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EFFECT OF THE CHARTER OF RIGHTS AND FREEDOMS ON SCHOOL LEGISLATION

Thesis presented to the School of Graduate Studies of the University of Ottawa in partial fulfillment of the requirements for the degree of Master of Laws.

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EFFECT OF THE CHARTER OF RIGHTS AND FREEDOMS ON SCHOOL LEGISLATION

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APPENDIXES

CHAPTER I INTRODUCTION

The Charter of Rights and Freedoms represents a shift from exclusive unrestricted control by provinces over education to constitutional recognition of individual rights and judicial intervention and priority setting in education. With the exception of constraints confining denominational, separate and dissentient schools, provincial legislatures have enacted legislation and regulations that reflect provincial educational priorities. The extent to which this shift occurs is the subject of this Thesis with prime focus on minority language education rights.

The history and legislative background to section 23 is detailed. Its major elements are analyzed and compared with provincial legislation, international commitments and legislative and constitutional approaches of other countries. The articles on section 23 by Professor J.E. Magnet provided the framework for the analysis. Suggestions for provincial initiative for implementation of and compliance with the Charter are reviewed.

Other provisions of the Charter will affect section 23. Section 29 recognizes denominational, separate and dissentient school rights. Section 15 provides for equal benefits of the law. Multiculturalism is to be enhanced and furthered through the interpretation of the Charter.

The Charter will also have a substantial effect on school policies and procedures relating to student conduct, curriculum setting, and employment matters in general. This Thesis will not review and discuss the extent of the Charter's application in those areas.

CHAPTER II LEGISLATIVE HISTORY

(A) *CONSTITUTION ACT, 1867*

The *Constitution Act, 1867*[1] (*British North America Act, 1867*) provides that EDUCATION is a provincial matter subject to constitutional guarantees for denominational education. The restriction on the law-making authority of the provincial legislatures relates to laws that "prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union". This includes rights conferred on separate schools and dissentient schools in Upper Canada.

Not only did section 93 provide for constitutional rights for denominational schools, it also provided for an appeal to the Governor General in Council from "any act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority".[2] Remedial legislative authority was conferred on Parliament "for the due execution of the provisions of this section and of any decision of the Governor General in Council".[3]

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1. 30-31 Vict., c. 3 (U.K.)
2. Supra, f. 1, sec. 93 (3).
3. Supra, f. 1, sec. 93 (4).

Section 93 was altered for Manitoba, Alberta, Saskatchewan and Newfoundland.[4] The alterations for those four provinces retained rights for members of the religious minority. In all other respects the provinces possessed the unrestricted right to enact laws relating to education.[5]

The *Constitution Act, 1867* does not expressly provide for minority language rights in relation to education . The scope of the restriction on provincial power is limited to religion and has been interpreted not to include language in both Ontario and Quebec. That point was clearly enunciated in 1916 by the Privy Council in Ottawa Roman Catholic Separate School Trustees vs MacKell.[6] Chief Justice Deschênes of the Quebec Superior Court, in 1976, made a similar ruling in Protestant School Board of Greater Montreal et al vs Minister of Education of Quebec et al; Attorney-General of Canada, Third Party.[7]

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4. For a description of the alterations see: DRIEDGER, Elmer A., - A Consolidation of the *British North America Act*, 1867 to 1975, Consolidation as of June 1, 1976 (prepared by E.A. Driedger for Department of Justice, Canada)

5. See Chapter IV (A) for details of the judicial interpretations of section 93(1-4)

6. [1917] A.C. 62

7. 83 D.L.R. (3d) 645 (an appeal from this decision was dismissed by the Quebec Court of Appeal, January 18, 1978 on the ground that the *Official Languages Act*, having been replaced by the *Charter of the French Language*, is no longer law.)

The lack of reference to minority language educational rights is not surprising in view of the history prior to the enactment of the *Constitution Act, 1867*. Tensions existed between English and French Canadians since the defeat of French forces in North America in 1759.[8] Lord Durham's Report of 1839 exemplifies the attempts prior to the *Constitution Act, 1867*, to make English the sole official language of communication.

(B) CANADIAN BILL OF RIGHTS

Parliament enacted a Bill of Rights[9] in 1960. The prime force behind the enactment of the Bill was Prime Minister John Diefenbaker who was deeply committed to establishing parliamentary recognition of fundamental rights and freedoms in Canada.

Although the Bill did establish parliamentary recognition of certain rights and freedoms, it did not establish any limitation on parliamentary sovereignty. The traditional concept of no limitation on what Parliament, acting within its constitutional jurisdiction, may do was not affected by the Bill of Rights. Driedger explained the theory for the Bill of Rights as follows:

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8. LAXTER, Robert M. - Bilingual Tensions in Canada, Series 141, Ontario Institute for Studies in Education (Curriculum), 1979

9. 1960 (Can.), c. 44

> *The fundamental difference in theory between the Canadian Bill of Rights and a Bill of Rights that limits sovereign power, such as the one in the Constitution of the United States of America, does not appear to have been appreciated. There, if Congress enacts a statute inconsistent with the Bill of Rights, that legislation is declared by the courts to be ultra vires. In Canada, Parliament has full sovereign power and, within its area of jurisdiction, has the power to infringe fundamental rights and freedoms."*[10]

Many critics of the Bill did not accept the maintenance of unfettered parliamentary sovereignty in the area of fundamental rights and privileges. A role for the judiciary through the entrenchment of the rights and freedoms in the Constitution, was viewed as desirable. an author best describes the value of judicial power vis-a-vis legislative supremacy:

> *In our parliamentary system, democratic parliaments -- both provincial and federal -- are the primary law-making bodies. Most of the important social policy decisions for change are taken there and, in my view, should be taken there and expressed in statutes that are passed by an ordinary majority of the elected representatives of the people, under the leadership of the cabinet. Periodic elections give the members of democratic legislatures a unique and primary legitimacy for this purpose that appointed persons do not have.*
>
> *Nevertheless, the independent courts, composed of judges appointed with secure tenure in office (for life or until an advanced age) also have a very important part to play. Courts should not be seen as rivals of parliamentary bodies, but rather as partners with complementary functions to carry out that are likewise essential. They have to take the legal principles found in constitutions and ordinary statutes, which run at various levels of generality, and individualize them so as to give authoritative decisions at the particular level of everyday affairs for the persons*

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10. DRIEDGER, Elmer A. - The Meaning and Effect of the Canadian Bill of Rights (1977) 9 Ottawa Law Review 303, at p. 303

contemplated by the terms of the laws. In this connection, courts have an authoritative fact-finding function that is crucial to the whole process of applying laws. It need hardly be emphasized that the historic independence of the judiciary, which we have inherited from Britain as part of our constitutional system, is essential to impartial and competent individualization of laws."[11]

The purpose of the Bill, namely, to protect and establish fundamental rights and freedoms in Canada, was given scant application in our courts. It soon became obvious that the Canadian courts were reluctant to apply the Bill of Rights in most cases. The "frozen concepts" theory developed to restrict the rights set forth in the Canadian Bill of Rights to the rights that existed in Canada immediately prior to its enactment subject to the qualifications on those rights that also existed at that time.[12]

Walter Tarnopolsky commented on the ineffectiveness of the Bill:

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11. MacDONALD, R.S. and J., and J.P. Humphrey - The Canadian Constitution and the Protection of Human Rights, c. 24, p. 412 in LEDERMAN W.R. - Continuing Canadian Constitutional Dilemmas, Butterworths, Toronto, (1981)

12. Robertson and Rosetanni vs The Queen [1963] S.C.R. 651 at p. 654 (Ritchie, J.); A.G. Can vs. Lavell [1974] S.C.R. 1349 at p. 1365 (Ritchie, J.): for further elaboration see W.S. TARNOPOLSKY, Canadian Bill of Rights 2nd ed. rev., Toronto, MacMillan, 1975, at pp. 128-163.

> *In the decade following the adoption of the Canadian Bill of Rights, until the famous Drybone's case, the Bill was given little effect. Within two or three years of its enactment the lower courts seemed reluctant to face its implications, and the trend was to ignore or explain away its existence. Similarly, the Supreme Court, while not openly dismissing or rejecting the applicability of the Canadian Bill of Rights, did not declare a single piece of legislation to be inoperative nor any administrative act to be invalid."*[13]

The Bill of Rights has also been criticized for its deficiencies. Language rights are not enunciated as a right in the Bill but are considered by many as being an essential right in a bilingual country.

(C) ROYAL COMMISSION ON BILINGUALISM AND BICULTURALISM

The Liberal Government under Prime Minister Lester B. Pearson appointed a Royal Commission on Bilingualism and Biculturalism[14] (referred to as the Royal Commission), to inquire into and report upon the existing state of bilingualism and biculturalism in Canada and to make recommendations to develop Canadian Confederation on the basis of an equal partnership between the two founding races. It held fourteen regional public hearings and received four hundred and four briefs.

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13. Tarnopolsky - Op. cit., f. 12 at p. 14

14. P.C. 1963-1106 (July 16, 1963)

In its Report on Education[15] to the Governor-General-in-Council, the Royal Commission made forty-six specific recommendations for implementing language rights in education. The recommendations dealt with all aspects of school operation including the right to receive instruction in the minority language in areas designated as bilingual districts and in major urban centres whenever numbers made it practical to do so.

The Royal Commission considered education to be a vital part of creating a bilingual state.

> *"Education is vitally concerned with both language and culture; educational institutions exist to transmit them to a younger generation and to foster their development. The future of language and culture, both French and English, thus depends upon an educational regime which makes it possible for them to remain 'present and creative'. In a minority situation education is even more significant, because the school can offer a cultural environment which the community cannot provide."*[16]

As a consequence of the Royal Commission recommendations, the *Official Languages Act*[17] was enacted by Parliament. As education is a provincial matter, no reference in that Act with respect to language and education was possible. No immediate legislative action was taken on the education recommendations. The federal government did accept the priorities embodied in the Royal Commission recommendations.. The Honourable Gerard Pelletier, Secretary of State, tabled the following statement in the House of Commons on November 6, 1969:

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15. Report of the Royal Commission on Bilingualism and Biculturalism, Book II Education, (Ottawa), (May 23, 1968)

16. Op. cit., f. 15, (Foreward)

17. R.S.C. 1970, C. O-2

A study of the recommendations of the Royal Commission (on Bilingualism and Biculturalism) which are addressed to the federal government shows that they are intended to cover both minority language education and second language learning. The first of these priorities is designed to redress an imbalance which has existed for many years and to ensure access to education in the minority, as well as the majority, language across Canada, wherever this is feasible. The second priority goes beyond this and looks to a future in which there will be an increasing opportunity for all Canadians to learn their second official language.

The government accepts both these priorities, and our acceptance of both is reflected in our willingness to provide financial assistance in the light of the Commission's recommendations."[18]

(D) CONSTITUTIONAL DEVELOPMENTS 1968-1978

Prime Minister Pierre Elliot Trudeau, in 1968, proposed a constitutionally entrenched Bill or Charter of Rights.[19] One of the prime features of the proposal was the guarantee of linguistic rights.

At the First Constitutional Conference of First Ministers held on February 5-7, 1968, the government White Paper, A Canadian Charter of Human Rights, was discussed. This White Paper did not contain a proposed text for the Charter of Rights. At the Second

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18. Statement concerning the federal government's policy with respect to the Royal Commission recommendations on Education (Book II)

19. TRUDEAU, P.E. - A Canadian Charter of Human Rights, Government White Paper, House of Commons, (February 1, 1968)

Constitutional Conference held on February 10-12, 1969, a second White Paper, The Constitution and the People of Canada,[20] containing details of the proposed text of a Charter of Rights, was presented for discussion. At that time, no agreement was reached on a Charter, but committees were established to study various aspects of the Charter including language rights. The specific federal government proposal for minority language educational rights was:

> "... the right of the individual to have English or French as his main language of instruction in publicly supported schools in areas where the language of instruction of his choice is the language of instruction of choice of a sufficient number of persons to justify the provision of the necessary facilities."[21]

The White Paper referred to the suggested guarantees as following the general pattern of, and not derogating from, the language rights recommended by the Royal Commission,[22] and designed to implement as far as possible in a charter of individual rights, the recommendations in Book I of the Royal Commission.[23]

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20. Published by the Government of Canada on the Occasion of the Second Meeting of the Constitutional Conference, Ottawa, February 10, 11 and 12, 1969, for the purpose of providing provisional positions on certain areas of the Constitution.

21. Op. cit., f. 20, p. 58

22. Ibid.

23. Id., p. 22

The Prime Minister and Premiers met at further Constitutional Conferences in February, 1971 and June, 1971. In February, 1971, the Federal-Provincial Constitutional Conference agreed to the minority language educational proposal of the White Paper, The Constitution and the People of Canada. Significant constitutional progress was made at the Conference in June, 1971 when the Premiers agreed to the Victoria Charter. The Victoria Charter dealt with many of the proposals for a Constitution but it contained no reference to minority educational language rights. The agreement reached in the preceding February was not incorporated into the Victoria Charter.

A Special Committee of the Senate and House of Commons was constituted by resolutions of the House of Commons and the Senate on January 27, 1970 and February 17, 1970 respectively. The thirty member Special Joint Committee held one hundred and forty-five public meetings across Canada over approximately two years.

During its two years of review and investigation, the Special Joint Committee considered the provisions of the Victoria Charter and deemed those provisions to be deficient in regard to linguistic rights for education. The Special Joint Committee (1972) recommended constitutional entrenchment of minority educational language rights with the following explanation:

> "Here, there are both theoretical and practical problems. The theoretical problem is raised by the Province of Quebec, which apparently feels some reluctance to accept an unqualified right in parents to choose the language of instruction of their children, for fear that the supposed economic advantages of knowing English might tempt too many parents to choose education in English for their children.

> *We are fully conscious of the need of the Quebec Government to keep constantly in mind demographic and linguistic factors. Yet the fact appears to be that the French language in Canada has never been stronger. Even a well-known separatist witness before the Committee admitted that the French language is now so secure that Quebec's continuance within Canada would no longer pose any threat to it. More important, there are some matters in which a Government in a free society may not go beyond persuasion. In our view this is one such matter, and the right of parents to choose their children's education is a basic human right which no government can encroach upon."*[24]

In addition to minority language educational rights, other specific recommendations were made as follows:

> *"88. Education as such should remain an exclusively Provincial power as at present, subject to the guarantees for minorities set out elsewhere in this Report.*
>
> *89. The Provinces should create a permanent office for cooperation and coordination in education, and Federal participation should be confined to the area of Federal jurisdiction over the education of native peoples, immigrants, and defence personnel and dependents."*[25]

In April, 1976, the Western Premiers established a Task Force on Constitutional Trends. The mandate of the Task Force was to identify and to undertake an analysis of and to monitor federal government legislative thrusts in eight identified subject areas. Education or minority language rights were not items identified for consideration by the Task Force.

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24. Special Joint Committee of the Senate and House of Commons on the Constitution - Final Report, Ottawa Information, Canada, March 7, 1972, p. 24

25. Op. cit., f. 24, p. 78

Premiers' Conferences were held in August and October of 1976. A letter dated October 14, 1976 from the Premier of Alberta to the Prime Minister indicated the unanimous agreement of the Premiers with respect to the confirmation of language rights of English and French along the lines discussed in Victoria, 1971. Those language rights did not provide for the entrenchment of minority educational language rights in a Constitution.

At the St. Andrews Premiers' Conference in late 1977, the suggestion of René Lévesque for reciprocity agreements between provinces for minority language education for Canadians who move from one province to another, was rejected by the other Premiers. Nor did the Premiers agree to constitutional entrenchment for minority language education rights. The reciprocity concept was opposed by Prime Minister Trudeau for two reasons:[26]

1. He considered it a trap of the Parti Quebecois to serve as a precedent for other bilateral agreements, thus furthering the sovereignty association concept.
2. Reciprocity would create unequal rights for Canadians who had received French education and those who had not.

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26. Op. cit., f. 8, p. 13

Prime Minister Truedeau recommended refusal[27] of reciprocity and recommended as an alternative, constitutional entrenchment.[28]

The Premiers did reach an agreement (Appendix "A"). The agreement provided that the Premiers would make their best efforts to provide minority language instruction "wherever numbers warrant". The Premiers also directed the Council of Ministers of Education to review and report on the current state of affairs of minority language education in Canada.

At the Premiers' Conference in Montreal in February, 1978, the "St. Andrews" agreement was further refined (Appendix "B") by the inclusion of two governing principles, namely, the right of every child to an education in the minority language wherever numbers warrant, and the exclusive provincial right to implement the first principle.

(F) BILL C-60 - THE CONSTITUTIONAL AMENDMENT BILL, 1978

In 1978, Prime Minister Trudeau continued his efforts to patriate the Canadian constitution. In June, he tabled a White Paper, A Time for Action[29] and Bill C-60, The Consitutional Amendment

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27. McWHINNEY, Edward - Quebec and the Constitution, University of Toronto Press, Toronto, Ontario, 1979, p. 72

28. Commissioner of Official Languages, Annual Report 1977, p. 28

29. TRUDEAU, P.E. - A Time for Action, Government of Canada, June, 1978.

Bill (1978) in the House of Commons. The White Paper described in general terms, the need for and the principles of a constitution. Included in the White Paper were references to linguistic rights for Canada. The "Principles of Renewal" provided for the full development of two linguistic majorities. This was described in terms of linguistic equality.[30] The major premises guiding renewal specifically included a reference to schooling in the language of the parent's choice, English or French, with this guarantee ensuring that "fair and reasonable treatment will always prevail".[31]

Section 21 of Bill C-60 defined minority language educational rights (Appendix "C"). The governing principles adopted by the Premiers in Montreal (Appendix "B") were also the governing principles of section 21. The right to minority language education was limited by "numbers" and by provincial control or regulation. The provinces were assigned rights to determine numbers and procedures or "reasonable requirements".

The government provided further clarification of the principles of section 21 in Canadian Charter of Rights and Freedoms (Constitutional Reform).[32] This document highlights the following points regarding section 21:[33]

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30. Id., p. 9

31. Id., p. 22

32. Canadian Charter of Rights and Freedoms, (Constitutional Reform), The Honourable Otto E. Lang, Minister of Justice, Government of Canada, August, 1978

33. Id., pp. 13-14

1. provision of choice by parents who speak the minority language;
2. need for provincial subscription to the Charter before section 21 is effective;
3. sufficient numbers must be present;
4. designed to protect minorities not majorities;
5. citizenship requirement;[34]
6. provincial regulation must be reasonable;
7. ultimate recourse to the courts; and
8. mandatory instruction in majority language if province so requires.

Prime Minister Trudeau enunciated the purpose and intent of section 21 in this way:

> "As far as education is concerned, we do not differentiate. The approach of this constitution is to protect official language minorities in the area of education wherever they exist, the English-speaking minority in Quebec and the French-speaking minority in every other province. We think this is the proper solution.
>
> I know that some provinces will say that we should not be discussing education because it is purely provincial, but the way in which this constitution is couched will permit the provinces to see that indeed we are not attempting here to legislate in that area. We are suggesting the way in which we think the linguistic problem at the provincial level will be solved, but I merely want to remind those who make that point that we have in our present constitution, and have since 1867, provision for the federal government to intervene in areas of legislation and to protect minorities in the educational system. Therefore, the concept is not new.

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34. Quebec was cited as the major reason for this restriction

It is true that when the Fathers of Confederation approached this problem 111 years ago they defined minorities then in religious terms because there was a certain equation between religious and linguistic problems in the province of Quebec and, indeed, at that time in the province of Manitoba, but the concept of the federal government's protecting minorities in the area of education is not a new one. It is 111 years old, and all I want to say is that we are not proposing the continuance of this protection by the federal government; we are suggesting that all governments in a sense give up some of their jurisdiction, not to other levels of government but to the citizen in a declaration of rights, including that of linguistic rights."[35]

Bill C-60 also provided for constitutional entrenchment of other basic rights and freedoms. At the Premiers' Conference in Regina in August, 1978, Bill C-60 was reviewed and discussed. Some of the Premiers were of the view that the Bill went further than previously agreed. Some of the provinces supported the principle of constitutional entrenchment of basic rights while others were of the view that individual rights are better protected by basic constitutional traditions and the ordinary legislative process. The same arguments were advanced by both groups as had been advanced since 1960 regarding the Canadian Bill of Rights.

