The Constitutional Status of Aboriginal Languages in Canada

By

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ABSTRACT

The languages of Indigenous peoples are threatened with disappearance worldwide, and Canada is no exception. Of the fifty or so Aboriginal languages still spoken in Canada today, only three can be considered relatively safe. In Canada, as in many other countries, this situation directly results from colonial policies intended to eradicate these languages and assimilate their speakers into the dominant society; policies which have been termed “cultural genocide”. To redress this imbalance and avert the loss of these languages, their proper place in our constitutional order must be recognized. The author argues that Aboriginal languages in Canada already possess constitutional status, a status which has three main aspects. First, these languages are protected as Aboriginal rights under section 35(1) of the Constitution Act, 1982. Second, that this protection, when examined in the light of important constitutional principles and Canada’s colonial past, imposes a corresponding duty on Canadian governments to support the revitalization, protection, and promotion of Aboriginal languages. And third, that the constitutional status of Aboriginal languages, as the languages of founding peoples of Canada, mandates their recognition as official languages, and that failure to do so would violate the equality rights of Aboriginal peoples, as well as amount to interference with their protected Aboriginal rights. The author concludes that the constitutional status of Aboriginal languages must be recognized and enhanced in order to enable the possibility of meaningful reconciliation between Aboriginal peoples and the Canadian state.
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TABLE OF CONTENTS

Abstract ........................................................................................................................................... ii

Acknowledgments ............................................................................................................................. iii

Table of Contents ............................................................................................................................ vi

Chapter 1   Introduction .................................................................................................................. 1

Chapter 2   The Current State of Aboriginal Languages in Canada .............................................. 10
   2.2 Indigenous Languages of the Americas ............................................................................... 10
   2.3 Aboriginal Languages of Canada ....................................................................................... 12
   2.4 Critical State of Aboriginal Languages .............................................................................. 17
   2.5 Efforts to Revitalize, Protect and Promote Aboriginal Languages ..................................... 28
   2.6 Conclusion ........................................................................................................................... 30
   2.7 The Current Constitutional and Legislative Context ............................................................. 30
   2.8 Conclusion ........................................................................................................................... 61

Chapter 3   Indigenous Language Rights: A Brief Comparative Survey ........................................ 62
   3.2 International Law .................................................................................................................. 62
   3.3 A Brief Comparative Survey of the Law Relating to Indigenous Languages ...................... 64
   3.4 Conclusion ........................................................................................................................... 77

Chapter 4   Aboriginal Languages as Aboriginal Rights ................................................................. 78
   4.2 Introduction ........................................................................................................................... 78
<table>
<thead>
<tr>
<th>Section/Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.3</td>
<td>Section 35 of the Constitution Act, 1982</td>
<td>78</td>
</tr>
<tr>
<td>4.4</td>
<td>Language as an Aboriginal Right</td>
<td>83</td>
</tr>
<tr>
<td>4.5</td>
<td>The Inherent Right of Self-Government and the Regulation of Language</td>
<td>128</td>
</tr>
<tr>
<td>4.6</td>
<td>Conclusion</td>
<td>137</td>
</tr>
<tr>
<td>Chapter 5</td>
<td>The Constitutional Duty to Protect Aboriginal Languages</td>
<td>139</td>
</tr>
<tr>
<td>5.2</td>
<td>Sources of the Constitutional Duty</td>
<td>139</td>
</tr>
<tr>
<td>5.3</td>
<td>The Scope of the Constitutional Duty</td>
<td>202</td>
</tr>
<tr>
<td>5.4</td>
<td>Conclusion</td>
<td>211</td>
</tr>
<tr>
<td>Chapter 6</td>
<td>Aboriginal Languages and the Official Languages of Canada</td>
<td>213</td>
</tr>
<tr>
<td>6.2</td>
<td>Official Bilingualism and the Constitutional Status of Aboriginal Languages</td>
<td>213</td>
</tr>
<tr>
<td>6.3</td>
<td>Aboriginal Languages and Section 15 Equality Rights</td>
<td>233</td>
</tr>
<tr>
<td>6.4</td>
<td>Conclusion</td>
<td>254</td>
</tr>
<tr>
<td>Chapter 7</td>
<td>Conclusion</td>
<td>258</td>
</tr>
<tr>
<td>Bibliography</td>
<td></td>
<td>262</td>
</tr>
<tr>
<td>Legislation</td>
<td></td>
<td>262</td>
</tr>
<tr>
<td>Jurisprudence</td>
<td></td>
<td>267</td>
</tr>
<tr>
<td>Documents and Reports</td>
<td></td>
<td>273</td>
</tr>
<tr>
<td>Books</td>
<td></td>
<td>280</td>
</tr>
<tr>
<td>Articles and Book Chapters</td>
<td></td>
<td>285</td>
</tr>
<tr>
<td>Websites</td>
<td></td>
<td>293</td>
</tr>
</tbody>
</table>
CHAPTER 1  INTRODUCTION

There is a fire burning over the earth, taking with it plants and animals, ancient skills and visionary wisdom. At risk is a vast archive of knowledge and expertise, a catalogue of the imagination, an oral and written language composed of the memories of countless elders and healers, warriors, farmers, fishermen, midwives, poets, and saints – in short, the artistic, intellectual, and spiritual expression of the full complexity and diversity of the human experience. Quelling this flame, this spreading inferno, and rediscovering a new appreciation for the diversity of the human spirit as expressed by culture, is among the central challenges of our times.¹

The unprecedented threat to the linguistic diversity of the world is well documented. The United Nations Educational, Scientific and Cultural Organization (UNESCO) estimates that nearly half of the world’s approximate total of 6,000 languages will disappear by the end of this century, if nothing is done to reverse current trends.² Among the most threatened languages we find the languages of the world’s Indigenous peoples.³ This is not surprising, given the impact of colonialism on the language diversity of the world. To give one particularly stark example, it is estimated that at the time of European arrival in Australia, there were around 250 languages spoken on the continent; by the end of the twentieth century, at least 205 of these languages were lost or at serious risk of being lost.⁴ The story is similar in North America: estimates at the end of the twentieth century forecast the disappearance of 80 percent of the remaining Indigenous languages of North America within a generation, unless current trends were reversed.⁵

⁴ Ibid. at para. 34.
Canada, the ravages of colonialism on Indigenous languages can be clearly seen in the fact that of the fifty or so languages remaining today, only three (Cree, Ojibway and Inuktitut) can be considered relatively safe if current trends continue.

The impact of colonialism on Indigenous languages in Canada was felt not only in the displacement and depopulation (either through violence or disease) that accompanied it, although these did play a role; but its most harmful manifestation was in the development of an ideology of destruction of Indigenous languages and cultures, carried out through explicit governmental policy enforced primarily, although not solely, through a system of forced attendance at residential schools for Indigenous children. This policy was recently recognized by the Chief Justice of Canada as amounting to “cultural genocide”. The Truth and Reconciliation Commission of Canada, which was set up in the wake of the largest class-action settlement in Canadian history to “[a]cknowledge Residential School experiences, impacts and consequences” and to “[c]reate as complete an historical record as possible of the [Indian Residential School] system and legacy”, affirms that one of the central goals of Canadian governmental policy in the last two centuries was to “cause Aboriginal peoples to cease to exist

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6 The term Indigenous has recently emerged, especially in international contexts but increasingly in domestic contexts as well, as the preferred term to refer to the original inhabitants of settler states such as Canada. While there continues to be some controversy over the precise definition of the term, former UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya’s concise definition seems most apt: “Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest” (Indigenous Peoples in International Law, 2nd ed. (Oxford: Oxford University Press, 2004) at 3). In the Canadian constitutional context, the term Indigenous is not formally recognized; instead, section 35(2) of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, defines the “aboriginal peoples of Canada” to include “the Indian, Inuit and Métis peoples of Canada”. The “Indian” peoples are now generally referred to as the First Nations. Because of the constitutional import of the term Aboriginal (now generally capitalized), I have chosen to use it primarily throughout this work; I do, however, use the term Indigenous interchangeably in contexts that do not refer explicitly to Canadian constitutional law, and in the context of international law.

7 Mary Jane Norris, “Canada’s Aboriginal Languages” (1998) 51 Canadian Social Trends 8 at 8.


10 Ibid., Term of Reference 1(b).
as distinct legal, social, cultural, religious, and racial entities in Canada”,\textsuperscript{11} an assessment which is borne out in the many pages of its six-volume report. The residential schools were not only an assault on the physical well-being of Aboriginal children,\textsuperscript{12} but an assault on the very existence of Aboriginal identity. The avowed purpose of the schools was to “civilize” Aboriginal children, a purpose equated with the loss of their Aboriginal identity; an attempt to “kill the Indian in the child”\textsuperscript{13} which was “part of a coherent policy to eliminate Aboriginal people as distinct peoples and to assimilate them into the Canadian mainstream against their will”.\textsuperscript{14}

The assault on Aboriginal languages was seen as a necessary step in achieving that aim; consequently, the residential schools enforced the exclusive use of English—or in some cases, French—and prohibited the use of Aboriginal languages. As the Truth and Reconciliation Commission notes:

\begin{quote}
Although the use of Aboriginal languages was not completely banned at all times and in all places, it is clear that it was seen as a sign of progress if a principal could report that Aboriginal languages were not spoken in the school, or, even better, that children had forgotten how to speak them. Students were often punished for speaking their native language.\textsuperscript{15}
\end{quote}


\textsuperscript{12} As the Commission succinctly puts it:

\begin{quote}
Buildings were poorly located, poorly built, and poorly maintained. The staff was limited in numbers, often poorly trained, and not adequately supervised. Many schools were poorly heated and poorly ventilated, and the diet was meagre and of poor quality. Discipline was harsh, and daily life was highly regimented. … For the students, education and technical training too often gave way to the drudgery of doing the chores necessary to make the schools self-sustaining. Child neglect was institutionalized, and the lack of supervision created situations where students were prey to sexual and physical abusers (\textit{Ibid.}, at 4–5).
\end{quote}

\textsuperscript{13} Prime Minister Stephen Harper, Statement of apology to former students of Indian residential schools (11 June 2008), online: https://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649.

\textsuperscript{14} TRC, History Part 1, supra note 11 at 4.

\textsuperscript{15} \textit{Ibid.}, at 615 [footnotes omitted].
Many survivors of residential schools reported harsh punishments for speaking Aboriginal languages. The legacy of these practices for many survivors was not only the loss of language, but also an enduring shame of their language and the culture which it represented—a fact which led to a devastating disruption in the intergenerational transmission of Aboriginal languages and cultures.

The policy of forced assimilation was unsuccessful. Aboriginal languages have survived in spite of a more than century-long attempt to eradicate them. But the effect of these policies is unquestionable; as the Commission puts it, “The fragile state of almost all Aboriginal languages in Canada is a damaging legacy of residential schools.” Addressing that legacy is a necessary part of the journey of reconciliation of which the Truth and Reconciliation Commission is, in its own words, only the first step. It is not surprising, then, that the Commission raises the issue of the Government of Canada’s “moral and legal responsibilities to help repair the linguistic and cultural damages” caused by the policy of forced assimilation, and that it notes that “these obligations are affirmed in the Canadian Constitution and in numerous legal precedents”. If reconciliation is to involve reparation, and “concrete actions that demonstrate real societal change”, then the revitalization, protection and promotion of Aboriginal languages must become the new policy, and must be given a place in our legal and constitutional order. In the midst of a growing international consensus on recognizing the rights, including language and cultural rights, of Indigenous peoples worldwide, as made evident by the adoption of the United

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17 Ibid.
18 Ibid., at 137.
19 Ibid., at 138.
20 Ibid., at 137.
Nations Declaration on the Rights of Indigenous Peoples, it is important to find constitutional room for the recognition and support of the right of Aboriginal peoples to their languages.

Language rights, after all, are nothing new in Canadian law. As Justice Beetz once noted, “[T]he Fathers of Confederation were quite familiar with the old and thorny problem of language rights.” In one form or another, such rights have existed since the eighteenth century, culminating in the limited provisions as to the use of English and French in the Constitution Act, 1867, and the more ample provisions of the Constitution Act, 1982, recognizing the equality of the French and English languages. Notably absent from any of the various language rights schemes found throughout our history, however, are the languages of the Aboriginal peoples of Canada. As noted by the Truth and Reconciliation Commission, “Canada prides itself on its official bilingualism and is admired internationally for this policy. Yet there is no comparable policy … to equitably honour and encompass the mother tongues of the country’s third founders, the Aboriginal peoples of Canada.” This, too, is a legacy of Canada’s colonial history. Not only does this absence reflect a general understanding of these languages as unworthy of protection or doomed to disappear, but more fundamentally, it reflects a denial of the fact that Aboriginal peoples are founding peoples of our country.

Yet in spite of the lack of explicit mention of Aboriginal languages in our Constitution, there is a strong argument to be made that the constitutional space exists for the recognition and protection of these languages today. Indeed, my main argument in this work is that Aboriginal languages in Canada already possess constitutional status. I argue that this status has three main
aspects: first, that the use and regulation of Aboriginal languages are Aboriginal rights protected under section 35(1) of the Constitution Act, 1982; second, that a purposive interpretation of section 35, in light of other relevant constitutional provisions, and especially in the context of Canada’s colonial past, imposes a duty on Canadian governments, and especially the federal government, to support the revitalization, protection and promotion of Aboriginal languages in Canada; and third, that the constitutional status of Aboriginal languages places them in a position similar to that of the official languages, and that the lack of formal recognition of this status violates the equality and Aboriginal rights of the speakers of Aboriginal languages.

Before addressing these various aspects of the constitutional status of Aboriginal languages, however, it is necessary to review the current state of these languages, and to situate them in the wider global context of the world’s Indigenous languages. In Chapter 2, I set out the current state of Aboriginal languages in Canada, including their very limited recognition in legislation in various parts of the country. In Chapter 3, I provide a very brief and non-exhaustive survey of language rights and policies relating to Indigenous languages in other countries, with a particular focus on countries which share Canada’s common law tradition of Aboriginal rights (Australia, New Zealand, and the United States).

In Chapter 4, I address the first aspect of the constitutional status of Aboriginal languages: their protection as practices under section 35(1) of the Constitution Act, 1982. I argue that the use of Aboriginal languages is a protected Aboriginal right, and I examine some possible issues in the definition of this right, as well as its interaction with other language rights and policies, including Quebec’s Charter of the French language and Nunavut’s Inuit Language Protection Act. Finally, I argue that the right to regulate language and develop language policy

29 CQLR, c. C-11.
30 SNu 2008, c. 17.
is itself part of the inherent right of self-government of Aboriginal peoples, which is also protected under section 35.

In Chapter 5, I turn to the second aspect of what I call the constitutional status of Aboriginal languages. I argue that a purposive interpretation of the Aboriginal right to use and regulate Aboriginal languages under section 35, taking into account both the context of Canada’s colonial history and several important principles of constitutional interpretation, including the principles of the honour of the Crown and its fiduciary relationship with Aboriginal peoples, the underlying constitutional principles of the rule of law and the protection of minorities, and Canada’s international commitments under the United Nations Declaration on the Rights of Indigenous Peoples, leads to the conclusion that Canadian governments, and most especially the federal government, has a positive duty to support the revitalization, protection and promotion of Aboriginal languages. I examine the scope of this duty and possible issues in its implementation.

Finally, in Chapter 6, I examine the relationship between the constitutional status of Aboriginal languages and the privileged position of the official languages of Canada, English and French. I argue that the constitutional status of Aboriginal languages, and Aboriginal peoples’ status as founding peoples, make the current official languages regime a violation of Aboriginal peoples’ equality rights and a direct violation of their Aboriginal right to their languages. I maintain that this should be rectified by recognizing Aboriginal languages as official languages, and explore the implications of such recognition.

Many of these arguments have been made before; many have been insisted on by Aboriginal peoples for many years. Some of the claims I make are widely accepted, if not yet judicially proven; others are highly controversial. Nonetheless, I believe that a synthesis of the various arguments relating to the constitutional status of Aboriginal languages serves an
important purpose. It allows us to approach arguments relating to Aboriginal language rights in a more comprehensive, holistic and purposeful manner. It prevents us from relegating Aboriginal languages to one corner of our Constitution, and enables us to consider the entirety of the constitutional space available for the full recognition of the languages of the First Peoples of Canada. I hope that in attempting this synthesis, I am able to make a modest contribution to the goal of enabling Aboriginal languages to take their rightful place in the Canadian constitutional order.

In his landmark work, *Canada’s Indigenous Constitution*, John Borrows notes that “[t]he operation of multiple legal systems is a Canadian tradition, though its full diversity has been largely hidden from the country’s common law and civil law communities”. In a similar way, the full linguistic diversity of Canada has remained absent in the ongoing debates around bilingualism and language rights that have marked our country throughout its existence. Recognizing the fullness of this diversity is one step in developing a more inclusive vision of our constitutional history, one which embraces the contributions of Aboriginal peoples and recognizes their important role in the creation of our country. It is an important step in the process of reconciliation between Aboriginal and non-Aboriginal Canadians. This is why the Truth and Reconciliation Commission of Canada has called on the federal government to recognize that “Aboriginal languages are a fundamental and valued element of Canadian culture and society, and there is an urgency to preserve them”. I argue that this truth is already largely recognized in our constitutional framework, even if it has been ignored for too long. Allowing room for the recognition of Aboriginal languages does not require a radical departure from our existing constitutional arrangements and principles, or a wholesale revision or amendment of our

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32 TRC, *Reconciliation*, supra note 21, at 225, Call to Action 14(i).
Constitution. What is required is an interpretive starting point which recognizes that the full linguistic diversity of Canada is protected by our fundamental constitutional principles, and that official recognition of Aboriginal languages is a necessary development in any coherent account of linguistic rights in Canada. The constitutional space for these rights exists; it is up to us to fill it in with meaningful interpretations that will allow for Aboriginal languages to take their rightful place in our fundamental law.

Language rights are not the only step on the road to reconciliation and strengthened nationhood for Aboriginal peoples in Canada. But they are an important one. Similarly, recognition of the constitutional status of Aboriginal languages is not the only step necessary in revitalizing and protecting these languages. But it is an important part of that process, one which has profound symbolic importance given its intimate connection to Aboriginal identity and nationhood.
CHAPTER 2  THE CURRENT STATE OF ABORIGINAL LANGUAGES IN CANADA

2.2 Indigenous Languages of the Americas

The American continent is and always has been very linguistically diverse. While there are some lively debates among scholars regarding the ultimate origin of Indigenous American languages and the relationships among them, most scholars “believe that there are approximately 150 different language families in the Western Hemisphere which cannot at present be shown to be related to each other”.\(^1\) In North America alone, some 58 language families and *isolates* (languages that cannot be shown to be related to any other language) have been documented, several of which are now extinct.\(^2\) Some language families are restricted to relatively small areas, such as the Salish and Wakashan languages, which are found only on the West Coast of British Columbia and northern Washington State, and are unrelated to any other North American languages.\(^3\) Others cover wide areas of the continent. The most geographically widespread language family of North America is the Algonquian, or Macro-Algonquian family, which includes such languages as Mi’kmaq (Micmac), Abenaki, Maliseet (Passamaquoddy), Mohegan, Munsee, Shawnee, Potawatomi, Cheyenne, Blackfoot, and two of Canada’s largest Aboriginal language groups, Cree and Ojibway (Anishinaabemowin).\(^4\) This family extends from Labrador south to the Gulf of Mexico, and from the Atlantic seaboard to the Great Plains (with some related languages

\(^2\) Campbell, *ibid*.
\(^3\) Campbell, *ibid*.
Similarly, the Uto-Aztecan family stretches from Southern Oregon and Idaho down through the southwestern states of the US and into Central America.\(^5\)

It is commonly thought that a great many of the languages of the Americas have already become extinct.\(^7\) The number of Indigenous languages in North America, for example, is thought to have been around 300, a number which had more than halved by the 1970s.\(^8\) In spite of this, the Western Hemisphere remains very diverse linguistically. The *Ethnologue* counts 1,060 living languages originating in the Americas with a little over 51,000,000 speakers.\(^9\) The vast majority of the speakers of these languages are found in Central and South America. Quechua, for example, the language of the Incas, counts around 9 million speakers.\(^10\) The Mayan language family in Central America has around 6.5 million speakers. Aymara, spoken in Bolivia and Peru, comes close to 3 million speakers. The Uto-Aztecan family, which includes Nahuatl, the language of the Aztecs, and such North American languages as Hopi and Shoshoni, counts close to 2 million speakers.\(^11\) While North America is home to a significant number of Indigenous languages, the number of speakers of these languages is relatively small. The latest census figures recorded over 60 Aboriginal languages spoken in Canada by around 213,500 speakers, which can be grouped into 12 different language families.\(^12\) The latest US census figures reveal that 169 Indigenous languages are spoken in that country (not including Hawaii), although the


\(^{6}\) Crystal, *ibid*.

\(^{7}\) Campbell, *supra* note 1 at 4.

\(^{8}\) Crystal, *supra* note 5 at 330.


\(^{10}\) Ethnologue, “Quechua”.

\(^{11}\) *Ibid*, “Statistics—Language Families”

\(^{12}\) Statistics Canada, *Aboriginal Languages in Canada*, 2011, Census in Brief (Catalogue No 98-314-X2011003) (Ottawa: Ministry of Industry, 2012) at 1. The figures given in this section are for mother-tongue speakers, “mother tongue” being defined as “the first language learned at home in childhood and still understood by the individual at the time of the census” (*Ibid* at 7).
total number of speakers amounts to less than half a million. The data are not analyzed by language family.\textsuperscript{13}

In Canada, the largest family of languages by number of speakers is the Algonquian family, which includes Cree, Innu/Montagnais, and Ojibway (Anishinaabemowin); altogether, according to the 2011 census data, this language family counts 144,015 speakers. This is followed by the Inuit languages with 35,500 speakers and the Athapaskan languages, which include Dene and Tlicho (Dogrib), with 20,700 speakers.\textsuperscript{14} To put these numbers in perspective, it should be noted that the 2011 census revealed that 22 immigrant languages in Canada counted more than 100,000 speakers, with Italian, Spanish, German, Punjabi, and Chinese (all varieties included) each having over 400,000 speakers, which is double the total number of Aboriginal language speakers in Canada.\textsuperscript{15}

What follows is a brief description of the largest Aboriginal language families and languages spoken in Canada. The names used are those given in the 2011 Canadian census report; common alternate names as used in the \textit{Ethnologue} are given in parentheses.

\section*{2.3 Aboriginal Languages of Canada}

2.3.1 \textit{The Inuit Languages (Eskimo-Aleut)}

This group of languages is spoken from the Aleutian Islands and Alaska in the west to Baffin Island and Greenland in the east. The homeland of Inuit in Canada is often referred to as Inuit Nunangat, a wide area which includes the territory of Nunavut, Nunavik (Northern Quebec), Nunatsiavut (Northern Labrador), and the Inuvialuit region of the Northwest

\begin{footnotesize}
\begin{enumerate}
\item \textit{Aboriginal Languages in Canada}, 2011, \textit{supra} note 12, Table 1.
\end{enumerate}
\end{footnotesize}
“Inuktitut” is often used in a general sense as a synonym for the various dialectal forms of the language of Canadian Inuit, generally grouped into Western and Eastern varieties. In a more restricted sense, Inuktitut may refer to Eastern Canadian Inuktitut, the language of the eastern Canadian Arctic. Inuinnaqtun, spoken primarily in the western part of Nunavut, is often considered a different language. Nunavut’s Inuit Language Protection Act defines the “Inuit language” as follows: “(a) in or near Kugluktuk, Cambridge Bay, Bathurst Inlet and Umingmaktuq, Inuinnaqtun; (b) in or near other municipalities, Inuktitut; and (c) both Inuinnaqtun and Inuktitut as the Commissioner in Executive Council may, by regulation, require or authorize.” In the Northwest Territories, the language of the Inuvialuit, in the northwestern part of the territory, is referred to as Inuvialuktun, and is recognized as an official language along with Inuktitut and Inuinnaqtun. Similarly, the Inuktitut language as spoken among the Labrador Inuit is generally referred to as Inuttut or Inuititut. The Inuit languages also include Inupiatun or Inupiak, spoken in Alaska and some parts of northern Yukon, and Greenlandic or Kalaallisut, spoken in Greenland. The total number of Inuit language speakers in Canada, according to the latest census, is 35,500, with the majority located in Nunavut and Northern Quebec (Nunavik).

2.3.2 The Athapaskan Languages (Eyak-Athabaskan)

The main languages of this family are primarily spoken in the Northwest Territories and Saskatchewan: they include Dene (Chipewyan), Gwich’in (Loucheux), Tlicho (Dogrib), North

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17 *Ethnologue*, “Inuktitut, Eastern Canadian”.
20 *Ethnologue, supra* note 9, “Inuit-Inupiaq”. Kalaallisut is the national language of Greenland (Kalaallit Nunaat), a territory of Denmark.
21 *Aboriginal Languages in Canada, supra* note 12, Table 1.
Slavey, South Slavey, and Tutchone (spoken in the Yukon). Carrier (includes Wet’suwet’en) and Chilcotin (Ts’ilqot’in), spoken in British Columbia, are also members of this family.\(^{22}\) Some of these languages have official status in the Northwest Territories (Dene (Chipewyan), Slavey (North and South), Gwich’in, and Tlicho).\(^{23}\) The total number of mother-tongue speakers reported for the Athapaskan languages in the last census was 20,700.\(^{24}\)

### 2.3.3 The Siouan Languages

The Siouan languages are currently spoken in Alberta and Manitoba, and include Stoney, Dakota, and Assiniboine.\(^{25}\) Dakota is one of the languages recognized in Manitoba’s Aboriginal Languages Recognition Act.\(^{26}\) Some have suggested that this family of languages is related to the Iroquoian languages, but this remains controversial.\(^{27}\) This family of languages counted over 4,400 speakers as of the last census.\(^{28}\)

### 2.3.4 The Salish Languages

These languages are spoken in British Columbia and include Shuswap (Secwepemctsin) and Okanagan, spoken in the interior of British Columbia; and Halkomelem, Comox, Sechelt, and Squamish, spoken in the Lower Mainland and on Vancouver Island.\(^{29}\) The total number of speakers recorded for these languages in 2011 was just under 3,000.\(^{30}\)

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\(^{22}\) Ibid; Ethnologue, supra note 9, “Canada”.  
\(^{23}\) Official Languages Act, supra note 18.  
\(^{24}\) Aboriginal Languages in Canada, supra note 12, Table 1.  
\(^{25}\) Ibid; Ethnologue, supra note 9, “Siouan-Catawban”.  
\(^{26}\) See discussion in Chapter 3.  
\(^{27}\) Crystal, supra note 5 at 330.  
\(^{28}\) Aboriginal Languages in Canada, supra note 12, Table 1.  
\(^{29}\) Ibid.; First Peoples’ Cultural Council, First Peoples Language Map of British Columbia, online: <http://maps.fphlcc.ca/>; Ethnologue, supra note 9, “Salish”.  
\(^{30}\) Aboriginal Languages in Canada, supra note 12, Table 1.
2.3.5 The Tsimshian Languages

This family of languages includes Gitksan and Nisga’a, and are spoken in the interior of British Columbia, in the Northwest. Since the signing of the Nisga’a Final Agreement, the first treaty in British Columbia, Nisga’a is an official language of the Nisga’a Government, as set out in the Nisga’a Constitution. There were 1,815 speakers of the Tsimshian languages as of the 2011 census.

2.3.6 The Wakashan Languages

This includes Kwakiutl (Kwak’wala), Nootka (Nuu-chah-nulth), Heiltsuk and Haisla. These languages are spoken on the West Coast of British Columbia and on Vancouver Island. They counted 1,075 first-language speakers in 2011.

2.3.7 The Algonquian Languages

By far the largest family of Aboriginal languages today in Canada is the Algonquian family, which includes Cree, Ojibway (Anishinaabemowin), Oji-Cree, and Innu-Montagnais, which all count over 10,000 speakers as of the last census (with Cree—all varieties included—counting over 83,000). This family also includes Mi’kmaq (Micmac), spoken in Atlantic Canada, which has about 8,000 speakers; Atikamekw, spoken in central Quebec with around 6,000; and Blackfoot, in Southern Alberta, with about 3,200 mother tongue speakers. Other languages in this large family include Abenaki, Algonquin, Ottawa, and Potawatomi.

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31 Ibid.
33 Aboriginal Languages in Canada, supra note 12, Table 1.
34 First Peoples Language Map, supra note 29; Ethnologue, supra note 9, “Wakashan”.
35 Aboriginal Languages in Canada, supra note 12, Table 1.
36 Ethnologue, supra note 9, “Algic”.
2.3.8 The Iroquoian Languages

Concentrated in southern Ontario and Quebec, with Mohawk (Kanien’kéha) being the most prominent language of this family. Other languages in this family, including Oneida, Seneca, Cayuga, Onondaga, Tuscarora, and Huron-Wyandot (Wendat), are highly threatened. According to the 2011 census, these languages count 1,040 mother-tongue speakers (with Mohawk speakers making up over half of this number).

2.3.9 Isolates

Among the language isolates, which are languages which have no demonstrated relation to other languages, are Haida, spoken on Haida Gwaii (Queen Charlotte Islands), with 75 first-language speakers; Kutenai, spoken in the BC interior along the border with Alberta, with 100 speakers; and Tlingit, spoken on the northern West Coast of British Columbia, with 130. From this list of isolates, and the fact that three of the above eight families of languages are to be found almost exclusively in British Columbia, it is clear that linguistic diversity is especially prominent on the West Coast. Indeed, British Columbia is home to 60% of First Nations languages in Canada. This pattern holds true in the United States as well: California is the most linguistically diverse area of North America, with over 100 languages originally spoken, though only some 50 languages are still used today. This diversity can easily be seen on a map of the Indigenous languages of North America.

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37 Ibid, “Canada”.
38 Aboriginal Languages in Canada, supra note 12, Table 1.
39 Ibid.
41 Campbell, supra note 1 at 16.
42 See Crystal, supra note 5.
2.3.10 Michif

Finally, special mention must be made of the Métis language Michif, a unique mixture of French nouns and Cree verbs and syntax, which according to the latest census data, counts 640 speakers distributed across the Prairie Provinces. Many Métis also speak other Aboriginal languages.

2.4 CRITICAL STATE OF ABORIGINAL LANGUAGES

2.4.1 Levels of Endangerment

A significant number of the world’s languages are endangered. The United Nations Educational, Scientific and Cultural Organization (UNESCO) estimates that of the 6,000 languages still spoken today, half will disappear by the end of the 21st century. Its Ad Hoc Expert Group on Endangered Languages paints an even bleaker picture: “We estimate that about 90% of all languages may be replaced by dominant languages by the end of the 21st century.”

UNESCO defines a language as endangered when “its speakers cease to use it, use it in fewer and fewer domains, use fewer of its registers and speaking styles, and/or stop passing it on to the next generation”. It gives a list of nine factors which are important in determining the level of endangerment of a language. These are: (1) intergenerational language transmission; (2) absolute
number of speakers; (3) proportion of speakers within the total population; (4) shifts in domains of language use; (5) response to new domains and media; (6) availability of materials for language education and literacy; (7) governmental and institutional language attitudes and policies including official status and use; (8) community members’ attitudes toward their own language; and (9) amount and quality of documentation.

According to these criteria, UNESCO has produced an *Atlas of the World’s Languages in Danger*, which lists some 2,500 endangered languages worldwide (though it estimates that the true number is closer to 3,000). The atlas classifies endangered languages into the following five categories: (1) vulnerable; (2) definitely endangered; (3) severely endangered; (4) critically endangered; (5) extinct (included in the atlas if extinct since 1950).  

According to the *Atlas of the World’s Languages in Danger*, there are 87 endangered languages in Canada. Of these, 24 are considered “vulnerable” (including Mi’kmaq, Atikamekw, Tlicho (Dogrib) and many varieties of Ojibway and Cree); 14 are considered “definitely endangered” (including Inuinnaqtun, Malecite, Mohawk, Blackfoot, Dakota and Shuswap (Secwepemcts’in); 16 are considered “severely endangered” (including Gwich’in, Gitksan, Nisga’a, Nootka (Nuu-chah-nulth), Halkomelem and Kutenai); 31 are considered “critically endangered” (including Huron-Wyandot, Kwak’wala, Haida, Oneida, Seneca, Potawatomi, Tlingit, Sechelt, Assiniboine, and Michif); and finally, two languages (Pentlatch and Tsetsaut, both in British Columbia) are considered “extinct” (since 1950). That is indeed a grim assessment.

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49 Endangered Languages Atlas, “Canada”.
50 Endangered Languages Atlas, “Canada”.

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The *Ethnologue*, for its part, evaluates endangerment according to a methodology that focuses on two main dimensions: “the number of *users* who identify with a particular language and the number and nature of the *functions* for which the language is used”.

It uses a list of eleven factors to evaluate the level of endangerment of a language:

1. the speaker population;
2. the number of those who connect their ethnic identity with the language (whether or not they speak it);
3. the stability of and trends in population size;
4. residency and migration patterns of speakers;
5. information about the use of second languages;
6. language attitudes within the community;
7. the age range of the speakers;
8. the domains of use of the language;
9. official recognition of languages within the nation or region;
10. means of transmission (whether the language is being learned at home or in school); and
11. non-linguistic factors such as economic opportunity or the lack thereof.

Using these factors, the *Ethnologue* classifies languages on a scale known as the Expanded Graded Intergenerational Disruption Scale (EGIDS). Languages are placed at one of the thirteen status levels on the scale, with increasing levels of endangerment, starting at level 0 for widely-used international languages, and ending with 10 for extinct languages. Endangered languages will be found primarily at levels 6b (“threatened”), 7 (“shifting”), 8a (“moribund”), 8b (“nearly extinct”), and 9 (“dormant”).

In addition to this, the *Ethnologue* classifies languages into no fewer than 14 categories based on the level of recognition of the language within a country or region, ranging from “statutory national language”, through such middle categories as “de facto national language” or “de facto provincial language”, to “language of recognized nationality”.

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51 *Ethnologue*, supra note 9, “Endangered Languages” [emphasis in original].
52 Ibid.
53 *Ethnologue*, supra note 9, “Language Status”.
54 Ibid.
According to the *Ethnologue*, there are 2,387 languages in the world which fall within the levels 6b (“threatened”) to 9 (“dormant”), and are therefore endangered.\(^{55}\) These numbers are comparable to those of UNESCO’s *Atlas*. The *Ethnologue* estimates that since 1950, 377 languages have become extinct, a rate of loss amounting to 6 languages per year.\(^{56}\)

In Canada, the *Ethnologue* counts no fewer than 72 endangered languages (either in trouble or dying).\(^{57}\) This includes 15 languages at level 6b (“threatened”), including Algonquin, several varieties of Cree and Ojibway, Mohawk, Mi’kmaq, Montagnais, Dene, Dakota, and Stoney; 27 languages at level 7 (“shifting”) including Blackfoot, Carrier, Gitksan, Nisga’a, Gwich’in, Kwakiutl (Kwak’wala), Malecite (Passamaquoddy), Oneida, Ottawa, Shuswap (Secwepemctsin), Tutche, and Michif; 16 languages at level 8a (“moribund”), including Assiniboine, Beaver, Cayuga, Haida, Halkomelem, Onondaga, Potawatomi, Sechelt, Squamish, Kutenai, and Tlingit; 2 languages at level 8b (“reintroduced”)—Bella Coola and Chinook Wawa; 11 languages at level 8b (“nearly extinct”), including Munsee, Nuu-chah-nulth, Western Abenaki, Sekani, and Tuscarora; and one language (Huron-Wyandot) at level 9 (“dormant”).\(^{58}\)

Interestingly, the *Ethnologue* does not list any extinct languages for Canada (languages having become extinct since 1950).\(^{59}\)

While perhaps slightly less bleak than UNESCO’s, this assessment is certainly not cheerful. Indeed, the *Ethnologue* reports only a few Aboriginal languages in Canada above the endangered levels: Inuktitut (Eastern Canadian), Inuinnaqtun, Cree (Plains, Southern East, Northern East), Atikamekw, Tlicho (Dogrib), and Naskapi.\(^{60}\) It is interesting to note that all of

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\(^{55}\) *Ethnologue, supra* note 9, “Statistics—Summary by language status”, Table 4.

\(^{56}\) *Ethnologue, supra* note 9, “Endangered languages”.

\(^{57}\) *Ibid.*, “Canada”.

\(^{58}\) *Ibid.*

\(^{59}\) *Ibid.* Twelve such languages are listed for the United States (*ibid.*, “United States”).

\(^{60}\) *Ibid.*
these languages are considered “vulnerable” in UNESCO’s Atlas of the World’s Languages in Danger, with Inuinnaqtun considered “definitely endangered”.  

From these analyses, it is easy to see that Aboriginal languages are in a critical state today. This is confirmed by statistics showing an overall decline in the knowledge and use of Aboriginal languages. According to 2011 census data, only 17.2 % (about one in six) of those claiming an Aboriginal identity in Canada reported being able to carry on a conversation in an Aboriginal language; this was a drop of 2 % from 2006 levels, while the Aboriginal population increased by 20 %. The proportion of Aboriginal-language speakers is quite uneven among the different Aboriginal groups: 63.7 % of Inuit reported being able to conduct a conversation in an Aboriginal language, while only 2.5 % of Métis people could do so. Among First Nations people, 44.7 % of those living on reserve could carry out a conversation in an Aboriginal language, while only 14.1 % of those living off reserve, and only 2.2 % of those who were not “Status Indians”, could do so.

These numbers do little to contradict Mary Jane Norris’s earlier assessment that only three of Canada’s Aboriginal languages—Cree, Inuktitut, and Ojibway—can be considered safe from extinction if current trends continue. As the Task Force on Aboriginal Languages and Cultures points out, most Aboriginal languages “are at various stages of language loss” and “[a]ll are in danger”.

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61 Endangered Languages Atlas, “Canada”.
62 Aboriginal peoples and language, supra note 16 at 3.
63 Ibid.
64 Ibid.
65 Ibid at 8.
66 Mary Jane Norris, “Canada’s Aboriginal Languages” (1998) 51 Canadian Social Trends 8 at 8.
67 Task Force on Aboriginal Languages and Cultures, Towards a New Beginning: A Foundational Report for a Strategy to Revitalize First Nation, Inuit and Métis Languages and Cultures (Ottawa: Department of Canadian Heritage, 2005) at 33 [TFALC Report].
2.4.2 Factors Causing Endangerment

What are the causes of this critical situation? As pointed out above, language loss and endangerment are worldwide phenomena, with estimates that as many as 90% of the world’s languages could disappear by the end of this century. The forces threatening the linguistic diversity of the world are powerful and complex, but they are largely the result of the increasing dominance of a very few widely-spoken, politically and economically advantaged languages. As UNESCO explains, political and economic domination of one linguistic group by another is usually at the centre of language endangerment: “Languages are threatened by external forces such as military, economic, religious, cultural or educational subjugation, or by internal forces such as a community’s negative attitude towards its own language.” Negative attitudes towards one’s own language are brought about by feelings of inferiority towards a dominant linguistic group, often reinforced by latent or overt feelings of superiority on the part of members of the dominant group. These processes often have a historical origin in the power structures established by colonialism, as for example the colonial empires of European states that affected vast areas of the Americas, Africa, and Asia from the sixteenth to the twentieth centuries. Direct political domination has now often been relayed by economic and social domination, as globalizing media and communications assist in the domination of a few “world” languages. These global trends affect different languages differently, largely as a result of the particular history of the language and its speakers, but they nonetheless exert significant pressures on smaller and marginalized languages, and in particular on Indigenous languages all over the

68 See supra note 46 and accompanying text.
71 Ibid at 110–11, 121–23.
world. Canada’s Aboriginal languages do not escape these trends, being subject to both historical and present factors that contribute to their endangerment.

**Historical Factors**

In Canada, language endangerment and loss are a direct result of a long history of colonialism. As the Royal Commission on Aboriginal Peoples notes, beginning in the early nineteenth century, the recently arrived European settlers launched an all-out assault on Aboriginal societies.

Non-Aboriginal society made repeated attempts to recast Aboriginal people and their distinct forms of social organization so they would conform to the expectations of what had become the mainstream. In this period, interventions in Aboriginal societies reached their peak, taking the form of relocations, residential schools, the outlawing of Aboriginal cultural practices, and various other interventionist measures of the type found in the Indian Acts of the late 1800s and early 1900s.

These various attempts to “civilize” Indigenous peoples amounted to a program explicitly aimed at destroying all vestiges of Aboriginal identity. As Duncan Campbell Scott, Canada’s Deputy Superintendent General of Indian Affairs, famously declared in 1920, “Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department ….” To that end, the Canadian government criminalized specific Aboriginal traditions (the potlatch and the

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74 RCAP vol 1, *supra* note 73 at 42.

75 Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, testimony before the Special Committee of the House of Commons examining the Indian Act amendments of 1920, National Archives of Canada, RG 10, vol 6810, file 470-2-3, vol 7 at 55, 63; quoted in RCAP vol 1, *supra* note 73 at 577.
sundance), replaced traditional Aboriginal governance structures and laws by ones imposed through the Indian Act, and generally made assimilation the fundamental principle of its policy. 76

By far the most important tool in carrying out this policy was the Indian Residential Schools system. 77 This system, directed by government and managed by various churches, which at its height included 80 residential schools throughout the country, has been aptly described as “a national crime”. 78 The residential school system’s “concerted campaign ‘to obliterate’ those ‘habits and associations’, Aboriginal languages, traditions and beliefs, and its vision of radical resocialization, were compounded by mismanagement and underfunding, the provision of inferior educational services and the woeful mistreatment, neglect and abuse of many children—facts that were known to the department and the churches throughout the history of the school system”. 79

In carrying out this program of resocialization, of “overturning one ontology in favour of another”, 80 language was singled out as the key issue: “It was through language that the child gained its ontological inheritance from its parents and community. The word bore the burden of the culture from one generation to the next. It was the vital link. The civilizers knew it must be cut if any progress were to be made.” 81 And so “school staff in addition to their other responsibilities were assigned the duty of preventing pupils from ‘using their own language’”, and “[c]hildren throughout the history of the system were beaten for using their language”. 82

This harsh policy was a reflection of the basic fact that “the entire residential school project was

76 Ibid at 166–169.
77 Ibid at 172.
79 RCAP vol 1, supra note 73 at 312.
80 Milloy, supra note 78 at 38.
81 Ibid.
82 Ibid; RCAP vol 1 at 317 [footnotes omitted].
balanced on the proposition that the gate to assimilation was unlocked only by the progressive
destruction of Aboriginal languages”.  

The linguistic legacy of the residential school system is made plain by the critical state of
Aboriginal languages today. The result of the system’s emphasis on eradicating Aboriginal
languages was to severely disrupt the transmission of these languages over the course of several
generations:

The residential school system (followed by the Indian day school system) along
with simultaneous oppressive strategies of assimilation caused a vast and
devastating interruption in the intergenerational transmission of First Nations
languages as a mother tongue. First Nations people who had been raised at home
in their First Nations languages as children were trained, forced and shamed into
abandoning their languages at residential schools. Even when they were released
from the schools, many could not go back to speaking their languages or pass the
languages on to their children because of residual shame and trauma.  

The system did not achieve its goal of eradicating Aboriginal languages, a fact which is a
testament to the resiliency of these languages and their speakers. But its impact continues to be
felt as “a lamentable heritage for those children and the generations that came after, for
Aboriginal communities and, indeed, for all Canadians”.

Present Factors

The primary causes of endangerment for Aboriginal languages in Canada stem from the
effects of colonialism and deliberate government assimilative policies. These effects are
reinforced in the present day by other factors, some of which are global trends, as discussed
above. These include continued economic inequality, which leads to an economically dominant
language being seen as the key to socioeconomic improvement, cultural dominance and the

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83 Ibid.
84 BC Languages Report, supra note 40 at 9.
85 RCAP vol 1, supra note 73 at 312.
86 Hagège, supra note 70 at 110–15.
consequent marginalization (or “folklorization”) of minority languages and cultures; negative attitudes and stereotypes about the language, prevalent among both dominated and dominant language speakers; lack of political recognition of the language, including exclusion from national life and education systems;\textsuperscript{87} and increasing pressure from the global status of English.\textsuperscript{88} All of these factors affect Aboriginal languages in Canada to some degree. As noted by the First Peoples’ Cultural Council of British Columbia, “B.C. First Nations language loss has many deep-rooted historical causes, but this loss continues today due to modern day societal barriers and often underlying marginalization and discrimination.”\textsuperscript{89} Among the current factors noted by the council are the following:

- The B.C. public education system often fails First Nations children by neglecting to include and honour First Nations languages and cultures in curricula. …
- Governments provide inadequate support and infrastructure for First Nations language programs in schools and communities. …
- First Nations people, languages and cultures are largely excluded from government, commerce, industry, arts, higher education and media.
- Many people hold the attitude that speaking only English is somehow better for children to be successful in today’s society. The myth exists that bilingual children lag behind their monolingual peers.\textsuperscript{90}

These same factors are at work in the case of most Aboriginal languages in Canada.

2.4.3 Why Does It Matter?

Much has been written on the value of linguistic and cultural diversity in the world. Article 1 of UNESCO’s Universal Declaration on Cultural Diversity, for example, states that “[a]s a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and

\textsuperscript{88} Hagège, supra note 70 at 121–23.
\textsuperscript{89} BC Languages Report, supra note 40 at 10.
\textsuperscript{90} Ibid.
should be recognized and affirmed for the benefit of present and future generations”. The parallel between linguistic diversity and biological diversity is well documented, leading some to speak of “biocultural diversity”. While the notion of a causal link between the two remains controversial, it is unquestionable that the world’s many Indigenous languages threatened with disappearance contain a wealth of information regarding the world’s biological diversity. As K David Harrison points out, “Much—if not most—of what humankind knows about the natural world lies completely outside of science textbooks, libraries, and databases, existing only in unwritten languages in people’s memories.” This vast knowledge is only part of the wealth of cultural information that stands to be lost if the languages of primarily oral cultures disappear: “the traditional wisdom found in oral history, poetry, epic tales, creation stories, jokes, riddles, wise sayings, and lullabies” is at risk of being lost forever if the language of an oral culture becomes extinct. Beyond that, the structure of the language itself is an invaluable source of knowledge about the possibilities of human language and cognition. All of this can be lost forever with the extinction of a single language. Hence UNESCO’s statement that “[t]he extinction of a language results in the irrecoverable loss of unique cultural knowledge embodied in it for centuries, including historical, spiritual and ecological knowledge that may be essential.

94 Austin, supra note 87 at 7–8.
96 Harrison, supra note 95 at 15.
97 Ibid at 17.
98 Ibid at 18–19; Austin, supra note 87 at 6–7; Crystal, supra note 5 at 385.
for the survival of not only its speakers, but also countless others”. Yet it is estimated that as many as ninety per cent of the world’s languages may be gone by the end of the century. By comparison, endangered plant and animal species make up less than 7% of the total number of identified plant and animal species. That is a striking image of the critical state of the world’s languages.

Ultimately, however, the importance of linguistic diversity is of secondary significance to the question of the value of Canada’s Aboriginal languages. As I will argue throughout this thesis, these languages have a special place in Canada’s history and its constitutional order, and are part of the cultural heritage not only of Aboriginal peoples, but of all Canadians. Canada is not a bilingual country because of the inherent value of bilingualism, however valuable it may be. Nor am I suggesting that recognition of Aboriginal languages in Canada should be premised on the need to preserve linguistic diversity worldwide. But it may be useful to take into consideration, when assessing the actions required to preserve and promote Aboriginal languages, the intrinsic value of these languages and the cultures they embody. Ultimately, Aboriginal languages should be valued in Canada because they are the languages of Canada’s First and Founding Peoples.

2.5 EFFORTS TO REVITALIZE, PROTECT AND PROMOTE ABORIGINAL LANGUAGES

Indigenous peoples all over the world are now engaged in the process of attempting to revitalize, protect and promote their languages. In Canada, there have been important efforts by Aboriginal language speakers to revitalize and promote their languages.

99 UNESCO, supra note 69.
100 See supra note 46 and accompanying text.
101 Harrison, supra note 95 at 7.
In British Columbia, home to the greatest linguistic diversity in Canada, the 2010 *Report on the Status of BC First Nations Languages* highlighted several projects aimed at revitalizing and promoting Aboriginal languages: a master-apprentice program, whereby a “master” of the language takes on an “apprentice” and spends 300 hours a year doing everyday activities using only the Aboriginal language; a Language Authority and Language Plan Development Program, where different communities sharing a common language “come together to collaborate in spite of geographical challenges, dialect, political and community differences” and “share resources, knowledge, funding, resource people, infrastructure, and expertise to develop a Language Authority and Plan for language revitalization”; and the FirstVoices project, which involves the recording, documentation, and archiving of BC First Nations languages.\(^\text{102}\)

Similar efforts are being made to revitalize and promote the Mohawk language. For example, the First Nations Technical Institute on the Tyendinaga Mohawk Territory runs a university-level Mohawk language program in partnership with Trent University and the Tsi Tyonnheht Onkwawenna Language and Cultural Centre, which also operates a language nest program and a primary immersion program.\(^\text{103}\) Similarly, the Kanien’kehá:ka Onkwawén:na Raotitióhkwa Language and Cultural Center on the Mohawk Territory of Kahnawake runs an adult immersion program, language enrichment classes, a children’s summer camp, several radio shows and a library resource centre.\(^\text{104}\)

These are just some of the many projects that have been undertaken in an effort to revitalize and strengthen Aboriginal languages. These efforts on the front lines of the battle to

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\(^\text{102}\) *BC Languages Report, supra* note 40 at 26.

\(^\text{103}\) First Nations Technical Institute, online: <www.fnti.net/adult-mohawk-language/>; Tsi Tyonnheht Onkwawenna Language and Cultural Centre, online: <http://ttc-enkhtetke.org/?lang=en>.

\(^\text{104}\) Kanien’kehá:ka Onkwawén:na Raotitióhkwa Language and Cultural Center, online: <www.korkahnawake.org>. 

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protect Aboriginal languages and culture must be supported by governmental action, which includes legal recognition of the legal rights of Aboriginal language speakers, as well as recognition of the constitutional status of these languages.

2.6 CONCLUSION

As this brief sketch has shown, while notable efforts are being made to revitalize and preserve Aboriginal languages, these languages continue to be under threat, as are the languages of Indigenous peoples worldwide. Given the threat to the very existence of these languages, one might expect a strong response by governments to help preserve these. Unfortunately, as I discuss in the next section, there is a notable absence in Canada of legislation addressing the issue of Aboriginal languages and their protection. What few language rights are recognized in legislation have tended to be limited, either geographically or in their scope. Ultimately, the legislative response to the crisis in Aboriginal languages has been inadequate. I turn now to a review of the current state of the legislation dealing with Aboriginal languages in Canada.

2.7 THE CURRENT CONSTITUTIONAL AND LEGISLATIVE CONTEXT

2.7.1 Introduction

Canada is no stranger to language rights. As Beetz J pointed out in MacDonald v City of Montreal, “[T]he Fathers of Confederation were quite familiar with the old and thorny problem of language rights.” Protecting the rights of English- and French-speakers “has been a longstanding concern in our nation”, going back all the way to the Plains of Abraham.

