This paper aims to be a preliminary study of the impact of the federal principle in Aboriginal and official-language minority rights Supreme Court jurisprudence through two test cases: Tsilhqot’in Nation v. British Columbia, 2014 SCC 44, and Association des parents de l’école Rose-des-vents v. British Columbia (Education), 2015 SCC 21. Since the adoption of the Canadian Charter of Rights and Freedoms (Charter) in 1982, Canadian courts have had to hear an unprecedented amount of cases regarding official-language rights and Aboriginal rights in Canada. They have thus greatly participated in the evolution of the rights regime for these two minorities through their jurisprudence. Observations regarding the expanding power of the judges following the adoption of the new constitution have now become ubiquitous in Canadian politics literature. This is attested in the mushrooming of the literature regarding judicial activism in the last few decades. The premise of this literature is that the adoption of the Charter has had an effect of “deeply ‘politicizing’ the judiciary […] bringing judges into the thick of political controversies, forcing them to confront major social issues head on” (Mandel, 1994: 49).

Whereas some authors dubbed this change in the Canadian political system a “revolution” (Morton and Knopff, 2000: 13) that could be detrimental to democracy as the judges are seen as usurping the power of the legislators, others (Smith, 2002; 2005) would rather see the new role undertaken by the judges as a counter-majoritarian power of sorts, protecting minorities that have been unable to have their claims heard through the “regular” political channels, such as elections and lobbying. Such is the case of most groups we now call “Charter Canadians”, that is, groups who have been offered protection through the new Constitution Act of 1982 (Hein, 2000). Aboriginal peoples and official-language minorities are among those groups.

This paper will seek to revisit this debate by contending that the justices’ newfound power is in fact still constrained by state traditions (Cardinal and Sonntag, 2015). These state traditions, among which federalism is one of the most important, will be at the centre of our analysis as they appear in the Supreme Court’s interpretation of the law, limiting the possibility for the bench to respond positively to claims for autonomy and self-determination. Through the jurisprudence, judges are thus constrained as they try to interpret the Charter’s newfound universal rights by the underlying principles of the Canadian federal system.  

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1 By “universal rights”, we do not imply here that these rights apply that they apply universally to all Canadians, but rather that they apply universally across the Canadian territory, with little to no distinction between the subunits of the federation.
Through an analysis of two test cases, this paper will demonstrate the constraining effect of the federal principle on the evolution of minority rights, by answering the following questions: How does the federal principle influence the Supreme court’s interpretations of official-language and Aboriginal rights? What recognition and autonomy for these two groups do these interpretations allow (or deny)?

The paper will be divided in three sections. The first section will seek to explain the pertinence of comparing these two very different groups through the lens of law. The second section will discuss the two test cases selected and explore the judges’ rationale in both instances in order to highlight convergences and divergences. The third and final section will conclude on a discussion on the effect of the federal principle on the outcome of the two cases for these groups’ claims for autonomy and self-determination.

**Official-language minorities and Aboriginal peoples: a pertinent comparison?**

Establishing a comparison between official-language minorities (which comprise French speaking communities outside of Québec as well as English Quebeckers) and Aboriginal peoples in Canada may seem like a curious enterprise. While both groups have been oppressed by the Canadian state at some point throughout history, it would be an offensive fallacy to put this oppression on an equal footing; Francophones in Canada have also participated in the colonization of the North American continent. The present conditions of the two groups are also quite different from one another, as well as the respective sets of rights they have been awarded, both in the domestic and the international realm. Moreover, Aboriginal leaders have on many occasions expressed their objections at being relegated to the status of “minorities”. However, as Grammond (2009: xii) underlines, “The rights of indigenous peoples and linguistic minorities have overlapping, although not identical, philosophical foundations [… which] involve[s] the same questions of respect for individual and collective human rights”.

