Language Rights in Canada: A Theoretical Approach

Vanessa Gruben

I. INTRODUCTION

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

---

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

1 Joseph Magnet, Official Languages of Canada (Cowansville, Qc.: Yvon Blais, 1995); Joseph Elliot Magnet, Modern Constitutionalism (Markham, ON: LexisNexis Canada, 2004), at 143-50; Michael Behiels, Quebec Since 1867 (Toronto: Irwin Publishers, 2002); and Michael Behiels, Canada's Francophone Minority Communities (Montreal: McGill-Queen's University Press, 2004).


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

4 The phrase "Canada's language policy" often refers to federal, provincial and territorial language policies. However, the focus of this essay is on federal policies and the relevant constitutional provisions.
The concept of “linguistic community” itself is complex and contestable in Canada. Further, Canada’s language policy also extends to allophone communities and to certain Aboriginal language communities. This adds further layers of complexity, and potential for conflict. Thus, a comprehensive examination of language rights in Canada also requires a consideration of allophone and Aboriginal language communities.

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

II. WHY DO STATES PROTECT MINORITY LANGUAGES?

Patten and Kymlicka identify several contexts that sparked renewed interest in questions of language policy. These include democratization of Eastern Europe, ongoing unresolved countries, increased immigration, the formation of transnational unions, and the increasing awareness to 90 per cent of the world’s languages especially the Indigenous languages especially.

These developments have pro-

8 Alan Patten & Will Kymlicka, “Int Context, Issues and Approaches” in Alan Pet
9 Alan Patten & Will Kymlicka, “Int Context, Issues and Approaches” in Alan Pet
10 Alan Patten & Will Kymlicka, “Int Context, Issues and Approaches” in Alan Pet
11 Alan Patten & Will Kymlicka, “Int Context, Issues and Approaches” in Alan Pet
12 Alan Patten & Will Kymlicka, “Int Context, Issues and Approaches” in Alan Pet
13 Alan Patten & Will Kymlicka, “Int Context, Issues and Approaches” in Alan Pet
14 Alan Patten & Will Kymlicka, “Int Context, Issues and Approaches” in Alan Pet
15 Alan Patten & Will Kymlicka, “Int Context, Issues and Approaches” in Alan Pet

of Eastern Europe, ongoing unresolved countries, increased immigration, the formation of transnational unions, and the increasing awareness to 90 per cent of the world’s languages especially the Indigenous languages especially.

These developments have pro-

"ty" itself is complex and contestable. Language policy also extends to allophone ginal language communities. This and potential for conflict. Thus, a rage rights in Canada also requires a ginal language communities.

Frameworks underlying language principal theoretical frameworks that orars and examines how these have anims to protect minority-language I, I review the various theoretical ks that justify protection of minority II, I describe different models and to protect minority language rights. single theory of language rights in language policy is underpinned by volved over time, under different ation. Central to this explanation is the minority-language communities evolved on of linguistic human rights and the endeavour to show that the principal curity but linguistic survival. In Part policy vis-à-vis non-official not intended to be exhaustive. It is ries that have been advanced and to the Canadian context.

CT MINORITY LANG UAGES?

Several contexts that sparked renewed icy. These include democratization

afism (Markham, ON: LexisNexis Canada, 2004).

erent language policies are pursued by Parliament.

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

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

1. Language Rights as Human Rights

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

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

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


20 The importance of language as part of one's attachment to one's culture.

21 The importance of language as part of one's attachment to one's culture.

Based on these criteria, the extent to which human rights depends on the individual or in relation with the individual or in relation with the determination of national language choice. It is difficult to be used by various language communities in various circumstances and needs for difficulty of establishing universal international context.

(a) Language Is Fundamental

Language is fundamental to identity, first, as a tool of communication (or of one's attachment to one's culture). The instrumental dimension of language is recognized and the easiest to communication, language is necessary for others and to operate within society. Language is more than a means of expression of identity and culture. Identity, a cultural inheritance and a

(b) Universal Norms

Both dimensions of language subject to universal norms. This is
y language rights warrant protection of minority language rights as an identity and to preserve the peace theory argues that linguistic diversity, equal and should be protected from conservative theories are interconnected. They are intimately connected to culture. In the Canadian context, a closer protection of minority languages is a right, not only a cultural human right.18 A theory of rights. This is in part because of the ts. Partly they are caused by tension individual and the minority rights of likely that a human rights framework or coherent theory of language communal protection that minority recognition of human rights is contentious.19 od to be universal norms that established by all people.19 Human rights are nition of human rights is beyond the scope of this section may evolve in a direction which fits more in important question that is not answered here.


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

(a) Language Is Fundamental

Language is fundamental to individuals and communities in two ways: first, as a tool of communication (instrumental); and, second, as a marker of one’s attachment to one’s cultural group (expressive or intrinsic).20 The instrumental dimension of language is the most commonly recognized and the easiest to articulate. As an instrument of communication, language is necessary for an individual to interact with others and to operate within society.

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

(b) Universal Norms

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

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

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

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

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


The ICCPR contains a very specific language. Article 27 states:

In those States in which ethnic, racial, religious and cultural groups or persons belonging to such minorities exist, members of those minorities shall enjoy full participation in all aspects of public life without discrimination of any kind as regards their status, rights and obligations. They shall also enjoy, without discrimination, all rights and freedoms as regards their cultural and other social activities.

The Human Rights Committee's interpretation of this right is that it is not limited to protecting the rights of minority groups alone, but also to protecting the rights of individuals who are not part of a minority group. The Committee has stated that this right is not limited to protecting the rights of minority groups alone, but also to protecting the rights of individuals who are not part of a minority group. The Committee has stated that the right to freedom of speech, thought, and expression is limited by the need to protect the rights of others, and that the rights of others cannot be protected if the rights of minority groups are not protected.

