] Lijphart (n 80) 42–44.

[748] John McGarry and Brendan O'Leary, 'Consociational Theory, Northern Ireland's Conflict, and Its Agreement. Part 1: What Consociationalists Can Learn from Northern Ireland' (2006) 41 Government and Opposition 43, 44. The consociational model was first articulated by Lijphart, who included a fifth principle, a 'grand coalition government' : Ephraim Nimni, 'Introduction' in Nimni, Ephraim (ed), *National cultural autonomy and its critics* (Routledge 2005) 8.

[749] McRoberts (n 80) 6–9.

[750] Martel and Pâquet (n 68) 94–127.

[751] Lijphart (n 80) 43.

communities, via legally incorporated representative organizations operating on a non-territorial basis.[752] As I noted above, autonomy in such matters is often favoured by minorities as they are best placed to understand the community's needs and priorities, which can be difficult to grasp for outsiders, even well-meaning ones. The jurisdiction of these cultural corporations is determined on the basis of the personality principle, rather than the territorial principle, meaning that individuals are assigned to one community or another based on certain traits. In democratic systems, individuals are typically granted the right to self-select rather than being forcibly subjected to the authority of a cultural corporation to which they are assumed to belong (as was the case under the Ottoman *millet* system, for example, where individuals were forcibly assigned to a religious community based on their parentage).[753]

NCA has been proposed or used as a way of providing self-government to minorities that are geographically dispersed and therefore not suited to being granted territorial autonomy. As a constitutional model, it was first outlined in 1899 by the Austrian scholar-statesman Karl Renner as a means of grappling with the challenges posed by the Habsburg Empire's heavily imbricated ethnic communities.[754] Although never implemented in Austria-Hungary, it has been adopted in various guises in recent decades. The three linguistic 'communities' of the Belgian federation, which exist alongside a more conventional form of territorial federalism, are a well-known example of this model in practice.[755]

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[752] See generally : Nimni (n 748). See also : OSCE High Commissioner on National Minorities (n 745) 29.

[753] Ernest Gellner, 'Nationalism' (1981) 10 Theory and Society 753, 755.

[754] Karl Renner, 'State and Nation' in Ephraim Nimni (ed), *National cultural autonomy and its critics* (Routledge 2005).

[755] Nimni (n 748) 9.

The main advantage of NCA is its flexibility relative to territorial models of governance.[756] Ethnocultural or linguistic boundaries rarely track political ones perfectly, meaning that no matter how one carves up a given territory one will be left with minorities. Assuming that assimilation is considered undesirable—either for reasons of justice or out of concern for political stability—NCA offers a means of granting a degree of self-government suited to the needs and circumstances of geographically dispersed minorities.

What those needs might be will of course vary from one place to another. However, the model is described as 'cultural' autonomy because most proposals involve a grant of control over what we might describe as socio-cultural concerns, leaving matters of high politics to the central government. In the Canadian context, a prime example of this are the 'management and control' rights granted to the minority under s. 23 of the Charter, which often take the form of separate school boards. The institutions created under s. 16.1 of the Charter, like the linguistically defined health authorities,[757] are another example.

8.3 Autonomy and section 41

Having defined the concept of autonomy in somewhat greater detail, we can now begin to assess the extent to which s. 41 might be said to protect an autonomy interest. The first thing to do is to clarify how autonomy as a concept relates to s. 41 as a legal norm. The reader will recall that, in Chapter 3, I outlined a brief typology of legal constraints which might be relevant in the context of s. 41. I identified four

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[756] Chouinard (n 10) 143–4.

[757] See Part 3, Regional Health Authorities Act, RSNB 2011, c 217.

main types of constraints: rules, standards, factors and principles. The first order of business is therefore to examine how each of these relates to autonomy.

8.3.1 Autonomy as a legal norm

Autonomy does not inherently belong to any one of these categories. Indeed, across the CLRS as a whole, autonomy would appear to fall under each one of them at different times. In the context of the federal division of powers set out in ss. 91 and 92 of the Constitution Act, 1867, autonomy functions as a rule protecting each level of government from interference from the other. With few exceptions, the provinces and the federal government are granted 'exclusive' heads of power, meaning that legislative jurisdiction over each matter rests with only one order of government at a time, each of which is effectively sovereign. The boundaries between them can be described in advance with a fair degree of specificity, meaning that the content of a head of power does not derive its content from a particular factual matrix. Any transgression of this boundary is automatically sanctioned with a declaration of invalidity (barring the application of certain exceptions, like the doctrine of paramountcy), even in the absence of competing legislation.