Moreover, in the Canadian context, official-language minorities and Aboriginal peoples have developed a special relationship with the judiciary, as they are the only two groups whose “membership [is] regulated by law and results in a different set of rights and obligations” (Grammond, 2009: xi) than for the majority of the population. The Charter, through sections 16 to 23 and 35, respectively, recognizes and entrenches in the Constitution a number of rights for those two groups. Since 1982, they have both filed a number of claims for political recognition before the courts. In the case of Francophone minority communities, the claims for the management of their own institutions, notably in the realm of education, have eventually taken the form of a right to cultural autonomy, or institutional completeness (Cardinal and Gonzales Hidalgo, 2012; Chouinard, 2014). Aboriginal peoples, on the other hand, have presented claims to self-determination, which would lead to recognition of their national status as well as the control of territorial and non-territorial resources associated to this type of recognition (LaSelva, 1996; Lajoie, 2002; Papillon, 2011). This distinction between the two types of claims is significant. Despite the literature sometimes conflating autonomy and self-determination,

[a]almost no indigenous people think that institutions of cultural autonomy are sufficient to give them self-determination, important as these are. Their claims necessarily involve
control over land and resources, not only because their identities are tied to place, but also because they judge that their material improvement as individuals and groups requires having land and resources about which they as a group make autonomous decisions. (Young, 2005: 142)

In other words, autonomy and self-determination overlap in some respects, mainly in terms of control and management of cultural institutions, but they are different in that the latter entails control over territory – which is the basis of many Aboriginal claims, including the test case chosen for this paper.

Notwithstanding these differences, claims for cultural autonomy and self-determination both “present Canadians with a moral, as well as a theoretical challenge […] [and] compel a re-examination of first principles” of the constitutional order of the Canadian polity (LaSelva, 1996: 137). Federalism is one such “first principle”. It is an essential component of the polity. According to constitutionalist Pierre Foucher, federalism “is veritably a heavy trend, the most powerful structuring factor, of Canadian constitutionalism” (2010: 103). Canadian courts have contributed, since Canadian confederation, to the formation and the evolution of the federal system. Between 1880 and 1949, the Judicial Committee of the Privy Council, at the time the country’s highest tribunal, pushed Canada’s federal system towards decentralization (Smith, 2002: 6). The influence of the judiciary has only grown since 1982, as the Supreme Court has been granted the power of judicial review and “governments in Canada […] have seemed more willing to have major federal-provincial conflicts resolved [by the courts]” (Monahan, 1987: 5). The federal principle, in its broader sense, refers to the arrangement of powers within a polity between “self-rule and shared-rule that permit multiple polities to coexist as distinct, equal, and interdependent entities within a shared territory” (Otis and Papillon, 2013: 12). Canada’s federal system is but one of many possible arrangements. It differs from other countries’ in that there exists two representations of federalism in Canada, one that is cultural in nature, and the other, territorial. This has been qualified by Smith as a form of “double federalism”:

*There are two reasons for adopting a federal constitution. One is to recognize cultural difference, defined by features such as language, religion, or ethnicity. The other is to incorporate territory. Most federalism are attributable to one or other imperative. Canada is unusual in having at its origins both imperatives: one, to give Quebec jurisdiction over matters deemed essential to the preservation of its culture […] and two, to establish the central political institutions that would make territorial expansion possible through the transfer to Canada from the Hudson’s Bay Company of Rupert’s Land and the North-Western Territories (Smith, 2010: 21).*

Thus, as it stands, the present federal system does not recognize nor protect explicitly either official-language minorities or Aboriginal peoples. Neither of these groups “control the institutions of one of the federated units” (Papillon, 2011: 290), and despite federalism’s plasticity and capacity to adapt to different social and cultural contexts, they have continued to face resistance to their institutional recognition (*ibid.*). According to Foucher (1990: 68), at the time of Confederation, the federal compromise on the question of language was the following: “if Québec accepted to maintain the right to use both French and English before the Legislature and the courts of the province and to adopt its laws in both languages, these same rights would also be guaranteed at the federal level” (our translation). The province of Manitoba entered Confederation under this same premise in 1870, but it was – unconstitutionally – repealed by the
provincial legislature in 1890 in favour of (English) unilingualism. This unilingual language regime remained for nearly a century (Manitoba (A.G.) v. Forest, [1979] 2 S.C.R. 1032). As for Aboriginal peoples, “deliberate attempts were made to prevent the formation of indigenous-controlled [...] provinces” (Papillon, 2011: 290). In the case of both groups, the legislators acted in the “hope that a lack of institutional basis would facilitate their assimilation into the dominant [white, Anglo-Saxon] society” (ibid). In other words, while federalism is known to be a successful tool of accommodation and stabilization of culturally diverse societies, the federal state created in Canada in 1867 fell short of properly recognizing and accommodating the two groups discussed in this paper.