Language rights also fall under the ICESCR, which guarantees an inclusive and participatory process for the full realization of this right. The development and the diffusion
The ICCPR contains a very specific article, article 27, which pertains to language. Article 27 states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. 39

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

Article 2(2) of the ICESCR reads:

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

Language rights also fall under the purview of article 15 of the ICESCR, which guarantees an individual’s right to take part in cultural life. 32
Many international human rights instruments provide every individual with the right to the assistance of an interpreter in criminal proceedings. Article 14(3)(f) of the ICCPR protects the right of every individual to an interpreter to ensure that the accused can understand and respond to the allegations against him. These rights are often referred to as “language rights” but are distinguishable from the rights protected in article 27. Indeed, it is arguable that these rights are not language rights at all because the cultural component is absent.

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

promotion or accommodation rights fail “to confront the fact that privileging a limited set of languages, which are other languages spoken on the star

Under the human rights parl this becomes problematic. Privileging minorities — an essential accom plement to language policies of assimilation. It can p
language and can protect limits. Minimal standards are important. A human rights framework does not provide mechanisms for justifications to offer more compre

rights.

2. Language Rights Are Necessary for Peace

A second theoretical justification for language rights is its promotion of peacefull communities. To achieve this language communities certain r
their communities. In some state the nation-building process. A successful nation-building project no longer serves to separate citizens groups, but would become one identity”.

34 General Comment No. 23: The Rights of Minorities (Art. 27), UN HRCOR (1994), U.N. Doc. HRCGEN/1Rev.1 (1994), at para. 5.3.
35 Other non-binding international human rights instruments offer more rigorous protection for minority language rights. However, they also fall short of establishing universal rights for minority language communities. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. res. 47/135, 47 U.N. GAOR Supp. (No. 49), at 210, U.N. Doc. A/47/49 (1992) establishes rights for members of minority-language communities and imposes corresponding obligations on states to preserve and promote these minority-language communities. The Minorities Declaration, however, establishes few specific rights and duties. The Universal Declaration of Linguistic Rights adopted by UNESCO offers more extensive protection of minority languages: Universal Declaration on Linguistic Rights, UNESCO (June 9, 1996), online: UNESCO <http://www.unesco.org/culture/declaration/linguistic.pdf>. However, it does not establish a set of universal norms in respect of language. It establishes different rights for national languages (these are not national languages) and different rights for minority languages (language minorities) and immigrant linguistic minorities (language groups). The latter receive significantly less protection than the former. Although each of these rights is fundamental, they do not fit well within the traditional definition of “universal” human rights.
instruments provide every individual interpreter in criminal proceedings.\(^{39}\) Thus, the right of every individual to an understanding and respond to the rules are often referred to as “language rights” protected in article 27.\(^{28}\) Rights are not language rights at all.

The willingness to robustly protect the nation if not impossible to establish confirmed by a number of writers.\(^{36}\) To explain why it is difficult to standards for language. First, each distinctive. Communities differ in terms of origin and degree of language standards cannot satisfy the unique Patten and Kymlicka explain that that can be defined in this universal unification rights plus a few very modest

---

Expanding the Competing Rationales” in Alan Patten and Political Theory (New York: Oxford of Minorities (Art. 27), UN HRCOR (1994). U.N.

Rights instruments offer more rigorous protection of fall short of establishing universal rights for on the Rights of Persons Belonging to National A. Res. 47/135, 47 U.N. GAOR Supp. (No. 49) at for members of minority-language communities yourself and promote these minority-language, establishes few specific rights and duties. The aid by UNESCO offers more extensive protection in Linguistic Rights, UNESCO (June 9, 1996), //declarations/linguistic.pdf>. However, it does not of language. It establishes different rights for and immigrant linguistic minorities (language section than the former. Although each of these the traditional definition of “universal” human


---

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

A second theoretical justification advanced for protecting minority languages is to promote peaceful coexistence of minority and majority communities. To achieve this end, the state may grant minority-language communities certain rights intended to protect and promote their communities. In some states, language plays an important role in the nation-building process. Patten and Kymlicka observe that “[a] successful nation-building project can help to ensure that language longer serves to separate citizens into distinct and mutually antagonistic groups, but would become one of the defining bonds of a common identity.”\(^{30}\)

---

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

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

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

It may also explain, in part, why non-discrimination functional device which allows for the development of an effectively functioning collective polity within which citizens can communicate with one another. 40

Patten & Kymlicka identify two arguments advanced in support of a state common language policy. First, “a nation-building policy that seeks to integrate speakers of less widely spoken language into the majority language community can enhance social mobility by offering new options and opportunities to people raised in minority language communities”14. Second, “a common language has been seen as essential to democracy.”


Preserving linguistic diversity in protecting minority language rigl movement to protect biodiversity Linguistic and cultural diversity in human rights or nation-building as languages; still it is “gaining prominence Linguistic and cultural diversities language is a foundation of culture. Rights the Supreme Court of Canada

The importance of language right that language plays in human exist through language that we are able order the world around us. Language and community, allowing humans to hold in respect of one another Language also has intrinsic valued culture. Professor Réaume explains

The creation and development of language community is a work of valuation to its members as such. It is to insult their community. It is

---


have adopted assimilationist language policies, which designate the dominant state as necessary for the f the state. These states believe that promoted in the long term by creating silicu. away from these traditional notions of . Many states now consider language serve peace and foster national unity, ep the multinational state together, erence is necessary. Policies of d nationalist conflict. The imposition nerate deep resentment when it denies munities access to public institutions. n is an essential element of nation- that language claims are frequently urieties within society, including in and Kymlicka argue that “the best ty ... may be to adopt policies that degree of national and linguistic n, in part, why non-discrimination mment of an effectively functioning collective polity & another”.