In the context of s. 23 of the Charter, by contrast, autonomy appears to function as more of a standard. As the SCC held in *Mahe*, the proposition that the minority is entitled to exercise 'management and control' over s. 23 schools does not automatically entail the right to any specific form of control, such as a separate school board. Rather, it sets out a standard, the content of which must be specified on a case-by-case basis, depending on the size and distribution of the minority group, and the way in which the province has elected to organize its education system. The justiciable norm is not contained solely in s. 23, but rather emerges from the

interaction between the standard set out by the Charter and the broader factual and legislative context to which it is being applied.

In still a different context, like that at issue in the Montfort hospital case, autonomy has functioned as a factor. The OCA held that the Health Services Restructuring Commission's decision to downsize Montfort could be quashed on the grounds that the Commission had failed to consider the linguistic, cultural and educational role of Montfort as an institution.[758] The Commission's discretion was to be exercised 'in the public interest', and any definition of that interest had to consider, as a relevant factor, the role of Montfort as a locus of Franco-Ontarian cultural autonomy.

Finally, autonomy can also be seen as both an 'operative' and a 'justificatory' principle. As I explained in Chapter 6, both the SCC in the *Secession Reference* and the OCA in *Lalonde* held that the unwritten constitutional principle of minority protection serves as a general fountainhead for the specific legal and constitutional protections afforded minority groups in Canada. Those protections, like ss. 15 and 23 of the Charter, are simply instantiations of a broader principle, which they do not exhaust. Because of this, that principle has 'normative force' in its own right.[759] Part of that force rests in its ability to bear directly on the resolution of legal controversies, as when it constrains executive action as a factor in decision-making (as outlined above). But part of it also rests in its role—*qua* justificatory principle— n developing

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[758] *Lalonde (appeal)* (n 235), para. 184. The OCA's reasons are in fact somewhat unclear on this point, as they also seem to indicate that any decision that would impair those three roles would automatically be invalid: *ibid,* para. 181. This would suggest that such impairment is entirely off-limits, and that autonomy functioned as a binary standard, similar to that found in s. 23. However, my purpose here is simply to illustrate that autonomy can function as a factor.

[759] *Lalonde (appeal)* (n 235), para. 103.

a purposive interpretation of specific legal or constitutional rights.[760] Autonomy can be conceived of in much the same way, for it is one facet of the broader principles of equality and minority protection.

Of course, the distinction between political and cultural autonomy in this context can be quite important. The concept of cultural autonomy, as outlined above, can be thought of most naturally as a justificatory principle. Given the complexity of cultural autonomy as a social phenomenon, no legal norm could ever hope to fully capture it, through it may serve to justify a range of discrete measures. Indeed, the recommendations of the B&B Commission are a case in point. The Commission's overarching aim, from an empirical standpoint, was to generate the conditions necessary for Francophones to enjoy cultural autonomy, but doing so required a host of specific measures, none of which was sufficient in its own right. That being said, cultural autonomy can also function quite well as a factor. *Lalonde* might be thought of as an example of this.

Political autonomy, by contrast, while also a principle in its own right, is more easily operationalized as a legal rule or standard, as it lends itself more naturally to definition and specification. Political autonomy amounts to a Hohfeldian power, whose limits can be described with some precision, as a power over 'X'.

While it is not always easy to disentangle the two concepts in practice, the distinction is nevertheless important to keep in mind because the legal implications of claiming that political vs cultural autonomy is at issue can be quite different. Cultural autonomy often serves as a justification for political autonomy, but it can also justify other types of measures, like a sphere of negative liberty, or the provision of some specific good (like funding for cultural activities). Political autonomy, by contrast, is

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[760] *Reference re Senate Reform* [2014] 1 SCR 704, para. 25.

narrower. It is but one means to an end. While political autonomy certainly has a normative dimension, it tends to be parasitic upon the underlying normative value of the good(s) that autonomy secures for the collectivity in question.[761] Thus, under the language rights case-law, when a right to political autonomy has been inferred (as under s. 23 of the Charter), this has typically been because the court was satisfied that the protection of cultural autonomy required the provision of political autonomy.

8.3.2 Autonomy and section 41

How then does autonomy as a legal concept interact with s. 41 of the OLA? Or, perhaps more to the point, are there any circumstances in which one might validly formulate a legal claim that an OLMC is entitled to a specific measure on the grounds that this is necessary to preserve or increase its autonomy?

