

1994

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### Recommended Citation

Meyenhoff, Terrence. "Multiculturalism and Language Rights in Canada: Problems and Prospects for Equality and Unity." American University International Law Review 9, no. 3 (1994): 913-1013.

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# MULTICULTURALISM AND LANGUAGE RIGHTS IN CANADA: PROBLEMS AND PROSPECTS FOR EQUALITY AND UNITY

Terrence Meyerhoff\*

## INTRODUCTION

The Parliament of the United Kingdom enacted the Canada Act of 1982<sup>1</sup> upon request of the Canadian Parliament.<sup>2</sup> The Canada Act is Canada's primary constitutional document and, for the first time, empowered Canada to control its constitutional destiny.<sup>3</sup> With that respon-

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1. CANADA ACT, 1982, ch. 11 (U.K.).

2. See EDWARD MCWHINNEY, CANADA AND THE CONSTITUTION 1979-1982: PATRIATION OF THE CHARTER OF RIGHTS 172-73 (1982) (providing text of the final resolution in which Canada requested the Parliament of the United Kingdom Parliament to consent to the passing of the Canada Act).

3. See Anupam Chander, *Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights*, 101 YALE L.J. 451, 461 (1991) (noting, for example, that the British Parliament enjoyed the primary right to amend the Canadian Constitution prior to passage of the Canada Act). Prior to the passage of the Canada Act, the Parliament of Canada had narrowly circumscribed powers to amend its Constitution; see REDESIGNING THE STATE: THE POLITICS OF CONSTITUTIONAL CHANGE IN INDUSTRIAL NATIONS 108 (Keith G. Banting & Richard Simeon, eds., 1985) (noting that other than two sections of the British North America Act, constitutional amendment in Canada required the British Parliament's approval). With passage of the Canada Act, the United Kingdom forever renounced its power to legislate for Canada. CANADA ACT, *supra* note 1; see also MCWHINNEY, *supra* note 2, at 65-71 (discussing the relationship between Canada and the United Kingdom prior to the Charter).

Prior to promulgation of the Canada Act, the British North American Act of

sibility has come a host of challenges, the most visible of which concerns the accommodation of Quebec and ethnic minorities within the constitution.<sup>4</sup>

An integral part of the Canada Act is the Constitution Act of 1982,<sup>5</sup> of which the Canadian Charter of Rights and Freedoms (hereinafter Charter) is one part.<sup>6</sup> The Charter differs in important respects from the United States Constitution.<sup>7</sup> Unlike the United States Constitution, the Charter incorporates a delicate equilibrium between parliamentary supremacy and judicial review,<sup>8</sup> authorizes the judiciary to issue advisory

1867, 30 Vict. ch. 3 (U.K.), now known as the Constitution Act of 1867, served as Canada's primary constitutional document. Robert Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV. 1191, 1193 & n.6 (1984). The Canada Act of 1982, the Constitution Act of 1982, and the Constitution Act of 1867 today constitute the "fundamental" law of Canada. *Id.* at 1193-94.

4. See ALAN CAIRNS, CHARTER VERSUS FEDERALISM: THE DILEMMAS OF CONSTITUTIONAL REFORM 119 (1992) (discussing the failure of Canada to bring Quebec into the constitutional family through the Meech Lake Accord of 1987).

5. CAN. CONST. (Constitution Act, 1982) (Schedule B).

6. CAN. CONST. (Constitution Act, 1982), Pt. I (Canadian Charter of Rights and Freedoms) [hereinafter Charter]. Schedule B, Part I, which is comprised of sections 1 through 34, is commonly referred to as the Canadian Charter of Rights and Freedoms. See *id.* § 34 (permitting citation to Part I as the Canadian Charter of Rights and Freedoms). See generally DALE GIBSON, THE LAW OF THE CHARTER: GENERAL PRINCIPLES 30-41 (1986) [hereinafter GIBSON, CHARTER] (providing a comprehensive discussion of the Charter); McWHINNEY, *supra* note 2 (discussing the political, legal, and social circumstances that have shaped the Charter).

7. See e.g., Paul Bender, *The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison*, 28 MCGILL L.J. 811 (1983) (comparing specific provisions of the Charter and the United States Bill of Rights); Sedler, *supra* note 3, at 1249 (comparing and analyzing structural differences between protection of individual rights under the Charter and the United States Constitution and concluding that Canadian courts will likely have a smaller interpretive role than their American counterparts); see also, Paul C. Weiler, *Rights and Judges in A Democracy: A New Canadian Version* 18 U. MICH. J.L. REF. 51 (1984) (comparing how courts in Canada and the United States interpret their Constitutions and protect individual rights); Walter S. Tarnopolsky, *The New Canadian Charter of Rights and Freedoms as Compared and Contrasted with The American Bill of Rights*, 5 HUMAN RTS. Q. 227 (1983) (comparing individual rights under the Charter with the United States Bill of Rights).

8. See Weiler, *supra* note 7, at 80-91 (arguing that the Charter contains a unique constitutional structure to protect individual rights through a parliamentary override provision); Sedler, *supra* note 3, at 1233 (arguing that parliamentary supremacy and judicial review are incorporated into the Charter because of the Charter's section 33 override provision). See generally Calvin R. Massey, *The Locus of Sover-*

opinions,<sup>9</sup> and specifically enumerates individual rights, which in the United States are often developed through judicial review.<sup>10</sup>

This Comment focuses on two characteristics of, and particular to, the Canadian Charter. The first characteristic concerns the Charter's detailed language rights provisions.<sup>11</sup> Generally, these provisions provide Canada's official languages, that is French and English, with equality of status and equal rights as to the use of French and English throughout

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*eignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L. J. 1229. The upshot of this structural difference is that the Canadian Parliament must exercise self-restraint in yielding to majoritarian forces if individual rights are to be protected. Weiler, *supra* note 7, at 68-69. In the United States, it is the judiciary that serves in an anti-majoritarian role to protect the individual rights of insular minorities. See Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 830-32 (1974) (discussing the anti-majoritarian function of the Supreme Court vis-a-vis the legislative branch).

Although the Charter explicitly sets forth the principle of parliamentary supremacy in section 33, prior to its adoption parliamentary supremacy operated as a constitutional norm. See William C. Conklin, *Constitutional Ideology, Language Rights and Political Disunity in Canada*, 28 U.N.B.L.J. 39, 42-45 (1979) (arguing that no provision under the British North America Act of 1867 mandated legislative supremacy, but that the principle arose out of normative political values used to interpret it); see also *infra* note 153 (discussing section 33 of the Charter).

9. See Sedler, *supra* note 3, at 1232 (noting that parliament and provincial legislatures may present constitutional questions to the judiciary through a reference procedure). Canada employs a "reference procedure" that permits the federal and provincial governments to request the judiciary to determine prospectively whether a given statute will violate the Charter. *Id.* Thus, it allows advisory opinions. In the United States, by contrast, advisory opinions are constitutionally prohibited. See *Musk-rat v. United States*, 219 U.S. 346 (1911) (holding that the case or controversy requirement of Article III of the United States Constitution prohibits advisory opinions on prospective legislation); see also James L. Huffman & Marilyn Saathoff, *Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction*, 74 MINN. L. REV. 1251 (1990) (providing an analysis of the Canadian reference procedure).

10. See Sedler, *supra* note 3, at 1213-14 (arguing that the contemporary nature of the Charter allows Canada to delineate many rights that only developed through constitutional interpretation in the United States); see *id. passim* (providing a comprehensive analysis and comparison of the role that judges and courts play in the Canadian and United States constitutional structure); see also Ann F. Bayefsky, *Judicial Function Under the Canadian Charter of Rights and Freedoms*, 32 MCGILL L.J. 791 (1986) (analyzing the differing roles of American and Canadian judiciaries).

11. See *infra* note 257 (setting forth the language provisions contained in the Charter); see also *infra* notes 247-74 and accompanying text (discussing the content and scope of language rights afforded under the Charter).

the federal government.<sup>12</sup> More particularly, the provisions grant to Canada's official language minorities, defined to include French and English language groups within particular regions of the nation,<sup>13</sup> certain other rights, such as the right to receive primary and secondary education in either official language.<sup>14</sup>

The second important characteristic pertains to multiculturalism as embodied in section 27 of the Charter.<sup>15</sup> This section is unique among the constitutions of the world.<sup>16</sup> It states that "[t]his Charter shall be interpreted in a manner consistent with the preservation and enhance-

12. See *infra* notes 256-63 and accompanying text (explaining how the Charter provided French and English with equal status and rights).

13. See Andre Braen, *Language Rights*, in LANGUAGE RIGHTS IN CANADA 1, 8 (Michel Bastarache et al. eds., 1987) [hereinafter Braen, *Language Rights*] (noting that French is the national minority language while English is the provincial minority language within Quebec). Linguistic minorities are defined in terms of two criteria, numerical importance and a shared sense of linguistic identity, and a desire to maintain that identity. *Id.* at 7-8.

14. Charter, *supra* note 6, § 23.

15. Charter, *supra* note 6, § 27.

16. Michael R. Hudson, *Multiculturalism, Government Policy and Constitutional Enshrinement - A Comparative Study*, in MULTICULTURALISM AND THE CHARTER: A LEGAL PERSPECTIVE 59, 60 (Canadian Human Rights Foundation eds., 1987). The United States Constitution, for example, does not explicitly protect language rights or posit multiculturalism. See Bender, *supra* note 7, at 820 (stating that the official languages, minority educational rights, and the multicultural provisions of the Charter are not found in the United States Constitution).

A variety of language rights, however, have developed in the United States both legislatively and through case law. The Bilingual Education Act, for example, provides for minority language instruction in secondary schools and is designed to assist minority language students to become proficient in English. 20 U.S.C. § 3281-3386 (1988). The United States Supreme Court made this kind of bilingual education mandatory where sufficient numbers of minority language students exist. *Lau v. Nichols*, 414 U.S. 563 (1974). Bilingual ballots are also required, in certain circumstances, under the Voting Rights Act. 42 U.S.C. § 1973aa-1a (1982). Additionally, interpreters in civil and criminal proceedings are mandated in the federal courts of the United States. 28 U.S.C. § 1827 (1988). Finally, language services are required in federally-funded community health facilities. 42 U.S.C. § 254b(a)(1)(G) (1988).

Although linguistic minorities have a variety of language rights in the United States, the Supreme Court has been reluctant to construe linguistic minorities as a suspect class. See *Soboral-Perez v. Heckler*, 717 F.2d 36 (2d Cir.), *cert. denied* 466 U.S. 929 (1983) (finding English-only social security notices constitutionally valid under the equal protection clause); see also Frank M. Lowery, *Through the Looking Glass: Linguistic Separatism and National Unity*, 41 EMORY L.J. 223, 268-81 (1992) (providing an overview of language policy in the United States).

ment of the multicultural heritage of Canadians."<sup>17</sup> In contrast to the Charter's language rights, the content of this multicultural provision and the rights that it may (or may not) afford is less certain.<sup>18</sup> In its narrowest sense, the provision simply refers to Canada's cultural diversity.<sup>19</sup> The broadest understanding of section 27 includes collective rights and affirmative measures requiring the government to assist ethnic minorities<sup>20</sup>—that is, those linguistic and cultural groups other than French and English—in preserving and enhancing their distinct culture and language.<sup>21</sup>

Protecting rights and promoting unity—"unity" referring to social cohesion between diverse cultural groups living in one country—animated the Charter.<sup>22</sup> The Charter's framers conceived the language rights and multicultural provision as central to serving these two purposes.<sup>23</sup> Although the Charter entrenches individual rights previously vulnerable,<sup>24</sup> it has not, it is argued, ensured equality of rights or status be-

17. Charter, *supra* note 6, § 27.

18. See *infra* Part III (analyzing commentary and case law on the content of section 27 multiculturalism).

19. See *infra* notes 41-46 and accompanying text (discussing Canada's cultural diversity and that multiculturalism is understood to refer to this diversity).

20. Jose Woehrling, *Minority Cultural and Linguistic Rights and Equality Rights in the Canadian Charter of Rights and Freedoms*, 31 MCGILL LJ. 51, 51 (1985). The phrase ethnic minorities is used by a number of authors to refer to those linguistic and cultural minorities whose cultural origins are other than French and British, and whose language is other than French or English. *Id.* Article 27 of the International Covenant on Civil and Political Rights, upon which section 27 of the Charter discussed herein is based, employs this reference as well. *Id.* at 56. Admittedly, this group of Canadians is quite varied, but typically is not conceptualized to include Aboriginal peoples. See JEAN R. BURNET & HOWARD PALMER, *A HISTORY OF CANADA'S PEOPLES* 224 (1988) (noting that the Royal Commission on Bilingualism and Biculturalism (RCBB) acknowledged the contributions of other ethnic groups having origins other than British, French, or Native). For ease of discussion, this phrase is likewise employed throughout this Comment.

21. See *infra* notes 478-511 and accompanying text (arguing that the Charter should and can be interpreted to include collective rights and mandate affirmative measures under section 27).

22. Peter H. Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms*, 61 CAN. BAR. REV. 30, 31 (1983).

23. See *infra* notes 94-97, 111-15, 136-37, 309-19 and accompanying text (discussing the legislative and policy developments preceding the Charter's adoption and the framers' intent of the language rights and multicultural provision).

24. See Sedler, *supra* note 3, at 1194 (1984) (commenting that the Charter explicitly protects and entrenches individual rights as in the United States Constitution). The Charter is the first constitutional document in Canada to entrench individual

tween ethnic minorities and official language minorities.<sup>25</sup> Moreover, as continuing ethnic tension in Canada and persistent nationalism in Quebec attest to, the Charter has not produced the unity its framers envisioned.<sup>26</sup>

The thesis advanced here is that the Charter's failure to ensure equality and produce unity is symptomatic of an overarching difficulty at the heart of Canada's constitution-making. That difficulty concerns the model of language rights and multiculturalism that Canada employs to forge a constitution promoting unity and equality. Two features of this model, which legislation, policy, the Charter, and recent constitutional proposals reveal, are critical. One feature is linguistic dualism, which shapes Canada's language rights and multiculturalism. It is based on the concept that the French and British as Canada's two founding peoples, should share equal rights and status as to their language and culture within any constitution having unity as its aim. Linguistic dualism results in a disparity between ethnic minorities and official language minorities with respect to the rights and status each enjoy.<sup>27</sup>

The other important feature, which linguistic dualism produces, is a narrow definition of multiculturalism. Legislation, policy, and the Charter purport to recognize cultural, but not linguistic equality for ethnic minorities. The absence of language rights for ethnic languages clearly highlights this and implies that ethnic minorities will adopt, and thus assimilate to, one of the official languages. In this manner,

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rights. See *id.* at 1193 (remarking that the British North American Act of 1867 did not entrench individual rights, but that the Parliament could override these rights without judicial review). Although the Canadian Bill of Rights contained individual rights, these rights were in statutory form and were not a constitutional amendment to the British North American Act of 1867. See William C. Hodge, *Patriation of the Canadian Constitution: Comparative Federalism in a New Context*, 60 WASH. L. REV. 585, 618 n.110, (1985) (commenting that the Bill of Rights could be overridden because of its statutory form). Theoretically, then, the British Parliament could repeal the Bill of Rights. *Id.* Moreover, the Bill of Rights was never effective in protecting individual rights, as the Supreme Court did not give it much weight. Walter S. Tarnopolsky, *A Bill of Rights and Future Constitutional Change*, 57 CAN. BAR. REV. 626, 630 (1979).

25. See *infra* text accompanying notes 248-69, 285-308 (criticizing the Charter's definition of multiculturalism from the perspective of equality).

26. See *infra* text accompanying notes 323-45 (arguing that the Charter has failed to produce unity in Canada in light of continuing ethnic tension and Quebec nationalism).

27. See *infra* Part V (analyzing the influence of linguistic dualism on shaping the Charter's language rights and multicultural provisions).

multiculturalism is narrowly defined to include cultural, but not linguistic pluralism. Moreover, multiculturalism, so defined, and linguistic dualism are assumed complimentary aspects of a nation-building constitution. Although perpetuated in recent constitutional proposals, this model of language rights and multiculturalism, and the approach to nation building that it embodies, continues to present problems for equality and unity in Canadian society, and for Canada's constitution-making.<sup>28</sup>

Canada's model of language rights and multiculturalism in general and the Charter's language rights and multiculturalism provisions in particular are inconsistent with a broader, egalitarian definition. Ideally, multiculturalism and language rights are based on the principle of equality, and include the themes of group survival and freedom from discrimination. The egalitarian definition presumes that cultural equality and linguistic equality are necessarily coextensive in light of these characteristics. Similarly, the egalitarian definition of multiculturalism incorporates both linguistic and cultural pluralism.<sup>29</sup> To be sure, the claim advanced below is not that rights and multiculturalism should be framed in accordance with the egalitarian definition. Rather, the egalitarian definition is useful in that it suggests alternatives to the existing model of language rights and multiculturalism, that characterizes Canada's constitution-making.<sup>30</sup>

The most promising alternative is to interpret the Charter to extend to ethnic minorities similar, although not the identical language rights accorded official language minorities. This interpretation would require collective rights and affirmative measures, such as language education, for ethnic minorities. It would also promote equality—in rights and status—between ethnic minorities and official language minorities and thereby unity as to the ethnic minorities. Consequently, the claimed purposes of the Charter—protecting rights and promoting unity—and the role of multiculturalism and language rights in effectuating those purposes—might be better served.<sup>31</sup> It is not suggested that Canada adopt lin-

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28. See *infra* notes 91-92, 107-09, 248-66, 441-45 and accompanying text (discussing various legislation, policies, the Charter, and recent constitutional accords that failed to extend language rights to ethnic minorities); see also *infra* text accompanying notes 248-73, 285-348, 396-413 (analyzing the problems that linguistic dualism, in the Charter and recent constitutional accords, pose for equality and unity).

29. See *infra* notes 274-308 and accompanying text (outlining an egalitarian definition of multiculturalism).

30. See *infra* Parts V, VI (analyzing the difficulties Canada's model of language rights and multiculturalism and suggesting alternatives to it).

31. See *infra* text accompanying notes 478-507 (discussing in what respects the



guistic pluralism or constitutionalize equal language rights for ethnic minorities. Nor are Quebec's demands for constitutional reform addressed. Despite these limitations, the recommended interpretation is an improvement over the existing model of language rights and multiculturalism and a constitution-making process that has traditionally been unresponsive to ethnic minorities.<sup>32</sup>

This Comment attempts three things. First, it delineates Canada's model of language rights and multiculturalism. To do so, this Comment examines the content of language rights and multiculturalism within their historical, textual, and structural contexts. To begin to understand the content of multiculturalism and language rights, Part I of this Comment defines multiculturalism and language rights in broad terms. In this regard, multiculturalism and language rights serve as social and political norms with respect to Canada's social organization, its identity, and its efforts to promote unity by accommodating cultural diversity and its two dominant languages, French and English. Part II then outlines the legislation, policies, and historical background that informed the Charter's multicultural and language rights provisions. Increasing ethnic tension and disquietude in Quebec, unity, and linguistic assimilation emerge as three themes. Part III summarizes and analyzes both commentary and case law on the content of section 27. Of the three views commentators articulate on the content of section 27 multiculturalism, case law lends credence to the view that courts utilize section 27 to supplement the interpretation of other Charter rights. In so doing, courts buttress other Charter rights that might otherwise be overridden by weak judicial interpretation. Part IV examines what the structure of legislation, policy, and the Charter indicates about the content of, and the relationship between, multiculturalism and language rights. It argues that the concept of linguistic dualism historically has shaped language rights, implicitly multiculturalism, and Canada's constitution-making. In particular, Part IV notes the disparity between the rights and status, as to language and culture, that ethnic minorities enjoy relative to official language minorities.

Second, this Comment critiques Canada's model of language rights and multiculturalism. As the basis of the critique, Part V proposes an egalitarian definition of multiculturalism. This definition is proposed to

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suggested interpretation might serve equality and unity).

32. See *infra* text accompanying notes 447-62, 507-12 (noting the difficulties with promoting linguistic pluralism and linguistic equality, and the limitations and possibilities of the suggested interpretation).

assess critically Canada's model of multiculturalism and language rights from two perspectives—equality and unity. Focusing on the Charter, Part V demonstrates how Canada's model of language rights and multiculturalism, which reflect linguistic dualism and articulate a narrow definition of multiculturalism, are inconsistent with the principle of equality, which is central to the egalitarian definition. Part V then argues that the Charter's language rights and multicultural provision have neither united Canada, nor produced equality as the drafters envisioned. This is, in part, a consequence of linguistic dualism incorporated into, and the narrow definition of multiculturalism exhibited by, the Charter. Part VI outlines Canada's two recent constitutional Accords, paying particular attention to the Charlottetown Accord of 1992 and the constitutional proposals leading up to it. Part VI then argues that these Accords' perpetuated a flawed model of language rights and multiculturalism, causing Canadians to reject them. In this regard, opposition to linguistic dualism and the distinct society clause were paramount. Part VI concludes that a different model of language rights and multiculturalism, and a different approach to constitution-making in general, is essential to Canada's continued viability. This model must especially account for the ethnic minority agenda and circumvent the narrow definition of multiculturalism and linguistic dualism.

Third, and finally, this Comment explores alternatives to Canada's model of language rights and multiculturalism that might promote equality and unity with respect to ethnic minorities. To that end, Part VII addresses two alternatives to circumvent linguistic dualism and the narrow definition of multiculturalism in the Charter. One, albeit impractical, alternative is to rewrite the Charter to grant ethnic minorities equal language rights. A second, more promising, alternative is to interpret the Charter to extend similar, but not equal language rights to ethnic minorities, and to require collective rights and affirmative measures.

## I. MULTICULTURALISM AND LANGUAGE RIGHTS: SOCIAL ORGANIZATION, IDENTITY, AND UNITY

To begin to comprehend the content of language rights and multiculturalism and to understand the relationship between the two, it is necessary to discuss broadly both of these concepts. Generally, multiculturalism and language rights represent social and political norms regarding Canada's social organization, are integral to its identity, and are the primary means by which Canada accommodates linguistic and cultural diversity, within its constitution and legislation, to build unity. Beyond these generalities, the myriad of meanings, interpretations, and

uses attached to multiculturalism complicates the task of understanding its content in the Charter, which will be discussed in greater detail later.<sup>33</sup>

#### A. MULTICULTURALISM

Multiculturalism often is equated with cultural pluralism, and can be understood, in part, by reference to it.<sup>34</sup> Cultural pluralism envisages the harmonious coexistence of separate cultural groups.<sup>35</sup> It assumes that cultural groups are equal and should be free to preserve their culture and language.<sup>36</sup>

By contrast, assimilation posits that minority ethnic groups will adopt gradually the majority language and culture, and concomitantly relinquish their own.<sup>37</sup> Assimilation seeks to eliminate those linguistic and cultural distinctions that cultural pluralism or multiculturalism aspire to preserve.<sup>38</sup> In contrast to both cultural pluralism and assimilation, the melting pot notion assumes that ethnic minorities will become part of an amalgam—an identity distinct from any existing cultural group.<sup>39</sup> Of these three paradigms of social organization, Canada attempts to advance

33. See, e.g., MULTICULTURALISM CANADA, EDUCATION: CULTURAL AND LINGUISTIC PLURALISM IN CANADA 21 (1985) [hereinafter EDUCATION] (noting that the meaning of multiculturalism varies across Canada). See also *infra* notes 141-169 (outlining the opposing views of commentators regarding the content of section 27 multiculturalism).

34. See Leo Driedger, *Conformity vs. Pluralism: Minority Identities and Inequalities*, in MINORITIES AND THE CANADIAN STATE 157, 158 (Neil Nevitte & Allan Kornberg eds., 1985) (noting that Canada has accepted cultural pluralism in a variety of ways, including federal recognition of multiculturalism). Multiculturalism is only one approach to a culturally plural society. *Id.* at 158; see Lowrey, *supra* note 16, at 318 (remarking that some argue that multiculturalism is the proper approach to cultural pluralism in the United States); Stephen M. Feldman, *Whose Common Good? Racism in the Political Community*, 80 GEO. L.J. 1835, 1836 & n.3 (1992) (equating cultural pluralism with multiculturalism as the separation of distinct cultures within one society).

35. Driedger, *supra* note 34, at 158.

36. See Driedger, *supra* note 34, at 158 (stating that cultural pluralism, in contrast to assimilation, is based on the assumption that all people are of equal worth and should be free to choose their way of life).

37. Driedger, *supra* note 34, at 157.

38. See Driedger, *supra* note 34, at 158 (noting that assimilation posits the sweeping away of ethnic differences); Braen, *Language Rights*, *supra* note 13, at 10-11 (arguing that assimilation cannot be reconciled with equality or a policy of multilingualism because these presume differences in achieving an egalitarian ideal).

39. Driedger, *supra* note 34, at 166-67.

multiculturalism.<sup>40</sup>

Multiculturalism defines Canada's identity in a number of interrelated ways. Cultural diversity typifies Canada's history.<sup>41</sup> Today, Canada is one of the most ethnically diverse societies in the world,<sup>42</sup> with thirty-one percent of its population having origins other than British or French.<sup>43</sup> Broadly, multiculturalism refers to this diversity as a demographic fact,<sup>44</sup> exhibits Canada's appreciation for it,<sup>45</sup> and demonstrates Canada's commitment to its preservation.<sup>46</sup>

Narrowly, cultural diversity and fidelity to multiculturalism are believed to make Canada distinct.<sup>47</sup> In particular, these characteristics

40. See Thomas R. Berger, *The Charter and Canadian Identity*, 23 U.W.O.L. REV. 1, 1 (1985) (noting that Canadians have rejected the United States' goal of assimilation); GIBSON, CHARTER, *supra* note 6, at 67 (noting that Canada has long-rejected the 'melting pot' approach to cultural diversity, choosing instead a 'mosaic' approach); Raymond Breton, *Multiculturalism and Canadian Nation-Building*, in *THE POLITICS OF GENDER, ETHNICITY, AND LANGUAGE IN CANADA* 27, 50 (Alan Cairns & Cynthia Williams eds., 1986) (noting that Canada does not seek to be a melting pot, but instead, a multicultural society); REPORT OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS, *A RENEWED CANADA* 6 (Gérald Beaudoin & Dorothy Dobbie, February 28, 1992) [hereinafter *A RENEWED CANADA*] (stating that Canada chose to embrace linguistic and cultural diversity instead of the 'melting pot' concept).

41. See REPORT OF THE STANDING COMMITTEE ON MULTICULTURALISM: BUILDING ON THE CANADIAN MOSAIC 13-16 (June 1987) [hereinafter *STANDING COMMITTEE*] (summarizing the cultural diversity of Canada from the 1600s to the present).

42. See STATISTICS CANADA, *THE DAILY*, 4, 10-11 (Feb. 23, 1993) (illustrating the ethnic and linguistic diversity of the Canadian population drawn from 1991 census figures); see also Berger, *supra* note 40, at 2 (noting that Canada has one of the highest refugee populations per capita of any country in the world).

43. See Berger, *supra* note 40, at 4. In Toronto, 59 percent of the persons listed origins other than British or French. *Id.* at 6.

44. See EDUCATION, *supra* note 33, at 22 (1985) (noting that multiculturalism is used to refer to Canada's cultural diversity).

45. See WILLIAM SHERIDAN, LIBRARY OF PARLIAMENT, *CANADIAN MULTICULTURALISM* 1 (1991) [hereinafter *SHERIDAN*] (noting that multiculturalism involves recognition of Canada's diverse cultures in a pluralistic society).

46. See WILLIAM SHERIDAN & ABDOU SAOUAB, LIBRARY OF PARLIAMENT, *CANADIAN MULTICULTURALISM* 1 (Mar. 1992) [hereinafter *SHERIDAN & SAOUAB*] (referring to multiculturalism as a demographic fact of cultural diversity and those institutional measures adopted to improve relationships between ethnic minorities and the majority); REPORT OF THE CANADIAN MULTICULTURALISM COUNCIL 1985-87 at 5 (1987) (stating that as with official languages, multiculturalism is an essential Canadian characteristic that the government has a duty to support).

47. See Dale Gibson, *Protection of Minority Rights Under the Canadian Charter of Rights and Freedoms: Can Politicians and Judges Sing Harmony?*, in *MINORITIES*

function to distinguish Canada from the United States.<sup>48</sup> Observers traditionally perceive the United States as a melting pot where many immigrants gradually assimilate, although this view is changing. Canada, on the other hand, conceives itself as a multicultural mosaic, which celebrates cultural and linguistic differences.<sup>49</sup> Multiculturalism, as an ideal valuing differences and diversity, is central to Canada's identity.<sup>50</sup>

Multiculturalism also is related to Canada's social cohesion and its quest to fashion its constitution and legislation to promote unity between Canada and ethnic minorities.<sup>51</sup> Although preserving cultural diversity

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AND THE CANADIAN STATE, *supra* note 34, at 31, 47 [hereinafter Gibson, *Minority Rights*] (stating that Canada's distinctiveness lies in its cultural diversity and that there is increasing awareness that individual cultural heritages should be preserved, as evidenced in section 27 of the Charter); REPORT OF THE CANADIAN MULTICULTURALISM COUNCIL, *supra* note 46 at 1 (commenting that immigrants retain their characteristics, and through the resulting diversity Canada is creating a unique identity); GOVERNMENT OF CANADA, SHAPING CANADA'S FUTURE TOGETHER, 2 (1991) [hereinafter SHAPING CANADA'S FUTURE] (stating that Canadians' respect for diversity, tolerance, fairness, and belief in equality set it apart from all other countries).

48. See Breton, *supra* note 40, at 50 (noting that multiculturalism helps define Canada in terms that differentiate it from the United States). Apart from multiculturalism, Canadians base their differentiation from Americans on a number of other characteristics. See Charles Taylor, *Can Canada Survive the Charter?*, 30 ALTA. L. REV. 427, 429-30 (1992) (arguing that Canadians perceive themselves as different from Americans because they are less violent, more tolerant, and more committed to collective well-being than Americans, and accept economic redistribution as a means of equalizing regional differences).

49. See Berger, *supra* note 40, at 3-4 (stating that in Canada minority languages and cultures are not a transitional phenomenon, but a central characteristic of the Canadian identity); Taylor, *supra* note 48, at 431 (noting that Canadians see their society as a 'mosaic' in contrast to the melting pot of the United States).

50. See, e.g., Berger, *supra* note 40, at 2-3 (noting that diversity is central to the Canadian experience, and that unlike many modern nation-states, Canada has never defined itself in terms of a single ethnic group); EDUCATION, *supra* note 33, at 23 (stating that multiculturalism cannot be separated from a discussion of the Canadian identity); REPORT OF THE CANADIAN MULTICULTURALISM COUNCIL, *supra* note 46 at 1 (noting that respecting differences is a feature of Canadian life).

51. See SHERIDAN, *supra* note 45, at 1 (noting that in response to Canadian's growing demand to maintain their cultural identity, Canada adopted a policy of multiculturalism); REPORT OF THE CANADIAN MULTICULTURALISM COUNCIL, *supra* note 4, at 7 (stating that cohesiveness as a nation derives from free expression of culture, not conformity to a cultural norm); BURNET & PALMER, *supra* note 20, at 227 (commenting that by the 1980s, multiculturalism was regarded as a unique characteristic of Canada vital to its cohesion); see also *infra* notes 99-115, 126-36, 315-22 and accompanying text (describing the pressure from ethnic minorities that led to the adoption of the Multiculturalism Policy of 1971 and section 27 of the Charter and

could appear divisive and inimical to unity,<sup>52</sup> multiculturalism reflects the view that preserving cultural diversity is integral to unity.<sup>53</sup> Because multiculturalism embraces tolerance of cultural differences and equality, it is thought to lessen discrimination against ethnic minorities, and thus assist in their social integration and promote unity.<sup>54</sup> This conception of multiculturalism presumes that cultural diversity and unity go hand-in-hand; conversely, it repudiates the assimilation and melting pot ideals as means to promote unity.<sup>55</sup>

## B. LANGUAGE RIGHTS

Like modes of social organization, one can arrange language rights into assimilation and pluralism models.<sup>56</sup> Linguistic assimilation rejects the concept of a multilingual society; linguistic pluralism, on the other hand, suggests the converse.<sup>57</sup> Language rights in Canada, as shall be

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analyzing the role of multiculturalism as a means of promoting unity).