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

3. Language Rights Are Necessary to Preserve Linguistic Diversity

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

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

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

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

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


one community has fashioned for itself as less worthy of respect than that of another.\(^{48}\)

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

The importance of preserving linguistic and cultural diversity has been the topic of numerous colloquia, seminars and conferences and is discussed extensively in articles, conference papers and international instruments, including the UNESCO Universal Declaration on Cultural Diversity.\(^{49}\) The writers advance different rationales to support the centrality of linguistic and cultural diversity in human development.\(^{50}\) First, the loss of linguistic and cultural diversity, like the loss of biodiversity, will have devastating effects on the human species because diversity is valuable itself.\(^{51}\) The advancement and development of humanity is fostered by different experiences and perspectives. Second, linguistic diversity is important because languages are intrinsically valuable. They are manifestations of creativity and house a community's history and culture.\(^{52}\) Third, the preservation of linguistic diversity is important because language is essential to the notion of identity.\(^{53}\) This sense of identity is articulated by Green in his seminal book, \textit{Fundamental Law}.\(^{54}\) The difference in linguistic survival is interesting: language and culture over time are in the ability to use a particular language in the future.\(^{55}\) Many of the tools require language community impose sign the conditions to ensure linguistic diversity beyond the state's control.

The protection of linguistic and cultural rights is becoming the rapid rate of globalization homogeneity, in commerce, travel and work contributes to the rapid disappearance of many languages. There are now several international legal instruments to preserve linguistic and cultural diversity. The protection of linguistic and cultural rights is increasingly recognized by international law.\(^{56}\)


itself as less worthy of respect than
tural diversity involves preserving, diversity.
linguistic and cultural diversity has
ia, seminars and conferences and is
conference papers and international
Universal Declaration on Cultural
different rationales to support the
versity in human development. First,
versity, like the loss of biodiversity,
human species because diversity is
and development of humanity is
perspectives. Second, linguistic
ages are intrinsically valuable. They
house a community’s history and
of linguistic diversity is important

ity: The Territorial and Personal Principles of
Will Kymlicka, eds., Language Rights and
inc: United Nations Educational, Scientific and
lure/en/ev.php?URL_ID=13031&URL_DO=DO
studies and papers regarding the preservation,
ultural diversity can be found online: UNESCO
ID=12899&URL_DO=DO_TOPIC&URL_
see: David F. Marshall & Roscana D. Gonzalez,
ights: Rights as Human Rights from
nan, ed., Language and the State: The Law and
, 1991) 289. See also Robert Dunbar, “Preserving
from International and European Law” in André
s, Languages, Constitutionalism and Minorities

uction: Language Rights and Political Theory:
Will Kymlicka, eds., Language Rights and
ress, 2003), at 44. Diversity is valuable because it
which in turn has many benefits. See generally
“Goods, and the Principle of Fairness” in Alan
its and Political Theory (New York: Oxford

uction: Language Rights and Political Theory:
Will Kymlicka, eds., Language Rights and
ress, 2003), at 45.

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

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

The protection of linguistic and cultural diversity as a rationale for minority language rights is becoming more popular. This may be due to the rapid rate of globalization and the tendency towards linguistic homogeneity, in commerce, trade and cultural development, which contributes to the rapid disappearance of minority languages. Accordingly, there are now several international instruments whose objective is to preserve linguistic and cultural diversity. Most notable are the UNESCO Universal Declaration on Cultural Diversity 33 and the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage.

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


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


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

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

III. HOW DO STATES PROTECT MINORITY LANGUAGES?

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

---


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


63 Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 28, 56. That is not to say that they are maximally consistent with a genuine and national language group. This is certainly the case in Canada Legislation" in Michel Bastarache, ed., Language Rights in Canada (Toronto: University of Toronto Press, 2004) 37, at 49.

64 Heinz Kloss, Language Rights of Quebec (Toronto: University of Toronto Press, 2004) 37, at 49.

1. Constitutional Rights, Legislation, Policy

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

2. Tolerance and Promotion-oriented Language Rights

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

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

---

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

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

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

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

Rubio-Marín’s first type includes those rights where the state and its institutions accommodate language minorities in practical and symbolic ways. There are numerous mechanisms for doing this. Examples include designating a minority language as “official” or entrenching a right to interact with public institutions in the minority language. Rubio-Marín’s second type confers the power of minority so as to enable the men own linguistic environment. These influence immigration in order to Marín’s third type of language right minoritaty to defend itself against example is public funding to propr the media.

4. Individual versus Collective

Minority language rights may whether they are exercised individuation protection of minority language right as a communal activity and its linguistic community, more th Professor Résumé explains:

It is in and through participation with a language, and the cultural re-created. That larger enterprise sh A language is sustained as coun cumulate and conjoin as lives individually is relatively easy, but under which a community, as a very different project.

Patten and Kymlicka individual from collective rights.

---

70 C. Michael MacMillan, The Practice of Language Rights in Canada (Toronto: University of Toronto Press, 1998), although the Charter of the French language, R.S.Q. c. C-11 only protects the right to work in French, which is the majority language in Quebec, and restricts the right to work in other languages.
76 Alan Patten & Will Kymlicka, “Il Context, Issues and Approaches” in Alan P Political Theory (New York: Oxford Univers
on-oriented rights require the state and enhance the minority-language integrating the minority language into courts.

ted rights into "weak" and "strong" "level refers to actions taken to ensure some measure encouraged" government in the language of one's right. A strong-promotion right "aims to achieve language" as one's right. Rubi

Instrumental) Language Rights

ace and promotion-oriented approach lead a three-tier typology of language of language. Her typology rests on cultural protections to be exercised those rights where the state and its minorities in practical and symbolic smns for doing this. Examples include "official" or entrenching a right to the minority language. Rubio-Marín's

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

4. Individual versus Collective Rights

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

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

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

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

5. Designation of Minority Language as Official

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

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

6. Territoriality versus Personality Model

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

IV. THE PROTECTION OF LINGUISTIC MINORITIES IN CANADA

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

---

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


This Part examines the protection of communities, and provides an overview protecting language rights in Canada. It illustrates that there is no single theoretical justification for language communities has evolved been a concomitant evolution of protection these minority official-lan building was the original object theory the theoretical justifications now include rights and the preservation of language.