8.3.2.1 The autonomy interest and the purpose of s. 41

Let us start at the beginning, with a liberal and purposive interpretation of s. 41. Such an interpretation would have to take into account the various points raised in Chapters 4 to 7, as they are part of the legal, factual and philosophical context of that provision. The discussion in those chapters has made a convincing case, I believe, that autonomy is a very important facet of Canada's language rights architecture. In a variety of circumstances, it is necessary to achieve both the empirical and normative aims of the CLRS, and is in fact explicitly provided for in a number of contexts. One can therefore say that, as a general matter, the CLRS protects an 'autonomy interest'.

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[761] Recall that, in the last chapter, I argued that the moral valence of collectivities is based on the humanistic principle. As such, autonomy cannot be presumed to be an inherent good for groups in the same was as it is for individuals. Group autonomy must ultimately be justified in terms of individual interests.

The question then is whether that interest has any direct bearing on the meaning of s. 41. For reasons that should by now be fairly evident, I believe it does. For instance, s. 41 purports to protect the 'vitality' of 'linguistic minority communities'. As I argued above, linguistic minority communities are ethnolinguistic collectivities capable of possessing collective interests, like the interest in autonomy. Cultural autonomy is a necessary pre-condition for the survival of the collectivity, and (functional) political autonomy will often be the best or even the only way to ensure that its core interests as an ethnolinguistic group are protected. If autonomy is so important to safeguarding and promoting the 'vitality' of LMCs, it would be perverse indeed to conclude that it has no bearing on the interpretation of a legal provision explicitly geared towards protecting it.

In light of this, I think it fair to say that autonomy should at the very least function as a 'justificatory' principle in relation to s. 41, meaning that it represents one of the values or objectives that s. 41 is meant to further or achieve. In fact, I would go farther and say that it must also at a minimum be considered an 'operative' principle, analogous to the role it played in *Lalonde*, as outlined above. If the importance of institutional autonomy to the well-being of MFCs was a factor that the Health Services Restructuring Commission was required to consider when exercising its very broad discretionary power (constrained only by 'the public interest'), it almost goes without saying that it must be considered by federal institutions in the exercise of their own statutory discretion, which is constrained by s. 41.

8.3.2.2 Two readings of *Lalonde*

In that connection, however, it is important to point out that there are in fact two different ways of interpreting the OCA's reasons in *Lalonde*. One reading, which

I will describe as the 'strong' reading, is that the OCA held that any decision which would impair the linguistic, cultural or educational role of MFC institutions is prohibited by the principle of minority protection.[762] The other, 'weak', reading is that the court left the Commission with some residual discretion to adopt such measures, if it could provide a compelling reason to justify the proposed impairment. Autonomy, as a legal norm, actually falls into different categories depending on which of these readings one adopts.

On the 'weak' reading of *Lalonde*, autonomy functions as a factor—an issue which must be considered and given appropriate weigh to, but which does not determine any particular outcome. On the 'strong' reading, by contrast, autonomy is more akin to a standard. That reading effectively posits a binary norm: decisions impairing autonomy are prohibited, while those with a neutral or positive impact are not. (That norm cannot be described as a rule, however, because it is impossible to specify in advance which measures will impair autonomy and which will not).

These same two readings can be applied to s. 41. On the one hand, s. 41 could be read as prohibiting outright any decision that would impair the autonomy of MFC's (autonomy-as-standard). On the other, 'weaker' hand, it could simply be read as requiring federal institutions to consider and give due weight to the autonomy interest, and provide compelling reasons for any decision that would impair it (autonomy-as-factor).[763]

Autonomy-as-standard is clearly the more demanding of the two norms, as it places more restrictions on federal action, and there are good reasons for believing that this is the correct approach to interpreting s. 41, which I will turn to in a moment.

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[762] *Lalonde (appeal)* (n 235), para. 181.

[763] On this point, see also *Raîche c Canada (Procureur général)* 2004 CF 679, where the needs of an MFC were held to be a factor that Elections Canada must consider when drawing electoral boundaries.

But it is nevertheless worth noting that autonomy-as-factor is capable of producing useful results. We can see the logic of how this might work most easily in a situation like that involved in *DesRochers*, which I explored in Chapter 7.