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105 MacDonald v City of Montreal, [1986] 1 SCR 460 at 493 [MacDonald].
106 Société des Acadiens du Nouveau-Brunswick Inc v Association of Parents for Fairness in Education, [1986] 1 SCR 549 at 564 per Dickson CJ.
107 Maréchal Nantel, “La langue française au Palais” (1945) 5 R du B 201; MacDonald, supra note 105 at 525–38 per Wilson J.
While this ongoing struggle gave rise to the current regime of language rights in Canada, the focus on the French–English dichotomy has precluded consideration of Aboriginal languages.\(^{108}\) The languages of these peoples flourished on this continent well before the arrival of any speakers of French or English: “The varied and diverse voices of the aboriginal peoples of Canada have echoed across this land since time immemorial.”\(^{109}\) Yet they figure in a very limited way in the Canadian legal landscape.

What follows is an overview of the constitutional and legislative provisions related to Aboriginal language rights in Canada. It is limited to the following categories of legal materials: constitutional texts, federal and provincial/territorial law, and materials related to comprehensive land claims and self-government agreements, including the agreements themselves, implementing legislation, and Aboriginal constitutions and written laws. It does not include Aboriginal customary or unwritten law, which should be included in any thorough account of the law relating to Aboriginal languages; such a rich and complex topic is simply beyond the scope of this work.

### 2.7.2 The Constitutional Context

While only one section of the *Constitution Act, 1867* relates directly to language rights,\(^{110}\) eight sections of the *Canadian Charter of Rights and Freedoms* provide for specific rights related to the official languages of Canada.\(^{111}\) These languages, English and French, have been at

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\(^{108}\) See RCAP vol 1, *supra* note 73 at 611.

\(^{109}\) Bill S-212, *An Act for the advancement of the aboriginal languages of Canada and to recognize and respect aboriginal language rights*, 1st Sess, 42nd Parl, 2015, Preamble (first reading 9 December 2015). This bill is discussed below.


the centre of political contention and compromise in Canada for well over two centuries. They have now been given constitutional recognition as official languages, with equal rights and privileges. Notably absent, however, are any provisions directly related to the languages of the first inhabitants of Canada. Section 25 of the Charter does provide that “[t]he guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada …” Section 22 provides a general saving provision with regard to languages other than English or French. Thus, while Aboriginal languages are not granted official status in the Charter, sections 22 and 25 presumably operate to prevent any interpretation of the constitutional status of the official languages that would take away from any rights or freedoms relating to Aboriginal languages. Further, section 35 of the Constitution Act, 1982 provides that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”. The “aboriginal peoples of Canada” are there defined as including “the Indian, Inuit and Métis peoples of Canada”. Yet very few of the many languages of these peoples have achieved legal recognition anywhere in the country.

It should be noted that while the Constitution contains several provisions relating to specific language rights, it does not assign legislative competence over language as a subject-

112 Ibid, s 16(1).
113 “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.”
114 Section 27 of the Charter additionally provides that “[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”; section 26 states that “[t]he guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada”.
115 Constitution Act, 1982, supra note 111, s 35(1).
116 Ibid, s 35(2). While the term “Indian” may occasionally be used in this paper in connection with legislative provisions, the term “First Nation(s)” will generally be used instead.
matter to either Parliament or the provincial legislatures.\textsuperscript{117} The power to legislate regarding language remains “an ancillary power to the exercise of legislative authority over a class of subjects assigned to Parliament or to provincial legislatures”.\textsuperscript{118} Both Parliament and the provinces, then, are free to enact legislation bearing on Aboriginal language rights in their respective spheres of jurisdiction.

2.7.3 Official Status of Aboriginal Languages

Only in the Northwest Territories and Nunavut are any Aboriginal languages given official status. Under the Northwest Territories’ official language legislation, the following Aboriginal languages are recognized as official: “Chipewyan, Cree … Gwich’in, Innuinaqtun, Inuktitut, Inuivialuktun, North Slavey, South Slavey and Tlicho”.\textsuperscript{119} The Legislative Assembly of Nunavut has passed a new \textit{Official Languages Act} which reduces these to three: “[t]he Inuit Language, English and French”.\textsuperscript{120} The “Inuit Language” is defined in the \textit{Inuit Language Protection Act} in the following way:

- (a) in or near Kugluktuk, Cambridge Bay, Bathurst Inlet and Umingmaktuuk, Innuinaqtun;
- (b) in or near other municipalities, Inuktitut; and
- (c) both Innuinaqtun and Inuktitut as the Commissioner in Executive Council may, by regulation, require or authorize.\textsuperscript{121}

Thus Chipewyan, Cree, Gwich’in, Innuinaqtun, Inuktitut, Inuivialuktun, North Slavey, South Slavey and Tlicho are the Aboriginal languages currently recognized as official languages.

\textsuperscript{117} Jones \textit{v} Attorney General of New Brunswick, [1975] 2 SCR 182 at 187 per Laskin CJ.
\textsuperscript{118} \textit{R v Beaulac}, [1999] 1 SCR 768 ¶ 14 per Bastarache J.
\textsuperscript{119} \textit{Official Languages Act}, RSNWT 1988, c O-1, s 4; as duplicated for Nunavut by s 29 of the \textit{Nunavut Act}, SC 1993, c 28 (as repealed by \textit{Official Languages Act}, S Nu 2008, c 10, s 48 [not in force]); the Northwest Territories’ legislation was amended to its current form by \textit{An Act to Amend the Official Languages Act, No 3}, SNWT 2003, c 23, s 5, which does not apply to Nunavut (see note 122 \textit{infra}).
\textsuperscript{120} \textit{Official Languages Act}, S Nu 2008, c 10, s 3(1) (not in force).
\textsuperscript{121} \textit{Inuit Language Protection Act}, S Nu 2008, c 17, s 1(2) [ILPA].
in the Northwest Territories and Nunavut; while under the new Nunavut legislation, which has yet to be proclaimed in force, the Inuit Language, defined as including both Innuinaqtun and Inuktitut, will be the sole Aboriginal language granted official status. This is the extent of the official recognition of Aboriginal languages in Canadian legislation. The Northwest Territories legislation further provides that “[e]veryone has the right to use any Official Language in the debates and other proceedings of the Legislative Assembly” and that “Chipewyan, Cree, Gwich’in, Innuinaqtun, Inuktitut, Inuvialuktun, North Slavey, South Slavey and Tlicho may be used by any person in any court established by the Legislature”. Section 11(2) of the same act states that “[a]ny member of the public in the Northwest Territories has the right to communicate with, and to receive available services from, any regional, area or community office of a government institution in an Official Language other than English or French spoken in that region or community” where there is “a significant demand” and it is reasonable “given the nature of the office”. The act also establishes a Language Commissioner, with functions analogous to the federal Commissioner of Official Languages, and both an Official Languages Board, with representatives from all the official language communities, and a similarly composed Aboriginal Languages Revitalization Board, whose mandate is to “review programs and initiatives of communities, government institutions and other bodies or institutions to

122 The Official Languages Act, as originally enacted, recognized the following Aboriginal languages: “Chipewyan, Cree, Dogrib, Loucheux, North Slavey, South Slavey and Inuktitut” (see Official Languages Ordinance, SNWT 1984, c 2, s 5). This was amended by An Act to Amend the Official Languages Act, RSNWT 1988, c 56 (Supp), s 4, to the following: “Chipewyan, Cree, Dogrib … Gwich’in, Inuktitut and Slavey”. “Inuktitut” and “Slavey” were defined by s 3(2) of the same act to include, for Inuktitut, both Inuvialuktun and Innuinaqtun, and for Slavey, both North Slavey and South Slavey. This is the current state of the legislation in Nunavut. In the Northwest Territories, the section was given its current form by An Act to Amend the Official Languages Act, No 3, supra note 119, s 5. “Loucheux” and “Dogrib” are older terms for Gwich’in and Tlicho, respectively.

123 Official Languages Act (Nunavut), supra note 120, s 3(1) (not in force).

124 Official Languages Act (Northwest Territories), supra note 119, ss 6, 9(2).

125 Ibid, s 15.

126 Ibid, s 28.

127 Ibid, s 30.
maintain, promote and revitalize Aboriginal languages”.\textsuperscript{128} This is by far the largest extent of rights granted to speakers of First Nations languages anywhere in Canada.

The new Nunavut legislation provides similar rights for its three official languages (the Inuit Language, English and French) and also establishes a Languages Commissioner.\textsuperscript{129} In addition, it provides that the Speaker of the Legislative Assembly may “declare authoritative an Inuit Language version of a record or journal of the Legislative Assembly”; that “[a]n Inuktitut version of a bill must be made available at the time the bill is introduced”; and that “[t]he Legislative Assembly, on the recommendation of the Executive Council, may, by resolution, designate an Inuit Language version of an Act to be authoritative”.\textsuperscript{130} This important legislation (not yet in force) works as a companion statute to the much more vigorous \textit{Inuit Language Protection Act},\textsuperscript{131} which will be discussed below.

It should be noted that neither the Northwest Territories nor the Nunavut Legislative Assemblies can unilaterally amend or revoke any provision of their \textit{Official Languages Act} without the concurrence of Parliament, as per section 43.1 of the \textit{Northwest Territories Act}\textsuperscript{132} and section 38 of the \textit{Nunavut Act}.\textsuperscript{133}

\subsection*{2.7.4 Unofficial Recognition and Other Legislation Relating to Aboriginal Languages}

\textbf{Provincial and Territorial Legislation}

Legislation has been enacted which directly or indirectly impacts Aboriginal languages elsewhere in Canada (leaving aside for now the special case of comprehensive land claims and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{128} \textit{Ibid}, s 31(1)(a).
\item \textsuperscript{129} \textit{Official Languages Act} (Nunavut), \textit{supra} note 120, ss 4, 8, 12, 16.
\item \textsuperscript{130} \textit{Ibid}, ss 4(2.1)(b), 5(2),(4).
\item \textsuperscript{131} \textit{ILPA}, \textit{supra} note 121.
\item \textsuperscript{132} \textit{Northwest Territories Act}, RSC 1985, c N-27.
\item \textsuperscript{133} \textit{Nunavut Act}, SC 1993, c 28.
\end{itemize}
\end{footnotesize}
self-government agreements, which will be discussed below). While the Yukon has not adopted an official languages statute, its Languages Act states that it recognizes “the significance of aboriginal languages in the Yukon” and that it “wishes to take appropriate measures to preserve, develop, and enhance those languages in the Yukon”.\textsuperscript{134} Section 3(2) of that act states that “[e]veryone has the right to use … a Yukon aboriginal language in any debates and other proceedings of the Legislative Assembly”. Section 8 provides that “[n]othing in this Act shall be construed as preventing the Legislative Assembly or the Government of the Yukon from granting rights in respect of, and providing services in … any Yukon aboriginal language …” Section 11 then explicitly provides that “[t]he Commissioner in Executive Council may make regulations in relation to the provision of services of the Government of the Yukon in one or more of the aboriginal languages of the Yukon”. The act does not define what are the “aboriginal languages of the Yukon”. Nonetheless, this legislation grants significant rights to speakers of Aboriginal languages, though much less so than in the Northwest Territories or Nunavut. Like the other two territories, the Yukon cannot unilaterally amend or revoke its language legislation.\textsuperscript{135}

Manitoba has recently adopted legislation to recognize Aboriginal languages spoken on its territory, albeit not as official languages. The Aboriginal Languages Recognition Act recognizes seven Aboriginal languages (Cree, Dakota, Dene, Inuktitut, Michif, Ojibway and Oji-Cree) as “the Aboriginal languages spoken and used in Manitoba”.\textsuperscript{136} While the act’s preamble affirms that “government has a role to play in recognizing and promoting the preservation and use of Aboriginal languages”,\textsuperscript{137} it is unclear what effect, if any, this statute will have on the

\textsuperscript{134} Languages Act, RSY 2002, c 133, s 1(3).
\textsuperscript{135} Yukon Act, SC 2002, c 7, s 27(1).
\textsuperscript{136} Aboriginal Languages Recognition Act, SM 2010, c 22, CCSM c A1.5, s 1.
\textsuperscript{137} Ibid, Preamble, cl 7.
status and use of Aboriginal languages in Manitoba. The act does not commit the government of the province to any concrete action to preserve or promote the seven named languages. In relation to Métis languages, the *Louis Riel Institute Act* incorporates the Louis Riel Institute, whose mandate includes promoting, undertaking and supporting “research into … the culture, education and languages of the Metis people”.\(^{138}\)

British Columbia’s *First Peoples’ Heritage, Language and Culture Act* states in its preamble that “the Province of British Columbia wishes to … preserve, restore and enhance First Nations heritage, language and culture”.\(^{139}\) The law continues the First Peoples’ Heritage, Language and Culture Council,\(^{140}\) whose purposes include the duty “to support and advise ministries of government on initiatives, programs and services related to First Nations heritage, language and culture” and “to advise the government on the preservation and fostering of First Nations languages and other aspects of cultural development of First Nations peoples throughout British Columbia”.\(^{141}\) It is assisted in these duties by the First Peoples’ Advisory Committee, the members of which are nominated by the tribal councils of British Columbia’s First Nations.\(^{142}\) The First Peoples’ Heritage, Language and Culture Council recently issued a *Report on the Status of B.C. First Nations Languages*,\(^ {143}\) and is actively involved in the promotion of First Nations languages in British Columbia. In addition, the province has taken a significant step in

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\(^{139}\) *First Peoples’ Heritage, Language and Culture Act*, RSBC 1996, c 147, Preamble [FPHLCA].

\(^{140}\) *Ibid*, s 3(1). The First Peoples’ Heritage, Language and Culture Council was first established by the *First Peoples’ Heritage, Language and Culture Act*, SBC 1990, c 7, s 3(1).

\(^{141}\) *Ibid*, s 6(1)(c)–(d).

\(^{142}\) *Ibid*, s 2.

the recognition of the Haida language through the *Haida Gwaii Reconciliation Act*, which officially renames the Queen Charlotte Islands as Haida Gwaii.¹⁴⁴

Saskatchewan’s *Multiculturalism Act* states in its preamble that it is the policy of the Government of Saskatchewan to “preserve, strengthen and promote Aboriginal cultures and acknowledge their historical and continued contribution to the development of Saskatchewan” and to “recognize the many different languages spoken in Saskatchewan”.¹⁴⁵ The *Métis Act* specifically recognizes “the importance of the languages of the Métis people, including the Michif language, to Canada’s culture and heritage”.¹⁴⁶

Quebec’s *Charter of the French language* (*CFL*) specifically mentions Aboriginal languages in its preamble: “Whereas the National Assembly of Québec recognizes the right of the Amerinds and the Inuit of Québec, the first inhabitants of this land, to preserve and develop their original language and culture …”¹⁴⁷ Section 87 of the *CFL* provides that “[n]othing in this Act prevents the use of an Amerindic language in providing instructions to the Amerinds, or of Inuktitut in providing instruction to the Inuit”. Section 88 exempts certain Aboriginal school boards from the application of the education provisions of the law. Section 95 exempts Aboriginal administrative bodies from the act, and section 97 confirms that the *CFL* does not apply on Indian reserves.

Nova Scotia’s *Mi’kmaq Education Act* grants powers to Mi’kmaq communities to enact laws respecting education in the community.¹⁴⁸ Presumably this would include laws in respect of

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¹⁴⁵ *Multiculturalism Act*, SS 1997, c M-23.01, s 4(b), (f).

¹⁴⁶ *Métis Act*, SS 2001, c M-14.01, s 2(c).

¹⁴⁷ *Charter of the French language*, RSQ c C-11, Preamble [*CFL*].

¹⁴⁸ *Mi’kmaq Education Act*, SNS 1998, c 17, s 5.
the language of instruction. This appears to be the only piece of legislation bearing on the subject of Aboriginal languages in all of Atlantic Canada.

**Federal Legislation**

On 9 December 2015, Senator Serge Joyal of Quebec reintroduced Bill S-212, a proposed *Aboriginal Languages of Canada Act*. This bill provides, among other things, that “[t]he Government of Canada is committed to … preserving, revitalizing and promoting aboriginal languages in Canada by protecting them and using them where appropriate …” The bill stops short of making Aboriginal languages official, but provides for important governmental action and an annual report to Parliament. The bill has been through First Reading, but it should be noted that previous variants of this same bill have not been adopted in prior Parliaments.

On 9 April 2008, the Senate Standing Committee on Rules, Procedures and the Rights of Parliament issued a report recommending the adoption of a pilot project whereby senators would be allowed to use Inuktitut in the proceedings of the Senate. The pilot project was implemented and Inuktitut was used for the first time in the Senate on 2 June 2009.

The federal *Official Languages Act* does not refer to Aboriginal languages as such but repeats the saving provision of section 22 of the *Charter*, and adds that “[n]othing in this Act

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149 Bill S-212, supra note 109; this bill has had many variants over the years but has never passed through the entire legislative process.
151 Ibid, cl 11.
153 *Debates of the Senate*, 39th Parl, 2nd Sess, No 40 (2 June 2009) at 949 (Hon Noël A Kinsella, Speaker); see the interpretation of the remarks of Mary Simon, National President, Inuit Tapiriit Kanatami, at 950–52 and of Senators Charlie Watt (at 953) and Willie Adams (at 959 and 962–63).
shall be interpreted in any manner that is inconsistent with the preservation and enhancement of languages other than English or French". 154

The Indian Act is silent on the subject of language. 155 The Department of Indian and Northern Affairs (INAC) appears to have little to do with the promotion of Aboriginal languages, beyond funding a Cultural/Educational Centres Program for Aboriginal communities. 156 It did, however, in collaboration with the Department of Canadian Heritage, publish a report in 2002 on the state of Aboriginal languages, including data on the current distribution of languages and a detailed map. 157

The Department of Canadian Heritage established a Task Force on Aboriginal Languages and Cultures, which issued a report entitled Towards a New Beginning, 158 leading to the establishment of the Aboriginal Languages Initiative (ALI) administered by the Department. The objective of the ALI is to “support preservation and promotion of Aboriginal languages for future generations of Aboriginal peoples and other Canadians”. 159 Its “specific objectives” are “increasing the number of Aboriginal language speakers; … expanding the domain in which Aboriginal languages are spoken; and … increasing the rate of intergenerational transmission”. 160 To further its mandate, the ALI provides funds for programs designed to preserve, promote and revitalize Aboriginal languages. In its recent report, the Truth and

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154 Official Languages Act, RSC 1985, c 31 (4th Supp), s 83(2).
155 Indian Act, RSC 1985, c I-5.
157 Indian and Northern Affairs Canada, From Generation to Generation: Survival and Maintenance of Canada’s Aboriginal Languages Within Families, Communities and Cities (Ottawa: Minister of Public Works and Government Services Canada, 2002).
158 Task Force on Aboriginal Languages and Cultures, Towards a New Beginning: A Foundational Report for a Strategy to Revitalize First Nation, Inuit and Métis Languages and Cultures (Ottawa: Department of Canadian Heritage, 2005).
160 Ibid.
Reconciliation Commission of Canada has pointed out the inadequacies of the Aboriginal Languages Initiative’s funding.\textsuperscript{161} In its most recent budget, the new federal government stated that it “will work with Indigenous groups to consider how to best support Indigenous language and culture beyond 2016–17”.\textsuperscript{162}

Conclusion

This short survey of the legislative context reveals the limited nature of Aboriginal language rights in Canada. With the exception of the territories (and the special agreements discussed below), these rights remain at the level of the pious intentions of the federal and provincial governments, and even these are scarce. While Manitoba and British Columbia have at least stated a commitment to preserving and promoting Aboriginal languages, it is disheartening that no action of any real significance has been taken east of the ninety-fifth meridian.

2.7.5 The Inuit Language Protection Act

Special consideration must be given to Nunavut’s new \textit{Inuit Language Protection Act} (\textit{ILPA}). The federal \textit{Nunavut Act} gives the Legislative Assembly of the territory of Nunavut the power to make laws in relation to “the preservation, use and promotion of the Inuktut language, to the extent that the laws do not diminish the legal status of, or any rights in respect of, the English and French languages”.\textsuperscript{163} Nunavut has used this power to enact the \textit{ILPA}, a piece of legislation which is in many respects modeled on Quebec’s \textit{Charter of the French language}

\textsuperscript{163} \textit{Nunavut Act}, supra note 14, s 23(1)(n).
The ILPA is by far the strongest piece of legislation relating to the status of an Aboriginal language anywhere in Canada.

Preamble

The preamble to the ILPA is both an eloquent statement of the importance of the Inuit Language (which includes Inuktitut and Inuinnaqtun) to Inuit identity and an impassioned plea for the recognition of the Inuit Language (and by the same logic, all Aboriginal languages) as a “founding and official language”. The preamble begins by “[h]onouring as wise guardians, the Inuit Elders and the other Inuit Language speakers and educators who have sustained and developed the Inuit Language from time immemorial …” It goes on to recognize “the importance of the Inuit Language … as the fundamental medium of personal and cultural expression through which Inuit knowledge, values, history, tradition and identity are transmitted” and “as a foundation necessary to a sustainable future for the Inuit of Nunavut as a people of distinct cultural and linguistic identity within Canada”. The importance of the Inuit Language goes beyond the borders of Nunavut: the Legislative Assembly is “[d]etermined … to advocate for and to achieve the national recognition and constitutional entrenchment of the Inuit Language as a founding and official language of Canada …” This bold call to action directly addresses the lack of recognition afforded to the Inuit Language, and all other Aboriginal languages, in the Canadian constitutional context. The language of the Inuit, like all Aboriginal languages, remains threatened because of “past government actions and policies of assimilation and the existence of government and societal attitudes that cast the Inuit Language and culture as inferior

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165 ILPA, supra note 121, Preamble, cl 12.
166 Ibid, cl 1.
167 Ibid, cl 2.
168 Ibid, cl 12.
and unequal”; such actions and attitudes “have had a persistent negative and destructive impact on the Inuit Language and on Inuit”.169 As a result, the Inuit Language is less well able to counter the pressures and meet the challenges that confront it today. It is precisely to counter these pressures and meet these challenges that the Legislative Assembly of Nunavut has enacted the ILPA. The preamble affirms that “the Inuit of Nunavut have an inherent right to the use of the Inuit Language, and that positive action is necessary to protect and promote the Inuit Language and Inuit cultural expression”.170 The ILPA represents that positive action. In order to enhance the importance of the bold step taken for the protection of the Inuit Language with the ILPA, the legislature makes it clear that “the Inuit Language Protection Act shall enjoy quasi-constitutional status in law”.171 It relies both on “the fundamental character of the values expressed and the important objectives” of the legislation and on “sections 15, 25 to 27 and 35 of the Constitution Act, 1982” to support this position.172

General Provisions

While the ILPA is undoubtedly designed to defend the Inuit Language and enhance its status and use, it is a remarkably moderate piece of legislation, certainly when compared to the original version of the CFL.173 It is noteworthy that the act does not purport to affect the rights of the English or French languages as co-official languages of Nunavut.174 Its provisions requiring the use of the Inuit Language are non-exclusive.175 In addition, the Languages Commissioner

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169 Ibid, cl 3.
170 Ibid, cl 8.
172 Ibid; see supra notes 113–115 and accompanying text.
174 See ILPA, supra note 121, Preamble (cl 11), s 2(1)(a); such an attempt would be ultra vires in any event as contrary to the Nunavut Act: see supra note 55 and accompanying text.
175 See ibid, ss 3(1)(a)–(d) (not in force), 5(a) (not in force), 12(1), (3)(b) (not in force), 13 (not in force), and 25.1(2)(a),(f).
charged with enforcing the act is required to have regard to the “general principles and concepts of Inuit Qaujimajatuqangit”,176 which include: “Inuuqatigiitsiarniq (respecting others, relationships and caring for people)”; “Tunnganarniq (fostering good spirit by being open, welcoming and inclusive)” and “Aajiiqatigiinniq (decision making through discussion and consensus)”.177 This spirit will no doubt ensure that an already balanced piece of legislation will be applied with sensitivity, although only time will tell what issues will be encountered in its implementation.

Despite its more moderate tone, the ILPA has many similarities to the current version of the CFL. Section 3 of the act provides that “every organization”178 will be required to, among other things: “display its public signs” and “its posters and commercial advertising … in the Inuit Language together with any other language used”,179 provided that the Inuit Language text “is at least equally prominent with any other language used”.180 In addition, particular services, including “essential services” such as “emergency” and “health, medical and pharmaceutical services”, “household, residential or hospitality services”, including “restaurant, hotel, lodging, 

176 “Inuit traditional knowledge” (Asuilaak Living Dictionary, sub verbo “Inuit Qaujimajatuqangit”, online: Asuilaak Living Dictionary, <http://www.livingdictionary.com>; “Inuit Qaujimajatuqangit is a body of accumulated knowledge of the environment and the Inuit interrelationship with the elements, animals, people and family” (“Inuit Societal Values Project”, online: Nunavut, Department of Culture, Elders, Language and Youth <http://www.gov.nu.ca/cley/english/iqproject.html>). In terms of the vitality of both Inuit language and law in Nunavut, mention may also be made of the short-lived Akitsiraq Law School at Nunavut Arctic College, which is set to reopen in September 2017 (Thomas Rohner, “Nunavut to revive law school, Quassa says”, Nunatsiaq Online, 15 March 2016 <http://www.nunatsiaqonline.ca/stories/article/65674nunavut_lawyer_training_program_to_be_revived/>), and which made the study of Inuit law an important part of its curriculum. I am grateful to Prof. Noel McDermott for bringing the program to my attention.

177 ILPA, supra note 121, s 27.1(1).

178 Defined in section 1(1) as “a public sector body, municipality or private sector body …”; “public sector body” means “a department of the Government of Nunavut or public agency, or a federal department, agency or institution”; “private sector body” is defined as “a corporation, partnership, sole-proprietorship, society, association, cooperative, union or other non-government entity operating in Nunavut …” These are broad definitions. It is unlikely that the legislature of Nunavut can validly legislate for any branch of the federal government: see Braën, supra note 164 at 763.

179 ILPA, supra note 121, s 3(1)(a)–(b).

180 Ibid, s 3(1)(c); cf. CFL, supra note 40, s 58.
residential or housing services” and “basic services to a household” such as “the supply of
electricity, fuel, water and telecommunications”, and any other services prescribed by the
Commissioner in Executive Council, shall be provided in the Inuit Language.181 Section 5
provides for the use of the Inuit Language in the service of civil claims; sections 6 and 7 provide
for the provision of communications and services in the Inuit Language by municipalities
“regardless of the volume or level of demand”, and for government translation of documents “for
public circulation, review or comment at the municipal level”.182

Sections 8–10 provide for the use of the Inuit Language in education. Section 8 provides
to “[e]very parent whose child is enrolled in the education program in Nunavut … the right to
have his or her child receive Inuit Language instruction”. In no way does it make Inuit Language
instruction mandatory for any students.183 Depending on one’s point of view, this is either a
major point in favour of the act, or a major deficiency. This issue will be discussed below.184
Sections 11–14 of the ILPA deal with the Inuit Language in the public service. It is affirmed that
“the Inuit Language is a language of work in territorial institutions, and every employee of a
territorial institution has the right to use the Inuit Language at work”.185 The following sections
then set out provisions to ensure that the Inuit Language is integrated into the public-service
work environment and taken into account in assessing qualifications for the public service.186
Further, section 12(5) provides that “[n]o territorial institution shall discharge, suspend, expel,
reprimand, intimidate, harass, coerce, evict, transfer, impose a pecuniary or other penalty on or
otherwise discriminate against an employee only because the employee is a unilingual speaker of

181 Ibid, s 3(2)(a)–(c); cf. CFL, ibid, ss 30, 51–57.
183 Compare CFL, supra note 147, s 72.
184 It may be difficult to implement mandatory Inuit Language instruction in Nunavut in any case because of
section 23 of the Charter, if it does in fact apply to Nunavut: see discussion below.
185 ILPA, supra note 121, s 12(1) [emphasis added]; compare CFL, supra note 147, ss 16–18.
186 Ibid, s 12(2).
the Inuit Language or prefers to speak or use the Inuit Language”. Section 13, however, makes the Official Languages Act and its provisions paramount over the ILPA in case of conflict.\footnote{See Official Languages Act (Nunavut), supra note 120 (not in force).}

The Inuit Uqausinginnik Taiguusiliuqtii

Part 2 of the ILPA establishes an “Inuit Language authority” to be called the Inuit Uqausinginnik Taiguusiliuqtii (IUT).\footnote{ILPA, supra note 121, s 15.} This is a body similar to Quebec’s Office québécois de la langue française (OQLF).\footnote{See CFL, supra note 147, s 157.} Its duties are generally stated in section 16(1) of the act: “It is the duty of the Inuit Uqausinginnik Taiguusiliuqtii to expand the knowledge and expertise available with respect to the Inuit Language, and to consider and make decisions about Inuit Language use, development and standardization under this Act.” This is very similar to the duties of the OQLF,\footnote{See e.g. ibid, ss 159–164.} with the important exception that the IUT is not charged with ensuring compliance with the ILPA: that task is assigned to the Languages Commissioner.\footnote{ILPA, supra note 121, s 28; compare CFL, ibid, s 159.} By far the most important duty of the IUT relates to standardization. Unlike its Quebec counterpart, the IUT does not have the benefit of an already highly standardized language to work with: as section 1(2) of the ILPA itself makes clear, the Inuit Language is very much a work in progress. The IUT will have to make difficult decisions, not only between the two main recognized varieties of the Inuit Language in Nunavut (Inuktitut and Inuinnaqtun), but among the many local dialects as well. It is charged with developing standard terminology “through consideration of the oral traditions and usage, diversity and modern needs of the Inuit Language”;\footnote{Ibid, s 16(2)(a).} it is to develop and publish “standards of … use or correctness, including with respect to any dialect of the Inuit Language in
local use”;

and it is to “document and preserve traditional or historic terminology, regional variants or dialects, expressions and accounts of the Inuit Language”. These conflicting goals—standardization and regard for diversity—may create a real challenge for the IUT. Its recommendations, moreover, will not be mere advice: it can “designate standard terminology, expressions, orthography, language or usage in the Inuit Language” for any organization to which the ILPA applies, and may “direct a department of the Government of Nunavut or public agency to implement” such standards. In doing so, however, it is to consider “the careful assessment and selection” of measures “that are most likely to be effective … and not likely to result in any disproportionate adverse impact on an individual or group”. Besides this, as noted above, the enforcement of the entire legislation is to be guided by the principles of Inuit Qaujimajatuqangit.

The IUT will face a very delicate and challenging task in carrying out its mandate. Its members are to be no fewer than five in number, and are to demonstrate “excellent fluency in the Inuit Language”; “traditional or academic expertise concerning the history, diversity, status, use, teaching, development or needs of the Inuit Language”; and “personal knowledge concerning more than one regional variant or dialect” of the language. In addition to its regular duties, the IUT is to prepare an annual report on its activities and on the state of the Inuit Language.

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193 Ibid, s 16(2)(c).
194 Ibid, s 16(3)(a).
195 Ibid, s 16(5).
196 Ibid, s 18(e).
197 See supra note 176 and accompanying text.
198 ILPA, supra note 121, s 20(1)–(2).
199 Ibid, s 23.
Enforcement

Part 3 of the act makes the Minister of Languages responsible for the “full, efficient and effective realization of the rights and privileges established under this Act”.\(^{200}\) He or she is to take steps to promote the Inuit Language in its status, use, teaching and learning, including by engaging in “dialogue and co-operation with the representatives of Inuit outside Nunavut, with the objective of protecting, developing and promoting the Inuit Language”.\(^{201}\) The Minister’s most important duty, however, is to oversee the implementation of the ILPA within territorial and municipal institutions.\(^{202}\) He is also responsible for the administration of the Official Languages Promotion Fund established in section 25.1 of the act. Finally, the Minister is empowered to “enter into an agreement with any person or organization, respecting any matter under this Act that the Minister considers appropriate”\(^{203}\) and must also issue an annual report.\(^{204}\)

The general enforcement of compliance with the act is entrusted under Part 4 to the Languages Commissioner.\(^{205}\) As noted above, in carrying out his duties in this respect, the Languages Commissioner must have regard to the general principles of Inuit Qaujimajatuqangit.\(^{206}\) The Commissioner’s powers to enforce begin with the power to review Inuit Language plans submitted by organizations subject to the act.\(^{207}\) These plans are similar in nature to francization programs under the CFL.\(^{208}\) It should set out “the organizational measures, policies and practices proposed for the communications with or delivery of services to the public

\(^{200}\) Ibid, s 24(1).
\(^{201}\) Ibid, s 24(2)(k).
\(^{202}\) Ibid, s 25.
\(^{203}\) Ibid, s 26.
\(^{204}\) Ibid, s 27.
\(^{205}\) Ibid, s 27.1; the position of Languages Commissioner is established by section 18(1) of the current Official Languages Act, supra note 119, and continued under section 16(1) of the new Official Languages Act, supra note 120 (not in force).
\(^{206}\) See supra note 176 and accompanying text.
\(^{207}\) ILPA, supra note 121, s 29(1), 30(1)–(3).
\(^{208}\) CFL, supra note 147, s 140.
that are required under this Act”.209 The Commissioner is also granted extensive powers of investigation in case of a failure to comply with the ILPA. He is granted the power to “enter and inspect premises … at any reasonable time”; “request and examine information, records and objects, make or require copies or take photographs that the Commissioner considers relevant”; and “compel a person to give evidence on oath or affirmation”.210 If the Commissioner concludes that there is non-compliance with the act, he or she may then, if the party involved is a territorial institution, make recommendations in a report to the Minister of Languages, and if no appropriate action is taken, to the Speaker of the Legislative Assembly;211 if the party involved is another organization, make recommendations directly to the party, and failing compliance, apply to the Nunavut Court of Justice for a remedy.212 Section 39 provides that “[a]n application may be made to the Nunavut Court of Justice for a remedy that the Court considers appropriate and just in the circumstances …”; in addition to any remedy it considers appropriate, the Court may “order an organization to take specific remedial action to correct its practices in order to comply with this Act …; specify the role, if any, that the Court will have in supervising the preparation of an Inuit Language plan or other compliance …; and … award damages”.213 These are considerable powers, but the manner of their enforcement will have a considerable impact on how they are received by those who are affected by them.

Coming Into Force Provisions and Review

The provisions of the ILPA came into force at different times. While most of the legislation came into force on 18 September 2008, several sections were not in force until a later

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209 ILPA, supra note 121, s 29(1)(a).
210 Ibid, ss 33.4(1)(a)–(c), (2)(c), 36(1)(a)–(c), (2)(c); cf. CFL, supra note 147, ss 166–77.
211 Ibid, ss 33.5(1)–(3), 33.6(1)–(2).
212 Ibid, s 37(1).
213 Ibid, s 42(a),(c),(d).
date: Part 4, for example, which deals with ensuring compliance with the act, came into force on 1 July 2009; so did section 8, relating to the right to receive Inuit Language instruction, for kindergarten to the third grade; sections 16 to 19, which address the duties of the IUT, were not in force until 19 September 2009. Sections 11–13, relating to the use of the Inuit Language in the public service, came into force on 19 September 2011; sections 6 and 7, regarding the right to receive certain services in the Inuit Language from municipalities and a translation requirement for public documents at the municipal level, came into force on 19 September 2012. Some provisions have yet to come into force: the right to Inuit Language instruction, pursuant to section 8, for grades 3 to the end of secondary school will not be in force until 1 July 2019. Finally, sections 3–5 (relating to Inuit Language signage, services and communications for all organizations), and sections 9 and 10 (relating to early childhood and adult Inuit Language education, respectively) are not in force until a day to be fixed by order of the Commissioner (no date has yet been set).  

**Conclusion**

This extended review of the *ILPA* shows that it is both a vigorous measure in favour of the Inuit Language and, on its face, a very moderate and balanced piece of legislation. To the extent that the act implements the lessons learned from experience with the Quebec language legislation, its constitutionality is assured. It is an important and meaningful step in the protection and promotion of one of the most spoken Aboriginal languages in Canada. Whether it goes far enough (whether it can constitutionally go far enough), will be discussed below.

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214 For all of the above dates, see *ibid*, s 49.
215 With the important exception of its provision purporting to regulate operations of the federal government in Nunavut; see *supra* note 178.
2.7.6 Comprehensive Land Claims and Self-Government Agreements

No survey of Aboriginal language rights in Canada would be complete without consideration of the relatively new and growing body of law relating to comprehensive land claims and self-government agreements. Since 1973, when the federal government first announced its comprehensive land claims policy in the wake of the Calder decision, twenty-two comprehensive land claims agreements have been signed, covering about forty percent of Canada’s land mass. These include the James Bay and Northern Quebec Agreement (1977), the Northeastern Quebec Agreement (1978), the Inuvialuit Final Agreement (Northwest Territories, 1984), the Gwich’in Comprehensive Land Claim Agreement (Northwest Territories, 1992), the Council for Yukon Indians Umbrella Final Agreement (1993; an umbrella agreement with fourteen Yukon First Nations, of which eleven have signed individual land claims and self-government agreements), the Sahtu Dene and Métis Comprehensive Land Claim Agreement (Northwest Territories, 1994), the Nunavut Land Claims Agreement (1995), which culminated in the creation of the territory of Nunavut, the Nisga’a Final Agreement (British Columbia, 2000), the Tlicho Agreement (Northwest Territories, 2005), the Labrador Inuit Land Claims Agreement (2005), the Nunavik Land Claims Agreement (Quebec, 2008) and the Tsawwassen First Nation Final Agreement (British Columbia, 2009). The third such agreement to be signed in British Columbia, the Maa-nulth First Nations Final Agreement, took effect in 2011. These comprehensive land claim agreements may include self-government agreements:

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216 For an additional review of these, see Ghislain Otis, “La place des cultures juridiques et des langues autochtones dans les accords d’autonomie gouvernementale au Canada” (2009) 54 McGill LJ 237.
219 Ibid.
Under the Government of Canada’s 1995 Inherent Right Policy, self-government arrangements may be negotiated simultaneously with land and resources as part of comprehensive claims agreements. The Government of Canada is prepared, where the other parties agree, to constitutionally protect certain aspects of self-government agreements as treaty rights within the meaning of section 35 of the Constitution Act, 1982. Self-government agreements may be protected under section 35 as part of comprehensive land claims agreements.\(^{220}\)

Several levels of self-government may be negotiated, from “incremental” agreements, with limited jurisdiction, to “public government” in a case such as Nunavut.\(^{221}\) In general, the agreements cover a wide range of topics; language is not necessarily front and centre. There seems to have been an important evolution in this regard over the decades. The *James Bay and Northern Quebec Agreement*, for example, made little explicit reference to language, except for the limited rights relating to education and justice.\(^{222}\) By contrast, the recent *Tsawwassen First Nation Final Agreement* of 2009 explicitly recognizes the right of the Tsawwassen First Nation to practise its culture and “to use the Hun’qum’ium language”\(^{223}\) and specifically grants the Tsawwassen Government the power to make laws in respect of “the preservation, promotion, and development of the culture of Tsawwassen First Nation and the Hun’qum’ium language on Tsawwassen Lands”.\(^{224}\) These laws will prevail on Tsawwassen Lands in case of conflict with federal or provincial laws.\(^{225}\) The 2005 *Labrador Inuit Land Claims Agreement* and the *Labrador

\(^{220}\) *Ibid.*

\(^{221}\) *Ibid.*


\(^{223}\) *Tsawwassen First Nation Final Agreement*, online: INAC \(<http://www.ainc-inac.gc.ca/ai/scr/bc/trts/agrmts/tfn/fa/tfnfa-eng.pdf>, c 14, cl 1 [TFNFA].


Inuit Constitution, reviewed below, constitute by far the strongest legislative regime for the promotion of an Aboriginal language outside Nunavut.

While a thorough review of comprehensive land claims and self-government agreements is beyond the scope of this work, I will discuss in more detail, for the sake of comparison, the first of these modern treaties, the James Bay and Northern Quebec Agreement, and one of the most interesting of the recent ones, the Labrador Inuit Land Claims Agreement and the accompanying Labrador Inuit Constitution.

The James Bay and Northern Quebec Agreement, the Northeastern Quebec Agreement and Implementing Legislation

The James Bay and Northern Quebec Agreement (JBNQA) is considered to be the first modern treaty in Canada, and covers all of the land in Quebec draining into James and Hudson Bays.\(^{226}\) The JBNQA grants limited language rights, principally in two areas: education and the administration of justice. The agreement provides that Cree will be the teaching language for the Cree School Board,\(^{227}\) while Inuttituut is to be the teaching language in the Kativik School Board.\(^{228}\) Similarly, the Northeastern Quebec Agreement (NEQA), a subsequent agreement to bring the Naskapi into the regime governed by the JBNQA, provides that Naskapi will be the teaching language of the Naskapi school.\(^{229}\) These stipulations have been implemented by section 88 of the CFL, which provides that “in the schools under the jurisdiction of the Cree School Board or the Kativik School Board … the languages of instruction shall be Cree and

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\(^{226}\) Briefing Note, supra note 218.

\(^{227}\) JBNQA, supra note 222, s 16.0.10.

\(^{228}\) Ibid, s 17.0.59.

Inuktitut, respectively”. It is further stated that the section, “with the necessary modifications, applies to the Naskapi of Schefferville”. 230

The JBNQA also provides certain rights in relation to the administration of justice: in “all civil, criminal, penal and all statutory matters”, interpreters are to be provided “as of right without costs” to any Cree party; “the written motivated judgments” of a “court, tribunal, body or commission, are translated as of right into Cree without cost to the Cree parties”; simultaneous translation into Cree is to be provided for all statements of the presiding judge; and all “depositions, admissions, objections to evidence and the decisions thereon” are also to be translated free of cost. 231 The provisions contain an important caveat: such translations or interpretations are provided “for information purposes only”; they are not to be treated as official. This is an important limitation on the rights granted by the section. The Inuit receive even fewer rights: “[U]pon demand from any Inuit party, the judgments with reasons of the courts, judges, tribunals, bodies and commissions that are not rendered orally and in open court, but in writing, are translated as of right into Inuttituut without cost”. 232 There is no provision for simultaneous translation as with Cree. The Naskapi are given similar rights to the Crees in the NEQA. 233

Mention should also be made of section 95 of the CFL, which exempts any “persons qualified for benefit” under the JBNQA and any “bodies to be created under the said Agreement” from the application of the CFL. 234 Under this provision, the Cree Regional Authority (Eeyou Tapayatachesoo) created by the Act respecting the Cree Regional Authority, 235 is exempt from

230 CFL, supra note 147, s 88.
231 JBNQA, supra note 222, s 18.0.23.
232 Ibid, s 20.0.11.
233 NEQA, supra note 229, s 12.3.3.
234 See supra note 147 and accompanying text.
235 RSQ c A-6.1, s 2.
the CFL. Part of its mandate is to “advance the education of the James Bay Crees” and to “foster, promote, protect and assist in the preservation of the way of life, the values and the traditions of the James Bay Crees”.\(^{236}\) This would undoubtedly include promotion of the Cree language. Similar provisions apply to the Makivik Corporation\(^ {237}\) and to the Naskapi Development Corporation (Naskapi Gamowtapechsunaiyow).\(^ {238}\) Moreover, the federal *Cree-Naskapi (of Quebec) Act* provides for local self-government powers for the Cree and Naskapi bands covered by the *JBNQA* and the *NEQA*. One of the stated objects of the bands is “to promote and preserve the culture, values and traditions of the Crees or Naskapis”.\(^ {239}\) The act further provides that “[i]n addition to any other rights relating to the use of the Cree or Naskapi language, a Cree band may conduct its council meetings in the Cree language and the Naskapi band may conduct its council meetings in the Naskapi language”.\(^ {240}\) A band council may adopt a by-law or resolution in Cree or Naskapi concurrently with either an English or French version, and “[w]here a by-law is enacted or a resolution is adopted in more than one of the English, French, Cree or Naskapi languages, all versions in which it is enacted or adopted are equally authoritative …”\(^ {241}\) The remaining provincial legislation applying to the Crees, Inuit and Naskapi does not add significantly to their language rights.\(^ {242}\)

More recently, the Quebec government and the Crees of Quebec reached an *Agreement Concerning a New Relationship*, which declares that “[t]he Cree Nation must continue to benefit

\(^ {236}\) *Ibid*, s 6(e),(m).
\(^ {237}\) *An Act respecting the Makivik Corporation*, RSQ c S-18.1, s 5(b),(e).
\(^ {238}\) *An Act respecting the Naskapi Development Corporation*, RSQ c S-10.1, s 5(2),(5).
\(^ {239}\) *Cree-Naskapi (of Quebec) Act*, SC 1984, c 18, s 21(i).
\(^ {240}\) *Ibid*, s 31.
\(^ {241}\) *Ibid*, s 32(1)–(2).
\(^ {242}\) See *An Act respecting Cree, Inuit and Naskapi Native Persons*, RSQ c A-33.1; *The Cree Villages and the Naskapi Village Act*, RSQ c V-5.1; *An Act respecting Northern villages and the Kativik Regional Government*, RSQ c V-6.1.
from its rich cultural heritage, its language and its traditional way of life in a context of growing modernization.” 243 No changes are made, however, to the existing linguistic regime.

The Nunavik Inuit, for their part, signed the Nunavik Inuit Land Claims Agreement with the federal government in order to settle unresolved issues stemming from both the JBNQA and the NEQA as they related to marine areas in James Bay, Hudson Bay, Hudson Strait, Ungava Bay and a part of northern Labrador. 244 The agreement does not change the substance of the self-government rights of the Nunavik Inuit, but it does provide that “traditional Nunavik Inuit place names” may be used to replace current official place names under a process to be carried out by an entity designated by the Makivik Corporation. 245 It should also be noted that the agreement stipulates that it shall be available in an Inuktitut version, although only the English and French versions are authoritative. 246

The Labrador Inuit Land Claims Agreement, the Labrador Inuit Constitution and the Labrador Inuit Charter of Rights and Responsibilities

The 2005 Labrador Inuit Land Claims Agreement (LILCA) 247 involves 15,799 square kilometres of Labrador Inuit land and also establishes a self-government regime for the Labrador Inuit within their settlement area, 248 which is known as Nunatsiavut. 249 The LILCA provides in

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244 Briefing Note, supra note 110.
246 Ibid, art 2.9.
248 Briefing Note, supra note 110.
section 2.4.1: “The right of Inuit to practise Inuit culture and to use Inuktitut\textsuperscript{250} shall be exercised in a manner consistent with the Agreement.” The agreement also states that it shall be available in an Inuktitut version, but only the English and French versions will be authoritative.\textsuperscript{251} The place-names provision of the \textit{LILCA} is much more strongly worded than the corresponding section of the Tlicho agreement. It states unambiguously that “[t]he Nunatsiavut Government is the final authority on the spelling and pronunciation of place names in Inuktitut in Newfoundland and Labrador”, and not solely in Nunatsiavut.\textsuperscript{252} It has exclusive power regarding the naming and renaming of places in Nunatsiavut.\textsuperscript{253} Like the Nisga’a and Tlicho agreements, the \textit{LILCA} empowers the Labrador Inuit to draw up a constitution.\textsuperscript{254}

The \textit{Labrador Inuit Constitution (LIC)} states as its founding principles both “the existence of the Inuit of Labrador whose identity is based on ties of kinship, a shared language, common customs, traditions, observances … a common history, and our own political, social, cultural and economic institutions” and “the need to protect and advance Labrador Inuit aboriginal and treaty rights, including rights to language, culture, land and resources, and rights of self-government”.\textsuperscript{255} It also especially acknowledges as a founding principle “recognition that the ancestral language of the Inuit of Labrador is Inuttut, that it is the right of every Labrador Inuk to use Inuttut in personal and community life and in official transactions and business and that every Labrador Inuk has a responsibility to teach Inuttut and Inuit culture and customs to Inuit children”.\textsuperscript{256} This is the most strongly worded commitment to the protection of an

\textsuperscript{250}This is the form used in the agreement. The \textit{LIC, ibid.}, states that the ancestral language of the Inuit of Labrador is Inuttut (s 1.1.3(h)).
\textsuperscript{251} \textit{LILCA, supra} note 191, s 1.2.2.
\textsuperscript{252} \textit{Ibid}, s 16.2.1.
\textsuperscript{253} \textit{Ibid}, s 16.3.1.
\textsuperscript{254} \textit{Ibid}, s 17.3.1.
\textsuperscript{255} \textit{LIC, supra} note 193, s 1.1.3(a)–(b).
\textsuperscript{256} \textit{Ibid}, s 1.1.3(h).
Aboriginal language in all of the agreements examined so far. Furthermore, the LIC lists as another founding principle “the requirement that laws and policies must be expressed in clear language that can be easily understood by all Inuit of Labrador and are to be published in English and Inuttut”.257 This is a crucial commitment to ensure the meaningful equality of the Inuttut language. This principle is reflected in Part 1.6 of the LIC. Section 1.6.1 declares Inuttut and English to be the official languages of the Nunatsiavut Government and the Inuit Community Governments, and section 1.6.2 states that “[a]ll decisions, laws and policies of the Nunatsiavut Government must be published in Inuttut and English”.258 More importantly, the constitution goes on to provide:

Without limiting sections 1.6.1 and 1.6.2, the primary language of Nunatsiavut is Inuttut, and without limiting the generality of this principle:

- every member of the Nunatsiavut Assembly, the Nunatsiavut Executive Council, the Nunatsiavut Civil Service and every member of an Inuit Community Government and an Inuit Community Corporation has the right to transact business and speak at meetings in Inuttut;
- every Inuk has the right to communicate in Inuttut, orally and in writing, with the Nunatsiavut Government, the Inuit Community Governments and Inuit Community Corporations; and
- all bills of the Nunatsiavut Assembly and proposed bylaws of the Inuit Community Governments and all reports of the Nunatsiavut Government … and Community Governments must be made available in Inuttut.259

These are important rights for Inuttut speakers. Section 1.6.5 then states as follows:

Recognising the diminished use and status of Inuttut, the Nunatsiavut Assembly, the Nunatsiavut Government, the Inuit Community Governments and Inuit Community Corporations have an obligation … to take practical and positive measures to:

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257 Ibid, s 1.1.3(u).
258 The LIC itself is published in both languages, but the English version prevails in case of inconsistency: see s 13.2.5.
259 Ibid, s 1.6.3.
conduct business in Inuttut;

provide programs, services and information in Inuttut;

advance the use and elevate the status of Inuttut which, in the case of the Nunatsiavut Assembly, may include the enactment of Inuit laws and the provision of programs to encourage and support Labrador Inuit to learn and use Inuttut.

The use of Inuttut by government institutions must be monitored to ensure compliance with these provisions.\(^{260}\)

Chapter 2 of the \textit{LIC} contains the \textit{Labrador Inuit Charter of Rights and Responsibilities} (\textit{LICRR}). The \textit{LICRR} guarantees to “[e]very Labrador Inuk attending a Labrador Inuit educational institution … the right to receive education in Inuttut, English or both Inuttut and English”. In ensuring the effective realization of this right, the Nunatsiavut Assembly must have regard, among other things, to “the need to redress the results of past laws, policies, attitudes and practices that have eroded Inuttut”.\(^{261}\) The \textit{LICRR} further provides that “[e]very Labrador Inuk has the right to use Inuttut in personal and community life …” and in dealings with government. This right is importantly accompanied by a responsibility to “respect, preserve and advance the use of Inuttut by speaking Inuttut at home and by teaching it to their children and family members” and to “share Labrador Inuit stories, knowledge, customs and traditions with other Inuit, particularly with younger generations”.\(^{262}\) This clear statement of individual responsibility for the preservation of a language is unique in Canada.

