The Impact of Charter-based Judicial Review on Pan-Canadian Cultural Citizenship

by

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Abstract

This dissertation evaluates the impact of the Canadian Charter of Rights and Freedoms (1982) jurisprudence on Canada's cultural rights structure and cultural citizenship. In total, the dissertation analyzes 49 Supreme Court Charter decisions in the areas of minority language, multiculturalism and aboriginal issues, as well as their reception by governmental authorities. It argues that Charter-based judicial review has confirmed and pushed further the choice Canada made after the Second World War to promote a polyethnic citizenship. The dissertation also formulates three larger theoretical claims. First, that the recognition of specific cultural rights for certain groups that go beyond fundamental political and civil rights brings about positive legal change for minorities. This has especially been the case for the Anglophone minority inside Quebec and the Francophone minority outside Quebec, as well as for aboriginal communities across Canada. Secondly, that constitutionally entrenching rights and the transfer of power to the judiciary to invalidate laws that contravene those rights, is crucial for greater accommodation of diversity. As shown in the Canadian case, the Supreme Court's rulings in favour of minorities have been enforced by governmental authorities. Thirdly, that institutional nation-building objectives limit judicial review's potential for facilitating greater accommodation of diversity. The ideal of a polyethnic pan-Canadian citizenship prevents the recognition of new self-government rights for aboriginal peoples and Francophone Quebecers, even though there is interpretive space for such a constitutional reading.

Cette thèse évalue l'impact de la jurisprudence de la Charte canadienne des droits et libertés (1982) sur la structure des droits culturels et de la citoyenneté culturelle au Canada. Elle analyse 49 décisions de la Cour suprême ayant trait aux droits des minorités linguistiques, au multiculturalisme et aux affaires autochtones, ainsi que leur réception par les différentes autorités gouvernementales. Elle soutient que la revue judiciaire basée sur la Charte a confirmé et poussé encore plus loin le choix du Canada, fait après la deuxième guerre mondiale, de promouvoir une citoyenneté polyethnique. La thèse énonce aussi trois grandes affirmations théoriques. Premièrement, que la reconnaissance de droits culturels propres à certains groupes et dont l'étendue dépasse celle des simples droits fondamentaux a conduit à de grandes avancées pour les minorités. Ceci fut le cas pour la communauté anglo-québécoise, les minorités francophones hors Québec ainsi que pour les autochtones à travers le pays. Deuxièmement, que les garanties juridiques qui sont constitutionnalisées et arbitrées par les cours ont un impact important sur l'accommodement de la diversité. Comme démontré dans le cas canadien, les décisions de la Cour suprême en faveur des minorités ont été appliquées par les autorités gouvernementales. Troisièmement, que les objectifs étatiques d'édification de la nation amoindrissent le potentiel d'accommodement de la diversité dont dispose la revue judiciaire. L'idéal d'une citoyenneté pancanadienne polyethnique empêche la reconnaissance de nouveaux droits d'auto-détermination aux peuples autochtones et aux Québécois francophones, même si une certaine interprétation constitutionnelle pourrait le justifier.

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I dedicate this dissertation to the memory of my grandfather, Dr. Trang Nguyen Dinh.

Emmanuelle Richez

Table of Acronyms

AANDC	Aboriginal Affairs and Northern Development Canada
BNAA	British North America Act
CALDECH	Corporation de développement économique communautaire
CSMB	Commission scolaire Marguerite-Bourgeoys
DIAND	Department of Indian Affairs and Northern Development
NBHRC	New Brunswick Human Rights Commission
NWAC	Native Women's Association of Canada
OLA	Official Languages Act of Canada
OLA-NB	Official Languages Act of New Brunswick
PQ	Parti Québécois
RCAP	Royal Commission on Aboriginal Peoples
RCMP	Royal Canadian Mounted Police
ROC	Rest of Canada
UNHRC	United Nations Human Rights Committee

Introduction

INTRODUCTION

At first glance, the topic of this dissertation may strike its readers as odd. It might seem difficult to justify a paper, let alone a larger project, on citizenship and the *Canadian Charter of Rights and Freedoms,* 1982 (hereafter "*Charter*"), for at least two reasons. First, the text of the *Charter* is remarkably silent about citizenship (Cairns 1992; Sharpe 1993). Only three of the substantive rights protected by the *Charter*—voting and legislative membership rights (section 3), mobility rights (section 6), and minority language education rights (section 23)—refer explicitly to citizens. The remainder of the *Charter*'s provisions refer generically to "everyone," "any person," or "every individual."[1] Second, judicial pronouncements on citizenship have been rare and somewhat dismissive (Sharpe 1993). For example, in 1992 the Federal Court of Appeal described the term "citizen" in section 3 as "straightforward," "unambiguous," and in need of "no interpretation at all" (*Belczowski v Canada*). Similarly, in 1989 the Supreme Court placed relatively low value on distinctions based on citizenship when it read citizenship into section 15 and held that it is unnecessary for admission to the practice of law (*Andrews v Law Society of British Columbia*).

However, this textual silence about, and apparent judicial ambivalence towards, citizenship is difficult to reconcile with the opinions of informed observers and with recent developments in political and legal theory. For example, Alan C. Cairns has argued that "[o]ne of the most significant constitutional consequences of the *Charter*" is "its enhancement of the institution of citizenship" (1992, 75). Citizenship is now understood to be more than a legal status acquired by birth or by way of a naturalization process. Most importantly, it is said to encompass a cultural dimension. An interesting aspect of the *Charter* is that it goes beyond the recognition of civil and political rights and entrenches cultural rights for Canadians. A careful reading of the legal document reveals that out of the five sections specifically applicable to Canadian citizens, three are of a cultural nature: "Minority Language Educational Rights" (section 23), "Aboriginal rights and freedoms not affected by Charter" (section 25), and "Multicultural heritage" (section 27).

[1] There are also references to "part[ies] and witness[es] in [...] proceedings," as well as to "member[s] of the public."

This dissertation argues that the Supreme Court of Canada, through its *Charter* jurisprudence, has become an important actor in defining the concept of cultural citizenship. Although the *Charter* celebrated its 30th anniversary this year, no comprehensive study has to date concentrated on its impact on pan-Canadian cultural citizenship. This dissertation fills that void by examining a set of Supreme Court *Charter* decisions in the area of cultural citizenship and their policy consequences.

LITERATURE REVIEW

The Concept of Citizenship

As Judith Shklar puts it, "[t]here is no notion more central in politics than citizenship, [yet] none more variable in history, or contested in theory" (1991, 1). As a matter of fact, the concept of citizenship has been the subject of many theoretical and definitional dissensions.[2] Citizenship has generally been understood to be more than a narrow technical legal status that marks membership in a polity. Being such a multifaceted concept, many theorists have tried to break it down into different dimensions. For example, Will Kymlicka and Wayne Norman discern four understandings of the concept: immigration and naturalization policy, structures and institutions, civic virtues, and citizenship identity (1994). Similarly, Peter Schuck alludes to the political, legal, psychological and sociological aspects of citizenship (2000). Linda Bosniak, for her part, distinguishes between citizenship as legal status, as form of political activity, as system of rights and as form of identity and solidarity (2000). Finally, Jane Jenson identifies three dimensions to a "citizenship regime": rights and responsibilities, access, and belonging (2006).

Of interest to this study, in particular, is the recurring theme in the literature of the existence of a primordial link between citizenship and access to rights in liberal democracies. This shared assumption can be traced back to T.H. Marshall's *Citizenship and Social Class: And Other Essays* (1950) in which citizenship was equated with a legal status that guarantees equal rights to all members of the nation state. At the core of Marshall's citizenship concept is the idea that the newly acquired legal status would integrate previously excluded groups into society in order to obtain national unity. The inclusion of previously excluded group was partially realised in the

[2] For a discussion on the contemporary theoretical debates surrounding the concept of citizenship, see Will Kymlicka and Wayne Norman (1994), as well as Linda Bosniak (2000).

18th century with the recognition of civil rights, and in the 19th century with the recognition of political rights. However, greater inclusion was only made possible, according to Marshall, with the granting of social rights in the 20th century. These rights do not fit the strict legal definition of rights, but should rather be understood as "passive entitlements to welfare" (Ignatieff 1995, 70). In the post-welfare state, new rights demands were made, this time to recognize previously excluded cultural groups. The rights-based vision of citizenship has since been enlarged to include cultural rights for minorities (Kymlicka 1995). These have translated into special legal provisions and political structures, as well as governmental policies and programs (Ibid.).

The nature of the cultural rights granted in any polity informs its type of cultural citizenship. On one end of the spectrum lies the "universal" or "undifferentiated" conception of citizenship, which recognizes the rights-bearing equality of individuals and is blind to cultural group differences (Young 1989). On the other end of the spectrum is the "pluralist" or "differentiated" conception of citizenship which posits that substantive equality requires a differential treatment of certain cultural groups (Ibid.).

Differentiated citizenship can take many forms depending on the level of diversity that it promotes and how it translates into rights. Kymlicka, who is widely recognized as a leading authority on multiculturalism and minority rights, distinguishes "polyethnic" citizenship from "multinational" citizenship (1995). "Polyethnic" citizenship is associated with group differentiated rights for immigrants that promote cultural retention through funding of ethno-cultural activities and exemption rights, for instance. However, it insists on the necessity of facilitating the integration of immigrants into mainstream society, notably by providing official language training. By often recognizing equally all cultural differences, "polyethnic" citizenship is close to the "undifferentiated" model on the citizenship spectrum. In contrast, "multinational" citizenship involves self-government rights given to national minorities, such as Francophone Quebecers, to help them counter cultural assimilation from the dominant society and maintain a distinct collective identity. Of importance are "external protections," which refer to the national minority's possibility to "protect its distinct existence and identity by limiting the impact of the decisions of the larger society" (Ibid., 36); measures like these have been implemented by the government of Quebec to limit access of immigrants to the public English language school system.

Since its early beginnings, Canada has provided cultural minorities with legal protections and privileges. However, the cultural rights arrangement has been constantly evolving. The following section reviews the changes in cultural minorities' protection and its impact on Canadian citizenship until the adoption of the *Charter* in 1982.

Canadian Citizenship and Cultural Minorities Pre-1982

Different conceptions of citizenship have conflicted in Canada over time. At its inception, Canada adopted some elements of a multinational citizenship. The *British North America Act, 1867* (hereafter "BNAA") established both French and English as the languages of the legislatures[3] and the courts through section 133. It also guaranteed, through section 93, rights to denominational schools which at the time of its enactment were divided along linguistic lines. By doing so, the BNAA gave a special status to French-Catholics and English-Protestants. But most importantly, the BNAA created Canadian federalism with sections 91 to 95, which relate to the division of powers between the federal government and the provinces. Many argued that the choice of a federal system was made to grant the province of Quebec the powers necessary for the cultural survival of its Francophone majority, in exchange for its adhesion to the Confederation project (LaSelva 1996; Rémillard 1980). Canada also recognized the special status of aboriginal peoples. In 1763, the *Royal Proclamation* had reserved lands to aboriginals that had not been ceded to, or purchased by, the Crown. Later, the *Indian Act, 1876* conferred a special status onto some aboriginal peoples.[4]

Canada's early multinational vision was altered with the desire to guarantee national unity by creating a sense of shared Canadian citizenship in the post-World War II period. The push for a more undifferentiated citizenship model first materialized with the adoption in 1960 of the *Canadian Bill of Rights*, which guaranteed fundamental and civil rights to all Canadians equally. In addition, the federal government tried to further integrate Canada's national minorities, namely aboriginal peoples and Francophone Quebecers into a broad pan-Canadian citizenship. It presented a *White Paper* in 1969 (DIAND) that sought to abolish special status for Indians to permit aboriginal peoples' full participation in Canadian society (Weaver 1981). However, the federal government soon abandoned the policy after mounting aboriginal resistance. Many aboriginal peoples saw the *White Paper* as an assimilationist policy and wanted to preserve their

[3] The use of French and English are permitted in the Parliament of Canada and the Quebec legislature.
[4] This status was not conferred to the Inuits and the Metis.

special status in Canada, and a de facto asymmetrical citizenship (Cairns 2000).[5] In order to mitigate the rise of Quebec nationalism, the *Official Languages Act* which established institutional bilingualism within the Canadian government was passed in 1969. This new act unleashed a cultural unrest in Canada among those who were not of French nor of English descent (Breton 1986). In response to this growing "third force," the federal government adopted its *Multiculturalism policy* in 1971 (Ibid.) which simultaneously promoted "cultural retention" and "sociocultural integration" (Jedwab 2003, 312).

Eventually, the federal government made a compromise between a multinational and an undifferentiated citizenship model by adopting a polyethnic conception of citizenship in which cultural differences would be respected and in some instances accommodated, but would not be recognized as the basis for the development of parallel social structures. At the same time, however, the province of Quebec was making Canadian citizenship more multinational by taking its linguistic destiny in its own hands through self-government means. During and after the Quiet Revolution, different Quebec governments enacted several pieces of legislation to safeguard the vitality of the French language in the province, culminating with the adoption of the *Charter of the French Language, 1977* (also known as "Bill 101") by the Parti Québécois (hereafter PQ). This document notably reduced accessibility to English-language instruction. It also advanced the francization of the work place by requiring all firms of fifty employees or more to operate in French, and by mandating all public and commercial signs to be in French only. By making French the common and dominant language of public life, Bill 101 consolidated the concept of a distinctive Quebec citizenship within Canada (Gagnon and Iacovino 2004).

The Quiet Revolution also brought a radicalisation of a large segment of the Quebec nationalist movement, which became secessionist (Balthazar 1986). The new secessionist movement found its champion in the PQ, whose main objective was to achieve Quebec's sovereignty by democratic means. The PQ was first elected to government in 1976 on the promise to hold a referendum on the mandate to negotiate a *sovereignty-association* with the Canadian federal government. *Sovereignty-association* meant that the province of Quebec would become a de facto sovereign state, but would also maintain political and economical ties with the Rest of Canada. While some argued that a winning referendum would result in an increase of Canada's

[5] The aboriginal peoples' response to the *White Paper* came with the Indian Association of Alberta's publication of *Citizen Plus* (1970), also known as the *Red Paper*, under the leadership of Harold Cardinal. The expression "citizen plus" had been borrowed from the Hawthorn Report (1966-1967), and suggested that aboriginal peoples should be considered full Canadian citizens while still being able to maintain their Aboriginality.

multinational character, others thought it would simply result in the break-up of the country. In the end, the PQ's 1980 referendum failed to gain the support of a majority of Quebecers, the "Yes" camp collecting only 40.44% of the vote.

During the referendum campaign, Prime Minister Pierre E. Trudeau had promised that if Quebecers decided to stay within Canada, Canadian federalism would be renewed, but he had remained ambiguous as to what such reforms would entail (Laforest 1995). The federal government had tried repeatedly since the 1960s, but without success, to patriate the Canadian constitution and to entrench in it an amending formula. The constitutionalization of a charter of rights had been at the heart of Trudeau's project from the start of his political career (Trudeau 1968), but only became an important topic of discussion in 1978 with the tabling of Bill C-60. Throughout the different negotiation rounds Quebec was opposed to any constitutional modification that would reduce the scope of its powers within the Canadian federation and alter Canada's multinational qualities. Taking advantage of the fact that the PQ leadership had been weakened by the referendum loss, Trudeau decided to go forward with his constitutional renewal project. Under his leadership, Canada patriated its constitution in 1982 and entrenched within it the *Charter*, without the consent of Quebec. Many authors believed that the *Charter* was a direct response to Bill 101 and a way to recalibrate Canadian citizenship (Laforest 1995; Mandel 1994). The following section details the *Charter*'s original purpose and summarizes an early debate among scholars on what its potential impact on Canada's rights structure would be.

The *Charter*: Original Purpose and Potential Impact

The entrenchment of the *Charter* in the constitution (see Appendix I) was seen as a long-term solution to the country's cultural unrest and had a clear pan-Canadian nation-building objective (Russell, 1983; Cairns, 1991; Oliver, 1991; Tully, 1995; Behiels, 2003). In reality, it constitutionalized the "multiculturalism within a bilingual framework" adopted in the postwar period (Jenson 1991). A close look into Trudeau's vision reveals that this cultural rights arrangement was really meant to promote a polyethnic conception of citizenship. For the father of the *Charter*, the document was based on the "purest liberalism, according to which all members of a civil society enjoy certain fundamental, inalienable rights and cannot be deprived of them by any collectivity (state or government) or on behalf of any collectivity (nation, ethnic group, religious group or other)" (1990, 363). The *Charter*'s main emphasis was thus to be resolutely focused on individuals as rights bearers, to the detriment of collectivities.

But Trudeau also recognized that one of the problems associated with majoritarian democracy is the risk of having the rights of minorities infringed. That is why it was imperative for him that the *Charter* also protect minority rights. It would accomplish this, in Trudeau's view, by "enshrining the rights of the individual members within minorities" (1990, 364). This is why the linguistic rights of sections 16 to 23 were granted in Trudeau's view to individuals and not to collectivities. Most importantly, they were not given to a territorially-based community, such as the province of Quebec. Trudeau feared that such an arrangement would lead to the balkanisation of Canada and to intolerance towards minorities living inside Quebec. However, Trudeau thought that in "certain instances, where the rights of individuals may be indistinct and difficult to define, [the *Charter* and the *Constitution* should] also enshrine some collective rights of minorities" (1990, 364). This is why sections 25 and 35[6] guarantee specific collective rights for "the aboriginal peoples of Canada," while section 27 ensures the "preservation and enhancement of the multicultural heritage of Canadians." Nonetheless, Trudeau stressed that these provisions specifically "avoid any identification of these collectivities with a particular government," thereby cancelling the possibility of balkanization and intolerance (Ibid., 366).

Also of importance is Trudeau's concept of equality of opportunity, which guided his political agenda during his tenure as prime minister of Canada. While this concept is at odds with the "purest" form of classical Lockean liberalism, it is consistent with the liberal egalitarianism of John Rawls. According to this doctrine, freedom, and thus individual rights, must be limited in order to favour equality, the greater good. This principle is enshrined in section 36(1) of the *Constitution Act,1982* which embodies a commitment to promote equal opportunity for all. It is also found in section 15(2) of the *Charter* which states that equality before the law should "not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups." This provision would later be invoked to justify affirmative action programs for aboriginal groups (*R v Kapp* 2008).

When the *Charter* was first adopted, its potential impact on the cultural rights arrangement in Canada was much debated. While some authors contended that the *Charter* was only, or mostly, a vehicle for liberal individualism, others thought that it retained some elements of communitarianism. It was argued that the originality of the new Canadian constitutional order stemmed from the fact that it represented a true compromise between individual and collective

[6] While section 35 is included in the *Constitution Act, 1982*, it falls outside of the *Charter* per se.

rights. But what is the real difference between the two? According to David J. Elkins, an expert on human rights:

> Individual rights relate to benefits which accrue to a specific individual, with the "externalities" limited to the establishment of precedents for other individuals' ability to exercise these rights. Collective or community rights, on the other hand, may convey benefits on individuals, but those benefits will "spill over" onto a specific community and not to all individuals, and perhaps not even equally to all members of the community (1989, 702).

Few argued that the *Charter* represented the definitive victory of individual interests over communal ones. Only members of the critical legal studies school adhered to this position from a social justice point of view (Hutchinson 1995; Schneiderman and Sutherland 1997; Mandel 1994). If one looks at the language used in the sections on Fundamental Freedoms, Democratic Rights, Mobility Rights and Legal Rights, the liberal individualism conveyed by the *Charter* becomes apparent. However, if one looks at other sections - particularly "Equality Rights," "Official Languages of Canada," "Minority Language Rights," "Aboriginal and Treaty Rights," as well as "Multicultural heritage" - this emphasis on individuals becomes less evident. By referring directly or indirectly to minority groups, these sections possess a collective quality.

According to Cairns, "[t]he Charter gives constitutional recognition to a non territorial pluralism of women, 'multicultural' Canadians, official language minorities, and section 15 equality-seekers, among others" (1991, 84). The rights it confers on individual members of non territorial groups must be distinguished from territorially based 'national' rights like those demanded collectively by the Francophone Quebecers and aboriginal peoples. In the same way, F.L. Morton differentiated the minority group rights in the *Charter* that guarantee "non-discrimination" (section 15(1)) and "special treatment based on a group's unique legal status" (sections 15(2), 16 to 23, 25 and 35) from those related to "group self-government" that were not explicitly granted to the Québécois and First Nations in the legal document (1985, 71).

For Morton, non-discrimination and special legal status rights have a focus that is mainly individualistic: "[a] non-discrimination right [...] is the claim of an individual to be treated the same as everyone else regardless of minority group membership [and] special legal status amounts to the claim of an individual to be treated differently than anyone else because of minority group membership" (1985, 71-72). In those two cases, the groups hope to be better

integrated into, and participate more fully in, mainstream society while still preserving their distinct cultural attributes. In contrast, self-government rights are meant to help groups counter cultural assimilation from the dominant society and maintain a distinctive collective identity. Since the *Charter* only guarantees non-discrimination and special status rights, it mostly favours individual rights over collective rights according to Morton.

Yet, many legal theorists thought the language rights entrenched in the *Charter* could not be categorized as strictly individual or collective in nature (Manfredi 2001; Elkins 1989; Monahan 1987). Monahan stated that:

> Language freedom, as defined by ss. 16 to 23, is neither wholly individualistic nor wholly communitarian. Instead, a complex and symbiotic relationship between individual autonomy and community values is posited. Community is both a prerequisite for individual freedom and corollary of it. The complex and delicate linkage between individual and community is reflected most clearly in those provisions which make the exercise of individual rights expressly contingent on the presence of community (1987, 112).

This is made clear in section 20, in which the right to minority language services offered by the federal government is contingent on significant demand and in section 23, in which the right to minority language instruction is only guaranteed in places where numbers warrant .

Furthermore, it is not clear whether the multiculturalism clause favours individual or collective rights. As Michel Lebel reminded us, section 27 remains an interpretive clause that does not guarantee a particular right or freedom in the domain of multiculturalism *per se* (1987). It is most likely to throw light on the way in which section 2 on Fundamental Freedoms and section 15 on Equality Rights are to be interpreted. But as Joseph E. Magnet asserted, section 27 has the potential to promote symbolic ethnicity as well as structural ethnicity:

> "Symbolic ethnicity" is a psychological idea. It considers cultural heritage as a voluntary psychological identification of the self with the traditions and history of a particular identifiable group. The identification completes a person's sense of individual identity. It is a voluntary extension of the family. "Structural ethnicity" relates to the capacity of a group to perpetuate itself, control leakage, resist assimilation, and propagate its beliefs. It is not a matter of voluntary individual choice. Rather, it depends on the creation, by the group, of an institutional infrastructure, to maintain the well being of the group and to nurture its self-justification (1987, 148).

While symbolic ethnicity seems to be consistent with individual rights in the liberal pluralist tradition, structural identity clearly appears to be a form of collective right.

For his part, Kymlicka argued that multiculturalism promoted theoretically two types of group rights (1998). First, internal restrictions refer to the group's possibility to "protect [itself] from the destabilizing impact of internal dissent (e.g. decisions by individual members not to follow traditional practices of customs)" (Ibid., 62). Second, external protections refer to the group's capacity to "protect [itself] from external pressures (e.g. economic or political decisions made by the larger society)" (Loc.cit.). Kymlicka argued that external restrictions were compatible with the *Charter* and that this type of group right actually supplemented individual rights by extending liberal pluralism.

For some scholars (Elkins 1989; Monahan 1987), the collective quality of the *Charter* was reflected in the fact that it made a true compromise between the rights of individuals and the collective rights of society as a whole. They claimed that the limitation clause found in section 1 and the legislative override found in section 33 could allow society's collective goals aimed at the greater good to prevail over purely individualistic ones in certain instances.

The limitation clause found in section 1 of the *Charter* provides that rights and freedoms are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." As Janet Hiebert explained:

> An expansive interpretation of section 1 would allow Parliament and the provincial legislatures to promote, where justified, values other than those specifically enumerated in the Charter. This would enrich the Charter by embracing collective values that, like individual rights, are relevant to Canadian conceptions of a just and democratic society yet are not adequately captured by the Charter's highly individualist language (1996, 138).

When a *Charter* right is found to be violated, the onus to prove that this violation is justifiable in a free and democratic society rests on the government. Elkins thus saw in the limitation clause what he calls 'society's rights' (1989). For Trudeau, the *Charter* permitted the pursuit of society's common good, even though the language of its provisions served mostly the cause of individuals (1990).

As Hiebert has suggested, the courts first showed a certain reluctance to justify rights infringements under section 1 (1996). It was only two years after the implementation of the *Charter* that the Supreme Court of Canada developed a test for the application of the limitation clause in *R v Oakes* (1986). For Hiebert, "[t]he evaluation of reasonableness involves policy analysis (not precedents, experiences and expertise): a task that requires subjective evaluations of the merits of legislation and discretionary assessment on whether better or alternative legislative means are available" (1996: 71) . Therefore, section 1 not only gives power to the legislatures, it also gives significant power to the courts in deciding whether or not individual rights should take precedence over collective ones or not.

The other remedial mechanism found in the *Charter* is section 33, better known as the 'derogatory clause' or the 'notwithstanding clause'. It can be used by governments to overcome a *Charter* decision which strikes down one of their laws. Originally, the legislative override was not part of Trudeau's grand constitutional design (1990). Trudeau knew this provision had the power to threaten his nation-building project. But since the Supreme Court had ruled that, by constitutional convention, the federal government needed a substantial degree of provincial consent to patriate the constitution and enact the *Charter* (*Reference Re Resolution to amend the Constitution* 1981), it conceded section 33 to the provinces in order to gain their consent. In the end, Trudeau won the support of all the provinces except Quebec.

Section 33 stipulates that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." This clause has a five-year limitation period, after which the concerned government must either conform to the initial judgment or re-enact the override. What is interesting about section 33 is that it is not applicable to language, aboriginal peoples or multiculturalism rights. Yet what is even more interesting is that it can play both in favour of individual as well as collective rights.

According to many authors, this override mechanism has become less effective, since its perceived abusive use by the Quebec government has undermined its legitimacy (Hiebert 1996; Manfredi 2001; Russell 1994).[7] Prime Minister Paul Martin's declaration during the 2006 federal election leaders' debate that it should be abolished illustrates its perceived illegitimacy. Andrew

[7] Only nine weeks after the enactment of the *Charter*, the National Assembly of Quebec passed Bill 62 (*Act respecting the Constitution Act* 1982) which declared that all of Quebec's statutes would operate notwithstanding the provisions included in section 2 or sections 7 to 15 of the *Charter*.

Heard has argued that the lack of use of the notwithstanding clause has become a convention, if not in Quebec, at least in English Canada (1991). Conventions do not, however, necessarily have the force of law. Therefore, governments continue to have the right to invoke it.

In the end, Elkins had a difficult time imagining that the courts would endanger the accommodation of diversity that has made Canada a model for the world to emulate (1989). For his part, Patrick Monahan called upon judges to recognize the communitarian tradition of Canadian politics when interpreting the *Charter* (1987). Since then, the debate about the nature of the rights embodied in the *Charter* appears to have been superseded by, among other things, debates about legislative-judicial dialogue[8] and explanations for judicial decision making.[9] Nevertheless, the courts through judicial review have further delineated the rights found in the *Charter* and have unavoidably affected the prevailing model of citizenship in Canada.

Judicial Review

The constitutional entrenchment of the *Charter* in 1982 dramatically changed Canada's institutional context and facilitated the judicialization of politics (see, e.g., Knopff and Morton 2000; Manfredi 2001). Just as Trudeau had intended, it gave the courts, and especially the Supreme Court of Canada, a greater role in interpreting the scope of rights and limiting the powers of government (1996). Before 1982, the courts had mainly served as an umpire of federal-provincial relations under the 1867 constitution (Swinton 1990), but the new constitutional regime gave them the power to effectively adjudicate citizen-state relations. First, section 52(1) of the *Constitution Act, 1982* substituted constitutional supremacy for parliamentary supremacy in Canada. Second, section 24(1) gave the courts the power to enforce the rights found in the *Charter*. The new constitutional rights provisions described above coupled with the increased influence of the courts and a strong support structure for legal mobilisation resulted in what has been called in Canada a *Charter* revolution (Knopff and Morton 2000; Epp 1998).

[8] The notion of constitutional dialogue was first coined by Peter W. Hogg and Allison Bushell (now Thornton) (1997). It was then criticised and clarified by different constitutional experts, like Christopher P. Manfredi and James B. Kelly (1999), Janet Hiebert (2002), Matthew Hennigar (2004)and James B. Kelly (Kelly 2005).

[9] There are three main models for explaining judicial decision making. First, the institutional model contends that institutional arrangements affect judicial decision making (See, e.g. Flemming 2004). Second, the attitudinal model believes that judges are mainly guided by their own personal policy preferences (See, e.g. Ostberg and Wetstein 2007; Songer 2008). Third, the strategic model considers that judges strategically maximise their policy preferences while trying to minimise criticism to the effect that they are bypassing the law (See, e.g. Manfredi and Rush 2008; Radmilovic 2010).

To this day, no complete and methodical study has looked at the impact of the courts' decisions on the structure of cultural rights in Canada nor at the way the judiciary has understood cultural citizenship after 1982. Most of the scholarly attention has been given to civil rights. The *Charter*'s impact has been mostly evident in the area of criminal justice (Russell 1994; Knopff and Morton 2000; Manfredi 2001), and thus scholars have devoted most of their attention to this policy area. The second area in which *Charter*-based litigation has been highly successful is equality rights, especially in cases supported by feminist movements (Morton and Allen 2001; Manfredi 2004).

However, only three years after the implementation of the *Charter*, minority language rights cases were found to have had the highest success rate (Morton 1987). Francophone minorities outside Quebec gained significantly through remedial decree litigation (Riddell 2009; Manfredi 1994). But they were not the only beneficiaries of the new constitutional provisions. Some landmark cases were rendered in the late 1980s which struck down important provisions of the *Charter of the French Language* - also known as Bill 101 - in favour of the Anglophone Quebec minority (De Montigny 1997). Overall, Allan C. Hutchinson believes that the courts' jurisprudence has protected individual rights over Quebec's collective right to maintain its language and culture (1995). The recent Supreme Court case *Nguyen v Quebec* (2009) on the constitutionality of the so-called bridging-schools[10] still requires scholarly attention.

A study in 1987 found that the "Multicultural Heritage" clause of the *Charter* had been used as an interpretive tool for cases dealing with fundamental freedoms, equality rights, official languages and minority language rights. Since then, few studies have given a systematic analysis of this topic. A case study on the *Charter* jurisprudence of Ontario's educational system with respect to multiculturalism revealed that the courts favoured liberal neutrality over minority group rights (Dickinson and Dolmage 1996). In the same way, Shannon Ishiyama Smithey found that the *Charter* had failed to promote religious multiculturalism (2001). On the occasion of the *Charter*'s 20th anniversary, Jack Jedwab concentrated on its impact on Canadian multiculturalism, but his survey of the related jurisprudence remained limited (2003).

As for the new constitutional provisions related to aboriginal Canadians,[11] their actual and potential use for advancing the cause of Canada's first inhabitants has been identified by David C.

[10] Parents whose children were not entitled to receive publicly funded education in English according to section 23(1) of the *Charter*, would enrol their children in unsubsidized English schools for a short period of time so as to permit them to acquire the right to publicly funded English-language education thanks to section 23(2).

[11] The new constitutional provisions include section 25 of the *Charter* and section 35 of the *Constitution Act, 1982*.

Hawkes and Bradford W. Morse (1991). Despite a few promising early *Charter* judgments, Michael Murphy asserts that the Supreme Court's 1990s jurisprudence on aboriginal issues has dampened the hope of having self-government constitutionally recognized (2001). Similarly, after a careful reading of some aboriginal and Treaty rights landmark cases, Kiera L. Ladner and Michael McCrossan concluded that the new constitutional order did not fulfill the promise of a post-colonial regime for aboriginal peoples (2009). As Caroline Dick suggests, by "choosing a cultural justification for aboriginal rights, the Court's jurisprudence weakens the claims of aboriginal peoples for self-determination" (2009, 976).

Furthermore, an important aspect of judicial-review is the way it is received and applied by governmental authorities (Rosenberg 1991). Surprisingly, the bulk of *Charter* studies have been court-centered and the few that have tried to measure political compliance with court decisions have adopted mainly a statistical and procedural focus rather than a substantive one (Hogg and Bushell 1997; Manfredi and Kelly 1999; Hogg, Thornton, and Wright 2007; Hennigar 2004). Most importantly, they have not paid attention to how judicial-review has affected cultural policies. This dissertation seeks to fill this gap in the literature by not only conducting a methodical examination of cultural jurisprudence in Canada, but also by looking at how the jurisprudence has been translated into law and regulation. In this way, it seeks to properly assess the impact of judicial-review on pan-Canadian cultural citizenship.