Imagine that a federal institution, Industry Canada, has decided to establish a community economic development program. As a result of prior failures to properly meet the minority's needs, the latter has set up its own unilingual institution to deliver parallel services, for which it obtained temporary public funding. Industry Canada must now decide whether to continue to fund the minority agency in lieu of providing French-language services through its own agency, as the minority requests, or whether to persist in its attempts to operate through a single bilingual agency and cut all funding to the minority agency.

Under the autonomy-as-factor framework, Industry must, in making its decision, consider the fact that the minority has now acquired a degree of autonomy in managing the direction of economic development efforts in its community through the creation of its own agency. This autonomy has, *ex hypothesi*, resulted in more equal services, and contributes to the overall institutional completeness of the community (and therefore to its ethnolinguistic vitality). A decision to cut funding and force the minority to deal with a bilingual institution would damage the autonomy that the minority currently enjoys and result in less equal service. A decision to continue funding the minority agency, on the other hand, would buttress that autonomy, and increase the status and power of the minority-language business community, which is disproportionately low, thereby strengthening the minority community's ethnolinguistic vitality and contributing to its development.

Under such circumstances, autonomy-as-factor would at the very least require that Industry provide compelling reasons for choosing not to fund the minority

agency. Although this would appear to leave it with some discretion, its freedom to act is perhaps not as wide as might initially be supposed. For instance, cost and efficiency are unlikely to meet the threshold needed to justify an impairment to autonomy. The case-law has made it very clear that cost or administrative convenience alone are generally not sufficient reasons to warrant limiting a language right.[764] In fact, the principle of substantive equality assumes that, in many contexts, the cost of providing a good or a service to the minority will be greater than they are for the majority. Thus, unless the costs involved are prohibitive (which they did not appear to be in *DesRochers*), or unless there is some other non-pecuniary reason for preferring the single-agency approach, autonomy-as-factor could very well be said to allow for only one possible decision in such a case.

Nevertheless, the same result can be achieved much more straightforwardly using autonomy-as-standard, which also has the virtue of being less dependent on the somewhat idiosyncratic facts of the *DesRochers* scenario. And, although convincing a court to adopt the 'strong' reading of *Lalonde* outlined above might prove challenging (given the emphasis that the OCA placed on the Commission's failure even to consider the issue of autonomy, let alone provide reasons for impairing it), the case for a 'strong' reading (ie autonomy-as-standard) is in fact quite a bit sturdier in the context of s. 41.

It is important to recall that under that provision, federal institutions have a duty to take positive measures to enhance OLMC vitality and development. A logical corollary of such a duty is that federal institutions are also prohibited from taking

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[764] *Beaulac* (n 15), para. 39.

measures that would inhibit those goals.[765] Since autonomy is so important to achieving them, a prohibition on measures having a negative impact on it can also be seen as flowing from a more general prohibition on taking measures that adversely affect the 'vitality' and 'development' interests. Autonomy-as-standard is thus a more natural fit for the statutory language used in Part VII of the OLA than a reading that would generally allow for some discretion. Of course, this point is subject to the caveat—outlined in Chapter 3—that the content of s. 41 as a legal norm is the product both of s. 41 itself and its interaction with the statutory mandate of the federal institution at issue. An explicit statutory requirement that a specific action be taken, even if it impairs the OLMC autonomy interest, could not be overridden by the general requirements of Part VII of the OLA, although Parliament should be presumed not to have desired such an outcome in the absence of clear language to that effect.[766]

8.3.2.3 Negative vs. positive rights

The *DesRochers* facts were somewhat peculiar in that the minority had already set up its own agency, which received temporary funding from Industry while the latter attempted to get its own agency in order. Thus, as a practical matter, the decision Industry faced was whether to *change* the configuration of its programme to one that would be less beneficial for (and in fact, detrimental to) MFC autonomy. The question becomes somewhat more complicated, however, if one wishes to compel a federal institution to take some action that it was not otherwise

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[765] Cf. *Picard* (n 7). See also : *Canada (Commissioner of Official Languages) v CBC* 2014 FC 849, para. 33 (overturned on appeal for other reasons, 2015 CAF 251).

[766] *Mercure* (n 154), pp. 267-268.

contemplating. Can the concept of autonomy-as-standard outlined above provide a basis for claiming the right to some new measure?

Fundamentally, the question is—to put it in slightly different terms—whether the standard at issue protects a negative or a positive right. That dichotomy can of course be problematic,[767] but it is nevertheless useful in isolating a key difference in the architecture of rights, namely, the distinction between rights meant to prevent the state from interfering with a sphere of autonomy, and those meant to confer some claim upon the state to provide the means by which a certain activity might be engaged in. Viewed through that lens, the issue here is whether autonomy-as-standard simply protects pre-existing OLMC autonomy, such as it is, or whether it entitles OLMCs to claim enhancements to it from federal institutions.

