

## Minority Cultural and Linguistic Rights and Equality Rights in the *Canadian Charter of Rights and Freedoms*

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The enactment of the *Charter* has given significant protection to Canada's linguistic and cultural minorities. The author examines the extent of this protection, with respect to both the English- and French-language minorities and other minority groups, in part through a comparison with the guarantees contained in article 27 of the *International Covenant on Civil and Political Rights*. He also looks at the potential conflict between the principle of equality and minority rights enshrined in the *Charter*. In resolving these conflicts the courts will have a crucial role to play and the author examines potential judicial responses to the interaction of equality and minority rights. Certain legal notions underlying the *Charter* which may influence these judicial responses are considered, in particular the notion of collective as opposed to individual rights.

L'adoption de la *Charte* a eu pour effet d'accroître la protection accordée aux minorités linguistiques et culturelles canadiennes. L'auteur examine la portée de cette protection autant en ce qui concerne les minorités francophone et anglophone que les autres groupes minoritaires du Canada, en partie au moyen d'une comparaison avec les garanties découlant de l'article 27 du *Pacte international relatif aux droits civils et politiques*. Il traite ensuite de la possibilité de conflits apparaissant entre le principe d'égalité et les droits des minorités enchâssés dans la *Charte*. Les tribunaux étant appelés à jouer un rôle décisif dans la résolution de ces conflits, l'auteur examine leurs réactions éventuelles à cet égard. Certains concepts juridiques susceptibles d'influencer l'analyse du problème sont pris en considération, en particulier le concept de droits collectifs par opposition aux droits individuels.

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**Introduction**

This paper will examine the protection of Canada's linguistic and cultural (or, more commonly, ethnic) minorities in light of the *Canadian Charter of Rights and Freedoms*.<sup>1</sup>

The general equality guarantees found in subsection 15(1) of the *Charter* seek to ensure that ethnic minorities in Canada do not suffer discriminatory treatment. Even though language has not been singled out as a separate

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<sup>1</sup>Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

ground of prohibited discrimination, it is clear that irrational or discriminatory treatment based on language will also be forbidden under the clause.<sup>2</sup>

Despite the egalitarian promise of subsection 15(1), other, more substantial, guarantees are required. When a religious, linguistic or ethnic minority is placed on an equal footing with the majority — when its members are not discriminated against because of their membership in that minority — only “formal” or “abstract” equality is achieved. “Material” or “genuine” equality results from the recognition that minority and majority are obviously not in comparable situations and that the same treatment applied to different situations inevitably produces inequality. “Formal” equality implies that a minority is served by the cultural, religious and educational institutions of the majority. This integration into the cultural mainstream, however, would mean a rapid disintegration of all those distinctive features which make up a minority people. It would thus lead to assimilation.<sup>3</sup>

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<sup>2</sup>S. 15(1), properly analysed, contains two standards: the right to equality and the prohibition against discrimination. Whenever a person is dealt with on the basis of an irrelevant characteristic or consideration, language in particular, the right to equality is violated. Discrimination occurs where a person is treated unfavourably because he belongs to a disadvantaged group. S. 15(1) opens with the prohibition against *any* discrimination (in the French text, “toute discrimination”), which logically must include the prohibition of discriminatory treatment based on linguistic grounds. The clause then adds to this general prohibition against discrimination a non-exhaustive list of specifically prohibited grounds in which ethnic origin, but not language, is included. Discrimination based on grounds which are enumerated in s. 15(1) will probably be treated differently than discrimination based on grounds which are not enumerated; it might be argued that non-enumerated grounds like language will be subject to less rigorous levels of judicial “scrutiny” than those which are enumerated. If the *Charter’s* drafters expected judicial treatment of grounds of discrimination to be distinguished on this basis, perhaps they left “language” off the list in order to avoid the higher level of judicial “scrutiny”. It is possible to imagine that in excluding language the intention was to avoid or at least to reduce the number of conflicts likely to arise between s. 15(1) and the provisions of the Constitution containing minority language and cultural guarantees. Some fears about the conflicts likely to arise between the principles of equality and non-discrimination and language rights are reflected in Canada, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence* (Ottawa: Queen’s Printer, 1980) at 22:88 (J. Lapierre) and at 22:99 - 22:100 (L. Nystrom & A.L. Juzukonis) (Co-chair: H. Hays & S. Joyal). Regarding the interpretation of s. 15(1) and linguistic equality, see J. Woehrling, “L’article 15(1) de la *Charte canadienne des droits et libertés* et la langue” (1985) 30 *McGill L.J.* 266. Regarding the distinction between equality and non-discrimination, see B. Hough, “Equality Provisions in the *Charter*: Their Meaning and Interrelationships with Federal and Provincial Human Rights Acts” in A.W. MacKay, C.F. Beckton & B.H. Wildsmith, eds, *The Canadian Charter of Rights: Law Practice Revolutionized* (Halifax: Faculty of Law, Dalhousie University, 1982) 306 at 308; O.M. Fiss, “Groups and the Equal Protection Clause” (1976) 5 *Phil. & Pub. Aff.* 107 at 158-60.

<sup>3</sup>This undesirable result was fully appreciated by the Permanent Court of International Justice (P.C.I.J.) when it considered the problems of minorities living within the borders of newly-created, multicultural states in Europe following the Versailles Treaty of 1919. For a description of the system for protecting minorities in the context of the League of Nations, see Y. Dinstein,

The right of minorities to demand full equality with the majority and the preservation of their identity through their own institutions, is now enshrined in the *International Covenant on Civil and Political Rights*. Articles 2(1) and 26 enunciate the principles of equality and non-discrimination and article 27 sets out the right of ethnic, religious and linguistic minorities "to enjoy their own culture, to profess and practise their own religion, or to use their own language".<sup>4</sup>

In 1976, Canada ratified the covenant and, consequently, is bound to bring its domestic law in line with the standards set out therein.<sup>5</sup> Subsection

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"Collective Human Rights of People and Minorities" (1976) 25 Int'l & Comp. L.Q. 102 at 113-7; F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1979) Doc. E/CN4/Sub.2/384/Rev.1 at 16-26 [hereinafter the *United Nations Study*]. In an advisory opinion on this topic concerning minority schools in Albania, the P.C.I.J. introduced the distinction between two kinds of equality: see *Minority Schools in Albania* (6 April 1935) ser. A/B 64 P.C.I.J. 4. The Court declared, *ibid.* at 17, that in order that the rights of a minority be respected, it must have the means to develop and preserve its distinct traditions and characteristics; it must have institutions of its own:

[T]here would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being a minority.

See also Capotorti, *supra* at 41, where he states that the prevention of discrimination, on the one hand, and the implementation of special measures to protect minorities, on the other, are merely two aspects of the same problem: that of defending fundamental human rights.

<sup>4</sup>*International Covenant on Civil and Political Rights*, 19 December 1966, 1007 U.N.T.S. 172 (in force in Canada 19 August 1976) [hereinafter the *Covenant*].

2. (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.
26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
27. 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.

For the French version of the *Covenant*, see M. Lebel, F. Rigaldies & J. Woehrling, *Droit international public: notes et documents*, vol. 2, 2d ed. (Montreal: Thémis, 1982) at 837ff.

<sup>5</sup>On the implementation of international treaties protecting fundamental rights in Canadian domestic law, see A. Desjardins, "La mise en oeuvre au Canada des traités relatifs aux droits de la personne" (1981) 12 R.G.D. 359. For a summary of the international conventions concerning the protection of human rights to which Canada is a party, see M. Cohen & A.F. Bayefsky, "The *Canadian Charter of Rights and Freedoms* and Public International Law" (1983) 61 Can. Bar Rev. 265 at 285 n. 80. For the relationship between international law and Canadian domestic law, see F. Rigaldies & J. Woehrling, "Le juge interne canadien et le droit

15(1) of the *Charter* is the domestic counterpart to articles 2(1) and 26 of the *Covenant*. However, the list of expressly prohibited grounds of discrimination in the *Charter* is less complete than that of the *Covenant*. Language, for one, is conspicuously missing as a prohibited ground.<sup>6</sup> While the enumeration in subsection 15(1) is certainly not exhaustive and permits the courts to read into it any unreasonable and unjustifiable discrimination,<sup>7</sup> the *Covenant* would have been more satisfactorily implemented had all the internationally recognized grounds of discrimination been incorporated into subsection 15(1).<sup>8</sup>

Minority language and cultural rights that implement article 27 of the *Covenant* in Canadian constitutional law may be grouped into two categories. The first deals with the status of Canada's two "official languages", English and French, and with education rights for anglophone and francophone minorities.<sup>9</sup> These rights are specific and detailed; generally they confer immediately applicable rights and benefits upon those entitled. In the second category are found language and cultural rights that non-English or non-French peoples may invoke under the *Charter*.<sup>10</sup> These provisions are more ambiguous; it is therefore difficult to assess their full effect until the courts have offered an authoritative interpretation of their scope.

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international" (1980) 21 C. de D. 293. On the use of international law for interpreting the *Charter*, see D. Turp, "Le recours au droit international aux fins de l'interprétation de la *Charte canadienne des droits et libertés*: un bilan jurisprudentiel" (1984) 18 R.J.T. 353.

<sup>6</sup>On the other hand, s. 15(1) expressly prohibits discrimination based on "national or ethnic origin" [emphasis added].

<sup>7</sup>See *supra*, note 2.

<sup>8</sup>Desjardins, *supra*, note 5 at 366-7, points out that the Human Rights Committee created under art. 28 of the *Covenant* made reference to what it regards as shortcomings in Canadian law, including the fact that Canadian statutes (federal, provincial and territorial) do not contain a list of prohibited grounds of discrimination as extensive as the one contained in art. 2 of the *Covenant*. As regards *language*, the only Canadian statute which expressly prohibits discrimination on this basis is the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s.10 as am. S.Q. 1982, c. 61, s. 3. For a summary of the provisions concerning language rights and the right to linguistic equality in the major international instruments, see M. Tabory, "Language Rights as Human Rights" (1980) 10 Israel Y.B. Hum. Rts 167. See also J. Claydon, "The Transnational Protection of Ethnic Minorities: A Tentative Framework for Inquiry" (1975) 13 Can. Y.B. Int'l L. 25; A. Verdoodt, *La protection des droits de l'homme dans les États plurilingues* (Paris: Fernand Nathan, 1973) at 19ff. In some cases, such as art. 2 of the *Universal Declaration of Human Rights*, and arts 2(1) and 26 of the *Covenant*, language is expressly mentioned in the list, even though these articles are not limitative.

<sup>9</sup>These are ss 16-20 and 23 of the *Charter* to which must be added s. 133 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, and s. 23 of the *Manitoba Act, 1870*, S.C. 1870, c. 3. These two statutes, like the *Constitution Act, 1982*, are part of the "Constitution of Canada". See *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(2).

<sup>10</sup>See ss 27 and 25 in combination with s. 22.

Despite their relative differences, both categories of rights can be termed "collective" as opposed to "individual". The object and purpose of collective rights is to enable a collectivity, as defined by language, religion or, more generally, by culture, to preserve and develop its particular and distinct identity. Only those who are members of a collectivity may claim a benefit from such rights. Furthermore, collective rights confer upon those who are entitled to their enjoyment, special status in relation to the rest of the population. This special treatment necessarily reflects the minority situation of those collectivities. It is through such measures that a real, and not simply a formal equality is achieved.

This study will first examine the scope of the various domestic provisions in order to determine whether implementation of article 27 of the *Covenant* has been fully realized. In this light, it will be shown how the equality rights clause of the *Charter* and the special measures relating to minority protection complement one another.

At the same time, however, equality and non-discrimination and the conferring of special rights on minorities, can lead to antagonism, if not contradiction. The second part of the paper will focus on two sets of conflicts — the first concerning internal conflicts in Canadian law between the *Charter's* equality and minority rights and the second dealing with the *Charter's* compliance with the equality provisions of the *Covenant*.

The final part will attempt to assess the response of the courts to the interplay between equality and minority rights. Case law on constitutional minority language guarantees will be examined in an effort to discern the possible judicial interpretations of the internal conflicts embodied in the *Charter*. The courts, it will be shown, must arbitrate these conflicts and this paper will consider certain legal notions found in the *Charter* to which the courts may resort. A critical notion, in this regard, will be that of collective rights, and the study will conclude with a discussion of collective rights in Canadian constitutional law.

## I. The Scope of the Minority Language and Cultural Guarantees of the *Charter*

It is generally acknowledged that the *Charter* was enacted, in part, in furtherance of Canada's international obligations arising as a result of the 1976 ratification of the *Covenant*.<sup>11</sup> Accordingly, it is essential to compare the protection afforded by that instrument with the guarantees contained in the *Charter* in order to determine whether Canada may be faulted for breach of its international obligations.

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<sup>11</sup>See, e.g., Cohen & Bayefsky, *supra*, note 5 at 268 and 272.

Article 27 is the key provision in the *Covenant* designed to protect linguistic, religious and cultural (or, in the language of article 27, ethnic) minorities. The *Charter* deals separately with ethnic and cultural minorities,<sup>12</sup> and with linguistic minorities.<sup>13</sup> It is important to consider both categories with some attention.<sup>14</sup> In so doing, I will distinguish between the sections of the *Charter* dealing with rights conferred upon anglophone and francophone minorities and those concerning other minority rights.

#### A. *Language Guarantees — Sections 16 to 20 and 23 of the Charter*

The status of a minority language, as an "official language" to be used by the various government and state agencies, is the first question to consider. The *United Nations Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*<sup>15</sup> noted the diversity of practices adopted in the various countries examined. The Rapporteur, in fact, refused to enunciate a uniform rule in this area, insisting only that

in all cases where a minority language does not have official status, adequate facilities should be made available to members of the minority linguistic group to ensure that they are not at a disadvantage merely because they speak a different language from the majority. In judicial proceedings and relations with the authorities, for example, provision should be made for a system of translation at the expense of the State.<sup>16</sup>

The Canadian Constitution confers special status on minorities attached to the two principal language groups in the country. According to

<sup>12</sup>*Supra*, note 10.