This state of affairs evolved with the patriation of the Constitution and the entrenchment of the Charter in 1982, which can be understood as an attempt at revisiting the original federal compromise struck in 1867. For the purpose of this paper, sections 23 and 35 of the Charter are of primordial importance. Section 23 covers the right to official-language minority instruction, and states the following:

23. (1) Citizens of Canada

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

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province. (93)

[...]

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Section 35, for its part, bolsters Aboriginal treaty rights:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
Land claims agreements

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

These two sections of the Charter came as an imposition from the federal government of new obligations on provinces – namely, to provide minority language instruction and to recognize Aboriginal and treaty rights. The imposition of these new universal rights represented a challenge to the federal principle, notably by the overlap it created between certain aspects of the Charter, such as linguistic dispositions (cultural realm) and provincial jurisdictions (territorial realm) like education. According to Smith, this was indeed an inherent contradiction to the Constitution Act 1982 (Smith, 2010: 128). Hiebert concurs:

*The Charter’s intersection with federalism tells an important story of significant change arising from the promotion of identities based on “Canadianness” at the expense of “competing regional loyalties”, the homogenization of legislation, and the defederalization of political culture* (Hiebert, 2010: 55).

In other words, the Charter’s universal principles contradict the cultural and territorial protections offered by federalism.

Unsurprisingly, provinces have been reluctant to implement policies enacting Charter rights on many occasions, leading to groups targeted by these new rights to increasingly call on the judicial system to have their rights recognized. The judges’ discourse on federalism thus becomes important in light of the numerous cases presented to them by official-language minorities and Aboriginal peoples – an important manifestation of the “moral and theoretical challenge” their claims pose to Canada’s constitutional order, as identified by LaSelva. The two test cases discussed here also pose a very real legal challenge to the federal principle in Canada. On the one hand, Aboriginal peoples “challenge the territorial reach and legal boundaries of […] Canadian federalism” (Papillon, 2011: 290) through self-determination and land claims. On the other hand, official-language minorities’ autonomy claims are calling into question the division of powers established in the constitution by requesting, among other things, the control and management of their schools and school boards – a provincial jurisdiction. The result of these claims before the courts goes above and beyond the membership of these two minority groups. As noted by Monahan (1987: 5), “[a] constitutional decision has the potential to amend or even rewrite the ground rules for the public policy process in Canada”; it determines “the permissible scope of state power”. They therefore have an impact for the Canadian polity as a whole.

Judges have responded to these collective claims by an interpretation of the rights granted to them in the Charter through the federal prism. In other words, they have had to reconcile the federal principle with these new Charter rights in their interpretation, limiting the extent to which they could read into these two groups’ rights.
Tsilhqot’in and Rose-des-Vents: A discourse analysis

The two test cases for the purpose of this first foray into what we hope will be a larger comparative study are Tsilhqot’in Nation v. British Columbia, 2014 SCC 44, and Association des parents de l’école Rose-des-vents v. British Columbia (Education), 2015 SCC 21. They were chosen because both cases are examples of minority groups calling into question the powers vested in the province of British Columbia, and because of their historical proximity, therefore allowing the cases to be heard by a similar Supreme Court bench. Second, these two cases are quintessentially representative of Aboriginal peoples’ and official-language minorities’ claims for self-determination and autonomy since the adoption of the Charter – the first one settling an Aboriginal land claim, and the second one touching on the Francophone minority’s access to proper schooling establishments. This section will first discuss the issue at stake in each case in more detail, and then follow with an analysis of the federal principle as used by the bench in both cases and its impact on the outcome of each decision.