1. English- and French-Language

At the apex of Canada’s a la English-language communities, these language communities are the state recognition of both languages creation of the Canadian state at languages represent Canada’s two official languages. Since Confederation, the federal government rights on different mechanisms to protect the English and of all three theoretical justifications policy vis-à-vis English and French linguistic human rights is illustrous fundamental. It is also evident in languages rights in various human also evinces a shift from ensurin survival of minority official-langu

The most significant shift in a weak promotion-oriented mode rigorous promotion-oriented mode. The current model is a mix of inst

79 Mother Tongue, 2001 Counts for online: Statistics Canada, <http://ww LanguageComposition/Page.cfm?Lang=E&Geo Counts&B2=Both>. See also Denise Résumé Rights" in André Brain, Pierre Foucher & Yves and Minorities (Markham, ON: LexisNexis 2
image group to which the individual
squire membership in a designated
its, collective rights may be subject
or numbers warranting. Third, the
ual or a community: only collective
governance, are exercisable by a

age as Official

ge as official provides symbolic
linguistic minorities. Importantly,
er certain substantive rights on the
le against the state.
language community is an importa
ity within the larger society. The
m, as certain official-

y Model

language rights are conferred on
specific territories in the state,
are not exercisable. The territorial
ites. Belgium and Switzerland, for
regions. By contrast, a personality
induals and communities wherever

istic MINORITIES IN CANADA

usage communities in Canada is a
ied to achieve distinct objectives.

This Part examines the protection of Canada's minority official-language
communities, and provides an overview of the federal mechanisms
protecting language rights in Canada and the theories that justify them.
It illustrates that there is no single theory of language rights in Canada.
The theoretical justification for protecting minority official-
language communities has evolved since Confederation. There has
been a concomitant evolution of the mechanisms used by the state to
protect these minority official-language communities. Whereas nation-
building was the original objective of Canada's language policy,
theoretical justifications now include protection of linguistic human
rights and the preservation of linguistic diversity.

1. English- and French-Language Communities

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

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

LanguageComposition/Page.cfm?Lang=E&Geo=PR&View=1a&Table=1a&StartRec=1&Sort=2&B1=
Counts&B2=Both>. See also Denise Réaume, "Language Rights: Constitutional Misfits or Real
Rights" in André Brass, Pierre Foucher & Yves Le Bouthillier, eds., Languages, Constitutionalism
and Minorities (Markham, ON: LexisNexis Canada, 2000) 201, at 216.
rights. Some rights are based on territoriality, others on personality. Some offer individual protection, while others are to be enjoyed collectively.

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

(a) Confederation: Canada Is Founded on Two Languages

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

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

---

82 See generally Michael Behiels, Canada’s Francophone Minority Communities (Montreal: McGill-Queen’s University Press, 2004).
84 Peter W. Hogg, Constitutional Law in Canada, 1997, at para 53.8. Hogg explains: “section 93 prohibits the provincial Leg rights or privilege with respect to persons have by law in the provn rights of instruction was a right particular province at the time of 93 would be disabled from compelling different language.

Nevertheless, the Judicial Committee v. Mackell, [1917] A.C. 62, at 69 ("classes of persons determined according to language"). This had a profound impact on the official language of instruction was a right to which would be disabled from compelling different language.

toriality, others on personality. Some
er are to be enjoyed collectively.

led on Two Languages

m policy is rooted in nation-building,
ognized at the time of Confederation
r to the adoption of the Constitution
had been promoted. Lord Durham
necessary to unify and build the
s introduced in 1840 to achieve that
on quickly gave way to recognition
h-language minority communities.
the time of Confederation. It was
tratively in the 1970s, and partially
was intended to promote political
the Canadian state.82

the federal government adopted a
language rights. Language was
Constitution explicitly accorded
ich, most notably in both the federal
Section 133 of the Constitution Act,
nd French in the Records, Journals

c. 35, art. XLI. See Ramsay Cook, "Language
iderman, ed., Language and the State: The Law
iais, 1991) 73, at 74-75. The Report reasserted
hing peace between the "two nations warring in
the only pre-Confederation structure. Others also
or a detailed history, see Gil Rémillard, Le
mation et d'évolution (Montreal: Quebec-
ment of bilingualism and legislation see Robert
alation" in Michel Bastarache, ed., Language
nda's Francophone Minority Communities 

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

The rights entrenched in the Constitution Act, 186786 have been
described by the Supreme Court as "rudimentary."87 They did little to
protect the minority French-language communities outside of Quebec in
the years following Confederation; they certainly did not protect,
promote or enhance minority-language communities. The lack of
protection was exacerbated by the fact that the provinces were generally
left to adopt whatever language policy they chose.88 This, together with
other factors, fuelled much provincial conflict between Canada's

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

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

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

88 With the exception of Manitoba, Quebec, the Northwest Territories, Saskatchewan and
Alberta.
linguistic communities.\textsuperscript{89} Not surprisingly, Canada's French-language minority communities in many regions of Canada continued to decline following Confederation.\textsuperscript{90}

(b) The Renewal of Francophone Minority Communities

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

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

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

\textsuperscript{89} Professor Magnet argues that provincial language conflict is motivated by five structural dimensions of the Canadian federation: Joseph Magnet, \textit{Official Languages of Canada} (Cowansville, QC: Yvon Blais, 1995); Joseph Elliot Magnet, \textit{Modern Constitutionalism} (Markham, ON: LexisNexis Canada, 2004), at 146ff.

\textsuperscript{90} Joseph Magnet, \textit{Official Languages of Canada} (Cowansville, QC: Yvon Blais, 1995); Joseph Elliot Magnet, \textit{Modern Constitutionalism} (Markham, ON: LexisNexis Canada, 2004), at 145.

\textsuperscript{91} For a discussion of this renaissance see Michael Behiels, \textit{Canada's Francophone Minority Communities} (Montreal: McGill-Queen's University Press, 2004), at 3ff.

\textsuperscript{92} Report of the Royal Commission on Bilingualism and Biculturalism (Ottawa: Information Canada, 1971), at xxi.


\textsuperscript{97} Joseph Magnet, \textit{Official Languages}


risingly, Canada’s French-language
ons of Canada continued to decline.