<sup>13</sup>*Supra*, note 9.

<sup>14</sup>S. 93 of the *Constitution Act, 1867* contains guarantees for certain religious minorities in Canada. A discussion of these does not fall within the purview of the present study.

<sup>15</sup>In this study which concerns the implementation of art. 27 of the *Covenant*, *supra*, note 3, the Special Rapporteur of the UN Subcommission on Prevention of Discrimination and Protection of Minorities, F. Capotorti, conducted a survey on the present status in law of cultural, religious and linguistic minorities from many countries and made some interesting findings. As Capotorti reports, *supra* at 6, it was impossible for the United Nations agencies to agree on an official definition of the concept of "minority". However, Capotorti proposed the following definition, *supra* at 96:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members — being nationals of the State — possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

For legal opinions on this subject, see Dinstein, *supra*, note 3; Y. Dinstein, "Cultural Rights" (1979) 9 *Israel Y.B. Hum. Rts* 58 at 69; Claydon, *supra*, note 8; Tabory, *supra*, note 8; and Verdoodt, *supra*, note 8. The *United Nations Study* concludes with recommendations as to what, in Capotorti's opinion, ought to be the rights accorded to minorities under the *Covenant*. This paper will draw upon several of those recommendations.

<sup>16</sup>Capotorti, *ibid.* at 101.

the standards set out in the *United Nations Study*, the rights contained in sections 16 to 20 of the *Charter* and in certain other provisions of the Canadian Constitution<sup>17</sup> regarding such groups, go well beyond the minimum required under article 27 of the *Covenant*.<sup>18</sup> There are comparatively fewer provisions in the *Charter*, however, concerning ethnic and linguistic minorities whose language is other than French or English. In fact, only section 14 may be regarded as having application in this area even though it is not aimed primarily at conferring minority rights. This provision gives everyone who is a party or witness in any proceedings and who does not understand or speak the language in which the proceedings are conducted (or who is deaf), the "right to the assistance of an interpreter". It does not apply only to members of a minority, even though it obviously acquires particular practical importance for such people.<sup>19</sup>

Consequently, as regards the "official" use of minority languages, the Canadian Constitution may be regarded as more generous concerning the status of English and French than international law standards require. On the other hand, the *Charter* falls short of the standard required by article 27 of the *Covenant* regarding other minority languages.<sup>20</sup>

The *United Nations Study* contains similar recommendations concerning the educational rights of both cultural and linguistic minorities under the *Covenant*.<sup>21</sup> Although there may exist linguistic minorities which share

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<sup>17</sup>See *supra*, note 9.

<sup>18</sup>However, only agencies of the federal government and certain provinces (Quebec, Manitoba and New Brunswick) are subject to these constitutional provisions. In the other provinces any rights that benefit the francophone minorities arise from legislative provisions or regulations. It should also be pointed out that although the provisions of the Constitution of Canada concerning the status of the official languages benefit all those who speak English or French, and not solely members of official language minorities, it is nevertheless the latter whom the constitutional guarantees aim at protecting. In terms of their purpose, ss 16-20 of the *Constitution Act, 1982*, s. 133 of the *Constitution Act, 1867* and s. 23 of the *Manitoba Act, 1870* are truly "special measures for protecting minorities".

<sup>19</sup>The object of s. 14 is not to protect one or more linguistic minorities but to guarantee every *individual*, regardless of his or her language, the right to a fair trial. This is, therefore, an *individual* right, unlike those of ss 16-20 and 23 of the *Charter*, which are *collective* rights. On the distinction between individual and collective rights, see *infra*, notes 29, 113 and 114. On s. 14 of the *Charter*, see A. Morel, "Certain Guarantees of Criminal Procedure" in W.S. Tarnopolsky & G.-A. Beaudoin, eds, *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) 367 at 377.

<sup>20</sup>As Capotorti suggests in his recommendations, *supra*, note 3 at 101, it would be necessary to give *all* minorities, where the number so warrants, the right to use their language in dealing with government (at least as regards the most important administrative services). See also Dinstein, *supra*, note 3 at 120.

<sup>21</sup>Capotorti, *ibid.* at 100-1. See also V. Van Dyke, "Equality and Discrimination in Education: A Comparative and International Analysis" (1973) 17 *Int'l Stud. Q.* 375.



the majority culture,<sup>22</sup> most often the divisions between minority and majority are both cultural and linguistic. Furthermore, the education system is still the principal and indispensable means of preserving and protecting a minority *language* or *culture*. It has been widely held that article 27 of the *Covenant* requires only that the State Parties allow minorities to set up private schools, at their own expense, to provide instruction in their language. The State, then, is not legally obliged either financially or materially to assist the minorities concerned, or *a fortiori*, to set up a minority public school system for their benefit.<sup>23</sup> However, the *United Nations Study* emphasizes that a State which contains linguistic or cultural minorities has an obligation to assist and make available to them (to the extent that its level of material development so allows) the necessary physical resources in order to establish and operate schools where instruction is given in the minority language.<sup>24</sup>

The *Charter* contains a section guaranteeing members of the franco-phone and anglophone minorities the right to have their children educated out of public funds in their respective language at elementary and secondary

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<sup>22</sup>See Dinstein, *supra*, note 3 at 112: "The linguistic minority may ethnically belong to the majority people (e.g. Yiddish-speaking Jews in Israel) or to a minority people (say, Christian Arabs in Israel)."

<sup>23</sup>See e.g., Dinstein, *ibid.* at 118-20 and *supra*, note 15 at 69-73; Van Dyke, *supra*, note 21 at 385-9. Art. 5(1)(c) of the *Convention Against Discrimination in Education*, 14 December 1960, 429 U.N.T.S. 93, which expands upon art. 27 of the *Covenant* in this regard, provides that:

5. (1) (c) It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however: (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty; (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authority; and (iii) That attendance at such schools is optional.

Dinstein, *supra*, note 15 at 72, makes the following comment on the scope of art. 5 (1) (c):

Even though the matter is not explicitly resolved in Article 5(1)(c), it stands to reason that, as a rule, each minority must maintain its schools at its own expense. Needless to say, a State is not barred from subsidizing such schools if it wishes to. But there does not seem to be any general obligation incumbent on the State, under international law, to finance schools that preserve the minority's traditions.

<sup>24</sup>Capotorti, *supra*, note 3 at 100-1. See also Dinstein, *supra*, note 15 at 73; Van Dyke, *ibid.* at 387; L.B. Sohn, "The Rights of Minorities" in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 270 at 284-5.

levels where there is a sufficient number of eligible children.<sup>25</sup> Here again, the *Charter* gives English- and French-speaking minorities broader rights than those arising under article 27 of the *Covenant*. In the area of education, no provisions concerning the other linguistic and ethnic minorities can be found in the *Charter* — at least not at first glance. The drafters did not think it appropriate to include a provision expressly guaranteeing the right of a minority to establish private schools at its own expense.

### B. Cultural Guarantees — Section 27 of the Charter

Article 27 of the *Covenant* gives members of minorities “the right, in community with the other members of their group, to enjoy their own culture ...”.<sup>26</sup> This naturally raises the problem of how to define the concept of “culture”. The definition accepted by the relevant United Nations agencies and institutions is very general: “All that is inherited or transmitted through society”<sup>27</sup> including language, literature, religion, art and science

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<sup>25</sup> 23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or  
(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

For an analysis of the scope of s. 23 see J.E. Magnet, “Minority-Language Educational Rights” (1982) 4 Sup. Ct L. Rev. 195; P.W. Hogg, *Canada Act 1982: Annotated* (Toronto: Carswell, 1982) at 60-4; D. Proulx, “La précarité des droits linguistiques scolaires ou les singulières difficultés de mise en oeuvre de l’article 23 de la *Charte canadienne des droits et libertés*” (1983) 14 R.G.D. 335; P. Foucher, “Les droits scolaires des acadiens et la Charte” (1984) 33 U.N.B.L.J. 97; P. Carignan, “De la notion de droit collectif et de son application en matière scolaire au Québec” (1984) 18 R.J.T. 1 at 72ff.

<sup>26</sup>*Supra*, note 4.

<sup>27</sup>M. Leiris, *Race and Culture* (Paris: UNESCO, 1951) at 20-1. Capotorti, *supra*, note 3 at 37, adopts Leiris’ definition of culture.

or, in other words, all knowledge which humans transmit from one generation to the next.

If article 27 of the *Covenant*, according to the *United Nations Study*, requires that State Parties *not oppose* any efforts that minorities may make to preserve and develop their culture, it also has the effect of requiring the State to assist them materially, within the limits of its resources.<sup>28</sup>

The only provision of the *Charter* specifically devoted to cultural rights is section 27 which provides that "[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians".<sup>29</sup> Since this provision is interpretative, it does not directly confer additional rights. How are the courts likely to apply section 27 in order to give it effect? In answering this question it is important to keep in mind that language and culture are closely related and that consequently, even though section 27 refers expressly only to culture and not to language, it is nonetheless likely to have certain effects on minority language rights.

First, section 27 may serve to *limit* the scope of other provisions of the *Charter* to the extent that the latter would otherwise be regarded as preventing the adoption of measures necessary for the preservation and enhancement of the cultural (and consequently, linguistic) heritage of certain Canadian minority groups. Subsection 15(1) is one of the provisions which section 27 might limit. Imagine that a western province decided to adopt special legislative measures to assist an ethnic minority, which will probably also be a linguistic minority, for example, Germans or Ukrainians in Manitoba. The individuals belonging to that minority group would be treated differently from persons belonging either to the majority or to another minority which is not so favoured.<sup>30</sup> This difference in treatment could be regarded as being contrary to the right to equality of individuals who are not members of the minority in question and, consequently, as being incompatible with subsection 15(1). This will not be the case, however, if section 27 is read by the courts as modifying the meaning and application of the principle of equality in order to allow for measures aimed at achieving the constitutional objective of preserving and enhancing our multicultural

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<sup>28</sup>Capotorti, *ibid.* at 99-100.

<sup>29</sup>S. 27 obviously protects *minorities*, since culture is not an individual, but rather a collective, fact. Any rights arising under s. 27 are consequently *collective* in nature, although they may be capable of being exercised individually.

<sup>30</sup>There will always be linguistic and cultural minorities which are not substantial enough, numerically, to obtain the same advantages as minorities benefiting from special protective measures. Granting a linguistic or cultural collectivity such rights inevitably results in a difference in treatment as compared with other, less favoured, groups.

heritage.<sup>31</sup> In this way section 27 can facilitate the adoption of legislative, regulatory or, more prosaically, budgetary measures which will *complement* the Constitution with respect to the protection of ethnic and linguistic minorities other than those which already have special constitutional status.

Section 27 may have another use. In combination with other sections, it might be relied on to interpret the *Charter* as implicitly containing linguistic and cultural rights other than those expressly mentioned. For example, section 27 may be used to interpret section 23 of the *Charter* as conferring not only the right to education in the language of the minority, but also a right to instruction in the minority culture. Even though the latter provision mentions language only as a medium of education without any reference to its cultural content, it is nonetheless difficult to maintain a complete separation between the two. Even if this were possible, moreover, education provided in the language of the minority without any reference to its underlying culture would be of only limited value and would not give the minority concerned the benefits which the system is supposed to provide.<sup>32</sup> Consequently, section 23 implicitly contains a requirement that education in the language of the minority be accompanied by instruction in certain aspects of the minority culture. If we now combine section 23 with section 27, the reasoning that has just been advanced becomes even more compelling. If section 23 is to be interpreted in a manner consistent with the preservation and enhancement of multiculturalism, education in the language of the minority should not be completely divorced from instruction in the minority culture. Thus, section 27 might be used to expand the sections concerning the protection of the education rights of official language minorities.<sup>33</sup>

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<sup>31</sup>Professor Hogg, *supra*, note 25 at 71-2, feels that "s. 27 may prove to be more of a rhetorical flourish than an operative provision"; W.S. Tarnopolsky, "The Equality Rights" in Tarnopolsky & Beaudoin, *supra*, note 19, 395 at 437-42, on the other hand, is of the view that s. 27 may have certain positive effects for minorities. For an indication of the present case law under s. 27, see *infra*, notes 33 and 39.

<sup>32</sup>Preservation of a language without the cultural content that nourishes it is of dubious benefit. As Dinstein says, *supra*, note 15 at 70-1: "Experience — for example, in the case of Soviet Jewry — shows that what really counts is not whether members of an ethnic minority can obtain education in their own language, but whether they can study their cultural heritage in any language." [footnotes omitted]

<sup>33</sup>As language and culture are intimately connected, it is not surprising that the courts should sometimes use s. 27 to give a broad and generous interpretation to the sections concerning the protection of official language minorities. In *Reference Re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 at 39, 10 D.L.R. (4th) 491, the Ontario Court of Appeal held that

[i]n the light of s.27, s.23(3)(b) should be interpreted to mean that minority language children must receive their instruction in facilities in which the educational environment will be that of the linguistic minority. Only then can the facilities reasonably

Section 27, since it is a general interpretative provision, applies to all provisions of the *Charter*. It is likely to be of greatest significance, principally in combination with subsection 15(1), with respect to the "non-official" language groups of this country. For example, where a minority is obliged to communicate with government agencies exclusively in the language of the majority or to send its children to schools where instruction is given only in the majority language, can it be said that the right to equality is respected? The minority is certainly treated *differently* and the difference is to its disadvantage.<sup>34</sup>

In matters of education, in particular, it is obvious that the children of a minority, who receive instruction in a language that is not their own, do not derive the same benefits as those who are educated in their mother tongue. In extreme cases, the majority education system may be so ineffective that the right to education (to the extent that it is a constitutionally guaranteed right) of these children is no longer respected.<sup>35</sup>

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be said to reflect the minority culture and appertain to the minority.

