Collective Rights, Cultural Autonomy and the Cauadian State

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The author proposes that Canada's Constitution, while rooted in the principle of bi-nationality through the two founding cultures, also strives to accomodate the elaims to relative autonomy brought by other sub-national communities, such as aboriginal, religious or ethnic groups. He argues that collective rights historically have not found adequate enforcement in the Canadian Courts, but that their forceful restatement in the *Canadian Charter of Rights and Freedoms* marks a new beginning. Courts, he suggests, should interpret colleetive rights under the *Charter* so as to safeguard group institutions, allowing sub-national communities a measure of autonomy and self-determination. This would lead to a decentralised system of cultural pluralism, whereby collective rights would permit each sub-national group to protect its identityand its securityas a distinct community.

L'auteur suggère que la constitution canadienne, issue du prineipe de reconnaissance des deux peuples fondateurs, cherche aussi à accomoder les besoins d'autonomie relative des autres sous-communautés nationales, tels les groupes autochtones, religieux ou ethniques. Il soutient que les droits collectifs n'ont pas, à ce jour, été défendus adéquatement devant les tribunaux canadiens, mais que leur enchâssement dans la *Charte canadienne des droits et libertês* marque le début d'un changement d'attitude à leur égard. Il invite les tribunaux à interpréter les droits collectifs de façon à assurer l'autonomie et l'auto-détermination des sous-communautés nationales. Ceci mènerait à une décentralisation du pluralisme culturel et les droits collectifs permettraient alors de sauvegarder l'identité propre des sous-communautés nationales.

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Late in the last century, the territorial state became the principal unit of the international system. Territorial states were predicated upon the organization's ability to protect citizens from external aggression; to rationalize fragmented social and economic systems; and to raise the general level of material well-being. Today, these factors fail to justify the territorial state as the organizing principle of international politics. Because of the nuclear threat, no state can assure military protection for its citizens. Communications technology effectively penetrates national frontiers. Resulting transnational alliances diminish the role of the territorial state as an organizer of social systems. Freer trade and organization of the multi-national corporation on the basis of sub-systems of the global economic system, rather than on the basis of territorial states, contribute to the decline of the territorial state as an economic concept. Additionally, global interdependence limits national discretion to raise standards of living by domestic economic policies, without regard to the effects of international phenomena. As a basis for economic organization, the territorial state is largely outmoded.[1]

Because military, organizational and economic forces have crumbled as primary legitimizing features of the territorial state, secondary factors become all the more important. In today's international climate, a state without a national spirit cannot survive.[2] People who do not desire to live together, or who do not expect to accomplish great things together, will not be able to resist the forces exerted on their territorial state by the supranational phenomena above noted. In the multi-national state, secondary legitimizing factors take on added importance. While peoples with a long shared history can compete among themselves for limited resources without undue civil strife, others cannot. Bad economic times heat up suspicion and tension between sub-national ethnic, religious, linguistic and aboriginal communities, reducing their opportunity for compromise and weakening their resolve to endure united.

The spirit of Canada's constitution is rooted in the principle of bi-nationality. Canada's federal system proceeds directly from the requirements of a bi-national state. "I thought a Legislative Union would be preferable", Attorney-General John A. MacDonald stated in the Canadian Parliament in 1865, on the motion to adopt the "Quebec resolutions".

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[1]See J.D. Singer, "Trends Away From the Nation State" in I.D. Duchacek, ed., *Discord and Harmony* (Toronto: Holt, Rinehart and Winston, 1972) 17 at 19.

[2]See E. Renan, "What is a Nation?" in A. Zimmern, ed., *Modern Political Doctrines* (London: Oxford University Press, 1939) 186 at 202-03:

> A nation is a soul, a spiritual principal . . . . To share the glories of the past, and a common will in the present; to have done great deeds together, and to desire to do more — these are the essential conditions of a people's being.

> [B]ut ... we found that such a system was impracticable. In the first place, it would not meet the assent of the people of Lower Canada, because they felt that in their peculiar position — being in a minority, with a different language, nationality and religion from the majority ... their institutions and their laws might be assailed, and their ancestral associations, on which they prided themselves, attacked and prejudiced; it was found that any proposition which involved the absorption of the individuality of Lower Canada ... would not be received with favour by her people. ... So that those who were, like myself, in favour of a Legislative Union, were obliged to modify their views and accept the project of a Federal Union as the only scheme practicable ... .[3]

The bi-national principle was reinforced by rigorous guarantees of autonomy for scattered pockets of the two national communities in those political subdivisions where they lived as a minority.[4]

Bi-nationality is the major fissure upon which Canada is organized. It is not the only one, nor is it the only sub-national fracture for which Canada's Constitution makes special provision. Aboriginal communities claim special autonomous status embracing, at minimum, rights to land, resources, self-government, and independent discretion to determine their internal composition. Canada's Constitution accommodates these claims by the Royal Proclamation of 1763,[5] by the treaty process, and most recently by the *Constitution Act, 1982*.[6] Religious communities claim autonomy in the management and control of publicly funded systems of denominational education. Canada's Constitution accommodates this claim and Canadian

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[3]See the extracts of Attorney-General MacDonald's speech reprinted in H.E. Egerton & W.L. Grant, *Canadian Constitutional Development* (Toronto: Musson Book, 1907) at 362-63.