The \textit{LICRR} provides for the equality of all Labrador Inuit, and specifically provides that “[a]n institution of Labrador Inuit government must not discriminate against a Labrador Inuk on

\begin{itemize}
  \item \textit{Ibid.} s 1.6.7.
  \item \textit{Ibid.} s 2.4.26.
  \item \textit{Ibid.} s 2.4.27(a),(c).
\end{itemize}
the grounds of his or her ability to communicate in or his or her preference for only one of the official languages of Nunatsiavut”. Section 2.4.3 provides a saving provision, however, for measures designed “to promote Inuttut as the primary language of Nunatsiavut”. The LICRR is a very important addition to the linguistic rights of Labrador Inuit.

The LIC establishes the Nunatsiavut Government, which is composed of the President of Nunatsiavut, an Executive Council, the Nunatsiavut Assembly, and other institutions established under Inuit law. Section 1.6.4 of the constitution empowers the Nunatsiavut Government to make laws respecting the use of Inuttut and English by its institutions, subject to the provisions above. To date, it does not appear that the Nunatsiavut Government has passed any laws directly in relation to language.

Finally, mention must be made of the important provisions of the LIC recognizing Inuit customary law. Section 9.1.2 provides that “Labrador Inuit customary law is the underlying law of the Labrador Inuit and of Nunatsiavut for all matters within the jurisdiction or authority of the Nunatsiavut Assembly”. Section 9.1.5 provides for the codification of Inuit customary law. The central place accorded to Inuit customary law will ensure the preservation and development of Inuttut legal vocabulary, thereby further ensuring the continuing relevance and vitality of the Inuttut language. Curiously, there are no provisions directly addressing language in the section on the Inuit Court. The Court is, however, subject to the LIC, and presumably therefore its provisions respecting language. In light of its important role in the interpretation of

263 Ibid, s 2.4.2.
264 Ibid, s 1.3.2.
266 See Otis, supra note 109.
267 LIC, supra note 193, Part 9.2.
268 Ibid, s 9.2.3.
Inuit customary law, it may have been felt that the use of Inuttut by the Inuit Court did not need to be specified.

As already noted, the linguistic regime established under the LILCA and the Labrador Inuit Constitution forms the most significant legislative action for the preservation of an Aboriginal language outside Nunavut. It goes well beyond anything provided in the Nisga’a and Tlicho agreements, or even the more recent Tsawwassen First Nation Final Agreement. To the extent that the Nunatsiavut Government uses its powers and follows through on its commitments, then, these documents truly represent landmarks in the preservation and protection of Aboriginal languages in Canada.

2.8 CONCLUSION

This review of the legal framework governing Aboriginal language rights in Canada shows that much remains to be done. While important steps have been taken, especially in relation to Inuit languages in Nunavut and Nunatsiavut, a concerted effort on the part of the federal, provincial, and First Nations governments is necessary to stem the tide of Aboriginal language loss. While laws cannot reverse language loss on their own, they are an important tool in the protection and promotion of the status and use of languages.
CHAPTER 3  INDIGENOUS LANGUAGE RIGHTS: A BRIEF COMPARATIVE SURVEY

3.2 INTERNATIONAL LAW

As I have already noted, Indigenous languages worldwide are threatened with extinction. A body of international norms has been slowly developing around issues of Indigenous rights, including linguistic and cultural protection. First, Indigenous peoples, as minorities in the states in which they reside, benefit from the general rights accorded to minorities in international law.

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) states that where “ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”.¹ These are primarily negative rights of a generic nature,² and therefore of limited value in the protection of Indigenous languages, although in more recent times this provision has been held to include some positive obligations on the state.³

In 1992, a new UN document relating exclusively to minorities was signed, “inspired by the provisions of article 27” of the ICCPR.⁴ The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities provides that

States “shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity”.

Article 4(2) of the declaration provides: “States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs ....”

The United Nations Declaration on the Rights of Indigenous Peoples provides in article 13: “Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.”

In addition, article 14 states that “Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning”.

The Declaration was adopted by a vote in the General Assembly in which 144 States voted for it, 11 abstained, and 4 voted against: the United States, Canada, Australia, and New Zealand. Canada’s position remains that “the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws”. Nonetheless, there is

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5 UN Declaration on the Rights of Minorities, ibid, art 1.
6 Ibid, art 4(2).
8 Ibid, art 14.

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evidence that the Declaration may both reflect customary international law and have a strong influence on its development.\footnote{See eg S James Anaya & Siegfried Wiessner, “The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment”, JURIST (3 October 2007), online: <www.jurist.org>; Siegfried Wiessner, Introductory Note to the United Nations Declaration on the Rights of Indigenous Peoples, United Nations, Office of Legal Affairs, Codification Division, Audiovisual Library of International Law, online: <http://untreaty.un.org/cod/avl/ha/ga_61-295/ga_61-295.html>.}

3.3 A BRIEF COMPARATIVE SURVEY OF THE LAW RELATING TO INDIGENOUS LANGUAGES

3.3.1 United States

Indigenous languages are highly endangered in the United States as in Canada. UNESCO estimates that there are 191 endangered languages in the United States, including 74 critically endangered languages, and 54 extinct languages, largely on the linguistically diverse West Coast.\footnote{Christopher Moseley, ed, Atlas of the World’s Languages in Danger, 3d ed (Paris: UNESCO Publishing, 2010), online: <www.unesco.org/culture/languages-atlas/index.php>, “United States” [UNESCO Atlas].} The *Ethnologue*, for its part, considers that there are no fewer than 202 threatened languages in the United States.\footnote{M Paul Lewis, Gary F Simons & Charles D Fennig, eds, Ethnologue: Languages of the World, 17th ed (Dallas, Tex: SIL International, 2013), online: <www.ethnologue.com>, “United States” [Ethnologue].} According to the latest census data, there are 372,095 speakers of Native American languages in the United States.\footnote{Julie Siebens & Tiffany Julian, Native North American Languages Spoken at Home in the United States and Puerto Rico: 2006–2010, American Community Survey Briefs (Washington, DC: US Census Bureau, 2011), Table 1; these figures do not include Hawaiian.} This number represents only a minute fraction (0.62\%) of the 60 million people speaking a non-English language at home.\footnote{Ibid.} Of these, Navajo speakers were by far the largest group with over 169,000 speakers, 9 times the number of the next most spoken languages, Yupik and Dakota, with close to 19,000 speakers each.\footnote{Ibid at 3.}

The US Constitution gives the federal Congress the authority to “regulate commerce … with the Indian tribes”.\footnote{US Const art I, § 8, cl 3.} This power, and the power to make treaties,\footnote{US Const art II, § 2, cl 2.} have generally been
regarded as the source of a plenary power of Congress to legislate for Native Americans.\(^{19}\) It is under this authority that Congress has passed the *Native American Languages Act (NALA)*,\(^{20}\) which states that “[i]t is the policy of the United States to … preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages”.\(^{21}\) It also provides that “[t]he right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, including publicly supported education programs”.\(^{22}\) The law required federal departments to carry out an evaluation of “their policies and procedures in consultation with Indian tribes and other Native American governing bodies as well as traditional leaders and educators” in order to assess compliance with its provisions. The act was amended in 1992 “to assist Native Americans in ensuring the survival and continuing vitality of Native American languages”, by providing a grant mechanism for language education programs.\(^{23}\) This was supplemented by the *Esther Martinez Native American Languages Preservation Act of 2006*.\(^{24}\) This last piece of legislation was named for Esther Martinez, a tireless advocate for her native Tewa, an Indigenous language of New Mexico.\(^{25}\) These provisions have been used to fund language nests and various language education programs.\(^{26}\)

*NALA* has had a mitigated impact on language revitalization and education programs. On the one hand, it has enabled increased funding of these programs and has articulated a policy


\(^{21}\) 25 USC § 2903(1).

\(^{22}\) 25 USC § 2904.


\(^{24}\) 42 USC §§ 2991b-3, 2992c–d.


clearly aimed at protecting and promoting Indigenous languages. On the other hand, its provisions are sometimes contradicted by other federal legislation dealing with education, such as the *No Child Left Behind Act of 2001*.\(^{27}\) In addition, it has been found to grant very few enforceable rights in practice.\(^{28}\) While it may have its shortcomings, *NALA* represents official recognition at the federal level of the importance of Indigenous languages, something which has yet to be achieved in Canada.

As does Canada, the United States has a centuries-long history of attempting to “civilize” or assimilate its Indigenous population through a mandatory boarding school system, under the auspices of the Bureau of Indian Education (BIE).\(^{29}\) Unlike Canada, however, there is no specific provision of the US Constitution that protects the aboriginal and treaty rights of Native Americans. Instead, US constitutional doctrine relies on the notion of Indigenous nations as “domestic dependent nations”\(^{30}\) to ground both the principle of tribal sovereignty and a “federal Indian trust responsibility”.\(^{31}\) Indigenous language rights in the US might also be grounded in the Equal Protection Clause of the Fourteenth Amendment,\(^ {32}\) First Amendment free speech rights,\(^ {33}\) or even the “retained rights” under the Ninth Amendment.\(^ {34}\)


\(^{28}\) In *Tagupa v Odo*, 843 F Supp 630 (D Haw 1994), the District Court of Hawaii rejected a Hawaii attorney’s request to make a deposition in Hawaiian, stating that “Congress did not … intend to extend the [Native American] Language Act to judicial proceedings in federal courts” (*ibid* at 632). The court’s instrumental approach to language rights was obvious in its assertion that “because Mr. Tagupa is a member of the Hawaii bar who fully understands the American judicial process and possesses a mastery of the English language, no legitimate fact finding rationale supports his right to give a deposition in a language other than English” (*ibid* at 632-33).


\(^{30}\) *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 at 17 (1831) (Marshall CJ).


\(^{32}\) US Const, amend XIV, § 1.

\(^{33}\) US Const, amend I.

In recent years, however, there has been a reaction against minority language rights, particularly in education, that has created an unfavourable environment for the pursuit of constitutional language rights, even for speakers of Indigenous languages.

3.3.2 Australia

Australia was one of the most linguistically diverse areas on the planet. It is estimated that in the eighteenth century, there were over 500 Aboriginal languages in Australia, spoken by over 300,000 people. These languages are also unique, in that no clear relationship between them and any other languages in the world have yet been shown. The decline in the number of speakers of these languages has been no less dramatic than in North America: in the 2011 census, 83% of the Aboriginal and Torres Strait Islander population—which itself makes up only about 2.5% of the Australian population—reported speaking only English at home. UNESCO’s *Atlas of the World’s Languages in Danger* reports 108 endangered languages for Australia, including 42 critically endangered languages, a more conservative estimate than *Ethnologue*’s 178. Additionally, UNESCO’s *Atlas* reports 6 languages having become extinct since 1950, while *Ethnologue* reports 176. Australia’s *National Indigenous Languages Survey Report 2005* notes that only 20 Australian Aboriginal languages “are not currently endangered” but emphasizes that “none of these can be considered safe and [all] are likely to disappear this century unless a major effort is made by governments and communities”.

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38 Ibid.
Australian Aboriginal languages are in as dire a situation as North American Indigenous languages. This is largely because of a shared history of settler colonialism and similar policies of enforced assimilation.\footnote{Ibid.}

The Australian Constitution of 1900 specifically excluded Aborigines from the legislative competence of the federal Parliament, which received the power to legislate for “the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws”.\footnote{Commonwealth of Australia Constitution Act 1900 (UK), 63 & 64 Vict, c 12, s 51(xxvi) [emphasis added].} The italicized words were removed in 1967, after a referendum.\footnote{Constitution Alteration (Aboriginals) 1967 (Cth), s 2.} This allowed the federal Parliament to make laws specifically in relation to Aboriginal people as a “race”. It also, however, effectively removed any mention of Aboriginal peoples in the constitution.\footnote{The only other mention of Aboriginal peoples being in the Commonwealth of Australia Constitution Act 1900, supra note 41, s 127, which read, “In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.” This section was also repealed by the Constitution Alteration (Aboriginals) 1967 (Cth), s 3.} In order to remedy this deficiency, a new constitutional proposal was put forward in 2012 by the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples convened by the Gillard government, which recommended recognizing the Aboriginal and Torres Strait Islander peoples as the first occupants of Australia, and doing away with the “race” power to replace it with a general power to “make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples”.\footnote{Expert Panel on Constitutional Recognition of Indigenous Australians, Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel (Canberra: Department of Families, Housing, Community Services and Indigenous Affairs, 2012) at 230, online: <http://www.recognise.org.au/uploads/assets/3446%20FaHCSIA%20ICR%20report_text_Bookmarked%20PDF%2012%20Jan%20v4.pdf> [Australian Expert Panel Report].}
More interestingly for our purposes, the Expert Panel also recommended adding a new section 127A to the Constitution, which would consist of the following two clauses:

(1) The national language of the Commonwealth of Australia is English.
(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.45

This official recognition of Indigenous languages in the Australian constitution would represent a landmark, even if its effect is somewhat unclear.46

Following the recommendations of the Expert Panel, the Australian government introduced a bill containing a statutory recognition of Aboriginal and Torres Strait Islander peoples, while noting that “[t]he Parliament recognises that further engagement with Aboriginal and Torres Strait Islander peoples and other Australians is required to refine proposals for a referendum and to build the support necessary for successful constitutional change”.47 This bill was passed with the unanimous support of both Houses and assented to on 27 March 2013.48 It provides statutory recognition of Aboriginal and Torres Strait Islander peoples, and in particular, of their languages: “The Parliament, on behalf of the people of Australia, acknowledges and respects the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.”49 This statutory recognition, however, is intended “as essentially an interim step toward the more important objective of constitutional recognition”,50 while a review is conducted.

46 The Expert Panel suggested that a declaratory provision “would not give rise to implied rights or obligations that could lead to unintended consequences” (ibid at 132).
47 Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 (Cth), Preamble.
48 Ibid.
49 Ibid, s 3(3).
to “consider the readiness of the Australian public to support a referendum to amend the Constitution to recognise Aboriginal and Torres Strait Islander peoples”.51

After holding further hearings on the Expert Panel recommendations, the parliamentary Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples issued a Progress Report in June 2013.52 In this report, the Committee considered the proposed recognition of Indigenous languages in section 127A, and acknowledged “the importance that many Aboriginal and Torres Strait Islander people place on constitutional recognition of Australia’s original languages” but questioned “whether a standalone languages provision is necessary” and “whether it is capable of achieving public support”. It concluded that even if such a provision should be included, “there remains a need for further consideration of the exact structure and wording of that provision”.53

It therefore remains unclear whether constitutional recognition of Indigenous languages in Australia will be achieved.54 There is no question that the proposed amendments to the Australian constitution, however, represent a historic opportunity to change the difficult relationship between Australia and its Indigenous peoples.

51 Aboriginal and Torres Strait Islander Peoples Recognition Act 2013, s 4(2)(a).
53 Ibid at 23 (¶ 2.83).
54 Beyond the general recognition of the preambular paragraph of the proposed section 51A, enjoining respect for “the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples” (Australian Expert Panel Report, supra note 44 at xviii).
3.3.3 New Zealand

New Zealand (Aotearoa55) is in a unique situation, in that only one56 Indigenous language is spoken on its two main islands: Maori, the language of the original inhabitants, with whom the British Crown signed the Treaty of Waitangi in 1840.57 Very significantly, the Maori version of the Treaty is equally authoritative, as confirmed by the Treaty of Waitangi Act 1975.58 The Waitangi Tribunal established under this legislation is the final authority in the interpretation of the Treaty.59 This is already significantly more than has been achieved for any single Indigenous language in any other common-law jurisdiction. In addition to this, the Maori language is an official language of New Zealand, as set out in the Maori Language Act 1987.60 This legislation also grants rights to use Maori in legal proceedings, and establishes a Maori Language Commission (Te Taura Whiri I Te Reo Maori),61 which is charged with assisting in the “implementation of policies, procedures, measures, and practices designed to give effect to the declaration … of the Maori language as an official language of New Zealand”; and “[g]enerally to promote the Maori language, and, in particular, its use as a living language and an ordinary

56 New Zealand also administers three overseas dependencies—the Cook Islands, Niue, and Tokelau—the first two of which are “fully self-governing states in free association” with New Zealand, while Tokelau is a non-self-governing territory with some devolution of responsibilities (see New Zealand Ministry of Foreign Affairs and Trade, Pacific Division, Pacific Information Papers, online: <www.mfat.govt.nz/Foreign-Relations/Pacific/index.php>). There are an additional six languages spoken on these islands, all of which are considered vulnerable or endangered by UNESCO (see UNESCO Atlas, supra note 12).
58 Treaty of Waitangi Act 1975, s 5(2).
59 Ibid.; it should be noted that its decisions are non-binding, however.
60 Maori Language Act 1987, s 3. New Zealand now has two recognized official languages: Maori and New Zealand Sign Language (New Zealand Sign Language Act 2006, s 6); English, however, is the de facto national language, although no legislative provision declares it official.
61 Maori Language Act 1987, ss 4(1), 6(1). The Commission was originally known as “Te Komihana Mo Te Reo Maori”; the current name was adopted in 1991.
means of communication”. In addition, the Commission issues “certificates of competency” in Maori interpretation and/or translation.

The Maori language is recognized as a *taonga* of the Maori. By the Treaty of Waitangi, the Crown guaranteed to the Maori “the full exclusive and undisturbed possession” of their “properties” (or “the unqualified exercise of their chieftainship over … all their treasures”). This fact imposes an obligation on the New Zealand Government to protect the Maori language, as recognized by the Privy Council in *New Zealand Maori Council v A-G of New Zealand*.

Lord Woolf noted that the principles of the Treaty of Waitangi included “the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga”, an obligation the “solemn nature” of which is reflected in the wording of the English text, which speaks of a “guarantee by the Crown”. This obligation is not “absolute and unqualified” but “should be founded on reasonableness, mutual co-operation and trust”. This continual obligation may change depending on the particular situation in which it arises: “While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.” In times of budgetary constraints, the Crown may reasonably avoid “heavy expenditure”, but “if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be

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63 *Ibid*, s 15(1)–(2).
64 Corresponding to “properties” in the original English text of the treaty, *taonga*, the word used in the original Maori text, is more appropriately translated as “treasures”; the *taonga* comprise material and non-material possessions, including language (see Waitangi Tribunal, Treaty of Waitangi, “The Kawharu Translation”, online: <www.waitangi-tribunal.govt.nz/treaty/kawharutranslation.asp> at n 8 [Kawharu Translation]; *New Zealand Maori Council v A-G of New Zealand* [1994] 1 AC 466 (PC) at 475 [New Zealand Maori Council]). There is official recognition of the Maori language as a *taonga* in the preamble to the *Maori Language Act 1987*.
66 *Kawharu Translation*, supra note 64, art 2.
67 *New Zealand Maori Council*, supra note 64.
69 *Ibid*.
70 *Ibid*. 
taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection”. 71

Furthermore, this ongoing obligation of the Crown must be looked at in light of its past actions in upholding or failing to uphold its duties under the Treaty: “This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown’s responsibility.” 72

This crucial principle helps ensure that the government cannot argue that its obligation to protect the Maori language is too onerous, when the critical state of the Maori language has itself been caused by the linguistic policies of the past and the failure of the Crown to live up to the obligations it undertook in the Treaty of Waitangi.

UNESCO considers Maori to be “vulnerable”, while the Ethnologue considers it to be “threatened” (level 6b). 73 According to the 2006 census data, only 4.1% of the New Zealand population could have a conversation about everyday things in Maori. 74 Nonetheless, an impressive amount of work has been done to revitalize and promote the Maori language. One project which was pioneered among the Maori is the kōhanga reo, or “language nest”, a program of total immersion for preschool children in the Maori language and culture. The first such program opened in 1982, and by 1989, children enrolled in kōhanga reo accounted for 11% of all children in preschool programs. 75 However, there was a decline in the numbers of schools and enrolment from 1995 to 2010 as government policies forced the schools to adapt to new

71 Ibid at 476.
72 Ibid.
73 UNESCO Atlas, supra note 12; Ethnologue, supra note 13.
requirements.76 In spite of this, Te Kōhanga Reo National Trust estimates that there are around 60,000 graduates of these language nests.77 While the Maori language is still threatened, as census statistics reveal, its place in New Zealand society and politics has become established, and continued efforts at revitalization give reason to be cautiously optimistic about its future.

3.3.4 Latin America

As was noted in Chapter 2, some Latin American countries have a relatively high number of speakers of Indigenous languages. For example, according to 2007 census data, there were over 3,000,000 speakers of Quechua in Peru, making up 13.02% of the population.78 Similarly, there are roughly 3,000,000 speakers of Aymara in Bolivia, making up over 20% of the population.79 While larger numbers of speakers do not guarantee survival,80 it is also clear that demographic weight is important in establishing the presence of a language in the national consciousness.

Many Latin American countries recognize Indigenous languages in their laws and constitutions. The Inter-American Development Bank maintains a database of legislation relating to Indigenous peoples in Latin America.81 From this it appears that no fewer than thirteen Latin American states (Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, and Venezuela) give some form of constitutional recognition to Indigenous languages.82 It should be noted, however, that most of these provisions are accompanied by a declaration that Spanish (in most cases) is the official language, with Indigenous languages given a lesser status—with the notable exception of

76 Ibid; Te Kōhanga Reo National Trust, “History”, online: <www.kohanga.ac.nz>.
77 Ibid.
78 Peru, Instituto Nacional de Estadística e Informática, Censos Nacionales 2007, online: <www.inei.gob.pe>.
79 Ethnologue, supra note 13, “Bolivia”.
80 Aymara is considered “vulnerable” by UNESCO, for example (UNESCO Atlas, supra note 12).
81 Indigenous Legislation DataBank, Inter-American Development Bank, online: <www.iadb.org/Research/legislacionindigena/leyn/index.cfm> [IADB].
82 Ibid.
Paraguay, where Guaraní is an official language along with Spanish. Nonetheless, this important recognition of Indigenous languages in the fundamental law of the state cannot help but have an impact on the perception of Indigenous peoples and their languages throughout society. No doubt this explains why several Latin American countries were among the sponsors and strongest advocates of the *United Nations Declaration on the Rights of Indigenous Peoples*.  

There is also specific legislation covering Indigenous languages in many Latin American countries, including Bolivia, Chile, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, and Venezuela.

Of course, ideals are one thing and reality another. The socio-economic status of Indigenous peoples throughout Latin America remains low, as was made abundantly clear by the UN’s 2009 report on the state of Indigenous Peoples.

### 3.3.5 Europe

The Sami people of northern Scandinavia have been recognized by the governments of Norway, Sweden and Finland as Indigenous peoples. In Norway, the Sami language is recognized in article 110a of the constitution, which sets out the state’s responsibility to “to create conditions

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84 Costa Rica, the Dominican Republic, Ecuador, Guatemala, Honduras, Nicaragua, Panama, and Peru, which introduced the resolution (UNGAOR, 61st Sess, 107th Plenary Meeting, UN Doc A/61/PV.107 at 10). No Latin American state voted against the Declaration, although Colombia abstained (*ibid*).

85 Where Indigenous languages are recognized as “national languages” (*lenguas nacionales*); see Mexico, *Ley General de Derechos Lingüísticos de los Pueblos Indígenas*, 13 March 2003.

86 IADB, *supra* note 81.


enabling the Sami people to preserve and develop its language, culture and way of life”.\textsuperscript{89} The Sami Act, section 1-5, states: “Sami and Norwegian are languages of equal worth. They shall be accorded equal status ….”\textsuperscript{90} Chapter 3 of the same law then grants rights to the use of Sami in communications with the government,\textsuperscript{91} in judicial proceedings within the Sami language administrative district,\textsuperscript{92} in church services,\textsuperscript{93} and in municipal government where designated.\textsuperscript{94} It also provides that “[a]ny person is entitled to receive tuition in Sami” within the framework of the general education legislation.\textsuperscript{95}

Sweden recently passed new legislation governing national minorities and national minority languages.\textsuperscript{96} The new act extends the administrative area for Sami, gives greater rights to use Sami in communications with government agencies and in receiving government services, and gives a greater role to the Sami parliament to develop Sami language policy. Two Sami language centres are created, with the goal of actively promoting the Sami language.\textsuperscript{97}

The Finnish constitution declares, “The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act.”\textsuperscript{98} The Sami Language Act, whose purpose is to ensure “the constitutional right of the

\textsuperscript{89} Constitution of the Kingdom of Norway, 17 May 1814, online: <www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution> (unofficial translation).

\textsuperscript{90} Act of 12 June 1987 No 56 concerning the Sameting (the Sami parliament) and other Sami legal matters (the Sami Act), online: <www.lovdata.no> (unofficial translation).

\textsuperscript{91} Ibid, § 3-3.

\textsuperscript{92} Ibid, § 3-4.

\textsuperscript{93} Ibid, § 3-6.

\textsuperscript{94} Ibid, § 3-9.

\textsuperscript{95} Ibid, § 3-8.


\textsuperscript{97} Sweden, Ministry for Integration and Gender Equality, Minority Rights Are Strengthened: Fact Sheet (Stockholm: Regeringskansliet, 2009).

\textsuperscript{98} Constitution of Finland, 11 June 1999, online: <www.finlex.fi> (unofficial translation).
Sámi to maintain their own language and culture and provides for rights to use the Sami language before public authorities, in representative bodies, and in government services, with increased rights within the Sami homeland.

3.4 CONCLUSION

This brief comparative survey highlights the importance of caution when comparing other jurisdictions to Canada, as the situation of various Indigenous languages can differ widely, both in terms of official legal recognition and of strength on the ground. Ultimately, however, while recognition in and of itself does not guarantee that a language will thrive, it does serve as an important symbolic marker of acknowledgment of Indigenous languages’ legitimate place within the state. Whether actual state practice lives up to this is, of course, a different matter.

While the nature of the recognition and rights afforded to speakers of Indigenous languages can be very different from one jurisdiction to the next, it nonetheless reflects a growing international awareness of the precarious situation of these languages, and the need to respond by addressing the legacy of colonialism and recognizing the importance of preserving and protecting these languages. In Canada, this awareness is just beginning to be felt, and legislative recognition of Aboriginal languages is a rare thing, as we saw in Chapter 2, while explicit constitutional recognition of these languages is lacking. Nonetheless, as I will argue in the next three chapters, Aboriginal languages in Canada have constitutional status—how we recognize and enhance that status will say much about our willingness to confront the colonial past and recognize the true linguistic diversity of our country, at a time when many other countries throughout the world are engaging in a similar reappraisal.

99 Finland, Sami Language Act (1086/2003), s 1, online: <www.finlex.fi> (unofficial translation).
100 Ibid, ss 4–6, 8, 11–18.
4.2 INTRODUCTION

In this chapter, I will argue that Aboriginal languages are constitutionally protected as Aboriginal rights\(^1\) under section 35 of the Constitution Act, 1982, as they are practices integral to distinctive Aboriginal cultures under the test set out in R v Van der Peet.\(^2\) (Or, in the case of Mëtis languages such as Michif, are protected by the modified test in R v Powley.\(^3\)) I will argue that this constitutional status protects Aboriginal languages from government interference, but also gives Aboriginal peoples the right to regulate their languages and adopt language policies, as the right to regulate language is itself part of the core of the inherent right of self-government of Aboriginal peoples, which is protected by section 35. A broad and purposive interpretation of section 35, in accordance with the principles set out by the Supreme Court of Canada in its jurisprudence, can lead to no other conclusion.

4.3 SECTION 35 OF THE CONSTITUTION ACT, 1982

Section 35 of the Constitution Act, 1982 reads as follows:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Mëtis peoples of Canada.
(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

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\(^1\) The phrase “Aboriginal language rights” could be ambiguous in that it might refer, broadly speaking, to the spectrum of constitutional rights and protections afforded to Aboriginal languages; I prefer to use the term “constitutional status of Aboriginal languages” when referring to this broad concept. As I use it, in this chapter in particular, the phrase “Aboriginal language rights” refers to “language rights as Aboriginal rights”, that is, language rights protected as Aboriginal rights under section 35(1) of the Constitution Act, 1982 (being Schedule B to the Canada Act 1982 (UK), 1982, c. 11). It is important to reiterate that in my view, these rights form only a subset of what I have called the constitutional status of Aboriginal languages, and do not represent the totality of the constitutional protection of these languages. Nonetheless, they do form the core of the constitutional recognition of Aboriginal languages, and as such provide us with a natural starting point to the broader discussion of constitutional status.

\(^2\) [1996] 2 SCR 507, 137 DLR (4th) 289 [Van der Peet cited to SCR].

\(^3\) 2003 SCC 43, [2003] 2 SCR 207 [Powley].
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.⁴

The section (along with the subsequently added section 35.1⁵) constitutes a separate Part of the Constitution Act, 1982, entitled “Rights of the Aboriginal Peoples of Canada”, a fact which distinguishes Aboriginal rights from other constitutional rights. In this sense, the section does much more than provide for the recognition of Aboriginal and treaty rights: it provides formal recognition of the central importance of Aboriginal peoples in the Canadian constitutional order, as I will discuss below.⁶ As Chief Justice Dickson and Justice La Forest stated in R v Sparrow, “It is clear . . . that s. 35(1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights.”⁷

⁴ Constitution Act, 1982, supra note 1, s 35. Subsections (3) and (4) were added to the section by the Constitution Amendment Proclamation, 1983, SI/84-102, reprinted in RSC 1985, App II, No 46.

⁵ Constitution Act, 1982, supra note 1, s 35.1. Section 35.1 reads as follows:

The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the “Constitution Act, 1867”, to section 25 of this Act or to this Part,

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

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

⁶ Prior to the adoption of the Constitution Act, 1982, the only direct reference to Aboriginal peoples in the constitution was in the tersely worded section 91(24) of the Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say …


This section has been held to include the Inuit (as “Eskimo”: see Reference whether “Indians” includes “Eskimo”, [1939] SCR 104, sub nom Re Eskimos, [1939] 2 DLR 417); and very recently, Métis and non-status Indians (Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12 [Daniels].

⁷ [1990] 1 SCR 1075 at 1105, 70 DLR (4th) 385 [Sparrow].
In Sparrow, the first case to address the scope of section 35, the Supreme Court of Canada set out the principles which should govern the interpretation of Aboriginal rights under the section: “The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.”

In that case, the court set out the justificatory standard required of government when regulating an Aboriginal right: if legislation has the effect of interfering with an existing Aboriginal right, and thus constitutes a prima facie infringement of section 35(1), then it can only be justified if there is a valid legislative objective and the legislation is in keeping with the honour of the Crown and its fiduciary duty to Aboriginal peoples.

This is a strong standard, consistent with the fact that “recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.”

The court in Sparrow thus confirmed the high level of constitutional protection afforded to Aboriginal rights and made strong statements in favour of a generous and liberal interpretation of section 35. But while it emphasized “the importance of context and a case-by-case approach to s. 35(1) . . . in light of the complexities of aboriginal history, society and rights”, the court provided little guidance as to how to define the scope of the Aboriginal right being claimed. That question was answered by the court in Van der Peet. As I discuss below, the controversial decision in Van der Peet set up a regime of Aboriginal rights that has arguably not lived up to the vision set out in Sparrow.

Those cases which have been brought successfully in the courts have tended to be focussed on

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8 Ibid at 1106.
[Tsilhqot’in].
10 Sparrow, supra note 7 at 1119.
11 Ibid at 1111.
12 Van der Peet, supra note 2.
narrow issues of specific rights to fish or hunt, and the courts have generally rejected comprehensive determinations of broad Aboriginal rights, and in particular have resisted the recognition of commercial rights. While there is some indication that courts—especially the Supreme Court—may be more willing to make such determinations when appropriate, the promise of section 35 remains largely unfulfilled for the vast majority of Aboriginal peoples in Canada. Nevertheless, even this restrictive approach does, I argue, allow for the recognition of Aboriginal languages as forming the basis of Aboriginal rights, as they are practices, traditions and customs integral to the distinctive cultures of the Aboriginal peoples who speak them. The nature of these rights remains largely unexamined, and I will note some issues that may arise in defining and determining the scope of Aboriginal language rights under the current jurisprudential standards.

4.3.1 Treaties and Language Rights

My focus in this chapter will be on the status of Aboriginal languages as Aboriginal rights under section 35(1) of the Constitution Act, 1982. This is not to imply that treaties are not important to the rights of Aboriginal-language speakers, or to the constitutional status of Aboriginal languages. As to the first point, I have already examined in Chapter 2 the various ways in which modern-day treaties, land claims agreements and self-government agreements, protect the rights of Aboriginal-language speakers in specific ways. As these provisions are included in “land claims agreements”, we can assume that they are constitutionally protected by virtue of s. 35(3) of the Constitution Act, 1982. These rights are therefore highly important to

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15 Tsilhqot’in, supra note 9.
16 Using a broad interpretation of that phrase, as equivalent to “modern treaty”, and including within it all modern agreements made by Aboriginal nations with the Crown since 1975.
the Aboriginal peoples involved, and will undoubtedly be the starting point for a discussion of linguistic rights for those particular nations. It is important to note, however, that such rights apply only to a minority of Aboriginal peoples in Canada. While there can be little ambiguity in terms of the basis for the constitutional protection of these rights—they are directly protected by section 35(3), their specificity means that they are necessarily limited in their scope. This can be contrasted, of course, with the complex interpretative and doctrinal issues that arise when discussing the rights of Aboriginal-language speakers as Aboriginal rights, which I discuss below. For this reason, my focus in this chapter will largely be on Aboriginal rights, rather than treaty rights, to language.

The treaties themselves, however, both historical and modern, hold tremendous significance as constitutional materials in elaborating the constitutional status of Aboriginal languages. Indeed, if one takes the view that treaties (a) form an integral part of the constitutional fabric of Canada and (b) are bipartite agreements, one version of which has been transmitted through oral tradition, often in an Aboriginal language, then this necessarily strengthens the argument for the constitutional status of Aboriginal languages.\(^\text{17}\) I will make this argument in Chapter 6, when I examine the relationship of Aboriginal languages to the official languages of Canada.

The discussion that follows, then, while focussed on Aboriginal rights, is certainly not meant to deny the importance of treaty rights for those nations who are treaty signatories; it is rather meant to examine in more detail the rather more complex basis and scope of the rights of Aboriginal-language speakers as Aboriginal rights.

\(^{17}\) For an interesting discussion of issues in treaty interpretation, including for modern treaties, see Sébastien Grammond, “Aboriginal Treaties and Canadian Law” (1994) 20:1 Queen’s LJ 57.
4.4 Language as an Aboriginal Right

4.4.1 Aboriginal Languages as Aboriginal Rights—A Given?

When first encountering the subject of the rights of Aboriginal-language speakers as Aboriginal rights, there may appear to be an easy consensus on the issue. While a claim of Aboriginal right to the use of language—or rather, given the nature of the court process establishing such claims, of government interference with these rights—has not been made, and so there is no governing jurisprudence on the issue, legal writers who have examined the matter have concluded that the use of Aboriginal languages likely constitutes an Aboriginal right. It seems, then, that the premise I am advancing in this chapter, that the use of Aboriginal languages is constitutionally protected as an Aboriginal right, is uncontroversial to the point of being unworthy of further examination. I believe, however, that examining this claim in more detail is important for two reasons. First, because, as I have already noted, my argument in this work is that the status of Aboriginal languages as Aboriginal rights does not exhaust their constitutional status—in other words, that the constitutional status of Aboriginal languages is not solely a function of their protection under section 35 as Aboriginal rights. That being the case, it is important to situate the relationship of the Aboriginal right to the use of Aboriginal languages in its overarching context, that of the constitutional status of Aboriginal languages.

Second, because the basis and scope of the protection of Aboriginal languages under section 35(1) has yet to be examined in a comprehensive manner. While the statement has often been made that Aboriginal languages qualify for protection as Aboriginal rights, little time has

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been spent laying out the legal groundwork for making such a claim. In particular, I will address some possible issues in the definition and application of these rights that have not been addressed thoroughly by previous writers, including issues involved in defining both the subject matter of the right and the appropriate rights holders. In doing so, I hope to give a clearer picture of the nature of the constitutional protection of Aboriginal languages and provide guidance for any future claim to such a right, whether through litigation or negotiation. Indeed, I will argue that the protection and promotion of Aboriginal languages need not be limited to what is constitutionally required by section 35(1)—but it must inevitably involve that core constitutional protection. Any definition of an Aboriginal right must, however, begin with the Supreme Court’s fateful decision in *R. v. Van der Peet*.

4.4.2 The Van der Peet Test

In what is commonly referred to as the *Van der Peet* trilogy, the Supreme Court of Canada was called upon to define the scope of Aboriginal rights under section 35. In *Van der Peet*, Chief Justice Lamer, speaking for a majority of the court, suggested that the test for identifying Aboriginal rights under section 35 must “aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans”. He then formulated the following test: “[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.” Moreover, the practice, custom, or tradition forming the basis of the Aboriginal right must have its origins in the period before contact with European

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19 The two companion cases to *Van der Peet* were *R v NTC Smokehouse*, [1996] 2 SCR 672, 137 DLR (4th) 528 [*NTC Smokehouse*]; and *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648.
20 *Van der Peet*, supra note 2 at para 44.
21 *Ibid* at para 46.
societies: “Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.”

This test has been heavily criticized as a “frozen rights” approach which significantly limits the scope of Aboriginal rights under section 35. In her dissent in Van der Peet, Justice L’Heureux-Dubé would have preferred a “dynamic rights” approach which would take account of the evolution of Aboriginal societies so that “[d]istinctive aboriginal culture would not be frozen as of any particular time but would evolve so that aboriginal practices, traditions and customs maintain a continuing relevance to the aboriginal societies as these societies exist in the contemporary world”. Similarly, Justice McLachlin (as she then was), while recognizing the importance of historical inquiry to the determination of Aboriginal rights, criticized an approach that would “freeze aboriginal societies in their ancient modes and deny them the right to adapt, as all peoples must, to the changes in the society in which they live.” The Van der Peet test seems to contradict the purposive and liberal approach sketched out in Sparrow.

While the Van der Peet test has rightly been criticized as unduly restrictive, it is adequate to our purpose, which is to show that Aboriginal languages are constitutionally protected as Aboriginal rights under section 35. That is because there is little room to argue, even under this

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22 Ibid at para 60.
24 Van der Peet, supra note 2 at para 173.
25 Ibid at para 240.
restrictive test, that Aboriginal languages were not integral to the distinctive cultures of Aboriginal peoples from pre-contact times.

4.4.3 Applying the Test – “Practice, Custom or Tradition”

In Van der Peet, Chief Justice Lamer set out that “in order to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture the aboriginal group claiming the right”. 26 He did so without defining the terms “practice, custom or tradition” in any concrete way. We can assume that nothing of legal significance would turn on the distinction between a practice, a custom, and a tradition, but that these generally all refer to patterns of behaviour handed down through the generations. Interestingly, the question of whether the use of the various terms might indeed create a distinction has not been addressed in any real sense by the courts. 27 Practice, in the relevant sense, is defined in the Oxford English Dictionary (OED) as “[t]he habitual doing or carrying on of something; usual, customary, or constant action or performance; conduct”. 28 Custom is defined as “[a] habitual or usual practice; common way of acting; usage, fashion, habit (either of an individual or of a community)”. 29 Tradition is defined as “[t]hat which is … handed down; a statement, belief, or practice transmitted (esp. orally) from generation to generation”. 30 The use of practice in the definitions of the other terms confirms that it is the broader, more general term. I will consequently use the term practice in what follows as shorthand for a “practice, custom or tradition”. 31

26 Van der Peet, supra note 2 at para 46.
27 The Supreme Court, e.g., usually moves from the initial use of the three terms in the Van der Peet decision to the use of the term practice as a general term. See e.g. Sappier, supra note 14 at para. 20; Lax Kw’alaams, supra note 14 at para. 46.
28 Oxford English Dictionary Online, sub verbo “practice” (n., 3(a)) [OED].
29 Ibid, sub verbo “custom”.
31 The Supreme Court has also focused on the notion of practice as the more general term, as can be seen from the discussions in R v Marshall; R v Bernard, 2005 SCC 43, [2005] 2 SCR 220 and Sappier, supra note 14.
Do Aboriginal languages qualify as “practices” and if so, what is the nature of these practices? It appears rather uncontroversial that Aboriginal languages constitute usual or customary action or performance or conduct, so as to bring them within the formal definition of practice. But viewing language as a practice raises several important questions regarding the nature of the constitutional protection afforded to Aboriginal languages. What, exactly, would be protected as an Aboriginal right under section 35? Which group(s) could claim this protection? What would be the relationship of the rights-claiming group to other speakers of the same language or language family? These issues are raised both by the nature of Aboriginal languages—which generally, although not in all cases, lack a standardized form—and by the unique way in which these languages are constitutionally protected—as “practices, customs and traditions”.

Defining the Rights Holders and the Subject Matter of the Right

If we recognize that Aboriginal languages are protected as “practices, traditions and customs” within the context of section 35 of the *Constitution Act, 1982*, then the question arises of defining both the appropriate rights holders, and the appropriate subject matter of the right. As I noted above, this question is unique in the realm of language rights in Canada because of the special manner in which Aboriginal languages gain constitutional protection, as “practices,

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32 Here mention may be made of Brian Slattery’s view that Aboriginal language rights are “generic” Aboriginal rights “because the basic structure of the right would presumably be identical in all groups where it arises, even though the specific languages protected would vary from group to group” (“Making Sense of Aboriginal and Treaty Rights” (2000) 79 Can Bar Rev 196 at 212). This view was recently endorsed by the Canadian Human Rights Tribunal (*First Nations Child and Family Caring Society et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 106). I do not adopt this distinction, nor do I find it particularly useful, for two reasons: (1) because the Supreme Court has consistently reiterated in recent jurisprudence the importance of grounding Aboriginal rights in a specific practice (see e.g. *Sappier, supra* note 14 at para 21; *Lax Kw’alaams, supra* note 14 at para 46; *Tsilhqot’in, supra* note 9 at para 22; and (2) because characterizing an Aboriginal right to language as a “generic” right does not assist us in resolving definitional issues in relation to either the rights holders or the subject matter of the right.
customs or traditions”. If one looks to section 16 of the Charter, for example, one will see that official status, and equal rights and privileges, are granted to two entities called “English” and “French”, without any definition or clarification of what might be excluded from or included within the ambit of these terms. To my knowledge, this has never presented a problem. This is largely because we operate with widely accepted, if sometimes hotly contested, definitions of what constitutes standard “English” or “French”. But let us suppose for a moment that in a flight of fancy the members of the House of Commons chose to publish their debates in Old English; would this violate section 18(1) of the Charter? Or would the term “English” as used in the section be broad enough to include Old English? Or suppose that one Member of Parliament chose to make a speech in Picard, and if asked to make herself understood, insisted on her constitutional right to use “French” in the House under section 17(1)?

These questions may be largely academic in the context of English and French, but they take on real significance when dealing with Aboriginal languages. This is so for two reasons: First, because unlike English and French, Aboriginal languages are protected as practices, and not as abstract entities. And second, because of the general lack of standardization of Aboriginal languages, which have not been generally subject to the centralizing and standardizing pressures imposed on European languages. Both of these factors are important in distinguishing Aboriginal language rights under section 35 from other language rights included in the Constitution.

**Protection as Practices—Defining the Subject Matter of the Right**

In *Sappier*, Chief Justice McLachlin reiterated that “[i]t is critically important that the Court be able to identify a *practice* that helps to define the distinctive way of life of the community as an aboriginal community”. If Aboriginal languages are to find protection under

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33 *Sappier, supra* note 14 at para 22 [emphasis in original].
section 35 of the *Constitution Act, 1982*, then it must be as *practices*. If we assume that Aboriginal languages do qualify for protection under section 35 as practices, this has significant consequences for the nature of the rights protected and creates an important distinction with other language rights protected by the Constitution. What is protected by section 35 is not an abstract entity such as “Cree” or “Ojibway”; it is a practice, a pattern of linguistic usage handed down through the generations, with nearly infinite variability in time and place. To oversimplify, one might argue, using Saussurean definitions, that while sections 16–22 of the Charter protect the *langue* (language system) of English and French, section 35 protects the *parole* (speech) of Aboriginal languages.  

As such, section 35 does not protect an abstract linguistic system, but a particular realization of it. This is reinforced by the personal nature of the right: Aboriginal languages are not protected as such, but only as practices of Aboriginal communities. If there is no one left to speak an Aboriginal language, it cannot be said to be the “practice, custom or tradition” of an existing Aboriginal community, and as such loses its constitutional protection. Conversely, in the unlikely scenario that French, for example, should become extinct in Canada, its constitutional protection would not be lessened. “French” as an abstract entity would continue to be protected under sections 16–22 even if the last speaker of French in Canada were to die.

This distinction has important practical consequences, as it raises the question of what is protected and how it is protected. And it raises the question of the perils of a possible “patchwork” approach by the courts. Let us suppose, for example, that a particular First Nation

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34 For definitions, see Ferdinand de Saussure, *Course in General Linguistics*, rev. ed. (London: Fontana, 1974). Roughly, *parole* is “the actual linguistic behaviour or performance of individuals on specific occasions” (*OED*, sub verbo “parable”, n2); *langue* is “language (or a language) viewed as an abstract system” (*ibid*, sub verbo “langue”).  
35 A fact which would itself be perverse, if the requirement of continuity were not flexibly interpreted. On the other hand, it may be difficult to assert that a practice which is no longer engaged in is “integral to the distinctive culture” of an Aboriginal group, a point which I discuss at more length below.
band were to bring an action to have its right to the use of Cree recognized. Let us say that the particular band involved are speakers of Woods Cree, a dialect of Cree spoken in northern Manitoba and Saskatchewan. The question then becomes: what exactly would a declaratory judgment of the court protect, and for whom? First, we might consider whether a court would issue a declaration that the members of the particular band have a general Aboriginal right to speak “an Aboriginal language”. It seems doubtful, however, that a court would be inclined to make such a broad declaration. First, this would not be in keeping with the narrow focus on particular practices which courts have adopted since Van der Peet. In the same way that courts have been reluctant to recognize a blanket right to self-government, it seems unlikely that they would be willing to recognize a general right to speak an Aboriginal language—any Aboriginal language?—that would not be anchored to a particular practice and a particular group of rights holders. Surely Aboriginal persons who are members of such a group have a right to choose which language(s) they wish to speak, but these choices will be constitutionally protected only when they can be directly related to a practice, custom or tradition integral to their distinctive culture, and which can be traced back to pre-contact times. At the other end of the spectrum, we could imagine a court issuing a declaration recognizing the right of the claimant band to use Woods Cree. Such a declaration, narrow in scope, would seem to be in keeping with the general approach taken by courts to the definition of Aboriginal rights. But it raises an interesting issue. How would one define the group of rights holders who may regulate the right internally? In other words, since Aboriginal rights are communal rights, they carry with them the possibility

36 The possibility of bringing such an action would of course depend on some government infringement of the right to use the Aboriginal language. I will not dwell on this issue for the purpose of the hypothetical, but we can easily imagine a particular governmental action—such as requiring all members of the community to communicate with government employees at all times in English or French only—that might trigger such an action.

37 Leaving aside for now the possible issue of sub-dialects.
of internal regulation. But language practices may be unique in that the reinforcement of one may well lead to the detriment of another. The question of internal regulation may be crucially important in defining the scope of the Aboriginal right to language.

**Internal Regulation of Aboriginal Language Rights—Defining the Rights Holders**

In *R. v. NTC Smokehouse*, the Supreme Court suggested that “because the determination of whether or not an aboriginal right exists is specific to the particular aboriginal group claiming the right, distinctions between aboriginal claimants will be significant and important”. In *Powley*, the court further added that “Aboriginal rights are communal rights; they must be grounded in the existence of a historic and present community” without elaborating on how narrowly such a community might be construed. More recently, in *Behn v. Moulton Contracting*, the Supreme Court stated that while in general Aboriginal rights are collective rights, some rights may be exercised by certain members of the community or assigned to them. The Court noted that in these instances, such rights would have “both collective and individual aspects”. It should be noted that in all of these cases, issues of internal self-regulation were not squarely addressed. While the result in *Behn* might appear to indicate that individual enforcement of Aboriginal rights is excluded, the obiter statements by Justice LeBel suggest rather that in an appropriate case, the rights of a sub-group may well be asserted even if the rights of the group as a whole are not. While this is not the same as suggesting that the rights of

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39 *NTC Smokehouse*, supra note 19 at para 23 (Lamer CJ).

40 *Powley*, supra note 3 at para 24.

41 *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para. 33, [2013] 2 SCR 227 [*Behn]*.

42 In *Behn*, ibid., while the court presumed that the rights at issue were traditionally held by the Fort Nelson First Nation (FNFN), it noted the possibility that “on the basis of a connection between their rights to hunt and trap and a specific geographic location within the FNFN territory” the Behns might have had “standing to raise the violation of their particular rights”. The Court did not decide the issue, as it determined that the claims being brought were in any event an abuse of process (at paras. 36–37).
the sub-group could be opposed to the rights of the group as a whole, it does not exclude it either. In other words, it may open the door to the segmenting of Aboriginal rights, a notion which might have far-reaching implications when it comes to language. In particular, it raises the question of how to determine which Aboriginal groups hold which Aboriginal rights, and the appropriate delimitation of those groups.

The existing case law offers little guidance on this issue. While there are several cases dealing with the determination of membership in an Aboriginal community, there is limited case law on the definition of such a community, and the existing case law and commentary on the issue is generally framed in relation to land-based rights, which do not pose the same fluidity problem as language.\footnote{The case law deals primarily, although not exclusively, with the definition of Métis communities: see the cases canvassed in \textit{Campbell v British Columbia (Forest and Range)}, 2011 BCSC 448; \textit{Powley}, \textit{supra} note 3; \textit{R v Laviolette}, 2005 SKPC 70, [2005] 3 CNLR 202; \textit{R v Goodon}, 2008 MBPC 59, [2009] 2 CNLR 278. A more detailed discussion regarding the definition of Aboriginal rights holders occurred in the BC Court of Appeal decision in the Tsilhqot’in litigation (\textit{William v British Columbia}, 2012 BCCA 285, [2012] 3 CNLR 333, rev’d \textit{Tsilhqot’in}, \textit{supra} note 9). An interesting discussion of definitional issues can also be found in Brent Olthuis, “The Constitution’s Peoples: Approaching Community in the Context of Section 35 of the \textit{Constitution Act, 1982}” (2009) 54 McGill LJ 1. I am grateful to Prof. Sébastien Grammond for raising this point with me.} Moreover, the underlying assumption in \textit{Behn} is that the individual or family rights being asserted were a subset of the rights traditionally held by the First Nation as a whole (they were, in other words, assigned rights\footnote{\textit{Behn}, \textit{supra} note 41, at para. 36.}). But there is no suggestion that Aboriginal rights may not be held by a sub-group of a larger group without automatically transferring to this larger group, in which case we would not be dealing with “assigned” rights as in \textit{Behn}. This raises the issue of the distinction between internal regulation and the definition of the rights-holding group. What if we supposed that an Aboriginal sub-group—such as the Behn family—were to recognize their membership in a larger Aboriginal group, but claim their rights not as a subset of the rights of the entire group, but as distinct Aboriginal rights belonging only to the sub-group? Would this affect the larger group’s ability to regulate the right? One might assume
that it would, since the right would not then properly belong to it. To put it a different way, when
is one dealing with the definition of the rights-holding group as opposed to the internal
regulation of the defined right within that group? If all members of the Musqueam Band have the
right to fish for food in the Fraser River, even though only a few of its members may actually
engage in the practice, it follows that the Musqueam Band has the right to regulate the fishery
internally. But what if, in the claiming of the right, the relevant group had been identified not as
the Musqueam Band, but as a sub-group within the band? It would seem incongruous then that
the Musqueam Band in its entirety could regulate the right, and could therefore potentially
infringe the right in relation to that sub-group, with absolutely no constitutional repercussions.

