

Linguistic Rights of Minorities and Indigenous Communities

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Abstract: Diritti linguistici delle minoranze e comunità indigene – The essay examines the legal status of linguistic groups in Canada, comparing them with other experiences especially of common law countries (Australia, New Zealand and United States). Both the English and French-speaking linguistic communities and the Aboriginal communities are analysed. Special attention is given to issues concerning education in English and French. For the Aboriginal communities, the experiences of Nunavut and Nisga'a are examined as paradigmatic cases. Finally, the teachings that the Canadian experience, also in comparison with the Italian case, can offer on the comparative level are highlighted.

775

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1. Introduction

Canada, as is widely known, has been studied, also in Italy¹, with a major focus on the implementation of the so-called multicultural model of society². In particular,

¹ See, especially, G. Martinico *et al.* (eds), *Il costituzionalismo canadese a 150 anni dalla Confederazione. Riflessioni comparatistiche*, Pisa, 2018; E. Ceccherini, 'Cittadinanza, immigrazione e integrazione: l'approccio multiculturalista canadese in bilico', in G. Cerrina Feroni, V. Federico (eds), *Strumenti, percorsi e strategie dell'integrazione nelle società multiculturali*, Presentation by L. Dei, Napoli, 2018, 345; E. Ceccherini 'Aboriginal Law nel mondo contemporaneo: l'esperienza canadese', in C. Murgia (ed.), *Scritti in onore di S. Volterra*, Torino 2017, 211; P.L. Petrillo, *Diritti linguistici e multiculturalismo in Canada, Diritto pubblico comparato ed europeo*, 2016, 983-1005; P.L. Petrillo, *Le istituzioni delle libertà. Esperienze costituzionali canadesi*, Padova, 2012, 19-22, 99-136; T. Groppi, *Il multiculturalismo come strumento per la costruzione dell'identità nazionale: l'esperienza del Canada*, in D. Amirante, V. Pepe (eds), *Stato democratico e società multiculturali. Dalla tutela delle minoranze al riconoscimento delle diversità culturali*, Torino, 2011, 17; T. Groppi, *Canada*, Bologna, 2006, 18-22, 42-45; G. Rolla, 'Tutela dell'identità culturale e personale negli ordinamenti multietnici: l'esperienza del Canada', in *Scritti in memoria di L. Paladini*, Vol. IV, Napoli, 2004, 1891; G. Rolla, *La tutela costituzionale delle identità culturali: l'esperienza del Canada*, in S. Gambino, C. Amirante (eds), *Il Canada. Un laboratorio costituzionale. Federalismo, Diritti, Corti*, Padova, 2000, 87; G. Rolla (ed.), *Lo sviluppo dei diritti fondamentali in Canada. Tra universalità e diversità culturale*, Milano, 2000.

² On the (very close) relationships between multiculturalism and linguistic issues see, in addition to the works quoted *supra* (note 1), D. Amirante, 'La questione linguistica nello Stato multiculturalista: profili comparati', *Diritto pubblico comparato ed europeo*, 2016, 917-941. For a comprehensive comparative survey on linguistic rights, cf. G. Poggeschi, *I diritti linguistici*.

the Canadian nation (demos) includes, on the one hand, the two founding peoples, the Anglophones and Francophones, and, on the other hand, the Indigenous peoples, or Aborigines. The present contribution intends to examine the legal status of English-speaking and French-speaking minorities from the point of view of linguistic rights and, secondly, the legal status of Indigenous peoples, with special reference to the problems relating to the use of language of Aboriginal communities in some peculiar territorial contexts. The underlying assumption is that linguistic rights are a key, predominant, element of minority rights³, in awareness of the complex interactions of minorities protection with nation-building and state-building.

The Canadian experience is of great interest for the comparatists. This is because, on the one hand, has long been committed to the realization of multiculturalism; on the other hand, it refers to both linguistic and ethnic minorities, represented in the latter case by the Indigenous peoples. The Canadian legal experience is useful, in particular, for the solution of the problems of linguistic minorities in Italy (as well as in Europe), and his direct knowledge is a source of special enrichment for the Italian comparative doctrine. The comparative approach is also useful for Canadian scholars, especially in relation of the pending Indigenous languages legislation introduced in the Federal Parliament⁴, which is aimed at preserving, revitalizing and promoting Aboriginal languages, beginning with the right to use them (where appropriate), even with the provision of obligations both for the federal government and for the provincial/territorial governments and for the municipal ones, including the local educational authorities.

Un'analisi comparata, Roma, 2010; G. Poggeschi, *Language Rights and Duties in the Evolution of Public Law*, Baden-Baden, 2013.

³ On the subject, see: M.J. Esman, 'The Politics of Official Bilingualism in Canada', *Political Science Quarterly*, Vol. 97, No. 2, 1982, 233-253; C.M. MacMillan, *The Practice of Language Rights in Canada*, Toronto, 1998; S.W. Crowe, 'Comparatively Speaking: Language Rights in the United States and Canada', *Canada-United States Law Journal*, Vol. 37, No. 1, 2012, 207-230; M.C. Barbier, 'La legislazione sul bilinguismo in Canada', in G. Rolla (ed.), *Lo sviluppo dei diritti fondamentali in Canada. Tra universalità e diversità culturale*, Milano, 2000, 268; M. Bastarache, M. Doucet (dir.), *Les droits linguistiques au Canada*, Foreword by L. Arbour, 3th edn, Montréal, 2014, and more recently. F. Bérard, *Charte canadienne et droits linguistiques. Pour en finir avec les mythes*, Foreword by J.-F. Montréal, 2017; O. Dulude, *La protection des minorités au Canada: fondements théoriques, lacunes et pistes de solutions*, Observatoire national en matière de droit linguistique, Montréal, 2017 (also with regards to the right to the media in the language of the minority). On the case law, see J. Woehrling, 'La Cour suprême du Canada et la réflexion sur la nature, les fondements et les caractéristiques des droits et de la liberté linguistiques', in C. Brohy *et al.* (eds), *Conference Proceedings of the 12th International Conference of the International Academy for Linguistic Law* (1-3 November 2010, Black Mountain, Thaba Nchu, South Africa), Bloemfontein, 2012, 313.

⁴ See, for example, "Bill S-212 – Aboriginal Languages of Canada Act. An Act for the advancement of the aboriginal languages of Canada and to recognize and respect aboriginal language rights".