1. Tsilhqot’in Nation v. British Columbia

This case touches on the question of the application of provincial law on Aboriginal title land, the reconciliation of public interests with those of the Aboriginal peoples who hold title, and the extent to which section 35 of the Constitution Act, 1982 protects these lands from provincial incursions. The Tsilhqot’in Nation is a group of six bands from central British Columbia who share a common culture and history. They have managed lands, hunted and trapped for centuries in a remote valley (Tsilhqot’in Nation: at para. 3). They had an unresolved land claim until 1983. That year, “the Province granted Carrier Lumber Ltd. a forest license to cut trees in part of the territory at issue” (ibid.: at para. 5). One of the six bands then sought a declaration of title in order to stop this harvesting of lumber on what they considered to be their land. In 1998, this claim was enlarged to all six bands of the Tsilhqot’in Nation. The Supreme Court applied the Delgamuukw test for Aboriginal title in order to determine whether these claims were founded. This test must determine that land occupation by the bands was sufficient, continuous, and exclusive (ibid.: at para. 25). The Tsilhqot’in passed this test and are therefore granted title over the claimed land (ibid.: at para. 66).

The Supreme Court then moves on to the extent of the rights granted by Aboriginal title and the relationship between those rights and provincial jurisdictions. The Court explains that “Aboriginal title ‘encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes’, including non-traditional purposes” (ibid.: at para. 70). However, the Crown has “the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the Constitution Act, 1982” (ibid.: at para. 71) – which the Court calls the “process of reconciling Aboriginal interests with the broader public interests” (ibid.). In other words, if the government proposes a use for the land to which the Aboriginal group does not consent, the government must establish that the proposed use of the land can be justified under section 35. This process is threefold. The government must first demonstrate that it has discharged itself of its duty to consult and accommodate in a degree proportionate to the strength of the claim and the impact of the proposed action on the land claimed, according to the spectrum determined in Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73. Second, the government must demonstrate that its
actions had a “compelling and substantial objective” (*Tsilhqot’in* at para. 77). Third, the government must show that its actions are consistent with the fiduciary obligation of the Crown to Aboriginal peoples, as stated in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. These three steps apply on a spectrum of duties depending on the strength of the claim for Aboriginal title. Once the title is fully established, “the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*” (*Tsilhqot’in* at para. 91; we underline).

Furthermore, “Section 35 requires any abridgement of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown’s fiduciary relationship with title holders” (*ibid.*: at para. 103). In other words, the Crown needs to reconcile its power to take action on Aboriginal title lands with its fiduciary duty. As it was underlined in *Sparrow*, at p. 1110:

> The constitutional recognition afforded by [section 35] therefore gives a measure of control over government conduct and a strong check on legislative power. [However,] it does not promise immunity from government regulation in a society that […] is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management […]. (We underline)

The Supreme Court finds that the government of British Columbia has breached its duty to consult and accommodate the Aboriginal band in this instance, but does not stop there in its decision. It continues by clarifying whether a provincial legislation such as the *Forest Act* would apply to Aboriginal title land. The Court continues: “As a general proposition, provincial governments have the power to regulate land use within the province. This applies to all lands” (*ibid.*: at para. 102). However, there are constitutional limitations to provincial power on Aboriginal title lands. First, as we already discussed, section 35 of the *Constitution Act, 1982* requires a provincial government to demonstrate that it has a substantial and compelling objective in order to encroach on Aboriginal rights, and that its actions will be consistent with the Crown’s fiduciary relationship with the Aboriginal group. Second, provincial governments may be limited in their action by the federal power over “Indians and Land reserved for the Indians” outlined in section 91(24) of the *Constitution Act, 1867*.

2. *Association des parents de l’école Rose-des-vents v. British Columbia (Education)*

The question at the heart of this case is whether the provincial government respected its duties flowing from section 23 towards Francophone parents living in West Vancouver. The Rose-des-Vents elementary school is the only French school located West of Main street in Vancouver. It shares its facilities with a French high school. Since its establishment in 2001, the school has increasingly become overcrowded. Many aspects of the facilities, from the washrooms, to the library, to the lack of windows or lockers for students, to the size of the playground, appear to be inadequate. The parents’ association was looking for a declaration on behalf of the court that their section 23 rights were being breached, since this school did not meet the “substantive equivalence” (*Association des parents de l’école Rose-des-vents v. British Columbia (Education)*, at para. 33) requirements as presented in the jurisprudence.
The extent of section 23 rights is determined on a case-by-case basis according to a “sliding scale” approach elaborated by the Supreme Court in Mahe v. Alberta, [1990] 1 S.C.R. 342. Where one community falls on this sliding scale depends on the number of potential pupils who are rights-bearers. The greater the number of potential pupils, the more autonomy will be devolved to the community in the management and control of minority-language instruction. At one extreme of the sliding scale, where very few pupils would be eligible for minority-language instruction, no action at all may be required of the provincial government. At the other extreme of the scale, where numbers warrant, the province’s duty may be to create a separate school board for the community, in order to ensure not only that pupils have access to minority-language instruction, but also that their parents have management and control (Mahe: 371-372) of this instruction. “In such cases, rights holders are entitled to full educational facilities that are distinct from, and equivalent to, those found in the schools of the majority language group” (Rose-des-vents: at para. 29).