RESEARCH QUESTION AND EXPLANATORY HYPOTHESIS

This dissertation aims to determine what impact *Charter*-based judicial review has had on pan-Canadian cultural citizenship. To do so, it will answer three corollary questions. First, what rights arrangement has been established by the Supreme Court's jurisprudence in the cultural domain after 1982? Second, has this new rights arrangement been matched by laws and regulations? Finally, how has *Charter*-based judicial review and its political repercussions affected pan-Canadian cultural citizenship? The dissertation will aim to verify the explanatory hypothesis[12] that *Charter*-based judicial review has confirmed and pushed further the choice Canada made

[12] The research question can best be answered by an explanatory hypothesis. This type of hypothesis is used for case studies, who unlike large-*n* observations, do not seek to test prime hypotheses (Van Evera 1997). Here the research question calls for a case study since it seeks to understand the particular impact of *Charter*-based judicial review on pan-Canadian cultural citizenship rather than the universal impact of constitutional judicial review on citizenship, which would require a large-*n* analysis.

after the Second World War to promote a polyethnic citizenship. The assumption here is that institutional nation-building objectives limit judicial review's potential for greater accommodation of diversity. The dissertation will thus explore the idea that the ideal of a polyethnic pan-Canadian citizenship prevents the recognition of new self-government rights for aboriginal peoples and Quebecers, even though there is interpretive space for such a constitutional reading.

THEORETICAL APPROACH

The explanatory hypothesis stated above is supported by an historical institutionalist approach. Through historical institutionalism, the impact of *Charter*-based judicial review on pan-Canadian cultural citizenship becomes more visible. This school of thought is part of the larger approach of new institutionalism, which posits that political institutions affect political outcomes (Hall and Taylor 1996; Immergut 1998).

According to the literature, historical institutionalism has four main characteristics (see, e.g., Hall and Taylor 1996; Lecours 2000). First, this theoretical approach argues that institutions not only condition political actors' strategic calculations, but also their primary policy preferences. This could explain why the Supreme Court, as a federal institution, has been permeated by the polyethnic ideal promoted by the Canadian federal state since the postwar period. Second, historical institutionalism recognizes the influence power asymmetries may have on institutional development. As it will be argued, the Quebec government has had a limited capacity to offset judicial decisions in order to promote a multinational vision of citizenship. Third, historical institutionalism recognizes the theory of path dependency according to which "institutions, once created, take 'a life of their own' and may generate processes not intended, nor foreseen, by their creators" (Lecours 2000, 517). This might explain why in some cases, new rights provisions brought about by the 1982 constitutional renewal may have evolved in a direction different from the one the Canadian government had originally intended. Finally, historical institutionalists believe that macro-level structures, such as a globalized economy, can affect social and political action. It is possible to imagine that the multiplication of group identities brought about by a globalized world (see, e.g., Ignatieff 2000) has had an impact on the quantity and quality of the challenges brought before the Supreme Court by different cultural groups.

According to the literature, historical institutionalism is an appropriate approach to tackle the topic of this dissertation. First, Cornell W. Clayton and Howard Gillman, who are experts in judicial politics, have identified historical institutionalism as appropriate for judicial review studies:

> Supreme Court Scholars engaged in these historical institutional studies tend to assume that judicial behaviour is not merely structured by institutions but is also constituted by them in the sense that the goals and values associated with particular political arrangements give energy and direction to political actors. The work is historical because it is assumed that, over time, as institutions interact with other features of the political system and attempt to cope with a changing society they might transform themselves and develop new norms and, traditions and functions (1999, 6-7).

Second, André Lecours suggests that historical institutionalism can also help us understand how cultural identities are constructed and modified by institutions (2000). Here, cultural identities are defined not as an ahistorical given, but as a product of institutional processes through time. Historical institutionalism thus becomes very relevant to the study of the concept of citizenship, which is not only linked to public policy but also to political identity. For example, Jane Jenson has used historical institutionalism to explain shifts in Canada's citizenship regime (1997).

METHODOLOGY

The central question of this dissertation is the extent to which *Charter*-based judicial review has affected pan-Canadian cultural citizenship in both theory and practice. The dissertation posits that the impact of judicial review is a function of the jurisprudential argument it develops, the specific outcomes in particular cases, and the changes it generates for legislation, policy and practices. Not every *Charter* case implicates cultural citizenship to the same degree. In the Canadian context, the constitutional rights most closely connected to cultural citizenship involve language, multiculturalism and national minorities. By engaging in a case study of *Charter* decisions involving these sets of rights, the dissertation can contribute to a greater understanding of the relationship between rights-based judicial review and this particular aspect of citizenship.

Data Collection

Selection of Court Cases

In order to examine its central question, the dissertation analyses all the Supreme Court *Charter*-based decisions and references that involve the validity of a law, regulation or administrative arrangement relating to minority language, multiculturalism or aboriginal issues. The dissertation also includes decisions brought under section 35 of the *Constitution Act, 1982* even though this provision falls outside of the *Charter*. Section 35 has conventionally been associated with the *Charter* revolution by its spiritual father, Trudeau (1990), and political scientists (see, e.g., Morton et al. 1992; Morton et al. 1994; Knopff and Morton 2000). As well, just like other *Charter* provisions, section 35 has led to rights-based judicial review, in which individuals and groups challenge government policies on the basis of rights. The Supreme Court decisions that form the study are listed in Appendix II. In total, 49 decisions are included in the study: 14 minority language decisions, 12 multiculturalism decisions and 23 aboriginal issues decisions.

Selection of Statutes

The laws, regulations and administrative arrangements selected for the study were those that were at issue in the selected Supreme Court cases or their legislative sequels. Legislative sequels have been defined by Peter W. Hogg and Allison A. Bushell as regulations and statutes that are a direct "response to the declaration by a court that a law was of no force or effect" (1997, 82). According to Christopher P. Manfredi and James B. Kelly, this definition is under inclusive because it fails to take into account instances where the courts have "read-in" new rights in existing legislation and where this legislation has in turn not been amended (1999, 516). For the purpose of the dissertation, Manfredi and Kelly's more comprehensive definition of legislative sequels was adopted.

Furthermore, to be considered a legislative sequel, the statute had to be enacted within a 6-year period following a judgment. In the case of an impugned statute, this left enough time for the legislatures to respond.[13] This also left enough time for government to comply with a judicial decision if they were to invoke the notwithstanding clause; the latter clause has a limited 5-year application. In the case of a legal victory by government, this left ample time for the losing complainants to mount a lobbying and public campaign to convince elected officials to change the unpopular law regardless. Finally, the researcher is aware that a certain symbolism attached to

[13] In *Corbiere* v *Canada* (1999) for example, the Supreme Court gave the federal government an 18 months stay, suspending the effects of the decision so that it could implement the necessary measures to conform to it.

a decision may inform future legislation. Given that this is harder to measure empirically, this was not treated in this study.

Data Analysis

The dissertation will use a categorizing strategy as well as a contextualizing strategy to answer its research questions about legal change, policy compliance and overall impact on pan-Canadian cultural citizenship. Joseph A. Maxwell believes both of these data processing methods should be combined in qualitative research in order to maximise insights (1998). These approaches are complementary and each one addresses the shortcomings of the other. The categorizing strategy allows the researcher "to develop a general understanding of what is going on, to generate themes and theoretical concepts, and to organize and retrieve [...] data to test and support these general ideas" (Ibid., 89). On the other hand, it prevents the researcher from "look[ing] for relationships that connect statements and events within a particular context into a coherent whole," which the contextualizing strategy permits .

Legal Change

To begin, the researcher will determine in each case whether the Court found in favour of the litigant or of the government. If an appeal is dismissed, it will indicate no legal change and conversely if an appeal is allowed it will indicate there is legal change. Appeals allowed in part will be considered as generating legal change. Legal change will manifest itself in judicial declarations of invalidity of laws or instances where the Court "reads-in" certain rights in the existing legislation. This conception of legal change runs counter to the conception of the integrity and coherence of the law. According to this vision, interpretation of the law is considered to be "the law." Therefore, "reading-in" does not constitute a legal change but is rather an interpretation of the law as it already existed. However, for the purpose of this dissertation, the use of this technique of statutory interpretation will be considered to engender legal change because it requires governmental authorities to apply the law differently than in the past. As for *Charter*-based references, they will be considered to generate legal change if they compel government to amend existing legislation or to adopt new policies and regulations.
The dissertation will then try to ascertain what type of rights arrangement has been established by the Supreme Court's jurisprudence in the cultural domain after the adoption of the *Charter*. In order to do so, a categorizing strategy will first be used. It will consist of coding the different

Supreme Court decisions to determine what kind of right they promote.[14] Here, rights are not only understood in the strict legal sense. As the literature review has established, they include both legal provisions and policy instruments. The categories used will be borrowed from existing theory, and will rely on Elkin's definition of individual and collective rights as a basic starting point. As previously mentioned, he defines individual rights as those "relat[ing] to benefits which accrue to a specific individual, with the 'externalities' limited to the establishment of precedents for other individuals' ability to exercise these rights" and collective rights as those "convey[ing] benefits on individuals, but those benefits will 'spill over' onto a specific community and not to all individuals, and perhaps not even equally to all members of the community" (1989, 702).[15]

Since some rights have both individual and collective elements, it is necessary to establish intermediary categories. To do so, the literature identifies a series of group-differentiated rights. As previously mentioned, Morton distinguishes between non-discrimination group rights, special status group rights and self-government group rights for minorities (1985). Similarly, Kymlicka differentiates three types of demands made by cultural minority groups: special representation rights for disadvantaged groups, multicultural rights for immigrant and religious groups and self-government rights for national minorities (1995). While these categorizations are more helpful than the strict binary distinction between individual and collective rights, they still fail to capture the complexity of cultural rights. To date, the most comprehensive classification that incorporates all the different definitions of cultural group rights in the existing literature is the one elaborated by Jacob T. Levy (1996). He summarizes it as follows :

Category	Examples
Exemptions from laws which penalize or burden cultural practices	Sikhs/motorcycle helmet laws, Indians/peyote, hunting laws

[14] In cases involving a minority opinion, only the outcome of the majority opinion will be assessed.
[15] It is important to note here that when government faces rights claims, it can argue in favour of collective as well as in favour of individual rights. Therefore, a governmental loss does not necessarily equate to an individual right victory.

Assistance to do those things the majority can do unassisted	Multilingual ballots, affirmative action, funding ethnic associations
Self-government for ethnic, cultural or "national" minorities	Secession (Slovenia), federal unit (Catalonia), and polity (Puerto Rico)
External rules restricting non-member's liberty to protect member's culture	Quebec/restrictions on English language, Indians/restrictions on local whites voting
Internal rules for member's conduct enforced by ostracism, ex-communication	Mennonite shunning, disowning children who marry outside the group
Recognition/enforcement of traditional legal code by dominant legal system	Aboriginals land rights, traditional or group-specific family law
Representation of minorities in government bodies, guaranteed or facilitated	Maori voting roll for Parliament, U.S. black-majority Congressional districts
Symbolic claims to acknowledge the worth, status, or existence of various groups	Disputes over name of polity, national holidays, teaching of history

Source: Levy (1996, 25).

In sum, the literature has identified three broad classes of rights: individual rights, collective rights and group-differentiated rights. For the purpose of the study, rights granted to every citizen irrespective of cultural group affiliation will be identified as "individual rights." Rights that benefit Canadian society as a whole and are non-group differentiated will be identified as "societal collective rights."[16] As for the group-differentiated rights, the dissertation will use the cultural rights in Levy's classification, except for "symbolic claims" and "internal rules." Symbolic claims belong strictly to the political arena and it is difficult to imagine that it could be the object of judicial review. Internal rules for their part, do not involve state law or policy and cannot be the object of constitutional review.

In addition, "anti-defamation rights" which relate to minorities' right not to be the victim of overt racism have been included in the categorization. This type of rights is problematic because it cannot be strictly associated with individual, collective or group-differentiated rights. As will be discussed in Chapter II on Multiculturalism, anti-defamation rights are defined in different ways and justified on several grounds. First, they give every individual the rights not to be discriminated against (individual right logic). Second, the presence of anti-defamation rights is

[16] The collective rights defended by provinces will also be considered to be societal in nature, since they represent the interests of sub-units of Canadian society. The collective rights promoted by the province of Quebec will only be considered societal in nature when they do not involve the specific French culture of its Francophone majority.

said to contribute to the establishment of a more tolerant society (collective right logic). Third, anti-defamation rights benefit in practice mostly certain cultural minorities (group-differentiated right logic). By including anti-defamation rights, the final categorization used is believed to be exhaustive enough to ensure reliability.

Furthermore, the dissertation will use a contextualizing strategy to render an account of legal change. The selected Supreme Court *Charter* cases will be submitted to a doctrinal analysis.[17] In this "classical form of legal scholarship[, the] researcher examine[s] the content of a legal opinion to evaluate whether it was effectively reasoned or to explore its implications for future cases" (Tiller and Cross 2006, 518). The dissertation will limit itself to determining the kind of interpretational logic that lies behind *Charter*-based judicial decision-making that affects the cultural rights arrangement in Canada. It will not assess the normative value of these decisions. However, the dissertation will be interested in how the arguments being put forward by the judiciary in certain cases inform subsequent ones. Here, not only the majority opinions of the Court will be analyzed but also the minority opinions. Often, minority opinions will inform subsequent cases or legislative sequels. In general, their presence signals that there are diverging views in society on some issues and that there is interpretational space for different outcomes.

The outcome of constitutional cases depends largely on the types of arguments used by the judiciary. Hogg conceives of four general methods of interpretation used to construct the *Charter*: progressive interpretation, generous interpretation, purposive interpretation and process as purpose (Hogg 2005). First, progressive interpretation rests on the idea that the constitution should be interpreted in a flexible way so as to adapt it to evolving social circumstances. This method has inspired the "living tree approach"[18] in Canadian constitutional law. It has also been described as contrary to American "originalism," which posits that the constitution should be interpreted according to the original intent of its drafters. Second, generous interpretation calls for a large and liberal approach in interpreting the *Charter's* provisions and usually results in a limitation of government's power. Third, purposive interpretation tries to determine the purpose of constitutional rights. The purpose will usually be derived "from the pre-Charter history and

[17] A legally trained reader might be sceptical of a political scientist who attempts to go about doing this without training in the tradition of legal interpretation. However, this dissertation hopes to inscribe itself in the long tradition of public law research in political science in both the United States and Canada. In Canada, this tradition began with J. R Mallory in the 1950s (1954), and continued in the 1960s with Peter H. Russell (see, e.g., 1965). Today, this tradition is being continued by F.L. Morton, Rainer Knopff, Janet Hiebert, James B. Kelly, and Christopher P. Manfredi among others.

[18] In *Edwards v A.-G. Can.* (1930), Lord Stankey stated that "[t]he British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."

from the legislative history of the Charter" (Ibid., 749). A fourth method of interpretation, process as purpose, as the name suggests sees the process as the main purpose of the *Charter*. Therefore, the constitutional provisions are constructed in a way that either favours procedural fairness or reinforcement of the democratic political process.

Aside from the above general methods of interpretation, Hogg identifies two instances in which certain rules of interpretation apply: when rights conflict and when there are discrepancies between the English and French versions of the *Charter*.[19] When rights conflict, the courts have preferred "ad hoc balancing" to "definitional balancing,"[20] meaning that:

> [T]he scope of each right should be defined without regard for the existence of other rights. When other rights are invoked in support of a challenged law, the conflict is to be resolved by application of the justificatory principles of s. 1. In that way, the Court does not assign priorities to rights, except in the context of a specific law in a particular case (Ibid., 754).

Certain rules have also been adopted for resolving discrepancies between the English and French versions of the *Charter*. Since both versions are equally authoritative as per section 57 of the *Constitution Act, 1982*, the general rule stipulates that "where there is divergence between the two language versions, that meaning should be selected that is compatible with both versions" (Ibid., 1190). The dissertation will be interested in seeing how the different general methods of interpretation and constitutional rules affect the structure of rights promoted by the *Charter*'s cultural jurisprudence.

Political Compliance

Once the legal impact of *Charter*-based judicial review on Canada's cultural rights arrangement has been evaluated, its political compliance will be analysed. This dissertation considers the impact of *Charter*-based judicial review to be extramural as well as intramural. As described by F.L. Morton and Avril Allen, "[e]xtramural studies expand the focus of inquiry to what happens outside the courtroom and after the judgment" (2001, 64). As previously mentioned, court decisions will have no policy impact unless they are enforced by government (Rosenberg 1991).

[19] Hogg also talks of a "Hierarchy of rights" which is related to the fact that some provisions are subject to the notwithstanding clause (section 33), while others are not. Since this does not influence constitutional construction *per se*, it will not be considered as a rule of interpretation for the purpose of this dissertation.
[20] An exception to this rule can be found in cases involving sections 29 (denominational rights) and 25 (aboriginal and treaty rights) which deal directly with conflicts between rights and offer guidance as to how to resolve them.

If a statute is found to be unconstitutional by the courts, the legislatures may reverse, modify or avoid the judgment (Hogg and Bushell 1997). If a statute is found to be constitutional, the policy status quo can still be altered when civil society forces politicians to reverse a court decision perceived as unfair (Pal and Morton 1986).

The Promotion of Cultural Citizenship

To assess the type of cultural citizenship promoted by judicial review, the dissertation will first look at the types of rights that have been the most frequently promoted by the *Charter* in the cultural domain. As previously mentioned, the types of cultural rights prevailing in a polity inform its model of cultural citizenship. Undifferentiated citizenship has been defined as recognizing the rights-bearing equality of individuals and as being blind to cultural group differences, and under this model fall individual rights that apply equally to everyone. Societal collective rights also fall under this heading because they do not take into consideration group preferences within Canadian society. Anti-defamation rights can be associated with an undifferentiated citizenship as well because, even though they benefit some groups more than others, they are available to every citizen regardless of group affiliation. Furthermore, they are often justified on the basis that they benefit society as a whole.

The polyethnic model of citizenship is characterized mostly by the granting of group differentiated rights that permit cultural retention, but promote first and foremost social integration. Exemptions are an example of these types of rights. According to Levy, exemptions are exercised individually and "while they are group-differentiated they are not 'group rights' in any meaningful sense" (Levy 1996, 28). As for assistance rights, they help minority groups do those things the majority can do unassisted in order to help them better integrate into mainstream society. The same logic applies to representation rights. As Kymlicka and Norman explain, these rights are put in place as a temporary measure in the hope that they will be rendered useless once the minority group is well integrated into society (Kymlicka and Norman 1994).

The multinational citizenship model helps cultural groups, and especially national minorities, to counter cultural assimilation from the dominant society and maintain a distinct collective identity. This is achieved mostly with the establishment of parallel social structures. Self-government, external rules and recognition/enforcement rights all permit the establishment of such structures.

The following table summarizes the different models of cultural citizenship and the different types of cultural rights associated with each one of them:

Cultural citizenship models	Associated cultural rights
Undifferentiated citizenship	• Anti-defamation • Societal collective • Individual
Polyethnic citizenship	• Assistance • Exemption • Representation
Multinational citizenship	• External rules • Recognition/enforcement • Self-government

The dissertation will evaluate which citizenship model collects the largest amount of associated cultural rights through judicial review. While this categorizing method may serve as an indicator of the type of cultural citizenship being promoted, it is likely to generate results that do not faithfully reflect reality. The measurement tool will certainly give an idea of the propensity of court decisions and policies to promote certain rights over others but will not permit to appreciate the relative importance of each case with regards to Canadian cultural citizenship as a whole. Therefore, the dissertation will not give all the cases the same attention. Some cases, especially those that are considered "landmark cases," will be discussed more than others. Also, since the categorizing strategy can prevent the researcher from understanding the contextual relationships between the data, the contextualising strategy will be important, especially in determining whether there have been changes to the Canadian citizenship in the cultural domain after 1982.

CONCLUSION

Consistent with historical institutionalism, the dissertation treats *Charter* judgments as an integral part of the institutional rules that shape political behaviour. The question posed by the dissertation is whether these judgments have established a consistent set of new rules about cultural citizenship that political actors have followed in establishing legislation and regulations. The Court may "theorize" citizenship in new ways in these cases, but it is political action that

translates this theory into new practices of citizenship. By examining both judicial decisions and subsequent political behaviour, the dissertation aims to contribute to both our understanding of citizenship and the *Charter*'s political impact.

The next three chapters will look at the impact of *Charter*-based judicial review in the areas of minority language, multiculturalism and aboriginal issues. The final chapter will bring together the data from the previous chapters to make general inferences on *Charter*-based judicial review in the cultural domain and to draw conclusions on post-1982 pan-Canadian cultural citizenship.

Chapter I: Minority Language

INTRODUCTION

Minority language rights occupy a prominent place in the *Canadian Charter of Rights and Freedoms* (hereafter "*Charter*") and contribute to its originality. These rights fall into two categories. First, official language rights, found in sections 16 to 22, give French and English the status of official languages in the operations of the federal government and the government of New Brunswick. They extend the rights found in section 133 of the *Constitution Act, 1867*[21] and constitutionalize the principles of the *Official Languages Act of Canada, 1969* (hereafter "OLA"). The second category of linguistic rights included in the *Charter* is educational rights listed under section 23. Their addition to the constitutional edifice of Canada was a novelty. While denominational education rights had been protected since Confederation, the courts had ruled that they did not include educational linguistic rights (*Ottawa Separate Schools Trustees v MacKell* 1917; *Bureau métropolitain des écoles protestantes de Montréal v Ministre de l'Éducation du Québec* 1976).

Since the enactment of the *Charter*, the courts have been called upon to interpret the meaning of minority language rights (sections 16 to 23), as well as other provisions that affect the use of language, such as freedom of expression (section 2(b)), legal rights (sections 7 and 14), equality rights (section 15(1)) and enforcement (section 24). This chapter reviews the Supreme Court of Canada's jurisprudence on minority language rights, as well as its reception by governmental authorities, to determine what type of citizenship the *Charter* has promoted. Cases involving linguistic minorities outside and inside Quebec will be covered. It will be argued that *Charter*-based judicial review has confirmed and pushed further Canada's choice of a polyethnic model of citizenship. More specifically, it will be shown that the assistance and representation rights of linguistic minorities have been promoted to the detriment of the provinces' societal collective rights and particularly, to the detriment of Quebec's use of external rules to protect its culture. Before tackling these matters, this chapter will first take a look at the nature of minority linguistic rights in Canada.

[21] Section 133 of the *Constitution Act, 1867* establishes both French and English as the languages of the courts. It also permits the use of French and English in the Parliament of Canada and the Quebec legislature.

MINORITY LINGUISTIC RIGHTS

According to Jacob T. Levy, minority language rights fall under the category of assistance rights (1996). Assistance rights help cultural minorities to "do those things the majority can do unassisted" (Ibid., 25). Unlike other assistance rights, minority language rights tend to create parallel social structures (Ibid.). For instance, in the area of education, they may require the establishment of separate schools. Thus, it could be argued that they belong to a multinational rather than a polyethnic conception of citizenship. Still, this dissertation associates them with the polyethnic model. Though they find their origin in the historical "binational" character of Canada, they have evolved to be individualistic in focus (Morton 1985). In reality, the *Charter* favours a non-territorialized bilingualism that recognizes the individual right of every Canadian to use French or English across the country, as opposed to a territorialized bilingualism which would give the collective right to national minorities, such as Francophone Quebecers for instance, to protect their language (Burelle 1995).

As will be discussed in this chapter, the educational rights found in section 23 of the *Charter* have been interpreted to include a right to "management and control" of minority-language schools (*Mahe v Alberta* 1990). This right constitutes a representation right since it gives minorities the possibility of having their interests protected in existing governmental bodies. Although the jurisprudence allowed for the establishment of separate school boards for the minority in some cases, these would still report to the provincial government and not constitute a totally distinct social structure. Therefore, the representation rights granted by judicial review in the area of minority language education can be associated with a polyethnic model of citizenship as well.

In theory and practice, assistance and representation rights have conflicted with the societal collective rights of majorities. The fact that the language provisions in the *Charter* are not subject to the notwithstanding clause found in section 33 of the *Charter*, severely reduces the federal and provincial governments' capacity to affirm their parliamentary authority in language policy matters. Governments are thus left to rely exclusively on the limitation clause found in section 1 of the *Charter* to justify legislative choices that might be found to infringe language rights. Furthermore, the detailed nature of educational rights has been said to interfere directly with the provinces' constitutional jurisdiction to legislate in the field of education (Mandel 1994). In the unique Quebec case, the new national linguistic rights regime goes against the province's

external rules to protect the culture and identity of its Francophone majority, which is itself a minority in North America. The following section summarizes the minority language rights judicial review outside Quebec.

LINGUISTIC MINORITIES OUTSIDE QUEBEC

The outcome of judicial review based on minority linguistic rights outside Quebec illustrates clearly a preference for a polyethnic citizenship as opposed to an undifferentiated one. In many instances, governments adopted, sometimes reluctantly, new group-differentiated legislation following the Court's orders. More precisely, assistance rights and representation rights within existing Canadian institutions were given to Francophone minorities to facilitate their well-being in Canada. As will be discussed, this has been the case to some extent in the public services domain (federal and in New Brunswick), and to a greater extent in the area of minority language education.

Federal Public Services

The federal government has not come under attack as much as the provinces in the area of minority language rights. Since 1969, the OLA has established institutional bilingualism within the Canadian government. Subsequent to the adoption of the *Charter*, the OLA was substantially amended in 1988 to take into account the federal government's new constitutional obligations, making it a quasi-constitutional document. However, this did not prevent federal governmental action from being challenged at the Supreme Court level by a Francophone minority group seeking an assistance right in *DesRochers v Canada* (2009).

DesRochers v Canada (2009)

DesRochers (2009) concerned the quality of economic development services, that Industry Canada offered to the Francophone community of Huronia through the North Simcoe Community Futures Development Corporation (hereafter "North Simcoe"). Due to North Simcoe's incapacity to provide services in French, the Francophone community had put in place in 1995 its own organisation, the Corporation de développement économique communautaire CALDECH (hereafter "CALDECH"), to service its members. Still, CALDECH filed a complaint

with the Commissioner of Official Languages that resulted in North Simcoe's adopting corrective measures. Even though North Simcoe was providing bilingual services, CALDECH was still dissatisfied with the quality of the French services compared to that of the English ones. Before the country's highest tribunal, CALDECH was now claiming that under section 20(1) of the *Charter* and section IV of the OLA, North Simcoe had to take into account the special needs of the French-speaking community in developing and implementing its programs. CALDECH was also demanding funding to service the Francophone community of Huronia until North Simcoe put in place the appropriate services.

In *DesRochers*, the Court affirmed without hesitation that section 20(1) of the *Charter* and section IV of the OLA, read in light of section 16(1) of the *Charter*, warranted the right to services of equal quality in both French and English. Since all the parties involved in the case agreed on this matter, the bench did not bother explaining the way in which section 16(1) could promote such an obligation. The real issue in this case was the scope of this right to services of equal quality. To that effect, the Court found that the principle of linguistic equality in communications and the provision of services could entail access to services with distinct content for the minority. Justice Charron, writing for a unanimous court, held that "[d]epending on the nature of the service in question, it is possible that substantive equality will not result from the development and implementation of identical services for each language community" (para 51).

This interpretation of the underlying principles of section 16(1) and 20(1) of the *Charter* created an important precedent for linguistic minorities, especially for Francophones outside Quebec. However, the Court was careful to qualify this new assistance right to services of equal quality under the OLA. First, the Court specified that under Part IV of the OLA the federal government did not have to provide a set minimum level of quality or to satisfy truly the needs of both the majority and minority. Second, the Court contended that the right to services of equal quality did not necessarily have to produce equal outcomes for the majority and the minority. As illustrated by the case at hand, these limitations were fatal to the appellant's plea, making this legal breakthrough less meaningful for linguistic minorities in general.

In the end, the Court dismissed CALDECH's appeal. It argued that the nature and objectives of the federal economic development policy literally required the authorities to consult members of the Francophone minority to take into account their special needs. Since the majority community had been consulted for the definition and implementation of programs, the minority community

also had to be consulted to uphold the principle of linguistic equality. At the time of the application for appeal, the Francophone community of Huronia was already being consulted by North Simcoe. While the Court agreed that the services provided to the French-speaking community by North Simcoe did not have the same results as the ones provided for the English-speaking community, it could not conclude, taking all the evidence into account, that these services were not of equal quality. This balanced approach to official languages rights at the federal level would be echoed at the provincial level in the case of New Brunswick.

New Brunswick Public Services

Contrary to all other Canadian provinces, New Brunswick fully opted into the national linguistic regime created by the *Charter*, by guaranteeing to its Acadian minority both official language rights and educational rights (Tuohy 1992). In reality, these rights had been recognized in the *Official Languages Act of New Brunswick* (hereafter "OLA-NB") since 1969. Given that New Brunswick is the province with the highest portion of Francophones outside Quebec, it comes as no surprise that the rights of its linguistic minority would be legally secured there more than anywhere else. While the national character of Acadians has been widely debated (McRoberts 2001; Gold 1984; Thériault 1994), they are considered to be a linguistic minority group rather than a national minority for the purpose of the dissertation. As will be seen, the aim of their legal challenges before the Supreme Court has been the establishment of assistance rights instead of self-government rights in the cases of *Société des Acadiens v Association of Parents* (1986), *Charlebois v Saint John* (2005) and *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v Canada* (2008).

Société des Acadiens v Association of Parents (1986)

One assistance right conferred to the Acadian minority of New Brunswick by the *Charter* is the right to plead in French in provincial court proceedings. To that effect, section 19(2) provides that "[e]ither English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick." Similarly, section 13(1) of the OLA-NB provides that "in any proceeding before a court, any person appearing or giving evidence may be heard in the official language of his choice and such choice is not to place that person at any disadvantage." Although these guarantees are meant to be enjoyed by all, in reality they serve the interest of the Francophone minority. In *Société des Acadiens I* (1986), the Supreme Court asked whether

section 19(2) also included the right of litigants to be understood by members of the bench in both official languages without translators. Of the seven judges who heard the case, five refused to recognize that right while two did.

The majority, led by Justice Beetz, concluded that section 19(2) could not be construed as giving the right to be understood in the language of one's choice in New Brunswick's courts. In the majority's view, the text of section 19(2) paralleled that of section 133 of the *Constitution Act, 1867* regarding courts of Canada and courts of Quebec, and thus had to be interpreted in the same manner. The restrictive jurisprudence of section 133 had only established the right to be heard but not the right to be understood in a court proceeding. Moreover, the majority believed that the right to be understood pertained to the common law right to a fair hearing and thus fell within the scope of natural justice. Because this right was already protected by sections 7 and 14 of the *Charter*, it was neither necessary to incorporate it in language rights nor advisable because of its different nature. Justice Beetz explained that "[u]nlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle" (para 63). While legal rights are broad and demand frequent judicial delineation, language rights need to be approached with more restraint. The majority thought this was especially the case because language rights are not subject to the legislative override and can only be modified by amendment by unanimous consent. In sum, the majority believed that the political nature of language rights required that their scope be expanded by the political process rather than by the courts.

In two distinct but concurring judgments, then Chief Justice Dickson and Justice Wilson adopted a more liberal interpretative approach to the *Charter* and argued that section 19(2) afforded the Acadian minority of New-Brunswick the right to be understood in French by the judiciary. Chief Justice Dickson pointed out that overlap between legal rights and language rights was inevitable under the *Charter*. Moreover, Justice Wilson added that the mere presence of section 19(2) suggested that it was supposed to do "more than duplicate the pre- and post-Charter entitlement to rudimentary fairness" (para 176). Contrary to the majority, the minority agreed that section 16 of the *Charter* which establishes the equality of status of the two official languages of Canada was remedial rather than declaratory in nature and that the interpretation of section 19(2) should be informed by it. For Justice Wilson, implicit in the political commitment to linguistic duality of section 16 was the idea of a "gradual progression towards the ultimate goal of bilingualism" (para 138) "to meet gradually increasing social expectations" (para 180).

In *Société des Acadiens I*, Justice Wilson determined that social expectations of the time had not been met. In order for the litigant's linguistic rights to be meaningful under the *Charter*, the judge had to be able to fully comprehend the arguments of the latter: "[T]he judge's level of comprehension must go beyond a mere literal understanding of the language used by counsel. It must be such that the full flavour of the argument can be appreciated" (para 186). Finally, both Chief Justice Dickson and Justice Wilson decided that a judge should be solely responsible for assessing whether he or she had the appropriate level of comprehension of the litigant's language and that his or her assessment should only be challenged on the basis of proof.

In practice, this legal loss for Acadians was minimal. While they were not granted the assistance right to be understood by a judge that qualifies minimally as a "receptive bilingual" (para 185), due process gave them the individual right to be heard by members of the bench that were "capable by any reasonable means of understanding the proceedings, the evidence and the arguments, written and oral, regardless of the official language used" (para 76). The loss was more greatly felt at the symbolic and jurisprudential levels. At stake was really the capacity of the Acadians to take part in public life in their own language, thereby strengthening the vitality of their community and its culture (Réaume 2002). The majority's refusal to decide the case on the basis of concerns for the equality of status of both official languages in New Brunswick and the deference showed to the legislature in matters of language rights dampened the hope of Francophone minorities outside Quebec of making significant legal gains under the *Charter*.

According to Joseph E. Magnet, "the Court's stultifying literalism here transformed a guarantee for minority language into a right for the majority, acting through the legislature or administration, to deal with minority language communities in the language of the majority" (1986, 180). It is possible to assume that at the beginning, the judges were uncomfortable justifying new financial burdens on the state through the *Charter*. As will be discussed though, this restrictive approach to language rights in early *Charter* jurisprudence did not last very long. The Supreme Court even explicitly disavowed this approach in *R v Beaulac* (1999), while not reversing its decision in *Société des Acadiens I*. Furthermore, it must be noted that the province of New Brunswick did not forever turn a blind eye on the Acadians' plea in this matter. More than a decade later, in 2002, it amended the OLA-NB to comply with the dissenting judgments of Chief Justice Dickson and Justice Wilson. It now protects the right of litigants to be understood in one of the two official languages by the judiciary "without the assistance of an interpreter or any process of simultaneous translation or consecutive interpretation" (section 19(1)).