The issue here may be one of identifying what the court in *Powley* called the “historic
rights-bearing community”.

45 In other words, where an Aboriginal right depends on
identification of a practice, custom or tradition with a historic rights-bearing community tied to a
contemporary community of which the claimant individual or group is a part, it does not matter
whether that individual engages in the practice or not: the right belongs to the contemporary
rights-bearing community in its entirety,

46 and it follows that since the rights of the individual or
group are a subset of those of the larger collective, they may properly be regulated by the whole
as an internal matter. But where a particular practice, custom or tradition can be traced to a
historic rights-bearing community which forms a distinct sub-group within the contemporary
rights-bearing community, the situation may be quite different. Here, the rights are not a subset
of rights belonging to the larger collective, but belong to the sub-group independently, and it
would make no more sense to allow the whole group to regulate the right than to allow a
Mi’kmaq band to regulate a Haudenosaunee Aboriginal right.

45 *Powley, supra* note 3, at paras. 21–23.
46 *Powley, ibid.,* at paras. 24, 29.
Why is this important? The point may appear to be purely academic, but it takes on real significance when looked at in the light of efforts to standardize Aboriginal languages, efforts which will be necessary to the preservation and revitalization of these languages. These efforts, by First Nations, Inuit and Métis governments and organizations as well as specialized government agencies, might well encounter problems, since standardization will require interfering with the rights of Aboriginal language speakers to speak a particular form of their language; in other words, to engage in a particular language practice, custom or tradition. The requirement to use a particular form of the language—which under appropriate legislation, could well be imposed on all employees of particular government departments or agencies—would be vulnerable, in appropriate cases, to a claim of infringement of an Aboriginal language right. This possibility follows directly from the protection of Aboriginal languages as practices, customs and traditions and departs from the usual form of language rights in Canada, which are rights to a pre-defined standard language. To better understand this unique feature of Aboriginal language rights, we must look at the role of standardization and its interaction with these rights.

*Standardization and Aboriginal Language Rights*

The problem, as I noted, is not purely academic: it goes to the heart of what is protected by an Aboriginal right to language under section 35(1). The uncertainty results from the nature of the protection of Aboriginal languages as practices, but also from the general lack of standardization of many Aboriginal languages, which exist as dialect continua, rather than homogeneous linguistic zones. This means that from the start, it may not be as clear what is included within the ambit of an Aboriginal language as it is with a European language. Take Cree, for example; the language referred to as Cree exists in various dialectal forms which are
spoken across a vast expanse of land. Its speakers are broken up into many distinct and diverse communities, each with its own local form of the language. As I noted elsewhere, the very notion of language is problematic to define, but even using the most common criterion, that of mutual intelligibility, one might encounter some difficulty at the margins. In other words, there would be borderline cases where the question might well be asked whether a particular form of the language qualifies as Cree or is better classed as something else, or as its own separate language. While these academic questions might better be left to linguists, they could have a real impact on the protection of Aboriginal languages. How a court defines the language to which an Aboriginal right attaches will matter, because it will affect any assessment of whether this right was met. The right to use Cree, for example, would have different implications from the right to use Woods Cree or Plains Cree. This would be so regardless of mutual intelligibility, since the purpose of protecting a particular form of the language is to protect a particular practice, custom or tradition which is integral to the distinctive culture of the claimant group. Language protection legislation, which might well be needed to protect and preserve Aboriginal languages, would be left with the problem of defining the language to be used and protected. Some tolerance of dialectal variation can be built in, but a complete lack of standardization would inhibit efforts to protect the language. Ultimately, standardization is necessary to the promotion of a language as an effective vehicle for communication, especially over a larger territory. Standardization, however, will inevitably result in certain dialectal variants being excluded from the standard form of the language.

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To illustrate, let us take the *Inuit Language Protection Act* of Nunavut, which defines the Inuit Language in section 1(2) as meaning Inuktitut in certain parts of the territory, Inuinnaqtun in others, and both as ordered by the Commissioner in Executive Council.\(^{49}\) Such a definition recognizes the dialectal diversity of the Inuit Language, but does not resolve the issue of what variants are or are not included as part of either Inuktitut or Inuinnaqtun. Note also that the section makes the language subject to the definition of the Inuit Uqausinginnik Taiguusiliuqtiiit (Inuit Language Authority), which receives the mandate in section 16(5) to both “designate standard terminology, expressions, orthography, language or usage in the Inuit Language” and to “direct a department of the Government of Nunavut or public agency to implement standard terminology, expressions, orthography or another standard language or usage in the Inuit Language that the Inuit Uqausinginnik Taiguusiliuqtiiit has recommended”.\(^{50}\) These are broad powers to shape the language, and exclude from it variants deemed non-standard. These powers are necessary, of course, to the protection of the Inuit Language as a vehicle of communication throughout the territory and for official purposes. But the protection of the standard necessarily comes at the expense of the rejection of other forms of the language. This is problematic because the constitutional protection of Aboriginal languages is premised on particular realizations of a language for specific groups; in other words, it is not a language such as Inuktitut that is protected, but only the particular linguistic forms reflected in the practices of the communities who may recognize a common language—or not. It is important at the outset to note that this is very different from the language rights granted in the Constitution to French, for example. The right of a resident of Northern Ontario or New Brunswick to communicate with the federal government in French does not extend to the right to use a particular *form* of French; there is no

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\(^{49}\) *Inuit Language Protection Act*, SNu 2008, c 17, s 1(2) [*ILPA*].

\(^{50}\) *Ibid*, s 16(5).
protection accorded to local varieties, because to the extent that the French language receives protection, it is as an abstract entity or system, and not as a practice of particular communities. Another hypothetical serves to illustrate the point.

Suppose an employee of the Government of Nunavut were asked to communicate in an official capacity with a member of his own Inuit community; what if, after drafting a letter, that same employee was asked to remove from it expressions or terminology that while readily understood and used in the particular community, were considered non-standard and thus not suited for official government communications? Could that same employee, as a member of an Inuit community, claim an infringement of his section 35 Aboriginal right to use his language? It would appear that a prima facie case would be made out for such a claim, and that any limitations created by standardization would need to be justified under the Sparrow test.

Now let us compare the situation of the Inuit employee of the Government of Nunavut with a hypothetical French-speaking employee of the Government of Quebec. First, it should be noted that the French speaker has no general right to speak French under the Constitution. She has specific rights to the use of French in specific situations—for example, when communicating with an office of the federal government under section 20(1), but can otherwise be required to use another language without constitutional infringement. It follows that this same worker can surely be made to use a particular form of her own language to communicate for official work purposes—she could easily be required to use only standard French in communications with members of her own community, even where this might interfere with the use of her preferred variants. Not so the Inuktitut speaker: as we have already noted, requiring him to use standard

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51 Although workers in Quebec do have the right to use French as set out in s. 4 of the Charter of the French language, CQLR c C-11 [CFL].
expressions may well violate his section 35(1) right to engage in a protected “practice, custom or tradition”.

Second, if the French speaker were to claim an infringement of her right to a preferred variant of French in a context where she does possess a constitutional right (e.g., when communicating with a federal government office under section 20(1)), the question of whether her rights had been infringed would turn on the definition of “French”, which is highly likely to be equated with standard French. On the other hand, it would be no answer to the Inuktitut speaker to argue that he was allowed to use “Inuktitut” to communicate, regardless of how broadly or narrowly this was defined. His constitutional right is to engage in a particular linguistic practice, founded in his community, and not the abstract right to use a particular language system, however defined.

These particular features of the protection of Aboriginal language rights under section 35 may be a double-edged sword. On the one hand, the constitutional protection afforded to speakers of Aboriginal languages is in some cases broader than that afforded to speakers of the official languages.52 On the other hand, this broad protection might, under certain circumstances, present a challenge to the standardization and official use of Aboriginal languages, measures which are highly necessary to ensure their continued use and survival. It is likely that these issues would need to be resolved by a balancing of the interests of smaller communities of speakers with those of the broad linguistic community. As I will argue below, the appropriate place for this balancing is the justificatory analysis of the Sparrow test. But at the definition stage, it is important to note the wide-ranging diversity of protected Aboriginal language practices included under section 35.

52 In constitutional terms; it must be remembered that most of the linguistic rights of official language speakers do not derive directly from the Constitution, but rather from enabling legislation such as the Official Languages Act.
So far, we have examined Aboriginal languages as practices under section 35, and looked at the implications of such a definition, which is unique in the domain of language rights in Canada. By focusing on the definitional question of language as a practice, custom or tradition, we have already isolated some unique features of Aboriginal language rights. But any recognition of Aboriginal rights under section 35(1) must involve the entire Van der Peet test. However we define those linguistic practices covered by the section, only those that can be said to be “integral to the distinctive culture” of the Aboriginal group in question will be protected. I turn now to an examination of this question.

4.4.4 Applying the Test – “Integral to a Distinctive Culture”

As a preliminary matter, it must be noted that the Supreme Court has repeatedly acknowledged the importance of language to both cultural and personal identity. In one of his most eloquent judgments, Justice Rand acknowledged the fundamental importance of “the primary condition of social life, thought and its communication by language”, and added, “Liberty in this is little less vital to man’s mind and spirit than breathing is to his physical existence.”53 In Reference re Manitoba Language Rights, the court again recognized the fundamental nature of language:

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.54

Similarly, in Ford v. Quebec (Attorney General), the court noted the intimate connection between language and identity:

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Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one’s choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the Charter of the French Language itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality.\textsuperscript{55}

Finally, in \textit{Mahe v. Alberta}, the court reiterated that “[l]anguage is more than a mere means of communication, it is part and parcel of the identity of the people speaking it.”\textsuperscript{56}

The court’s assertions of the importance of language to collective identity do not dispose of the matter, but they do suggest that, prima facie, Aboriginal languages are the very paradigm of practices, customs, or traditions integral to the distinctive culture of an Aboriginal group. A review of the different factors considered in the majority’s judgment leads to the same conclusion. In his judgment in \textit{Van der Peet}, Chief Justice Lamer listed the following, among others, under the heading “Factors to be Considered in Application of the Integral to a Distinctive Culture Test”:

- Courts must take into account the perspective of Aboriginal peoples themselves.
- In order to be integral a practice, custom or tradition must be of central significance to the Aboriginal society in question.
- The practices, customs and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact.
- Claims to Aboriginal rights must be adjudicated on a specific rather than general basis.
- For a practice, custom or tradition to constitute an Aboriginal right it must be of independent significance to the Aboriginal culture in which it exists.

\textsuperscript{56}[1990] 1 SCR 342 at 362, 68 DLR (4th) 69 (Dickson CJ).
The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that a practice, custom or tradition be distinct.

The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence.

Courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.57

Aboriginal languages are doubly significant to the maintenance of distinctive Aboriginal cultures. First, because they are, in themselves, emanations of those distinctive cultures; and second, because they are the vehicle by which all other elements of those distinctive cultures are transmitted from generation to generation.

Aboriginal languages are certainly distinctive, in that they are distinguishing or characteristic features of Aboriginal societies.58 Indeed, Aboriginal languages have a strong claim to distinctness as defined by the court.59 Recognizing the distinctiveness of Aboriginal languages—“a claim that this tradition or custom makes the culture what it is”60—does not amount to suggesting that there can be no form of Aboriginal culture without a distinguishing Aboriginal language.61 The Royal Commission on Aboriginal Peoples rightly notes that “the preservation of a distinctive language may not always be essential to preservation of a distinct identity. In other words, language shift does not automatically imply ethnic assimilation.”62

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57 Van der Peet, supra note 2 at para 48–75.
58 Ibid. at para 71.
59 “A culture with a distinct tradition must claim that in having such a tradition it is different from other cultures; a claim of distinctness is, by its very nature, a claim relative to other cultures or traditions” (ibid.).
60 Ibid. [emphasis in original].
61 Although the Assembly of First Nations seems to make precisely this claim in a 1990 report: Towards Linguistic Justice for First Nations (Ottawa: AFN, 1990) at 39.
may well be that some Aboriginal communities maintain their cultural identity without a distinctive language. These groups are unlikely to make a section 35 claim based on language. This fact, in itself, has no bearing on the validity of other groups’ claims. As noted by the court in Van der Peet, “Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis.”63 This means that “the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right.”64 For the many Aboriginal peoples whose distinctive language is an integral part of their collective identity, section 35 ensures that they have a constitutionalized Aboriginal right to the use and preservation of that language.

The crucial role played by Aboriginal languages in the transmission of Aboriginal identity has been recently reaffirmed by the Task Force on Aboriginal Languages and Cultures: “Our languages are more than just tools of communication. They also describe who we are as peoples and tell us of our relationship to each other and to the land.”65 The task force emphasized that “language and culture are the foundations of First Nation, Inuit and Métis nationhood”.66 The Assembly of First Nations had earlier made the same point in starker terms: “Language is our unique relationship to the Creator, our attitudes, beliefs, values, and fundamental notions of what is truth. Our languages are the cornerstone of who we are as a People. Without our languages our cultures cannot survive.”67

Furthermore, Aboriginal languages provide a crucial connection to, and continuity with, the past. In the poetic words of a Senate bill to recognize Aboriginal languages, “the varied and

63 Supra note 2 at para 69.
64 Ibid. [emphasis in original].
65 Towards a New Beginning: A Foundational Report for a Strategy to Revitalize First Nation, Inuit and Métis Languages and Cultures (Ottawa: Department of Canadian Heritage, 2005) at 21 [TFALC].
66 Ibid. at 7.
diverse voices of the aboriginal peoples of Canada have echoed across this land since time immemorial”. 68 Aboriginal languages are the vehicles of oral tradition, the living memory of Aboriginal peoples, and thus provide a vital link through time to pre-contact practices, customs, and traditions. The First Peoples’ Heritage, Language and Culture Council of British Columbia (now the First Peoples’ Cultural Council) notes that language is the primary means by which a people is connected to its past: “The loss of a language means the loss of thousands of years’ worth of cultural nuances, rituals and practices. . . . Every culture has adapted to unique environmental, social and political circumstances, and the language holds an accumulation of the experiences and circumstances of the people.”69 A society’s language embodies its most fundamental structures and norms, and ensures their transmission through time. As Lorena Sekwan Fontaine puts it, “Aboriginal languages have been the vehicles used to express cultural values that governed community, family and nation relationships for centuries.”70 Language has ensured the survival of Aboriginal cultures over the centuries, and remains vital to that survival. The Task Force on Aboriginal Languages and Cultures points out that continuity with the past is a fundamental aspect of Aboriginal identity: “[O]ur oral tradition has survived as a separate way of describing the human experience of this world even as we have survived as separate peoples.”71 Indeed, oral tradition is uniquely reliant on linguistic structure as both an aid to memory and a conveyor of subtle yet important nuances.72 This makes it particularly difficult to

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68 Bill S-212, An Act for the advancement of the aboriginal languages of Canada and to recognize and respect aboriginal language rights, 1st Sess., 42nd Parl., 2015, Preamble.
71 TFALC, supra note 65 at 25.
72 For a classic statement of this proposition, see Walter J. Ong, Orality and Literacy: The Technologizing of the Word (London: Methuen, 1982) at 33–36.
translate without a significant loss of meaning. For example, when Chief Jake Thomas gave a recitation of the Great Law of the Iroquois Confederacy for the Royal Commission on Aboriginal Peoples, he expressed his frustration at the difficulties of attempting to translate the Great Law into English: “As I say, I’m not really comfortable when I use English because at least—I can say this much, that English does not have any translation. . . . They tell me that there’s no word that we can use in English to explain anything in Native language.” Similar to Chief Johnny David of the Wet’suwet’en nation gave evidence in preparation for the trial of Delgamuukw, there were many issues occasioned by the attempt to translate oral histories into English. Elders repeatedly stressed to the Royal Commission on Aboriginal Peoples the importance of using Aboriginal languages to convey traditional Aboriginal knowledge: “We cannot protect our culture and our ceremonies unless we have our language. . . . In the language, it has a real essence that can’t be expressed in English.”

For this reason, the preservation of Aboriginal languages is crucial to the preservation of Aboriginal oral traditions and traditional knowledge. It is indeed a vital link to the past, the embodiment of the continuity of Aboriginal cultures over the centuries, reaching back well beyond the time of first contact.

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73 Royal Commission on Aboriginal Peoples, For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples, CD-ROM (Ottawa: Libraxus, 1997), Public Hearings, Akwesasne, Ont., 3 May 1993, Jake Thomas, Recital of the Great Law of the Iroquois Confederacy; Thomas’s struggles to interpret the Great Law in English are shown by his frequent recourse to Aboriginal-language terms during his recitation.

74 Antonia Mills, ed., Hang Onto These Words: Johnny David’s Delgamuukw Evidence (Toronto: University of Toronto Press, 2005).


76 As emphasized by Andrea Bear Nicholas: “While there are many aspects of oral tradition, there is but one that must be seen as a pre-requisite to the survival of all, one to which we must all commit ourselves, and that is to the matter of language survival” (“The Assault on Aboriginal Oral Traditions: Past and Present” in Renée Hulan & Renate Eigenbrod, eds., Aboriginal Oral Traditions: Theory, Practice, Ethics (Halifax & Winnipeg: Fernwood Publishing for the Gorsebrook Research Institute, 2008) 13 at 31.
Of course, suggesting that Aboriginal languages are a crucial link to the past is not to deny their present utility or adaptability. All languages change and evolve over time, and Aboriginal languages are no exception. These changes may result in significant differences between the forms of language once used and the forms of language in current use. The influence of other languages is also an important factor in this evolution. But what is important to the protection of language as an Aboriginal right is continuity with the past. Continuity is not identity, and substantial changes in a practice will not preclude it from qualifying under section 35. As the court notes: “The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.”

The obvious connection to pre-contact practices in the case of language should leave ample room for the adaptations inherent in the application of language planning and revitalization efforts, as well as for natural adaptations of the language through, for example, contact with other languages. Even significant post-contact influence of European languages will not deprive an Aboriginal language of its constitutional protection. Chief Justice Lamer suggests that “[i]f the practice, custom or tradition was an integral part of the aboriginal community’s culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to the determination of the claim”.

On the other hand, the issue of continuity may pose a more significant problem in the case of communities where languages have been lost and are in the process of being re-acquired. On the one hand, as we have seen, the requirement of continuity will generally be interpreted flexibly, so that even a gap in time between instances of a particular practice, custom or tradition

77 Van der Peet, supra note 2 at para. 64.
78 Ibid. at para. 73.
will not disrupt the required continuity. As noted in *Van der Peet*, “It may that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right.”\(^7\)

A proper interpretation of the requirement of continuity would seem to indicate that a language no longer spoken but being revitalized should be protected under section 35(1). On the other hand, the longer the period of time when the language is not spoken, and the more difficult it would seem to establish the element of “distinctiveness”. How can a language—always viewed as a practice and not as an abstract entity—be said to be of “central significance” to a culture or to “make it what it is” if it is no longer used, and has not been for decades? This may present an important roadblock to groups whose language is no longer in use, but I suggest that Canadian courts would again interpret the requirement of distinctiveness in light of the fundamental purpose of section 35. It would seem perverse, indeed, if the success of assimilative efforts against Aboriginal languages were to lead to a lesser protection of the very languages most affected. Such an enshrining of the linguistic status quo would appear to run counter to the very essence of section 35 and the spirit of reconciliation. It is likely that courts would tend to favour the overarching goal of the provision rather than apply a narrow test of distinctiveness that would deny constitutional protection to the most endangered languages.

It would seem, then, that the *Van der Peet* test protects Aboriginal languages as Aboriginal rights under the constitution, as practices integral to the distinctive cultures of Aboriginal peoples. Having argued that Aboriginal languages are protected under section 35(1), I will now try to delineate the scope of these rights. In particular, what is the practical significance

\(^7\) *Ibid.* at para. 65.
of the protection of Aboriginal languages under the Constitution? What are the limits to the exercise of these rights? These are the questions I turn to now. Before doing so, however, I will briefly touch on the status of Michif, the Métis language, as its protection rests on a different footing from the other Aboriginal languages.

The Status of Michif under the Test in R. v. Powley

The Métis language Michif\(^ {80} \) must be considered under a different test. In Van der Peet, Chief Justice Lamer noted that

the history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined.\(^ {81} \)

He went on to state that only when the court was properly presented with a Métis claim and had the benefit of counsel’s arguments would it be prepared to determine the scope and content of Métis rights under section 35.\(^ {82} \) Such a claim was presented to the court in R v Powley.\(^ {83} \)

In Powley, the Supreme Court upheld the Van der Peet test, but adapted it for the purposes of determining Métis rights:

[W]e modify the pre-contact focus of the Van der Peet test when the claimants are Métis to account for the important differences between Indian and Métis claims. Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights.\(^ {84} \)

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\(^{81}\) Supra note 2 at para. 67.

\(^{82}\) Ibid.

\(^{83}\) Supra note 3.

\(^{84}\) Ibid. at para 18.
The Powley test has been widely acknowledged as an important landmark for Métis rights, while at the same time leaving many of the issues raised in Van der Peet unresolved.\footnote{See e.g. Andrea Horton & Christine Mohr, “R v Powley: Dodging Van der Peet to Recognize Métis Rights” (2005) 30 Queen’s LJ 772; Catherine Bell, “Towards an Understanding [of] Métis Aboriginal Rights: Reflections on the Reasoning in R. v. Powley” in Dwight A. Dorey & Joseph Eliot Magnet, eds., Aboriginal Rights Litigation (Markham, ON: LexisNexis Butterworths, 2003) 387.} For our purposes, however, it can be seen to protect Métis languages (the most important being Michif) since these languages would constitute practices “that predate the imposition of European laws and customs on the Métis”,\footnote{Powley, supra note 3 at para 37.} as the court defines “effective European control”.\footnote{For a history of the development of Michif as a language, see RCAP, vol 4, supra note 80.} Moreover, while Michif is certainly in a precarious position today,\footnote{See discussion above, and RCAP, vol 4, supra note 80 at 223–27. It was reported as a mother tongue by 640 people in the latest census—see the latest Statistics Canada census report on Aboriginal languages: Aboriginal languages in Canada, 2011 (Ottawa: Minister of Industry, 2012), Catalogue no. 98-314-X2011003 [Census 2011 Report].} it continues to be of central significance to Métis identity. The Royal Commission on Aboriginal Peoples noted in its report: “Preservation of their culture and their contact with Aboriginal languages underlies and informs all other concerns of the Métis Nation.”\footnote{Ibid. at 223.} The Métis National Council recently reaffirmed that one of its primary concerns is “to protect, enhance and promote the use of Michif, our national language”.\footnote{“Submission to Ministerial Task Force on Aboriginal Languages & Cultures” (26 August 2004), in TFALC, supra note 65 at 52.} Michif was also recently recognized by the Manitoba Legislative Assembly in its Aboriginal Languages Recognition Act.\footnote{SM 2010, c 22, CCSM c A1.5.} Because it is integral to the distinctive Métis culture, and because of its continuity with the pre-control fusion of Aboriginal and French cultures, Michif receives the protection of section 35 under the Powley test.

It should be noted that many Métis speak Aboriginal languages other than Michif. These Métis could also claim the protection of section 35. As the claim would then be for a Métis Aboriginal right, the appropriate test would be the pre-control test from Powley, even though the
language claimed to be an Aboriginal right is not specific to the Métis (many Métis, for instance, speak Cree, Dakota, Ojibway, or Dene). This is one of the inconsistencies occasioned by the different tests. But the preservation of Aboriginal languages is as integral to Métis culture as it is to many First Nations, as emphasized by the Royal Commission on Aboriginal Peoples. In addition, the recent decision in Daniels v. Canada has made it clear that Métis are “Indians” for the purpose of section 91(24) of the Constitution Act, 1867, implying a greater federal responsibility for the language rights of Métis.

4.4.5 The Scope of Aboriginal Language Rights

Section 35 of the Constitution Act, 1982, together with section 35.1, constitutes its own separate part of the statute: Part II, entitled “Rights of the Aboriginal Peoples of Canada”. This has some important consequences for the interpretation of the section, particularly when it comes to evaluating the scope and limits of the rights recognized by section 35(1). To begin with, unlike Charter rights, whose application is limited by section 32 to the federal (including the territorial) and provincial governments, the Aboriginal and treaty rights recognized and affirmed by section 35(1) are not explicitly limited in their application. They are not subject to section 1 of the Charter, although this has lost its practical importance through the decision in Sparrow, where the Supreme Court applied a justificatory analysis largely reminiscent of the section 1 test for justification. They are also largely insulated from the conflicting application of Charter rights,
through the operation of section 25 of the Charter.\textsuperscript{96} All of these facts lead to the conclusion that Aboriginal and treaty rights stand apart in the constitutional scheme.

The limits to the application of Aboriginal rights under section 35(1) may be more important to the issue of language than they have been with other rights. Part of the reason for this, as discussed above, lies in the possible interference with Aboriginal language rights that may be inevitable with efforts to standardize these languages. These efforts may be carried out primarily through Aboriginal governments at various levels, or through publicly or privately funded organizations, but they may also be the result of public legislation, as in Nunavut. While courts may be reluctant to find private parties liable for infringing Aboriginal rights, they are likely to have little reluctance in insisting that publicly funded organizations comply with them. They may also insist on governmental action to restrict such infringements. This would mean that governmental action would not be necessary to a finding of infringement of Aboriginal rights, unlike Charter rights, where the requirement for governmental action still largely holds. I will return to this issue in Chapter 5 below.

In most cases where an infringement of an Aboriginal or treaty right is claimed, the claim is made against a government—most often, but not exclusively, the federal government. Language rights have not been tested as Aboriginal or treaty rights, largely because they have not directly been regulated by governments. While past governmental policies have had a very significant negative impact on Aboriginal languages—a point to which I will return in the next chapter—direct legislation affecting Aboriginal languages has not been enacted. This is not to

\textsuperscript{96} Part I of the Constitution Act, 1982, supra note 1, which reads:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

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

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
say that there could not be tension between existing legislation, and especially, of course, existing language legislation, and Aboriginal language rights as recognized under section 35(1). In Chapter 6, I will focus on the interaction between the federal official languages regime and Aboriginal language rights. In this section, I will focus on the interaction between Quebec’s language legislation, primarily the *Charter of the French language* (*CFL*), and Nunavut’s fairly recent *Inuit Language Protection Act*, and Aboriginal language rights. Before doing so, however, it is important to make some general observations about the protection afforded to Aboriginal languages through their recognition as Aboriginal rights.

To say that Aboriginal languages are protected as Aboriginal rights must mean, first and foremost, that no governmental interference with Aboriginal languages is permitted unless justified under the high standard set out in *Sparrow*. To use an obvious example, no Canadian government could pass a law purporting to prohibit the speaking of an Aboriginal language. Perhaps more significantly, no government could now establish a system of mandatory schools among whose primary purposes is the eradication of Aboriginal languages and cultures. Yet this is precisely what successive Canadian governments did for over a century, in the form of the Indian residential school system. I will discuss these actions at more length in the next chapter.

Today, interference with the right to use Aboriginal languages is unlikely to come in the form of a deliberate policy of eradication. Rather, interference with Aboriginal language rights is likely to be a by-product of other governmental actions. Perhaps the most obvious is language regulation. Several Canadian jurisdictions have legislated on the subject of language, including the federal government, several provinces, and the territories. As noted in Chapter 2, where federal, provincial or territorial legislation does explicitly address Aboriginal languages, it

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97 *Supra* note 51.
generally provides limited but specific rights to the use of these languages, rather than place restrictions on their use. Such legislation, whether or not it directly addresses Aboriginal languages, must be interpreted and applied so as not to interfere with Aboriginal language rights under section 35(1). But other forms of regulation could also indirectly affect Aboriginal language rights, from legislation governing communications technologies to regulations on product labelling standards to the use of prescribed forms by certain government departments.\(^9^8\) Again, where such general legislation interferes with Aboriginal language rights, it will need to be justified under the strict requirements of the *Sparrow* test. Unless a compelling government objective is being pursued and the honour of the Crown is being maintained, it is unlikely that legislation directly or indirectly infringing Aboriginal language rights would be upheld.

A more interesting case, as noted above, would be where such legislation was itself made in furtherance of the protection of language rights, such as for example legislation providing rights to certain Aboriginal languages but not others, or even legislation intended to protect the position of French. The two most obvious examples which come to mind are Nunavut’s *Inuit Language Protection Act* (ILPA) and the *Charter of the French language* in Quebec. I will examine each of these in turn. In order to understand how such conflicts might be resolved however, it is necessary to examine the test for justification of interference with constitutionally protected Aboriginal rights, which was first elaborated in the case of *R. v. Sparrow* in 1990, and refined in subsequent cases, including in the recent case of *Tsilhqot’in Nation v. British Columbia*.\(^9^9\)

\(^9^8\) A noteworthy example is that of the Dene woman, Shene Catholique Valpy, who was unable to register her daughter’s name, Sahaiʔa, with the Northwest Territories’ vital statistics department, because it contained a special character not included in the traditional Roman-alphabet fonts used by the government department: see Erin Brohman & Garrett Hinchey, “Chipewyan baby name not allowed on NWT birth certificate”, CBC News, 6 March 2015, online: <http://www.cbc.ca/news/canada/north/chipewyan-baby-name-not-allowed-on-n-w-t-birth-certificate-1.2984173>.

\(^9^9\) *Supra* note 9.
**Prima Facie Infringement**

In *Sparrow*, the Supreme Court began its analysis of Aboriginal fishing rights by noting that the first question to be asked is whether the legislation or regulation in question has the effect of interfering with an Aboriginal right, in which case it represents a prima facie infringement of section 35(1). The onus of proving such a prima facie infringement lies on the person or group challenging the regulation. To determine whether the impugned measures interfere with an Aboriginal right, the following questions must be asked: “First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?” This should make it clear that not any measure which has an impact on Aboriginal rights will be an infringement of section 35(1), but only those measures which interfere with the exercise of these rights in a way which is unreasonable, imposes undue hardship, or denies holders of the right their preferred means of exercising it. These are all, to a large extent, questions of degree, and they are all interrelated. A measure which bars rights holders from exercising their right through their preferred means is likely to be unreasonable and cause undue hardship. The extent to which a particular form of language regulation would interfere with Aboriginal language rights would depend on the nature of the measure and the extent of its application. Let us suppose for a moment that the government of Quebec were to require the use by local governments of French in their communications with Cree citizens; such a requirement could certainly be seen as imposing undue hardship on unilingual Cree speakers, and thus be unreasonable. Or let us assume that the Inuit Uqausinginnik Taiguusiliuqtiit required the use of certain forms, to the

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100 *Sparrow*, supra note 7 at 1112.
exclusion of others, in government communications. This would certainly appear to deny to holders of the right—speakers who use the excluded variants—from exercising their right in their preferred manner. While it is difficult to determine at the outset the precise limit at which regulation of this sort would represent undue hardship or be unreasonable and constitute an infringement, it is reasonable to assume that given a certain level of language regulation, that line will be crossed and certain measures will be deemed to be prima facie infringements of section 35(1). On the other hand, it is also likely that a certain level of regulation (requiring a particular spelling of a certain word with no special significance, for example) would, in isolation, fall below the threshold of interference, or represent de minimis interference with Aboriginal rights. But if the aggregate effect of these measures disproportionately affects one particular group (e.g. the speakers of one particular dialect), this may well constitute undue hardship and amount to prima facie interference. Ultimately, as discussed below, different considerations will apply to the impugned measures depending on the legislative goal being sought. But at the level of prima facie infringement, it is important to note that language regulation in general is likely to have some impact on the rights of holders of Aboriginal language rights, and could thus amount to a prima facie infringement of section 35(1).

*Justification*

If a certain regulation represented prima facie interference with the Aboriginal right to engage in the practice of speaking a particular Aboriginal language or form of the language, it could be challenged by members of an Aboriginal community opposed to the chosen

103 As it is authorized to do by s. 16(5) of the *ILPA*; see *supra* note 50 and accompanying text.
104 In this regard, note that in *Sparrow* (*supra* note 7 at 1112) the court specifically asked as its third question in determining infringement, “[D]oes the regulation deny to holders of the right their preferred means of exercising that right?”
standardized form. If this were to occur, it is likely that any interference created by the regulation would need to be justified under the test set out in *Sparrow*.

In *Sparrow*, Chief Justice Dickson and Justice La Forest suggested that “federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights”. 105 This is required, in the Court’s view, by the very meaning of “recognized and affirmed” as used in section 35(1), while it also cautioned that “[r]ights which are recognized and affirmed are not absolute”. 106 Once a prima facie interference with an Aboriginal right has been established, the onus is on the government to show that its regulation meets the test for justification. To determine if the regulation is justified, a court would ask (1) whether there was a valid legislative objective, and (2) whether the legislation or regulation was in keeping with the principles of the honour of the Crown and the special fiduciary relationship between government and Aboriginal peoples. 107 In *Sparrow*, as in the many subsequent fishing rights cases, the legislative objective was found to be conservation, and to be a valid legislative objective as such. 108 In the context of language regulation, the validity of the legislative object is likely to depend on the need for language regulation. This need will be important where regulation is needed to protect or preserve a particular language. Even so, different considerations will apply, as discussed below, when the legislative objective is that of preserving a non-Aboriginal language, such as French, or when it involves protecting an Aboriginal language itself. This latter objective would be particularly compelling in the context of justification. As with the conservation of fishing stocks in *Sparrow*, such an objective “is consistent with aboriginal beliefs and practices, and, indeed,
with the enhancement of aboriginal rights.”\textsuperscript{109} It could be argued, however, that a measure which infringes the Aboriginal rights of one group cannot be justified on the basis that it enhances the Aboriginal rights of another group. A valid legislative objective must not prefer the rights of others at the expense of Aboriginal rights;\textsuperscript{110} but can it privilege certain Aboriginal rights at the expense of others? While there is a clear link between conservation of resources such as fish stocks and the continued enjoyment of Aboriginal fishing rights for all,\textsuperscript{111} this does not imply that one set of Aboriginal rights is prioritized over any other. While a strong argument can be made that there is a similar link between the standardization and official use of a language and its continued viability, such a “conservation” measure requires privileging the Aboriginal rights of one group over those of another (the speakers of variants or dialects which are excluded from the standard form).

Even if we assume that a valid legislative objective is found, this does not resolve the question. The valid legislative objective must still be pursued in a manner that is in keeping with the honour of the Crown and the special fiduciary relationship between government and Aboriginal peoples.\textsuperscript{112} The application of the principle of the honour of the Crown to the federal or provincial governments or legislatures is a given. Public governments, such as Nunavut’s, are likely to be subject to a traditional analysis regarding their compliance with the honour of the Crown and the special fiduciary relationship (although, as I discuss below, this should be tempered in the case of Nunavut by recognition of its broadly representative nature for the Inuit population of the territory). In many cases, however, as I discuss below, compliance with the

\begin{itemize}
\item \textsuperscript{109} \textit{Sparrow, supra} note 7 at 1114.
\item \textsuperscript{110} \textit{Ibid.} at 1116.
\item \textsuperscript{111} Although, as was made clear in \textit{Lax Kw’alaams, supra} note 14, not all Aboriginal groups will hold an Aboriginal right to fish—or especially to trade in—all species.
\item \textsuperscript{112} \textit{Sparrow, supra} note 7 at 1114.
\end{itemize}
honour of the Crown might raise the difficult question of the precise relationship between Aboriginal governments and the Crown, and the nature of the power exercised by Aboriginal governments.

In the following sections, I will examine these possible conflicts in two specific contexts of language regulation: that of Quebec’s *Charter of the French language*, and that of Nunavut’s *Inuit Language Protection Act*. By examining how these particular instances of language regulation might interact with constitutionally protected Aboriginal language rights, I hope to elicit some general guiding principles to assist in balancing language regulation with the rights of Aboriginal language speakers.

**Aboriginal Language Rights and Quebec’s Charter of the French language**

First enacted in 1977, Quebec’s *Charter of the French language* (*CFL*) has regulated the use of French—and by implication, that of other languages—for nearly forty years. In that time, it has been hotly contested, and parts of it have been struck down as unconstitutional by the Supreme Court.\(^{113}\) While English-language media are fond of highlighting the sometimes questionable judgment of the “language police”,\(^{114}\) the legislation has become an accepted part of the political and linguistic landscape of Quebec. Moreover, the underlying premise of the legislation—that French in North America is a language in need of protection—has been explicitly endorsed by the Supreme Court. In *Ford*, the Court made reference to the “vulnerable position of the French language in Quebec and Canada” and noted that this fact “amply establishes the importance of the legislative purpose reflected in the Charter of the French


Language and that it is a response to a substantial and pressing need.”. How would this explicit recognition of the need to protect the French language be reconciled with the undoubtedly even more fragile position of Aboriginal languages, should they come into conflict?

The CFL itself addresses Aboriginal languages in its preamble and in specific provisions. The preamble of the statute notes that “the National Assembly of Québec recognizes the right of the Amerinds and the Inuit of Québec, the first inhabitants of this land, to preserve and develop their original language and culture”.

While this preambular clause does not subordinate the primary purpose of the CFL—“to make of French the language of Government and the Law, as well as the normal and everyday language of work, instruction, communication, commerce and business”—to the interests of Aboriginal languages, it does suggest that a balancing of the rights of speakers of Aboriginal languages with the overarching purpose of the act was contemplated from the moment of enactment. And while a preamble does not by itself carry authoritative force, it does serve as an interpretative aid to the enactment’s purpose and object.

The reference to Aboriginal languages in the preamble is complemented by specific provisions of the CFL acting as exemptions to its rules of general application. Indian reserves, for example, are exempted from the application of the Act, as are, for the most part, the Cree and Inuit entities created under the James Bay and Northern Quebec Agreement (JBNQA).

These general exemptions are supplemented by provisions which refer specifically to Aboriginal

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115 Ford, supra note 55, at p. 777.
116 CFL, supra note 51, Preamble, para. 4. The term “Amerind” is rarely used in English, and corresponds directly to the French amérindien, which is itself losing currency in favour of autochtone. The absence of the term “Métis” may be of little significance given the constitutional definition of the term “Indian”, with which the term amérindien can be equated (see Daniels, supra note 6).
117 CFL, supra note 51, Preamble, para. 2.
118 See e.g. Interpretation Act, CQLR c. I-16, s. 40; Interpretation Act, RSC 1985, c. I-21, s. 13.
119 CFL, supra note 51, s. 97.
120 Ibid., s. 95; note, however, that s. 96 provides that “[t]he bodies envisaged in section 95 must introduce the use of French into their administration, both to communicate in French with the rest of Quebec and with [residents who are not Cree or Inuit] and to provide their services in French to those persons.”
languages and their use. Section 87 provides that “[n]othing in this Act prevents the use of an Amerindic language in providing instruction to the Amerinds, or of Inuktitut in providing instruction to the Inuit”.\textsuperscript{121} Section 88 further provides that notwithstanding the preceding provisions regarding French as the language of education, “in the schools under the jurisdiction of the Cree School Board or the Kativik School Board … the languages of instruction shall be Cree and Inuktitut, respectively, and the other languages of instruction in use in the Cree and Inuit communities in Québec on the date of the signing of the [James Bay and Northern Quebec Agreement]”.\textsuperscript{122} The reference to the JBNQA is significant in that many of the educational rights with respect to language confirmed in the CFL were first set out in the JBNQA and its complementary agreements. In addition, the JBNQA provides other specific rights with regard to language, such as that a Cree person, upon arrest or detention, “must be informed in the Cree language, if he does not comprehend either French or English, of his basic rights”\textsuperscript{123} and that “[p]robation, parole, rehabilitation and aftercare services are provided to Crees, in the Cree language, if possible, taking into account their culture and way of life”.\textsuperscript{124} Cree has also been made one of the official languages of the newly created Eeyou Istchee James Bay Regional Government.\textsuperscript{125} In 1983, the provincial Cabinet adopted fifteen principles meant to guide the province’s relationship with Aboriginal peoples. Among these was the declaration that “Québec recognizes that the aboriginal peoples of Québec constitute distinct nations, entitled to their own

\textsuperscript{121} Ibid., s. 87.
\textsuperscript{122} Ibid., s. 88.
\textsuperscript{123} James Bay and Northern Quebec Agreement and Complementary Agreements, s. 18.0.28 (Sainte Foy, QC: Publications du Québec, 1998), online: <http://www.collectionscanada.gc.ca/webarchives/20071115160724/http://www.ainc-inac.gc.ca/agi/que/jbnq_e.html> [JBNQA]; such a requirement may now be considered implicit in s. 10(a) and (b) of the Canadian Charter of Rights and Freedoms (see R. v. McAvena, [1987] 4 WWR 15, 34 CCC (3d) 461 (Sask. CA)) but the specific reference to the Cree language is nonetheless significant.
\textsuperscript{124} JBNQA, supra note 123, s. 18.0.30.
\textsuperscript{125} Agreement on Governance in the Eeyou Istchee James Bay Territory between the Crees of Eeyou Istchee and the Gouvernement du Québec (2012), s. 108.
culture, language, traditions and customs, as well as having the right to determine, by themselves, the development of their own identity” and that “[t]he aboriginal nations have the right to have and control, within the framework of agreements between them and the government, such institutions as may correspond to their needs in matters of culture, education, language, health and social services as well as economic development”. While these are lofty principles, they have generally remained just that: little action or financial support has accompanied these declarations, as noted by some commentators. Nonetheless, the Quebec legislation is the most explicit provincial legislation in Canada in recognizing rights to use Aboriginal languages in practice (outside the three territories).

If Aboriginal language rights are recognized under section 35(1), however, the real issue is likely to be one of balancing these rights with the recognized valid legislative objective of protecting and promoting the French language in Quebec. French also has a constitutionally protected status as an official language under section 16 of the Charter. Moreover, as I will discuss at more length in the next chapter, the underlying (unwritten) constitutional principle of protection of minorities would apply equally to French as to Aboriginal languages. Could the

127 See e.g. Marcel Martel & Martin Pâquet, Langue et politique au Canada et au Québec: Une synthèse historique (Montreal: Boréal, 2010) at p. 269: “Cependant, la politique linguistique québécoise relative aux Amérindiens et aux Inuits se cantonne surtout dans un énoncé de principes: peu de ressources financières sont généralement allouées à leur mise en œuvre.”
128 Section 16(1) provides that “English and French are the official languages of Canada”. This does not impose these languages as official languages of any province (hence the need for s. 16(2) relating to New Brunswick), but it would likely factor into a court’s analysis when balancing linguistic rights. One should also note, however, that s. 16(1) is itself subject to s. 25 of the Charter, stating that “rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada”.
particular status of French, especially in Quebec, be the basis for government justification of legislation interfering with Aboriginal language rights?

The justification process would be the *Sparrow* test under section 35(1), as discussed below.\(^{130}\) This would involve different considerations from the section 1 justification process which the court engaged in in *Ford*.\(^{131}\) Notably, the issue of the honour of the Crown would be highly relevant when judging whether a particular infringement was justified, even where a valid legislative objective was recognized. Ultimately, the decision may come down to reconciling the interests of two different minority groups, by drawing on this fundamental constitutional principle to allow for both groups to protect and promote their language and culture without prejudice to the other.

In assessing these conflicting claims, a court is likely to consider the relative positions of the languages whose speakers are involved. While the Supreme Court has recognized the fragility of the French presence in North America, French is not an endangered language on a global scale.\(^{132}\) This can be contrasted with the fact that the vast majority of the languages in UNESCO’s *Atlas of the World’s Languages in Danger* are Indigenous languages, including most of those found in Canada.\(^{133}\) Even in Canada, where French has been recognized as in need of protection, the relative positions of French and Aboriginal languages are not comparable. According to the latest census data (2011), there were roughly 7.05 million mother-tongue speakers of French in Canada; by contrast, the largest Aboriginal language, Cree, counted 78,200

\(^{130}\) See *Sparrow*, supra note 7, at pp. 1113–14.

\(^{131}\) *Ford*, supra note 55.

\(^{132}\) The Organisation Internationale de la Francophonie estimates that there are around 274 million speakers of French in the world, as of 2014 (<www.francophonie.org/estimation-des-francophones.html>).

mother-tongue speakers, or about 1.1 percent of the number of French speakers. This disproportion is naturally even greater in Quebec itself: roughly 6.1 million mother-tongue speakers of French for about 15,000 mother-tongue speakers of Cree (the most widely spoken Aboriginal language in the province), or a proportion of about 1 in 400. In light of these numbers, it would be difficult to claim that any threat to the existence of French justifies infringing the rights of Aboriginal language speakers.

Moreover, the reasons behind this discrepancy must also be examined. While demographics account for some of the difference, these numbers are themselves the result of displacement and colonialism. But beyond their demographic weight, the position of French relative to Aboriginal languages cannot be explained simply by the size of the relevant populations. French, as a minority language, has certainly faced threats to its survival, and the right to French-language institutions has been a source of conflict for most of Canada’s history, primarily in the provinces where French speakers have been in the minority. The right to use French in educational, legislative and judicial contexts has been restricted by certain provincial governments at various times in the past. French was not, however, the object of a deliberate policy of cultural genocide, as were Aboriginal languages.

In the next chapter I will discuss in more detail the constitutional implications of this sustained policy of eradication of Aboriginal languages. For now, however, it is important to note that the relative positions of French and

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134 Statistics Canada, Summary Tables, online: <www.statcan.gc.ca>.
135 Ibid.
136 According to 2006 census data, nearly 1.7 million Canadians claimed Aboriginal origins (5.4% of the total population), while about 5 million claimed French origins (16% of the total) (ibid.).
137 For a good overview of this history, see Martel & Pâquet, supra note 127; see also Re Manitoba Language Rights, [1985] 1 SCR 721, 19 DLR (4th) 1.
138 As discussed in Chapter 5 below, this was done primarily through the residential school system, of which the Truth and Reconciliation Commission has said that they were “a key component of a Canadian government policy of cultural genocide” (Canada’s Residential Schools: The History, Part I, Origins to 1939, Final Report of the Truth and Reconciliation Commission of Canada, Winnipeg: TRC, 2015) at vii.
Aboriginal languages are qualitatively as well as quantitatively different, and that the valid legislative objective of protecting and promoting the French language must be limited by the even more pressing objective of protecting the constitutionally recognized rights of Aboriginal language speakers to the use of their languages.

A further argument may be made, in constitutional terms, that the rights of French speakers, while constitutionally recognized, are specifically limited when it comes to the rights of Aboriginal language speakers (or, indeed, Aboriginal rights in general). This argument can be made by examining the constitutional bases of the status of French. First, sections 16–20 of the Charter, which constitutionalize particular rights for French speakers, and constitutionally protect the status of French as an official language, are specifically limited by section 25, which mandates that they cannot be construed in a manner that would “abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada”. Section 35(1) rights are not so limited, though they are subject to being examined in the context of the entire constitution, particularly under the Sparrow justification test.

Second, the principle of protection of minorities undoubtedly applies to both French and Aboriginal languages; but a further principle of reconciliation with and recognition of the Aboriginal peoples of Canada might also be found in the constitutional architecture which would counterbalance, or rather refine, the general principle of protection of minorities. In the Secession Reference, the Supreme Court stated: “The protection of these rights [Aboriginal rights], so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.” The language used suggests that while one might see the protection of Aboriginal rights as part of the larger

139 Charter, supra note 96, ss. 16–20, 25.
140 Secession Reference, supra note 129, at para. 82 [emphasis added].
concern with the protection of minorities in general, one could also see it as a distinct if related constitutional principle, that of acknowledging the first inhabitants of the land.\footnote{This would be consistent with Justice Laskin’s analogous recognition of both “respect for minority rights” and “reconciliation of Aboriginal and non-Aboriginal interests” as separate aspects of the underlying principle of the rule of law in \textit{Henko Industries Limited v. Haudenosaunee Six Nations Confederacy Council} (2006), 82 OR (3d) 721 at para. 142, 277 DLR (4th) 274.}

Taken together, these considerations lead us to believe that it would be very difficult to justify, in the context of section 35(1) of the \textit{Constitution Act, 1982}, any infringement on Aboriginal language rights through Quebec’s \textit{Charter of the French language}, and suggests that the former should take precedence over the latter in case of conflict. Whether such a conflict would arise on the facts would be determined by the degree to which any limitation on the use of Aboriginal languages were unreasonable, or imposed undue hardship. I will return to this point in my general discussion of justification under the \textit{Sparrow} test, below. Given our conclusion on the question of the relationship between Quebec’s language legislation and Aboriginal language rights, however, it is interesting to see if any parallels can be drawn with Nunavut’s language legislation. I turn now to look at the possible interaction between the Inuit Language Protection Act and Aboriginal language rights.

\textit{Aboriginal Language Rights and the Inuit Language Protection Act}

Nunavut’s \textit{Inuit Language Protection Act} (ILPA) was in large part modelled on Quebec’s language legislation, and many of the same considerations will apply. The differences, however, are very important: on the one hand, the legislative objective here is in furtherance of section 35(1) rights: the protection of Inuktitut, or more precisely, the “Inuit language”, as discussed above.\footnote{\textit{ILPA}, supra note 49, s. 1(2); see supra note 45 and accompanying text.} On the other hand, the legislation also has a more direct impact on other Aboriginal languages, especially on dialectal variations such as Inuinnaqtun. This is so, as discussed above,
because of the broad powers of standardization conferred on the Inuit Uqausinguinnik Taiguusiliuqtit (Inuit language authority, IUT), powers which could, in a very real way, affect the ability of speakers of dialectal variants of the Inuit language to use their preferred form of the language. The conflict is thus at once more direct but also more ambiguous. Furthermore, the legislative action here is taken by a government which, while a public government subject to the Charter, is nonetheless representative, in large part, of the will of an Aboriginal people itself. This in itself would likely be enough for a court to consider that the legislative objective embodied by the Inuit Language Protection Act must be treated with deference. The courts are, however, constitutionally mandated to protect Aboriginal rights from government interference. Again, the issue is likely to be resolved in the context of the Sparrow justification test, as discussed below. At the stage of considering whether legislation such as the ILPA constitutes a prima facie infringement, two competing considerations once again come into play. The first is the issue of the reasonableness of the legislation. The second is whether the legislation denies “to the holders of the right their preferred means of exercising that right”. On the issue of reasonableness, the question would likely be given that there is a valid legislative objective, have appropriate means been taken to ensure that limitations on the rights of all Aboriginal-language speakers are reasonable? There are several indications that such rights have indeed been taken into account in framing the legislation. As noted, for example, the ILPA takes the distinctiveness of Inuinnaqtun into consideration in the definition of the term “Inuit language”. It further provides that

[i]n its application to Inuinnaqtun, this Act shall be interpreted and implemented in a manner that is consistent with the need to give priority to
(a) the revitalization of Inuinnaqtun; and

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143 See supra note 50 and accompanying text.
144 Sparrow, supra note 7 at 1112.
145 ILPA, supra note 49, s. 1(2)(a).
(b) improved access to communication, services, instruction and Inuit Language programs in Inuinnaqtun … in the communities where Inuinnaqtun is indigenous.146

Further, the legislation is made subject to “any existing aboriginal or treaty rights of the aboriginal peoples of Canada under section 35 of the Constitution Act, 1982” and “any responsibility of the Parliament and Crown of Canada concerning the linguistic or cultural rights or heritage of Inuit or other linguistic minorities in Nunavut”.147 These limitations on the legislation show that it is not intended to interfere with the rights of other Aboriginal-language speakers, and would go a long way to showing the reasonableness of any necessary limitation. Indeed, if an infringement were found valid under these provisions of the legislation, then it is likely that they would pass the constitutional test as well, as they would almost certainly have to be essential to the overall objective of the legislation in protecting the Inuit language. On the other hand, standardization necessarily implies choices that may deny to certain rights holders their preferred means of exercising the right. It is likely, however, that so long as this is done in a balanced way that takes into account the rights of minority groups, a court would again defer to the larger objective of the legislation, given the goal of preserving the Inuit language. Of course, this balancing exercise would have to meet the high threshold of the honour of the Crown. While the ILPA itself provides some latitude to recognize the rights of minority groups, such as the explicit recognition of the needs of Inuinnaqtun speakers and the revitalization of that form of the language,148 it is likely in the interaction between this recognition and the mandate of the IUT to standardize the Inuit language, including by requiring “standard terminology, expressions, orthography, language or usage” for government or public agency communications or “by an

146 Ibid., s. 1(3).
147 Ibid., s. 2(1).
148 See supra note 146 and accompanying text.
organization or in an area of activity to which this Act or the regulations apply. The manner in which such standardization is applied may indeed have an impact on the justification of any interference with the rights of speakers of other Aboriginal languages; but it is also very likely that a wide latitude in the implementation of these provisions may be given to the IUT, because of the importance to the preservation and promotion of the Inuit language of the standardization process.