52. See Berger, *supra* note 40, at 3 (commenting that the entrenchment of diversity is often seen to weaken the nation-state, but is a defining feature of Canada's socio-political history and is valued because it promotes freedom); EDUCATION, *supra* note 33, at 22 (noting that opposition to multiculturalism is often based on the perception that emphasizing ethnic differences will threaten national unity and that assimilation to British and French can circumvent this threat).

53. See Evelyn Kallen, *Multiculturalism, Minorities, and Motherhood: A Social Scientific Critique of Section 27*, in *MULTICULTURALISM AND THE CHARTER*, *supra* note 16, at 123, 125-26 (stating that multiculturalism is based on the goal of 'unity in diversity'); SHERIDAN & SAOUAB, *supra* note 46, at 1 (noting that Canada is involved in a process of 'unity in diversity' for the purpose of social integration).

54. See, e.g., EDUCATION, *supra* note 33, at 22 (commenting that unity and equality are two themes consistent in many interpretations of multiculturalism); SHERIDAN & SAOUAB, *supra* note 46, at 7 (stating that multiculturalism implies recognition of diversity and the equality of all Canadians); STANDING COMMITTEE, *supra* note 41, at 19 (noting that multiculturalism is aimed at promoting equality for minorities and is implemented for social integration); BURNET & PALMER, *supra* note 20, at 227 (stating that multiculturalism created an atmosphere in which ethnic minorities could challenge discrimination aimed against them); see also *infra* notes and accompanying text 110-15, 315-19 (discussing in detail the role of multiculturalism in promoting unity).

55. Hudson, *supra* note 16, at 61; see Kenneth Freed, *Canada Not Quite a Melting Pot*, L.A. TIMES, July 28, 1986, at 1 (noting that Canada attempts to integrate immigrants while encouraging them to maintain their cultures); see also *infra* notes 292-301 and accompanying text (criticizing the conflicting goals of multiculturalism).

56. See Braen, *Language Rights*, *supra* note 13, at 9-11 (distinguishing between language rights based on assimilation and pluralism).

57. See Braen, *Language Rights*, *supra* note 13, at 9-11 (stating that language

seen, do not conform to linguistic pluralism, but instead mirror linguistic assimilation.<sup>58</sup> Theoretically, to be consistent with multiculturalism, language rights should be based on linguistic pluralism, inasmuch as culture and language often coincide.<sup>59</sup> Practically, that might not be advisable.<sup>60</sup>

Historically, language rights have been the focal point for political debate in Canada<sup>61</sup> over its constitution<sup>62</sup> and its effort to maintain unity in a nation of loosely-federated provinces.<sup>63</sup> Lingering questions regarding Quebec's status in Canada and the conflict over language rights are evidence of the continued focus on these issues.<sup>64</sup> Framed

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policies based on assimilation negate multilingualism, whereas those based on pluralism seek to preserve language differences).

58. See *infra* text accompanying notes 91-109, 128-32, 248-69, 289-307, 389-414, 443-46 (analyzing various legislation, policies, the Charter, and recent constitutional accords reflecting linguistic dualism and arguing that these imply linguistic assimilation).

59. See *infra* text accompanying notes 279-84, 302-15 (discussing how an egalitarian definition of multiculturalism ideally requires that both linguistic and cultural pluralism be promoted).

60. See *infra* text accompanying notes 452-60 (discussing the problems a policy of linguistic pluralism might present in Canada).

61. See Braen, *Language Rights*, *supra* note 13, at 25 (noting that language has been a dominant topic in Canada); Eric Waddell, *State, Language and Society*, in *THE POLITICS OF GENDER, ETHNICITY AND LANGUAGE IN CANADA*, *supra* note 40, at 67 (stating that language has been the focus of studied attention during the last two decades).

62. See Weiler, *supra* note 7, at 54 (noting that language has been central to the issue of rights and the constitution in Canada); see also Lowrey, *supra* note 16, at 223-264 (providing an excellent overview of Canadian language policy and its role in the debate over its constitution).

63. See CAIRNS, *supra* note 4, *passim* (discussing the Canadian Constitution, Canada's evolving federalism under the Charter, and the prospects for Canadian unity); GOVERNMENT OF CANADA, CITIZENS' FORUM ON CANADA'S FUTURE 50-51 (1991) [hereinafter SPICER COMMISSION REPORT] (summarizing how the language issue has led to discord in Canada since 1965 and the pressing need to resolve it).

64. See Charles Truehart, *Quebec's Anglophones Dial Winning Number*, WASH. POST, Apr. 15, 1993, at A26 (reporting that the U.N. Center for Human Rights found Quebec's French-only language law, Bill 178, which governed signs, to violate the freedom of expression); *Quebec Language Rights*, THE OTTAWA CITIZEN, Apr. 7, 1993, at A10 (commenting on the debate over whether Quebec should renew its notwithstanding exemption provided under the Charter with respect to Bill 178, Quebec's French-only sign law); Anthony Wilson-Smith, *Challenges for a New Leader*, MACLEAN'S, June 21, 1993, at 18 (stating that the economy was the top priority in Canada in 1993, but that the issue of Quebec's status will come to the foreground

this way, language rights are no less central to Canada's identity than Canada's cultural diversity and its allegiance to multiculturalism.<sup>65</sup>

Language rights also are associated with Canada's effort to promote unity between French and English speaking Canada through its constitution and legislation.<sup>66</sup> Generally, it is believed that language rights will unify Canada because they ensure that its two dominant languages enjoy equal rights and status throughout the nation, thus lessening tension between French and English Canada.<sup>67</sup> To begin to assess whether language rights and multiculturalism unify Canada and to understand more specifically their content in the Charter it is helpful to trace their history.

## II. LANGUAGE RIGHTS & MULTICULTURALISM PRIOR TO THE CHARTER'S APPROVAL

Three themes emerge from the history preceding the Charter. First, growing nationalism in Quebec and increasing ethnic tension throughout Canada were the two most important factors propelling promulgation of language rights and multiculturalism in legislation, policy, and ultimately the Charter.<sup>68</sup> Second, although the product of pressure from two disparate political groups, the government believed that recognizing language rights and multiculturalism in federal legislation, policy, and the Charter would advance unity.<sup>69</sup> Third, legislation, policy, and the Charter's passage illustrate how the government framed language rights and

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early in 1994 after its elections).

65. See Russell, *supra* note 22, at 39 (remarking that language rights in the Charter relate to Canada's quest for an identity).

66. See *infra* notes 78-80, 95-97, 309-13 and accompanying text (detailing the historic role of language rights with respect to promoting unity between French and English Canada).

67. See *infra* notes 78-80, 95-97, 136-37, 248-49, 309-13 and accompanying text (discussing the rationale for the function of language rights as a means to promote unity).

68. See *infra* notes 78-80, 86-91, 94-101, 126-27, 136, 309-22 and accompanying text (summarizing the development of language rights and multiculturalism in Canada in response to Quebec nationalism and ethnic minority tension); see also CAIRNS, *supra* note 4, at 23 (noting that the Charter was a response to escalating nationalism and ethnicity); *id.* at 111 (noting that section 27 is an important component of Canada's response to ethnic pluralism outside the French-English conception of Canada).

69. See *infra* notes 78-136, 309-22 and accompanying text (explaining the federal government's legislative and constitutional response to Quebec nationalism and ethnic pressure as a method of promoting unity in Canada).



multiculturalism to build unity. The government constituted multiculturalism to affirm cultural, but not linguistic equality. In a related way, language rights were based on bilingualism and equality between two languages, French and English, to the exclusion of others. Thus, the government appeared to move in two opposing directions: acknowledging cultural equality, but implying linguistic assimilation of ethnic minorities.<sup>70</sup> As will be discussed in greater detail, Canada's efforts, in the Charter and subsequent constitutional proposals, to forge a nation-building constitution accommodating cultural and linguistic diversity and promoting language rights and multiculturalism reflect these three themes.<sup>71</sup>

#### A. THE ROYAL COMMISSION

Canada's constitution-making history, particularly the Constitution Act of 1867, exemplifies its commitment to some form of cultural pluralism.<sup>72</sup> The concept of multiculturalism, however, only emerged in Canada's public discourse in the early 1920s.<sup>73</sup> Prior to the 1920s, there was little appreciation for the cultural and linguistic diversity of Canada's immigrants.<sup>74</sup> A movement in the late 1800s, that successfully

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70. See *infra* notes 78-115, 128-37, accompanying text (evaluating legislation, policy, and the Charter's passage of and arguing that these reflects linguistic assimilation).

71. See *infra* notes 256-66, 285-301, 309-322, 346-446 and accompanying text (analyzing the Charter's language rights and multicultural provisions and discussing these three themes).

72. See SHERIDAN & SAOUAB, *supra* note 46, at 2 (commenting that appreciation for cultural pluralism is reflected in the 1867 British North America Act, which recognized the rights of French persons); Joseph E. Magnet, *Multiculturalism and Collective Rights: Approaches to Section 27*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 739, 768 (Gérald A. Beaudoin and Ed Ratushny, 2nd ed., 1989) [hereinafter Magnet, *Collective Rights*] (commenting that Canada's commitment to cultural pluralism is embedded in its constitution); SHERIDAN & SAOUAB, *supra* note 46, at 2 (stating that cultural pluralism can be traced to the 1759 Articles of Capitulation).

73. See Hudson, *supra* note 16, at 61 (noting that in the 1920s, cultural pluralism began to attract attention); STANDING COMMITTEE, *supra* note 41, at 16 (indicating that the ideal of the cultural mosaic gained attention during the immigration wave of the early part of the 20th century). The term multiculturalism was not coined to refer to the cultural diversity of Canada until the 1960s. SHERIDAN & SAOUAB, *supra* note 46, at 2.

74. See STANDING COMMITTEE, *supra* note 41, at 16 (noting that during the first-half century of confederation, Canada expected its ethnic minorities would assimilate

established or maintained English as the official language, reflects this intolerance.<sup>75</sup> Not until very recently has multiculturalism, as an ideal and a policy, gained wide public support.<sup>76</sup>

One can trace the origins of Canada's multiculturalism policy to increased immigration and demographic changes occurring after the close of World War II.<sup>77</sup> One also can trace this policy to the establishment of the Royal Commission on Bilingualism and Biculturalism (RCBB), appointed in 1962,<sup>78</sup> in response to growing tension between English Canada and Quebec separatists.<sup>79</sup> The RCBB's mandate in 1962 included reporting on the state of bilingualism and biculturalism, and making recommendations that would unify Canada through the "equal partnership of the two founding races".<sup>80</sup>

This mandate perpetuated the conceptualization of Canada as bicultur-

and was neither prepared to accept a multiracial population, nor appreciated cultural diversity).

75. See STANDING COMMITTEE, *supra* note 41, at 16 (outlining the struggle in the 1880s between those who wanted a monolingual society and those who fought to maintain the existing bicultural and bilingual nature of Canadian society). A spate of monolingual legislation, at the time, reflects the struggle between groups promoting monolingualism and those seeking to maintain bilingualism. See Lowrey, *supra* note 16, at 226-27 (noting that French speaking citizens did not have official status in the late 1800s in a variety of provinces that either left it unprotected in language legislation, or adopted English as their official language).

76. See SHERIDAN, *supra* note 45, at 2 (noting that multiculturalism has gained only recently widespread acceptance); Breton, *supra* note 40, at 45 (stating that multiculturalism as an ideology did not crystalize among ethnic groups until the 1960s).

77. See SHERIDAN, *supra* note 45, at 2 (noting the origins of multiculturalism policy lay in particular demographic, political, and immigration policy changes). Prior to World War II, Canadian immigrants were primarily from northern and western Europe. *Id.* After World War II, most non-British and non-French immigrants were from southern and eastern Europe. *Id.* By 1984, 17 years after Canada allowed immigration from third-world countries, third-world immigrants formed the majority of new immigrants to Canada. *Id.* See also THE DAILY, *supra* note 42, at 5 (noting that 31 percent of respondents reported an origin other than British or French and that this could be attributed to immigration trends).

78. MULTICULTURALISM CANADA, MULTICULTURALISM AND THE GOVERNMENT OF CANADA 8 (1985) [hereinafter GOVERNMENT OF CANADA] (discussing the appointment of the Royal Commission on Bilingualism and Biculturalism).

79. See EDUCATION, *supra* note 33, at 14 (noting that a rise in Quebec nationalism led to the founding of the Royal Commission of Bilingualism and Biculturalism).

80. EDUCATION, *supra* note 33, at 14. The government appointed this Commission with the understanding that cultural diversity would be easier to reconcile with unity than forced homogeneity of French Canada. Hosein, *infra* note 109, at 607-08.

al and bilingual, namely, British and French.<sup>81</sup> So conceived, representatives of ethnic minority groups criticized the mandate and pressured the RCBB to recognize their unique cultural contribution to Canada.<sup>82</sup> Ethnic minority groups claimed that the mandate implied assimilation of other ethnic minorities,<sup>83</sup> disputed the official bicultural view of Canada it reflected,<sup>84</sup> and demanded an equal place relative to the British and French in the RCBB's work.<sup>85</sup>

In response to these criticisms,<sup>86</sup> and in the context of the increasing politicization of ethnic minorities,<sup>87</sup> the RCBB modified its mandate to consider the contribution of other ethnic groups besides the French and British, and established a new framework that valued the unique contributions of ethnic minorities.<sup>88</sup> This framework acknowledged the

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81. See, e.g., Hudson, *supra* note 16, at 62 (noting that the RCBB's work was narrowly defined to address two cultures and two languages and that it did not, in any meaningful fashion, consider the other cultural and linguistic groups of Canada); Breton, *supra* note 40, at 47 (remarking that the terms of the RCBB could be interpreted to support a 'two nations' view of Canada); Walter S. Tarnopolsky, *The Equality Rights, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY*, 395, 439 (Walter S. Tarnopolsky and Gérald A. Beaudoin eds., 1982) (noting that the very name of the RCBB precluded a role for ethnocultural groups other than the British and French).

82. See Hudson, *supra* note 16, at 63 (noting that a variety of groups were displeased with the RCBB's work, and during the 1960s pressured it to consider more carefully the contribution of non-Charter groups to Canada).

83. See Breton, *supra* note 40, at 49 (discussing the ethnic minorities' criticism of the RCBB mandate).

84. See Breton, *supra* note 40, at 46-47 (noting that a number of groups responded vehemently to the terms of the RCBB's mandate); *STANDING COMMITTEE*, *supra* note 41, at 17 (remarking that the RCBB's suggestion that Canada was bicultural provoked especially strong reaction from Ukrainian-Canadians).

85. See Breton, *supra* note 40, at 48-49 (noting that some groups criticized the RCBB's mandate for not placing ethnic minorities on par with British and French Canadians); Hudson, *supra* note 16, at 63 (discussing the negative reaction of ethnic minority groups to the RCBB's work).

86. See Magnet, *Collective Rights*, *supra* note 72, at 743 (noting that in response to lobbying by ethnocultural representatives for greater recognition of the contribution of ethnic minorities, the RCBB modified the terms of its mandate).

87. See BURNET & PALMER, *supra* note 20, at 223-24 (stating that as ethnicity and human rights emerge world-wide as a political issue, ethnic minorities demonstrated a new assertiveness to which the government responded in the RCBB).

88. See Breton, *supra* note 40, at 49 (noting that the RCBB sought to counter the criticism that ethnic minorities were treated as second-class citizens while preserving the French and English language communities). The reformulation of the RCBB's work and its new framework is reflected in its separate report detailing the cultural

multicultural character of Canada and the equal worth of all Canadians, including ethnic minorities.<sup>89</sup> It also purportedly recognized the importance of preserving ethnic minority languages and cultures.<sup>90</sup> The RCBB recommended legislative prohibitions on discrimination to preserve, and funding of programs to promote, languages and cultures.<sup>91</sup>

Although the RCBB recognized the importance of preserving ethnic minority languages, it rejected a multilingual policy, preferring instead to advance bilingualism and linguistic equality only between English and French.<sup>92</sup> Moreover, despite its contrary recommendation that Canada legislate to preserve ethnic minority cultures, the RCBB officially remained committed to biculturalism, perpetuating the concept of Canada as British and French.<sup>93</sup> In these two ways, the RCBB's acknowledgement of the multicultural character of Canada appears to have been primarily rhetorical and symbolic, not substantive.

## B. LEGISLATIVE AND POLICY DEVELOPMENTS

The RCBB's recommendations and experience<sup>94</sup> provided the foundation for two important developments; one a response to Quebec nationalism, the other a response to ethnic politicization. The first development was the adoption of the Official Languages Act of 1969 (OLA).<sup>95</sup>

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contribution of non-British and non-French Canadians. *Id.* at 49; CANADA, REPORT OF THE ROYAL COMMISSION ON BILINGUALISM AND BICULTURALISM, BOOK IV: THE CULTURAL CONTRIBUTIONS OF OTHER ETHNIC GROUPS (Queen's Printer, 1969).

89. See SHERIDAN, *supra* note 45, at 7-8 (quoting the RCBB as affirming that all Canadians must have the right to protect their culture and language and that the cultural contributions of all Canadians are equally important).

90. See Magnet, *Collective Rights*, *supra* note 72, at 743 (quoting the Commission's recognition of ethnic groups' desire to maintain their own language and culture, and its endorsement of a policy furthering the cultural heritage of ethnic minorities).

91. Magnet, *Collective Rights*, *supra* note 72, at 743.

92. See Hudson, *supra* note 16, at 63 (commenting that although multiculturalism became an acceptable goal to the RCBB, equal French and English linguistic rights were not to be sacrificed for a pluralilingual Canada).

93. See GOVERNMENT OF CANADA, *supra* note 78, at 8 (indicating that although the Commission recommended ways to preserve other cultures in Canada in Book IV of its report, its official policy embodied biculturalism); Waddell, *supra* note 61, at 91 (stating that the RCBB recommended a policy of multiculturalism).

94. See Lowrey, *supra* note 16, at 229 (noting that the OLA implemented the recommendations of the RCBB); SHERIDAN & SAOUAB, *supra* note 46, at 3-4 (recognizing that the RCBB's recommendations assisted in the promulgation of the OLA).

95. R.S.C. chs. 0-2, (1970).

In response to Quebec nationalism, the OLA made English and French the official languages of Canada, and ensured, through specific guarantees at the federal level, equality of status and equal rights as to their use in all institutions of Parliament and the Canadian government.<sup>96</sup> A policy of official bilingualism and language equality—in which French and English speakers would enjoy equal language rights “coast-to-coast”—promised to assuage increasing francophone nationalism and, thereby, to unify the country.<sup>97</sup>

The second development springing from the RCBB was the official pronouncement, in 1971, of multiculturalism as a federal policy.<sup>98</sup> In response to ethnic minority groups' criticism of the RCBB's commitment to biculturalism and the OLA,<sup>99</sup> and to counter the bicultural

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96. R.S.C. chs. 0-2, (1970). Section 2 of the Official Languages Act reads: “The English and French languages are the official languages of Canada for all purposes of the Parliament and Government of Canada, and possess and enjoy equality of status and equal rights and privileges as to their use in all the institutions of the Parliament and Government of Canada.” *Id.* This legislation went one step further than the Constitution Act of 1867 by recognizing French and English as Canada's official languages, thus conferring equal status to both. See Lowrey, *supra* note 16, at 229-32 (outlining specific provisions of the Official Languages Act having the effect of establishing linguistic parity between English and French in Canada's federal institutions). Designed to further bilingualism and biculturalism, the Official Languages Act provides that persons have the right to transact business with federal institutions in either French or English; mandates that court judgments be in both languages; and calls for public documents to be in both languages. Braen, *Language Rights*, *supra* note 13, at 35 (discussing the Official Languages Act).

97. See Lowrey, *supra* note 16, at 230 (remarking that then-Prime Minister Trudeau felt that ‘coast-to-coast’ bilingualism and language parity were an appropriate response to the growing separatist movement in Quebec).

98. See Breton, *supra* note 40, at 49 (noting that the government responded to the Commission's new orientation to consider ethnic minorities in its work, as reflected in Book IV of the RCBB's report, by adopting a policy of multiculturalism within a bilingual framework); Hudson, *supra* note 16, at 63 (mentioning that Book IV of the RCBB's report included 16 recommendations promoting a bilingual constitutional framework in which other ethnic groups could develop and flourish).

99. See STANDING COMMITTEE, *supra* note 41, at 17 (indicating that criticism of the RCBB's suggestion that Canada was a bicultural country led to adoption of the Multiculturalism Policy of 1971); SHERIDAN, *supra* note 45, at 8 (noting that the government responded to ethnic groups' criticisms of the RCBB by adopting a policy of multiculturalism in 1971).

This policy was also a response to ethnic minorities who opposed the OLA because they felt it threatened their status as equal partners in Canadian life as recognized in the RCBB, inasmuch as it protected only English and French. Bernard Blischen, *Continuity and Change in Canadian Values*, in MINORITIES AND THE CANA-

view of Canada inherent in the RCBB's mandate,<sup>100</sup> then-Prime Minister Pierre Trudeau adopted the policy of multiculturalism within a bilingual framework (hereinafter Multiculturalism Policy).<sup>101</sup> All political parties endorsed the policy.<sup>102</sup>

The Multiculturalism Policy marked the first substantive recognition of the multicultural ideal and the first official departure from the pre-existing bicultural view of the country.<sup>103</sup> It noted that ethnic minorities contribute importantly to Canada's heritage<sup>104</sup> and that cultural pluralism or multiculturalism is central to the Canadian identity.<sup>105</sup> More importantly, it repudiated the bicultural view of Canadian society<sup>106</sup> and affirmed the equality of all cultures.<sup>107</sup> Like the RCBB's work, however, the Multiculturalism Policy did not account for the multilingual character of Canada, as the government rejected proposals to protect non-official, ethnic languages.<sup>108</sup> Rather, the Multiculturalism Policy implied

DIAN STATE, *supra* note 34, at 1, 19.

100. See Breton, *supra* note 40, at 49 (quoting Trudeau's statement that articulates the conscious effort of the Government to remedy any bias toward the French culture and language in the RCBB's mandate with adoption of the Multiculturalism Policy of 1971); BURNET & PALMER, *supra* note 20, at 175-76 (commenting that the policy emerged in response to ethnic sentiment that bilingualism demonstrated "undue favoritism" towards French Canada and served politically to soften opposition against it).

101. See House of Commons Debates, Vol. 115, No. 187, 28th Parliament, 3rd Session, October 8, 1971 (statement of Prime Minister Trudeau) at 8545-46 outlining the 1971 Multiculturalism Policy); GOVERNMENT OF CANADA, *supra* note 78, at 8 (indicating that in Trudeau's 1971 statement on multiculturalism before the House of Commons, the government chose an official policy of multiculturalism within a bilingual framework).

102. STANDING COMMITTEE, *supra* note 41, at 17.

103. See Dale Gibson, *Section 27 of the Charter: More than a "Rhetorical Flourish"*, 28 ALTA. L. REV. 589, 589-90 (1990) [hereinafter Gibson, *Rhetorical Flourish*] (discussing the historical recognition of biculturalism prior to Trudeau's announcement of the Multiculturalism Policy in 1971). This is not to suggest that the government did not symbolically attempt to recognize the multicultural character of Canada prior to 1971. See GOVERNMENT OF CANADA, *supra* note 78, at 7 (discussing debate, conferences, and the promulgation of programs to assist immigrants prior to 1971).

104. See Breton, *supra* note 40, at 49 (quoting Trudeau's statement of the policy in which he states that cultural groups, other than the French and English, are also essential to Canada's heritage and deserve recognition as well as financial assistance to contribute equally to Canadian life).

105. See SHERIDAN & SAOUAB, *supra* note 46, at 4 (quoting Trudeau's statement of the policy that "[c]ultural pluralism is the very essence of the Canadian identity").

106. See SHERIDAN, *supra* note 45, at 8 (quoting Trudeau's statement to the effect that there are only two official languages, but no official culture).

107. Breton, *supra* note 40, at 49.

108. See Kallen, *supra* note 53, at 132 (noting that Trudeau rejected proposals for

assimilation of language differences, while articulating the value of preserving the cultural diversity of ethnic minorities.<sup>109</sup>

By recognizing cultural diversity, it was hoped the Multiculturalism Policy would foster unity.<sup>110</sup> Concretely, in the government's view, the Multiculturalism Policy could promote unity if equality between all cultural groups and tolerance for cultural diversity were ensured.<sup>111</sup> Eliminating discrimination against individual members of ethnic minority groups and providing government assistance to these groups were features of this equality.<sup>112</sup> Also important, was encouraging ethnic minorities' equal participation in Canadian society, and the overall cultural exchange within that society.<sup>113</sup> In this regard, the government thought it necessary to provide financial assistance<sup>114</sup> to establish programs supporting the development of Canada's ethnic minority groups.<sup>115</sup>

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protecting non-official, ethnic minority languages in the Multiculturalism Policy of 1971).

109. Hanson R. Hosein, *Distorted: A View of Canadian Multiculturalism*, 30 ALTA. L. REV. 597, 609 (1991); *see also* Hudson, *supra* note 16, at 64 (noting that the 1971 policy sought to advance the elimination of discrimination against ethnic communities to facilitate their cultural integration and linguistic assimilation into Canadian society and, at the same time, sought to preserve cultural distinctiveness through assistance for ethnic minorities).

110. *See* SHERIDAN & SAOUAB, *supra* note 46, at 4 (noting that after the adoption of the Official Languages Act, the government refused to reject any of Canada's cultural groups for the purpose of unity through conformity, but instead adopted a policy of multiculturalism). The expressed goal of multiculturalism within a bilingual framework has been to foster unity by recognizing diversity. *Id.* at 2.

111. *See* Breton, *supra* note 40, at 49-50 (quoting Trudeau as stating that unity requires equality between all cultural groups through which the exchange of ideas can take place and prejudice can be eliminated, and that multiculturalism can help create that equality).

112. *See* Hudson, *supra* note 16, at 64 (stating that the Multiculturalism Policy of 1971 incorporated both the elimination of discrimination and assistance to ethnic groups as its goals).

113. *See* Blishen, *supra* note 99, at 19 (noting that the policy encouraged ethnic minorities to express their identity and participate equally in Canadian society).

114. *See* Breton, *supra* note 40, at 49 (noting Trudeau's endorsement of government assistance in order for ethnic groups to express and exchange their culture with other Canadians). The policy's elements reflect the importance the government attached to assistance; SHERIDAN & SAOUAB, *supra* note 46, at 4 (quoting the four main elements of the policy). These elements included assistance to cultural groups to: 1) facilitate their growth; 2) overcome barriers to facilitate their participation in society; 3) ensure that immigrants acquire at least one official language; 4) promote the interaction and exchange between cultural groups. *Id.*

115. *See* Breton, *supra* note 40, at 52-3 (listing several of the programs that

## C. THE CHARTER'S APPROVAL AND SECTION 27'S ADOPTION

During the 1970s, multiculturalism remained an issue in the formulation of Canada's constitution. In 1972, the Molgat-MacGuigan Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (Joint Committee)<sup>116</sup> recommended that any proposed constitution reflect both the bilingual and multicultural character of Canada.<sup>117</sup> It also repudiated the notion of an official Canadian culture or cultures.<sup>118</sup> To this end, the Joint Committee suggested that the preamble to the new constitution formally affirm the cultural diversity of Canada and the equality of all ethnic groups.<sup>119</sup> The 1972 proposed constitution, however, did not adopt the suggested preamble.<sup>120</sup>

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emerged from the Multiculturalism Policy of 1971). To administer these programs the government established a Multiculturalism Directorate as part of the Department of State in 1971. SHERIDAN, *supra* note 45, at 8. The appointment of the Minister of State for Multiculturalism followed in 1972, and then the Canadian Consultative Council on Multiculturalism was established in 1973 (now the Canadian Multiculturalism Council). *Id.* See GOVERNMENT OF CANADA, *supra* note 78, at 9-11 (outlining the federal programs administered by the Minister of State for Multiculturalism).

Despite its historical significance, the impact of the Multiculturalism Policy of 1971 has been marginal. See STANDING COMMITTEE, *supra* note 41, at 1-2 (pointing out that the Multiculturalism Policy of 1971 does not adequately respond to the realities of Canada's cultural diversity, especially in light of its small budget).

116. CANADA, REPORT OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND THE HOUSE OF COMMONS ON THE CONSTITUTION OF CANADA: FINAL REPORT, 28th Parliament, 4th Sess. (Ottawa, 1972) [hereinafter JOINT COMMITTEE].

117. See Gibson, *Rhetorical Flourish*, *supra* note 103, at 590 (noting that the 1972 Committee recommended that the new constitution's goal should aspire to a "pluralistic mosaic").

118. See Hosein, *supra* note 109, at 609 (quoting the Committee's rejection of the theory of Canada as comprised of two cultures, and position that there can be no official Canadian culture); see also JOINT COMMITTEE, *supra* note 116, at 2 (citing the language).

119. See Tarnopolsky, *supra* note 81, at 440 (citing recommendations three and five of the committee). The committee made a series of recommendations of which two, numbers three and five, are relevant. Recommendation three proposed that a provision be made to "develop Canada as a bilingual and multicultural country in which all citizens . . . and all groups from every ethnic origin feel equally at home." *Id.* Recommendation five suggested that the constitution "present Canada as a pluralistic mosaic, a free and open society which challenges the talents of her people." *Id.*

120. See Magnet, *Collective Rights*, *supra* note 72, at 744 (noting that although the Molgat-MacGuigan 1972 Report of the Special Joint Committee recommended that the preamble include recognition of Canada as multicultural, the Victoria Charter of



In 1978, in response to the separatists' success in the Quebec elections,<sup>121</sup> the federal government proposed Bill C-60, a Resolution to Patriate the Constitution.<sup>122</sup> The Bill, which was never enacted, included a constitutional charter of rights that the government steadfastly advanced to unify Canada.<sup>123</sup> Apart from this nation-building feature, Bill C-60 exemplified the importance the government attached to bilingualism and multiculturalism. For example, it included a preamble highlighting Canada's diversity and the notion that all Canadians, whatever their origin, deserve equal respect.<sup>124</sup> The federal government incorporated neither this preamble, nor any other reference to multiculturalism, however, into the Resolution introduced into the House of Commons in 1980.<sup>125</sup>

Finally, in 1981, after intense pressure from ethnic minorities and others before the Hayes-Joyal Committee on the Constitution,<sup>126</sup> the government added section 27 as an amendment to the proposed Charter.<sup>127</sup> Ethnic minorities appearing before the Committee also demanded

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1972 did not mention it).

121. See Russell, *supra* note 20, at 35 (pointing out that the government embarked on constitutional reform in response to the success of separatists in Quebec).

122. The Resolution to Patriate the Charter, adopted by the Canadian Parliament and presented to the United Kingdom, had four versions, one of which was Bill C-60. MCWHINNEY, *supra* note 2, at 139.

123. See Russell, *supra* note 20, at 35 (noting that the government so firmly believed in the unifying function of the proposed charter that it insisted the proposed charter be coupled with patriation of the constitution).

124. See Tarnopolsky, *supra* note 81, at 440 (quoting the 1978 proposed preamble which states the goal of ensuring equal respect for Canadians of different "origins, creeds and cultures").

125. Tarnopolsky, *supra* note 81, at 440; Magnet, *Collective Rights*, *supra* note 72, at 744; see MCWHINNEY, *supra* note 2, at 141 (providing the text of the 1980 proposed resolution). One explanation for the failure to include the preamble is that parliament members felt that other provisions in the proposed Charter, notably sections 15 and 22, left non-official languages protected and prohibited discrimination on the basis of ethnic or national origin. See Hudson, *supra* note 16, at 73 (noting that while no mention of multiculturalism was made in either the preamble or body of the resolution, sections 15 and 22 left non-official languages with those rights customarily recognized and broadly prohibited all forms of discrimination).

126. See Hudson, *supra* note 16, at 74 (estimating that approximately one-fourth of the 100 witnesses who appeared before this committee criticized the absence of any provision for multiculturalism); see also GIBSON, CHARTER, *supra* note 6, at 37 (summarizing the Hayes-Joyal Committee proceedings).