A further Federal-Provincial Conference on the Constitution was held on October 30-31, and November 1, 1978. At that Conference, varied views were presented and no agreement was reached either regarding entrenchment of rights and freedoms generally, or entrenchment of

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35. House of Commons Debates, June 27, 1978, at 6785-6786

minority language educational rights, specifically.[36] Neither did a Special Joint Committee of the Senate and House of Commons[37] constituted to review and report on Bill C-60 make specific recommendations regarding minority language educational rights.[38]

A Task Force on Canadian Unity[39] was constituted by the Governor-General-in-Council to obtain and to publicize the views of Canadians regarding the state of their country. Under the Joint Chairmanship of Jean-Luc Pepin and John Robarts, the Task Force, in January, 1979, made specific recommendations including a recommendation regarding linguistic rights in education (Appendix "D"). The entitlement recognized by the Premiers in Montreal in 1978 (Appendix "B") was recommended for inclusion in provincial law. The same concepts of provincial control of education and the need for minority language educational rights were thus reemphasized by the Canadian Unity Task Force Report.

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36. For the various positions of provinces, see: Proposals on the Constitution (1971-1978), Collation by the Canadian Inter-Governmental Conference Secretariat, pp. 76-81 and pp. 105-108

37. Approved by a resolution of the House of Commons on June 27 and by a resolution of the Senate on June 29, 1978. The Senate also appointed its own Committee to review and report regarding the Constitution of Canada. Its Committee was appointed on July 25 and was reconstituted on October 11. Although it heard witnesses and held 36 sittings over 2½ months, it was not able to reach final conclusions with respect to language and schooling rights.

38. Special Joint Committee of the Senate and House of Commons on the Constitution - Final Report, (Ottawa Information Canada, 1978)

39. Appointed under Part I of the *Inquiries Act* by O.I.C., of July 5, 1977, (P.C. 1977-2361 and P.C. 1977-2363) and February, 1978 (P.C. 1978-573)

In February, 1979, Quebec, British Columbia, Alberta, Manitoba, and Nova Scotia rejected a federal proposal that all children of the two official language groups be guaranteed freedom of choice of language of education throughout Canada wherever numbers warranted.[40]

For the period of the Clark government[41] there were no significant constitutional developments. A constitutional research group within the federal conservative party, headed by Arthur Tremblay, was formed but had hardly begun its work by the time the Clark government was defeated.

Following the successful Quebec referendum[42] and Trudeau's reelection[43] another first Ministers' Conference on the constitution was convened.[44] Many months of negotiations before and after the Conference between the federal and provincial governments resulted in a failure to reach a consensus.[45]

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40. Federal-Provincial Conference on the Constitution February, 1979.

41. June, 1979 - February, 1980

42. May 20, 1980

43. February, 1980

44. June 9, 1980

45. McWHINNEY, Edward Canada and the Constitution 1979-1982 University of Toronto Press, Toronto, 1972 pp. 42-45. The 1980 conference was preceded by a "best efforts" draft to revise Bill C-60 by the Attorneys' General.

(F) CHARTER OF RIGHTS AND FREEDOMS

A Federal-Provincial Conference of First Ministers on the Constitution held in Ottawa on September 8-13, 1980, failed to achieve agreement on patriation of the Constitution and also on entrenchment of minority language educational rights. On October 2, 1980, Prime Minister Trudeau announced the intention of the Liberal Government to proceed unilaterally, if necessary, to achieve patriation of the Constitution of Canada.[46] Prime Minister Trudeau referred to the minority language educational rights provision of the Proposed Resolution (Appendix "E") as providing rights for parents to have their children educated in their own official language "where numbers warrant". He also referred to the agreement of the Premiers to this provision. Prime Minister Trudeau's reference to the "agreement of the provinces" to the provision was very misleading as the Premiers' agreement in 1978 included provincial control and determination with respect to the language rights and did not include entrenchment of the right in the Constitution. The Proposed Resolution was void of any reference to provincial control over the language rights in education.

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46. The Government introduced Proposed Resolutions for a Joint Address to Her Majesty, the Queen Respecting the Constitution of Canada, October 2, 1980.

The provision, section 23, established two classes of persons who would acquire minority language education rights:

1. citizens whose first language learned and still understood is that of the minority; and
2. citizens who move from one province to another where one of their children has started his or her studies in the minority language.

The Minister of Justice, Jean Chretien, made a special plea for agreement to the minority language educational rights provision:

> *"Mr. Speaker, this government holds the view that such rights must be protected in the constitution because they are fundamental to what Canada is all about. When minority language education rights are taken away, the right to take up a job in any part of Canada is seriously impaired. English-speaking Canadians, if they move to Quebec, want to have the right to send their children to school in their own language. Indeed Mr. Levesque and Quebec government members pat themselves on the back for doing so, therefore I do not see why that could not be enshrined and confirmed in the constitution.*
>
> *Similarly, French-speaking Canadians do not want to move to other parts of Canada unless they can send their children to school in their own language. The only way to achieve this is to guarantee such rights in the constitution. In effect, without a guarantee of minority language education rights, there can be no full mobility rights.*
>
> *Members on all sides of this House representing Canadians everywhere made a commitment to the people of Quebec during the referendum campaign that a new constitution would guarantee the fundamental rights of French-speaking Canadians outside of Quebec and English-speaking Canadians in Quebec. The guarantee of minority language education rights everywhere in Canada meets this commitment. It also marks our maturity as a nation because it must never be forgotten that a civilization is judged by how it treats its minorities.*
>
> *For the first time in Canadian history, the education rights of official language minorities all across the country will be guaranteed. I would appeal particularly to the Federation of Francophones outside Quebec to put*

pressure on Premier Levesque to drop his opposition to a measure which goes further than anything in our history to protect the rights of French language minorities everywhere in Canada.

It was because of the opposition of the government of Quebec to the Victoria Charter of 1971 that we lost the opportunity to achieve institutional bilingualism in many provinces. Today I would strongly urge the people of Quebec to put enormous pressure on the government of Quebec not to oppose this chance of a lifetime to assure education rights for French Canadians everywhere in Canada.

And I would urge just as strongly support for the charter of rights by those who oppose the provisions of Bill 101 which restricts the rights of English-speaking Canadians who move to Quebec to send their children to an English School."[47]

By Orders adopted by the House of Commons on October 23, 1980 and by the Senate on November 3, 1980, a Special Joint Committee of Senate and the House of Commons on the Constitution of Canada was established to consider and report upon the Proposed Resolution.[48]

1. Section 23 - Minority Language Education Rights

The Special Joint Committee received briefs from many organizations including provincial minority language groups

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47. House of Commons Debates, October 6, 1980, at pp. 3286-3287

48. The Special Joint Committee commenced intense sittings on November 6, 1980. It received one thousand, two hundred and eight submissions and heard one hundred and four witnesses, including five expert witnesses

who were opposed to the limitations of section 23.[49] The general submission of those groups was to eliminate the limitation "where numbers warrant". Several racial groups opposed the application of section 23 to "citizens of Canada" as immigrants would not be afforded any rights thereunder. The Official Languages Commissioner, Max Yalden, also opposed the "citizenship requirement" and the reference to "sufficient numbers" particularly because of its linkage to public funding.[50]

One association[51] urged the Special Joint Committee to use a singularized approach for various regional and provincial situations. None of the provinces made submissions to the Special Joint Committee regarding section 23.

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49. Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (1st Session of the 32nd Parliament). The organizations included the Positive Action Committee (7:55-7); Canadian Jewish Congress (7:96-8); Association-Canadienne-française de l'Ontario (ACFO) (8:46-8:53); Canadian Association for the Mentally Retarded (10:9-10); Société franco-manitobaine (10:26-45); Protestant School Board of Greater Montreal (11:7-26); Association culturelle franco-canadienne de la Saskatchewan (12:7-26); Fédération des Francophones Hors Québec Inc. (13:26-56); Canadian Bar Association (15:10)

50. Notes from a statement by Max Yalden, Commissioner of Official Languages to the Special Joint Committee on the Constitution of Canada, Ottawa, November 17, 1980

51. SPECIAL JOINT COMMITTEE - Op. cit., f. 49, 10:31 (Société franco-manitobaine)

The Minister of justice placed before the Special Joint Committee, a further amendment to section 23 in January, 1981 (Appendix "F").[52] The proposed amendment:

1. added an additional class of persons who would be entitled to the section 23 rights, namely, children of parents who received their primary school instruction in Canada in the minority language of the province in which they now reside;
2. removed the limitation whereby the right to have all children instructed in the language of school instruction of the first child only applies where the parents move from one province to another.
3. removed all references to "educational facilities"; and
4. provided no reference to amplify what "receiving instruction" would or could include.

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52. Consolidation of Proposed Resolution and Possible Amendments as placed before the Special Joint Committee by the Minister of Justice (January, 1981), together with explanatory notes

Due to confusion over the deletion of the reference to "educational facilities", a further subsection was added at the instigation of the Minister of Justice to again insert the reference to "educational facilities".

On January 29, the Special Joint Committee, in its clause by clause debate on the Proposed Resolution, agreed to the proposed amendment as provided by Mr. Chretien.

The Minister of Justice referred to section 23 when he moved the Proposed Resolution on February 17, 1981, as amended by the Special Joint Committee[53] as follows:

> *"I also indicated a while ago that we would provide francophones outside Quebec with the constitutional right to set up French schools in all Canadian provinces, and that the price to pay for this right which has not been recognized for the past 114 years in Canada would be to grant anglophones in Quebec the same education rights as those being granted to francophones outside Quebec."*[54]

The Proposed Resolution was passed by the House of Commons on April 23, 1981 and by the Senate on April 24, 1981.

The unilateral patriation of the Canadian Constitution was challenged in court. The Supreme Court rendered its decision on September 28, 1981[55] when it ruled that while Parliament was within

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53. SPECIAL JOINT COMMITTEE - Op. cit., f. 49, no. 57

54. House of Commons Debates, February 17, 1981, p. 7375

55. (1981) 125 D.L.R. (3d) 1 (S.C.C.)

its legal rights to proceed alone, the federal action was not in accordance with a convention requiring substantial measure of provincial consent.[56]

Following the Supreme Court of Canada ruling, further meetings were held with the provincial Premiers. On November 5, 1981 at a Federal-Provincial Conference of First Ministers on the Constitution, the agreement of nine provinces was reached. This agreement included agreement to section 23 of the Charter of Rights and Freedoms (Appendix "G"). Quebec was the lone dissenting province. As a result of Quebec's dissent, section 59 was added to the *Constitution Act*. The effect of section 59 is to exclude the application of section 23(1)(a) in Quebec until Quebec agrees.

2. Section 29 - Denominational, Separate and Dissentient School Rights

The Special Joint Committee received representations[57] requesting the retention of religious school rights. The proposed individual rights of the Charter were viewed as contradicting in part, the former section 93 religious school rights. Sections 2 and 15

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56. Supra, f. 55 (see judgments of Martland, Ritchie, Beetz, Chouinard and Lamer J.J.)

57. Canadian Catholic School Trustees' Association; Ontario Separate School Trustees' Association; Ontario Confederation of Catholic Bishops; Denominational Educational Committees of Newfoundland

of the Charter were cited as possible contradictory provisions. To resolve this contradiction, the Canadian Catholic School Trustees' Association for example, recommended that the following provision be added to the Charter:

> "... *the guarantee in this Charter of certain rights and freedoms shall not be construed as preventing or limiting:*
>
> *(a) any rights or privileges, by any provision of the constitution of Canada, granted or secured with respect to separate, dissentient or other denominational schools;*
>
> *(b) the establishment or extension by authority of public statute or otherwise of any separate, dissentient or other denominational school or system of schools, or of any scheme of funding from public revenues or otherwise for the support of such school or system as is deemed appropriate; or*
>
> *(c) the operation of any separate, dissentient or other denominational school or system of schools in accordance with its denominational requirements including, but not limited to, the right to follow a selective policy with respect to enrolment on the basis of sex or religion and to employ persons subscribing to the tenets of a particular religion."*[58]

To meet the concerns, the Minister of Justice recommended the addition of the following section:

> "*25. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of*
> *(a) ...*
> *(b) any other rights or freedoms that may exist in Canada"*

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58. SPECIAL JOINT COMMITTEE - Op. cit., f. 49, 19:8

Another amendment was proposed during the Special Joint Committee clause by clause debate to protect the Newfoundland denominational school system[59] but was defeated in favour of the general wording for section 29 as it now appears in the Charter.[60]

3. Section 27 - Multiculturalism

The Special Joint Commitee received briefs from many minority groups in Canada that requested recognition in the Charter of the federal government's declared support for multiculturalism in Canada.[61]

The Minister of Justice, in his proposed amendments in January, 1981, recommended the inclusion of section 27 in the Charter. On January 31, 1981, the Special Joint Committee agreed to the Minister's proposal.[62] The stated intent for section 27 was for interpretative

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59. Id., 48:126

60. Id., 48:126-127

61. The federal government adopted a policy of multiculturalism in 1971 in response to the Recommendations in Book IV of th Royal Commission on Bilingualism and Biculturalism (Tabled in House of Commons on October 8, 1971)

62. SPECIAL JOINT COMMITTEE - Op. cit., f. 49, 50:20

assistance, not to guarantee any multicultural rights.[63]

Mr. Chretian provided further elaboration in the House of Commons:

> *"Sixth, the charter makes specific reference to the multicultural nature of our society. At the time of confederation our forefathers established a new country based on two great cultures, the English and the French. Over the last 114 years, Canada has been enriched by the contribution of immigrants from the four corners of the globe. And because Canada prides itself on not being a melting pot, we are establishing today that the charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". As far as the government is concerned, the multicultural heritage of Canadians is such an essential fabric of our nationhood that it must be reflected in our Constitution."*[64]

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63. SPECIAL JOINT COMMITTEE Op. cit. f. 49 50:16 - Roger Tassé, Deputy Minister of Justice, in response to questioning on the purpose of the clause stated:
"So the rule we are talking about here would rather be a question of interpretation of the charter itself and, fundamentally, it is a suggestion the charter is making to the courts; when a question is raised about the interpretation of the charter, they will have to try to interpret the charter in a manner consistent with the objective we have in that clause."

64. House of Commons Debates, February 17, 1981, p. 7375

CHAPTER III MINORITY LANGUAGE EDUCATIONAL RIGHTS

(A) ANALYSIS OF SECTION 23

1. Aids to Interpretation

Before analyzing the component parts of section 23, it is necessary to review and outline the interpretative framework within which the analysis is to take place.

The first and most important aspect is that the Charter is a constitutional document.[65] It is the Supreme Law of Canada and not merely an ordinary statute. Lord Sankey's words are relevant:

> *The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. ...*
>
> *Their Lordships do not conceive it to be the duty of this Board -- it is certainly not their desire -- to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own home, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs."*[66]

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65. The Charter of Rights and Freedoms is Part I of the *Constitution Act, 1982* as enacted by the *Canada Act*, 1982 (U.K.) c-11 proclaimed in force April 17, 1982.

66. Edwards v. Attorney-General of Canada, [1930] A.C. 124 (P.C.) at p. 136. The issue was the meaning of "persons" in the *British North America Act* as it related to appointment to the Senate.

Lord Sankey's words were adopted in Minister of Home Affairs and another v. Fisher and another[67] where the word "child" was given a very broad or generous meaning. Lord Wilberforce, delivering the judgment of the Privy Council, considered what rules of interpretation were to apply in the interpretation of a constitution. One approach was described in this way:

> *"The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law."*[68]

This "radical" approach was accepted. Lord Wilberforce provided an explanation for so accepting this approach:

> *This is in no way to say that there are no rules of law which should apply to the interpretation of a constitution. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.*[69]

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67. [1979] 3 ALL E.R. 21

68. Supra, f. 67 p. 26

69. Supra, f. 67, p. 26

Lord Wilberforce does not reject the application of ordinary principles of statutory interpretation. Instead, he broadens the scope of judicial interpretation of a constitution by accepting the premise that a constitution calls for principles of interpretation of its own, which may or may not include the ordinary principles of statutory interpretation.

Chief Justice Deschênes of the Quebec Superior Court stated that "the whole thrust of constitutional law is aimed at ensuring a liberal interpretation and a generous and uniform application across the country".[70] Chief Justice Deschênes was considering the interpretation of section 23 of the Charter[71] when he made these remarks.

The "living tree" reference suggests a flexible and liberal approach to an interpretation of the Charter so that individual facts of each case may be considered and applied so as to further the growth of the tree.

The Constitution provides that both the English and French versions are "equally authoritative".[72] This provision is similar to a provision contained in the *Official Languages Act*.[73] Any analysis of a provision in the Charter should include a reference to both the French and the English texts.

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70. Quebec Protestant School Boards v. Attorney General of Quebec (No. 2) 140 D.L.R. (3d) 33 at p. 54

71. For a further example of an interpretation of a Charter provision, see: Southam Inc. v. Director of Investigation and Research of the Combines Investigation Branch et al, [1982] 4 W.W.R. 673 (Alta. Q.B.) Cavanagh J. at p. 682

72. Section 57

73. R.S.C. 1970, c. O-2, s. 8

The Charter is not an Act of the Parliament of Canada nor of the provinces in Canada, therefore, the Canadian *Interpretation Act*[74] and the various provincial counterparts do not apply. A reading of the *Interpretation Acts* may provide useful guidance and assistance in interpreting the Charter.[75]

The most difficult question to be considered when interpreting and applying a provision of the Charter is the use of extrinsic evidence. The general rule has been that extrinsic evidence is not admissible in court to aid in the interpretation of a statute.[76]

The decision of the Supreme Court of Canada in the Anti-Inflation Reference[77] marked the real beginning of Canadian judicial decisions which reduce the inflexibility of the past general rule of no admissibility. Chief Justice Laskin, in considering the validity of the *Anti-Inflation Act*, permitted extrinsic evidence. In doing

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74. R.S.C. 1970, c. I-23

75. Southam Inc.,, Supra, f. 71, pp. 681-682 Justice Cavanagh indicated that "although the Canadian *Interpretation Act* does not apply, it is useful to note it".

76. KILGOUR, D.R. - The Rule Against the Use of Legislative History: "Canon of Construction or Counsel of Caution"? (1952) 30 Can. Bar Review 769; and see also CORRY - The Use of Legislative History in the Interpretation of Statutes (1954) 32 Can. Bar Review 624

77. IN THE MATTER OF Section 55 of the *Supreme Court Act* AND IN THE MATTER OF a Reference by the Governor in Council Concerning the Validity of the *Anti-Inflation Act*, as set out in Order in Council P.C. 1976-581 dated the 11th day of March 1976 (1976) 68 D.L.R. (3d) 452

so, he stated that the extrinsic evidence would be considered "as bearing on the validity of challenged legislation",[78] that is, in the determination of the "valid constitutional base".[79] He emphasized that there was no issue in that case as to the meaning of the terms of the legislation nor as to the object of the legislation,[80] but he did refer to the rules of Heydon's Case[81] for adaptation to constitutional purposes.

The extrinsic evidence that was considered to be admissible included evidence of the prevailing level of inflation and the White Paper tabled in the House by the Minister of Finance. Justice Beetz, in dissent, saw no reason why Hansard should not also be used for determining constitutional pivot, that is the constitutional characterization, and not to construe and apply the provisions of the Act.[82]

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78. Id.. p. 467

79. Id., p. 470

80. Ibid.

81. 76 E.R. 637. The "mischief" rule as laid down in Heydon's Case states that, in the interpretation of statutes, one is to consider the common law before the making of the legislation, the mischief or defect for which the common law did not provide, the remedy intended to cure the defect and the true reason for the remedy.