However, a certain tension might also exist between s. 27 and ss 16-20 and 23 of the *Charter*; see *infra*, notes 99-102 and accompanying text.

<sup>34</sup>It has been held that the obligation to use the language of the majority exclusively did not involve discrimination against the minority because the rule was the same for everyone. See *Association des Gens de l'Air du Québec Inc. v. Lang* (1978), [1978] 2 F.C. 371 at 378, 89 D.L.R. (3d) 495 (C.A.) [hereinafter cited to F.C.]; *Devine v. A.G. Quebec* (1982), [1982] C.S. 355 at 374-5; *Ford v. A.G. Quebec* (1984), [1985] C.S. 147 at 152. While it may be argued, as in these decisions, that a law which requires the minority to speak and use the language of the majority applies equally to everyone, it is obvious that this manner of interpreting the concept of equality reduces it to complete insignificance. Equality does not consist in treating identically those who are in different situations but in taking such differences into account. As Van Dyke states, *supra*, note 21 at 384:

If all pupils get instruction in their different mother tongues, it would seem that the requirements of equality would be served. Conversely, if pupils who speak different languages are in the same school and if one of the languages becomes the medium of instruction, then some students automatically gain an advantage and others are handicapped.

<sup>35</sup>The right to education is not *expressly* enshrined in the *Charter*, but it arises *implicitly* under s. 23 (as regards the members of the official language minorities) and s. 2 (freedom of thought, belief, opinion and expression). See, *e.g.*, P. Bender, "The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison" (1983) 28 McGill L.J. 811 at 854-5. Moreover, even if there were no right to education guaranteed in the *Charter*, if the State decides to offer a service to the public, it would have to respect the principle of equality and that of non-discrimination contained in s. 15(1) in so doing. Thus the European Court of Human Rights ruled that, even though the *European Convention on Human Rights* does not require the State Parties to provide education to their populations, it nevertheless prohibits them, if they choose to do so, from acting in a discriminatory manner. See *Case relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, (1968) 11 Eur. Y.B. Hum. Rts 832 at 856-68 [hereinafter the *Belgian Linguistic Case*]. For an analysis of this decision, see F.G. Jacobs, *The European Convention on Human Rights* (Oxford: Clarendon, 1975) at 169ff.

Canadian minorities, other than those referred to in section 23, could thus rely on sections 15(1) and 27 to demand that English or French language courses be set up to prepare their children for public education in the majority language, or that fully bilingual (French/English-minority language) instruction be organized for the early school years.<sup>36</sup> It might also be possible for minorities to rely on sections 15(1) and 27 to demand that the State assist minority *private* schools financially. Such demands could be based on the right of children of the minority to be treated equally with those of the majority<sup>37</sup> as interpreted and applied in light of the objective of enhancing and promoting multiculturalism. A culture is, after all, only maintained by imparting it to new generations and such transmission takes place in large part, if not exclusively, through the school system. A demand of this kind could also be based on the right to education if it is accepted that such a right is implicitly guaranteed by the *Charter* and that the education so guaranteed must be useful and meaningful to those receiving it.<sup>38</sup>

Similarly, in interactions between citizens and government agencies, the exclusive use by the State of the majority language, in addition to placing members of linguistic minorities at a disadvantage, may also deny them the benefit of other constitutional rights. One can imagine, for example, a situation where, in an election or referendum, only the majority language is used on the ballots; this would greatly reduce the democratic rights of the minority which are guaranteed by section 3 of the *Charter*.

The reasoning advanced above could also be applied to the "official" use of minority languages. The preservation and enhancement of a minority

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<sup>36</sup>In *Lau v. Nichols*, 414 U.S. 563 (1974), non-English speaking Chinese-American students attending San Francisco public schools alleged that teaching classes only in English deprived them of a meaningful educational opportunity. The United States Supreme Court ruled that Title VI of the *Civil Rights Act of 1964* s. 601, 42 U.S.C. § 2000d required compensatory programs. Following this ruling, bilingual and bicultural programs were developed to ease the difficulties of linguistically disadvantaged students. See Note, "Bilingual Education and Desegregation" (1979) 127 U. Pa L. Rev. 1564. See also W.P. Foster, "Bilingual Education: An Educational and Legal Survey" (1976) 5 J. Law & Educ. 149; K.M. Fong, "Cultural Pluralism" (1978) 13 Harv. C.R.-C.L. L. Rev. 133; E.B. Grubb, "Breaking the Language Barrier: The Right to Bilingual Education" (1974) 9 Harv. C.R.-C.L. L. Rev. 52; C.J. Reeber, "Linguistic Minorities and the Right to an Effective Education" (1972) 3 Cal. W. Int'l L.J. 112.

<sup>37</sup>In reality, granting a minority the right to a bilingual education (or to French or English language preparatory courses) does not *ipso facto* create full equality; at most the inequality between the minority and majority is slightly lessened.

<sup>38</sup>See Reeber, *supra*, note 36 at 122:

An inferior education, the reinforced conditioning to failure, and excessive dropout rates are not the only detrimental results produced by an education presented solely in a non-native tongue. A British educator considered the continual inability of immigrants . . . to speak English was the surest route to *de facto* segregation.

culture require that the language of the cultural group concerned be given a certain status in the context of government operations.<sup>39</sup>

It must be emphasized, however, that there is a condition that must be met before subsection 15(1), in conjunction with section 27, can be interpreted in this manner. The subsection must be regarded as conferring the right to claim *benefits* in certain circumstances, and not merely as a non-interference right, or as a standard which merely *prohibits* irrational and discriminatory distinctions. The exercise of language and cultural rights generally requires that those entitled be able to demand a benefit or material advantage from the State.

The concept of equality which the judiciary is likely to find embodied in section 15 will probably lie between that of "formal" equality, as advocated by classical liberalism, and the socialist (or "egalitarian") conception of equality, which holds that the State should intervene to eliminate material inequalities in order to establish a "genuine" equality between individuals.<sup>40</sup> According to the former concept, the State must merely refrain from creating inequalities or aggravating those which already exist. Under the latter, the State is obliged to eliminate existing inequalities. In other

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<sup>39</sup>The present case law under s. 27 shows that the courts are of the opinion that this provision requires a measure of equality of treatment among the various cultural groups of Canada. In *R. v. Videoflicks* (1984), 48 O.R. (2d) 395 at 427-8, 14 D.L.R. (4th) 10, the Ontario Court of Appeal used s. 27 of the *Charter* as an aid in interpreting s. 2(a) (freedom of conscience and religion) and concluded that

a law infringes freedom of religion, if it makes it more difficult and more costly to practise one's religion . . . , such a law does not help to preserve and certainly does not serve to enhance or promote that part of one's culture which is religiously based.

The same approach was taken by the Provincial Court of Alberta in *R. v. W.H. Smith Ltd* (1983), [1983] 5 W.W.R. 235 at 258, 26 Alta L.R. (2d) 238 where Jones J. said: "In requiring the Charter to be interpreted in a manner consistent with the preservation and the enhancement of the multicultural heritage of Canadians, the section [s. 27], in my opinion, directs that a measure of equal treatment be dispensed when interpreting any problem involving the Charter and a problem involving multicultural considerations."

The Court also expressed the view that religion is part of culture and that in consequence, s. 2(a) of the *Charter*, when read in light of s. 27, prevents the State from unduly favouring the beliefs of certain citizens at the expense of the religious liberty of others. Nonetheless, it was held that the equality of treatment required by s. 27 is *not* absolute. Finally, in *R. v. Big M Drug Mart Ltd* (1985), [1985] S.C.R. 295 at 337-8, 18 D.L.R. (4th) 321, Dickson C.J.C. held in interpreting s. 2(a) of the *Charter*,

that to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians. To do so is contrary to the expressed provisions of s. 27.

<sup>40</sup>M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982) 4 Sup. Ct L. Rev. 131 at 156.

words, it must attempt to equalize the situations of disparately placed individuals, which often involves giving certain benefits or material advantages to those in disadvantaged situations.<sup>41</sup> The “post-liberal” or “neo-liberal” ideology underlying the *Charter* should not rule out the possible use of certain sections, subsection 15(1) in particular, as a basis for the right to claim benefits. The *Charter* contains provisions whose implementation requires, either expressly or implicitly, that the State make necessary physical resources available to the beneficiaries of the right in question: examples include sections 14 and 23, both concerning language use. The concept of “recipient” rights (or rights giving rise to State benefits for the beneficiaries), then, was not unfamiliar to the drafters.<sup>42</sup>

Finally, subsection 15(1) explicitly declares the right to “equal benefit of the law”. This provision might be interpreted as allowing certain individuals to demand that the State provide them with the necessary physical resources to be equal with other individuals.<sup>43</sup>

For these reasons, it is therefore quite possible that certain provisions of the *Charter*, in particular subsection 15(1) together with section 27, will be used as a basis for the right to claim government benefits with regard to the protection of Canada’s linguistic and cultural minorities.

Obviously the interpretation of subsection 15(1) with section 27 will not go so far as to allow minorities other than those whose language is French or English to claim rights identical to those enjoyed by the latter under sections 16 to 20 and 23 of the *Charter*. The scope of these provisions is limited to certain groups precisely because the intention was to give French and English a special status and special treatment compared with other minority languages. However, the foregoing considerations do not preclude the argument that the combination of sections 15(1) and 27 might give rise to certain linguistic rights for these “other” minorities even if these rights are different from, and not as extensive as, the rights of the anglophone and francophone minorities.

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<sup>41</sup>Hough, *supra*, note 2 at 312 states that “where government’s violation of the right to equality in the law involves not exacerbating or creating inequality but rather failing to lessen it, it violates the right . . . to remedial equality”. For a discussion of “negative” and “affirmative” rights in the *Charter* and the Bill of Rights see Bender, *supra*, note 35 at 822ff.

<sup>42</sup>For the monetary obligations which s. 14 imposes on the State, see M. Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (Toronto: Emond-Montgomery, 1983) at 457-8, para. 544. Bender, *ibid.* at 826 n. 40, underlines a few other respects in which the *Charter* may create rights that are *affirmative* in character. Hough, *ibid.* at 320, sets out certain objections that might be raised against interpreting s. 15(1) as the basis for a right to “remedial equality”.

<sup>43</sup>From the same perspective mention can be made of s. 36(1) of the *Constitution Act, 1982*, under which the federal and provincial governments are committed to promoting equal opportunities for all Canadians and providing essential public services to them.



It must still be pointed out that any rights which the courts might thus derive from the combination of section 27 with other provisions of the *Charter* may (like all rights and freedoms guaranteed by the *Charter*) be limited under section 1.<sup>44</sup> Even if the courts find, for example, that sections 15(1) and 27 give all Canadian ethnic minorities (other than those referred to in section 23) the right to send their children to a bilingual public school, a province might nevertheless invoke certain "overriding concerns" to establish that it could reasonably limit the right in question. One such concern might relate to the financial cost of introducing such a school system. If the provincial government maintained that the cost was prohibitive, the courts might find it difficult to question this allegation.

A second possible justification or "overriding concern" is suggested by Swiss case law and by the decision of the European Court of Human Rights in the *Belgian Linguistic Case*.<sup>45</sup> Switzerland and Belgium both apply the principle of "territoriality" in matters of language. Simply put, this principle allows each national language group a territory within which it can impose official and educational unilingualism. In other words, each language group can require of minorities living within its territory that their correspondence with the government be exclusively in the majority language and that their children be sent to schools in which that language is the only language of instruction. The principle of territoriality requires that each language group has an "area of linguistic security" where it is sheltered from "linguistic competition" from other groups. In this way, each collectivity can protect its "linguistic homogeneity".

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<sup>44</sup>1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

<sup>45</sup>For the decision of the European Court of Human Rights, see *supra*, note 35. For case law in Switzerland, see J. Woehrling, "De certains aspects de la réglementation linguistique suisse en matière scolaire" in *Études juridiques en l'honneur de Jean-Guy Cardinal* (Montreal: Thémis, 1982) 453. See also Van Dyke, *supra*, note 21 at 384ff.; G. Héraud, "L'arrêt du Tribunal fédéral suisse du 31 mars 1965 et la protection des aires linguistiques" in *Mélanges offerts à Paul Couzinet* (Toulouse: Université des sciences sociales de Toulouse, 1974) 373; F. Fleiner, "Le droit des minorités en Suisse" in *Mélanges Maurice Hauriou* (Paris: Sirey, 1929) 285; K.D. McRae, *Switzerland: Example of Cultural Coexistence* (Toronto: Canadian Institute of International Affairs, 1964) at 11ff.; C. Hegnauer, *Das Sprachenrecht der Schweiz* (Zurich: Schulthess, 1947) at 56ff.; Verdoodt, *supra*, note 8 at 50ff.; B. Dutoit, "Droit et plurilinguisme en Suisse" in *Travaux du sixième colloque international de droit comparé* (Ottawa: University of Ottawa Press, 1969) 39; J.B. Paradis, "Language Rights in Multicultural States: A Comparative Study" (1970) 48 *Can. Bar Rev.* 651 at 654ff.; C. Marti-Rolli, *La liberté de la langue en droit suisse* (Zurich: Juris Druck und Verlag, 1978) at 54ff.

