CANADA'S "DIVERSITY GENE" AND ITS CONSTITUTION; AN EVOLVING GLOBAL TEMPLATE FOR RECONCILING DIVERSITY, COLLECTIVE RIGHTS OF NATIONAL MINORITIES AND INDIVIDUAL RIGHTS?

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This article suggests that the lineage of the minority rights and the multiculturalism provisions of the Canadian Charter of Rights and Freedoms[1] *goes back much further than April 17, 1982. It is the culmination of the development of the "diversity gene" of the Canadian peoples and Constitution that even pre-dates the founding of Confederation.*

This author argues that multiethnic federal states like Canada can only ensure social stability if the federal model offers substantive equality within the notion of collective rights to its minorities. This is especially important where historically settled national minorities not only form the majority in a part of the territory of a federal state, but also where their communities are dispersed across the geographic boundaries of the federal state . Canada could be providing an emerging global template for federal states with multinational and multi-ethnic populations to develop such substantive equality minority rights frameworks to prevent social and ethnic conflict and the breakdown of federal states. Canada's judicial and socio-political experience under the Constitution and Charter of Rights and Freedom are hunching out principles and frameworks of distributive justice to balance the collective rights of minorities and individual rights while protecting and enhancing the multicultural heritage of Canada. Principled parameters for dealing with unilateral secessionist attempts by a minority group are also being set down by the Supreme Court of Canada.

I. INTRODUCTION: THE CANADIAN "DIVERSITY GENE"

On April 17, 2007, Canada celebrated the 25th anniversary of the establishment of the *Canadian Charter of Rights and Freedoms.* Many have explained the lineage of the *Charter* as originating in the post-Second World War international human rights movement and the desire of former Prime Minister Pierre Trudeau to counter Quebec nationalism and separatism with a new Pan-Canadian identity based on a recognition of the nature of Canada as a diverse and multicultural nation while establishing the primacy of fundamental rights. A deeper analysis of Canadian history and its peoples may reveal a much longer lineage for the collective rights and pluralist personality of the *Charter*, in particular it is the aboriginal rights, official language minorities and multiculturalism provisions whose lineage can be traced even before the birth of Confederation.

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[1] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act (U.K.), 1982, c.11* **[*Charter*]**.

Given time and space limitations, this article will deal primarily with a brief politico-juridical analysis of the lineage of the linguistic rights of historically settled official language minorities in Canada and the inclusion of the interpretive provision on multiculturalism in Section 27 of the *Charter* as indications of the collectivist and pluralist lineage of this constitutional document. A separate detailed work remains to be done on the constitutional lineage and present day analysis of the collective rights of Canada's aboriginal peoples based on section 35 of the *Constitution Act, 1982*[2] that recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada and section 25 of the *Charter* which states that *Charter* rights do not abrogate or derogate from any aboriginal, treaty or other rights and freedoms that pertain to the aboriginal peoples of Canada.

At the outset of this discussion, I suggest that collective rights can only be claimed by four groups in Canada namely, the First Nations, official language minorities belonging to historically settled communities, denominational minorities and the Francophone majority in Quebec, which constitutes a minority within Canada as a whole. As shall be discussed, these minorities are part of the constitutional bargain that resulted in Canadian Confederation and whose rights were entrenched into Canada's several constitutional documents, including the *Charter*. As other leading experts have pointed out, these minorities base their collective rights on the original bargain of Confederation that the Constitutional framework, treaties and jurisprudence would seek to protect their cultural identities and provide institutional supports against assimilation by the dominant majority.[3] In contrast, what the non-historically settled ethno-cultural groups are entitled to seek are rights to substantive equality as Canadian citizens as will be discussed below.

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[2] *Canada Act 1982* (U.K.), 1982, c.11.

[3] For an interesting discussion of this distinction between the collective rights of these "constitutional minorities" and ethno-cultural groups in Canada, see Joseph Magnet, "Multiculturalism and Collective Rights" in Gerald-A Beaudoin & Errol Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 4th ed. (Toronto: LexisNexis/Butterworths , 2005) 1261 at pp.1267-1280.

My starting point will be to examine what, until recently, was regarded as the flagship of Canadian diversity, its fabled multiculturalism policy. In 1982, the policy was integrated into the Canadian Constitution by an interpretive clause in Section 27 of the *Charter,* which will be discussed below.

When Canada's multiculturalism policy was first developed and promoted some thirty-four years ago as a world class model for the integration of ethno-cultural communities into the mainstream of Canadian society, it was a product more of political necessity and expediency than one of global leadership. The origins of our multiculturalism policy were in the backlash by these same communities against the mandate and the findings of the 1963 Royal Commission on Bilingualism and Biculturalism (the title gave it away), whose goal was to provide a response to the demands of French-Canadian nationalism. The demands against second class citizenship and for equal treatment by the so called "Third Force" lead to the Trudeau government proclaiming, on October 8, 1971, the official policy of multiculturalism within a bilingual framework, the first of its type in the world.[4] This was later followed by the federal 1988 *Canadian Multiculturalism Act*[5] whose goal was the promotion of cultural diversity, sensitivity and awareness in federal institutions and agencies.

There is no doubt that the growing electoral strength of the Third Force was a major motivator for the Trudeau government. However, the official goal of the new policy was to promote unity among different ethno-cultural groups while combating both discrimination against these groups and ethno-cultural rivalries. The underlying philosophy of some of the promoters of the new policy was that State promotion of inclusion and recognition of the equal worth and value of each culture would lead to greater tolerance and respect of other cultures in the growing cultural mosaic into which Canada was evolving.

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[4] For a history of the policy and the establishment of the interpretive clause in Section 2, see Joseph Magnet, *supra* note 3 at pp.1267-1280. For other insightful and critical analysis of the evolution of Canada's multiculturalism policy from leading Canadian social science experts, see A. Cairns & C. Williams, eds., *The Politics of Gender, Ethnicity and Language in Canada* (Toronto: University of Toronto Press, 1986).

[5] R.S., 1985, c. 24 (4th Supp.)

I suggest that what happened in 1971 was primarily the establishment of multiculturalism as an **ideology** of the State, not the origin of the "diversity gene" that allowed the notion of multiculturalism to be entrenched in Canadian society.[6] That occurred through trial and much error throughout much of the relatively short history of the country.

I suggest the origins of our diversity gene started as early as 1763 with the Royal Proclamation[7] that granted the status of protected nations with the right to their own form of governments to the First Nations of British North America, a treatment very different from that meted out to First Nations in the Americas by the Portuguese, the Spanish and later the Americans. In Canada, the Proclamation became the basis of the legal nature of Indian title and an historical root of the treaty process. The Proclamation described the Aboriginal nations as autonomous political units living under the Crown's protection against the "great frauds and abuses" that had been meted out to them in other parts of British North America. The Proclamation portrayed the links between Aboriginal peoples and the Crown as broadly 'confederal' in nature that would respect their diversity. Its provisions underlie the surrenders and designations of reserves for the First Nations of Canada.[8]

This early manifestation of the constitutive fact of diversity continued with the *Quebec Act*[9] of 1774 that, unlike the results of military conquests anywhere else in the world at that time, bestowed to the French colonists the most fundamental of diversity rights that protected their religion and legal systems. In part this was a realisation of the inevitable failure of the assimilationist policies of the British against the French population in the Royal Proclamation.10 The impending American Revolution and the fear that the "Canadiens"

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[6] For further analysis of this ideology of Canadian multiculturalism, see L. W. Roberts & R.A. Clifton, "Exploring the Ideology of Canadian Multiculturalism," (1982) 8:1 Canadian Public Policy, 88.

[7] George, R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. 11, No. 1.

[8] For a historical analysis of the treatment of First Nations in Canada, the United States and Mexico, see Curtis Cook, *Aboriginal Rights and Self-Government*, (Montreal and Kingston: McGill-Queen's University Press, 2003).