The test for equivalence, according to the Supreme Court, is that “the educational experience of the children of s. 23 rights holders […] be of meaningfully similar quality to the educational experience of majority language students” (ibid.). Substantive equivalence does not signify equality of costs per pupil enrolled nor equal treatment. Moreover, a “purposive approach” must be used in order to consider the other choices available to the parents. The educational options in the geographical vicinity available for the parents and whether the quality of those majority schools is sufficiently superior to that of the minority school, the parents’ will to have their children education in their official language could become undermined, thus leading to assimilation (ibid.: at para. 35). This assessment must be holistic, considering all aspects of the education experience: “not only physical facilities, but also quality of instruction, educational outcomes, extracurricular activities, and travel times”, among others (ibid.: at para 39).

Questions of “costs and practicalities” for the province may also influence a province’s duty to a particular community. According to the Supreme Court, “costs and practicalities are relevant to the determination of the level of services a groups of rights holders is entitled to on the sliding scale” (ibid.: at para. 46), and these may “again become relevant if a responsible party seeks to justify a violation of s. 23 under s. 1 of the Charter” (ibid.: at para. 49).

In the particular case of Rose-des-vents, the Supreme Court sided with the parents and declared that their section 23 rights had indeed been violated, and that it was up to the province and the Commission scolaire francophone, which are both bound by the Charter, to comply to this declaration “promptly and swiftly” (ibid.: at para. 65).

3. The Supreme Court’s use of the federal principle: what effects on claims for autonomy and self-determination?

The impact of the federal principle in the justices’ ratio decidendi in both these cases appear as a damper on the collective rights at stake, which in both cases takes the form of a sliding scale approach to the application of those rights. In the case of Aboriginal rights, this “sliding scale” appears in the “spectrum” of government duties established in Haida and backed by the

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2 In the Haida decision, the Supreme Court understood the government’s duty as a spectrum of consultation. “The Crown’s duty to consult and accommodate the asserted Aboriginal interest ‘is
Sparrow³ test. The power of the province to encroach on Aboriginal title will decrease as the strength of the title claim increases, or in the words of the Supreme Court:

As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong – for example, shortly before a court declaration of title – appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s.35 of the Constitution Act, 1982. (Tsilhqot’in: at para. 91)

The sliding-scale approach is however explicit in language rights, where the degree of control and management in the domain of education that should be devolved by the province to the minority language community depends on the number of pupils who could possibly be enrolled in minority schools, according to the principle of “where numbers warrant” found in section 23. The sliding scale is also impacted by issues of “cost and practicalities” for the province.

In the cases examined here, both groups had strong claims to the collective rights granted to them by the Constitution Act, 1982. In Tsilhqot’in, the Supreme Court upheld the trial judge’s decision to recognize Aboriginal title on the land claimed by the six bands. In Rose-des-vents, the Supreme Court of British Columbia had already recognized that “the number of children of rights holders [in the West Vancouver area] warranted the highest measure of management and control contemplated under s. 23” (at para. 1). This decision was the impetus for the creation of l’École Rose-des-vents in 2001. Therefore, the factual evidence placed both groups at the extreme upper end of their respective sliding scale of autonomy and self-determination rights.

Yet, in both cases, the Court underlined that the province continued to hold the possibility to override the groups’ granted rights, given that the encroachment could be justified. Acceptable justifications ranged from budgetary imperatives (Rose-des-vents) to upholding the greater good or general population interests against minority claims.

In Tsilhqot’in, the Supreme Court clearly specifies that “provincial laws of general application apply to land held under Aboriginal title” as long as they pass the Sparrow test (Tsilhqot’in: at para. 91).