In Switzerland and Belgium this principle works to the advantage of both majority and minority.<sup>46</sup> Protection of its language is, however, obviously more important for the latter.<sup>47</sup> Switzerland and Belgium are undeniably "free and democratic" societies and in both countries the application of the principle of territoriality has been seen as being compatible with the constitutional (or international) protection of fundamental minority rights.<sup>48</sup> They are perhaps good examples in demonstrating that the principle of territoriality — and the protection of linguistic homogeneity which is the aim of that principle — would constitute a sufficient "overriding concern", in the context of section 1, to restrict the linguistic and cultural rights of Canadian minorities (both the rights arising *implicitly* from sections 15(1) and 27 and those which are *expressly* contained in other provisions of *Charter*).

## II. Conflicts Between the Principle of Equality and Minority Rights in the *Charter*

### A. Sections 15 and 27 of the Charter

While the provisions concerning the protection of minorities largely complement the right to equality, they may also be seen to be at variance with it. Subsection 15(1) expressly prohibits distinctions based on ethnic (or cultural) origin and implicitly prohibits those based on language. It requires that individuals be treated without regard to their attachment to a particular linguistic or cultural collectivity. The provisions of the *Charter* concerning the protection of minorities ensure, on the contrary, that certain

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<sup>46</sup>In Belgium, the Flemish constitute a majority in the country as whole, while the French-speaking Walloons are a minority. In Switzerland, German speakers form a majority both nationally and in nineteen cantons, while francophones comprise a majority in six cantons and Swiss Italians in only one.

<sup>47</sup>In Canada, Quebec is in the peculiar situation where the majority language is threatened in both status and integrity by competition from the minority English language within its own borders. See J. Woehrling, "À la recherche d'un concept juridique de la langue: présence et qualité du français dans la législation linguistique du Québec et de la France" (1981-82) 16 R.J.T. 457.

<sup>48</sup>In its decision in the *Belgian Linguistic Case*, *supra*, note 35, the European Court of Human Rights held that, except on one minor point, the Belgian language legislation did not contravene the provisions of the *European Convention on Human Rights* (and, in particular, that it did not contravene the principle of equality or of non-discrimination). In *Association de l'École française und Mitbeteiligte v. Regierungsrat und Verwaltungsgericht des Kantons Zürich* (1965) 91 (1ère partie) Arrêts du Tribunal fédéral suisse at 480ff., a decision of 31 March 1965, Switzerland's Tribunal fédéral ruled that regulations of the canton of Zurich requiring members of the francophone minority to send their children to German-language schools were justified by the need to preserve the linguistic homogeneity of the canton, despite the fact that the federal Constitution guarantees everyone "freedom of language" (in other words, free use of his mother tongue). This decision was subsequently affirmed on several occasions. See Woehrling, *supra*, note 45 at 461ff.

persons are treated differently from others precisely because they belong to a minority. The constitutional objectives both of promoting the equality of individuals and of protecting minorities cannot be realized without "conflicts of rights" appearing on certain occasions.

The conflicts likely to arise between subsection 15(1) and the rights of minorities other than francophone or anglophone minorities will be the easiest to resolve. It is sufficient in this regard to refer to what has been said concerning the possible scope of section 27 of the *Charter*. If the federal government or the provinces wished to confer certain special rights on one of these linguistic and cultural collectivities and there was an apparent incompatibility between such special treatment and the principle of equality, section 27 would make it possible to overcome any objections based on subsection 15(1). Alternatively, it would be possible to rely on subsection 15(2) in certain cases for the same purpose, if the criteria governing its application were met.

Respect for genuine — and not merely formal — equality of individuals belonging to an ethnic and linguistic minority should require that the State make certain physical resources available. Nevertheless, all those who speak a language different from that of the majority will not necessarily be given the same rights. The inequality created, for example, by making the establishment of a bilingual school or bilingual classes conditional on a minimum number of interested children will probably not be regarded as contrary to subsection 15(1) since it is in order to give effect to that subsection that certain collectivities are given special rights. Furthermore, it is simply not conceivable that the State would guarantee all those living within its boundaries the right to special educational arrangements.<sup>49</sup> It may be argued that where the same rights cannot be extended to all minorities they must, strictly in accordance with the principle of equality, be denied to all. Section 27 can then be relied upon to maintain that Canada's "traditional" minorities must be given rights greater than those of linguistic and cultural groups whose roots in the country are more recent.<sup>50</sup> Consequently, one could argue that any rights that may arise from sections 27 and 15(1) will be granted

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<sup>49</sup>Such a claim would, of course, place a disproportionate burden upon the resources of the State. See Capotorti, *supra*, note 3 at 6.

<sup>50</sup>S. 27 of the *Charter* is aimed at promoting "the preservation and enhancement of the multicultural *heritage* of Canadians" [emphasis added]. The concept of "heritage" ("patrimoine" in the French text) seems to indicate an intention to give to long-established *traditional* cultural groups and minorities rights greater than those given to more recently-established ethnic groups. It is generally recognized, moreover, that immigrants to a country where language or culture is different from their own cannot claim the same linguistic and cultural rights as traditional groups living in that country: see H. Kloss, "Language Rights of Immigrant Groups" (1971) 5 *Int'l Migration Rev.* 250.

only to certain collectivities that can be said to participate in Canada's multicultural "heritage".

On the other hand, subsection 15(2) would probably make it possible to extend particular rights to all groups or individuals that are "disadvantaged" by reason of their language or their culture. Minorities that have recently settled in Canada are probably more socially and economically disadvantaged than those that have been here longer and have had time to carve out a place for themselves in Canadian society. Consequently, subsection 15(2) makes it possible to avoid an overly radical application of the principle of equality in subsection 15(1) and authorizes special treatment of "disadvantaged" groups, while section 27 plays a similar role with respect to groups participating in the Canadian cultural "heritage" (where the criterion seems to be the group's "seniority").

### ***B. Compatibility of the Charter with the Covenant***

Conflicts are also likely to arise between the principle of equality contained in the *Covenant* and the rights conferred on French- and English-speaking minorities by sections 16 to 20 and 23 of the *Charter* as well as by section 133 of the *Constitution Act, 1867* and section 23 of the *Manitoba Act, 1870*.

The substance of sections 16 to 20 of the *Charter* is not exactly the same as that of section 133 of the *Constitution Act, 1867* and section 23 of the *Manitoba Act, 1870*. Generally speaking, the rights under the *Charter* are both broader and more precise in scope than those under the two earlier constitutional statutes.<sup>51</sup> In particular, whereas the institutional bilingualism which is provided for under the latter statutes applies generally only to judicial and legislative matters,<sup>52</sup> that which is provided for by the *Charter*

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<sup>51</sup>For a detailed study of the differences between s. 133 of the *Constitution Act, 1867* and s. 23 of the *Manitoba Act, 1870* on the one hand, and ss 16 to 20 of the *Charter* on the other, see J.E. Magnet, "The *Charter's* Official Languages Provisions: The Implications of Entrenched Bilingualism" (1982) 4 Sup. Ct L. Rev. 163 at 179ff.; A. Tremblay, "The Language Rights" in Tarnopolsky & Beaudoin, *supra*, note 19, 443 at 461ff.; H. Brun & G. Tremblay, *Droit constitutionnel* (Montreal: Yvon Blais, 1982) at 566ff. See also Hogg, *supra*, note 25 at 53-9.

<sup>52</sup>However, the Supreme Court of Canada interpreted s. 133 of the *Constitution Act, 1867* as also requiring that *regulatory instruments* ("delegated legislation"), or at least most of them, be bilingual: See *A.G. Quebec v. Blaikie* (1979), [1979] 2 S.C.R. 1016 at 1027, 101 D.L.R. (3d) 394, 49 C.C.C. (2d) 359 [hereinafter *Blaikie (No. 1)* cited to S.C.R.]; *A.G. Quebec v. Blaikie* (1981), [1981] 1 S.C.R. 312, 123 D.L.R. (3d) 15, 60 C.C.C. (2d) 524 [hereinafter *Blaikie (No. 2)* cited to S.C.R.]. See also Magnet, *ibid.* at 184-5.

also concerns government and administrative functions.<sup>53</sup> Since language education rights only became entrenched in the Constitution in 1982, section 23 of the *Charter* does not have any counterpart in the *Constitution Act, 1867* or in the *Manitoba Act, 1870*.

### 1. Education Rights — Section 23 of the *Charter*

Section 23, which gives the right to minority language education out of public funds, provides francophone and anglophone minorities with special treatment as compared with other cultural and linguistic minorities. This difference in treatment (which *prima facie* contravenes articles 2(1) and 26 of the *Covenant*<sup>54</sup>) may be justified by the fact that the French- and English-speaking minorities are different from other Canadian minorities (aboriginal peoples aside), if not always in their numerical significance, then at least in the historical legitimacy of the rights they claim as Canada's two founding communities.<sup>55</sup> Moreover, for obvious practical and financial reasons, it is not possible to give all minority language groups living in Canada the right to demand that the provincial governments provide them with education in their mother tongue out of public funds.<sup>56</sup> Consequently, it does not seem that the *Charter* contravenes the principle of equality in the *Covenant* when it restricts minority language education rights to francophones and anglophones.

Once it is recognized that certain language groups have special rights under the *Charter*, it becomes necessary to select the criteria which will be used to determine which individuals belong to these groups and are consequently legally entitled to the rights in question.<sup>57</sup>

Section 23 of the *Charter* begins by distinguishing between those who have Canadian citizenship and those who do not; the rights it guarantees

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<sup>53</sup>See s. 20 of the *Charter*. A detailed examination of the differences between the two sets of provisions is beyond the scope of this study. Furthermore, since the interpretation and application of the provisions of the *Charter* are currently posing the most problems and arousing the greatest interest, we shall concentrate on these.

<sup>54</sup>*Supra*, note 4.

<sup>55</sup>The special status of the official language minorities is based on the principle of "dualism". See *infra*, note 99.

<sup>56</sup>Capotorti, *supra*, note 3 at 6. In its decision in the *Belgian Linguistic Case*, *supra*, note 35 at 866, the European Court of Human Rights stated quite rightly that "to interpret [the *European Convention on Human Rights* and its Optional Protocol] as conferring on everyone within the jurisdiction of a State a right to obtain education in the language of his own choice would lead to absurd results . . .".

<sup>57</sup>Even though the language rights in ss 16-20 and 23 of the *Charter* (as well as those in s. 133 of the *Constitution Act, 1867* and s. 23 of the *Manitoba Act, 1870*) are collective rights in terms of their *purpose* (see *supra*, notes 18, 19 and 29 and *infra*, notes 113 and 114), they belong legally to *individuals* and it is up to the individual to enforce them.

benefit only the former. This first criterion is compatible with the *Covenant* and with the concept of minority which has been used in applying article 27. According to the definition which was adopted in the *United Nations Study*, only nationals of the State from which the rights arising under article 27 are being claimed can be regarded as belonging to a minority entitled to such rights.<sup>58</sup>

Two further criteria in section 23 determine which individuals belong to the minorities in question and, consequently, are entitled to the rights provided for. These criteria<sup>59</sup> are that of "first language learned and still understood" (or, more simply, mother tongue) and that of the language in which the parents, who wish to have a child educated in the language of the minority, received their education.<sup>60</sup> These distinctions, based on the language of the individuals, are also compatible with the *Covenant* since they are used to define the group of people contemplated by article 27<sup>61</sup> and

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<sup>58</sup>*Supra*, note 15. See also Capotorti, *supra*, note 3 at 12; Kloss, *supra*, note 50. It should be pointed out that unlike s. 23 of the *Charter*, s. 73 of the *Charter of the French Language*, R.S.Q., c. C-11 does not impose any citizenship requirements for attending English-language minority schools in Quebec. S. 73(a) applies to children "whose father or mother received his or her elementary instruction in English, in Québec". However, the Quebec *Charter* applies only to kindergarten classes and elementary and secondary schools. College and university-level institutions are consequently exempt from its application, as are unsubsidized private schools at all levels. Furthermore, under the *Regulation Respecting the Language of Instruction of Persons Staying in Québec Temporarily*, R.R.Q. 1981, c. C-11, Reg. 6, the children of persons staying temporarily may receive instruction in English if they obtain express authorization to that effect. This authorization is issued for a period of three years and is renewable. Both s. 73 of the *Charter of the French Language* and the *Regulation* have been declared unconstitutional as being incompatible with s. 23 of the *Charter*: see *Quebec Association of Protestant School Boards v. A.G. Quebec* (1984), [1984] 2 S.C.R. 66, 54 N.R. 196.

<sup>59</sup>See *supra*, note 25.

<sup>60</sup>These two criteria are contained in s. 23(1)(a) (commonly referred to as the "universal clause") and s. 23(1)(b) (commonly referred to as the "Canada clause"). It should be pointed out that s. 23(2) contains a third criterion for entitlement to the right to instruction in the minority language. S. 23(2), which is aimed at preserving the linguistic unity of family groups, is likely to receive a very broad interpretation which would extend the right to instruction in the minority language to a considerably wider number of beneficiaries than is provided for by ss 23(1)(a) and 23(1)(b). On this point, see J. Woehrling, "De l'effritement à l'érosion" in *Le statut culturel du français au Québec* (Quebec: Éditeur officiel, 1984) 416 at 426-7.

<sup>61</sup>Capotorti, *supra*, note 3 at 15 points out that it is generally accepted that the State can impose an *objective test* in order to determine entitlement under art. 27 of the *Covenant*:

When such a determination [e.g. whether an individual is a member of a given group] must be made in order to apply a particular status to the individual concerned, it can, in theory, be done on the basis of a definition provided by the law, of the categorically expressed desire of the individual, or of objective criteria. . . . The objective criterion requires membership of a minority to be determined by the presence of certain traits or characteristics which can be evaluated without reference to a statement by the individual concerned.