Charlebois v Saint John (2005)

The use of French in court proceedings was also discussed in *Charlebois* (2005). Mario Charlebois had taken legal action, in French, to force the City of Saint John to offer more services to the Acadian minority and to question the constitutional validity of some provisions of the OLA-NB. In its counter-response, the City of Saint John filed pleadings in English only. The Attorney General of New Brunswick pleaded in French but used some English citations to support his argument. Drawing on section 22 of the OLA-NB, Mario Charlebois joined by the Association des juristes d'expression française du Nouveau Brunswick, was arguing that he had the right to have all the pleadings of the parties involved in his case in the language of his choice. Section 22 states that in court proceedings, institutions of New Brunswick have to provide oral or written pleadings in the language of choice of the other party. While all the judges agreed that section 22 allowed for case law citations and evidence in either official language, they were split on whether the provision applied to municipalities.

The Court split five to four and held that the City of Saint John was not obliged to use French in its pleadings because the word "institution" in section 22, as characterized in section 1 of the OLA-NB, does not include municipalities. Moreover, since sections 35 to 38 of the OLA-NB deal specifically with the municipalities' language obligations, which are more limited, the majority did not see fit to consider them institutions in the sense of section 1. As was pointed out, section 37 gives the municipalities the discretion to declare themselves bound by the entirety of the OLA-NB. Justice Charron wrote that "[t]his interpretation of the word "institution" is the only one that creates no illogical or incoherent consequences when read in the context of the statute as a whole" (para 21). In the absence of circumstances of a genuine ambiguity, the majority decided that the ordinary rules of statutory interpretation rather than *Charter* values should guide the decision in this case as established by Justice Iacobucci in *Bell ExpressVu Limited Partnership v Rex* (2002). Additionally, the majority believed that the Court should not distort the legislative intent of New Brunswick by resorting automatically to the *Charter*.

On the other hand, the minority led by Justice Bastarache, rejected the formalistic approach of the majority and found that it was contrary to the principle that usually guides the interpretation of language rights. The minority was of the opinion that normal rules of statutory interpretation required a contextual approach as well. As determined by the Court of Appeal in 2001, section 22 of the OLA-NB had specifically been put in place to extend the *Charter* rights found in section

19(1). The minority thus suggested that New Brunswick wanted to extend constitutional guarantees in the spirit of section 16(3) of the *Charter* which encourages the advancement of the equality of status of both official languages. As Justice Bastarache put it:

> [W]here the Legislature is extending the protection of minority rights, the Court must not adopt a restrictive interpretation in order to eliminate apparent inconsistencies in the law. It must, rather, search for a meaning consistent with the protection of minorities and the achievement of equal rights for the two official languages and language communities that can be reconciled with the wording of the legislation whenever possible (para 38).

In order to address the internal inconsistency found in the OLA-NB, the minority thought that the sections dealing specifically with municipalities should be read as a general exception to the general provisions. Only in the case of a conflict between the general and the specific should the specific obligations prevail.

This second legal battle loss for the Acadian minority of New Brunswick was not remedied by the City of Saint John or the provincial government.

Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v Canada (2008)

In 2008, the same group that had appealed to the Supreme Court of Canada in *Société des Acadiens I* (1986), appealed once more to have assistance rights of the Francophone minority recognized, this time under section 20(2) of the *Charter* which pertains to "Communications by public with New Brunswick institutions." In 1992, the Royal Canadian Mounted Police (hereafter "RCMP") had entered into an agreement with the government of New Brunswick to provide policing services in the province. In a unanimous judgment, delivered by Justice Bastarache, the Court held that the RCMP, acting as New Brunswick's provincial police, had the constitutional obligation to serve citizens of the province in both official languages.

Section 20(2) of the *Charter* provides that "[a]ny member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French." This right is guaranteed everywhere in the province, regardless of the presence of a "significant demand," as required for services from federal institutions under section 20(1). In the case at hand, the bench had to determine if the RCMP, acting as provincial police, would need to satisfy the

constitutional obligations of federal or New Brunswick institutions. The Court pointed out that under the agreement between the RCMP and New Brunswick, the province maintained control of policing activities and RCMP members were only delegates of the provincial government. The institution in question thus belonged to New Brunswick and had to comply with section 20(2) of the *Charter.* Additionally, the Court was of the view that a delegation of power in an adjudicative context should not result in rights violation under the *Charter*, as was determined by Justice Lamer in *Slaight Communications Inc. v Davidson* (1989).

The requirement for bilingual RCMP officers in New Brunswick as mandated by *Société des Acadiens II* could not be implemented immediately. As of 2010, nearly 65% of the officers operating in the province were bilingual and learning programs had been put in place to further the learning of both official languages (RCMP 2010).

In sum, *Charter*-based judicial review in matters of language policy generated mixed results in New Brunswick. On the one hand, the Supreme Court has tended to decide in favour of government rather than in favour of the Acadian community. On the other hand, the judgments that found against the Acadians were not unanimous. Most importantly, in two of the three cases under study, the governmental authorities ultimately decided to respond positively to the assistance right demands made by Acadians. These actions are a testament to the general tendency towards accommodation of minority linguistic rights in the province of New Brunswick (Migneault 2007) and to the value accorded to Canada's polyethnic model of citizenship. As will be discussed, the legislative attitude towards minority rights was not adopted by all the other provinces in Canada. Therefore, the Court was asked numerous times to intervene, especially with regards to instruction in the language of the minority.

Minority Language Education

Minority language education rights challenges outside Quebec have sought to not only to have new assistance rights recognized, but also representation rights. The first step for Francophone minorities involved guaranteeing access to French instruction (*Mahe v Alberta* 1990; *Reference Re Public Schools Act (Man.)* 1993; *Arsenault-Cameron v Prince Edward Island* 2000; *Doucet-Boudreau v Nova Scotia* 2003). The second step involved gaining an administrative overview of their schools (*Mahe* 1990; *Reference Re Public Schools Act (Man.)* 1993; *Arsenault-Cameron*

2000). In all these cases, Francophone minorities were successful at having their rights recognized.

Mahe v Alberta (1990)

The first Supreme Court decision involving the educational rights of French linguistic minorities under the *Charter* was rendered in *Mahe v Alberta* (1990). Members of the Francophone community were arguing that the institutional and legal framework governing French instruction in Edmonton resulted in the erosion of the French culture. This landmark case gave insight into the Court's understanding of the purpose of section 23 of the *Charter* with respect to minority language educational rights. It clarified the provinces' obligation to publicly fund educational facilities in the language of the minority. Most notably, it established that section 23 included the right of "management and control" of minority-language schools by the minority. Implicit in *Mahe* was the recognition that the individual rights of members of linguistic minorities were dependent on the existence of a linguistic minority community.

Writing for a unanimous court, Chief Justice Dickson declared that the main purpose of section 23 of the *Charter* was "to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population" (para 31). According to him, section 23 wishes to accomplish this objective by de facto granting a general right to minority language education. As per Chief Justice Dickson, the rights given to individual children of the minority would have the effect of benefiting the linguistic minority community as a whole:

> In addition, it is worth noting that minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where the minority community can meet and facilities which they can use to express their culture (para 33).

However, this right is qualified by subsection (3)(a) which specifies that publicly funded education for the minority will only be guaranteed where the number of children is sufficient, and subsection (3)(b) which adds that where the number is sufficient, instruction will be given in publicly funded "minority language educational facilities." Dickson believed that subsections (3)(a) and (3)(b) should not be read as separate rights, but rather as encompassing a "sliding scale"

requirement, in which section (3)(a) would be the minimum level of right to which linguistic minorities are entitled and section (3)(b) the maximum one.

Chief Justice Dickson established that the "sufficient number" requirement of section 23(3)(a) did not call for an explicit standard. In his view, provincial governments had to base their analysis on "the number of persons who will eventually take advantage of the contemplated programme or facility" (para 78) and then determine if granting such a programme was pedagogically and financially sound. However, it was noted that pedagogical concerns should have a greater weight in the balance than financial ones. In other words, the rights of individual students should be more important than the province's financial interests. In the case at hand, the Court determined that the existing demand for Francophone educational services in Edmonton warranted the establishment of a separate school. By the time the *Mahe* case had reached the Supreme Court, an independent French school had been put in place for the minority which met the requirements of section 23(3)(a). However, the appellants were still not satisfied with the administration under which the school functioned.

Using a textual analysis, Chief Justice Dickson declared that the wording of section 23(3)(b), as made evident in the French version of the *Charter*, warranted "management and control" of a minority-language school by the minority. As he put it, the concept of "minority language educational facilities" would have no purpose or place within the ambit of section 23(3) if it was not to guarantee linguistic minorities a certain degree of administrative overview. Furthermore, Chief Dickson noted that granting such a power was consistent with the overall purpose of section 23, which is to protect Canada's official languages' culture in minority settings. The Court determined that in order to fulfill this purpose, "management and control" would need to be given to the minority for educational issues affecting their language and culture. While this could entail the creation of a completely separate school board, this was not necessary. In the *Mahe* case, it would simply mean giving Francophone parents significant representation on the existing school board and guaranteeing them exclusive control of issues involving linguistic and cultural concerns.

Ultimately, Chief Justice Dickson did not invalidate the Alberta *School Act*, amended in 1988 to comply with the *Charter*, since it permitted the implementation of an adequate institutional framework for the French linguistic minority. The problem arose from the province's inaction in the case at hand. Thus, the Court made a declaration to the effect that the government had to enforce the

rights of Francophone parents in Edmonton. It gave Alberta the discretion to implement an educational scheme that would satisfy the requirements of the *Charter*. However, the Court invalidated *Regulation 490/82* which obliged all of the province's schools to offer a minimum of 20% of instruction in English. This specific provision was found to violate section 23 of the *Charter* and was not considered a reasonable limit in the sense of section 1.

It took the Alberta government more than three years to comply with the *Mahe* decision due to its reluctance to expand Francophone rights, as well as unforeseen political events such as the Meech Lake Accord (Behiels 2004). In November 1993, the *School Amendment Act* was enacted and provided for a school governance scheme for Franco-Albertans. By granting its linguistic minority a school board system, the province exceeded its constitutional obligations under the *Charter*. Finally, it must be noted that the *Mahe* decision was also a key factor in the implementation of school governance schemes for Francophone minorities of other provinces that lacked such infrastructure (Riddell 2004). Yet, this important assistance and representation rights victory was only the beginning of a litigation saga for Francophone minorities across Canada.

Reference Re Public Schools Act (Man.) (1993)

The right to "management and control" found in section 23(3)(b) of the *Charter* would also be the object of a reference question brought before the Supreme Court three years after *Mahe* (1990) by the Fédération provinciale des comités de parents of Manitoba. In *Reference Re Public Schools Act (Man.)* (1993), the Court decided that the right to "minority language educational facilities" included the right for linguistic minority children to receive instruction in a distinct physical setting. The Court also unanimously declared some provisions of Manitoba's *Public Schools Act,* to be inconsistent with the requirements of section 23.

Pursuant to the finding in *Mahe* that minority language schools also acted as cultural centers for the minority, the Court argued that they would best play this role if they were in a distinct physical setting from the majority language schools. However, the Court did not specify what an appropriate educational facility should entail. Rather, consistent with the "sliding scale approach" developed in *Mahe*, the Court determined that the nature of the facilities would vary according to the geographic unit at stake.

In the reference at hand, the Court declared unconstitutional the Manitoba *Public Schools Act* because it did not provide for appropriate mechanisms of "management and control" of educational programs for Francophone parents. However, it could not strike down some of its provisions since the issue had come before it in the form of a reference. Instead, the Court exhorted the Manitoba government to implement immediately an educational scheme respecting the rights of Francophone parents as set out by section 23 of the *Charter* jurisprudence. It was determined that the size of the Franco-Manitoban community warranted the creation of an independent French-language school board in Manitoba. Within the same year, the Manitoba government established the Division scolaire franco-manitobaine by way of regulation (*Francophone Schools Governance Regulation* 1993).

Arsenault-Cameron v Prince Edward Island (2000)

The meaning of the constitutional right to "management and control" in education for linguistic minorities was further discussed in *Arsenault-Cameron v Prince Edward Island* (2000). At issue was the Minister of Education's refusal to establish a French school in the town of Summerside at the request of French language Board of Prince Edward Island. Even though the number of children entitled to publicly funded minority language education was sufficient to grant such a demand, the Minister preferred to maintain transportation services for Summerside children to an existing school located in Abraham's Village out of pedagogical concerns. The Supreme Court thus asked whether the application of section 23(3)(a) of the *Charter*, in the particular context of *Arsenault-Cameron*, included the right to education for the minority in the specific area of Summerside and whether section 23(3)(b), granted the French Language Board the right to determine the location of minority language schools.

In a unanimous decision delivered by Justices Major and Bastarache, the Court judged that travel arrangements constituted a means by which provincial governments could meet their constitutional obligation of providing minority language students with adequate educational services. However, it held that the appropriateness of that means had to be evaluated in light of the general purpose of section 23, which is to encourage the flourishing and preservation of the French language and culture as determined in *Mahe*. In the case at hand, the Minister had argued Francophone children were better served by receiving instruction in Abraham where they could have access to greater pedagogical resources than if they were to be instructed in Summerside. This resulted in some section 23 Francophone parents sending their children to English schools in

Summerside to prevent them from travelling long distances to go to French school in Abraham, thereby increasing the assimilation rate of the Francophone minority. As Justices Major and Bastarache put it: "Insisting on the individual right to instruction, the Minister appeared to ignore the linguistic and cultural assimilation of the Francophone community in Summerside, thereby restricting the collective right of the parents of the school children" (para 29).

More importantly in *Arsenault-Cameron*, the Court advocated in favour of the recognition of substantive equality rather than strict formal equality for linguistic minorities. It did not matter that the Summerside Francophone children attending the school in Abraham had travel times that fell within the provincial average or that they had access to the same educational resources there as the children had in English schools. This equal treatment did not give them the possibility to ensure the well-being of their culture. According to Justices Major and Bastarache:

> Section 23 is premised on the fact that substantive equality requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language majority (para 31).

On that account, the Court held that the French community of Summerside was entitled to its own local minority language school.

Following the "sliding scale approach," the Court also decided that, when a minority language board has been established in a province, that board has the right to determine what is appropriate for the minority language community. It argued that the Board was better positioned to assess the cultural and linguistic needs of the French community in Summerside than the governmental authorities. In *Arsenault-Cameron*, the prerogative to determine the location of instruction of the linguistic minority children fell within the exclusive right of "management and control" of the French Language Board. To that effect, Justices Major and Bastarache declared: "Although the Minister is responsible for making educational policy, his discretion is subordinate to the *Charter*" (para 40). In order to comply with the Supreme Court judgment, the government of Prince Edward Island established a new French school in Summerside for the start of the 2000 Fall term (PEI 2000).

Doucet-Boudreau v Nova Scotia (2003)

The Supreme Court was also determined not only to ensure that assistance rights for the French linguistic minorities with regards to education would be recognized, but also enforced. In *Doucet-Boudreau v Nova Scotia* (2003) a majority of the Court held that section 24 of the *Charter* relating to the "Enforcement of guaranteed rights and freedoms" took on a special meaning when minority language educational rights were concerned. The appellants in this case were Francophone parents urging the government of Nova Scotia to build educational facilities for the minority. While the authorities had recognized that the Francophone community was entitled to such facilities under section 23, their implementation had been delayed, thereby rapidly increasing the assimilation rate of the linguistic minority in the province. At trial, the judge found a section 23 right violation and pressed the government to use its "best efforts" to complete the project's construction within a set timetable (para 7). He additionally mandated the government to report to him on the progress of the project's implementation. At issue in *Doucet-Boudreau* was the constitutionality of this particular remedy used to enforce minority language educational rights.

Even though the case was moot, since the schools in question had been built, the Court decided to hear the case in order to address this important constitutional issue. In a 5 to 4 majority ruling, the Court affirmed that the trial judge had "jurisdiction to hear progress reports on the status of the Province's efforts in providing school facilities by the required dates" (para 88) under section 24 of the *Charter.*

Following notably *R v 974649 Ontario Inc.*, the majority believed the purposive approach used to interpret section 23 rights should also inform the nature of the remedies available under the *Charter*. Moreover, the majority determined that, in order for remedies to be responsive and effective, historical and contextual circumstances of the case had to be taken into account. In the case at hand, it had been established that Nova Scotia had a terrible record in protecting its Francophone community. Assimilation rates in the province were skyrocketing to a point where soon the numbers in the province would no longer warrant the establishment of school facilities for the minority. Justices Arbour and Iacobucci, writing for the majority, recognized this potentially pernicious effect of governmental inaction:

> [P]articular entitlements afforded under s. 23 can be suspended, for so long as the numbers cease to warrant, by the very cultural erosion against which s. 23 was designed to guard. In practical, though not legal, terms, such suspensions may well be permanent. If delay is tolerated, governments could potentially avoid the duties imposed upon them by s. 23 through their own failure to implement the rights vigilantly (para 29).

The majority concluded that the remedy, of having reports on the implementation of school facilities, was justifiable since it prompted the authorities to act expeditiously and thus ensured that the minority language educational rights protected in the *Charter* were meaningful.

The majority in *Doucet-Boudreau* also brushed away concerns, raised by the dissenting judgment, to the effect that the proposed remedy breached the constitutional principle of separation of powers and the *functus officio* doctrine[22]. First, the majority judged that despite the reporting order, the executive retained wide discretionary power to meet its constitutional obligation of providing minority language education. The reporting order was also considered to be judicial since it pertained to powers generally attributed to the judiciary. Second, the majority declared that the remedy sought did not go against the doctrine of *functus officio*. As per Justices Arbour and Iacobucci, "[t]he retention of jurisdiction [...] did nothing to undermine the provision of a stable basis for launching an appeal [and] did not purport to retain a power to change the decision as to the scope of the s. 23 rights in question, to alter the finding as to their violation, or to modify the original injunctions" (para 80).

While the court was divided in *Doucet-Boudreau*, the majority judgment was important since it signified a hardening of the position of the Supreme Court towards governmental authorities. By its decisions to take on a purposive and contextual approach to educational rights, the Court had taken on the role of the true defender of Francophone minorities across Canada. Constrained by the Court's interpretation of the *Charter*, provincial governments had to and would have to acquiesce to the assistance demands of Francophone minorities in matters of education.

[22] The majority in *Doucet-Boudreau* referred to *The Oxford Companion to Law*'s definition of this common law principle: "*Functus officio* (having performed his function). Used of an agent who has performed his task and exhausted his authority and of an arbitrator or judge to whom further resort is incompetent, his function being exhausted" (Walker 1980, 508).

Summary

By and large, judicial review based on minority linguistic rights outside Quebec has promoted a polyethnic model of citizenship by resulting in new group-differentiated policies. Using a purposive approach, the judicial branch responded positively to the assistance and representation demands formulated by the Francophone linguistic minority. The rights gains made by the minority conflicted with the societal collective rights of the majority, or preferably here, governmental interests. There is a general agreement that providing services in the language of the minority increases costs. This is not to say that the Supreme Court has been insensitive to the public purse. For example, the judiciary has qualified the rights of Francophone minorities under the "where numbers warrant" provision of section 23(3) and in turn limited their host province's financial obligations towards them. Also, the "sliding scale" approach developed in *Mahe* (1990) gave provincial governments some flexibility in formulating educational policies (Urquhart 1997). This is an indication that minority language rights have to be weighed against the interests of the majority as a whole, perhaps because of their political nature.

Francophone linguistic minorities have been less successful in having official language rights recognized than educational rights. In the official language rights cases, the Court was mostly asked to widen the scope of rights that were already in existence prior to the adoption of the *Charter.* In the educational rights cases, the Court was called upon to define and implement new rights. This is perhaps why the bench chose to adopt a more balanced approach to the first category of linguistic rights and a more purposive approach to the second one. But since instruction in the language of the minority is far more vital to the survival of minority culture than other symbolic recognition acts, the Court may have strategically decided to give priority to educational rights. Often, the implementation of those rights is perceived as less costly and more reasonable than the implementation of official language rights and thus more acceptable to the Anglophone majority.

However, it would be wrong to affirm that the educational rights protected in the *Charter* benefitted all the members of French linguistic minority. As per Michael D. Behiels, "[section]23 as written and interpreted by the Supreme Court, left the smallest, assimilation-ravaged communities with fewer rights than the larger, more self-supporting communities" (2004, 178-179). In that sense, the polyethnic model of citizenship was not pushed to its fullest potential. The fate of Francophone communities outside Quebec thus remains decidedly dependent on the

provincial governments' will to go beyond constitutional requirements and promote actively their cultures. As will be discussed, the province who has surprisingly promoted linguistic minority culture the most to date has been Quebec.

LINGUISTIC MINORITIES INSIDE QUEBEC

Interestingly, minority language *Charter*-based challenges in Quebec have involved mostly the same provisions as in other provinces but different constitutional questions. This can be explained by the fact that the English-speaking minority in Quebec has evolved in quite a different setting than the French-speaking minorities outside of Quebec. First, the precarious status of Francophones outside Quebec can be contrasted with the established special status of Anglophones in Quebec. The latter can be qualified as a "dominant minority" due to its direct tie to the English majority in Canada (Woehrling 1985). Moreover, consociational arrangements have notably given the Anglophone community several institutional privileges (Stevenson 1999). Even prior to the adoption of the *Charter*, the provincial government guaranteed access to English education to the Anglophone community, regardless of whether the numbers warranted such a right. Second, Quebec was not concerned with controlling costs associated with minority language services like other governments, but rather to protect its culture. It is thus not surprising that the interests of the minority would clash severely with that of the majority.

All the *Charter* cases in the area of minority language originating from Quebec that the Supreme Court of Canada has heard have challenged important provisions of the *Charter of the French Language,* 1977 (also known as "Bill 101"). Bill 101 was put in place by the first Parti Québécois government to safeguard the vitality of the French language in the province of Quebec. Most notably, Bill 101 reduced accessibility to English-language instruction by allowing only children whose parents or siblings had received English-language instruction in the province of Quebec to attend publicly funded English schools. It also furthered the francization of the work place by requiring that all firms of fifty or more employees operate in French and by mandating that all public and commercial signs be in French only.

The multinational aim of Bill 101 inevitably clashed with the polyethnic and undifferentiated rights contained in the *Charter*. This explains why immediately after the enactment of the *Charter*, the National Assembly retrospectively invoked the notwithstanding clause to protect all

of its legislation (*An Act respecting the Constitution Act* 1982). Concretely, all of Quebec's statutes adopted before the coming into force of the *Charter* were re-enacted to include an override provision to the effect that the statutes would operate notwithstanding a provision included in section 2 or sections 7 to 15 of the *Charter.* However, this blanket override strategy did not prevent Bill 101 from being challenged under section 23 of the *Charter*. As will be discussed, Francophone Quebecers' use of external rules conflicted with the assistance rights demands made by the Anglophone minority (*A.G. (Que.) v Quebec Protestant School Boards* 1984; *Ford v Quebec* 1988; *Devine v Quebec* 1988) and eventually with the individual rights demands made by some Allophones and Francophones (*Gosselin v Quebec* 2005; *Solski v Quebec* 2005; *Nguyen v Quebec* 2005). In an overwhelming majority of cases, the interest of Francophone Quebecers as a national minority within Canada was not upheld.

Assistance Rights

A.G. (Que.) v Quebec Protestant School Boards (1984)

The first *Charter* case aimed at challenging Bill 101 under section 23 of the *Charter* was *A.G. (Que.) v Quebec Protestant School Boards* (1984). The unanimous decision declared that provisions regarding instruction in English found in sections 72 and 73 of Bill 101 were inconsistent with section 23 of the *Charter.* Section 72 and 73 required that all children attend public elementary and secondary school in French with the exception of those whose parents had received primary school instruction in English 'in the province of Quebec'. These provisions, known as the "Quebec clause," had been put in place to ensure that immigrant groups, whether from other Canadian provinces or the rest of the world, would integrate into the French majority culture. The high rate of newcomers' linguistic transfers to English, due to the socio-economic attractiveness of this language as compared to French, had dampened the hope of survival of the French fact in North America. Section 23(1)(b) of the *Charter*, known as the "Canada clause" had been enshrined specifically to invalidate the "Quebec clause." It provided that all children whose parents had received primary school instruction in English 'anywhere in Canada' had the right to minority language education.

Having decided that sections 72 and 73 of Bill 101 were inconsistent with the meaning of section 23(1)(b) of the *Charter*, the Court argued that the impugned provisions could not be saved under section 1. Adopting a purposive approach, the Court established that the minority language

educational rights found in the *Charter* had been adopted precisely to "remedy the perceived defects" (para 79) of Quebec's language policy. The remedial nature of section 23 of the *Charter* was made clear by the use of a similar terminology and criteria as in Bill 101. Consequently, the Court thought the *Charter*'s framers could not have possibly believed the "defects" could be justifiable within the ambit of section 1. Furthermore, the bench pointed out that the framers also had Quebec in mind when they exempted the province in section 59 of the *Constitution Act, 1982* from having to comply with section 23(1)(a). This provision known as the "Universal clause" guarantees the right to education in the language of the provincial minority to any citizen whose first language learned and still understood is that of the minority. As per the Court, this privilege was given to Quebec to address its immigration concerns.

To Francophone Quebecers' grand disappointment in this case, the notwithstanding clause could not be invoked since section 23 is shielded from its prerogative. Pursuant to the decisions made by lower courts in the same case, the Quebec government nevertheless attempted to immunise Bill 101 from future legal challenges by amending it to include a standard override provision (*An Act to amend the Charter of the French Language* 1983).

Ford v Quebec (1988) and Devine v Quebec (1988)

Bill 101's legislative scheme pertaining to the language of commerce and business was also challenged before the Supreme Court in *Ford v Quebec* (1988) and *Devine v Quebec* (1988). In *Ford*, Section 58 which required public signs and posters, as well as commercial advertising to be solely in French and section 69 which mandated firms to use exclusively the French version of their names in the province were found to violate the freedom of expression guaranteed by section 2(b) of the *Charter.* In *Devine*, sections 59, 60 and 61[23] which created exceptions to section 58 were also found to be of no force or effect since they were connected to the general rule found in section 58. Bill 101's only provisions to have escaped judicial invalidation under the *Charter* were sections 52[24] and 57[25] since they permitted the use of French together with

[23]Sections 59 to 61 of Bill 101read as follows: "59) Section 58 does not apply to advertising carried in news media that publish a language other than French, or to messages of a religious, political, ideological or humanitarian nature, if not for a profit motive. 60) Firms employing not over four persons including the employer may erect signs and posters in both French and another language in their establishments. However, the inscriptions in French must be given at least as prominent display as those in the other language. 61) Signs and posters respecting cultural activities of a particular ethnic group in any way may be in both French and the language of that ethnic group."

[24] Section 52 of Bill 101reads as follows: "Catalogues, brochures, folders and any similar publications must be drawn up in French."

another language, when read with section 89[26]. In addition, the Court declared that Bill 101 was only partly protected from the application of section 2(b) of the *Charter* by the standard override provision that had been adopted earlier.

In *Ford*, the bench found that the constitutional freedom of expression included "the freedom to express oneself in the language of one's choice":

> Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality (*Ford*, para 40).

The Court interpreted freedom of expression generously and extended it to commercial expression. In *RWDSU v Dolphin Delivery Ltd* (1986), the Court had already established that freedom of expression protected by the *Charter* went beyond political expression. Identifying process as purpose, it decided that commercial expression played a key role in a free and democratic society, that of "enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy" (para 59). So while freedom of expression generally could be justified according to the benefits it conferred to the speaker, its extension to commercial expression would be justified by the benefits it conferred to the listeners.

Extending the freedom of expression to include commercial expression was seen however as problematic by the Attorney General of Quebec for multiple reasons. Notably, the Quebec government argued that since freedom of expression was listed under fundamental freedoms in the *Charter*, it had to be fundamental. Commercial expression was not seen as such. The Court's interpretation of the freedom of expression recognized de facto an economic right, even though the framers of the *Charter* did not intend this. Furthermore, the Quebec government contended

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[25] Section 57 of Bill 101reads as follows: "Application forms for employment, order forms, invoices, receipts and quittances shall be drawn up in French."

[26] Section 89 of Bill 101 reads as follows: "Where this act does not require the use of the official language exclusively, the official language and another language may be used together."

that no grounds existed for constitutionally protecting commercial advertising in particular, since its main goal was to condition economic choices and not to truly inform those choices. Finally, the American experience had shown that even a limited recognition of the right to commercial expression required policy evaluation that was a prerogative of the parliament and not of the courts.

But in *Ford*, the real test was in deciding whether Bill 101's violation of section 2(b) of the *Charter* constituted a reasonable limit in accordance with section 1. Following the *Oakes* test[27], the Court agreed that Bill 101's stated objective to protect the quality and influence of the French language was serious and legitimate due to its endangered status in the province:

> The causal factors for the threatened position of the French language that have generally been identified are: (a) the declining birth rate of Quebec francophones resulting in a decline in the Quebec francophone proportion of the Canadian population as a whole; (b) the decline of the francophone population outside Quebec as a result of assimilation; (c) the greater rate of assimilation of immigrants to Quebec by the anglophone community of Quebec; and (d) the continuing dominance of English at the higher levels of the economic sector. These factors have favoured the use of the English language despite the predominance in Quebec of a francophone population. Thus, in the period prior to the enactment of the legislation at issue, the "*visage linguistique*" of Quebec often gave the impression that English had become as significant as French. This "*visage linguistique*" reinforced the concern among francophones that English was gaining in importance, that the French language was threatened and that it would ultimately disappear. It strongly suggested to young and ambitious francophones that the language of success was almost exclusively English. It confirmed to anglophones that there was no great need to learn the majority language. And it suggested to immigrants that the prudent course lay in joining the anglophone community (para 72).

The Court also recognized that taking measures, such as signage regulations, to protect the "visage linguistique" were necessary to ensure the predominance of French in the province. However, it determined that the exclusive use of French in commercial advertising was neither a necessary nor a proportionate means to achieve the law's objective. As the Court explained, the Quebec government could have made the use of other languages conditional on the presence of French or required that French be accorded greater visibility than other languages.

[27]The Supreme Court of Canada developed a test for the application of the limitation clause in *R v Oakes* (1986).

While the blanket override used in *An Act respecting the Constitution Act, 1982* had expired when the *Ford* and *Devine* cases appeared before the Supreme Court,[28] the one contained in *An Act to amend the Charter of the French Language*, *1983* had not. After ruling on the validity of that standard override provision, the Court established sections 58 and 52 of Bill 101 were saved but not sections 57, 59 to 61 and 69, to which it did not apply. But since the judges found all the impugned provisions to be inconsistent with the Quebec *Charter of Human Rights and Freedoms* (hereafter the "*Quebec Charter*"), they were all invalidated.

In sum, the judges based their decisions in *Ford* and *Devine* on the merits of liberal individualism (Woehrling 2000). But while these cases signified advancement of the individual freedom of expression for all Quebecers, in reality they benefited mostly the Anglophone minority whose members brought the cases before the Court (Galipeau 1992). In this sense, they promoted a polyethnic citizenship by granting assistance rights. Although those judgments reduced the strength of Bill 101, they cannot be said to have shown a total disregard for its cultural objective (Cameron and Krikorian 2008). In a fine act of rights balancing, the Court was able to simultaneously uphold Quebec's external rule to protect its "visage linguistique" and the Anglo-community's assistance right to function in its own language in its everyday life, under the guise of the right to individual expression. However, the rights compromise reached by the Court did not fare well among Francophone Quebecers who interpreted it as a denial of the multinational character of Canadian citizenship.

In response to *Ford* and *Devine*, Robert Bourassa, then Premier of Quebec, passed an *Act to amend the Charter of the French language, 1988* (also known as "Bill 178"). Bill 178 allowed for bilingual advertisement inside commercial establishments with French preserving a marked predominance, but required the exclusive use of French on all exterior commercial signs. Because the new law went against the verdicts given in *Ford* and *Devine*, the government of Quebec made use of the notwithstanding clause found in both the federal and provincial charters. By enacting Bill 178, known as the "inside-outside" law, the Quebec government decided to affirm its power to use external rules in language policy matters. Even though the Anglophone minority had made minor gains under Bill 178, it was seen as a setback in terms of the rights the Supreme Court had granted them. Ironically, the use of the legislative override backfired and

[28] Even though the blanket override contained in an *Act respecting the Constitution Act, 1982* was expired, the Court pronounced itself on the validity of its application in conformity with section 33 of the *Charter* in *Ford*. It was decided that in general, section 33 only allows for prospective derogation and not for retrospective derogation of rights protected by the *Charter*.

created uproar outside Quebec which led to the demise of the Meech Lake Accord that would have recognized Quebec as a "distinct society" and eventually reduced the debilitation of its language policy through constitutional litigation (Monahan 1991).

Early *Charter* jurisprudence on Bill 101 had proven to be generally detrimental to Quebec's power to defend its culture (De Montigny 1997; Mandel 1994; Hutchinson 1995). Before the 5-year derogation expired, the National Assembly passed the *Act to amend the Charter of the French language, 1993* (also known as "Bill 86") which mandated the marked predominance of French on both interior and exterior commercial signs. Bill 86 also amended Bill 101 to have the "Canada clause" officially recognized. However, it tightened the eligibility criteria to publicly funded English school by providing access to only the children of those who had completed the "major part" of their education in English. These policy amendments to Bill 101 showed that Quebecers' mindset was changing and indicated that a certain linguistic peace in the province was possible through compromise (Woehrling 2000). This legal lull would last for more than a decade until Bill 101 would once again be challenged under the *Charter*. This time however, it would not be challenged by Quebec's historical Anglophone community, but by individual members of the Francophone community (*Gosselin* 2005; *Solski* 2005) and of the Allophone community (*Solski* 2005; *Nguyen* 2009).