127. See CAIRNS, *supra* note 4, at 109-11 (noting that the Charter and section 27 responded to the increasing ethnic heterogeneity of Canada and the new ethnic agenda that was the result of this heterogeneity); Magnet, *Collective Rights*, *supra* note 72, at

that they receive the right to minority language instruction, just as section 23 of the proposed Charter afforded official language minorities.<sup>128</sup> Underlying their demand was the notion that equality between cultures and languages dictated as much.<sup>129</sup> The government flatly rejected proposals to amend the Charter to include parallel language education rights for ethnic minorities.<sup>130</sup> Instead, the government adhered to the policy of multiculturalism within a bilingual framework<sup>131</sup> the RCBB and Multiculturalism Policy sanctioned, tacitly assuming that ethnic minorities would linguistically assimilate.<sup>132</sup>

Section 27 and the other recommended amendments to the Final Resolution to Patriate the Constitution were tabled in 1981.<sup>133</sup> Shortly thereafter, the federal government and all the provinces, except Quebec, reached an accord concerning patriation of the Charter and a constitutional amending formula.<sup>134</sup> The federal government sent the Final Resolution to the United Kingdom Parliament for approval. In early 1982, the United Kingdom Parliament approved the proposed constitution, the Charter of Rights and Freedoms within it, and section 27.<sup>135</sup>

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744-45 (describing the political pressure by ethnic minority groups that led to the inclusion of section 27 in the Charter).

128. Charter, *supra* note 6, § 23. See also Hudson, *supra* note 16, at 75-6 (noting that the Council on National Ethnocultural Organizations recommended provisions to protect linguistic rights and that the Ukrainian Canadian Committee proposed a revision that language education be provided for those speaking neither French, nor English, where demand is sufficient).

129. See Hudson, *supra* note 16, at 74 (quoting one witness before the Committee as stating that "if the constitution is to be equal, for all Canadians, not just English and French Canadians, I would like [it] to recognize that I too am a Canadian, that my language, though unofficial, is a Canadian language . . .").

130. Hudson, *supra* note 16, at 77-78.

131. See Hudson, *supra* note 16, at 76 (noting that the Canadian Consultative Council on Multiculturalism felt that section 23 should include provisions for non-official languages, but remained committed to bilingualism).

132. See *infra* text accompanying notes 248-66, 289-307 (analyzing how the policy of multiculturalism within a bilingual framework and the Charter implicitly advance linguistic assimilation).

133. See Hudson, *supra* note 16, at 77.

134. See GIBSON, CHARTER, *supra* note 6, at 38 (discussing the November 1981 accord in which Quebec refused to participate); MCWHINNEY, *supra* note 2, at 165 (providing the text of the November 1991 accord); see also *infra* notes 348-49 and accompanying text (highlighting Quebec's rejection of the Charter and the amending formula).

135. GIBSON, CHARTER, *supra* note 6, at 39. The Canada Act was approved on March 29, 1982. *Id.*

In the face of Quebec nationalism and increasing ethnic tension in Canada, the government and many Canadians hoped the Charter would facilitate national unity.<sup>136</sup> The government believed that the Charter, like the earlier Multiculturalism Policy of 1971 and the OLA, could accomplish this purpose by guaranteeing cultural equality for ethnic minorities and linguistic equality for official language minorities.<sup>137</sup> Thus, the government moved in opposing directions in the RCBB, the Multiculturalism Policy, and the Charter. On the one hand, the government attempted to advance cultural equality to preserve ethnic minority cultures. On the other hand, the government did not understand multiculturalism to include language equality for ethnic minorities, thereby facilitating their linguistic assimilation.

Although the themes emerging from the above history provide a context in which to understand language rights and multiculturalism in general terms, the history inspiring section 27 does not assist one in ascertaining the precise content of multiculturalism in Canadian constitutional law.<sup>138</sup> There was much disagreement concerning the content of multiculturalism during the debates on the Canadian constitution.<sup>139</sup> This disagreement persists<sup>140</sup> among the commentators and the courts with respect to section 27.

### III. THE CONTENT AND IMPACT OF MULTICULTURALISM

The text of section 27 is even less obliging in illuminating section 27's content than the history surrounding its adoption. Section 27 re-

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136. See Weiler, *supra* note 7, at 51 (commenting that Canadians hoped the Charter would preserve unity in the face of increasing French Canadian nationalism and the prospect of Quebec becoming an independent province). Russell, *supra* note 20, at 35-6 (noting that Prime Minister Trudeau firmly believed the Charter would unify the country).

137. See *infra* text accompanying notes 309-322 (explaining in detail the means through which the language rights provision and section 27 were thought to serve the goal of unity).

138. See Magnet, *Collective Rights*, *supra* note 72, at 745 (concluding that investigation of the policies, legislation, statements or other background sources behind section 27 yield little in the way of a coherent multicultural principle that would be useful to the courts in interpreting section 27).

139. See Hudson, *supra* note 16, at 77 (concluding that comments on multiculturalism before the 1980 Committee on the Constitution reflected a variety of understandings of the content of multiculturalism).

140. See, e.g., Magnet, *Collective Rights*, *supra* note 72, at 742 (noting that while multiculturalism has been popular in political debate, there has been an absence of public agreement on its content).

quires that the Charter "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."<sup>141</sup> This provision, in itself, does not elucidate the content of multiculturalism. It is not surprising, therefore, that commentators and courts find it difficult to reach a consensus on the content of section 27 multiculturalism.<sup>142</sup> Nevertheless, attempting to understand the content of multiculturalism is important to determine the rights, if any, it affords, the obligations it impliedly imposes on the government, and its impact. To that end, the following discussion first outlines three positions of commentators regarding the content of section 27. To evaluate the legitimacy of these three positions, an analysis of case law interpreting the content of section 27 follows. That analysis reveals that although section 27 does not appear to be a substantive provision, clearly affording rights and explicitly imposing obligations, nonetheless, it is used to supplement the interpretation of other Charter rights, thereby buttressing them.

#### A. THE COMMENTATORS

There are three primary positions on the content of section 27. The first position assumes that section 27 is a substantive provision, and argues that it contains an individual or collective right.<sup>143</sup> Regardless of the nature of the right section 27 is said to contain, section 27 is significant because it guarantees some kind of a right, and some kind of obligation implicitly flows from that right. The second position asserts

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141. Charter, *supra* note 6, § 27.

142. See Magnet, *Collective Rights*, *supra* note 72, at 745 (noting the indeterminacy resulting from the diverse opinions of the content of multiculturalism as understood in section 27).

143. Canadian courts distinguish between individual and collective rights within the Charter. See Joseph E. Magnet, *Collective Rights, Cultural Autonomy and the Canadian State*, 32 MCGILL L.J. 170, 178-86 (1986) [hereinafter Magnet, *Cultural Autonomy*] (summarizing Canadian courts' use of individual and collective rights when interpreting the Charter). Collective rights are asserted because of membership in a group and are particular to that group, while individual's rights are exercised equally by all despite membership in any group. See *id.* at 182 (quoting one court stating this distinction).

It should be noted that some commentators argue that multiculturalism must account for both the individual and collective rights of Canada's ethnic minorities. See Kallen, *supra* note 53, at 123-137 (arguing that to the extent that multiculturalism is built on the idea of unity in diversity, it must protect both individual and collective rights of ethnic minorities). Clearly, the division of commentators into these three groups is somewhat artificial, even if analytically useful.

that section 27 is merely an interpretive provision not containing any rights at all. A third position claims that although not a substantive provision, one can use section 27 to supplement the interpretation of other Charter rights and, in so doing, support them. The content of any right afforded and the kind of governmental obligations, if any, that might flow therefrom distinguish these three positions.

Of those who assume that section 27 is a substantive provision, some assert it contains an individual, not a collective, right.<sup>144</sup> If one understands section 27 to provide an individual right, only non-interference measures, such as prohibitions against discrimination, are implied.<sup>145</sup> As such, section 27 would only protect individuals from discrimination based on membership in an ethnic group.<sup>146</sup> Hence, although one would have the right to associate freely with others to preserve one's culture and language, one would not be entitled to any affirmative government measures to assist one in exercising this right.<sup>147</sup>

Others assuming that section 27 is a substantive provision contend that it affords a collective right.<sup>148</sup> If one frames section 27 as a col-

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144. See Hudson, *supra* note 16, at 122 (arguing that while multiculturalism has an individual and collective dimension, this should not be understood to mean that section 27 extends any kind of collective rights to minority groups).

145. See, e.g., Tarnopolsky, *supra* note 81, at 437-39 (remarking, in the context of section 27, that individual rights emphasize the notion that everyone should be treated equally regardless of group membership, whereas collective rights propose that an individual or group of individuals deserve special treatment as a group because of membership in that group); Hosein, *supra* note 109, at 601 (noting the non-interference and affirmative aspects of individual versus collective rights).

146. See Tarnopolsky, *supra* note 81, at 437-39 (noting that if section 27 is limited to symbolic ethnicity then only freedom from discrimination - an individual right - would be provided under it).

147. See Hudson, *supra* note 16, at 78 (concluding that section 27 could include government programs for language retention, or alternately, only mean that individuals be permitted to express their culture free from governmental interference).

148. See Gerald L. Gall, *Some Miscellaneous Aspects of Section 15 of the Canadian Charter of Rights and Freedoms*, 24 ALTA. L. REV. 462, 470 (1986) [hereinafter Gall, *Miscellaneous Aspects*] (concluding that multiculturalism protects a collective right applicable to cultural groups, as opposed to advancing protection to individuals, even though such collective rights are exercised by individual members of cultural groups); Magnet, *Collective Rights*, *supra* note 72, at 739, 779-80 (concluding that section 27 should be interpreted through the principle of structural ethnicity or a collective right); Kallen, *supra* note 53, at 128 (arguing that section 27 should be interpreted to protect the collective cultural rights of non-Charter groups, that is, groups other than the French and the British); Hosein, *supra* note 109, at 601 (noting that section 27 is understood to protect groups).

lective right, then affirmative measures, such as special programs and other institutional infrastructure, are implied.<sup>149</sup> In this context, section 27 would permit ethnic minority groups to assert claims to the government for affirmative measures.<sup>150</sup> These affirmative measures would assist ethnic minority groups<sup>151</sup> in preserving and enhancing their culture and language.<sup>152</sup> Thus, if read as containing a collective right, section 27 would be expansive indeed.

Commentators who contend that section 27 confers a collective right generally rely on one of two bases. Some claim that section 27 affords a collective right because provincial legislatures may not use section 33 to escape compliance with section 27.<sup>153</sup> Section 33,<sup>154</sup> also referred

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To the extent that multiculturalism contains a collective right, it would appear to come into conflict with other individual rights in the Charter. See Hosein, *supra* note 109, at 601-02 (discussing the tension between multiculturalism as a collective right and the classic liberal tradition of individual rights). Some commentators have argued that where collective and individual rights conflict, collective rights should be given precedence. See Woehrling, *supra* note 20, at 90 (concluding that the Charter requires collective rights to be given preference over individual rights, particularly the right to equality under section 15(1)).

149. See Magnet, *Collective Rights*, *supra* note 72, at 771 (claiming that collective rights necessitate affirmative governmental obligations); *id.* at 739, 779-80 (concluding that section 27, as a collective right, implies that an institutional infrastructure be created and maintained through which ethnocultural communities can preserve and enhance their culture); Tarnopolsky, *supra* note 81, at 395, 438 (stating that the assertion of group rights entails claims to positive government interference because of membership in a minority group).

150. See Magnet, *Collective Rights*, *supra* note 72, at 739, 771-72 (arguing that if interpreted through structural ethnicity or as a collective right, then section 27 may support claims for institutional autonomy and affirmative measures to provide that autonomy).

151. See Magnet, *Cultural Autonomy*, *supra* note 143, at 184 (defining collective rights as rights that apply to groups and are intended to aid in group survival).

152. See Magnet, *Cultural Autonomy*, *supra* note 143, at 184 (arguing that collective rights embrace an institutional infrastructure through which the group could interact with other groups and propagate its cultural beliefs).

153. See Roger Tassel, *Application of the Canadian Charter of Rights and Freedoms*, in *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS*, *supra* note 72, at 65, 103 (stating section 33 does not apply to section 27).

154. Charter, § 33, *supra* note 6. Section 33(1) reads: "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 provision thereof shall operate notwithstanding a provision included in section 2, or section 7 to 15 of this Charter." *Id.* This provision of the Charter is commonly referred to as the "notwithstanding clause." SHERIDAN & SAOUAB, *supra* note 46, at 5. Section 33 allows a legislature to declare

to as the notwithstanding clause, allows provincial legislatures to opt out of specified Charter rights. Thus, commentators conclude one must view section 27 as protecting collective cultural rights, which legislatures might otherwise circumvent by employing section 33.<sup>155</sup>

Other commentators point to Article 27 of the International Covenant on Civil and Political Rights (hereinafter Covenant)<sup>156</sup> to support the proposition that section 27 affords a collective right. Article 27 of the Covenant served as a model for section 27.<sup>157</sup> Arguably, Article 27 provides a collective right to ethnic minorities to preserve and enhance

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that a part or whole of a statute will operate notwithstanding its conflict with specified Charter rights. Charter, § 33, *supra* note 6. Thus, it gives provincial legislatures a final say over certain Charter rights and the judiciary's interpretation of Charter rights. See Sedler, *supra* note 3, at 1233 (noting that the notwithstanding provision grants parliament a final say over when laws will operate notwithstanding the Charter, while the judiciary retains the power to interpret the meaning of the Charter's provisions).

The power to override Charter rights is circumscribed because legislatures can override Charter rights only after publicizing and debating the matter, Weiler, *supra* note 7, at 81-84, and because only specified rights can be overridden, Roger Tassell, *Application of the Canadian Charter of Rights and Freedoms*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, *supra* note 153, at 65, 103.

155. See, e.g., Gerald L. Gall, *Multiculturalism and the Fundamental Freedoms: Section 27 and Section 2, in MULTICULTURALISM AND THE CHARTER, A LEGAL PERSPECTIVE*, *supra* note 16, at 29, 37 [hereinafter Gall, *Fundamental Freedoms*] (suggesting that because section 33 does not allow legislatures to escape section 27, section 27 may grant a substantive right); Gall, *Miscellaneous Aspects*, *supra* note 148, at 470 (commenting that a court might use section 27 alone, as a substantive right, to give effect to rights under the Charter that have been circumvented through use of section 33's opt-out provision).

156. The International Covenant on Civil and Political Rights, *reprinted in CANADIAN CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY*, *supra* note 81, at app. 3 at 543 (providing the Covenant's text). This Covenant came into force in Canada in 1976. Peter W. Hogg, *A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY, *supra* note 81, at 1, 8. Article 27 of the International Covenant on Civil and Political Rights states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." The International Covenant on Civil and Political Rights, *supra*, at app. 3, at 550.

157. Magnet, *Collective Rights*, *supra* note 72, at 745-46 (noting that Article 27 provided the model for section 27, and that the language of both provisions is similar); see Woehrling, *supra* note 20 (providing a comparison of the protection of ethnic minority rights in the Charter and the International Covenant on Civil and Political Rights).

their distinctiveness and requires governments to provide affirmative measures to assist them in so doing.<sup>158</sup> Canadian courts rely heavily on international human rights law, which informed the Charter,<sup>159</sup> to interpret it.<sup>160</sup> When one considers this reliance in conjunction with the fact that Article 27 served as a model for section 27, one can interpret the latter to extend the same collective right.<sup>161</sup>

A second group of commentators maintains a position diametrically opposed to the first. They argue that section 27 is not a substantive provision providing any kind of right, but is merely interpretive: other Charter rights are only read through it.<sup>162</sup> Accordingly, under this view,

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158. See Magnet, *Collective Rights*, *supra* note 72, at 749-50 (noting the trend towards recognizing under Article 27 that some affirmative obligations might be imposed on signatories); Woehrling, *supra* note 20, at 53 (arguing that minorities have the right under Article 27 of the Covenant to demand institutions to preserve their culture).

159. William F. Pentney, *Interpreting the Charter: General Principles*, in *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS*, *supra* note 72, at 21, 60-61 (noting that the Charter's drafters were well aware of international human rights law and based several provisions on it). A number of international instruments and norms, including the International Covenant on Civil and Political Rights, influenced the Charter. See generally Walter S. Tarnopolsky, *A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights*, 8 QUEEN'S L.J. 211 (1982/1983); John Claydon, *International Human Rights Law and the Canadian Charter of Rights and Freedoms*, 4 SUP. CT. L. REV. 287 (1982); M. Ann Hayward, *International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications*, 23 U.W.O.L. REV. 9 (1985); L.C. Green, *The Canadian Charter of Rights and Int'l Law*, 26 CAN. Y.B. INT'L L. 3 (1982); Ann F. Bayefsky & Maxwell Cohen, *The Canadian Charter of Rights and Freedoms and Public International Law*, 61 CAN. B. REV. 265 (1983); Edward McWhinney, *The Canadian Charter of Rights and Freedoms: The Lessons of Comparative Jurisprudence*, 61 CAN. B. REV. 55 (1983).

160. See Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 829 (1990) (noting that norms embodied in many human rights treaties had a strong influence on the Charter and continue to dramatically influence its interpretation in Canada's courts).

161. See Magnet, *Collective Rights*, *supra* note 72, at 738, 751 (noting that section 27 of the Charter will likely follow those trends established under Article 27 of the Covenant); Hudson, *supra* note 16, at 59, 118-19 (suggesting that Article 27 and Canada's multiculturalism policy implies collective rights and may mandate more than state non-interference); Kallen, *supra* note 53, at 123, 128-30 (concluding that in light of the international documents informing section 27, it should be interpreted as affording collective cultural rights to ethnic minorities).

162. See Tarnopolsky, *supra* note 81, at 395, 441 (declaring section 27 to be only interpretive, akin to a preamble or aims provision, and as such non-binding);



section 27 does not mandate that the government provide ethnic minority groups with affirmative measures to preserve their culture and language. Nor does section 27 grant individuals an independent basis upon which to seek redress for actions prejudicing them on the basis of membership in an ethnic minority group. In short, section 27 allows of no constitutionally enforceable obligation.<sup>163</sup> These commentators add that section 27 is redundant, as other individual rights provisions in the Charter, such as the freedom of religion, operate to preserve culture.<sup>164</sup> Thus, they conclude that even as an interpretive provision, section 27 will have little, if any, affect on the substance of individual rights other sections of the Charter enumerate.<sup>165</sup>

A third position contends that, even if not a substantive provision in itself, section 27 supplements the interpretation of other Charter rights and, more importantly, supports them.<sup>166</sup> Thus, in contrast to the second position, section 27 is not merely an interpretive provision with little impact. Instead, section 27 is important because it can significantly

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Gibson, *Rhetorical Flourish*, *supra* note 103, at 591-92 (noting that the multicultural clause is an interpretative, rather than a substantive provision); Woehrling, *supra* note 20, at 60 (stating that section 27 is interpretive and hence, does not confer additional rights).

163. See, e.g. Gibson, *Minority Rights*, *supra* note 47, at 48 (commenting that section 27's language is too general to afford any legally enforceable obligation on the part of the government to provide multicultural programs); Tarnopolsky, *supra* note 81, at 395, 441 (noting that section 27 is purely declaratory and that it is difficult to see, in the absence of any other provision, what it alone affords in the way of a right); Gall, *Fundamental Freedoms*, *supra* note 155, at 29, 35 (quoting the Directorate of Multiculturalism as stating that section 27 will not constitute an independent source of constitutional authority upon which to attack laws perceived to be prejudicial to cultural diversity).

164. See Gall, *Fundamental Freedoms*, *supra* note 155, at 29, 35 (quoting the Directorate of Multiculturalism as stating that guarantees preserving culture exist in other provisions of the Charter making section 27 unnecessary).

165. See Tarnopolsky, *supra* note 81, at 395, 441 (concluding that section 27 will not affect the fundamental freedoms of the Charter as they afford protection in and of themselves for individual rights). At least one well-known constitutional scholar has argued that section 27 is little more than a rhetorical flourish and consequently does not substantially affect other rights in the Charter. See PETER HOGG, *CONSTITUTIONAL LAW OF CANADA: CANADA ACT OF 1982 ANNOTATED* 82 (1982).

166. See Gall, *Miscellaneous Aspects*, *supra* note 148, at 469 (contending that although section 27 does not alone confer any rights per se, it might be used to modify or enhance the interpretation of other rights); Pentney, *supra* note 159, at 21, 40 (arguing that section 27 will be used as a "prism" through which other rights are interpreted and will alter the substance of these rights when used to interpret them).

affect the substance of other rights, particularly the equality rights under section 15,<sup>167</sup> and free speech and religion rights under section 2 of the Charter.<sup>168</sup> In so doing, it may buttress rights otherwise subject to being overridden by weak judicial interpretation.

That section 27 may be used to supplement the interpretation of other Charter rights and functions to strengthen them appears the most tenable of the three positions. This conclusion is supported when one considers that section 27 lacks any definitive language from which one can derive specific rights, and by the general reluctance of Canadian courts to extend collective rights to minorities or to read the Charter in the collective rights tradition.<sup>169</sup> It also is sustained when one analyzes case law on section 27.

#### B. THE COURTS: CASE LAW ON SECTION 27

To assess the legitimacy of commentators' claims regarding the rights, obligations, and impact of section 27, it is useful to examine case law on section 27. Admittedly, as will be seen, the scant case law on section 27 is varied and contradictory.<sup>170</sup> One cannot, therefore, make defini-

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167. See e.g., William Black & Lynn Smith, *The Equality Rights*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, *supra* note 72, at 557, 602-03 (concluding that section 27 is invaluable to interpretation of section 15); Gibson, *Rhetorical Flourish*, *supra* note 103, at 597 & n.5 (citing Claire Beckton as saying that section 27 will have its greatest impact on equality rights); Woehrling, *supra* note 20, at 62 (stating that section 27 is likely to have the greatest impact in combination with section 15(1)); Raj Anand, *Ethnic Equality*, in EQUALITY RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, 124 (Ann Bayefsky and Eberts eds., 1985) (arguing that section 27 is an adjunct to section 15 - both intended to protect the individual and collective rights of all Canadians).

168. See Gall, *Fundamental Freedoms*, *supra* note 155, at 29, 51 (concluding that in particular, section 27 will primarily be effective in buttressing arguments under section 2 and protecting rights under section 2 that would otherwise be left unprotected); *infra* note 1171. But see Tarnopolsky, *supra* note 81, at 395, 441 (arguing that section 27 will have little affect on the substance of the section 2 "fundamental freedoms" rights); see also Irwin Cotler, *Freedom of Conscience and Religion*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, *supra* note 72, at 195; Gall, *Fundamental Freedoms*, *supra* note 155, at 29 (providing a useful analysis of section 2 cases).

169. Magnet, *Cultural Autonomy*, *supra* note 143, at 181; Magnet, *Collective Rights*, *supra* note 72, at 739, 768-69.

170. See Magnet, *Collective Rights*, *supra* note 72, at 739, 751 (stating that no coherent doctrine regarding section 27 has evolved). Compare, e.g., Edward Books *infra* notes 193-97 and accompanying text with *Big M Drug Mart* *infra* notes 198-204 and accompanying text.

tive conclusions about the right, if any, contained in section 27, the obligations that right may impose, or the impact of section 27. The analysis of case law that follows, however, suggests two preliminary observations.

First, section 27 does not appear to be a substantive provision, and even if it is, the kind of right it contains and the obligations it imposes remains uncertain in case law.<sup>171</sup> Second, and notwithstanding the conflicting case law, it is clear that courts frequently use section 27 to interpret other Charter rights.<sup>172</sup> In using section 27 to interpret other Charter rights, section 27 is given effect: section 27 affects the substance of other rights and supports legal claims made pursuant to them. This is particularly the case when parties bring claims under the freedom of religion provision,<sup>173</sup> but also when parties make claims under the equality and minority language education rights provisions.

Section 27 arises most frequently in freedom of religion cases. The freedom of religion cases illustrate the special connection between the protection of religious freedom, which is one aspect of culture, and the enhancement and preservation of the multicultural heritage of Canadians.<sup>174</sup> They also support the conclusion that courts use section 27 to supplement the interpretation of other Charter rights. As a result, although not a substantive provision, the freedom of religion cases demonstrate that section 27 can buttress rights otherwise vulnerable to generally applicable legislation.

*R. v. Videoflicks, Ltd.*<sup>175</sup> is the leading case on section 27 and its relationship to religious freedom. In *Videoflicks*, appellants, a group of

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171. See, e.g., Hudson, *supra* note 16, at 121 (concluding that 20 years of policy and debate on multiculturalism prior to and after adoption of section 27 do not provide any definitive meaning of "multicultural heritage" or what goals the preservation and enhancement of this heritage imply); STANDING COMMITTEE, *supra* note 41, at 18 (stating that although multiculturalism was entrenched in the Charter it fails to describe what the government must do); *infra* text accompanying notes 175-242 (analyzing the case law on section 27).

172. See *infra* text accompanying notes 175-242 (analyzing the case law on section 27).

173. See Pentney, *supra* note 159, at 21, 41 (noting that section 27 has been used to buttress the result in freedom of religion cases, including *Videoflicks* and *Big M Drug Mart*).

174. See Gall, *Fundamental Freedoms*, *supra* note 155, at 50-51 (concluding that this interconnection focuses on the fact that in many ethnocultural groups, religious affiliation is a central and vital component of their existence).

175. 14 D.L.R.4th 10 (Ont. Ct. App. 1984), *rev'd in part sub nom. Edwards Books and Art Ltd. v. R.*, 35 D.L.R.4th 1 (Can. 1986).

Orthodox Jews who owned of a retail business, challenged the validity of the Ontario Retail Business Holidays Act.<sup>176</sup> The statute imposed a uniform day of rest in Ontario for specified holidays and Sundays.<sup>177</sup> Appellants argued that the statute violated their freedom of religion as guaranteed under section 2(a) of Charter.<sup>178</sup> They contended that the statute had the effect of imposing an economic sanction on their religious practice of observing Saturday, as opposed to Sunday, as their Sabbath, because it forced them to close on Sundays.<sup>179</sup> The Ontario Court of Appeals agreed. In a two-pronged analysis, it held that the statute violated the group's freedom of religion<sup>180</sup> and could not be justified as a reasonable limitation on that freedom under section 1 of the Charter.<sup>181</sup>

The court assessed the impact of section 27 on the meaning of the freedom of religion to support its conclusion that the statute violated the freedom of religion.<sup>182</sup> It noted the integral importance of the historical context surrounding the section's adoption, including the Multiculturalism Policy of 1971, and the relevance of Article 27 in the International Covenant on Civil and Political Rights.<sup>183</sup> After a thorough analysis of this historical context, the court concluded that section 27 is based on the precept that Canada is a pluralistic society; as such, it must accommodate different religious practices.<sup>184</sup> Thus, in the court's view, section 27 might require exemption from legislation otherwise generally applicable.<sup>185</sup>

With this background understanding of section 27, the court reasoned that the challenged statute failed to assist in preserving and enhancing

176. *Id.* at 18.

177. *Id.* at 19.

178. *Id.* at 27-28. Section 2, the freedom of religion provision in the Charter, reads in part: "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 communication . . ." Charter, *supra* note 6.

179. *Id.* at 28.

180. *Id.* at 39. See *infra* note 190 (delineating the basic two-prong constitutional analysis of statutes alleged to infringe the Charter's fundamental rights).

181. *Id.* at 45. See *infra* note 190 (delineating the basic two-prong constitutional analysis of statutes infringing fundamental rights).

182. *Id.* at 41-42.

183. *Id.* at 42-43.

184. *Id.* at 43.

185. *Id.*

the multicultural heritage of Canadians.<sup>186</sup> Rather, the statute made it more difficult to practice one's religion, which is a major aspect of one's culture.<sup>187</sup> Consequently, because the statute failed to accommodate religious differences, it violated the freedom of religion provision.<sup>188</sup>

Once the court found that the statute violated the appellants' freedom of religion, it then examined whether that violation was justified as a reasonable limitation on the freedom of religion under section 1 of the Charter.<sup>189</sup> Section 1 provides that a statute may reasonably limit Charter rights if one can demonstrably justify the limitation in a "free and democratic society."<sup>190</sup> The court ruled that the province failed to provide sufficient proof to satisfy its burden of showing that the limitation was reasonable under section 1.<sup>191</sup> Consequently, the court found the statute placed an unreasonable limit on the free exercise of religion and therefore struck the statute down.<sup>192</sup>

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186. *Id.*

187. *See id.* (stating that its conclusion that "a law infringes freedom of religion, if it makes it more difficult and more costly to practice one's religion, is supported by the fact that such a law does not help to preserve and certainly does not serve to enhance or promote that part of one's culture which is religiously based").

188. *Id.*

189. *Id.* at 44. The court noted that section 27 is applied to interpret not only the individual rights provisions of the Charter, but the entire Charter, including section 1. *Id.* at 43. *See, Gall, Fundamental Freedoms, supra* note 155, at 37 (contending that section 27 does not say that only the individual rights of the Charter shall be interpreted in light of Canada's multicultural heritage, but rather implies that the whole Charter, including section 1, shall so be interpreted).

190. Charter, *supra* note 6, Section 1 reads: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." *Id.* Section 1 provides the basic framework for constitutional analysis of statutes limiting individual rights. *See Sedler, supra* note 3, at 1223-26 (summarizing the basic constitutional analysis). A court must first assess whether the right implicated in the statute at issue is explicitly within the Charter. *Id.* If so, the court then determines whether the statutory restriction of that right is valid, that is whether it is reasonable, prescribed by law, and justifiable in a democratic and free society. *Id.* at 1224. The leading case on section 1 is *R. v. Oakes*, 1 S.C.R. 103 (Can. 1986), which sets forth the criteria to be applied in determining whether a limitation is justified under section 1. *See also* William R. Lederman, *Assessing Competing Values in the Definition of Charter Rights and Freedoms, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, supra* note 72, at 127 (providing a comprehensive consideration of section 1, Canadian constitutional analysis, and section 1 cases).

191. 14 D.L.R.4th 10, 44-45 (Ont. Ct. App. 1984).

192. *Id.* at 45.

Although the Supreme Court of Canada reached a different conclusion in *Edwards Books and Art Ltd v. R.*,<sup>193</sup> this decision followed *Videoflicks* in one important respect. In a plurality opinion, a majority of the court ruled the statute impinged upon petitioners' freedom of religion.<sup>194</sup> In reaching its conclusion, the court reasoned that the statute imposed an economic burden on religious groups observing the Sabbath on Saturday.<sup>195</sup> Nevertheless, in applying section 1 analysis to the statute, the majority held that the statute imposed a reasonable limit on the freedom of religion, given the balance of interests at stake.<sup>196</sup> Although it reached a different result from the lower court, the Supreme Court majority and dissent agreed that section 27 was relevant to, and served to supplement, the interpretation of the freedom of religion provision.<sup>197</sup>

*R. v. Big M Drug Mart*<sup>198</sup> is another freedom of religion case relying on section 27. This case concerned the validity of the Federal Lord's Day Act that, like the Ontario statute at issue in *Videoflicks* and *Edwards Books*, restricted retail business operation on Sundays and certain holidays.<sup>199</sup> The Supreme Court of Canada held the statute violated the freedom of religion<sup>200</sup> and was not justified as a reasonable limitation on religious freedom.<sup>201</sup> The Court reasoned that the statute was inherently discriminatory because it evinced a legislative preference for one religion over another.<sup>202</sup> The Court found this preference inconsistent with the requirement under section 27 to preserve and enhance the multicultural heritage of all Canadians.<sup>203</sup> Thus, the Court used section 27 to supplement its interpretation of the freedom of reli-

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193. 35 D.L.R.4th 1 (Can. 1986). Some commentators have criticized the Supreme Court's approach to the issue of religious freedom and multiculturalism. See Hosein, *supra* note 109, at 604-06 (arguing that the Supreme Court's position on the purpose of Sunday closing reflects dominant norms at odds with the values of other cultural groups and results in stigmatizing these groups).

194. 35 D.L.R.4th at 40.

195. See *id.* at 37-40, 55 (noting that the Act burdens some, but not all religious observers and retailers).

196. *Id.* at 51-52.

197. *Id.* at 29, 74.

198. 18 D.L.R.4th 321 (Can. 1985).

199. *Id.* at 327.

200. *Id.* at 365.

201. *Id.* at 368.

202. *Id.* at 354.

203. *Id.* at 354-55.

gion provision.<sup>204</sup> In so doing, it gave effect to section 27.