It should also be noted that the ILPA is made subject to the paramountcy of the *Official Languages Act*, which in turn makes the Inuit Language, English and French the official languages of the territory. Thus, while the rights of the English- and French-speaking minorities are explicitly protected by Nunavut legislation, the rights of speakers of Aboriginal languages are referred to only by implication—because the legislation in its interpretation is made subject to Aboriginal rights under section 35(1).

Thus, while the interaction between the ILPA and Aboriginal language rights may be more complex and nuanced than that between those same rights and Quebec’s language legislation, it is not devoid of possibilities of conflict. These should be noted especially as the ILPA might itself be a model for other legislation seeking to preserve and promote Aboriginal languages. It should also be noted, however, that the ILPA may be unique in that it constitutes public government legislation. With regard to other Aboriginal languages, this kind of regulation is more likely to emanate from Aboriginal governments at various levels, although it could also possibly be put in place by a specialized government agency (e.g. British Columbia’s First Peoples’ Cultural Council) acting through enabling legislation with delegated authority. Under

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149 *ILPA, supra* note 49, s. 16(5).
150 *Official Languages Act*, SNu 2008, c. 10, s. 3(1).
151 *Ibid.*, s. 3(2), 2(1)(b); *ILPA, supra* note 49, s. 2(b).
these conditions, the question that arises is likely to be what limits can be imposed on Aboriginal governments acting to protect an Aboriginal language to the extent that such protective measures might interfere with the rights of speakers of other forms of the language, or other minority languages, within a given territory. While, as noted earlier, section 35(1) is not limited in its application to the federal and provincial legislative and executive branches, it is questionable whether it could be invoked against an Aboriginal government, particularly one exercising inherent jurisdiction. Indeed, whether language regulation is seen as an essential component of an Aboriginal group’s exercise of inherent jurisdiction is likely to have a significant impact on a court’s assessment of—and willingness to assess—measures to revitalize, protect and promote Aboriginal languages. With this in mind, I turn now to the question of the regulation of language as part of the inherent right of self-government of Aboriginal peoples.

4.5 The Inherent Right of Self-Government and the Regulation of Language

Recognition of the inherent right of self-government of Indigenous peoples has recently been achieved at the international level. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), now endorsed by Canada, declares that “[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”152 It further provides that Indigenous peoples, “in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”.153 These rights belong to all Indigenous peoples, including the Aboriginal peoples of Canada as defined in section 35(2) of

153 Ibid art 4.
the *Constitution Act, 1982*, and the question then becomes how this right to self-determination, and the right to autonomy or self-government, are to be implemented within the Canadian constitutional context. In particular, since these rights are recognized to Indigenous peoples as peoples, this would suggest that the right of autonomy or self-government is an inherent right, as opposed to one delegated from a superior sovereign such as the Crown. This, of course, is the position that has been taken for a long time by the vast majority of Indigenous peoples in Canada, who assert that they never surrendered their sovereignty over their people or their lands. It is also the view that for centuries was denied by successive Canadian governments and courts, whose most basic assumption was the unquestionable and unquestioned sovereignty of the British (and then Canadian) Crown over all of the land which forms what we now call Canada. It was only in the last decades of the twentieth century that this position began to change.

The Government of Canada now recognizes the inherent right of self-government as an Aboriginal right protected by section 35(1) of the *Constitution Act, 1982*, and admits that the inherent right allows Aboriginal peoples “to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.” This is what the Royal Commission on Aboriginal Peoples refers to as the “core” of inherent Aboriginal self-government: “The core of Aboriginal jurisdiction includes all matters that are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity;

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that do not have a major impact on adjacent jurisdictions; and that otherwise are not the object of transcendent federal or provincial concern.”

Language, as a central aspect of an Aboriginal people’s culture and identity, is to be found well within this core of jurisdiction. Indeed, it would be difficult to understand the meaning of self-government if it did not include the power to address issues that are fundamental to a people’s identity. As Patrick Macklem notes, “[P]art of the purpose of a right of Aboriginal self-government is to enable Aboriginal communities to exercise greater control over their distinct collective identities, and to this extent, a right of self-government is a collective right of Aboriginal peoples to preserve their distinctive cultures.” The fundamental nature of cultural preservation and its central place in the exercise of self-government places language regulation beyond the reach of “transcendent federal or provincial concern”. It should be noted in any event that language is not a constitutionally assigned head of power under the Constitution Act, 1867. The power to regulate language is ancillary to the power to legislate on other matters, subject of course to the specific constitutional provisions addressing language, such as section 133 of the Constitution Act, 1867, and sections 16–23 of the Constitution Act, 1982. To the extent that it is not regulated by the federal and provincial levels of government, language can be regulated by Aboriginal peoples as part of their inherent right of self-government.

While the federal government, since 1995, has declared itself prepared to negotiate self-government agreements on the basis of the recognition of the inherent right of self-government, Canadian courts have not set out a clear conception of either the sources or the scope of this

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As Kent McNeil shows, there are two main competing judicial approaches to the inherent right of self-government, which can be traced to two seminal cases, the Pamajewon case and the Campbell case. While the second approach is by far the preferable one, I will show in the following section that the regulation of language would fall within the core of the inherent right of self-government under both approaches, at least for some Aboriginal groups. After determining that language regulation does indeed, in Canadian law, form part of the inherent right of self-government, I will attempt to delineate the scope of this right and its limits.

4.5.1 The Pamajewon Approach

In R v Pamajewon, a decision handed down the day after Van der Peet, the Supreme Court suggested that self-government rights were to be determined on the basis of the Van der Peet test: “In so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard.” In Chief Justice Lamer’s view, the right of self-government is specific to the subject-matter in question, and any such right must be seen in that context: “Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right.” The question, then, under this approach, is whether an aboriginal practice, custom or tradition of language regulation can be established.

What, exactly, must be proved under this approach? Surely not that an Aboriginal people has a history of adopting language “laws” or formal regulations governing its language. Such a

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160 Ibid at 12.
162 Ibid at para 27.
requirement would be contrary to the principles that courts must “take into account the perspective of Aboriginal peoples themselves” and that “courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims”. On the other hand, all languages are “regulated” to the extent of possessing a set of grammatical rules which define the possibilities of expression in that language. That simple fact would seem insufficient to ground a “practice, custom or tradition” of language regulation in order to engage the protection of section 35(1). Instead, we must look to some form of social or political regulation (broadly defined) of the use of language by Aboriginal peoples. One example of such regulation comes to us from the Haudenosaunee (Iroquois) Confederacy, where, according to William Fenton, “Mohawk is the official language of the Condolence Council”. Any practice, custom, or tradition requiring the use of a particular language or a particular form of language for ceremonial or official purposes would arguably qualify as language regulation in the required sense. Similarly, the use of specific forms of language for religious or ritualistic purposes, such as among the Anishinabe (Ojibway), is an instance of language regulation in the relevant sense. In both these cases, a particular language, or form of language, is authoritatively prescribed for particular purposes. That is sufficient to ground a pre-contact practice of language regulation and engage the protection of section 35. It should be noted that the particular manner of enforcing or exercising such regulation would not affect the existence of the practice, as it is assumed that the modern right would derive from the evolution of a pre-contact practice of language regulation, however exercised.

163 Van der Peet, supra note 2 at para 49 & 68.
165 See e.g. William W Warren, History of the Ojibway People (St Paul: Minnesota Historical Society Press, 1984; originally published 1885) at 67.
166 See e.g. Sappier, supra note 14 at para 48 (Bastarache J).
Such direct evidence may not be available to all Aboriginal groups. Language, however, is so central to the ritual life of all human societies that it would be difficult to think of any community having no rules whatsoever governing its use in such circumstances. So long as these rules can be shown to be social rules (and many rules might qualify both as linguistic rules and social rules, as e.g. the distinction between forms of address to particular persons practiced in a great many languages), they should be enough to show a pre-contact practice of language regulation. Requiring evidence of particular forms of regulation or particular means of enforcement would seem to go beyond the demands of the Van der Peet test, as elaborated in Sappier. Any assessment of pre-contact practices would also have to take into account the relative situation of the language then as opposed to now. This would not be to transform a current need into a past practice, but rather to recognize that part of the evolution of a practice, in keeping with changing circumstances, may involve its growing importance.

If the preservation of the community’s language was taken for granted in the pre-contact past, with limited regulation reflecting this fact, then surely the current condition of the language, and the greater need for regulation, cannot be irrelevant in examining pre-contact practices for evidence of language regulation. To do so would be to demand that Aboriginal regulation of a vital matter of cultural survival, a matter well within the core of inherent Aboriginal jurisdiction, be dependent on direct evidence of a pre-contact practice of legally enforced language regulation. This is, of course, the general limitation of the Van der Peet test as applied in Pamajewon. But even under this limited approach, a court which takes into account the perspective of Aboriginal peoples and seeks to further the purposes of section 35 would be required to assess the evidence in light of current circumstances.
The limitations of the Pamajewon approach are made clear by the foregoing analysis. Indeed, if some Aboriginal groups might have trouble establishing their inherent right of self-government over such vital matters of cultural survival, one might well question the appropriateness of this approach in ensuring that the fundamental rights of self-government and self-determination are guaranteed to Canada’s Aboriginal peoples. For this reason, a different approach is highly preferable. Such an approach was delineated in the Campbell case.

4.5.2 The Campbell Approach

If a right belongs to a group or community, then that group or community must be able to regulate its exercise. Rights belonging to peoples must be subject to regulation by those same peoples. This is recognized, for example, in the right of Indigenous peoples to “to maintain and develop their own indigenous decision-making institutions” referred to in article 18 of UNDRIP, as well as in the right, guaranteed by article 20(1) of the Declaration, to “maintain and develop their political, economic and social systems or institutions”. Such self-government rights are necessary to the exercise of all other communal rights. So it is with the Aboriginal and treaty rights recognized and affirmed by section 35(1) of the Constitution Act, 1982 to the Aboriginal peoples of Canada. This follows naturally from the idea that Aboriginal rights are communal or collective rights. The principle is well recognized in common law that where there is to be communal enjoyment of a right, such a community will have “customs under which its individual members are admitted to enjoyment”. In Delgamuukw v British Columbia, Chief Justice Lamer stated that since Aboriginal title was held communally, decisions about the use of

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167 UNDRIP, supra note 152, arts 18, 20(1).
168 McNeil, supra note 159.
169 Amodu Tijani v Secretary, Southern Provinces (Nigeria), [1921] 2 AC 399 (PC) at 3.
land held under Aboriginal title must be made communally.\textsuperscript{171} This same logic applies to other Aboriginal rights. Since Aboriginal rights, by their very nature, belong to an Aboriginal community rather than an individual, the right of that community to regulate the particular practice, custom or tradition must also be protected if protection of the practice itself is to have any meaning. In \textit{Campbell}, Justice Williamson of the British Columbia Supreme Court stated this clearly when he suggested that “the right to aboriginal title ‘in its full form’, including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by Section 35”.\textsuperscript{172} While Justice Williamson was specifically referring to Aboriginal title, the same logic applies to all Aboriginal rights, as pointed out by Kent McNeil:

Aboriginal title to land, and indeed all other Aboriginal and treaty rights as well, are communal in nature. Aboriginal communities must, therefore, have decision-making authority over how those rights can be exercised. As Justice Williamson said, there must be “a political structure” – that is, a government – within the community for exercising this authority. Consequently, Aboriginal nations must have an inherent right of self-government in relation to all their Aboriginal and treaty rights.\textsuperscript{173}

The scope of this inherent right of self-government also follows logically from the communal nature of the Aboriginal rights of the community: “[T]he scope of their jurisdiction is determined by the extent of the Aboriginal and other treaty rights of the Aboriginal nation claiming the jurisdiction.”\textsuperscript{174} In other words, Aboriginal and treaty rights carry with them the power to regulate the exercise of those rights. This means that so long as an Aboriginal community can show that it has an Aboriginal right to its language, it will have the right to make

\textsuperscript{171} \textit{Ibid} at para 115.
\textsuperscript{172} \textit{Campbell v British Columbia}, 2000 BCSC 1123 at para 137, 189 DLR (4th) 333, [2000] 4 CNLR 1 [Campbell]. The case involved a challenge by leader of the Opposition Gordon Campbell to the Nisga’a Final Agreement on the basis of the exhaustive division of powers under ss. 91 and 92 of the \textit{Constitution Act, 1867}.
\textsuperscript{173} McNeil, \textit{supra} note 159 at 16–17.
\textsuperscript{174} McNeil, \textit{supra} note 159 at 17.
collective decisions about that language, including decisions meant to ensure the survival of that language. Under this approach, then, jurisdiction over language regulation follows naturally from the fact that Aboriginal languages are protected as Aboriginal rights under section 35. There is no need to establish an additional right to regulate language as a separate practice, custom or tradition. This eliminates the necessity of showing any pre-contact historical precedent for language regulation, as under the Pamajewon approach.

It does, however, raise the question of a possible distinction to be made between regulating the Aboriginal language itself (through standardization, for example) and regulating language in general (by passing language legislation or making the language mandatory in certain contexts). This objection can be met in two ways, however. First, the ability to regulate language in general is intimately tied to the survival of Aboriginal languages, in a way which would make Aboriginal language rights meaningless if it were denied. Second, such a distinction is harder to make than it might at first appear.

The importance of language policy in the survival of Aboriginal languages should not be overstated, since, as the Royal Commission on Aboriginal Peoples has pointed out, it is not a substitute for the intergenerational transmission of these languages. Nonetheless, it is an important tool in ensuring that Aboriginal-language speakers can exercise their constitutional right to use their languages in a meaningful way, which in turn will contribute to a greater use and transmission of these languages. Mandating the use of Aboriginal languages in certain contexts within an Aboriginal people’s jurisdiction—as has been done in Nunavut with the Inuit Language Protection Act—is a central element of that people’s inherent right of self-government. Without the ability to regulate language in areas within their jurisdiction, the

175 See discussion above.
language rights of Aboriginal peoples will be rendered largely nugatory. The recognition of this fact leads to the conclusion that properly interpreted, the right of self-government as it relates to Aboriginal languages includes the right to regulate language in general, and not simply the Aboriginal languages themselves.

In this regard, it is also important to note that such a distinction, while superficially attractive, might be very hard to make. I have already alluded to the possible difficulties in defining the boundaries of any particular Aboriginal language. Given the inherent difficulty in defining the “language” over which the regulatory power might extend, it is likely that such a limit would be ineffective in any case, and that part of the regulatory power must necessarily include the ability to decide what does and does not form part of the language in question. In such a situation, the line between regulating a particular language, and regulating language in general, will be significantly blurred, to the point of being minimally useful.

4.6 Conclusion

Section 35 of the Constitution Act, 1982 protects the languages of the Aboriginal peoples of Canada as Aboriginal rights, as “practices, customs or traditions” integral to the distinctive cultures of these peoples. This is true for the languages of the First Nations peoples and the Inuit, as well as the Métis (under the modified test in Powley). The constitutional protection of Aboriginal languages as Aboriginal rights means that Aboriginal-language speakers have the right to use their languages (and the right to exercise this right, in particular in their relations with government), to regulate their use, and to take the necessary steps to ensure their survival. This includes adopting language planning measures such as standardization, provided that the rights of all speakers are respected. In addition, because language is so intimately tied to the

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176 Van der Peet, supra note 2.
issue of Aboriginal identity, it forms part of the core of the inherent right of Aboriginal self-government, as recognized by the Canadian government, a self-government right that is itself protected by section 35 of the Constitution Act, 1982. This right of self-government allows Aboriginal peoples, through their chosen forms of government, to regulate language in areas under their jurisdiction.

The constitutional protection of Aboriginal languages as Aboriginal rights is one aspect of what I have termed the constitutional status of these languages. It offers a minimal level of protection for the use and regulation of these languages by Aboriginal peoples, and forms the constitutional basis for measures taken to protect and promote these languages. But it does not exhaust the constitutional significance of Aboriginal languages. In particular, it does not exhaust the duties of all levels of government, and specifically the federal government, towards these languages, nor does it represent a sufficient level of recognition of these languages by the Canadian state. In the following chapter, I will argue that Canadian governments, and most particularly the federal government, have a constitutional duty to protect Aboriginal languages, a duty which is grounded both in long-standing principles of Canadian constitutional law and in Canada’s recognition of international norms regarding indigenous peoples; a duty which is informed by the need for justice and reconciliation in the face of a shameful history of attempted eradication of Aboriginal identity.
CHAPTER 5  THE CONSTITUTIONAL DUTY TO PROTECT
ABORIGINAL LANGUAGES

5.2 SOURCES OF THE CONSTITUTIONAL DUTY

5.2.1 Reconciliation as a Constitutional Imperative

Throughout the Supreme Court of Canada’s jurisprudence on Aboriginal and treaty
erights, one can find as a central theme the need for reconciliation. Indeed, Mark Walters refers to
the Court’s “jurisprudence of reconciliation”.¹ In R v Van der Peet, Chief Justice Lamer stated
that Aboriginal rights “must be directed towards the reconciliation of the pre-existence of
aboriginal societies with the sovereignty of the Crown”.² Similarly, Chief Justice McLachlin has
spoken of “the promise of reconciliation embodied in s. 35(1)”³ and suggested that reconciliation
lies “at the heart of Crown-Aboriginal relations”.⁴ She also pointed out that

[r]econciliation is not a final legal remedy in the usual sense. Rather, it is a
process flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982.
This process of reconciliation flows from the Crown’s duty of honourable dealing
toward Aboriginal peoples, which arises in turn from the Crown’s assertion of
sovereignty over an Aboriginal people and de facto control of land and resources
that were formerly in the control of that people.⁵

This “overarching constitutional goal of reconciliation”⁶ arises from the assertion of sovereignty
by the Crown over Aboriginal peoples; in other words, from the claims of control and
domination, backed up by might rather than right, inherent in the practice of colonialism.

¹ For a detailed discussion, see Mark D Walters, “The Jurisprudence of Reconciliation: Aboriginal Rights in
Canada” in Will Kymlicka & Bashir Bashir, eds, The Politics of Reconciliation in Multicultural Societies (Oxford:
Oxford University Press, 2008) 165.
⁵ Ibid at para 32.
⁶ Canada (Indian Affairs) v Daniels, 2014 FCA 101.
Canada’s colonial past must be remedied through the constitutional demands for reconciliation with pre-existing Aboriginal societies that form the basis of the protection of Aboriginal and treaty rights.

This focus on reconciliation and remedying the injustices of the past is a fundamental aspect of the constitutional protection of Aboriginal rights. These rights are protected and deserving of protection precisely because of Canada’s colonial history. (The term “aboriginal” makes the connection explicit.) The Crown’s assertion of sovereignty implied the denial of Aboriginal sovereignty, which in turn represented a denial of the worth of Aboriginal societies. The settler state was founded on an ideology that essentially denied the fact that “when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries”. The policies of colonialism were premised on that very denial; they paradoxically sought to destroy Aboriginal societies—Aboriginal laws, cultures, and economies—by denying that these in fact existed, or existed in such a primitive state as to be unworthy of regard. As recently noted by the Truth and Reconciliation Commission of Canada, “For over a century, the central goals of Canada’s Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada.” The underlying purpose of Aboriginal rights is to recognize this fact and attempt to

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8 Van der Peet, supra note 2 at para 30 [emphasis in original].

remedy its effects through reconciliation. Section 35 does not so much protect defined rights as provide a framework for this reconciliation; its primary purpose is not to restrain state action—although it does do that—but to provide a constitutional basis for the Canadian state to regain its legitimacy. As Mark Walters notes:

For post-colonial states that seek to establish relations of justice and harmony with indigenous minorities who have suffered histories of injustice, and who continue to suffer from the legacy of those histories, the ideal of integrity or consistency that normally secures the value of legality is not enough. … [S]tate authorities that have inherited the mantle of power from colonial predecessors are simply not, in the sense demanded by the ideal of the rule of law, legal authorities in relation to indigenous peoples. … The integrity that legality demands will involve demonstrations of equal respect for entire peoples ….

The need for reconciliation in light of the failures of the past is the foundational basis of Aboriginal rights. The constitutional imperative of reconciliation makes these rights fundamentally different from other constitutional rights such as Charter rights. It also makes section 35 unique in our constitutional order. Section 35 does indeed protect existing Aboriginal and treaty rights from interference; but it is not limited to that function. It contains a “promise”, in the words of the Supreme Court; the promise of reconciliation of Aboriginal peoples with the Canadian state. This promise is embodied in the enduring principles of the honour of the Crown and its fiduciary duty to Aboriginal peoples.

But while section 35 embodies the imperative of reconciliation with Aboriginal peoples in a very particular way, it is not the only constitutional source of that duty. Other fundamental constitutional principles embody the demand for reconciliation and come into play in defining the Canadian state’s responsibilities towards the languages and cultures of its Indigenous inhabitants. First are the related underlying constitutional principles of (a) the rule of law, which includes as one of its dimensions the reconciliation of Aboriginal and non-Aboriginal interests,

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Walters, supra note 1 at 189 [emphasis in original].

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as set out by the Ontario Court of Appeal in the *Henco Industries* case;\(^{11}\) and (b) respect for and protection of minorities, as delineated by the Supreme Court of Canada in the *Secession Reference* and applied by the Ontario Court of Appeal in *Lalonde*.\(^ {12}\) Second are Canada’s international commitments under the United Nations Declaration on the Rights of Indigenous Peoples, which it has recently endorsed, and which represent a growing international consensus to recognize the rights of the world’s Indigenous peoples.\(^ {13}\) Together these reinforce the purposive interpretation of section 35, an interpretation which sees the section more as the locus of a constitutionalized process of reconciliation rather than as a simple guarantee of static and predetermined rights.

It is in this sense that we can speak of a constitutional duty to protect Aboriginal languages. The constitutional imperative of reconciliation would be given little meaning, if it were not ignored outright, in the absence of such a duty. The protection of Aboriginal languages from state interference which is the most basic layer of protection offered by section 35 would be insufficient to meet the demands of reconciliation; it is not enough to restore legitimacy to Canada’s relations with Aboriginal peoples. I argue that a careful consideration of the history of colonialism, and in particular, the history of state-sanctioned assaults on Aboriginal languages and cultures—a history which has recently been labeled “cultural genocide” by the Truth and Reconciliation Commission\(^ {14}\)—together with a purposive interpretation of section 35 which relies on the well-established principles of the honour of the Crown and its fiduciary duty to Aboriginal peoples, as well as a robust interpretation of the underlying constitutional principles


\(^{14}\) *TRC Final Report Summary*, supra note 9 at 1.
of the rule of law and protection of and respect for minorities, and Canada’s international obligations towards Indigenous peoples, leads to the conclusion that the constitutional imperative of reconciliation demands some form of government action to protect and promote Aboriginal languages. Of course, such an argument, if it is to be accepted, must overcome the serious jurisprudential and doctrinal objections to the imposition of positive duties to act on governments. This is no easy task; however, the peculiar historical context surrounding the rights now guaranteed by section 35 does, in the end, serve to overcome the strong objections which could be made to the imposition of a positive constitutional duty. It imposes a constitutional duty upon Canadian governments, and the federal government in particular, to take positive measures to reverse, to the extent possible, the damage of the past centuries of assimilative policies.

Reconciliation and Redress

This argument takes as its premise that the “demonstrations of equal respect”\textsuperscript{15} mentioned by Walters as a necessary ingredient of reconciliation involve more than recognition of historical wrongs; they require some form of redress. As noted by the Truth and Reconciliation Commission of Canada (TRC):

\begin{quote}
A just reconciliation requires more than simply talking about the need to heal the deep wounds of history. Words of apology alone are insufficient; concrete actions on both symbolic and material fronts are required. Reparations for historical injustices must include not only apology, financial redress, legal reform, and policy change but also the rewriting of national history and public commemoration.\textsuperscript{16}
\end{quote}

This premise is not uncontroversial. There are some who argue that redress, in the sense of a restitution of the status quo ante, would have perverse effects and would lead to a greater

\textsuperscript{15} Supra note 1.
injustice. Jeremy Waldron, for example, has made that argument in the context of Indigenous peoples’ entitlement to their traditional territories.\(^\text{17}\) As Waldron notes:

> Arguments for reparation take as conclusive claims of entitlement oriented towards circumstances that are radically different from those we actually face: claims of entitlement based on the habitation of a territory by a small fraction of its present population, and claims of entitlement based on a determination to ignore the present dispersal of persons and peoples on the face of the earth, simply because the historic mechanisms of such dispersal were savagely implicated in injustice.\(^\text{18}\)

On its face, this view has merit: it is clear that an equivalent, or perhaps even greater, injustice may be occasioned in the present day by a return—even if it were possible—to prior circumstances, an attempt to “wind the tape back to the injustice”\(^\text{19}\), in Waldron’s own words. One can easily see how an argument for the restitution of traditional lands in their entirety to the Indigenous peoples who once occupied them could lead to injustice, in the present, for millions of non-Aboriginal people who currently occupy these lands. It would be hard to suggest that one dispossession is necessary to redress another.

However, there is no need to assume that redress or reparation, in this context, are equivalent to restitution, or even that they are primarily focussed on the past rather than the future. The TRC, for example, defines reconciliation as “an ongoing process of establishing and maintaining respectful relationships”\(^\text{20}\), and suggests that one of the main goals of reconciliation is to “create a more equitable and inclusive society”\(^\text{21}\). This forward-looking approach is not an attempt to “wind back the tape”, but rather to take stock of the present. Doing so, however, requires more than simply a recognition of past injustices. It requires “constructive action on


\(^{18}\) Ibid. at 159.

\(^{19}\) Ibid. at 158.

\(^{20}\) TRC, Reconciliation, supra note 16 at 11.

\(^{21}\) Ibid. at 16.
addressing the ongoing legacies of colonialism that have had destructive impacts on Aboriginal peoples’ education, cultures and languages, health, child welfare, administration of justice, and economic opportunities and prosperity”. It is, in other words, the ongoing present injustices that require redress, rather than any past ones.

Furthermore, while the argument against redress as restitution might be cogent in the context of land claims, it loses much of its meaning when looking at cultural loss. The dispossession of land is fairly straightforward: one group historically appropriated the land of another, and full restitution would imply the “giving back” in some form of the land. But the loss of language and culture implies no such illicit appropriation by another group, and the very notion of restitution or “giving back” makes little sense in this context. Indeed, one must guard against the facile assumption that the measure of redress for language loss is the return of Indigenous languages to their pre-contact state. Not only is this actually impossible—language loss and change are inevitable over time—but it would serve to undermine the argument for a constitutional duty by imposing an impossibly high burden on the Crown.

Of course, it is true that in a world of scarce resources, imposing an obligation on the state to do anything means preventing it from doing something else. Resources allocated to the preservation of Aboriginal languages will no longer be available for the promotion of other languages, or from use in pursuing other state goals. This argument has merit, at a theoretical level, in the sense that setting priorities in the face of changing circumstances is a necessary part of the role of government—hence the reluctance to impose any positive duties on governments at all. Indeed, in a state where much of the basic needs of the population were not met, or where other priorities took on much higher significance, the argument that assuring the well-being of all

22 Ibid.
might require failing to redress injustices against some groups might be convincing—although
again, it bears noting that it is not the issue of past injustices, but rather the ongoing injustices
created by the past, that require redress, and a society that tolerates ongoing injustice is likely to
endanger, rather than preserve, its overall well-being. At any rate, this argument loses its force
when confronted with the reality of a modern state such as Canada. Not only are government
resources adequate to ensure prioritizing cultural policy; but the state is actively engaged in the
promotion of not one, but two official languages, and the amount of state resources devoted to
doing so is out of all proportion to the amount devoted to the protection of Aboriginal
languages.\footnote{See the discussion in \textit{Canada’s Residential Schools: The Legacy}, The Final Report of the Truth and Reconciliation Commission of Canada (Montreal & Kingston: McGill-Queen’s University Press, 2015) at 115–17.} In such a context, arguing that imposing an obligation on the state to protect Aboriginal languages would require too high a burden on the state’s resources amounts to little
more than arguing for the perpetuation of the unjust treatment of Aboriginal languages.

Perhaps a more interesting and subtle argument against imposing a state obligation to
preserve Indigenous languages is that it would \textit{perpetuate} the injustice done to the speakers of
these languages, by imposing on them the use of a language with lesser utility in the modern,
globalized world. This is the argument made by Jacob Levy, for example. Levy argues that
“\[e\]ven if the state that has committed the injustices bears the entire \textit{financial} cost of the
minority language revival programme, it is still the children of the victimized group who will
speaker of a language spoken by half a billion persons is too much greater than the range
available to the member of a 500-person language group”.\footnote{\textit{Ibid.} at 238.} By the “range of options”, Levy
understands the comparative life chances of speakers of languages with a large “communicative range” as opposed to those with little currency. This, as he argues, means that “if communicative range matters at all in our evaluations of what languages it is in children’s interest to learn—as surely it must—then we must often admit that language preservation policies are not in children’s interests”. Therefore, Levy concludes, “[i]n the world that we have, complete with its unjust history, the interests of the children and grandchildren of the language’s speakers may have to be overridden in order to pursue language revival”. This argument thus suggests that not only would imposing an obligation on the state to preserve Aboriginal languages take scarce resources away from other priorities, but it would perversely result in a perpetuation of injustice towards Aboriginal communities by lessening the life chances of Aboriginal children.

While such an argument might be superficially attractive, it suffers from a number of flaws. First and foremost, as Levy himself admits, there is no reason to assume “that communicative range is the only value served by speaking a language”; and he goes on to recognize “the communal, aesthetic, and symbolic values associated with language preservation”. Communicative range may be a consideration, but it need not be the only consideration. Indeed, a strong argument could be made that for most of the world’s peoples, the preservation of their own language is a fundamental matter of identity and self-determination, which has little to do with the calculation of economic prospects.

Furthermore, Levy again focuses on past injustices, rather than current and ongoing ones. He recognizes the inherent injustices of the world, but denies the fundamental role of colonialism—and thus, of state action—in creating inequalities between languages. Not only

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26 Ibid. at 239 [emphasis in original].
27 Ibid.
28 Ibid.
29 Ibid. at 238-239, and 239, n. 12.
can we make a strong argument that current inequalities between languages are primarily the result of colonialism and state intervention,\textsuperscript{30} at least as regards the Aboriginal peoples of Canada; but further, denying the role of the state in constructing the current linguistic landscape of the world prevents us from seeing the potential of state action to reverse it. In other words, it ignores the fact that the “communicative range” of a language, to use Levy’s words, is largely a creation of the state and can be increased or diminished with state action. Active promotion of Indigenous languages would increase their “communicative range”, thereby improving the life chances of speakers of these languages.

Second, such arguments suffer from an all-or-nothing approach in at least two ways. First, without explicitly stating it, Levy’s argument relies on an assumption of generalized unilingualism; multilingualism is an exception to the rule, destined to disappear sooner or later within a society. This becomes apparent when Levy argues that “a revival project that tries to minimize the burden on children—say, by continuing to encourage fluency and literacy in the language(s) that drove out the ancestral language … may not do much reviving”.\textsuperscript{31} The assumption here is that bilingualism—and a fortiori multilingualism—is unnatural and necessarily detrimental to the learning of another language. It also implicitly assumes that success in language revival is to be measured by unilingualism, or the exclusive daily use of the language in all areas of life. Both of these assumptions are highly questionable.

But perhaps more fundamentally, Levy’s argument seems to separate the goals of language revitalization or preservation from the choices of its speakers. These goals can only be determined by the peoples involved, the peoples whose languages they are. It is these self-

\textsuperscript{30} This is the argument made by Stephen May in the same work: Stephen May, “Misconceiving Minority Language Rights: Implications for Liberal Political Theory”, in Kymlicka & Patten, \textit{supra} note 24, 123.

\textsuperscript{31} Levy, \textit{supra} note 24 at 240.
determined goals that will serve as the benchmark to measure the success of any revitalization or preservation efforts. To argue that the state has an obligation to support these projects is not the same as suggesting that the state should impose them, or decide on their scope, or determine their goals. Perhaps the best answer to Levy’s argument is simply to state again that language revitalization or preservation is a fundamental question of self-determination for the peoples involved, and that they must determine when and how such efforts are initiated, and when they are successful.

So while there are some important theoretical arguments against imposing an obligation of redress on the state for the current situation of Aboriginal languages, there are more compelling arguments in favour of such an obligation. Most importantly, we must guard against arguments that would deny such an obligation by suggesting that it would place an impossible burden on the state. Such arguments generally assume that the goals of language preservation and protection involve a return to a prior state, an attempt to “wind back the tape”. Ultimately, the goals of language preservation and protection remain firmly within the fundamental core of self-determination for Aboriginal peoples, and it is these peoples themselves who must decide on its desirability, extent, and success. What is required of the state is, in the words of the TRC, “concrete actions on both symbolic and material fronts”. Without these, given the current injustice of the situation of Aboriginal languages, apologies and recognition of the past will ring hollow; true reconciliation requires redress.

But while there may be a strong political argument to be made in favour of an obligation of redress, there are also strong legal arguments against it—not the least of which is a consistent and general reluctance of courts to impose positive obligations on the state. In the following

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32 TRC, Reconciliation, supra note 16 at 82.
sections, I will address these objections and argue that in the Canadian context, there are more compelling legal arguments to be made in favour of a constitutional duty on the Crown to protect and promote Aboriginal languages.

The Positive Obligation in the Canadian Context

The notion of imposing positive constitutional obligations on the state is generally associated with socio-economic rights, and courts in Canada, while not precluding the possibility of such obligations, have been reluctant to impose them in practice. In the context of section 7 of the Charter, for example, the Supreme Court of Canada was rather ambiguous in its view of positive obligations. On the one hand, it stated that “[n]othing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person”. On the other, it suggested that “[o]ne day s. 7 may be interpreted to include positive obligations. … It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases.” In reality, Canadian courts have yet to impose such obligations.

This is not surprising, as there is a long-standing reluctance of courts to impose positive duties on governments. Partly, this stems from the traditional jurisprudential distinction between “positive” and “negative” liberty and the corresponding view of the appropriate role of law as it affects government action. It is also, however, and more convincingly perhaps, founded on a

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36 Ibid at para. 82.
37 Ibid. at para 83; Wynberg v Ontario (2006), 82 OR (3d) 561, 269 DLR (4th) 435 (CA).
concern to maintain the appropriate boundaries of the judicial role, and not upset the traditional separation of powers between the branches of government. These concerns, especially in a constitutional context, are indeed deserving of careful consideration.

The reluctance of courts to impose positive obligations on the state might form a preliminary objection to the notion of a constitutional duty to protect Aboriginal languages. Indeed, some authors have come to the conclusion that section 35 is limited to the protection of Aboriginal languages from government interference. But one should be wary of comparing the Aboriginal and treaty rights contained in section 35 with Charter rights. The latter are universal in nature, and primarily directed at preventing future injustices rather than remedying those of the past. They rely for their force on the legitimacy of state authority even while limiting it. By contrast, Aboriginal rights seek to remedy past injustices which continue into the present, as well as prevent them in the future. They do not depend for their force on the legitimacy of the state, but rather help establish that legitimacy; they are in themselves a source of that legitimacy. Indeed, reconciliation and legitimacy could be seen as two sides of the same coin. The reconciliation mandated by section 35 is directly related to the uncomfortable position of Canadian courts, faced with the difficult problem of addressing the bald assertion of sovereignty by the British (and later, Canadian) Crown with the plain fact of the historical presence and self-determination of Aboriginal peoples. Unquestioning acceptance of the claims of Crown sovereignty places the courts in the position of accepting “fictitious accounts of the manner in which their countries came into being, accounts that accept even the most extravagant imperial

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40 The notable exception being s 15; but that section has an origin and history all its own, and stands apart somewhat from other Charter provisions.
claims at face value and ignore the historical presence and viewpoints of indigenous peoples”.\textsuperscript{41} Canadian courts, led by the Supreme Court of Canada, have begun to question these long-standing assumptions, recognizing that such slavish adherence to imperial narrative puts them at risk of “forfeiting their moral authority and acting as passive instruments of colonial rule”.\textsuperscript{42} In \textit{Haida Nation}, Chief Justice McLachlin referred to the Crown’s assertion of sovereignty and to its “\textit{de facto} control of land and resources”,\textsuperscript{43} thereby implying that the original assertion of sovereignty was less than fully legitimate. This is a cautious but important qualification of the traditional acceptance of Crown sovereignty. One could argue that while the court did not reject the legitimacy of the Crown’s assertion of sovereignty outright, it does point to the constitutional imperative of reconciliation as the basis of its continued legitimacy. In other words, the Crown’s \textit{de facto} control can only become \textit{de jure} sovereignty through the process of reconciliation with Aboriginal peoples.

In that sense, then, the Aboriginal and treaty rights recognized by section 35(1) form a very different class of constitutional rights. Aboriginal rights, as a manifestation of the unique relationship between Aboriginal peoples and the Crown, are “intersocietal”\textsuperscript{44} in nature. As such they demand an interpretation that is attuned to both the differing perspectives—those of Aboriginal peoples and of the settler state—that inform these rights and the unique purposes which those rights pursue. In particular, any appropriate interpretation of these rights must take into account the overarching purpose of reconciliation and its role in maintaining the legitimacy of the Canadian state. It would therefore be a mistake to assume that one can simply import wholesale the principles of \textit{Charter} interpretation, and the limitations of \textit{Charter} rights, to an

\textsuperscript{41} Slattery, \textit{supra} note 7 at 692.
\textsuperscript{42} \textit{Ibid}.
\textsuperscript{43} \textit{Haida Nation}, \textit{supra} note 4 at para 32.
examination of the nature of Aboriginal and treaty rights. The demands of reconciliation are such that the traditional judicial reluctance to impose positive obligations on the state cannot be determinative of the appropriate interpretation of the scope of Aboriginal rights.

Indeed, there are two compelling reasons to argue that such a duty can be imposed on the state in the particular circumstances of Aboriginal language rights. The first is that a purposive interpretation of section 35, taking into consideration the relevant principles of interpretation—the honour of the Crown and its fiduciary duty, the underlying principles of the rule of law and the protection of and respect for minorities, Canada’s international obligations, as well as the Supreme Court’s own jurisprudence on linguistic rights—and being cognizant of Canada’s colonial history, leads to the conclusion that any meaningful conception of Aboriginal language rights requires such a duty. The second is that the exclusion of Aboriginal languages, as the languages of founding peoples of Canada, from the statutory and constitutional scheme of official languages, amounts to interference with the language rights of Aboriginal-language speakers, under the principles set out by the Supreme Court in Dunmore. This chapter will be devoted to establishing that a proper interpretation of section 35 in light of what I have termed the constitutional imperative of reconciliation imposes a constitutional duty on Canadian governments to protect Aboriginal languages. In Chapter 6, I will address the second argument—relating to the exclusion of Aboriginal languages from the statutory scheme of official languages—in the context of my broader discussion of the relationship between the languages of the First Peoples of Canada and the official languages.

But before turning to these arguments, it is necessary to set out the historical context which commands the need for reconciliation. It would be futile at best and misleading at worst to

attempt a purposive interpretation of section 35 and the protection of Aboriginal language rights without situating it in its historical context. As the Royal Commission on Aboriginal Peoples states in the first volume of its report, “it is impossible to make sense of the issues that trouble the [Aboriginal–non-Aboriginal] relationship without a clear understanding of the past”. It is only by taking “a walk together through history” that we can “search out common ground on which to build a shared future”. Before attempting to delineate the constitutional duty to protect Aboriginal languages, therefore, it is necessary to review the centuries-long history of government attempts to destroy Aboriginal languages and cultures—an official policy which the Truth and Reconciliation Commission described as “cultural genocide”—and in particular, the “national crime” of the Indian Residential School System. Given the long history of the residential school system and its far-reaching consequences, as detailed in the final report of the Truth and Reconciliation Commission of Canada, what follows is necessarily a very short review of the historical record. Nonetheless, I believe it is important to highlight the context for the discussion of the constitutional duty to protect and promote Aboriginal languages.

*The Indian Residential School System*

The appreciation of Aboriginal languages exhibited by missionaries, linguists, or other Europeans who applied themselves to their study was never shared by the general public and did not influence government policy. The assumption—unstated or explicit—was that the

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47 Ibid at 8.
48 As defined by the Commission, *cultural genocide* “is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group” (*TRC Final Report Summary*, supra note 9 at 1).
50 Early missionaries such as Jean de Brébeuf expressed admiration for the intricacy of Aboriginal languages, often comparing them against a Greek model (see e.g. *The Jesuit Relations and Allied Documents: Travels and
languages of “uncivilized” peoples could not be suited to the pursuit of civilized aims. To the extent that the “civilizing” of Aboriginal peoples grew to become an explicit government objective, Aboriginal languages and cultures were increasingly seen as obstacles in reaching that goal, and a deliberate policy of eradication was gradually put in place. It is this policy, and the measures used to enforce it, which the Truth and Reconciliation Commission has called cultural genocide:

States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.

In its dealing with Aboriginal people, Canada did all these things.51

As noted, this policy culminated in the ultimate “civilizing” project, the Indian Residential School System.

The Royal Commission on Aboriginal Peoples gives a concise description of the Indian Residential School System: “Put simply, the residential school system was an attempt by successive governments to determine the fate of Aboriginal people in Canada by appropriating and reshaping their future in the form of thousands of children who were removed from their

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51 TRC Final Report Summary, supra note 9 at 1; interestingly, while the Commission states in its introduction to the section that “[l]anguages are banned” in the context of a cultural genocide, it does not provide an example of this outside of the residential school system. It does point, however, to the notorious ban on cultural practices such as the potlatch and sun dance which was incorporated into the Indian Act (S.C. 1884, c 27, s 3).
homes and communities and placed in the care of strangers.”52 The Indian residential school system was formally established in the late nineteenth century and continued in operation until the 1990s.53 The impact of the system on Aboriginal languages and cultures is not in doubt. As the Truth and Reconciliation Commission of Canada stated in its Interim Report: “Residential schools suppressed Aboriginal language and culture, contributing to the loss of culture, language, and traditional knowledge.”54 This was not an accidental by-product of the operation the schools. Rather, it was their explicit and foundational goal. In the words of the Truth and Reconciliation Commission, “These measures were part of a coherent policy to eliminate Aboriginal people as distinct peoples and to assimilate them into the Canadian mainstream against their will.”55 As John Milloy notes, one of the central pillars of the “civilizing” mission of these schools was the eradication of Aboriginal worldviews, and language was crucial to that purpose: “That the department and churches understood the central challenge they faced in civilizing the children as that of overturning Aboriginal ontology is seen in their identification of language as the most critical issue in the curriculum. It was through language that children received their cultural heritage from parents and community.”56 The assimilative or “civilizing” project required no less, in the eyes of its proponents, than the complete destruction of Aboriginal languages: “[T]he entire residential school project was balanced on the proposition that the gate to assimilation was unlocked only by the progressive destruction of Aboriginal languages.”57 Through the residential school system, the eradication of Aboriginal languages became institutionalized as official

52 RCAP Report, vol 1, supra note 46 at 335.
53 TRC Final Report Summary, supra note 9 at 3.
55 TRC Final Report Summary, supra note 9 at 2.
56 Milloy, supra note 49 at 341.
57 Ibid.
government policy. It was the policy put in place at hundreds of schools throughout the country, where thousands of Aboriginal children were forbidden to speak their languages, often under threat of severe punishment. Residential school principals vied with each other in suppressing the use of “the Indian language” and “[i]nspectors viewed the continued use of Aboriginal languages by the students as a sign of failure”. As noted by the Truth and Reconciliation Commission, this policy continued well into the twentieth century:

After a 1935 tour of Canada, Oblate Superior General Théodore Labouré expressed concern over the strict enforcement of prohibitions against speaking Aboriginal languages. In his opinion, “The forbidding of children to speak Indian, even during recreation, was so strict in some of our schools that any lapse would be severely punished—to the point that children were led to consider it a serious offense.”

Aboriginal languages were not only prohibited, but “belittled and repressed”, so that “[b]y making students feel ashamed of who they were, the system undermined their sense of pride and self-worth”. This resulted in a “vast and devastating interruption in the intergenerational transmission of First Nations languages … as children were trained, forced and shamed into abandoning their languages at residential schools”. Ultimately, many students “could not go back to speaking their languages or pass the languages on to their children because of residual

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58 “Almost universally, school staff in addition to their other responsibilities were assigned the duty of preventing pupils from ‘using their own language’. When children did, school authorities resorted to what was the most common corrective technique—punishment” (ibid at 39 [footnotes omitted]); “Children throughout the history of the system were beaten for speaking their language” (RCAP Report, vol 1, supra note 46 at 342 [footnotes omitted]); punishments included beatings, close haircuts, and washing of the mouth with soap (TRC Final Report Summary, supra note 9 at 84–5 [footnotes omitted]; for many personal accounts, see The Survivors Speak: A Report of the Truth and Reconciliation Commission of Canada (Winnipeg: TRC, 2015) at 47–58, online: <www.trc.ca/websites/trcinstitution/index.php?p=893> [Survivors Speak]; and see generally Canada’s Residential Schools: The History, Part I, Origins to 1939, The Final Report of the Truth and Reconciliation Commission of Canada (Winnipeg: TRC, 2015) at 615–27, online: www.nctr.ca/reports.php [TRC, History I].

59 TRC Final Report Summary, supra note 9 at 83; see also TRC, History I, ibid., at 620–23.

60 TRC Final Report Summary, supra note 9 at 83–4 [footnotes omitted]; see also TRC, History I, supra note 58 at 619.

61 TRC Interim Report, supra note 54 at 26.

shame and trauma”.63 Today, many of these languages are threatened with extinction.64 That the policy did not achieve its goal of complete eradication is a testament to the resilience of Aboriginal cultures.

The Canadian government has acknowledged responsibility for the residential school system and its policy of assimilation. In his formal apology delivered in the House of Commons in 2008, Prime Minister Stephen Harper noted that “[t]he government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language”.65 He added, “The Government of Canada sincerely apologizes and asks the forgiveness of the Aboriginal peoples of this country for failing them so profoundly.”66

In order to settle several class-action lawsuits brought against it and the various churches who ran the schools, the Canadian government entered into the Indian Residential Schools Settlement Agreement (IRSSA), the largest class-action settlement in Canadian history.67 The settlement agreement set up the Truth and Reconciliation Commission of Canada, with the mandate to “[a]cknowledge Residential School experiences, impacts and consequences” and contribute to “rebuilding and renewing Aboriginal relationships and the relationship between Aboriginal and non-Aboriginal Canadians”.68 The Commission’s original commissioners having

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63 Ibid.
64 See discussion in Chapter 2.
66 Ibid.
resigned, they were replaced in 2009 by the Honourable Justice Murray Sinclair as Chair, Chief Wilton Littlechild and Dr. Marie Wilson. The commissioners were supported in their work by an Indian Residential Schools Survivor Committee, whose members made up a cross-section of Aboriginal peoples in Canada.\textsuperscript{69} The Commission held a series of national and local events, gathered statements from residential school survivors all over Canada, and engaged in education and outreach to promote the goals of the Commission and increase knowledge of the issue of residential schools. It issued an interim report in February 2012.\textsuperscript{70} The Commission’s work was sometimes frustrated by a lack of co-operation on the part of the federal government and some churches, as it relates in the executive summary of its findings:

> Under the terms of the Settlement Agreement, the federal government and the churches were obliged to turn over relevant documents in their possession to the Commission. The Commission has had to overcome some significant challenges to completing this task, and has had to seek court direction to resolve disputes with the parties about the handing over of documents. Once the Commission’s document-collection processes began, it became increasingly apparent that Canada would not produce numerous documents that appeared to be relevant to the Commission’s work.\textsuperscript{71}

This prompted the U.N. Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, to recommend in a recent report that “[t]he [Canadian] Government should ensure that the mandate of the Truth and Reconciliation Commission is extended for as long as may be necessary for it to complete its work, and should consider establishing means of reconciliation and redress for survivors of all types of residential schools”.\textsuperscript{72} While litigation arising from the Commission’s attempts to obtain full disclosure is ongoing—with the federal government and some churches arguing that disclosure would violate privacy

\textsuperscript{69} TRC Final Report Summary, \textit{supra} note 9 at 27.
\textsuperscript{70} \textit{Ibid.} at 27–39.
\textsuperscript{71} \textit{Ibid.} at 30–31.
rights—the Commission has stated unequivocally that “Survivors’ stories must be preserved”, and that “the loss of these documents would be a blow to Canada’s national memory of a significant historic injustice” and “could contribute to the argument of those who would assert that this never happened”. It would seem crucial to the reconciliation process that those affected should believe that full disclosure has been made. While these issues may be resolved in the near term, the controversy nonetheless provided an inauspicious start to the reconciliation process. In spite of these setbacks, the Commission continued its work over a span of six years.

The Truth and Reconciliation Commission has now released its Final Report, consisting of five volumes and published in seven languages, including Mi’kmaq, Ojibway, Cree and Dene. The Commission had already issued a total of 94 calls to action, which it emphasized must be adopted to redress the legacy of residential schools and lead the way to reconciliation, which it defines as “an ongoing process of establishing and maintaining respectful relationships”. The Commission further noted:

Together, Canadians must do more than just talk about reconciliation; we must learn how to practise reconciliation in our everyday lives—within ourselves and our families, and in our communities, governments, places of worship, schools, and workplaces. To do so constructively, Canadians must remain committed to the ongoing work of establishing and maintaining respectful relationships.

The Commission pointed to recent developments in the international recognition of the rights of Indigenous peoples as an appropriate guide for the reconciliation process:

A reconciliation framework is one in which Canada’s political and legal systems, educational and religious institutions, the corporate sector and civic society

73 Ibid. at 33.
76 TRC Final Report Summary, supra note 9 at 16.
77 Ibid at 20 [emphasis in original]; see also TRC, Reconciliation, supra note 16 at 3–17.
function in ways that are consistent with the principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples*, which Canada has endorsed.  