[4]*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 93 (control of denominational schools assured to religious minorities); s. 133 (special protection in the machinery of government, including the Legislature and Courts for official language minorities); s. 80 and the Second Schedule (protection for the linguistic integrity of anglophone electoral districts in Quebec).

[5]See *Canada* v. *Secretary of State for Foreign and Commonwealth Affairs, Ex parte Indian Association of Alberta* (1982), [1982] Q.B. 892 at 912, [1982] 2 All E.R. 118 (C.A.), Denning M.R.:

> To my mind the Royal Proclamation of 1763 was equivalent to an entrenched provision in the constitution of the colonies in North America. It was binding on the Crown 'so long as the sun rises and river flows'.

Leave to appeal was refused by the Appeal Committee of the House of Lords; see *supra* at 937, Lord Diplock:

> [Their Lordships refuse leave] because in their opinion, for the accumulated reasons given in the judgment of the Court of Appeal, it simply is not arguable that any obligations of the Crown in respect of the Indian peoples of Canada are still the responsibility of Her Majesty's Government in the United Kingdom.

[6]*Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, ss 25, 35, 35.1, 37 and 37.1.

Governments have legislated to enhance the status of denominational education beyond that required by constitutional law.[7] Certain ethnic groups claim autonomy for educational programmes and institutions, and for greater recognition of, and public funding for, their cultural heritage. Canada's Constitution accommodates this claim by special provision.[8]

It should be clear that autonomy for sub-national communities in Canada is an enduring feature of Canadian constitutional development. This tradition was extended and reinforced by proclamation of the *Canadian Charter of Rights and Freedoms*[9] in 1982. Almost one third of the *Charter*'s provisions deal with the collective rights of autonomous Canadian communities.[10] So do Parts II, IV and IV.1 of the *Constitution Act, 1982*. One cannot, therefore, speak seriously about Canadian constitutionalism without considering the unique role played by collective rights of autonomous communities within the Canadian federation.

Before considering the peculiar problems collective rights pose for Courts sitting under the *Charter*, we should ask how the security of Canadian collectivities has been advanced by other institutions of Canadian government. Canadian party and electoral systems are designed so that Canadian political parties usually do not divide along any of the major ethnic cracks in Canadian society. Effective operation of Canadian political parties thus requires that sub-cultural elites work out compromises and modes of accommodation. This process has so far ensured that sub-cultural elites are more or less committed to making the system work. It has produced stable government. Accommodation between sub-cultures is reinforced by the representative nature of the Federal Cabinet. By constitutional convention, certain major groups are entitled to representation in Cabinet. The representative cabinet has proved to be a significant institution for reducing conflict between sub-cultural groups, as their elites have an effective forum for reaching accommodation.

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[7]*Constitution Act, 1867, supra*, note 4, s. 93; *The Saskatchewan Act, 1905*, S.C. 1905, c. 42, s. 17, reprinted in R.S.C. 1970, App. II, no. 20; *The Alberta Act, 1905*, S.C. 1905, c. 3, s. 17, reprinted in R.S.C. 1970, App. II, no. 19; s. 17 of *Terms of Union of Newfoundland with Canada*, being the Schedule of the *Newfoundland Act* (U.K.), 12 & 13 Geo. 6, c. 22 (formerly *British North America Act, 1949*), reprinted in R.S.C. 1970, App. II, no. 30; *Constitution Act, 1982, supra*, note 6, s. 29.

[8]*Constitution Act, 1982, ibid.*, ss 15 ("equal benefit of the law") and 27. See also *Reference Re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 at 39, 10 D.L.R. (4th) 491 (Ont. C.A.) [hereinafter *Education Rights Reference* cited to O.R.]:

> In the light of s. 27, s. 23(3)(b) should be interpreted to mean that minority language children must receive their instruction in facilities in which the educational environment will be that of the linguistic minority. Only then can the facilities reasonably be said to reflect the minority culture and appertain to the minority.

[9]Part I of the *Constitution Act, 1982, supra*, note 6 [hereinafter *Charter*].

[10]*Ibid.*, ss 16-23, 25, 27 and 29.

Canada's representative cabinet rejects the merit principle.[11] In consequence, Canadian cabinets are neither efficient nor imaginative. In his *Letters on the French Coup d'État of 1851*, Walter Bagehot praised "stupidity" as "nature's favourite resource for preserving steadiness of conduct and consistency of opinion".[12] "Stupidity" is a cutting word, but it is nevertheless true that the dullness of Canadian cabinets, their want of daring initiative and their elephantine resistance to responding to events effectively contribute to the stability of Canada's constitutional system.