[9] 14 George III, c. 83 (U.K.)

[10] George, R., *supra* note 7.

might join them in the revolt led the British government to entrench the French fact in British North America. The *Quebec Act* was a unique recognition of diversity in the British Empire. Roman Catholics were emancipated in Quebec a full half century before Catholics in Britain received similar benefits. The concessions made in the *Quebec Act* persuaded the "Canadiens" from not joining the American Revolution; had Britain not granted the Quebec Act it is possible to imagine that Canada would not exist today, which would also have meant that Canada would not be celebrating the 25th anniversary of the entrenchment of the *Charter* in 2007.[11]

While some historiographers would argue that these diversity rights given to the First Nations and the conquered French populations were done for reasons of fear of new conflicts with First Nations and conquest from the South rather than for profoundly valuing diversity, these actions nevertheless established the beginnings of what I term **"the Canadian diversity gene"**.

My primary thesis is that without the collective rights of Canada's constitutional minorities and the interpretive multicultural principle building on the Canadian "diversity gene", the entrenchment in the *Canadian Charter of Rights and Freedoms* of provisions that recognize the collective rights of linguistic minorities, aboriginal peoples and the promotion of the multicultural heritage of Canada would not have the force that they have today.

The Canadian diversity gene was further strengthened by the underlying rationale and structure of Canadian confederation as established by the Quebec resolutions in 1864 and at Charlottetown in 1867. The guiding principles behind the 1867 *British North America Act*[12] were the protection and promotion of regional and cultural differences while ensuring a strong enough central government to be the glue of that diversity. The goal was to give the

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[11] For the factors that lead to the protection of the French settler's distinctiveness and diversity, see Alain-G. Gagnon & Luc Turgeon, "Managing Diversity in Eighteenth and Nineteenth Century Canada: Québec's Constitutional Development in Light of the Scottish Experience", (2003) 41:1 Commonwealth & Comparative Politics, 1-23.

[12] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. 11, No. 5 **[*BNA Act*]**.

central government sufficient resources and powers to expand the new state westwards and deal with regional disparities. As a constitutional lawyer, I have long argued that diversity and indeed the protection of the distinct society in Quebec was written into the fundamental constitutive document of this country. The *BNA Act* was based on the seventy-two 1864 Quebec resolutions strongly influenced by the francophone founding architects of Confederation. The goal of these architects of Canada, such as George-Ėtienne Cartier, was to ensure "la survivance" of the French population living in Quebec by keeping their control over their language, schools and laws. The Act enabled each province to have their own specified powers to control their own distinct societies. The Provincial legislatures were given under the *BNA Act* the power to make their own laws in fifteen specific subject categories that allowed provincial diversity to flourish, especially through the provincial jurisdiction over all matters dealing with property and civil rights in section 92(13) of the Act.[13] These provisions were designed to entrench the pre-existing diversity gene in the fundamental constitutional document of the new country. The genius of the founding architects of Canadian nationhood was to entrench asymmetry up to the limits of the politically possible, but then to permit differences to flourish under other symmetrical provisions I suggest that this constitutional diversity gene is also the historical origins of the desire for what is termed "asymmetrical federalism" by Quebec federalists today and also the foundations of the language rights of minorities under the 1982 *Charter*.

However, the foundational constitutive facts of diversity in Canada were greatly undermined since 1867 by vicious and overt governmental and societal acts of racism and discrimination against aboriginal peoples, racial minorities and indeed women from the dominant culture. The litany of such acts has filled the pages of Canadian history from the abuses of Indian residential schools, to racist immigration laws, including the Chinese head tax, and the denial of the equal occupational rights and the franchise to Asian immigrants, First Nations and women. Added to these shameful annals of the antithesis of diversity are the expropriations and internments of the Japanese Canadians and other immigrant communities whose only sin

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[13] *BNA Act, supra* note 12, s.92(13). For an excellent description of the historical evolution of the structure of the *British North America Act*, see Edgar McInnis, *Canada, A Political and Social History,* 3rd ed. (Toronto: Holt, Rinehart and Winston of Canada, 1969) c. 13 at 342-361.

was to have origins in an enemy country and the denial of European Jewish refugees before and during the Second World War due to rampant anti-Semitism.[14]

Has this tragic record of racism and xenophobia from the earliest beginnings of the Canadian state undermined its diversity gene and rendered any entrenchment of multiculturalism in the *Charter* "more of a rhetorical flourish than an operative provision," as Professor Peter Hogg once predicted? [15] The Supreme Court of Canada has not agreed, as will be discussed below. It is safe to say that the reinforcement of the diversity gene that underlies both the multiculturalism policy and the interpretive clause in Section 27 of the *Charter* has come from a more recent non-discriminatory immigration policy.

13.4 million immigrants have come to Canada since 1901.[16] In one decade alone, between 1991 and 2000, the arrival of 2.2 million immigrants constituted the highest number of immigrants recorded in the previous century.[17] From the end of the 1990s, the annual number of immigrants has totaled approximately 230,000.[18] If these numbers hold, Canada has the record of accepting more immigrants and refugees than any other country, in terms of a percentage of total population.[19] According to Statistics Canada, as of May 15, 2001, 5.4 million people, or 18.4% of the total population, were born outside the country.[20] In 1996,

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[14] For further description of the history of rampant racism in Canada see W. Peter Ward, *White Canada Forever: Popular Attitudes and Public Policy Toward Orientals in British Columbia* (Montreal and Kingston: McGill-Queen's University Press, 2002); R.W. Winks, *The Blacks in Canada: A History* (Montreal and Kingston: McGill-Queen's University Press, 2000); A. Grant, *No end of grief : Indian residential schools in Canada* (Winnipeg: Pemmican Publications, 1996); I. Abella and H. M. Troper, *None is too many: Canada and the Jews of Europe, 1933-1948* (Toronto: L. & O. Dennys, 1986.

[15] See Peter Hogg, *Constitutional Law of Canada and Canada Act Annotated,* 2nd ed. (Toronto: The Carswell Company Limited, 1982)

[16] Metropolis, "20th Century Immigration Facts," online: Security and Immigration, Changes and Challenges <http://atlantic.metropolis.net/security/twentycimmigration.html>.

[17] *Ibid*. For more details on historic immigration patterns, see the Metropolis website at http://atlantic.metropolis.net/security/twentycimmigration.html

[18] *Ibid*

[19] *Ibid.*

[20] Statistics Canada, "Canada's Ethnocultural Portrait: The Changing Mosaic," online: Statistics

the proportion was 17.4%, the second highest in the world after Australia.[21] In contrast, only 11% of the population is foreign born in the U.S. [22]

The ethnic composition of the Canadian populace has also changed rapidly, reinforcing the diversity gene of the country. In 1957, European countries accounted for the top ten sources of immigrants, with the United Kingdom proving one-third of all immigrants. Forty years later in 1997, non-European countries accounted for the top ten sources of immigration.[23]

According to Statistics Canada, of the 1.8 million immigrants who arrived between 1991 and 2001, 58% came from Asia; 20% from Europe; 11% from the Caribbean, Central and South America; 8% from Africa; and 3% from the United States.[24] In comparison, individuals born in Asia represented 47% of immigrants during the 1980s, and 33% of those who arrived during the 1970s.[25] Just 3% of immigrants who came to Canada before 1961 were Asian-born.[26]

It is interesting to note that the multicultural interpretive provision in Section 27 of the *Charter* mandates not only the interpretation of the other provisions in the document consistent with the preservation of the multicultural heritage of Canadians, but also requires that such interpretation enhance such heritage. As is clear from the dramatically changing diversity of the Canadian population described above, the enhancement of that diversity is an uncontestable reality whether accepted by the courts or not. Such a reality could require

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Canada (2001 Census)
<http://www12.statcan.ca/english/census01/products/analytic/companion/etoimm/canada.cfm>.