82. Supra, f. 77, p. 534

The Supreme Court of Canada has on two recent occasions further considered the admissibility of extrinsic evidence in constitutional matters. In Re British North America Act and the Federal Senate[83] the court considered the constitutional authority of the federal government to abolish or make changes in the Senate. It considered historical background which lead to the creation of the Senate and then interpreted sections 91 and 92 of the *British North America Act* in light of, and in line with, the intention of the provisions as shown by the historical background.[84] The historical background included parliamentary debates.

In Reference re: Residential Tenancies Act[85] Justice Dickson stated:

> "A constitutional reference is not a barren exercise in statutory interpretation. What is involved is an attempt to determine and give effect to the broad objectives and purpose of the Constitution, viewed as a 'living tree', in the expressive words of Lord Sankey in Re s. 24 of the B.N.A. Act, 1930 1 D.L.R. 98, 1930 3 W.W.R. 479. Material relevant to the issues before the Court, and not inherently unreliable or offending against public policy should be admissible subject to the proviso that such extrinsic materials are not available for the purpose of aiding in statutory construction: ..."[86]

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83. 30 N.R. 271 (December 21, 1979)

84. Id., p. 287

85. (1981) 123 D.L.R. (3d) 554 This decision has been followed in other constitutional characterization cases: see: Re Clearwater Well Drilling Ltd. (1981) 124 D.L.R. (3d) 447 (where Hansard was also used) and Reference re: Upper Churchill Water Rights Reversion Act (1982) 134 D.L.R. (3d) 288 (where numerous documents related to the political history such as speeches of government officials in and out of the Legislature were admitted but subject to court consideration as to their weight)

86. Residential Tenancies Act, Id. p. 562-563

He admitted Law Reform Commission Reports and a Green Paper published by the provincial government. Justice Dickson indicated that Royal Commission reports and reports of parliamentary committees are admissible "to show the factual context and purpose of the legislation"[87] but that generally Hansard is inadmissible.[88]

Both Justice Dickson and Chief Justice Laskin remarked that the weight to be given to such extrinsic evidence would be determined by the court. They may be given very little weight depending on the circumstances.[89]

The admission of extrinsic evidence has also arisen in non-constitutional cases. In Laidlaw v. Metropolitan Toronto,[90] a Law Reform Commission report was considered. The issue before the court was the interpretation of a provision of the Ontario *Expropriation Act*. Justice Spence considered the report in order "to determine the problem faced by the legislators which they must have sought to meet in the new statute".[91] He indicated that the report could not be considered "by seeking to interpret the statute in accordance with the recommendations made".[92] The reference and use is in line with Heydoh's Case and the mischief rule. As the intention of the legislation

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87. Residential Tenancies Act, Supra, f. 85, p. 561

88. Ibid.

89. Id., p. 562; Anti-Inflation, Supra, f. 77, p. 461

90. [1978] 2 S.C.R. 736

91. Id., p. 743

92. Laidlaw, Supra, f. 90, p. 743

was found to be the replacement of a vague concept, Justice Spence concluded that a narrow interpretation would fail to carry out the obvious purpose of the legislation. He thus gave the provision a wide interpretation to carry out the intention.

The Laidlaw case was followed in Re Urman[93] where the Ontario Supreme Court relied on a Law Commission Report in interpreting a statutory provision. The court also indicated that the weight to be placed on the report depends on how closely the legislation follows the report.[94] Similarly, in Babineau v. Babineau[95] the court stated that political statements or reports may be admissible in any kind of case, not just a constitutional case.[96] The use of the extrinsic materials by other courts was reviewed in detail with the conclusion of the court being that extrinsic evidence ought to be admitted but that such materials would only be relevant in assisting the court in its determination if the materials would conclusively settle the matter.[97]

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93. (1981) 128 D.L.R. (3d) 33

94. Id., p. 37

95. (1981) 122 D.L.R. (3d) 508 (Ont. H.C.); affd (1982) 37 O.R. (2d) 527 (Ont. C.A.)

96. Id., p. 512

97. Id., p. 513

The law in this area is not settled. The interpretation of the Charter will create a new category for consideration by the judiciary. In the past, the decisions have dealt with consideration of constitutional characterization or constitutional pivot and with interpretation of statutory provisions. The Charter cases will involve both a consideration of a constitutional nature, although not characterization or pivot, and an interpretation of the wording of a provision. The foregoing decisions support a relatively free use of extrinsic materials when considering Charter provisions. Lord Sankey's "living tree" reference for the interpretation of a constitution is support for the need to consider any relevant materials provided these materials are only used to determine background and purpose in order to resolve ambiguities.

In the past, Hansard or parliamentary proceedings have been placed in a different category from Royal or Law Commission Reports and government White (or Green) Papers although recent decisions have blurred this different category status. Hansard should be resorted to only if it will conclusively settle the matter, or alternatively Hansard should be given less weight by a court than the other materials as any major reliance on Hansard could be considered to be unreliable.

It is clear that extrinsic materials may not be used to interpret otherwise clear and unambiguous terms of a statute. Extrinsic materials are relevant in determining the mischief aimed at by the legislation, the purpose or intent of the legislation, and the general context of the provision. A court is to take into account

the context of the legislation when arriving at an interpretation of an ambiguous provision.[98]

The final matter to consider in the interpretation of the Charter is how to resolve conflicting interests or rights. At times, the liberal or generous interpretation of a Charter provision may result in adverse consequences to other parties. The American jurisprudence provides a useful test for resolving this matter.

Students in the United States have constitutional rights with respect to freedom of expression. In Tinker v. Des Moines School District,[99] the Supreme Court of the United States ruled that students do not shed their constitutional rights to freedom of expression at the schoolhouse gate. The test that has evolved from Tinker is a "balancing of interests" test.

Although students have a constitutional right to freedom of expression, the American courts also recognize that school authorities have a right to establish reasonable rules for school operation for the benefit of all students who go to school. These two competing interests are balanced in each freedom of expression case.[100]

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98. The European Court of Human Rights considers extrinsic materials in order to determine the intention of the parties to the European Convention. In the Belgium language case (1968) 11 Yearbook of the European Convention on Human Rights 832, the court considered the "preparatory work" in order to ascertain the object of Article 2.

99. 393 U.S. 503 (1969) (students wore black armbands to class to protest the government's policy in Vietnam)

100. See: Schwarz v. Schuker (N.Y.) 298 F. Supp. 238 (1969); Shanley v. Northeast Independent School District (Federal Court of Appeals, 5th Cir., 1972, 462 F. (2d) 960); Blackwell v. Issaquena County Board of Education 363 F. (2d) 749 (Miss. 1966).

This "balancing of interests" test has been used in non-educational litigation. For example, competing state interests have been balanced against freedom of speech.[101] At times, this has resulted in greater protection for free speech as the court will consider the context in which the freedom is sought to be protected rather than determining at the outset that there is no constitutional protection.

Where there are conflicting interests, the "balancing of interests" test should be used to resolve the issue.

2. Application

Minority language educational rights exist for citizens of Canada. Citizenship is a prerequisite for the rights provided in section 23.

The citizenship restriction was opposed by most groups that made representation to the Special Joint Committee in 1980. It was retained in section 23 as a concession to Quebec.[102]

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101. Konigsberg v. State Bar of California, 366 U.S. 36 (1961), at p. 51 (Harlan, J.). For a discussion of this test in relation to freedom of speech see BECKTON, Clare Freedom of Expression ch. 5 pp. 82-84 in TARNOPOLSKY, Walter J. and Gérald-A. Beaudoin Canadian Charter of Rights and Freedoms (Commentary) Carswell Company, Toronto, 1982

102. See f. 34; for a list of the groups see f. 49.

For Canadian citizens, section 23 provides a right, not an obligation, to choose minority language instruction for their children. This right is possessed only by a limited number of citizens. Although citizenship is a prerequisite, it is not the sole determinant. Section 23 provides three categories of citizens who possess the right:

1. citizens whose first language learned and still understood is that of the minority of their resident province;
2. citizens who have received their primary school instruction in the minority language; and
3. citizens who have a child who has received minority language education.

The first category enables parents to claim minority language rights if three criteria are present. First, the language must be that of the linguistic minority population of the province in which they reside. In Quebec, English is the language of the minority and in the other provinces, French is the language of the minority. Within each province there may exist areas in which the majority language of the province is the minority language of that area or region. For example, English is the minority language in northern New Brunswick whereas English is the majority language of the province of New Brunswick. The English minority of nothern New Brunswick are given no language rights under this first category. The provision is clear and unambiguous in that it refers to the "linguistic minority population of the province".

The second criterion for the first category is that "first language learned" by the parents must be the language of the minority population of the province. The third criterion provides that the language first learned must still be understood by the parents.

The difficulty presented by this first category is the proof required for determining "first language learned and still understood". As parents will be claiming the benefit of this provision, the onus or burden of proof will rest with the parents.[103]

A simple Declaration or Affidavit from parents will likely suffice to prove "first language learned". The burden would then shift to the appropriate school authority to dispute the Declaration. In only rare instances will there be evidence to refute a parental Declaration as to first language learned.

The same result or procedure may not apply with respect to "language still understood". This criterion or requirement may be measured through competency or proficiency tests whereby an objective assessment of language competency may be made by school officials. This raises the possibility of language tests.

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103. Re Jamieson and A.G. for Quebec et al (1982), 70 C.C.C. (2d) 430 (Quebec Superior Court)

During the Special Joint Committee debate, Mr. Roger Tassé, Deputy Minister of Justice, provided his views in answer to the question, "Would there have to be a testing procedure, or would it differ from province to province, or will the courts make the decision?", as follows:

> *"The parents will have to show that the language they first learnt in Quebec, for example, was the English language, and in another province the French language before they can qualify for the right.*
>
> *They will also have to show that this is a language that they still understand.*
>
> *Now, I would think a school board or a provincial school authority could establish administrative presumptions which could facilitate the determination of people, and citizens would have that right.*
>
> *In fact, it may well be that in practice the test which is provided for in (b) might operationally be a test that a province or board might wish to apply. In other words, they might be satisfied that a person who has received his primary school instruction in English or French would be qualified for the right, or a person who has lived in a certain part of Canada, either French or English, would qualify subject to the contrary being proven by the person.*
>
> *Because, eventually if a citizen is unhappy with the decision made by the school authorities, that could be challenged. But we would think that in effect those cases where there would be challenge, the citizen would not be satisfied with the decision made after he has presented his case, would be few in number."*[104]

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104. SPECIAL JOINT COMMITTEE - Op. cit., f. 49, 48:112

Language tests were used in Quebec in relation to Bill 22.[105] Bill 22 defined the language of instruction in Quebec schools as French with English instruction to be provided in certain specified situations. Pupils who had "sufficient knowledge" of the English language could receive English instruction.

Bill 22 expressly provided for language tests to determine the knowledge or competency of the pupil.[106] The tests were designed to take into account levels of instruction, and age, and previous education of the pupils. The Minister of Education was given final authority to determine the language competency and the right to an English education.[107]

The Charter neither provides for language tests nor gives to any authority the right to make final determinations. Any language tests implemented by a school authority would not be conclusive evidence of competency or of fulfillment of the requirement of the first category. The results of language tests could be considered by a court but need not be accepted as conclusive proof. The standard of competency set, as well as the reliability of the tests, would be subject to judicial scrutiny. In order to provide a liberal and generous interpretation for section 23, minimal language competency may be accepted as sufficient despite the results of a language test.

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105. Bill 22, (An Act Respecting Official Languages) National Assembly of Quebec, assented to July 31, 1974; This Bill was repealed on August 26, 1977 when the Charter of the French Language was assented to. For further elaboration see Chapter III (B)(6).

106. Id., s. 43

107. Ibid.

As well as the inconclusiveness of language tests, there are other problems with such tests. When Bill 22 was repealed and replaced by Bill 101,[108] which has no provision for language tests, the Minister of State for Cultural Affairs, Camille Laurin, explained the difficulty. He stated that determination of a child's native language "poses serious problems"[109] and further that "there is no objective and valid means of determining a child's native language".[110] He further stated that the language tests of Bill 22 were designed to show capacity to receive instruction and not to prove native language.

The Lévesque government concluded that the only way to prove a child's native language would be through sworn Declarations.[111] The government further concluded that this method "is open to deceit and to false declarations".[112] For those reasons, "mother tongue" or language competency were not chosen as criteria for entitlement to English education as determined by Bill 101.

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108. Bill 101, Charter of the French Language, 1977 (National Assembly of Quebec assented to on August 26, 1977)

109. Quebec, White Paper, Livre Blanc: La politique québécoise de la langue française, (1977) p. 73.

110. Ibid.

111. LIVRE BLANC - Op. cit., f. 109, pp. 89-90

112. Id., p. 90

The Quebec experience shows the difficulties presented by the first category of section 23 of the Charter. Neither Declarations nor tests appear to be satisfactory answers. Yet, there are no other objective alternatives. Any tests that are implemented will be subject to judicial scrutiny.

Both the first category and the second category are prefaced by the phrase "citizens of Canada". The plurality of the word "citizens" suggests that both parents must possess the criteria stipulated for the categories in order to qualify for the rights. Tremblay supports this interpretation.[113]

Support is also found by examining the other provisions of the Charter. "Citizen" is referred to in sections 3 and 6 in the singular. Only in section 23 is the reference in the plural.

The better view is that only one parent need qualify for the following reasons. First, a requirement for both parents to qualify would greatly reduce the scope of section 23. In order to give section 23 a liberal and broad interpretation, the less strict interpretation should be adopted.

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113. TREMBLAY, André G. The Language Rights, Chapter 14, p. 466: TARNOPOLSKY, Walter and Gérald A. Beaudoin Canadian Charter of Rights and Freedoms, (Commentary), Carswell Company, Toronto, 1982.

Second, the singular references to "citizen" in sections 3 and 6 are appropriate for the context of those sections. Section 3 provides a right to vote and section 6 provides a right to be mobile in and out of Canada. Those rights are obviously rights to be enjoyed by each individual citizen. The context of section 23 is different in that it refers generally to family rights. There is no individuality within the section 23 reference.

Third, the Canadian *Interpretation Act*[114] provides that "words in the singular include words in the plural, and words in the plural include words in the singular".

Fourth, the Charter of the French Language (Bill 101), provides that the right to minority instruction occurs where either "a father or mother" qualifies.[115] The Quebec Charter and the Canadian Charter, in relation to minority language instruction rights, are statutes "*in pari materia*" and as such, should be read together to assist in interpretations of ambiguous terms.[116]

Finally, the social structure of our current society recognizes the substantial numbers of single parent families. Courts

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114. *Interpretation Act* - Supra, f. 74, s. 11 (similar provisions are found in provincial *Interpretation Acts*)

115. Bill 101 - supra, f. 108, s. 73 (a)

116. Capital Grocers v. Registrar of Land Titles [1953] 1 D.L.R. 318

are able to give judicial notice of this reality.[117] The singular approach to the section 23 reference to "citizens" would recognize rights for single parent families.

The first category, that is "mother tongue" or first language learned and still understood", does not apply in Quebec. Section 23(1)(a) is not applicable in Quebec at this time by virtue of section 59 of the Charter. Quebec has placed a further limitation by providing that section 23(1)(a) requires the approval of the National Assembly of Quebec before it will apply to Quebec.[118]

The second category of citizens who have rights under section 23 are citizens who have received primary education or instruction in the minority language. As with the first category, section 23(1)(a), the second category, section 23(1)(b), also contains restrictions or limitations.

As with the first category, the reference is in the plural. Citizens are to have received "their" primary instruction... This reference should be read in the singular for the reasons outlined for the first category.

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117. In Re Calgary Charter, [1933] 3 W.W.R. 385 (the court took judicial notice of the unemployment situation)

118. Bill 62, an Act respecting the Constitution Act, 1982 (National Assembly of Quebec) (assented to June 23, 1982); section 4 provides that no proclamation may be authorized by the government without the prior consent of the National Assembly of Quebec.

The category requires residence in a province where the language in which they received their primary instruction is that of the linguistic minority. Thus, in order to qualify, the language of instruction of the parent must have been French if the parent resides in Canada outside of Quebec and English if the parent resides in Quebec.

The parent need only receive his instruction somewhere in Canada. It need not have occurred in the province in which he claims rights for his children. The legislative background or history shows that the original wording in Bill C-60 did not provide for this category. This category first appeared in the Proposed Resolution in 1980 (Appendix "F").

Unlike the first category, there is no language requirement for either a parent or the child.

The ambiguous reference in this category is the phrase "their primary instruction". Two issues arise: first, what is meant by "primary" and second, does the reference require the entire primary education to have occurred in the minority language or is it sufficient to have received "partial" primary education.

The reference to "primary" is ambiguous as it has no commonly accepted meaning in relation to Canadian education. Ontario uses primary to describe kindergarten and the first three years of school thereafter.[119] Nova Scotia refers to the first year of school

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119. *Education Act*, R.S.O. 1980, c. 129, s. 1(38)

attendance as primary.[120] Most of the other provinces refer to "elementary" as descriptive of the first years of school attendance. Although the reference to "elementary" is used by several provinces, it is not used uniformly. New Brunswick[121] and Alberta[122] define elementary as grades 1-6, Ontario[123] and Manitoba[124] define elementary as grades K to 8, and British Columbia[125] defines elementary pupils as those in grades K to 7. Saskatchewan, unlike any other province, refers to Divisions, each having three grades.

The Quebec Charter[126] provides for rights similar to those provided by section 23(1)(b). The Quebec Charter, English version, refers to elementary instruction. The French version refers to "l'enseignement primaire". The Canadian Charter, French version, refers to "au niveau primaire". As these two statutes are statutes

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120. Regulations of the Governor in Council pursuant to section 3 of *The Education Act*; s. 7 (1978)

121. New Brunswick Regulation 67-67, s. 24

122. Although the *School Act* R.S.A. 1980, C. S-3 and regulations thereunder do not refer to the term "elementary" the Program of Studies and other related documents prescribed by the Minister of Education in accordance with section 11(2) of the Act classify elementary schools as grades 1-6 inclusive.

123. Ontario, *The Education Act*, Supra, f. 119 (generally)

124. Manitoba Regulation 5/81 pursuant to *Public Schools Act*, s. 1

125. British Columbia *School Act*, R.S.B.C. 1979, c. 375, s. 1

126. Bill 101 f. 108, s. 73

"*in pari materia*"[127] they may be read together. This provides a link between elementary and primary and suggests that the two terms may be used interchangeably.

That solves only part of the problem. As elementary has no commonly accepted definition, one is still left with an ambiguous reference. The other point that compounds the difficulty is that section 23(1)(b) contemplates two different provinces, the one in which the parent has received his instruction, and the one in which he seeks instruction for his child. There need be no movement from the place of the parent's schooling in order for rights to accrue. Similarly, there is no denial of rights if the parent resides in a province different than the province in which he was educated. There will be, on many occasions, two sets of provincial laws to consider.

If a court accepts the meaning for "primary" or "elementary" that exists for the province in which the parent is educated, unequal rights will accrue. The section will not provide equal benefits for Canadians. In the view of Prime Minister Trudeau, unequal treatment is to be avoided.[128]

In order to resolve the difficulty, a flexible approach must be assumed by the courts. A right will accrue if a parent has received his first few years of education in the minority language.

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127. See f. 116

128. This was cited as a reason to reject "reciprocity agreements" as suggested by René Lévesque at the St. Andrews Conference (see f. 26).

The number of years may vary but will be within a certain range, that is, five, six or seven years of education.

This leads to the second ambiguity contained in the phrase "their primary instruction"; that is, whether all of the primary instruction need have occurred in the minority language. In view of the imprecise nature of the word "primary", it is obviously necessary to avoid rigid rules for determining "how much" education is enough.