Minority Communities

In Confederation, popularly known as a national crisis and an evaluation policies. In response, Canada on Bilingualism and Biculturalism exist to

existing state of bilingualism and ammend what steps should be taken eration on the basis of an equal ing races, taking into account the ic groups to the cultural enrichment should be taken to safeguard that

d the most detailed discussion of c relations in Canadian history. The has among minority francophone eaching recommendations. One of s was that English and French be. This recommendation ultimately

1 Language conflict is motivated by five structural qh Magnet, Official Languages of Canada x Magnet, Modern Constitutionalism (Markham, Canada (Cowansville, Qc.: Yvon Blais, 1995); (Markham, ON: Lexitexa Canada, 2004), at see Michael Behiels, Canada’s Francophone on Bilingualism and Biculturalism (Ottawa: on Bilingualism and Biculturalism (Ottawa:

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

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

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

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

97 Joseph Magnet, Official Languages of Canada (Cowansville, Qc.: Yvon Blais, 1995), at 73.
99 Michael Behiels, Canada’s Francophone Minority Communities (Montreal: McGillQueen’s University Press, 2004), at 29.
bilingual districts. Minority-language communities outside these areas received little support or recognition. Réaume explained that "while it is true that there is a geographical concentration to language use, speakers of a language often do not group themselves neatly". Second, the very nature of the Act as a federal legislative instrument reflected a major shortcoming of Canada's language policy during this period — the conspicuous absence of provincial recognition or protection of French linguistic minorities. To implement a minority-language policy successfully, the support of the provinces appears to be crucial as they hold jurisdiction in many areas that impact minority-language use.

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

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

The watershed in Canada for French and English minority-language communities was the entrenchment of language rights in the Charter. Sections 16 to 23 of the Charter explicitly establish language rights for Canada's English- and French-language reflect a shift in both the justificational framework of Canada's official minority-language building theory of language rights language policy, language rights in a of linguistic human rights and the The entrenchment of substantive equality of status of official language constitutional, from individual to collective-oriented rights to strong promotion.

The constitutional entrenchment protection of minority languages a exceptional importance of this is rights are immune from override and is also important that constitutional purposive interpretation by courts. Canada has played a leading role in the theory of language rights in Canada.

Sections 16 to 23 of the Charter to a personality model that began with a personality model is not complete, of the territorial model remain in the provision of government service rights. Both rights require satisfaction.

---


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


104 S.Q. 1977, c. 5.

enge communities outside these areas. Réaume explained that “while it is

centration to language use, speakers

selves neatly.”

Second, the very lative instrument reflected a major

tal recognition or protection of element a minority-language policy

ices appears to be crucial as they

mpact minority-language use.

ished its own framework of language

er of the French language, enacted

language affirmed the primacy of nada’s language policy was moving

he personality principle, the language

y established a territorial model of

ow competes with the personality

he Protection of Minority-

rench and English minority-language

of language rights in the Charter. establish language rights for

f Individual Choice and Territoriality in the

itted to the Commission of Official Languages

Constitutional Misfits or Real Rights” in André

s, Languages, Constitutionalism and Minorities 204.


quite complex. For a discussion of the potential

The Canadian Charter of Rights and Freedoms, le B to the Canada Act 1982 (U.K.), 1982, c. 11.

m (Markham, ON: LexisNexis Canada, 2004), at

w in Canada, looseleaf (Scarborough: Thomson

Michel Bastarache, ed., Language Rights in

4), at 23. Justice Bastarache also provides a brief


Canada’s English- and French-language speakers. These provisions

reflect a shift in both the justification and mechanism for protecting

Canada’s official minority-language communities. Although the nation-

building theory of language rights continues to influence Canada’s

language policy, language rights in Canada are also premised on a theory

of linguistic human rights and the preservation of linguistic diversity.

The entrenchment of substantive language rights and guarantee of

equality of status of official languages marks a shift from legislative to

constitutional, from individual to collective and from weak promotion-

oriented rights to strong promotion-oriented rights.

The constitutional entrenchment of language rights has hardened the

protection of minority languages against whims of the legislature.

The exceptional importance of this is signified by the fact that language

rights are immune from override under the notwithstanding clause. It

is also important that constitutional provisions are subject to a broad

and purposive interpretation by courts. In recent years, the Supreme Court of Canada has

played a leading role in articulating and advancing the theory of language rights in Canada.

Sections 16 to 23 of the Charter also deepened the federal commitment to

a personality model that began with the Constitution Act, 1867. The

personality model is not complete, even at the federal level. Remnants

of the territorial model remain in two principal areas at the federal level:

provision of government services and minority-language education

rights. Both rights require satisfying a numerical threshold to become

106 As is discussed below, other sections of the Canadian Charter of Rights and Freedoms,

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

address language rights of allophone and Aboriginal communities.

107 Section 33 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution


The Court in a trilogy of cases advocated a narrow approach of language rights:


Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls


importance of the courts to the development of language rights has been affirmed by Parliament

who provided funding through the Court Challenges Program. The Court Challenges Program

was launched in 1970. The objective of the Court Challenges Program was “to help official-language

communities in a minority setting to take legal action to clarify and affirm their language rights”:

Marie-Eve Hudon and Marion Menard, “The Role of the Courts in the Recognition of Language

Rights” Library of Parliament (February 14, 2006, PRB 05-57E), online: Library of Parliament


personality model also continued with s. 530 of the Criminal Code, R.S.C. 1985, c. C-46.
activated. A territorial model has also persisted because these provisions do not exhaustively regulate language rights in Canada. By virtue of Canada's federal system, the provinces also regulate language. Only one province, New Brunswick, is officially bilingual. Thus, the territoriality principle has persisted because of differing approaches in various provinces.

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

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

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

---

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

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


530 of the Criminal Code advancement "does not however e: the principle of equality of the two Lalonde, the Court of Appeal con 16(3) is to shield legislative mal discrimination; it is not a rights Webber notes in another essay significant potential to impact lan (d) The Evolution of the Theoretical Rights

Judicial interpretation of the much about their theoretical underp has identified the principal rational communities as well as protecti of minority-language communities language rights theory.