[21] *Ibid.*

[22] *Ibid.*

[23] Jeffrey G. Reitz, *Warmth of the Welcome: The Social Causes of Economic Success for Immigrants in Different Nations and Cities* (Boulder, CO: Westview Press, 1998).

[24] Statistics Canada, *supra* note 20.

[25] Statistics Canada, *supra* note 20.

[26] *Ibid*.

governments and the courts to apply a "dynamic" interpretation of the provision that may include the need for positive action according to one leading expert.[27]

2. FEDERALSIM AND SUBSTANTIVE EQUALITY WITHIN THE CONCEPT OF COLLECTIVE RIGHTS OF NATIONAL MINORITIES

Recent history would seem to offer up a stunning paradox that federal states may not be the best form of human governance for societies with multi-ethnic populations. The former Soviet Bloc had nine states, six of which were unitary states while three were federal in structure. With the unification of Germany, the six unitary states are now five, but the three federal states, Yugoslavia, the Soviet Union, and Czechoslovakia are now 22 independent states, perhaps 23 if we include Kosovo.[28] Most of these newly independent states were forged by minorities who did not feel that their human rights were sufficiently protected by the federal structures they previously existed in. It is not an adequate counter argument to suggest that this spectacular break up of Eastern European states, the Soviet Union and the Balkan multiethnic federal states was due to the ending of the oppressive authoritarian state after the end of the Cold War and the return of the historic ethnic hatreds and conflicts let loose without the restraints of the strong man and his overwhelming security forces. I suggest that ethnic identities are not predetermined to be in conflict with other groups and that the causes of ethnic conflict are not only influenced by history, but also by the way in which such groups are treated. As one Bosnian Muslim teacher is reported to have said: "We were Yugoslavs. But when we began to be murdered because we are Muslims, things changed. The definition of who we are today has been determined by our killing."[29]

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[27] See Magnet, *supra* note 3 at 1267.

[28] See A. Stepan, "Federalism and Democracy: Beyond the U.S. Model" (1999) 10:4 Journal of Democracy19-34. For an excellent analysis of how federal structures in the Former Republic of Yugoslavia (FRY) did or did not contribute to the breakup of the FRY, see S. Malesevic, "Ethnicity and Federalism in Communist Yugoslavia and its Successor States" in Yash Ghai, ed., *Autonomy and Ethnicity, Negotiating Competing Claims in Multi-Ethnic States* (Cambridge: Cambridge University Press, 2000) 147. The author's thesis is that regarding the value of federal arrangements for the maintenance of multiethnic societies, "a great deal depends on the historical, political and social conditions of the particular society. What is crucial is the way in which the agreement between the constituent units is reached."

[29] See B.W. Jentleson, "A Responsibility to Protect: the Defining Challenge for the Global Community" (2007) 28:4 Harvard International Review 19.

At first sight, this does not bode well for the idea of federations being particularly good structures for the protection of minority rights. Yet, the orthodox thesis is that it is federations rather than unitary states that can best protect minorities across diverse populations or across large territories. Perhaps this view is outdated and should be replaced with the thesis that it is only multiethnic societies, whether federations or not, that develop the appropriate constitutional and legal framework on substantive equality that can hope to remain united and avoid the human rights catastrophes that we see in multiethnic societies around the world today.

I suggest the value of substantive equality may be even more important than having a formal democratic system in a multiethnic society. For example, Sri Lanka, a democratic multi-ethnic state, has stood accused of violating the human rights and equality rights of its Tamil minorities and found itself in a seemingly intractable civil war that has left more than 65,000 dead.[30] Similarly, other theoretically democratic multiethnic states, such as Russia,[31] and most currently, the debacle that is Iraq, are, in practice, refusing to go down the road of a democratic federalism based on respect for substantive equality—with potentially similar disastrous consequences.

The future for authoritarian non-democratic multi-ethnic states is even bleaker. We only have to look at the genocidal carnage in Sudan to understand this horrible future.

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[30] See Neelan Tiruchelvam, "The Politics of Federalism and Diversity in Sri Lanka" in Ghai, *supra* note 28 at 198. The author, a friend and colleague, was a moderate Tamil scholar and jurist who paid with his life for his belief that constitutional reform in the direction of regional autonomy could resolve Sri Lanka's ethnic conflict. He was killed by a suicide bomber on July 29, 1999.

[31] The annual reports of Amnesty International and Human Rights Watch continue to condemn the gross human rights violations and lack of effective democratic institutions in both countries. See the respective websites of Amnesty International at http://www.amnesty.org and Human Rights Watch at http://www.hrw.org.

WHAT DOES SUBSTANTIVE EQUALITY MEAN IN THE CONTEXT OF MINORITY COLLECTIVE RIGHTS?

At the core of the concept of substantive equality is the thesis that sometimes treating minorities,[32] regions, or, indeed, citizens identically can sometimes lead to unequal treatment. Substantive equality, I suggest, would promote treating all groups in a multiethnic society with equal concern and respect, which often requires differential treatment, while formal equality would promote identical treatment of all minorities, regions, and citizens. [33]

The foundational act of the Canadian state, the *British North America Act, 1867*[34] is replete with provisions related to constitutional symmetry and asymmetry. However, what is particularly interesting about the evolution of the Canadian Constitution is that it contains critical constitutional provisions that are sometimes asymmetrical and sometimes symmetrical and that allow differences to flourish. Examples include: the guarantee of 75 seats for Quebec in the Canadian Parliament (Section 37), a critical asymmetrical provision; the entrenchment of the provinces symmetrical jurisdiction over property and civil rights in Section 92(13), a critical symmetrical provision that allows differences between the provinces to flourish; the protection of denominational schools in Ontario and Quebec (Section 93), and the official use of English and French in the Canadian and Quebec legislatures (Section 133), both important asymmetrical provisions. The 1870 *Manitoba Act*[35]

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[32] For a discussion of equality and the accommodation of differences between minority groups and majorities, see W. Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995) at 108-116.

[33] For further discussion of this hotly contested view, see D. Milne, "Equality or Asymmetry: Why Choose?" in R.L. Watts & D.M. Brown, eds., *Options for a New Canada* (Toronto: University of Toronto Press, 1991) at 285-307.

[34] *BNA Act, supra* note 12. For a detailed discussion of the early pre- and post-Confederation history of Canada, see J.L. Finlay, *Pre-Confederation Canada: The Structure of Canadian History to 1867* (Scarborough, ON: Prentice-Hall, 1990); P.B. Waite, *The Life and Times of Confederaion, 1864-1867* (Toronto: University of Toronto Press, 1962); S.B. Ryerson, *Unequal Union: Confederation and the Roots of Conflict in the Canadas, 1815-1873* (Toronto: Progress Books, 1973); A.I. Silver, *The French Canadian Idea of Confederation, 1864-1900* (Toronto: University of Toronto Press, 1982).

[35] 33 Victoria, c. 3 (Can.)

bringing Manitoba into Confederation imposed similar obligations on that province's legislature, found in Section 133 of the *BNA Act*. Likewise, the maintenance of the Civil Law system in Quebec is another example of asymmetrical federalism entrenched in the constitutional history of the country. The genius of the founding architects of Canadian nationhood was to entrench asymmetry up to the limits of the politically possible, but then to permit differences to flourish under other symmetrical provisions.[36]

Leading American federalism theorists such as the late William H. Riker[37] argued, as did opponents of the Meech Lake Accord and the Charlottetown Accord,[38] that it is only symmetrical federalism that is truly compatible with democratic federalism. The federal bargain that created the United States, according to many American federalism theorists like Riker, would deem asymmetrical arrangements incompatible with the fundamental principle of equality of citizens and equality of states. I suggest that the promotion by some American federalism theorists of symmetrical federalism proposes a vision of constitutional formal equality based on their particular revolutionary history. In the evolution of American federalism, the overwhelming political imperative was to minimize differences to create a national identity based on the supremacy of individual and economic liberty. This imperative is protected and safeguarded by a strong central government and a Supreme Court empowered with the strongest remedial mechanisms inherent in the power of judicial review.[39]

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[36] For the landmark text that discusses and analyzes how the division of powers under the *Constitution Act, 1867* allows for asymmetry, even while symmetry predominates, see G-A. Beaudoin, *La Constitution du Canada: institutions, partage des pouvoirs, droits et libertés* (Montreal: éditions Wilson & Lafleur, 1990).