The result in *Big M. Drug Mart* is striking. The Supreme Court in both *Bug M. Drug Mart* and *Edwards Books* used section 27 to interpret the freedom of religion provision in ruling on the constitutionality of similar statutes. Yet the Court reached contrary results. A comparison between these cases illustrates the divergence of decisions in this area.

In *Re Zylberberg*,<sup>205</sup> the Ontario Divisional Court upheld an Ontario regulation providing for predominately Christian religious exercises in public schools.<sup>206</sup> The court held that the regulation did not impinge on the freedom of religion.<sup>207</sup> It further ruled that, even assuming that the regulation did violate the freedom of religion provision, the regulation, nevertheless, constituted a reasonable limitation on religious freedom.<sup>208</sup> In dicta, the court noted the importance of referring to section 27 when addressing alleged violations of the freedom of religion,<sup>209</sup> but did not address whether the regulation at issue offended section 27.

The Ontario Court of Appeal reversed the Divisional Court, holding that the regulation violated appellants' freedom of religion and was not a reasonable limitation on that freedom.<sup>210</sup> It explicitly relied on section 27 to interpret the freedom of religion provision. Moreover, in contrast to the lower court, the Ontario Court of Appeal stated that the regulation contravened section 27.<sup>211</sup> Thus, section 27 functioned to support the court's result and buttress the right at issue.

In addition to freedom of religion cases, the use of section 27 arises in cases alleging violations of equality under section 15 of the Charter.<sup>212</sup> A major case in this area is *R. v. Keegstra*.<sup>213</sup> In *Keegstra*, the Alberta Court of Queen's Bench addressed the issue of whether a crimi-

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204. *Id.* at 328.

205. 29 D.L.R.4th 709 (Ont. 1986), *rev'd* 52 D.L.R.4th 577 (Ont. Ct. App. 1988).

206. *Id.* at 724-25.

207. *Id.*

208. *See id.* at 723 (noting that even if the statute at issue impinged on the freedom of religion it constituted a reasonable limit under section 1).

209. *Id.* at 716.

210. 52 D.L.R.4th 577 (Ont. Ct. App. 1988).

211. *Id.* at 591-92.

212. *R. v. Kent, et al.* 40 22 C.C.C.3d 405, 420 (Man. Ct. App. 1986); *R. L. C. Punch*, 22 C.C.C.3d 289 (N.W.T. Sup. Ct. 1985); *Law Society of British Columbia v. Andrews*, 56 D.L.R.4th 1, 33 (Can. 1989).

213. 19 C.C.C.3d 254 (Alta. Q. B. 1984); *see* Mark L. Berlin, *Criminal Hate Propaganda Law and Human Rights*, in *HUMAN RIGHTS AND FREEDOMS IN CANADA*, 7(48) (Mark L. Berlin & William F. Pentney eds., 1987) (discussing this case in detail).

nal code prohibiting hate propaganda violated the freedom of speech under section 2(b) of the Charter.<sup>214</sup> The court held it did not.<sup>215</sup> First, the court found that hate propaganda opposed the principles of equality and dignity incorporated in section 15.<sup>216</sup>

Second, the court applied section 27 to interpret the freedom of speech provision. It reasoned that although section 15 protects the rights of individuals within minority groups, when issues arise under section 27, section 15 implicates the collective rights of groups.<sup>217</sup> The court then found hate speech to contravene the requirement of interpreting the Charter in a manner consistent with multiculturalism.<sup>218</sup> Consequently, the court ruled the Charter did not protect hate speech, and thus held the statute did not violate the freedom of speech.<sup>219</sup> Because the court held that the statute did not violate the freedom of speech, the court was not required to apply section 1 to determine whether the statute imposed a reasonable limitation on that freedom.<sup>220</sup> Nevertheless, the court engaged in that analysis.<sup>221</sup> The court applied sections 15 and 27 to interpret section 1, and ruled that the statutory limitation on hate speech was reasonable in light of these sections.<sup>222</sup>

The Alberta Court of Appeal reversed.<sup>223</sup> The Court of Appeal held that the statute violated the freedom of speech<sup>224</sup> and struck it down as unconstitutional.<sup>225</sup> The court rejected the lower court's understanding of sections 15 and 27.<sup>226</sup> It reasoned that the statute contradicted sections 15 and 27 inasmuch as it prohibited a diversity of speech.<sup>227</sup> In contrast to the lower court, the Court of Appeal found that the freedom

214. 19 C.C.C.3d at 257. *See supra* note 178 (quoting the text of section 2(b)).

215. *Id.*

216. *Id.* at 267-68.

217. *Id.* at 268.

218. *Id.* This view of section 27 has found support in the Supreme Court of Canada. *See Andrews*, 56 D.L.R.4th at 33.

219. 19 C.C.C.3d at 268.

220. *See Gall, Fundamental Freedoms, supra* note 155, at 43-44 (commenting that the lower court did not need to reach section 1 analysis since it found no right to speech implicated under section 2(b) of the Charter).

221. 19 C.C.C.3d at 269.

222. *Id.* at 277.

223. 43 C.C.C.3d 150 (Alta. Ct. App. 1988).

224. *Id.* at 164-65.

225. *Id.* at 179.

226. *Id.* at 162-64.

227. *Id.* at 162.



of speech provision protected hate speech.<sup>228</sup> Moreover, relying on a similar use of sections 15 and 27 to interpret section 1, but reaching a result opposite that of the lower court, it ruled that it could not uphold the statute as a reasonable limitation on the freedom of speech.<sup>229</sup>

Section 27 also arises in cases concerning the minority language education rights contained in section 23 of the Charter. In *Reference re: Education Act of Ontario and Minority Language Rights*,<sup>230</sup> the Ontario Court of Appeal concluded that in light of section 27, section 23 should be interpreted so as to require the government to provide educational facilities tailored to linguistic minorities.<sup>231</sup> The court reasoned that the purpose of section 23 is to permit cultural minorities to preserve and develop their cultural heritage.<sup>232</sup> Accordingly, linguistic minorities should have the opportunity to receive instruction in an environment that will facilitate the development of their cultural (and presumably linguistic) heritage.<sup>233</sup> In the court's view, this reading is the only way to reconcile section 23 with the multiculturalism mandate of section 27.<sup>234</sup>

A minority of this same court, dissenting, suggested a different approach to the issue surrounding minority language education rights in *Reference re: An Act to Amend the Education Act*.<sup>235</sup> This case concerned a bill providing full funding for Catholic schools.<sup>236</sup> The dissent held that the bill violated section 15<sup>237</sup> and did not satisfy the reasonable limitation test of section 1.<sup>238</sup> The dissent reasoned that section 15 prohibits affording one religious group a benefit while denying that benefit to others.<sup>239</sup> Accordingly, the bill violated the section 15 equality guarantee because it provided for the funding of Catholic schools at the expense of other types of ethnocultural and religious schools.<sup>240</sup> Using section 27 to support its conclusion, the dissent argued that the bill did not preserve the multicultural heritage of Canadians, as section

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228. *Id.*

229. *Id.* at 168.

230. 10 D.L.R.4th 491 (Ont. Ct. App. 1984).

231. *Id.* at 529.

232. *Id.* at 528-29.

233. *Id.* at 529, 533.

234. *Id.* at 529.

235. 25 D.L.R.4th 1 (Ont. Ct. App. 1986).

236. *Id.* at 7-8.

237. *Id.* at 45-46.

238. *Id.* at 50-51.

239. *Id.* at 43-44.

240. *Id.* at 44.

27 required.<sup>241</sup> In its view, religion is one aspect of the multicultural heritage of Canadians; therefore, because the bill disadvantaged certain religions, it undermined the preservation of that heritage.<sup>242</sup>

From the preceding case law analysis, one may draw a number of conclusions. First, case law suggests that section 27 is not treated as a substantive provision. Courts do not rely solely upon section 27 as a basis for constitutional adjudication, although they do sometimes find that statutes contravene section 27. Even if section 27 is a substantive provision, case law leaves unclear the rights and obligations section 27 contains. For example, although a few courts have interpreted section 27 expansively as containing or implicating a collective right,<sup>243</sup> many others assume the section does not contain any right at all.<sup>244</sup> Additionally, apparently only one court has interpreted section 27 as imposing an affirmative obligation on the part of the government. Others obliquely opine that section 27 imposes some sort of obligation, but do not specify what kind of obligation is involved.<sup>245</sup>

Second, case law also reveals that section 27 is used to supplement the interpretation of other Charter rights. When used to supplement the interpretation of other Charter rights, section 27 can function to buttress legal claims made pursuant to those other Charter rights.<sup>246</sup> Consequently, section 27 can have an important impact on the substance of other rights and case results. In this manner, courts give effect to section 27. Thus, even if section 27 is less than a substantive provision affording an independent right and requiring particular obligations, it is, without doubt, more than merely an interpretive provision with little impact on other rights.

One cannot fully understand the content of section 27 on the basis of the history underlying its adoption, its text, commentators' views, or

241. *Id.* at 49-50.

242. *Id.*

243. See *supra* text accompanying notes 212-22 (analyzing the lower court's opinion in *R. v. Keegstra*); see also *R. v. W.H. Smith Ltd.*; 5 W.W.R. 235, 258-59 (Alta. Prov. Ct. 1983) (interpreting the multicultural principle of section 27 as containing both freedom from discrimination and group survival dimensions, and mandating that multicultural issues should be treated with equality in mind).

244. See *supra* text accompanying note 192.

245. See *supra* text accompanying notes 198-204, 230-42 (discussing *R. v. Big M Drug Mart*, *Reference re: Education Act of Ontario and Minority Language Rights*, respectively).

246. See *supra* notes 170-242 and accompanying text (analyzing cases on section 27 in which other Charter rights were supported by interpretation of section 27).

case law. To fully comprehend multiculturalism and language rights in general, and in the Charter in particular, one also must examine they are situated within the overall structure of legislation, policy, and the Charter and consider how this affects or defines their content. The concept of linguistic dualism and the Charter's language rights provisions are paramount in these regards.

#### IV. THE CHARTER'S STRUCTURE: LINGUISTIC DUALISM

In contrast to section 27 multiculturalism, language rights are well-defined in the Charter. These rights are generally understood to be individual and collective in nature, and are thought to impose specific obligations on the government to effectuate them.<sup>247</sup> Historically, Canada has provided certain rights to French and English and to official language minorities, but not to other languages or to ethnic minorities.<sup>248</sup> This disparity in rights reflects the concept of linguistic dualism: the historical dichotomy between the English and French languages and their cultures, the idea that these two languages and cultures are equal, and that equal rights and status for both are vital to Canadian unity.<sup>249</sup> Lin-

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247. See Woehrling, *supra* note 20, at 54-55 (noting that the language rights under the Charter are collective); Hosein, *supra* note 109, at 601 (characterizing the language rights provisions of the Charter and sections 29, 35, and 37 of the Charter as collective rights); Robert W. Kerr, *The Language Provisions of the Constitutional Amendment Bill 1978*, 57 CAN. B. REV., 640, 645-47 (1979) (noting that the proposed Charter's language provisions afford both individual and collective language rights to official language minorities); *infra* notes 250, 257 (quoting various provisions of the Charter and Canadian constitution that provide certain language rights and spell out parallel government obligations). See also generally LANGUAGE RIGHTS IN CANADA, *supra* note 13 *passim* (providing a comprehensive analysis of Canada's development of language rights and language policies in various constitutional documents, including the Charter, and in legislation).

248. See Woehrling, *supra* note 20, at 75 (indicating that the Charter, like section 133 of the Constitution Act of 1867, reflects a difference between the treatment of official linguistic minorities and other linguistic and cultural minorities in Canada).

249. See Joseph E. Magnet, *The Charter's Official Language Provisions: The Implications of Entrenched Bilingualism*, 4 SUP. CT. L. REV. 163, 170-71 [hereinafter Magnet, *Entrenched Bilingualism*] (stating that linguistic dualism refers to a variety of political realities, reflected in the idea of equality between the French and British as founding peoples; the dominance of the French and English languages in Canada; and the constitutional protection afforded French and English); Woehrling, *supra* note 20, at 82-83 (noting that the principle of dualism expresses recognition of the bicultural and bilingual character of Canada). This is not to suggest that language policies have historically developed in one direction. In fact, it is clear that development towards bilingualism has been punctuated by periods of regressive legislation designed to en-

guistic dualism shapes language rights in Canada, and implicitly, multiculturalism. Government policy, legislation, and the Charter at large reveals the influence of linguistic dualism in the aforementioned ways.

The Constitution Act of 1867<sup>250</sup> and provincial legislation during the 1870s<sup>251</sup> conferred special rights for the use of French and English in the courts, in parliamentary proceedings, and in legislative text. These bilingual language rights emphasized equality only between French and English, and affirmed the French-British duality of Canadian culture, thus their equality.<sup>252</sup> They did not acknowledge other languages or

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trench monolingualism. See Braen, *Language Rights*, *supra* note 13, at 28-30 (discussing various provincial legislation declaring English to be the official language); see generally Lowrey, *supra* note 16, at 224-64 (providing a synopsis of federal and provincial language policy in Canada).

250. R.S.C. 1970, App.II, no.5, § 133.

Section 133 establishes the right of any person to use either English or French when before the courts established by either the federal parliament or Quebec legislature. *Id.* Section 133 of the Act also specifies that everyone has the right to use English or French in debates of the Parliament of Canada and in the legislature of Quebec. *Id.* In addition, it provides that legislation and legislative records be maintained in both languages. See Andre Braen, *Bilingualism and Legislation*, in *LANGUAGE RIGHTS IN CANADA*, *supra* note 13, at 67, 67 (discussing the nature, scope, and implications of section 133 with respect to bilingual legislation and parliamentary proceedings). See generally Michel Bastarache, *Bilingualism and the Judicial System*, in *LANGUAGE RIGHTS IN CANADA*, *supra* note 13, at 121, 123-48 (summarizing the development, interpretation, and scope of section 133's provision for language rights in courts).

251. See Manitoba Act of 1870, S.C. 1870, c.3, § 23 adopted by the Constitution Act, 1871, R.S.C. 1970, App.II, No.11 (providing bilingual measures analogous to section 133 of the Constitution Act of 1867); Northwest Territories Act of 1877, S.C. 1877, 40 Vict. c.7, section 11 (recognizing bilingualism in the courts of the territories). Quebec, in particular, has recognized bilingualism in a number of legislative acts throughout its history. See Braen, *LANGUAGE RIGHTS IN CANADA*, *supra* note 13, at 37; Hudson, *supra* note 16, at 82 (discussing bilingual legislation in Quebec).

252. See, e.g., Gibson, *Rhetorical Flourish*, *supra* note 103, at 590 (stating that the dichotomy between French and English prevailed in section 133 of the Constitution Act of 1867); Braen, *Bilingualism and Legislation*, in *LANGUAGE RIGHTS IN CANADA*, *supra* note 13, at 67, 69 (commenting that section 133 reflected the egalitarian attitudes of its framers); Michel Bastarache, *Principle of Equality of Official Languages*, in *LANGUAGE RIGHTS IN CANADA*, *supra* note 13, at 499, 501-04 (detailing how the principle of equality of official languages has been recognized in section 133 of the Constitution Act of 1867, section 2 of the Official Languages Act, and section 15 of the Charter); SHERIDAN & SAOUAB, *supra* note 46, at 2 (noting that British North American Act was related to the idea of a dual, not plural culture); see also Braen, *Language Rights*, *supra* note 13, at 43-53 (discussing the principle of linguistic equality embedded in legislation and constitutional provisions dealing with

cultures, such as ethnic minorities or Canada's aboriginal peoples.<sup>253</sup> Similarly, the policy of multiculturalism within a bilingual framework, which the RCBB advanced, contemplates language, and arguably cultural, equality only between French and English.<sup>254</sup> The Multiculturalism Policy of 1971 and the OLA perpetuated that framework and its limited language equality.<sup>255</sup>

The Charter's structure also exhibits the historical preference for linguistic dualism<sup>256</sup> as a means of building unity. The language rights provision figure predominantly here. Sections 16 through 23 of the Charter,<sup>257</sup> which comprise its language rights provisions, omit official

the official languages of Canada prior to and after adoption of the Charter).

253. See, e.g., REPORT OF THE SPECIAL JOINT COMMITTEE OF THE HOUSE OF COMMONS AND THE SENATE ON THE PROCESS OF AMENDING THE CONSTITUTION 17 (Gérald Beaudoin & Jim Edwards, 1991) [hereinafter Beaudoin-Edwards] (detailing the view that Canada has two founding peoples and that aboriginals were not invited to negotiate at the 1867 constitutional talks).

254. See Pierre Foucher, *The Right to Receive Public Services in Both Languages*, in LANGUAGE RIGHTS IN CANADA, *supra* note 13, at 177-78 (discussing RCBB's policy of linguistic equality as it is reflected in the receipt of public services under section 20 of the Charter); *supra* notes 86-93 and accompanying text (indicating that the RCBB policy affirmed a bicultural view of the country notwithstanding its protestations to the contrary).

255. See *supra* notes 78-132 and accompanying text (discussing and analyzing the RCBB's recommendation of a policy of multiculturalism within a bilingual framework, the language rights provided French and English in the OLA, and the rejection of multilingualism in the Multiculturalism Policy of 1971).

256. See, e.g., Andre Braen, *The Enforcement of Language Rights*, in LANGUAGE RIGHTS IN CANADA, *supra* note 13, at 445, 496 (concluding that language rights in the Canadian constitution and Charter reflect the fundamental value of Canada's legal system—linguistic duality); Bastarache, *supra* note 252, at 501-525 (discussing the principle of linguistic equality embodied in sections 15 and 27 of the Charter); Magnet, *Entrenched Bilingualism*, *supra* note 249, at 170-75 (arguing that duality permeates the Charter and discussing how it infused various Charter provisions); Woehrling, *supra* note 20, at 82 (noting that sections 16 to 23 give effect to duality).

257. See Charter, *supra* note 6, §§ 16-23. The relevant language provisions read as follows:

Section 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.

...

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

...

Section 17

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

. . .

Section 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.

. . .

Section 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.

. . .

Section 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 communication with and services from that office be available in both English and French.

. . .

Section 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.

. . .

Section 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.

. . .

Section 23

(1) Citizens of Canada

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

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

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

recognition of, or an equality of status and rights for, ethnic languages and ethnic minority cultures.<sup>258</sup> The language rights provisions formally provide for equality only between French and English.<sup>259</sup> They make French and English the official languages of Canada and grant equal rights and status regarding their use.<sup>260</sup> Providing equal rights and status to French and English also reflects the idea that French and British cultures should be equal to promote unity. On the one hand, the language rights provisions expand the protection of the French and English languages dramatically.<sup>261</sup> On the other hand, they entrench the pre-

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(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.

*Id.*

258. See Magnet, *Entrenched Bilingualism*, *supra* note 249, at 171-73 (discussing the principle of dualism in various Charter provisions).

259. See Andre Tremblay & Michel Bastarache, *Language Rights*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, *supra* note 72, at 684 (concluding that the Charter's language provisions are founded on the principle of equality of official languages). Section 16(1) of the Charter, for example, mandates that English and French shall be the official languages of Canada and provides for equality of status and the equal right to use either language in Parliament or in institutions of the federal government. Charter *supra* note 6, See also Andre Tremblay, *The Language Rights*, in CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY, *supra* note 81, at 443, 446-59 [hereinafter Tremblay, COMMENTARY] (reviewing the legislative antecedents, scope, and implementation of language equality under section 16(1)).

260. See, e.g., Charter, *supra* note 6, § 17 (providing the right to use either French or English in any debate or proceeding of the Parliament); *id.* § 18 (requiring that legislation and legislative records be published in English and French); *id.* § 19 (guaranteeing the right to use either French or English in any process of a court established by Parliament); *id.* § 20 (granting the right to communicate with and receive public services from an institution of Parliament or the government of Canada in French and English); *id.* § 23 (providing provinces the right to establish minority language instruction in either French or English where numbers warrant, the right to educational facilities for this instruction, and the right to manage this instruction); *id.* §§ 56, 57 (dealing with the equality of French and English versions of a statute); see also *supra* note 259 (discussing section 16 of the Charter).

261. See Magnet, *Entrenched Bilingualism*, *supra* note 249, at 169-70 (analyzing how the Charter guarantees certain protection of English and French that were not previously protected fully under the Constitution Act of 1867).

existing language rights the Constitution Act of 1867 embodied,<sup>262</sup> and, incidentally, the concept of linguistic dualism upon which the language rights in the Constitution Act of 1867 were premised.<sup>263</sup> To the extent that the Charter's language rights grant language rights and equality only to official languages and official language minorities, they also confer upon French and English, and their respective cultures, a special status ethnic minorities do not enjoy.

Linguistic dualism's influence also is demonstrated in other aspects of the particularly section 27. There are no other provisions in the Charter that, like the language rights provisions, confer rights upon ethnic languages or ethnic minorities generally.<sup>264</sup> Section 27 in particular, refers

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262. See, e.g., Charter, *supra* note 6, §§ 17, 18 (requiring legislative bilingualism in the federal and New Brunswick parliaments, as previously required under section 133 of the Constitution Act of 1867 and section 23 of the Manitoba Act of 1870); *id.*, § 16(1) (making English and French the official languages of Canada in the federal parliament and government institutions, as previously required under section 2 of the Official Languages Act of 1969); *id.*, at 16(3) of the Charter (providing that section 133 of the Constitution Act of 1867 serves as a benchmark, allowing federal and provincial parliaments to advance further the equal status of French and English). Section 21 of the Charter, in particular, explicitly mandates that nothing in sections 16 to 20 will abrogate or derogate from rights attaching to English and French in the Constitution Act, 1867. *Id.* These rights remain in force. See Tremblay, COMMENTARY, *supra* note 259, at 460 (pointing out that section 21 entrenches § 133 of the Constitution Act, 1867); see also Kerr, *supra* note 247, at 647-650 (comparing the then proposed Charter's language provisions with existing language rights under federal and provincial legislation and concluding that the then proposed Charter perpetuates then existing rights); Tremblay, COMMENTARY, *supra* note 259, at 447 (noting that the principle of linguistic equality as embodied in § 16(1) of the Charter had its roots in § 2 of the Official Languages Act).

263. See Woehrling, *supra* note 20, at 75 (noting that the Charter, like section 133 of the Constitution Act of 1867, indicates a difference between the treatment of official language minorities and other cultural and linguistic minorities in Canada).

264. See Woehrling, *supra* note 20, at 57 (noting that as compared to English and French speakers, there are no provisions, apart from section 14, which confer rights to non-official linguistic groups). Sections 14, 15 and 22 are relevant possibilities. *Id.*

Although section 22 says that sections 16 through 23 do not preclude non-official language rights this section provides no constitutional protection in itself for the language rights of ethnic minorities. Charter, *supra* note 6. Moreover, even if used in combination with section 27, a combined reading of sections 22 and 27 would probably not extend language rights to any group except Aboriginals. Tamopolsky, *supra* note 81, at 441.

Section 15(1) provides a variety of equality rights. It does not, however, list language as one of the prohibited grounds of discrimination. Charter, *supra* note 6. Consequently, equality between language groups, other than that afforded the English



only to culture, not to language.<sup>265</sup> It is not intended to supply ethnic minorities with any language rights, let alone rights coextensive to those granted official languages and official language minorities in the Charter.<sup>266</sup>

Indeed, section 27 conforms to linguistic dualism.<sup>267</sup> Section 27 does not limit the language rights provisions.<sup>268</sup> Rather, the language rights provisions limit section 27.<sup>269</sup> Where there is a conflict between the two, the Charter's language rights provisions typically are thought to prevail.<sup>270</sup> Nor, as some have suggested,<sup>271</sup> can the courts utilize section 27 to interpret restrictively the language rights in the Charter so as to limit their scope. The Supreme Court of Canada has condemned overriding the Charter's language rights in this fashion.<sup>272</sup> Consequently, although one might employ section 27 to enhance cultural diversity, one cannot use it to negate the rights that the Charter grants official languages and official language minorities.<sup>273</sup> Thus, in the foregoing man-

and French languages in section 16(1) of the Charter, is not definitively guaranteed under this section either.

Finally, section 14 provides that a party or witness to a proceeding may receive an interpreter where the criminal proceeding is conducted in a language which the person does not understand. *Id.* Arguably, this is the only provision in the Charter that provides any affirmative right to minorities whose language is not English or French. Given its limited scope, this provision cannot be equated with the expansive protection provided for English and French.

265. See Woehrling, *supra* note 20, at 82 (remarking that section 27 refers to culture, not language, despite their close relationship).

266. See Woehrling, *supra* note 20, at 82 (noting that the drafters of section 27 were not referring to language rights as addressed in sections 16 to 20, and 23 of the Charter).

267. See Hosein, *supra* note 109, at 616 (noting that multiculturalism accommodates differences, but only to the extent that it does not intrude on linguistic dualism).

268. See Tarnopolsky, *supra* note 81, at 441 (noting that section 27 appears to apply to section 22, but not to sections 16 through 20 which comprise the Charter's language rights).

269. Hosein, *supra* note 109, at 613.

270. See Woehrling, *supra* note 20, at 90-92 (concluding that because of the underlying value system of the Charter, the history of language equality, the dualism principle, and the specific nature of the Charter's language provisions, dualism must take precedence over multiculturalism where there is a conflict between the two).

271. See Bastarache, *supra* note 252, at 521 (concluding that because the Supreme Court has used section 27 to interpret other provisions of the Charter, it might also use section 27 to define language rights if the Court is willing to recognize the link between language and culture).

272. *Societe des Acadiens v. Ass'n of Parents*, 27 D.L.R.4th 406, 457 (Can. 1986).

273. See, e.g., Gibson, *Rhetorical Flourish*, *supra* note 103, at 602-03 (commenting

ner, linguistic dualism, which explicitly shapes language rights, implicitly shapes the content of section 27 multiculturalism. As shall be seen, linguistic dualism produces a narrow definition of multiculturalism.<sup>274</sup>

Parts I through IV of this Comment addressed understanding the content of, and the relationship between multiculturalism and language rights, focusing especially on the Charter. Examining four things proved fruitful in this regard. First, broadly understood, multiculturalism and language rights represent norms regarding Canada's social organization, its identity, and its quest to build unity through its constitution and legislation.

Second, the history informing multiculturalism and language rights illustrates that, in response to increasing ethnic tension and conflict between English and French Canada, the government promulgated multiculturalism and language rights to promote unity. Moreover, the history preceding the Charter reveals something of Canada's model of language rights and multiculturalism, and the government's approach to building unity. To build unity, the government framed language rights and multiculturalism, in legislation and policy, and the Charter, to include cultural, but not linguistic equality for ethnic minorities, thereby implying their linguistic assimilation.

Third, with regard to section 27, case law supports the position of commentators that the Charter's multicultural provision, although not a substantive provision, can be used to supplement the interpretation of other Charter rights. Fourth, like earlier legislation and policy, the Charter's structure reflects the influence linguistic dualism—the notion that French and English languages and cultures should have equal rights and status—has had on shaping multiculturalism and language rights. The upshot of linguistic dualism, as legislation, policy, and the Charter exhibit, is a disparity between the rights and status—as to language and culture—afforded official language minorities compared to ethnic minorities. As discussed in connection with the history preceding the Charter, providing language rights and promoting multiculturalism are the primary components of Canada's efforts to accommodate official language and ethnic minorities. Consequently, linguistic dualism, which shapes

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that section 27 does not mean to end the preferential treatment that English and French enjoy under the Charter among the cultural groups of Canada). In this sense, section 27 cannot be used to equalize the rights enjoyed by ethnic minorities compared to official language minority groups.

274. See *infra* text accompanying notes 285-306 (analyzing the definition of multiculturalism incorporated into legislation, policy, and the Charter).

multiculturalism and language rights, emerges as an important element of Canada's model of language rights and multiculturalism and its approach to promote equality and build unity.

Parts V through VII of this Comment further delineate Canada's model of language rights and multiculturalism. Canada's model of language rights and multiculturalism is critically analyzed, highlighting the difficulties this model poses with respect to Canada's attempts to guarantee equality and promote unity through its constitution. Recent constitutional accords are then examined, emphasizing the continuing influence of linguistic dualism and the narrow definition of multiculturalism they perpetuate. Finally, recommendations are suggested concerning how Canada might more effectively accommodate ethnic minorities to ensure equality and build unity.

#### V. A CRITIQUE OF CHARTER MULTICULTURALISM AND LANGUAGE RIGHTS

Canada passed the Charter to guarantee individual rights and promote national unity. Two features of Canada's model of language rights and multiculturalism present difficulties in achieving these interrelated goals. One feature concerns linguistic dualism, and consequentially, the disparity between the rights and status official languages and official language minorities traditionally enjoy compared to ethnic languages and ethnic minorities. The second feature, which is largely a product of linguistic dualism, pertains to the narrow definition of multiculturalism, which legislation, policy, and the Charter reflect. Linguistic dualism and the narrow definition of multiculturalism that the Charter displays in particular, and that language rights and multicultural legislation and policy evince historically, are problematic from two perspectives: equality and unity. In addressing these two perspectives, I propose an egalitarian definition of multiculturalism. The egalitarian definition is employed in a limited fashion. First, I use it to analyze critically the model of language rights and multiculturalism in the Charter and recent constitutional proposals from the perspectives of equality and unity. Second, with that critical analysis in place, I employ the definition to assess how one can interpret the Charter to promote equality of rights and status with respect to ethnic minorities and to advance thereby social cohesion or unity.

## A. THE PRINCIPLE OF EQUALITY

Ideally, multiculturalism and language rights are based on the principle of equality:<sup>275</sup> equality of opportunity for individuals and equality in the treatment of, or respect for, groups.<sup>276</sup> They also incorporate two themes, representing elements of this equality. One theme concerns freedom from discrimination against individuals; the other theme focuses on group survival in the form of assistance for the preservation of cultural and linguistic distinctiveness.<sup>277</sup> Both themes relate to the principle of equality in that prohibiting discrimination directed at individuals and providing assistance to preserve and enhance the language and culture of minority groups assures equal opportunity and equal treatment.<sup>278</sup> Some Canadian courts have so interpreted multiculturalism.<sup>279</sup>

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275. See SHERIDAN & SAOUAB, *supra* note 46, at 2 (noting that multiculturalism has emphasized the equality of Canadians regardless of their background). Multiculturalism reflects the increasing trend towards egalitarianism in Canadian social and political life. See Blishen, *supra* note 99, at 18 (noting that the drive for egalitarianism forms the basis for Canada's social assistance systems).

276. See, e.g., Braen, *Language Rights*, *supra* note 13, at 25 (concluding that language equality between individuals and between language communities should give rise to language rights in a pluralistic society such as Canada); SHERIDAN & SAOUAB, *supra* note 46, at 1 (stating that multiculturalism is based on equality, dignity for all cultures, and support for cultural pluralism); Hosein, *supra* note 109, at 620 (noting that multiculturalism embodies a commitment to an equal recognition of, and equal opportunity for, all Canadians).

Most multiculturalism policies embody this notion of equality. See Hudson, *supra* note 16, at 122 (noting that the observed countries attempted to remove discrimination and preserve collective ethnic identity as companion goals of a policy of multiculturalism).

277. See Kallen, *supra* note 53, at 125 (pointing out that multiculturalism, although not necessarily section 27, includes both equality of opportunity for individuals and accommodation of cultural diversity among ethnic groups); Hosein, *supra* note 109, at 598 (arguing that the concept of multiculturalism implies both the absence of discriminatory barriers and an institutional structure offering opportunities for exploring cultural heritage); Braen, *Language Rights*, *supra* note 13, at 20-23 (remarking that language rights require measures prohibiting discrimination against individuals on the basis of language and justify special provisions, at the group level, to ensure the preservation of a minority language group's cultural and linguistic distinctiveness).