One of the more exhaustive studies of this question of criteria for membership in an ethnic

may be regarded as reasonably suited to, and adequate for, this purpose.<sup>62</sup>

Finally, until Quebec "adopts" paragraph 23(1)(a) of the *Charter* pursuant to section 59 of the *Constitution Act, 1982*, the former provision applies only to the other nine provinces.<sup>63</sup> A difference in treatment based on residence thus becomes another potential source of conflict with the equality principle of the *Covenant*. One need only think of a situation involving two parents, the first of British origin living in Quebec and the second of Belgian (francophone) origin living in Ontario, both of whom have become Canadian citizens. The latter will have the right to have his or her children educated in a French-language public school in his or her province of residence under section 23, while the former will not have the corresponding right to send his or her children to an English-language public school. Is such a difference in treatment justified in terms of the standards set out in the *Covenant*? It can be argued that the non-application of paragraph 23(1)(a) to Quebec is valid in so far as Quebec is in a special situation. Quebec is the only Canadian province with a francophone majority which is nevertheless a minority at a national level. That Quebec francophones may be regarded as a "disadvantaged majority" in socio-economic terms was brought to light in the report of the Laurendeau-Dunton Commission in the 1960s and in the report of the Gendron Commission a few years later.<sup>64</sup> Although their situation has improved considerably since, it may be considered that francophones in Quebec do not possess, even today, the economic power normally associated with a majority group.<sup>65</sup> In fact, it can be said that the anglophone community in Quebec has had considerably

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or linguistic group is that by H. Kloss, *Grundfragen der Ethnopolitik im 20. Jahrhundert (Die Sprachgemeinschaften zwischen Recht und Gewalt)* (Wien-Stuttgart: Wilhelm Braumüller Universitäts-Verlagsbuchhandlung, 1969) at 223ff.

<sup>62</sup>It should be pointed out, however, that although s. 23(1)(b) is easy to apply, the same is not true of s. 23(1)(a), which relies on the criterion of mother tongue. The experience with Quebec's *Official Language Act*, S.Q. 1974, c. 6 indicated the problems involved in applying a criterion which requires a system of *language tests*. See Hogg, *supra*, note 25 at 62.

<sup>63</sup>Whereas it is in force in the nine other provinces, s. 23(1)(a) will not take effect for Quebec until the National Assembly or Government of Quebec has so authorized. See s. 59 of the *Constitution Act, 1982*.

<sup>64</sup>Canada, *Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen's Printer, 1967-69) (Commissioners: A. Laurendeau & A.D. Dunton); Quebec, *Report of the Commission of Inquiry on the Position of the French Language and on Language Rights in Quebec*, Books 1, 2, and 3 (Quebec: Éditeur officiel, 1972) (Chair: J.-D. Gendron) [hereinafter the *Report*].

<sup>65</sup>See the figures cited in Quebec, *Pour une véritable politique linguistique*, by L. Dion (Quebec: Ministère des Communications, 1981) at 24ff.; *Quebec Association of Protestant School Boards v. A.G. Quebec* (1982), [1982] C.S. 673 at 707, 140 D.L.R. (3d) 33, rev'd (1983), [1983] C.A. 77, 1 D.L.R. (4th) 573, aff'd (1984), [1984] 2 S.C.R. 66, 54 N.R. 196; F. Vaillancourt, "La Charte de la langue française du Québec: un essai d'analyse" (1978) 4 Can. Pub. Policy 284.

greater social and economic power than its size alone can explain. It is consequently a "dominant minority", a situation which is explained in large part by its being a part of the English majority in Canada.<sup>66</sup> This situation explains why the language of the majority in Quebec has less prestige, attraction and economic utility than the minority language and why, as a result, linguistic "free competition" has been unfavourable to it.<sup>67</sup>

When there is a disproportionate relationship between the demographic weight of majority and minority on the one hand, and their respective socio-economic situations on the other, article 27 of the *Covenant* does not place the same obligations on the State as in cases where the situation is "normal", that is, where the numerical majority is socially dominant. The *United Nations Study* itself, as well as the very definition of the concept of "minority" adopted in that report, affirms this clearly. The only minorities entitled to the rights provided for under article 27 are those in need of protection; "dominant minorities" are excluded.<sup>68</sup> Conversely, it may be argued that a "dominated majority" would not be subject to the obligations arising under article 27.<sup>69</sup>

Canada's *Charter* does not go so far as to divest the "dominated majority" of all its obligations inasmuch as it gives the anglophone minority in Quebec rights identical to those of francophone minorities living in the other provinces of Canada, even if their respective situations are quite different.<sup>70</sup> The only way the drafters of the *Charter* took these considerable

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<sup>66</sup>See M.B. Stein, "Bill 22 and the Non-Francophone Population in Quebec: A Case Study of Minority Group Attitudes on Language Legislation" in J.R. Mallea, ed., *Quebec's Language Policies: Background and Response* (Québec: Presses de l'Université Laval, 1977) 243 at 258ff.; J.R. Mallory, "English-Speaking Quebecers in a Separate Quebec" in R.M. Burns, ed., *One Country or Two?* (Montreal: McGill-Queen's University Press, 1971) 121 at 129ff.; H. Guindon, "The Modernization of Quebec and the Legitimacy of the Canadian State" in D. Glenday, H. Guindon & A. Turowetz, eds, *Modernization and the Canadian State* (Toronto: Macmillan, 1978) 212 at 230ff.

<sup>67</sup>The 1981 census reveals that in the demographic transfers between the French and English speaking groups in Quebec, there is a *net* anglicization of the French group. There are more "linguistic transfers" from French to English than from English to French. See C. Castonguay, "Le véritable bilan de l'anglicisation au Québec", *Le Devoir [de Montréal]* (11 November 1983) 11 at 11-2.

<sup>68</sup>See the definition of the concept of "minority" adopted by Capotorti, *supra*, note 15: "A group numerically inferior to the rest of the population of a State, in a non-dominant position . . ." [emphasis added] See also Capotorti, *supra*, note 3 at 11-2.

<sup>69</sup>*Ibid.* at 12: "It is obvious that dominant minority groups do not need protective measures, while the oppressed majorities have rights which far exceed the very limited contents of article 27 of the Covenant." See also Dinstein, *supra*, note 3 at 112.

<sup>70</sup>In fact, s. 23 will probably be of much greater benefit to the English in Quebec than to French outside Quebec. The geographical concentration of Anglo-Quebeckers makes it less difficult for them to meet the sufficient "number" requirements provided for in s. 23. Moreover, since the anglophone minority in Quebec already enjoys its own educational facilities, it need



differences into account was in not making paragraph 23(1)(a) (the “universal clause”) applicable to Quebec until that province decides to adopt it of its own initiative. This minor concession to Quebec’s special problems is surely not contrary to the *Covenant*.

## 2. “Official Language” Rights — Sections 16 to 20 of the *Charter*

Sections 16 to 20 of the *Charter*, section 133 of the *Constitution Act, 1867* and section 23 of the *Manitoba Act, 1870* have the effect of giving English and French the status of “official languages” (whether or not this expression is used) with respect to the operations of the central government and some of the provincial governments. The anglophone minority in Quebec (section 133 of the 1867 *Act*), the francophone minorities in Manitoba<sup>71</sup> and New Brunswick (section 23 of the 1870 *Act* and sections 16(2) to 20(2) of the *Charter*) and, at the federal (or “central”) government level, the francophone minority in Canada (sections 16(1) to 20(1) of the *Charter*),<sup>72</sup> are all covered by these guarantees.

These sections are difficult to reconcile in certain respects with the principle of equality in the *Covenant*.

The first inequality affects francophone minorities in provinces that are not officially bilingual under the Constitution. There is no reason why these groups should not enjoy the same protection of their language rights as the

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not marshal evidence or fight court battles to obtain effective educational rights. The francophone minorities, on the other hand, will have a harder battle on their hands. See Brun & Tremblay, *supra*, note 51 at 570:

Le critère du nombre suffisant est en lui-même de nature à laisser aux différents gouvernements beaucoup de jeu. Mais si l'on tient compte du contexte des réseaux scolaires existants, il a pour effet de rendre le droit de l'article 23 potentiellement efficace au Québec seulement, au bénéfice des anglophones. L'uniformité, qui déjà ignore la situation minoritaire du Québec, n'est qu'apparente: elle cache en fait une règle qui contraint uniquement la province qui justifiait en la matière certaines restrictions.

<sup>71</sup>When the *Manitoba Act, 1870* was passed, the francophone population of that province formed the majority. See Magnet, *supra*, note 51 at 165. Subsequently, the demographic relationship was reversed, and this provision was invoked by Franco-Manitobans. Thus the enactment of ss 16(2)-20(2) of the *Charter* in 1982 was the *first time* a constitutional provision was adopted in order to protect the language rights of a francophone minority at a provincial level.

<sup>72</sup>Ss 17(1)-19(1) of the *Charter* re-enact, sometimes in greater detail, the rights provided under s. 133 of the *Constitution Act, 1867*. These two clauses thus “duplicate” each other to some extent. See also s. 21 of the *Charter*.

minorities who benefit from the above constitutional guarantees.<sup>73</sup> Even if the provinces to which the Constitution's official language provisions do not apply enacted similar (or even better) statutory guarantees, such guarantees would not have supralegislative validity and, consequently, would not be comparable to those entrenched in the Constitution. They would not give the minorities concerned the same protection against the whims and arbitrary conduct of the majority as does the *Charter*.<sup>74</sup> To the extent that the Constitution contains special protective measures for the anglophone minority in Quebec and the francophone minorities in New Brunswick and Manitoba but declines to give the same rights to French-speaking minorities in other provinces, Ontario in particular, it is incompatible with articles 2(1), 26 and 27 of the *Covenant*.<sup>75</sup>

As is the case with section 23 of the *Charter*, the sections of the Constitution dealing with official languages reveal a difference between the treatment given to anglophone and francophone minorities and that given to other Canadian cultural and linguistic minorities. It could be argued that sections 16 to 20 of the *Charter* (as well as section 133 of the 1867 *Act* and section 23 of the 1870 *Act*) apply to everyone, unlike section 23 of the *Charter* which benefits only those who have Canadian citizenship and who belong to the francophone or anglophone minority in their province of residence.<sup>76</sup> It is obvious, however, that an individual whose mother tongue (or most frequently spoken language) is neither English nor French is not in a situation of equality with anglophones and francophones where these two languages are the only ones used by the government, even if the individual concerned has the "freedom" to choose between English and French.<sup>77</sup>

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<sup>73</sup>Like s. 23 of the *Charter*, ss 16-20 should have been drafted so that they would apply wherever the anglophone or francophone minority was sufficiently large. It is inconsistent, for example, to guarantee in the Constitution the right of Franco-Ontarians to education in French, and yet not to grant them a right to use their language in the province's courts.

<sup>74</sup>That it was felt necessary to give additional protection to the language rights entrenched in the *Charter*, by excluding ss 16-23 from the application of s. 33 of the *Charter* (the "override" clause), provides further indication of the injustice and inequality suffered by the francophone minorities in the provinces that are not subject to ss 16-20 (or s. 133 of the *Constitution Act, 1867* or s. 23 of the *Manitoba Act, 1870*).

<sup>75</sup>In this respect, it must be concluded that Canada has not met its international obligations under the *Covenant* and, consequently, is likely to be cited for non-compliance before the United Nations Human Rights Committee. See Desjardins, *supra*, note 5 at 372ff.

<sup>76</sup>See *supra*, notes 58-62 and accompanying text.

<sup>77</sup>The opinion sometimes expressed in cases, *supra*, note 34, that a law which obliges the minority to use the language of the majority involves no difference in treatment "because the rule is the same for everyone" must be rejected. It does not follow, however, that the State must give all languages spoken within its territory the status of official languages or provide education in all those languages. Various considerations, based on the cost of bi- or multi-lingualism or the linguistic homogeneity of the national society, may create restrictions on the right to language equality on the ground that such restrictions are both reasonable and justifiable. See *supra*, notes 49 and 56.

This further inequality may be justified by considerations similar to those that have already been raised with respect to section 23 of the *Charter*: the numerical significance of the anglophone and francophone minorities and the historical legitimacy of their claims,<sup>78</sup> as well as practical and financial considerations.<sup>79</sup> Consequently, it does not seem that the Canadian Constitution contravenes the principle of equality in the *Covenant* when it gives only English and French the status of official languages.

### III. Judicial Response to Equality and Minority Rights in the *Charter*

The courts will have considerably less latitude in interpreting sections 16 to 20 and even section 23, than other sections of the *Charter*. The minority language rights are generally set out with much greater precision and detail than the other rights and freedoms, such as the "fundamental rights" in section 2. Nonetheless, the case law concerning section 133 of the *Constitution Act, 1867* and section 23 of the *Manitoba Act, 1870*, as well as that dealing with the interpretation of section 2 of the federal *Official Languages Act* (which served as a model for subsections 16(1) and (2) of the *Charter*), indicates that the provisions respecting language rights are likely to receive widely differing interpretations and that consequently their scope may vary considerably.<sup>80</sup>

#### A. Role of Courts in the Implementation of the Language Provisions

Subsections 16(1) and 16(2), which deal with the establishment of official languages, will require extensive interpretation by the courts and are likely to give rise to the widest divergence of opinion. The courts will have to determine the nature of the standard (declaratory or executory) contained in that provision as well as the application of the principle of equality of

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<sup>78</sup>In Quebec and New Brunswick, and throughout Canada, the numerical significance of the English and French minorities justifies the enhanced status they are given. Yet in Manitoba, the francophone minority is at present smaller than other linguistic minorities. There remain considerations based on *history* to justify the special status granted to it: the theory of the "two founding peoples" or the principle of "dualism"; see *infra*, note 99.