2. Anglophones and Francophones, between the International Covenant on Civil and Political Rights and the Canadian Charter of Rights and Freedoms

The origin of the constitutional protection currently guaranteed to the two official languages⁵ of the Canadian Federation, namely English and French, is significantly to be found in sections 26 and 27 of the International Covenant on Civil and Political Rights of 1966. These rules forbid discrimination of individual persons and minorities from discriminating on a number of grounds, including language (used by the individual and by minority group). The rules themselves constitute a specification of the general prohibition of discrimination contained in the second paragraph of section 2 of the International Covenant on Civil and Political Rights. Canada ratified in 1976 the just-mentioned international agreement; from this it is derived the obligation to transpose into national law the prohibition of discrimination envisaged by the instrument of international law. In this sense has provided the first paragraph of section 15 of the Canadian Charter of Rights and Freedoms of 1982, which, moreover, does not explicitly mention the use of language amongst the causes of discrimination prohibited⁶. Implementation within the Canadian constitutional order of the provisions contained in section 26 and, most importantly, section 27 of the International Covenant on Civil and Political Rights in the field of the protection of linguistic rights of minorities is therefore mainly entrusted in sections 16 to 20 and 23 of the Canadian Charter of Rights and Freedoms.

The protection recognized by the Canadian Charter of Rights and Freedoms to the official languages of Canada, namely English and French, is comparatively more advanced or 'generous' than that contemplated by section 27 of the International Covenant on Civil and Political Rights; on the other hand, for linguistic minorities other than the English-speaking and French-speaking minorities, the situation is certainly different, in the sense that for these last linguistic communities the protection afforded by the Canadian Charter of Rights and Freedoms is not only lower than that for Anglophones and Francophones, but it also falls below the standards outlined in the International Covenant on Civil and Political Rights. If, in fact, sections 16 to 20 of the Canadian Charter of Rights and Freedoms fully equate English and French as languages which can be used in the relations with the public administration and with the judicial authorities, the same can not be said for the other minority languages. This applies to minority languages still spoken by Aborigines belonging to the so-called First Nations⁷, who are "old" minorities settled in Canadian territory before the arrival in the New Continent of the colonizers coming from Europe, and those who belong to the

⁵ So-called linguistic duality, or official language minority communities (OLMCs).

⁶ See D. Newman, 'Recent Interactions Between Aboriginal Rights and Section 15 of the Charter', *Saskatchewan Legal Education Society Inc. (SKLESI), Civil Law Charter Update*, March 2007, 1-7.

⁷ The Canadian First Nations are over 600 (634 officially recognized), and speak more than 60 distinct languages, grouped into ten language families; cf. J. Preston, 'Canada', in K. Broch Hansen, K. Jepsen, P. Leiva Jacquelin (eds), *The Indigenous World 2017*, Copenhagen, 2017, 94. For a general overview, see O.P. Dickason, *A Concise History of Canada's First Nations*, 2nd edn, Toronto, 2010.

“new” minorities⁸, as for example the native speakers of German, Ukrainian or Russian⁹, or even more recently, the Arabophones who have moved from their countries of origin to Canada (*i.e.*, the so-called non-English-speaking and non-French-speaking immigrants¹⁰). The only disposition, at the federal constitutional level, expressly applicable to problems related to the use of mother tongue is section 14 of the Canadian Charter of Rights and Freedoms, which provides for the assistance of an interpreter in favor of the parties to a judicial proceeding, or a witness, who is unable to understand and speak the language (English or French) in which the process takes place. It is clear, however, that in the last case there is an individual right¹¹, while in the cases covered by sections 16 to 20 of the Charter of Rights and Freedoms, this is a collective right¹².

This is confirmed by section 16.1. of the Canadian Charter of Rights and Freedoms, which was incorporated through the 1993 constitutional amendment and provides, for the inhabitants of New Brunswick, equality of status and

⁸ The distinction between “new” linguistic minorities (*i.e.* immigrant linguistic minorities) and historical linguistic minorities, from the point of view of linguistic rights, is also present in the Italian legal system; see, recently, L. Panzeri, *La tutela dei diritti linguistici nella Repubblica delle autonomie*, Milano, 2016 (where also references to the peculiar condition of the Roma and Sinti minorities, which are linguistic minorities as well as historical minorities but not fully territorialized). In the comparative perspective, see D.E. Tosi, *Diritto alla lingua in Europa*, Torino, 2017 (*Le Frontiere del diritto*, no. 23). On the “new” alloglot communities, see M. Chini, ‘New linguistic minorities: repertoires, language maintenance and shift?’, *International Journal of the Sociology of Language*, No. 210, 2011, 47-69. As regards the historical linguistic communities, see G. Iannàccaro, V. Dell’Aquila, ‘Historical linguistic minorities: suggestions for classification and typology’, *International Journal of the Sociology of Language*, No. 210, 2011, 29-45.

⁹ Not excluding the Italian native speakers; see D. Taddeo, R. Taras, *Le débat linguistique au Québec. La communauté italienne et la langue d’enseignement*, Montréal, 1987. In general, on the sociological universe of immigrants in Canada, see M. Tshibangu, *L’intégration des immigrants au Canada. Conflits de valeurs et problématiques d’adaptation*, Foreword by T. Banjikila Bakajika, Paris, 2015, and, for comparative legal aspects, C. Di Maio, ‘Profili di integrazione politica dello straniero. Una riflessione comparata tra Europa e Canada’, *Federalismi.it*, October 10, 2017 (www.federalismi.it); F. Palermo, K. Kössler, *Comparative Federalism. Constitutional Arrangements and Case Law*, Oxford and Portland (OR), 2017, 403 ff. (*sub Immigration and Migrant Integration*). New immigrants refer to the problem of so-called third-type linguistic rights, according to the classification proposed by Giovanni Poggeschi (see *supra*, note 2).

¹⁰ They are also definable as allophones, *i.e.* “those with neither English nor French as a mother tongue”; cf. J. Friesen, ‘Allophones on the cusp of outnumbering francophones in Canada’, available on the website www.theglobeandmail.com, October 23, 2012, where interesting demo-linguistic considerations.

¹¹ Which refers not only to those belonging to linguistic minorities other than English and French, but also, for example, to deaf people.