278. See Kallen, *supra* note 53, at 125 (noting that multiculturalism should include respect for the collective cultural rights of ethnic groups and ensure equal opportunity to transmit their culture through institutions and special measures); Weiler, *supra* note 7, at 56 (noting that language equality requires the positive conditions in which one's language can be maintained and enhanced); CANADIAN BAR ASSOCIATION, *YOUR*

The egalitarian definition of multiculturalism includes the principle of equality and the themes of group survival and freedom from discrimination. Under the definition, equality and the two themes are relevant considerations with respect to Canada's cultural diversity and—it bears emphasizing—linguistic heterogeneity, and should be incorporated into multiculturalism and language rights. Given that culture and language are inseparable,<sup>280</sup> one cannot truly advance cultural equality without similarly adopting linguistic equality.<sup>281</sup> Equal opportunity for individuals and equal treatment of groups hinge on preventing discrimination on the basis of not only culture, but also language. Similarly, preserving a group's distinct language, as well as culture, is integral to group survival. Thus, in a constitution purporting to protect language rights and promote multiculturalism, the egalitarian definition demands that one provide official language minorities and ethnic minorities not only equal cultural recognition, but also similar, if not equal, language rights. Cultural pluralism is consistent with the former requirement; linguistic pluralism comports with the latter.<sup>282</sup>

Admittedly, there are difficulties with this definition of multiculturalism. Equality may be at odds with a policy of linguistic and cultural pluralism. Insofar as economic power is concerned, equality may necessitate assimilation; the preservation of languages and culture, in contrast, explicitly dictates pluralism.<sup>283</sup> Moreover, it is far from clear

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CLIENTS AND THE CHARTER-LIBERTY AND EQUALITY 236-37 (Gérald-A. Beaudoin ed., 1987) [hereinafter *LIBERTY AND EQUALITY*] (noting that equality requires ameliorating the conditions of disadvantage, and positive action by the government to provide equal opportunity).

279. See *Regina v. Andrews*, 43 C.C.C.3d 193 (Ont.C.A. 1988) (weighing, in a multicultural context, the competing interests of individuals and groups). The court held that a statute forbidding hate speech promoted multiculturalism where empirical data showed a likelihood of harm to identifiable groups). *Id.* at 219. See also *supra* notes 170-246 and accompanying text (indicating that some courts have found these two themes to be implicated in section 27 multiculturalism).

280. See *infra* notes 303-04 and accompanying text (discussing the relationship between language and culture); see also Kallen, *supra* note 64, at 131 (summarizing the argument that without constitutional protection of the French and English languages their culture would not survive).

281. See, e.g., BURNET & PALMER, *supra* note 20, at 226 (noting that ethnic minorities who had been discriminated against sought full equality and linguistic and cultural maintenance).

282. See, e.g., Braen, *Language Rights*, *supra* note 13, at 22 (arguing that an egalitarian definition of multiculturalism is driven by the principle of equality and linguistic pluralism).

283. See, e.g., BURNET & PALMER, *supra* note 20, at 221-22 (stating that the

that linguistic or cultural pluralism is viable practically from the perspective of social cohesion and national unity, of which this Comment will discuss more later.<sup>284</sup> With these qualifications in mind, and using the egalitarian definition as a basis, the following critically analyzes Canada's model of language rights and multiculturalism.

## B. THE PROBLEM OF EQUALITY

The principle of equality and the two related themes guided the Multiculturalism Policy of 1971 and section 27.<sup>285</sup> They were explicitly the impetus behind the language rights spelt out in the OLA and the Charter.<sup>286</sup> Linguistic dualism attests to the importance of cultural and linguistic equality with respect to official languages and official language minorities. At the same time that linguistic dualism informs Canada's language rights, it implicitly shapes multiculturalism. Language rights and multiculturalism—as legislation, policy, and the Charter evidence—reflect a disparity between the rights and status respecting language and culture official language minorities relative to ethnic minorities enjoy.<sup>287</sup> Moreover, as the following explicates, they exhibit a narrow definition of multiculturalism. This model of language rights and multiculturalism is inconsistent with the principle of equality, which is

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policy of multiculturalism has contradictory effects and noting that critics have suggested that multiculturalism is flawed because it does not account for economic power).

284. See *infra* text accompanying notes 452-60 (discussing the problems that linguistic pluralism presents for social cohesion, unity, and equality).

285. See Magnet, *Collective Rights*, *supra* note 72, at 744 (arguing that two themes - freedom from discrimination and group preservation - guided the 1971 Policy and that these two themes were important to adoption of section 27); Magnet, *Interpreting Multiculturalism*, in *MULTICULTURALISM AND THE CHARTER: A LEGAL PERSPECTIVE*, *supra* note 16, at 145, 147-50 [hereinafter Magnet, *Interpreting Multiculturalism*] (arguing that both freedom from discrimination and provisions for group survival provide constitutional support for section 27); BURNET & PALMER, *supra* note 20, at 224 (commenting that proponents of the Third Force lobbied for recognition of cultural differences to achieve equality because data demonstrated ethnic minorities were largely excluded from the professional and economic elite); see also *supra* note 55 and accompanying text (commenting that equality is central to the conception of multiculturalism).

286. See *supra* notes 95-97, 248-64 and accompanying text (stating that language rights traditionally have had equality between French and English as their goal).

287. See *supra* notes 248-73 and accompanying text (analyzing historically how the concept of linguistic dualism has been embraced in multiculturalism and language rights).

central to the egalitarian definition of multiculturalism.<sup>288</sup> This inconsistency inheres in the Multiculturalism Policy of 1971, section 27 multiculturalism, and the Charter's language rights.

The policy of multiculturalism within a bilingual framework, which the Multiculturalism Policy of 1971 adopted, attempts to reconcile two competing ideas: the idea that Canada is a multicultural society in which all cultures are equal and the idea that only two of its many language groups—namely French and English—merit language rights.<sup>289</sup> In this sense, the Multiculturalism Policy, and the underlying notion of multiculturalism within a bilingual framework, narrowly defines multiculturalism to include cultural, not linguistic equality and pluralism, despite rhetoric to the contrary.<sup>290</sup> Multiculturalism, so defined, is often considered complimentary to linguistic dualism and bilingualism.<sup>291</sup> The Multiculturalism Policy, however, is internally inconsistent, for it presupposes that one can advance cultural equality without likewise advancing linguistic equality.

The Charter, which the policy of multiculturalism within a bilingual framework inspired,<sup>292</sup> also attempts to reconcile two competing principles: multiculturalism or cultural equality and linguistic dualism, with the language inequality it poses with respect to ethnic minorities.<sup>293</sup>

288. See *supra* pp. 49-51 (summarizing the terms incorporated in an egalitarian definition of multiculturalism).

289. See, e.g., Hudson, *supra* note 16, at 64 (stating that the 1971 policy of multiculturalism within a bilingual framework moved in two different directions: it sought to eliminate discrimination against ethnic minorities to facilitate their assimilation into society while at the same time it sought to preserve their cultural distinctiveness through assistance programs). The apparent contradiction inherent in the policy of multiculturalism within a bilingual framework appears to reflect a broader tension between individual and collective rights that pervades Canadian rights jurisprudence generally. See Blishen, *supra* note 99, at 24 (noting that there is a conflict between recognizing group rights of ethnic minorities, and respecting individual rights regardless of group affiliation, which is extant throughout Canadian society).

290. See Hudson, *supra* note 16, at 64 (noting that the Multiculturalism Policy of 1971 articulated the assimilation of language differences, although it recognized the importance of preserving ethnic languages); See also *supra* note 93 and accompanying text (noting that although the RCBB recommended that ethnic languages be preserved its commitment to this goal was apparently rhetorical).

291. See STANDING COMMITTEE, *supra* note 41, at 55 (noting bilingualism and multiculturalism complement one another); Magnet, *Entrenched Bilingualism*, *supra* note 249, at 174-75 (implying that duality and multiculturalism can be reconciled if the limits of each principle are remembered).

292. See *supra* notes 98-137 and accompanying text (discussing the policy of multiculturalism within a bilingual framework and its influence on the Charter).

293. See Woehrling, *supra* note 20, at 83 (pointing out that linguistic dualism

Similar to the policy of multiculturalism within a bilingual framework, the Charter embraces a narrow, not an egalitarian definition of multiculturalism, as it incorporates cultural, but not linguistic pluralism. Thus, the same theoretical contradiction besets the Charter. These points are readily apparent when one examines the Charter's multicultural and language rights provisions.

Section 27 articulates the value of cultural diversity and equality between all cultures.<sup>294</sup> Technically, in this sense, section 27 is consistent with the egalitarian definition's requirement of cultural equality. What the multicultural provision articulates in the way of cultural equality, however, the Charter's language rights provisions dramatically undercut.

The Charter's language rights, and the concept of linguistic dualism they reflect, are inconsistent with the egalitarian definition of multiculturalism on three counts. First, the Charter's language rights treat language groups disparately in that the Charter extends equal rights and status only to French and English.<sup>295</sup> Guaranteeing language rights for Canada's official languages, but not for ethnic languages, privileges the former over the latter.<sup>296</sup> This is inconsistent with the definition's requirement of linguistic equality.

Second, and incidentally, the Charter's language rights oppose cultural equality. Because the language rights privilege the language of two official groups—French and English—over all others, they also arguably confer to these two groups a preferred cultural status other cultural groups do not enjoy.<sup>297</sup> This is inconsistent with the egalitarian defi-

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requires that French and English be accorded special constitutional status, while multiculturalism requires all cultural groups to be equally treated); Hoscain, *supra* note 109, at 616 (noting that multiculturalism accommodates cultural differences only to the degree that this accommodation does not intrude on linguistic dualism); Gibson, *Rhetorical Flourish*, *supra* note 103 at 597, (summarizing the framers' recognition of both linguistic dualism and multiculturalism).

294. See Gibson, *Rhetorical Flourish*, *supra* note 103, at 507 (commenting that with respect to cultural differences, section 27 affirms a pluralistic conception of equality).

295. See *supra* note 256-269 and accompanying text (analyzing the Charter's language rights and the influence of linguistic dualism on them).

296. See Magnet, *Entrenched Bilingualism*, *supra* note 249, at 175 (1982) (stating that Francophone and Anglophone minorities have a preferred position relative to other ethnic minorities under the Charter with respect to language rights and services).

297. See Bastarache, *supra* note 252, at 520 (arguing that "even if section 27 leaves the impression that all cultures are equal, it would seem, nevertheless, that sections 16 to 23 place two of them in a privileged position with respect to one of



nition of multiculturalism, which requires cultural equality.

Third, the absence of language rights for ethnic minorities in the Charter suggests, as had earlier multicultural policy, linguistic assimilation.<sup>298</sup> The language rights imply that the languages of official language minorities are worth preserving, while those of ethnic minorities are not. Indeed, even those who assume that multiculturalism complements bilingualism concede that ethnic minorities will adopt one of the two official languages.<sup>299</sup> Less significant, but also implying linguistic assimilation, is that the text of the multicultural provision refers to culture, not language.<sup>300</sup> The text connotes that cultural diversity, but not linguistic heterogeneity, deserves recognition and that equality is relevant with respect to culture, but not language.<sup>301</sup> Indeed, in this respect, as shown previously, section 27 conforms to linguistic dualism. Obviously, linguistic assimilation is inconsistent with the egalitarian definition's requirement of linguistic pluralism.

As has already been intimated, underlying the Charter's model of language rights and multiculturalism is a conception of language and culture exhibiting a deeper theoretical flaw. The narrow definition of multiculturalism the Charter embodies, and linguistic dualism produces, presumes that language and culture are divisible. It also intimates that language has little, if any, place in the context of multiculturalism under section 27.<sup>302</sup> This is a difficult proposition, as culture and language

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their most important manifestations: language").

By so preferring one cultural and linguistic group over another, the Charter has been criticized for perpetuating vertical multiculturalism. See Kallen, *supra* note 53, at 127-8 (commenting that provisions favoring official language groups in Canada, to the detriment of minority ethnic groups, perpetuates a "vertical Canadian mosaic"); Hosein, *supra* note 109, at 616-18 (arguing that multiculturalism has resulted in a hierarchy of ethnocultural groups in Canada).

298. See *supra* notes 89-93, 108-09 and accompanying text (describing how the Multiculturalism Policy of 1971, and earlier recommended multiculturalism proposals, implicitly adopted linguistic assimilation and rejected multilingualism).

299. See REPORT OF THE CANADIAN MULTICULTURALISM COUNCIL, *supra* note 46, at 6-7 (arguing official language policy and multiculturalism are compatible because English and French are the cultural heritage of Canada's two peoples, others primarily use these languages to communicate and maintain their languages at the same time).

300. See *supra* notes 264-66 and accompanying text.

301. See, e.g., GIBSON, CHARTER *supra* note 6, at 68 (stating that section 27 connotes a pluralistic conception of equality with respect to cultural differences).

302. See, e.g., Hosein, *supra* note 109, at 609 (stressing that multiculturalism within a bilingual framework seems to deny the connection between language and culture); Hudson, *supra* note 16, at 77 (quoting Chretien's statement to the 1980 Special Joint Committee of the House of Commons and the Senate, that

are often inextricably linked.<sup>303</sup> Because language is an integral and, some would say, determinative part of culture,<sup>304</sup> section 27's multiculturalism provision, which professes to value cultural diversity also should account logically for Canada's linguistic heterogeneity<sup>305</sup>—quite apart from the demands of the egalitarian definition of multiculturalism. In other words, section 27 should advance linguistic equality and pluralism, as well as articulate cultural equality and pluralism.

Notwithstanding the difficulties with advancing linguistic pluralism, that the Charter does not espouse equality for all languages seriously undermines Canada's commitment to promoting cultural pluralism as opposed to cultural assimilation.<sup>306</sup> If language and culture are inseparable, then the Charter will integrate those whose dominant language is neither English nor French, not only into one of these languages, but, arguably, also into its attendant culture.<sup>307</sup> The cultural preference that the Charter's language rights impart to official language minorities similarly encourages cultural assimilation. Viewed in this context, the Charter's model of language rights and multiculturalism is inconsistent not only with the egalitarian definition of multiculturalism, but also with the cultural equality and pluralism the multicultural provision purports to promote.

In sum, the Canada's model of language rights and multiculturalism, and the concept of linguistic dualism which informs it, repudiates the egalitarian definition in that it fails to advance linguistic, as well as cultural, equality and pluralism. The Charter, in particular, reflects a

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multiculturalism does not relate to language or the policy of official bilingualism).

303. See Pierre Foucher, *Language Rights and Education*, in *LANGUAGE RIGHTS IN CANADA*, *supra* note 13, at 255, 257 (illustrating the connection between language and the preservation of culture in the context of education); Woehrling, *supra* note 20, at 58 (noting that the divisions between majority and minority groups are both cultural and linguistic).

304. Woehrling, *supra* note 20, at 60; Foucher, *supra* note 303, at 314; see BURNET & PALMER, *supra* note 20, at 6 (describing the relationship between language and culture and stating that language often determines culture and is essential to its expression).

305. See Hosein, *supra* note 109, at 613 (asserting that if language is important to culture, then section 27 should not be limited by the official language provisions to exclude equal language rights for ethnic minorities).

306. See, e.g., Hosein, *supra* note 109, at 606 (stating that Canada's multicultural policy has failed because of the constraints that the legal and historical commitment to duality place on it).

307. Bastarache, *supra* note 252, at 520-21.

narrow definition of multiculturalism. Ethnic languages and ethnic cultures are not deemed to warrant equal rights and equal status within the Charter relative to official languages and official language minorities. Instead, the Charter implies that ethnic minorities will linguistically assimilate. Moreover, even to the extent the Charter's multicultural provision articulates cultural equality, the language rights provisions oppose it by privileging official language cultures over ethnic minority cultures. In these ways, the Charter and the concept of linguistic dualism informing language rights and multiculturalism constrain the scope of section 27 multiculturalism.<sup>308</sup> Finally, the conception of language and culture underlying Canada's model of language rights and multiculturalism is not only theoretically inconsistent, but also undermines Canada's commitment to preserving cultural diversity. Canada's model of language rights and multiculturalism, and the concept of linguistic dualism also pose problems with respect to Canada's attempts to promote unity, to which we now turn.

### C. THE PROBLEM OF UNITY

The second perspective from which Canada's model of language rights and multiculturalism is problematic concerns unity. In formulating the Charter, the framers apparently disregarded the constraints that linguistic dualism places on the scope of multiculturalism and the narrow definition of multiculturalism the Charter incorporates. Indeed, the framers believed that the Charter's language rights and multicultural provision, as constructed, would adequately respond to Quebec nationalism and ethnic tension, thereby facilitating unity with respect to Quebec, ethnic minorities, and Canada at large. Multiculturalism and language rights, as Canada's primary means of accommodating ethnic minorities and Quebec to build unity through its constitution, have not produced the unity expected.

In response to nationalist sentiments in Quebec,<sup>309</sup> the Charter's

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308. See, e.g., Kallen, *supra* note 53, at 126-28 (criticizing the Charter for limiting protection for ethnic minorities to individual rights, while providing for the collective linguistic and religious rights of the English and French majorities and concluding that the Charter is weak in terms of an egalitarian multiculturalism); Hosein, *supra* note 109, at 611 (concluding that official bilingualism constrains multiculturalism, which requires equality). This is somewhat unsurprising when one considers that the Charter's language rights trump section 27 where there is a conflict between the two. See *supra* notes 269-72 and accompanying text.

309. *Supra* notes 78-79, 94-96, 121-22 and accompanying text.

framers purposefully privileged the English and French languages,<sup>310</sup> as language rights were considered essential to maintaining Canada's unity.<sup>311</sup> The framers incorporated linguistic dualism into the Charter's language rights because they deemed linguistic dualism crucial to quell Quebec nationalism and to unite French and English speaking Canada.<sup>312</sup> Bilingualism and language equality between French and English throughout Canada—facets of linguistic dualism—were central in this regard.<sup>313</sup> Because the Charter's language rights entrenched bilingualism, and thus promised to guarantee language equality throughout Canada, Quebec might come to view the rest of Canada as its own country.<sup>314</sup> In this way, the Charter's language rights and the concept of linguistic dualism shaping them, held the potential to bind Quebec to Canada.

Similarly, the framers adopted section 27 to assuage ethnic minorities,

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310. See Woehrling, *supra* note 20, at 82-83 (noting that the language rights provisions were intended to give effect to the principle of Canadian "duality" — that is equality between French and English — and express the bilingual and bicultural character of Canada); *id.*, at 89-90 (stating that the drafters of the Charter gave preeminence to collective rights generally and of these collective rights attached the greatest importance to the language rights of French and English).

311. See Russell, *supra* note 20, at 38 (stating that the language rights provisions of the Charter were intended to unify Canada); Weiler, *supra* note 7, at 56 (commenting that constitutional guarantees protecting individual language rights have been implemented towards averting the threat to unity that two coexisting, but distinct language groups pose).

312. See Magnet, *Entrenched Bilingualism*, *supra* note 249, at 175 (claiming that duality was the political solution to reconcile Canada and Quebec); *id.* at 191-92 (remarking that the language provisions of the Charter may provide a means of binding Canada); Waddell, *supra* note 61, at 92-93 (quoting the Canadian Task Force on Unity as stating that unless constitutional reform enhances duality, unity will not be achieved); Magnet, *Entrenched Bilingualism*, *supra* note 249, at 170-71 (quoting the Task Force on Canadian Unity as stating that "any general reform effort, however well intended, which fails to enhance duality . . . is unlikely to increase harmony and unity in Canada.") (omission in source). The disparity posed by linguistic dualism has been justified on several grounds. See Woehrling, *supra* note 20, at 65 (noting that the disparity in the Charter has been justified on the numerical superiority of French and English speakers; the historical legitimacy of their claims to language rights; and the practical and financial difficulty of providing all groups with language rights).

313. See *supra* notes 94-97, 117-20, 136 and accompanying text (noting that the OLA, the recommendations of the Joint Committee, and the Charter had unity through language equality and bilingualism as its goal).

314. See William Johnson, *Strength of Reform and Bloc is Legacy of Mulroney and Meech*, *GAZETTE* (Montreal), Oct. 16, 1993, at B5 (describing the common assumptions held by Canada's traditional main parties).

who were seeking greater recognition of their cultural contribution to Canada.<sup>315</sup> Articulating multiculturalism in the Charter would provide ethnic minorities with the recognition they so ardently sought.<sup>316</sup> Promoting cultural equality, affirming the value of cultural diversity, and preserving Canada's cultural diversity were the main features of this multiculturalism.<sup>317</sup> These features promised to reduce discrimination against ethnic minorities and facilitate their integration into Canadian society.<sup>318</sup> Moreover, some thought that multiculturalism's emphasis on cultural equality would offset the notion that the Charter's language rights provisions, in effect, provided official linguistic minorities and Quebec a preferred position and a special status.<sup>319</sup>

Finally the Charter's framers believed that their model of language rights and multiculturalism would promote overall social cohesion. Consistent with linguistic dualism, the framers rejected proposals to provide language rights to ethnic minorities, while acknowledging their cultural equality.<sup>320</sup> They did so because the government perceived assimilation to one of the two official languages to provide a basis of commonality in a country of cultural diversity.<sup>321</sup> On a broader scale, the framers envisioned multiculturalism and the Charter to provide for, respectively, a distinct Canadian identity and a common set of national values, which they also believed would further social cohesion.<sup>322</sup>

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315. See *supra* notes 82-91, 99-111, 126-37, and accompanying text (describing the ethnic tension that propelled adoption of multiculturalism in the RCBB's mandate, the Multiculturalism Policy of 1971, and the Charter).

316. Johnson, *supra* note 314.

317. See *supra* notes 90-91, 104-07, 111-15, 137 and accompanying text.

318. See *supra* notes 111-15 and accompanying text.

319. Johnson, *supra*, note 314.

320. See *supra* notes 130-32 and accompanying text.

321. See, e.g., Hosein, *supra* note 109, at 617 (commenting that multiculturalism within a bilingual framework has been justified because the country needs language as a basis of commonality for unity). The RCBB also justified its recommendation of bilingualism as a means to ensure that all Canadians would learn one of the two official languages and therefore not be hampered in daily life by the constraints of their inherited language. See Breton, *supra* note 40, at 54 (quoting the RCBB report as stating that it is essential that every person learn either official language to become freely functioning in the social and commercial life of Canada); see also *supra* note 114 (outlining the elements of the policy of multiculturalism within a bilingual framework); Braen, *Language Rights*, *supra* note 13, at 12 (stating that language is an important component of cohesion and that unity may be nurtured through language policies aimed at assimilation).

322. See Johnson, *supra* note 314; *supra* notes 49-53 and accompanying text (de-

Theoretically, the Charter's language rights and multiculturalism provision might promote unity on the three fronts detailed above. Practically, Canada's model of language rights and multiculturalism, which is premised upon linguistic dualism and includes a narrow definition of multiculturalism, has provided a weak reed for nation-building.<sup>323</sup> This criticism applies to the Charter and its progenitors, the OLA and Multiculturalism Policy of 1971.

Language rights, and more broadly linguistic dualism, have not united French and English speaking Canada. French and English Canada increasingly reject the scheme of bilingualism crafted in the OLA and the Charter.<sup>324</sup> Although Canadians accept bilingualism as a personal choice and a social asset, many outside Quebec express the view that official bilingualism has been divisive, unnecessary, impractical, and expensive.<sup>325</sup> French and English-language minorities, for their part, stress that the current constitutional system has neither protected their language or culture, nor served the goal of language equality.<sup>326</sup>

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scribing the role of cultural diversity and multiculturalism in providing Canada with an identity and in promoting unity).

323. See Lowrey, *supra* note 16, at 263 (suggesting that Canada's experience with official bilingualism indicates that it may not be capable of circumventing the political divisions indigenous to language differences); CAIRNS, *supra* note 4, at 120-22 (contrasting the acceptance of the Charter by English Canada and its rejection by French Canada and concluding that it has failed to unify the country as proposed); *id.* at 125-26 (noting that the Charter has failed to weaken Quebec nationalism and consequently has not served as an instrument of unity).

324. See Lowrey, *supra* note 16, at 241 (noting that when Quebec passed Bill 101 it firmly rejected the OLA, and the tradition of bilingualism and linguistic dualism embodied in it); *id.* at 243-45 (noting the resistance of English provinces to the OLA and the problems it has caused for implementation of official bilingualism); SPICER COMMISSION REPORT, *supra* note 63, at 71 (stating that many outside Quebec felt that 25 years of official bilingualism has failed in light of Quebec's plans to separate). This does not mean that linguistic dualism itself has been rejected. See *infra* notes 366-13 and accompanying text (analyzing the government's and Liberal Party's constitutional proposals that recognize the need to articulate dualism).

325. See SPICER COMMISSION REPORT, *supra* note 63, at 68-69, 73-74 (summarizing reaction to official bilingualism).

326. See SPICER COMMISSION REPORT, *supra* note 63, at 115 (citing representatives of official language minority groups as asserting that their rights have not been recognized or enforced); REPORT OF THE CONSTITUTIONAL COMMITTEE OF THE QUÉBEC LIBERAL PARTY, *A QUÉBEC FREE TO CHOOSE 22* (Jean Allaire, January 28, 1991) [hereinafter ALLAIRE REPORT] (arguing that official bilingualism has failed to circumvent the threat of assimilation that confronts many Francophone populations in Canada).

Moreover, French and English Canada appear less willing to accommodate one another, even if this means Quebec separates.<sup>327</sup> Linguistically, separation is already occurring in Canada: Quebec is becoming increasingly unilingual French, while the rest of Canada is becoming increasingly unilingual English.<sup>328</sup> Provincially, the Quebecois now define themselves more in terms of their affiliation to the province and than to Canada.<sup>329</sup> In a more pronounced manner, Quebec's persistent refusal to endorse the Charter and its continuing demands for greater autonomy give witness to the fact that language rights and linguistic dualism have not mitigated its nationalism or unified Canada.<sup>330</sup>

Nor has the narrow definition of multiculturalism inherent in the Charter, which linguistic dualism produces, promoted unity with respect to Canada's ethnic minorities. Ethnic minorities found Charter multiculturalism unsatisfactory on three grounds. First, they claimed, not surprisingly, that the Charter preferentially treated the British and French cultures.<sup>331</sup> In this regard, section 27 did not counteract the suggestion that the Charter's language rights granted a special status to official languages and their cultures.

Second, although the multicultural provision affirmed the value of cultural diversity, the Charter left ethnic minorities without language rights. That result was inevitable in light of linguistic dualism; indeed, the framers intended it. Ethnic minorities, however, were displeased with a multiculturalism that ignored language equality.<sup>332</sup>

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327. See Lowrey, *supra* note 16, at 260-63 (discussing increasing separatism in Quebec, the unwillingness of English-speaking provinces to accommodate Quebec to preserve its place in the federal structure, and weakening support for unity among both English and French Canada); Charles Truehart, *Reform Package Faces Daunting Test in Canada*, WASH. POST, Oct. 25, 1992, at A29 [hereinafter Truehart] (discussing the opposition of both Anglophones and Francophones to the Charlottetown Accord).

328. Lowrey, *supra* note 16, at 246.

329. See Lowrey, *supra* note 16, at 260.

330. See *infra* notes 350-80 and accompanying text (discussing Quebec's refusal to enforce the Charter, its contentious language legislation, and its demands for greater rights and recognition in two recent constitutional accords).

331. See Magnet, *Entrenched Bilingualism*, *supra* note 249, at 173-74 (noting that the Canadian Polish Congress opposed the preferred position provided to the British and French cultures through the Charter).

332. See Alan Cairns & Cynthia Williams, *Constitutionalism, Citizenship and Society in Canada: An Overview*, in *CONSTITUTIONALISM, CITIZENSHIP AND SOCIETY IN CANADA* 1, 26 (Alan Cairns & Cynthia Williams eds., 1985) (stating that the simultaneous attempt to privilege English and French while treating all cultures equally has caused political difficulties, especially among Ukrainians who are displeased with the

Third, ethnic minorities criticized multiculturalism because it lacked an adequate institutional infrastructure that would preserve and enhance their culture<sup>333</sup> and minimize discrimination against them.<sup>334</sup> The Charter's multicultural provision, in other words, had not ensured the cultural equality the drafters intended or ethnic minorities demanded. Thus, deprived of both cultural and linguistic equality, one might say that ethnic minorities rejected linguistic dualism and the narrow definition of multiculturalism in the Charter it produced.

Against the background of these criticisms, ethnic minorities sought greater recognition throughout the 1980s.<sup>335</sup> Canada passed legislation regarding multiculturalism in the late 1980s in response to these criticisms.<sup>336</sup> This legislation affirmed the principle that all Canadians have the right to equal opportunity and equal recognition.<sup>337</sup> It also increased the financial resources available to cultural programs and language instruction.<sup>338</sup> Nevertheless, multiculturalism has neither preserved the cultures and languages of ethnic minorities, nor made equal opportunity for all citizens a reality.<sup>339</sup> Discrimination against ethnic minorities and recent immigrants persists. As a result, ethnic minorities remain dissatisfied with their standing.<sup>340</sup>

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absence of language from multiculturalism).

333. See Breton, *supra* note 40, at 53 (noting that those who saw multiculturalism as a means of maintaining ethnic cultures criticized the lack of institutional support).

334. See STANDING COMMITTEE, *supra* note 41, at 1-2 (concluding that the cultural programs then-existing were marginal and failed to diminish discrimination against minorities or truly advance the institutionalization of multiculturalism and support for ethnic minorities).

335. See BURNET & PALMER, *supra* note 20, at 178-81 (discussing the increasing politicization of ethnic minorities in the 1980s).

336. In 1987, the Standing Committee on Multiculturalism recommended the government promulgate legislation outlining its obligations and institutionalizing multiculturalism. See STANDING COMMITTEE, *supra* note 41, at 27 (recommending that to institutionalize multiculturalism policy, it should be given structural support through an adequate infrastructure); *id.* at 55 (providing a synopsis of the Committee's specific recommendations for a multicultural infrastructure). In response to the Standing Committee's report, Canada passed the Canadian Multiculturalism Act in 1988. See SHERIDAN AND SAOUAB, *supra* note 46, at 15-16 (detailing passage of and developments subsequent to the Act).

337. See SHERIDAN & SAOUAB, *supra* note 46, at 15-16 (quoting section 31 of the Canadian Multiculturalism Act of 1987).

338. See SHERIDAN & SAOUAB, *supra* note 46, at app. (noting that Canada spent approximately \$52 million on multicultural programs in the 1990-91 fiscal year).

339. BURNET & PALMER, *supra* note 20, at 227-28.

340. BURNET & PALMER, *supra* note 20, at 227; see Mario Toneguizzi, *Ottawa*



Lastly, multiculturalism and language rights have not, as the drafters envisioned, contributed to Canada's overall social cohesion. One cannot say that multiculturalism has equipped Canada with a distinct identity or a common set of values, thus encouraging social cohesion. For example, many Canadians accept multiculturalism in principle, but reject government funding of multicultural programs.<sup>341</sup> Others contend that multiculturalism is divisive and weakens a distinct Canadian identity because it accentuates differences, not commonalities between Canadians.<sup>342</sup> Quebec, in particular, resists multiculturalism, preoccupied with its own agenda.<sup>343</sup> Nor is it certain that language serves as a common bond to unite Canadians.<sup>344</sup> Finally, it is evident that the Charter has not supplied Canada with a common set of values that might thereby unite it, to which continual constitutional stalemate attests.<sup>345</sup>

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*Efforts to Promote Multiculturalism "Missing the Boat,"* THE VANCOUVER SUN, June 11, 1994 (citing a study indicating that Canada's policy of multiculturalism has not promoted equal access to the social, political, and economic spheres of Canadian life, and has not preserved cultures).

341. SPICER COMMISSION REPORT, *supra* note 63, at 85-87. See Mario Toneguizzi, *Ottawa Efforts to Promote Multiculturalism Missing the Boat*, THE VANCOUVER SUN, June 11, 1994 (citing a study indicating that Canada's policy of multiculturalism has failed to promote access to the social, political, and economic spheres of Canadian life and has not preserved cultures).

342. See SPICER COMMISSION REPORT, *supra* note 63, at 85, 88-89 (stating that some view multiculturalism as divisive, hyphenates Canadians, and undermines allegiance to traditional Canadian symbols and institutions). Indeed, preserving cultural diversity may undermine social cohesion in that it requires separation within ethnic groups and between ethnic groups and Canadians at large. See, e.g., BURNET & PALMER, *supra* note 20, at 227-28 (stating that multiculturalism could not preserve and enhance cultures because to do so would require separation between groups that Canadians would find neither desirable, nor possible).

343. See *infra* notes 350-80, 452 and accompanying text (discussing Quebec's opposition to the Charter, its demands for greater autonomy, and its opposition to multiculturalism).