The Commission’s calls to action are wide-ranging. In the category “Language and Culture” (Calls to Action 13–17), the Commission made five principal recommendations which included recognition by the federal government “that Aboriginal rights include Aboriginal language rights”; enactment of an Aboriginal Languages Act including recognition that “Aboriginal languages are a fundamental and valued element of Canadian culture and society” and that “the federal government has a responsibility to provide sufficient funds for Aboriginal-language revitalization and preservation”; the appointment, in consultation with Aboriginal groups, of an Aboriginal Languages Commissioner; the creation of “university and college degree and diploma programs in Aboriginal languages”; and a waiving of name-change process fees for those Survivors whose names were changed by the residential school system and who may want to reclaim their original names. As I argue below, these calls to action are in keeping with the constitutional obligations of the Canadian state in relation to Aboriginal languages. Indeed, I argue that the failure to recognize Aboriginal languages and provide for their protection and promotion is unconstitutional given the differential treatment accorded to Canada’s current official languages. The Commission’s recommendation that Aboriginal language rights should be recognized as Aboriginal rights under section 35(1) is consistent with a proper interpretation of the scope of the section and past jurisprudence, as I argued in Chapter 4. The Commission’s Final Report makes clear, if it was ever in doubt, the responsibility of the Canadian government in the establishment, operation, and vocation of the residential schools and demonstrates through both exhaustive analyses and numerous personal stories its abject failure to uphold the honour of  

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78 Ibid. at 16.  
79 TRC Calls to Action, *supra* note 75 at 2.
the Crown. That the residential school system was a blot on Canada’s historical conscience was no revelation. Already in 1996, the Royal Commission on Aboriginal Peoples had pointed to growing awareness of the impact of these schools:

By the mid-1980s, it was widely and publicly acknowledged that the residential school experience … like smallpox and tuberculosis in earlier decades, had devastated and continued to devastate communities. The schools were … part of the contagion of colonization. In their direct attack on language, beliefs and spirituality, the schools had been a particularly virulent strain of that epidemic of empire, sapping the children’s bodies and beings.80

But the full scale of this shameful past, the magnitude of the wrongs committed, have now been exposed like never before. The Indian Residential School System was the cornerstone of an assimilative, destructive policy, maintained for more than a century, which has now been labeled as genocidal, including by the Chief Justice of Canada.81 However controversial the label “cultural genocide” may be, and whatever its precise legal import, it has brought new awareness of a concerted government effort—which is uncontroverted—to “cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada”.82 Such a policy, which lay at the very heart of the Canadian nation-building project, seriously undermines the legitimacy of the Canadian state, not only in the eyes of Aboriginal peoples, but of all its citizens. Only through the process of reconciliation, through “demonstrations of equal respect for entire peoples”, 83 can this legitimacy be regained. It is in this sense that we can speak of a constitutional imperative of reconciliation.

80 RCAP Report, vol 1, supra note 46 at 376–77.
82 Ibid.
83 Walters, supra note 1 at 189.
The constitutional imperative of reconciliation is particularly pressing in the face of the devastation wrought by the residential school system and the entire apparatus of state oppression of Aboriginal peoples. The work of the Truth and Reconciliation Commission represents a starting point rather than a conclusion to this process. In constitutional terms, this means that the impact of the system must be taken into account in the interpretation and application of section 35 of the Constitution Act, 1982. The history of residential schools is the backdrop against which the constitutional interpretation of the status and protection of Aboriginal languages, both under section 35 and in light of other fundamental constitutional principles, must be measured. If foundational principles of our constitution are to be upheld, the dramatic failure of past governments to live up to them must have consequences in the present. If the constitution is to serve its role of reconciling the sovereignty of the Crown with the prior claims of Aboriginal peoples, and ensure the legitimacy of the state, then a robust interpretation of the constitutional status of Aboriginal languages is needed that takes these past failings into account. This requires recognizing that section 35 imposes an ongoing constitutional duty on the Crown to preserve, protect and promote Aboriginal languages. Such an interpretation is not uncontroversial, of course. But it is one that can be defended by reference to several fundamental constitutional principles which guide the interpretation of the section. In the following sections, I will look at these important constitutional principles in turn and argue that each one of them weighs in favour of a constitutional duty of Canadian governments to protect Aboriginal languages. I shall then proceed to examine the scope of that constitutional duty. First, and perhaps most importantly, is the fundamental interpretive principle of the honour of the Crown and the related concept of the Crown’s special fiduciary relationship with Aboriginal peoples.
5.2.2 The Honour of the Crown and Its Fiduciary Duty towards Aboriginal Peoples

In its seminal decision in *Guerin v The Queen*, the Supreme Court recognized the special fiduciary duty of the Crown in its dealings with Aboriginal peoples. This duty has been described by Chief Justice McLachlin as “an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation”. This fiduciary duty arises from the *sui generis* relationship of Aboriginal peoples to the Crown. As the court noted in *Sparrow*, “[T]he Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.”

Similarly, in *R v Badger*, Justice Cory suggested that “the honour of the Crown is always at stake in dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown.” The honour of the Crown underlies the process of reconciliation mandated by section 35 of the Constitution Act, 1982. Chief Justice McLachlin notes that the “process of reconciliation flows from the Crown’s duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people”. The principle of the honour of the Crown is fundamental to a proper understanding of section 35. “Section 35 represents a promise of rights recognition .... It is a corollary of s. 35 that

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84 [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin* cited to SCR].
85 “In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians” (*Ibid* at 376, Dickson J (as he then was)).
87 *R v Sparrow*, [1990] 1 SCR 1075 at 1108, 70 DLR (4th) 385, Dickson CJC and La Forest J [*Sparrow*].
89 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32, [2004] 3 SCR 511, 245 DLR (4th) 33 [*Haida Nation*].
the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests.\textsuperscript{90}

In its recent decision in the \textit{Manitoba Metis} case,\textsuperscript{91} the Supreme Court delineated the doctrine of the honour of the Crown in great detail. The Court noted that the principle of the honour of the Crown “is not a cause of action itself; rather, it speaks to \textit{how} obligations that attract it must be fulfilled”.\textsuperscript{92} The Court reviewed the situations in which the honour of the Crown may come into play, and emphasized that “the duty that flows from the honour of the Crown varies with the situation in which it is engaged. What constitutes honourable conduct will vary with the circumstances”.\textsuperscript{93} At the highest level, where the Crown assumes discretionary control over a specific Aboriginal interest, the honour of the Crown gives rise to the fiduciary duty outlined in \textit{Guerin};\textsuperscript{94} it is engaged in treaty making and treaty implementation; it requires the Crown to “act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples”; and it “informs the purposive interpretation of s. 35 of the \textit{Constitution Act, 1982}, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest”.\textsuperscript{95} The interpretative role of the principle was reiterated by the Court, which emphasized that “the honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation”.\textsuperscript{96}

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\textsuperscript{90} \textit{Ibid} at para 20.
\textsuperscript{91} \textit{Manitoba Metis Federation v Canada (Attorney General)}, 2013 SCC 14, [2013] 1 SCR 623 [\textit{Manitoba Metis}].
\textsuperscript{92} \textit{Ibid}, at para. 73 (McLachlin CJ and Karakatsanis J).
\textsuperscript{93} \textit{Ibid}, at para. 74.
\textsuperscript{95} \textit{Ibid}.
\textsuperscript{96} \textit{Ibid} at para. 77.
The two doctrines are not equivalent, and important differences arise in their application.\textsuperscript{97} But both are fundamental constitutional principles, and are central to the purposive interpretation of section 35. As Timothy McCabe puts it,

Both the doctrine of the honour of the Crown and the fiduciary principle have been created or developed by the Supreme Court of Canada primarily so that s. 35(1) of the \textit{Constitution Act, 1982} may achieve its purpose—reconciliation of the aboriginal societies of Canada with the sovereignty of the Crown and the broader Canadian society. Accordingly, both can be aptly called constitutional law doctrines.\textsuperscript{98}

The doctrines form a bridge, as it were, between a distinctly dishonourable past, where the relationship between the Canadian state and Aboriginal peoples was most certainly adversarial rather than trust-like, and a renewed relationship that can only come from meaningful reconciliation.

At this point, it is important to make a clear distinction in my use of the fiduciary principle in particular as an interpretive principle, and its use to ground direct claims against the Crown. As the Supreme Court made clear in the \textit{Manitoba Metis} case, there remains a high threshold for an Aboriginal claimant to make out a breach of fiduciary duty on the part of the Crown. That is not to suggest that such an argument could not be made successfully, as I explore below, but there would be significant obstacles to such a claim. But even if a discrete breach of the fiduciary duty cannot be shown, the interpretive potential of the Crown’s special fiduciary relationship with Aboriginal peoples is not thereby exhausted; much less that of the honour of the Crown. In other words, I am not arguing that the history of residential schools and assimilationist policies grounds a claim for breach of fiduciary duty on the part of the Crown.

\textsuperscript{97} “The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty” (\textit{Haida Nation, supra} note 89 at para 18); see also J Timothy S McCabe, \textit{The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples} (Markham, Ont: LexisNexis, 2008) at 58–62.

\textsuperscript{98} \textit{Ibid} at 62 [footnotes omitted].
Although I find such an argument plausible, as I discuss below, my main focus is elsewhere. It is in recognizing the interpretive force of these two fundamental principles governing the relationship of the Crown to Aboriginal peoples in the interpretation of section 35—a role which has been many times reaffirmed by the courts. Before turning to my main purpose of constitutional interpretation, however, it is worth pausing to consider whether, in fact, the actions taken by the Crown in the last two centuries, now recognized by many as cultural genocide, amount to a breach of the fiduciary duty to Aboriginal peoples and ground claims against the Crown. This kind of claim may have been by and large rendered moot by the Indian Residential Schools settlement. Nonetheless, and in spite of the many difficulties involved in making such a claim, I believe that a plausible argument can be made that the fiduciary duty was indeed breached.

_Breach of the Fiduciary Duty_

While courts have not pronounced definitively in favour of such a claim, they have not rejected it outright either. Rather, courts have generally alluded to the complex factual background of such claims to avoid deciding them. While there are no doubt a number of factual complexities involved, as well as important issues of legality, morality, and historical interpretation, there is also no doubt that the TRC has now made the factual record much clearer than it has ever been. The paradox is that the TRC is itself the product of a settlement agreement which in large part precluded consideration of these claims on their merits. Nevertheless, it is worth examining a few instances where courts have commented on the possibility of a claim for breach of fiduciary duty.
In *Blackwater v Plint*, the Supreme Court declined to resolve the issue of the breach of fiduciary duty towards Aboriginal peoples in relation to the operation of the residential school system, but did acknowledge the possibility. Chief Justice McLachlin made note of “the argument that the system of residential schools robbed Indian children of their communities, culture and support and placed them in environments of abuse. This, it is argued, amounted to dishonest and disloyal conduct that violated the government’s fiduciary duty to Canada’s Aboriginal peoples.” The court noted that the argument had not been raised in the courts below, and so refused to consider it on grounds of procedural unfairness.

Similarly, the Ontario Court of Appeal, in *Bonaparte v Canada*, reversed a motions court judge’s decision to strike out the portion of a statement of claim dealing with the government of Canada’s fiduciary duty to Aboriginal peoples in relation to the operation of residential schools. The court disagreed with the motions judge’s conclusion that the duty could not apply to succeeding generations of Aboriginal people whose aboriginal right to their language and culture was denied them by government policy (referred to in the case as the “secondary plaintiffs”). It noted:

In this respect, we agree with the motions judge’s conclusion that, with the implementation of the “residential school policy”, the federal Crown “assumed a duty to act in a fiduciary capacity with respect to the education of aboriginal

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100 *Ibid* at para 61.
102 (2003), 64 OR (3d) 1, [2003] 2 CNLR 43 (available on CanLII).
103 The court described the argument as follows:

The secondary plaintiffs claim damages for breach of fiduciary duty. Their claim against the federal government is based on the allegation that … it owed them, as the generational descendants of the primary plaintiffs, a duty to act as a protector of their aboriginal rights, including the protection and preservation of their language, culture, and their way of life. They allege that, by reason of the application of government policy, they have been deprived of the full benefit of the transmission of their Indian culture from their parents, the primary plaintiffs, and they have been denied the opportunity to achieve a full and normal family, social, and economic life, as has been afforded to other Canadians, and as would have been the case except for the application of the policy (*ibid* at para 7).
peoples.” However, in the factual context of this case, we do not agree with his further conclusion that it is plain and obvious that the fiduciary duty did not extend to the secondary plaintiffs simply on the basis that they were not yet in existence at the time. This ignores the essence of the secondary plaintiffs’ claim. They allege that the very purpose of the Crown’s assumption of control over the primary plaintiffs was to strip the Indian children of their culture and identity, thereby removing, as and when they became adults, their ability “to pass on to succeeding generations the spiritual, cultural and behavioural bases of their people.” Hence, the secondary plaintiffs claim that they were specifically targeted by the governmental policy. They further allege that they were profoundly and adversely affected as a result. 104

The court concluded that, in the circumstances of the case, it was not appropriate “to determine in summary fashion whether the fiduciary duty extended to the secondary plaintiffs without the benefit of an evidentiary record”. 105 The case was eventually settled as part of the Indian Residential Schools Settlement Agreement. 106

These cases show that the courts were, if not fully willing to entertain a properly pleaded claim for breach of fiduciary duty relating to the residential school system, certainly not prepared to dismiss it outright. The fact that much of the litigation surrounding residential schools has now been settled through the Indian Residential Schools Settlement Agreement means that the issue has yet to be resolved.

The argument made in Bonaparte is compelling, but there are a number of problematic issues that must be resolved if it is to be successful. First are the important restrictions to the fiduciary principle noted by Justice Binnie in Wewaykum Indian Band v Canada. These include that “the fiduciary duty does not exist at large but in relation to specific Indian interests” and that the Crown must have “assumed discretionary control in relation thereto sufficient to ground a

104 Ibid at para 35.
105 Ibid at para 36.
106 Brown v Canada (Attorney General), 2010 ONSC 3095 at para 144, 102 OR (3d) 493, [2010] 3 CNLR 41; in a subsequent decision in the Brown case (dealing with certification of a class action regarding the “Sixties Scoop”), Belobaba J. of the Ontario Superior Court of Justice similarly noted that the issue of a fiduciary duty of the federal Crown towards “scooped” children could not be ruled out: see Brown v Canada (Attorney General), 2013 ONSC 5637 at para. 44.
fiduciary obligation”; and the caveat that “fiduciary protection accorded to Crown dealings with aboriginal interests in land has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of section 35(1) of the Constitution Act, 1982”\textsuperscript{107} would not find application here for two reasons. First, because as the underlined passage just quoted notes the decision in \textit{Wewaykum} related to a matter outside the scope of section 35, as I discuss below.\textsuperscript{108} And secondly, there is little doubt that the federal government “had assumed discretionary control in relation” to the residential school system “sufficient to ground a fiduciary obligation”.\textsuperscript{109} As John Milloy notes: “Essentially, the residential school system was a creature of the federal government even though the children in the schools were, in most cases, in the immediate care of the churches.”\textsuperscript{110} These two factors render the limitations in \textit{Wewaykum} inapplicable in interpreting the scope of the fiduciary duty under section 35.

Further developments to the concept of both the honour of the Crown and the fiduciary duty were made in \textit{Manitoba Metis Federation Inc. v. Canada}.\textsuperscript{111} In that case, the court noted two ways in which a breach of the fiduciary duty owed to Aboriginal peoples could be established. The first is where government assumes discretionary control over a specific or cognizable Aboriginal interest, as already noted in \textit{Wewaykum}.\textsuperscript{112} The second is where a fiduciary duty is established on the basis of an undertaking by the Crown, which requires:

(1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary’s control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands

\textsuperscript{107} \textit{Wewaykum}, supra note 94 at para. 81, 83, [2002] 4 SCR 245, 220 DLR (4th) 1 [emphasis added]; the court reiterated the first of these limits in \textit{Manitoba Metis, supra} note 91 at paras. 46–50.

\textsuperscript{108} \textit{Ibid} at para 3.

\textsuperscript{109} \textit{Ibid} at para 83.

\textsuperscript{110} \textit{Supra} note 49 at xiii.

\textsuperscript{111} \textit{Supra} note 91.

\textsuperscript{112} \textit{Ibid.} at para. 51.
to be adversely affected by the alleged fiduciary’s exercise of discretion or control.  

In the context of the Crown’s constitutional obligations to the Métis, the Court decided that the factors needed to establish a fiduciary duty had not been met under either category. Once again, the interest at stake here was land, but it is worth noting that while the test was framed in 

*Manitoba Metis* as relating specifically to interests in land, Justice Binnie in *Wewaykum* left open the question of whether the fiduciary duty could apply to interests other than land within the context of section 35(1).  

Aboriginal language rights being firmly entrenched in the “core” of recognized Aboriginal rights, it would seem, a priori, that they could form a specific or cognizable Aboriginal interest within the meaning of the test. This would be in keeping with Justice Binnie’s broad description of the source of the fiduciary duty: “The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples.”

The question would then become whether the Crown undertook discretionary control of the identified Aboriginal interest. It cannot be said that the Crown ever undertook to regulate the use of Aboriginal languages outside of the Indian Residential Schools. Within the residential school system, however, it has been well established that language eradication was an explicit goal of the curriculum, and indeed was a central element of the overarching policy goal of “killing the Indian in the child”. The assumption of discretionary control over language or language use follows from the assumption of discretionary control over the education of Aboriginal children in ways which excluded—and were intended to exclude—all other sources of learning and even socializing. It seems, then, that so long as Aboriginal interests other than

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114 *Wewaykum*, *supra* note 94 at para. 81.
interests in land, in the context of section 35(1), are indeed sufficient to ground a fiduciary duty under the first category, the breach of this duty might well be established by putting forward the conduct of the Crown in the implementation and management of the Indian Residential School policy.

One could also argue that a claim could be made out in considering the second category, where a fiduciary duty is predicated on an undertaking by the Crown. Can it be said the Crown undertook to act in the best interests of Aboriginal peoples in taking discretionary control over all aspects of Aboriginal children’s education? Can it further be said that in doing so, the Crown demonstrated “a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake”?116 As a preliminary matter, it should be noted that the “undertaking” in the Manitoba Metis case, had it been found to exist, was dependent on a statute (and moreover, one that is constitutionally entrenched). While one might argue that explicit wording is required to establish such an undertaking, the Court in Elder Advocates specifically noted that the undertaking could “be found in the relationship between the parties” as well by express agreement or statute.117 There does not appear to be any reason why such an undertaking could not be read into the actions of the Crown vis-à-vis Aboriginal peoples in the context of the residential school policy.

But proving an implied undertaking may be a high burden. In the context of the Manitoba Metis case, the Court found that the Crown’s undertaking to distribute lands did not contain an implicit promise to act only in the best interests of Métis children in allocating lands:

While s. 31 shows an intention to benefit the Métis children, it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns, such as ensuring land was available for the construction of

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117 Ibid. at para. 32.
the railway and opening Manitoba for broader settlement. Indeed, the discretion
conferred by s. 31 to determine “such mode and on such conditions as to
settlement and otherwise” belies a duty of loyalty and an intention to act in the
best interests of the beneficiary, forsaking all other interests.\footnote{118}

I suggest that the Court’s reasoning here must be interpreted in light of its identification of
“legitimate concerns”, such as ensuring that land was available for broader settlement and for the
construction of the railway. In other words, the Court sees the Crown’s role in this situation as
that of balancing competing interests, since the Crown is no “ordinary fiduciary”, but “wears
many hats” and must seek to balance the rights and interests of Aboriginal peoples with the
interests of broader society.\footnote{119} Thus, where “legitimate concerns” outweigh, or at least balance,
the competing interests of Aboriginal peoples, the Crown is not required to make the latter
paramount. Its fiduciary obligation to Aboriginal peoples, being of a \textit{sui generis} nature, allows it
flexibility in serving the interests of broader society. But should this be the case even in the
absence of legitimate competing concerns? What if the competing interest is precisely that of
limiting an Aboriginal right or denying Aboriginal interests? Could such an interpretation allow
the Crown to shirk its fiduciary duty precisely on the basis of a refusal on its part to acknowledge
Aboriginal rights or interests and their importance? It seems that an assumption of discretionary
control over a significant aspect of Aboriginal peoples’ lives—such as the establishment of the
residential school system—under colour of seeking the ultimate best interests of Aboriginal
peoples themselves, should be a sufficient undertaking to ground a fiduciary duty. It would seem
to be a perversion of the doctrine—or a cynical nod to the dictates of realpolitik—to allow the
Crown in such a case to limit its fiduciary duty on the basis that it did not, in fact, seek the best
interests of the peoples concerned. This view is in line with the Supreme Court’s recent decision

\footnote{118 \textit{Manitoba Metis}, \textit{supra} note 91 at para. 62.}
\footnote{119 \textit{Wewaykum}, \textit{supra} note 94 at para. 96.}
in the *Tsilhqot’in* case, where Chief Justice McLachlin noted that “to constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective”.¹²⁰ Unless the balancing of competing interests serves the purpose of furthering reconciliation, it cannot serve as a pretext for the Crown to abandon its constitutional duty.

But while it may seem logical that the Crown could not shirk its duty by arguing that it was acting against the best interests of Aboriginal peoples, could it plead that, at the time, it was in good faith acting in what it thought was the best interests of Aboriginal peoples? Leaving aside the well-documented pervasive apathy and cynicism which infused the project of residential schools from the beginning,¹²¹ can one argue that a sincere desire to benefit Aboriginal people was at the root of the project? Such a question involves complex questions of law, morality, and historical analysis. Even though we may now recognize the entire residential school project as one of cultural genocide, there is much evidence that nineteenth-century Canadians saw this “civilizing mission” as a duty, one being carried on for the ultimate benefit of Aboriginal peoples.¹²² But even assuming the immorality of the project from the outset, can it be said to have been in any way illegal at the time? There is little doubt that while much of the operation of the residential schools was a matter of policy—one carried out primarily through the vehicle of independent churches—this policy was carried out under the authority of the Department of Indian Affairs and authorized by statute, as haphazard as this legal framework may have been.¹²³ Did it contravene fundamental constitutional principles such as the honour of

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¹²¹ See e.g. TRC, *History I*, supra note 58 at 197–245.
¹²² For a critical account of nineteenth-century missionaries’ motivations and worldview, see TRC, *History I*, *supra* note 58 at 25–38.
¹²³ On the legal foundations of the residential school system, see *ibid.*, at 151–67, 199–209.
the Crown, the principle of respect for and protection of minorities, and the rule of law? From today’s perspective, there are strong arguments to be made that these actions did just that. From the perspective of the non-Aboriginal public, and in particular Canadian courts, at the time, these actions may have seemed not only morally right, but legally unassailable.

The question of the legality of the policy goes to the heart of our conception of law. Indeed, from the Aboriginal perspective, even at the time, these actions did not reflect “law” at all, but were an exercise of brute force by the colonial power. The question of legality can only be answered in relation to a particular legal tradition or worldview. While there may be a strong argument to make that these actions were legal at the time in Euro-Canadian law, there is an equally strong argument to be made that they could not be from the perspective of Aboriginal legal traditions. If, as I argue below, our conception of the rule of law today must take into account the perspective of Aboriginal legal traditions, then we must be consistent in doing so for past actions as well. Otherwise, we are essentially refusing to acknowledge the importance, or even the presence, of Aboriginal legal orders at the time; we are saying that only Euro-Canadian law mattered or existed at the relevant time. If the honour of the Crown and the fundamental principles of respect for minorities and the rule of law truly are at the heart of our constitutional makeup, then it would seem illogical to deny that these fundamental principles were at play throughout our constitutional history, and can be called on to analyze the actions of the past.

But a further point can be made in favour of recognizing the fiduciary duty: that the breach complained of is an ongoing one, even though the actions which caused it occurred in the past. The longstanding effects of the residential school policy continue to harm Aboriginal people today; it is they, as noted in Bonaparte,¹²⁴ who suffer this harm; and it is this harm, today,

¹²⁴ See supra note 103 and accompanying text.
that is a breach of their fundamental constitutional rights. As noted by the Court in the *Manitoba Metis* case, such an “ongoing rift in the national fabric” must be remedied if “the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Constitution Act, 1982*” is to be achieved.\(^\text{125}\)

The *Manitoba Metis* case serves both as a guide and as a caution, since the Court in that case noted that a claim for breach of fiduciary duty would have been statute-barred.\(^\text{126}\) But this very fact highlights that a direct claim would not exhaust the power of the honour of the Crown. While I have been examining the interesting possibility of a direct claim of breach of fiduciary duty here, I am not relying on such a claim for my argument. Rather, I am suggesting that the true import of the principles of the honour of the Crown and its special fiduciary relationship with Aboriginal peoples lies in their interpretive force. The argument that precedes matters less as a direct cause of action, and more as context for the interpretation of section 35 and the need to interpret that section to mend the “rift in the national fabric” occasioned by the policies of cultural genocide carried out by the Crown in the last two centuries. As noted by the Court in the *Manitoba Metis* case, “[t]he unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import”.\(^\text{127}\) This is true for all Aboriginal peoples. The interpretation of the Constitution in a manner that furthers the ongoing goal of reconciliation is a primary duty for the courts, the “guardians of the Constitution”, and is required by “the principles of legality, constitutionality and the rule of law”.\(^\text{128}\) I turn now to a discussion of the role of the honour of the Crown, in particular, in the interpretation of section 35.

\(^\text{125}\) *Manitoba Metis*, supra note 91 at para. 140.


The Honour of the Crown and the Fiduciary Principle as Interpretive Guides

The relationship between the honour of the Crown and the fiduciary principle was clarified in *Manitoba Metis*. The Court expanded on the principle of the honour of the Crown, of which the fiduciary duty is but one manifestation. The majority cited the decision in *Haida Nation*, reiterating that the honour of the Crown “is not a mere incantation, but rather a core precept that finds its application in concrete practices”. The Court, however, also clarified that the honour of the Crown “is not a cause of action itself; rather, it speaks to how obligations that attract it must be fulfilled”. In dealing with Aboriginal language rights, we are in the realm of constitutionally protected rights, which clearly engage the honour of the Crown, both in the process of defining these rights, and that of possible legislative infringement of those rights.

The focus on the process of defining rights is important in this context: rights protected by section 35(1) cannot be defined in a way that would render them meaningless.

As noted above, the class-action lawsuits launched by several Aboriginal groups in relation to the residential school system were comprehensively settled. The settlement provided for compensation as well as the establishment of the Truth and Reconciliation Commission process. It remains to be seen to what extent this settlement represents an adequate attempt by the Crown to deal with its distinctly dishonourable conduct of the past. There are indications of governmental lack of co-operation with the process which call into question both the sincerity of the Crown in establishing a new relationship with Aboriginal peoples, and the ability of the

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129 *Haida Nation*, *supra* note 4 at para. 16.
130 *Manitoba Metis*, *supra* note at para. 73 [emphasis in original].
131 *Ibid.*, at para. 69; see also *Haida Nation*, *supra* note 4 at para. 20.

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settlement to address adequately the underlying fracture in Canadian and Aboriginal societies caused by the residential schools.

But while such a settlement may arguably exhaust direct causes of action against the Crown for past assimilative policies and thereby represent a limit on Crown liability, it does not exhaust the importance of the two fundamental principles of the honour of the Crown and its special fiduciary relationship with Aboriginal peoples. We know from the decision in Sparrow that the honour of the Crown and the fiduciary duty “ground a general guiding principle for s. 35(1)”\(^{133}\). It is through the application of these principles that the reconciliation sought in enacting the provision can be achieved. Given the particularly egregious breach of these principles by Canadian governments where Aboriginal languages are concerned, a robust interpretation and application of section 35 is needed to redress the imbalance in this area. A purposive interpretation of section 35 leads to the conclusion that Canadian governments—and most especially the federal government—have a constitutional duty to protect Aboriginal languages. That very argument was put forward by the Task Force on Aboriginal Languages and Cultures, which asserts precisely that the duty on all Canadian governments to protect Aboriginal languages flows from the principles of the honour of the Crown and the fiduciary duty enshrined in section 35:

The unique historical relationship between the Crown and the First Nation, Inuit and Métis peoples is fiduciary in nature. All Canadian governments acting in the name of the Crown therefore owe a duty of loyalty and protection to the First Peoples of Canada. … It is the duty of the entire federal, provincial or territorial government and cannot be delegated and must not be avoided.\(^{134}\)

\(^{133}\) Supra note 87 at 1108.

\(^{134}\) Task Force on Aboriginal Languages and Cultures, Towards a New Beginning: A Foundational Report for a Strategy to Revitalize First Nation, Inuit and Métis Languages and Cultures (Ottawa: Department of Canadian Heritage, 2005) at 27 [TFALC Report].
The task force reiterated that the federal government, especially, must accept responsibility for the protection of Aboriginal languages, and must do so at a general level. As it notes, “[T]he Crown obligation to protect our languages cannot be restricted to the Department of Canadian Heritage as is currently the case. It must be supported by, among others, key federal departments such as Justice, Indian Affairs and Northern Development, Health, Public Safety and Emergency Preparedness and by important federal agencies such as the Public Service Commission.”135 This would be consistent with the constitutionally protected status of Aboriginal languages.

While the principles of the honour of the Crown and the special fiduciary relationship to Aboriginal peoples stand at the very core of section 35 and articulate in a very special way the constitutional imperative of reconciliation, they are not the only principles relevant to a purposive interpretation of the section. As the Supreme Court has noted on several occasions, there are unwritten and underlying principles of the Canadian Constitution which both emerge from the written constitution and help with its interpretation. Two of these principles, in particular, are both inherent in our constitutional structure and vitally important to a proper interpretation of section 35(1): the principles of the rule of law and that of respect for and protection of minorities. I turn now to a discussion of the nature of the unwritten principles of the Constitution and their application to the interpretation of section 35.

135 Ibid at 28.
5.2.3 The Unwritten Principles of the Rule of Law and of Respect for and Protection of Minorities

The Nature of the Unwritten Principles

In Reference re Resolution to Amend the Constitution, the Supreme Court noted that “the phrases ‘Constitution of Canada’ and ‘Canadian Constitution’ … embrace the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state”. 136 This “certainly includes the constitutional texts enumerated in s. 52(2) of the Constitution Act, 1982”. 137 But as the court noted in the Secession Reference, “Although these texts have a primary place in determining constitutional rules, they are not exhaustive.” 138 Rather, “the Constitution embraces unwritten, as well as written rules”. 139 These unwritten rules are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. 140

The unwritten rules and principles of our constitution are a result of Canada’s peculiar constitutional history. As Chief Justice Lamer reminded us in the Provincial Judges Reference, “[G]iven that ours is a Constitution that has emerged from a constitutional order whose fundamental rules are not authoritatively set down in a single document, or a set of documents, it

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136 [1981] 1 SCR 753 at 874 (sub nom Reference re Amendment of the Constitution of Canada (Nos 1, 2 and 3)) 125 DLR (3d) 1 [Patriation Reference].
137 Secession Reference, supra note 12 at para 32.
138 Ibid.
140 Secession Reference, supra note 12 at para 32.
is of no surprise that our Constitution should retain some aspect of this legacy.”

The constitutional text itself can only be understood in the light of that history: “Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based.”

The unwritten principles and rules of the Canadian constitution “emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning”. In particular, they emerge from a contextual interpretation of the preamble of the Constitution Act, 1867, which expresses the desire of the federated colonies to adopt “a Constitution similar in Principle to that of the United Kingdom”. Thus the preamble “indicates that the legal and institutional structure of constitutional democracy in Canada should be similar to that of the legal regime out of which the Canadian Constitution emerged”. The preamble lays the foundations of our constitution, and expresses “the political theory which the Act embodies”, in the words of Justice Rand. It is in that sense a compendium of the entire constitution:

It recognizes and affirms the basic principles which are the very source of the substantive provisions of the Constitution Act, 1867. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to

141 Provincial Judges Reference, supra note 139 at para 92.
142 Secession Reference, supra note 12 at para 49.
143 Ibid at para 32.
144 Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, Preamble, reprinted in RSC 1985, App II, No 5. Mark Walters points out the problematic aspects of the historical argument:

The Court’s argument is, on its own terms, premised upon the proposition that, as a historical fact, a particular intent really did exist among the framers in 1867. As a defence of the democratic legitimacy of the Court’s use of supreme unwritten law in the review of legislation, the preamble argument will therefore fail if it turns out that it was not the “clear and stated intention of the founders of our country” that certain British constitutional norms be regarded as supreme and entrenched (“The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law” (2001) 51 UTLJ 91 at 103).

145 Provincial Judges Reference, supra note 139 at para 96.
146 Switzman v Elbling, [1957] SCR 285 at 306, 7 DLR (2d) 337 [Switzman].
construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.147

Thus the preamble has “important legal effects”.148 The principles it embodies “dictate major elements of the architecture of the Constitution itself and as such are its lifeblood”.149

The unwritten principles, then, are not merely vague aspirations. They “assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions”.150 The Supreme Court is clear about their effect: “The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.”151 They “may in certain circumstances give rise to substantive legal obligations”.152

This conception of the normative force of unwritten principles is certainly not without its critics, who claim that such a doctrine amounts to a judicial licence to reinvent the constitution.153 Nonetheless, the use of unwritten principles as sources of constitutional rights is nothing new in Canada. In his landmark introduction to the Canadian constitution in 1922, W.P.M. Kennedy noted simply that “[t]he Constitution of Canada is partly written and partly unwritten”, and that “the unwritten constitution includes all the great landmarks in British history in so far as they are working principles—Magna Carta, the Petition of Right, the Bill of Rights,

147 Provincial Judges Reference, supra note 139 at para 95 (Lamer CJ).
148 Ibid at para 94.
149 Secession Reference, supra note 12 at para 51.
150 Ibid at para 52.
151 Ibid at para 54.
152 Ibid.
the Habeas Corpus Acts, the Act of Settlement—as well as the generally recognized conventions and usages”. In his famous judgment in *Roncarelli v Duplessis*, Justice Rand spoke of the rule of law as “a fundamental postulate of our constitutional structure”, one imposing very real limitations on the powers of public officials. Similarly, in both *Saumur v City of Quebec* and *Switzman*, he suggested that fundamental rights implied by the preamble to the *Constitution Act, 1867* could be a check on legislation. As Mark Walters reminds us, this “implied Bill of Rights” was equally premised on the normative significance of the unwritten principles and underlying structures of the constitution. David Mullan points out the natural connection between Justice Rand’s judgments and the more recent Supreme Court decisions on unwritten principles. This is not to suggest that the two conceptions are equivalent. But, as Warren Newman notes, “[A] careful reading of the jurisprudence shows that they [the unwritten principles of the constitution] have always been with us, even if their role had never heretofore been quite as fully articulated and developed.”

Of course, recognizing the normative force of the unwritten principles and applying them to specific cases raises significant jurisprudential and practical challenges. But then, so does the interpretation and application of many of the written provisions of the constitution. The Supreme

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155 *Roncarelli v Duplessis*, [1959] SCR 122 at 142, 16 DLR (2d) 689 [Roncarelli].
157 *Switzman*, supra note 146; Justice Abbott went further, stating clearly that “Parliament itself could not abrogate” the right of free speech (ibid at 328).
158 “Legality as Reason: Dicey, Rand, and the Rule of Law” (2010) 55 McGill LJ 563 (“Rand was as concerned with implicit law as he was with explicit law. The ‘postulates’, ‘implied conditions’, ‘implication[s]’, ‘necessary implication[s]’, ‘corollaries’, ‘implicit’ rules and principles, and the ‘political theory’ behind the written texts of the constitution were, for Rand, as important as the written texts” at 576 [footnotes omitted]).
159 “Underlying Constitutional Principles: The Legacy of Justice Rand” (2010) 34:1 Man LJ 73 (“Indeed, he [Justice Rand] might not have been out of sympathy with the Court’s list of unwritten or underlying principles of the constitution, not only for the interpretation of text but as a basis for independent or free-standing constitutional claims” at 99).
160 “‘Grand Entrance Hall’, Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada” (2001) 14 Sup Ct LR 197 at 204.
Court’s decisions on the unwritten principles of the constitution have generated a great quantity of criticism and analysis, a thorough discussion of which is beyond the scope of this thesis. For our purposes, it will suffice to note that the doctrine expounded by the court in the *Secession Reference* can be defended on the basis of Canadian constitutional history and the court’s own past jurisprudence; that none of the four principles identified by the court can seriously be questioned as an underlying premise of our written constitution;¹⁶¹ and finally, as Warren Newman notes, that “by whatever route they may have entered, constitutional principles have taken up residence and are here to stay”.¹⁶² With this in mind, I turn now to a discussion of the principles most germane to the constitutional status of Aboriginal languages: the unwritten principles of the rule of law and of respect for and protection of minorities.

**The Rule of Law**

The preamble of the *Canadian Charter of Rights and Freedoms* states that Canada is founded upon principles that recognize the rule of law.¹⁶³ In the *Secession Reference*, the Supreme Court noted the importance of the rule of law and reiterated its status as “a fundamental postulate of our constitutional structure”.¹⁶⁴ According to the court, the rule of law comprises the following elements: (1) it “provides that the law is supreme over the acts of both government and private persons”;¹⁶⁵ (2) it “requires the creation and maintenance of an actual order of positive

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¹⁶¹ Mullan, supra note 159 (“[T]he Supreme Court of Canada’s identification of four underlying principles of the Canadian constitution in the *Secession Reference* was scarcely controversial, as a statement of at least some of those understandings or pillars on which our formal constitutional arrangements are built. It was both good political science and constitutional history” at 91).
¹⁶³ Charter, supra note 34, Preamble.
¹⁶⁴ *Secession Reference*, supra note 12 at para 70 (quoting Justice Rand in *Roncarelli*, supra note 155); the court mentioned the principle of the rule of law in conjunction with the principle of constitutionalism.
laws which preserves and embodies the more general principle of normative order”; and (3) it demands that “the exercise of all public power must find its ultimate source in a legal rule”; or in other words, that “the relationship between the state and the individual must be regulated by law”. The court noted that “[t]aken together, these three considerations make up a principle of profound constitutional and political significance”.

The last principle in particular, that every exercise of public power “must find its ultimate source in a legal rule”, relates to the legitimacy of the state and its authority and is particularly apt in this context. The legitimacy of the Canadian state and its exercise of public power, find their ultimate source, in relation to the Aboriginal peoples of Canada, in a bald assertion of sovereignty by the Crown over a vast territory, much of which had not even been seen by Europeans at the time. As Mark Walters notes, “[S]tate authorities that have inherited the mantle of power from colonial predecessors are simply not, in the sense demanded by the ideal of the rule of law, legal authorities in relation to indigenous peoples.” It is for this reason that upholding the rule of law as a constitutional principle requires more than the application of the positive legal order; it requires the constitutional reconciliation of this bold assertion of Crown sovereignty with the fact of pre-existing Aboriginal sovereignty, as noted by the Supreme Court in Van der Peet. It requires, again in Mark Walters’s words, “demonstrations of equal respect for entire peoples for whom the authority of law will only materialize as the process of political reconciliation does”. This process of political reconciliation, of relationship building, is a crucial element of the rule of law in all post-colonial societies. In the Canadian context, it

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166 Secession Reference, supra note 12 at para 71; quoting Manitoba Language Reference, supra note 165 at 749.
168 Secession Reference, supra note 12 at para 71.
169 Ibid.
170 Walters, supra note 1 at 189 [emphasis in original].
171 Van der Peet, supra note 2 at para 31.
172 Walters, supra note 1 at 189.
mandates the reconciliation of Aboriginal and non-Aboriginal interests, not only within the confines of section 35 of the *Constitution Act, 1982*, but as part of the very basis of the rule of law. This was recognized by the Ontario Court of Appeal in *Henco Industries Limited v Haudenosaunee Six Nations Confederacy Council*. 173 Justice Laskin, in varying the motions judge’s contempt order, noted that “the rule of law has many dimensions”174 and explicitly recognized as one of these dimensions the “reconciliation of Aboriginal and non-Aboriginal interests through negotiations”.175 Once again we find, at the heart of relations between Aboriginal peoples and the Canadian state, the constitutional imperative of reconciliation.

The reconciliation of Aboriginal and non-Aboriginal interests is not limited to negotiations over land claims. As a central element of the rule of law, a fundamental constitutional principle, it must enter into the interpretation and application of constitutional provisions, including section 35. The fundamental principle of the rule of law, the importance of which was reiterated in the preamble to the *Charter*, requires that Aboriginal rights be interpreted in a way that will allow a meaningful reconciliation of Aboriginal and non-Aboriginal interests. In the case of Aboriginal languages, there can be no meaningful reconciliation without an acknowledgment of the traumatic past, and a recognition of the damage done by government policies over the centuries. The “demonstrations of equal respect” to which Mark Walters refers must involve more than a token acknowledgment of Aboriginal languages and a promise no longer to pursue their destruction. If section 35 is to have any real meaning in regard to Aboriginal languages, if it is to fulfill its purpose of reconciliation and be consistent with the underlying principle of the rule of law, then it must provide for government action to

173 (2006), 82 OR (3d) 721, 277 DLR (4th) 274 [*Henco cited to OR*].
174 *Ibid* at para 141.
175 *Ibid* at para 142.
redress centuries of attempts to eradicate the languages and cultures of Canada’s First Peoples. This is especially clear when the principle of the rule of law is juxtaposed on the fiduciary duty of the Crown in dealing with Aboriginal peoples. Government disregard of Aboriginal interests, and indeed government attempts to destroy the very essence of Aboriginal society, were profound violations of both the Crown’s fiduciary duty and the rule of law that severely threaten the legitimacy of Canadian governments and the Canadian constitutional order. Taken together, these principles articulate in a strong way the constitutional demand for reconciliation. This demand can only be met by allowing constitutional space for the protection of Aboriginal languages in the form of a constitutional duty on Canadian governments to protect these languages. A narrower interpretation of section 35 would be inconsistent with these important principles of Canadian constitutional law. The interpretative force of the imperative of reconciliation is strengthened even more by another underlying principle of the Canadian constitution: the principle of respect for and protection of minorities, as set out by the Supreme Court in the Secession Reference and applied by the Ontario Court of Appeal in Lalonde. I turn now to that principle.

The Principle of Respect for and Protection of Minorities

In the Secession Reference, the Supreme Court made specific mention of four “fundamental and organizing principles of the Constitution”\(^{176}\) federalism, democracy, constitutionalism and the rule of law, and respect for (or protection of) minorities.\(^{177}\) The court

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\(^{176}\) Secession Reference, supra note 12 at para 32. The court was quite clear that “this enumeration is by no means exhaustive” (ibid); it also confirmed that “constitutional conventions and the workings of Parliament” are included among the unwritten principles (ibid).

\(^{177}\) Ibid. The court originally lists the principle as one of “respect for minorities”, but in its later discussion of the principle refers to the “protection of minorities” (ibid at paras 32, 79). The Ontario Court of Appeal in Lalonde v Ontario (Commission de restructuration des services de santé) (2001), 56 OR (3d) 505, 208 DLR (4th) 577 [Lalonde], refers to the principle as one of “respect for and protection of minorities” (ibid at para 111).
made clear that “[t]hese defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.” Nonetheless they can be seen as distinct underlying principles of the Canadian constitution. The principle of respect for and protection of minorities is the last of the four major principles discussed by the court in the Secession Reference (although it is important to emphasize that the list is not closed). There, the court suggested that “the protection of minority rights was clearly an essential consideration in the design of our constitutional structure”, and that “[t]he principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution”. The court further pointed out that this “concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the Charter”. As examples of this concern, the court refers to “specific constitutional provisions protecting minority language, religion and education rights”. These include section 93 of the Constitution Act, 1867 as well as sections 16 to 23 of the Charter. Finally, the court specifically refers to section 35 of the Constitution Act, 1982 as an instantiation of the principle.

The specific rights recognized through section 35(1) do not exhaust the application of the principle to Canada’s Aboriginal peoples. As the Ontario Court of Appeal noted in Lalonde, “The principle of respect for and protection of minorities is a fundamental structural feature of the Canadian Constitution that both explains and transcends the minority rights that are specifically guaranteed in the constitutional text.” The force of the principle is not limited to

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178 Secession Reference, supra note 12 at para 49.
179 Ibid at para 81.
180 Ibid.
181 Ibid.
182 Ibid at para 79.
183 Ibid at para 82.
184 Lalonde, supra note 177 at para 114 (Weiler and Sharpe JJA).
“specific guarantees in favour of minorities”; rather, as the court noted, “This structural feature of the Constitution … infuses the entire text, and … plays a vital role in shaping the content and contours of the Constitution’s other structural features ….”

The court in Lalonde was called upon to consider, in its own words, “the appropriate weight, value, and effect to be accorded to the respect for and protection of minorities as one of the fundamental principles of our Constitution”. It recognized as uncontroversial, given the past decisions of the Supreme Court, that the unwritten principles of the constitution have normative force, although they “do not confer on the judiciary a mandate to rewrite the Constitution’s text”. Rather, the unwritten principles grant rights that may not be explicitly set out in the constitutional text, but are nonetheless vital to our constitutional order:

Although not expressly stated by the Constitution’s text, such rights are immanent in the text when it is understood and interpreted in a proper and complete legal, historical, and political context. When used in this way, the unwritten or organizing principles allow the courts to unlock the full meaning of the Constitution and to flesh out its terms ….

The court also confirmed the important and uncontroversial role of the unwritten principles “as aids to interpretation or otherwise to assist in the resolution of constitutional issues”. The court noted specifically that “the Constitution’s structural principle of respect for and protection of minorities is a bedrock principle that has a direct bearing on the interpretation” of the legislation in the case, and indeed of all legislation. This function of the unwritten principles is of central importance in the case of Aboriginal languages. Section 35 of the Constitution Act, 1982 is an embodiment of the general principle of respect for and protection

185 Ibid at para 114.
186 Ibid at para 115.
187 Ibid at para 116, 121.
188 Ibid at para 118.
189 Ibid, quoting Elliott, supra note 153 at 83???
190 Ibid at para 125.
of minorities, and can only be understood in light of this principle. Moreover, the principle is important in assessing government action, which in turn is crucial to determining the requirements of the reconciliation process mandated by both section 35 and the rule of law. In Lalonde, the court noted that “Fundamental constitutional values have normative legal force. … [T]he values of the Constitution must be considered in assessing the validity or legality of actions taken by government. This is a long-established principle of our law.”191 When government action towards Aboriginal languages and cultures is evaluated in light of the bedrock principle of respect for and protection of minorities, the extent of the Crown’s failure to live up to fundamental constitutional values becomes all too painfully obvious. As minority groups “who look to the Constitution of Canada for the protection of their rights”,192 Aboriginal peoples have faced centuries of government attempts to eradicate their languages. There would be no value to the principle of respect for and protection of minorities if its normative content were exhausted in simply preventing governments from now finishing the task. In the absence of the recognition of a constitutional duty incumbent on all levels of government to protect and promote Aboriginal languages, the recognition of this longstanding “bedrock principle” of the Canadian constitution, as it relates to Canada’s Aboriginal peoples, would amount to little more than empty words.

**The Nature of Linguistic Rights and Supreme Court Jurisprudence**

In a recent article, Gabriel Poliquin argues that a positive obligation to promote Aboriginal languages may be grounded in the very nature of linguistic rights as interpreted and applied in recent Supreme Court jurisprudence. Citing recent cases where the Supreme Court

192 *Secession Reference*, supra note 12 at para 96.
appears to recognize linguistic rights as fundamental rights, Poliquin argues that the very nature of linguistic rights, as intended to redress a situation of historical inequality, combined with a liberal and purposive interpretation of section 35, leads to the conclusion that the guarantee of linguistic rights implies a government obligation to act in order to fulfil the restorative, ameliorative purpose of the section: “Ainsi, les droits linguistiques, dans la mesure où ils poursuivent un objectif réparateur, entraînent une obligation positive de l'État de mettre en place des structures appropriées à des fins réparatrices.” Poliquin grounds this view on the Supreme Court’s jurisprudence interpreting both section 23 of the Charter and section 530 of the Criminal Code. Both of these sections were found to have an ameliorative purpose, and both were found to imply some required state action in order to have any meaningful content. To the extent, then, that language rights require state action to be meaningfully exercisable, such a duty may be independent of any consideration of the special relationship between the Crown and Aboriginal peoples.

It is, however, questionable whether such a direct link between language rights in general and Aboriginal language rights can be made in light of the unique nature of Aboriginal language rights. As noted, while official language rights derive from explicit statutory or constitutional provisions, Aboriginal language rights find their source in the recognition of the pre-existing

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195 Ibid. at 590.
197 Indeed, Poliquin goes on to examine the special fiduciary relationship and Canada’s international obligations as additional sources of a governmental duty to act to protect Aboriginal languages: see Poliquin, supra note 194 at 593–605.
rights of Canada’s first inhabitants and the need to reconcile these rights with the state’s assertion of sovereignty over Aboriginal peoples. In addition, while the scope of official language rights is generally precisely circumscribed by explicit legislative provisions, that is not the case with Aboriginal language rights. This would necessarily impact the content of the right, and the nature of the government obligation. For example, it may well follow from the fact that an accused may choose to be tried in the language of his or her choice, under section 530 of the Criminal Code, that there is a corresponding obligation on government to provide the means to exercise this right, failing which it would be utterly devoid of meaning. But while this may be implied, it nonetheless provides a concrete limit on the nature of the government obligation: the requirement to provide the means to exercise the precise recognized right. In the case of Aboriginal language rights, the scope of the right is not precisely defined, and so the nature of the governmental obligation is necessarily ill-defined.

Nevertheless, where Aboriginal language rights can be defined under section 35(1), the nature of the precise rights recognized may well imply a governmental duty to provide the means to exercise this right. Such a limited obligation, however, should be distinguished from the overarching duty to preserve and promote Aboriginal languages which flows from the constitutional imperative of reconciliation. In any event, it is worthwhile noting that Supreme Court jurisprudence on language rights does not oppose, and indeed may well support, the imposition of a constitutional duty to promote Aboriginal languages.

It is clear from the foregoing discussion that a constitutional duty to promote Aboriginal languages can be grounded on fundamental principles of Canadian constitutional law. These principles are sufficient to come to the conclusion that a purposive interpretation of section 35 requires the Crown to take action to preserve and promote Aboriginal languages. This conclusion
is reinforced, however, by international agreements which Canada has endorsed. In the next section, I suggest that the imposition of a constitutional duty is consonant with Canada’s international commitments, especially under the United Nations Declaration on the Rights of Indigenous Peoples, which Canada endorsed in November 2010.

5.2.4 The United Nations Declaration on the Rights of Indigenous Peoples

In September 2007, the General Assembly of the United Nations adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).\(^{198}\) There were four votes against the declaration: Australia, New Zealand, the United States, and Canada.\(^{199}\) All four countries have since relented and endorsed the declaration: Australia in 2009,\(^{200}\) New Zealand in April 2010,\(^{201}\) Canada in November 2010,\(^{202}\) and the United States in December 2010.\(^{203}\)

UNDRIP has now been universally endorsed. Its effect is only beginning to be felt. While dissenting governments have emphasized that the declaration is “non-legally binding”\(^ {204} \), UNDRIP is, in the words of one commentator, “a solemn, comprehensive and authoritative response of the international community of States to the claims of indigenous peoples, with which maximum compliance is expected. Some of the rights stated therein may already form part of customary international law, others may become the fons et origo of later-emerging customary

\(^{198}\) Supra note 13.