To be clear, I am not claiming that there could be a *right to autonomy*, writ large. Rather, the question I am asking here is whether the autonomy interest can justify the recognition of a specific legal norm under s. 41, which would function as a positive right and entitle OLMCs to claim some particular enhancement to their autonomy.

I will examine this question in a moment, but before I do, it is important to note first that the positive/negative distinction is not entirely dispositive. Even if autonomy-as-standard is viewed merely as a species of negative right, it has the potential to ground a claim to certain enhancements. In other contexts, the courts have been willing to recognize a 'positive' entitlement flowing from a 'negative' right. *Dunmore*, a leading case under s. 2(d) of the Charter (freedom of association), which I discussed in Chapter 4, is a case in point.

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[767] See generally : Stephen Holmes and Cass R Sunstein, *The Cost of Rights : Why Liberty Depends on Taxes* (WWNorton 1999). Consider also : *Fraser* (n 345), paras. 67-73.

Dunmore arose as a challenge to new legislation dealing with labour rights in an agricultural context. In 1994, the Ontario Legislature enacted a statute extending the Wagner model of collective bargaining to agricultural workers, who had previously been denied access to it. In 1995, a newly elected government repealed that statute in its entirety. The statute repealing those rights was challenged under s. 2(d) of the Charter on the grounds that, by stripping away collective bargaining rights, it interfered with protected associational activity.

The SCC refrained from holding that the workers had a free-standing entitlement under s. 2(d) to the collective bargaining rights provided by the 1994 act, citing s. 2(d)'s character as a 'freedom' (ie a negative right). The court held that the duty of legislators is, for the most part, to refrain from interfering with the exercise of that freedom, and that they have no obligation to provide statutory enhancements to it. However, the court also recognized that interference can come in different forms. Some statutes may directly inhibit the exercise of the freedom to associate through an explicit prohibition. But others, like the impugned Ontario statute, do not, while nevertheless producing effects on the ground that are tantamount to direct interference. In the case at bar, the evidence showed that the new statute had done more than simply withdraw certain statutory support mechanisms for agricultural workers' organizational activity. The total exclusion of these workers from any kind of statutory protection had in fact had a chilling effect on that activity by sending a clear signal that these workers had a lower status than those in other industries and could be treated poorly.[768]

It is easy to imagine a structurally similar argument being made under s. 41 of the OLA. If a measure adopted for the benefit of some other group, or for some other

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[768] *Dunmore* (n 345), paras. 45-46.

purpose, has the effect of eroding OLMC autonomy, a negative right version of autonomy-as-standard could be invoked, either to quash the measure, or obtain some prophylactic to protect against its effects.

8.3.2.4 Section 41 as a basis for positive rights to autonomy

However, this line of argument may in fact be too defensive. Autonomy-as-standard can be construed as generating genuine positive rights. In fact, this reading fits most naturally with the wording of the provision, which imposes a duty to be proactive and take 'positive measures'. It would also be consistent with the expectations expressed during the Senate Committee hearings which, as I explained in Chapter 3, were that federal institutions would be required to be proactive, and that its measures be aimed (amongst other things) at supporting OLMC institutional vitality.

One way in which the autonomy interest might translate into a positive right is through a duty to consult. The federal government is large, complicated, and somewhat opaque, while OLMC organizations are fragmented and have limited resources. The likelihood of a federal institution taking a decision with damaging consequences for an OLMC before the latter is able to learn of it and organize any effective response therefore seems quite high. If one assumes that s. 41 imposes even the minimal autonomy-as-standard norm described above (i.e. one prohibiting measures that impair the autonomy interest), a general duty to be proactive arguably translates into a duty to consult OLMCs prior to taking decisions with a potential to affect their protected interests, including the interest in cultural autonomy.[769] The

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[769] Cf. Levy's concept of counter-balancing, discussed in Chapter 3, at p. 109. The logic here is closely analogous to that underpinning the duty to consult under aboriginal law, on which the leading case is *Haida Nation* (n 295). Interestingly, the CRTC has imposed a duty on the CBC to consult with OLMC representative when making decisions affecting local programming : *Canada (Commissioner of Official Languages) v CBC* 2014 FC 849, at paras. 96, 104.