344. Although Canada remains primarily English speaking, many immigrants do not learn either English or French. SHERIDAN AND SAOUAB, *supra* note 46 at 3. Succeding generations of immigrants, however, tend to acquire fluency in one of the two official languages. See BURNET & PALMER, *supra* note 20, at 214.

345. See, e.g., CAIRNS, *supra* note 4, English Canada has received the Charter more favorably, viewing it as a symbol of Canadian identity, French Canada has not similarly embraced it. *Id.* at 119-22; Angus Reid, *Troubled Canada*, TORONTO STAR, June 2, 1991, at A14 (discussing a poll citing widespread malaise over the issue of Quebec and constitutional debate, and the common belief that Quebec's separation may threaten cohesion of the country); *infra* notes 414-40 and accompanying text (discussing the failure of two recent constitutional accords to unify Canada).

To recapitulate, the Charter, and the model of language rights and multiculturalism it embodies, has neither ensured equality with respect to ethnic minorities, nor produced unity. The reasons for these shortcomings are manifold. The problem of equality is primarily due to linguistic dualism's influence on the Charter, the constraints it places on the scope of multiculturalism, and the narrow definition of multiculturalism it produces in the Charter. The problem of unity is fundamentally a product of rejection of linguistic dualism, the reluctance of many Canadians to accept multiculturalism as a policy, and the resistance of ethnic minorities to its narrow definition in the Charter. Recent constitutional accords are also problematic from the perspectives of equality and unity. Their difficulties in these regards stem, in large part, from continuing fidelity to linguistic dualism and a narrow definition of multiculturalism.

## VI. RECENT CONSTITUTIONAL ACCORDS

Unrest in Quebec and ethnic tension in Canada continued after the Charter's passage in 1982, and into the early 1990s.<sup>346</sup> This unrest indicates that the Charter's model of language rights and multiculturalism has not successfully served to unify Canada. Recent constitutional proposals have not been any more productive in uniting Canada and in ensuring equality than the Charter. They too incorporate the concept of linguistic dualism and thus perpetuate a narrow definition of multiculturalism. Before turning to these proposals, it is necessary to discuss briefly the social and political milieu in Quebec during, and subsequent to, the Charter's passage.

### A. THE POLITICS OF LANGUAGE AND CULTURE IN QUEBEC

When Canada passed the Charter in 1982, it did so without Quebec's consent.<sup>347</sup> Quebec's National Assembly overwhelmingly rejected the Charter, especially the Charter's new formula requiring the vote of only seven provinces (representing fifty percent of the population) to amend the Constitution.<sup>348</sup> Quebec rejected the Charter because it perceived

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346. See *supra* notes 323-45 and accompanying text; *infra* notes 347-57 and accompanying text.

347. ALLAIRE REPORT, *supra* note 326, at 12.

348. See ALLAIRE REPORT, *supra* note 326, at 12; Beaudoin-Edwards, *supra* note 253, at 5 & n.9 (noting that the National Assembly voted 111 to 9 to reject the Charter and its amendment formula). The amending formula has historically been a

the Charter to threaten its individuality and autonomy.<sup>349</sup>

In what many Canadians perceived to be an affront to the Charter, Quebec maintained legislation mandating the use of French, and restricting the use of English in several different circumstances.<sup>350</sup> Subsequent to the Charter's adoption, Quebec promulgated other contentious language legislation.<sup>351</sup> Quebec has held fast to this legislation, despite its questionable constitutionality under the Charter.<sup>352</sup> Invoking the

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divisive issue in Canada, with Quebec seeking some kind of veto power over constitutional amendments. *Id.* 4-6 (discussing the various amending formulas presented by the government of Canada to Quebec since 1927). The Meech Lake Accord proposed to alter the formula adopted by the Constitution Act of 1982 to secure Quebec's consent to the Constitution. SHAPING CANADA'S FUTURE, *supra* note 47, at 22. When the Meech Lake Accord failed, the government established the Beaudoin-Edwards Special Joint Committee, on January 30, 1991 to study the issue and to devise a new amendment formula. *Id.* at 23; Beaudoin-Edwards, *supra* at 9. That proposed formula, which would require unanimous agreement by the Parliament and all legislatures with respect to certain issues, also failed to garner the support necessary for its adoption. SHAPING CANADA'S FUTURE, *supra* note 47, at 22-3. Nevertheless, the Government was prepared to proceed with the changes if consensus could be had. *Id.* at 25; *see also* Charter, *supra* note 6, sections 38-49 (detailing the existing Amending Formula in the Constitution).

349. CAIRNS, *supra* note 4, at 120-21.

350. *See* Lowrey, *supra* note 16, at 239-243 (outlining Bills 22 and 101, which made French the official language of Quebec). In 1976, Bill 101 passed and provided that French would be the official language in legislation, provincial courts and administration of public services. *Id.*, at 241. It also mandated the use of French in conducting business, limited English language instruction for new immigrants to Quebec, and prohibited signs in only English. *Id.* at 241-42, 252.

351. *See* Peter Maser, *Quebec's Sign Law*. THE OTTAWA CITIZEN, Apr. 22, 1993 at A6 (discussing Bill 178, which banned English and other languages from outdoor commercial signs, and noting that the United Nations found it to violate the International Covenant on Civil and Political Rights, to which Canada is a signatory); Greta Chambers, *Living With Language Compromise May Pay Off in the Long Run*, THE GAZETTE (MONTREAL), Apr. 29, 1993, at B3 (discussing Bill 178's passage, the controversy surrounding signs, and the fading justification for such legislation as the percentage of French-speaking persons in Quebec has dramatically risen); Storer H. Rawley, *Linguistic Rebels Fight Quebec's French-Only Laws*, CHICAGO TRIBUNE, May 2, 1993, at 7 (discussing debate over Quebec's language policy including Bills 101 and 178).

352. *See* A.G. Quebec v. Quebec Protestant School Boards, 2 S.C.R. 66 (1984) (ruling unconstitutional sections 72-73 of Bill 101 which restricted access to English-language instruction in schools to those children who have one parent who had been educated in an English school and presently attend such a school); A.G. Quebec v. *Chaussure Brown's Inc.*, 1 C.A. 80 (1987) (holding Bill 101's prohibition on English signs to violate the constitutional guarantees of linguistic equality).

Charter's notwithstanding clause,<sup>353</sup> Quebec exempted this legislation from compliance with the Charter.<sup>354</sup> Quebec continues to challenge directly the legitimacy of a constitution secured without its consent, which nonetheless remains legally binding on it.<sup>355</sup>

As the above indicates, language continues to be a controversial issue in Canada, and Quebec's place within the confederation remains unsettled.<sup>356</sup> Language rights and Quebec's language legislation during the 1980s and early 1990s are symbolic of a greater concern, and a more pressing agenda Quebec seeks to advance: its autonomy to preserve its distinct culture.<sup>357</sup> Even assuming the Charter resulted in language equality throughout Canada—a result far from clear—one reason the Charter has proven unsatisfactory is that it does not accommodate adequately Quebec's need for cultural autonomy. Recent constitutional proposals have taken on that task, among others, hoping to overcome the constitutional impasse now close to thirty-years in duration.

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353. See *supra* note 154 (describing use of section 33 of the Charter).

354. Lowrey, *supra* note 16, at 249-52. Quebec has employed the notwithstanding clause of the Charter to exempt Bill 101 from the Charter's requirements. *Id.* at 248, 252. It also employed the clause in 1988 to exempt Bill 178 from the Charter and to override a Supreme Court decision finding such legislation unconstitutional under the Charter. *Take Down Quebec Sign Law*, FINANCIAL POST, Apr. 13, 1993, at 14. Quebec chose not to invoke the notwithstanding clause again in 1993, but instead passed Bill 86, which eased the restrictions that Bill 178 had placed on outdoor commercial signs. Kevin Dougherty, *Bilingual Signs Go Back Up on Quebec Stores*, THE FINANCIAL POST, Dec. 23, 1993, at 5; see Jules Deschane, *Beyond Our Solitudes*, THE GAZETTE (MONTREAL), June 1, 1993, at B3 (discussing the details of Bill 86).

355. See Beaudoin-Edwards, *supra* note 253, at 5. The Supreme Court of Canada rejected Quebec's claims that an earlier decision of the Court gave Quebec veto power over the Constitution Act of 1982, and required its vote and unanimous approval by the provinces to patriate the constitution. *Id.*; *Re: Objection to a Resolution to Amend the Constitution*, 2 S.C.R. 793 (Can. 1982).

356. See *supra* notes 61-64 and accompanying text (discussing the conflict over language rights in Canada and Quebec's unsettled status within the country); SPICER COMMISSION REPORT, *supra* note 63, at 125-26 (stating that official bilingualism continues to be an irritant outside Quebec and is not much valued within Quebec).

357. See ALLAIRE REPORT, *supra* note 326, at 56 (stating that initially Quebec was concerned with language equality and has increasingly had to defend its distinct nature); REPORT OF THE GROUP OF 22, SOME PRACTICAL SUGGESTIONS FOR CANADA 18 (1991) (concluding that language difficulties presently emerge not out of bad policy but more out of tensions played out at the symbolic level).

## B. THE MEECH LAKE AND CHARLOTTETOWN ACCORDS

Since passage of the Charter in 1982, the government has proposed two constitutional accords to mollify Quebec and secure its consent to the Charter: the first, in 1987, dubbed the Meech Lake Accord, and the second, in 1992, referred to as the Charlottetown Accord. This comment discusses Meech Lake only briefly here, as other commentators have treated it exhaustively.<sup>358</sup> The following discusses the more recent Charlottetown Accord and proposals preceding it in greater detail.

At Meech Lake, Quebec proposed five conditions for its consent to the Constitution Act of 1982.<sup>359</sup> These five conditions included: 1) recognition of Quebec as a distinct society; 2) greater control over immigration; 3) participation in the appointment of three civil law judges to the Supreme Court; 4) limitations on federal spending; and 5) the right (previously denied) to veto constitutional amendments.<sup>360</sup> Broadly, these conditions sought to affirm not only Canada's linguistic duality, but also Quebec's distinct culture.<sup>361</sup> In particular, the provision recognizing Quebec as a distinct society—commonly referred to as the distinct society clause—granted the Quebec legislature the power to preserve and promote Quebec's distinct culture, and mandated that courts interpret the Charter consistent with recognizing Quebec as a distinct society.<sup>362</sup> Ethnic minorities were barely acknowledged in the constitutional process. It was only after ethnic minorities criticized Meech Lake's dualist conception that Meech Lake's drafters inserted a provision guaranteeing that section 27 would not be derogated.<sup>363</sup>

In April of 1987, the eleven First Ministers of Canada's provinces agreed to these five conditions. To bring Quebec back into the constitutional family, the Parliament and all eleven legislatures had to ratify the Accord by June of 1990.<sup>364</sup> Three years later, the Accord failed to

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358. See generally PETER HOGG, MEECH LAKE CONSTITUTIONAL ACCORD ANNOTATED (1987); KEITH BANTING & RICHARD SIMEON, AND NO ONE CHEERED: FEDERALISM, DEMOCRACY, AND THE CONSTITUTION ACT (1983).

359. ALLAIRE REPORT, *supra* note 326, at 12.

360. ALLAIRE REPORT, *supra* note 326, at 12; see *supra* notes 348-55 (discussing conflict over the constitution's amendment formula).

361. See Lowrey, *supra* note 16, at 249 (quoting language from the Meech Lake Accord that acknowledges the bilingual character of Canada).

362. Lowrey, *supra* note 16, at 249.

363. CAIRNS, *supra* note 4, at 115.

364. ALLAIRE REPORT, *supra* note 326, at 12; Beaudoin-Edwards, *supra* note 253,

achieve the necessary support, rendering it void on June 23, 1990.<sup>365</sup>

Responding to the failure of Meech Lake,<sup>366</sup> the government established the Citizen's Forum on Canada's Future (Spicer Commission) in November of 1990 to reexamine public opinion.<sup>367</sup> In addition, in January of 1992, it founded the Special Joint Committee of the Senate and House of Commons on the Process for Amending the Constitution of Canada (Beaudoin-Edwards) to analyze the amendment formula included in the Constitution Act of 1982 and suggest improvements to it.<sup>368</sup>

At the same time, Quebec's Liberal Party presented its own platform for constitutional renewal (Allaire Report).<sup>369</sup> To Quebec, Meech Lake's failure exemplified English Canada's rejection of linguistic dualism and its reluctance to recognize Quebec as a distinct society.<sup>370</sup> According to Quebec, this state of affairs remained unchanged in the interim.<sup>371</sup> The Liberal Party asserted three arguments in support of this contentions.

First, increases in immigration, it argued, undermined linguistic dualism because immigrants did not adhere to the traditional understanding

at 5.

365. Beaudoin-Edwards, *supra* note 253, at 5. Apparently, the issue of language caused three First Ministers—those of New Brunswick, Manitoba, and Newfoundland—to renege on their earlier agreement to the Meech Lake Accord. Lowrey, *supra* note 16, at 251. In particular, Quebec's refusal to abrogate Bill 178 was one reason Meech Lake failed. Kevin Dougherty, *Bilingual Signs Go Back Up on Quebec Stores*, THE FINANCIAL POST, Dec. 23, 1993, at 5.

366. See Beaudoin-Edwards, *supra* note 253, at 7 (noting that after the failure of the Meech Lake Accord the Government established a citizen's forum and a Special Joint Committee to study the Constitution's amendment formula).

367. SPICER COMMISSION REPORT, *supra* note 63, at 15. The Spicer Commission's mandate was to meet with Canadians from all regions, and all cultural, linguistic, and ethnic backgrounds and discuss a broad range of issues relevant to Canada's future, including the issue official languages, cultural and ethnic diversity, and the Canadian identity. *Id.* at 149-51 (outlining the mandate of the Commission).

368. Beaudoin-Edwards, *supra* note 253, at 9.

369. See ALLAIRE REPORT, *supra* note 326, at 58-62 (summarizing the Quebec Liberal Party's platform for constitutional reform offered on January, 28, 1991). This report became the official policy of the Liberal Party. Robert McKenzie, *Satisfied Bourassa to Attend Meeting on Unity*, TORONTO STAR, July 30, 1992, at A1.

370. See ALLAIRE REPORT, *supra* note 326, at 3 (commenting that Quebec perceived the failure of Meech Lake as a refusal to recognize it as distinct and a rejection of the "principle of equality between the two founding peoples").

371. See ALLAIRE REPORT, *supra* note 326, at 22, 55 (proclaiming that the notion of equality of two founding peoples and recognition of Quebec as a distinct society are rejected by English Canada).

of Canada as a dual culture.<sup>372</sup> Second, and seemingly related, federal support for multiculturalism frustrated recognition of Quebec as a distinct society, which a priori required Quebec to be treated different from, not equal to, other cultural groups.<sup>373</sup> Third, federally-sanctioned bilingualism left Francophones unprotected in many parts of Canada, proving official bilingualism had failed.<sup>374</sup> It is against this background that the Quebec Liberal Party claimed it could not maintain its autonomy and preserve its language and distinct culture, and at the same time remain, within the existing structure of federalism, united to Canada.<sup>375</sup>

Finding the status quo unacceptable, Quebec's Liberal Party sought a constitutional pact that would acknowledge Quebec as a distinct society and foster a robust Quebec economy.<sup>376</sup> To these ends, the Liberal Party proposed to alter the existing form of federalism and, deriving from that, the political and economic relationship between Quebec and Canada.<sup>377</sup> Through such changes, Quebec sought greater autonomy and power, which it held as prerequisites to its development and survival as a distinct society.<sup>378</sup> Included in its platform, the Liberal Party set a

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372. See ALLAIRE REPORT, *supra* note 326, at 13 (arguing that the demise of the historical basis of living together as two founding peoples may be attributed to the large number of new immigrants who have little knowledge of Canada's dual origins).

373. See ALLAIRE REPORT, *supra* note 326, at 23 (contending that multiculturalism works against the Francophone population because it means that Francophones are considered one cultural group among others and objecting to the implication that Francophones should therefore be treated equally).

374. See ALLAIRE REPORT, *supra* note 326, at 22 (noting that despite official bilingualism Francophone populations are threatened with assimilation).

375. See ALLAIRE REPORT, *supra* note 326, at 3, 13, 25 (noting that the failure of Meech Lake means that Quebec cannot survive, remain autonomous, or seek unity within the existing structure of federalism).

376. See ALLAIRE REPORT, *supra* note 326, at 14-24 (criticizing federalism in its then-current form as a barrier to Quebec's development as a distinct society and its determination to assert its autonomy); *id.* at 24-25 (arguing that a new political and economic order and an overhaul of federalism are essential to Quebec's development as a distinct society and a strong Quebec economy).

377. See ALLAIRE REPORT, *supra* note 326, at 25-34 (outlining a new political and economic order thought to foster Quebec's development); *id.* at 35-43 (describing a new federal structure granting Quebec exclusive political autonomy over areas previously and primarily within federal jurisdiction and eliminating federal spending power in areas historically within the purview of the federal government).

378. See ALLAIRE REPORT, *supra* note 326, at 10-11 (describing governmental decentralization, Quebec's demands for greater power, its desire for jurisdiction over cultural matters, and its struggle for greater autonomy as mechanisms by which Quebec can affirm itself, and has emerged, as a distinct society); *id.* at 25-26, 35 (stating

fall 1992 deadline for a referendum on its place within the confederation.<sup>379</sup> Should Canada reject the Liberal Party's proposals, the referendum would concern whether Quebec should become a sovereign state; conversely, if Canada accepted the proposals, then the referendum would relate to their ratification.<sup>380</sup>

Subsequently, in September of 1991, the government referred its constitutional reform proposals to the Special Joint Committee of the Senate and the House of Commons on a Renewed Canada (Special Committee), which was to review them, receive public debate, and offer recommendations.<sup>381</sup> In February of 1992, the Special Committee issued its report on the government's proposals, a report that included Draft Constitutional Amendments.<sup>382</sup>

The Draft Constitutional Amendments (Draft Amendments) encompassed the same broad range of issues as the government's proposals, including composition of the Supreme Court, reform of the Senate, provincial control over immigration, the exercise of federal spending power in areas of exclusive provincial jurisdiction, and intergovernmental socio-economic covenants.<sup>383</sup> Moreover, like the government's proposals, and responding to demands made by aboriginal peoples and Quebec, the Draft Amendments restructured Canada's system of federalism<sup>384</sup> and targeted Canada's relationship to its aboriginal peoples and Quebec.<sup>385</sup>

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that under the existing form of federalism Quebec lacks the power to develop fully as a distinct society and that power must be repatriated to it so that it can do so).

379. See ALLAIRE REPORT, *supra* note 326, at 46-49 (discussing the constitutional negotiation process, the deadline, and the alternative referendums). This referendum was set for October 26, 1992.

380. *Id.*

381. A RENEWED CANADA, *supra* note 40, at 3-4. See SHAPING CANADA'S FUTURE, *supra* note 47 *passim* (describing in detail the Government's proposals to reunite Quebec with Canada and to recognize aboriginal peoples).

382. A RENEWED CANADA, *supra* note 40, at 3-4.

383. Compare SHAPING CANADA'S FUTURE, *supra* note 47, at 51-59 (outlining the Government's proposals) and A RENEWED CANADA, *supra* note 40, at 103-24 (summarizing the Draft Constitutional Amendments).

384. Compare A RENEWED CANADA, *supra* note 40, at 117-22 (summarizing proposed changes in the balance of federal-provincial control over immigration, labor training, and culture, and the extent of the federal spending power) and SHAPING CANADA'S FUTURE, *supra* note 47, at 58-59 (same).

385. Compare A RENEWED CANADA, *supra* note 40, at 17, 22, 27 (commenting that both Quebec and aboriginals need to be included in renewal of the constitution, recognizing Quebec as a distinct society, and acknowledging the rights of aboriginals)



Pertaining to Canada's aboriginal peoples, the Draft Amendments acknowledged the aboriginal peoples' right to self-government, the desirability of their participation in the current constitutional debate, and the need for their increased representation in the federal government.<sup>386</sup> Respecting Quebec, the Draft Amendments, like the government's proposals, advanced two goals: the affirmation of Canada's linguistic dualism and the recognition of Quebec as a distinct society.<sup>387</sup> These two goals represented a consensus among those who appeared before the Special Committee,<sup>388</sup> clearly motivating many of the proposed Amendments.<sup>389</sup>

The Draft Amendments included a number of provisions to recognize Quebec as a distinct society and to affirm Canada's linguistic duality and the concept of linguistic dualism. They granted special status and rights to Quebec in the Canada clause,<sup>390</sup> the distinct society

and SHAPING CANADA'S FUTURE, *supra* note 47, at vi (same).

386. See A RENEWED CANADA, *supra* note 40, at 27-34, 107-09 (discussing Canada's aboriginal peoples and presenting a series of proposals concerning them); see also SHAPING CANADA'S FUTURE, *supra* note 47, at 6-8, 51-52 (same).

387. Compare A RENEWED CANADA, *supra* note 40, at 22-27, 106-07 (referencing the fact of Quebec's distinctiveness and Canada's linguistic dualism, the need to recognize both features, and the proposed distinct society clause of section 25(1) and Canada Clause as mechanisms for doing so) and SHAPING CANADA'S FUTURE, *supra* note 47, at 5-6, 9-12, 51-52 (stating that Quebec's distinctiveness and Canada's linguistic dualism should be recognized and proposing two constitutional amendments to that end).

388. See A RENEWED CANADA, *supra* note 40, at 26 (commenting that most witnesses before the Committee thought it necessary to recognize both linguistic duality and Quebec's distinctiveness).

389. See A RENEWED CANADA, *supra* note 40, at 43-44, 77-78 (commenting that Canada's duality and Quebec's special needs must be considered in the constitutional process and noting their relevance with respect to reform of the Senate, provincial jurisdiction over cultural matters, and the relationship between the federal government and Quebec).

390. A RENEWED CANADA, *supra* note 40, at 106. The Canada clause noted "the special responsibility of Quebec to preserve and promote its distinct society," acknowledged the French, British, Aboriginals, and peoples from other nations as Canada's forebears, and commented that Quebec had flourished "as a distinct society within Canada". *Id.* The Draft Amendment's Canada clause differed from the Government's proposed version in that it did not include any reference to the responsibility of governments to preserve Canada's two minority linguistic groups. Compare *id.* (stating Canada has a "commitment to the vitality and development of official language minority communities") with SHAPING CANADA'S FUTURE, *supra* note 47, at 52-53 (stating that it is the "responsibility of governments to preserve Canada's two linguistic majorities and minorities").

clause,<sup>391</sup> and an amendment on Quebec's cultural autonomy.<sup>392</sup> Symbolically, the Canada and distinct society clauses acknowledged official language minorities throughout Canada, and thereby affirmed linguistic dualism.<sup>393</sup> Concretely, the proposed distinct society clause required the Charter to be interpreted consistent with preserving Quebec as a distinct society and developing official language minorities throughout Canada. According to the Special Committee, this would reassure Quebec and official language minorities about their position within the Canadian federation.<sup>394</sup> In stark contrast to these proposed amendments, the Draft Amendments only briefly considered the issue of cultural diversity, multiculturalism, and how to accommodate Canada's ethnic minorities within the constitution.<sup>395</sup>

On August 28, 1992, delegations representing each of the provinces and the Canadian government met at Charlottetown to formulate the Draft Legal Text (Text) of the Amendments.<sup>396</sup> The Text largely ad-

391. A RENEWED CANADA, *supra* note 40, at 107. The distinct society clause in the Draft Amendments read:

25 (1) This Charter shall be interpreted in a manner consistent with -

(a) the preservation and promotion of Quebec as a distinct society within Canada; and

(b) the vitality and development of the language and culture of French-speaking and English-speaking minority language communities throughout Canada.

(2) For the purposes of subsection (1), "distinct society" in relation to Quebec, includes

(a) a French-speaking majority;

(b) a unique culture; and

(c) a civil law tradition.

*Id.*

392. See A RENEWED CANADA, *supra* note 40, at 118 (adding section 93B to the Constitution thereby granting Quebec the exclusive authority to regulate cultural matters within the province).

393. See, e.g., *supra* note 387 and references cited therein; A RENEWED CANADA, *supra* note 40, at 26 (stating that recognition of official language minorities could be had through a constitutional provision embodying the idea of linguistic dualism).

394. A RENEWED CANADA, *supra* note 40, at 25-26.

395. Compare A RENEWED CANADA, *supra* note 40, at 106 (recognizing within the proposed Canada clause the "irreplaceable value of our multicultural heritage" and acknowledging that people from many other nations were among Canada's forebears) with *id.* at 107-10, 118-20 (discussing in several separate proposed amendments a variety of rights for and recognition of Quebec and Canada's aboriginal peoples). The Liberal Party also only scantily recognized ethnic minorities, promising to respect the rights of ethnocultural groups to preserve and promote their distinctiveness, while encouraging their integration in Quebec. ALLAIRE REPORT, *supra* note 326, at 31-32.

396. Draft Legal Text, Charlottetown Accord of August 28, 1992 (Oct. 9, 1992)

dressed the same breadth of issues and incorporated many of the suggested provisions the Draft Amendments contained including: Senate reform; the Supreme Court makeup; aboriginal self-government; and intergovernmental social and economic covenants.<sup>397</sup> Similarly, the Text recognized Quebec as a distinct society and articulated a commitment to official language minorities and linguistic dualism.<sup>398</sup> Finally, the Text, like the Draft Amendments, only attended slightly to ethnic minorities, citing Canada's commitment to racial and ethnic equality and the contributions of its diverse peoples.<sup>399</sup>

The Text, however, varied from the Draft Amendments, the government's proposals, and the Quebec Liberal Party's platform in two ways. First, the Text did not separately include provisions recognizing Quebec as a distinct society, affirming linguistic dualism, and acknowledging official language minorities, as had the government's proposals and Draft Amendments.<sup>400</sup> Rather, the Text included an altered version of the Draft Amendments' distinct society clause within the Canada clause itself, and moved both to the main body of the constitution.<sup>401</sup>

(on file with the author).

397. Compare Draft Legal Text, *supra* note 396, at 3-13, 16, 24-26, 31, 37-46 (detailing Senate and House of Commons Reform, provincial control over cultural matters, Quebec representation in the Supreme Court, self-government and other issues related to aboriginals, and social-economic covenants) and A RENEWED CANADA, *supra* note 40, at 40-58, 107-09, 118, 122 (same).

398. Compare Draft Legal Text, *supra* note 396, at 1-2 (recognizing within the Canada clause Quebec as a distinct society, Quebec's role to preserve its distinct society, and Canada's commitment to the vitality of its official language minorities) and A RENEWED CANADA, *supra* note 40, at 106-07 (recognizing Quebec's distinctiveness and Canada's linguistic duality in proposed section 25.1 and the Canada clause); see also SHAPING CANADA'S FUTURE, *supra* note 47, at 51-53 (same).

399. Draft Legal Text, *supra* note 396, at 1, § 2(e).

400. Compare Draft Legal Text, *supra* note 396 at 1-2 with A RENEWED CANADA, *supra* note 40, at 106-07 and SHAPING CANADA'S FUTURE, *supra* note 47, at 51-53.

401. The Canada clause in the Charlottetown Accord read:

- (1) The Constitution of Canada, including the Canadian *Charter of Rights and Freedoms*, shall be interpreted in a manner consistent with the following fundamental characteristics: (c) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition; (d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada; . . .
- (2) The role of the legislature and Government of Quebec to preserve and promote the distinct society of Quebec is affirmed.

Draft Legal Text, *supra* note 396, at 1-2. Compare *supra* notes 390-91 (quoting the text of the Canada and distinct society clauses in the Draft Amendments).

The newly-worded distinct society clause, which was incorporated into the Canada clause, mandated that courts interpret the entire constitution, not only the Charter, consistent with recognizing Quebec as a distinct society and with acknowledging Canada's commitment to official language minorities.<sup>402</sup> Moreover, the Canada clause noted Quebec's role in promoting and preserving its distinct society.<sup>403</sup> These changes, arguably, went even further than the distinct society clause included in the government's proposals and Draft Amendments: they provided Quebec with the autonomy to preserve its distinct culture.<sup>404</sup>

The second way the Text varied from the Draft Amendments concerns provincial equality. The Text's Canada clause explicitly set forth the principle of provincial equality.<sup>405</sup> In addition, the Text changed the structure of Canada's federalism, changes made equally applicable to all provinces—not only to Quebec.<sup>406</sup> The changes to federalism included:

402. Compare *supra* note 391 (quoting the distinct society clause in the Draft Amendments) with *supra* note 401 (quoting the newly-worded distinct society clause included within the Canada clause itself). The change in wording was clearly an objective of Quebec Premier Bourassa. See William Johnson, *A Heavy Price: Ottawa Gave Away Much to Get Bourassa Back*, THE GAZETTE (MONTREAL), July 30, 1992, at B3 (noting that a new clause requiring the entire constitution be read in light of Quebec's distinct society had been an objective of Bourassa).

403. See *supra* note 401 (quoting the Canada clause in the Draft Legal Text). The Text's Canada clause did not mandate, as had the Draft Amendments, that the Charter be interpreted to preserve and promote Quebec as a distinct society. Compare *supra* note 391 (quoting the text of the distinct society clause contained in the Draft Amendments). In this sense, one might argue that it relieved the government of any obligation to preserve Quebec as a distinct society.

404. See, e.g., Terrance Wills, *Distinct Division, Little Support for New Canada Clause*, THE GAZETTE (MONTREAL), Aug. 1, 1992, at A9 (noting that critics say the new clause will increase Quebec's ability to promote its distinct society); Philip Authier, *Bourassa Will Go to Lunch*, THE GAZETTE (MONTREAL) July 30, 1992, at A1 (stating that the new distinct society clause is more explicit in granting Quebec the right to promote itself). These changes essentially restored the wording included in the Meech Lake Accord. See Julian Beltrame, *Ghost of Meech Lake Rears its Head*, CALGARY HERALD, at A3 (noting that the new distinct society clause restored the controversial wording included in the Meech Lake Accord).

405. See Draft Legal Text, *supra* note 396, at 1 (including within the Canada clause section (h), which "confirm[s] the principle of equality of the provinces"). The principle of provincial equality was only implicit in some of the federal government's proposals. See SHAPING CANADA'S FUTURE, *supra* note 47, at 57-59 (stating that the government will negotiate with any province over immigration, culture, training, and noting areas of exclusive provincial jurisdiction).

406. Compare ALLAIRE REPORT, *supra* note 326, at 60-61 (summarizing the Liberal Party's demands for exclusive or shared control over specific areas of political

1) granting provinces a major role in regulating their cultural matters;<sup>407</sup> 2) delegating areas within exclusive provincial authority, such as tourism, housing, and urban affairs;<sup>408</sup> and 3) providing a mechanism by which provinces and the federal government could agree on the withdrawal of federal spending,<sup>409</sup> provincial control over labor development,<sup>410</sup> and a role in immigration.<sup>411</sup>

The Liberal Party's proposals, in contrast to the Text, diverged from provincial equality, inasmuch as the Party sought special status and political autonomy for Quebec within a newly-constituted system of federalism.<sup>412</sup> Although the Text recognized Quebec as a distinct society and affirmed linguistic dualism, it did not adopt the Liberal Party's proposed changes to federalism that treated provinces unequally. In this way, the Text did not grant Quebec as great a distinct society status or as much autonomy as it had sought.

In sum, the Liberal Party's platform, the government's proposals, the Draft Amendments, and the Charlottetown Accord's Text reflect the continuing influence of linguistic dualism on Canada's constitution-making and Canada's fidelity to linguistic dualism as a method of building unity and ensuring equality. These constitutional documents symbolically and concretely recognized Quebec as a distinct society, affirmed

concern, including immigration, culture, and other matters) with Draft Legal Text, *supra* note 396, at 15-16 (summarizing changes regarding immigration, culture, labor, and other areas to be within the exclusive provincial control of *all* provinces).

407. Compare Draft Legal Text, *supra* note 396, at 16 (maintaining the government's role in relation to national cultural matters while providing that all provinces could exclusively make laws regarding culture) with A RENEWED CANADA, *supra* note 4, at 118 (granting only Quebec exclusive authority over culture).

408. See Draft Legal Text, *supra* note 396, at 17 (mandating certain matters to be within the control of all provinces).