Sub-cultural groups compete for the limited quanta of power and resources available in Canada's political system. In the party system and Cabinet, the competition takes place among elites. Canadian elites are aware that each has a large stake in maintaining the system. In the party machinery and in Cabinet, elites have an effective forum to seek accomodation among the different interests and demands of the sub-cultures. Thus accommodation is usually forthcoming; compromises result in pacts to make common cause with the elites of rival sub-cultures.[13] The process transforms a fragmented political culture with tendencies towards disintegration into a stable democracy.

Entrenchment of collective rights in the *Charter* is quite a different matter. Entrenched collective rights are to be enforced in the Courts. Constitutional litigation does not invite the dull political compromise which is characteristic of sub-cultural accommodation in Cabinet and party politics. Collective rights litigation is adversarial. Litigation invites smart lawyers and subtle strategems. Community is pitted against community, majority against minority, often in a battle for survival. The history of collective rights litigation in the Canadian courts is a history of deep and lasting bitterness. The most explosive cleavages in Canadian society were produced

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[11]W.A. Matheson, *The Prime Minister and the Cabinet* (Toronto: Methuen, 1976) at 29.

[12]Cited in K.C. Wheare, *Legislatures* (Oxford: Oxford University Press, 1963) at 114.

[13]A landmark article by A. Lijphart, "Consociational Democracy" in K. McRae, ed., *Consociational Democracy: Political Accomodation in Segmented Societies* (Toronto: McLelland and Stewart, 1974) 70 at 79 suggests four factors conducive to the success of consociational democracies, such as Canada (consociational democracy is defined as "government by elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy"). All four factors are present in Canada. They are:

> (1) That the elites have the ability to accommodate the divergent interests and demands of the sub-cultures. (2) This requires that they have the ability to transcend cleavages and to join in a common effort with the elites of rival sub-cultures. (3) This in turn depends on their commitment to maintenance of the system and to the improvement of its cohesion and stability. (4) Finally, all of the above requirements are based on the assumption that the elites understand the perils of political fragmentation.

See also, by the same author, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press, 1977); and *Democracies: Patterns of Majoritarism and Consensus Government in Twenty-One Countries* (New Haven: Yale University Press, 1984).

by collective rights cases: the Manitoba school crisis,[14] Regulation 17,[15] Tiny Township[16] and the Manitoba Language Rights Reference.[17] Because collective rights litigation turns a searchlight on the crucial fault lines underpinning Canada's political structure, they are very dangerous.

Canada's final courts of appeal have never developed a *modus operandi* for dealing with collective rights cases. In particular, the Privy Council's intervention, often overruling the Supreme Court of Canada, produced disastrous results. The Privy Council usually found against minority communities,[18] dealing them severe setbacks and leaving a history of resentment and bitterness. The aftermath of these cases was an increase in conflict, smouldering over long periods of time.

Peoples who do not dream of national greatness together cannot survive as a state. Changes in the world system conspire against the multinational state as an organizing unit of politics. While Canada's system for sub-cultural accommodation tends to produce dull and uninspiring politics, it nevertheless works, fostering a growing sense of Canadian nationality, albeit slowly. The *Charter* makes accommodation between sub-national communities much more exciting, but also much more perilous. It is therefore crucial to consider entrenched collective rights carefully. We, who set the terms of debate, should strive to assist Courts expounding the *Charter* to devise a *modus operandi* that will fully protect the collective rights of semi-autonomous minorities, while keeping peace in the Canadian family. We need also to consider the extent to which further Canadian constitutional development should proceed by extending the collective rights idiom now deeply entrenched as part of Canada's fundamental law. This question is of particular importance to Constitution-makers in the North and in the aboriginal constitutional process.

What, therefore, are the underlying values on which our system of collective rights is based? What principles should Courts sitting under the *Charter* be jealous to safeguard?

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[14]*City of Winnipeg* v. *Barrett* (1892), [1892] A.C. 445 (P.C.); *Brophy* v. *A.G. Manitoba* (1895), [1895] A.C. 202 (P.C.).

[15]*Trustees of the Roman Catholic Separate Schools for the City of Ottawa* v. *Mackell* (1917), [1917] A.C. 62 (P.C.).

[16]*Roman Catholic Separate School Trustees for Tiny* v. *Ontario* (1928), [1928] A.C. 363 (P.C.).

[17]*Reference Re Certain Linguistic Rights under Section 23 of the Manitoba Act, 1870, and Section 133 of the Constitution Act, 1867* (1985), [1985] 1 S.C.R. 721 (*sub. nom Reference Re Language Rights under the Manitoba Act*) 19 D.L.R. (4th) 1.

[18]*Supra*, notes 14-16.