concept of equality-as-viability outlined in the last chapter lends further support to this view, as it imposes an additional burden on the state to be mindful of the potential impacts on the more vulnerable minority culture. As a corollary to this duty to consult, the federal government arguably has the obligation to fund the relevant MFC organizations sufficiently to enable meaningful consultation.[770]

A similar duty logically applies when a federal institution is contemplating adopting some measure for the benefit of an OLMC. The same informational asymmetry prevents federal institutions from having a good grasp of the needs and priorities of these communities, and thus stands in the way of effective action. Indeed, this was one of the reasons cited by Dickson CJ in *Mahe* when explaining why it was necessary for the minority to have a right to management and control under s. 23 of the Charter.[771] For similar reasons, protecting the equality of minority cultures is widely seen under international law as requiring some degree of participation in decision-making.[772]

This reading also has the virtue of achieving one of the goals of the 2005 amendments, which was to provide OLMCs with the means to monitor federal action for compliance with s. 41.[773] A legally enforceable duty to consult—and one that operates as a condition precedent for the validity of executive action—would provide

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[770] Rousselle (n 11) 190.

[771] *Mahe* (n 14), pp. 371-372. See also Rousselle (n 11) 194.

[772] Roy, 'Les diverses solutions « intégratives » et « autonomistes » offertes aux communautés de langue officielle du Canada pour préserver et développer leur spécificité' (n 11) 134–135.

[773] See Chapter 3, section 3.5.1.2.1. This argument was in fact put before the Federal Court in a case arising from the cancellation of a federal programme to fund constitutional test cases under the Charter, including language rights. The programme has been used many times by impecunious MFC litigants to assert their rights, and it was argued that cancelling it was contrary to a broadly formulated duty to consult under Part VII of the OLA. However, the case was settled before a final judgment was rendered, and the language rights portion of the programme was re-established. See : Larocque, Power and Vincelette (n 11) 413. See also : Doucet, 'La Decision Judiciaire Qui Ne Sera Jamais Rendue' (n 11).

OLMCs with meaningful leverage through which to increase their participation and oversight of federal policy-making in this area. In truth, federal practice has in many ways been consistent with such an approach. The policy frameworks put in place to implement Part VII of the OLA have imposed an administrative duty to consult with OLMCs.[774] However, such goodwill cannot necessarily be counted upon. Moreover, federal actors vary in the extent to which they are aware of the ways in which their mandates might affect OLMC interests. It is therefore best if the latter have some tools they can use to force them to come to the table.

That being said, the content of autonomy-as-standard is likely not limited to a duty to consult. By leveraging the concepts of equality-as-viability and equality-as-fairness, and with the right record, it would be fairly straightforward to argue that outright devolution is required, along the lines of what had been done by Industry Canada in the *DesRochers* case. The lack of homogeneous francophone institutional environments is one of the greatest problems afflicting MFC vitality, even in the high-density areas of Eastern Ontario and New Brunswick. Under those circumstances, an insistence on joint governance through bilingual institutions unduly favours the majority culture. One could therefore mount a very plausible argument that s. 41 imposes a greater degree of administrative dualism or consociation on the federal government than is currently provided for.

8.4 Autonomy and governance

This naturally brings us to the final point I wish to consider, one which has attracted a fair amount of attention of late, namely, the problematic role of OLMCs in

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[774] Although the practice had been in place for some time, it was formalized through the Accountability and Coordination Framework set out in the 2003 Action Plan for Official Languages : Cardinal, Lang and Sauvé (n 10) 218.

the governance of programs intended to benefit them. Simply put, the existing relationship between the federal government and OLMC organizations appears to be seriously flawed. While federal funding is essential to these organizations, it comes with many strings attached. The cumulative effect of this state of affairs is potentially quite worrying, and may call for redress using the legal remedies now available under s. 41 of the OLA.

Since the federal government first began funding OLMC groups and activities in the 1970s, MFC organisations have become financially dependent on federal institutions. Although this now often comes with the ability to participate in the development of policies aimed at them,[775] the high degree of financial dependence is problematic, as it undermines the autonomy of MFCs and their capacity to develop and pursue their own visions for community development.[776] Indeed, this very point was raised by the Law Commission of Canada in its testimony before the Senate Committee on the amendment to s. 41.[777] A recent report on the implementation of Part VII of the OLA from the Joint Standing Committee on Official Languages noted similar concerns expressed by OLMCs themselves.[778]

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[775] Éric Forgues, *Du conflit au compromis linguistique l'état et le développement des communautés francophones en situation minoritaire* (Institut canadien de recherche sur les minorités linguistiques = Canadian Institute for Research on Linguistic Minorities 2007) 23.