409. See Draft Legal Text, *supra* note 396, at 17-18 (providing that agreements may be negotiated concerning federal spending but that all provinces would be treated equally when engaging in like negotiations).

410. See Draft Legal Text, *supra* note 396, at 19-20 (allowing the provinces to negotiate an agreement with the government to withdraw from programs relating to labor development and requiring that all provinces be treated equally with respect to the terms and conditions of any such agreements).

411. See Draft Legal Text, *supra* note 396, at 22 (providing that provinces may negotiate agreements concerning immigration with the government and would be treated equally with respect to the terms and conditions of any other such agreement concluded with other provinces).

412. See ALLAIRE REPORT, *supra* note 326, at 58-62 (outlining Quebec's proposals for a new political and constitutional structure that would grant it autonomy and recognize it as a distinct society).

Canada's commitment to the vitality and development of its official language minorities, and acknowledged Quebec's role in preserving and promoting its distinct society. Moreover, each validated the privileged language rights and preferred cultural status official language minorities enjoy in the Charter. The paucity of provisions relating to ethnic minorities in the foregoing formal and informal constitutional proposals represents the persistent disparity between the rights and status afforded official language minorities relative to ethnic minorities. In effect, these constitutional proposals unchanged the narrow definition of multiculturalism in the Charter.

The foregoing formal and informal constitutional proposals considered much Quebec's demand for distinct society status and official language minorities' desire for greater protection. By contrast, these proposals hardly contemplated the criticisms of ethnic minorities.<sup>413</sup> Thus, as with the RCBB and the Charter, considering the ethnic minority agenda was, once again, an afterthought in the constitution-making process. Instead, Canada remained preoccupied with responding to the demands of official language minorities generally, and Quebec in particular.<sup>414</sup>

As seen in more detail in what follows, Canada's allegiance to linguistic dualism, the persistent disparity of rights and status between ethnic minorities and official language minorities, and the narrow definition of multiculturalism that recent formal and informal constitutional proposals perpetuate remains problematic. The model of language rights and multiculturalism they encompass did not ensure equality as to ethnic minorities or produce national unity.<sup>415</sup> Opposition to linguistic dualism and, more importantly, the distinct society clause demonstrates these inadequacies.

### C. OPPOSITION TO THE DISTINCT SOCIETY CLAUSE AND LINGUISTIC DUALISM

The major factor causing the breakdown of the Meech Lake and Charlottetown Accords appears to lie within broad opposition to the

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413. See *supra* text accompanying notes 363, 368-411 (analyzing the Meech Lake Accord, Liberal Party's Platform, government's proposals, Draft Amendments, and Charlottetown Accord Text).

414. See *supra* notes 86-91, 126-27 and accompanying text (noting that it was only after pressure from ethnic minority groups that Canada considered ethnic minorities in the RCBB or the Charter).

415. See *infra* notes 416-46 and accompanying text (discussing rejection of the Charlottetown and Meech Lake Accords in view these characteristics).

distinct society clause. Official language minorities, Aboriginals, ethnic minorities, nationalists, and Canadians at large roundly condemned the distinct society clause. Also prominent in the Accords' failure was the reluctance of Canadians outside Quebec, ethnic minorities, and Aboriginals to providing Quebec with a preferred status and special rights, that is, to linguistic dualism.

Canadians outside Quebec rejected the distinct society clause and, more broadly, any special status or rights for Quebec in that direction. Many Canadians perceived the distinct society clause to grant Quebec a preferred status over other provinces.<sup>416</sup> Canadians could not reconcile that preferred status with the principle of provincial equality.<sup>417</sup> Canadians outside Quebec were unwilling to compromise that principle for the sake of Quebec's continued participation in the confederation, even if they agreed that Canada should somehow recognize Quebec's distinct culture.<sup>418</sup> Unity between Canada and Quebec was desirable, but, in the view of many, could not be secured by providing Quebec with power other provinces did not share. Provincial equality, then, was a pre-condition to any constructive agreement.<sup>419</sup> Both the Meech Lake and Charlottetown Accords contravened that principle to the extent they designated Quebec as a distinct society, and provided it with special rights and a status not granted to other provinces. Both Accords were rejected, then, as a consequence.<sup>420</sup>

There are two other reasons why many Canadians outside Quebec

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416. See CAIRNS, *supra* note 4, at 119 (noting that antagonism to designation of Quebec as a distinct society derives from the preferential rights it implies the Québécois should enjoy).

417. See SPICER COMMISSION REPORT, *supra* note 63, at 51-52 (commenting that many Canadians felt that the principle of provincial equality is antagonistic to the notion that Quebec should be afforded a preferred status).

418. See SPICER COMMISSION REPORT, *supra* note 63, at 53-56 (stating that many Canadians were unwilling to grant Quebec a status that would come at the expense of equality for other provinces among Canadians who otherwise acknowledge that Quebec's distinctiveness should be recognized).

419. See SPICER COMMISSION REPORT, *supra* note 63, at 55, 58 (noting that while unity was favored by many, equality was viewed as a pre-condition to the effort to keep Canada united).

420. See SPICER COMMISSION REPORT, *supra* note 63, at 53-56 (commenting that allegiance to the idea of provincial equality was the primary factor in rejection of the Meech Lake Accord); Mark Tait, *Equality an Issue*, CALGARY HERALD, at A2, Oct. 27, 1992 (noting that many Canadians voted no to the referendum on the Charlottetown Accord because they felt it gave special powers to Quebec that compromised the idea of provincial equality).

rejected the distinct society clause and the special rights and status for Quebec it afforded. First, many perceived Canada to have accommodated considerably Quebec, while Quebec asked for too much and gave far too little in return in the constitutional process.<sup>421</sup> Second, the distinct society clause appeared to grant Quebec the power, in preserving its distinctiveness as a French-speaking province, to override the rights of English-language minorities within the province.<sup>422</sup> Coupled with Quebec's restrictive language legislation, that prospect cultivated opposition to the distinct society clause, any special status and rights it included, and more generally, the linguistic dualism and the federal policy of official bilingualism.<sup>423</sup>

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421. See Lowrey, *supra* note 16, at 255 (noting that many Canadians feel English Canada has gone out of its way to accommodate bilingualism and Quebec's demands, and feel that further rights to Quebec should not be extended); Truehart, *supra* note 327, at A29 (stating that Westerners opposed the Charlottetown Accord because they perceived it as a "giveaway" to Quebec); SPICER COMMISSION REPORT, *supra* note 63, at 51, 58 (stating that two decades of working towards bilingualism were perceived as a major effort to accommodate Quebec, and that its language laws, particularly Bill 178, were symbolically contemptuous of that effort).

422. See Lowrey, *supra* note 16, at 253 (noting the concern felt by English Canada when the Quebec government overruled a Supreme Court decision); William Johnson, *A Heavy Price: Ottawa Gave Away Much to Get Bourassa Back*, THE GAZETTE (MONTREAL), July 30, 1992, at B3 (remarking that the clause is descriptive not prescriptive with respect to language minorities and that Quebec may easily override their rights, as it has done in the past).

423. See Lowrey, *supra* note 16, at 244, 249-53 (discussing Quebec's vigilance for promoting its Francophone character through legislation and the resulting Anglophone opposition to the distinct society clause and to bilingualism); SPICER COMMISSION REPORT, *supra* note 63, at 51-52 (stating that in the minds of many there was little reason to negotiate a special status for Quebec when it had already demonstrated that it was treating some of its citizens less equally than others); *id.* at 67 (commenting that English-speaking Quebecois felt Bill 178 threatened their freedom of expression and was unnecessary to protect the French language in Quebec); Kevin Dougherty, Bilingual Signs Go Back Up on Quebec Stores, THE FINANCIAL POST, at 5, Dec. 23, 1993 (noting that some premiers feared that granting Quebec distinct society status as proposed in Meech Lake would permit Quebec to abuse its Anglophones). One indication of the opposition to bilingualism and the distinct society clause in the Meech Lake Accord is the English-only resolutions that arose in various municipalities of the country in the late 1980s. See Lowrey, *supra* note 16, at 254 (noting that forty-three municipalities declared themselves English-only during the 1987 to 1990 period in response to the distinct society clause and Quebec's Bill 101). The clause in the Meech Lake Accord also reignited controversy over Quebec's Bill 101, which mandated the use of English on public and commercial signs in Quebec and limited access to English language education for immigrants to Quebec. *Id.* at 251-53.



Ethnic minorities criticized the distinct society clause for its preferential treatment of official language minorities and Quebec.<sup>424</sup> They condemned the definition of Canada as a dual culture inherent in proposals recognizing Quebec as a distinct society; in its stead, ethnic minorities sought an expanded definition of Canada that would include them.<sup>425</sup> In other words, they objected to linguistic dualism. Ethnic minorities also demanded equal status in the Accords vis-a-vis official language minorities, and insisted on parity, in the constitution-making process, between multiculturalism and official bilingualism.<sup>426</sup>

Aboriginals similarly objected to the distinct society clause and the concept of linguistic dualism propelling it.<sup>427</sup> In the wake of Meech Lake and during debates on the Charlottetown Accord, they rejected the position that only Quebec deserved designation as a distinct society.<sup>428</sup> Aboriginals reasoned that they too constitute a distinct society in Canada and, as such, merit the special status, rights, and autonomy Quebec had demanded.<sup>429</sup> Canadians widely agreed with these sentiments, under-

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424. See Hosein, *supra* note 109, at 615 (quoting a minority representative regarding the Meech Lake Accord as criticizing the constitution for preferring official language minorities over other ethnic minorities and arguing that all groups should be equal).

425. See CAIRNS, *supra* note 4, at 111 (commenting that Meech Lake Accord's reliance on the traditional dualist definition of Canada resulted in confrontation with Canada's newer ethnic agenda); SPICER COMMISSION REPORT, *supra* note 63, at 71-72 (stating that the concept of "two founding nations" was attacked because it ignored aboriginals as a founding people and the multicultural character of Canada); *id.* (acknowledging those who argued that the founding nations concept be expanded beyond the French-English definition).

426. CAIRNS, *supra* note 4, at 111.

427. See CAIRNS, *supra* note 4, at 111 (noting that aboriginal and non-"founding" Canadians have objected to the dualist definition of Canada inherent in proposals to position Quebec as a distinct society and the lack of a similar recognition of Canada's multicultural character); Beaudoin-Edwards, *supra* note 253, at 16-17 (summarizing aboriginals' testimony before the Beaudoin-Edwards Committee in which aboriginals noted their disagreement with any description of the founding peoples that does not include them); Beltrame, *supra* note 404, at A3 (stating that in a "replay of Meech Lake" Francophones outside Quebec and aboriginals encouraged opposition to the distinct society clause); see also Johnson, *supra* note 316, *passim*.

428. Chambers, *supra* note 351, at B3 (commenting that Ovide Mercredi fought against distinct society for Quebec unless aboriginal peoples also were recognized as distinct).

429. See Anthony Wilson-Smith, *Challenges for a New Leader*, MACLEAN'S, June 21, 1993, at 18 (commenting that the process leading to the Charlottetown Accord highlighted the problems of Natives and increased their desire for greater recognition).

standing Aboriginals as equally an important founding group as the French or British.<sup>430</sup>

In Quebec, nationalists criticized the distinct society clause in the Charlottetown Accord for not going far enough in recognizing Quebec as a distinct society.<sup>431</sup> Nationalists noted that other features of the Accord threatened the conception of Canada as a nation comprised of two founding cultures—French and British—upon which any proposed constitutional reform should be based.<sup>432</sup> Additionally, nationalists found the distinct society clause, and more generally the Charlottetown Accord, flawed not because they upset provincial equality; rather, they were faulty because they did not adequately guarantee Quebec the power essential for it to flourish alongside the dominant culture in Canada.<sup>433</sup>

Quebec's English-language minorities argued that the Accord's clause exempted provincial governments from a meaningful responsibility to protect official language minorities, and therefore, threatened them.<sup>434</sup> As they had during Meech Lake, Quebec's English-language minorities

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430. See SPICER COMMISSION REPORT, *supra* note 63, at 74-85 (summarizing that a majority of Canadians agree that Aboriginals are a distinct society that has not been adequately recognized but which is as much a founding people as the French or British and should be afforded a degree of self-government).

431. See Authier, *supra* note 402, at A1 (summarizing the criticisms of nationalists who argued that the new distinct society clause was "watered down").

432. See Sarah Scott, *New Senate Will Give Clout to Small Provinces*, THE GAZETTE (MONTREAL), Sept. 30, 1992, at A9 (citing the Parti Quebecois as complaining that proposed reform of the Senate in the Charlottetown Accord would undermine the principle of Canada as comprised of two founding nations).

433. See *Strange Kind of Win to Leave So Much Lost*, CALGARY HERALD, at A4, Oct. 27, 1992 (noting the division between those outside Quebec who believed that the Accord went too far in recognizing Quebec, undermining provincial equality, and those within Quebec who sensed the Accord did not go far enough in protecting them, and preserving the vision of a country of two founding nations); Fred Langan, *Mulroney Warns of Nation's Breaking*, THE DAILY TELEGRAPH, at 10, Sept. 30, 1992 (commenting that many in Quebec were against the Charlottetown Accord because they felt that the province did not gain enough new powers while many outside Quebec, particularly the Western provinces, felt that the Accord went too far and treated Quebec unlike other provinces).

434. See Authier, *supra* note 402 (quoting Alliance Quebec as stating that the rewritten clause "weakens the commitment of government to protect minorities" and noting Anglophones criticized the new distinct society clause because it did not do enough to sustain them); see also William Johnson, *A Heavy Price: Ottawa Gave Away Much to Get Bourassa Back*, THE GAZETTE (MONTREAL), July 30, 1992, at B3 (arguing that the clause, even with language citing governmental responsibility to protect official language minorities did not restore such responsibility).

hesitated to accept the distinct society clause because they feared Quebec would use it to repress them.<sup>435</sup> Outside Quebec, official language minorities similarly criticized the distinct society clause in the Charlottetown Accord, claiming it gave too little constitutional protection to their rights in contrast to what the Accord proposed for Quebec.<sup>436</sup> More generally, they sought collective rights to protect themselves as a group.<sup>437</sup>

Coming from so many quarters, opposition to the distinct society clause—either on the basis that it went too far or not far enough—and, more narrowly, linguistic dualism, surfaces as the prominent factor in the collapse of the Meech Lake Accord in 1990<sup>438</sup> and the Charlottetown Accord in 1992.<sup>439</sup> In particular, ethnic minorities rejected the Accords because of the model of language rights and multiculturalism they embraced.<sup>440</sup> These Accords adhered to linguistic dualism and the

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435. See Lowrey, *supra* note 16, at 253; Greta Chambers, *Back at the Beginning: Groping for a Consensus Takes Time*, THE GAZETTE (MONTREAL), July 30, 1992, at B3 (stating that many Anglophone and other non-Francophone Quebecois were reluctant to embrace the new distinct society clause—eventually adopted at Charlottetown—because they felt it might be used against them).

436. See Alex Paterson, *Protection: Don't Let Governments Forsake Minority Rights*, THE GAZETTE (MONTREAL), July 30, 1992, at B3 (noting the distinct society clause included only a commitment by Canadians to minorities, not any government responsibility, and arguing that official language minorities are a fundamental characteristic of Canada making necessary the constitutionalization of their rights); Wills, *supra* note 404, at A9 (citing critics who claimed that the clause weakens protection of official language minorities in Canada).

437. Greta Chambers, *Enshrining Collective Rights Would Benefit Quebec Anglos*, THE GAZETTE (MONTREAL), at B3, Dec. 19, 1991 (noting that francophones outside Quebec pressed for collective representation and arguing that collective rights are essential if Canada's language minorities outside Quebec are to be included in the constitutional negotiations).

438. See Lowrey, *supra* note 16, at 256-58 (discussing the breakdown of support for the Accord among Canada's first ministers because of the distinct society clause and Bill 101); Wills, *supra* note 404, at A9 (noting that opposition to the distinct society clause led to the defeat of Meech Lake in June 1990).

439. See Clyde H. Farnsworth, *Canadians Reject Charter Changes*, N.Y. TIMES, Oct. 27, 1992, at A1 (commenting on the failure of the Charlottetown Accord); Julian Beltrame, *Accord Suffers Massive Rejection*, CALGARY HERALD, at A5, Oct. 27, 1992 [hereinafter Beltrame, *Accord Suffers*] (discussing the vote on the Charlottetown Accord and reasons for the Accord's failure); *supra* note 433 and sources therein cited (discussing the division between English and French Canada on the distinct society clause).

440. See *supra* notes 353-59, 363, 393-411, 424-26 and accompanying text (outlining the terms of the Meech Lake and Charlottetown Accords and highlighting ethnic

policy of multiculturalism within a bilingual framework.<sup>441</sup> They did not extend language rights to ethnic minorities. Instead, they maintained the disparity between the language rights and cultural status the Charter affords official language minorities as compared to ethnic minorities.<sup>442</sup> Likewise, the Accords sustained the narrow definition of multiculturalism inherent in the Charter.<sup>443</sup> They did not entertain, much less provide, parity between multiculturalism and bilingualism, which ethnic minorities had requested. In fact, the distinct society clause explicitly gave one culture a status above all others.<sup>444</sup> Failing to advance either linguistic or cultural equality, and leaving linguistic assimilation in place, the Accords conflict with the egalitarian definition of multiculturalism.<sup>445</sup>

Having found this model of language rights and multiculturalism unacceptable in the Charter, it is unsurprising that Canadians in general, and ethnic minorities in particular objected to the recent constitutional accords. Canada's model of language rights and multiculturalism, which linguistic dualism and the narrow definition of multiculturalism characterize, is a flawed response to preserving Canada's linguistic and cultural diversity and a outdated means of accommodating the demands of Quebec and ethnic minorities to build unity. This model is neither a useful guiding principle to Canada's constitution-making, nor a vehicle serving to unify the country or promote equality.

What remains extant are the issues related to accommodating Quebec, ethnic minorities, and Aborigines.<sup>446</sup> Clearly, then, a different model

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minorities' rejection of these Accords).

441. CAIRNS, *supra* note 4, at 111. See Hosein, *supra* note 109, at 611 (commenting that Canada remained committed to multiculturalism within a bilingual framework in the 1987 Meech Lake proposal).

442. See *supra* text accompanying notes 286-96, 331-32, 424-26 (discussing the disparity in rights and status produced in the Charter and recent constitutional accords).

443. See *supra* text accompanying notes 275-308, and p. 74 (summarizing how the narrow definition of multiculturalism is incorporated into the Charter and recent constitutional proposals).

444. See *supra* text accompanying notes 359-63, 398-404, 415-30 (outlining the distinct society clause in the two accords and discussing opposition to the clause because of the preferred status accorded Quebec).

445. See *supra* notes 275-308 and accompanying text (discussing the egalitarian definition and analyzing the Charter with respect to it).

446. See Beltrame, *Accord Suffers*, *supra* note 439, at A5 (noting that preexisting grievances and unfilled aspirations remain in light of the failure of the Charlottetown Accord); *Strange Kind of Win to Leave So Much Lost*, CALGARY HERALD, at A4, Oct. 27, 1992 (commenting that Canada remains torn by ethnic resentment and re-

is essential for the continued viability of the Canadian federation. At a minimum, that model must better account for two constitutional agendas: one Quebec advances, seeking greater rights and autonomy; the other ethnic minorities present demanding, as a defining characteristic of a new Canada, recognition of multiculturalism equal to that Canada has traditionally bestowed upon language rights (and Quebec) in the constitution-making process.

The exegesis below discusses how one can interpret the existing constitutional framework to account for the ethnic minority agenda. It does not speak to the issue of Quebec and resolving the constitutional impasse with respect to it. Others have already discussed this.<sup>447</sup> In this regard, the following recommendations are certainly limited. Nevertheless, moving in the direction of equality for ethnic minorities is an improvement over the status quo in which ethnic minorities do not enjoy equal rights and status respecting language and culture. Moreover, given that the demands of ethnic minorities are typically an afterthought in Canada's constitution-making process, as Canada's constitution-making history demonstrates, special attention to the issue of how Canada can accommodate ethnic minorities is merited.

## VII. RECOMMENDATIONS

If the Charter or any constitutional proposal is to promote unity between ethnic minorities and Canada, and equality between ethnic minorities and official language minorities then it will have to circumvent linguistic dualism, the policy of bilingualism within a bilingual framework, and the narrow definition of multiculturalism inherent in the Charter.<sup>448</sup> In other words, a different model of language rights and

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gional divisions); Jean-Claude LeClerc, *Spooked: Liberals Avoiding Phantom of the Commons*, THE GAZETTE (MONTREAL), Jan. 24, 1994, at B3 (discussing the why issue of aboriginal self-government remains); Jack Aubry, *Quebec Separation*, THE OTTAWA CITIZEN, May 19, 1994, at A1 (citing the comments of Quebec's Cree leader that should Quebec separate it stands ready to protect its land and autonomy); Charles Truehart, *Liberals Are Stumbling on Quebec Separatism*, WASH. POST, May 22, 1994, at A27 (discussing the political troubles confronting the Liberal Party in the Fall 1994 Quebec provincial elections and the plan of the Parti Quebecois to call a province-wide referendum on separation should it receive a majority of the seats in the election); Craig Turner, *Quebec's Freedom Fighter*, L.A. TIMES, July 30, 1994, at A1, A12 (discussing the possibility that the Parti Quebecois will win the Fall 1994 Quebec election and its serious intentions regarding separation).

447. Cairns, *supra* note 4 *passim*.

448. See, e.g., Hosein, *supra* note 109, at 618-20 (suggesting that the notion of

multiculturalism, and a different approach to constitution-making is essential. The egalitarian definition of multiculturalism is suggestive, but by no means definitive of what is necessary to accomplish this task. First, it suggests that one diminish (if not eliminate) the disparity in rights and status the Charter affords ethnic minorities vis-a-vis official language minorities. Second, it intimates that one provide ethnic minorities a degree of collective rights, affirmative measures, and an institutional infrastructure through which to preserve and promote their culture and language. These suggestions might advance equality and unity, and thus, serve the purposes the Charter's supporters envisioned. What I do not propose is that Canada adopt fully the egalitarian definition, such as the requirement of linguistic pluralism, as doing so may be counter productive.

#### A. REWRITING THE CHARTER TO PROVIDE ETHNIC MINORITIES WITH LANGUAGE RIGHTS

The most obvious response to ethnic minorities' criticism regarding their disparate treatment in the Charter and recent constitutional accords would be to grant them language rights comparable to those the Charter already provides to official language minorities.<sup>449</sup> Arguably, the Charter's language rights are necessary to protect official language minorities.<sup>450</sup> It is equally evident, however, that ethnic minorities deserve similar rights to the extent that they too are disadvantaged and discriminated against on the basis of culture or language.<sup>451</sup>

Extending language rights in the Charter to ethnic minorities is not a tenable alternative. It would likely evoke resistance from Francophones in Quebec and French-speaking minorities elsewhere, who are reluctant to accept multiculturalism.<sup>452</sup> That multiculturalism may minimize the

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two founding peoples and official languages policy may have to be eradicated to pursue a proper policy of multiculturalism).

449. See Kallen, *supra* note 53, at 130 (making a similar point by concluding that other constitutional provisions are necessary if the Charter is to be consistent with an egalitarian multiculturalism).

450. See Bastarache, *supra* note 252, at 524 (arguing that the need to protect and respect official languages justifies deviation from equality).

451. See *supra* note 340 and accompanying text (indicating ethnic minorities remain discriminated against despite the Charter's multiculturalism provision).

452. See Driedger, *supra* note 34, at 166 (citing various studies indicating the Quebecois to be the least interested in multiculturalism and least tolerant of immigrants); BURNET & PALMER, *supra* note 20, at 177 (commenting that both the Quebec Liberal Party and Parti Quebecois rejected the federal policy of multiculturalism);

full recognition of their language rights may explain this reluctance.<sup>453</sup>

Another related explanation is that French-speaking minorities may perceive the emphasis on cultural plurality inherent in multiculturalism to diminish the cultural preference that they have enjoyed in Canada's constitutions, government policy, such as the RCBB's recommendations, and language legislation, such as the OLA. In a limited, symbolic sense, the Charter's multiculturalism provision offset the preference that Canada has historically conferred to the French and British cultures. Recent constitutional accords, albeit slightly, also affirmed the value of multiculturalism. Yet, Quebec nationalists objected to even minor recognition of multiculturalism that these proposals included; moreover, they resisted any change in the definition of Canada as a dual culture.<sup>454</sup> Indeed, Quebec's demand in recent constitutional accords for distinct society status may reflect its dissatisfaction with the shift, inherent in multiculturalism, in the definition of Canada as a dual culture.<sup>455</sup> In this atmosphere, Quebec would not readily accept constitutionalizing language rights for ethnic minorities, especially when it perceives its own culture at risk.

These difficulties aside, extending equal language rights to ethnic minorities is problematic from a more fundamental perspective. It suggests that Canada wholeheartedly embrace linguistic pluralism, and sanction an indeterminate number of different languages. Although theoretically consistent with the egalitarian definition of multiculturalism, practically, that model of language rights might not unify Canada.<sup>456</sup> One need only consider the difficulties that Canada has encountered in insti-

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Tonequizzi, *supra* note 341 (noting the opposition of Canada's Reform Party to public financing of multiculturalism); *supra* notes 341-42 and references cited therein.

453. See Taylor, *supra* note 48, at 432 (noting that multiculturalism is problematic because it is often viewed as reducing or minimizing the rights of French-speaking minorities).

454. See *supra* notes 363, 395, 431-33 and accompanying text (noting the single provision in both the Meech Lake and Charlottetown Accords pertaining to ethnic minorities and multiculturalism, and citing Quebec's objection to discarding the dual cultural view of Canada).

455. See, e.g., SHERIDAN & SAOUAB, *supra* note 46, at 8 (noting that Quebec's concerns about multiculturalism can be explained in terms of their uneasiness with the shift from cultural duality to cultural plurality); Cairns & Williams, *supra* note 40, at 24-26 (chronicling changes in the definition of Canada to encompass ethnic minorities).

456. See Braen, *Language Rights*, *supra* note 13, at 9 (noting that linguistic heterogeneity can threaten unity). Switzerland and Belgium, however, have had apparent success with pluralistic language policies. *Id.* at 12-13.

tuting a simpler language policy-official bilingualism-and reflect on the fact that providing language rights to French and English-speaking minorities, has not, as supposed, united the nation.<sup>457</sup> Despite such difficulties, however, bilingualism remains central to the Canadian identity. Discarding it may raise more problems for unity than replacing it with a language policy based on linguistic pluralism.

More importantly, if linguistic pluralism results in ethnic minorities maintaining their language without becoming proficient in either English or French, then that may hinder their economic and social integration into Canadian society.<sup>458</sup> Additionally, a policy of linguistic pluralism might also impede equality for ethnic minorities, equality more broadly understood to include economic and social factors.<sup>459</sup> Linguistic pluralism, then, may undermine equality and unity, problems which the Charter's language rights and multicultural provision already present.<sup>460</sup>

Thus, tendering equal language rights to ethnic minorities is not a tenable alternative. At the opposite extreme, however, the existing model of language rights and multiculturalism, in which linguistic assimilation is implied and inequality a consequence, is also unsatisfactory.<sup>461</sup> Some middle course would, therefore, appear constructive. That middle course is to interpret the Charter to minimize the disparity in the language rights and cultural status ethnic minorities possess relative to official language minorities.

457. See *supra* notes 323-45, 347-57, 415-40 and accompanying text (commenting on the failure of the Charter, recent constitutional proposals, the policy of bilingualism, and language to unify Canada).

458. See BURNET & PALMER, *supra* note 20, at 213 (stating that comprehension of one of the official languages is vital to the adjustment of first-generation immigrants). The failure of some immigrants to adopt English is often used to justify the policy of linguistic assimilation in the United States.

459. *Supra* note 283.

460. See *supra* Part V (discussing Canada's model of language rights and multiculturalism in the Charter and the problems it presents for unity and equality).

461. See Lowrey, *supra* note 16, at 318 (pointing out that the denial of bilingual services or prohibiting the use of a minority language may well create the very divisions such measures seek to resolve by alienating minority groups from society); *supra* text accompanying notes 275-357, 415-40 (arguing that linguistic dualism, and the narrow definition of multiculturalism, as embodied in recent constitutional proposals and the Charter has failed to unify Canada and promote equality as hoped, and imply that ethnic minorities will assimilate).



## B. INTERPRETING THE CHARTER

There is a viable alternative to the two extremes enunciated above. Courts may interpret the Charter's existing provisions, alone or in combination with one another, to extend similar, although not equal, language rights to ethnic minorities.<sup>462</sup> Such interpretation would neither constitutionalize equal rights for ethnic minorities, nor embrace linguistic pluralism. Nevertheless, this interpretation would minimize the linguistic and cultural inequality inherent in the Charter between official language and ethnic minority groups. Additionally, this interpretation would be an important step in responding to the agenda of ethnic minorities and thus in promoting unity.

Section 15, the equality rights provision, is the most obvious candidate for this role. Section 15<sup>463</sup> of the Charter prohibits discrimination on a number of grounds, including religion, race, ethnic and national origin.<sup>464</sup> It also provides that the Charter not preclude affirmative action programs.<sup>465</sup> Commentators have interpreted the language of sec-

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462. See, e.g., Woehrling, *supra* note 20, at 61 (suggesting that section 27 might be used in combination with other Charter provisions, such as section 23, to interpret the Charter at large as providing cultural and linguistic rights not explicitly stated). Section 27 might be used not only to extend language rights not explicitly in the Charter to non-official language groups, but also to interpret those language rights that already exist with respect to Canada's official languages. *Id.* at 82-83 (noting that section 27 might plausibly, if problematical, be used to justify a liberal interpretation of the language rights provisions, assuming such an interpretation is necessary to preserve and enhance the culture of either official language group).

463. See generally LIBERTY AND EQUALITY, *supra* note 278; Black & Smith, *supra* note 167, at 557-647; Walter S. Tarnopolsky, *The Equality Rights in the Canadian Charter of Rights and Freedoms*, 61 CAN.BAR.R. 242 (1983); Woehrling, *supra* note 20; see also, *supra* note 167 and accompanying text (noting that section 27 will have a great impact on the interpretation and substance of section 15's equality rights).

464. See Charter, *supra* note 6. Section 15(1) reads: "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 based on race, national or ethnic origin, (sic) color, religion, sex, age or mental or physical disability." *Id.*

465. See Charter, *supra* note 6, at section 15(2). Section 15(2) provides that: "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, color, religion, sex, age or mental or physical disability." *Id.* This subsection does not impose an affirmative duty on the government to adopt affirmative action programs. Tarnopolsky, *supra* note 81, at 442. It is only intended to clarify that such programs are permissible. See

tion 15(1) as non-exhaustive such that other, non-enumerated grounds of discrimination may provide a basis for equality claims.<sup>466</sup> Thus, one could read section 15(1) to prohibit discriminatory treatment on the basis of language.<sup>467</sup> Assuming this analysis is correct, then section 15(1) would enable one to challenge statutes, such as the OLA, that discriminate on the basis of language.<sup>468</sup> This interpretive use of section 15 is limited in three ways.

First, it would only empower one to request the invalidation of special statutory programs, and then only where such programs discriminate between ethnic minority groups.<sup>469</sup> Constitutionally supreme, the language rights provisions are exempted from the principle of equality laid out in section 15(1).<sup>470</sup> Consequently, one could not seek to invalidate

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Black & Smith *supra* note 167, at 596 (noting that there is agreement that section 15 was intended to make clear that affirmative action programs are not precluded under the Charter).

466. See Black & Smith, *supra* note 167, at 582 (noting that the cases and commentators agree that section 15(1) includes within its purview both enumerated and non-enumerated grounds of discrimination).

467. See Woehrling, *supra* note 20, at 67 (commenting that section 15(1) implicitly prohibits discrimination on the basis of language); Braen, *supra* note 13, at 54 (concluding that to the extent that language rights are based on equality, then no one should be discriminated against on the basis of language); Woehrling, *supra* note 20, at 60-61 (suggesting that section 27 might be read to limit section 15(1) if the latter obstructs the preservation and enhancement of multicultural heritage).