<sup>79</sup>Experience shows that for all practical purposes it is impossible for the State and the government to operate properly in more than *two* official languages. Thus, it is often pointed out that in Switzerland, even though *three* languages have the status of "official languages" under the Constitution (a fourth language, Rheto-Romansh, is recognized only as a "national language"), only two of them (French and German) are truly used equally. The third, Italian, is not *in practice* given the same importance as the other two. See, *c.g.*, Dutoit, *supra*, note 45 at 41-3.

<sup>80</sup>For an analysis of the case law pertaining to s. 133 of the *Constitution Act, 1867*, s. 23 of the *Manitoba Act, 1870* and the *Official Languages Act*, R.S.C. 1970, c. 0-2, see Magnet, *supra*, note 51; Tremblay, *supra*, note 51; Brun & Tremblay, *supra*, note 51; Woehrling, *supra*, note 60.

status between the official languages to the area of the "language of work" of federal institutions.<sup>81</sup> The impact of this provision of the *Charter* will depend on whether the interpretation given to subsections 16(1) and 16(2) is similar to that adopted with respect to section 2 of the *Official Languages Act* by the Federal Court and the Quebec Court of Appeal or to that adopted by Chief Justice Deschênes of the Quebec Superior Court. While Chief Justice Deschênes held that section 2 was self-executing in the sense that a legal remedy could be founded upon it if French were denied the status of a working language in the federal public service,<sup>82</sup> the Quebec Court of Appeal decided that the section was not self-executing and that executive action was necessary to implement bilingualism in the federal workplace.<sup>83</sup>

Similar considerations arise with respect to sections 17 to 20 of the *Charter*. Section 20, which reproduces in subsection (1) certain provisions of the federal *Official Languages Act*,<sup>84</sup> contains terms whose meaning will have to be clarified before their true significance can be determined. It will be up to the courts to say when "there is a significant demand for communications with and services from [an] office" in English or French, or when "due to the nature of the office it is reasonable that communications with and services from that office be available in both English and French".<sup>85</sup>

Sections 17 to 19 of the *Charter* reproduce, with certain variations, the substance of section 133 of the *Constitution Act, 1867* and section 23 of the

<sup>81</sup>See Magnet, *ibid.* at 176-9; Tremblay, *ibid.* at 446ff.

<sup>82</sup>*Joyal v. Air Canada* (1976), [1976] C.S. 1211 at 1219, rev'd (1982), [1982] C.A. 39, 134 D.L.R. (3d) 410, Monet J.A. (Nolan J.A. concurring).

<sup>83</sup>Barbès J.A., dissenting, agreed with the broader view of s. 2 taken by Deschênes C.J.S.C. In *Association des Gens de l'Air du Québec Inc. v. Lang* (1977), [1977] 2 F.C. 22 at 35, 76 D.L.R. (3d) 455 (T.D.), Marceau J.'s view of s. 2 was similar to that taken later by the Quebec Court of Appeal. His view was affirmed in *Association des Gens de l'Air du Québec Inc. v. Lang*, *supra*, note 34 at 379-80, where Le Dain J. (Hyde D.J. concurring) commented that:

[S]ection 2 would appear to be the only provision from which one may derive a right to use French, as well as English, as a language of work as well as a language of service in the federal government. As such, it is in my respectful opinion more than a merely introductory provision, but rather the legal foundation of the right to use French, as well as English, in the public service of Canada, whether as a member of the service or a member of the public who has dealings with it. Of course, the practical implementation required to make that an effective right is another thing. That is the chief reason for the office of the Commissioner of Official Languages with the duty to watch over compliance with the Act. The annual reports of the Commissioner show that implementation is a long and difficult process.

<sup>84</sup>S. 20(1) of the *Charter* re-enacts in broader terms s. 9 of the federal *Official Languages Act*, *supra*, note 80 and s. 20(2) corresponds to s. 10 of the New Brunswick *Official Languages Act*, R.S.N.B. 1973, c. O-1.

<sup>85</sup>Note, however, that the application of s. 20(2) is not subject to the same conditions. For an analysis of s. 20(1), see Magnet, *supra*, note 51 at 179-82; Tremblay, *supra*, note 51 at 464-5.

*Manitoba Act, 1870*. The way in which these provisions have been applied in the past shows that the courts will be able to choose between two interpretations, liberal or restrictive, each of which will give these sections a radically different scope and utility. The case law concerning the application of section 133 to legislative and judicial matters provides a striking illustration of how the stance adopted by the courts has been instrumental, either in giving the provision an importance it may not have had at the time it was drafted or, on the contrary, reducing its scope to the point of stripping it of a large part of its significance.

In *Blaikie (No. 1)*<sup>86</sup> the courts had to decide whether section 133 applies only to statutes as such or whether it also applies to delegated legislation. They also had to determine whether section 133 imposes bilingualism only on the courts or whether its provisions also extend to the operations of administrative tribunals. Delegated legislation was not nearly as important in 1867 as it is now and administrative tribunals were practically unknown at that time. It is therefore clear that the drafters of the Constitution of 1867 could not have intended the provisions of section 133 to apply to tribunals other than the existing courts, just as they could not have anticipated the great mass of delegated legislation which was to appear later. Yet every court which considered the case decided that section 133 should extend to these new realities. To justify this conclusion, the judges relied on the principle that constitutional provisions must be given a generous, and hence evolutive, interpretation.<sup>87</sup> In this instance, the courts adopted an attitude of "judicial activism", since they based their decision on an assessment of the political, economic and social context, and not merely on legal considerations. This attitude had the effect of giving section 133 a considerably broader meaning with respect to the bilingualism of regulations and administrative tribunals than had been anticipated at the time it was drafted.<sup>88</sup>

Where it was necessary to determine the scope of section 133 in the area of judicial bilingualism, the courts in *Blaikie (No. 1)* adopted a diametrically opposed attitude and gave this provision a restrictive interpretation that detracts from its utility. The Supreme Court held that

not only is the option to use either language given to any person involved in proceedings before the Courts of Quebec or its other adjudicative tribunals (and this covers both written and oral submissions) *but documents from such bodies or issued in their name or under their authority may be in either language,*

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<sup>86</sup>*Supra*, note 52, aff'g (1978), [1978] C.A. 351, 95 D.L.R. (3d) 42, aff'g (1978), [1978] C.S. 37, 85 D.L.R. (3d) 252.

<sup>87</sup>*Ibid.* at 1028ff.

<sup>88</sup>The exact scope of s. 133 regarding bilingual regulations was spelled out by the Supreme Court in a further judgment: see *Blaikie (No. 2)*, *supra*, note 52.

and this option extends to the issuing and publication of judgements or other orders.<sup>89</sup>

On the basis of this judgment, it was decided that section 133 does not require that summonses issued by criminal courts be bilingual, or even that they be in the language of the accused.<sup>90</sup>

Thus, the right to use one's language before the courts does not imply the right to be addressed by them, or by the Crown, in that language. This result greatly reduces the significance of certain guarantees contained in section 133. It is not clear that such a restrictive interpretation was inevitable, especially when one considers how the courts interpreted the same section with respect to the bilingualism of regulations and administrative tribunals in *Blaikie (No. 1)*. If the same generous and evolutive approach had been used to resolve the issue of the language of summonses and judgements, it would have been concluded that the right of litigants to choose between English and French implies that the State must address them and answer them in the language they have chosen. This is how judicial bilingualism is generally understood and applied in countries where individuals have the right to choose the language they wish to use in their interactions with the administration of justice.<sup>91</sup>

Another way of illustrating the court's varying interpretations of the Constitution's language provisions is to compare the application of section 133 of the *Constitution Act, 1867* by the Quebec courts on the one hand,<sup>92</sup> and the application of section 23 of the *Manitoba Act, 1870* by the Manitoba courts on the other.<sup>93</sup>

The discrepancies in the lower court decisions respecting section 133 thus show that the judicial interpretation of the sections of the *Charter* concerning the status of the official languages is likely to vary considerably.

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<sup>89</sup>*Blaikie (No. 1)*, *supra*, note 52 at 1030 [emphasis added].

<sup>90</sup>*Walsh v. City of Montreal* (1980), [1980] C.S. 1054 at 1055, 55 C.C.C. (2d) 299; *MacDonald v. City of Montreal* (1982), [1982] C.S. 998 at 1000; *Bilodeau v. A.G. Manitoba* (1981), [1981] 5 W.W.R. 393 at 402 and 409, 10 Man. R. (2d) 298 (C.A.). For a criticism of these decisions, see Magnet, *supra*, note 51 at 190-1.

<sup>91</sup>Capotorti, *supra*, note 3 at 80-2.

<sup>92</sup>In *A.G. Quebec v. Collier* (1983), [1983] C.S. 366, the Quebec Superior Court declared that legislation enacted in contravention of s. 133 of the *Constitution Act, 1867* is unconstitutional and therefore cannot serve as a valid basis for criminal prosecution.

<sup>93</sup>In *Bilodeau v. A.G. Manitoba*, *supra*, note 90, the Manitoba Court of Appeal decided that s. 23 was not mandatory, that its provisions were only directory and that consequently the provincial government was free to ignore them with impunity. This view of s. 23 was rejected and the provision considered to be imperative by the Supreme Court of Canada in *Reference Re Language Rights under the Manitoba Act, 1870* (1985), 19 D.L.R. (4th) 1, (*sub nom. Manitoba Language Rights Reference*) 59 N.R. 321.

### *B. Arbitrating Conflicts Between Equality and Minority Rights*

We must now consider to what extent the principles of equality and non-discrimination contained in subsection 15(1) are likely to influence the choice the courts will have to make between a broad or narrow interpretation of sections 16 to 20 and 23, which confer minority rights.

There is a potential conflict between minority language and cultural rights and the principles of equality and non-discrimination. Whereas the latter principles require that a person be treated without regard to the fact that he or she belongs to a particular group, language and cultural rights are conferred on individuals precisely because they are members of a minority. The existence of special rights for minorities results in differences between the treatment they receive and that given to the rest of the population.

The protection of the rights of French and English minority groups provided by sections 16 to 20 and 23 may be regarded as an exception to the principles of equality and non-discrimination in subsection 15(1). This suggestion is reinforced when these provisions are read in conjunction with section 27 which also protects ethnic and linguistic minorities. Section 27 is intended to circumvent certain consequences that might otherwise result from the strict application of subsection 15(1).<sup>94</sup>

If sections 16 to 20 and 23 (as well as section 27) are indeed exceptions, the question arises whether they should, like any exception, be interpreted restrictively. Admittedly, the drafters of the *Charter* wished to establish a certain balance between the right to equality and the special measures for protecting minorities. A broad, liberal and evolutive judicial interpretation of language and cultural rights by increasing their importance is likely to disturb the original balance of the *Charter* and will thus give rise to a "conflict of rights" between subsection 15(1) and sections 16 to 20 and 23. This is particularly true in cases where, as with the extension of the section 133 bilingualism rights to administrative tribunals and delegated legislation, judicial interpretation of sections 16 to 20 and 23 will have the effect of extending their scope to areas which the drafters of the *Charter* had probably not contemplated.<sup>95</sup> We must then question whether the courts should create *new* exceptions to the principles of equality and non-discrimination in subsection 15(1) or whether, on the contrary, these principles have the effect of restricting the extension and "growth potential" of sections 16 to 20 and 23. If a court is tempted to interpret language rights *restrictively*, subsection

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<sup>94</sup>See *supra*, notes 26-52 and accompanying text.

<sup>95</sup>The problem arises in particular with ss 16(1) and 16(2); in view of the vague and open-ended nature of its provisions, this section is likely to grow in scope considerably if it is interpreted in a broad, liberal and evolutive manner. In this regard, see Tremblay, *supra*, note 51 at 446ff.

15(1) will provide it with a means of rationalizing its attitude. On the other hand, if the court wishes to interpret sections 16 to 20 and 23 *liberally* it might not find the necessary justification in the text of the *Charter* to allow it to overcome any objections based on subsection 15(1). For resolution of the conflicts between the right to equality and the minority language rights, it might ultimately be necessary to rely on considerations lying beyond the actual wording of the Constitution and relating instead to its underlying system of values.

A provision of the *Charter* which may assist in resolving conflicts between language rights and equality rights is subsection 16(3), which provides:

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

It is generally agreed that subsection 16(3) was included in the *Charter* to meet potential objections to federal or provincial statutes which *increased* anglophone and francophone minority rights. The argument was raised against the 1969 federal and New Brunswick *Official Languages Acts* that the Constitution (specifically section 133 of the *Constitution Act, 1867*) prohibits not only the *reduction* of the rights it guarantees, but also their *extension*. This line of reasoning, however, was rejected by the Supreme Court in *Jones v. A.G. New Brunswick*. It could not, in view of subsection 16(3), be invoked against an extension of the guarantees given to English- and French-speaking minorities in the *Charter*.<sup>96</sup>

Subsection 16(3) goes further than merely rebutting the type of argument raised in the *Jones* case. It states that “[n]othing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French” [emphasis added]. Consequently, this provision would also make it possible to put to rest any objections, based on subsection 15(1), that might be raised against a federal or provincial statute

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<sup>96</sup>*Jones v. A.G. New Brunswick* (1974), [1975] 2 S.C.R. 182 at 192-3, (*sub nom. Jones v. A.G. Canada*) 45 D.L.R. (3d) 583 [hereinafter *Jones*]. For this interpretation of s. 16(3), see, e.g., Tremblay, *supra*, note 51 at 459-60. A literal interpretation of s. 16(3) suggests a different meaning however: rather than making it possible to expand language rights of anglophone and francophone minorities, the provision would authorize an exception to the principle of the equality of status of the two official languages contained in ss 16(1) and 16(2), on condition that such an exception is necessary to promote a more genuine equality between the two languages (e.g., a New Brunswick statute might give preferential treatment to francophones in the province to improve their situation, which is currently disadvantaged when compared to the majority).



which gave anglophone or francophone minorities additional privileges to those conferred on them by the *Charter*.<sup>97</sup>

Subsection 16(3) clearly permits a *legislative* extension of the language rights recognized in the *Charter*. Does it also permit their extension through judicial interpretation? This is clearly not its primary purpose. The subsection refers only to legislative extensions and so it does not provide a strong argument to offset effectively considerations arising from subsection 15(1) that may be invoked to justify a restrictive judicial interpretation of language rights.