This issue was considered by the Quebec Superior Court in relation to the Quebec Charter, section 73. Chief Justice Deschênes in Campisi v. P.g. du Québec et autres[129] considered whether section 73(a) of the Quebec Charter provided a right for English instruction when the parent in question had enrolled in an English school in Quebec in grade 5. The first four years of schooling were taken in another country. Chief Justice Deschênes held that there was no entitlement to English instruction. Total elementary instruction, not partial, was required. The decision was based on section 73(a) being an exception to the general rule of French instruction. The interpretation that favours the advancement of the general rule, that is, French instruction, was to be adopted. Exceptions were to be interpreted strictly and rigorously.[130]

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129. [1977] C.S. 1068; affirmed on appeal, [1978] C.A. 520

130. Campisi, Supra, f. 129, p. 1075

As section 73(a) of the Quebec Charter is similar in wording to section 23(1)(b) of the Canadian Charter, the Campisi decision appears to be relevant. There is a fundamental difference, however. Section 23(1)(b) is not an exception that takes away from the general object and intent of the statute in which it is found. It is a right provided in a constitution whose prime purpose is to enshrine and further such rights. The context in which these two similar provisions are found is diametrically opposite.

If one accepts Chief Justice Deschênes' rationale for his decision in Campisi as valid, and if that same rationale is applied to section 23(1)(b), bearing in mind the purpose of section 23, the conclusion is that total instruction is not a prerequisite. In order to further the object of the Charter generally and section 23 specifically, a flexible and generous interpretation, having the purpose in mind, must be given. The obvious purpose of section 23 as shown by the wording itself and supported by extrinsic evidence[131] is to provide minority language education rights. That purpose would be defeated by a narrow or rigid interpretation.

The third category, that is, entitlement based on the education of a sibling, is also based on previous instruction and not on any language requirement. Section 23(2) provides rights for parents to have all their children receive instruction in the

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131. See Chapter II (generally)

minority language if one of the children has received instruction in that language. The restrictions of this category parallel the restrictions of the second category except that the third category refers to the prior education of siblings instead of parents. The reference to instruction is also different in that it refers to the child having received or "receiving" either primary or secondary instruction. This means that rights accrue if the instruction has been completed or if it is still continuing. If the instruction may still be continuing, it follows that there is no requirement that the sibling has received his or her entire schooling in the minority language.

The legislative background of this category shows a broadening of its application from the original version. Bill C-60 contained no provision for siblings. The Proposed Resolution (Appendix "E") limited the category to families who move from one province to a different province. The later amendment to the Proposed Resolution (Appendix "F") deleted the reference to moving from one province to another province. The explanation for the amendment made it clear that the right was not limited to those parents who moved from one province to another province.

Section 23(2) has been judicially considered by Chief Justice Deschênes. In Chi Sum Mak v. Minister of Education and Attorney General of Quebec[132] a father had obtained for his son

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132. Cour Supérieure, District of Montreal, No. 500-05-0089 60-823 (unreported) September 8, 1982

a certificate of admissibility to English schooling that had been annulled by the Minister of Education on the grounds of wrong information. The Attorney-General submitted that the son had no right to schooling in English in Quebec pursuant to section 23 of the Canadian Charter because he had illegally studied in English in Quebec. Chief Justice Deschênes held that section 23(2) applied even though the child or sibling had illegally received English instruction in Quebec. Chief Justice Deschênes refused to read the word "legally" into section 23(2). The Minister's power to annul a declaration was not given retroactive effect.

On the same day and involving essentially the same situation, Chief Justice Deschênes rendered a similar ruling in Wong-Woo, Walia, Fong and Patel v. Minister of Education and Attorney-General of Quebec. For Fong, Chief Justice Deschênes held that an additional right applied, that being the child's English instruction in Ottawa for two years. This case supports the interpretation of section 23(2) that a child need not have received all the "primary or secondary" instruction in the minority language. Two years' instruction was considered sufficient.

The remaining issue for both the second and third categories is what kind of instruction qualifies for rights to accrue.

The Royal Commission on Bilingualism and Biculturalism distinguished between minority language education and second language

learning. The basic difference is that minority language education is education in the minority language for the minority-speaking pupils. Second language training, on the other hand, is minority language instruction for pupils of the majority language. There are varying degrees of second language training including immersion which generally involves most of the pupil's instruction in the minority language and regular second language.[133]

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133. Statistics Canada, Education Science and Culture Division, (Elementary-Secondary Education Section), provides the following definitions:

Minority Language Education - The minority language education programme is designed to offer instruction in the mother tongue of the minority language group (Anglophones in Quebec, Francophones outside Quebec). The minority language is used as the language of instruction for part of the school day.

Second Language Education - Second language education programmes are designed to offer instruction in the minority language (English in Quebec, French outside Quebec) for children of the majority language group. There are two types of second language programmes:

> *Second Language Immersion - A programme whereby students learn the second language by receiving all or a large part of their education in that language. In the nine provinces excluding Quebec, immersion students generally are non-French-speaking children for whom French is the language of instruction. That is, a student outside Quebec whose mother tongue is English, would be taught some subjects of the curriculum in French.*
>
> *Regular Second Language - A programme where students take the second language as a 'subject'. That is, the second language occupies much the same position in the school's curriculum as do other academic subjects. While there are provincial and local variations, regular second language programmes tend to be of the same duration as other subjects.*

The Official Languages Commission makes a similar distinction.[134] The federal government in adopting the Royal Commission recommendations,[135] referred to both types of instruction.

Provincial legislation across Canada does not use similar definitions or terms. Alberta, for example, makes no distinction whatsoever between minority language instruction and French immersion programs. Ontario legislation does recognize a difference between the two categories but it uses the term "French language instruction" for instruction for Francophone pupils. It further restricts access to that kind of instruction for pupils who do not speak French.[136]

The Council of Ministers of Education studied minority language education in Canada.[137] It defined minority language education as education in French for Francophones outside Quebec, and education in English for Anglophones in Quebec.[138] It noted that students belonging to the majority language group are often enrolled in the minority language programs. It concluded that figures were not available to show how many French-speaking students are enrolled in any of the programs.[139]

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134. See: Annual Reports - Official Languages Commission

135. Op. cit., f. 15

136. *Education Act*, Supra, f. 119, s. 258

137. C.M.E.C. - The State of Minority Language Education in the Provinces of Canada, January, 1978 (this is the Study requested by the Premiers in accordance with the St. Andrews agreement)

138. Id., p. vii

139. Id., p. 7

In order to possibly assist in resolving the ambiguity of the reference to instruction in section 23, extrinsic evidence should be reviewed to ascertain if it provides assistance; that is, if it warrants any weight to be given to it.

The Royal Commission recommended minority language schools.[140] In the discussion of the mischief or the reasons for the recommendation, the Royal Commission observed the need to preserve the cultural character of minority schools:

> *"406. This recommendation may create certain difficulties. Minority-language schools are intended to meet the needs of the minority by ensuring a milieu in which their language and culture will be fostered. The language environment of the school will be affected if too large a proportion of students enrolled in a minority-language school have not learned this language at home. In such a case the majority-language could easily become the language of the playground and even of the classroom. Even if the teachers insist on using only the minority-language in the classroom, the level of instruction will be affected because some of the students will have difficulty in understanding the lesson. This would defeat the purpose of the minority-language schools."*[141]

The Royal Commission recommended a solution to the mischief or problem:

> *"We recommend that the linguistic and cultural character of the official-language minority schools be preserved by limiting, where necessary, the numbers of majority-language students attending these schools."*[142]

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140. ROYAL COMMISSION - Op. cit., f. 15, Book II, Recommendation 8

141. Id., para 406 (p. 158, Book II)

142. Id., para. 407 (p. 159, Book II)

The Royal Commission recognized a need to preserve and foster the minority culture. Its solution was the excluding of non-minority-speaking pupils from the minority language schools.

The Proceedings of the Special Joint Committee also provided some suggestion as to the meaning of "instruction" in section 23. Mr. Chretien advised that the Charter was "not determining education for the majority, but for the minorities".[143] He also advised that section 23 would have no application to French immersion programs as shown by the following statement:

> *"The fact that many anglophones now take advantage of immersion courses which have become very popular in Manitoba, Alberta, Saskatchewan, British Columbia, etc., pleases me immensely; and it is the provinces that run these programs. Here, in the charter, we aim to protect the rights of the minority. Therefore, the provinces may continue and as a matter of fact will be encouraged to continue offering the program they now have. The charter will have no effect whatsoever on immersion courses."*[144]

The Agreement of the Premiers in Montreal (Appendix "B") links the minority language right to children of the minority. The explanatory notes to Bill C-60 (Appendix "C") refer to the right of Francophones and Anglophones, as the case may be, to the "instruction".

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143. SPECIAL JOINT COMMITTEE - Op. cit., f. 49, 48:108

144. Ibid.

The subsequent legislative events support a broadening of the application of section 23. The explanatory notes to the Proposed Resolution (Appendix "E") do not refer to Francophones or Anglophones. There is no longer a link between section 23 and the members of the minority. The rights are now referred to as rights for Canadian citizens.

The first category is based on a language qualification for parents. As the language qualification includes mother tongue as well as current fluency in the minority language, this category will apply only to members of the linguistic minority. As there are no language requirements or restrictions in either of the other two categories, it follows that the other two categories are not limited to members of the minority.

Section 23(1)(b) provides for rights to accrue if parents have received primary instruction in the minority language. Parents may receive instruction in the minority language either through minority language programs or through immersion programs.

Similarly, section 23(2) provides for rights to accrue if one child of a family has received instruction in the minority language. That instruction may be received either through minority language programs or through immersion programs.

This means that the children and siblings of current immersion pupils in addition to the children of the minority, will benefit from section 23 rights.

This interpretation of instruction provides a liberal interpretation and broadens the scope of section 23 as more citizens will qualify for minority language education rights for their children.

With great deference to Mr. Chretien's views of the non-applicability of section 23 to French immersion programs, his views do not fit the language of section 23. Section 23 could have been limited to members of the minority group. It could have been limited to French-speaking pupils. It could have excluded majority language speaking pupils as recommended by the Royal Commission. It did none of these things. The obvious deliberate avoidance of those qualifications is important and must be given significance.

The relevance of immersion instruction arises in a second context; that is what type of instruction is required to be provided for those children whose parents qualify for section 23 rights. Two major reasons support the inclusion of both minority language and immersion instruction in this reference.

First, there is no requirement in section 23 for a language proficiency for the pupils who will be receiving the minority language instruction. The right to the instruction will arise regardless whether the pupil is able to speak the minority language. Although section 23(1)(a) requires a language proficiency for parents, there is no language proficiency for the children of those parents.

Immersion instruction for non-minority language speaking pupils whose parents are not members of the minority would be the only logical and reasonable type of instruction for those children. Where the children who qualify for section23 rights are minority speaking pupils, minority language instruction, not immersion instruction, is the most reasonable type of instruction. It is therefore necessary

for both types of instruction to be included within section 23 in order to accommodate both minority speaking and non-minority speaking pupils.

The second reason to support the inclusion of immersion instruction in the kinds of instruction available for implementation of section 23 rights is the rule of interpretation that a reference should be interpreted in the same or similar fashion[145] when it is repeated in a provision. It has been concluded that the reference to minority language instruction in sections 23(1)(b) and 23(2) includes immersion instruction. In order to provide a similar interpretation for the same reference, immersion instruction should be included in the kinds of instruction available for implementation of section 23.

The conclusion is that the instruction referred to in section 23 includes both types of language instruction as defined by Statistics Canada[146] with the exception of regular second language instruction due to its small percentage of the instructional day.

3. Where Numbers Warrant

Section 23(3)(a) provides that the "number of children ... who have such right" must be sufficient before instruction is

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145. Giffels and Vallett v. The King, [1952] 1 D.L.R. 620, see also: MAXWELL, A.B. - Maxwell on the Interpretation of Statutes, (12th Ed.), Sweet and Maxwell, London, (1969), pp. 278-280

146. STATISTICS CANADA - Supra, f. 133

given. The numbers must therefore arise from the numbers who qualify under the three categories of section 23(1) and (2). In some situations, there may be persons who request minority language instruction but who do not qualify under section 23. Those persons are not included in the numbers calculation.

This qualification of the minority language right has existed since the Royal Commission made its recommendations. Included in those recommendations were references to "where numbers are sufficient".[147]

The Agreement of the Premiers at St. Andrews (Appendix "A") and in Montreal (Appendix "B") qualified the right to situations "where numbers warrant". No explanation is provided to show what would qualify as sufficient numbers. Each of the government proposals for section 23 provided the numbers qualification with no explanation to show what is considered to be sufficient.

The foregoing references do make two points clear with respect to the numbers qualification. First, the provinces are not to be the sole judge of sufficient numbers. Bill C-60 expressly provided for provincial determination and control. That very explicit

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147. ROYAL COMMISSION - Op. cit., f. 15 Recommendation 1 provided for minority language instruction in bilingual districts. The bilingual districts were based on percentages - (10%) of the population. Recommendation 2 provided for minority language schools in major urban areas "whenever the number makes it practicable".

language was omitted from the Proposed Resolution two years later. If the government had intended provincial control, the language of Bill C-60 would have been brought forward and made part of the Proposed Resolution.

Second, this qualification is to be given some meaning and purpose. The consistency of its inclusion in the extrinsic materials shows that it is meant to be a real qualification. The provinces, the federal government, Royal Commission on Bilingualism and Biculturalism and the Canadian Unity Task Force, all reached the conclusion that the right should only exist if the numbers were sufficient.

There are sources that will provide possible assistance in the interpretation of the phrase "where numbers warrant". The major source is existing provincial school legislation. British Columbia provides, in government policy not legislation, that minority language education for Francophones is to be instituted if there are ten students per class, and immersion is to be instituted if there are twenty students or twenty-four for late immersion. Saskatchewan Regulations[148] set fifteen as the minimum for each instructional grouping. Manitoba legislation provides that a school board is required to provide French instruction if there are twenty-three or more students to be instructed in a class.[149] Ontario legislates twenty-five for elementary and

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148. Saskatchewan Regulation 118/79

149. *The Public Schools Act*, S.M. 1980, c. 33 CAP P-250, s. 79

twenty for secondary instruction.[150] Prince Edward Island sets twenty-five pupils for minority language instruction. The twenty-five may be within three consecutive grade levels.[151] Quebec and Nova Scotia rely on "sufficient numbers" similar to the Charter.[152] Newfoundland and Alberta have no "numbers" legislation or policy.

The provincial legislation sets a range from ten to twenty-five. That range is reasonable and is indicative of what the provinces have assessed as justifying the expenditure of public funds. As section 23 links numbers with the expenditure of public funds, the provincial legislation is a useful guideline. That is not to suggest that a province may, by legislation, usurp the control over numbers determination for section 23. The provincial legislation is relevant background legislation for consideration by a court if it is faced with determining whether numbers justify the expenditure of public funds for minority language education.

The materials that are available to show the mischief to be remedied by section 23 do not reference "numbers" as a problem that needed rectification. Prime Minister Trudeau stated that the

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150. *Education Act*, Supra, f. 119, s. 258

151. Prince Edward Island Regulation E.C. 653/80

152. Bill 101, f. 108, s. 79; Nova Scotia *Education Act* Amendment, 1981 S.N.S., c. 20

purpose of section 21 of Bill C-60 was "to protect official language minorities".[153] The Minister of Justice stated that the rights were necessary to ensure mobility in Canada. He further stated that the commitment to the people of Quebec during the Referendum was a reason for section 23 in the Proposed Resolution of 1980.[154]

The reference to Quebec is important for the history and background of section 23. Bill 22 followed by Bill 101 restricted the rights of Quebec Anglophones. Prior to those Bills, the Anglophones enjoyed unrestricted rights in relation to choice of language of instruction for their children. Section 23 was intended to cure that recent restriction in Quebec. Again, numbers of persons to justify the instruction was not, at any time, part of the problem. In some respects the converse was true. The Quebec government sought to eliminate some of the numbers who wished to receive English instruction.[155]

There is no need to alter substantially the current provincial practice in order to remedy any mischief aimed at by section 23. There is a need, however, to provide a liberal and generous interpretation for minority language education rights in general. The right is a very important right for a bilingual country that must be fostered and furthered if at all possible. One liberal interpretation possible is to use the "numbers" established by the provinces in untraditional

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153. Supra, f. 35

154. Supra, f. 47

155. SPECIAL JOINT COMMITTEE - Op. cit., f. 24

groupings. This could include grouping or combining of grades, grouping of children from more than one school jurisdiction, and disregard for school jurisdiction boundaries.

The only grouping limitation that exists is the provincial restriction. Section 23 clearly restricts the "numbers" test to numbers "in a province". That is the only area limitation that is provided. There is freedom within a province to group pupils so as to produce sufficient numbers without contravening section 23.

Some of the provinces have recognized this concept in their legislation. The Alberta legislature approved an amendment to the *School Act*[156] in 1979 that has yet to be proclaimed. The amendment provides authority for the Minister of Education to order the payment of all costs by the resident board of a child who enrols in a French language program offered by another board and not offered by the resident board.

Manitoba provides for agreements between boards where there are insufficient numbers.[157] In Prince Edward Island, where numbers are less than the prescribed number, the regional board is to endeavour to make arrangements for the minority language children to be instructed in a regional minority language unit.[158] The New

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156. *School Act* Amendment, S.A. 1979, c. 68, s. 21

157. Manitoba *Public Schools Act*, Supra, f. 149., s. 79(7)

158. P.E.I. Regulation - Supra, f. 151, s. 5:32(3)

Brunswick Minister of Education has authority to make alternative arrangements if numbers are insufficient.[159]

The *Official Languages Act*[160] provides a further example of untraditional groupings for the purposes of minority language rights. As the *Official Languages Act* is a direct product of the Royal Commission report, and as the Royal Commission is relevant for the purposes of section 23, considerable weight may be given to the scheme adopted out of it. The Act provides for designation of areas as "bilingual districts". Section 12 provides that the boundaries are limited by the provincial boundaries but may, within the province, be determined by:

1. a census district established pursuant to the *Statistics Act*;
2. a local government or school district;
3. a federal or provincial electoral district.

The Royal Commission supported the use of existing local government boundaries both to reduce confusion and to provide a base for proposing responsibilities to existing local governments.[161] It also recognized that natural language areas may extend and be different from local government boundaries.

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159. New Brunswick *Official Languages Act*, R.S.N.B. 1973, c. O-1, s. 12

160. R.S.C. 1970, c. O-2

161. ROYAL COMMISSION - Op. cit., f. 15, Book I, p. 106

A recent Manitoba Court of Appeal decision adopted the concept of grouping within a school district, of children who are enrolled in kindergarten and grade 1.[162] The action arose based on section 79(3) of the *Public Schools Act*. Combining grades is a second form of grouping that may be used.

The numerous American desegregation cases provide authority for judicial disregard of traditional school boundaries. One of the two major plans adopted for desegregation eliminates the school attendance areas and reorganizes school district boundaries.[163]

Groupings may result either from combinations of pupils from different school jurisdictions or by grouping grades together within one school jurisdiction.

4. Primary and Secondary School Instruction

Section 23 specifies that the minority language education rights that are guaranteed, are rights to receive primary and secondary instruction in the minority language. There is no question but that

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162. Re Pernisie et al and Swan Valley School Division No. 35 (August 27, 1982, Man. C.A.) 16 A.C.W.S. (2d) p. 226

163. Davis v. Board of School Commissioners of Mobile County 402 U.S. 33 (1970)

the reference to primary and secondary[164] is a reference to the normal public or separate school grades. It is not an entitlement to pre-school education nor to advanced education past the normal high school final grade.[165]

The meaning of "instruction" has been reviewed with the conclusion that both minority language instruction for minority-speaking pupils and second language immersion for majority-speaking pupils is covered by the reference to "instruction".[166] In order to ensure sufficient numbers, it may be necessary to combine or group English and French-speaking pupils. At times where numbers are sufficient, the two groups may be separated so that different forms of instruction will be provided for each group.