¹² Cf. J. Woehrling, ‘Minority Cultural and Linguistic Rights and Equality Rights in the Canadian Charter of Rights and Freedoms’, *McGill Law Journal/Revue de droit de McGill*, Vol. 31, No. 1, 1985, 50-92. On the theoretical level, see D. Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups*, Oxford-Portland (OR), 2011; D. Newman, ‘Theorizing Collective Indigenous Rights’, *American Indian Law Review*, Vol. 31, 2007, 273-289; D. Newman, ‘Collective Interests and Collective Rights’, Vol. 49, 2004 [published in 2005 despite date] *American Journal of Jurisprudence*, 127-163. Whit reference to the collective land rights (or the community commons) of the Arctic Indigenous peoples, see widely M. Mazza, *Aurora Borealis. Studies on Polar Law and Legal Comparison*, Oisterwijk (The Netherlands), 2017, 81-226.

(collective) rights in favor of the two privileged linguistic communities of Canada, that is to say, English-speakers and French-speakers.

3. The linguistic rights recognized to the English and French minorities in the field of education

The privileged constitutional status of English-speaking and French-speaking minorities also emerges from the provisions contained in section 23 of the Canadian Charter of Rights and Freedoms, concerning the education sector¹³. Public funding for first and second grade schools is, in fact, limited, with regard to minority language education, only to English and French. Again, in this respect, in the same way to what has been seen in the previous paragraph for the provisions contained in sections 16 to 20 of the Charter of Rights and Freedoms, it goes beyond the provisions of section 27 of the International Covenant on Civil and Political Rights as regards the protection of linguistic minorities. However, the above-mentioned consideration¹⁴ of the level of protection for linguistic minorities other than English-speaking and French-speaking minorities lower than that provided for in section 27 of the International Covenant also applies to Canada's constitutional provisions on minority language education. In particular, the constitutional text does not expressly provide even the right of linguistic communities, formed by "old" or "new" minorities¹⁵, other than English and French, to create private school institutions¹⁶ for teaching in minority languages that are not the official ones (*i.e.*, at the federal level, English and French). This also derives from the fact that – as will be seen immediately – the protection provided by the International Covenant is subsequent to that of legislative source introduced in Canada.

From the point of view of their genesis, the provisions of section 23 of the Canadian Charter of Rights and Freedoms are historically linked to section 93 of the British North America Act¹⁷ of 1867, which governs the creation of confessional schools for both the Anglo-Protestant minority in Quebec and for French-Catholic minorities in the rest of the Provinces. In the constitutional history of Canada, therefore, there is a close connection between linguistic dualism and religious dualism, as regards of the protection of English-speaking and French-speaking minorities. In fact, section 23 of the Charter of Rights and Freedoms exclusively concerns the juridical status of the Anglophone minority in Quebec and Francophone minorities established in the Canadian Federation outside the Quebec provincial territory. In particular, the first paragraph of section

¹³ See the thorough analysis of M. Hayday, *Bilingual Today, United Tomorrow. Official Languages in Education and Canadian Federalism*, Kingston-Montreal, 2005. For the case law of the Supreme Court, cf. G. Gaggero, 'Il diritto all'educazione nelle lingue dei "padri fondatori": verso un'uguaglianza realmente sostanziale?', in G. Rolla (ed.), *L'apporto della Corte suprema alla determinazione dei caratteri dell'ordinamento costituzionale canadese*, Milano, 2008, 393.

¹⁴ See the previous paragraph.

¹⁵ See the meaning specified in paragraph 2.

¹⁶ Funded entirely with private funds (without, therefore, public contributions).

¹⁷ Subsequently abbreviated BNA.

23 of the Charter of Rights and Freedoms provides the so-called universal clause and Canada clause. The first clause relates to the fact that Canadian citizens can give their children primary and secondary education in the English or French mother tongue provided that the same parents – who can also be immigrants, provided that they have acquired Canadian citizenship – belong to the English-speaking or French-speaking minority of the Province or Territory of residence¹⁸. The second clause, however, concerns Canadian citizens who have received primary teaching in English or French in a Province or Territory of Canada and now reside in a Province or Territory where the language of their primary education is minority¹⁹. The second paragraph of section 23 then establishes with respect to the so-called familial linguistic uniformity. This rule provides that the parents, who are Canadian citizens, who has chosen for one of his children primary or secondary education in English or French, has the right to give primary and secondary education in the same language to other children as well. However, a significant limit is set out in the third paragraph of section 23 of the Charter of Rights and Freedoms. It provides that, for the purpose of the actual exercise of the rights contemplated by the first two paragraphs of section 23 of the Charter, it is nevertheless necessary that there is a sufficient number of applications for enrollment in primary or secondary education by parents who intend to choose teaching for their children in English (Quebec) or French (in the rest of Canada) minority languages. The other limit, of an implicit nature, to teaching in English or French minority languages with funding from the public budget comes from the fact that section 23 of the Charter of Rights and Freedoms expressly refers to only primary or secondary education, with the exclusion of post-secondary education in general and university in particular.

The Canadian Supreme Court has had the opportunity to deal with the constitutional provision on primary and secondary education in the minority language, English or French, by using public funds. In particular, in the case *Mahe v. Alberta* of 1990²⁰, the Supreme Court, in interpreting section 23 of the Charter of Rights and Freedoms, has elaborate the principle of the so-called variable criterion or “sliding scale”. Based on this criterion, the Supreme Canadian judges identify three levels of constitutional protection of primary and secondary education provided in the English or French minority language. The first level, the so-called minimum level, envisages the programming of lessons in English or French. The second level, which we can call the highest level, contemplates the creation of primary and secondary education institutions in the language of the English-speaking or French-speaking minority. But there is also, according to the Supreme Court, a third level, which is referred to as an intermediate level. In addition to the activation of teaching in English or French minority languages²¹, but in the absence of school facilities exclusively devoted to the teaching provided in the English or French minority languages²², there is the participation of

¹⁸ See section 23, paragraph 1, letter (a) of the Charter of Rights and Freedoms.

¹⁹ See section 23, paragraph 1, letter (b) of the Charter of Rights and Freedoms.

²⁰ *Mahe v. Alberta*, [1990] 1 S.C.R. 342.

²¹ Minimum level.