Section 27 is another provision that might be relied on to circumvent subsection 15(1) should this provision stand in the way of a broad and evolutive interpretation of the specific language guarantees. The advantage of section 27 over subsection 16(3) is that it is a general interpretative clause and not, as is the case with subsection 16(3), specifically concerned with the scope of the *Charter* in relation to the legislative jurisdiction of Parliament and the legislatures. Thus, section 27 may be used to construe judicially the sections of the *Charter* that confer rights on French- and English-speaking minorities. This is clear from its literal meaning and from the case law.<sup>98</sup> Consequently, if it could be shown that a liberal and evolutive interpretation of sections 16 to 20 and 23 is necessary to preserve and enhance the culture of francophone minorities outside Quebec or the anglophone minority in Quebec, it might be employed by the courts to overcome any objections based on the argument that such an interpretation is contrary to the principles of equality or non-discrimination.

Such reasoning, however, has certain weaknesses. Section 27 speaks of *culture* not of *language* and, even though the two are closely related, the choice of one concept over the other indicates that the drafters of the *Charter* were not referring in section 27 to the same situation entirely as that covered by sections 16 to 20 and 23. Moreover, these sections are among the provisions which give effect to the principle of Canadian "duality", although that term is not actually used, while section 27 is intended to promote "multiculturalism". The principle of duality expresses a recognition of the

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<sup>97</sup>Similarly, according to the interpretation proposed, *ibid.*, s. 16(3) would make it possible to overcome any objections based on s. 15(1) that might be raised against preferential treatment given to the francophone minority, (e.g. priority in employing public servants) with a view to helping it achieve linguistic equality with the majority. See also Tremblay, *ibid.* at 460.

<sup>98</sup>*Supra*, note 33.

bicultural, bilingual, and perhaps, binational nature of the country.<sup>99</sup> The principle of multiculturalism, if it is to have any significance, tends to recognize that all cultural collectivities which make up Canadian society are of equal importance and dignity.<sup>100</sup> The former principle requires that the English and French collectivities have a *special* constitutional status, while the latter requires that all cultural groups be treated *equally*.<sup>101</sup> It will no doubt be necessary to discover a way of giving effect to both principles at once, since the *Charter* enshrines them both.<sup>102</sup> There is an undeniable tension between section 27 and sections 16 to 20 and 23, however, which will make it problematic to rely on section 27 in favour of a broad and liberal interpretation of the rights given to official language minorities.<sup>103</sup>

Sections 16(3) and 27 will probably not be of sufficient assistance in resolving possible conflicts between equality rights and minority language rights. However, this difficulty may be overcome if the various rights and freedoms are set forth in the *Charter*, either explicitly or implicitly, according to a certain hierarchy thereby enabling the courts to give preference in cases of conflict to higher ranking rights.

One way to establish a hierarchy of *Charter* rights is to classify them depending on whether or not they can be overridden through the use of a "notwithstanding" clause under section 33.<sup>104</sup> A possible explanation of the

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<sup>99</sup>For the concept of Canadian "duality", see M. Bastarache, "Dualism and Equality in the New Constitution" (1981) 30 U.N.B.L.J. 27 at 30 where the author states the concept as follows: "The significance of Canadian dualism . . . can be summarized in two basic principles: cultural security and political representation of the two national linguistic communities." See also, Canada, Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Supply & Services, 1979) at 25-6 (Co-chair: J.-L. Pépin & J.P. Robarts). The concept of "duality" was also referred to by the Supreme Court of Canada in the second reference concerning the amendment of the Constitution: *Reference Re Objection by Quebec to a Resolution to Amend the Constitution* (1982), [1982] 2 S.C.R. 793 at 813-4, (*sub nom. Re A.G. Quebec and A.G. Canada*) 140 D.L.R. (3d) 385; see J. Woehrling, "La Cour suprême et les conventions constitutionnelles: les renvois relatifs au 'rapatriement' de la Constitution canadienne" (1984) 14 R.D.U.S. 391 at 410-1. Without the expression itself ever being used, the principle of duality is nevertheless reflected in numerous provisions of the Constitution. Thus Magnet, *supra*, note 51 at 171-2, notes the following expressions thereof: in the *Constitution Act, 1867*, ss 133, 93 and 98 (s. 94 could probably be added); in the *Manitoba Act, 1870*, s. 23; in the *Charter*, ss 16-20, 21, 23 and 29.

<sup>100</sup>For the concept of "multiculturalism" see Tarnopolsky, *supra*, note 31.

<sup>101</sup>*Supra*, note 39.

<sup>102</sup>Magnet, *supra*, note 51 at 174-5 and Tarnopolsky, *supra*, note 31, propose certain criteria to harmonize the two principles. See also *infra*, note 127.

<sup>103</sup>If there exists a potential tension between s. 27 and the sections that confer rights upon official language minorities, there is also a possible complementarity as is shown by the case law under s. 27: see *supra*, note 33 and accompanying text.

<sup>104</sup>See Tremblay, *supra*, note 51 at 445. See also *supra*, note 74.

fact that some rights are susceptible of being overridden and not others<sup>105</sup> is that the latter are more important (or of greater intrinsic value) than the former. Sections 16 to 20 and 23 cannot be neutralized under section 33.<sup>106</sup> If we adopt this approach, in case of a conflict with subsection 15(1), all the language rights must thus be classified among the "superior" rights and consequently will take precedence over the right to equality and non-discrimination.

Another way of explaining why only certain rights can be overridden does not relate to the respective *hierarchical value* of the two categories of rights but rather to the very nature of the mechanism provided for in section 33 of the *Charter*. Although the ability to insert a "notwithstanding" clause in their legislation gives the legislatures the final say on major policy issues, it also obliges them, when interfering with certain rights or freedoms, to accept full responsibility for their actions and the resulting political consequences. It is the democratic process, then, which will ultimately control government uses of section 33 and which will sanction any abuses thereof. In order for democratic control to be exercised, however, it must be impossible to jeopardize the integrity of the electoral process by means of section 33. In other words, it must not be possible to override the *democratic rights* whose exercise is essential to the operation of parliamentary institutions and which give the people the opportunity to punish governments at election time. This may explain why the democratic rights contained in sections 3 to 5 of the *Charter* do not fall within the ambit of section 33.<sup>107</sup> Similarly, *minority rights* are excluded from the application of this provision: the democratic process is based on majority rule and, consequently, if the majority uses section 33 to interfere with the rights of a minority, the latter will have no way of defending itself. Since section 33 does not apply

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<sup>105</sup>Except, of course, by means of s. 1 of the *Charter*, where it can be shown that the law limiting the right in question is reasonable and justifiable. Use of s. 33, on the other hand, is discretionary and does not require any such demonstration.

<sup>106</sup>The same applies to ss 25 and 27 of the *Charter*. Ss 133 of the *Constitution Act, 1867* and 23 of the *Manitoba Act, 1870* obviously do not fall within s. 33, since they are not part of the *Charter*. The s. 14 right to an interpreter, on the other hand, may be the subject of an exception by means of an express declaration under s. 33. It is true that this is not a measure for protecting minorities, or a language right, but an additional attribute of the right to a fair trial.

<sup>107</sup>However, if this is in fact the reason that ss 3-5 of the *Charter* are not subject to s. 33, one may well wonder why the same is not true of s. 2. The integrity of the democratic process does not depend solely on the right to vote and the holding of a sitting of Parliament and the legislatures at least once every twelve months, but equally on freedom of thought, belief, opinion and expression (including freedom of the press and the other media) and freedom of assembly and association. See *Reference Re Alberta Statutes* (1938), [1938] S.C.R. 100 at 132-5, [1938] 2 D.L.R. 81, Duff C.J.

to such rights, minorities may resort to judicial review to have a law restricting their rights declared inoperative.<sup>108</sup>

This explanation of the exclusion of certain rights and freedoms from the application of section 33<sup>109</sup> makes the theory of a hierarchy of rights and freedoms based on that provision less compelling. One can justify the fact that the right to life (section 7) may be overridden by a notwithstanding clause whereas the same is not true of the right to vote (section 3) or the right to be served in English or French at the head office of a federal institution (subsection 20(1)). If this difference in status reflects a difference in the intrinsic value and moral importance attributed to each of these rights by the drafters of the *Charter*, one has to conclude that the scale of values applied is highly unusual. It becomes clear, however, that exceptions to section 7 can be sanctioned through the democratic process whereas this might not be the case with exceptions to the sections containing minority rights. In the case of the democratic rights, their existence and integrity is a prerequisite to the operation of the democratic system. Hence the scope of section 33 reflects not a hierarchy of constitutional values, but a distinction between those values directly related to the democratic process and those which are not.

It should also be noted that American courts deciding on the application of the Fourteenth Amendment (the Equal Protection clause), have established three categories of rights regarded as fundamental, which, when threatened, invoke "strict scrutiny" by the courts. These are: rights necessary for the operation of the democratic system, rights pertaining to freedom of mobility, and rights of minorities too small to be able to influence the political process significantly.<sup>110</sup> Since the Constitution of the United States does not contain anything similar to section 33 of the *Charter*, it is interesting to note the concordance between the categories of rights on which the *Charter* confers special status (by excluding them from the application of section 33) and the rights regarded as fundamental by the American courts. This parallelism, it may be argued, may explain why, even if a

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<sup>108</sup>See the famous passage by Stone J. in *United States v. Carolene Products Co.*, 304 U.S. 144 at 152-3 n. 4 (1938). It is reproduced and commented on in Fiss, *supra*, note 2 at 152 n. 69 and in M.S. Ball, "Judicial Protection of Powerless Minorities" (1974) 59 Iowa L. Rev. 1059 at 1060-1.

<sup>109</sup>The other rights and freedoms in the *Charter* that are not subject to s. 33 are those in ss 6 and 28. The guarantee of equal rights to both sexes is probably explained by the considerable lobbying of the federal government by women's groups. The s. 6 "mobility rights" are not subject to s. 33 probably because of their dual nature: s. 6 is as much (and perhaps more so) concerned with the proper operation of the Canadian economic union (and, consequently, the division of jurisdiction over economic matters) as with the protection of the fundamental rights of Canadians.

<sup>110</sup>See Gold, *supra*, note 40 at 139-45.

*hierarchy* of rights and freedoms cannot be derived directly from section 33, the rights excluded from the application of that clause nevertheless require *special protection*. However, the American experience does not suggest that in the case of a conflict of rights, minority rights must take precedence over the right to equality. The distinction made by the American courts between "fundamental" rights which require "strict scrutiny" and those which are less fundamental and justify only "intermediate" or "minimal" scrutiny is not intended to circumvent the principle of equality in order to give precedence to other rights. This distinction has been made by American case law in the context of the application of the Fourteenth Amendment and merely allows the courts to vary the degree of severity of their scrutiny depending on the nature of the classification used and the nature of the right whose exercise is the subject of that classification.

Consequently, although there are provisions in the *Charter* which suggest certain ways of resolving conflicts that might arise between subsection 15(1) and the language rights, none of those which have been examined seems convincing enough to gain general acceptance.<sup>111</sup> In view of the difficulty of the moral and political choices involved in arbitrating between the right to equality and the protection of linguistic minorities, it would be hazardous to rely solely on reasoning as uncertain as that which we have just examined.

An additional analytical perspective may prove helpful. We have seen that the purpose of the language and cultural guarantees in the *Charter* is to permit the preservation and enhancement of certain minority rights in Canada. They are aimed, in a sense, at establishing equality between minorities and the majority, or equality among the various groups which make up Canadian society.<sup>112</sup> The purpose of the right to equality and the right to non-discrimination has traditionally been seen as the promotion of individual development, in particular by prohibiting differences in treatment

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<sup>111</sup>Another way of establishing a hierarchy of the rights and freedoms in the *Charter* might be to classify them according to the amending procedure applicable in each case. Almost insurmountable difficulties arise, however, when we try to apply this to conflicts between s. 15(1) and the provisions respecting language rights. Although the right to equality must undoubtedly be classified as an "inferior" right, since s. 15(1) can be amended using the general amending procedure, ss 16-20 and 23 are not uniformly subject to the same amending formula and, moreover, in the case of ss 16-20, the same provisions require different procedures depending on whether they apply federally or provincially.