5. Educational Facilities

Section 23(3) not only provides minority language "instruction" rights, it also includes a right to receive the instruction

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164. British Columbia defines secondary pupils as those in grades 8-12 (supra, f. 125); Ontario defines secondary as grades 8-13 (Supra, f. 123); Manitoba defines secondary grade as grades 9-12 (Manitoba Regulation 5/81); Quebec refers to secondary schools (Quebec Charter, s. 73); The balance of the provinces tend to refer to high schools or a like expression.

165. The cases described in Chapter III D(1) regarding Article 2 (Optional Protocol) of the European Convention support the exclusion of post secondary education.

166. See discussion in Chapter III A(2)

"in minority language educational facilities". There are thus, two rights provided, one being a right of instruction and the other being a right to have educational facilities.

Section 23(3)(b) begins with the word "includes" and then proceeds to establish the right to educational facilities. This means that the right to minority language instruction includes a right to educational facilities but is not limited to the requirement of educational facilities. The instruction may be provided through other means. The reference to facilities is not all inclusive nor is it a prohibition against other methods of providing the minority language instruction. The word "includes" is very important when read in relation to the Charter remedy provision.[167] A court of competent jurisdiction may grant "such remedy as the court considers appropriate and just in the circumstances". The general remedial power reinforced by the non-limiting reference in section 23(3)(b), that is "includes", provides judicial flexibility to order innovative remedies for methods or means of minority language instruction.

An example for the possible use of the court's power could arise with regard to the kind of instruction provided by a school jurisdiction. In the appropriate circumstance, the court could order a school jurisdiction to provide minority language instruction, not

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167. Section 24(1)

immersion instruction under the non-limiting reference of section 23(3)(b). Other methods of instruction such as correspondence and audiovisual could also be ordered under this general power. There is no limit provided for the methods of implementing the right to an instruction, except for the definite inclusion of facilities. The Royal Commission suggested residential schools and correspondence.[168] Jean Chretien suggested television and correspondence.[169]

The right to receive instruction in minority language educational facilities is limited by numbers. The right only arises "where the number of children so warrants". The numbers limitation is expressed twice in section 23, first in relation to the right to instruction and second in relation to facilities. As the right to facilities is "included" in the right to instruction, there would be no need to express the numbers limitation twice unless the numbers test is to be applied twice. The rule against the existence of superfluous words applies.[170]

This means that sufficient numbers must exist before there is a right to instruction. Then once that right is established, a further numbers requirement must be present before the right to educational facilities arises. The determination of numbers for an educational facility will be dependent on what the facility is. If the facility is a school, the court may consider statistics which outline the normal or average numbers of pupils in schools in each

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168. ROYAL COMMISSION - Op. cit., f. 15, p. 156

169. SPECIAL JOINT COMMITTEE - Op. cit., f. 49, 48:108-109

170. Medicine Hat v. Howson (1920) 53 D.L.R. 264

province. There are no provincial requirements that set either minimum or maximum population figures for a school.

The *Official Languages Act*[171] provides for the creation of bilingual districts if ten percent of the population of the district are part of the district's linguistic minority.[172] Government of Canada services are available in both official languages in a bilingual district.[173]

The "ten percent of the population" test adopted by the *Official Languages Act* is a test that could be used in determining necessary numbers for educational facilities. The Act and section 23 both originate from the Royal Commission report so have a definite linkage. In addition, the word "services" as used in the *Official Languages Act* was suggested for substitution for "facilities" during the legislative evolution of section 23.[174]

The meaning and scope of "educational facilities" is not easily determined. It is necessary to consider if the phrase includes separate school buildings, that is, a separate and distinct physical building for instruction, commonly referred to as a school.

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171. Supra, f. 160

172. Id., s. 13(2)

173. Id., ss. 9 - 10

174. SPECIAL JOINT COMMITTEE - Op. cit., f. 49, 48:109-110

The provincial legislation is not of assistance in the interpretation of the phrase as provincial legislation tends to refer to schools and school buildings and not to facilities. Similarly, the Royal Commission recommended minority language schools not facilities.[175]

The common usage of the word reflects physical structure. For example, many institutions have "Facilities Committees" that deal with physical building matters. The dictionary definition of facilities is broader in that it includes the definition, "that which promotes the ease of action" as well as "something that is built, constructed ...."[176]

There are statutory references in Canada that use the word "facilities". Provincial human rights legislation refers to "facilities customarily available to the public" or a similar phrase but still retaining the reference to facilities. Unfortunately, the human rights decisions are not useful for the purposes of assisting in defining "educational facilities".[177]

The word "facilities" has been judicially interpreted in St. Mary's and Western Railroad Co. v. Township of West Zona.[178] Facilities for loading cattle was interpreted as denoting the physical

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175. ROYAL COMMISSION - Op. cit., f. 15, Recommendations #8, #9, #10 and #11

176. Black's Law Dictionary, Webster's New International Dictionary, (3rd Ed.)

177. For a summary of the decisions, see: TARNOPOLSKY, Walter - Discrimination and the Law in Canada, Richard DeBoo, Toronto, 1982, c. XI

178. (1910) 2 O.W.N. 455

structures on the spot and had nothing to do with the ease or difficulty of procuring cars.

M.R. Esher, stated that "when you speak of giving reasonable facilities, you imply that the thing with regard to which you order a facility is an existing thing".[179] One is therefore left with a general and imprecise meaning for the phrase.

More assistance is gathered from an examination and comparison of the French and English versions. The French version of the phrase is "des établissements d'enseignement". Petit Larousse[180] defines "établissement" as "action d'établir; maison où se donne un enseignement (école, collège, lycée) and "enseignement" as "action, art d'enseigner, de transmettre des connaissances". The French version supports a broader reference than merely a "physical building". It includes types of teaching methods as well as the physical reference that one is lead to by the English version.

For the purposes of determining if the phrase includes a school building, it is sufficient to conclude that both the French and English versions support such reference. Beaupre[181] concludes that the construction that is common to both versions should prevail "so long as it is not subject to objection when the provision is so read within its total context". Applying that conclusion to this

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179. Darlaston v. Larder and North Western Railway [1894] 2 Q.B. 694 at p. 697

180. Petit Larousse (Nouveau) 1971, p. 398 and p. 376

181. BEAUPRE, M.R. - Construing Bilingual Legislation in Canada, Butterworths, Toronto, 1981, p. 125.

matter, in the absence of any contextual difficulty, school buildings are included.

An examination of certain extrinsic materials makes it clear beyond doubt that separate school buildings were to be included in the phrase "educational facilities". As the extrinsic evidence is so clear, great weight ought to be given to it.[182]

The mischief to be rectified and the problems existing in relation to minority language education include the need for schools for minorities.

The Royal Commission[183] described the need for separate elementary schools wherever possible, including the important role that such schools have in metropolitan areas. The mobility of parents within Canada is referred to as a reason supporting separate schools.

In the White Paper, The Constitution and the People of Canada, Prime Minister Trudeau described the federal government proposal as the right to have instruction "in publicly supported schools".[184] Minister of Justice Chretien, in moving the Proposed Resolution in the House of Commons in 1980 referred to the francophones setting up French schools throughout Canada.[185] During the Proceedings of the Special Joint Committee, Mr. Chretien explained his views of "educational facilities" as follows:

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182. Babineau - Supra, f. 95, p. 513

183. ROYAL COMMISSION - Op. cit., f. 15, pp. 154-156

184. White Paper, Op. cit., f. 20

185. Supra, f. 54

"Q. When you were drawing up the constitution resolution, following a request made by Mr. Yalden, we had talked about removing any mention of educational facilities. As far as I am concerned, that meant that even if there was a very limited number of people interested in being taught in French, they could have access to it by other means such as technical equipment, televisions, etc.

In the amendment we are now discussing, we have brought back in the matter of educational facilities which would be granted to those area where it is necessary to have separate schools because of language differences. That seems now accepted in the context of the charter. Is that a correct interpretation of the text?

A. We had a long discussion about this during a meeting the other day. You will recall the intervention made by Senator Tremblay on the different terms used in the text. There were a few problems with regard to the interpretation of the new term we had chosen so what we did here was use the word 'services', which means that we could envisage other methods, and not only school programs.

That would open the door to television, correspondence courses, et cetera. We thought, by using that term, that the provincial government could have refused to construct the buildings, so we added what was there before. We think that is contained in the word 'services'. Therefore both aspects are covered by the text.

I do not know if this explanation was necessary or not, but it might serve to eliminate the doubts that certain observers might have. Therefore, the text guarantees the provision of educational facilities, i.e., buildings, and of other teaching methods in the minority language."

And further,

"Q. ... could you define for me what you believe the courts would decide to be educational facilities?

A. Sometimes when you talk in terms of education, there is a need for a school or classrooms, and so on, the court will look into the matter to see if the decision of the school board or the provincial government is reasonable."[186]

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186. SPECIAL JOINT COMMITTEE Op. cit., f. 49, 48:108-110

Mr. Chretien was of the view that the "educational facilities" reference was required in order to ensure that the right to a separate school building or facility was part of section 23. His statement supports the general purpose and intent of the federal government.

There is also considerable social evidence available to show the mischief or the problem surrounding the need for minority language schools. Schools in which both English and French are languages of instruction are referred to as mixed schools. The consensus is that mixed schools are detrimental to the minority. Members of the French-speaking communities have denounced mixed schools as being "little better than instruments of assimilation".[187]

An examination of three hundred such schools in Ontario by a senior researcher at the Ontario Institute for Studies in Education provides this conclusion regarding mixed secondary schools:

> *"'Bilingualism' is very much a one-way street in which the Francophones learn English but very little happens in the other direction. In this optic, the mixed secondary school would be a failure, a mirage of bilingualism hiding a unilingual reality."*[188]

The Finn-Elliot Report, a report commissioned for the New Brunswick government, recommended the elimination of mixed schools.[189] A study published by the Canadian Association of French Language School Trustees reserved its harshest criticism for mixed or

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187. Official Language Commissioner Annual Report, 1978, p. 35

188. CHURCHILL, Stacy - French Language Instructional Units, Ontario Ministry of Education, Toronto, 1978, p. 286

189. Report of the Committee on the Organization and Boundaries of School Districts in New Brunswick, Fredericton, 1979, pp. 50-51

bilingual schools frequented by both English- and French-speaking pupils.[190]

The Official Language Commissioner reports the evidence of lack of use of the French language by French students in mixed schools as follows:

> *"In New Brunswick, Ontario and Manitoba, approximately 80% of elementary students normally use French, but this falls to 65% among high school students. The corresponding figures for Prince Edward Island and Nova Scotia are 65% at the elementary level and 40% in the secondary schools, while in Saskatchewan and Alberta the figures are approximately 15% at the elementary level and 10% in high school."*[191]

A publication of the Federation of Francophones Outside Quebec has stinging references to mixed schools:

> *"The so-called bilingual mixed schools do not ensure the transfer of our cultural identity from one generation to the other. They are not the centres of personal and collective development we would like them to be. On the contrary, for a number of reasons we will state, they have become a unique environment for the progressive and constant weakening of our identity. As a result, entire generations are lost."*[192]

And further:

> *"The schools for Francophones living outside Quebec are dressed up with all kinds of names which reveal the state of inequality in which the Francophone community is maintained: designated schools, separate schools, French immersion schools, bilingual schools or mixed schools.*

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190. Official Language Commissioner Annual Report, 1981, p. 42

191. Ibid.

192. The Federation of Francophones Outside Quebec - The Heirs of Lord Durham, Manifesto of a Vanishing People (intro. by Ramsay Cook) 1978

For young Francophones living outside Quebec, the school environment could be an ideal place for transmitting their culture. The school shapes the relationships a child has with his peers and passes on knowledge about his heritage and culture. But this is not the case in most 'mixed/bilingual' schools: this education system does not make it possible to completely transmit the French-Canadian culture. That is why such situations, which are discreetly maintained and not always denounced by the French-speaking communities, cannot leave even the most disinterested observer indifferent.

In actual fact, these types of schools often become a unique environment for assimilation. Often, the language of school administration is English, Anglophone and Francophone students are either together in the same class or close by, the subjects taught in French are based on English textbooks, the Francophone teachers sometimes address their students in English, etc.. It is not surprising that English is widely spoken during recess.

When a child leaves his family environment to attend a school which has no distinctive identity and where everything takes place in a bilingual context, it is almost certain that he will cease to perceive the distinctions between his own culture and the other and that he will slowly become assimilated."[193]

After the explosive issue at Penetanguishene, Ontario concerning the establishment of a French language high school,[194] the Ontario Minister of Education issued a Policy Statement[195] that announced the Ontario government's plan to lead to the elimination of mixed language secondary schools.

The definite and overwhelming conclusion is that mixed schools should be eliminated.

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193. Id., pp. 53-54

194. Official Language Commissioner Annual Report, 1979, reviews the Penetanguishene incident at p. 32

195. Policy Statement by Minister of Education, October 5, 1979

All indicators show that the reference to "educational facilities" in section 23(3) includes a reference to a separate school for the minority language instruction. In order to provide a liberal interpretation of the section in order to achieve its full purpose and intent, educational facilities should be provided whenever the numbers warrant. It is clear that a court may so order if the matter is referred for adjudication.

This examination has considered the meaning and scope of educational facilities in relation to a separate school building. A similar review must be made regarding the phrase "educational facilities" in relation to control or authority over the school by members of the minority; that is, does the phrase "educational facilities' include a right to a minority language school board.

The "physical" component that results from an examination of common usage, dictionaries,[196] statutes[197] and judicial decisions[198] does not lend itself to an inclusion of an administrative governmental structure.

The French version is broader than the English version and could include an administrative structure concept. However, the test suggested by Beaupre is well-founded and, when applied to the phrase "educational facilities", results in the narrower interpretation. That narrow interpretation excludes the concept of an administrative structure.

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196. Op. cit., f. 176

197. Op. cit., f. 177

198. Supra, f. 178 and f. 179

Any extrinsic evidence that is available to show the mischief or the background to section 23 does not support the inclusion of an administrative structure, such as a school board, being included in section 23.

The Royal Commission[199] considered the matter of minority language school boards. It acknowledged the complaints from minority groups against a single school authority, but considered that the recommendations for separate schools would solve the most serious disputes. Its reasons for supporting a unitary system of governance include:

1. where school trustees are responsible for both kinds of schools, they are more likely not to sabotage the education of the minority;
2. the provision of physical services is more efficient i.e., single transportation system, specialized equipment, maintenance;
3. unified administration reduces friction;
4. financial arrangements are simpler and more efficient; and
5. the present traditional school governance structure could be used.

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199. ROYAL COMMISSION - Supra, f. 15, pp. 169-170

There are no references in the various White Papers and speeches on introduction of Bill C-60 or the Proposed Resolution that identify the governance structure, either as a problem or as an intended inclusion. Jean Chretien, when questioned on this matter during the Proceedings of the Special Joint Committee, provided his views as to why "school boards" were not covered:

> *"If the federal government should decide or require the setting up of French school boards under the constitution instead of the provincial legislature, it would mean massive federal interference in the education in the English provinces."*[200]

It is acknowledged that an aspiration of minority language groups is control through their own elected school boards.[201] There is, however, no link or acceptance of those aspirations in relation to section 23. The conclusion that necessarily follows is that educational facilities does not include a right to elect a minority language school board.

6. Public Funds

Section 23 provides that the instruction including the educational facilities is to be paid for out of public funds.

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200. SPECIAL JOINT COMMITTEE - Supra, f. 49, 4:22

201. Official Language Commissioner Annual Report, 1981, p. 43; aspirations of individual groups are examined in the context of the particular province affected in Chapter III (B)

In fact, the public funding is linked with the numbers test so that section 23(3) states that the instruction and facilities rights apply "where the number ... is sufficient to warrant the provision to them out of public funds".

This linkage suggests the use of the "balancing of interests" test.[202] The interests or needs of the community as a whole must be balanced with the interests or needs of the individuals that request minority language instruction. There are rights of the other pupils of the school district to receive a proper education. The public funds must be equitably divided so that both sets of interests are satisfied.

It must be recognized that the right to minority language education is part of the Charter, so it is part of the supreme law of Canada. As such, it must be given a broad and generous application but it is not an absolute right as "reasonable limits" pursuant to section 1 may be applied. If the diversion of public funds to minority language education adversely and substantially affects the general well-being of the pupil population as a whole, the right may not be upheld, as a limitation of the right would qualify as a "reasonable limit".

The two sets of interests will be balanced one against the other and a decision reached based on the facts of the particular situation.

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202. Supra, f. 100 and f. 101.

The Royal Commission stated that minority language instruction would require additional funds. For that reason it recommended that the federal government pay for the extra costs so that the provinces would be able to provide the instruction out of the normal program of educational services.[203] The Royal Commission implicitly accepted the "balancing of interests" test. In order not to adversely affect the pupil population as a whole as funded through provincial funds, it recommended that the additional costs be paid for elsewhere, that is, by the federal government.

Once a right to instruction is established, through balancing or through whatever criteria are relevant, the instruction must be paid for through public funds. There are certain costs that are easily identifiable as being covered by public funding, teacher costs, for example.

An Ontario study identified extra costs incurred when French is added to the curriculum to be attributed to transportation, smaller class size, use of para-professionals and new programs.[204] Any such costs that are directly attributable to the minority instruction are covered by the public funding. A further study confirms the need

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203. ROYAL COMMISSION, Op. cit., f. 15, pp. 192-193

204. PARTLOW, H.R. - The Costs of Providing Instruction in French to Students Studying French as a Second Language, Ministry of Education, Queen's Park, Toronto, 1977 (The study considered costs for K-8 in 534 schools) at pp. 129-133.

for the support services described in the Ontario study as extra costs. The success of the minority immersion language program is largely dependent on the support services.[205]

Transportation was identified as an extra cost. When groupings of pupils occur to achieve sufficient numbers, transportation must be provided with public funding to cover the costs. It has been reported that as school bus transportation costs are expensive, "some boards want to avoid paying for the transportation of Francophone pupils".[206] No matter what the desires or wishes are, if transportation is required in order to provide the pupil with the right to minority language instruction, it must be publicly funded.

In Ridings v. Elmhurst S.D. (No. 2),[207] the statute required a school board to make provision for the education of its resident children.[208] The school board made arrangements for the children to attend a school operated by a neighbouring school board, but refused to pay for the transportation that was needed in order for the children to attend the school. The Saskatchewan Court of Appeal decided in the mother's favour on a point of discrimination, but in so doing, provided the following dicta:

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205. The Teaching of French as a Second Language ... A Position Paper Developed by the Canadian Teachers' Federation Commission on French as a Second Language, November 1981 (at p. 7, class size is stated to be a major element in the success of the program; at p. 8, support services are stated to be particularly essential)

206. Heirs of Lord Durham, Op. cit., f. 192, p. 53

207. [1927] 2 W.W.R. 159 (Sask. C.A.)

208. *The School Act*, R.S.S. 1920, c. 110, s. 207

"... it could be argued that the Board is not making provision or arrangement in any practical sense when a school is so far distant that the children could not go to it."[209]

In United Counties of Northumberland and Durham v. Murray and Brighton Tps. Public School Trustees,[210] the Supreme Court of Canada held that the reference in an Ontario statute to "cost of education" included the transportation costs of the non-resident pupils.

Limits have been placed on what must be paid for in the transportation. School trustees are not required to provide transportation beyond what is reasonably adequate, reasonable adequacy being a question of fact varying with the circumstances.[211]

The Perreault[212] decision clarifies the limit on what will be funded in order to ensure an education. The court ordered the school board to pay for the costs incurred in sending children to a different school district. Justice Gordon of the Saskatchewan Court of Appeal held, in relation to the costs, that what can be recovered must be reasonable in all the circumstances. The actual costs of sending and boarding the children in a private school (chosen by the parent, not the school board) is not the proper measure of damages.[213]

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209. Ridings, Supra, f. 207, p. 162

210. [1941] 2 D.L.R. 273 (S.C.C.)