A useful starting point is the premise that individuals can only find fulfillment by being members of a social group.[19] In Canada, group identification is strong. In communities which enjoy or seek collective rights, participation in the group is the indispensable condition of self-fulfillment. Participation requires institutions mediating individual interactions with the group. A principal value protected by a system of collective rights is the preservation of those institutions by which the group maintains itself.[20]

A second value protected by our system of collective rights is autonomy. Collective rights enshrined in the Constitution seek to guarantee "to certain social or ethnic groups a degree of independence from governmental interference in matters of concern to these groups".[21] A measure of autonomy allows ethnic, linguistic, religious and aboriginal communities to promote the evolution of their ancestral institutions and customs in their own particular way, and thus to preserve crucial distinctions of language, culture, religion or government differentiating these communities from the majority.

A third value is the strengthening of the position of minorities in the political process. Collective rights vest in preferred groups a greater weight

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[19]This is a basic precept of social psychology. See generally G.H. Mead, *Mind, Self and Society* (Chicago: University of Chicago Press, 1962) at 138:

> The individual experiences himself as such, not directly, but only indirectly from the particularist standpoints of other individual members of the same social group, or from the generalized standpoint of the social group to which he belongs.

See also G.H. Mead, *On Social Psychology* (Chicago: University of Chicago Press, 1964) at 19 and 33ff.

[20]To some extent the Permanent Court of International Justice pointed towards this value in *Minority Schools in Albania* (6 April 1935) ser. A/B 64 P.C.I.J. 4 at 17:

> The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and in co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.
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> In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.
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> The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.
>
> The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.
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> These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.

[21]H. Hannum & R.B. Lillich, "The Concept of Autonomy in International Law" in Y. Dinstein, ed., *Models of Autonomy* (London: Transaction Books, 1982) 215 at 246; and see R. Bernhardt, "Federalism and Autonomy" in *Models of Autonomy, supra*, 23 at 26.

in the balance of power. Without this advantage, the full impact of democratic egalitarianism could be used at the ballot box to frustrate the development of collectivities by subsidiary regulations to which they would be obliged to conform. Collective rights ensure that Courts scrutinizing such regulations will have an aroused sense of respect for the position of collectivities in assessing the uses of majoritarian power.

The values advanced by collective rights have limits. These are dictated by two overarching needs of the central state: to promote good relations between sub-cultural communities and to foster a sense of national spirit.[22]

An important way to promote good relations among sub-cultural groups in a pluralistic state is to distribute power among many collectivities. This is preferable to concentrating power in one hegemonic group, or striving for a dual balance of power between two pre-eminent groups:

> When one group is in the majority, its leaders may attempt to dominate rather than co-operate with the rival minority. Similarly, in a society with two evenly matched sub-cultures, the leaders of both may hope to achieve their aims by domination rather than co-operation... .[23]

By contrast, a multiple balance of power encourages coalition and compromise. Domination is not possible. This would tend to keep a relatively greater number of disputes in political fora, where Canadian experience teaches that they can, in most cases, be resolved satisfactorily by elite cartel. It keeps them out of the Courts which, as history demonstrates, are an explosive forum, and rarely produce a stable accommodation.

Courts may assist the development of multiple centers of community power by paying serious attention to section 27 of the *Charter*. Section 27 requires that the *Charter* "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". In pouring content into section 27, it is open to the Courts to concentrate

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[22]Professor F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1979), Doc. E/CN 4/Sub.2/384/Rev.1 at 54 makes a similar point:

> The need to safeguard the integrity of the State and to avoid encouraging separatism is of course the legitimate concern of any government. This may regard it as a natural limit to any policy of protection for minorities even a policy pursued in the form of a very broad pluralism. Nevertheless, it is a matter for regret that concern to avoid weakening the integrity of the state or opening the door to separatist tendencies sometimes presents an obstacle to the adoption of special measures in favour of individuals belonging to minority groups.

[23]Lijphart, "Consociational Democraey", *supra*, note 13 at 81.

attention on institutional and economic impact, in cases implicating community political structures, schools, churches and public funding.[24] The Ontario Court of Appeal has already taken this approach to minority language education rights and the rights of religious communities.[25] The advantage of this approach is that all cultural communities are encouraged to advance claims for various types of autonomy, so that some may succeed. This diffuses the center of power. While dominant anglophone and francophone communities have expressed reservations about this approach,[26] their ultimate reaction may be expected to be at worst ambivalent, rather than wholly negative. This is because a multicultural approach has already assisted them.[27] Communities do not often reject instruments by which they can benefit, even if it means that others benefit as well.

In its initial approach to the *Charter*, the Supreme Court of Canada has begun to expound a constitutional theory that gives pre-eminence to the role of individual rights, and pays scant attention to the special demands of collectivities. This tendency has blinded the Court to the special legacy of collective rights which distinguishes Canadian constitutional development from that of other countries. The *Charter*'s function, said the Court in *Hunter* v. *Southam Inc.*, "is to provide ... for the unremitting protection of individual rights and liberties".[28] In *R.* v. *Big M Drug Mart*, the Court later elaborated:

> [An] emphasis on individual conscience and individual judgment ... lies at the heart of our democratic political tradition. ...
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> The values that underlie our political and philosophic traditions demand that every individual be free to hold and manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours ... .
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> ...
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> [When] people believed in the collective responsibility of the community to-

[24]For an elaboration see J.E. Magnet, "Interpreting Multiculturalism" in *Multiculturalism* (Toronto: Carswell, [forthcoming]).