Individual Rights

Gosselin v Quebec (2005)

In *Gosselin v Quebec* (2005), section 73 of Bill 101 was once again under attack. This time, Francophone parents[29] who did not qualify as rights holders under section 23 of the *Charter* were claiming that section 73 was discriminatory towards the majority of French-speaking children by refusing them access to publicly funded English instruction and by denying, in general, freedom of choice with regards to language of instruction in Quebec. The appellants contended that Bill 101 violated the equality rights protected in the *Quebec Charter*. Even though the Supreme Court dismissed their appeal under the provincial charter, it judged necessary to assess whether such a challenge should also be dismissed under the federal one. In a unanimous decision, the Court

[29]Out of the sixteen appellants in *Gosselin*, only two had not been born in Quebec and had not received their primary education in French (para 3).

held that Bill 101 did not infringe the equality rights protected in section 15 of the Canadian *Charter.*

Even though "maternal language" had been recognized as an analogous ground for discrimination under section 15 of the *Charter* by the Quebec Superior Court in *Quebec v Les Entreprises W.F.H. ltée* (2000), the judges considered that it was not the content of section 15 that was at stake in *Gosselin* but its relationship with the positive language guarantees given to minorities in section 23 of the *Charter* and section 73 of Bill 101. The Court found that, as in *Mahe* (1990), universal individual rights such as those found in section 15 of the *Charter* could not be invoked to nullify the special status given to the English and French groups protected by sections such as section 23. Furthermore, it found as in *Arsenault-Cameron* (2000), that special treatment given to linguistic minorities in section 23 was not an exception to section 15, and thus not a violation of equality, but rather the application of substantive equality. The Court thus established that there was not a hierarchy among constitutional rights and that the text of the *Charter* had to be understood comprehensively.

The Court also argued that the principle of freedom of choice with regards to language of instruction was not supposed to be recognized within the ambit of section 23 according to the *Charter*'s framers. The framers were concerned that giving members of the linguistic majority access to minority language schooling would transform minority language schools into "assimilation centers" (para 31) where members of the majority would outnumber members of the minority. In the Quebec context, the framers were additionally worried that such a policy would "operate to undermine the desire of the majority to protect and enhance French as the majority language in Quebec, knowing that it will remain the minority language in the broader context of Canada as a whole" (Loc.cit.). Since section 73 of Bill 101 as amended in 1993 was the legislative articulation of the constitutional right found in section 23 of the *Charter*, the Court argued it could not be opposed to section 15 of the *Charter*.

In the end, *Gosselin* resulted in the preservation of the legislative status quo. Graham Fraser believes the case demonstrated that the *Charter* is sensitive both to Quebec's desire to retain control over its education policy and to the rights of linguistic minorities to thrive (2009). This suggests that jurisprudence on Bill 101 was open to a certain conception of a multinational Canadian citizenship. However, the Court justified its decision mainly on the basis that the impugned provision of Bill 101was protecting the assistance right of the members of the

Anglophone community in Quebec, and not the National Assembly's external rule with respect to minority language education. Therefore, it preserved its dominant polyethnic logic in interpreting rights. However, the bench would later adopt an undifferentiated conception of minority education rights in *Solski v Quebec* (2005).

Solski v Quebec (2005)

Members of the linguistic French majority and members of the Allophone community were more successful in challenging Bill 101 under the *Charter* in *Solski* (2005). At issue was the constitutionality of section 73(2) of Bill 101 which specifies that only the children who have completed the "major part" of their education in English should have access to publicly funded education in English. In the appellants' view, this provision violated section 23(2) of the *Charter* which provides that "[c]itizens 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." In a unanimous decision, the bench concluded that section 73(2) of Bill 101 did not infringe the rights protected in section 23(2) of the *Charter* when properly interpreted and determined that the appellants should have qualified for instruction in a publicly funded English school.

To determine whether a child had completed the "major part" of his or her education in English, the Quebec government would simply calculate if the child had spent more months in the English schooling system than in the French one. In the Court's view, this strictly mathematical interpretation of the "major part" requirement was incompatible with the purpose of section 23(2) of the *Charter*. The Court believed the framers of the *Charter* intended for this guarantee to "provide continuity of minority language education rights, to accommodate mobility and to ensure family unity" (para 30). Section 23(2) did not specify the time a child had to spend in a minority language school system in order to benefit from the constitutional guarantee.

Rather, the Court found that section 23(2) required that the child have a sufficient connection with the language of the minority – in other words, the child needed to have spent a "significant part" of his educational pathway in the language of the minority. Furthermore, this connection had to be assessed both subjectively and objectively. The Quebec government would need to ask: "Subjectively, do the circumstances show an intention to adopt the minority language as the language of instruction? Objectively, do the educational experiences and choices to date support

such a connection?" (para 40). The Court thus preferred a qualitative evaluation of a pupil's genuine commitment to minority language instruction that would take into account notably "the time spent in each program, at what stage of education the choice of language of instruction was made, what programs are or were available, and whether learning disabilities or other difficulties exist" (para 33). Only by adopting such an approach would section 73(2) of Bill 101 be considered constitutional.

Solski is important in the sense that it created a new category of rights holders under section 23(2) of the *Charter*. A careful analysis of the *House of Commons Debates* in which the then Justice Minister Jean Chrétien explained the rationale for section 23(2), reveals that what was intended was to ensure continuity of minority language education and family unity in the case of interprovincial immigration (1980, 3286). Concretely, continuity of education and family unity were conditional on interprovincial immigration and not constitutional guarantees on their own. In *Solski* however, the judges decided to stray away from the original intent of the *Charter*'s drafters and to do away with the concept of mobility: "Section 23(2) in particular facilitates mobility and continuity of education in the minority language, though change of residence is not a condition for the exercise of the right" (para 33).

Two out of the three appellant families whose children were deemed to qualify for publicly funded English instruction in *Solski* had not moved from a Canadian province to Quebec. The *Solski* family had moved from Poland to Quebec and had been granted permission to send its children to publicly funded English schools under the basis that their stay in Quebec was supposed to be temporary. In the end, the family decided to settle permanently in Quebec and sought permanent eligibility to attend English school for their children. In the case of the Lacroix family, one daughter had completed year 1 and 2 of her primary education in private French school but had opted to continue her education in an English private school.

By adopting a broad and purposive approach in interpreting the meaning of 23(2), the Court determined that this constitutional guarantee was not only for members of the official linguistic minority as conventionally defined, but also for members of the Allophone community and the linguistic majority. Thus in *Solski*, the Court was more concerned with the individual rights of children in general to have continuous education than with protecting Quebec's external rule to promote French culture. However, even before the decision in *Solski* was delivered, the Quebec government had adopted *An Act to Amend the Charter of the French Language, 2002* (also

known as "Bill 104") under which the children of the Solski and Lacroix families would not have qualified for public English instruction. The constitutionality of these amendments would later be assessed by the Supreme Court of Canada in *Nguyen v Quebec* (2009).

Nguyen v Quebec (2009)

Nguyen (2009) is the final case of a series of legal challenges aimed at reducing the power of Bill 101 with respect to minority language education. At issue in *Nguyen* was the constitutionality of paragraphs 2 and 3 of section 73 of Bill 101, regarding the eligibility to attend publicly subsidized English school in Quebec. These provisions had been added by Bill 104 in order to counter the effects of so-called "bridging-schools." Parents whose children were not entitled to receive publicly funded education in English according to section 23(1) of the *Charter*, would enrol them in unsubsidized English schools for a short period of time so as to permit them to acquire the right to publicly funded English-language education thanks to section 23(2). Paragraph 2 of section 73 establishes that time spent in an unsubsidized English school cannot be taken into account when determining if a child can have access to a publicly subsidized English school. Paragraph 3 of section 73 specifies that the same rule is applicable for schooling received in English following an authorization given by the province in special cases where the child has a serious learning disability, is temporarily residing in Quebec, or is in an exceptional family or humanitarian situation.

In a unanimous judgment, the Court decided that paragraphs 2 and 3 of section 73 of Bill 101 infringed section 23(2) of the *Charter*. The Court pointed out that this constitutional right does not specify whether the education received or being received has to be private or public, nor does it mention according to which type of authorization it needs to have been granted. On the contrary, the Court believed that section 23(2) alludes to the factual instruction of a child received in one of Canada's two official languages. As Justice Lebel writing for the court argued:

> The inability to assess a child's educational pathway in its entirety in determining the extent of his or her educational language rights has the effect of truncating the child's reality by creating a fictitious educational pathway that cannot serve as a basis for a proper application of the constitutional guarantees (para 33).

As determined in *Solski* (2005), eligibility for instruction in the language of the minority was conditional on the child's educational pathway being "genuine." For the Court, this meant that

the evaluation of a child's pathway had to be comprehensive, but also that it had to recognize when attendance at a school was used solely to acquire artificially an educational minority language right. The judges acknowledged that a literal interpretation of section 23(2) might lead to a return to the principle of freedom of choice of the language of instruction in Quebec, which was not in their view the original intent of the *Charter*'s drafters.

Furthermore, the Court found that the impugned provisions of Bill 101 did not withstand section 1 analysis. While the objective of the law was found to be pressing and substantial, the means chosen were found to be excessive. The Court had already recognized the importance for the province of Quebec to protect the French language in *Ford* (1988) and realized that the "bridging-schools" were compromising this objective. However, the Court thought paragraphs 2 and 3 of section 73 of Bill 101 did not minimally impair the constitutional rights of the appellants. While the number of children who become eligible for publicly funded English education after having attended a privately funded English school is increasing, the overall number remains low in proportion to the number of children enrolled in the educational system. For that reason, Justice Lebel said that "the absolute prohibition on considering an educational pathway in [an unsubsidized private school] seem[ed] overly drastic" (para 42). The Court concluded that in reality there was not a return to freedom of choice, and that other solutions were available to Quebec's national Assembly to deal with the problem of the "bridging-schools," such as the contextual approach referred to in *Solski*.

In addition, paragraph 3 was found to be incompatible with the principle of preserving family unity provided for in section 23(2) of the *Charter.* In the case at hand, one of the appellants was not able to secure eligibility for instruction in English for his son even though his daughter was attending a school in the publicly funded English system, pursuant to a special authorization. By granting special authorizations to attend publicly funded English schools to certain children, the government was exceeding its constitutional obligations. But once this was done, the Court considered that the government could not limit the constitutional rights derived from such authorizations.

As in *Solski*, in *Nguyen* the right of eligibility for publicly funded English instruction for certain categories of individuals was promoted to the detriment of Quebec's external rule aimed at protecting the vitality of the French language. In these two rare instances, the judges adopted an undifferentiated vision of Canadian citizenship. While the court was careful to say that the

educational pathway would need to be genuine rather than artificial, in reality the invalidation of paragraph 2 of section 73 of Bill 101 granted the economic right for individuals to buy their children and generations to come a legal status as a member of one of Canada's official linguistic minority community. For example, parents would be able to pay for their children to attend private English school at the elementary level and then claim the right to have them attend public English school for free at the secondary level. After having attended public English secondary schools, these children and their children would be considered linguistic minorities in the constitutional sense. *Nguyen* therefore undeniably increased the possibility of language substitution to the benefit of English and took from the Quebec government a policy tool that would have been helpful in integrating new comers into the French public culture.

Even though some, like the Leader of the Official Opposition Pauline Marois, summoned the government to invoke the notwithstanding clause in response to *Nguyen*, the government could technically not do so since section 23 is not subject to it. The Charest government thus adopted *An Act following upon the court decisions on the language of instruction, 2010* (also known as "Bill 115"). Bill 115 basically complies with the *Solski* and *Nguyen* decisions by allowing the government to determine by way of regulation the analytical framework that must be used in determining the eligibility to publicly funded English school. To that effect, *Regulation c C-11, r 2.1* takes into account the time spent in an unsubsidized English school in assessing the educational pathway of students. Even though Bill 115 considers illegal the setting-up or the operatorship of an educational establishment for the purpose of circumventing the principle of French instruction, the new regulations provide that three years spent in an unsubsidized English school are sufficient to guarantee access to publicly funded English school.

Summary

In almost all of its judgments on Bill 101, the Supreme Court unanimously secured the assistance rights of the Anglophone minority or the rights of individuals, rather than the external rules used by the Francophone Quebecer majority. Even in *Gosselin* (2005), which found in favour of the Quebec government, the main justification given was the need to protect linguistic minorities, rather than protecting Francophone Quebecers' collective interest. Despite the fact that the judges started recognizing the necessity for Quebec to preserve its French culture with *Ford* (1988), it did not prevent them from invalidating significant parts of Bill 101 aimed precisely at doing so,

whether in the area of education or within the work place. The "proportionality'' requirement of the *Oakes* test seems to have been fatal to Quebec's desire to limit language rights.

From Quebec's majoritarian perspective, the *Charter* jurisprudence in the area of language rights is very problematic. In the end, Quebecers never signed off on the *Charter*, yet in its name, the powers of the National Assembly were significantly reduced (Laforest 2004). Since the provincial language policy was predominantly challenged under section 23 pertaining to educational rights, the establishment of a right violation by the judiciary could not be overturned constitutionally with the derogatory clause. In *Ford* , the only case in which the notwithstanding clause was available, its use was found to be politically non viable in the long run. By constantly being forced to comply with the Court's judgments, Quebec accepted to protect assistance rights, and in some cases purely individual rights, to the detriment of its use of external rules. It accepted that Canadian citizenship was becoming less and less multinational in character.

ANALYSIS

As predicted, the *Charter* has contributed to the shaping of a more polyethnic vision of cultural citizenship in Canada in the area of minority language rights. Constitutional review has supported the implementation of group-differentiated rights for official linguistic minorities rights without endorsing parallel social structures, such as a totally distinct linguistic rights regime in Quebec. Using a purposive approach, the Court constrained governmental action in Quebec cases and compelled governmental action in outside Quebec cases. More precisely, the language rights granted in judicial decisions have conflicted with societal collective rights in the Anglophone provinces, and in the case of Quebec, with the Francophone majority's use of external rules to protect its culture. Yet, governments have been unable, in the case of sections 16 to 23 *Charter* rights violation, or unwilling, in the case of other *Charter* rights violations, to use the notwithstanding clause repeatedly to overturn judicial invalidations of their laws. To date, parliaments have abided with no exception by the Supreme Court's rulings, advancing mainly assistance and representation rights which are associated with a polyethnic model of citizenship.

With respect to the interpretation of minority language right, the Supreme Court of Canada has adopted a "constitutional parallelism" approach that consists of treating linguistic minorities equally regardless of their spoken official language (Tuohy 1992; Ryan 2003). According to

Carolyn J. Tuohy, this legal parallel treatment of English and French originates from the founding myth of two nations. However, this constitutional parallelism does not reflect reality. As previously mentioned, the precarious status of Francophones outside Quebec does not compare to that of the established special status of the Anglophones in Quebec. The two "founding nations" encompassing those minorities, namely Quebec and the *Rest of Canada* (hereafter "ROC"), cannot be said to be on equal footing either. Interestingly, all the rights demanded by Francophones outside Quebec had already been granted to Anglo-Quebecers before the enactment of the *Charter*. Furthermore, the right claims to which the judges responded favourably in Quebec to the dismay of the majority would have been non-issues in the ROC.

This constitutional parallelism, juxtaposed to a purposive approach, has been highly beneficial to linguistic minorities across Canada, especially in education. All the decisions that were found to be in favour of assistance rights for linguistic minorities, with the exception of *Doucet-Boudreau* (2003), have been unanimous. The only two judgments (*Société des Acadiens* 1986; *Charlebois* 2005) that refused the recognition of assistance rights for the minority were delivered by a divided bench and pertained to official languages rights rather than educational rights. This should come as no surprise since the Court recognized "protection of minorities" to be an underlying constitutional principle that informs the Canadian Constitution and especially the *Charter* (*Reference Re Secession of Quebec* 1998)[30]. Yet, for the Court, Francophone Quebecers do not constitute a minority that needs significant protection.

The judiciary has shown a lack of concern for Francophone Quebecers' national minority interests which has dampened their hope of establishing an authentic multinational citizenship in Canada. This lack of concern is witnessed in the Court's articulation of section 1 in Quebec linguistic rights cases. In *Solski* (2005), the Court recognized that, despite its uniform approach to linguistic rights, the socio-historical context of each province had to be taken into account when implementing those rights under section 1. Yet, none of the *Charter* rights violations found in the Quebec cases surveyed were saved under the limitation clause, even though there was interpretive space for a different constitutional reading. The use of the *Oakes* test seems to have been fatal to the government of Quebec's defence.

[30] *Reference Re Secession of Quebec* (1998) will be further discussed in Chapter III on aboriginal Issues.

The lack of concern for Francophone Quebecers' national minority interests can also be illustrated by the fact that individual rights were upheld under section 23 of the *Charter* in *Solski* (2005) and *Nguyen* (2009). The reasons given in these newer cases to advocate the right of Allophone and Francophone Quebecers to instruction in the language of the minority, in certain circumstances, differed greatly from those given earlier to defend the same right for Francophones outside Quebec. In the first instance, the Court stressed the importance of guaranteeing continuous education for individual children under section 23(2). In the second instance, it had insisted on the general purpose of section 23 which was ultimately to counter the assimilation of linguistic minority communities above all else (*Mahe* 1990). Also explicit in the outside Quebec jurisprudence was the judges' intent to redress past injustices for linguistic minorities under section 23 (Ibid.). However, granting eligibility to publicly funded English instruction to children of Allophone immigrants in Quebec and to those of Francophone Quebecers does not amount to countering assimilation of the Anglo-Quebecer community nor does it redress past linguistic injustices.

Is this jurisprudential deviation a step towards a more undifferentiated model of citizenship? In reality, freedom of choice in the area of public education in Quebec was not validated by the court in *Gosselin* (2005), which is what a truly undifferentiated conception would have warranted.

CONCLUSION

The well being of linguistic minorities, and especially Francophone minorities outside Quebec, was thought to be essential in the creation of a shared Canadian citizenship in the post-World War II period. This justified the implementation of the OLA. This legislation recognized assistance rights to official linguistic minorities and represented a step towards a polyethnic citizenship in Canada. Later, the *Charter* constitutionalized those rights. As this chapter has argued, *Charter*-based judicial review on minority language rights has confirmed and pushed further the choice Canada made of promoting a polyethnic citizenship. It confirmed it by implementing official languages rights but also pushed it further by implementing minority educational rights, which have included representation rights as well. The next chapter will evaluate if a polyethnic conception of citizenship that informed Canada's postwar

multiculturalism policy has also informed *Charter*-based judicial review in the area of multiculturalism.

Summary of Cases

Case	Type of right claimed by litigant	Type of right defended by government	Cultural minority supports	Winner	Legal change	Type of right promoted by the judiciary	Policy compliance	Type of right promoted by government
A.G. (Que.) v Quebec Protestant School Boards (1984)	Assistance	External rule	LIT (Anglo Queb.) GOV (Franco Queb.)	LIT	Yes	Assistance	Yes: Quebec tacitly complied with the decision. Eventually, the government officially recognized the "Canada clause" with *An Act to amend the Charter of the French language, 1993.*	Assistance
Société des Acadiens v Association of Parents (1986)	Assistance	Societal collective	LIT	GOV	No	Societal collective (Individual)	Yes: Section 19(1) of The *Official Languages Act of New Brunswick* was not amended until 2003 to include the right to bilingual judges.	Societal collective
Ford v Quebec (1988)	Assistance	External rule	LIT (Anglo Queb.) GOV (Franco Queb.)	LIT	Yes	Assistance	Yes: *An Act to amend the Charter of the French language, 1993.*	Assistance
Devine v Quebec (1988)	Assistance vs. External rule	External rule	LIT (Anglo Queb.) GOV (Franco Queb.)	LIT	Yes	Assistance	Yes: *AnAct to amend the Charter of the French language, 1993.*	Assistance
Mahe v Alberta(1990)	Assistance and Representation	Canadian collective	LIT	LIT	Yes	Assistance and Representation	Yes: *School Amendment Act, 1993.*	Assistance and Representation
Reference Re Public Schools Act (Man.)(1993)	Not applicable	Policy status quo: Societal collective	Not the policy status quo	Cultural minority	Yes	Assistance and Representation	Yes: *Francophone Schools Governance Regulation.*	Assistance and Representation
Arsenault-Cameron v Prince Edward Island (2000)	Assistance and representation	Societal collective	LIT	LIT	Yes	Assistance and Representation	Yes: Prince Edward Island established a new French school in Summerside for the start of the 2000 Fall term.	Assistance and Representation
Doucet-Boudreau v Nova Scotia (2003)	Assistance	Societal collective	LIT	LIT	Yes	Assistance	Yes: The case was moot and a minority language school had already been built.	Assistance
Charlebois v Saint John (2005)	Assistance	Societal collective	LIT	GOV	No	Societal collective	Yes: The *Official Languages Act* of New Brunswick was not amended.	Societal collective
Gosselin v Quebec (2005)	Individual	External rule	GOV	GOV	No	External rule (Assistance)	Yes: *The Charter of the French language* was not amended.	External rule
Solski v Quebec (2005)	Individual	External rule	GOV	LIT	Yes	Individual	Yes: The Court's remedy was "read-in" the *Charter of the French language*. Later, Quebec adopted *An Act following upon the court decisions on the language of instruction, 2010* and *Regulation c C-11, r 2.1.*	Individual
Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v Canada (2008)	Assistance	Societal collective	LIT	LIT	Yes	Assistance	Yes: Learning programs for RCMP members have been put in place to further the learning of both official languages.	Assistance
DesRochers v Canada (2009)	Assistance	Societal collective	LIT	GOV	No	Societal collective	Yes: The federal government did not fund CALDECH.	Societal collective
Nguyen v Quebec (2009)	Individual	External rule	GOV	LIT	Yes	Individual	Yes: Quebec invalidated *An Act to Amend the Charter of the French Language, 2002* and adopted *An Act following upon the court decisions on the language of instruction, 2010.* It also put in place *Regulation c C-11, r 2.1.*	Individual

Chapter II: Multiculturalism

INTRODUCTION

With the adoption of a multiculturalism policy in 1971, Canada became the first officially multicultural country in the world. In formulating this policy, the federal government was pursuing four goals, which can be summarized as follows: 1) to assist cultural groups in preserving their cultural heritage; 2) to help cultural groups overcome cultural barriers in view of greater participation in Canadian society; 3) to promote cultural exchange in order to foster greater national unity and 4) to facilitate the learning of one of Canada's official languages for immigrants (*House of Commons Debates* 1971, 8546). In order to further these goals, ethnic cultural expression funding and programs aimed at the reduction of racial discrimination were put in place, but no parallel ethnic institutional structures were established (Breton 1986; Stasiulis 1988; Abu-Laban 1999). Officially, the multiculturalism policy simultaneously promoted "cultural retention" and "sociocultural integration" (Jedwab 2003, 312). In reality, it has tended to promote superficial cultural differences, rather than deep ones, to the benefit of a single social structure (Roberts and Clifton 1982; Brotz 1980).[31] For these reasons, and as explained in the Introduction chapter, Canada's multiculturalism was informed by a polyethnic model of citizenship.

When the multiculturalism ideal was enshrined under section 27 of the *Canadian Charter of Rights and Freedoms, 1982* (hereafter "*Charter*"), there was no consensus on whether the normative meaning of constitutional multiculturalism would mirror that of the federal policy or take on a new one (Hudson 1987). Section 27 stipulates that the "Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." From a legal point of view, "it does not have a static meaning, circumscribed by the niceties of legal precision" (Magnet 1987). At the outset, constitutional experts agreed that this provision was an interpretive clause that did not guarantee a positive or absolute right in the domain of multiculturalism *per se* (See for example Lebel 1987; Woehrling 1985; Tarnopolsky 1982). They debated whether section 27 would conflict with other provisions of the *Charter* or would supplement them (Lebel 1987; Bottos 1988; Woehrling 1985). Some saw it as more

[31] For a different view, see Neil Bissoondath (1994).

'declarative' in nature and questioned whether it would be given any weight at all in constitutional interpretation (Hudson 1987; Hogg 1982). To that effect, Peter W. Hogg suggested that "s.27 may prove to be more of a rhetorical flourish than an operative provision" (Hogg 1982, 71-72). Others however, speculated that it had the potential to promote certain cultural group rights (Kallen 1987; Woehrling 1985; Magnet 1987).

After 30 years of *Charter* rule, what has been the weight and content given to section 27 of the *Charter* in particular, and multiculturalism in general? In order to answer this question, this chapter reviews the Supreme Court of Canada's jurisprudence on multiculturalism, as well as its reception by governmental authorities, to determine the types of rights the *Charter* has promoted in this domain. It will be argued that judicial review in the area of multiculturalism, just like official multiculturalism policy, has tended to favour a polyethnic model of citizenship by granting to minority groups new exemptions rights and assistance rights. Although rights associated with an undifferentiated model of citizenship, such as individual rights, societal collective and anti-defamation rights were also upheld, they resulted essentially in the preservation of the policy status quo. In other words, they resulted in the maintenance of the ideals of Canada's post-World War II period. The following sections will discuss the multiculturalism cases that have involved freedom of religion, freedom of expression and due process.

FREEDOM OF RELIGION

The ideal of Canadian multiculturalism was first put to the test in freedom of religion cases. Most of the claims made under section 2(a) of the *Charter* pertaining to "freedom of conscience and religion" have amounted to exemption rights demands (*R v Big M Drug Mart* 1985; *R v Edwards Books and Art* 1986; *Multani v Commission scolaire Marguerite-Bourgeoys* 2006; *Alberta v Hutterian Brethren of Wilson Colony* 2009). Jacob T. Levy defines exemption rights as "individually exercised negative liberties granted to members of a religious or cultural group whose practices are such that a generally and ostensibly neutral law would be a distinctive burden on them" (1996, 25). But the judiciary has also been confronted with one claim of an assistance right (*Adler v Ontario* 1996). This type of right involves demands for state benefits by religious minorities and thus, the recognition of a positive right (Levy 1996). As will be seen, cultural minority groups have been quite successful in freedom of religion cases. The new exemption

rights and assistance rights that were granted to cultural minority groups consolidated Canada's polyethnic model of citizenship.

R v Big M Drug Mart Ltd. (1985) and R v Edwards Books and Art Ltd. (1986)

The constitutionalized notion of multiculturalism was first used as a support for interpreting freedom of religion in two cases involving Sabbatarian observance laws. The first case, *R v Big M Drug Mart Ltd.* (1985) challenged the federal government's *Lord's Day Act, 1970* and the second case, *R v Edwards Books and Art Ltd.* (1986), challenged the Ontario *Retail Business Holidays Act, 1980*. Both statutes barred most commercial activities on Sundays, thus compelling retailers and their employees to observe the Christian Sabbath, but the *Retail Business Holidays Act* provided for an exemption for some Saturday Sabbath observers. In Big M Drug Mart, the judges unanimously[32] invalidated the federal statute since it was found to violate section 2(a) of the *Charter* pertaining to "freedom of conscience and religion." However, in *Edwards Books and Art*, a divided bench[33] upheld the impugned provincial law. A majority of the judges determined that the Act violated section 2(a) of the *Charter*, but should be saved under section 1.

In *Big M Drug Mart*, the judges thought that the entrenchment of the freedom of conscience and religion in the Canadian constitution warranted a break from past jurisprudence based on the *Canadian Bill of Rights, 1960*. Contrary to the *Canadian Bill of Rights*, the *Charter* "does not simply 'recognize and declare' existing rights as they were circumscribed by legislation current at the time of the *Charter*'s entrenchment" (para 115). Following the decision in *Hunter et al. v Southam Inc.* (1984), the Court believed a purposive approach should guide the interpretation of section 2(a) of the *Charter*. In *Hunter*, Chief Justice Dickson had pointed out that the *Charter*'s purpose was "the unremitting protection of individual rights and liberties" (155). In *Big M Drug Mart*, Chief Justice Dickson added that "[i]t [was] easy to see the relationship between respect for individual conscience and the valuation of human dignity that motivates such unremitting protection" (para 121). He also indicated that the freedom of conscience and religion was vital to the protection of the democratic tradition underlying the *Charter*: "The ability of each citizen to make

[32] In reality, the reasons for the decision in *Big M Drug Mart* were given in two separate judgments. Chief Justice Dickson wrote the majority judgment on behalf of himself and Justices Beetz, McIntyre, Chouinard, and Lamer. Justice Wilson wrote the concurring judgment. For the purpose of this chapter, only the arguments laid in the majority judgment will be discussed.

[33] The *Edwards Books and Art* case gave rise to four different decisions. The majority judgment was rendered by Chief Justice Dickson for himself and Justices Chouinard and Le Dain. Justice Beetz, in accordance with Justice McIntyre, and Justice Forest both issued concurring judgments. Finally, Justice Wilson wrote a dissenting judgment.

free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government" (para 122). The judges thereby associated freedom of religion with the need to reinforce the democratic political process.

Given the philosophical and political foundations of the *Charte*r, the Court defined the freedom of conscience and religion guaranteed by it as follows:

> [E]very individual [is] free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice (para 123).

Chief Justice Dickson concluded that "government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose" (123).

Following American Sunday-cIosing laws jurisprudence and the decision rendered in *A.G. (Que.) v Quebec Protestant School Boards* (1984), the Court established that both the purpose and effect of legislation should be scrutinized when determining its constitutionality under the *Charter*, but that priority should be given to the purpose. Given that the legislative purpose of the *Lord's Day Act* was compulsory religious observance, the impugned statute was found to infringe freedom of conscience and religion. Chief Justice Dickson declared:

> To the extent that it binds all to a sectarian Christian ideal, the *Lord's Day Act* works [as] a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture (para 97).

Conversely in *Edwards Books and Art*, the secular legislative purpose of the *Retail Business Holidays Act* which was to provide retail workers with a common day of rest was not found to

violate section 2(a) of the *Charter*. The Court thus inquired into the effects of the law. It found, exemption aside, its effects to be detrimental to Saturday observing retailers who had to close an extra day in comparison to Sunday observers. Even the exemption for some Saturday observers was found to be disadvantageous. Section 3(4) of the *Retail Business Holidays Act* granted the right to retailers to open on Sundays if they had been closed the preceding Saturday, but only if they had seven or fewer employees at the time servicing the clientele in a commercial space of less than 5,000 square feet. According to the majority, this exemption had the effect of penalizing large Saturday observer retailers as compared to smaller ones. Finally, the Act was also seen as constraining the religious freedom of Saturday observing consumers by limiting their access to commercial services.

Having determined in *Big M Drug Mart* and *Edwards Books and Art* that direct and indirect burdens on religious practice were inconsistent with the freedom of conscience and religion guaranteed by the *Charter*, the Court also established that they ran contrary to section 27. As per Chief Justice Dickson, "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" (para 99). While this declaration may have been self-explanatory for the bench, the lack of further clarification for this perceived inconsistency did not allow for additional light to be shed on the meaning of section 27. It only suggested that this *Charter* provision could "support the liberal interpretation of a substantive right"(Small 2007).

Once the Court ascertained that the *Lord's Day Act* and the *Retail Business Holiday Act* both violated section 2(a) and were inconsistent with section 27 of the *Charter*, it asked whether these statutes could withstand a section 1 analysis. At the time the decision was rendered in *Big M Drug Mart*, the Court had not standardized its interpretational approach to the limitation clause – it would do so later in *R v Oakes* (1986). Nevertheless, it established the necessity of having a sufficient legislative objective to limit a *Charter* right as well as reasonable means to achieve that objective. In the case at hand, the Attorney General of Canada attached two policy goals to the Sunday-closing law that should justify limiting the freedom of conscience and religion. First, he argued that the choice of Sunday as a day of rest was the most practical one due to the fact that a majority of the population was of the Christian faith. The Court dismissed this utilitarian argument as repugnant "because it would justify the law upon the very basis upon which it is attacked for violating s. 2(*a*)" (para 140). Second, the Attorney General insisted on the secondary importance of having a uniform day of rest. While the Court agreed on the reasonableness of

such a secular legislative intent, it found that this was not the primary motivation behind the *Lord's Day Act.* To the contrary, the act had been enacted chiefly to compel religious observance.

By the time the Court heard the case in *Edwards Books and Art*, it had developed a test for the application of section 1 in *Oakes*. This was an opportunity for the bench to refine the *Oakes* test. In *Big M Drug Mart*, the Court had already recognized as an important concern the secular objective of having a uniform day of rest for families and community members. The real question, then, was whether a fundamental freedom, that of religiously observant retailers, could be limited in order to promote the interest of a vulnerable group, that of the retail workers. According to the majority, the exemption found in section 3(4) of the *Retail Business Holiday Act* minimally impaired the freedom of religion of Saturday observer retailer. Chief Justice Dickson also added that: "When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the Legislature for determining that the protection of the employees ought to prevail" (para 141). Ultimately, the Court decided that rights balancing under section 1 of the *Charter* had to take into account "the type and intended beneficiaries of public policy" (Manfredi 2001, 41).