²² Maximum level.

representatives of the English-speaking or French-speaking minority language communities to the schools of the language majority (depending on the case, Anglophone or Francophone), in relation to the control and administration of the educational institution and its activities. Also other decisions of the Supreme Court of Canada have interested the linguistic rights, as *Ford v. Quebec* of 1988²³ on distinctive signs and trade names that can not be foreseen exclusively in French, or the so-called PEI case of 2000²⁴, in which the supreme federal judges established that the Province of Prince Edward Island (PEI) was constitutionally obliged to create a school for French-speaking children, or even when the Supreme Court, in *Solski v. Quebec* of 2005²⁵, decided that the children of the English-speaking minority receive “most” (“major part”) of their education in English in the sense of “significant part”, or again in the Yukon case of 2015²⁶, when it was decided that the criteria for admission to French schools outside the Quebec are established by the Provinces or Territories, but they can delegate the councils of the schools²⁷.

Concerning the concrete implementation of the provisions contained in section 23 of the Canadian Charter on Rights and Freedoms, it should be noted that these are linguistic rights that need positive support measures. They are therefore not absolute rights, but their implementation depends on providing adequate financial resources. In that light, section 93 of the BNAA states that the exclusive legislative competence in education is at the provincial (or territorial) level. It follows that the Provinces (and the Territories) have to allocate the financial resources needed to fully implement section 23 of the Charter of Fundamental Rights and Freedoms. In this respect, however, a lot of difficulties have arisen. They complain²⁸ about frequent and widespread delays by provincial (and territorial) authorities in implementing the normative provisions on the linguistic rights of Anglophone and Francophone minorities, often due to the lack of adequate public funding. In addition, many difficulties stem from the fact that the discretion of the Federal Ministry of Education is wide in the subject matter, and concerns in particular the minimum numbers for the implementation of educational programs for the English-speaking and French-speaking minority communities, in accordance with the provisions of section 23, paragraph 3, letters (a) and (b)²⁹.

Ultimately, the current situation of linguistic rights of the English-speaking and French-speaking minorities in the field of education recalls in some respects the general framework already outlined in section 133 of the BNAA, that is, the full formal equivalence of the two official federal languages (English and French),

²³ *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

²⁴ *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3.

²⁵ *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 201.

²⁶ *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015] 2 S.C.R. 282.

²⁷ For updated judicial references, see now G. Régimbald, D. Newman, *The Law of the Canadian Constitution*, 2nd edn, Toronto, 2017.

²⁸ Cf. V. Piergigli, ‘I diritti linguistici nell’educazione: il contributo della Corte Suprema canadese alla tutela della francofonia minoritaria’, in S. Gambino (ed.), *La protezione dei diritti fondamentali. Europa e Canada a confronto*, Milano, 2004, 141.

²⁹ See what has been said above in this paragraph.

but the fact that the condition of the Anglophone minority in Quebec is more favorable than that of the French-speaking communities in the rest of Canada³⁰, so that the latter communities are still exposed to a high risk of assimilation by the Anglophone majority.

4. Indigenous minorities and language problems: Peculiarities of the Canadian approach in the context of the common law countries

The Canadian Federation, on the other hand, is an interesting observatory for the comparative analysis of the rights of Indigenous and tribal peoples³¹. These are represented by Indians, Inuit and Métis (or mixed-blood). The Métis include both Indian mid-blood and Métis-Inuit³². The definition of the Métis as a distinct legal category represents a significant difference with US constitutional/public law, which has dealt with similar issues³³. The same can be said with reference to Australian and New Zealand experiences in the field of the protection of Indigenous peoples, in the sense that the latter are based on the US and not the Canadian criteria as regards the Métis³⁴.

The Constitution Act of 1982 explicitly recognizes, in the part devoted to the rights of the Aboriginal peoples of Canada, that the latter include the Indians, the Inuit, and the Métis³⁵. The constitutionalization of the rights of Indigenous peoples has, however, been accomplished by passing through distinct phases, though in part superimposed. With the adoption of the Indian Act of 1876, the

³⁰ See J. Woehrling 'La Constitution canadienne et l'évolution des rapports entre le Québec et le Canada anglais de 1867 à nos jours', *Revue française de droit constitutionnelle*, No. 10, 1992, 195-250; J. Woehrling, 'La Constitution du Canada, la législation linguistique du Québec et les droits de la minorité anglo-québécoise', in N. Levrat (coord.), *Minorités et organisation de l'État*, Bruxelles, 1998, p. 564.

³¹ See M. Mazza, *La protezione dei popoli indigeni nei Paesi di common law*, Padova, 2004, 64-131; M. Mazza, 'La condizione giuridica dei popoli indigeni nell'ordinamento canadese', *Diritto pubblico comparato ed europeo*, 2004, 1199-1238.

³² In particular, on the condition of the Métis in the Canadian legal system, cf. R. Motta, 'Aborigeni, diritto e Stato in alcune Rich Countries del Quarto Mondo: il caso canadese', in A. Giasanti, G. Maggioni (eds), *I diritti nascosti. Approccio antropologico e prospettiva sociologica*, Milano, 1995, 221; D. Purich, *The Métis*, Toronto, 1988; C. Bell, *Who Are the Métis in Section 35(2)?*, in *Alberta Law Review*, Vol. 29, No. 2, 1991, 351-381; L. Chartrand, 'Métis Constitutional Law Issues', in P. Oliver, P. Macklem, N. Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution*, New York, 2017, 367. For a historical profile, see G.J. Ens, J. Sawchuk, *From New Peoples to New Nations. Aspects of Métis History and Identity from the Eighteenth to the Twenty-First Centuries*, Toronto, 2016. On the case law, see M. Mazza, 'Canada. La proprietà foncière dei Métis manitobani davanti alla Corte suprema', *Diritto pubblico comparato ed europeo online*, 2013, No 3, 1-13.

³³ Cf. Mazza, *La protezione dei popoli indigeni nei Paesi di common law*, quoted *supra*, note 31, 133-214.

³⁴ *Id.*, pp. 215-295. More recently, on the models or topology of constitutional recognition, see B.F. Gussen, 'A Comparative Analysis of Constitutional Recognition of Aboriginal Peoples', *Melbourne University Law Review*, Vol. 40, 2017, 867-904.