211. [Man] Rex rel Kowalski v. Oak Bluff S.D. (No. 2) [1937] 2 W.W.R. 634; upheld on appeal without reasons, [1937] 3 W.W.R. 352

212. [Sask] Perreault v. Kinistino School Unit No. 55 (No. 2) (1956-57) 20 W.W.R. 145; aff'd (1957) 21 W.W.R. 17

213. Id., (C.A.) p. 34

If boarding away from home is required in order to receive an education, the costs of boarding are considered to be costs of the education.[214]

By applying the principles of the foregoing cases, the costs of minority language instruction will include such reasonable costs including transportation or boarding, that arise in order for the instruction to be received. Any reasonable costs that are necessary in order for the education to be received will be included.

If the instruction that is provided is correspondence the same general principles will apply.

Costs that are incurred but are either unreasonable or arise from unnecessary elements; that is, expenditures that are not needed in order to receive the instruction will not be covered by public funding.

Section 23 also provides for public funding of the educational facilities as well as the instruction. This provision will require major capital projects whenever new school buildings are the resulting right from section 23.

Many of the provinces have implemented grant structures or legislation to deal with the public funding required for minority language programs and schools. For example, Ontario provides grants for French school construction. Alberta[215] has a grant program to

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214. Id.; see also: Henchel v. Board of Medicine Hat School Division No. 4 [1950] 2 W.W.R. 369

215. Alberta School Foundation Program Fund Regulation, 1983 (O.C. 500/83 A.R. 214/83) sections 6.4 and 8.1

ensure free transportation for French immersion pupils. British Columbia[216] provides funds for the additional costs related to Francophone education.

(B) PROVINCIAL LEGISLATION

The Constitution of Canada, including section 23, is the supreme law of Canada. Provincial laws that are inconsistent with section 23 may be declared to be of no force and effect. In addition, section 24(1) provides broad remedial powers for courts to order "such remedy as is considered appropriate and just in the circumstances" where a conflict with the Charter occurs. The potential impact of section 23 on existing provincial laws will be examined on a province by province basis. The state of affairs of minority language education will also be reviewed.

1. British Columbia

British Columbia has never had nor now has specific provisions in its school legislation for French language instruction.

Although legislation is lacking, government policy and initiative are not. The British Columbia government has adopted

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216. British Columbia Circular 146 (includes teacher salaries, transportation, administration, physical space, library materials and supplementary materials) April, 1981

a policy that guarantees access, subject to certain restrictions, to minority language education.[217] The policy recognizes a difference between minority language instruction for Francophones and French immersion second language instruction for Anglophones. The essential ingredients of its Programme-Cadre de Français (French Language Core Curriculum) are:

1. French language instruction provided for Francophone pupils where there is a minimum of ten pupils per class (mandatory requirement);
2. Eventual absolute right of the son or daughter of a Francophone parent (only one) to be educated in French;
3. A program paralleling the English core curriculum in which all instruction is to be given in French except the English Arts Program;
4. Strict limitations on the admission of non-francophones to the program; and
5. Extra costs funded by the Ministry of Education.

For French immersion programs, school districts are allowed to conduct early immersion classes where it is possible to bring together twenty non-francophone pupils in kindergarten or grade one. Provision is also made for late immersion when twenty-four non-francophones can be assembled in grade 6.

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217. B.C. Circular 146 see f. 216

The weakness with the policy is that no provision is made for transportation or boarding for non-resident pupils. Transportation is provided within the school district but not for pupils who reside out of the district that offers the program.

From 1970-71 to 1980-81, the percentage of students enrolled in elementary second language instruction increased from 5.6% to 30.1% and the instructional time devoted to the French language increased minimally from five percent to six percent.[218] The increase is much more pronounced with respect to French immersion enrolment. In 1977-78, one thousand, three hundred and one students from kindergarten to grade 9 in fifteen schools were enrolled in French immersion programs. In 1981-82, that number increased to six thousand in fifty-five schools.[219]

The Ministry of Education is not recommending any amendments or any new legislation as a response to the Charter, although the matter is under general review by the Minister of the Attorney General.[220]

As there is no legislation in force in British Columbia, there are no conflicts with section 23. The practice and policy adopted may be reviewed and remedies ordered pursuant to section 24(1) of the Charter. The only apparent area where a remedy may apply is with respect to the lack of grouping between districts and with respect

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218. Commissioner of Official Languages Annual Report, 1981, p. 197

219. Id., p. 199

220. Letter dated October 27, 1982 from David A. Logan, Research Officer, Ministry of Education, to J. Anderson; further letter dated December 13, 1982 from E.N. Hughes, Q.C., Legal Services to Government to J. Anderson

to the lack of provision for optional instructional devices such as correspondence courses and educational television.

2. Alberta

Both English and French were used as languages of instruction in the first schools established in the area now known as Alberta. These schools, primarily under the control of Protestant or Roman Catholic Churches commenced operation as early as 1842 when Father Thibault established a mission at Lac Ste.-Anne and well before 1870, when the first Canadian government of the Northwest Territories assumed office and adopted an educational policy.[221] From 1892, the use of French was limited in practice to approximately one hour each day. In 1901, the Territorial Ordinance provided for schools to be taught in the English language with primary courses in the French language optional.[222] In 1952, the legislation was amended to permit the instruction in French in primary grades.[223]

The current *School Act*[224] authorizes French language instruction provided there is compliance with the Regulations.[225]

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221. CHALMERS, John W. - Schools of the Foothills Province, University of Toronto Press, 1967, pp. 10-12

222. Northwest Territories Ordinance, 1901, c. 75, s. 136

223. *School Act*, S.A. 1952, ss. 381-384

224. *School Act*, R.S.A. 1980, c. S-3, s. 159

225. Alberta Regulation 490/82

The Regulations impose procedural requirements on boards including the providing of satisfactory arrangements for all English instruction pupils that are displaced as a result of the French language instruction and minimum time requirements for English arts instruction. The amount of English instruction required varies from grade to grade with the amount of English instruction increasing in the higher grades. Minimum amounts of English instruction are specified for grades 3-12.

There is no distinction made in legislation or regulation between French instruction for Francophones and French immersion. In practice, pupils regardless of their mother-tongue are placed in the same program. The justification is the sparsity and the wide geographical dispersion of the Alberta Francophone community. The description of programs outlined by Alberta Education defines French as the language of instruction when instruction in the French language is provided in at least one other subject in addition to a French language arts course and when French is used as the language of instruction for at least twenty-five percent of the instructional time per day for each pupil to a maximum of eighty percent of the school day.

The provision of minority language instruction is discretionary. However, there are two factors which influence the decision. First, the *School Act* provides for Local Advisory Boards which are granted authority by the Act. The authority includes the right to request the institution of French language instruction, the right to nominate teachers for the program, and the right to advise

the board.[226] If a school board receives a request to institute a French language program, it is required to do so "as soon as it is practicable to do so".[227]

Second, there exists an unproclaimed amendment to the *School Act* that provides authority for the Minister of Education to order a school board to pay the costs of French language instruction for its resident pupils who attend a different school jurisdiction provided that the resident board does not offer the French program.[228]

From 1970-71 to 1980-81, the percentage of students enrolled in elementary second language instruction decreased from 25.3% to 22.2% and the instructional time increased from six percent to seven percent.[229] The numbers of students enrolled in French immersion in 1982-83 totalled fifteen thousand, five hundred and five or approximately 3.65% of the total pupil population.

Alberta's lack of distinction between Anglophone and Francophone pupils is unique. It is the only province that makes no distinction. If a remedy ordered pursuant to section 24(1) includes the provision of separate instruction or facilities for Francophone pupils, Alberta's present system would be inadequate and would require revamping.

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226. *School Act* - Supra, f. 224, s. 27 .

227. Ibid.

228. Supra, f. 156

229. Official Language Commissioner Annual Report, 1981, p. 197

A conflict between section 27(2) of the *School Act* and section 23 of the Charter may arise depending on the particular situation. Section 27(2) allows a school board time before it institutes French language instruction. It need only offer the instruction "as soon as practicable to do so". Section 23 does not contemplate a time lapse between when the right accrues and when the right is implemented.

The discretionary offering of French language instruction in Alberta is usurped by the provisions of section 23 of the Charter. If the criteria of section 23 are met, there is no longer a discretion.

The Alberta Francophone Association in 1980, made a formal request for the establishment of Francophone school boards in order to guarantee reasonable control over their own system.[230] The request has not been implemented.

Since the enactment of the Charter the two Edmonton and two Calgary school boards have received petitions for minority language schools or, alternatively, for the transfer of funds to a

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230. Official Language Commissioner Annual Report, 1980, p. 33. A further request was made in 1983 by the Association to the Minister of Education for amendments to the *School Act* to include the rights of French Albertans to a French education in French schools administered by francophones. Approximately 15 schools are requested. (Source: Calgary Herald, Thursday, September 1, 1983)

private Francophone school. The two Calgary school boards have agreed to transfer funds to the private Francophone school, Lycée Pasteur, for their resident pupils who attend the Lycée. The Edmonton Catholic school board has resolved to establish a French school for its Francophone pupils effective September, 1984. Criteria for entry to the school are to meet the spirit of section 23 of the Charter and will be determined by an elected parent advisory committee.[231]

A legal action, supported by the Court Challenges Program[232] has been commenced by L'Association de l'Ecole Georges et Julia Bugnet against the provincial government. The action seeks a Declaration that the *Alberta School Act* is inconsistent with section 23 of the Charter and a further Declaration that the rights provided by section 23 include the right to equivalent powers and rights as parents of English speaking children and to equivalent facilities as provided to English speaking children.[233]

The Minister of Education will be recommending new legislation for Alberta with respect to minority language education rights.[234]

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231. As solicitor for the Alberta School Trustees' Association, I have personal knowledge of these matters.

232. See Chapter III (E)(e)

233. Mahe, Martel, Dube and L'Association de l'école Georges et Julia Bugnet v. Her Majesty the Queen in Right of the Province of Alberta (Court of Queen's Bench, Judicial District of Edmonton, No. 8303 33948)

234. Information supplied by Alberta Education

3. Saskatchewan

The Education Act[235] provides that English is the language of instruction but that a language other than English may be used as a language of instruction subject to the Regulations.[236] The Lieutenant Governor in Council has the power to designate schools in which French shall be the principal language of instruction in a designated program. Once a school or program is designated as French, every pupil has the right to attend and to receive instruction appropriate to his grade and year.

The Regulations provide for the establishment of French language schools if four conditions are met:

1. the school must have minimum of fifteen students for instructional grouping;
2. the school must offer only the designated program;
3. the Minister must be satisfied that the designated program will operate for at least three consecutive years; and
4. adequate provision must be made for the education of pupils who do not wish to enrol in the French program.

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235. *The Education Act*, R.S.S. 1978, c. E 0-1, s. 180

236. Saskatchewan Regulation 118/79

There are two types of designated programs, Type "A" and Type "B". Type "A" resembles the definition of minority language instruction for Francophones, although there is no language limitation on who attends. It includes French language instruction for all courses except English Arts, complimentary cultural activities, French administration with some provision for English communication if requested, by teachers or parents, and a restriction that no other programs may be offered in a school where a Type "A" program is offered.

In effect, the Type "A" program guarantees a French school with its own administration and cultural activities.

The Type "B" program consists of various courses of study, some in French so that more than fifty percent but less than eighty percent of the instruction is in the French language.

The Regulations provide discretion for the Minister of Education to establish French language programs if requested to do so by a Board of Education or by the governing body of a private school. Boards of Education are required to make a request if parents of fifteen or more students request the establishment of a French program.

The Act and the Regulations have been the subject of litigation on two occasions. In one decision[237] the Saskatchewan Queen's Bench issued an Order for a Writ of Mandamus ordering the

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237. Saskatchewan ex rel White v. Prince Albert Roman Catholic Separate School District No. 6 (1981) 6 Sask. Rep. 109 (Q.B.)

school board to request the Minister of Education to designate a school. Parents representing twenty-two students from kindergarten to grade 6 had petitioned the board to make such a request but the board had not made the request to the Minister.

In the second case,[238] parents requested the reinstatement of an advanced French program (Type "B") in grades 10, 11 and 12. The Saskatchewan Court of Appeal interpreted the Regulations as requiring the designation of a school and not the designation of any particular grades in the school. As there was a school, no order was made against the school board. Justice Hall stated:

> *"The provision in the regulation is only to designate the school for the program. The manner in which the program is implemented if the school is designated, and the extent to which it is implemented, are matters not covered by the regulations relied upon."*[239]

On February 17, 1981, the Supreme Court of Canada denied leave to appeal the decision of the Saskatchewan Court of Appeal. The Regulations were, however, subsequently amended to allow the Minister of Education not only the right to recommend the designation of schools but also the levels to which the designation applies.[240]

Both the French-Canadian Cultural Association and the Association of French-Canadian School Commissioners, in August,

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238. Saskatchewan ex rel Leblanc v. Board of Education of the Saskatoon East School Division No. 41 and Minister of Education (1981) 6 Sask. Reporter 113 (C.A.)

239. Id., pp. 117-118

240. Saskatchewan Regulation 116/81 (O.C. 749/81 dated May 19, 1981)

1980, requested the establishment of French Language school boards but no action has been taken on the request.[241]

The Department of Education has established an official language minority advisory committee effective 1980.[242]

Pupil enrolment in elementary second (French) language instruction has decreased slightly over the past ten years[243] whereas French immersion programs have flourished. Approximately two thousand children were enrolled in 1981-82 in immersion programs in kindergarten to grade 12 in eighteen schools. This represents approximately 1% of the total pupil population. In 1977-78, four hundred and seven pupils or approximately .2% of the total pupil population were enrolled in French immersion programs for kindergarten to grade 8 in two schools.[244]

A comparison of section 23 of the Charter with the Saskatchewan legislation does not show any blatant conflicts or contradictions. The implementation of French instruction is based on numbers with no discretion once the numbers are reached. The number "15" will be subject to review pursuant to the numbers test of section 23. It is not likely that "15" will result in many conflicts.

Saskatchewan does recognize two types of programs. Its legislation is easily adaptable to French schools pursuant to section 23. There are no restrictions on which type or category of parent is entitled to qualify. Thus, the Saskatchewan legislation is broader than section 23.

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241. Official Language Commissioner Annual Report, 1981, p. 43

242. Op. cit., f. 194, p. 30

243. Op. cit., f. 190, p. 197

244. Id., p. 199

The Saskatchewan Department of Education is neither recommending the amendment of the Act nor new legislation as a result of the Charter.[245]

4. Manitoba

Manitoba's history of French language instruction is that of controversy and turmoil. In 1890, the Protestant English majority expressed resentment over the dual educational system and the use of the French language. Consequently, legislation was passed to remove guarantees provided by the *Manitoba Act*[246] for French Catholic minorities. The dual system was replaced by a non-denominational system with English as the only language of education[247] and with all ratepayers taxed to support the public school.

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245. Letter dated November 2, 1982 from W.A. Wells, School Administration Consultant, Saskatchewan Education, to J. Anderson

246. *Manitoba Act* (1870) 33 Vict, c. 3 sec. 22 granted legislative authority in relation to education to the province with the following restriction as a substitution for sec. 93(1), (2) and (3) of the *B.N.A. Act*
(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the Union:
(2) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or of any Provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education:
(The words "or practice" were inserted as there was no education legislation in existance in Manitoba in 1870.)

247. *Public Schools Act* (1890) 53 Vict, c. 38 For a general review of Manitoba's history, see: LAXTER - Op. cit., f. 8, pp. 61-62; SCHMEISER, D. - Civil Liberties in Canada, Oxford University Press (1964) p. 158-169.

On an application by a Catholic ratepayer, the Supreme Court of Canada[248] held that the 1890 legislation prejudicially affected rights and privileges with respect to denominational schools which Catholics had "by practice". The Privy Council,[249] however, reversed the decision and held that the only right or privilege was the right to establish and maintain church schools.

The Roman Catholic minority appealed to the federal government to disallow the legislation and to pass remedial legislation pursuant to section 93 of the *British North America Act*.[250] The federal and provincial governments, as an alternative to federal remedial legislation, agreed to a compromise whereby limited educational and religious instruction in French would be where there were ten or more French-speaking students.[251] In 1970, Bill 113[252] gave back to the French-speaking residents, the right to have their children educated in French.

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248. Barrett v. City of Winnipeg (1891) 19 S.C.R. 374

249. City of Winnipeg v. Barrett (1892) A.C. 445

250. On this occasion, the Privy Council agreed with the Roman Catholic minority that an appeal could be taken to the federal cabinet for remedial legislation pursuant to sec. 22(2) of the *Manitoba Act* see f. 246 (Brophy v. A.G. Manitoba [1895], A.C. 202.) For further details see McCONNELL, William H. Commentary on the B.N.A. Act, MacMillan, Toronto, (1977) pp. 290-291

251. LAXTER, Op. cit. 8 pp 61-62 (See Schmeiser, Op. cit. 219, p. 166, referred to as the Laurier-Greenway Compromise)

252. An Act to amend the *Public Schools Act* S.M. 1970, S-1.

The current *Public Schools Act*[253] declares both French and English to be languages of instruction. A school board is required to provide French instruction if there are twenty-three or more students to be instructed in a class.[254] The Minister of Education has the authority to require a school board to provide French language instruction where there are less than twenty-three pupils. School boards that receive requests for French language instruction from insufficient numbers have the option of providing the instruction through agreement with other boards.[255]

English is a compulsory course for all French instruction programs in grades 4 to 12. The Minister has discretion with respect to time allotments for instruction and for textbooks and materials to be used.[256]

Manitoba also provides for the administration and operation of a school to be carried out in French where seventy-five percent or more of the instruction in an elementary school or sixty percent or more of a secondary school is in French.[257] The French

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253. S.M. 1980, c. 33, CAP P-250, s. 79(1)

254. Id., s. 79(3)

255. Id, s. 79(7)

256. Manitoba Public Schools Regulation 5/81 (January 24, 1981; Volume 110, No. 4)

257. Id., s. 9(2) and Act - Supra, f. 253, s. 79(5) Approximately 30 schools operate in the French language for administration (information supplied by Louis Gosselin, Department of Education, Manitoba)

program is accessible to any pupil regardless of mother-tongue or qualifications of the parent.

The Act[258] provides for the establishment of a Languages of Instruction Advisory Committee. This Committee is an advisory committee to the Minister on all matters pertaining to language instruction. By the end of 1980, a joint co-operative committee on French language education had become the first Provincial Council for French education.[259]

Manitoba, unlike Alberta and Saskatchewan, has experienced an increase in enrolment in both second language core instruction and French immersion programs. In Alberta and Saskatchewan, the increase has been substantial but only in the immersion area whereas in Manitoba, for second language enrolment, there was 29.6% of the pupil population in 1970-71 compared to 45.1% in 1981-82. The amount of instructional time also increased from five percent to six percent.[260] French immersion enrolment increased from one thousand, six hundred and sixty-seven pupils or approximately .6% of the total pupil population in 1977-78 in kindergarten to grade 9 in thirteen schools, to five thousand, five hundred or 2.88% of the total pupil population in kindergarten to grade 12 in fifty-nine schools in 1981-82.[261]

Manitoba experienced a reverse court challenge to the ones in Saskatchewan. Parents whose children were in English

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258. Act - Id., s. 79(8)

259. Annual Report - Op. cit., f. 190, p. 41

260. Id., p. 197

261. Id., p. 199

instruction classes objected to their children being displaced by a French immersion school.[262] Their neighbourhood school had been designated by the board as a French immersion school. The court found in favour of the school board by ruling that the parents and their children had no vested rights in relation to the neighbourhood school. Good faith and acting fairly on the part of the school board were identified by the court as important and necessary criteria when establishing a minority language program and when displacing the majority language student. This case illustrates how conflicting interests are weighed and balanced with the French language instruction prevailing.