Noteworthy in *Edwards Books and Art*, was Justice Wilson's objection to limiting the right of freedom of conscience and religion under section 1 of the *Charter*. In her dissenting judgment, she regarded as unacceptable the disparate treatment of big Saturday observer retailers and of small Saturday observer retailers because it weakened the bond holding the Saturday observing community together. As per Justice Wilson, "when the *Charter* protects group rights such as freedom of religion, it protects the rights of all members of the group"; otherwise, it would "introduce an invidious distinction into the group and sever the religious and cultural tie that binds them together" (para 207). Only this interpretation would be consistent with "the preservation and the enhancement of Canada's multicultural heritage" according to her. This understanding of section 27 of the *Charter* suggested that the ideal of multiculturalism supported cultural retention more than socio-cultural integration.

Following the Court's decisions, the *Lord's Day Act* was repealed, but the *Retail Business Holiday Act* was upheld. Nevertheless, Queen's Park amended its Sabattarian law shortly after the judgment rendered in *Edwards Books and Art* to widen the scope of the exemption for all religious observers (*An Act to amend the Retail Business Holidays Act* 1989). The new legislation allowed retailers to open for business on Sundays if they closed another day of the week for

religious reasons. This religious exemption was not accompanied by limitations related to the size of the commercial space and the number of employees servicing the clientele. By providing for such a permissive religious exemption, the authorities complied with the minority judgment of Justice Wilson in *Edwards Books and Art*. Concurrently, Ontario protected vulnerable retail workers by providing them with the right to refuse Sunday work (*An Act to Amend the Employment Standard Act* 1989). Eventually in 1993, the province of Ontario removed "Sunday" from the definition of "holidays," permitting retail businesses to operate everyday of the week (*An Act to amend the Retail Holidays Act in respect of Sunday shopping*). The 1989 religious exemption was maintained in cases where a public holiday falls on a Sunday.

Multani v Commission scolaire Marguerite-Bourgeoys (2006) and Alberta v Hutterian Brethren of Wilson Colony (2009)

More recent religious exemption *Charter* cases have invoked the ideal of multiculturalism in support of justificatory factors under section 1, and for different reasons without explicit reference to section 27. In *Multani v Commission scolaire Marguerite-Bourgeoys* (2006) a young Orthodox Sikh sought an exemption to wear his kirpan to public school in Quebec, while in *Alberta v Hutterian Brethren of Wilson Colony* (2009), Hutterites wanted to be exempted from Alberta's universal photo requirement for licensed drivers.[34] In both cases, an infringement of freedom of religion under section 2(a) of the *Charter* was found and the judges had to debate whether or not it could be justified under section 1. Ultimately, the Court unanimously[35] granted the right for Sikhs to wear their kirpan to school, but refused to exempt Hutterites from the universal photo requirement by a one vote margin[36].

In both cases, the authorities had attempted to accommodate the religious beliefs of the appellants. In *Multani*, Gurbaj Singh Multani had been forbidden by the council of commissioners from carrying his ceremonial dagger since it was thought to endanger the security of his schoolmates, but allowed to wear a "symbolic kirpan in a form of a pendant or another form made of a material rendering it harmless" (para 5). In *Hutterian Brethren of Wilson Colony*, the Alberta government had agreed not to display the pictures of Hutterites on their driver's licences, but had insisted that a picture be taken nonetheless for placement in the

[34]The *Operator Licensing and Vehicle Control Regulation*, Alta Reg 320/2002, s 14(1)(b) specifies this requirement.
[35]Chief Justice McLachlin and Justices Bastarache, Binnie and Fish concurred with the reasons given by Justice Charron. Justice Deschamps, in accordance with Justice Abella, and Justice Lebel both issued concurring judgments.
[36]The majority judgment was delivered by Chief Justice McLachlin on behalf on herself and Justices Binnie, Deschamps and Rothstein. Justices Abella, Lebel and Fish each delivered their dissenting reasons in separate judgments.

province's central data bank to prevent identity theft. These accommodation attempts, however, were thought to be unacceptable by the appellants on religious grounds.

As set out in *Syndicat Northcrest v Anselem* (2004), two criteria had to be met in order to conclude that there had been an infringement of freedom of religion. First, the claimant had to show "that he or she sincerely believes in a practice or belief that has a nexus with religion" and second, "that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief" (*Multani* 2006, para 145). The Court agreed that Multani could only genuinely comply with his religion by carrying a metal kirpan at all times. The bench also agreed that preventing Multani from wearing his kirpan interfered significantly with his religious conviction. As a result, the appellant had left the public school system to attend a private school where kirpans were allowed. As for the Hutterites, the Court also recognized that their beliefs were honestly held. Relying on lower courts' judgments, the judges assumed as well that the universal photo constituted a substantial interference with Hutterite beliefs.

Having recognized a freedom of religion violation in *Multani* and *Hutterian Brethren of Wilson Colony*, the bench made its final decisions based on the *Oakes* test. In *Multani*, the judges found the need to ensure a reasonable level of safety in schools to be a pressing and substantial need. They also ascertained a rational connection between the need for safety and the prohibition of metal kirpans. The Court asserted that the absolute prohibition on kirpans in schools did not however minimally impair the rights of Sikhs. The evidence had demonstrated that the risk of kirpan use for violent purposes was low. Consenting to having kirpans worn sealed and sown up inside the clothing was seen as a better alternative. Without directly invoking section 27 of the *Charter*, Justice Charron added that the "absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others" (para 78). A religious exemption in *Multani* was deemed necessary to show the importance of religious tolerance to students. In that sense, the deleterious effects of the decision of the council of commissioners outweighed its salutary effects. In the end, since Multani was no longer attending school in the public system, the Court simply declared the kirpan prohibition to be null and void. Nonetheless, the school board announced in a press release that it would comply with the judgment (CSMB 2006).[37]

[37]It was confirmed in a phone interview conducted June 27, 2011 with the School Board's Secretary General Alain Gauthier that Sikh students are now allowed to wear their kirpan to school provided that it does not endanger the safety

On the other hand, the application of the *Oakes* test in *Hutterian Brethren of Wilson Colony* did not result in a religious exemption. The majority thought that the maintenance of the integrity of the drivers' licensing system, in order to prevent identity theft, was an important policy objective. It also believed that a universal photo requirement was rationally connected to that objective. As well, the majority argued that the policy passed the minimal impairment test. The Hutterites retained the option to use alternate means of transportation. Furthermore, the majority asserted that any measure other than the universal photo requirement would severely increase the chance of identity theft. Finally, the deleterious effects of the law were not found to outweigh its salutary effects. To that effect, Justice Charron stated:

> In judging the seriousness of the limit in a particular case, the perspective of the religious or conscientious claimant is important. However, this perspective must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs. The bare assertion by a claimant that a particular limit curtails his or her religious practice does not, without more, establish the seriousness of the limit [...]" (para 90).

In this statement, Justice Charron hinted at a thin vision of multiculturalism in which differences are officially recognized but given no clout in terms of rights. This led the majority to conclude that the law imposed on the Hutterites some financial costs and prevented them from being self-sufficient in terms of transportation, but insisted that it did not prohibit religious practice *per se*. The collective security goals of the government were thought to be more important than the preservation of the communal lifestyle of a religious group.

This thin multiculturalism perspective was contested, notably by Justice Abella in her dissent. She was of the view that the limit imposed on the Hutterites' freedom of religion was dramatic. The universal photo requirement would inevitably lead to the Hutterites' inability to drive, and thus, not only affect them individually, but also collectively by hampering their autonomous communal lifestyle by having them rely on others for their transportation needs. Conversely, requiring all Hutterite drivers to have their photo taken for inclusion in a central date base only benefitted marginally the province, according to Justice Abella. As she explained, 700,000 Albertans did not have a driver's licence and their photo was hence not included in the province's central database. Consequently, to exempt 250 Hutterites from having their picture

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of others. Problematic cases are dealt with on an individual basis as they arise and there is no set rule as to how the kirpan must be worn.

taken would not significantly hinder Alberta's efforts in reducing identity theft. In the end, these arguments did not sway the government and to this day, there exists no exemption for Hutterite drivers.

Adler v Ontario (1996)

The entrenchment of the ideal of multiculturalism in the *Charter* was less successful in securing positive entitlements than protecting negative freedoms for religious groups. The Supreme Court made that clear in its decision in *Adler v Ontario* (1996). At issue in this case was the constitutionality of Ontario's *Education Act*, *1990* which provided direct funding only to the province's secular public school system and the separate Roman Catholic school system, as well as of *Regulation 552, 1990* of the Ontario *Health Insurance Act* which provided for special education programs only for disabled children attending taxpayer funded schools. By not funding independent religious schools, both policies were challenged on the ground that they violated freedom of religion and the right to equality, protected respectively by sections 2(a) and 15 of the *Charter*. Of the nine judges who heard the case, eight upheld the validity of the *Education Act* and seven, that of the Ontario *Health Insurance Act* regulation.

The majority,[38] led by Justice Iacobucci, explained that section 93 of the *Constitution Act, 1867* which guarantees the right of denominational schools, such as the Roman Catholic schools in Ontario, was the result of a political compromise that enabled Confederation. As established in *Reference Re Bill 30* (1993), it was thought to constitute a comprehensive code that could not be enlarged by other parts of the constitution, such as section 2(a) and 15 of the *Charter*. The majority supported this argument by invoking *Mahe v Alberta* (1990)[39] in which section 23, pertaining to minority linguistic rights, had also been held to be a comprehensive code protected from the operations of other sections of the *Charter*. In *Mahe*, Chief Justice Dickson had declared: "[Section 23] is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada" (para 27). Accordingly, the majority in *Adler* decided that denominational rights were thought to grant a special status to Roman Catholics, but that these rights could not be extended to other religious groups. Further, the rights of Roman Catholics could not be abrogated by other rights and freedoms, as provided by section 29 of the *Charter*. Relying again on *Reference Re Bill 30*, the

[38]The majority was formed by Chief Justice Lamer and Justices La Forest, Gonthier, Cory and Iacobucci.
[39]The decision rendered in *Mahe* is discussed in Chapter I on Minority Language Rights.

majority also held that public schools were an integral part of the comprehensive code of section 93 of the *Constitution Act* and were thus immune from *Charter* scrutiny. Ontario's funding of the secular public school system could not be found to discriminate against independent religious schools under section 15.

Neither could the funding for special education programs be extended to independent religious schools, according to the majority. Following the Ontario Court of Appeal judgment in the same case, the majority qualified the special education programs as "education services" as opposed to "health services" and consequently declared them immune from *Charter* scrutiny. In the end, the fact that the majority did not find it necessary to invoke section 27 of the *Charter* directly, suggests that it believed that the ideal of multiculturalism could not grant to every religious group the constitutional privileges granted to historical religious minorities. Implicit in the majority judgment was a preference for the status quo in which cultural differences are tolerated but not vigorously supported. This status quo was however contested by Justice L'Heureux-Dubé in her dissent.

Contrary to the majority, Justice L'Heureux-Dubé believed the *Education Act* and *Regulation 552* could be challenged under section 15 of the *Charter*. Following section 15 jurisprudence (*Andrews v Law Society of British Columbia* 1989; *Egan v Canada* 1995), she determined that both policies were discriminatory in the sense that they denied equal benefit of the law to religious groups. Not only did the law create a financial prejudice for religious groups who wanted to educate their children according to their convictions, it also prevented them from ensuring the vitality of their community of faith. Taking into account section 27, Justice L'Heureux-Dubé judged that the preservation of the different communities of faith was important to the *Charter*'s project. Using the metaphor she developed in *Egan v Canada* (1995), she declared: "[W]e cannot imagine a deeper scar being inflicted on a more insular group by the denial of a more fundamental interest; it is the very survival of these communities which is threatened" (para 86). Her vision of multiculturalism differed greatly from that of the majority in the sense that she believed it should allow for state-funded parallel religious institutional structures.

Like Justice L'Heureux-Dubé, Justice McLachlin invoked the ideal of multiculturalism, but the latter gave it an opposite meaning. In her partial dissent, she also found the *Education Act* and *Regulation 552* to be subject to section 15 of the *Charter*. While she found both policies to be inconsistent with the equality provision, she upheld the education scheme under section 1. Most importantly, she recognized as pressing and substantial the objective of the *Education Act*, which

was "the encouragement of a more tolerant and harmonious multicultural society" (para 215). McLachlin believed that free access to secular education enticed parents of all religions to educate their children within the public system. She was concerned that if the government started to fund independent religious schools, and thus reduced their tuition fees, many students now enrolled in the public system would leave it to join a school of their respective faith. The resulting school segregation, based on religion, would reduce children's multicultural exposure and consequently their tolerance for diversity. So without directly invoking section 27, Justice McLachlin suggested that a multiculturalist approach should put the emphasis on socio-cultural integration rather than cultural retention.

Shortly after the defeat in *Adler*, the proponents of religious school funding successfully challenged Ontario's educational policy on the basis of the *International Covenant on Civil and Political Rights, 1966* before the United Nations Human Rights Committee (*Waldman v Canada* 1999). Nonetheless, the United Nation ruling did not prompt the Ontario government to amend its education funding scheme. Eventually, certain special education services were made available to disabled children attending faith-based schools through the Ontario Health Ministry in 2000, but not those provided for children attending publicly funded schools by the Ministry of Education (Byrne 2009).[40] Almost a decade after *Adler*, the Progressive Conservative Party of Ontario ran on the promise to fund religious schools in the 2007 provincial election, but it failed to garner sufficient support to form the government. To this day, faith-based separate schools, other than the Roman Catholics ones, remain unfunded by the Ontario public purse, even though they receive funding in five other Canadian provinces.[41]

FREEDOM OF EXPRESSION

The meaning of constitutional multiculturalism was further expanded in freedom of expression cases. At issue was the constitutionality of different forms of hate propaganda, and specifically anti-Semitic hate, under section 2(b) of the *Charter* (*R v Andrews* 1990; *R v Keegstra* 1990; *Canada v Taylor* 1990; *R v Zundel* 1992; *Ross v New Brunswick School District No. 15* 1996). On the one hand, individual claimants were challenging governments' censorship of hate speech.

[40]While the Ontario government provided for nursing services, occupational therapy, physiotherapy and speech and language therapy for all disabled children, it did not provide services for children attending faith-based schools which are blind, deaf or have other learning-disabilities.

[41]Quebec, Manitoba, Saskatchewan, Alberta, and British Columbia provide some direct funding to independent religious schools.

On the other hand, the authorities were trying to protect vulnerable groups from discrimination and emphasize the collective benefits of establishing a tolerant society. In all these cases, section 27 of the *Charter* was invoked "in support of justificatory factors under section 1" (Small 2007). Interestingly, the Court was sharply divided on the limits that could be imposed on hate speech and two camps of judges were formed over time. Ultimately, the decisions found mostly in favour of governments' regulation of hate speech. As will be discussed, the freedom of expression cases resulted in the promotion several anti-defamation rights which are associated with an undifferentiated model of citizenship.

Canada v Taylor (1990), R v Keegstra (1990) and R v Andrews (1990)

The Supreme Court first tackled the validity of hate propaganda in three landmark companion cases: *Canada v Taylor* (1990), *R v Keegstra* (1990) and *R v Andrews* (1990). At issue in those cases were section 13(1) of the *Canadian Human Rights Act, 1977*, which prohibited the transmission of hate messages via telephone (*Taylor* 1990) and section 319(2) of the *Criminal Code, 1985*, which outlawed the public and wilful promotion of hatred against an identifiable group (Keegstra 1990; *Andrews* 1990). Using a liberal approach, all the judges found that these provisions violated the freedom of expression protected by section 2(b) of the *Charter*, but disagreed on whether they constituted reasonable limits on that right under section 1.

Following the two-step analysis developed in *Irwin Toy Ltd. v Quebec* (1989), the bench established that the prohibition on hate propaganda infringed the freedom of expression guaranteed by the *Charter*. First, the judges asserted that hate speech constituted an activity that conveyed meaning and could therefore be said to have an expressive content. In that sense, it fell within the ambit of section 2(b). Second, the Court determined that the purpose of the impugned provisions was precisely to restrict freedom of expression and was thus in violation of it. Furthermore, hate propaganda could not be equated with violence, and thus be considered an exception. As per the Court, the former expressed a "meaning that [was] repugnant, but the repugnance stem[med] from the content of the message as opposed to its form" (*Keegstra* 1990, para 37). The bench also refused to invoke section 27 to support the interpretation of freedom of expression, finding it more appropriate to invoke it in support of justificatory factors under section 1.

The majority bloc, formed by Chief Justice Dickson, Justice Wilson, Justice L'Heureux-Dubé and Justice Gonthier, saved the impugned provisions under section 1. Most importantly, these

provisions were found to have an important objective in a free and democratic society, that of preventing harm caused by propaganda. According to the majority, this objective was two-fold: "to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada" (*Keegstra* 1990, para 80). Greater concern was shown, however, for the fate of vulnerable groups than for society at large. Section 27 of the *Charter* was specifically invoked to emphasize the necessity to protect individual members of vulnerable groups. Constitutional multiculturalism was understood as "the principle of non-discrimination and the need to prevent attacks on the individual's connection with his or her culture" (*Keegstra* 1990, para 78). Finally, the impugned provisions having satisfied the proportionality component of the *Oakes* test in all the cases, the majority of the Court upheld the anti-hate legislation, which is still valid today.

For the minority bloc, composed of Justices La Forest, Sopinka and McLachlin, the legislation did not meet the proportionality test. The main argument put forward against state censorship was its possible "chilling effect." The minority found the impugned provisions to be "drafted too broadly, catching more expressive conduct than c[ould] be justified by the objectives of promoting social harmony and individual dignity" (*Keegstra* 1990, para 309). It was thought that the prohibition on hate propaganda would have the effect of deterring legitimate expression that is essential to the vitality of a democratic debate and the preservation of the rule of law. The minority's logic would later prevail in *R v Zundel* (1992).

R v Zundel (1992)

Two years later, another freedom of expression case was reviewed by the Supreme Court in *R v Zundel* (1992). This time, section 181 of the *Criminal Code*, which prohibits the wilful dissemination of false news that goes against public interest, was being challenged under section 2(b) of the *Charter*. Interestingly, the previous minority bloc, joined by Justice l'Heureux-Dubé, outnumbered the previous majority bloc. The new majority held that the freedom of expression violation caused by section 181 of the *Criminal Code* could not be saved under section 1 of the *Charter*. It determined that the original objective of the impugned provision, which was "the prevention of deliberate slanderous statements against the great nobles of the realm" (*Zundel* 1992, para 45), to be anachronistic and therefore not pressing and substantial. The majority also refused the argument advanced by the minority to the effect that the purpose of section 181 of the *Criminal Code* had shifted to include the protection against harm caused by hate propaganda. The judges added that even if they did accept this "shifting purpose" as important, the limit imposed

by section 181 on freedom of expression would not be able to pass the proportionality component of the *Oakes* test, for the same reasons given by the minority in *Keegstra* (1990).

In the end, section 181 of the *Criminal Code* was declared unconstitutional but was not repealed by Parliament. This non formal compliance, however, did not mean that the impugned provision still had the force of law following the judgment, since statutes do not have a separate meaning apart from how they are read. Sections 24(1) and 52(1) of the *Constitution Act, 1982* give judicial pronouncements the force of law. For the impugned provision to be saved, the federal government would have needed to invoke the notwithstanding clause and thereby explicitly declaring it to be valid.[42] A possible explanation for the government's inaction in this case is that it was awaiting the outcome of the next Supreme Court hate speech case. Four years later, in the case *Ross v New Brunswick School District No. 15* (1996), a unanimous decision favoured anti-defamation rights and to this day the federal government has not formally amended the *Criminal Code*.

Ross v New Brunswick School District No. 15 (1996)

The reversal of fortune of hate propaganda cases observed in *Zundel* (1992) was not final. The judicial and legislative powers' general stance against hate speech was confirmed in *Ross* (1996). The appellant, Malcom Ross, was a school teacher who had publicly made anti-Semitic comments on his personal time. He was contesting, under section 2(b) of the *Charter*, a decision rendered by the New Brunswick Human Rights Commission (hereafter "NBHRC") to the effect that the school board contravened the *Human Rights Act* by continuing to employ him after he had made discriminatory comments. The decision had ordered the school board to transfer Ross to a non-teaching position and to dismiss him completely if he continued to propagate hate. In a unanimous decision, the Supreme Court held that the NBHRC's decision violated the appellant's freedom of expression, but could be upheld under section 1 of the *Charter.*

The judges stressed the importance of protecting vulnerable groups against hate speech and promoting a tolerant society under section 27 of the *Charter*, as had been the case in earlier freedom of expression cases. The NBHRC's decision, which concerned a specific case and not a general rule of the *Criminal Code* nor the *Human Rights Act*, could not be said to be overly broad

[42] For the categorizing strategy, judicial review in the case of *Zundel* (1992) promotes an individual right, despite government's inaction which is seen as tacit compliance.

with regards to expression and was not considered to have the "chilling effect" the minority bloc had feared in the earlier jurisprudence. Ultimately, the Court agreed with the NBHRC's decision to transfer Ross to a non-teaching position, but refused to dismiss him from his new non-teaching position if he continued disseminating hate propaganda.

Immediately after the judgment, Ross filed a complaint to the United Nations Human Rights Committee (hereafter "UNHRC") alleging that his transfer to a non-teaching position violated the *International Covenant on Civil and Political Rights* (*Ross v Canada* 2000). In its decision, the UNHRC stated that "the removal of the author from a teaching position c[ould] be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance" (para 11.6).

DUE PROCESS

Section 27 was invoked to support the liberal interpretation of substantive rights in two due process cases with partial success (*R v Gruenke* 1991; *R v Tran* 1994). First, in *R v Gruenke* (1991), the appellant failed to get a religious exemption from the admissibility of incriminating evidence at trial. Second, in *R v Tran* (1994), the appellant was awarded an assistance right to an interpreter under section 14 of the *Charter.* As will be discussed, cases on due process resulted in the recognition of a societal collective right, associated with an undifferentiated citizenship, in *Gruenke* and, in a promotion of an assistance right, associated with a polyethnic citizenship, in *Tran.*

R v Gruenke (1991)

In *Gruenke* (1991), the appellant had been convicted of first degree murder due to the admission, as evidence, of self-incriminating confessions she had made to a pastor and lay counsellor of her fundamentalist Christian church. Adele Rosemary Gruenke was claiming that her confessions were protected confidential communications and thus inadmissible on the basis of her freedom of religion. Two concurring judgments, dismissing the appeal, were rendered.

The Court established that there existed no common law *prima facie* privilege for religious communication and that a case-by-case approach was more appropriate to determine if the

evidence was admissible or not. The judges used the common law Wigmore criteria to determine if the appellant's freedom of religion had been jeopardized by the admission of the pastor and lay counsellor's testimonies. The necessary conditions for the establishment of a communication as privileged were defined by American jurist and expert in the law of evidence, John Henri Wigmore, as follows:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation (1961, para 2285).

The Court added that the Wigmore criteria had to be applied in light of section 2(a) and 27 of the *Charter.* These provisions would have been particularly relevant to the interpretation of the third and fourth legs of the Wigmore test. However, the bench found that Gruenke's communication failed to satisfy the first criterion and was thus admissible at trial. According to Chief Justice Lamer, the "communications [had been] made more to relieve Ms. Gruenke's emotional stress than for a religious or spiritual purpose" (para 40). In this particular due process case, the appellant's interest in protecting her relationship with her spiritual leader, on the basis of a religious privilege, was outweighed by society's interest in the search for truth.

The Wigmore criteria call for an interest balancing that allows other social concerns, such as religious tolerance, to be taken into account. In her decision, Justice L'Heureux-Dubé determined that the pastor-penitent relationship satisfied the third and fourth criteria of the Wigmore test. The claim for a religious communication privilege could thus be met in future *Charter* cases. But as the Court suggested, the establishment of such a privilege should be the prerogative of the legislative branch. Still to this day, pastor-penitent communications are only recognized as privileged in two provinces: Quebec and Newfoundland.

R v Tran (1994)

In *Tran* (1994), the appellant had been convicted of sexual assault at trial. Being a native from Vietnam with no command of the English language, the appellant had had to rely on an interpreter during the proceedings of his trial. However, deficiencies in the translation of the evidence had pushed him to question his conviction on appeal, on the basis of section 14 of the *Charter*. This constitutional guarantee provides that: "A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter." In this constitutional case, the Supreme Court had to delineate the scope of this right to the assistance of an interpreter. In a unanimous decision, the judges allowed the appeal and held that section 14 guaranteed the right to "full and contemporaneous translation of all the evidence at trial" (para 8).

Following its general approach to the *Charter* (*Hunter v Southam Inc.* 1984), the Court decided to interpret section 14 of the *Charter* purposively. Three purposes were identified. First, the bench established that the assistance of an interpreter was based on the right of the accused to hear the case against him or her as well as the right to full answer and defence. Second, the judges believed that the right to interpreter assistance rested on the need for a fair trial. Third, the Court argued that the need to preserve Canada's multicultural heritage under section 27 of the *Charte*r mandated such a right: "In so far as a multicultural heritage is necessarily a multilingual one, it follows that a multicultural society can only be preserved and fostered if those who speak languages other than English and French are given real and substantive access to the criminal justice system" (para 37). While the primary intention was the promotion of fundamental justice, the bench suggested in this case that the ideal of multiculturalism had more to do with cultural maintenance than with social equality for individuals.

In order to fulfill all these purposes, the Court concluded that "linguistic understanding" (para 39) should be the underlying principle of section 14. This meant that "a party must have the same basic opportunity to understand and be understood as if he or she were conversant in the language of the court" (Loc.cit). After having proposed a framework of analysis for determining a section 14 violation, the judges determined that such a violation had taken place in the case at hand. Most notably, the translation given to the appellant at trial could not be qualified as continuous, precise and contemporaneous.

Consequently, the Court quashed the appellant's conviction and ordered a new trial. However, in 1997, the media noted that the appellant had never been retried for sexual assault due to administrative neglect (CP 1997). Though by that time, he had been accused in a murder case in which he was eventually convicted (*R v Tran* 2000).

ANALYSIS

Legal Change

In general, the weight given to section 27 of the *Charter* in multiculturalism jurisprudence has been moderate. The interpretive clause has been invoked in 10 out of 12 cases, and successfully so in 6 of them. Constitutional multiculturalism was effectively used as a support for interpreting liberal rights such as freedom of religion (*Big M Drug Mart* 1985) and the right to an interpreter in court proceedings (*Tran* 1994). The Court would most likely have reached the same decisions in these cases irrespective of section 27. This provision played a greater role as a supplement to justificatory factors under section 1. In most hate propaganda cases, the ideal of multiculturalism was upheld as a competing claim against freedom of expression (*Andrews* 1990; *Keegstra* 1990; *Taylor* 1990; *Ross* 1996).

Of significance is the fact that constitutional multiculturalism was unsuccessful in extending to cultural minorities the positive entitlements granted politically to official language and denominational minorities (Small 2007; Bottos 1988; DaRe 1995). In *Mahe* (1990) and *Adler* (1996), the Court refused to use section 27 of the *Charter* to extend the rights found respectively in sections 23 and 29. The multiculturalism jurisprudence thus hints to a hierarchy of rights within the constitutional edifice of Canada: "The Constitution clearly favours the Christian religions and the Anglophone and Francophone communities. The extent of s.27 seems to go only so far as to not affect the privileged relationship that the above named groups have over 'true' minority cultures" (Bottos 1988, 631).

What is also telling is the Court's refusal to invoke section 27 directly while still making arguments based on Canada's multicultural character to justify recent decisions (*Multani* 2006; *Hutterian Brethen of Wilson Colony* 2009). This reluctance to use constitutional multiculturalism can be explained by the judges' fear of creating a jurisprudential slippery slope by further expanding its

meaning (DaRe 1995). Instead, the bench prefers to make ad hoc decisions. Another possible explanation for this unwillingness to use section 27 is the fact that this provision is not subjected to the notwithstanding clause of the *Charter*.[43] By not making explicit references to section 27, the Court is perhaps suggesting that the political branch should have the last word on some multiculturalism issues.

The process as purpose approach was used in the multiculturalism jurisprudence to the benefit of religious and ethnic minorities. In *Big M Drug Mart Ltd.* (1985), freedom of religion was interpreted as protecting individuals from compulsory religious observance in view of preserving Canada's democratic tradition. As well, in *Tran* (1994), the right to the assistance of an interpreter in court proceedings was said to include the right to "full and contemporaneous translation of all the evidence at trial" (para 8), in order to guarantee the fairness of due process for individuals whose spoken language is different than French or English. However, the rules regarding rights balancing seem to have been more critical in multiculturalism cases. The Court preferred ad hoc balancing to definitional balancing in cases involving rights conflicts. For instance, in fundamental freedom cases, the judges decided to give a broad liberal interpretation to section 2 rights of the *Charter* and to decide whether impugned provisions constituted reasonable limits on those rights and were justifiable in a free and democratic society under section 1. In freedom of religion cases, ad hoc balancing found in favour of religious minorities in two cases out of four (*Big M Drug Mart* 1985; *Multani* 2006). In freedom of expression cases, however, ad hoc balancing found in favour vulnerable groups in a majority of cases (*Canada v Taylor* 1990; *R v Keegstra* 1990; *R v Andrews* 1990; *Ross v New Brunswick School District No. 15* 1996). In total more undifferentiated rights were promoted than polyethnic ones by the jurisprudence. The Court recognized 8 undifferentiated rights: 4 anti-defamation rights, 3 collective rights and 1 individual right. And it only recognized 3 polyethnic rights: 2 exemption rights and 1 assistance right.

Political Compliance

Political compliance with the jurisprudence on multiculturalism has been total. Governmental authorities did not make use of the notwithstanding clause in cases where it was available. In cases where government was asked to modify its legislation, it did so formally (*Big M Drug Mart* 1985;

[43]Dale Gibson questions whether it is relevant that section 27 is not subjected to section 33: "[Section 27] requires only that the Constitution be interpreted in a certain manner. If Parliament or a legislature did opt out of the relevant substantive rights, there would be nothing left to be 'interpreted' under section 27" (Gibson 1990, 592).

Tran 1994; *Multani* 2006), except in the case of *Zundel* (1992) where compliance was tacit. As well, in two cases that commanded no response, government exceeded its constitutional obligations towards minority groups. While the judges had upheld Ontario's Sunday-closing law in *R v Edwards Books and Art Ltd.* (1986), the provincial government decided ultimately to grant exemptions for all non-Sunday religious observers. Pursuant to *Adler v Ontario* (1996), the government of Ontario also chose to extend special education services to disabled children attending faith-based schools even though the Court did not require it. By these actions, the legislative branch signified a preference for a polyethnic model of citizenship.

The Promotion of Cultural Citizenship

Constitutional multiculturalism review seems to have mirrored the polyethnic ideology behind the official multiculturalism policy. First, constitutional multiculturalism has tended to recognize only superficial differences. In freedom of religion cases, this resulted in granting Sikhs an exemption right to wear their kirpan to school (*Multani* 2006). Such an arrangement was not seen as endangering the safety of schools. However, no exemption from Alberta's universal photo requirement for licensed drivers was granted to Hutterites, since such an arrangement would potentially increase identity theft (*Hutterian Brethen of Wilson Colony* 2009). Freedom of religion cases have also furthered the separation of Church and State in Canada. In *Big M Drug Mart* (1985), the Supreme Court invalidated a law whose purpose was compulsory religious observance. The judicial upholding of a Sabbatarian law with alleged beneficial secular effects in *Edward Books and Art* (1986), was also ultimately counteracted by Queens Park.

Second, the ideal of multiculturalism has been interpreted as favouring the integration of cultural minority groups into mainstream society. In *Adler* (1996), the Court refused to amend Ontario's educational scheme to provide public funding to independent religious schools as well as for certain of their educational services. Even though the province debated the possibility of changing this scheme, it decided to keep it. It is likely that the funding of parallel education institutions for cultural minorities would have contributed to a greater social segregation which runs counter to a polyethnic citizenship. But in Canada, "multiculturalism within a bilingual framework" requires cultural minorities to integrate within the French or English linguistic community. Eventually, Ontario did make accessible some publicly funded special educational services for disabled children attending faith-based schools, but this simply had the effect of guaranteeing the well being of cultural minority groups in Canadian society. As for the decision in *Tran* (1994), it did warrant publicly funded

interpretation in court proceedings for those who do not have command of one of Canada's official languages. Nevertheless, the aim here was not the promotion of a parallel institutional structure but rather ensuring that every individual had the means to participate fully in society, despite linguistic differences. Accordingly, Robert J. Currie argues that the constitutionalization of multiculturalism has brought greater fairness and equity within in the judicial system for cultural minorities (2007).

It is important to mention that *Charter*-based judicial review in the area of multiculturalism has promoted a significant amount of rights associated with an undifferentiated model of citizenship. Nevertheless, it would be premature to argue that their presence signifies a departure from the polyethnic model of citizenship chosen in the postwar period. For one, the upholding of these undifferentiated rights did not involve a change in the policy status quo (*Keegstra* 1990; *Andrews* 1990; *Taylor* 1990; *Ross* 1990; *Adler* 1996; *Gruenke* 1991; *Hutterian Brethen of Wilson Colony* 2009), except in the case of *Zundel* (1992). Then again, this case challenged a provision of the *Criminal Code* that was determined to be anachronistic. Secondly, an over-representation of hate speech cases contributed to an artificial increase in the amount of undifferentiated rights promoted (*Andrews* 1990; *Keegstra* 1990; *Taylor* 1990; *Zundel* 1992; *Ross* 1996). These cases resulted in the protection of many anti-defamation rights. As previously explained in the Introduction chapter these rights can be justified according to a polyethnic logic since they can be said to protect vulnerable groups from discrimination and to reduce racial tensions in Canada.