³⁵ See section 35, paragraph 2, of the Constitution Act of 1982. In the legal doctrine, see D. Newman, 'Aboriginal 'Rights' as Powers: Section 35 and Federalism Theory', *Supreme Court Law Review*, Vol. 37, 2007, 163-176, reprinted in G. Mitchell *et al.* (eds), *A Living Tree: The Legacy of 1982 in Canada's Political Evolution*, Toronto, 2007, 527.

“regulation season” was opened by means of administrative acts concerning Indian affairs and issues related to the Inuit populations of northern Canada. This phase saw the development of the Indians’ registration system, and had had the definitive setup with the reform of the Indian Act of 1985³⁶, designed to adjust the Indian federal legislation to Canadian constitutional provisions of 1982. During the period that goes from 1680 to 1921, furthermore, legal relations between the Aboriginal populations and the British Government were governed by treaties³⁷.

As already mentioned, the evolution of Canadian public law institutions is characterized by the overlapping, rather than the mutually exclusivism, of normative disciplines for Indigenous peoples. It should be noted in that regard that the guarantees accorded by section 35 of the Constitution Act of 1982³⁸ to the Canadian Aboriginal rights did not in any way determine the abrogation of the provisions of the Indian Act of 1876 (in revised versions), but rather required a reinterpretation to be conducted in the light of the subsequent constitutional provisions. In particular, the distinction between Indians and so-called non-status-Indians, based on the inclusion or not in the register maintained by the Canadian Ministry of Indian Affairs, still remains³⁹.

Furthermore, the autonomous Dominion of Canada, which was born with the Statute of Westminster of December 11, 1931, and subsequently (following

³⁶ The text of the Indian Act in force until 1876 is usually referred to as the “old Indian Act”; while the text in force since 1985 is called “new Indian Act”. The Indian Act consolidated pre-existing norms on the status of Indigenous people. See W. Dougherty, D. Madill, *Indian Government under Indian Act Legislation, 1868-1951*, Ottawa, 1980; S. Clatworthy, A.H. Smith, *Population Implications of the 1985 Amendments to the Indian Act*, Ottawa, 1992; K. Coates, *The Indian Act and the Future of Aboriginal Governance in Canada*, Ottawa, 2008. The jurisdiction over Indians and lands reserved for the Indians was assigned to the Federal Parliament when the Canadian Provinces became a Federation in 1867. On the prospects of the reform of the Indian Act, with particular reference to the problem of land ownership (so-called Indian property rights, *i.e.* customary land rights, First Nations land management, First Nations property-rights systems, etc), see T. Flanagan, C. Alcantara, A. Le Dressay, *Beyond the Indian Act. Restoring Aboriginal Property Rights*, Foreword by M. Jules, Kingston-Montreal, 2010. *Adde*, on the peculiar meaning of the “*territorialité autochtone*”, B. Thom, ‘Confusion sur les territoires autochtones au Canada’, in I. Billier (dir.), *Terres, territoires, ressources. Politiques, pratiques et droits des peuples autochtones*, Paris, 2014, 89, especially at 94-96.

³⁷ The two dates quoted in the text refer to the years of conclusion of the first and last treaty concluded by the British Government with the North American Canadian tribes. Cf. M. Le Puloch *Le piège colonial. Histoire des traités de colonisation au Canada*, Foreword by É. Marienstras, Paris, 2007.

³⁸ Which operated the so-called constitutionalization of Indigenous identity; see J. Lechair, ‘Institutions autochtones et traditions juridiques nationales. Articulations et contradictions: le cas canadien’, in I. Bellier (dir.), *Peuples autochtones dans le monde. Les enjeux de la reconnaissance*, Foreword by R. Stavenhagen, Paris, 2013, 247, at 254-261. On the notion of ethnicity, or ethnic group, as a “community of language and culture”, see for instance S. El Mechat, ‘Introduction. Les minorités: quelques repères pour une approche conceptuelle’, in A.-C. De Gayffier-Bonneville, S. El Mechat, É. Gojosso (dir.), *Les minorités ethniques, linguistiques et/ou culturelles en situation coloniale et post-coloniale (XIIIe-XXIe siècles)*, Poitiers-Paris, 2015, 7.

³⁹ See S. Grammond, *Identity Captured by Law. Membership in Canada’s Indigenous Peoples and Linguistic Minorities*, Montreal-Kingston, 2009; S. Grammond, ‘Treaties as Constitutional Agreements’, in Oliver, Macklem, Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution*, quoted *supra*, note 32, 305.

the well-known “Patriation” of the Constitution⁴⁰), the Canadian independent State have not even stated that the treaties are no longer in force, and indeed they are committed to recognizing and respecting the Aboriginal treaty rights⁴¹.

With the approval of the Constitution Act of 1982, the rights of the Canadian Indigenous peoples are no longer merely those accorded by the treaties, but also those that derive from the Indian legal custom and which have acquired constitutional relevance in 1982, subject to their continued observance by Indians (as well as Inuit and Métis) from time immemorial. The first paragraph of section 35 of the Constitution Act of 1982 states that existing rights, whether they are “ancestral” or resulting from treaties, of Indigenous peoples of Canada, are recognized and confirmed. In other words, the Canadian system of constitutional law contemplates the protection of Aboriginal rights, including non-treaty rights, existing at the date of entry into force of the Constitution Act of 1982.

The limitations of the legislative power of both the Canadian Federation and the Provinces, deriving from the existing and treaty rights of Indigenous peoples, have recently been reaffirmed by the Supreme Court of Canada, in the cases *Tsilhqot’in Nation v. British Columbia* of 2014⁴² and *Grassy Narrows Nation v. Ontario*, of the same year⁴³.

⁴⁰ This led to the definitive renunciation of the Westminster Parliament to exercise its normative power in Canada, whose constitutional system is free from legal constraints (and formal ties of “colonial” nature) with Britain. We can better talk of “patriation”, or bringing home the Constitution, rather than “repatriation”, since the BNAA was originally a British law, which could therefore only be “carried” (but not “reported”) in Canada. Similarly to what is happening in other countries of the British Commonwealth, the Queen/King of England is still formally the Canadian State Chief. See F. Lanchester, ‘La «Patriation» della Costituzione canadese: verso un nuovo federalismo?’, *Rivista trimestrale di diritto pubblico*, 1983, 337-360; E. Ceccherini (ed.), *A trent’anni dalla Patriation canadese. Riflessioni della dottrina italiana*, Genova, 2013; E. McWhinney, *Canada and the Constitution 1979-1982: Patriation and the Charter of Rights*, Toronto, 1982; E. McWhinney, “Patriation”; of the Canadian Constitution and the Charter of Rights and Freedoms’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 42, No. 2, 1982, 223-260; L. Harder, S. Patten (eds), *Patriation and Its Consequences. Constitution Making in Canada*, Vancouver, 2015. Lastly, a Patriation Conference was held at the Faculty of Law of the University of Ottawa from 8 to 10 March 2017.