In a recent decision, the Manitoba Court of Appeal[263] construed the reference in section 79(3) to a "class" as allowing grouping of pupils from kindergarten and grade 1 to make a class. This was necessary in order to meet the numbers qualification (23) for a French program. It ordered the school board to provide for French instruction for the group that had petitioned for it. The Court of Appeal also held that kindergarten pupils are included in the reference to pupils in section 79(3), even though there is no obligation on a school board to implement kindergarten programs.

In a further recent decision, the Queen's Bench of Manitoba[264] upheld a school board policy that required parents to

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262. Howden Parents Assn. et al v. Board of School Trustees of Saint Boniface School Division No. 4 and the Minister of Education of Manitoba, (1981) 5 M.R. (2d) 278 (Q.B.)

263. Re Pernisie - Supra, f. 162

264. Bachmann v. St. James-Assiniboia School Division No. 2 Court of Queen's Bench, Court No. 2668/83, dated November 17, 1983 (Morse, J.)

pay for transportation to French immersion programs. Transportation free of charge was provided for attendance at English programs. Justice Morse determined that although the applicant had a right to have her children attend the French language classes, the school board could levy a transportation fee as the Manitoba legislation imposes no duty on a school board to provide transportation.

The Manitoba legislation does not expressly differentiate between Anglophone and Francophone French language instruction, nor does it expressly provide for French schools. As both may result from the implementation of section 23 and the remedy power of section 24(1) of the Charter, the Manitoba legislation may be lacking in those areas.

The flexibility in grouping for French instruction is a positive feature of the legislation. It not only allows for grouping between boards, it also allows grouping in grades within a school jurisdiction.

The "numbers" test is higher than the test provided in British Columbia and Saskatchewan. It will be judged in accordance with the circumstances of each case, but could be found in conflict with the numbers test of section 23.

Mixed schools of both English and French instruction are contemplated by the legislation as administration is determined by the language of the majority of classes in the school. The right to French instruction is guaranteed on a class basis not on a school basis.

Although the Manitoba Department of Education is reviewing the legislation in light of the Charter, no amendments are planned

for the area of French language instruction.[265]

5. Ontario

Religious, not linguistic, provisions were made for schools in Ontario.[266] In the post-confederation period, the linguistic rights of Franco-Ontarians became hotly debated issues[267] and resulted in an Ontario Regulation that officially stated that English is the language of instruction and communication "except where impracticable by reason of the pupil not understanding English".[268]

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265. Letter dated December 16, 1982 from Leonard A. Floyde, Director Departmental Administrative Support Services to J. Anderson.

266. *Common Schools Act*, 1859 (22 Vict., c. 64, Upper Canada) and *Separate Schools Act*, 1863 (26 Vict., c. 5, Upper Canada) These include the right to establish denominational schools, the right to invoke state aid in the collection of taxes, the privilege of exemption from taxation for the support of public schools, and the privilege of teaching religious tenets of their denomination in their schools (see CLEMENT The Canadian Constitution, (3rd Ed), Carswell, Toronto, (1916) p. 780

267. LAXTER - Op. cit., f. 8, p. 63

268. Quoted in Report of the Royal Commission on Education in Ontario, Baptist & Johnson Printer, Toronto, 1950, p. 401

Regulation 17 was passed for 1912-13 commencement. This Regulation provided that French may be used as a language of instruction and communication not to exceed one hour per day in each class. The trustees of the separate schools in the City of Ottawa in opposition to Regulation 17 refused to open schools. The provincial legislature thereupon enacted legislation to provide for the duties of the separate school board. A legal action was commenced whereby and the French Catholic trustees attempted to have the Regulations deemed *ultra vires*. This controversy culminated in the Privy Council where it was determined that the restriction on the use of French was *intra vires* the provincial legislature.[269] For obvious reasons, the opposition to the Regulation continued until it was rescinded in 1944. During the mid-60s, significant modification of Ontario's legislation was made to provide rights for use of the French language.

The current *Education Act*[270] provides for French immersion programs for English-speaking students and for French instruction for French-speaking students.[271] There is restricted access to French instruction programs for non-French-speaking pupils.[272]

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269. Ottawa Roman Catholic Separate School Trustees v. MacKell (1917) A.C. 62 For a detailed description of the controversy see Schmeiser, Op. cit. f. 249, pp. 143-145; for an Annotation of the MacKell case see LEFROY 24 D.L.R. 490

270. R.S.O. 1980, c. 129

271. Id., s. 258

272. Id., s. 250(6)

The legislation sets numbers required before the French program becomes mandatory.[273] For elementary, there must be twenty-five pupils. For secondary, there must be twenty pupils.[274] The pupils are to be assembled in "classes or groups" in order to achieve the required numbers. This allows for multiple grades in one classroom. If there are insufficient numbers, the school board may in its discretion, implement a French language program. These provisions do not apply to implementation of French immersion instruction.

Similar provisions are made for English instruction in areas where English is the minority language.

There is a distinction made between the right to a French class and the right to a French school. The right to a French elementary school arises where the numbers warrant, in the opinion of the school board. This means that a school board is obligated to provide French language classes if twenty-five pupils may be assembled but is not obligated to provide a French elementary school unless it determines that the numbers are sufficient.[275] Similar discretionary provisions exist for a French secondary school with the additional authority to provide "an appropriate unit of a secondary school" as an alternative to a school,[276] and the authority to enter into an agreement with another board in order to establish a school.[277] By the end of 1980, six school boards had taken advantage of a provincial

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273. Id., s. 258(2)

274. Id., s. 261

275. Id., s. 258(4)

276. Id., s. 261(4)

277. Id., s. 261(5)

scheme which provided special grants for separate entity high schools.[278]

English Arts as a subject is required for grades 5 and up for all French programs.[279]

A Languages of Instruction Commission of Ontario is established by the Act to advise the Minister of Education on matters pertaining to minority language instruction.[280] There are also provisions for French advisory committees to the local school boards.[281]

French language instruction in Ontario for Anglophones is increasing dramatically. Second language enrolment in elementary schools increased from 37.5% to 61.4% from 1970-71 to 1981-82 with instructional time increasing from seven percent to eleven percent.[282] French immersion enrolment increased from approximately .76% of total pupil population or twelve thousand, seven hundred and sixty-four pupils to approximately one percent of the total pupil population or eighteen thousand pupils in kindergarten to grade 8 in one hundred and sixty schools to one hundred and ninety schools from 1977-78 to 1981-82.[283]

The Ontario legislation addresses all of the issues that may arise out of the application of section 23 of the Charter.

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278. Id., s. 258(5)

279. Annual Report - Op. cit., f. 230, pp. 31-32

280. Supra, f. 270, ss. 274-277

281. Id., s. 262

282. Annual Report - Op. cit., f. 190, p. 196

183. Id., p. 199

There may be situations where the application of section 23 will displace the discretion provided in the Ontario legislation.

The issue that remains as the "hot" political issue in Ontario is control over Francophone schools.[284] The establishment of a French language school board for the twenty thousand French-speaking pupils in the Ottawa/Carleton region and for any other region that would be viable, was recommended by the Franco-Ontario Education Council, an advisory body to the Minister of Education in 1980.[285]

A lawsuit similar to the St. Boniface case from Manitoba[286] arose in Ontario. Justice Stewart of the High Court of Justice dismissed a motion for an injunction by English parents whose children had been transferred out of the local school due to the school being designated as a French immersion school.[287]

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284. An action has been commenced to determine this issue (Desroches, Brisson, Belanger, Godin, Association Canadienne - Française de L'Ontario and Association des enseignants Franco-Ontariens v. The Attorney-General of Ontario.) As well, the Lieutenant Governor by Order in Council 2154/83 dated August 4, 1983 has referred the issue to the Court of Appeal for hearing and consideration pursuant to section 1 of the *Constitutional Questions Act*.

285. Annual Report - Op. cit., f. 190, p. 43; recent developments on this matter are discussed in Chapter IV (C)(3)

286. Howden - Supra, f. 262

287. Crawford et al v. Ottawa Board of Education, [1971] 1 O.R. 267

The Attorney-General's Department, in consultation with the Ministry of Education, has reviewed the Ontario legislation in relation to the Charter. Legislation to recognize the right of every French-speaking pupil to an education in the French language and to establish minority-language sections of public school boards consisting of trustees elected by minority-language electors is proposed.[288]

6. Quebec

A Royal Commission on the French Language and Language Rights in Quebec (Commission Gendron) was appointed by the Bertrand government in December 1968 after a school conflict in St. Leonard where the school board had attempted to direct the children of Italian immigrant families to French-language schools. The Gendron Commission Report, presented to the government on December 31, 1972, recommended that French be declared the official language of Quebec. Other recommendations for various areas such as industry and work were made including a recommendation that no action be taken in the area of public education for three to five years. The major problem for resolution facing the Commission was the trend of immigrants to Quebec enrolling their children in English schools. It was the view of the Commission that that problem may be partially resolved by the implementation of the other recommendations.

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288. Ministry of Education - Ministry of Colleges and Universities: A Proposal in Response to the Report of the Joint Committee on the Governance of French-Language Elementary and Secondary Schools, March 23, 1983 (see Chapter IV C(3) for further details)

As a result of the Gendron Commission recommendations, the Bourassa government passed Bill 22 on July 31, 1974.[289] Bill 22 or the *Official Languages Act*, generally followed the Gendron recommendations, the exception being in the area of education.[290]

Bill 22 established that the language of instruction in Quebec public schools be French but that English continue, as it then was, as a language of instruction.[291] For any changes to the English "status quo", the Minister's approval was required. Two basic schemes were provided for determining eligibility for English instruction:

(a) mother-tongue of the pupil;[292]

(b) linguistic competence.[293]

A series of language tests was also established for determining linguistic competence.[294]

The Greater Montreal Protestant School Board unsuccessfully challenged the legislation.[295] Chief Justice Deschênes held that section 93 of the *British North America Act of 1867* guaranteed religious rights, not language rights.

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289. Bill 22 Supra, f. 105

290. See McWhinney, Edward - Quebec and the Constitution, University of Toronto Press, Toronto, 1979, p. 63, for a review of the possible reasons for the exception

291. Bill 22, Supra, f. 105, s. 40

292. Id., s. 40, 3rd paragraph

293. Id., s. 41

294. Bill 22, Supra, f. 105, s. 43

295. Protestant School Board - Supra, f. 7 (to be discussed in more detail in Chapter IV (A))

In 1977, the Lévesque government replaced Bill 22 with a more comprehensive language act, Bill 101.[296] Included in Bill 101 were substantial changes for the languages of instruction for Quebec.

Bill 101 was preceded by a White Paper[297] that described, among other points, the provisions relating to the language of instruction. Camille Laurin, Minister of State for Cultural Affairs, through the White Paper, clearly enunciated the government's views as being two-fold; first, to open the English schools to those who then lived in Quebec and were part of the English-speaking community; and second, to direct all others to French schools.[298]

Section 72 of the Quebec Charter (Bill 101) provides that instruction in kindergarten, elementary and secondary schools shall be in French. Section 73 provides for four exceptions to section 72:

(a) children whose mother or father received English elementary instruction in Quebec;

(b) children whose mother or father received English elementary instruction outside of Quebec but who were domiciled in Quebec on the date of the coming in force of the Quebec Charter;

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296. Bill 101, Supra, f. 108

297. Quebec, White Paper, Libre Blanc, Supra, f. 109

298. Id., pp. 71-72

(c) children who were receiving instruction in English in Quebec during the year before the coming in force of the Quebec Charter; and

(d) children whose older brothers or sisters were receiving instruction as specified in (c) above.

The Lévesque government acknowledged the difficulty in specifying the criterion for determining the right of access to instruction in English.[299] A new criterion was therefore selected that "has the advantage of being related to the school system".[300] Parents or children who study or studied in English schools are "thought to belong to the linguistic community which created and maintained this system of instruction. These parents are, in a way, the heirs of the English schools."[301]

Section 79 provides a limitation on the right to English instruction similar to section 23 of the Charter, namely, where numbers warrant.

Non-residents or future residents of Quebec were not entitled to rights pursuant to section 73. However, the Quebec Charter does provide for persons who are temporarily resident in Quebec[302] and does provide for authority for the government to make regulations to extend the scope of section 73 to persons covered by a reciprocity agreement between Quebec and another province.[303]

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299. See White Paper - Op. cit., f. 109, pp. 73-75

300. Ibid.

301. Id., p. 74

302. Quebec Charter, s. 85

303. Quebec Charter - s. 86 This is the point raised and offered by Premier Lévesque at the St. Andrews Conference (see Chapter II (D))

Bill 22 and Bill 101 have the effect of limiting access to English instruction in Quebec.[304] The percentage of children in English-language schools has decreased considerably.[305] The percentage has dropped from 16.7% in 1975-76 to 13.8% in 1980-81.

In addition to limited access to English schools, enrolment in second language or French immersion programs has also diluted English instruction in Quebec. At the elementary level, 41.2% of the pupil population enrolled in second language instruction for 9% of the school day in 1970-71. In 1981-82, 37% of the pupil population for 10% of the instructional day, were enrolled in second language instruction.[306] Secondary level figures show a decrease from 100% to 98% but an increase in the amount of instructional time from 14% to 16%.[307] French immersion enrolment has increased from seventeen thousand, eight hundred in 1977-78 to eighteen thousand, five hundred in 1981-82[308] despite the overall decrease in English school enrolment.

On September 8, 1982, Chief Justice Deschênes of the Quebec Superior Court[309] declared sections 72 and 73 of the Bill 101,

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304. For a discussion of the adverse effect of the legislation on English schools, see: Annual Report - Op. cit., f. 194, pp. 30-31; Annual Report - Op. cit., f. 230, pp. 34-35; Annual Report - Op. cit., f. 190, pp. 44-45

305. Annual Report - Op. cit.. f. 190 Enrolments are decreasing at approximately twice as fast as the French schools

306. Id., p. 194

307. Id. p. 195

308. Id., p. 199

309. Quebec Association of Protestant School Boards - Supra, f. 70

Charter of the French Language, to be of no force and effect insofar that they are inconsistent with section 23 of the Canadian Charter. He further declared certain Regulations[310] to be of no effect insofar as they were inconsistent with section 23 of the Canadian Charter. The facts giving rise to the legal action commenced on May 27, 1982, when Dr. Camille Laurin, Minister of Education, issued a directive to all school boards in Quebec reminding them of the provisions of the Charter of the French Language and directing that only those children who qualified under the Quebec Charter were to be entitled to instruction in English in Quebec.

The plaintiffs in the action were quickly advised that individual legal proceedings were being prepared against them for contravention of the Canadian Charter, in particular, section 23. In order to ensure that proceedings would be general enough to cover all possible cases which could arise, it was decided, after a meeting between the Chairmen of the Lakeshore School Board and the Protestant School Board of Greater Montreal and the Executive Committee of the Quebec Association of Protestant School Boards, that a petition for a declaratory judgment should be made by those three entities jointly.

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310. Regulations respecting requests for instruction in English, O.C. 2851-77 (1977) 109 G.O. II 4591 with amendments; Regulations respecting the language of instruction of persons staying in Quebec temporarily, O.C. 2851-77 (1977) 109 G.O. II 4615 as amended by O.C. 1129-82, May 12, 1982 (1982) G.O. II 2229

The petition was presented in August during seven days and the decision was rendered on September 8. The first section of the Canadian Charter that Chief Justice Deschênes considered was the remedy provision, section 24(1). In his view, a declaratory judgment was an appropriate remedy pursuant to section 24(1). Although the verb used in section 24(1) (English version) is in the past tense, he determined that the scope of section 24 should be interpreted to include future events. He cited the following as reasons to support his determination:

1. The liberal approach of the Supreme Court of Canada in Borowski v. Minister of Justice[311] to standing in constitutional cases should apply to section 24(1).
2. The French version of section 24(1) is broader and could apply to future events.
3. The factual situation was not merely an apprehended future infringement. Dr. Laurin's May directive brought the matter into real existence.
4. The school year had begun by the date of the decision, so that the matter was no longer in the future. It was in the interests of the children to have the matter resolved quickly and not to require refiling of the petition.

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311. (1981) 130 D.L.R. (3d) 588

5. The Charter is not an ordinary law. It is the supreme law of Canada and must be interpreted liberally.[312]

. . . As no proclamation had been issued for section 23(1)(a) to apply to Quebec pursuant to section 59 of the *Constitution Act, 1982*, the court considered only sections 23(1)(b) and 23(2).

The Charter of the French Language specifies that French is the language of instruction. The exceptions outlined for instruction in the English language in section 73 refer to Quebec. This is in contrast to section 23 of the Canadian Charter which refers to Canada.

Chief Justice Deschênes compared section 73(a) and (b) with section 23 (1)(b) of the Canadian Charter, and section 73(c) and (d) with section 23(2) of the Canadian Charter. He concluded that although the Quebec Charter was broader in scope as it applied equally to immigrants as to Canadian citizens, sections 72 and 73 conflicted with the rights provided in section 23. The provisions applied to Quebec instruction whereas section 23 applies to Canadian instruction. In that way, sections 72 and 73 deny rights that citizens of Canada acquired pursuant to section 23. This was considered by Chief Justice Deschênes to be a denial of the Charter rights and not simply a limit on the Charter. In his view, section 1 was not applicable where there was a denial of rights, only where a limit was placed on the rights.

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312. Quebec Association - Supra, f. 70, pp. 42-43

Notwithstanding his finding, he proceeded to consider, as an alternative, the application of section 1 to section 23.

One of the most significant features of this decision is the review and application of section 1. The four elements of section 1 were studied in detail and interpreted by the court. Both Canada and Quebec were held to be free and democratic societies so that the first element was present. The Chief Justice referred to the political history of the Parti québécois as justification for this conclusion. As the Charter of the French Language (Bill 101) is a provincial law, it met the second condition, "prescribed by law". The third element "demonstrably justified", was proven by the Quebec government through extensive evidence. The expert evidence showed the purpose of the Charter of the French Language to be the advancement and expansion of the Quebec French-speaking society. The fourth element for section 1 is the "reasonable limits" element. Chief Justice Deschênes examined Canadian and international jurisdiction and arrived at the following principles:

> "1. *Une limite est raisonnable si elle est un moyen proportionné à l'objectif visé par la loi;*
>
> 2. *La preuve du contraire implique la preuve non seulement d'une erreur, mais d'une erreur qui heurte le sens commun;*
>
> 3. *Les tribunaux ne doivent pas céder à la tentation de substituer leur opinion à la légère à celle de la législature."*[313]

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313. Quebec Association - Supra, f. 70, p. 77

The Quebec government advanced many arguments in favour of the Quebec Charter being a "reasonable limit", including the following:

1. The Canada clause threatens to destroy the cultural identity of a substantial portion of the Canadian population.

2. The Quebec clause was known when Parliament adopted the Charter. Compromise was indicated by adoption of section 59 and by statements that other arrangements might be preferable.

3. The Quebec clause is not the result of a feeling of niggardliness on Quebec's part toward the rest of Quebec. Evidence of its generous treatment toward English schools was presented.

4. There is no hidden purpose or ulterior motive in the Quebec clause.

5. There are no reciprocity agreements between Quebec and other provinces.

6. The Quebec clause is vital for Quebec society to become French. Evidence of the need for limits on anglicization through education were presented.

7. The application of the Canada clause to Quebec produces a substantial shift in pupils from French to English schools.

8. The application of the Canada clause would further anglicization of the Outaouais region.

9. As education is a provincial matter and as Canadians residing outside of Quebec have no vested right of education in Quebec, the Quebec clause is legitimate.

10. In view of Quebec's generosity toward English education and the rest of Canada's niggardliness toward French education, the Quebec clause merely restores the equilibrium.