\(^{199}\) There were also eleven abstentions; see “Declaration on the Rights of Indigenous Peoples”, United Nations Permanent Forum on Indigenous Issues, <social.un.org/index/IndigenousPeoples.aspx>. The voting record may be consulted at <unbisnet.un.org/#voterecords>.


\(^{204}\) See Canada’s declaration of support, supra note 202; and the US announcement of support, supra note 203.
international law.”205 Indeed, UNDRIP’s importance in setting international norms was emphasized by the decision of the Inter-American Court of Human Rights in the case of *Saramaka People v Suriname*, in which it specifically referred to article 32(2) of the declaration, relating to the duty to consult, in interpreting the American Convention on Human Rights.206 It is assumed that as more Indigenous peoples bring their claims in international, regional, and national courts and tribunals, the impact of the declaration on customary international law as well as the domestic law of various states will only increase. The important role of UNDRIP as a landmark document in establishing international norms for the rights of Indigenous peoples worldwide makes it particularly valuable in assisting in the interpretation of constitutional and legislative provisions of Canadian domestic law, particularly now that Canada has signalled its approval of the declaration.

In *Baker v Canada (Minister of Citizenship and Immigration)*,207 the Supreme Court of Canada noted the “important role of international human rights law as an aid in interpreting domestic law”.208 It confirmed that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation”.209 The court also reiterated that international human rights law is “a critical influence on the interpretation of the scope of the rights included in the Charter”.210 This point is worth emphasizing, since it highlights the even greater interpretative weight to be accorded to international norms when construing rights-bearing instruments and particularly constitutional provisions.

206 Case of the Saramaka People v Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 28 November 2007, Series C No. 172 at para 131, online: <www.corteidh.or.cr> [Saramaka People Case].
208 Ibid at para 70 (L’Heureux-Dubé J).
209 Ibid.
210 Ibid.
UNDRIP is undoubtedly an important part of international human rights law, and has the overwhelming approval of the world’s states including, since November 2010, that of Canada. Its provisions should guide the interpretation and application of domestic law, even if it does not supersede domestic law. The Federal Court of Canada recognized this in its recent decision in Canada (Human Rights Commission) v. Canada (Attorney General).211 The court acknowledged the importance of UNDRIP as both a potential source of international customary law and as an international obligation of Canada’s which should be weighed in interpreting and applying domestic legislation, in this case the Canadian Human Rights Act.212 The decision was recently upheld in the Federal Court of Appeal.213

The Truth and Reconciliation Commission of Canada, in its findings, has pointed to the United Nations Declaration on the Rights of Indigenous Peoples as constituting “a framework for reconciliation in Canada” and noted its conviction “that the United Nations Declaration provides the necessary principles, norms, and standards for reconciliation to flourish in twenty-first-century Canada”.214 It described its “reconciliation framework” as “one in which Canada’s political and legal systems, educational and religious institutions, the corporate sector and civic society function in ways that are consistent with the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples, which Canada has endorsed”.215 As the Commission points out, meaningful reconciliation, in the spirit of “establishing and maintaining respectful relationships”,216 can only be achieved through the recognition of that which was

211 2012 FC 445 (available on CanLII) [Child Welfare Case].
212 Ibid at para 350-355 (Mactavish J); Canadian Human Rights Act, RSC 1985, c H-6.
213 2013 FCA 75.
214 TRC Final Report Summary, supra note 9 at 20.
215 Ibid.
216 Ibid.
denied: the worth and self-determination rights of Indigenous peoples. Healing must be accomplished “in ways that revitalize individuals as well as Indigenous cultures, languages, spirituality, laws, and governance systems”. It adds that “[f]or governments, building a respectful relationship involves dismantling a centuries-old political and bureaucratic culture in which, all too often, policies and programs are still based on failed notions of assimilation”.

Direct enforceability of UNDRIP in Canadian courts may not be possible; it is, however, uncontroversial that the principles enunciated in UNDRIP—and now endorsed by Canada—are principles which reinforce the longstanding domestic constitutional principles examined above, and which require a change in the relationship between the Canadian state and Indigenous peoples. Canada’s international commitments thus add further weight to the constitutional imperative of reconciliation.

Among the articles that are relevant to the issue of language in UNDRIP are the following:

Article 5, guaranteeing the right of Indigenous peoples “to maintain and strengthen their distinct political, legal, economic, social and cultural institutions”. This provision could not only have an impact on the interpretation of any right of self-government under section 35(1), but it could also directly impact the interpretation of language rights under that section, to the extent that language is—and depends on—a cultural institution.

Article 7(2), which sets out the right to be free of any “act of violence, including forcibly removing children of the group to another group”.

Article 8, stating that “[i]ndigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture”; and obliging states to provide

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217 Ibid.
218 Ibid. at 20–21.
“effective mechanisms for prevention of, and redress for” such state policies as, among others, any action “which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities” and “[a]ny form of forced assimilation or integration”. The mention of redress here is very important. Obviously, the article is directed at preventing any such actions in the future, but it is also aimed at ensuring that past instances of such actions are adequately redressed. This would be a vital component of any interpretation of section 35 which would seek to place a duty on government to protect Aboriginal languages, since part of the rationale for doing so is the past policy of forced assimilation.

Article 13, which protects the right of Indigenous peoples to “revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons”; and also mandates that states shall “ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings”. Once again, this article could have a significant impact on the scope of language rights under section 35. The right to use a language is illusory if the conditions for using that language are not present, or if they have been rendered nearly impossible by past government policy and action.

Article 14, which provides for the right of Indigenous peoples “to establish and control their educational systems and institutions providing education in their own languages” and requires states to take effective measures to provide children with access to “an education in their own culture and provided in their own language”. This again puts the onus on the state to support transmission of Indigenous languages and cultures, while emphasizing the need for Indigenous control over cultural institutions. In the context of section 35 language rights, both of these elements would be necessary to give meaningful scope to the right to Aboriginal languages.
Among other articles that might affect a purposive interpretation of Aboriginal rights under section 35 are Article 16, which provides the right of Indigenous peoples to “establish their own media in their own languages” and requires states to “take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity”; Article 31, which provides for the right of Indigenous peoples to “maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions”; and article 39, which provides that “[i]ndigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration”.219

Even this cursory glance at the declaration shows that it should have a significant impact on the interpretation and application of section 35 of the Constitution Act, 1982 as it relates to Aboriginal languages. In particular, Article 8 of the declaration sets out a conception of Indigenous rights at international law which accords with the Canadian constitutional mandate of reconciliation. Article 8 reinforces the centrality of reparation and reconciliation in upholding the rights of the world’s Indigenous peoples, and makes it clear that meaningful redress is an important right itself, which must be considered in the interpretation and application of other rights, in the same way that the constitutional imperative of reconciliation always colours the interpretation of Aboriginal rights under the Canadian constitution. There is no question that the federal government’s Indian Residential School System constituted an act of “forced assimilation or integration” under article 8. (It is arguable that it also constituted an act of forcible removal of children under article 7(2).) The question then becomes what constitutes effective redress for those actions. It should be noted that the evaluation of the adequacy of government responses to

219 UNDRIP, supra note 13.
the trauma of the residential school system has been found to be outside the mandate of the TRC.\textsuperscript{220} The Canadian government has provided financial redress in the form of the Common Experience Payment payable to former students,\textsuperscript{221} and has set up the Truth and Reconciliation Commission of Canada, whose mandate was introduced as follows:

There is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future. The truth telling and reconciliation process as part of an overall holistic and comprehensive response to the Indian Residential School legacy is a sincere indication and acknowledgement of the injustices and harms experienced by Aboriginal people and the need for continued healing. This is a profound commitment to establishing new relationships embedded in mutual recognition and respect that will forge a brighter future. The truth of our common experiences will help set our spirits free and pave the way to reconciliation.\textsuperscript{222}

While these are appropriate gestures, they do not exhaust the need for reconciliation in the relationship between the Canadian state and Aboriginal peoples. In particular, they do not address the place of reconciliation as a constitutional imperative and the necessary work of constitutional reconciliation. That work can only be done within the framework of section 35 of the Constitution Act, 1982, through an interpretation of that section which is consonant with Canada’s commitments at international law as set out in UNDRIP, and with longstanding principles of Canadian constitutional law.

5.2.5 Conclusion

Throughout Canadian constitutional law, there can be found the theme of reconciliation. The need for reconciliation grows out of Canada’s colonial past, and the invasion and appropriation of what is now Canada by European settlers over the course of the last four

\textsuperscript{220} See Fontaine v Canada (Attorney General), 2013 ONSC 684, 114 OR (3d) 263.
\textsuperscript{221} See Indian Residential Schools Settlement Agreement (8 May 2006), arts 5.01-02, online: <www.residentialschoolsettlement.ca/settlement.html>.
\textsuperscript{222} Mandate for the Truth and Reconciliation Commission, Schedule N to the Indian Residential School Settlement Agreement, \textit{ibid.}. 
centuries. The resulting assertion of sovereignty by the Crown must now be reconciled with the legitimate pre-existing sovereignty of Aboriginal peoples; in the words of Mark Walters, the de facto sovereignty of the Canadian state must be made de jure.223

The need for reconciliation is all the more pressing, in the area of Aboriginal languages and cultures, because of the past actions of the Canadian state. For the last two hundred years, Canadian governments have led an all-out assault on Aboriginal languages and cultures, and enforced policies whose explicit goal was the destruction of Indigenous identity. These policies are largely responsible for the critical state of Aboriginal languages in Canada today. In light of the damage inflicted by these deliberate policies, the demands of reconciliation are more than a simple acknowledgement of wrongdoing and a promise to do better. True reconciliation demands full recognition of the pre-existing language rights of Aboriginal peoples and reparation for the disregard of those rights in Canada’s past. It demands action on the part of the Canadian state. It demands space in our constitutional order for the legitimate rights of Aboriginal peoples.

The constitutional imperative of reconciliation finds expression in many facets of the Canadian constitution. It is at the heart of section 35 of the Constitution Act, 1982, which guarantees the existing Aboriginal and treaty rights of Canada’s Aboriginal peoples. It lies at the root of the central doctrines of the intersocietal body of law which governs relations between the state and Aboriginal peoples: the honour of the Crown and its fiduciary duty towards Aboriginal peoples. It also infuses such fundamental constitutional principles as the rule of law and respect for and protection of minorities. Finally, the constitutional imperative of reconciliation is also consonant with Canada’s international obligations under the United Nations Declaration on the Rights of Indigenous Peoples, which also evidences the development of international practice—

223 See Van der Peet, supra note 2; Walters, supra note 1.
perhaps even normative practice—relating to the reconciliation of the claims of states with those of the world’s Indigenous peoples. All of these factors together militate in favour of a purposive interpretation of section 35 in which the recognition of Aboriginal rights truly serves to bring about a reconciliation of the claims of the Canadian state with those of Aboriginal peoples. This deeper reconciliation can only exist if adequate reparation is provided for deliberate wrongs inflicted on Aboriginal peoples in the past. Thus a purposive interpretation of section 35, taking into account important principles of Canadian constitutional law as well as Canada’s obligations in international law, leads to the conclusion that government action is needed to protect and promote Aboriginal languages. Any other interpretation of the protection afforded these languages by section 35 would essentially condone the centuries of destruction wrought by deliberate government policy.

We are led to the conclusion that there is a constitutional duty upon Canadian governments to protect and promote Aboriginal languages. Of course, the duty falls primarily on the federal government, given not only the constitutional grant of authority under section 91(24) of the Constitution Act, 1867224 (which, it is worth emphasizing, now includes Inuit and Métis peoples225) but its central role in the enactment and carrying out of assimilative policies. But the duty might also apply to provincial governments in appropriate circumstances. In the following section, I will attempt to delineate in general terms the scope of the constitutional duty to protect and promote Aboriginal languages.

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224 Constitution Act, 1867, supra note 144, s 91(24).
225 Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12 [Daniels].
5.3 The Scope of the Constitutional Duty

Since the origin of the duty lies in the imperative of reconciliation and the need to redress centuries of assimilative policies, it could be argued that the scope of the duty is defined by what is necessary to achieve reconciliation and sustain the process of reversing the loss of language among Aboriginal people. A good idea of what should be included within the ambit of the duty can be obtained by looking at the recent findings of the Truth and Reconciliation Commission. Among the ninety-four calls to action made by the Commission in its recent report, six major recommendations directly related to language. Under the heading “Language and Culture”, the Commission made five principal suggestions. The first was a call for the federal government to recognize “that Aboriginal rights include Aboriginal language rights”. This would ensure that Aboriginal languages have the full protection of section 35 of the Constitution Act, 1982, and would serve as formal recognition of the constitutional status of Aboriginal languages. Second, the Commission called on the federal government to enact an Aboriginal Languages Act. According to the Commission, this statute should incorporate the principles that “Aboriginal languages are a fundamental and valued element of Canadian culture and society” and that “there is an urgency to preserve them”; that “Aboriginal language rights are reinforced by the Treaties”; that “the federal government has a responsibility to provide sufficient funds for Aboriginal-language revitalization and preservation”; that “the preservation, revitalization, and strengthening of Aboriginal languages and cultures are best managed by Aboriginal people and communities”; and that “funding for Aboriginal language initiatives must reflect the diversity

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226 TRC Calls to Action, supra note 79 at 2, no. 13.
227 Ibid. at 2, no. 14.
228 A point which is in line with the principles enunciated in Mahe v. Alberta, [1990] 1 SCR 342, and subsequent cases with regard to official-language minority education systems.
of Aboriginal languages”. Largely, these principles reflect the constitutional status of Aboriginal languages: recognizing Aboriginal languages as a “fundamental … element of Canadian culture and society”; noting the languages’ connection with the Treaties, themselves a fundamental part, as I argue in Chapter 6, of the Canadian constitutional order; and invoking the federal government’s responsibility, under section 91(24) of the Constitution Act, 1867, to fund the preservation of Aboriginal languages, amounts to enshrining these languages in the constitution. They also point directly to the scope of the duty: that of providing Aboriginal peoples with the means to regain control of their linguistic futures, both legally and financially.

The Commission also recommended the appointment of an Aboriginal Languages Commissioner in consultation with Aboriginal groups. According to the Commission, “[t]he commissioner should help promote Aboriginal languages and report on the adequacy of federal funding of Aboriginal-languages initiatives”. This role would be similar to that of the Commissioner of Official Languages and the similar positions in the Northwest Territories and Nunavut.

Finally, the Commission recommended that post-secondary institutions should “create university and college degree and diploma programs in Aboriginal languages”, a recommendation which would necessarily depend on the extent of government funding (federal and provincial).

In many ways, the recommendations made by the Truth and Reconciliation Commission echo those made ten years earlier by the Task Force on Indigenous Languages and Cultures (TFALC), assembled by the Department of Canadian Heritage. The recommendations of that report were all but ignored. It remains to be seen whether strong public support for the Truth and

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229 TRC Calls to Action, supra note 79 at 2, nos. 14(i) to (v).
230 Ibid. at 2, no. 15.
231 Note however, the important omission of any principle recognizing the right to government services in an Aboriginal language. The absence of such a legislated right would greatly diminish the scope of the Aboriginal Languages Commissioner’s role.
232 That report had called unequivocally for recognition of “the constitutional status of our [Aboriginal] languages” (TFALC Report, supra note 134 at ix).
Reconciliation Commission’s calls to action will translate into meaningful government action.\(^{233}\) The crux of the issue will necessarily be the adequacy of funding for revitalization efforts, but also the status of Aboriginal languages.\(^{234}\) Costs associated with these measures are often cited as a reason for government reluctance to act in this area.

Measuring the adequacy of funding for revitalization efforts might indeed be a fraught endeavour. Tensions will necessarily arise not only with other constituencies in Canada who have a claim to government funding, but among Aboriginal groups themselves. All Aboriginal languages in Canada are not in the same situation, as we saw in Chapter 2. Funding for revitalization and promotion of these languages will have to be fiscally accountable, but also, as the Truth and Reconciliation Commission noted, “reflect the diversity of Aboriginal languages”\(^{235}\) and their very different circumstances. This will be a delicate balance to achieve.

The Commission’s recommendation to appoint an Aboriginal Languages Commissioner to “report on the adequacy of federal funding for Aboriginal-languages initiatives”\(^{236}\) may be the wisest course, provided such a commissioner is perceived as truly independent and is given the means, both legal and financial, to make useful findings and to have his or her recommendations followed by the federal government. The details of the position would have a great impact on its effectiveness. Ultimately, any such commissioner would have to consult extensively with

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\(^{233}\) According to a recent Angus Reid Institute poll, 7 out of 10 Canadians agree with the Commission’s characterization of the residential school system as “cultural genocide”, and there is strong support for many of the Commission’s recommendations; however, 43 percent of Canadians believe that the government will take less restorative action than it should (“Truth and Reconciliation Commission: Canadians see value in report, skeptical government will act”, CBC News (9 July 2015), online: <www.cbc.ca/news/aboriginal/truth-and-reconciliation-canadians-see-value-in-report-skeptical-government-will-act-1.3144271>.

\(^{234}\) The Assembly of First Nations has called on the federal government to make all Aboriginal languages official (Gloria Galloway, “AFN asks Ottawa to declare all aboriginal languages official”, The Globe and Mail (8 July 2015), online: <www.theglobeandmail.com/news/politics/afn-asks-ottawa-to-declare-all-aboriginal-languages-official/article25378218/>.

\(^{235}\) Supra note 229 and accompanying text.

\(^{236}\) TRC Calls to Action, supra note 79 at 2, no. 15.
Aboriginal groups to determine both an adequate funding formula, as well as meaningful measures of the effectiveness of funded programs. While it is impossible to describe the details of such a funding arrangement in the abstract, it seems plain that the process used to arrive at a final determination will be of the greatest importance, and may ultimately matter more than the particular level of funding achieved for any individual language.

Similarly, the cost of providing government services in Aboriginal languages is often cited as a reason to be wary of making these languages official. This argument, however, remains unconvincing, especially in Canada, where there is long experience with this issue in the context of the official languages regime.

Government services in both official languages are guaranteed by section 20(1) of the Charter, which provides as follows:

> Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where
> 
> (a) there is a significant demand for communications with and services from that office in such language; or
> 
> (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French. 237

This explicit constitutional guarantee is not available to Aboriginal languages, although there is a right to receive services in Aboriginal languages in Nunavut and the Northwest Territories, couched in much the same terms as the federal guarantee. 238

Limiting the provision of government services to those languages which have a sufficient number of speakers may seem like an unseemly ratification of the status quo, if not a perversion of the imperative of reconciliation—the more effective government assimilative policies were

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237 Charter, *supra* note 34, s 20(1).
238 See *Official Languages Act*, RSNWT 1988, c O-1, s 11(2)-(3); *Official Languages Act*, SNu 2008, c 10, s 12(1)-(8).
towards a particular group, the fewer rights this group obtains—but there are ways to manoeuver around this limitation. In Nunavut, for example, the *Official Languages Act* provides that services shall be offered based on “significant demand” or “reasonableness” but that “in the event of special concern about language loss or assimilation”, provision of services in a language may be required on the grounds that it is “likely to have a revitalizing impact on or promote the use of the language indigenous to the affected area or group”.239

If one considers that there are over sixty Aboriginal languages spoken in Canada today,240 it might be reasonable to suggest that the scarcity of government resources dictates a limit to the accommodation of Aboriginal languages in the provision of government services. A modified standard of reasonableness might serve better here than one of “significant demand”. Provided that the reasonableness standard takes into account the historical context and the current situation of a particular Aboriginal language, it might well suggest practical limits to the provision of services which would serve to economize scarce resources. For example, while a federal government office in Halifax might well be constitutionally required to provide services in Mi’kmaq, one in Vancouver might not. A modified standard of reasonableness would allow room for decisions to be made as to the allocation of scarce resources while rejecting, or at least tempering, the “significant demand” standard.241 A direct standard of significant demand is inappropriate in the case of Aboriginal languages because it would allow the government to enshrine a status quo that is largely of its own making; it would, in other words, complete the

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239 *Ibid* s 12(5).
241 A commonly used threshold in the case of the official languages is the figure of 5%; see the Official Languages (Communications with and Services to the Public) Regulations, SOR/92-48; *Doucet v Canada*, 2004 FC 1444, [2005] 1 FCR 671.
work of centuries of assimilative policies, which are the primary cause of the lack of demand for these services.

Making Aboriginal languages official would no doubt come at a certain cost, but it is a cost which can be managed, and which is outweighed by the symbolic benefits of conferring a higher status on these languages. One good example of recognition of Indigenous languages in a constitutional context can be found in the South African constitution: section 3(b) provides that the national and provincial governments “may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned” (this, it should be noted, involves a much more nuanced analysis than the significant demand standard); while section 4 reaffirms that “all official languages must enjoy parity of esteem and must be treated equitably”. Such an approach might well serve as an example of the kind of flexibility that may be required in dealing with the constitutional status of Aboriginal languages.

5.3.1 Enforcing the Duty

Assuming, then, that there is a constitutional duty on the Crown to protect and promote Aboriginal languages, and that its scope can be meaningfully defined, how is it to be enforced? I have argued that the duty can be found in a purposive and context-sensitive interpretation of section 35 of the Constitution Act, 1982, supported by fundamental principles of Canadian constitutional law. This leads to the conclusion that failure to abide by this duty would be unconstitutional according to section 52(1) of the Constitution Act, 1982. The fact that the duty is

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a corollary of the protection afforded to Aboriginal languages under section 35(1), however, raises a number of issues.

First, could the duty be enforced by a representative organization such as the Assembly of First Nations or Congress of Aboriginal Peoples? This is likely to depend on the kind of remedy being sought in the particular case. Large representative organizations could only enforce the duty in a broad, overarching sense, as a duty to all Aboriginal languages, as opposed to the individual claims of infringement of rights which could be brought only by the individual rights-holders, however defined. But these organizations might well be better suited to obtaining such a declaration than individual groups of rights holders. In this regard, both the Manitoba Metis case and the Daniels case are instructive. In Manitoba Metis, the Court granted standing to the Manitoba Metis Federation on the basis that rather than a series of actions seeking individual relief, the Métis claim was “a collective claim for declaratory relief for the purposes of reconciliation between the descendants of the Métis people of the Red River Valley and Canada”. The Court reasoned that “[t]his collective claim merits allowing the body representing the collective Métis interest to come before the Court”. This was so even though individual Métis rights holders were also claiming on the basis of individual entitlements under the Manitoba Act. Similarly, in Daniels, the Congress of Aboriginal Peoples acted as the main driving force behind the litigation and was a plaintiff and appellant/respondent at all stages of the proceedings.

243 See the discussion in Chapter 4, above, regarding the definition of the rights-holding groups.
244 Manitoba Metis, supra note 91; Daniels, supra note 225.
245 Manitoba Metis, supra note 91, at para. 44.
246 Ibid.
247 Ibid., at para. 41.
In both cases, the relief sought was declaratory. This brings up another issue: would a declaration of non-compliance with the constitutional duty to protect and promote Aboriginal languages be obtainable? The test for obtaining declaratory relief was recently restated in Canada (Prime Minister) v. Khadr, as involving three elements: (1) the court must have jurisdiction over the issue at bar; (2) the question before the court is real and not theoretical; and (3) the person raising it has a real interest in raising it. The Court in that case also stressed that a declaration of unconstitutionality is a discretionary remedy. That being the case, it seems likely that all of the elements could be met when dealing with the duty to protect and promote Aboriginal languages: since the issue would be the interpretation of section 35 of the Constitution Act, 1982, ordinary courts would have jurisdiction over the issue—there would be no difficulties here, since the courts’ role in constitutional interpretation is of course fundamental. The second element might seem to present more difficulty; however, once a duty is established as part of the interpretation of section 35, the issue of the Crown’s compliance with this duty is no longer theoretical. There may be challenges in deciding how to measure Crown compliance with the duty, as I discuss below, but while this may make deciding the issue more complex, it does not make it any less real. Finally, there is the issue of the claimant’s interest in raising the issue. This would, of course, be easily met were representatives of particular linguistic communities to seek such a declaration in regard to their own communities. It may present somewhat more of a challenge where a representative organization seeks to raise the issue. It is likely, however, that this question would be resolved in a similar manner to the Manitoba Metis case. The collective interest of Aboriginal peoples in Canada in having the Crown meet its duty towards Aboriginal languages would suggest that the issue could be

250 Ibid.
properly raised by a large representative group. The difficulty, of course, would be attempting to assess the Crown’s compliance on a general level. A court may be reluctant, for example, to grant a declaration covering the entire range of Aboriginal languages in Canada, without examining programs aimed at specific languages but not at others. In other words, it could be possible for the Crown to be complying in its duty towards some Aboriginal languages but not others; in such a case, a court may not wish to issue a blanket declaration covering all Aboriginal languages.

This brings us, of course, to the limits of such a declaration. They are usually unaccompanied by more robust remedies. Courts are sensitive to respecting the separation of powers and are unlikely to require specific actions from governments, especially where these would involve policy considerations and the spending of public money, as would be the case here. There may be little immediate effect on the Crown of obtaining such a remedy, but its force lies elsewhere, as has recently been demonstrated by the *Manitoba Metis* and *Daniels* cases. The Manitoba Metis Federation and the federal government recently signed a Memorandum of Understanding prompted by the Supreme Court’s decision in the case. 251 And the *Daniels* decision was widely recognized for its symbolic impact, prompting Prime Minister Trudeau to state that the decision would have “broad consequences and impacts”. 252 Ultimately, the purpose of obtaining such a declaration is not to involve the courts in directing the minutiae of implementation, but rather to provide an impetus for negotiation, and a strengthened starting point for those negotiations for the Aboriginal peoples involved. In the end, negotiation between Aboriginal peoples and the Crown is the only means of allowing these peoples to fully exercise

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their right of self-determination in relation to their linguistic rights, and implement the self-government necessary to achieve their goals of linguistic and cultural independence. It bears restating that acknowledging that the Crown has a duty to protect and promote Aboriginal languages is not the same as suggesting that the Crown should be in control of efforts to protect and promote these languages. Ultimately, it is only Aboriginal peoples themselves who can collectively determine their cultural and linguistic goals. They have the right to do so, and the Crown has a duty to support them in the exercise of this right.

5.4 CONCLUSION

The legitimacy of the Canadian state, and of its constitutional order, is endangered unless it comes to terms with the historical fact that it is based on an assertion of authority over vast territories in denial of the sovereignty of the Indigenous peoples living in those territories. Reconciliation of those pre-existing and continuing rights which are inherent to Indigenous sovereignty with the reality of Canadian authority is not an easy task. But it is a necessary one if we wish to transform what the Supreme Court has called “de facto control”\textsuperscript{253} into legitimate, de jure authority. This is the ultimate source of the constitutional imperative of reconciliation.

That imperative of reconciliation is enmeshed within our constitutional structure, and finds expression in a multitude of ways. First, through the constitutional recognition afforded to Aboriginal and treaty rights under section 35(1) of the Constitution Act, 1982, and the fundamental principles which provide meaning to that section: the longstanding principles of the honour of the Crown, and the special fiduciary relationship between the Crown and Aboriginal peoples. The imperative of reconciliation is also reinforced by fundamental underlying principles of our Constitution, of which section 35 is but one illustration: the fundamental principles of the

\textsuperscript{253} Haida Nation, supra note 4 at para. 32.
rule of law and respect for and protection of minorities. Finally, the imperative of reconciliation is informed by Canada’s international commitments to uphold the rights of Indigenous peoples, as recently exemplified in the United Nations Declaration on the Rights of Indigenous Peoples.

When the constitutional imperative of reconciliation is juxtaposed to Canada’s history of attempts to destroy the reality of Aboriginal languages and cultures—an effort recently characterized as cultural genocide—it leads to the conclusion that reconciliation, in constitutional terms, demands more than the simple recognition of Aboriginal languages as Aboriginal rights and a promise of future non-interference by governments, important as those elements are. Longstanding and fundamental principles of constitutional law demand meaningful redress for past actions. The constitutional imperative cannot be exhausted by a simple court settlement, no matter how large or comprehensive. The very legitimacy of our constitutional order depends on recognizing the Crown’s ongoing duty to redress its past policies by recognizing the constitutional status of Aboriginal languages and assuming its duty to preserve, protect and promote them in the spirit of ongoing reconciliation. Only in this way can the recognition of Aboriginal language rights be given a truly liberal and purposive interpretation, one which will be meaningful to Aboriginal language speakers. Without a constitutional duty to preserve and promote Aboriginal languages, the promise of reconciliation first spoken of in Sparrow and given new urgency by the Truth and Reconciliation Commission would be a hollow promise indeed.
CHAPTER 6  ABORIGINAL LANGUAGES AND THE OFFICIAL LANGUAGES OF CANADA

6.2 OFFICIAL BILINGUALISM AND THE CONSTITUTIONAL STATUS OF ABORIGINAL LANGUAGES

6.2.1 Origins of Official Bilingualism

Canada has two official languages, English and French, whose status is now constitutionally enshrined in the Canadian Charter of Rights and Freedoms, 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.”¹ This provision protects the official status of English and French under the constitution, but it is not the origin of that status. English and French first became the official languages of Canada with the passage of the Official Languages Act of 1969.²

The Official Languages Act of 1969 was a reaction to the findings of the Royal Commission on Bilingualism and Biculturalism, co-chaired by André Laurendeau and A Davidson Dunton, which had been convened by Prime Minister Lester B Pearson “to inquire into and report upon the existing state of bilingualism and biculturalism in Canada and to recommend what steps should be taken to develop the Canadian Confederation on the basis of an equal partnership between the two founding races, taking into account the contribution made by the other ethnic groups to the cultural enrichment of Canada”.³ The commission, having found that

¹ Canadian Charter of Rights and Freedoms, s 16(1), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].
² SC 1969, c 54 [OLA 1969] (now replaced by the Official Languages Act, RSC 1985, c 31 (4th Supp) [OLA 1988]).
³ Terms of Reference of the Royal Commission on Bilingualism and Biculturalism, PC 1963-1106 (19 July 1963), reprinted in Report of the Royal Commission on Bilingualism and Biculturalism, vol 1 (Ottawa: Queen’s Printer,
equality “hardly exists between Canada’s two main language groups”, 4 recommended a series of measures including the adoption of official languages legislation, as it noted that “[o]fficial bilingualism—that is, the recognition of English and French as official languages—evolves from the sum of rights expressly guaranteed to English and French by laws protecting their use”. 5 The commission thus recommended the adoption of federal legislation in the form of an “Official Languages Act” which should form “[t]he keystone of any general programme of bilingualism in Canada” and which “should state certain basic principles concerning the rights and privileges of Canadians with respect to the use of French and English at the federal level”. 6 This recommendation was adopted by the government of Prime Minister Pierre Elliott Trudeau with the passage of the Official Languages Act on 9 July 1969, section 2 of which declared unequivocally: “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.” 7

While this was the first formal legislative recognition of official status for the two languages, the notion of Canada having two “official” languages was not new in 1969. As the Royal Commission on Bilingualism and Biculturalism pointed out, before 1969 the term “official” was used in relation to the two languages in a more restricted sense: “Indeed, the term ‘official’ is used for institutions affected by the B.N.A. Act, especially the federal and Quebec Parliaments, statutes, and courts. Thus it is often said, ‘Quebec is the only officially bilingual

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4 Ibid at xlii (para 74).
5 Ibid at 74 (para 214).
6 Ibid at 138 (para 429), 139 (para 431).
7 OLA 1989, supra note 2, s 2; cf. Charter, s 16(1), supra note 1 and accompanying text.
province’ because it is the only province mentioned in section 133 of the Constitution.” But section 133 of the BNA Act provided only a narrow form of official bilingualism. As noted by the Supreme Court:

Section 133 has not introduced a comprehensive scheme or system of official bilingualism, even potentially, but a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism at the option of the speaker in Parliamentary debates and at the option of the speaker, writer or issuer in judicial proceedings or processes. 

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8 B & B Comm. Report, supra note 3 at 74 (para 214). This statement reflects the state of things in 1967. New Brunswick is currently the only province whose official bilingualism is fully constitutionally protected (see Charter, supra note 1, ss 16(2), 16.1, 17(2), 18(2), 19(2), 20(2) and Official Languages Act, SNB 2002, c O-0.5, which replaced the previous Official Languages of New Brunswick Act, RSNB 1973, c O-1, first enacted as SNB 1969, c 14) while a limited form of “official” bilingualism is constitutionally required in Quebec and Manitoba: the mandatory nature of s 133 of the Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 (formerly known as the British North America Act, 1867) was confirmed in Attorney General of Quebec v Blaikie et al, [1979] 2 SCR 1016, 101 DLR (3d) 394 [Blaikie No 1] and Attorney General of Quebec v Blaikie et al, [1981] 1 SCR 312, 123 DLR (3d) 15 (“Blaikie No 2”), in which the attempt of the Quebec legislature to make French the sole official language of Quebec by adopting the Charter of the French language (“Bill 101”), SQ 1977, c 5, ss 7–13, was found unconstitutional. The equivalent of s 133 in s 23 of the Manitoba Act, 1870, 33 Vict, c 3, constitutionally entrenched by the Constitution Act, 1871 (UK), 34–35 Vict, c 28, was also found mandatory in Re Manitoba Language Rights, [1985] 1 SCR 721, 19 DLR (4th) 1, invalidating a similar attempt by the legislature of Manitoba in the late nineteenth century to make English the sole official language of the province (An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba, SM 1890, c 14), and thereby rendering all unilingual legislation enacted since 1890 invalid. A similar provision in the North-West Territories Act, RSC 1886, c 50, s 110, was not constitutionally entrenched (R v Mercure, [1988] 1 SCR 234, 48 DLR (4th) 1; R v Paquette, [1990] 2 SCR 1103, [1990] 6 WWR 577) and was repealed by both Saskatchewan (The Language Act, SS 1988–89, c L-6.1) and Alberta (Languages Act, SA 1988, c L-7.5), with unilingual legislation made retroactively valid. A fresh challenge to this legislation was successful in the Alberta Provincial Court (R v Caron, 2008 ABPC 232, [2008] 12 WWR 675) but overturned on appeal to the Court of Queen’s Bench (R v Caron, 2009 ABQB 745, [2010] 8 WWR 318); a further appeal to the Court of Appeal was dismissed (see R v Caron, 2014 ABCA 71, [2014] 6 WWR 74); and finally, the legislation was upheld in Caron v Alberta, 2015 SCC 56, [2015] 3 SCR 511.

9 Now known as the Constitution Act, 1867, supra note 8; Section 133 reads as follows:
Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

10 MacDonald v City of Montreal, [1986] 1 SCR 460 at 496, 27 DLR (4th) 321 (Beetz J) [MacDonald].
The provision was further narrowly interpreted in the courts to provide very limited rights to speakers of either language.\(^\text{11}\) The section’s “limited concern with language rights”\(^\text{12}\) reflected the very rudimentary state of “official” bilingualism prior to 1969. French did not appear on Canadian postage stamps until 1927, and on bank notes until 1936.\(^\text{13}\) The Supreme Court did not uniformly provide bilingual judgments until 1970.\(^\text{14}\) Even the workings of Parliament, while nominally bilingual, reflected the inequality of the two languages: the equal authority of both language versions of statutes was not firmly established until 1935,\(^\text{15}\) and simultaneous translation was provided in the House of Commons beginning only in 1959, making questionable the effective use of French in federal parliamentary debates prior to that time.\(^\text{16}\) The inequality of the two languages was perhaps most tellingly exemplified in the very fabric of the country’s constitution: the text of the BNA Act, as an Imperial statute, was official in English only, and remains so today.\(^\text{17}\)

But imperfect as it was, this limited form of official bilingualism reflected a longstanding conception of Canada as a country of two languages. This is one emanation of the “duality” of Canada, a view of the country which, while it has not always been uncritically accepted, is

\(^{11}\) See Jones v AG of New Brunswick (1974), [1975] 2 SCR 182, 45 DLR (3d) 583 [Jones]; Blaikie No 1, supra note 8; Bilodeau v AG (Man), [1986] 1 SCR 449, 27 DLR (4th) 39; MacDonald, supra note 10; Société des Acadiens v Association of Parents, [1986] 1 SCR 549, 27 DLR (4th) 406. This restrictive interpretation was questioned by the court in R v Beaulac, [1999] 1 SCR 768, 173 DLR (4th) 193.

\(^{12}\) Jones, supra note 11 at 193.


\(^{14}\) Compare the 1969 volume of the Supreme Court Reports with the 1970 volume; see also Peter H Russell, The Supreme Court of Canada as a Bilingual and Bicultural Institution (Ottawa: Queen’s Printer, 1969).


\(^{16}\) David Hoffmann and Norman Ward, Bilingualism and Biculturalism in the Canadian House of Commons (Ottawa: Queen’s Printer, 1970) at 5–12.

\(^{17}\) As are all other constitutional acts adopted by the UK Parliament, with the exception of the Canada Act 1982, supra note 1 (which includes the Constitution Act, 1982): see Hugo Choquette, “Translating the Constitution Act, 1867: A Critique” (2011) 36:2 Queen’s LJ 503.
nonetheless firmly established in our collective psyche. As Joseph Magnet puts it, “[D]uality pervades Canada’s constitution in multifaceted forms. Duality determines the specific colouring of the legal system, educational system, culture, religious instruction, operation of government and provision of government services. … Duality is the ghost in the constitutional machine, omnipresent in all Canadian constitutional discussions.” This duality does not rest on the current or even past demographic realities of Canada’s two main language groups; in other words, Canada is not a bilingual country because of the relative numerical strength of English and French speakers. Rather, the special status of English and French is linked to the “nineteenth century political compromises between English and French communities which made Canadian Confederation possible”, or in the words of the Laurendeau–Dunton Commission, “the undisputed role played by Canadians of French and British origin in 1867, and long before Confederation”. This was the basis of the commission’s terms of reference: they referred to an “equal partnership between the two founding races”. The phrase was already archaic in 1963, and elicited a considerable amount of controversy, as evidenced by the commission’s efforts in its report to dispel misconceptions about its mandate.

But this phrase reflects a vision of Canadian duality which has a long history. In its language, it harkens back to the Durham Report of 1839, with its famous depiction of “two

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20 Magnet, *supra* note 18 at 92.
23 *Ibid* at xxii-xxv (paras 4–15); the French version contained the more modern term “peuples”.

217
nations warring in the bosom of a single state … a struggle not of principles, but of races”.24 These two “races” (the term is used in its nineteenth-century meaning of “[a] tribe, nation, or people, regarded as of common stock”)25, according to this theory, reached a compromise in 1867 which enabled their relatively peaceful co-existence. This agreement formed the necessary basis of Confederation. Viewed through this lens, then, Confederation is to be regarded primarily not as the union of four separate colonies but as a pact between two national groups. The process of constitutional interpretation must accordingly occur within this perspective.

This dual conception of Confederation has particularly deep roots in Quebec. Sir George-Étienne Cartier had declared in 1865 that “British and French Canadians alike could appreciate and understand their position relative to each other. They were placed like great families beside each other, and their contact produced a healthy spirit of emulation.”26 In 1886, Sir Wilfrid Laurier, in language reminiscent of the image of the Two-Row Wampum, poetically described this vision of the country:

Below the island of Montreal the water that comes from the north from Ottawa unites with the waters that come from the western lakes, but uniting they do not mix. There they run parallel, separate, distinguishable, and yet are one stream, flowing within the same banks, the mighty St. Lawrence, and rolling on toward the sea bearing the commerce of a nation upon its bosom—a perfect image of our nation. We may not assimilate, we may not blend, but for all that we are the component parts of the same country.27

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27 Ulric Barthe, ed, *Wilfrid Laurier on the Platform, 1871–1890* (Quebec: Turcotte & Ménard, 1890) at 310–11. The Two-Row Wampum or *Kaswenta* is a famous wampum (seashell bead) belt recording an agreement originally made between Dutch settlers and the Haudenosaunee people, which later came to be seen as the basis of the series of treaties known as the Covenant Chain. The symbolism of the belt lay in its depiction of two vessels sailing down parallel streams, with peace and friendship between them, but never touching.
Henri Bourassa, its most famous exponent, expressed it concisely in a speech in 1912: “The basis of confederation is the duality of races, the duality of languages, guaranteed by the equality of rights.” For Bourassa, this duality was fundamental to the existence of Confederation, and far from dividing national loyalties, was the sole basis of true Canadian patriotism: “Our nationalism is Canadian nationalism founded on the duality of races and on the particular traditions which accompany this duality. We are working for the development of Canadian patriotism, which in our eyes is the best guarantee of the existence of the two races and of the mutual respect they owe one another.”

This version of the “compact theory” of Confederation has not gone unchallenged. Donald Creighton, for example, vehemently denied the existence of any such agreement. “The case for Confederation as a bicultural compact”, he wrote, “is so completely imaginary that its advocates are prudently inclined to define it as an ‘extra-legal’, ‘implicit’, or ‘tacit’ agreement. If they were honest with themselves, and with the Canadian people … they would admit candidly that there is no evidence for their theory at all.” More temperately, Ramsay Cook agreed that “the most that can be said about Confederation is that, while it was clearly intended to meet the needs of both French and English Canadians, there was no detailed contract stating the conditions of the agreement”. But that is not exactly a denial of the duality of Confederation; of

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28 Henri Bourassa, “The Spirit of Confederation”, in Joseph Levitt, ed, Henri Bourassa on Imperialism and Bi-culturalism, 1900–1918 (Toronto: Copp Clark, 1970) 131 at 131, originally published as Pour la justice (Montreal, 1912) at 31 (La base de la confédération, c’est la dualité des races, la dualité des langues, garanties par l’égalité des droits.)

29 Henri Bourassa, “Canada: A Bi-Cultural Nation”, in Levitt, supra note 28, 107 at 107, originally published as “Réponse amicale à la ‘Vérité’”, Le Nationaliste, 3 April 1904 at [2] (Notre nationalisme à nous est le nationalisme canadien, fondé sur la dualité des races et sur les traditions particulières que cette dualité comporte. Nous travaillons au développement du patriotisme canadien, qui est à nos yeux la meilleure garantie de l’existence des deux races et du respect mutuel qu’elles se doivent.)


course, there was no detailed contract, no comprehensive statement of cultural accommodation, and the only explicit reference to language in the text of the Constitution Act, 1867, in section 133, was far from a bold statement of linguistic equality, as we have seen above. But some of the fundamental structures of the Canadian state, federalism in particular, can be ascribed to the need to accommodate both cultural groups. Without this fundamental need, it is likely that a simple legislative union would have been chosen. As Eugénie Brouillet points out, “La principale considération des Québécois et de leurs leaders politiques quant au schème proposé était l’adoption du principe fédératif comme fondement du nouveau système de gouvernement: c’était la condition sine qua non de leur adhésion à la nouvelle constitution et la garantie constitutionnelle de leur survie et de leur épanouissement comme peuple distinct.” In other words, without constitutional arrangements which, in the eyes of the French-Canadian Fathers of Confederation at least, would ensure the survival of French culture in North America and its place in the new country, there would have been no Confederation. It is in that sense that Confederation may be looked at as an arrangement between two main cultural groups.

Whatever the historical merits of the bicultural vision of Canada, it was explicitly adopted by the Pearson government in the terms of reference of the Laurendeau–Dunton commission. In Pearson’s own words, the commission was premised on the theory that “the Canadian foundation was essentially dual”. As mentioned above, the terms of reference mandated the commission “to recommend what steps should be taken to develop the Canadian Confederation on the basis of an equal partnership between the two founding races”. While the

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32 Eugénie Brouillet, La négation de la nation: L’identité culturelle québécoise et le fédéralisme canadien (Sillery, Que: Septentrion, 2005) at 149.
34 B & B Comm Report, supra note 3 at 173.
Commission itself did much to attempt to clarify misconceptions of its mandate as tied to ethnic origins, it did not—and given its mandate, could not—challenge the concept of dualism. Indeed, the Commission’s work did much to reinforce this vision of Canadian duality.

Of course, one could argue that the concept of founding people is problematic in and of itself, and thus should not be taken as the basis of a regime of official languages or any other policy, for that matter. Such an argument was made by some of the groups who submitted briefs to the Commission. There is certainly some merit to this line of argumentation. It is not an argument I need to contend with, however, since I am not making a normative argument in favour of the notion of founding people (or, for that matter, in favour of a scheme of official languages). What I am arguing, on the basis of the historical record, is that the concept of a dualistic founding is at the base of the official languages policy. In my view, this interpretation is amply borne out by the history of the official languages scheme.

It was on this basis that the *Official Languages Act* of 1969 was adopted. In the words of Minister of Justice John Turner, the *Official Languages Act* reflected “a fundamental premise that this country as we know it can survive only if we broaden our recognition of the two founding cultures and the two founding languages”.35 This was the basis of the Canadian official languages regime, which was constitutionally enshrined in 1982. Linguistic duality can now rightly be seen as “one of the fundamental features of the Canadian identity”.36 But its roots are unmistakably tied to a particular view of the foundation of the country and its constitutional history. It is a view that is flawed, however, since it fails to recognize the contributions of Aboriginal peoples to the making of Canada.

6.2.2 Aboriginal Peoples as Founding Peoples

The “dual” conception of Canada is a historical abstraction, one which ignores a fundamental part of our history: it ignores not only the very presence, but also the vital role played by Aboriginal peoples in the construction of Canada. It denies the fact that, in John Ralston Saul’s simple and eloquent phrase, “We are a Métis civilization.”

The Laurendeau–Dunton commission, in the language of the time, recognized this basic failing: “Our terms of reference contain no allusion to Canada’s native populations. They speak of ‘two founding races,’ namely Canadians of British and French origin, and ‘other ethnic groups,’ but mention neither the Indians nor the Eskimos.” The commission recognized that consideration of these two groups (the Métis were not even thought of) was beyond its remit, but nonetheless felt duty-bound
to remind the proper authorities that everything possible must be done to help the native populations preserve their cultural heritage, which is an essential part of the patrimony of all Canadians. The Commission also feels that the Canadian government, in close co-operation with the provinces concerned, should take the necessary steps to assist the survival of the Eskimo language and the most common Indian dialects.

While the language is dated and steeped in the vocabulary of colonialism, this statement nonetheless represents an important admission of the inadequacy of the vision of Canada proposed in the commission’s terms of reference. The commission charged with examining ways
“to develop the Canadian Confederation on the basis of an equal partnership between the two founding races” explicitly recognized that to pose the problem in this way was to ignore the fundamental contribution of Aboriginal peoples to the making of the country.

This theme would be taken up twenty-six years later by another Royal Commission, this one called specifically to examine the place of Aboriginal peoples in the Canadian Confederation in the wake of the Oka crisis of 1990. The Royal Commission on Aboriginal Peoples, in the first volume of its report, made the point that “the characterizations [of Canada] that predominate in public discourse and popular images—Canada as an association of two nations (French and English), Canada as a bilingual but multicultural country, Canada as a union of ten equal provinces, Canada as a single nation of free and equal persons—completely ignore or misrepresent the nature of the country from an Aboriginal perspective”. They ignore the fact that the true foundations of Canada were laid by prior agreements with Aboriginal peoples, without which the very idea of Confederation could not have existed. Canada exists because representatives of Aboriginal nations entered into solemn agreements with representatives of the British and French Crowns and with their successors, agreements that enabled Europeans and others to establish themselves in this country with minimal violence and confrontation. These agreements were and are the mechanism for affirming collective rights and obligations on both sides, for sharing the land and its resources, and for agreeing to live in harmony and partnership.

These are the very real bases upon which the modern state of Canada rests. As Saul points out:

It could be argued that the key moment in the creation of the idea of Canada was the gathering of thirteen hundred Aboriginal ambassadors from forty nations with the leaders of New France in 1701. The result was the Great Peace of Montreal. It was here that the indigenous Aboriginal ways of dealing with the other were consciously and broadly adopted as more appropriate than the European. Here the

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43 Ibid.
idea of future treaties was born. Here an approach was developed that would evolve into federalism. Sir William Johnson’s great gathering of two thousand chiefs at Niagara in 1764 had been organized in order to cement the Royal Proclamation. In many ways, this was the second act in the creation of the idea of Canada—a continuation of the Great Peace of Montreal.44

It would, in other words, be a perversion of our constitutional history to view the events of 1867 in isolation; rather, they should “be understood as part of a protracted historical evolution that, in one way or another, had already been proceeding for some time”.45 Nor should Aboriginal peoples be considered outsiders to the confederal pact; rather, they played a key role in enabling it, and continue to do so: “The process of building Confederation is not restricted to the historic pact struck in the 1860s between the French- and English-speaking representatives of Lower Canada, Upper Canada, Nova Scotia, and New Brunswick, which gave rise to the Constitution Act, 1867 and the modern state of Canada. It incorporates the treaties and other processes whereby the Indigenous peoples of America became affiliated with the Crown and eventually entered the Confederation of Canada”.46 Canada’s constitutional history includes the treaties and agreements by which Aboriginal nations shared lands and resources, and became, in the Royal Commission’s phrase, “partners in Confederation”. While they were excluded from participating in the conferences leading up to Confederation, and marginalized in the following century, Aboriginal people continued to feel “a sense of loyalty to something high and important, a sense of worth as honourable partners and a sense of responsibility to uphold the alliance”47 with the Canadian state, as evidenced among other things by the number of Aboriginal veterans who served with Canada’s military in both world wars.48 On an objective view of Canadian

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44 Saul, supra note 37 at 69.
46 Ibid at 22.
47 RCAP Report, vol 1, supra note 42 at 523.
48 Ibid at 523–76.
history, Aboriginal peoples must be included as “founding peoples” if the phrase is to have any meaning at all.

It follows, then, that if the official languages regime of Canada is premised on the recognition of the languages of the founding peoples of the country, which is explicitly the case, then the languages of the Aboriginal peoples of Canada should also be recognized as official languages. If the Canadian constitution is to be interpreted through the prism of the bicultural compact, then that conception must be revised to incorporate another dimension: the place of Aboriginal languages and cultures within Confederation must be acknowledged and integrated into the interpretative scheme. I will address each of these points in turn.

6.2.3 The Constitutional Status of Aboriginal Languages

As noted above, the official status of English and French has been constitutionalized by the Canadian Charter of Rights and Freedoms. Section 16(1) of the Charter reads: “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.” This provision constitutionally protects the official status of English and French. What is its impact on a possible recognition of Aboriginal languages as official languages of Canada? Does the section prohibit such recognition? Or does it merely protect from any attempt to remove either of the two current official languages?

In Jones v AG of New Brunswick, Chief Justice Laskin made the following comments regarding section 133 of the Constitution Act, 1867, dealing with the use of English and French: “I am unable to appreciate the submission that to extend by legislation the privileged or required public use of English and French would be violative of s. 133 when there has been no
interference with the special protection which it prescribes.”

Of course, section 133 is worded in terms of the permissive and mandatory use of the two languages, and does not directly confer official status upon them. Section 16(1) is quite different, stating clearly that “English and French are the official languages of Canada”. An argument can certainly be made that such a definitive statement imports the absolute protection of English and French as official languages, in the sense not only that neither language could be removed as an official language, but that no other language could be made official. Such an interpretation, however, would be difficult to sustain for two reasons: first, because, as noted by Justice Wilson in Société des Acadiens, while governments cannot derogate from the principle of equality by taking away language rights, they can freely enhance equality by granting further rights.