[37] See William H. Riker, "Federalism" in F. Greenstein and N.W. Posby, eds., *Handbook of Political Science*, vol. 5 (Boston: Addison-Wesley, 1975) at 93-172.

[38] For further discussion of the equality/asymmetry arguments that took place in these constitutional rounds, see P. Monahan*, Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991); K. McRoberts & P. Monahan*, The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: University of Toronto Press, 1993).

[39] There are a plethora of sources that advance this theme. See, for example, P. A. Freund, "The Judicial Process in Civil Liberties Case" in V. Stone, ed., *Civil Liberties and Civil Rights* (Chicago: University of Illinois Press, 1975); A. Cox, *The Role of the Supreme Court in American Government* (Oxford: Oxford University Press, 1976); M. Kammen, *Sovereignty and Liberty* (Madison, WI: The University of Wisconsin Press, 1988).

However, where multi-ethnic nations have large dominant ethnic populations and historically settled national ethnic, linguistic, or religious minorities, an insistence on symmetrical federalism would be a denial of the substantial equality and therefore the collective rights of these minorities. Symmetrical federalism and formal equality can often lead to the assumption of uniformity where it does not exist and could lead to the coercive institutions of the federal state imposing such uniformity and assimilation. The result can be disastrous, as we have seen in the case of the Balkans. Asymmetrical federalism in multi-ethnic federations is especially important to promote the essential features of cultural self-determination of such minorities in areas such as language, education, culture, religion and, as in the case of Canada, the legal traditions and systems. Effective participation in decision making at the central level which may be asymmetrical to the proportion of the minorities' percentage of the federation's population is essential to protect against the "nationalizing" tendencies of the dominant population in a multi-ethnic federation.[40] This is the chief rationale of providing a permanent 75 seats to Quebec, regardless of what percentage of the Canadian population the Quebec population comprises.

It is suggested that asymmetrical federalism within a democratic multi-ethnic federal state is a fundamental requirement of substantive equality and the collective rights of these national minorities. To reiterate, substantive equality differs from formal equality in that it recognizes that identical treatment can lead to discriminatory treatment of minorities and impose uniformity and coercive assimilation that would threaten the existence of such minorities and deny them any real content of collective rights.[41] Democratic multiethnic federal states such as India,[42] Canada, and Spain,[43] have learned that asymmetrical federalism has been critical to the survival of their federations.

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[40] See Will Kymlicka, ed. *The Rights of Minority Cultures* (New York: Oxford University Press, 1995) for a collection of essays by some of the leading experts in the world on this theme.

[41] See *Kymlicka, supra* note 40.

[42] See Stepan, *supra,* note 28 at 53.

[43] In some respects, Spain has shown the greatest creativity among multiethnic or multinational societies in designing a constitutional framework to promote substantive equality through asymmetrical arrangements. Although in strict constitutional theory Spain is not a federal state, it

I argue that the entrenchment of asymmetrical federalism in Canada in the *BNA Act* laid the foundations for the entrenchment of the linguistic rights of French and English minorities in Canada under Section 23 of the *Charter,* which will be more fully discussed below.

Both majority populations and minority populations who form the majority in their territory, inevitably also have "nationalizing" or assimilationist tendencies and it is crucial that within both majority and minority populations, historically settled national minorities are afforded the ability to combat intended or unintended assimilation, particularly in the area of language and education. Examples of these "nationalizing tendencies" have been evident throughout the history of Canada, including the failure of the Manitoba legislature to follow the bilingualism mandate from 1890 until ordered to do so by the Supreme Court of Canada in 1979 in two major decisions.[44] Ontario provided another example of majority intolerance when it passed Regulation 17 prohibiting the teaching of French in schools and making English the exclusive language of instruction from 1913 until 1944. The Francophone majority in the Quebec National Assembly demonstrated similar tendencies in attempting to make French the exclusive language of the Assembly under that province's *Charter of the French Language*,[45] until it too was struck down by the Supreme Court of Canada in 1979.[46]

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demonstrates many of the most important features of a federation. In the quasi-federal Spanish framework there is constitutional recognition that there are differences in the desire, especially of the historic national communities of the Basque Country, Catalonia, Galicia, Navarre and Andalusia, for different levels of autonomy. After the 1978 Constitution, all regions gained the possibility of becoming autonomous communities. Thereafter, each autonomous community was granted its own statute of autonomy reached by negotiation between the Autonomous region's leadership and the central government and Parliament in Madrid. There is also asymmetry in the different financial arrangements and the size and nature (conditional or unconditional) of the fiscal transfers from the national government. Such Spanish constitutional creativity is also courageous as it risks the possibility of creating ever greater demands for asymmetry from either the most advanced autonomous region or from the region(s) with the most radicalized national identity. However, the risks may well be worth taking as a way of ensuring the survival of a complex society with so many national communities each with their own unique historic identities.

[44] See *Forest v. Manitoba (Attorney General),* [1979] 2 S.C.R. 1032 and *Reference Re Manitoba Language Rights,* [1985] 1 S.C.R. 721.

[45] R.S.Q. c. C-11

Such precedents would ultimately be seen as going against the very heart of the Canadian diversity gene and would soon be regarded as permanently unconstitutional under the language provisions of the 1982 *Charter*.

It is not therefore surprising that in sections 16 to 23, the *Charter* entrenched minority language rights provisions that mirror those in the original *BNA Act* and extended them. In sections 17 to 19 there is a virtual re-enactment of the provisions of Section 133 of the original *BNA Act*, although, rather curiously, reference to the Quebec legislature is excluded. Following the desire of the province of New Brunswick to have a similar status as regards the bilingual nature of its legislature, these sections also apply to that province. Finally, it is suggested that the rights of the Canadian national minorities to be educated in their own language in Section 23 of the *Charter* was also a historic outcome of the way in which the "diversity gene" developed before and after Confederation.

3. JUSTIFYING THE COLLECTIVE RIGHTS OF MINORITIES WITHIN THE CONTEXT OF LIBERAL DEMOCRATIC FEDERALISM

As Professor Stephan has also pointed out, leading American federalism theorists, such as Riker, also claimed that an essential feature of democratic federalism is the protection of individual rights against encroachments by central or state governments or by the will of the majority.[47] This is accomplished by a number of classic federal structures such as an entrenched *Bill* or *Charter of Rights and Freedoms*, a bicameral legislature where the will of the majority in the lower house can be restrained by an upper house based on regional representation, and, most importantly, a federal Supreme Court that protects the fundamental rights of all citizens of the federation and whose remedial orders are backed by the coercive powers primarily, but not exclusively, of the central government.[48]

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[46] See *Blaikie v. Quebec (Attorney General),* [1979] 2 S.C.R. 1016.

[47] See Riker, *supra* note 37.

[48] See the literature, *supra* note 36 for discussion on this point also.