Protecting language and culti modern courts and certain bureaux: Commissioner. This goal reflect language rights in Canada: the p diversity. The Court has explici cannot be separated from a conce language". To preserve linguisti
530 of the *Criminal Code* is an example. The principle of advancement “does not however exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada.” In *Lalonde*, the Court of Appeal concluded that the purpose of subsection 16(3) is to shield legislative matters from challenge on the basis of discrimination; it is not a rights-conferring provision. As Grégoire Webber notes in another essay in this volume, section 16 has significant potential to impact language rights in Canada.

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

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

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

---

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

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

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

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

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


53, at para. 22). It also confirms the language communities continue to be of the primary objectives of the gradually been implemented in Canada.

Any broad guarantee of language respect for and interest in the protected languages... Thus, the language instruction contributes language and culture, as well as to language education.)\[123\]

The cases show the Supreme Court’s minority goal of Canada’s language pol
The Court of Appeal for Ontario the importance of linguist minority. In Lalande the Court Montfort hospital, an Ontario francophone by the Ontario government the government had failed “to give the importance of Montfort as a Franco-Ontarian minority”.127 In the Appeal relied on many sources, principle of protection for minc Court’s finding that hospitals are cultural identity.129

The importance of preserving clearly evident in the Official l

\[126\] Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201, at paras. 6-7 (S.C.C.).

\[127\] This shift away from linguistic see “Are Language Rights Fundamental?” (1987) Constitutional Protection of Language:SU Language and the State: The Law and Politics 126


\[129\] Lalande v. Ontario (Commission et al), No. 4768, 56 O.R. (3d) 305, at para. 125 (Ont. C.A.)
(2008), 39 S.C.L.R. (2d) LANGUAGE RIGHTS IN CANADA

53, at para. 22). It also confirms that the need and desire to ensure that language communities continue to exist and develop represented one of the primary objectives of the language rights scheme that has gradually been implemented in Canada.

Any broad guarantee of language rights attests to a fundamental respect for and interest in the cultures that are expressed by the protected languages... Thus, the recognition of rights to minority language instruction contributes to the preservation of the minority language and culture, as well as of the minority group itself. (emphasis added)\footnote{Solski (Tutor of) v. Quebec (Attorney General), [2005] S.C.J. No. 14, 2005 SCC 14, [2005] I S.C.R. 201, at paras. 6-7 (S.C.C.).}

The cases show the Supreme Court has made linguistic survival a key goal of Canada’s language policy.\footnote{This shift away from linguistic security is likely a welcome one for many: Leslie Green, “Are Language Rights Fundamental?” (1987) 25 Osgoode Hall L.J. 639; Denise Réiveau, “The Constitutional Protection of Language: Survival or Security” in David Schneiderman, ed., Language and the State: The Law and Politics of Identity (Cowansville, Qc: Yvon Blais, 1991).}

The Court of Appeal for Ontario also affirmed as a language policy goal the importance of linguistic survival for the Franco-Ontarian minority.\footnote{Lalonde v. Ontario (Commission of reconstruction des services de santé), [2001] O.J. No. 4758, 56 O.R. (3d) 505 (Ont. C.A.).} In Lalonde the Court of Appeal considered whether the Montfort hospital, an Ontario francophone hospital, was protected from closure by the Ontario government. The Court of Appeal concluded that the government had failed “to give serious weight and consideration to the importance of Montfort as an institution to the survival of the Franco-Ontarian minority”.\footnote{Lalonde v. Ontario (Commission of reconstruction des services de santé), [2001] O.J. No. 4768, 56 O.R. (3d) 505, at para. 125 (Ont. C.A.).} In reaching this conclusion, the Court of Appeal relied on many sources, including the unwritten constitutional principle of protection for minorities.\footnote{Lalonde v. Ontario (Commission of reconstruction des services de santé), [2001] O.J. No. 4768, 56 O.R. (3d) 505, at paras. 69-71 (Ont. C.A.).}

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

\footnote{Lalonde v. Ontario (Commission of reconstruction des services de santé), [2001] O.J. No. 4768, 56 O.R. (3d) 505, at para. 188 (Ont. C.A.).}
constitutional status. Subsection 41(2) of the Official Languages Act requires federal institutions to take “positive measures” for enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development.

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

A third justification is evident in the jurisprudence: the protection of linguistic human rights. The two hallmarks of human rights, fundamental importance and universality, are both present in the protection of minority official-language rights. The Supreme Court affirmed the fundamental importance of language in its jurisprudence. In Ford v. Quebec, the Court observed that language is “the means by which the individual expresses his or her personal ideas. Language rights are necessary to minority are “given the opportunity to Canada has affirmed the universalist its ratification of the two universal human rights, collective identity as Canadians, and legislative fora. The “universalist constitutional protection of the promotion of robust and which are essential for Canada to action Plan is rooted in the present recognition that “linguistic dual Canadian heritage”.

That nation-building continues is illustrated in the Court’s affirming in part, to remedy past harms. This Code, which is “remedial language”, is based on the true purpose of redress. Canada’s minority official-langu

---


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

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


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

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

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

41(2) of the Official Languages to take “positive measures” for English and French linguistic minority supporting and assisting their development of a range of policies to on Plan for Official Languages is a policy statement issued by the use of strengthening the Official administered by the Minister for areas the Action Plan targets are the public service. By these ensure the linguistic survival of the ties in Canada and to promote their minorities is necessary because communities have always nurtured our strong contribution to our linguistic the jurisprudence: the protection of marks of human rights, fundamental present in the protection of minority the Court affirmed the fundamental rudence. In Ford v. Quebec, the means by which the individual

---


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

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

(e) Future Steps

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

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

To implement the theoretical frameworks of nation-building, human rights and linguistic and cultural diversity, improvement is required in three areas. First, to ensure linguistic promotion-oriented right communities. For example, greater involvement both the private and public sectors in the process of language rights that will strengthen the pressures of assimilation to ensure that this objective is to offer minority languages in the media.¹⁴⁶ Canada’s English and French minority language schemes are balanced. The asymmetry ref of Canada’s official-language minority in this volume have noted, more roles in the survival of official minority-language, bilingualism and offer constitutional language communities. However, an situation of Quebec, the only provi in third important step necessary to country is to promote bilingualism.¹⁴⁷

V. CANADA’S OTHER LAW

The principal focus of Canada’s language rights in English and French communities, but restricted to English and French official and cultural communities are also included in Section 22 of the Charter. Explic language rights of protection.