[25]*Education Rights Reference, supra*, note 8; and *R.* v. *Videoflicks Ltd* (1984), 48 O.R. (2d) 395, 14 D.L.R. (4th) 10, 15 C.C.C. (3d) 353 (C.A.). For a discussion, see Magnet, *ibid.*

[26]See generally G. Rocher, "Multiculturalism, The Doubts of a Francophone" in *Multiculturalism as State Policy* (Second Canadian Conference on Multiculturalism, Government Conference Centre, Ottawa, 13-15 February 1976) (Ottawa: Canadian Consultative Council on Multiculturalism, 1976) 47.

[27]See *Education Rights Reference, supra*, note 8. This approach was also advanced in support of the francophone minority in *Mahe* v. *Alberta* (1985), 22 D.L.R. (4th) 24, 39 Alta L.R. (2d) 215 (Q.B.), Purvis J.

[28](1984), [1984] 2 S.C.R. 145 at 155, 11 D.L.R. (4th) 641, (*sub. nom Director of Investigation and Research, Combines Investigation Branch* v. *Southam Inc.*) 41 C.R. (3d) 97.

> ward some deity, the enforcement of religious conformity may have been a legitimate object of government, but since the *Charter* it is no longer legitimate.[29]

While one would hardly wish to quarrel with the sentiments underlying these statements, they are nevertheless inadequate as an expression of Canadian constitutional theory and equally curious as explanatory of the Courts's own practice when confronted with collective rights disputes. In *Caldwell* v. *Stuart*, the Supreme Court dismissed the complaint of a Roman Catholic teacher who was not rehired by a Catholic school because she married a divorced man in a civil ceremony, contrary to church dogma. The Court emphasized "the special nature and objectives of the school" and found "the acceptance and observance of the Church's rules regarding marriage ... reasonably necessary to assure the achievement of the objects of the school".[30] The Court therefore held that failure to rehire the newly married teacher was legitimate. This result runs in the same channel cut by the major currents of Canadian jurisprudence.[31] However, *Caldwell* and similar cases cannot be squared with the Court's broadly phrased *Charter* theory, particularly as regards the statement that the enforcement of religious conformity is not legitimate. This obvious contradiction draws attention to the inadequacy of the Court's *Charter* theory, particularly when it must explain a mixed constitution that equally emphasizes individual and collective rights.[32]

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[29](1985), [1985] 1 S.C.R. 295 at 346 and 351, 18 D.L.R. (4th) 321, 18 C.C.C. (3d) 385. The point is even clearer in *Société des Acadiens du Nouveau-Brunswick* v. *Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, *infra*, note 33. In this case the Supreme Court interpreted the official languages sections of the *Charter*. After a general discussion of s. 16, Chief Justice Dickson stated at 565: "I should add that the Charter was designed primarily to recognize the rights and freedoms of *individuals* vis-à-vis the State" [my emphasis].

[30](1984), [1984] 2 S.C.R. 603 at 624-25, 15 D.L.R. (4th) 1 [hereinafter *Caldwell* cited to S.C.R.].

[31]See generally W. Tarnopolsky, *Discrimination and the Law* (Toronto: De Boo, 1982) at 210ff. Of equal interest is *Reference Re Roman Catholic Separate High Schools Funding* (1986), 13 O.A.C. 241. The Court referred to ss 93 and 133 of the *Constitution Act, 1867*, *supra*, note 4, as group collective rights.

[32]In *R.* v. *Oakes* (1986), [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321, the Court demonstrated much greater sensitivity to the mixed nature of the *Charter* as embracing both individual and collective rights — individual dignity and cultural pluralism. In discussing inclusion of the word "free and democratic society" in s. 1 as the final standard of justification for limits on rights and freedoms, Chief Justice Dickson stated at 136:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accomodation of a wide variety of beliefs, *respect for cultural and group identity*, and faith in social and political institutions which enhance the participation of *individuals and groups* in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [my emphasis]

In *Société des Acadiens du Nouveau Brunswick* v. *Association of Parents for Fairness in Education, Grand Falls District 50 Branch*[33] the Supreme Court's inability to see in the language provisions of the *Charter* any broad system for protection of official language communities produced a curious result. The Court read guarantees for official bilingualism with utmost literalism. It reached the startling conclusion that the *Charter*'s official language sections should be read, in the characterization of Justice Wilson (who concurred in the result only), as "permitting the litigant to use the language he or she understands but allowing those dealing with him or her to use the language he or she does not understand".[34] In the case of *MacDonald* v. *City of Montreal*, heard the same day, Justice Wilson reflected on this conclusion and wondered, cuttingly, "[what] kind of linguistic protection would that be".[35] The editorialists rightly replied that this "smothering narrowness" rendered language rights "hollow".[36] The crucial point to notice is that the Court's stultifying literalism here transformed a guarantee for minority languages into a right for the majority, acting through the legislature or administration, to deal with minority language communities in the language of the majority. This constitutional approach is devoid of principle and lacks sensitivity for the hard-won collective rights of minority communities.