CONCLUSION

Just like in the area of minority linguistic rights, judicial review in the area of multiculturalism has promoted a polyethnic model of citizenship. The legal gains of racial and religious minorities have been less important than those made by official linguistic minorities. This is attributable to the fact that they have had to rely largely on the more general provisions of the *Charter*. The next chapter will seek to determine if constitutional review has generated more tangible results for aboriginal peoples who had the benefit of challenging government on the basis of specific cultural rights.

Summary of Cases

Case	Type of right claimed by litigant	Type of right defended by government	Cultural minority supports	Winner	Legal change	Type of right promoted by the judiciary	Policy compliance	Type of right promoted by government
R v Big M Drug Mart Ltd. (1985)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The *Lord's Day Act* was repealed.	Exemption
R v Edwards Books and Art Ltd. (1986)	Exemption	Societal collective	LIT	GOV	No	Societal collective	No: *An Act to amend the Retail Business Holidays Act, 1989*.	Exemption
Canada (Human rights commission) v Taylor (1990)	Individual	Anti-defamation	GOV	GOV	No	Anti-defamation	Yes: Section 13(1) of the *Canadian Human Rights Act, 1977* was not amended.	Anti-defamation
R v Keegstra (1990)	Individual	Anti-defamation	GOV	GOV	No	Anti-defamation	Yes: Section 319(2) of the *Criminal Code, 1985* was not amended.	Anti-defamation
R v Andrews (1990)	Individual	Anti-defamation	GOV	GOV	No	Anti-defamation	Yes: Section 319(2) of the *Criminal Code, 1985* was not amended.	Anti-defamation
R v Gruenke (1991)	Exemption	Societal collective	LIT	GOV	No	Societal collective	Yes: Gruenke's conviction was upheld.	Societal collective
R v Zundel (1992)	Individual	Anti-defamation	GOV	LIT	Yes	Individual	Yes: Though section 181 of the *Criminal Code* was not amended or repealed, the federal government did not invoke the notwithstanding clause.	Individual
R v Tran (1994)	Assistance	Societal collective	LIT	LIT	Yes	Assistance	Yes: Tran's conviction was quashed. No: Tran was never re-trialed in this case.	Assistance
Ross v New Brunswick School District No. 15 (1996)	Individual	Anti-defamation	GOV	GOV	No	Anti-defamation	Yes: Ross was kept in a non-teaching position.	Anti-defamation
Adler v Ontario(1996)	Assistance	Societal collective	LIT	GOV	No	Societal collective	No: Certain special education services were made available to disabled children attending faith-based schools through the Ontario Health Ministry in 2000 Yes: The Ontario government did not amend its education funding scheme.	Assistance/Societal collective
Multaniv Commission scolaire Marguerite-Bourgeoys (2006)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The school board complied with the judgment.	Exemption
Alberta v Hutterian Brethren of Wilson Colony (2009)	Exemption	Societal collective	LIT	GOV	No	Societal collective	Yes: The *Operator Licensing and Vehicle Control Regulation, Alta Reg 320/2002, s 14(1)(b)* was not amended.	Societal collective

Chapter III: Aboriginal Issues

INTRODUCTION

In contrast with linguistic, religious and racial minorities, aboriginal peoples waited longer before mounting court challenges to have new rights recognized under Canada's new constitutional order. The Supreme Court rendered its first decision on aboriginal issues under the new rights regime only in 1990 (*R v Sparrow*), while it decided its first case on minority linguistic rights in 1984 (*A.G. v Quebec Protestant School Boards*) and its first multiculturalism case in 1985 (*R v Big M Drug Mart*). According to Mary E. Turpel, this can be explained by the fact that aboriginal peoples see the process of constitutional review as dominated by Western conceptions of the law which are anathema to their own (1990). However, the potential for the expansion of aboriginals rights associated with the *Canadian Charter of Rights and Freedoms, 1982* (hereafter "Charter") and section 35 of the *Constitution Act,1982* was too great not to be exploited.

The first section of this chapter discusses the new rights-based litigation opportunities for aboriginals created by Canada's new constitution. The following section reviews the constitutional jurisprudence of the Supreme Court of Canada on aboriginal rights following the *Charter* revolution and its policy consequences. It argues that aboriginal peoples were successful at getting exemption rights and representation rights recognized, and somewhat unsuccessful at getting recognition/enforcement rights and assistance rights recognized. What stands out, is their clear inability to have their right to self-government judicially validated. As a consequence, this chapter concludes that *Charter*-based review in the area of aboriginal issues has mostly promoted a polyethnic view of citizenship rather than a multinational one.

NEW LITIGATION OPPORTUNITIES

Prior to 1982, aboriginal rights in Canada had limited constitutional protection.[44] The *Royal Proclamation, 1763* reserved lands to aboriginals that had not been ceded to, or purchased by, the Crown. It also posited that these reserved lands could only be surrendered to the Crown. This provision was meant to protect aboriginal peoples from being "molested" by white settlers and traders who had an interest in their land (Pentney 1987, 34). Even though the *Royal Proclamation* has facilitated treaty-making between aboriginals and the Crown since then (Borrows 1997), it has not permitted jurisprudential breakthroughs for aboriginals.[45] Later, the *British North America Act, 1867* (hereafter BNAA) did not grant specific rights to aboriginal peoples. Section 91(24) of the BNAA only mentioned that "Indians, and Land reserved for the Indians" were to be placed under the authority of the Parliament of Canada. Under this power, the federal government passed in 1876 the *Indian Act* which made aboriginal peoples legal wards of the State (RCAP 1996). More concretely, this act defined eligibility to Indian status as well as the rules governing the organization of reserves and bands. Many aboriginal women contested the patriarchal character of this legislation; the Métis contested its under inclusiveness;[46] and others contested its paternalism (Weaver 1981).[47]

The adoption of the *Constitution Act, 1982* constituted a turning-point for the aboriginal peoples and their rights. To start, it first acknowledged the existence of "aboriginals peoples" and "aboriginal rights" within the constitutional edifice. Though the scope and depth of the provisions related to aboriginal peoples and their rights were somewhat unclear, it was obvious that they would be remedial in nature (Slattery 1982-1983; Sanders 1983).

The first provision pertaining to aboriginal peoples and their rights can be found in section 25 of the *Charter*. It reads as follows:

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[44] Aboriginal rights were protected to some extent at common law in Canada. See for example, *Calder* v *British Columbia* (1973)which affirmed that aboriginal title to land existed prior to colonization by European nations but that it could be extinguished by virtue of government's exercise of sovereignty on the land.

[45]For example, aboriginals were not able to have rights recognized under the *Royal Proclamation* in *St. Catharines Milling and Lumber Co. v R* (1887) and *Calder* v *British Columbia* (1973).

[46] *Reference Re Eskimos* (1939) confirmed that Inuits were considered to be Indians for the purposes of the BNAA.

[47] It must be noted however that many Indians opposed the federal *White Paper, 1969* which would have scrapped the *Indian Act* thereby abolishing special status for Indians and the privileges attached to it.

> 25.The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
> *(a)* any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> *(b)* any rights or freedoms that now exist by way of land claims agreements or may be so acquired.[48]

Unlike for linguistic minorities, the *Charter* does not recognize new rights for aboriginals but rather protects and affirms their rights that exist independently of the *Charter*. The phraseology of section 25 is inclusive and does not limit the types of aboriginal rights protected to those specified in subsections 25(a) and 25(b) (Lysyk 1982; Pentney 1987). Some authors suggested that the provision would shield all those rights derived from aboriginals' distinctive status, such as common law and statutory rights (Slattery 1982-1983; Pentney 1987). The consensus was, that under section 25, special arrangements made to the advantage of aboriginals could not be challenged on the grounds of the equality clause found in section 15 (Sanders 1983; McNeil 1982; Pentney 1987).[49] Legal scholars disagreed however on whether or not section 25 rights would be exempted from the application of section 28 pertaining to gender equality (Slattery 1982-1983; Pentney 1987).

One point of contention among scholars pertained to the possible effect of the limitation clause found in section 1 on the rights protected by section 25. L.C. Green suggested that section 1 could be used to justify a derogation from section 25 rights (1983), but Brian Slattery argued "that section 1 could not be used to reduce the insulating effect of section 25" (1982-1983, 240). That being said, aboriginal peoples could find comfort in the fact that section 25 is not subject to the notwithstanding clause found in section 33 of the *Charter*.

The promise of greater accommodation of aboriginals' collective aspirations is embodied by section 35 of the *Constitution Act, 1982*. Although this provision falls outside of the *Charter*, it is considered to be an integral part of the *Charter* revolution because it consists of a "declaration of

[48] Section 25(b) was repealed and re-enacted by the *Constitution Amendment Proclamation, 1983. It originally read as follows: "*(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.*"*
[49] Alternatively, some argued that the aboriginal rights protected in section 25 of the *Charter* would need to be extended to non-aboriginals under the equality clause found in section 15 (See, e.g. Green 1983).

the special rights of Canada's most salient racial minority" (Knopff and Morton 2000, 42) and it has been the object of significant judicial review. It reads as follows:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada.
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.[50]

As understood in Canadian jurisprudence at the time of its enactment, subsection 35(1) recognizes and affirms "aboriginal land rights" and "land-based rights, such as those of hunting, fishing and trapping" (Sanders 1983, 329).The big question was whether it recognized and affirmed an inherent right to self-government for aboriginals: some scholars believed it did or could (McNeil 1982; Pentney 1987) and others thought it clearly did not (Sanders 1983; Lysyk 1982). As for the term "existing rights," it was thought to exclude those titles to land lawfully extinguished but include those to hunt, fish and trap that have been restricted by federal or provincial legislation (Slattery 1982-1983; McNeil 1982; Lysyk 1982; Pentney 1987). As Douglas Sanders put it, subsection 35(1) "does not substantively enhance [aboriginal] rights," but "[i]t does prevent their non-consensual limitation or extinguishment by other than constitutional amendment" (Sanders 1983, 314).

As for subsection 35(2), it enlarges the number of rights-bearing aboriginal peoples under the Canadian constitution (Cairns 2000; Pentney 1987). While it had been confirmed that Inuits were considered to be Indians for the purposes of the BNAA in *Reference Re Eskimos* (1939), it was unclear whether the Métis were (Lysyk 1982; Pentney 1987). Subsection 35(3) also dissipated all doubts that subsection 35(1) treaty rights included those rights established by treaty or land claims agreements after 1982. Finally, subsection 35(4) stressed the importance of recognizing the equality rights of aboriginal women. In *Attorney General of Canada v Lavell* (1973), the Supreme Court upheld under the *Canadian Bill of Rights* subsection 12(1)(b) of the *Indian Act*, which provided that Indian status women could lose their status if they married a non-status

[50] Subsections 35(3) and (4) were added by the *Constitution Amendment Proclamation, 1983.*

Indian, while the reverse was not true for men. Subsequent to the adoption of the *Constitution Act, 1982*, this provision was amended to conform to the requirements of gender equality (*An Act to amend the Indian Act* 1985).

Because section 35 falls outside of the *Charter*, it is not subject to its remedial mechanisms. The fact that section 35 rights are not subject to the limitation clause found in section 1 of the *Charter* led Slattery to declare that they were absolute in nature (1982-1983). He believed that this would prompt a legal interpretation of the section guided by standards of reasonableness. Still, it could be argued that this would trigger a more restrictive approach to section 35 rights. Then again, government may not suspend the application of section 35 rights because these are not subject to the legislative override provision found in section 33 of the *Charter.* Yet, since section 35 is not judicially enforceable by way of section 24(1), its effectiveness was made uncertain (Pentney 1987; Lysyk 1982). Aboriginals thus had to rely on section 52(1) of the *Constitution Act, 1982* to have their rights upheld.

As discussed, Canada's new constitution created new rights-based litigation opportunities for aboriginals, but it remained to be seen if those opportunities would translate into real legal and political gains. The next section reviews the post-1982 constitutional jurisprudence on aboriginal issues.

JURISPRUDENCE

The jurisprudence on aboriginal issues has involved many rights associated with a polyethnic model of citizenship, such as exemption rights, representation rights and assistance rights. It has also involved claims associated with a multinational model of citizenship, like that of recognition/enforcement of traditional legal codes and that of self-government. It will be argued that the constitutional review based on polyethnic rights has been more successful than the one based on multinational rights. The following section will review these different rights claims in turn.

Exemptions

Aboriginals have been quite successful at securing exemption rights under section 35 of the *Constitution Act, 1982*. The exemptions claimed mostly include the right to hunt or fish for food and ceremonial purposes (*Sparrow* 1990; *R v Badger* 1993; *R v Nikal* 1996) as well as for commercial purposes (*R v Van der Peet* 1996; *R v N.T.C. Smokehouse* 1996; *R v Gladstone* 1996; *R v Adam* 1996; *R v Côté* 1996; *R v Marshall (1) and (2)* 1999). Some exemption demands were incidental to these rights, like the right to be exempted from paying an entry fee to access a controlled harvest zone (Z.E.C.) (*Côté* 1996) or to construct a log cabin in a provincial park (*R v Sundown* 1999). Other exemption claims concerned the duty payable on goods imported into Canada (*Mitchell v M.N.R.* 2001), wood harvesting (*R v Sappier-Gray* 2006) and the regulation of gambling activities (*R v Pamajewon* 1996). With regards to aboriginals, exemption rights involved establishing that the legislation was of no force or effect with respect to them, and did not require governments to amend their respective legislations. In 9 out of 13 cases, aboriginals were granted a full or partial exemption. In all the cases, the authorities followed suit.

The Sparrow Test

The Court first explored the content and scope of section 35(1) in the landmark case of *R v Sparrow* (1990). The unanimous decision held that the "existing" aboriginal rights protected under section 35 referred to those rights that had not been extinguished prior to 1982, the year of enactment of the provision, rather than those rights that were able to be exercised in 1982. Extinguishment of a right could only be established by a "clear and plain" intention of the Crown to extinguish such a right and not by a simple regulation (para 37). This meant according to Chief Justice Dickson and Justice La Forest that "an existing aboriginal right c[ould] not be read so as to incorporate the specific manner in which it was regulated before 1982" (para 24). With this reasoning, the judges opted for a flexible approach that allowed for the evolution of aboriginal rights over time, rather than a frozen rights approach.

Furthermore, the Court specified what it entailed for aboriginal rights to be "recognized and affirmed" under section 35. First, the fact that section 35(1) rights were "affirmed," mandated that they would be given a generous liberal interpretation. The bench also asserted that they should be interpreted with a purposive approach. Because section 35(1) rights were the end result of an extended and painful fight for the recognition of aboriginal rights in the political realm, the

Court asserted that the provision should be remedial in nature. Therefore, disputes involving aboriginals and government would be resolved in favour of aboriginals when in a situation of legal uncertainty. Following *R v Taylor and Williams* (1981), *Nowegijick v The Queen* (1983) and *Guerin v The Queen* (1984), the judges decided that section 35(1) engaged the Crown's fiduciary duty towards aboriginals. This meant that "[t]he relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship" (para 59).

Mindful of the fact that section 35(1) was not subject to the limitation clause found in section 1 of the *Charter*, the Court also place internal limits on the exercise of aboriginal rights by developing a test for justified limitation by the Crown. It posited that aboriginal rights were not absolute since the federal government retained jurisdiction over Indians as per section 91(24). In order to reconcile federal power with federal duty, the judges determined that the federal government had to justify any interference with an aboriginal right. The first stage involves the establishment by the individual or group challenging the law of a *prima facie* interference with an aboriginal right. Chief Justice Dickson and Justice Laforest mentioned three questions that had to be answered at this stage: "First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?" (para 70). If an infringement is found, the analysis must then move to a second stage relating to the issue of justification. According to the judges, the government would first need to prove that the law has a valid objective. Conservation of the coveted resource and prevention of harm were found to be compelling and substantial objectives. Then, the government would need to show that the honour of Crown is upheld by the infringement. Questions such as these might be answered: "whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented" (para 82).

The *Sparrow* test awarded formidable protection to aboriginal rights against Crown infringement in its first years of application (*Sparrow* 1990; *Nikal* 1996). It was decided in *R v Badger* (1996) that the *Sparrow* test should apply not only to aboriginal rights but also to treaty rights, also protected under section 35(1) of the *Constitution Act, 1982*. No infringement of treaty rights were justified under the *Sparrow* test in the cases surveyed (*Badger* 1996; *Sundown* 1999; *Marshall (1) and (2)* 1999). While the jurisprudence in *Sparrow* and *Badger* posited that aboriginal and treaty

rights were not absolute, it was nevertheless very promising for aboriginals. However, the framework for analyzing aboriginal rights claims was later narrowed in the *Van der Peet* trilogy.

The Van der Peet Test

More than half a decade after *Sparrow* (1990), the Court defined the precise meaning of aboriginal rights for the first time in three landmark companion cases known as the *Van der Peet* trilogy: *R v Van der Peet* (1996), *R v Gladstone* (1996)and *R v N.T.C. Smokehouse Ltd.* (1996). In *Van der Peet*, the majority found that the purposive approach to section 35(1) developed in Sparrow was too cursory. Basing itself on the Canadian, American and Australian jurisprudence, a majority of the Court asserted that the special constitutional status given to aboriginals derived solely from the fact that "when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries (emphasis in the original)" (para 30). According to the majority of the Court, section 35(1) fulfilled a double purpose: first, that of recognizing the pre-existence of distinctive aboriginal societies and second, that of reconciling this prior occupation with the sovereignty of the Crown on Canadian territory.

In view of that, the majority established a test for identifying aboriginal rights in Section 35(1), known as the *Van der Peet* test, before the *Sparrow* test for extinguishment, infringement and justification could be applied. In *Sparrow*, the Court had identified the Musqueam's right to fish for food based on the anthropological evidence showing fishery had "always constituted an integral part of their distinctive culture" (para 40). Building on this precedent, the majority argued in *Van der Peet* that, in order to qualify as protected rights, aboriginal practices had to be "integral to the distinctive cultures of aboriginal peoples" (para 45). In order for a practice to meet this standard, the majority pin-pointed several "factors" that should be kept in mind when evaluating aboriginal rights claims (paras 48-75), two of which were crucial. First, the aboriginal right claimed had to be "of central significance to the aboriginal society in question" before the first contact with the Europeans (para 55). In the twin cases of *R v Adams* (1996) and *R v Côté* (1996), aboriginal rights were soon after deemed to be often site-specific and not abstract rights which can be exercised anywhere. Practices exercised for survival purposes were further found to be of central significance for certain groups in *R v Sappier; R v Gray* (2006). Second, a claimed right needed to "have continuity with the practices, customs and traditions that existed prior to

contact" (*Van der Peet* 1996, para 60). This requirement was later adjusted in the special case of Métis in *R v Powley* (2003).

The approach developed by the majority in *Van der Peet* was severely criticized by Justices L'Heureux-Dubé and McLachlin in their respective dissents. They both argued that the "integral distinctive culture test" developed by the majority was founded on a frozen rights approach which diminished the original promise of section 35(1) by imposing too great of a burden of proof on aboriginals to have their rights recognized. To this frozen rights approach, Justice L'Heureux-Dubé opposed a dynamic approach. She contended that aboriginal practices should be protected rights when they "are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people" (para 160). Additionally, she determined that the period of time relevant to the assessment of this characteristic should not be the first contact with Europeans but rather "a substantial continuous period of time" (para 198), which could be between 20 and 50 years in her opinion. In search of a middle ground, Justice McLachlin privileged what she termed an empirical historic approach to aboriginal rights. She suggested that a modern aboriginal practice could be recognized as a right if it could be linked to a traditional law or custom of a native group, without specifying a time period for the enactment of the latter.

Even though the *Van der Peet* test has been criticised as limiting the scope of constitutional aboriginal rights (see, e.g., Barsh and Henderson 1997), more than half of the cases were able to meet its requirements (G*ladstone* 1996; *Adams* 1996; *Côté* 1996; *Powley* 2003; *Sappier-Gray* 2006). When a claimed right had passed the *Van der Peet* test, no infringement on that right was subsequently justified under the *Sparrow* test, except in the case of *Côté* (1996). In the cases where no constitutional aboriginal right was recognized under the *Van der Peet* test (*Van der Peet* 1996; *N.T.C. Smokehouse* 1996; *Pamajewon* 1996; *Mitchell* 2001), the claimant had failed to prove that that the claimed right was of central significance to the aboriginal society in question prior to contact.

Representation

Some aboriginal groups have made significant legal and political gains under judicial review in the area of representation. The representation rights of minorities in decision-making bodies usually involve three aspects: "the presence of members of the minority group," "the chance for

members of the minority group to choose representatives" and "protection of minority group interest" (Levy 1996). The demand made by female aboriginal groups for more presence in decision-making bodies under the equality provision found in section 15 of the *Charter* were unsuccessful (*Native Women's Assn. of Canada v Canada* 1994). In contrast, "off-reserve" Indians were more successful at having their right to elect their representatives under the same provision (*Corbiere v Canada* 1999). Aboriginal peoples in general were also successful at having their minority group interest protected under section 35 of the *Constitution Act, 1982* in an eventual Quebec secession negotiating process (*Reference Re Secession of Quebec* 1998).

Presence of Members of the Minority Group

In *Native Women's Assn. of Canada v Canada* (1994), aboriginal women claimed their Charter rights had been breached by the fact that they were not directly funded and invited to participate in the constitutional negotiations leading to the 1992 Charlottetown Accord by the federal government while the "male-dominated" national aboriginal organizations were. The Native Women's Association of Canada (hereafter "NWAC") feared that its lack of representation in the process would in general undermine concerns for aboriginal women equality and in particular, prevent the future application of the *Charter* to aboriginal self-government. While NWAC based its legal action on freedom of expression found in section 2(b) of the Charter and the gender equality clause found in section 28, a majority of the Court found that the issue should preferably be dealt with under section 15. In the bench's view, NWAC had failed to prove that, by not providing it with a particular platform of expression, the federal government was under-inclusive and acting in a discriminatory fashion. First, NWAC had had the opportunity to express its views to government through the national aboriginal organizations as well as by means other than formal constitutional negotiations, as it did through the Beaudoin-Dobbie Commission. Second, there was no evidence that the national aboriginal organizations advocated in favour of a "male-dominated" approach to self-government.

In deciding the case, the judges also made a pronouncement that had potentially wide-ranging implications for all aboriginals. They asserted that section 35(1) of the Constitution Act, 1982 did not include the right for aboriginal peoples of Canada to participate in constitutional discussions. Consequently, section 35(4) which stipulates that aboriginal and treaty rights apply equally to male and female was of no help to NWAC. In the end, the Court did not call for any governmental remedy in the case at bar. Since the failed Charlottetown Accord, the Canadian

constitution has not been re-opened for debate and it is impossible to know whether or not the federal government would be more sensitive to aboriginal's participatory needs in future constitutional negotiations in general, or to NWAC's needs in particular.

Choosing Minority Group Representatives

Aboriginal peoples were more successful in having their right to choose their representatives recognized. In *Corbiere v Canada* (1999), the Court determined that the *Indian Act*'s "on-reserve" residency requirement for the right to vote in band council elections was unconstitutional since it discriminated against "off-reserve" Indians. More specifically, the residency requirement found in section 77(1) of the *Indian Act* was found to violate section 15 of the *Charter*. In applying the Law test[51], the Court first determined that the law imposed a differential treatment between "off-reserve" and "on-reserve" Indians that denied equal benefit of the law to "off-reserve" Indians. Second, it argued that "aboriginality-residence" was a ground of discrimination analogous to the ones enumerated in section 15, which are associated with potentially discriminatory and stereotypical decision-making. Third, the Court decided that the distinction at issue was discriminatory. As Justices McLachlin and Bastarache explained in the majority judgment:

> It denies off-reserve band members the right to participate fully in band governance on the arbitrary basis of a personal characteristic. It reaches the cultural identity of off-reserve aboriginals in a stereotypical way. It presumes that aboriginals living off-reserve are not interested in maintaining meaningful participation in the band or in preserving their cultural identity, and are therefore less deserving members of the band. The effect is clear, as is the message: off-reserve band members are not as deserving as those band members who live on reserves (para 18).

In general, the law was found to violate the dignity of "off-reserve" Indians and to constitute a violation of substantive equality. The Court also deemed that it could not be saved under section 1 of the *Charter*. In applying the *Oakes* test[52], the judges recognized as pressing and substantial Parliament's objective "to give a voice in the affairs of the reserve only to the persons most directly affected by the decisions of the band council" (para 21). However, they believed that excluding completely "off-reserve" Indians from voting in band council elections did not

[51] The *Law* test was developed in *Law* v *Canada* (1999) to determine whether there is a section 15 right violation.
[52] The Supreme Court of Canada developed a test for the application of the limitation clause in *R* v *Oakes* (1986). The test was later clarified by Justice Iacobucci in *Egan v Canada* (1995).

minimally impair their equality rights. According to them, other electoral schemes that balance the rights of "off-reserve" and "on-reserve" band members were available.

Pursuant to these findings, the bench invalidated section 77(1) of the *Indian Act* and gave the federal government an 18-month stay. It suggested that the development of an electoral process that balances the rights of "off-reserve" and "on-reserve" band members should be privileged. In her concurring judgment, Justice L'Heureux-Dubé emphasized the need for government to consult with aboriginals in addressing electoral reform for the reserve bands. In response to *Corbiere*, the government announced that it would comply with the decision in a two-phase process (DIAND 1999). Only one month before the end of the judicial stay, the government started by amending its regulations on Indian Band Elections and Indian Referendum to allow for the participation of "off-reserve" Indians (*Regulations Amending the Indian Band Election Regulation* 2000; *Regulations Amending the Indian Referendum Regulation* 2000). Later in 2002, the government introduced the *First Nations Governance Act* which constituted an overhaul of the *Indian Act* (Bill C-7). It provided for, among other things, band-designed leadership selection codes that balance the interests of "off-reserve" and "on-reserve" band members. Many national aboriginal leaders opposed this legislative proposal notably on the basis that it had been drafted without proper consultation of aboriginals (Elliott 2001). In the end, the *First Nations Governance Act* was never ratified and the *Indian Act* thus never amended.

Protection of Minority Group Interest

Aboriginal peoples were also able to secure their interests in an eventual Quebec secession negotiating process. In *Reference Re Secession of Quebec* (1998), aboriginal organizations successfully intervened against allowing Quebec to unilaterally separate from Canada without consideration for aboriginals. The Court established that "Protection of minorities" constitutes an underlying principle of the Canadian constitution that needed to inform any secession process.[53] It pin-pointed that the inclusion of section 25 of the *Charter* and section 35 of the Constitution Act, 1982 was a clear illustration of the concern for the safeguard of minority rights in Canada's constitutional edifice. The judges added that "[t]he protection of [aboriginal] rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value" (para 82). It followed that "a

[53] Federalism, Democracy, as well as Constitutionalism and the Rule of Law were the other principles identified by the Court.

clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account" (para 139). Pursuant to these judicial pronouncements, the federal government adopted the *Clarity Act, 2000* which provides that aboriginals' point of view shall be considered with respect to the wording of the referendum question and the evaluation of the referendum result, as well as to the terms of secession. Of importance here is that the Court and Parliament underlined the importance of protecting aboriginal interest in constitutional negotiations without providing them with a formal seat at the negotiation table nonetheless.

Assistance

Aboriginals were somewhat unsuccessful at securing assistance rights under section 15 of the *Charter*. Assistance rights translate into two types of policies for disadvantaged groups: redistributive and preferential policies (Levy 1996). While aboriginal groups were legally recognized as an historically disadvantage group (*Lovelace v Ontario* 2000), they failed to have new redistributive policies implemented under section 15(1) in *Lovelace v Ontario* (2000) and *Ermineskin Indian Band and Nation v Canada* (2009). They were only able to insure the protection of a preferential policy under section 15(2) in *R v Kapp* (2008). The jurisprudence thus mandated no new policy initiative to be put in place by the government to the benefit of aboriginals and preserved the policy status quo.

Redistributive Policies

Aboriginal groups first sought better redistributive justice in *Lovelace*. At issue in this case was Ontario's *Casino Rama Revenue Agreement, 1996* which provided that part of Casino Rama's proceeds would be redistributed amongst the province's First Nations communities registered as bands under the *Indian Act*. The province's first reserve-based commercial casino was the result of long negotiations pertaining to Indian bands' participation in gaming activities in view of increasing their self-government capabilities. The appellants who were registered as individual Indians and not as band members under the *Indian Act* were claiming that the agreement violated their equality rights by excluding them from a share in the casino's proceeds and any related negotiation process. In applying the *Law* test, however, the Court found that an analysis of contextual factors of the case did not lead to the conclusion that the Ontarian government had acted in a way that was substantively discriminatory towards non-band communities under

section 15(1). First, it was determined that the governmental policy was tailored to the specific needs and circumstances of Indian band communities and that it had to be therefore distinguished from a universal comprehensive benefit scheme. Second, the ameliorative purpose of the targeted program, which was to empower Indian bands, was found to be consistent with the purpose of section 15(1). Finally, the judges did not see how the exclusion of non-band Indians from the program would prevent them from being self-governing as well.

In *Ermineskin Indian Band and Nation*, aboriginal groups contested the money management system chosen by the Crown to administer bands' royalties from natural resource exploitation under sections 61 to 69 of the *Indian Act*. This system precluded the Crown from investing aboriginal royalties in a diversified portfolio and privileged instead their holding in the federal government's Consolidated Revenue Fund with interest payable to the bands, calculated on the basis of the yield on long-term government bonds. In the appellant's view, the Crown's failure to invest their royalties resulted in lower returns for Indians than those available to non-Indians and thus constituted a violation of their section 15(1) rights. In applying the Andrews test,[54] the Court determined that the differential treatment established by the *Indian Act* in this matter was not discriminatory in the sense that it did not "perpetuat[e] disadvantage through prejudice or stereotyping" (*Ermineskin Indian Band and Nation* 2009, para 202). On the contrary, it was said to show concern for aboriginal autonomy and self-government. Investment of aboriginal royalties was not only deemed to be financially risky and to prevent complete liquidity, it would have forced the Crown to exercise greater control over the bands' budgets.

Preferential Policies

A preferential policy was upheld in *Kapp* to the benefit of aboriginal communities. At issue in this case was a pilot sales program granting an exclusive communal fishing licence to three aboriginal bands to fish salmon from the Fraser River for 24 hours under the federal Aboriginal Fisheries Strategy (*Aboriginal Communal Fishing Licences Regulations* 1993). Commercial fishers who were mainly non-aboriginal and who were forbidden to fish during that period argued that the program violated their section 15(1) equality rights. They contended it discriminated against them on the basis of race. The Court determined that the appellants' section 15(1) claim

[54] The *Andrews* test was developed in *Andrews* v *Law Society of British Columbia* (1989) to determine whether there is a section 15 right violation. The return to the Andrews test after the development of the *Law* test can be explained by the problems of the "human dignity" analysis associated with the latter, as discussed in *Kapp*. For a discussion on this topic, see Sophia Moreau (2009).

was inadmissible since the governmental program was protected under section 15(2) whose purpose is to "*enabl[e]* governments to pro-actively combat discrimination" (para 37) by creating programs that aim at improving the well-being of marginalised groups. The judges thereby affirmed that section 15(2) is "more than an interpretive aid to section 15(1) [and] can insulate certain ameliorative programs from any kind of scrutiny under section 15(1)" (Moreau 2009, 283). In the case at hand, the program had been put in place to further the self-sufficiency of aboriginals who qualify as a disadvantaged group in Canadian society. The precedent established in *Kapp* sent a clear message that existing aboriginal rights or privileges could not be taken away on the basis that they gave an unfair advantage. Rather, *Charter* equality was to be understood in substantive terms and allow for affirmative action in the case of aboriginals.

Recognition/Enforcement

Aboriginal peoples have tried to get their traditional legal codes recognized and enforced by the Canadian legal system through constitutional review in the area of land rights. According to Jacob T. Levy: "At the base of indigenous land rights claims is the notion that the legal system of the settlers ought to recognize the property systems established according to native law, and that if a particular group owned a particular piece of land under traditional law, they ought to have a valid title under settlers' law as well" (1996, 37). Recognition/enforcement of aboriginal law cases has at first involved the establishment of aboriginal land title (*Delgamuukw v British Columbia* 1997; *R v Marshall; R v Bernard* 2005), but was eventually more concerned with the protection of aboriginal interests in land (*Haida Nation v British Columbia* 2004; *Taku River Tlingit First Nation v British Columbia* 2004).

Aboriginal land title

In *Adam* (1996) and *Côté* (1996), the judges affirmed that aboriginal title to land was a category of aboriginal rights that was afforded protection under section 35(1) of the *Constitution Act, 1982*. The recognition and enforcement of aboriginal title was advocated in the landmark decision of *Delgamuukw v British Columbia* (1997). The case sought to have aboriginal perspectives taken into account for determining the legal content of aboriginal title and establishing its proof.

The Court affirmed that not solely common law, but aboriginal law as well, should inform the content of aboriginal title. The judges qualified aboriginal title as *sui generis*, and as such,

associated three general features to it. First, they held that "[l]ands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties" (para 113). Second, they declared that aboriginal title arises from ownership and occupation by aboriginal peoples before the assertion of British sovereignty according to the common law principle, but also from aboriginal law itself. Third, they stated that aboriginal title was communal in nature and that decisions affecting it should be made by the community that owns it. From these general features, the Court extrapolated two propositions regarding aboriginal title:

> [F]irst, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land (para 117).