468. See Bastarache, *supra* note 252, at 519 (concluding that although section 15 is unnecessary to justify the principle of equality as it relates to the official languages in section 16, section 15 may be invoked to overturn a statute discriminating against individuals on the basis of language); Woehrling, *supra* note 20, at 60 (commenting that special legislative measures adopted to assist one minority group, but not another, could be contrary to the right to equality embodied in section 15(1)).

469. See Tarnopolsky, *supra* note 81, at 442 (commenting that section 15(1)'s "equal benefit of the law" clause might afford individuals the right to challenge discriminatory funding of cultural groups and seek a more equitable distribution). Although discriminatory funding might raise an equality claim under section 15(1), such a claim could not be pursued merely because a particular group has received funding, while another has not. See Gall, *Miscellaneous Aspects*, *supra* note 148, at 469 (quoting Beckton to the effect that whether section 15 is contravened would not turn solely on discriminatory funding of non-official linguistic groups as equality may demand treating such groups differently).

470. See Woehrling, *supra* note 20, at 80 (noting that several sections of the Charter except French and English language rights from the lesser protections provided to other linguistic minorities). In fact, the Charter appears to explicitly allow this exception. See Bastarache, *supra* note 252, at 520 (noting that section 15 might be read to allow the different treatment between official languages and all other language

Charter language rights on the basis that they discriminate against ethnic minorities.

Second, a statutory challenge under section 15 would probably not result in affirmative measures, such as program funding for ethnic minorities to preserve their culture and language.<sup>471</sup> Section 15(1) would only mandate that, to the extent that such affirmative action programs are provided, all ethnic minority groups should receive equal consideration in the funding process.<sup>472</sup> Without mandated affirmative measures, an ethnic minority group, which a particular language and culture characterize, might not survive, but would instead assimilate. Yet group survival is one theme commonly thought to underlie multiculturalism.<sup>473</sup>

Third, section 15, alone, does not provide a collective right. Section 15(1) of the Charter is primarily individualistic<sup>474</sup> in that prohibits discrimination based on an individual's group affiliation to ensure equality between individuals.<sup>475</sup> It neither speaks to the multicultural ideal of equal treatment or respect for all groups, nor protects culture or language at the collective level.<sup>476</sup> Thus, section 15, read alone, does not greatly reduce the disparity between ethnic minorities' and official language minorities' rights and status that the Charter displays; nor does

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groups, including ethnic languages). Alternately, section 27 might be used to interpret section 15(1) as allowing such discriminatory language rights to achieve the purposes of section 27 with reference to official minority language groups. Woehrling, *supra* note 20, at 60.

471. See Tarnopolsky, *supra* note 81, at 442 (noting that it is highly unlikely that a court reviewing a challenge to statutory programs under section 15(1) would compel the government to provide similar grants to all cultural groups).

472. See Tarnopolsky, *supra* note 81, at 442 (remarking that section 27 might be used to argue that certain minority ethnic or cultural groups should be considered when affirmative action programs are adopted).

473. See *supra* text accompanying note 277 (commenting that group survival is one theme influencing multiculturalism and underlying an egalitarian definition of multiculturalism).

474. See Kallen, *supra* note 53, at 123 (remarking that section 15 is an individualistic provision); Woehrling, *supra* note 20, at 87, n.113 (noting that section 15(1), both as to its non-discrimination and equality components, has mainly been characterized as an individual right).

475. See Woehrling, *supra* note 20, at 86-7 (noting that the right to equality under section 15(1) functions by prohibiting discriminatory treatment against individuals based on their membership in particular groups).

476. See Kallen, *supra* note 53, at 123 (arguing that the equality provisions of the Charter do not afford protection for the collective cultural rights of Canada's ethnic minorities).

section 15 further proposes equal treatment of groups, a common attribute of multiculturalism.<sup>477</sup>

Collective rights and affirmative measures are crucial, if Canada is to minimize the inequality between official language and ethnic minority groups and realize the purposes of multiculturalism.<sup>478</sup> Section 27 and the Charter's language rights do not clearly provide a collective right for ethnic minorities.<sup>479</sup> Nor do they clearly prescribe affirmative measures to protect the language and culture of ethnic minorities.<sup>480</sup> Nevertheless, as the case analysis on section 27 indicates, courts frequently use section 27 to interpret other Charter rights, which supplements the substance of these rights and buttresses claims made pursuant to them.<sup>481</sup> Consequently, one could use section 27 to interpret section 15 to minimize the inequality inherent in the Charter and to realize the purposes of multiculturalism.<sup>482</sup>

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477. See *supra* notes 275-79, 285 and accompanying text (arguing that equality, freedom from discrimination, and group survival underlie the Multiculturalism Policy of 1971 and section 27).

478. See Kallen, *supra* note 53, at 136-37 (concluding that section 27 is empty insofar as the Charter as a whole fails to protect the collective rights of ethnic minorities); see also *supra* notes 148-52 (discussing collective rights and affirmative measures).

479. See *supra* Part III (summarizing the debate between commentators, analyzing case law on section 27, and concluding it remains uncertain whether section 27 provides either a collective or individual right).

480. See *supra* notes 142-43, 243-45 and accompanying text (indicating that both courts and commentators are unsettled as to whether section 27 provides a collective right or necessitates affirmative measures).

481. See *supra* Part III.B (reviewing case law on section 27 that indicates that section 27 is typically read in conjunction with other Charter provisions, and not as an independent, collective right).

482. One commentator contends that section 27 alone may be read to require such rights and measures. See Magnet, *Collective Rights*, *supra* note 72, at 771-72 (suggesting that section 27 may be employed to establish affirmative obligations on the part of the government to protect the collective rights of cultural groups); Magnet, *Interpreting Multiculturalism*, *supra* note 285, at 152 (suggesting that section 27 might require affirmative action programs favoring those who speak languages other than French or English). Nevertheless, even he recognizes the limitations of this approach to resolving ethnic tension. See Magnet, *Collective Rights*, *supra* note 72, at 769-70 (noting that one must critically assess the prospects of relying on collective rights as a method of remedying ethnic tension in Canada because of the dismal record of minorities bringing claims under existing collective rights provisions). Others have suggested that section 27 provides an important counterbalance to the dualistic nature of entrenched language rights, but have not gone so far as to conclude that it mandates special measures. See Gibson, *Rhetorical Flourish*, *supra* note 103, at 592 (concluding

There are three advantages to this tandem reading. First, it would permit ethnic minorities to challenge discrimination based on language, including legislation advantaging official language minorities.<sup>483</sup> Second, and more importantly, unlike a reading of section 15 alone, a combined reading might require affirmative measures, such as special programs to assist ethnic minorities to overcome disadvantages and preserve their distinctiveness.<sup>484</sup> In this regard, some commentators have suggested that equality and multiculturalism oblige the state to fund separate ethnic minority schools.<sup>485</sup> Third, and in contrast to the interpretation of section 15 alone, this combined reading arguably confers collective rights.<sup>486</sup>

Although a combined reading of sections 15 and 27 has advantages compared to interpreting section 15 alone, it shares similar limitations. Because the Charter's framers intentionally advantaged English and French, this reading would not extend to ethnic minorities the identical language rights the Charter provides English and French,<sup>487</sup> despite the

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that without section 27 the language rights provisions of the Charter carry dualistic tones).

483. See Bastarache, *supra* note 252, at 519-20 (noting that commentators have suggested that sections 15 and 27 may be read together as providing a right to challenge discrimination on the basis of language and arguably the French Language Charter).

484. See Gall, *Miscellaneous Aspects*, *supra* note 148, at 468-69 (citing the comments of Professor Claire Beckton to the effect that section 15(2), when read with section 27, might be interpreted to require special measures for some groups to overcome disadvantages arising from discrimination against them and programs directed towards assisting such groups in retaining their distinctiveness); Bastarache, *supra* note 252, at 522 (citing another author as suggesting that section 27 might serve as a strong means of establishing the duty of the state to take positive action).

485. See Woehrling, *supra* note 20, at 63 (arguing that if equality is interpreted and applied through the ideal of multiculturalism, then the right to receive an education equal to that of others might require funding private minority schools in which minorities could transmit, and hence maintain, their language and culture). This argument reflects the principle behind language instruction to official language minorities, which is justified on the basis that equality of educational opportunity requires differential treatment. See Foucher, *supra* note 303, at 268-69 (noting that the objective of section 23 is to assure equal opportunity for language minorities).

486. See Black & Smith, *supra* note 167, at 603 (arguing that section 27 reinforces section 15); see also, LIBERTY AND EQUALITY, *supra* note 278, at 240-41 (contending that section 15 protects group rights).

487. See, Woehrling, *supra* note 20, at 65 (pointing out that a combined reading of section 15(1) and section 27 will not extend to ethnic minorities rights identical to those enjoyed by French and English speakers under the language rights provisions of the Charter because the intent of the framers was to provide special status to French

apparent contradiction between section 15's notion of equality and section 27's multicultural principle requiring equal treatment of groups.<sup>488</sup>

Additionally, this combined reading would not require that all ethnic minority groups receive the same rights, collective or individual, relative to one another.<sup>489</sup> Nor would this reading oblige the government to furnish all ethnic minorities with the same affirmative measures. For example, a combined reading of sections 15 and 27 does not require that all ethnic minorities receive the right to language education.<sup>490</sup> In light of the exigencies of public resources, failure to provide such affirmative measures would be a probable result<sup>491</sup> courts would unlikely upset, given their reluctance to intrude on the legislature's fiscal prerogatives.<sup>492</sup>

### C. COLLECTIVE RIGHTS AND AFFIRMATIVE MEASURES

Collective rights and affirmative measures comport with an egalitarian definition of multiculturalism and might unite ethnic minorities and Canada.<sup>493</sup> Collective rights comport with an egalitarian definition of

and English as compared to other minorities).

488. See Woehrling, *supra* note 20, at 67-80 (discussing the conflict between equality and the language and cultural rights provided in the Charter). Sections 15(1) and 27 seem at odds with each other with respect to the rights of non-official or ethnic minorities in that section 27 requires equality in the treatment of different groups, whereas section 15(1) requires that certain groups be treated differently on account of their group affiliation. *Id.*

489. See Woehrling, *supra* note 20, at 68-69 (arguing that under a combined reading of sections 15(1) and 27 "traditional minorities", who might be said to participate in the multicultural heritage of Canada, must be given rights greater than those minorities of more recent immigration).

490. See Woehrling, *supra* note 20, at 60-61 (arguing that special rights and programs for some ethnic minorities, but not others, would not necessarily be contrary to section 15(1)). Section 27 may be read to modify section 15(1) to permit special measures directed at preserving the culture and language of some minority groups, even if other ethnic minority groups are not likewise provided these measures. See *id.* (concluding that section 27 and section 15 may be reconciled in this fashion).

491. See Woehrling, *supra* note 20, at 70 (noting that it would impracticable to provide all minorities with special educational and language services out of public funds).

492. See Bastarache, *supra* note 252, at 524 (concluding that, with respect to language rights, courts must strike a balance between judicial activism and legislative prerogatives).

493. But see Kallen, *supra* note 53, at 127-28 (arguing that the Charter's omission with respect to providing collective rights for ethnic minorities reflects its weakness in meeting the demands of an egalitarian multiculturalism); Magnet, *Cultural Autonomy*,

multiculturalism because it is primarily in the context of the group or the collective that one appreciates culture and language and one beneficially exercises rights relating to them.<sup>494</sup> Collective rights include the idea of group survival: ethnic minority groups can endure if granted autonomy over certain institutions through which they can maintain their language and culture.<sup>495</sup> Equality—in the sense of equal treatment of groups—requires the prohibition of discrimination against groups based on culture and language.<sup>496</sup> Affirmative measures are also integral to the egalitarian definition of multiculturalism because equality often necessitates different government treatment,<sup>497</sup> a proposition the Supreme Court of Canada accepts.<sup>498</sup> Put differently, equality demands more than simple prohibitions against discrimination; it also requires particular conditions through which the group as a group can survive.<sup>499</sup>

An institutional infrastructure providing those conditions through which ethnic minorities can preserve and enhance their culture and language is essential to ensuring equality and group survival.<sup>500</sup> Education

*supra* note 143, at 184-86 (arguing that cultural pluralism requires accommodation of ethnic groups, which can be had only if their security is promoted through collective rights and autonomy for ethnic groups).

494. See Tarnopolsky, *supra* note 81, at 437-38 (analyzing the relationship between collective and individual rights and commenting that certain rights are meaningful only in the context of a group); Magnet, *Cultural Autonomy*, *supra* note 143, at 176 (stating that individuals are only fulfilled when they are a part of a social group); Foucher, *supra* note 303, at 274-75 (noting that section 23's language rights are meaningless unless they are understood to protect the collective rights of linguistic minorities).

495. Magnet, *Cultural Autonomy*, *supra* note 143, at 184.

496. See *supra* notes 278-82 and accompanying text (arguing that equality necessitates prohibiting discrimination against groups on the basis of culture and language).

497. See LIBERTY AND EQUALITY, *supra* note 278, at 237 (noting that equal opportunity may require that different people be treated differently); Braen, *Language Rights*, *supra* note 13, at 21-22 (arguing that equality may call for, and is reconcilable with, special measures designed to ensure the preservation of linguistic and cultural characteristics of minority groups); Braen, *Language Rights*, *supra* note 13, at 23 (concluding that language rights in a multiethnic society require consideration of equality between linguistic groups and this implies affirmative preferential treatment of these groups).

498. LIBERTY AND EQUALITY, *supra* note 278, at 235.

499. See Paul C. Weiler, *The Evolution of the Charter: A View From the Outside*, in *LITIGATING THE VALUES OF A NATION: THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS*, 1, 50 (Joseph M. Weiler & Robin M. Elliot eds., 1986) (stating that linguistic minorities need not just protection against discrimination based on language, but also the fostering of conditions in which language can flourish).

500. See Magnet, *Interpreting Multiculturalism*, *supra* note 285, at 148 (suggesting

is the most viable infrastructure to preserve and enhance language and culture. Thus, commentators and at least one court have suggested that ethnic minorities receive the same right to language education presently afforded official language minorities under section 23<sup>501</sup> of the Charter.<sup>502</sup> In light of the role that education plays in perpetuating culture and language,<sup>503</sup> and in the absence of any Charter provisions other-

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that section 27 necessitates an institutional infrastructure through which ethnic groups can act to maintain and enhance their culture); Woehrling, *supra* note 20, at 52 (noting that without institutions to preserve their distinctiveness, cultural groups will be assimilated if they are served only by the cultural institutions of the majority); Bastarache, *supra* note 252, at 523 (concluding that infrastructures are essential to the survival of a language minority as a collective and to the exercise of their language rights); see also STANDING COMMITTEE, *supra* note 41, *passim* (detailing how Canada could begin to institutionalize multiculturalism by providing an institutional infrastructure through the Canadian Multiculturalism Act of 1988).

501. See *supra* note 257 (quoting section 23). Section 23 is expressly limited to French and English speakers. Children whose language is other than French or English do not have the right to receive an education with public funds in their language even where sufficient numbers of such minorities exist. See, Woehrling, *supra* note 20, at 70-71 (discussing the requirements of section 23 and noting that the official language groups, as compared to other minorities, may have a legitimate claim to rights under section 23 given their historical roots in the country). See generally Jean E. Magnet, *Minority Language Educational Rights*, 4 SUP. CT. REV. 195 (1982); Denise Reaume & Leslie C. Green, *Education and Linguistic Security in the Charter*, 34 MCGILL L.J. 777 (1989); Michel Bastarache, *Education Rights of Provincial Official Language Minorities*, in CHARTER OF RIGHTS AND FREEDOMS, *supra* note 72, at 687.

502. See Woehrling, *supra* note 20, at 61 (arguing that although section 23 does not mention culture, section 27 might be used to interpret section 23 as mandating instruction for minority children in their language as well as their culture); see *supra* notes 230-34 and accompanying text (reviewing *Reference re: Education Act of Ontario and Minority Language Rights*).

Other rights might also flow from this analysis. See e.g. Magnet, *Interpreting Multiculturalism*, *supra* note 285, at 151-52 (suggesting that if section 27 requires an institutional infrastructure, and thus is interpreted to afford a collective right, then the language rights provisions may be interpreted in light of section 27 as requiring that non-Charter bilingual speakers be given preference in public service hiring and that additional language services might be necessary to satisfy section 27); Woehrling, *supra* note 20, at 63-64 (noting that the preservation of a minority culture might require, under sections 27 and 15(1), that a cultural group's language be given recognized status in government operations).

503. See Woehrling, *supra* note 20, at 58 (noting that education is the primary means by which the language and culture of minorities is preserved); Weiler, *supra* note 7, at 50 (commenting that education is the most effective means by which a minority can resist assimilation and transmit its culture and language).



wise protecting the language rights of ethnic minorities,<sup>504</sup> extending minority education language rights to ethnic minority rights would be prudent. Certainly, Quebec's reluctance to extend any minority educational language rights may make such a recommendation difficult to accomplish in that province; nevertheless, the recommendation is plausible as courts become more willing to interpret the Charter to extend language rights to ethnic minorities.<sup>505</sup>

Interpreting section 15 concurrently with section 27 to require collective rights and affirmative measures advances equality and unity, the two goals commonly articulated for the Charter and multiculturalism. As to equality, this interpretation concretely recognizes two things: first, that language is a fundamental component of culture, which multiculturalism in section 27 of the Charter purports to recognize, and second, that multiculturalism—if promoting cultural equality, preserving cultural diversity, and valuing cultural pluralism are serious goals—must account for, even if it does not advance, linguistic plurality.<sup>506</sup> Seen in this light, this interpretation is closer to the egalitarian definition, and would reduce the disparity in rights and status, and hence promote equality, between official language minorities and ethnic minorities. Thus, interpreting section 15 concurrently with section 27 in the above manner would serve to counterweigh the linguistic assimilation both the Charter and recent constitutional accords imply, the theory of linguistic dualism propelling them, and the narrow definition of multiculturalism they embrace or perpetuate.<sup>507</sup>

This interpretive use of sections 15 and 27 is only partly responsive to the demands of ethnic minorities, and to their criticisms of the Char-

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504. See *supra* notes 250-66 and accompanying text (analyzing the language rights provided for official language minorities, but not for ethnic minorities).

505. See *supra* text accompanying notes 230-42 (discussing two cases willing to read the Charter expansively as including language education rights for ethnic minorities); Jean-Claude LeClerc, *School Shakeup: Few Willing to Give up Power*, THE GAZETTE (MONTREAL), Feb. 28, 1994, at B3 (discussing a recent Canadian Supreme Court decision allowing Quebec to establish school boards along linguistic lines, but noting the difficulties incident to such reform); Jules Deschenes, *Beyond Our Solitudes*, THE GAZETTE (MONTREAL), June 1, 1993, at B3 (discussing the reluctance of Quebec to alter Bill 86, which restricts language education of immigrants in Quebec).

506. See *supra* notes 275-83, 298-308, 456-60 and accompanying text (outlining the egalitarian definition of multiculturalism, the conception of language and culture underlying the Charter multiculturalism, and the problems attendant to advancing linguistic pluralism).

507. See text *supra* notes 28-30, 81-115, 249-67, 289-309, 321 and Part VI.B (analyzing Canada's model of language rights and multiculturalism in these respects).

ter and recent constitutional accords. It does not presume to constitutionalize for ethnic minorities those language rights, including the right to language education, that official language groups possess. Nor does it guarantee a cultural status equal to that of official language minorities or Quebec. Rather, it only suggests an avenue whereby ethnic minorities can share similar, but not identical, status and rights that official language minorities possess. Consequently, this interpretative method does not respond to the call of ethnic minorities for parity between multiculturalism and bilingualism in the constitution-making process.<sup>508</sup>

Despite these limitations, interpreting section 15 concurrently with section 27 promises, in several ways, to assuage increasing ethnic tension that is a consequence of Canada's model of language rights and multiculturalism, and thereby, promote unity. First, to the extent that it minimizes the inequality between official language and ethnic minority groups, it responds to the criticism that official language minorities enjoy a privileged position over ethnic minorities in the Charter and in the recent accords' distinct society clauses.<sup>509</sup> Second, it responds to the demand of ethnic minorities for increased recognition, an institutional infrastructure, and a definition of Canada consistent with cultural plurality, not duality.<sup>510</sup> By requiring collective rights and affirmative measures through which ethnic minorities might actually preserve their language and culture, Charter multiculturalism is more than a symbolic affirmation of cultural diversity. Collective rights and affirmative measures concretely advance the implementation of multiculturalism as a policy.

Third, Quebec and official language minorities are more likely to accept the suggested interpretation of sections 15 and 27 than constitutionalizing equal language rights for ethnic minorities.<sup>511</sup> This is

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508. See *supra* notes 424-26 and accompanying text (noting ethnic minorities' criticism of the Charlottetown Accord and their insistence that multiculturalism be considered equal to bilingualism).

509. See *supra* notes 295-97, 331-32, 424 and accompanying text (summarizing the privileged position afforded official language minorities in the Charter and recent constitutional accords and ethnic minorities' criticism of this privileged position).

510. See *supra* notes 332-35, 425 and accompanying text (noting that ethnic minorities sought greater recognition, an institutional infrastructure, and an expanded definition of Canada that would include them).

511. See *supra* notes 452-55 and accompanying text (discussing Quebec's resistance to multiculturalism and the probability that it would not accept equal language rights for ethnic minorities).

likely to be more acceptable because extending similar, but not equal, language rights to ethnic minorities does not negate the historic and current rights of official language minorities. Clearly, those are rights that Quebec and official language minorities and Quebec are hesitant to surrender, and indeed, as recent constitutional debate attests to, seek to expand.<sup>512</sup> Thus, the interpretative use of sections 15 and 27 is one means by which Canada can accommodate the ethnic minority agenda without greatly infringing on the existing rights of official language minorities or encroaching upon Quebec's constitutional agenda.

### CONCLUSION

The Charter, and more generally Canada's model of multiculturalism and language rights, has neither unified Canada, nor ensured equality. Canada's model of language rights and multiculturalism is at the heart of the difficulties it has faced in constitution-making. This model has hindered Canada's attempts to fashion a constitution that ensures equality and affirms, on similar terms, the cultural and linguistic diversity of official language minorities and ethnic minorities. Moreover, this model has hampered Canada's attempts to promote unity through its constitution by accommodating, within it, the demands of Quebec and official language minorities, on the one hand, and those of ethnic minorities, on the other. As Canada becomes ethnically more diverse,<sup>513</sup> and as Quebec separatism increases, the problems this model causes for Canada's constitution-making will grow. Increasing ethnicity makes it likely that ethnic minorities will continue to apply pressure for greater equality and an egalitarian multiculturalism; expanding Quebec nationalism and Canada's historical allegiance to linguistic dualism will pull Canada in the opposite direction. The need for a constitution adequately accounting for the equality concerns of both official language minorities and ethnic minorities remains clear and vital to Canada's unity.

Canada is unlikely to relinquish its problematic model of language rights and multiculturalism. Linguistic dualism and a narrow definition of multiculturalism are rooted deeply in Canada's constitution-making. Canada's historical fidelity to linguistic dualism and to a narrow defini-

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512. See *supra* notes 369-80, 431-33 and accompanying text (summarizing Quebec's constitutional platform and its rejection of the Charlottetown Accord, which it claimed did not go far enough in granting Quebec autonomy).

513. See CAIRNS, *supra* note 4, at 110-11 (noting that by the turn of the century, 40 percent of Canada's population will be other than French and British and visible minorities will constitute nearly ten percent of the population).

tion of multiculturalism presages a future filled with debate over the proper content and scope of language rights and multiculturalism in the Canadian constitution. To the extent that Canada remains wedded to the concept of linguistic dualism and advances a narrow definition of multiculturalism, its stability will remain a source of concern.

Language rights and multiculturalism are issues not exclusive to Canada.<sup>514</sup> Canada's effort to accommodate official language minorities and ethnic minorities and to recognize linguistic and cultural diversity within its constitution has occurred in a global context of increasing ethnic diversity, and ethnic politicization.<sup>515</sup> With the end of the Cold War,<sup>516</sup> the division of many previously unified countries in Eastern Europe and elsewhere,<sup>517</sup> and the increase of immigration, particularly in Europe,<sup>518</sup> cultural diversity and ethnic tensions are escalating around the world.<sup>519</sup> This has brought the issue of ensuring equality

514. See Clarine Chonghaile, *Catalonia Spanish Speakers Demand Language Rights for Children*, REUTERS, LTD., Nov. 2, 1993, available in LEXIS, Nexis Library (noting that Catalan and the Castilian dialect of Spanish are the official languages of Catalan). Catalan is the language of instruction in schools, and that Castilians seek the right to educate their children in Spanish. *Id.*; Peter Maser, *South Africa Will Be New*, CALGARY HERALD, Jan. 2, 1994, at A6 (concluding that South Africa's new constitution, which makes eleven languages official, reflects its multiethnic composition and desire to avoid the conflict incident to confusing language with nationalism).

515. See CAIRNS, *supra* note 4, at 23-27 (discussing the global politicization of ethnicity and its impact on Canada's Charter).

516. See Thomas W. Lippman, *Is the World More Violent, or Does it Just Seem that Way?*, WASH. POST., July 1, 1993, at A14 (discussing the effect of the cold war's demise, namely, the revival and increase of ethnic conflict, and the demand of various ethnic groups for self-government).

517. See *id.* (stating that the break-up of the Soviet Union and Yugoslavia along ethnic lines, the separation of Eritrea from Ethiopia, and the partitioning of Bosnia-Herzegovina appears to be leading to a "new tribalism").

518. See John Pomfret, *Europe's "Rio Grande" Floods with Refugees: Rich Nations Becoming Inundated By Millions Fleeing War, Poverty*, WASH. POST., July 11, 1993, at A1 (detailing the wave of immigration into Germany, France, Britain, and Sweden from North Africa and Eastern Europe).

519. See *id.* (noting the percentage of immigrants in various European countries; the violent social backlash against immigrants in Germany, France, and Spain; and the European perception that their identity is tied to the notion that they are comprised of a single ethnic group, language, and culture); Stephen Engelberg, *Now Hungary Adds Its Voice to the Ethnic Tumult*, N.Y. TIMES, Jan. 25, 1993, at A3 (noting increased tension in Hungary and language restrictions on Hungarians in Slovakia); William Drozdiak, *Rolling Up a Worn-Out Welcome Mat: French Fear Loss of Identity, While Immigrants Seek New One*, WASH. POST., July 13, 1993, at A1 (noting that there is increased civil unrest and racial tension in France's North African ghettos); Suzanne

and promoting unity, while reconciling language rights and multiculturalism, to the forefront in various countries,<sup>520</sup> including the United States.<sup>521</sup> Increasingly, there is debate over the wisdom of pre-

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Goldenberg, *Georgia and Abkhazia: A Bloody Tale of Treachery*, VANCOUVER SUN, Oct. 2, 1993, at B5 (describing the competing ethnic competition between ethnic Georgians and Abkhazians).

520. See, e.g., William Branigin, *Australian Immigration Raising New Concerns*, WASH. POST, April 4, 1993, at A12 (discussing increased immigration in Australia and the conflict over multiculturalism); Drozdak, *supra* note 27 (describing France's difficulty in integrating its immigrants into society and its fear that they will threaten, not embrace, its culture); Richard Balforth, *Kazakhstan Approves Post-Soviet Constitution*, REUTERS, LTD., Jan. 28, 1993, available in LEXIS, Nexis Library (stating that Kazakhstan's constitution has made Kazakh the only official language of the newly-formed state, despite the fact that many of its citizens speak Russian and that it might alienate the large Russian majority sensitive to the language rights issue); *Georgia Makes Language Ruling to Appease Abkhazians*, REUTERS, LTD., March 25, 1993, available in LEXIS, Nexis Library (stating that to quell a separatist revolt in Abkhazia, Georgia made Abkhazian a state language alongside Georgian in the province); Nikolai Morozov, *Where Is Tatarstan Moving To?*, RUSSIAN PRESS DIGEST, Nov. 21, 1992, available in LEXIS, Nexis Library (noting that Tartarstan's new constitution is intended to promote "inter-ethnic and civic accord" and makes Tatar and Russian the official languages).

521. See, e.g., *'Ingles No! Puerto Ricans Shout*, N.Y. TIMES, Jan. 25, 1993 (commenting on conflict over an initiative to make English an official language in Puerto Rico); William C. Anderson, *The Power of Language: A Call for a Common Language*, ST. PETERSBURG TIMES, May 23, 1993, at 1D (arguing that English should be adopted as an official language as proposed in state legislation to avoid the divisive effects incident to diverse ethnic groups living together, and commenting on the impracticality of providing for multilingual government services); Stephen Games, *The Latest Attack of the Anglophones*, L.A. TIMES, Sept. 12, 1992, at M2 (arguing that a recent proposal to adopt English as the official language in the United States would be counterproductive); Mary Jordan, *Newcomers Remake Schools*, WASH. POST, July 28, 1993, at A1 (describing the recent influx of immigrants, the pressures placed on schools to educate children of numerous different languages, and the debate on whether to create separate schools to accommodate the educational needs of immigrants); Anthony Sommer, *Landmark Language Rights Case*, PHOENIX GAZETTE, June 28, 1993, at B1 (discussing a recent Fifth Amendment due process challenge to civil forfeiture proceedings in which the defendant is not provided with an interpreter or notice of a pending action in his language); Linda Chavez, *Bilingual Education Gobbles Kids Taxes*, USA TODAY, June 15, 1994, at 15A (contending that federal reauthorization of a bilingual education bill, encouraging native-language instruction, is counter productive as students tend to stay in such programs for many years at the expense of mastering English); David G. Savage, *High Court Lets English-Only Job Rules Stand*, L.A. TIMES, June 21, 1994, at A1 (discussing the Supreme Court's decision in *Garcia v. Spun Steak Co.*, Slip Op. 93-1222, letting stand a 9th circuit decision which upheld English-only workplace rules against a challenge brought under

serving diverse languages and advancing multiculturalism in light of the need for unity, a common culture, and continuity in our national identity.<sup>522</sup> The likelihood that the demand for language rights and multiculturalism recognition will reach such a critical mass as to threaten unity in the United States, however, appears minimal.<sup>523</sup> Nevertheless, couched in a global context of increasing immigration and its attendant ethnic tensions, Canada's efforts to forge a constitution embracing multiculturalism and language rights presents problems for equality and unity that other countries, confronting similar challenges, should consider cautiously.

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the 1964 Civil Rights Act). See generally LORMAN A. RATNER & JOHN P. BUENKER (eds), *MULTICULTURALISM IN THE UNITED STATES: A COMPARATIVE GUIDE TO ACCULTURATION AND ETHNICITY* (1992).

522. See Ronald Takaki and Linda Chavez, *Are the Multicultural Experiments Working? Two Views*, WASH. POST EDUC. REV., Aug. 1, 1993, at 1 (analyzing the importance of a multiculturalism curriculum in light of demographic trends, indicating that racial minorities will become a majority of the population in the 21st century, and increased racial tension, signifying a 'disuniting' of America); *id.* at 38 (asserting that immigrants' demand for instruction in their own language, culture, and history should not be accommodated, as a shared sense of values and civic culture, essential to America's unity, should be inculcated); Orlando Patterson, *Black Like All of Us*, WASH. POST, Feb. 7, 1993, at C2 (arguing that an unrestricted multiculturalism, in which all cultures are deemed equally special, poses the danger of balkanization, and concluding that a common set of values is necessary in light of cultural diversity).

523. Lowrey, *supra* note 16, at 316. In the United States, avoiding the problems that language often presents can be explained by the assimilation of minority languages into English and the desire of immigrants to understand English, in contrast to French Canadians. *Id.* at 311, 316.

Nevertheless, there is the potential that language differences will lead to political divisiveness between majority and minority language groups in the United States, especially as Hispanic-Americans attain majority status in particular regions, share a common language, economic status, and identity in those regions, and oppose an economically privileged minority in those regions. Lowrey, *supra* note 16, at 302-18. Moreover, as assimilation to English is rejected and perceived to threaten ethnic minority culture, and as the concentration and number of minority language groups increases, then ethnic minorities might well demand language rights and cultural autonomy. See *id.*, at 313-15 (discussing the likelihood that Hispanic-Americans assimilation into English might foster nationalistic sentiments and political cohesiveness, and thus lead to demands for cultural distinction).

See also, Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH. L. REV. 643 (1991) (comparing Canadian and American native people's struggle to retain their cultural identity despite assimilation policies).