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


¹⁴⁷ See Grégoire Charles N. Webber Declaration”, and Christine Ruest, “Constitution Declaration”, in this volume.


¹⁴⁹ Canadian Charter of Rights and Freedom, Schedule B to the Canada Act 1982 (U.K.), 15 to 20 derogates or derogates from any legal}
nd security between Canada's two
gle overarching justification for the
guage communities in Canada. The
ghts for the purpose of promoting
guage community is consistent with
human rights and preserving linguistic
as that French and English minority-
be the principal focus of Canada's

x in Canada has generally benefitted
ties, but in an asymmetrical manner.
in part, by the fact that there is no
lial-language communities at the
there is no single justification or
n of minority-language communities
not consider provincial language
that asymmetry is exacerbated by
guage policies, where protection of
ties differs widely from province to
protection benefit minority-language
single normative theory? Do the
eoretical justifications? These are
f ul consideration in the design and
le policy.
ile scheme are laudable. However,
een theory and application.
eworks of nation-building, human
ersity, improvement is required in

guage communities are protected on the basis that
age" is a secondary rationale that should not, in
ights protection: Denise Réau, "Language
André Bruin, Pierre Foucher & Yves Le
orities (Markham, ON: LexisNexis Canada,
 of the text reviews and highlights the different
vis official language minorities.

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

V. CANADA'S OTHER LINGUISTIC COMMUNITIES

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

\textsuperscript{146} Ruth Rubio-Marin, "Language Rights: Exploring the Competing Rationales" in Alan
Patten & Will Kymlicka, eds., Language Rights and Political Theory (New York: Oxford

\textsuperscript{147} See Grégoire Charles N. Webber, "The Promise of Canada’s Official Languages
Declaration", and Christine Reest, "Constitutional Guarantees for Official Languages in the
Legislative Process", in this volume.

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

\textsuperscript{149} Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being
Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. Section 22 states “[n]othing in sections 16
to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed
22 also permits the creation of new language rights for non-official language communities, including Aboriginal language communities. Section 27 requires that the Charter be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". Section 35 of the Constitution Act, 1982 constitutionally protects the "existing aboriginal and treaty rights" of Canada's Aboriginal peoples. As is discussed below, section 35 likely protects Aboriginal language rights.

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

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


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

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


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

A complex framework of federal and non-official language communities the most prominent instruments to model appears to underpin Canadian allophone and Aboriginal commum varying degrees.

1. Allophone Communities

A human rights approach is of the Charter. These sections acknowledge the importance of treating allophones as a minority group and seeking to protect their rights. The right to non-discrimination in a criminal trial. These rights are safeguarded and are protected by the Charter.

The right not to be discriminate likely protected under section 15 of the Charter that is protected by the Charter.

157 As mentioned, Canada's committee recognized in the Preamble to the Canadian Mu


159 This is because language is non-discrimination in several int and Canada is a party to each of

view language rights for non-official aboriginal language communities.\textsuperscript{150} After be interpreted "in a manner of enhancing the multicultural 35 of the Constitution Act, 1982 ing aboriginal and treaty rights" of is discussed below, section 35 likely languages communities are not the sole r is evident in federal legislation.\textsuperscript{151} Canadian Multiculturalism Act affirm iplicity recognize the importance of f languages other than English and s and use of the official languages.\textsuperscript{155} s Act is not to be interpreted in a ration and enhancement of languages

\textsuperscript{150} Charter with respect to any language that is not w of Language” in Michel Bastarache, et al., r’von-Blais, 1987) 313, at 324-25. See also Leslie 87) 25 Osgoode Hall L.J. 639, at 666-66. dom, Part I of the Constitution Act, 1982, being c. 11.

\textsuperscript{151} B to the Canada Act 1982 (U.K.), 1982, c. 11. Official Languages Act, R.S.C., 1985, c. 31 (4th Ed.), 1985, c. 24 (4th Supp.). Provincial versions also c. 31 (4th Supp.) at s. 83(1) states: “Nothing in customary right acquired or enjoyed either before the right to any language that is not English or R.S.C. 1985, c. 24 (4th Supp.) states: “AND Official Languages Act provide that English and neither abrogates nor derogates from any rights or any other language.” The Preamble also affirms International Covenant on Civil and Political arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 EREAS Canada is a party to ... the International covenant provides that persons belonging to ethnic, ed the right to enjoy their own culture, to profess language.”

\textsuperscript{155} 1985, c. 24 (4th Supp.), s. 3(1)(i) and Official name.

\textsuperscript{152} 31 (4th Supp.), s. 83(2).

1. Allophone Communities

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

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

\textsuperscript{157} As mentioned, Canada’s commitment to these international obligations is also explicitly recognized in the Preamble to the Canadian Multiculturalism Act, R.S.C. 1985, c. 24 (4th Supp.).


\textsuperscript{159} Although this discussion arises in the context of official languages, the rationale applies equally to any language. Vaz notes that language may be linked to the enumerated ground of national or ethnic origin on the basis of the decision of the Permanent Court of International Justice in Advisory Opinion on Minority Schools in Albania, April 6, 1935, Series A/B P.C.I.J. 4 p. 117.

assumed to respect its international obligations, it is likely that language is a ground of discrimination under section 15.161

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

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

Canada preserves cultural diversity. Although education programming often falls under provincial jurisdiction, the scheme of provincial education for linguistic communities. Professor N

Programming support is provided to communities. To take an example, organisations which involve which goes on in 150 schools and an amalgamation of institutions off in 30 languages, including child elementary level.168

Education is vital to linguistic community support of these education programs preserves linguistic and cultural divide.