Aboriginal law was also used to establish proof of aboriginal title. In *Van der Peet* (1996), it had been suggested that in aboriginal rights adjudication "[t]he courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would [normally] be applied" (para 68). Following this precedent, the bench affirmed in *Delgamuukw* that oral histories could be admitted as evidence in judicial proceedings to establish aboriginal title, to the same extent as common law evidence. As per the Court, three criteria needed to be met in order to prove aboriginal title. First, the aboriginal community had to prove that prior to the assertion of the British Crown, it occupied the claimed territory. Second, if present occupation was used as a proof of pre-sovereignty occupation, the aboriginal community had to show continuity between pre-sovereignty occupation and present occupation. Third, the aboriginal community had to prove that at the time of the assertion of British sovereignty, the land was used exclusively by it, or if shared with another community, that the land was used in shared exclusivity. In *R v Marshall; R v Bernard* (2005), it was determined that these principles should also be applied in the cases of nomadic and semi-nomadic peoples.

Following the precedent in Sparrow, the judges affirmed however that aboriginal title to land was not absolute and could be limited by the Crown. In *Delgamuukw*, they therefore proceeded to adapt the test for justification of infringement developed in Sparrow to aboriginal title. At the first stage of the analysis, the Crown had to show that it was infringing aboriginal title pursuant

to a compelling and substantial legislative objective. Economical development and environmental protection objectives all qualified as such in the case of aboriginal title. At the second stage of the analysis, the Crown needed to prove that it was acting in a manner consistent with its fiduciary duty towards aboriginals. This could be established by the fact that aboriginals had been invited to participate in the exploitation of resources, had been properly consulted and/or compensated in the process.

These legal developments have translated mostly into negotiation tools for establishing aboriginal title. With respect to the land claim made in *Delgamuukw*, the Court reordered a trial so aboriginal law could be given proper weight in the Gitxsan and Wet'su'weten's dispute settlement. However, the judges noted that generally speaking treaty negotiation rather than litigation was more appropriate in solving aboriginal land claims. They added that the Crown also had the moral and legal duty to negotiate in good faith. In the end, no trial was re-ordered in the case of *Delgamuukw* and negotiations favoured. In the *Marshall* and *Bernard* cases, the Court rejected the Mi'kmaq's title claim due to a lack of evidence, but the adoption of the Made in Nova Scotia Process, 2007 framework laid the path for a larger land settlement for Nova Scotia's Mi'kmaq through negotiation. Yet, treaty negotiations being lengthy and strenuous have not resulted in the establishment of title for the Gitxsan and Wet'su'weten (BC Treaty Commission 2011), nor for the Mi'kmaq (NS Aboriginal Affairs 2011).

Aboriginal interests in land

The twin cases of *Haida Nation v British Columbia* (2004) and *Taku River Tlingit First Nation v British Columbia* (2004) "mark[ed] the emergence of a new constitutional paradigm governing aboriginal rights" (Slattery 2007, 285). The new jurisprudence emphasized the need to base aboriginal land rights on the "Principles of Reconciliation," which allowed for aboriginal interests in land to be taken into account rather than on the "Principles of Recognition," which was only concerned with the establishment of formal aboriginal title (Ibid., 262). This shift can be explained by the need to modernise aboriginal land rights in order to simultaneously accommodate aboriginal interest, but also public and private interest on claimed territory.

The importance for the Crown to consult and accommodate aboriginal peoples regarding their land had already been identified in *Delgamuukw*. In *Haida Nation an*d *Taku River Tlingit First Nation* however, it was elevated to a positive right. The Court determined that the Crown had the

duty to consult and accommodate aboriginals even before their title to land had been legally recognized if the Crown had "knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplate[d] conduct that might adversely affect it" (para 35). Though the judges grounded this duty in the principle of the honour of the Crown, they asserted that it was "an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands" (*Haida Nation*, para 38). While the principle of Reconciliation was emphasized, the principle of recognition of a *sui generis* title was not totally evacuated. The judges added that the degree of consultation and accommodation required would vary according to the strength of the land claim and the severity of the possible perverse effects of an aboriginal right infringement by the Crown.

The jurisprudence on aboriginal land rights has been more effective in preserving aboriginal interests in land than in granting them land titles. In 2002, the government of British Columbia adopted the Provincial Policy for Consultation with First Nations, which recognized the need to consult and accommodate aboriginal interest in land even if a title had been claimed but not yet proven, thereby applying the decisions made by the Court of Appeal of British Columbia in 2002 and upheld later by the Supreme Court in Haida Nation and Taku River Tlingit First Nation in 2004. Pursuant to the finding in Haida Nation that the Crown should have consulted and accommodated the Council of the Haida Nation regarding the harvest of Haida Gwaii, *the Haida Gwaii Strategic Land Use Agreement, 2007* was signed by the two parties. In the case of Taku River Tlingit First Nation, the plaintiffs failed to have the government of British Columbia rescind its certificate of approval given to the mining company Redfern to build a road to transport ore on their traditional territory. The Court determined that they had been adequately consulted and accommodated.[55]

Self-government

[55]In a twist of faith, the road was never built due to the high cost associated with it (Tobin 2007). Redfern sought instead governmental approval to construct an air-cushioned barge on the Taku River to transport the ore. After consulting with the Taku River Tlingit First Nation, British Columbia amended the mining company's environmental assessment certificate in 2009 so it could go forward with its barging alternative (British Columbia 2009).

Contrary to the hope of some (McNeil 1982; Pentney 1987), aboriginals were not able to have the general right to self-government recognized through rights-based judicial review. In *R v Pamajewon* (1996), the Court refused to decide whether claims to self-government were included in section 35. In this case, the Shawanaga First Nation and the Eagle Lake First Nation had been convicted of operating common gaming houses without a provincial authorization contrary to the *Criminal Code*. In their defence, they asserted an inherent right to self-government that would allow them to regulate gambling activities. Chief Justice Lamer, writing for the majority, judged that their claim was too broad and that "[a]boriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the rights" (para 27). Assuming without deciding that section 35 encompasses the right to self-government, the majority decided that the legal standard developed in *Van der Peet* (1996) was the appropriate one to follow. It found that the regulation of gambling did not constitute a practice that was an integral part of the distinctive culture of the Shawanaga First Nation and the Eagle Lake First Nation.

By reverting to the culturalist approach to deal with specific self-government claims instead of developing a specific approach to the general right to self-government, the Court left the matter of aboriginal governance to the other branches of government. A few months after the decision in *Pamajewon*, the Royal Commission on aboriginal peoples (hereafter "RCAP") tabled its final report recognizing aboriginal peoples' inherent right to self-government and recommending the implementation of a third order of government in Canada (1996). When confronted a year later in the case of *Delgamuukw* (1997) with an indirect self-government claim, the Court avoided it again. Chief Justice Lamer pointed out to the complexity of the establishment of a third order of government for aboriginals as illustrated by the RCAP final report itself. While the federal government has not pushed for the establishment of a third order of government, it has adopted since 1995 a self-government policy which seeks to negotiate self-government agreements with different aboriginal groups rather than to establish a legal definition of the inherent right to self-government (Wherrett 1999).

ANALYSIS

Legal Change

The rights-based litigation opportunities created by Canada's new constitution have translated into considerable legal gains for aboriginal peoples, but with a few caveats. Of the 23 cases surveyed, the Supreme Court of Canada ruled in favour of aboriginals in 14 of them. The overwhelming majority of their judicial victories can be attributed to the purposive approach given to section 35(1) of the *Constitution Act, 1982*. Noteworthy here are the exemptions granted to aboriginals with respect to land-based rights. Although the framework for analyzing these claims was narrowed in the *Van der Peet* trilogy (1996), it undeniably contributed to aboriginal rights expansion in Canada. Still, this jurisprudence has attracted severe criticism from academia (Barsh and Henderson 1997; Borrows 2002; Murphy 2001). Apart from putting an unfair burden of proof on aboriginals, the *Van der Peet* test has tended to overemphasize what was important in the past to guarantee the distinctiveness of aboriginal cultures, rather than what aboriginals cultures need today to preserve their distinctiveness.

Furthermore, section 35(1) allowed for recognition and enforcement of aboriginal law with respect to land claims. While the Court did not formally recognize any aboriginal group's title to land, it identified the way in which the first inhabitants of this country could have land titles recognized (*Delgamuukw* 1997) and have their interests in land preserved (*Delgamuukw* 1997; *Haida Nation* 2004; *Taku River Tlingit First Nation* 2004). As James B. Kelly and Michael Murphy suggest:

> [J]udicial review in Canada has facilitated an [...] intergovernmental dialogue among First Nations and Canadian governments over the implementation of section 35. The Supreme Court has generally established the framework within which policy remedies must be framed but has left substantive policy choices to the discretion of political actors" (2005, 219).

Similarly, Brian Slattery considers that aboriginal title has metamorphosed into a generative right, meaning that it "exists in a dynamic but latent form, which is capable of partial articulation by the courts but whose full implementation requires agreement between the Indigenous Party and the Crown" (2007, 255).

Even though section 35(1) rights are not subject to the limitation clause found in section 1 of the *Charter*, the bench has constructed substantial internal limits on them. In *Sparrow*(1990), the

judges affirmed that aboriginal rights are not absolute and that infringements on those rights are sometimes justifiable. In the same case, the Court established a test for justifying governmental interference with aboriginal land-base rights, and in *Delgamuukw* (1997) a test for justifying interference with aboriginal title to land. Interestingly, no infringement on an aboriginal right was validated under those two tests. In *Haida Nation* (2004) however, the right for the Crown to infringe on aboriginal title was insinuated; aboriginal peoples were only left with the right to be consulted and accommodated. Some have argued that the possibility of infringing on aboriginal rights amounts to a complete denial of aboriginal Sovereignty and the perpetuation of a colonial relationship between aboriginal peoples and the Crown (Christie 2005).

The aboriginal rights protected under section 35(1) were not defined by the Court as including the right to participate in constitutional discussions (*Native Women's Assn. of Canada* 1994). Aboriginal peoples were only guaranteed that their interests would be taken into consideration in an eventual Quebec secession process (*Reference Re Secession of Quebec* 1998). However, section 35.1 of the *Constitution Act, 1982* gives aboriginals a say in future constitutional negotiations affecting section 25 and 35 of the same act, as well as section 91(24) of the BNAA. What was more startling is the Court's refusal to determine whether section 35(1) of the *Constitution Act, 1982* encompassed the right to aboriginal self-government. As Paul Joff puts it:

> It would be difficult to conceive of how an aboriginal people that is considered to be an "organized society"' for the purposes of s. 35(1) of the Constitution Act, 1982 and possessing collective aboriginal and treaty rights could be determined to have few or no rights of self-government" (2000, 167).

Many scholars have developed approaches to section 35(1) that would recognize aboriginal self-government (McNeil 1982; Pentney 1987). One central explanation for why the judges decided to assume without deciding that section 35(1) includes a right to self-government is the inherent conflict between the individualistic values of the *Charter* and the collective values on which self-governing Indian bands would be based (Morton 1985; Mandel 1994).

The more restrictive approach to aboriginal rights developed over time in the jurisprudence on section 35(1) of the *Constitution Act, 1982* was also adopted in the jurisprudence on section 25 of the *Charter*. In reality, the Court has shied away from interpreting this constitutional provision which was supposed to protect specific aboriginal rights from *Charter* abrogation. In *Kapp* (2008), when section 25 was first invoked at the Supreme Court level, a majority of the bench

preferred to decide the case under section 15(2) than to delineate the former. The majority added that it was unclear whether the impugned law that granted an exclusive fishing right to aboriginals to the detriment of non-aboriginals fell within the ambit of section 25 because it was statutory and not constitutional in nature. The majority also questioned whether section 25 constituted an absolute bar to other Charter claims or if it was only a mere canon of interpretation. Rather than tackling these important questions and developing a general interpretative approach under section 25, it opted for solving these issues on a case by case basis. Justice Bastarache, in a concurring judgment, was alone in asserting that statutory rights were protected under section 25 and to affirm that the provision constituted a shield for aboriginal rights from erosion based on the Charter. While he developed a generous approach to section 25 in *Kapp*, it remains to be seen whether it will be applied in future cases. It is thus too early to speculate on the provision's propensity to expand aboriginal rights.

Aboriginals were clearly less successful at having their rights recognized under the more general provisions of the *Charter.* The Charter jurisprudence *per se* only granted aboriginals one representation right (*Corbiere* 1999) and one assistance right (*Kapp* 2008). While the bench did not limit aboriginal rights under section 1, it refused to hear *Native Women's Assn. of Canada* (1994) on the basis of freedom of expression found in section 2(b) and gender equality protected by section 28 of the Charter. Most of the aboriginal Charter cases were decided under the equality clause found in section 15. Challenges under section 15(1) were unsuccessful in all cases (*Native Women's Assn. of Canada* 1994; *Lovelace* 2000; *Ermineskin Indian Band and Nation* 2009), but one: *Corbiere* (1999). As for the only case involving section 15(2), it ruled in favour of aboriginals (*Kapp* 2008).

In two of the three cases that failed under section 15, considerations for self-reliance and self-government were invoked. In *Lovelace* (2000) the Court refused to take some of the proceeds of the Casino away from bands to the benefit of non-band Indians for the purpose of enhancing the former's self-reliance abilities. In *Ermineskin Indian Band and Nation* (2009), the Court vindicated the federal government's bands' royalties management scheme because it showed concern for aboriginal self-government. One may ask if the judges were primarily concerned with promoting self-government or simply restraining public spending? Even though the proceeds of the Casino are limited, the Court could have mandated the government to put in place other measures to help non-band Indians. In the case of *Ermineskin Indian Band and Nation*, the Court could have mandated the government to calculate the interest on the royalties in a way that is

more advantageous to aboriginals. Finally, in the cases involving alleged intra-group discrimination (*Native Women's Assn. of Canada* 1994; *Corbiere* 1999, *Lovelace* 2000), the Court has tended to favour the majority aboriginal group rather than the minority aboriginal group.

Political Compliance

In the case of aboriginal issues, the Crown's compliance with the Supreme Court judgments has been total. The notwithstanding clause found in section 33 of the *Charter* could only be invoked pursuant to the decision in *Corbiere* (1999), but the federal government decided not to. However, the federal and provincial governments have not really exceeded their constitutional obligations either with regards to aboriginal peoples. Nova Scotia did adopt a framework for land settlement with the Mi'kmaq even though they failed to have their title to land recognized in *Marshall-Bernard* (2005). But this initiative can also be traced to *Delgamuukw*'s (1997) more general exhortation to settle aboriginal claims by way of negotiations (Made in Nova Scotia Process, 2007). What is telling is that the governments accepted wholeheartedly the controversial jurisprudence laid out in the *Van der Peet* trilogy, even though the Court was split on the matter. Following the split decision in *Société des Acadiens v Association of Parents* (1986) which ruled against the minority, the government had ultimately decided to do away with the majority pronouncement and to take the side of the minority.

The fact that section 35 of the *Constitution Act, 1982* falls outside the *Charter* and is not subject to section 24(1) did not prevent its enforcement. However, an argument could be made to the effect that it delayed enforcement in the cases of aboriginal title to land. In those cases, the Supreme Court was not able to provide clear remedies, but only to lay out the principles that should guide future negotiations under section 52(1). In the cases surveyed, negotiations have begun but have yet to yield concrete results for aboriginals (*Delgamuukw* 1997; *Marshall-Bernard* 2005). As Frances Abele and Michael J. Prince point out, treaty-making processes between aboriginal peoples and the Crown are very complex and lengthy (2003). There are only 24 self-government or comprehensive land claim agreements finalized between the federal government and aboriginal peoples (AANDC 2011).

The Promotion of Cultural Citizenship

Judicial review in the area of aboriginal issues has revealed a clear repudiation of an undifferentiated model of citizenship in Canada. The special constitutional status awarded to aboriginal peoples has given them group-differentiated rights, notably exemption rights, assistance rights, representation rights and recognition/enforcement rights. Nevertheless, the new constitutional regime of 1982 has not promoted a true multinational conception of citizenship. As exemplified by the *Van der Peet* trilogy, a simple retention of aboriginal culture was favoured, as opposed to the implementation of parallel social structures, such as aboriginal self-government. The enforcement and recognition of aboriginal law with regards to aboriginal title represents to some extent a step towards a multinational citizenship, though land settlement processes are still ongoing.

The cultural rights arrangement established by constitutional review has confirmed and pushed further Canada's choice of a polyethnic model of citizenship. It confirmed this choice by upholding existing aboriginal-friendly legislation and even went further by pushing for the adoption of new aboriginal-friendly legislation. The large majority of rights recognized have been group-differentiated and while they have permitted cultural retention, they promoted first and foremost social integration. Aboriginals were granted many exemption rights to lessen their cultural costs for taking part in mainstream society. Assistance rights were also given to them to facilitate their well-being in Canada. Finally, they benefited from representation rights within existing Canadian institutions.

CONCLUSION

In sum, one can ask whether aboriginal peoples have exhausted the potential of judicial review. One possible avenue would be for them to bring a case before the Court on the application of section 25 of the *Charter.* Another would be to find a way to force the country's highest tribunal to decide for good whether section 35 of the *Constitution Act, 1982* includes the right to aboriginal self-government. In the past, when faced with such challenges, the judges have been reluctant to take a stance. Perhaps the changing composition of the bench in the upcoming years will create new opportunities for aboriginals to have these constitutional questions answered. In the meantime, it seems that the faith of aboriginals lays in the outcomes of the negotiations processes taking place all across the country.

Summary of cases

Case	Type of right claimed by litigant	Type of right defended by government	Cultural minority supports	Winner	Legal change	Type of right promoted by the judiciary	Policy compliance	Type of right promoted by government
R v Sparrow (1990)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The setting aside of the conviction was affirmed. No: A trial was never reordered.	Exemption
Native Women's Assn. of Canada v Canada (1994)	Representation	Societal collective	LIT (Abo. Women) GOV (Abo. Nat. Org.)	GOV	No	Societal collective	Yes	Societal collective
R v Badger (1996)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The conviction was set aside. No: A trial was never reordered to decide if infringements on the established aboriginal right were justifiable.	Exemption
R v Nikal (1996)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The acquittal was restored.	Exemption
R v Van der Peet (1996)	Exemption	Societal collective	LIT	GOV	No	Societal collective	Yes: The conviction was upheld.	Societal collective
R v N.T.C. Smokehouse Ltd.(1996)	Exemption	Societal collective	LIT	GOV	No	Societal collective	Yes: The conviction was upheld.	Societal collective
R v Gladstone (1996)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The Crown stayed that count and remitted to the plaintiffs $137.079.50.	Exemption
R v Pamajewon (1996)	Self-government	Societal collective	LIT	GOV	No	Societal collective	Yes	Societal collective
R v Adams (1996)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The Appellants were acquitted.	Exemption
R v Côté (1996)	Exemption	Societal collective	LIT	LIT/GOV	Yes	Exemption/ Societal collective	Yes: The Appellants were acquitted for fishing without a liscence. Yes:The Appellants' conviction for entering a controlled harvest zone (Z.E.C.) was upheld.	Exemption/ Societal collective
Delgamuukw v British Columbia (1997)	Recognition-Enforcement and self-government	Societal collective	LIT	LIT	Yes	Recognition-Enforcement	Yes: The Provincial Policy for Consultation with First Nations was adopted in 2002. No: A trial was never reordered and a treaty recognizing the aboriginal title of the Gitxsan and Wet'su'weten has not yet been negotiated.	Recognition-Enforcement/ Societal collective
Reference Re Secession of Quebec (1998)	Not applicable	Policy status quo: Societal collective	Not the policy status quo	Cultural minority	Yes	Representation	Yes: Clarity Act, RSC 2000, c 26.	Representation
Corbiere v Canada (1999)	Representation	Societal collective	LIT GOV	LIT	Yes	Representation	Yes: "Off-reserve" Indians were made eligible to vote by way of regulation. See Regulation Amending the Indian Band Election Regulation, SOR/2000-391 and Regulation Amending the Indian Referendum Regulation, SOR/2000-392. No: No electoral process that balances the rights of "off-reserve" and "on-reserve" band members was adopted.	Representation
R v Marshall (1) and R v Marshall (2) (1999)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The appellant was acquitted.	Exemption
Lovelace v Ontario (2000)	Assistance	Assistance (Band Members)	LIT (Individual Indians) GOV (Band Members)	GOV	No	Assistance (Band Members)	Yes: The *Casino Rama Revenue Agreement* was not amended.	Assistance (Band Members)
Mitchell v M.N.R (2001)	Exemption	Societal collective	LIT	GOV	No	Societal collective	Yes: *Akwesasne Residents Remission Order*, SOR/91-412 was not amended.	Societal collective

Case	Type of right claimed by litigant	Type of right defended by government	Cultural minority supports	Winner	Legal change	Type of right promoted by the judiciary	Policy compliance	Type of right promoted by government
R v Powley (2003)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The appellants were acquitted.	Exemption
Haida Nation v British Columbia (Minister of Forests) (2004)	Recognition-Enforcement	Societal collective	LIT	LIT	Yes	Recognition-Enforcement	Yes: The Provincial Policy for Consultation with First Nations, 2002 was adopted as well as the Haida Gwaii Strategic Land Use Agreement, 2007.	Recognition-Enforcement
Taku River Tlingit First Nation v British Columbia (2004)	Recognition-Enforcement	Societal collective	LIT	GOV	No	Societal collective	Yes: The Provincial Policy for Consultation with First Nations was adopted in 2002. No: British Columbia did not revoque Redfern's Environemental Assessment Certificate to construct on TRTFN traditional territory pursuant to the judgment.	Recognition-Enforcement/ Societal collective
R v Marshall; R v Bernard (2005)	Recognition-Enforcement	Societal collective	LIT	GOV	No	Societal collective	Yes: Title to land was not recognized to the Mi'kmaq. No: The Made in Nova Scotia Process, 2007 framework lays the path for a larger land settlement for Nova Scotia's Mi'kmaq through negotiation.	Societal collective/ Recognition-Enforcement
R v Sappier; R v Gray (2006)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The appellants were acquitted.	Exemption
R v Kapp (2008)	Individual	Assistance	GOV	GOV	No	Assistance	Yes: The Aboriginal Fisheries Strategy is still in full force.	Assistance
Ermineskin Indian Band and Nation v Canada (2009)	Assistance	Societal collective (Self-government)	LIT	GOV	No	Societal collective (Self-government)	Yes: The Indian Act, RSC 1985, c. I-5, ss 61-68 was not amended.	Societal collective

Conclusion

INTRODUCTION

This dissertation sought to evaluate the impact of *Charter*-based judicial review on pan-Canadian cultural citizenship over the last three decades. By relying on the historical institutionalist approach, this research has argued that *Charter*-based judicial review has confirmed and pushed further the choice Canada made after World War II to promote a polyethnic citizenship. The next sections summarize the legal change observed in the *Charter*'s cultural jurisprudence, the way in which governmental authorities have complied with this jurisprudence, and the overall repercussions of judicial review on the Canadian model of citizenship. The chapter will also propose future research to be conducted to further validate the theoretical claims being made in this dissertation.

LEGAL CHANGE

In total, the dissertation surveyed 49 Supreme Court of Canada decisions in the areas of Minority language rights (14 cases), Multiculturalism (12 cases) and aboriginal issues (23 cases); a summary table of all the cases can be found in Appendix III. The judiciary rendered decisions that promoted different types of rights. In some cases, the bench promoted more than one type of right. In total, there were 52 instances where a right was promoted by the judges. The following table summarizes the number of instances where a right was promoted by the Supreme Court by right category and offers a breakdown of the number of instances per policy domain:

Type of right promoted	Minority Language	Multiculturalism	Aboriginal Issues	Total
Individual	2	1	0	**3**
Societal collective	3	4	8	**15**
Anti-defamation	0	4	0	**4**
Exemption	0	2	9	**11**
Assistance	8	1	2	**11**
Self-government	0	0	0	**0**
External rule	1	0	0	**1**
Recognition/Enforcement	0	0	2	**2**
Representation	3	0	2	**5**

Societal collective, followed by exemption and assistance, were the types of rights the most promoted by the judiciary. The Court also promoted some representation rights, some anti-defamation rights, some individual rights, some recognition/enforcement rights and one external rule. However, it upheld no self-government right.

In 65% of the cases surveyed (32 out of 49 cases), the judiciary ruled in favour of cultural minority groups whether, this involved changing the law to make it minority-friendly or upholding an already minority-friendly law.[56] Linguistic minorities, namely Anglophone-Quebecers and Francophones outside Quebec, were the most successful cultural group, winning 73% of their cases before the Court (8 out of 11 cases). In second place, were aboriginal groups, who had their rights recognized in 70% of the cases (16 out of 23 cases).[57] Next were racial and religious minorities which preserved their interests in 58% of cases (7 out of 12 cases).[58] The biggest losers of *Charter* litigation have been Francophone Quebecers, who were represented by

[56]Includes cases in which the bench ruled in favour of the Quebec Anglophone minority but against the Quebec government (*A.G.* v *Quebec Protestant School Boards*, 1984; *Ford* v *Quebec*, 1988; *Devine* v *Quebec*,1988). Includes as well rulings in favour of government which ended up benefitting cultural minorities such as aboriginal groups (*Native Women's Assn. of Canada v Canada* 1994; *Lovelace* v *Ontario* 2000; *R v Kapp* 2008) or racial and religious minorities (*Canada* v *Taylor* 1990; *R* v *Keegstra* 1990; *R* v *Andrews* 1990; *Ross* v *New Brunswick School District No. 15* 1996). Finally, cases in which individual Francophones or Allophones won against the government of Quebec in minority language education cases are excluded (*Solski* v Quebec 2005; Nguyen v *Quebec* 2009).

[57] Includes rulings in favour of government which ended up benefitting aboriginal groups (*Native Women's Assn. of Canada v Canada* 1994; *Lovelace* v *Ontario* 2000; R v *Kapp* 2008).

[58] Includes as well rulings in favour of government which ended up benefitting racial and religious minorities (*Canada* v *Taylor*, 1990, *R* v *Keegstra*, 1990; *R* v *Andrews*, 1990; *Ross* v *New Brunswick School District No. 15*, 1996).

the Quebec government. As a cultural minority group within Canada, Francophone Quebecers were victorious in only 17% of cases (1 out of 6 cases).[59]

Minorities have made significant legal gains under the *Charter* due to the interpretation the Court has made of its provisions. The Court's cultural jurisprudence has brought legal change in 55% of the cases (27 out of 49 cases). Out of these cases, 89% were found to favour one cultural minority group or another (24 out of 27 cases). This legal change in favour of minorities is mostly attributable to the availability of specific cultural rights that go beyond fundamental political and civil rights. Challenges based on sections 16-23 of the *Charter* pertaining to linguistic minority rights were successful in 73% of cases (8 out of 11 cases),[60] while those mounted on section 35(1) of the *Constitution Act, 1982* pertaining to aboriginal and treaty rights were successful in 67% of the cases (12 out of 18 cases). Since section 27 was not interpreted as guaranteeing a positive right in the domain of multiculturalism, religious and racial minorities had to rely mainly on the more general provisions of the *Charter* and only secured positive legal change in 43% of cases (3 out 7 cases).[61] In general, challenges based on the more general provisions of the *Charter* only yielded positive legal change for cultural minorities in 46% of cases (6 out of 13 cases).[62] While these empirical results are indicative of the Court's influence on the cultural rights arrangement in Canada, they do not tell us much about the arguments used by the judges in making their decisions, especially in cases where they were confronted with conflicting rights claims.

The judges used a variety of methods of interpretation to give meaning to the text of the *Charter*. Of importance are the purposive approach, the process as purpose approach and rules regarding rights balancing. A review of the way these methods were applied sheds light on the Court's understanding of the scope of the rights found in the *Charter*.

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[59] This calculation only includes language rights cases brought against the Quebec government and excludes the case of *Multani v Commission scolaire Marguerite-Bourgeoys* (2006), which was brought against an institution of the Quebec government but did not involve Francophone Quebecers' specific culture.

[60] Includes the cases of *Solski* v *Quebec* (2005) and *Nguyen* v *Quebec* (2009) which successfully challenged Quebec's linguistic policy on the basis of section 23 of the *Charter*, even though the outcome was the promotion of an individual right.

[61] Excludes the cases which were originally brought by individual on the basis of freedom of expression to alter the status quo that favoured anti-defamation polices for cultural minorities (*Canada* v *Taylor*, 1990; *R* v *Keegstra*, 1990; *R* v *Andrews*, 1990; *R* v *Zundel*, 1992; *Ross* v *New Brunswick School District No. 15*,1996).

[62] Excludes the cases which were originally brought by individual and not cultural groups (*Canada* v *Taylor* 1990; *R v Keegstra* 1990; *R v Andrews* 1990; *R v Zundel* 1992; *Ross* v *New Brunswick School District No. 15* 1996; *Gosselin v Quebec* 2005; *R v Kapp* 2008).

The Court used extensively the purposive approach in the *Charter'*s cultural jurisprudence. This comes as no surprise, since early on in *Hunter et al. v Southam Inc.* (1984), Chief Justice Dickson stipulated that the purposive approach should generally guide interpretation under the *Charter*:

> The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action (156).

In dealing with the specific cultural rights provisions, the judges looked at pre-*Charter* history and legislative history of the *Charter* to derive their original purpose. The Court stressed that the framers of minority language educational rights (section 23) and aboriginal and treaty rights (section 35(1)) wanted them to be remedial in nature. For example, explicit in the jurisprudence of non-Quebec cases was the judges' intent to satisfy the wish of Parliament to redress past injustices for linguistic minorities under section 23 (*Mahe v Alberta* 1990). In *A.G. v Quebec Protestant School Boards* (1984), the bench stipulated that section 23 of the *Charter* had been adopted precisely to "remedy the perceived defects" (79) of Quebec's language policy. However, it must be noted that the judges decided to stray away from original intent when they recognized the rights of Francophones and Allophones to attend publicly funded English school in Quebec in certain circumstances (*Solski v Quebec* 2005; *Nguyen v Quebec* 2009).[63] In *R v Sparrow* (1990), the Court asserted that section 35(1) was the consequence of an extended and painful fight for the recognition of aboriginal rights in the political realm. Therefore, the bench concluded that disputes involving aboriginals and government would be resolved in favour of aboriginals when in a situation of legal uncertainty. The general purposive approach adopted by the judiciary resulted in constraining governmental action in Quebec minority language education and aboriginal rights cases, and in compelling governmental action in outside Quebec minority language education cases. In the end, many assistance and representation rights for linguistic minorities and exemption rights for aboriginal groups were granted just like the drafters had intended.

Process was also identified as an important purpose of the *Charter* in cases involving the more general provisions of the *Charter*. Therefore, these constitutional provisions were constructed in

[63] As previously explained, section 23(2) of the *Charter* was intended was to ensure continuity of minority language education and family unity in the case of interprovincial immigration (*House of Commons Debates* 1980). Concretely, continuity of education and family unity were conditional on interprovincial immigration and not constitutional guarantees on their own.

order to reinforce the democratic political process. In *R v Big M Drug Mart Ltd.* (1985), freedom of religion was interpreted as protecting individuals from compulsory religious observance in view of preserving Canada's democratic tradition. As well, in *Ford v Quebec* (1988) and *Devine v Quebec* (1988), freedom of expression was extended to commercial expression since, in the Court's view, commercial expression played a key role in a free and democratic society. In *R v Tran* (1994), section 14 on the right to the assistance of an interpreter in court proceedings was said to include the right to "full and contemporaneous translation of all the evidence at trial" (para 8), in order to guarantee the fairness of due process for individuals whose spoken language is different than French or English. The use of the process as purpose approach definitely resulted in legal gains for ethnic and religious minorities as well as for linguistic minorities.

In cases involving rights conflicts, the Court preferred ad hoc balancing to definitional balancing. This method of interpretation was critical mostly in cases involving the more general provisions of the *Charter*. For instance, in freedom of expression cases, the judges decided to give a broad liberal interpretation to section 2(b) rights of the *Charter* and to decide whether impugned provisions constituted reasonable limits on those rights and were justifiable in a free and democratic society under section 1. In hate speech cases, governmental censorship was upheld to protect vulnerable groups from discrimination and to emphasize the collective benefits of establishing a tolerant society (*Canada v Taylor* 1990; *R v Keegstra* 1990; *R v Andrews* 1990; *Ross v New Brunswick School District No. 15* 1996). In a fine act of rights balancing, the bench was able to partially uphold Quebec's "visage linguistique" while allowing the Anglophone community to function in its own language (*Ford v Quebec* 1988; *Devine v Quebec* 1988). In contrast, because section 35(1) is not subject to section 1, the bench favoured definitional balancing in cases involving this provision. The Court built internal limits into the exercise of aboriginal and treaty rights by developing a test for justified interference by the Crown. It posited that aboriginal rights were not absolute since the federal government retained jurisdiction over "Indians" as per section 91(24) of the *Constitution Act, 1867*. In sum, in situations where different constitutional provisions were in conflict, the Court tended to favour a middle ground which inevitably played against Canada's two national minorities, namely Francophone Quebecers and aboriginal peoples.