The fundamental problem posed by this classic American model of the role that rights play within democratic federalism is that the U.S. Constitution and American jurisprudence, particularly that of the U.S. Supreme Court, has not acknowledged the existence of collective rights, which some would assert is the very marrow of minority rights.[49] While some liberal thinkers have attempted to downplay this denial of collective rights legitimacy by pointing out that what may seem to be collective rights can be exercised by individuals and are thereby transformed into individual rights,[50] a major theoretical and practical challenge still exists. In many multi-ethnic federal states, individual citizens of a group can participate effectively in a "group benefiting right" only if the group obtains the effective collective right to education and access to cultural, religious, or legal institutions that are specific to their particular forms of cultural self-determination.[51] As will be discussed below, this is a fundamental aspect of distributive justice within a democratic federalist state.

The dilemma of how to fit minority rights within a federalism framework that is liberal and democratic is being developed in theory and practice by Canadians and within the Canadian constitutional framework. Will Kymlicka argues that "group specific" rights are compatible with liberal fundamental tenets that uphold the supremacy of individual rights. Liberal think tanks like the Friedrich Naumann Foundation of Germany, linking up with Canadian political philosophers and legal experts like Kymlicka and this author, together with other experts and minority representatives from around the world, have developed a liberal manifesto on "The Rights of Minorities" that upholds the group specific rights of minorities

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[49] It should be noted that U.S. law and jurisprudence has offered protection to several collective interests including under the 14th Amendment relating to, *inter alia*, the positive duty to accommodate language minorities in the areas of voting, education and judicial proceedings. Likewise, there has been judicial notice of the collective interests of Native American tribes, including their declaration as "domestic dependent nations" in *Cherokee Nation v. The State of Georgia,* 30 U.S. 1, 5 Pet. 1 (1831). Finally, the position of Puerto Ricans, who have Spanish as the official language in their federated Commonwealth status as well as the rights of the indigenous inhabitants of Guam and Hawaii over land use and language should also be noted as departures from the American focus on individual rights.

[50] It is ironic that one of the main architects of the modern Canadian constitutional order, the late Right Hon. Pierre Trudeau, seemed to have held this perspective of collective rights. See K. McRoberts*, Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997) at 60-64.

[51] See Kymlicka, *supra* note 32 at 75-106.

while proclaiming the supremacy of individual or universal rights.[52] The fundamental premise of these new liberal democratic federalists is that it is because the rights and liberties of individual citizens include the right to associate that most such rights have a group related or specific dimension. Thus, belonging to a minority based on common cultural, linguistic, or religious heritage is indeed an important factor of identity and indeed of human dignity for most members of such minorities. Where individuals thus freely associate, no central or state government or majority, however large, may deny the right of such groups to cultural self determination within the limits of the supremacy of individual and universal rights and the Rule of Law.[53]

Indeed, it is unlikely that the majority francophone population in Quebec or the minority francophone communities outside Quebec or the Catalans in Spain would ever feel comfortable as equal citizens in their democratic federal states without the "group specific" rights enshrined in the respective federal constitutions of their countries.[54]

As with all things, the devil is in the details. The way in which national minorities are settled can often determine the way in which democratic federal states can afford them such group-specific rights. Where such minorities are living in contiguous and compact settlement areas and form a majority, granting some form of territorial autonomy to allow them to fully exercise their right to cultural self-determination can be accomplished most effectively in democratic federal structures through the establishment of a state or province where they form the majority. The province of Quebec in Canada and Catalonia in Spain are examples of such territorial autonomy.[55] Liberal democratic federalists would insist that such territorial

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[52] *A Declaration of Liberal Democratic Principles Concerning Ethnocultural and National Minorities and Indigenous Peoples*, adopted by members of 38 indigenous peoples, national and ethnocultural minorities from 26 countries at the 2nd Minorities Conference of the Friedrich Naumann Foundation held at Berlin from September 13-16, 2000. Copies can be obtained from Liberales Institut der Freidrich-Naumann-Stiftung, Postfach 90 01 64, D-14437 Potsdam or online from Freidrich-Naumann-Stiftung at http://www.fnst.de/libinst/publikationen/minoeng.pdf.

[53] See Kymlicka, *supra* note 32 at 75-106.

[54] For an extensive discussion of how important language is with such "group specific" rights from a historical and international perspective, see F. de Varennes, *Language, Minorities and Human Rights* (Boston: Martinus Nijhoff Publishers, 1996).

[55] For a comparison of these two types of territorial autonomy, see M. Pares & G. Tremblay, eds.,

autonomy granted to such minorities should not come at the expense of the rights of individuals or other minority groups within the territory granted autonomy. There is thus a need for an entrenched Bill or Charter of Rights enforced by an independent federal judiciary.

Where minorities live dispersed among the majority population within a federal structure, other functional forms of protecting the essential areas of cultural self-determination in areas such as language, education, etc., are needed. Examples include the constitutional guarantees for minority language education for dispersed minority francophone communities outside Quebec, which will be discussed below.

This is where fundamental conceptions of distributive justice that underpin the concept of collective rights and substantive equality must enter the picture to set the context for the human rights framework of individual and collective rights within a democratic federalism framework and to help in adjudicating conflicts between different sets of rights.

4. A CANADIAN CONCEPTION OF DISTRIBUTIVE JUSTICE

By the above discussion, I have tried to show that distributive justice must also be at the core of any democratic federalism attempt to entrench substantive equality to protect minority rights. It is time for me to explain what, then, is the conception of distributive justice that I advocate.

Distributive justice encapsulates every aspect of all human societies because all human societies are also institutions of distribution. Different political and legal systems promote different distributions of society's most valued assets, such as power, knowledge, wealth, security of the person, health, and education. The judiciary also is an instrument of distributive justice. Different interpretations of rights, especially collective rights, lead to

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Catalunya, Quebec: Dues Nacions, Dos Models Culturals, Ponencies del Primer Simposi, Barcelona, maig, 1985. (Barcelona: Generlitat de Catalunya, 1988).

different distributions of power and access to public goods. The decisions of the Supreme Court in the area of linguistic and aboriginal rights most clearly demonstrate this.[56]

In human history, some societies have either expressly (*e.g.,* the former apartheid regime in South Africa) or *de facto* (including many so-called Western liberal democracies) allowed full and equal access to the above-mentioned societal goods only to those who conform to a singular and dominant racial, ethnic, linguistic, or cultural paradigm. This has been the root cause of much of the racial and ethnic strife that we have seen and continue to see around the world today, from the civil rights movement in the United States to the ethnic strife in the Balkans and Sri Lanka. Conceptions of distributive justice found within democratic federal systems deny that such societal distributional criteria can ever be just. Democratic federalist and pluralist conceptions of distributive justice must acknowledge that all manifestations of race, language, ethnicity, or national origin are worthy of equal concern and respect. Distributive justice in democratic federalist societies must aim at the establishment of a society where no one segment of society can claim that they have the singular and dominant racial, cultural, ethnic, or linguistic paradigm and, on that basis, have the predominant access to society's most valued goods. This concept of distributive justice does not exclude the rights of historically settled national minorities or aboriginal peoples to seek to preserve their cultural traditions and seek protection against assimilation. As discussed by Kymlicka, the freedom to associate with other members of these national minorities with the goal of preserving their cultural traditions is a fundamental issue of human dignity. If the state robs members of these national minorities of this aspect of human dignity, it robs them of their intrinsic worth as human beings. Nothing is more critical to a fair system of distributive justice than the preservation of human dignity and self-worth.

It is readily acknowledged that this is one conception of distributive justice. As others have so well stated, distributive justice is one of most hotly contested battlegrounds for different political, philosophical, and moral perspectives.[57]

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[56] For support on this point relating to aboriginal rights, see Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

It is suggested that this approach to distributive justice is also the predominant value behind the equality guarantee in section 15 of the *Canadian Charter of Rights and Freedoms* as confirmed by the jurisprudence of the Supreme Court of Canada.[58]

Again, the Canadian constitutional order is "hunching" out a theoretical and practical framework for the human rights framework of individual and collective rights while respecting the multicultural interpretive principle that seems to be based on unarticulated notions of distributive justice.