⁴¹ Cf. S. Grammond, *Aménager la coexistence. Les peuples autochtones et le droit canadien*, Blais-Montréal-Bruxelles, 2003.

⁴² *Tsilhqot’in Nation v. British Columbia*, [2014] 2 S.C.R. 256.

⁴³ *Grassy Narrows Nation v. Ontario*, [2014] 2 S.C.R. 447.

On the last two judgments cited, see E. Ceccherini, ‘La giurisprudenza della Corte suprema del Canada nel biennio 2014-2015’, *Giurisprudenza costituzionale*, 2016, 1989-2020, at 2006-2015; R. Junger *et al.*, ‘Supreme Court declares Aboriginal title in *Tsilhqot’in Nation v. British Columbia*’, *Aboriginal Law Bulletin*, June 2014, 1-8, where the authors observe that “More than 41 years ago, a six-member panel of the Supreme Court of Canada held in *Calder v. BC*² that the concept of Aboriginal title exists under Canadian law. Now, for the first time in history, the Court has formally declared Aboriginal title to exist in a specified area of British Columbia historically occupied by the *Tsilhqot’in* people”; S. McKelvey, ‘The SCC on treaty rights in *Grassy Narrows First Nation v Ontario (Natural Resources)*’, available on the website www.lexology.com, who writes “Call it the Supreme Court’s summer of Aboriginal law: Just a little over two weeks after releasing a landmark decision on Aboriginal title in *Tsilhqot’in Nation v British Columbia*, the Supreme Court of Canada has returned with a landmark decision on treaty rights in *Grassy Narrows First Nation v Ontario (Natural Resources)*”; M.. Nickason, ‘The *Tsilhqot’in* Decision: Lock, Stock and Barrel, Plus Self-Government’, *University of British Columbia Law Review*, Vol. 49, No. 3, 2016, 1061-1102.

The “special” protection of the rights of the Indigenous peoples by the Canadian constitutional order becomes even more evident when we reflect on the fact that section 25 of the Charter of Rights and Freedoms states that the guarantees contained in the Charter cannot be interpreted in such a way as to erode, by means of repeal or derogation, the rights and freedoms the exercise of which is recognized to the Aborigines under the Constitution. The peculiar element of Canadian constitutional experience in the field of Aboriginal and treaty rights seems therefore to consist in the coexistence in the constitutional system of higher degree provisions with others that are subordinate. It is evident, in fact, that in the case of conflict between the rights granted to the Indigenous peoples by the treaties and the so-called Charter rights, the latter are in any case destined to succumb⁴⁴. This, however, must be confronted with the fact that case law has been very reluctant to give content to section 25.

As we see, this is a great constitutional protection of Indigenous peoples, which, however, does not contain explicit provisions on linguistic rights. The situation, from this point of view, would probably be better if Canada had approved, especially since the beginning, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007⁴⁵. Anyway, some innovations in this regard have been introduced, as will be discussed in the next two paragraphs, in the context of provincial and territorial legislation.

5. (Follows) The case of Nunavut

An interesting constitutional evolution has concerned the regions of northern Canada. This is the creation, based on the provisions contained in the 1993⁴⁶ Nunavut Act, of a new autonomous Territory in northern Canada, called Nunavut, which means “our land” (in Inuktitut, the language of the Inuit)⁴⁷.

⁴⁴ See G. Otis, ‘Le libertà’, in J. Frémont *et al.*, *L’ordinamento costituzionale del Canada*, Torino, 1997, 203, at 226.

⁴⁵ This has been correctly highlighted by prof. Dwight G. Newman during the Italian-Canadian Conference: “The Canadian Constitution in Global Context: An Italian-Canadian Dialogue”, held at the Faculty of Law of the University of Toronto (Canada) from 16 to 17 September 2017. Canada has subsequently undertaken to implement the UNDRIP. The theme has been recently analyzed by prof. Hayden King and prof. John Borrows at the event titled “From Principle to Implementation: Indigenous Rights, the Constitution and UNDRIP in Canada”, held at the Faculty of Law of the McGill University of Montreal on 21 September 2017. See also S. Axmann, B. Gray, S. Lee-Andersen, ‘United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Canada – Implementation Status Update’, available at www.canadianerperspectives.com (doc. dated August 8, 2017). In particular, in view of the implementation of UNDRIP, the Canadian Federal Government adopted in July 2017 a document entitled “Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples”, in which the Government of Canada recognize that the implementation of UNDRIP “requires transformative change in the Government’s relationship with Indigenous peoples” (cf. the introduction to the “10 Principles”, available at www.justice.gc.ca).

⁴⁶ The Law on Nunavut received the Royal Assent on June 10, 1993.

⁴⁷ For the Nunavut Territory legal profiles, see C. Pitto, ‘Nunavut: come cambia la carta geopolitica del Canada’, in Gambino, Amirante (eds), *Il Canada. Un laboratorio costituzionale*, quoted *supra*, note 1, 327 ss.

The Nunavut Territory is added, from the point of view of the history of constitutional and administrative law of northern Canada, to the two (pre-)existing northern Territories represented by the Northwest Territories and Yukon. Nunavut is a political-administrative entity that includes the eastern and central sectors of the Arctic region already part of the Northwest Territories, covering an area of approximately 20% of the entire territory of the Canadian Federation. The remaining (and today existing) Northwest Territories keep this name provisionally, although a debate is underway to rename the ancient Northwest Territories with the expression *Denendeh*, a word that for the Indians of Northwest Canada (the so-called *dénés* for the Francophones, or *dene* for the Anglophones) has the same meaning as the term Nunavut in the language of the Inuit. Further developments of the constitutional scenario in Northern Canada are represented by: 1) the adoption of a new territorial constitution by the Northwest Territories, which will have to be transposed in a federal law and thus take the place of the present Northwest Territories Act of 2014⁴⁸; 2) the request from the Nunavut Territory, the Northwest Territories and Yukon to acquire the political-constitutional statute of the Canadian Federation Province.