Another less explicit approach adopted by the Court was the use of structural arguments (Bobbitt 1982).[64] These arguments seek to maintain the viability of the structure of power of the state – for example, ensuring that the federal structure is not diminished by a decision. In the area of

[64] As Philip Bobbitts explains, this type of argument has often been used in the American constitutional context.

minority linguistic rights, the judges were careful to leave some leeway to the provinces in the area of education which is an important provincial jurisdiction. For instance, the sliding scale approach developed in *Mahe v Alberta* (1990) gave Anglophone provinces[65] some discretion in implementing educational schemes that would satisfy the requirements of the *Charter.* In *Gosselin v Quebec* (2005), the bench allowed the province of Quebec to continue limiting accessibility to publicly funded English instruction because it was convinced that a contrary approach "would, in effect, nullify any exercise of the constitutional power" (para 14). Furthermore, the Court's cultural jurisprudence hinted at a hierarchy of rights within the constitutional structure of Canada.[66] In *Mahe* and *Adler v Ontario* (1996), the Court refused to use sections 27 and 15 of the *Charter* to extend the rights granted to linguistic minorities in section 23 and the rights of denominational minorities protected by section 29. Therefore, the judiciary confirmed that Canada's two "founding-nations," namely the Anglo-Protestants and the French-Catholics, have precedence over the other groups forming the Canadian mosaic.

Finally, *Charter*-based judicial review has resulted in a complex cultural rights structure akin to what Michael Ignatieff calls a "patchwork quilt" as opposed to a uniform "pool table" (2004). Nonetheless, some general observations can be made. First, the historical groups that came together in 1763, year of the *Royal Proclamation*, to build what would become Canada, namely Francophones, Anglophones and aboriginals, have asserted their acquired special status through the Court. Regardless of their geographical situation, Francophones and Anglophones have been recognized as having the right to a minimum level of service in their respective language. The judiciary also confirmed that aboriginals could not have their ancestral rights totally disregarded. Second, the Court suggested that these special statuses for Francophones and aboriginal peoples do not automatically translate into absolute self-government rights on a delimited territory. Third, the bench has adopted a definition of constitutional multiculturalism that promotes superficial cultural differences, rather than deep ones, to the benefit of a single social structure. The next section verifies if the "patchwork quilt" sown by the judges has been worn as is by the authorities.

POLITICAL COMPLIANCE

[65] Even prior to the adoption of the *Charter*, the Quebec government guaranteed access to English education to the Anglophone community, regardless of whether the numbers warranted such a right.

[66] In *Gossselin* (2005), the Court denied such a hierarchy of constitutional rights and affirmed instead that the different constitutional provisions constitute a comprehensive code. However, the outcome of constitutional interpretation has a hierarchical appearance.

The action or inaction of governmental authorities, pursuant to the Court's decisions, resulted in 56 instances where rights were promoted. The following table summarizes the number of instances where a right was promoted by the legislative/executive branch by type of rights and according to the policy area:

Final right promoted	Minority Language	Multiculturalism	Aboriginal Issues	Total
Individual	2	1	0	**3**
Societal collective	3	3	9	**15**
Anti-defamation	0	4	0	**4**
Exemption	0	3	9	**12**
Assistance	8	2	2	**12**
Self-government	0	0	0	**0**
External rule	1	0	0	**1**
Recognition/Enforcement	0	0	4	**4**
Representation	3	0	2	**5**

In the end, governmental authorities chose to promote mostly societal collective rights, followed by assistance rights and exemption rights. Judicial review resulted in the promotion to a lesser extent of representation rights, anti-defamation rights, enforcement/recognition rights and individual rights. It only translated into the granting of one external rule. Noteworthy is the fact that the new constitutional order granted not a single self-government right.

Governmental compliance with the Supreme Court's decisions has been total. This confirms that Canadian authorities have accepted the rights arrangement established by the judiciary in the cultural domain. Noteworthy is the fact that compliance has not differed depending on the policy area. Compliance has been explicit, except in the case of *R v Zundel* (1992) where it was tacit. At issue was section 181 of the *Criminal Code* which prevented the dissemination of false news. Pursuant to the Court's judgment that this provision infringed freedom of speech protected by section 2(b) of the *Charter*, the federal government did not amend nor repeal it, probably thinking that future litigation would reverse it. Though in the subsequent hate speech case the Court unanimously reiterated the fact that the impugned provision might have a "chilling effect" on expression (*Ross* 1996), the government has not amended nor repealed it to this day.

Governments did not make extensive use of the notwithstanding clause found in section 33 of the *Charter* to respond to unfavourable *Charter* cultural jurisprudence. Since all of the specific cultural rights provisions of the *Charter* are immune to it, authorities could only invoke it when dealing with the more general provisions of the *Charter.* In the end, section 33 was only invoked once by the government of Quebec in response to the twin cases of *Ford v Quebec* (1988) and *Devine v Quebec* (1988) based on freedom of expression found in section 2(b) of the *Charter.* Nevertheless, right before the expiry of this notwithstanding clause, the government of Quebec decided not to renew it and instead amended its language policy to conform to the Court's judgments. The Quebec Anglo-community's right to have bilingual commercial signs was upheld against Quebec's initial wish to have French monolingual signs.

In some cases however, the political authorities complied only partially with the Court's decisions. For example, in many cases trials were never reordered as per the judges' request (*R v Tran* 1994; *R v Sparrow* 1990; *R v Badger* 1996; *Delgamuukw v British Columbia* 1997). But in *Delgamuukw*, for instance, the parties settled their matter outside the court through negotiations. Also following the case of *Corbiere v Canada* (1999), "off-reserve" Indians were made eligible to vote by way of regulation, but no electoral process reform was adopted. The *First Nations Governance Act* (Bill C-7 2002) which provided for band-designed leadership selection codes that balance the interests of "off-reserve" and "on-reserve" band members died on the *Order Paper*.

In other instances governments exceeded their constitutional obligations to accommodate minority groups pursuant to decisions of the Court. Following *Mahe* (1990), the government of Alberta established a school governance scheme for Franco-Albertans instead of just giving Francophone parents significant representation on Edmonton's existing school board. While the judges had upheld Ontario's Sunday-closing law in *R v Edwards Books and Art Ltd.* (1986), the provincial government decided ultimately to grant exemptions for all non-Sunday religious observers. Pursuant to *Adler v Ontario* (1996), the government of Ontario also chose to extend special education services to disabled children attending faith-based schools even though the Court did not require it. In all these cases, political authorities went out of their way to accommodate linguistic and religious minorities. What is telling, however, is that no such treatment was given to national minorities such as aboriginal peoples. In the case of *R v Marshall; R v Bernard* (2005), no land title was recognized by the judiciary to the Mi'kmaq, but the

province of Nova Scotia laid the framework for the negotiation of a larger land settlement. To this day however, no title has been awarded to the Mi'kmaq.

THE PROMOTION OF CULTURAL CITIZENSHIP

To assess the type of cultural citizenship promoted by judicial review, it is important first to look at the categories of rights that have been the most frequently promoted. As previously mentioned, political compliance by government with judicial review resulted in 56 instances where rights were promoted. The following table summarizes the number of instances where a right was promoted by rights category and by associated citizenship model:

Rights category	Number of rights promoted
Undifferentiated citizenship	**22**
Individual	3
Societal collective	15
Anti-defamation	4
Polyethnic citizenship	**29**
Exemption	12
Assistance	12
Representation	5
Multinational citizenship	**5**
Self-government	0
External rules	1
Recognition/enforcement	4

At first glance, the rights categorization reveals that the types of rights associated with the polyethnic model of citizenship are those that have been the most frequently promoted by the process of *Charter*-based judicial review. The multinational model of citizenship seems to have been the least favoured one. At the same time, the number of rights associated with an undifferentiated citizenship is not negligible. Taking this data into account, is it possible to argue that *Charter*-based judicial review has confirmed and pushed further the choice Canada made after World War II to promote a polyethnic citizenship? More context is required to answer this question.

Though judicial review in the cultural domain has resulted in the promotion of a significant number of Societal collective rights, this cannot be equated with the promotion of an undifferentiated model of citizenship because of the overwhelming number of group-differentiated rights that were also granted. Furthermore, the cases in which societal collective rights and anti-defamation rights were upheld did not modify the policy status quo and did not take away existing group-differentiated rights from cultural minorities. Rather, the jurisprudence confirmed some of the policy choices made in the postwar period. The only exceptions to this are the cases of *Solski v Quebec* (2005) and *Nguyen v Quebec* (2009) in which the individual rights to attend publicly funded English school in Quebec in certain circumstances were recognized for Francophones and Allophones. These rights took away from Francophone Quebecers the power to use some external rules to preserve their French public culture. However, freedom of choice in the area of public education in Quebec was not validated by the Court in *Gosselin* (2005) which is what a truly undifferentiated model of citizenship would have warranted.

The *Charter* revolution cannot be said to have promoted a multinational model of citizenship either, since it did not recognize new rights for Canada's national minorities. While the province of Quebec was able to continue to limit access to publicly funded English education (*Gosselin* 2005), it had to widen its eligibility criteria (*A.G. v Quebec Protestant School Boards* 1984; *Solski* 2005; *Nguyen* 2009). Confronted with the non-sustainability of invoking the notwithstanding clause *ad vitam æternam*, the government of Quebec also had to allow for bilingual commercial signs (Manfredi 2001). As for aboriginal peoples, they were not able to have self-government formally recognized through section 35 of the *Constitution Act, 1982*, which can help protect them from assimilation (Kymlicka 1995). The only step taken towards a multinational citizenship was the enforcement and recognition of aboriginal law when it comes to aboriginal title, though land settlement processes are still ongoing in the cases surveyed (*Delgamuukw 1*997; *Marshall-Bernard* 2005).

The cultural rights arrangement established by *Charter*-based judicial review confirms and pushes further Canada's choice of a polyethnic model of citizenship. It confirmed this choice by upholding minority-friendly legislation and even went further by pushing for the adoption of new minority-friendly legislation. The large majority of rights recognized have been group-differentiated and while they have permitted cultural retention, they promoted first and foremost social integration. Religious minorities and aboriginals were granted many exemption rights to lessen their cultural costs for taking part in mainstream society. Assistance rights were also given

to linguistic minorities, aboriginals, as well as to racial and religious minorities to facilitate their well-being in Canada. Representation rights within existing Canadian institutions were also given to aboriginals and linguistic minorities. As previously mentioned, *Charter* review did not promote new parallel institutional structures for Francophone Quebecers and aboriginals. Neither did it do so for racial and religious minority groups. A clear example is the case of *Adler* (1996) in which the government of Ontario refused to amend its education funding scheme to support faith-based schools.

The promotion of rights associated with such a model of citizenship through judicial review does not mean that the actual model of Canadian citizenship is strictly polyethnic. Only certain types of cases make it to the Supreme Court level, often those considered "core" and "borderline" A number of cases involving cultural citizenship are resolved at the lower courts level and some rights infringements are never legally challenged. In reality, Canada's cultural citizenship has both undifferentiated, polyethnic and multinational elements that are not necessarily the subject of constitutional review. For instance, the *Citizenship Act* guarantees each Canadian citizen an undifferentiated status. One of the *Multiculturalism Act*'s goal is to promote the different cultures Canada encompasses and thereby to enforce the country's polyethnic character. Also, the province of Quebec has different national holidays than those of the *Rest of Canada* (ROC), as well as a different history curriculum, which reinforce the multinational element of Canadian citizenship. What the results of this dissertation suggest is that, through the cultural cases that made it to the Supreme Court's docket, the judges have articulated a polyethnic vision of Canadian citizenship which has been picked-up by governmental authorities.

One question remains: Why has constitutional review not brought about a greater accommodation of diversity? In reality, the implementation of a truly multinational citizenship runs counter to Canada's institutional nation-building objectives. Since the end of World War II, national unity has been at the forefront of the federal government's concerns, especially with the persistence of the Quebec secessionist threat. There was a sense that allowing national minorities, such as French-speaking Quebecers through the unimpeded control of the Quebec State and aboriginal communities through the establishment of a third order of government,[67] to further the development of a citizenship distinct from the all-encompassing Canadian one, would diminish their attachment to the latter and eventually lead to the disintegration of the Canadian territory.

[67] In 1999, the federal government created Nunavut. While this Canadian territory is mostly populated by Inuits and founded on Inuit approaches to government, it remains a "public government" in which both Inuits and non-Inuits can take part (See, e.g. Hicks and White 2000).

In a country as culturally diverse as Canada, finding a common identity to which every citizen can adhere has been difficult. Canadian leaders have thus preferred to emphasize what unites Canadians rather than what sets them apart. For Trudeau, the answer was in their common humanity and thus in their equal right to dignity (1990). But since basing Canadian citizenship solely on universal principles would create a conception of Canadian identity that was too thin, it was important to recognize superficial cultural differences as part of that identity also. Furthermore, it was only by embracing a polyethnic conception of citizenship that the Canadian State could secure the national adhesion of several cultural groups and tame cultural unrest. This reason of state was put in place well before the adoption of the *Charter*. Out of a concern for national cohesion, the federal government strategically supported the advocacy activities of groups who had been historically disadvantaged such as aboriginal peoples but also of those whose identity the government wanted to promote, such as minority language and ethno-cultural groups (Pal 1993).

The development of parallel social structures in Canada has also been seen as a direct threat to the territorial unity of the country. This is why the primary goal of the official multiculturalism policy was social integration rather than cultural retention. This is also why the federal government has constantly refused to devolve powers significantly to Quebec. Many believed that making too many concessions to Quebec would eventually lead it to become a de facto distinct country. This view was clearly exposed during the demise of the Meech Lake Accord in 1990. The recognition of aboriginal self-government is also seen as an impediment to Canadian sovereignty, notably the provinces' "jurisdiction and control over lands, natural resources and populations" (Paltiel 1987, 36). This reluctance to recognize self-government for aboriginals by the institutions was also present in the Canadian population as a whole who refused to ratify the Charlottetown Accord in 1992. The accord provided for self-government subject to the *Charter*. Finally, the federal government adopted a self-government policy in 1995, but insisted that the provisions of the *Charter* apply to the new aboriginal governments (Wherrett 1999), which prevented the development of a parallel legal system in Canada.

While the Supreme Court of Canada has often been described as an umpire of federal-provincial relations (Swinton 1990), it is above all a federal institution rather than a supranational one. This assertion can be supported by the fact that the bench is nominated on the recommendation of the Prime Minister of Canada. According to historical institutionalism, institutional arrangements may affect judicial decision making. Therefore, the supposition is that the federal state's

preference for a polyethnic citizenship would have permeated the Court as well.[68] Though there was interpretive space for a more generous reading of the constitutional provisions in favour of a multinational conception of Canadian citizenship, the Court has chosen to stick to a polyethnic one. With regards to Francophone Quebecers, it refused to maintain the integrity of Quebec's French "visage linguistique" under section 1 in *Ford* (1988) and *Devine* (1988). It also refused to uphold the government of Quebec's interpretation of section 23(2) of the *Charter* in *Solski* (2005), by determining that children who had spent a "significant part" of their education in the English system were eligible to publicly funded English instruction, rather than those who had spent the "majority part" of it. Though some have argued that these judicial pronouncements were aimed at reconciling the existence of the right of a national minority with those of individuals (see, e.g., Fraser 2009), the same level of concern cannot be said to have prevailed for aboriginal peoples.

With regards to aboriginal peoples, the Court simply refused to determine if section 35(1) encompassed a right to self-government in a general sense (*R v Pamajewon* 1996). By reverting to the culturalist approach to deal with specific self-government claims instead of developing a taylored approach to the general right to self-government, the judges ended up promoting exemption rights which are individualistic in focus, rather than truly collective rights for aboriginals. Nevertheless, many legal scholars suggested section 35(1) could include the right to self-government when it was first entrenched (McNeil 1982; Pentney 1987). Subsequent section 35(1) jurisprudence made it also hard to deny the recognition of aboriginal self-government (Joffe 2000). Referring to the decision in *Delgamuukw* (1997), Paul Joff proposed:

> It would be difficult to conceive of how an aboriginal people that is considered to be an "organized society"' for the purposes of s. 35(1) of the Constitution Act, 1982 and possessing collective aboriginal and treaty rights could be determined to have few or no rights of self-government" (2000, 167).

The supposition that institutional nation-building objectives may limit judicial review's potential for facilitating greater accommodation of diversity, gives a plausible explanation as to why *Charter*-based judicial review has promoted a polyethnic conception of Canada's cultural citizenship. Still, this contention needs to be further tested.

FUTURE RESEARCH

[68] This is a reason why the government of Quebec has always made the power to nominate judges from Quebec on the Supreme Court one of its traditional constitutional demands.

This research has made it possible to formulate three larger theoretical claims about the impact of bills of rights on cultural minorities. First, the recognition of specific cultural rights for certain groups that go beyond fundamental political and civil rights brings about positive legal change for minorities. This has especially been the case for the Anglophone minority inside Quebec and the Francophone minority outside Quebec, as well as for aboriginal communities across Canada. Secondly, constitutionally entrenching rights and the transfer of power to the judiciary to invalidate laws that contravene those rights, is crucial for greater accommodation of diversity. As shown in the Canadian case, the Supreme Court's rulings in favour of minorities have been enforced by governmental authorities. Thirdly, institutional nation-building objectives limit judicial review's potential for facilitating greater accommodation of diversity. As previously mentioned, the ideal of a polyethnic pan-Canadian citizenship prevents the recognition of new self-government rights for aboriginal peoples and Francophone Quebecers, even though there is interpretive space for such a constitutional reading. However, these claims still need to be tested in order to consolidate a larger theory of the impact of bills of rights for minorities. The researcher hopes to be able to conduct a comparative study on the topic involving the cases of Australia, Canada, New Zealand and the United-States.

Appendix I: Constitution Act, 1982

Citation: *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

PART I
CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada **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.

Fundamental Freedoms

Fundamental freedoms **2.** Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

Democratic Rights

Democratic rights of citizens **3.** Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies **4.** (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.

Continuation in special circumstances (2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of legislative bodies **5.** There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

Mobility of citizens **6.** (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of person **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure **8.** Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment **9.** Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention **10.** Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters **11.** Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is

imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment **12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination **13.** A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter **14.** A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

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

Affirmative action programs (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

Official languages of Canada **16.** (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and **16.1.** (1) The English linguistic community and the French linguistic community

French linguistic communities in New Brunswick

in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(*a*) there is a significant demand for communications with and services from that office in such language; or

(*b*) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

Language of instruction

23. (1) Citizens of Canada

(*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of language instruction

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

Application where numbers warrant

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

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

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

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal rights

25. The guarantee in this Charter of certain rights and freedoms shall not be

and freedoms not affected by Charter

construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Other rights and freedoms not affected by Charter **26.** The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage **27.** This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes **28.** Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved **29.** Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

Application to territories and territorial authorities **30.** A reference in this Charter to a Province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Legislative powers not extended **31.** Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter **32.** (1)This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception (2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration **33.** (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

Citation **34.** This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

PART II
RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Commitment to participation in constitutional conference **35.1** The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,

(*a*) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(*b*) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

Commitment to promote equal opportunities **36.** (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(*a*) promoting equal opportunities for the well-being of

Canadians;

(*b*) furthering economic development to reduce disparity in opportunities; and

(*c*) providing essential public services of reasonable quality to all Canadians.

Commitment respecting public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

PART VII
GENERAL

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Commencement of paragraph 23(1)(*a*) in respect of Quebec

59. (1) Paragraph 23(1)(*a*) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

Authorization of Quebec

(2) A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec.

Repeal of this section

(3) This section may be repealed on the day paragraph 23(1)(*a*) comes into force in respect of Quebec and this Act amended and renumbered, consequentially upon the repeal of this section, by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

Appendix II: Supreme Court Cases Selection

MINORITY LANGUAGE

- *A.G. (Que.) v Quebec Protestant School Boards*, [1984] 2 SCR 66, 1984 CanLII 32.
- *Société des Acadiens v Association of Parents*, [1986] 1 SCR 549, 27 DLR (4th) 406.
- *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, 54 DLR (4th) 577.
- *Devine v Quebec (Attorney General)*, [1988] 2 SCR 790, 55 DLR (4th) 641.
- *Mahe v Alberta*, [1990] 1 SCR 342, 106 AR 321.
- *Reference Re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 SCR 839, 100 DLR (4th) 723.
- *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1, [2000] 1 SCR 3.
- *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3.
- *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 SCR 238.
- *Solski (Tutor of) v Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 SCR 201.
- *Charlebois v Saint John (City)*, 2005 SCC 74, [2005] 3 SCR 563.
- *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v Canada*, 2008 SCC 15, [2008] 1 SCR 383.
- *DesRochers v Canada (Industry)*, 2009 SCC 8, [2009] 1 SCR 194.
- *Nguyen v Quebec (Education, Recreation and Sports)*, 2009 SCC 47, [2009] 3 SCR 208.

MULTICULTURALISM

- *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 60 AR 161.
- *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713, 35 DLR (4th) 1.
- *Canada (Human rights commission) v Taylor*, [1990] 3 SCR 892, 75 DLR (4th) 577.
- *R v Keegstra*, [1990] 3 SCR 697, [1991] 2 WWR 1.
- *R v Andrews*, [1990] 3 SCR 870, 75 OR (2d) 481.
- *R v Gruenke*, [1991] 3 SCR 263, [1991] 6 WWR 673.
- *R v Zundel*, [1992] 2 SCR 731, 95 DLR (4th) 202.
- *R v Tran*, [1994] 2 SCR 951, 133 NSR (2d) 81.

- *Adler v Ontario*, [1996] 3 SCR 609, 30 OR (3d) 642.
- *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825, 171 NBR (2d) 321.
- *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256.
- *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567.

ABORIGINAL ISSUES

- *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385.
- *Native Women's Assn. of Canada v Canada*, [1994] 3 SCR 627, 119 DLR (4th) 224.
- *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324.
- *R v Nikal*, [1996] 1 SCR 1013, 133 DLR (4th) 658.
- *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289.
- *R v N.T.C. Smokehouse Ltd.*, [1996] 2 SCR 672, 137 DLR (4th) 528.
- *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648.
- *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204.
- *R v Adams*, [1996] 3 SCR 101, 138 DLR (4th) 657.
- *R v Côté*, [1996] 3 SCR 139, 138 DLR (4th) 385.
- *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193.
- *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.
- *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1.
- *R v Marshall*, [1999] 3 SCR 456, 178 NSR (2d) 201 and *R v Marshall*, [1999] 3 SCR 533, 179 NSR (2d) 1.
- *Lovelace v Ontario*, 2000 SCC 37, [2000] 1 SCR 950.
- *Mitchell v M.N.R.*, 2001 SCC 33, [2001] 1 SCR 911.
- *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207.
- *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.
- Taku River Tlingit First Nation *v* British Columbia (Project Assessment Director), 2004 SCC 74, [2004] 3 SCR 550.
- *R v Marshall*; *R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220.
- *R v Sappier*; *R v Gray*, 2006 SCC 54, [2006] 2 SCR 686.
- *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483.
- *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222.

Appendix III: Summary of Cases

Case	Type of right claimed by litigant	Type of right defended by government	Cultural minority supports	Winner	Legal change	Type of right promoted by the judiciary	Policy compliance	Type of right promoted by government
Minority Language								
A.G. (Que.) v Quebec Protestant School Boards (1984)	Assistance	External rule	LIT (Anglo Queb.) GOV (Franco Queb.)	LIT	Yes	Assistance	Yes: Quebec tacitly complied with the decision. Eventually, the government officially recognized the "Canada clause" with *An Act to amend the Charter of the French language, 1993.*	Assistance
Société des Acadiens v Association of Parents (1986)	Assistance	Societal collective	LIT	GOV	No	Societal collective (Individual)	Yes: Section 19(1) of The *Official Languages Act of New Brunswick* was not amended until 2003 to include the right to bilingual judges.	Societal collective
Ford v Quebec (1988)	Assistance	External rule	LIT (Anglo Queb.) GOV (Franco Queb.)	LIT	Yes	Assistance	Yes: *An Act to amend the Charter of the French language, 1993.*	Assistance
Devine v Quebec (1988)	Assistance vs. External rule	External rule	LIT (Anglo Queb.) GOV (Franco Queb.)	LIT	Yes	Assistance	Yes: *AnAct to amend the Charter of the French language, 1993.*	Assistance
Mahe v Alberta(1990)	Assistance and Representation	Canadian collective	LIT	LIT	Yes	Assistance and Representation	Yes: *School Amendment Act, 1993.*	Assistance and Representation
Reference Re Public Schools Act (Man.)(1993)	Not applicable	Policy status quo: Societal collective	Not the policy status quo	Cultural minority	Yes	Assistance and Representation	Yes: *Francophone Schools Governance Regulation.*	Assistance and Representation
Arsenault-Cameron v Prince Edward Island (2000)	Assistance and representation	Societal collective	LIT	LIT	Yes	Assistance and Representation	Yes: Prince Edward Island established a new French school in Summerside for the start of the 2000 Fall term.	Assistance and Representation
Doucet-Boudreau v Nova Scotia (2003)	Assistance	Societal collective	LIT	LIT	Yes	Assistance	Yes: The case was moot and a minority language school had already been built.	Assistance
Charlebois v Saint John (2005)	Assistance	Societal collective	LIT	GOV	No	Societal collective	Yes: The *Official Languages Act* of New Brunswick was not amended.	Societal collective
Gosselin v Quebec (2005)	Individual	External rule	GOV	GOV	No	External rule (Assistance)	Yes: *The Charter of the French language* was not amended.	External rule
Solski v Quebec (2005)	Individual	External rule	GOV	LIT	Yes	Individual	Yes: The Court's remedy was "read-in" the *Charter of the French language*. Later, Quebec adopted *An Act following upon the court decisions on the language of instruction, 2010* and *Regulation c C-11, r 2.1.*	Individual
Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v Canada (2008)	Assistance	Societal collective	LIT	LIT	Yes	Assistance	Yes: Learning programs for RCMP members have been put in place to further the learning of both official languages.	Assistance
DesRochers v Canada (2009)	Assistance	Societal collective	LIT	GOV	No	Societal collective	Yes: The federal government did not fund CALDECH.	Societal collective
Nguyen v Quebec (2009)	Individual	External rule	GOV	LIT	Yes	Individual	Yes: Quebec invalidated *An Act to Amend the Charter of the French Language, 2002* and adopted *An Act following upon the court decisions on the language of instruction, 2010.* It also put in place *Regulation c C-11, r 2.1.*	Individual

Case	Type of right claimed by litigant	Type of right defended by government	Cultural minority supports	Winner	Legal change	Type of right promoted by the judiciary	Policy compliance	Type of right promoted by government
Multiculturalism								
R v Big M Drug Mart Ltd. (1985)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The *Lord's Day Act* was repealed.	Exemption
R v Edwards Books and Art Ltd. (1986)	Exemption	Societal collective	LIT	GOV	No	Societal collective	No: *An Act to amend the Retail Business Holidays Act, 1989*.	Exemption
Canada (Human rights commission) v Taylor (1990)	Individual	Anti-defamation	GOV	GOV	No	Anti-defamation	Yes: Section 13(1) of the *Canadian Human Rights Act, 1977* was not amended.	Anti-defamation
R v Keegstra (1990)	Individual	Anti-defamation	GOV	GOV	No	Anti-defamation	Yes: Section 319(2) of the *Criminal Code, 1985* was not amended.	Anti-defamation
R v Andrews (1990)	Individual	Anti-defamation	GOV	GOV	No	Anti-defamation	Yes: Section 319(2) of the *Criminal Code, 1985* was not amended.	Anti-defamation
R v Gruenke (1991)	Exemption	Societal collective	LIT	GOV	No	Societal collective	Yes: Gruenke's conviction was upheld.	Societal collective
R v Zundel (1992)	Individual	Anti-defamation	GOV	LIT	Yes	Individual	Yes: Though section 181 of the *Criminal Code* was not amended or repealed, the federal government did not invoke the notwithstanding clause.	Individual
R v Tran (1994)	Assistance	Societal collective	LIT	LIT	Yes	Assistance	Yes: Tran's conviction was quashed. No: Tran was never re-trialed in this case.	Assistance
Ross v New Brunswick School District No. 15 (1996)	Individual	Anti-defamation	GOV	GOV	No	Anti-defamation	Yes: Ross was kept in a non-teaching position.	Anti-defamation
Adler v Ontario(1996)	Assistance	Societal collective	LIT	GOV	No	Societal collective	No: Certain special education services were made available to disabled children attending faith-based schools through the Ontario Health Ministry in 2000 Yes: The Ontario government did not amend its education funding scheme.	Assistance/Societal collective
Multaniv Commission scolaire Marguerite-Bourgeoys (2006)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The school board complied with the judgment.	Exemption
Alberta v Hutterian Brethren of Wilson Colony (2009)	Exemption	Societal collective	LIT	GOV	No	Societal collective	Yes: The *Operator Licensing and Vehicle Control Regulation, Alta Reg 320/2002, s 14(1)(b)* was not amended.	Societal collective
Aboriginal Affairs								
R v Sparrow (1990)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The setting aside of the conviction was affirmed. No: A trial was never reordered.	Exemption
Native Women's Assn. of Canada v Canada (1994)	Representation	Societal collective	LIT (Abo. Women) GOV (Abo. Nat.Org.)	GOV	No	Societal collective	Yes	Societal collective
R v Badger (1996)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The conviction was set aside. No: A trial was never reordered to decide if infringements on the established aboriginal right were justifiable.	Exemption
R v Nikal (1996)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The acquittal was restored.	Exemption
R v Van der Peet (1996)	Exemption	Societal collective	LIT	GOV	No	Societal collective	Yes: The conviction was upheld.	Societal collective
R v N.T.C. Smokehouse Ltd.(1996)	Exemption	Societal collective	LIT	GOV	No	Societal collective	Yes: The conviction was upheld.	Societal collective
R v Gladstone (1996)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The Crown stayed that count and remitted to the plaintiffs $137.079.50.	Exemption

Case	Type of right claimed by litigant	Type of right defended by government	Cultural minority supports	Winner	Legal change	Type of right promoted by the judiciary	Policy compliance	Type of right promoted by government
R v Pamajewon (1996)	Self-government	Societal collective	LIT	GOV	No	Societal collective	Yes	Societal collective
R v Adams (1996)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The Appellants were acquitted.	Exemption
R v Côté (1996)	Exemption	Societal collective	LIT	LIT/GOV	Yes	Exemption/ Societal collective	Yes: The Appellants were acquitted for fishing without a liscence. Yes:The Appellants' conviction for entering a controlled harvest zone (Z.E.C.) was upheld.	Exemption/ Societal collective
Delgamuukw v British Columbia (1997)	Recognition-Enforcement and self-government	Societal collective	LIT	LIT	Yes	Recognition-Enforcement	Yes: The Provincial Policy for Consultation with First Nations was adopted in 2002. No: A trial was never reordered and a treaty recognizing the aboriginal title of the Gitxsan and Wet'su'weten has not yet been negotiated.	Recognition-Enforcement/ Societal collective
Reference Re Secession of Quebec (1998)	Not applicable	Policy status quo: Societal collective	Not the policy status quo	Cultural minority	Yes	Representation	Yes: Clarity Act, RSC 2000, c 26.	Representation
Corbiere v Canada (1999)	Representation	Societal collective	LIT GOV	LIT	Yes	Representation	Yes: "Off-reserve" Indians were made eligible to vote by way of regulation. See Regulation Amending the Indian Band Election Regulation, SOR/2000-391 and Regulation Amending the Indian Referendum Regulation, SOR/2000-392. No: No electoral process that balances the rights of "off-reserve" and "on-reserve" band members was adopted.	Representation
R v Marshall (1) and R v Marshall (2) (1999)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The appellant was acquitted.	Exemption
Lovelace v Ontario (2000)	Assistance	Assistance (Band Members)	LIT (Individual Indians) GOV (Band Members)	GOV	No	Assistance (Band Members)	Yes: The *Casino Rama Revenue Agreement* was not amended.	Assistance (Band Members)
Mitchell v M.N.R (2001)	Exemption	Societal collective	LIT	GOV	No	Societal collective	Yes: *Akwesasne Residents Remission Order*, SOR/91-412 was not amended.	Societal collective
R v Powley (2003)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The appellants were acquitted.	Exemption
Haida Nation v British Columbia (Minister of Forests) (2004)	Recognition-Enforcement	Societal collective	LIT	LIT	Yes	Recognition-Enforcement	Yes: The Provincial Policy for Consultation with First Nations, 2002 was adopted as well as the Haida Gwaii Strategic Land Use Agreement, 2007.	Recognition-Enforcement
Taku River Tlingit First Nation v British Columbia (2004)	Recognition-Enforcement	Societal collective	LIT	GOV	No	Societal collective	Yes: The Provincial Policy for Consultation with First Nations was adopted in 2002. No: British Columbia did not revoque Redfern's Environemental Assessment Certificate to construct on TRTFN traditional territory pursuant to the judgment.	Recognition-Enforcement/ Societal collective
R v Marshall; R v Bernard (2005)	Recognition-Enforcement	Societal collective	LIT	GOV	No	Societal collective	Yes: Title to land was not recognized to the Mi'kmaq. No: The Made in Nova Scotia Process, 2007 framework lays the path for a larger land settlement for Nova Scotia's Mi'kmaq through negotiation.	Societal collective/ Recognition-Enforcement
R v Sappier; R v Gray (2006)	Exemption	Societal collective	LIT	LIT	Yes	Exemption	Yes: The appellants were acquitted.	Exemption

Case	Type of right claimed by litigant	Type of right defended by government	Cultural minority supports	Winner	Legal change	Type of right promoted by the judiciary	Policy compliance	Type of right promoted by government
R v Kapp (2008)	Individual	Assistance	GOV	GOV	No	Assistance	Yes: The Aboriginal Fisheries Strategy is still in full force.	Assistance
Ermineskin Indian Band and Nation v Canada (2009)	Assistance	Societal collective (Self-government)	LIT	GOV	No	Societal collective (Self-government)	Yes: The Indian Act, RSC 1985, c. I-5, ss 61-68 was not amended.	Societal collective

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