<sup>112</sup>In the case of ss 16-20 and 23 of the *Charter*, s. 133 of the *Constitution Act, 1867* and s. 23 of the *Manitoba Act, 1870*, equality between the two founding peoples of Canada is expressed through the principle of "dualism". See *supra*, note 99. As for s. 27 of the *Charter*, it is aimed at ensuring a certain equality among *all* Canadian cultural communities, or at least among those whose culture is part of "the multicultural heritage of Canadians"; s. 27 thus gives effect to the principle of "multiculturalism". See *supra*, note 100.

based on membership in a particular group. Their purpose is to establish equality among persons.<sup>113</sup> If subsection 15(1) thus relates to an individualistic ethic, minority rights, on the other hand, are based on the conviction that there are certain collective rights which deserve and need to be protected. Where the equality of *groups* and the equality of *persons* come into conflict, it becomes necessary to ascertain where collective rights and individual rights respectively fall within the *Charter's* system of values.<sup>114</sup>

The liberal constitutional tradition, of which Canada is a part, is highly individualistic. It is an outcome of the philosophical traditions stemming from the Age of Enlightenment, in particular, the social contract theories, which hold that there are only two types of "actors" in political dealings: the State and the individual.<sup>115</sup> Under such a political theory, there is no

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<sup>113</sup>This is the traditional analysis. See, e.g., Tarnopolsky, *supra*, note 31 at 438; Dinstein, *supra*, note 3 at 103. However, as Fiss brilliantly demonstrates, *supra*, note 2 at 147ff., there is a less conventional way of analyzing the principle of non-discrimination. If we recall the generally accepted definition of discrimination, namely the unfavourable treatment of a person because he belongs to a group which is itself collectively in an unfavourable situation compared with the rest of the population, we realize that the prohibition against discrimination may be regarded as being aimed as much at protecting the *group* concerned as an entity, as it is at protecting its members. However, since the main body of opinion holds that the right to non-discrimination should be characterized as an individual right (and it seems clear that within the *Charter* this is the role which s. 15(1) was intended to play), we shall keep to the traditional point of view. As for the right to equality, which also arises under s. 15(1), we have seen, *supra*, note 2, that it can be defined as the right of every person to be treated without regard to irrelevant considerations or, in other words, the right of that person to "fair" treatment and prohibition of "irrational" treatment. This is a right that is essentially individual in its purpose.

<sup>114</sup>In order to distinguish properly between collective and individual rights, I am adopting the criterion of the ethical basis for, and the purpose of, the rights in question. From this point of view I share the opinion of Tarnopolsky, *supra*, note 31 at 437-8; and F. Chevrette, "Notions as to 'Acquired Rights', 'Group Rights', and 'Collective Rights' in Quebec Law" in *Report: Language Rights*, Book 2, *supra*, note 64, 413 at 432 where he looks for the reason why certain rights are termed "collective":

[C]'est bien plutôt le fait que ces droits, qui légalement peuvent appartenir à des individus ou à des groupes, tirent leur légitimité de l'existence et de la nécessité de reconnaître certaines réalités collectives, face à des intérêts individuels ou des intérêts d'autres collectivités.

For the concept of "collective rights" and the distinction between collective and individual rights, see also Carignan, *supra*, note 25; Dinstein, *supra*, notes 3 and 15; Fiss, *ibid.*; V. Van Dyke, "Human Rights and the Rights of Groups" (1974) 18 Am. J. Pol. Sci. 725; V. Van Dyke, "Justice as Fairness: For Groups?" (1975) 69 Am. Pol. Sci. Rev. 607; V. Van Dyke, "Human Rights Without Discrimination" (1973) 67 Am. Pol. Sci. Rev. 1267; Van Dyke, *supra*, note 21; E. Cloutier, "Les conceptions américaine, canadienne-anglaise et canadienne-française de l'idée de l'égalité" in E. Cloutier & D. Latouche, eds, *Le système politique québécois* (Montreal: Hurtubise, 1979) 451; R. Ben-Israel, "Is the Right to Strike a Collective Human Right?" (1981) 11 Israel Y.B. Hum. Rts 195; *Les droits de l'homme: droits collectifs ou droits individuels?*, Annales de la Faculté de droit et des sciences politiques et de l'Institut de recherches juridiques, politiques et sociales de Strasbourg, vol. 32 (Paris: L.G.D.J., 1980).

<sup>115</sup>See Van Dyke, "Justice as Fairness: For Groups?", *ibid.* at 607-9.

room for "intermediate bodies", not even natural social groups whose existence does not depend on legal creation.<sup>116</sup> It is thus not surprising to note that in the eighteenth and nineteenth centuries, classical liberal constitutions placed very little emphasis on collective rights. The American Constitution of 1787 and the first French Constitutions are examples of such individualism taken to an extreme. Later, in particular after the First World War, collective rights were given a place in the constitutions of liberal democracies. This movement gained further momentum after the Second World War,<sup>117</sup> but it did not substantially affect the precedence given individuals in the hierarchy of values underlying the Western legal systems.

Even though Canada is attached to the liberal constitutional tradition, it nevertheless departs from it fairly clearly as regards the emphasis placed respectively on individual and collective rights. The precedence of individual rights has not been recognized in the Canadian legal system in the same way as in other liberal democracies. As early as 1867, the Canadian Constitution placed special emphasis on certain collective rights. Among the very few rights enshrined in the *Constitution Act, 1867*, those found in sections 93 and 133 are aimed at protecting the linguistic and religious minorities of that period.<sup>118</sup> The traditional fundamental and individual rights, on the other hand, were given no protection in the 1867 Constitution, and this situation was not rectified until the *Constitution Act, 1982* came into force.<sup>119</sup> It can therefore be said that in Canadian law, between 1867 and 1982, collective rights of linguistic and religious minorities had precedence, in case of conflict, over individual rights and, in particular, the right to equality. This precedence of collective rights in constitutional law may be seen as indicative of the hierarchy of values on which the 1867 Constitution is implicitly based; it tells us that in the normative system underlying the *Constitution Act, 1867*, group equality (more precisely, equality of the two groups in the Confederation compact) had precedence over individual equality.

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<sup>116</sup>In this context the only natural social group to be given legal recognition is the *family*.

<sup>117</sup>For a history of the development of collective rights in the constitutions of liberal democracies, see J. Rivero, "Rapport général introductif" in *Les droits de l'homme: droits collectifs ou droits individuels?*, *supra*, note 114, 1 at 18ff.

<sup>118</sup>S. 133 of the *Constitution Act, 1867* was substantially reproduced in s. 23 of the *Manitoba Act, 1870*. Concerning ss 93 and 133 of the *Constitution Act, 1867*, see the comments of Morrow J. in *Athabasca Tribal Council v. Amoco Canada Petroleum Co.* (1980), 22 Alta R. 541 at 568, 112 D.L.R. (3d) 200, [1980] 5 W.W.R. 165 (C.A.).

<sup>119</sup>It is true that ss 20 and 50 of the *Constitution Act, 1867* protected certain democratic rights, which are now enshrined in ss 4(1) and 5 of the *Charter*. It must also be remembered that, prior to 1982, the courts have used interpretation devices to effect a constitutional protection of civil liberties. See P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) ch. 24 at 417ff.

This situation has, of course, changed with the coming into force of the *Charter*, but only partially. The collective rights of minorities are no longer the only rights to be entrenched in the Constitution. Consequently, it has become necessary to reconcile them with the individual rights which are also guaranteed by the *Charter*. However, there are many reasons for believing that the new Constitution has not broken continuity with the old, and that the collective rights of minorities, in particular language rights, will continue to enjoy pre-eminence.

The protection of language rights was one of the essential concerns of those who took the initiative in patriating the Constitution and entrenching fundamental rights. It can be concluded that the drafters of the *Charter* attached considerable importance to the rights of the official language minorities.

The importance of collective rights is indicated by the large number of provisions devoted to them,<sup>120</sup> as well as by the precision and detail with which most are drafted. As has already been noted, this last characteristic distinguishes language rights from many other rights and freedoms guaranteed by the *Charter* which are so vaguely worded that it will be up to the courts to give them genuine substance. The very nature of language rights no doubt requires that they be defined in greater detail and more precisely than the fundamental rights in section 2 or those set out in section 7. One cannot help thinking, however, that by defining the scope of language rights as precisely as possible, the drafters of the *Charter* also wished to ensure that they could not be reduced to insignificance by an overly restrictive judicial interpretation and that any restrictions that might be placed on these rights by federal or provincial legislation or regulations could not too easily be regarded as justifiable under section 1. As was clearly shown by the judgments which declared inoperative section 73 of the Quebec *Charter of the French Language*<sup>121</sup> as contrary to section 23 of the *Charter*, the more detailed a right or freedom is, the more difficult it will be to establish that a limitation on that right or freedom is "reasonable".<sup>122</sup> Section 35 of the *Constitution Act, 1982*, which guarantees aboriginal rights (and which is connected to the *Charter* by section 25) and section 27 of the *Charter*, which concerns the "preservation and enhancement of the multicultural heritage of Canadians", are not at all precise or detailed. It will therefore be necessary to await the courts' interpretation in order to determine their true scope. This indicates that of all the collective rights guaranteed by the *Charter*, the

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<sup>120</sup>See *supra*, notes 9 and 10.

<sup>121</sup>*Supra*, note 58.

<sup>122</sup>See *Quebec Association of Protestant School Boards v. A.G. Quebec, supra*, note 65. For an interesting comment on the Supreme Court decision, see D. Proulx, "La Loi 101, la clause-Québec et la Charte canadienne devant la Cour suprême: un cas d'espèce?" (1985) 16 R.G.D. 167.



drafters attached the greatest importance to English and French language rights.

In addition, the failure of the drafters of the *Charter* to include language among the expressly prohibited grounds of discrimination might perhaps be explained by their concern to avoid any conflicts likely to arise between language rights on the one hand, and the right to equality and non-discrimination contained in subsection 15(1) on the other.<sup>123</sup> It could probably be interpreted as indicating that the drafters felt that individual linguistic equality is less important and requires less protection than equality between the two major language groups in Canada.

The constitutional tradition and circumstances surrounding the enactment of the *Charter*, as well as the structure and content of its relevant provisions, thus make it possible to maintain that the Canadian Constitution is based on a value system in which certain collective rights are of central importance. This is not at all surprising if one recalls that in 1867 one of the objectives of Confederation was to create a legal and political framework for a *binational* State and that in 1982 the Constitution was amended to carry out the promise which the Canadian Prime Minister had made to Quebeckers, that their demands concerning protection of the language and culture of the country's francophone minority would be met.

Consequently, the courts should not hesitate to give collective rights, especially the rights in sections 16 to 20 and 23 of the *Charter*, the broad, liberal and evolutive interpretation necessary to ensure the protection and security of minorities. If these collective rights come in conflict with certain individual rights and, in particular, with the right to equality and non-discrimination (as will almost certainly be the case), it must be concluded that the *Charter* permits and, in fact, requires that precedence be given to collective rights. This is not a "totalitarian" vision. It is generally accepted that where there are ethnic, religious or linguistic minorities, individual rights must sometimes give way to the rights of these collectivities and, in particular, that it is often necessary to override individual equality in favour of group equality.<sup>124</sup> The legal systems of multinational countries demonstrate that positive law places considerable importance on this imperative.

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<sup>123</sup>See *supra*, note 2.

<sup>124</sup>Thus, in multinational states it is impossible to apply in an automatic fashion the principle of equality of representation, the concrete expression of the democratic principle. In these countries it has been necessary to balance the equality of individuals against the equality of national groups to which they belong. See H. Kloss, "Democracy and the Multinational State" in *Multilingual Political Systems: Problems and Solutions* (Quebec: Presses de l'Université Laval, 1975) at 29ff.

Canada's *Charter* is consequently not an exception or an innovation in this regard.<sup>125</sup>

Finally, if the above arguments make it possible to say that the *Charter* recognizes the precedence of certain collective rights over individual rights, they also indicate that section 27, whether in isolation, or in conjunction with subsection 15(1), should not be used as a pretext for refusing to interpret sections 16 to 20 and 23 broadly and liberally.<sup>126</sup> It seems clear, in view of the value system on which the *Charter* is based, that the duality principle, as reflected in particular in the sections concerning the language rights of the official language minorities, must take precedence over the principle of multiculturalism contained in section 27 of the *Charter*. Equality between the two "founding peoples" is an old and traditional constitutional principle, whereas protection for collectivities other than the official language minorities was not enshrined in the Constitution until the enactment of the *Charter* in 1982. Furthermore, whereas the language rights of the English and French minorities are the subject of numerous precise and detailed provisions in the *Charter*, the principle of multiculturalism appears only in section 27, which is merely an interpretative provision.<sup>127</sup> History shows, however, that Canadian courts allow themselves considerable latitude in applying and interpreting the rights of minorities. Depending on the facts of the case, the judiciary has been willing to expand these rights considerably or to limit

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<sup>125</sup>For numerous examples of legal provisions which give certain minorities special status and consequently establish a difference in treatment between the minority and the majority, see Van Dyke, "Human Rights and the Rights of Groups", *supra*, note 114 at 729ff. See also G. Turi, *Les dispositions juridico-constitutionnelles de 147 états en matière de politique linguistique* (Quebec: International Center for Research on Bilingualism, 1977); Verdoodt, *supra*, note 8; Capotorti, *supra*, note 3 at 57ff. In all these instances, the collective rights of the minorities override or limit the individual right to equality and non-discrimination.

<sup>126</sup>See *supra*, notes 100-2 and accompanying text.

<sup>127</sup>See Magnet, *supra*, note 51 at 175:

The duality theory signifies that official-language minorities are not like other minorities. The constitution grants special and additional protection to them with respect to those areas of the constitution that reflect duality. Ethnic minorities will take the point hard, but the thesis of our new constitution is that, with respect to the language of government jobs, government services, religious instruction, schools and culture, anglophone and francophone minorities stand in a preferred position. The reason is wholly political. It is an attempt to forge a working reconciliation between Quebec and the rest of Canada.

However, the author adds, *supra*: "Canadian duality is circumscribed. Beyond its limits, multiculturalism rises supreme as the interpretational inspiration of the *Charter*." See also Tarnopolsky, *supra*, note 31 at 441-2.

and restrict them to the point of insignificance.<sup>128</sup> We can only hope that the future attitude of the courts will be more consistent and, at the very least, that the language provisions of the *Charter* will be evenly interpreted with respect to Canada's official language minorities.

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<sup>128</sup>See A. Tremblay, "L'interprétation des dispositions constitutionnelles relatives aux droits linguistiques" (1983) 13 Man. L.J. 651 at 652-3 and 661-2.