From the point of view here specifically examined, it should be noted that the official languages of Nunavut are Inuktitut, English and French⁴⁹. There is also a minority language of the Inuit, known as Inuinnaqtun, which equally is official language of Nunavut⁵⁰. The provisions on the use of Inuit languages are contained in the (Nunavut's) Official Languages Act (OLA) of 1999, as amended by the Inuit Language Protection Act (ILPA) of 2008. The latter⁵¹ provides, in

⁴⁸ In force since 1 April 2014, and which replaced the former Northwest Territories Act of 1985.

⁴⁹ On the institutional status of Inuit language in Nunavut, see M. Stefanini, 'Le lingue native d'America. Recupero e riconoscimento', *Federalismo & Libertà*, Vol. 9, 2002, 143-184, at 161-164; Petrillo, 'Diritti linguistici e multiculturalismo in Canada', quoted *supra*, note 1, 997-998. From 1988, Aboriginal languages are also recognized in the Northwest Territories (NWT) and Yukon. In particular, the official languages of Northwest Territories are eleven: English, French and nine Aboriginal languages, *i.e.* Chipewyan, Cree, Gwich'in, Inuinnaqtun, Inuktitut, Inuvialuktun, North Slavey, South Slavey and Tâchô. Cf. section 4 of the NWT Official Languages Act. In turn, the official languages of Yukon are ten: English, French, Gwich'in, Han, Kaska, Northern Tutchone, Southern Tutchone, Tagish, Tlingit and Upper Tanana. See B.A. Meek, 'Language Ideology and Aboriginal Language Revitalization in the Yukon, Canada', in P.V. Kroskrity, M.C. Field (eds), *Native American Language Ideologies. Beliefs, Practices, and Struggles in Indian Country*, Tucson, 2010, 151. The approval of the Yukon's territorial law on official Aboriginal languages has been strongly supported by the Yukon Native Language Centre (YNLC). In implementation of the above mentioned (in this note) Yukon law of 1988, the Canada-Yukon Cooperation and Funding Agreement on the Preservation, Development and Enhancement of Aboriginal Languages was signed on 24 February 1989.

⁵⁰ As regards the fundamental role of educational institutions at all levels of Inuit schooling, for an effective intercultural, bilingual education, cf. S. Tulloch *et al.*, 'Inuit principals and the changing context of bilingual education in Nunavut', *Études Inuit Studies*, Vol. 40, No. 1, 2016, 189-209.

⁵¹ Which entered into force five years after its adoption, on 1 April 2013 (14th anniversary of the creation of Nunavut). See 'Aboriginal Language Gets Official Status in Nunavut, Canada', *Indian Country*, April 4, 2013. According to the Government of Nunavut's Department of

sections 16 to 34, an independent body called Languages Commissioner, who oversees compliance with the norms on official languages in Nunavut⁵². The Language Commissioner may also appeal, in most serious cases, to the Nunavut Court of Justice. It is an Ombudsman for the protection of linguistic rights⁵³; the office was last assigned, on June 15, 2017⁵⁴, by the Commissioner of Nunavut⁵⁵ and on the recommendation of the Legislative Assembly of the Nunavut, to Helen Klengenberg, an expert in Aboriginal languages and dialects, who stated⁵⁶ that “it’s important that we do everything in our abilities in Nunavut to keep the use of our languages alive”⁵⁷. *Inter alia*, Klengenberg was a member of the Task Force on Aboriginal Languages and Cultures⁵⁸, which presented in July 2005 a Report on language revitalization – entitled “Towards a New Beginning: A Foundational Report for a Strategy to Revitalize First Nations, Inuit and Métis Languages and Cultures”⁵⁹ – to the Federal Government.

On the other hand, the condition of the Inuit of Nunavut is quite special. This is because Nunavutian Inuit constitute the majority (85%) of Nunavut residents, and are thus able to control their government structures. Political-constitutional institutions of the Nunavut territory do not therefore need to be constructed as a system of government recognizing ethnic autonomy in order to realize the Inuit Indigenous self-government, since the attribution of electoral rights (active and passive) to non-Inuit voters in the elections which take place in the Nunavutian Nordic territory of Canada must in any case be confronted with the Aboriginal majority condition.

All this has some reflections on the linguistic rights as evidenced, *inter alia*, by the recent proposal to recognize to English the status of minority language of Nunavut⁶⁰.

Culture and Heritage, “This level of statutory protection for an Aboriginal language is unprecedented in Canada” (statement of 2 April 2013).

⁵² See the website at the address <http://langcom.nu.ca>.

⁵³ *I.e.*, a so-called watchdog for language rights.

⁵⁴ For a five-year term.

⁵⁵ Representative of the Canadian Federal Government in the Territory of the Nunavut (in short, the Commissioner’s role is much like that of a Lieutenant Governor of a Province).

⁵⁶ In office – as Acting Languages Commissioner – from June 29, pending the oath on September 12, 2017, during the next sitting of the Nunavut Legislative Assembly. The position has been vacant since June 3, 2016, when Sandra Inutiq resigned, citing health reasons; Sandra is a legal counsel, and in 2006 she became the first Inuk woman in Nunavut to pass the bar exam.

⁵⁷ B. Brown, ‘Nunavut’s new languages boss vows to keep “languages alive”. Helen Klengenberg to advocate for Inuit language rights’, at www.nunatsiaqonline.ca, June 16, 2017. Unfortunately, the office suffers some difficulties, on which see S. Ducharme, ‘Big workload, job vacancies, hinder Nunavut languages commissioner’, at www.nunatsiaqonline.ca, November 25, 2015.

⁵⁸ The Task Force was appointed in December 2003.

⁵⁹ See the full text of the Report on the website of the Assembly of First Nations (www.afn.ca).

⁶⁰ S. Rogers, ‘Ottawa should recognize Anglophones as linguistic minority in Nunavut: language expert’, available at <http://www.nunatsiaqonline.ca>, March 17, 2017, with reference to the proposal formulated by prof. Ian Martin of York University (Department of English) of Toronto.