The collective rights of Canada's constitutional minorities and juridical respect for the growing diversity of Canadian society have been guaranteed in the *Canadian Charter of Rights and Freedoms* entrenched in our Constitution in 1982.[59] In the Constitution, we recognize the collective rights of our Aboriginal people, and the interpretive multicultural principle in section 27 supports the preservation and enhancement of our multicultural and multiracial communities. Through court decisions and provisions of the original Constitution and the *Charter*, we recognize the collective rights of our French-speaking population.

The wording of some of the provisions in the Canadian Constitution and *Charter*, which recognize collective rights of Canada's constitutional minorities and support the interpretive multicultural principle in section 27, pose some interesting dilemmas for those who are

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[57] See the debate that continues today over other theories of justice that include distributive justice, including Michael Walzer, *Spheres of Justice, A Defense of Pluralism and Equality,* (Basic Books, Inc., 1983); John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) and Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977). I draw on all these seminal works (but reject some of the ideas contained in them) for the proposed conception of distributive justice as a framework for adjudicating collective and individual rights.

[58] For a discussion of the recent jurisprudence of the Court, see E.P. Mendes, "Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity" (2000) 12:3 National Journal of Constitutional Law 3.

[59] For one of the most comprehensive analyses of the provisions of the *Charter*, see, G.-A. Beaudoin & E. Mendes, eds., *The Canadian Charter of Rights and Freedoms,* 3rd ed. (Scarborough, ON: Carswell, 1996).

steeped in classical liberalism in the American legal tradition. In what follows I briefly discuss two examples, namely, sections 23(3) and 27 of the *Charter*.

5. DISTRIBUTIVE JUSTICE AND THE EDUCATION RIGHTS OF LINGUSITIC MINORITIES

Section 23(3) of the *Canadian Charter of Rights and Freedoms* entrenches the minority linguistic education rights of French speaking minorities outside Quebec and English speaking minorities within Quebec. The Section states:

> 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 of 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.[60]

This is a curious type of right to be found in a constitutional document in a Western liberal democracy, where the exercise of the right is contingent on the number of people who wish to exercise it! Imagine a similarly contingent right related to the freedom of speech. This entrenchment of linguistic rights in Canada points to the fact that collective rights require an examination of the sociological, economic and cultural backgrounds from which they arise.[61]

The Supreme Court of Canada, in *Arsenault-Cameron* v. *P.E.I.*,[62] handed down a profound example of the critical role distributive justice, on a conscious or unconscious level, plays in

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[60] *Charter supra* note 1, s.23(3).

[61] See M. Bastarche, ed., *Les droits linguistique au Canada* (Montreal: Les Éditions Yvon Blais, Inc. : 1986).

[62] [2000] 1 S.C.R. 3 **[*Arsenault-Cameron*]**.

setting the context of the human rights framework for protection of the collective rights of minorities within a democratic federal system.

In that case, the individual francophone parents entitled to have their children schooled in French under section 23 of the *Charter* sought to have their children schooled at the primary level in a school located in their local community of Summerside, P.E.I. The provincial Minister of Education insisted that such minority language education could be provided at an existing French language school, approximately 57 minutes away by school transportation services. The Supreme Court ruled, in a judgment delivered by Mr. Justice Major and Mr. Justice Bastarache, the former academic expert on linguistic rights, that section 23 was not meant to uphold the status quo by adopting a formal vision of equality where the majority and minority language groups were treated alike. The Court held that the purpose of section 23 was to remedy past injustices and provide minority language communities with equal access to high quality education in circumstances where community development is enhanced. The reference to "where numbers warrant" in the section must take into account community development and the desire of the minority community to use institutions such as minority schools to prevent assimilation, even where the numbers in the Summerside area were at the low end 49 and 155 at the higher end of the number of potential minority students.

In a clear expression that Canada has taken a different liberal democratic route from the United States, the Court held that focusing on the individual right to instruction at the expense of the linguistic and collective rights of the minority community effectively restricts the collective rights of the minority community. Here the Minister had failed to realize that the existence of a local minority language school was the single most important institution for the survival of the linguistic minority and to prevent the assimilation of minority language children. The Court also held that the local management and control by the minority language community was critical to the enjoyment of the section 23 rights.

It is suggested that the *Arsenault-Cameron* decision of the Supreme Court of Canada is a paradigm example of the need to strive for substantive equality based on conceptions of distributive justice within the context of democratic federalism to protect the rights of

minorities within a democratic federal system. I suggest that the Supreme Court in the *Arsenault-Cameron* decision moved much closer to a distributive justice conception of the rights of linguistic minorities than the previous decisions of the Court in this area. In particular, I argue that the Court in the previous *Mahe v. Alberta*[63] decision failed to recognize the need for linguistic minorities to have a say in what constitutes sufficient numbers of minority students to qualify for their section 23 rights. Instead the Court interpreted section 23 to be based on a numerical "sliding scale" of entitlements which could have resulted in the small numbers of minority students in the *Arsenault-Cameron* situation not being entitled to any program of minority language instruction.

Protection of minorities has been confirmed as one of four foundational principles of Canadian federalism by the Supreme Court in its landmark ruling on the right of Quebec to unilaterally secede from Canada. In *Reference re Secession of Quebec,*[64] the Court held that neither the Canadian Constitution nor International Law gave the government of Quebec the right to effect secession unilaterally. However, in a landmark ruling, the first of its kind in any multi-ethnic democratic federalist state, the Court went much further. The Court advised that there would be a constitutional duty on all parties to negotiate if the legitimate goal of secession was supported by *"the clear expression of a clear majority"* of Quebecers.[65] Such negotiations would have to address the interests of all provinces and the federal government and the rights of all Canadians wherever they live. Most relevant to this discussion, the Court stipulated that such negotiations would have to proceed with respect for "*the same constitutional principles that give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities."*[66]

The Supreme Court related this fundamental principle to the *Charter* in the following manner:

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[63] [1990] 1 S.C.R. 342. The "sliding scale" of entitlements was followed in the Supreme Court decision in *Re Public Schools Act (Manitoba),* [1993] 1 S.C.R. 839.

[64] [1998] 2 S.C.R. 217.

[65] *Reference re Secession of Quebec, supra* note 64 at para. 100.

[66] *Ibid.* at para. 90.

> The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the Charter. Undoubtedly, one of the key considerations motivating the enactment of the Charter, and the process of constitutional judicial review that it entails, is the protection of minorities.[67]

I suggest that the Canadian Supreme Court has advised all democratic multi-ethnic federal states that the breakup of such federations are subject to much the same fundamental values as the preservation of such states as I have argued above. I also suggest that because Canada has striven hard to observe these fundamental values, there will never be a clear expression of a clear majority of Quebecers to leave the Canadian federation.

6. DISTRIBUTIVE JUSTICE AND SECTION 27 OF THE *CHARTER*

As discussed above, in section 27 of the *Charter*, one finds an interpretive section that reinforces the view that racial and ethnic minorities who derive their existence from both longstanding and more recent immigration into Canada have a different sort of protection under the *Charter* than the collective rights of Canada's aboriginal peoples and the historically settled national minority communities of French and English found across Canada. The section states:

> **27.** This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.[68]

This section requires that all rights and freedoms in the *Charter* be interpreted in a manner that not only ensures the preservation of what I have called the Canadian diversity gene or the multicultural heritage of Canada, but also promotes its actual enhancement. Does it not seem paradoxical that individual rights found in other sections of the *Charter* must be interpreted in a way that not only preserves but enhances a country's long history of diversity together with linguistic and cultural pluralism?