[776] Forgues, 'Le partenariat des communautés francophones en situation minoritaire avec l'État' (n 728) 187.

[777] 'It is not easy for governments to support communities because our research has shown that governments sometimes create a distortion with regard to community needs. Sometimes people develop needs because money is available for those needs rather than others. The Law Commission is willing to help governments minimize the distorting effects which are sometimes created by their programs.' Senate of Canada, 'Legal and Constitutional Affairs, Issue 28' (n 211) 19.

[778] 'Various community organizations argued that OLMCs must have the tools to take charge of their development. That means having access to funding to support their development. The Minister of Canadian Heritage and Official Languages stated before the committee: ―It is important for the government to provide funding to grassroots organizations that have a very clear understanding of the concerns of new Canadians and the governmental and non-governmental services they require. The FCFA argued however: ―As for community development, which is an essential component for the creation of better services and environments for French-speaking citizens, it was completely absent as a priority in the roadmap, as it had been in the action plan before. It added that: ―This constant erosion

Amongst other problems, dependence of this kind creates the risk that MFCs will be instrumentalised by the federal government.[779] There is a strong tendency for policies and programmes purporting to be in the service of MFCs gradually to become an extension of the government's broader agenda, with MFC interests (as defined by these communities themselves) having little role to play in driving the discussion.[780] A related problem is the fact that the administrative constraints placed on community organizations are extremely onerous, and consume a large proportion of their resources.[781] In this regard, so-called 'results-based' or 'metrics-based' management frameworks are particularly troublesome, as they force MFC organizations to adopt only programs whose output can be 'measured', and to expend substantial resources in tabulating such metrics.[782]

In a similar vein, the extension of internal bureaucratic logic to relations with MFCs promotes an ever-greater fragmentation of community leadership and organization, as governance is broken down into sector-specific organizations (health, economics, education, arts and culture, youth, women, etc),[783] each representing its own particular range of interests.[784] This inhibits the functioning of a genuinely

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of capacities in community organizations will have a negative impact on the development of Canada's [F]rancophone and Acadian communities': 'Implementation of Part VII of the Official Languages Act: We Can Still Do Better. Report of the Standing Senate Committee on Official Languages' (n 9) 23.

[779] Forgues, 'Le partenariat des communautés francophones en situation minoritaire avec l'État' (n 728) 188.

[780] Forgues, *Du conflit au compromis linguistique l'état et le développement des communautés francophones en situation minoritaire* (n 775) 31.

[781] Forgues, 'Le partenariat des communautés francophones en situation minoritaire avec l'État' (n 728) 188.

[782] Lizette Jalbert, 'La décentralisation: enjeux et perspectives' in Louis Maheu and Arnaud Sales (eds), *La recomposition du politique* (Presses de l'Université de Montréal et Paris-L'Harmattan 1991) 265; Forgues, *Du conflit au compromis linguistique l'état et le développement des communautés francophones en situation minoritaire* (n 775) 31.

[783] Cardinal, Lang and Sauvé (n 10).

[784] Forgues, 'Le partenariat des communautés francophones en situation minoritaire avec l'État' (n 728) 189.

communal (ie community-wide) public sphere in which the relative importance of various sectors is debated and priorities set.[785] As it is, such strategic visions as exist tend to be ignored by the government.[786]

In light of my conclusions regarding the content of s. 41, the federal government must at the very least be mindful of these problems. If MFCs are to be a genuine partner in Confederation, they must have the ability to interact with the federal government without being totally subsumed by it. In a sense, the problems outlined above reproduce, on a much larger scale, those that Dickson CJ warned of in *Mahe* when concluding that the minority must have a right to management and control. Even a well-meaning majority will invariably make decisions that are contrary to the interests of the minority, whose needs and circumstances it does not fully understand. If genuine partnership requires formal institutional autonomy for the minority when it comes to education, there is no reason to think it should not apply in other contexts as well, *mutatis mutandis.*

There are various institutional schemes, inspired by the NCA model, that might provide a suitable remedy.[787] Outlining a precise solution to this problem is beyond the scope of this thesis, and perhaps beyond the ambit of the courts themselves. That being said, it seems reasonable to conclude that the federal government has a legal obligation to negotiate a solution with OLMCs. Such a solution must include, at a minimum, some degree of guaranteed, unconditional

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[785] Forgues, *Du conflit au compromis linguistique l'état et le développement des communautés francophones en situation minoritaire* (n 775) 29.