6. (Follows) The case of the Nisga'a Nation

A significant legal document of constitutional relevance concerns the Aboriginal rights of the so-called Nisga'a Nation, an Indigenous people, composed of four tribes⁶¹, living in the Territory of the British Columbia Province. This is the Nisga'a Final Agreement, or Nisga'a Treaty, approved on 6 and 7 November 1998 through a popular referendum by the members of the Nisga'a Nation, which is of particular relevance, while taking into account that it is just one example of a treaty and that some others also have language provisions in them.

The Legislative Assembly of British Columbia voted unanimously on 22 April 1999 in favor of the adoption of the Nisga'a Final Agreement. The Federal Act on the Nisga'a Treaty was approved by the House of Commons on 13 December 1998 (two hundred and seventeen votes in favor and forty-eight against) and by the Senate on 13 April 2000 (fifty-two votes in favor, fifteen against and thirteen abstained), and then received the sovereign sanction (Royal Assent).

The Nisga'a Final Agreement was undersigned by representatives of the Province of British Columbia, the Tribal Council of the Nisga'a Nation and the Canadian Federal Government on August 4, 1998. It was prepared by the Nisga'a Agreement-in-Principle (AIP), concluded between the same parties on 15 February 1996.

The Nisga'a Treaty, though destined mainly to solve the land claims of Nisga'a Indigenous people, deals with many other aspects. In fact, the territorial/cultural rights of the Nisga'a are exhaustively set out in the Final Agreement, which constitutes a land claims agreement pursuant to section 25 of the Charter of Fundamental Rights and Freedoms and 35 of the Constitution Act. In other words, the Agreement represents for the Aboriginal-ancestral rights of the Nisga'a ethnic group a full and final settlement.

At the level of the self-government bodies of the Nisga'a communities, a "central" government (or the government of the Nisga'a Nation) is set up, named Nisga'a Lisims Government (NLG)⁶². Each of the four villages inhabited by the Indigenous Nisga'a also has a local self-government structure. Independent Indigenous self-government authorities are the Nisga'a Village Governments (NVGs). The organs of self-government of the people of Nisga'a have powers that are not exclusive, but they coexist (and cooperate) with those of both the Canadian Federation and the British Columbia.

Indigenous local self-government powers refer to the regulatory discipline of matters concerning: *a*) culture and traditions; *b*) language; *c*) public works; *d*) traffic and transport regulation; *e*) land use; *f*) celebration of marriages (according to traditional customary law, *i.e.* *Ayuukhl Nisga'a*⁶³). Furthermore, as regards the

⁶¹ The four Nisga'a tribes, located in the Nass River area in northwestern British Columbia (BC), are the following: *a*) Laxsgiik (or "eagle tribe"); *b*) Gisk'aast (or "whale hunters' tribe"); *c*) Ganada (or "crow tribe"); *d*) Laxgibuu (or "wolf tribe").

⁶² See the website www.nisgaanation.ca.

⁶³ Nisga'a law, or code of laws, covers ten areas: the first is respect; cf. B. McKay, 'Rule of Law – Nisga'a Nations', on the website of the National Centre for First Nations Governance-NCFNG, at www.fn.govance.com.

impact, assessment and environmental protection, local self-government authorities have functions and powers, concurring with those of federal and provincial levels. In the field of environmental law, however, if there is a conflict between Indigenous and Federal or Provincial law, the latter prevail.

The profile specifically related to this paper is that concerning the letter *b*) above, namely the linguistic policies pursued by the Government of the Nisga'a Nation, since the Nisga'a language, which belongs to the Tsimshianic language family, is the official language of the territorial community (formed by four villages/tribes⁶⁴) of the people of Nisga'a.

7. Conclusion

Link with one's own culture leads to specific claims, which, given the very close connection between language and culture, are frequently directed towards the recognition of minority language rights. This has happened, as we have seen above, even in Canada, paradigmatically. The outcome of these claims, however, was very different. While the linguistic rights of the English-speaking minority in Quebec are effectively and strongly protected, lawfully and in fact, those of the French-speaking minorities of the rest of Canada are still nowadays guaranteed more from the formal point of view than from that of the application practices. Worst in comparison of both levels of protection just mentioned is then the condition of Indigenous or Aboriginal peoples, who only occasionally, as an effect of agreements with the provincial and territorial authorities, as well as federal ones, have obtained a limited measure of recognition of their linguistic rights⁶⁵.

There still is a long way to go to ensure the effectiveness of the so-called differentiated rights⁶⁶ in favor of national linguistic minorities and ethnic groups, including Indigenous people, with particular regard to linguistic rights. On the other hand, as the Canadian Supreme Court stated in the first decision on equality rights recognized by the Canadian Charter of Rights and Freedoms⁶⁷, acceptance of differences is the essence of true equality. The latter is a methodological indication of great importance, which applies to any national context where linguistic, ethnic and cultural minorities are present; it follows that – as stated at the beginning of this paper⁶⁸ – the study of Canada's constitutional and public law is indispensable for comparatists dealing with multicultural societies.

⁶⁴ See above, note 61.

⁶⁵ On the tension between integration policies and recognition policies, see E. Ceccherini, 'Un antico dilemma: integrazione o riconoscimento della differenza? La costituzionalizzazione dei diritti delle popolazioni indigene', in G. Rolla (ed.), *Eguali, ma diversi. Identità ed autonomia secondo la giurisprudenza della Corte Suprema del Canada*, Milano, 2006, 58; E. Ceccherini, 'Il riconoscimento della *Indigenous difference* nell'ordinamento costituzionale canadese', in *Identità dei Popoli Indigeni: aspetti giuridici, antropologici e linguistici* (proceedings of the International Conference of Siena, 4 and 5 June 2007), Foreword by P. Bruni, Roma, 2008, 79.

⁶⁶ On which see W. Kymlicka, *Multicultural Citizenship*, Oxford, 1995. In Italy, see F. Palermo, J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze*, 2nd edn, Padova, 2011.

⁶⁷ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. On this landmark decision, see R. Moon, 'A Discrete and Insular Right to Equality: Comment on *Andrews v. Law Society of British Columbia*', *Ottawa Law Review*, Vol. 21, No. 3, 563-583.

⁶⁸ Cf. *supra*, paragraph 1.