I turn to an examination of what the interpretive principle of multicultural heritage of Canadians consists of as set out in section 27. For the purpose of the ensuing discussion, I

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[67] *Ibid* at para 81.
[68] *Charter, supra* note 1, s.27.

am assuming that the concept of multiculturalism is equivalent to the concept of multicultural heritage of Canadians. It is imperative to define multiculturalism first. Attempts to define multiculturalism have usually set out an historical evolution of Canadian nationhood accompanied by what the concept means or should mean today. The 1987 House of Commons Report entitled *Multiculturalism: Building the Canadian Mosaic*[69] arrived at what I have summarized as the following essential features of multiculturalism:

- Multiculturalism is a principle applicable to all Canadians and it seeks to preserve and promote a heterogeneous society in Canada. The principle refutes the idea that all citizens should assimilate to one standard paradigm over time.
- Multiculturalism is today most fundamentally concerned with ensuring substantial equality for all Canadians regardless of what cultural groups they belong to.

If this is correct, then the interpretive rule in section 27 is a mandate for Canadian courts and governments to interpret all rights and freedoms in the *Charter*, even those focused on individual rights, in a manner that preserves cultural pluralism and substantive equality among all citizens in Canada while taking into account the historical bargain that established the collective rights of the aboriginal peoples and the national linguistic minorities of the country. This again involves applying a uniquely Canadian principle of distributive justice.

The most relevant and controversial conclusion from this analysis of section 27 is that there will be situations when the exercise of individual rights and in some cases the exercise of the collective rights of national minorities will, in some circumstances, have to give way to or reasonably accommodate the multicultural interpretive principle, where the exercise of such rights crushes the equal access by members of ethno-cultural groups to the most important goods in our society. This has been illustrated in the area of hate propaganda in the *R.* v. *Keegstra*[70] decision of the Canadian Supreme Court, where the Court, in upholding the hate propaganda provisions of the Canadian *Criminal Code*[71] ruled that the freedom to willfully

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[69] House of Commons, Standing Committee on Multiculturalism, "Multiculturalism: Building the Canadian Mosaic," 2d Sess., 33rd Parl. (1987) at 22-23.

[70] [1990] 3 S.C.R. 697 **[*Keegstra*].**

[71] R.S.C. 1985, c. C-46 **[*Criminal Code*].**

disseminate hate propaganda against identifiable minority groups in our society cannot crush the rights of such minorities to equality and full citizenship in our society. The Court ruled that these rights are protected both by section 15, (the equality guarantee) and section 27 of the *Charter* in the context of balancing individual rights against the multicultural and equality provisions of the *Charter* under section 1 of the same document. In this decision, the Court held that section 27 could be a used in the context of the balancing test under section 1 to give legitimacy and enhance the government's legislative objective in the Criminal Code to prohibit the willful promotion of hatred against an identifiable group. The Court viewed such willful promotion of hate propaganda as an attack on the targeted individual's connection with their culture and thereby also constituting an attack on the process of self-development and human dignity of members of such identifiable groups. As suggested above, the ability to preserve one's human dignity should be regarded as perhaps the most valued good in a free and democratic society.

Other decisions of the Supreme Court have reinforced the thesis that section 27 is a buffer against governments establishing legislative objectives that regard some religious, cultural or ethnic groups as less worthy of equal concern and respect. n particular, section 27 will play a part where governments are seen to regard some religions as dominant and therefore others as less entitled to being treated as an equal. In the *R. v. Big M Drug Mart Ltd.*[72] decision, the Court struck down the Sunday closing law that clearly had the Christian Sabbath as its main rationale. Chief Justice Dickson asserted that "*to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians*".[73] Likewise in the *R. v. Edwards Books and Art Ltd.*[74] decision of the Supreme Court in validating Sunday as a secular day of rest, Chief Justice Dickson took the opportunity to stress that Section 27 mandated an interpretation of the freedom of religion guarantee in section 2 of the *Charter* to ensure that the multiplicity of religions in Canada's pluralist society was protected from both direct and indirect coercion.

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[72] [1985] 1 S.C.R. 295.

[73] *Ibid*., at para. 99.

[74] [1986] 2 S.C.R. 713.

At a later stage, both lower courts and the Supreme Court in the criminal and civil contexts seem to be applying the multicultural principle in section 27 to ensure that a dominant society affords to ethno-cultural and aboriginal minorities an equal chance of obtaining justice in the criminal context and to be reasonably accommodated in the provision of or access to public services or education. In *R. v. Punch,*[75] the Supreme Court of the Northwest Territories mandated the use of a 12-person jury in the Northwest Territories, instead of a six person jury as permitted by the *Criminal Code,*[76] as the larger number of jurors were more likely to reflect the multicultural heritage of the local population. Likewise in *R. v. Tran*[77], the Supreme Court applied section 27 to the right to an interpreter guaranteed under section 14 of the *Charter*. The court held that the multicultural society in Canada is a multilingual one, therefore requiring, if necessary, language interpreters for those who speak languages other than English or French if they are to be given "real and substantive access to the criminal justice system."[78]

In a controversial decision regarding the extent to which minority religions should be accommodated in a non-criminal law context, a majority of the Supreme Court in *Syndicat Northcrest v. Amselem*[79] held that a religious practice of a minority can be protected under the *Charter* even if that practice was not necessarily an obligatory part of an established belief system or shared by others, if it was a voluntary expression of faith and the claimant sincerely believed the practice was of religious significance.[80] On the facts of that case, expert evidence indicated that orthodox Jews were under no obligation to build personal "succahs" (hut-like temporary dwellings) on their condominium balconies where they would

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[75] [1986] 1 W.W.R. 592 (N.W.T.S.C.).

[76] *Criminal Code, supra* note 71.

[77] [1994] 2 S.C.R. 951.

[78] *R v. Tran, supra* note 77 at para. 37.

[79] [2004] 2 S.C.R. 551. There were two strong dissents by Justice Bastarache and Justice Binnie in the case that indicated that the Court may have gone too far in attempting to accommodate this subjective religious practice despite the evidence that the practice was not obligatory and the practitioners had voluntarily agreed to the by-laws.

live for a nine day period during an annual Jewish festival. Nevertheless, the Court held that a subjective desire to carry out this religious duty overrode the contractual duty of the condominium owners not to act in violation of the building's by-laws.

More recently, the Supreme Court of Canada has sent a strong signal that those who administer, control access to or teach in Canada's public education institutions have a duty to embrace diversity, which includes promoting a culture in public education institutions that respect the freedom of religion of Canada's multicultural society. In its decision in *Multani v. Commission scolaire Marguerite-Bourgeoys,*[81] the Court concluded that the *Charter* protected the right of an orthodox Sikh student to wear his ceremonial dagger called a "kirpan" at school. A majority of the Court[82] also ruled that the *Charter* establishes a minimum constitutional protection for freedom of religion that applies both to all legislatures and administrative tribunals. In this context safety concerns must pass the constitutional standards laid down by the *Charter* and jurisprudence emanating from it, if an infringement of the freedom of religion is to be justified. The Court followed its earlier decision in the *Amselem* case and ruled that the freedom of religion guarantee in the *Charter* protected this practice even though it was not obligatory for orthodox Sikhs to wear a metal kirpan at all times. The student's desire to do so was based on a reasonable religiously motivated interpretation and a sincere belief that he adhere to this practice to comply with the requirements of his religion. Because this sincerely held belief would force the student to choose between adhering to the practice or not being allowed into the public school system, the Court held that the decision by the Quebec School Board to prohibit the wearing of the metal kirpan on the premises of the school was an infringement of the freedom of religion guarantee in section 2 of the *Charter*, which was not trivial or insignificant and could only be justified under section 1 of the same document.

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[81] [2006] 1 S.C.R. 256 **[*Multani*]**.