The Supreme Court's difficulty with the theory and administration of collective rights draws attention to a larger and more general inability of the Canadian judicial system to assimilate collective rights precepts or to apply them satisfactorily to the communities for whose benefit they were designed. In *Quebec Association of Protestant School Boards* v. *A.G. Québec*, Chief Justice Deschênes considered Quebec's argument that minority language educational rights guaranteed by section 23 of the *Charter* were collective rights established in the interest and for the benefit of the Anglo-Quebec minority. Quebec argued that the educational provisions of Bill 101 entailed the complete loss of section 23 rights for some individual anglophones. Nevertheless, Quebec submitted that these stipulations only limited, but did not completely deny, the group's collective right. Chief Justice Deschênes' reaction to this submission signals caution to those who would rely

[33](1986), [1986] 1 S.C.R. 549, 27 D.L.R. (4th) 406 [hereinafter *Société des Acadiens* cited to S.C.R.].

[34]Justice Wilson's expression is taken from her written reasons in *MacDonald* v. *City of Montreal* (1986), [1986] 1 S.C.R. 460 at 540, 27 D.L.R. (4th) 321 [hereinafter cited to S.C.R.].

[35]*Ibid.*

[36]"Hollow Language Right" *The [Toronto] Globe and Mail* (7 May 1986) A6.

primarily on entrenchment of collective rights to protect the semi-autonomous status of their communities, or otherwise to guarantee their cultural security. Chief Justice Deschênes said:

> Quebec's argument puts forward a totalitarian view of society to which the Court does not subscribe. Human beings are, to us, of paramount importance and nothing should be allowed to diminish the respect due to them. Other societies place the collectivity above the individual. They use the Kolkhoze steamroller and see merit only in the collective result even if individuals must be destroyed in the process.
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> This concept of society has never taken root here ... and this Court will not honour it with its approval.[37]

This ruling attracted sharp criticism from the commentators: "[L]a conclusion ne découle pas des prémisses".[38] The journalists were more blunt: "On doit donc regretter que la juge Deschênes ait, par certains de ses propos, contribué à embrouiller d'avantage dans l'opinion publique des concepts juridiques qui, bien compris, peuvent pourtant favoriser l'avènement d'une plus grande justice."[39]

The incomplete assimilation of collective rights precepts and the hostility to collective rights concepts expressed by some courts ought not blind us to the slow development of collective rights theory among Canadian courts and commentators.[40] In *A.G. Quebec* v. *Greater Hull School Board*[41] the Supreme Court of Canada considered whether certain school tax legislation of Quebec was offensive to protected denominational rights in section 93 of the *Constitution Act, 1867*. In concurring reasons Mr Justice Le Dain held that section 93 gave a "right or power of local self government to denominational schools" and that "the rights contemplated by s. 93(1) ... may be characterised as 'collective rights'". Mr Justice Le Dain added:

> What the characterization does suggest, however, is that it is the interests of the class of persons or community as a whole in denominational education that is to be looked at and not the interests of the individual ratepayer.[42]

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[37](1982), [1982] C.S. 673, 140 D.L.R. (3d) 33, aff'd (1984), [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321. The Supreme Court made no reference to the quoted remark of Chief Justice Deschênes.

[38]P. Carignan, "De la notion de droit collectif et de son application en matière scolaire au Québec" (1984) 18 R.J.T. 1 at 97; see also M. McDonald, "Collective Rights: The Canada and Quebec Clauses" (Lecture at the International Association for Legal and Social Philosophy Meeting, 31 May 1983) at 33 [unpublished].

[39]J.-P. Proulx, "Droits individuels et droits collectifs" *Le Devoir [de Montréal]* (2 October 1982) Cahier 1 at 17.

[40]For additionnal documentation on collective rights, see M. McDougall, Bibliography on Collective Rights (Human Rights Research and Education Center: University of Ottawa, 1985) [unpublished]; and Centre de recherche et d'enseignement sur les droits de la personne, *Rapport: Premier séminaire sur les droits collectifs* (Ottawa: University of Ottawa, 1985) (presidents: J.E. Magnet & G.-A. Beaudoin).

[41](1984), [1984] 2 S.C.R. 575, 15 D.L.R. (4th) 561 [hereinafter cited to S.C.R.].

[42]*Ibid.* at 599.