³ The Sparrow test was elaborated by the Supreme Court as the following: “the following factors will be relevant in determining whether a law of general application results in a meaningful diminution of an Aboriginal right, giving rise to breach: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right. All three factors must be considered” (Tsilhqot’in: at para. 104).
Moreover, as noted above, provincial encroachment on Aboriginal title is still possible if the government “has discharged its duty to consult and the development is justified pursuant to s.35 of the Constitution Act, 1982”. This duty was breached by British Columbia in Tsilhqot’in (at para. 98), and the province also failed to justify its infringement according to section 35. This justification needed to be “backed by a compelling and substantial government objective and to be consistent with the Crown’s fiduciary relationship with the title holders” (ibid.: at para. 103). The province demonstrated neither in this case (ibid.: at para. 126).

Similarly, in Rose-des-vents, the province could not attempt to demonstrate that the claimant community was entitled to a lower level of management and control on the sliding scale as it was granted in the 1996 court case, since the school that was created following this prior decision was now over capacity. The numbers therefore definitely still warranted the level of control and management previously attained. Since it had been established that the West Vancouver Francophone community was already at the highest echelon of the sliding scale, it was not appropriate anymore for the province to bring forward issues of costs and practicalities in the determination of their duties (Rose-des-vents: at para. 46). The question of costs and practicalities could have become relevant again in this case if the province would have pleaded section 1 to justify a limitation of Charter rights (at para. 49), but it did not do so. The possibility for the province to override its section 23 responsibilities was therefore found moot in this case. The striking characteristic of these decisions is that in both cases, the last word remains in the hands of the provinces.

**Conclusion: The federal principle as a limit on the recognition of minority claims**

This paper sought to establish a preliminary dialogue between Aboriginal and official-language minority rights in Canada in order to compare how both sets of rights in the Canadian constitution could lead to a measure of autonomy and/or self-determination for these cultural groups. We argued that these sets of rights continued to be limited within the Canadian political system by federal imperatives, mostly with regards to provincial jurisdictions. We established that despite the historical and cultural differences between these two groups, they had a similar relationship with the Canadian constitution, as it enshrined and limited their group’s membership. Moreover, while not identical, their claims for autonomy and self-determination showed some significant overlap, and their recognition bore comparable moral underpinnings. Finally, both groups’ claims posed a challenge to the federal organization of the Canadian state, as neither had been recognized, explicitly or implicitly in its creation.

The two test cases analysed in the paper were chosen for both their territorial and historical proximity, as well as for the subject of the claims made to the Supreme Court. As we saw in both cases, Aboriginal and official-language minority group rights have maintained underpinnings within the federal framework in the Supreme Court’s interpretation of those rights. While the two test cases had positive outcomes for the groups concerned, the power of the federated unit relative to the groups varied according to a sliding scale approach used to determine the strength of the minority’s claims. The justices have also highlighted the possibility for the federal subunits to override the groups’ respective sets of rights – as long as these encroachments could be justified before the Court. Moreover, in the case of Aboriginal rights, despite the Supreme Court underlining that the relationship between this group and the governments should bear “an ethos of reconciliation” (Tsilhqot’in: at para. 17), it is unclear how this group’s struggle for self-
determination over their ancestral lands could be entirely devoid of competition with the federated subunits with jurisdiction over these lands prior to the establishment of Aboriginal title.

Further analysis between Aboriginal and official-language jurisprudence will be essential to a more in-depth comparison regarding the interpretation of these two sets of group rights by Canada’s highest court and the impact of the federal principle on their extent and limits. However, from this preliminary study, it appears that despite an evolution between 1867 and 1982, Canada’s federal system is still struggling to adapt to and to recognize the multiple identities existing in the country, including those who are posing a strong challenge to its cultural and territorial foundations. As these groups are increasingly posing these challenges in the realm of the judiciary, turning to the courts to have their claims heard, it is up to the judges to determine whether, and if so, to what extent, Canada’s constitutional order may recognize these claims. Our analysis has confirmed that in the face of confrontation by Aboriginal and official-language minority groups, in the eyes of the Supreme Court, the federal principle seems to remain a strong state tradition, both framing and limiting the breadth of the self-determination and autonomy rights granted to these groups. Thus, transformation of the federal system in order to recognize these groups continues to happen at the margin, rather than at the core, of Canada’s federal order, as its founding principles (and the identities they bolster, at the expense of others) continue to prevail.
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