This would indicate that the provisions of sections 16–22 should be read as a floor, rather than a ceiling. If that is the case, one could make a convincing argument that adding to the rights of other languages, since it does not affect the relative equality of English and French, does not contravene section 16. In other words section 16, like section 133, does not represent an exhaustive distribution of legislative power with regard to official languages. Second, such a restrictive interpretation would run directly counter to the explicit wording of section 22 of the Charter: “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 22 raises two very important points. First, it confirms, through the use of the expression “after the coming into force of this Charter”, that there is constitutional space for the recognition of Aboriginal languages as official languages. In its most logical interpretation,

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49 Jones, supra note 11 at 193.
50 Société des Acadiens, supra note 11 at 619.
section 22 precludes the use of sections 16–20 to hinder granting rights or privileges to any languages other than English or French, thereby specifically contemplating granting official status (or any other rights or privileges) to other languages. It also raises the interesting possibility that languages might possess pre-existing legal or customary rights or privileges which are left intact by the officialization of French and English. Do Aboriginal languages possess such legal or customary rights or privileges? Certainly Aboriginal languages have always enjoyed rights and privileges among their traditional communities of speakers. They have also been formally recognized in the three territories, and in some provinces, albeit with varying degrees of commitment and efficacy. All of these rights and privileges would be protected by the application of section 22, but this would be largely unnecessary, as sections 16–20 apply only to the federal Parliament and government (excluding the territories), and to the provincial legislature and government of New Brunswick. Section 22 would be effective, however, in insulating any right or privilege that Aboriginal languages might possess at the federal level.

I would argue that Aboriginal languages possess a constitutional status in spite of their lack of official status. As we saw above, the two are not necessarily related. English and French were constitutionally recognized (and in that limited sense, “official”) long before the passage of the Official Languages Act of 1969. Indeed, the constitutional status of English and French predates the enactment of section 133 of the BNA Act. Section 133 was largely a codification of a practice of bilingualism which had been reintroduced to the Legislature of the Province of Canada after 1848, which had developed in Lower Canada since 1791, and ultimately can be traced back to the British conquest of Canada. Section 133 represented the explicit recognition of a practice which had acquired constitutional status over the years, a practice which, had it not been explicitly set down, might nonetheless have been recognized as an unwritten rule of the
constitution, in much the same way as the independence of the judiciary or a legislative assembly’s control of its own proceedings.\textsuperscript{51} One can trace the evolution of the constitutionalization of bilingualism, and the corresponding constitutional status of English and French, from the Articles of Capitulation of Quebec in 1759 through to the Constitution Act, 1982, and the Official Languages Act of 1988.

In much the same way, Aboriginal languages are enmeshed in the constitutional history of Canada. One can trace the evolution of this practice even further—to the first contacts between Europeans and Aboriginal peoples on this continent. As noted by Saul, the Great Peace of Montreal of 1701 provides an interesting reference point. At this gathering, which in large part ensured the survival of the French colonial enterprise, and therefore of what would become Canada, the presence of Aboriginal languages was not only natural, but constitutionally significant, in that, as many commentators have pointed out, the process followed and the protocol adopted were infused with Aboriginal legal concepts. Aboriginal terminology was adopted, and a distinctly Aboriginal outlook was part of the essence of the agreement. It would be very hard to reach a proper understanding of this seminal treaty, and of the others that followed it, without an adequate understanding of the Aboriginal version of that treaty. That version, of course, was and is preserved not on the dried parchments of the Europeans scribes, but in the oral tradition of the Aboriginal peoples. This tradition, long regarded as marginal to, or even outside, Canadian constitutional history, must be looked upon as part and parcel of our constitutional record. The agreements and principles embodied in these traditions are part of Canadian constitutional law and custom. In \textit{R v Badger}, Justice Cory noted that

\textit{[t]he treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement} \textsuperscript{51}\textit{See Reference re Remuneration of Judges of the Prov. Court of PEI, [1997] 3 SCR 3 (sub nom Reference re: Public Sector Pay Reduction Act (PEI), s 10) 150 DLR (4th) 577.}

228
.... [They] were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.\(^{52}\)

The oral traditions which provide evidence of the treaties must not, therefore, be relegated to an inferior status. As Chief Justice Lamer stated in *Delgamuukw*, “Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.”\(^{53}\) On the contrary, they should be privileged as part of a balanced interpretive approach to treaties. And the treaties themselves, as the Royal Commission on Aboriginal Peoples made clear, are an integral part of our constitutional law. In that regard, the fact that Aboriginal languages are the languages of the treaties, and are key to understanding those treaties, means that they have acquired a constitutional importance and status commensurate with that fact.

This conclusion is reinforced by the continued existence of Aboriginal legal traditions within the Canadian constitutional order—Aboriginal legal traditions which can only be fully understood through the medium of Aboriginal languages. As John Borrows argues, “Indigenous legal traditions are inextricably intertwined with the present-day Aboriginal customs, practices and traditions that are now recognized and affirmed in section 35(1) of the *Constitution Act,*


In this respect, they are also a part of Canadian law."54 In other words, Canada must be understood as a “legally pluralistic state” with “civil, common and Indigenous legal traditions”.55 The Indigenous legal traditions can be fully understood only through their original medium of transmission—that is, through Aboriginal languages. This is not to deny the possibility of translation, but rather to emphasize the importance of the semantic structure of language in describing legal concepts and realities. Lorena Sekwan Fontaine points out this connection between Indigenous legal and governmental traditions and Indigenous languages: “Aboriginal languages have been the vehicles used to express cultural values that governed community, family and nation relationships for centuries.”56 The connection between language and legal traditions is reinforced by concrete examples of Indigenous justice systems where “[t]he importance of language in directing the development and implementation of traditional forms of justice cannot be stressed enough”.57 It is made obvious by the difficulty of adequately translating Indigenous legal forms or traditions to English, as for example in Chief Jake Thomas’s attempt to translate the Great Law of Peace into English.58

If then, Indigenous legal traditions are to be fully accepted and received as part of Canadian law, it follows that Indigenous languages, as the keys to understanding and indeed, preserving these traditions, must have acquired a legal status commensurate with that role.

54 John Borrows, Canada’s Indigenous Constitution (Toronto: University of Toronto Press, 2010) at 11 [footnotes omitted].
Further, if these legal traditions are constitutionally protected under section 35(1) of the Constitution Act, 1982, it follows that the languages in which these traditions are preserved are also protected and as the languages of one the major legal traditions of the legally plural Canadian state, have acquired a constitutional status in keeping with their importance.

While the constitutional status of Aboriginal languages is not equivalent to official status, it does mean that Aboriginal languages are in a unique position in the Canadian constitutional structure. One could argue that this would have been the position occupied by English and French in the absence of the explicit constitutional provisions addressing their status as official languages.

The constitutional status of Aboriginal languages should imply at least a minimal level of recognition at the federal level. Acknowledging the constitutional significance of Aboriginal languages would be a welcome first step towards that recognition. Some legislative attempts at recognizing the languages of Canada’s First Peoples in the past have come to nought, but in any event these attempts were to recognize these languages in a general sense, rather than acknowledge their constitutional status. Beyond mere recognition, such a status might also be sufficient in itself to ground a governmental obligation to provide both funding for the promotion of Aboriginal languages, and services in these languages. We have already noted these obligations in the context of section 35 of the Constitution Act, 1982. But such obligations might well exist independently of section 35 Aboriginal language rights, insofar as they are linked to the constitutional status of Aboriginal languages, recognized as languages of founding peoples of Canada, and as the languages of a significant part of our constitutional law. Such a status, as we

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59 Such as the multiple iterations of the Senate bill last presented by Senator Serge Joyal: see Bill S-212, An Act for the advancement of the aboriginal languages of Canada and to recognize and respect aboriginal language rights, 1st Sess, 42nd Parl, 2015; this bill has repeatedly been introduced but not passed.
have discussed, would be independent of any explicit recognition of Aboriginal languages. As such, the status accorded Aboriginal languages would be free of any restrictions placed on the interpretation and application of Aboriginal rights under section 35.

These two conclusions are mutually supporting: granting Aboriginal languages official status would be constitutionally appropriate because these languages already possess a constitutional status; and on the other hand, the constitutional status of Aboriginal languages militates strongly in favour of granting official status to these languages, and fully realizing their constitutional significance for Canada, as has already been done with English and French.

As the Royal Commission on Aboriginal Peoples duly noted, granting Aboriginal languages official status would not guarantee their survival. But it would be a fundamental symbolic step on the road to their recovery. This is especially important given the history of governmental interference with these languages. Indeed, no other language groups in Canada have been the target of such a calculated, explicit policy of eradication as Aboriginal languages. The fact that the government of Canada attempted over the course of centuries to eliminate any trace of the languages of the First Peoples of Canada cannot be without significance in assessing the place of these languages in the modern Canadian state. The fact that such a policy was carried out in such complete disregard for Aboriginal and treaty rights, and for the constitutional significance of Aboriginal languages, reinforces the conclusion the positive action must now be taken by the state to restore the balance. The time has come to recognize the constitutional status of Aboriginal languages and for Canadian governments to assume the responsibilities that come with this recognition.
6.3 ABORIGINAL LANGUAGES AND SECTION 15 EQUALITY RIGHTS

6.3.1 Exclusion of Aboriginal Languages from the Official Languages Regime

The official languages regime is, I have argued, premised upon the recognition of the “founding peoples” of Canada. The adoption of English and French as official languages, and the exclusion of Aboriginal languages from official status, amounts to a denial of the fact that Aboriginal peoples are also founding peoples. As such, it represents a significant injustice to Canada’s Aboriginal peoples. The fact that Aboriginal languages do not enjoy the official status of English and French accounts to a large degree for their lack of presence in government, in Canadian politics and society at large, and in the Canadian consciousness generally. The lack of official status contributes to the marginalization of Aboriginal languages, which in turn leads to their continued decline. Unfortunately, the Royal Commission on Aboriginal Peoples failed to take into account the importance of the status of Aboriginal languages in making its recommendations. In the third volume of its report, which addresses the language issue, it pointed out that

Declaring a language official can do little more than sanction a reality. If there is a wide discrepancy between the official status of a language and its actual use, the status will be essentially symbolic or political in intent and effect. Assigning a language official status will not guarantee intergenerational transmission.  

The commission reinforced its argument by pointing out that in spite of the official languages regime, “the percentage of francophones outside Quebec who speak French at home continues to decline”. It is certainly true that granting a language official status will not, in and

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of itself, guarantee intergenerational transmission. Nonetheless, it is an important piece of the puzzle. The Office of the Commissioner of Official Languages reflected in its 35th anniversary report on the impact of official bilingualism by noting that:

Duality blossomed in the government’s highest institutions, in civil society, in the private sector, and among citizens. The two official language communities now have education rates that reflect greater equality. French became stronger in Quebec and generally held its own elsewhere in Canada; English remained overall stable in Quebec. Canadians in all regions are more bilingual. Federal services are increasingly available in both official languages. Anglophones and Francophones are more equitably represented within the federal administration, where they can work more frequently in their own language. The nation’s major cultural institutions (the CBC, the Canada Council for the Arts, the NFB, etc.) exemplify duality and actively support it.  

These are certainly not negligible effects of the policy of official bilingualism. The increase in the prestige of a language that comes with official status can be an important boost to that language, especially when, as is the case with Canada’s Aboriginal languages, it has previously been viewed as somehow inferior to a dominant language. Officially recognizing and using that language in governmental and public institutions sends a clear message of linguistic equality. As Stephen May argues, “[T]he legitimation and institutionalisation of a language are the key to its long-term survival in the modern world”. Moreover, such legitimation of the language may be key to ensuring a reversal of language shift in the long run: “Perhaps only when the new-found status of minority languages becomes firmly established might the tendency for individuals to shift to a majority language begin to change.” This is because, as Will Kymlicka and Alan Patten note, “Although symbolic, these decisions [making a language official] can

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64 Ibid.
profoundly affect whether and how members of different groups identify with the state and/or their own linguistic group.”

The Supreme Court of Canada has also recognized the importance of symbolic measures in promoting a language and ensuring its survival. In *Ford v. Quebec (Attorney General)*, the Court accepted the importance of maintaining a French “visage linguistique” (dominant visual presence of the language in signs and advertising) in order to sustain the prevalence of the French language:

> [I]n the period prior to the enactment of the legislation at issue, the “visage linguistique” of Quebec often gave the impression that English had become as significant as French. This “visage linguistique” reinforced the concern among francophones that English was gaining in importance, that the French language was threatened and that it would ultimately disappear. It strongly suggested to young and ambitious francophones that the language of success was almost exclusively English. It confirmed to anglophones that there was no great need to learn the majority language. And it suggested to immigrants that the prudent course lay in joining the anglophone community. The aim of such provisions as ss. 58 and 69 of the *Charter of the French Language* was, in the words of its preamble, “to see the quality and influence of the French language assured”. The threat to the French language demonstrated to the government that it should, in particular, take steps to assure that the “visage linguistique” of Quebec would reflect the predominance of the French language.

> The [s. 1 justificatory materials] establish that the aim of the language policy underlying the *Charter of the French Language* was a serious and legitimate one.

Ultimately, the language of signs and advertising alone will not change the intergenerational transmission of a language. But as the court recognized, it has a powerful psychological impact on speakers of both that language and other minority or majority languages. Making a language official, giving it enhanced status, and promoting its use in government institutions and the public sphere is vitally important to the way in which its

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speakers, and speakers of other languages, perceive it. The same logic has been applied in Nunavut, where the drafters of the Inuit Language Protection Act declared themselves “[d]etermined to respond to the pressures confronting the Inuit Language by ensuring that the quality and prevalent use of the Inuit Language are protected and promoted” and called for “national recognition and constitutional entrenchment of the Inuit Language as a founding and official language of Canada within Nunavut”.67

The exclusion of Aboriginal languages from the official languages regime thus has a significant impact on the status and visibility of these languages. If, as I have argued, Aboriginal peoples are founding peoples, and therefore equal to speakers of French and English in constitutional terms, then the lack of recognition of Aboriginal languages as part of the official languages regime constitutes case of inequality in the law to which section 15 of the Charter might bring a remedy.

6.3.2 Section 15 and the Equality of Aboriginal Languages

Language is conspicuously absent from the list of enumerated grounds of unlawful discrimination given under section 15; but as we know, this does not end the matter, since unconstitutional discrimination may also be found on analogous grounds.68 In McDonnell v Fédération des Franco-Colombiens, however, the British Columbia Court of Appeal noted that “[w]hile discrimination based purely on language may be within s. 15, our concern is whether the concept of “official language” comes within it. … I do not think that it does.”69 The Supreme

67 Inuit Language Protection Act, SNu 2008, c. 17, Preamble, paras. 4, 12; note the interesting formulation of “founding and official language”: clearly the drafters of the ILPA recognized the importance of the distinction in constitutional terms.
Court stated in *Mahe v Alberta* that section 23 rights are an exception to the equality provision of section 15, leaving in doubt whether section 15 can ever be used to challenge official language rights or privileges.\(^{70}\) While these cases involved the members of official language minority groups seeking to supplement or extend the scope of the official language rights granted in sections 16–23 of the Charter, it is likely that courts would be reluctant to entertain a claim of discrimination from speakers of a minority language based on lack of official status. The Ontario Court of Appeal, for example, pointed out that

> [p]ersons who are illiterate or unilingual in any one of a multitude of languages, other than English, are put to more trouble than an English-speaking person when receiving such a document [unilingual summons]. However, this is a difference which falls short of s. 15 discrimination. All government documents will inevitably be unreadable by some group of persons. It would be trivializing s. 15 to declare them all discriminatory and then, as the appellant would have it, turning to s. 1 to justify all except those which affect French-speaking unilinguals.\(^{71}\)

It is highly unlikely that a court would use section 15 to require government to provide services in all languages. No modern state could be required to do so,\(^{72}\) and it seems logical that such a limitation could easily be justified under section 1. At first glance, then, it would seem that a claim of discrimination, based on official language status or lack thereof, cannot be sustained. While this is a significant objection, I believe that it would not bar a claim for discrimination on behalf of Canada’s Aboriginal peoples. First, because the type of unlawful discrimination alleged as the grounds for challenge is fundamentally different from a general challenge to the privileged status of English and French. What is being alleged here is not that the granting of official status to these two languages is in and of itself unlawful discrimination,

\(^{70}\) [1990] 1 SCR 342 at 369, 68 DLR (4th) 69; I discuss the import of *Mahe* below.

\(^{71}\) *R v Crête* (1993), 1993 CarswellOnt 1145, 64 O.A.C. 399 (CA).

\(^{72}\) Although, with constant improvement in translation technologies, the cost of doing so may not be prohibitive in the near future. At that point, the question of a government’s obligation to provide services in a language understood by a member of the public, or even in a language of his or her choice, will likely require a more nuanced analysis.
but rather that the deliberate exclusion—or underinclusion—of another set of qualifying languages, according to the criteria used to single out the official languages, is itself discrimination. It follows that what is being alleged is not really discrimination on the basis of language at all, but rather discrimination on the basis of national or ethnic origin: the argument would be that a particular group of languages, otherwise equally entitled, along with English and French, to the status of official languages, were excluded because of the ethnic origin of their speakers. Second, because the nature of the interests at stake, being independently recognized by the constitution under both sections 35(1) and 25 of the Constitution Act, 1982, requires a separate analysis from that undertaken thus far by the courts. When examined in its proper context, it will be found that a challenge under section 15, on behalf of speakers of Aboriginal languages, is assisted by placing it within the broader constitutional context.

Perhaps the best answer to the objection that official language status is not an analogous ground under section 15 is to note that what is being alleged here is not discrimination based on language at all, but on the basis of race, or national or ethnic origin. Such an argument accepts as legitimate the establishment of an official languages regime, and even admits the validity of the criteria used to determine which languages will qualify, but argues that the criteria were applied in a discriminatory manner to exclude one or more particular languages. This is the argument which can be made for Aboriginal languages. In that sense, then, the ground of discrimination is not official language, or even language at all; it is the ground of race, or national or ethnic origin. In other words, it is an argument that while Aboriginal languages met all of the criteria for the status of official languages, they were excluded because of the national or ethnic origin of their speakers. This argument circumvents the issue of the inclusion of language, or official language status, under section 15.
It is here that the bases of the official language regime become important considerations. If, as I have argued above, the adoption of the official languages regime in 1969 was premised on the recognition of the languages of the founding peoples of Canada, then Aboriginal peoples can quite rightly claim that their exclusion from this regime is discrimination based on national or ethnic origin. Aboriginal languages, in this sense, are unlike any other language in Canada. While all may arguably be rendered unequal by the choice of English and French as the official languages, very few would have an equal claim to the status of language of a founding people, and thus very few could make a claim for inclusion on those grounds. Aboriginal languages—or more properly, their speakers—stand in a very different situation. They have just as strong a claim as English or French to be the languages of founding peoples and if, as I have argued, that is the fundamental rationale for the existence of the official languages regime, then it follows that failure to include them among the official languages is an instance of unlawful discrimination.

The plausibility of such a discrimination claim is confirmed upon engaging in a review of the section 15 jurisprudence. As noted by Justice Abella in *Quebec v. A.*, “The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.”

The exclusion of Aboriginal languages from the official languages regime perpetuates discrimination against Aboriginal peoples and serves to widen the gap.

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73 It may be interesting to note here that this argument could possibly be applied to other languages as well; could Ukrainian, German, or Italian speakers, for example, argue that their languages are also the languages of “founding peoples”? While many of the groups who submitted briefs to the Royal Commission on Bilingualism and Biculturalism challenged the idea of “biculturalism”, acceptance of English and French as recognized official languages was generally taken as a given. See e.g. Ukrainian Canadian Committee Headquarters, *Brief Submitted to the Royal Commission on Bilingualism and Biculturalism*, September 1964.

74 *Quebec (Attorney General) v. A.*, 2013 SCC 5 at para. 332, [2013] 1 SCR 61 [*Quebec v. A.*].
between these peoples and the rest of society. The current two-part test for a claim of inequality under section 15 was stated in *Kapp* as follows:

1. Does the law create a distinction based on an enumerated or analogous ground? 2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? \(^{75}\)

As I argued above, the distinction created here is based not on the ground of language, or official language status, but rather on the ground of race, or national or ethnic origin. The essence of the claim would be that as the languages of founding peoples of Canada, Aboriginal languages stood in the same position as English and French in relation to their inclusion as official languages of Canada; and that their exclusion, therefore, creates a distinction based solely on grounds of race, or national or ethnic origin. Moreover, this distinction is discriminatory, in that it serves to perpetuate prejudice against Aboriginal languages, and validate the stereotype of Aboriginal languages as somehow inferior and unworthy of recognition, unworthy even of the status of language (being mere “dialects”). \(^{76}\) The continuation of these myths, which were the soul of the residential school system, has a considerable detrimental effect on Aboriginal languages and their perception by both Aboriginal and non-Aboriginal people alike. Of course, it should be noted that whether or not this was the intention of the legislators in adopting official languages legislation is not the issue. As noted by Justice Abella in *Quebec v. A.*, “An emphasis at this stage [determination of discrimination under section 15] on whether the claimant group’s exclusion was well motivated or reasonable is inconsistent with this substantive equality approach to s. 15(1) since it redirects the analysis from the impact of the distinction on the affected individual or group to the legislature’s intent or purpose. … Assessment of legislative purpose is an important part of a *Charter* analysis, but it is


\(^{76}\) See *supra* note 41 and accompanying text.
conducted under s. 1 once the burden has shifted to the state to justify the reasonableness of the infringement.”

Here, the fact that we are dealing with a historically disadvantaged group whose languages were targeted by assimilationist policies in the past should be taken into consideration when assessing the creation of a disadvantage. It would not be difficult to show that historical, and ongoing, prejudice is at the heart of the exclusion.

Would this exclusion be saved under section 1? I believe it would not. Indeed, I would argue that the government’s attempt at justification may not make it past the rational connection stage. While it is true, as noted by Justice Abella, that “at the rational connection stage, the government does not face a heavy burden”, it must nonetheless show that the limit imposed or the distinction created may reasonably be supposed to further the legislative objective. If, as I have argued above, the legislative objective of the official languages legislation is fundamentally the recognition of the languages of the founding peoples of Canada, then excluding the languages of a large number of founding peoples simply cannot be rationally connected to that goal; it is directly opposed to it. Of course, this analysis depends on accepting the argument that the official languages legislation is indeed premised on a recognition of the founding peoples. That argument has been rejected by a number of commentators, but in my view the historical record amply supports it. I add, as I noted above, that this is not a case of asserting an argument from “original intent” of a constitutional or legislative provision, but rather of determining the underlying purpose or rationale of the legislation, an analysis which is crucial to a purposive interpretation of the legislation itself, and one which was recently engaged in by the Supreme Court, in the context of the Supreme Court Act, in the Nadon reference.

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77 Quebec v. A., supra note 74 at para. 333.
78 Ibid., at para. 359.
80 See Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21 at paras. 19–68, [2014] 1 SCR 433 [Nadon].
reiterated that purposive interpretation of legislation requires understanding it in its “proper linguistic, philosophic and historical context”. In my view, looking at the underlying purpose or rationale of the official languages legislation in its proper linguistic, philosophic and historical context leads to the conclusion that the purpose of the legislation was to recognize and promote the languages of the founding peoples of Canada. If this is the case, then it seems as though an attempt at justifying this legislation would fail at the rational connection stage of the test.

But supposing for the sake of argument that the government could show that excluding Aboriginal languages was necessary for the purpose of advancing recognition of the other founding peoples’ languages or that the purpose of the legislation was to be found elsewhere, it would be difficult to show that complete exclusion of Aboriginal languages from the official languages regime constitutes minimal impairment of the equality rights of Aboriginal peoples. As noted by Justice Abella in Quebec v. A., the Supreme Court “has generally been reluctant to defer to the legislature in the context of total exclusions from a legislative scheme”. This is necessarily the case, since the government is required to show at this stage of the test why a less intrusive means of achieving the legislative goal was not chosen. Consequently, “[t]his will be a difficult burden to meet when, as in this case, a group has been entirely left out of access to a remedial scheme”. This is undoubtedly the case with Aboriginal languages in relation to the official languages legislation. The fact that other options could have been pursued (e.g., a partial inclusion of Aboriginal languages in areas where there are significant numbers of Aboriginal-language speakers) makes it unlikely that this total exclusion from the legislative scheme would

81 Ibid., at para. 19.
82 Quebec v. A., supra note 74 at para. 361.
84 Quebec v. A., supra note 74 at para. 362.
pass the minimal impairment branch of the section 1 analysis. It seems likely, therefore, that an attempt to justify the exclusion of Aboriginal languages from the official languages legislation would fail, and the section 15 claim of unlawful discrimination would succeed.

There is, however, one strong objection to a section 15 challenge of the official languages scheme. This would be to suggest that the constitutionalization of the official languages regime has put it beyond the reach of section 15 review. In other words, the principle would be invoked that one part of the constitution cannot be used to challenge another part. It is important to note at the outset that my argument above was not that sections 16–23 of the Charter could be invalidated by reference to section 15. Such an argument, arguing for the unconstitutionality of a part of the Constitution, is difficult to conceive and likely to be rejected outright by the courts. Rather, the question is whether sections 16–23 serve to insulate the legislative scheme of official languages from constitutional review under section 15. It must be remembered that the official languages provisions of the Charter simply constitutionalized an existing legislative regime, at least at the federal level. Does the fact that the Official Languages Act and related policies are now constitutionally protected under section 16 mean that they are immune from a challenge on grounds of discrimination under section 15? I argue that it does not, since section 16 should not be read as precluding the addition of other official languages, as I discuss above. In addition, the principle that constitutionalization of an exception to section 15 renders it immune from Charter challenge, which could be derived from cases dealing with section 93 of the Constitution Act, 1867, can be distinguished as dealing with a very specific situation, and one which is inherently different from the situation of the exclusion of Aboriginal languages.

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An argument could be made that constitutionalization of a legislative regime serves ipso facto to insulate it from claims of discrimination under section 15 of the *Charter*. This argument arises primarily in the context of cases addressing section 93 of the *Constitution Act, 1867*, a section which calls for a very different analysis, as I will argue. In *Adler v. Ontario*, the Court relied on the parallel analysis found in *Mahe v. Alberta*, where it pointed out that section 23 rights should not be interpreted in the light of section 15(1), as “the section is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada”. 86 I would argue that this statement by Chief Justice Dickson needs to be placed in its context. First, it must be noted that while the court considered the applicability of section 27 (“multicultural heritage of Canadians”) it did not consider the impact of section 25, to which I will return below. Simply put, the relationship between official language rights and Aboriginal language rights specifically was not considered at all by the Court in *Mahe*. Second, the statement applies only to section 23, which does indeed create a comprehensive code for official language minority education rights. The decision in *Mahe* was restricted to this context. The Court in *Adler* supported its own reasoning with regard to section 93, a similar comprehensive code dealing also with educational rights, by comparing it to section 23 rights. While the analogy may hold for section 23, I would argue that this reasoning cannot be applied to all of the official language rights, and especially not to section 16. As I discussed above, a good argument can be made that section 16 should not be given a restrictive interpretation, in the sense of excluding Aboriginal languages from being made official or restricting the existing rights or status of these languages. 87 Similarly, any addition to the rights and privileges of another language cannot be said to derogate from the

86 *Mahe, supra* note 70 at 369.
87 See *supra* note 50ff and accompanying text.
rights and privileges of English or French. In both *Reference re Bill 30* and *Adler*, the issue was one of invalidating a regime conferring benefits on members of a particular religion, as the result of a historical compromise at Confederation. While in *Adler* the applicants did seek to have the province fund their religious schools, the natural solution to the inequality would be the abolition of Roman Catholic Separate Schools. The alternative, requiring the funding of separate religious education systems for all religions, would not only be impractical, but would involve the creation of an indeterminate obligation on the provincial government. On the contrary, the extension of rights under the official languages regime to Aboriginal languages creates an added, but determinate responsibility. In the section 93 cases, the Court considered the historical rationale of the provision—that of the compromise worked out at Confederation, between members of the two dominant religions (Catholics and Protestants) in the newly formed Dominion. The two religions singled out by section 93 are given special status not because of numbers or importance to the country, but because of the peculiar situation of minority adherents in each of the newly formed provinces. The qualifications involved the issue of a majority of adherents in one province wishing to protect their co-religionists in the minority in other provinces. That is the essence of the historical compromise giving rise to section 93. The exclusion of other religious beliefs is grounded in that historical compromise, and in the unique situation of the two religious groups at Confederation. In other words, no other religious group can make the claim that, being in the same situation at Confederation, they were ignored or passed over in a discriminatory way.88 That argument, however, is available to speakers of Aboriginal languages in the context

88 Although one might be tempted to argue that Aboriginal spiritual traditions would have qualified here as well, I would argue that section 93 was never intended to protect minority religions in themselves. It only sought to protect religious minorities disadvantaged by Confederation. Judaism, for example, was not included because Jews were in the minority no matter how provincial boundaries were drawn; the Catholic minority in what became Ontario, however, was placed in a minority situation by Confederation since it lost the support of its co-religionists in what became Quebec.
of the official languages regime. The concept of official language, as I have argued, is inherently reflective of that of “founding language”, a concept which did include, at the time of the passing of both the Official Languages Act and the Constitution Act, 1982, the languages of Aboriginal peoples. In that sense, then, while section 93 must be given a restrictive, exclusive interpretation as that is in the nature of the historical compromise arrived at in 1867, that is not the case with section 16, which served merely to enshrine an unequal situation whose historical rationale is itself faulty and discriminatory. The constitutional protection afforded to sections 23 and 93 in Mahe and Adler was reiterated by the Supreme Court in Gosselin (Tutor of) v Quebec (Attorney General). 89 There again, the Court noted that both sections 93 and 23 were “comprehensive codes”, 90 which cannot be said of section 16. Moreover, the Court’s rejection of the constitutional challenge to these provisions was partly based on the underlying principle of protection of minorities, and made specific reference to sections 25 and 35 of the Constitution Act, 1982 to support this argument. 91 These major distinguishing factors would militate in favour of a non-restrictive interpretation of section 16, which would in turn allow a challenge to the underinclusiveness of the official languages regime to succeed.

The section 93 cases also differ in the very different relationship of the impugned provisions to other sections of the Charter. Rights relating to denominational schools are mentioned in section 29 of the Charter, which reads:

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

90 Ibid at para 23.
91 Ibid at para 27.
As Justice Wilson pointed out in Reference re Bill 30, “s. 29 is there to render immune from Charter review rights or privileges which would otherwise, i.e., but for s. 29 be subject to such review”\textsuperscript{92} One can contrast this with the wording of section 25 of the Charter:

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

The two sections are quite different in their import. Section 29 serves to insulate an unequal situation from challenge under other sections of the Charter. By contrast, section 25 serves to prevent any interpretation of Charter rights which would limit Aboriginal rights. The result is that while section 93 receives limited protection from the application of Charter rights, and is thus an exception carved out from the application of the Charter, section 25 influences the very delimitation of Charter rights, and requires courts to define these rights in a way which does not impair existing Aboriginal rights. One ultimate effect of the two provisions may not be very different: both serve to insulate rights granted under one part of the Constitution from competing rights. As noted by Justice Bastarache in \textit{Kapp}, section 25 “serves the purpose of protecting the rights of [A]boriginal peoples where the application of the Charter protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group”\textsuperscript{93} It constitutes “a shield”\textsuperscript{94} and “a bar to competing rights”\textsuperscript{95} Nonetheless, I would argue

\textsuperscript{92} \textit{Reference re Bill 30, supra} note 85 at 1198.
\textsuperscript{93} \textit{Kapp, supra} note 75 at para. 89.
\textsuperscript{94} \textit{Ibid.}, at para. 89.
\textsuperscript{95} \textit{Ibid.}, at para. 87. It should be noted that the majority in \textit{Kapp} expressed concerns with Justice Bastarache’s interpretation of s. 25, but did not reject it outright, stating simply that “[i]n our view, prudence suggests that these issues are best left for resolution on a case-by-case basis as they arise before the Court” (at para. 65). In spite of the Court’s concerns, I find the arguments of Justice Bastarache convincing, especially in his examination of similar sections of the Charter, and his interpretation of the word “construe”.

247
that the broader and more demanding language of section 25, when read in the context of the reconciliation mandated by section 35 of the Constitution Act, 1982, gives it another very different function as well: section 25 can be called upon when considering challenges to other sections of the Charter and their scope in the context of Aboriginal rights. In this context, the section is not simply a shield, but can become a sword; whereas it is clear that section 29 can only be invoked as a shield against competing rights. In considering the very different function of these provisions, one can see why a challenge under section 15(1) to the provisions of section 93 must be interpreted in light of the strict—but limited—wording of section 29 to bar a successful challenge. On the other hand, when looking at a possible challenge to section 16, one must consider the ramifications of section 25, and give a non-restrictive interpretation to the section. This interpretation is reinforced, as noted above, by section 22 of the Charter, which reads:

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.

These limitations placed on section 16 lead to the conclusion that it must be read in a way that does not restrict the rights and privileges of any other language, but especially of Aboriginal languages. And an interpretation of the section which bars a challenge, on equality grounds, of the denial of the rights and privileges of Aboriginal-language speakers, which are themselves founded in constitutionally protected language rights, would arguably run afoul of these limitations.

Given these very real differences of context, there is reason to doubt the applicability of the section 93 cases, and of the dictum in Mahe. If, then, the underinclusiveness of the official language regime constitutionalized in section 16—at least insofar as it relates to Aboriginal
languages—is not immune from review under section 15—since it is not protected from challenge on a proper reading of section 16—there would seem to be little standing in the way of a successful challenge to the official languages regime on equality grounds. The speakers of Aboriginal languages would have a strong case to make under section 15 that the exclusion of their languages from the status of official languages constitutes unlawful discrimination on the basis of national or ethnic origin, resulting from a discriminatory application of the criteria used to determine inclusion in the number of official languages—that of the notion of founding peoples.

But perhaps an even better argument can be made that such an exclusion in and of itself amounts to detrimental government action that adversely affects Aboriginal languages. In other words, one could argue that the very fact of excluding Aboriginal languages from the official languages regime constitutes an infringement of Aboriginal language rights under section 35. This argument, which relies on the Supreme Court’s decision in *Dunmore v. Ontario (Attorney General)*, would provide an even stronger argument in favour of granting official status to Aboriginal languages. Indeed, if the denial of official status to Aboriginal languages—a status to which I have argued they are amply entitled—has a detrimental effect on these languages, then it would seem to amount to interference with the protected status of these languages itself: in other words, an infringement of section 35(1) and its constitutional protection of Aboriginal language rights.

6.3.3 The Exclusion of Aboriginal Languages, Section 35, and the Dunmore Principle

An argument can be made that excluding Aboriginal languages from the official languages regime is itself an instance of government interference with Aboriginal language rights, insofar as it has a significant impact on these rights. It is an instance of an underinclusive
regime which affects protected rights, in this case Aboriginal language rights. In this regard, it is interesting to consider the Supreme Court of Canada’s decision in the Dunmore\textsuperscript{96} case. In that case, which involved the section 2(d) freedom of association rights of agricultural workers in Ontario, the court noted that “exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom”.\textsuperscript{97} This is a claim of unequal treatment—legislative underinclusion—but where the grounds of challenge are not limited to the consideration of the impact on dignity, but rather focused on the effect of the underinclusion on the exercise of the relevant right or freedom. As Justice Bastarache noted:

In such a case, it is not so much the differential treatment that is at issue, but the fact that the government is creating conditions which in effect substantially interfere with the exercise of a constitutional right; it has been held in the s. 2(a) context, for example, that “protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity” (see Big M Drug Mart, supra, at p. 337). This does not mean that there is a constitutional right to protective legislation per se; it means legislation that is underinclusive may, in unique contexts, substantially impact the exercise of a constitutional freedom.\textsuperscript{98}

The core of the argument to be made is that the exclusion of Aboriginal languages from the official languages regime has such a disparate impact on the exercise of Aboriginal language rights because of the peculiar fragility of Aboriginal languages, a fragility which is reinforced by the perception of inferiority of these languages, a perception which was itself created by the government through the residential school program. In short, it can be argued that given the historical context of aggressive attempts by governments to suppress and even eradicate Aboriginal languages, and their continual assertion that these languages were inferior, the exclusion of Aboriginal languages from the official languages regime reinforces the effect of

\textsuperscript{96} Dunmore v Ontario (Attorney General), 2001 SCC 94, [2001] 3 SCR 1016 [Dunmore].
\textsuperscript{97} Ibid at para 22 (Bastarache J).
\textsuperscript{98} Ibid.
these past policies and has a disproportionate impact on the use, and ultimately the survival, of these languages. The continued effect on the perception of Aboriginal languages, by non-Aboriginal people but most especially by Aboriginal people, is directly related to the survival of these languages, and therefore any reinforcement of these negative attitudes amounts to a positive interference with the rights of Aboriginal language speakers.

The Supreme Court in *Dunmore* described the evidentiary burden on a claimant in such a case as that of demonstrating “that exclusion from a statutory regime permits a substantial interference” with protected rights. It does not require “that the exercise of a fundamental freedom be impossible”. A large body of testimony has shown that reinforced perceptions of inferiority or inadequacy of Aboriginal languages (often coupled of course with painful memories of the harsh punishment incurred for using them) directly contributed to entire generations of Aboriginal people being unable to speak their languages. A government policy which essentially continues to privilege other languages, on the very basis that they are the languages of the founding peoples of Canada, while continuing to exclude Aboriginal languages from that status, reinforces both the idea that Aboriginal languages are inferior and that Aboriginal peoples themselves are lesser partners in Confederation. It thereby continues the marginalization of Aboriginal language and culture which suggests that these languages have no place in modern Canadian society, being at best primitive artifacts from a bygone era. Such an attitude is a large factor in preventing the revitalization and promotion of Aboriginal languages. It directly impacts the state of these languages.

As noted by the Truth and Reconciliation Commission of Canada, these attitudes are the legacy of the residential school system and its policies of assimilation, policies “which cannot

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100 *Ibid*. 

251
simply be consigned to history”\textsuperscript{101} and are responsible for “the critically endangered status of most Aboriginal languages”.\textsuperscript{102} These attitudes did not disappear overnight, and as the Commission suggests, “some of the damages done by residential schools to Aboriginal families, languages, education, and health may be perpetuated and even worsened as a result of current governmental policies”.\textsuperscript{103} The continued devaluation of Aboriginal languages, reflected in their absence in any official capacity throughout Canada, is without a doubt one of the most damaging legacies of the residential school system.

The First Peoples Cultural Council\textsuperscript{104} of British Columbia points out the connection between negative perceptions and continued use of Aboriginal languages:

First Nations people who had been raised at home in their First Nations languages as children were trained, forced and shamed into abandoning their languages at residential schools. Even when they were released from the schools, many could not go back to speaking their languages or pass the languages on to their children because of residual shame and trauma. … Many residential school survivors, their children, grandchildren and great-grandchildren still feel the effects of the loss of their traditional First Nations languages.\textsuperscript{105}

A continued belief in the inferiority of Aboriginal languages is an integral part of the legacy of residential schools. As the Truth and Reconciliation Commission notes,

Residential schools suppressed Aboriginal language and culture, contributing to the loss of culture, language, and traditional knowledge. Even when those direct attacks came to a stop, culture remained devalued. There is a need for the recognition of the continuing value to communities and society of Aboriginal traditional knowledge, including spiritual, cultural, and linguistic knowledge.\textsuperscript{106}


\textsuperscript{102} Ibid.

\textsuperscript{103} Ibid. at 185.

\textsuperscript{104} Previously known as the First Peoples’ Heritage and Cultural Council.


The Royal Commission on Aboriginal Peoples pointed out that one of the most important causes of the continued decline of Aboriginal languages is “the low regard many Aboriginal people have had for traditional language proficiency as a result of policies devised by government and enforced by churches and the education system”.107 In its National First Nations Languages Strategy, the Assembly of First Nations pointed to the important goal of fostering “among First Nations and Non-First Nations a positive attitude towards, and accurate beliefs and positive values about First Nations languages so that multilingualism becomes a valued part of Canadian society”.108 This is a first step and necessary prerequisite to the revitalization, protection and promotion of Aboriginal languages.

In that sense, recognition is a vital first step to revitalization. Because recognition would lead to changed perceptions of the worth and desirability of Aboriginal languages, it is key to sustaining the political will to put in place effective measures for the revitalization, protection and promotion of Aboriginal languages, since, as the TRC points out, “[t]he resources spent on this [language revitalization and promotion] should be commensurate to the monies and efforts previously spent to destroy such knowledge.”109 Such an effort will require the support of Aboriginal and non-Aboriginal Canadians alike to sustain it.

This evidence points to the conclusion that a lack of recognition of Aboriginal languages has a significant negative impact on their continued viability, and therefore represents, in effect, substantial interference with the exercise of Aboriginal language rights. Applying the Dunmore criteria, this should be sufficient to assert that in such an instance, governments have a duty to act to eliminate the discriminatory regime and ensure that the unequal treatment of Aboriginal

107 RCAP Report, vol 3, supra note 60 at 564.
109 Ibid.
languages ceases. In other words, the discriminatory underinclusion must be remedied by bringing Aboriginal languages into the official languages regime.

6.4 Conclusion

Canada is a country with “a longstanding concern”\textsuperscript{110} with language rights and the official and constitutional status of its languages. English and French are the constitutionally recognized official languages of Canada. They have been recognized as official languages not because of their relative numerical superiority (which has varied through the years), but rather because they have long been recognized as the languages of the “founding peoples” of Canada. Whatever one may think of the notion of “founding peoples, the historical context makes it clear that it formed the basis of the process which ultimately led to the adoption of French and English as the official languages of Canada. It was the basis on which the Royal Commission on Bilingualism and Biculturalism was called. It was the basis on which the government of Pierre E. Trudeau ushered in the Official Languages Act of 1969. It is the basis of the official languages regime in Canada.

The notion of founding peoples, in its current incarnation, gives a distorted view of Canadian history and the structure of the Canadian polity, not so much because of its singling out of linguistic groups as having played a more significant role in creating Confederation, but because of its lack of acknowledgment of groups who played an equally important role in the creation of Canada. The Indigenous inhabitants of what we now call Canada were instrumental in the continued existence of the country. Without their significant contributions, the Canadian state as we know it would simply not exist. The absence of recognition of that fact is an injustice to the First Peoples of Canada.

\textsuperscript{110} Société des Acadiens, supra note 11 at 564 (Dickson CJ).
It is an injustice made all the more bitter by the fact that while English and French thrive, protected and promoted by governmental authority through the mechanisms of the official languages regime, Aboriginal languages are on the verge of extinction, in very large part due to the efforts of the same Canadian government, who for years maintained an explicit policy of eradication of these languages, carried out through the repressive vehicles of the Indian Act and associated laws, and in particular, through the Indian Residential School system. The cruel irony is thus that those of the founding peoples of Canada whose languages should be most deserving of recognition and protection are deprived of it, while those languages which are thriving are constitutionally protected.

The exclusion of Aboriginal languages from the official languages regime is an instance of detrimental differential treatment, of discrimination. As such, I argued that it is contrary to the provisions of section 15 of the Canadian Charter of Rights and Freedoms. It also represents, in and of itself, interference with the constitutionally protected language rights of the Aboriginal peoples of Canada, an interference which can only be remedied by the inclusion of Aboriginal languages in the official languages regime. The underinclusive nature of the official languages legislation, according to the principle set out by the Supreme Court of Canada in Dunmore, itself amounts to direct interference with a protected right. Remedying this injustice, by including Aboriginal languages as official languages of Canada, would be a significant symbolic step in the recognition of these languages. It would be an important element in raising the status and prestige of these languages. In the face of centuries of education policies which denigrated them and considered them unworthy of study or even of existence, this would provide a welcome change of attitude and signal to speakers of Aboriginal languages that their heritage is indeed valued and important. It would contribute to changing attitudes both within and outside
Aboriginal communities, attitudes which too often tend to deny the value of Aboriginal languages. While such recognition would not guarantee intergenerational transmission, and therefore survival, of Aboriginal languages, it would nonetheless represent a very important element in the creation of an environment in which such languages can thrive.

There are constitutionally persuasive reasons for the official recognition of Aboriginal languages. These languages already possess a constitutional status, as distinguished from the official status of English and French. This constitutional status is independent of official recognition. It is derived from the history of contacts between speakers of Aboriginal languages and others, as well as the significant contributions made by Aboriginal language speakers to the building of Canada. It is also directly related to the presence of Aboriginal languages in the heart of Canada’s constitutional order. Canada’s constitution includes the numerous treaties and agreements made with the Indigenous inhabitants of the country, reaching back to first contacts with Europeans. These treaties are contained not only in the imperfect written record kept by the Europeans (and later the Canadian government), but also, and with equal force, in the oral traditions of the Aboriginal peoples. The treaties are thus, for a large part, to be understood and interpreted by reference to their version in an Aboriginal language or languages.

In addition, Canada's constitutional structure includes within it the living legal traditions of Aboriginal peoples, legal traditions that have neither been abandoned nor legitimately displaced, legal traditions which are now explicitly recognized through the force of section 35 of the Constitution Act, 1982. These legal traditions can only be interpreted and understood, for the most part, through the Indigenous languages which are their original vehicles. They have proven extremely difficult to translate accurately, without significant loss of meaning. The Canadian legal order is thus dependent, to the extent that it contains Aboriginal legal traditions, on the
understanding of these traditional vocabularies, in the same way that understanding and applying the concepts of the Civil law depends on understanding the languages (French, Latin) which are its traditional vehicles.

These factors compel us to recognize the constitutional status of Aboriginal languages. At the same time, acknowledging the constitutional status of Aboriginal languages leads us to observe the incongruity of their lack of official status. Both approaches are thus mutually supporting and lead us to the same conclusion: understanding the bases of the official languages regime forces us to note the discriminatory nature of the exclusion of Aboriginal languages and the detrimental effects of that exclusion; understanding the constitutional status of Aboriginal languages leads us to note the importance of recognizing these languages officially and granting them explicit rights, since the official status of languages “evolves from the sum of rights expressly guaranteed to [them] by laws protecting their use”. The constitutional status of Aboriginal languages can only be fully realized through the granting of official status and the rights that come with it.

The constitutional status of Aboriginal languages is thus multi-faceted. Recognizing and realizing this status is not a panacea. It will not ensure that these languages will thrive, or even survive. But it would, most certainly, indicate a dramatic change in attitude and policy, a long-overdue recognition of the importance of Aboriginal peoples to the constitutional makeup of Canada. After centuries of attempts at assimilation and eradication, of contempt and denigration, of outright violence and abuse against the speakers of these languages and their culture, it would represent a very basic first step on the road to redress, and perhaps, reconciliation.

111 B & B Comm Report, supra note 3 at 74 (para 214).
CHAPTER 7 CONCLUSION

In its final report, the Truth and Reconciliation Commission of Canada notes the importance of Aboriginal languages to our country in the following terms:

The neglect of Aboriginal languages affects all Canadians. It impedes the ability of non-Aboriginal Canadians to understand and to appreciate the linguistic and cultural diversity that is part of a shared history. The language and culture of all Canadians is infused with the words and history of Aboriginal peoples.\(^1\)

Aboriginal languages are the original languages of this land. They have been spoken and heard in our country for millennia. They are the languages of founding peoples of this country. They are the languages which embodied the co-operation and knowledge that enabled the first settlers to survive in this land. They are the languages of the treaties which enabled the sharing of the land and its resources. They are the languages of peoples whose contribution to the building of Canada, too often unacknowledged, were and are central to the viability of our country. And so, it is not surprising that they are also key to the future of Canada, and to the reconciliation process in which, in the words of the Truth and Reconciliation Commission, “[a]t stake is Canada’s place as a prosperous, just, and inclusive democracy”\(^2\).

In the foregoing chapters, I have argued that the tools for acknowledging the importance of Aboriginal languages and allowing them to take their rightful place in our country are already present in our constitutional order. I have argued that Aboriginal languages already possess constitutional status. They are protected as Aboriginal rights under section 35(1) of the Constitution Act, 1982.\(^3\) This protection, when seen in the context of the critical state of Aboriginal languages and Canada’s past colonial history, in particular the policy of cultural

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\(^3\) Being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.
genocide against Aboriginal peoples engaged in by the Canadian state for over a century, primarily but not exclusively in the form of the residential school system, and in light of several important interpretive and normative constitutional principles, imposes a duty on Canadian governments, and especially on the federal government, to support the revitalization, protection, and promotion of Aboriginal languages. And finally, this constitutional status mandates that Aboriginal languages be accorded their rightful place as languages of founding peoples of our country by being granted the status of official languages; failure to do so would amount to a violation of the equality rights of Aboriginal peoples, and to interference with their Aboriginal right to their languages. These three aspects of the constitutional status of Aboriginal languages highlight their significance to our constitutional order and its continued legitimacy: the recognition of Aboriginal languages is one element of what I have called the constitutional imperative of reconciliation. Without recognition and protection of this status, reconciliation will remain an elusive goal.

“Those who have stolen something valuable”, notes the Truth and Reconciliation Commission, “cannot expect their apology to be believable and acceptable without the return of what was stolen, or a mutually agreeable level of compensation.” 4 This simple analogy serves perhaps better than any other to highlight the critical important of meaningful redress for past assimilationist policies which robbed generations of Aboriginal people of their languages, cultures, and identities. In the words of the Commission, any apology must be “a moral commitment on the part of the Government of Canada to support the health of Aboriginal cultures and languages”. 5 The tools for living up to this commitment, in the constitutional and legal sphere, already largely exist, as I have argued throughout this work. These can and should

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4 TRC, Reconciliation, supra note 2 at 127.
5 Ibid.
be enhanced. But the absence of explicit mention of Aboriginal languages in our constitution cannot be used as an excuse to deny these languages their rightful place in our constitutional order.

It is too early to tell if Canada as a country has fully embraced the challenge of reconciliation with Aboriginal peoples. There are positive signs: governments have made commitments to implementing the *United Nations Declaration on the Rights of Indigenous Peoples* in one form or another, although they have yet to make good on those promises. Canadian society is slowly becoming more conscious of its history and of the need for reconciliation. Strengthening the recognition and protection of Aboriginal languages would further serve to heighten the consciousness of the full diversity of our country, a diversity that has too long been denied. The symbolic value of the recognition of language, and through it, of Aboriginal nationhood and identity, is crucial to the project of coming to terms with our history and moving forward into a new relationship. As the Truth and Reconciliation Commission notes:

> As First Nations, Inuit, and Métis communities access and revitalize their spirituality, cultures, languages, laws, and governance systems, and as non-Aboriginal Canadians increasingly come to understand Indigenous history within Canada, and to recognize and respect Indigenous approaches to establishing and maintaining respectful relationships, Canadians can work together to forge a new covenant of reconciliation.⁷

Linguistic diversity is a Canadian reality, and always has been. It is time to recognize the fullness of this diversity, and embrace it. We, in Canada, are in a unique position to make an

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⁷ TRC, *Reconciliation*, supra note 2 at 12.
important contribution to the maintenance of diversity, to quelling the “spreading inferno”\(^8\) of cultural loss that is engulfing the planet. As I write these words on the traditional lands of the Haudenosaunee and Anishinabe peoples, it is my hope that the sounds of their languages will one day soon be heard all over these lands. This would go a long way, I believe, in helping to “inspire Aboriginal and non-Aboriginal peoples to transform Canadian society so that our children and grandchildren can live together in dignity, peace, and prosperity on these lands we now share”.\(^9\)

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