In that light, Mr Justice LeDain held Quebec's taxing procedure offensive to paragraph 93(1) of the *Constitution Act, 1867*. He said:

> While the requirement of approval by referendum for taxation beyond [a] severely limited amount may be said to enlarge the democratic rights of the individual member of the class and to be a measure for the protection of his or her pocketbook, it is a measure or requirement which, because of its cost and uncertainty of outcome as indicated in the evidence, is prejudicial to the effective management of denominational schools in the interest of the class as a whole. ... What is in issue here is ... the effective power of school commissioners and trustees to provide for and manage denominational schools in the interests of the class.[43]

In *Reference Re an Act to Amend the Education Act*, the Ontario Court of Appeal refered to sections 93 and 133 of the *Constitution Act, 1867* as amounting to "a small bill of rights". The Court noted that sections 16 to 23 of the *Charter* expanded upon section 133 rights. These provisions, stated the Court, "constitute a major difference from a bill of rights such as that of the United States, which is based on individual rights". The Court continued:

> Collective or group rights, such as those concerning language and those concerning certain denominations to separate schools, are asserted by individuals or groups of individuals *because of* their membership in the protected group. Individual rights are asserted equally by everyone *despite* membership in certain ascertainable groups. Collective rights protect certain groups and not others. To that extent, they are an exception from the equality rights provided equally to everyone. ...
>
> To apply this to s. 93, it is necessary to recognize that that provision for the rights of Protestants and Roman Catholics to separate schools became part of 'a small bill of rights' as a basic compact of Confederation.[44]

The actual or potential conflict between characterization of statutory prescriptions as creating individual or collective rights had been noticed earlier by a New Brunswick trial court. In *Société des Acadiens* Mr Justice Richard considered amendments to the provincial *Schools Act*[45] and *The Official Languages of New Brunswick Act*[46] which provided for the creation of separate French and English school systems to replace the existing bilingual system. Mr Justice Richard also considered *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*,[47] which affirmed "the equality of status and equal rights and privileges" of the English and French linguistic communities.

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[43]*Ibid.* at 599-600.
[44](1986), 53 O.R. (2d) 513 at 566-67 (Ont. C.A.).
[45]R.S.N.B. 1973, c. S-5.
[46]R.S.N.B. 1973, c. 0-1.
[47]S.N.B. 1981, c. 0-1.1.

This litigation concerned a minority language school board which had been established in the Grand Falls region. The board not only accepted francophone students into its regular English program, but also permitted francophone students to enroll in its French immersion program, which had been designed for anglophone students. Reviewing the evidence, Mr Justice Richard found that New Brunswick abolished bilingual schools because they harmed the linguistic minority child and minority community by excessive assimilation and by "degeneration of the mother tongue [producing a] mixture common to colonized or assimilated peoples". He was then faced by counsel's submission that the *Schools Act* and *Official Languages Act* advanced the interest of the francophone community be requiring that all francophone students be educated in the French system. To consider this submission Mr Justice Richard asked:

> [H]as the legislator declared that collective rights are to take precedence over the individual rights of the parents? Furthermore, did the legislator intend to take away the parents' right to place their children in the school system of their choice?[48]

Counsel's suggestion was rejected because it posed insuperable difficulties with respect to mixed families, assimilated francophones, and anglophones.

Mr Justice Richard did not clearly decide whether, as submitted, the school provisions were collective rights, designed to benefit the French linguistic community. The tenor of his remarks suggests that he rejected this view with respect to the *Schools Act* and *Official Languages Act*. This is apparently the reason why he held that parents had a large measure of choice in deciding to which system they would send their children. Had Mr Justice Richard decided that the school provisions were collective rights, it seems likely that he would have felt constrained to severely limit the parents' ability to choose school systems, in light of counsel's submission.

While Mr Justice Richard appeared to reject a collective rights interpretation of the school prescriptions, he did make these comments about the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*:

> As for the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, there is nothing in its three sections dealing with individual rights. ... The Act always speaks of linguistic communities, not individuals ... .[49]

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[48]*Société des Acadiens du Nouveau-Brunswick* v. *Minority Language School Board No. 50* (1983), 48 N.B.R. (2d) 361 at 397, 126 A.P.R. 361 (Q.B.) [hereinafter cited to N.B.R.].

[49]*Ibid.* at 401.

In light of this interpretation, Mr Justice Richard concluded that parents did not have unrestricted freedom to choose a school system for their children. Parental autonomy was subject to a requirement of the child having adequate language competence in the chief language of the school. The limitation to parental autonomy to choose results from the collective rights idiom of *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick.* This Act signifies that the collective rights of the French and English linguistic communities to a school system are rights intended to benefit communities, notwithstanding any contrary claim asserted by individuals. It is in this sense that a collective rights characterization becomes relevant: it elevates the right of the community to protect the linguistic purity of its schools, over the claimed freedom of the individual to choose a school system irrespective of the child's language competence.

These rulings are of interest because they emphasize the following points. Collective rights differ significantly from individual rights, and implicate distinct, if novel, doctrine for their administration. Collective rights elevate group security over individual freedom. They protect groups, not individuals, and create special limited autonomy for these groups by reserving power to them to manage or control certain institutions.

It is possible to synthesize from these crucial points a more general, but vitally important principle. Collective rights are designed to guarantee group survival by protecting from majority interference certain specific institutions through which minorities propogate their communities.