2. Aboriginal Communities

A complex web of constitutions exists at the federal, provincial, and language and allophone communities underpins Canada’s federal Aborigines Approximate 60 Aboriginal languages. The language community of language loss. Some are nearly widely spoken.171 The 2001 Census

---

164 Joseph Elliot Magnet, Modern Constitutionalism (Markham, ON: LexisNexis Canada, 2004), at 217.
165 Canadian Multiculturalism Act, R.S.C. 1985, c. 24 (4th Supp.). The Preamble, in part, states: “AND WHEREAS the Constitution of Canada and the Official Languages Act provide that English and French are the official languages of Canada and neither arrogates nor derogates from any rights or privileges acquired or enjoyed with respect to any other language.”
obligations, it is likely that language section 15.161
des every individual with a right to he Canadian context, there is some properly classified as a "language" noted the "complete distinctiveness "162 These categories of rights differ official language rights are intricately he collective identity of sub-national in interpreter is intended to ensure interpreter is concerned only with age. In the international context, this because it pertains to language.163
linguistic diversity also appear to Both the Charter and the Canadian multicultural heritage and its policy 4 Canada has declared itself to be purely; it is multicultural as well. {turalism Act declares that it is a "preserve and enhance the use of each, while strengthening the status Canada".164 This is because of the being the multicultural heritage of anada has a policy to take measures tion and use of all languages that are of Canada".165

Canada preserves cultural diversity through education policy as well. Although education programming for non-official language communities falls under provincial jurisdiction, the federal government indirectly influences provincial education programming.166 There is a complex scheme of provincial education programming for certain allophone linguistic communities. Professor Magnet explains:

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

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

2. Aboriginal Communities

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

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

163 Task Force on Aboriginal Languages and Cultures, Towards a New Beginning, online: Task Force on Aboriginal Languages and Culture <http://www.aboriginallanguagestaskforce.ca/pdf/taskforce_e.pdf>, at 33.
164 Task Force on Aboriginal Languages and Cultures, Towards a New Beginning, online: Task Force on Aboriginal Languages and Culture <http://www.aboriginallanguagestaskforce.ca/pdf/taskforce_e.pdf>, at 33. See also Raymond Samuels II, ed., Toward a Native-Canadian Equal Rights Amendment: Replacing the current Official Languages and Indian Acts in favour of a rejuvenated Constitutional framework for the preservation and promotion of aboriginal languages and cultures (Kanata: Agora Cosmopolitan, 2003), at 15-18.
Aboriginal languages are Cree, Ojibway and Inuktut. Although some are used more widely than others, each language is intricately connected to Aboriginal culture.

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

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

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

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

173 Raymond Samuels II, ed., Toward a Native-Canadian Equal Rights Amendment: Replacing the current Official Languages and Indian Acts in favour of a rejuvenated Constitutional framework for the preservation and promotion of aboriginal languages and cultures (Canada: Agora Cosmopolitan, 2003), at 19.
174 Task Force on Aboriginal Languages and Cultures, Towards a New Beginning, online: Task Force on Aboriginal Languages and Culture <http://www.aboriginallanguages.taskforce.ca/pdf/foundrpt_e.pdf>, at 21, citing the late Elder Eli Taylor of the Sioux Nation.
175 Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
177 Task Force on Aboriginal Languages Task Force on Aboriginal Languages and Cult pdf/foundrpt_e.pdf) at i.
179 The Northwest Territories Official English, French, Gloch'in, Inuinnaqto, Inuktut Talchí as official languages: R.S.N.W.T. 198 Official Languages Act as incorporated into Nitat Act, S.C. 1993, c. 28. Nunavut tabled a new i greater protection than the Northwest Territor development of this legislation, which is be are not designated official languages in the Yuk
way and Inuittitut. Although some
eras, each language is intricately
ately connected to the cultures and
poples. This connection has been
en by the Creator as an integral part
of the notion that language contributes to greater pride
and ownership of the land and culture is
ited from generation to generation.
ure is one's ancestral language.
original languages and cultures have
tertain provincial governments to
and cultural diversity of Canada's
been motivated by the fundamental
people and by a desire to heal the
ple and Canada.
ly protected by virtue of section 35
e Supreme Court of Canada has not
cludes Aboriginal language rights.
gal arguments that section 35 includes
Aboriginal languages, including the

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

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

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

autochtones" (1994) 4 NJCL 265; Brian Slattery, "Aboriginal Language Rights" in David

Task Force on Aboriginal Languages and Culture <http://www.aboriginallanguagestaskforce.ca/ pdfs/landrpt_e.pdf>, at i.

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

The Northwest Territories Official Languages Act designates "Chipewyan, Cree,
English, French, Inuktitut, Inuinnaqtun, Naskapi, Inuinnaqtun, North Slavey, South Slavey and
Taichó" as official languages: R.S.N.W.T. 1988, c. O-I, s. 4 (as am.). The Northwest Territories
Official Languages Act is incorporated into Nunavut law by virtue of ss. 29 and 38 of the
greater protection than the Northwest Territories Official Languages Act. There is a rich history to
the development of this legislation, which is beyond the scope of this essay. Aboriginal languages
are not designated official languages in the Yukon. However, there is recognition in the Languages
substantive protection, both constitutional and legislative, as minority official-language communities? Or should there be tailored protection for each linguistic community?

VI. CONCLUSION

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

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

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

---

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

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

Joseph Elliot Magnet, Modern Constitutionalism (Markham, ON: LexisNexis Canada, 2004), at 146-49.

The Promise of (Official) Languages

Grégoire Chai

Je souhaite que sur cette lancée, maturité politique. Qu’il devienn jamais cesser d’être dans le cœur un Canada tirant force et fierté de

— Pierre Elliott Tr

I. INTRODUCTION

Section 16 of the Canadian Ch the first section under the heading captures the vision promoted in Tr. 17, 1982. It provides:

16.(1) Official languages of Canada — 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.

* B.C., LL.B. (McGill); D.Phil. can indebted to many people who helped me strug thank Marie-Joie Brady, François Chevrette, Roderick Macdonald, Joseph Elliot Magnet, Mi Stephen Scott. The generous support of the Fr gratuitously acknowledged. A different and short Revista de Llengua i Dret 243.

Remarks at the Proclamation Ceremony premiersministres/h4-4024-f.html> (emphasis w 2 Part I of the Constitution Act, 1982, 1982, c. 11.