[82] Two of the Supreme Court Justices, Madam Justice Deschamps and Madam Justice Abella disagreed on this point. They concluded that recourse to a constitutional law justification is not appropriate where, as in this case, what must be assessed is the propriety of an administrative body's decision relating to human rights. Whereas a constitutional justification analysis must be carried out when reviewing the validity or enforceability of a norm such as a law, regulation or other similar rule of general application, the administrative law approach must be retained for reviewing decisions and orders made by administrative bodies

Applying the section 1 test, the Court held that a total prohibition of the kirpan "undermines this religious symbol and sends students the message that some religious practices do not merit the same protection as others."[83]

While acknowledging the sufficiently important objective of safety in the schools and the rationality of the ban on kirpans, the Court concluded that the total prohibition of the kirpan was not a minimal impairment of the freedom of religion guarantee. Even though she did not specifically refer to section 27, Madam Justice Charron writing for the majority of the Court stated:

> The respondents submit that the presence of kirpans in schools will contribute to a poisoning of the school environment. They maintain that the kirpan is a symbol of violence and that it sends the message that using force is the way to assert rights and resolve conflict, compromises the perception of safety in schools and establishes a double standard.
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> The argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict must fail. Not only is this assertion contradicted by the evidence regarding the symbolic nature of the kirpan, it is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism.[84]

The Court completed its analysis that the total ban on the wearing of the kirpan could not be justified under section 1 by ruling that the deleterious effects of a total ban outweighed the salutary effects. The Supreme Court supported the Quebec Superior Court's decision to allow the student to wear the kirpan under certain conditions (it had to be carried in a wooden case, wrapped in fabric, and sewn into his clothes). The Supreme Court concluded that applying such a less restrictive approach "demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities."[85]

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[83] *Multani, supra* note 81 at para. 79.

[84] *Multani, supra* note 81 at paras. 70-71.

[85] *Ibid*. at para. 79.

These decisions, which were quite controversial in Quebec, together with other demands for reasonable accommodation by minority groups in Quebec, have created, in my view, an unreasonable and growing antipathy to the accommodation of ethnocultural minorities in that province. An opinion poll by the CROP organization found that 61% of Quebecers are concerned about reasonable accommodation and 73% fear that such accommodation has gone out of control.[86] Behind this concern and fear is the worry that such reasonable accommodation may start to undermine the cultural identity of Quebec. What must be discussed and debated in that province is that while Canada's national minorities, including the Francophone majority in Quebec, have collective rights to maintain their cultural and linguistic identities, the substantial equality rights of ethnocultural minorities to full participation and access to the critical societal goods such as public education in these societies cannot be sacrificed where reasonable accommodation can take place. It will take wise and courageous leadership to pursue that debate rather than succumbing to or, worse still, exploiting these unjustified fears.

7. THE ULTIMATE DISTRIBUTIVE JUSTICE CHALLENGE; BALANCING INDIVIDUAL AND COLLECTIVE RIGHTS

It cannot be disputed that both the *Charter* and Canadian society recognize the equal value of civil and political rights based on the dignity of the individual human being. Many of the civil and political rights are stated in absolute terms that seems to allow little room for abridgement. For example, section 2 of the *Charter* states:

> 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 means of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.[87]

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[86] See Daphnée Dion-Viens, "Accommodements raisonnables: les Québécois preoccupies" *Le Soleil* (27 August 2007), online: Le Soleil (Cyberpresse) <http://www.cyberpresse.ca/article/20070827/CPSOLEIL/70826140/-1/CPSOLEIL>.

[87] *Charter, supra* note 1, s.2.

The jurisprudence of the Canadian Supreme Court has imposed a two-step approach to interpreting rights such as these in any litigation process. First, the complainant who is alleging that his or her rights have been infringed must establish a *prima facie* case that the government has violated the guaranteed right. No governmental justification for abridgement of the right is permitted at this stage. For example, even the curtailment by government action or legislation of the vilest forms of hate propaganda and more recently, child pornography, have been ruled a violation of section 2.[88] The Supreme Court has held that any form of communication has expressive content and government restriction of any such form of expression is a violation of section 2(b).[89]

However, despite this initial, seemingly absolutist, approach to civil and political rights, we do not place the collective rights of the national or constitutional minorities described above or the multicultural interpretive principle in section 27 at risk of being trumped by individual rights and freedoms, no matter how they are being used. Rather, we attempt to balance the categories of rights by the distributive justice principles that have been enunciated in the Supreme Court of Canada case law interpreting section 1 of the *Charter*.

The need to develop some fundamental principles of distributive justice is introduced in the first section of our *Charter.* This section states:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society..[90]

The section comes into operation after the plaintiff has proven that there is a *prima facie* violation of his or her rights, as described above. The burden of proof then switches to the government to show that it can justify such a violation on the basis of the criteria set out in

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[88] See *Keegstra, supra* note 70. See also *R*. v. *Sharpe,* [2001] 1 S.C.R. 45, S.C.C. 2.

[89] See *Irwin Toy Ltd*. v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927 **[*Irwin Toy*]**.

[90] *Charter, supra* note 1, s.1.

section 1, which makes all the guaranteed rights subject to reasonable limits demonstrably justified in a free and democratic society.

I suggest that section 1 was a mandate given by the people of Canada to the judiciary, in particular the Supreme Court of Canada, to work out a framework of distributive justice within which an appropriately Canadian rights adjudication process concerning the collective rights of Canada's national minorities and the multicultural interpretive principle could take place.

During the relatively brief period of the existence of the Canadian *Charter* since 1982, there have been cases where, I suggest, the Supreme Court of Canada has courageously met the challenge of creating this uniquely Canadian framework of distributive justice for collective and individual rights adjudication.

The landmark decision of the Canadian Supreme Court in *Ford* v. *Quebec (A.G.)*[91] is, I suggest, the paradigmatic example. In this case, five businesses operated by English speaking Quebeckers sought a declaration that sections 58 and 69 of the Quebec *Charter of the French Language*[92] infringed the individual right of free expression as they required exclusive use of French on exterior commercial signs. The Court held that this total prohibition was too heavy an infringement of the individual right of free expression and so struck down the law. The Court even suggested a different legislative scheme that would be constitutionally acceptable. The Court suggested that requiring the predominant display of the French language, even its marked predominance, would be proportional to the legitimate goal of promoting and maintaining a French "visage linguistique" in Quebec. Distributive justice requires that collective rights maintain a sense of proportionality in impairing the individual good of free expression and other individual freedoms and liberties that enhance the value of human dignity. Ultimately, even a subsequently elected separatist government

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[91] [1988] 2 S.C.R. 712.

[92] *Charter of the French Language, supra* note 45.

in Quebec accepted this suggestion by the Court as a just way to deal with cultural self-determination while respecting the individual rights of all the province's citizens.[93]

In the rather complex interpretations of section 1, it should never be forgotten at this time of celebration of the 25th anniversary of the *Charter* that one of the most pre-eminent jurists in Canadian history, Chief Justice Dickson, in *R.* v. *Oakes*[94] focused upon the final words of section 1 as they were seen as "the ultimate standard against which a limit on a right or freedom must be shown, despite its effect... ."[95] Chief Justice Dickson argued that because Canada is a free and democratic society, the courts must be guided in interpreting section 1 by the values inherent in concepts such as:

> ...respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[96]

There can be no better conclusion as to what are the fundamental values that must underpin the historical and present day Canadian "diversity gene" than these words of Chief Justice Dickson. There can be no better description of the values of democratic pluralism and substantive equality based on Canadian perceptions of distributive justice that can prepare Canadians, Canadian lawyers and the Canadian judiciary for the next 25 years of the *Charter's* existence.

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[93] For a detailed discussion of this case, see E. P. Mendes, "Two Solitudes, Freedom of Expression and Collective Linguistic Rights in Canada: A Case Study of the Ford Decision" (1991) 1:3 The National Journal of Constitutional Law 283.

[94] [1986] 1 S.C.R. 103.

[95] *Ibid*., at para. 64.

[96] *Ibid.*