This general principle raises a question as to the scope of the institutional infrastructure which an intelligently designed system of collective rights ought properly to embrace. If a system of collective rights were to be an important guarantee of community security, the system at minimum would have to include the following: mechanisms through which the group can interact with other groups, particularly the dominant or governing group in the society (namely, political structures); mechanisms for propagation of the group's beliefs (ethnic schools, religious institutions, and associations); mechanisms of group definition (namely, control over inclusion and exclusion of members of the group, as in the case of a priesthood or band council); defensive mechanisms able to protect the group from the adverse affects of discrimination, racism, and other forms of majority oppression.

Notwithstanding our ability to synthesize important collective rights precepts, one cannot fail to notice the unhappy history which collective rights cases delineate. One must also pause over the incomplete assimilation of colleetive rights precepts into Canadian constitutionalism, and the outright hostility of some Canadian judges and commentators to the collective rights concept. These observations suggest that it would be unreasonable to

expect the Canadian judicial system, in the near future, to become an astute administrator of collective rights mechanisms. Because this is so, certain proposals for aboriginal self-government and for constitutional development of the North require closer attention.

Michael Asch and Gerston Dacks propose direct consociation as the best model for government in the Western Northwest Territories.[50] By "consociation" Asch and Dacks mean a political system in which institutions are organized in a manner acknowledging specifically "that there are distinct cultural communities that have the right to control certain matters".[51] Asch and Dacks make a valuable contribution in suggesting the establishment of segmented political institutions, such as cultural councils, culturally composite cabinets, and cultural checks on the legislative process as a means for utilizing the theory of consociational government[52] to solve the problem of aboriginal self government in the North. However, Asch and Dacks also advocate that government for the Western Northwest Territories include a Charter of Collective Rights, supervised by the Courts.[53] So does the Dene Nation.[54] These proposals merit careful consideration.

It is probable that collective rights, supervised by the Courts, would serve a useful educational function if entrenched in a constitution for northern governments. Collective rights would probably also be useful as an emergency switch for embattled communities when other institutions of government failed. However, it would be unwise to expect too much from entrenching justiciable collective rights. In particular, it would be unrealistic to rely on collective rights as a primary regulator of community relations, or as a primary guarantor of community security. The Courts have a poor history in these matters, and perhaps lack the proper orientation, sophistication, experience, expertise and resources to make out of collective rights cases all that the proponents of collective rights expect, but seldom, if ever, receive. The better course would be for Northern constitution-makers to concentrate primary attention on the design of consociational or segmented

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[50]M. Asch & G. Dacks, "The Relevance of Consociation to the Western Northwest Territories" in *Partners for the Future: A Selection of Papers Related to Constitutional Development in the Western Northwest Territories* (Yellowknife: Western Constitutional Forum, 1985) 35.

[51]*Ibid.* at 39.

[52]See the discussion, *supra*, note 13.

[53]*Supra*, note 50 at 44: "[I]f at all possible, a Charter of rights should be created that defines and entrenches the fundamental rights of the cultural communities in the new territory".

[54]See Dene Nation and Metis Association of the Northwest Territories, *Denedeh Public Government: Official Discussion Paper of the Dene Nation* (Yellowknife, 1985). See also Dene Nation and Metis Association of the Northwest Territorie, *Public Government for the People of the North* (Yellowknife, 1982) at 22: "There are vast inequalities and differences between people and groups. Any consideration of rights must take these inequalities and differences into account."

political institutions. Canadian history places these political arrangements in a flattering light as a mechanism to overcome major divisions in Canadian society. Justiciable collective rights could play a secondary supplementative and educational role, but ought not to be relied on as a primary regulator of community relations or a principal guarantor of cultural security.

All Charters of Rights are inspired by an overriding concept of individual liberty that derives from the eighteenth century philosophers and found profound expression in the American Bill of Rights in 1791. Charters create a private area of human space where individual conscience reigns supreme as the motivator of human action. Within the protected sphere, government cannot obstruct the operation of conscience by majoritarian preferences. This classical idea of individual liberty received its most profound development in the twentieth century constitutional jurisprudence of the United States Supreme Court. It is a welcome and needed addition to Canada's constitutional system. Nevertheless, for American style constitutionalism to thrive in Canada, it must be rationalized with a constitutional tradition that emphasizes bi-nationality and cultural pluralism, and that decentralizes large areas of state power to institutions of semi-autonomous cultural groups. Courts will have to tread carefully in developing *Charter* theory for, in Canada, cultural pluralism is the indispensable element that allows sub-national minorities to feel secure. Stable ethnic accommodation requires that this sense of collective security be nurtured and protected. The Courts must therefore pay special attention to the semi-autonomous status of collectivities at the same time as they enhance our great democratic traditions by the addition of a *Charter* jurisprudence. This may be a difficult and labourious responsibility, but it is a necessary condition for enhancing that sense of Canadian national purpose and spirit which most of us find utterly worth preserving.