[786] Forgues, 'Le partenariat des communautés francophones en situation minoritaire avec l'État' (n 728) 190.

[787] See, for example: Poirier (n 728); Léger (n 10) 431.

funding, which is in any event a necessary precondition for effective participation in the mandatory consultation process outlined above.[788]

[788] Rousselle (n 11) 199–200.

CONCLUSION

The immediate aim of this thesis was to clarify the content of s. 41 of the OLA from the 'internal perspective' of legal discourse. However, given the wording and the underlying aims of that provision, it was necessary to engage with a broad range conceptual, empirical and normative issues that remain unsettled in the case-law and the academic literature on the CLRS. Advancing on so many fronts at once can be perilous, but it was necessary, and the effort has borne fruit. By showing that section 41 creates rights for OLMCs that can and often will entail an entitlement to demand that specific measures be taken in particular circumstances, I have put to rest the notion that the federal government is free to decide which measures it will take, and how, at its discretion, in order to comply with its obligations under Part VII of the OLA. By developing an account of CLRS rights as collective rights, I have made some progress in defining the nature of 'minority linguistic communities' as legal subjects, in specifying the types of interests they possess, and in explaining how these considerations should bear on the legal constraints flowing from s. 41. This account will provide guidance to litigants and the courts as the law develops in this relatively uncharted area, especially as MFCs continue their decades-long push to shore up their sociolinguistic foundations and increase their autonomy.

In his excellent book published shortly before his appointment as Commissioner for Official Languages, Graham Fraser wrote that

> Language has always been, and remains, at the heart of the Canadian experience. The fact that there is a thriving French-speaking society in Canada, and the tensions that have resulted from this fact, is as central to Canadian politics and society as race is to the United States, and class is to Great Britain.[789]

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[789] Fraser (n 77) 6.

Struggles over language have sometimes brought out the worst in Canadians, but more often they have brought out the best. Section 41 of the OLA offers a clear opportunity for the courts and the government to rise to the occasion. At its heart lies an ideal, that official language communities can survive and thrive across the country, not merely in provinces where they form a majority. If that ideal is to be realised, then those communities must be recognized as constituent elements of the Canadian social and political fabric and as true partners in the public sphere. OLMCs themselves would welcome this of course, but so should all members of Canadian society. The struggles over language have taught the political system and the courts habits of tolerance, accommodation and cooperation that can be harnessed in dealing with the challenges posed by other forms of diversity. Fully embracing the legal principles developed through that experience is in the interests of all.

APPENDIX A: EXCERPTS FROM THE OFFICIAL LANGUAGES ACT OF CANADA

Official Languages Act, R.S.C., 1985, c. 31 (4th Supp.)

An Act respecting the status and use of the official languages of Canada

Preamble

WHEREAS the Constitution of Canada provides that English and French are the official languages of Canada 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 WHEREAS English-speaking Canadians and French-speaking Canadians should, without regard to their ethnic origin or first language learned, have equal opportunities to obtain employment in the institutions of the Parliament or government of Canada;

(…)

AND WHEREAS the Government of Canada is committed to enhancing the vitality and supporting the development of English and French linguistic minority communities, as an integral part of the two official language communities of Canada, and to fostering full recognition and use of English and French in Canadian society;

(…)

PURPOSE OF ACT

Purpose

2. The purpose of this Act is to

(a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;

(b) 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; and

(c) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.

(…)

PART VII
ADVANCEMENT OF ENGLISH AND FRENCH

Government policy

41. (1) The Government of Canada is committed to

(a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and

(b) fostering the full recognition and use of both English and French in Canadian society.

Duty of federal institutions

(2) Every federal institution has the duty to ensure that positive measures are taken for the implementation of the commitments under subsection (1). For greater certainty, this implementation shall be carried out while respecting the jurisdiction and powers of the provinces.

Regulations

(3) The Governor in Council may make regulations in respect of federal institutions, other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner or Parliamentary Protective Service, prescribing the manner in which any duties of those institutions under this Part are to be carried out.

APPENDIX B: EXCERPTS FROM THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Constitution Act, 1982
Part I
Canadian Charter of Rights and Freedoms

Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and French linguistic communities in New Brunswick

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed. (85)

(…)

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English

or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada. (92)

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

Language of instruction

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

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