11. The Quebec clause attempts to offset the discrepancy in Quebec between its cultural and its socioeconomic situation.

There were equally persuasive arguments presented against the reasonableness of the Quebec clause including the following:

1. The Canada clause is a constitutional provision that must be given the broadest possible effect.

2. The Charter will be reduced to "wishful thinking" if provinces are allowed to depart from it.

3. Parliament in full knowledge of the Quebec clause adopted the Canada clause and thus expressed a clear intention of its application to Quebec.

4. Quebec clause impedes mobility of Canadians and restricts the mobility rights as set forth in section 6 of the Charter.

5. Citizens in Canada must be given equal rights and privileges throughout Canada.

6. Quebec clause is excessively harsh as shown by evidence of the declining number of English in Quebec and its schools.

7. Quebec clause has produced negative migration of Anglophones to Quebec so goes beyond the end sought.

8. The possible cultural danger to the Outaouais region does not give Quebec the right to control a segment of its population.

9. Reciprocity agreements are possible pursuant to the Quebec legislation. Such agreements would produce substantially the same results as the Canada clause. It is unreasonable to offer reciprocity at the same time as opposing the Canada clause.

Chief Justice Deschênes concluded that it must be proved convincingly that the Quebec clause is necessary for the purpose of the legitimate object Quebec has set for itself and that the Quebec clause is not disproportionate to its objective.

Considering all the arguments, both for and against Quebec, the court concluded that the Quebec government failed to meet the onus of demonstrably showing "reasonable limits".

The Quebec Court of Appeal dismissed an appeal from the decision of Chief Justice Deschênes as it concluded that the Quebec clause was a denial or an annihilation of a Charter right and thus not a reasonable limit pursuant to section 1 of the Charter.[314]

There is no need to speculate in the case of Quebec, whether its legislation conflicts with section 23 of the Charter. Chief Justice Deschênes has provided the answer.

The Quebec National Assembly has not authorized the issuance of a problamation in order for section 23(1)(a) to come into force in Quebec pursuant to section 59 of the *Constitution Act, 1982*.[315]

7. Prince Edward Island

Although Prince Edward Island has an Acadian French-speaking element in its population, the school legislation did not guarantee

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314. Le Procureur général de la Province de Québec v. Québec Association of Protestant School Boards et al Province of Quebec, District of Montreal, No. 500-09-001270-82 (Court of Appeal) Monet, J. at p. 3. Justice Beauregard further determined that the Quebec clause denies the "raison d'être" of section 23 of the Charter (at p. 2).

315. Op. cit., f. 118 Bill 62 passed by the Quebec National Assembly in 1982 provides that a proclamation must come from the National Assembly and not from the government.

minority language education until 1980 when the *School Act*[316] was amended.

The legislation requires regional school boards to provide minority language instruction if parents of a prescribed number of children whose mother-tongue is the minority language, so petition. The Regulations[317] prescribe twenty-five children within three consecutive grade levels as sufficient for grades 1 through 9. Once a program is instituted it must be continued for three years regardless whether numbers drop below the prescribed limit. The regional board must endeavour to make arrangements through a regional minority language unit if the numbers are less than prescribed. In that event, placement may be made in either a French immersion program or a French language education program and transportation is to be arranged.[318] The school board has discretion to determine if numbers are sufficient to provide minority instruction for grades 10, 11 and 12.[319] It also has discretion to designate schools in which the instruction is to be given.[320]

In 1981 the government Curriculum Committee was advised by Acadian spokesmen,[321] that the future of the Acadian community

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316. R.S.P.E.I. 1974, c. S-2 as amended by S.P.E.I. 1980, c. 48 (proclaimed July 5, 1980)

317. P.E.I. Regulation E.C. 653/80

318. Id., s. 5.32(3)

319. Id., s. 5.33

320. Id., s. 5.34

321. Annual Report - Op. cit., f. 190, p. 41

depended on the extent to which Acadians were allowed to control their own institutions, schools and school boards.[322]

Pupil enrolment in elementary second language instruction has increased from 21.2% in 1970-71 to 59% in 1981-82 although the time allotment for such instruction had fallen over the same period of time from 8% to 7%.[323] Pupil enrolment for French immersion programs has increased from approximately 2.2% of total pupil population or five hundred and forty-one in 1977-78 to approximately 6.94% of the total pupil population or seventeen hundred in 1981-82. Grades 1 to 10 in eighteen schools offered French immersion programs in 1981-82 compared to grades 1 to 4 and 7 to 8 in seven schools in 1977-78.[324]

The legislation creates an additional category for entitlement to minority language instruction, namely, children whose mother-tongue is that of the minority but completely ignores the three categories created by section 23 of the Charter, namely, parents whose first language learned and understood is French; parents who received their elementary education in French; and parents who have one child who has received some elementary instruction in French. It is undoubtedly in conflict with section 23 of the Charter.

The Prince Edward Island legislation specifically provides for French language instruction where the prescribed numbers

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322. Id., p. 43

323. Id., p. 196

324. Id., p. 199

are present and for either French language instruction or French immersion where the numbers are below the prescribed level. That is an approach that may be considered by the judiciary when determining rights pursuant to section 23. Only where numbers are small, will French immersion be considered as sufficient instruction to qualify for section 23.

As in the Manitoba legislation, co-ordination with other school units is provided for minority language instruction.[325] Where numbers are not sufficient in one area, pupils may be transported and pooled with pupils from neighbouring areas in order to qualify for sufficient numbers.

The prescribed number is twenty-five for three consecutive grades or approximately eight for each grade. The combining of three grades provides flexibility in determining numbers. This same flexibility is the format or design of section 23.

Prince Edward Island does not intend to amend or to pass new legislation in response to section 23 of the Charter.[326]

8. Nova Scotia

In 1981, the Nova Scotia *Education Act*[327] was amended to provide for minority language instruction. Prior to that date,

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325. P.E.I. Regulation - Supra, f. 317, s. 5.32(3)

326. Letter dated October 28, 1982 from Linda Trenton, Management Information Co-ordinator, Department of Education, P.E.I., to J. Anderson

327. R.S.N.S. 1967, c. 81 as amended by Education Act Amendment 1981, S.N.S., c. 20

permission to offer French language instruction had been implicitly given by the inclusion of a program of studies for Acadian schools in the general provincial program of studies.[328]

The amendment to the Act provides for the designation of Acadian schools and the area to be served by the schools. The criteria for the designation is where there is a sufficient number of children "whose first language learned and still understood" is French. The principle language of administration and the communication with the community shall be French. The numbers qualification is linked to public funding.

The designation of an Acadian school is made by the Minister. Two or more school boards may request such designation. If there is a request by two or more boards, the Minister determines the responsibility of each board for the school.

The Minister of Education established an advisory committee with "strong Francophone representation to recommend the best ways for French-speaking students to enjoy the benefits of the new legislation".[329]

Nova Scotia's pupil enrolment in elementary second language instruction and French immersion programs has increased substantially. In 1970-71, 10.4% of the pupil population were enrolled in elementary second language instruction for 7% of the instructional day. For French immersion, the enrolment increased from approximately .07%

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328. Source: Council of Ministers of Education - Op. cit., f. 137

329. Annual Report - Op. cit., f. 190, pp. 40-41

of the total pupil population or one hundred and twenty-seven pupils in kindergarten and grade 1 and grades 6 to 8 in three schools in 1977-78 to approximately .49% of the total pupil population or eight hundred and sixty-five pupils in primary to grade 12 in eighteen schools.[330]

Nova Scotia's new legislation has the same defect as that of Prince Edward Island. It guarantees access to minority language instruction for Francophone pupils but ignores the three categories of section 23 of the Charter, namely, parents whose first language learned and understood is French; parents who received their elementary education in French; and parents who have one child who has received some elementary instruction in French. As such, the legislation is inadequate and in conflict with the Charter.

The legislation does provide flexibility in grouping including groupings from several school boards for a school. It also recognizes different types of minority instruction and does provide for classes and for schools if the numbers are sufficient.

Government officials are awaiting judicial decisions or scholarly commentaries to clarify the impact of the Charter on education legislation.[331]

9. New Brunswick

The French minority population of New Brunswick is the largest French minority population in any province. Following

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330. Id., p. 196 and p. 199

331. Letter dated November 2, 1982 from Guy C. Pothier, Supervisor, Education Reference Service to J. Anderson

the Royal Commission Report, the New Brunswick legislature enacted legislation to recognize English and French as official languages in New Brunswick.[332] The declared object of the legislation was to achieve linguistic and cultural equality of opportunity.[333] This included the right to receive education in French or English where there are sufficient numbers.[334] Prior to the legislation, language instruction was guaranteed through regulations to the school legislation.[335]

The Act[336] provided that the language of instruction in a school would be that of the mother-tongue of the pupils, either French or English, with the other language to be taught as a second language. If the school was attended by both language groups, classes were to be arranged so that the chief language of instruction would still match the mother-tongue of the pupils. The Minister was authorized to make alternative arrangements if the mixed school concept was not feasible by reason of numbers.[337] Whether instruction rights could be defeated entirely by reason of numbers is unclear.

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332. *Official Languages of New Brunswick Act*, R.S.N.B., 1973, c. O-1

333. New Brunswick Debates of Legislative Assembly, 1968, (Speech from the Throne)

334. *Official Languages Act*, Supra, f. 332, s. 12; New Brunswick Debates - Supra, f. 333, Vol. II, p. 707

335. Regulations 67-67

336. *Official Languages Act*, Supra, f. 332, s. 12

337. This legislation closely resembled the school regulations (67-67). The regulations classified the mixed schools as "bilingual schools" and allowed for transportation in order to ensure minority language education. These regulations were repealed in 1980 (Reg. 80-100)

After a crisis occurred in the Moncton area in 1971, two school districts on a linguistic basis covering the same general geographic area were established. Similar action took place for the Bathurst area in 1978.[338] The Finn-Elliott Report recommended that all school districts be established on a first language basis and that all bilingual schools be eliminated.[339] At the time of the Finn-Elliott Report, only eight bilingual schools remained.[340]

In 1978, regulations were passed to create advisory committees for the minority language group in each school district where the minority represented less than 10% of the total pupil population.[341]

In 1981, an amendment to the *School Act*[342] implemented the major recommendations of the Finn-Elliott Report including a requirement that schools and classes be organized on the basis of the English or French language, a requirement that school districts be organized on the basis of language either on the initiative of the Minister or at the request of parents representing at least thirty children of elementary age, and a discretion for school boards to provide classes or schools for the pupils of the other official language provided there is no school board for that official language group in the area.

The meaning and purpose of this legislation has been interpreted to prohibit bilingual schools and to establish separate

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338. Finn-Elliott Report - Op. cit., f. 189, p. 53

339. Ibid.

340. Id., pp. 44-45

341. Regulation 78-10 (filed February 1, 1978) (only six school districts qualified)

342. Schools Act Amendment, S.N.B. 1981, c. 71

homogeneous school systems accessible to those who qualify to attend based on language proficiency whether Anglophone or Francophone. French immersion classes operated by the English system, however, are not open to Francophone students due to Department of Education Policy Statement 501. Section 23 of the Charter was held only to apply to the right of the Francophone minority to an education in French, not in English.[343]

As of February 1, 1981, there were twenty-five English school boards and twelve French school boards.

The government policy with respect to immersion instruction is that it is mandatory where there is sufficient interest for classes of comparable size to other classes in the district.[344]

Second language education has grown in New Brunswick. 60.6% of the pupil population were enrolled in elementary second language instruction in 1970-71 for 8% of the instructional day compared to 68.4% for 9% of the instructional day in 1981-82. The French immersion enrolment had increased from approximately 3.4% of the total pupil population or three thousand, one hundred and seventy-nine pupils in 1977-78 for kindergarten to grade 9 in thirty-four schools to approximately 7.9% of total pupil population or seven thousand, three hundred and ninety pupils in 1981-82 for kindergarten to grade 12 in sixty-two schools.[345]

It is difficult to compare the New Brunswick legislation with section 23 of the Charter. In some respects, particularly in

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343. La Société des Acadiens du Nouveau-Brunswick Inc. and L'Association des Conseillers Scolaires Francophones du Nouveau-Brunswick v. Minority Language School Board No. 50 48 N.B.R. (2d) 361 (New Brunswick Court of Queen's Bench Trial Division, Judicial District of Edmundson) at pp. 400-408

344. Department of Education Policy Statement dated July 1, 1981

345. Annual Report - Op. cit., f. 190, p. 196 and p. 199

relation to minority language governance, the legislation is far ahead of section 23 and other Canadian provinces in guaranteeing rights for minority groups. Because of the substantial number of each language group in New Brunswick and because New Brunswick does not have a school structure based on religion, it has been able to organize its school districts on the basis of language. However, the legislation does not fit the scheme of section 23 of the Charter. Section 23 provides rights for certain categories of citizens with only one of the categories relating to mother-tongue. The New Brunswick legislation is based entirely on mother-tongue. There are thus, gaps in the legislation that will be filled by section 23 of the Charter.

10. Newfoundland

The Newfoundland *Schools Act*[346] makes no provision for minority language instruction. In 1980 the Minister of Education created an advisory committee on bilingualism with Francophone representation on the committee. The committee's mandate is to submit recommendations for improving educational and cultural opportunities for French-speaking pupils.[347]

Enrolment in elementary second language programs increased from 21.4% in 1970-71 for 5% of the instructional day to 44.4% in 1981-82 for 6.4% of the instructional day.[348] Approximately .065% of total pupil population or ninety-five pupils were enrolled in French immersion in 1977-78 for grades kindergarten to 2 and grades 6 to

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346. R.S.N. 1970, c. 346

347. Annual Report - Op. cit., f. 190, p. 41

348. Id., p. 196

8 in three schools. In 1981-82, approximately .38% of total pupil population or five hundred and fifty-one pupils were enrolled in French immersion in grades kindergarten to 9 in seven schools.[349]

As Newfoundland has no legislation for minority language instruction, section 23 will serve to fill the void through section 24(1) remedies by requiring the establishment of instruction and facilities where numbers warrant. The areas of Labrador City/Wabush and Port au Port/Stephenville where the French mother-tongue population is concentrated will benefit from section 23.[350]

The Newfoundland Department of Education is not presently involved in initiating new legislation as a result of the Charter.[351]

11. Summary

No provinces with the possible exception of New Brunswick for which no information is available, have initiated legislative change for minority language instruction as a result of the Charter. The potential effect of section 23 on existing legislation is either unknown or if known, is considered to be in line with provincial legislation. Until judicial decisions are forthcoming to clarify the meaning and scope of section 23, the provinces do not appear to be prepared to declare existing education schemes for minority language instruction to be contrary to section 23.

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349. Id., p. 199

350. Council of Ministers of Education Canada. The State of Minority Language Education in the Provinces in Canada, January, 1983 p. 204

351. Letter dated November 4, 1982 from B.T. Fradsham, Director of School Services, Department of Education to J. Anderson

All provinces, with the exception of British Columbia and Newfoundland, have provided legislative schemes for minority language rights. British Columbia has provided for a scheme in policy.

British Columbia, Ontario, Nova Scotia, Prince Edward Island and New Brunswick recognize a clear distinction between minority language instruction for children who speak the minority language and immersion instruction for children who speak the majority language. Saskatchewan implicitly recognizes a distinction by providing for two types of programs. The problem is that only British Columbia and Ontario limit access to the programs by non-minority language speaking pupils. Administratively, all provinces, except Alberta, distinguish between programs for minority speaking pupils and programs for majority speaking pupils.

Most provinces guarantee minority language instruction in some manner. New Brunswick has no restrictions in that minority language instruction for minority speaking pupils is guaranteed. New Brunswick does not have similar guarantees for minority immersion instruction.

Newfoundland and Alberta provide no guarantees for minority language instruction except for the requirement in Alberta that a French instruction program must be implemented "as soon as practicable to do so" if so requested by a Local Advisory Board.

The rest of the provinces have ensured minority language instruction with a numbers restriction. British Columbia is at the lower end of the continuum as it provides for Francophone instruction if there are ten pupils. Although it sets numbers for immersion instruction (twenty), it does not mandate such instruction once the numbers are reached.

Saskatchewan and Prince Edward Island use a numbers limitation in the context of groupings of grades. The same is implicit in Manitoba's legislation as verified by the recent Court of Appeal ruling.[352]

Nova Scotia places a general numbers limitation on the creation of French language schools as does section 23 of the Charter. No provinces guarantee immersion programs except where no distinction is made between immersion and Francophone programs.

Saskatchewan, Ontario, Nova Scotia and New Brunswick expressly provide for separate schools for French language instruction.

With respect to administration, advisory committees or other forms of control over the minority instruction, no two provinces have provided for the same structure. New Brunswick with linguistic school boards, is far ahead of any of the other provinces.[353] Only British Columbia has no machinery in place to either advise or control. Most provinces have opted for some version of an advisory committee with varying kinds of duties and responsibilities.[354]

(C) MULTICULTURALISM

Section 27 of the Charter is an interpretative provision

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352. Re Pernisie Supra, f. 162

353. See Chapter IV (C)(2) for a review of the current Quebec proposal for the creation of linguistic school boards.

354. See Chapter III (E)(2)(c), for suggestions for provincial legislative amendments

that provides for interpretations "consistent with the preservation and enhancement of the multicultural heritage of Canadians". In itself, it does not guarantee any rights for Canadians.

1. Section 27

Section 27 has the potential to affect all Charter provisions in that all provisions are to be interpreted so as to "preserve and enhance" the multicultural heritage of Canada.

Section 27 provides an interpretative guide for the Charter. By itself it provides no specific rights for any person in Canada.[355] Hogg[356] considers section 27 to be more of a "rhetorical flourish" than an operative provision. The parliamentary debate offers no insight into any practical application for section 27. The debate suggests political rather than legal reasons for its insertion in the Charter.

The Charter is an unusual document in that it provides for many diverse interests without particular regard for the interrelationship of those interests. Section 27 is such an example. It was added

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355. Section 27 in conjunction with section 2(a) of the Charter was relied upon by Alberta Provincial Court Judge Jones in finding the Sunday observance legislation to be of no force and effect: R v. W.H. Smith Ltd. (1983) 3 C.R.D. 525 90-01

356. HOGG, P.W. - Constitutional Law: Canada Act, Annotated, Carswell, Toronto, 1982, p. 72

to the Charter in 1981 and was not part of any of the former Constitutional Bills except that pluralism was one of the stated aims of the Canadian federation in section 4 of Bill C-60.[357]

2. Interpretative Effect on Section 23

An illustrative example will demonstrate the possible interpretative effect of section 27 on section 23.

In Bonnyville, a town in northeast Alberta, there are two large ethnic groups. The vast majority of town people are French-Canadian while the vast majority of rural residents are Ukrainian. Both groups have maintained their language and culture. Most children speak two languages, English and the language of their culture. In terms of numbers for each group, there is no significant difference.

Both French and Ukrainian are offered as languages of instruction. For the purposes of this illustration, it is assumed that:

(a) resources are diminishing and cutbacks are necessary;

(b) the local board decides to eliminate both French and Ukrainian language programs; and

(c) both minority groups in the community oppose such elimination.

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357. This was preceded in 1971 by the adoption by the federal government of its policy of multiculturalism (see f. 61) and in 1972 by the recommendation of the Special Joint Committee of the Senate and the House of Commons (see f. 29) for the preamble of the Canadian Constitution to include protection for multiculturalism.

The French-speaking minority would apply to the Alberta courts for enforcement and application of section 23. All components of section 23 would exist. The Ukrainian community would also seek reinstatement of their language program. The court would be faced with obvious French language rights. It would also be faced with the interpretative provision, section 27.

It is a fact, one of which an Alberta judge may even be able to give judicial notice of, that Bonnyville has experienced, in the past, French-Ukrainian clashes and conflicts.[358] It would be brought to the court's attention that reinstatement of the French language instruction would not enhance multiculturalism, would cause tremendous local friction and conflict, and would be paid for by either cutting back on programs that are needed and used by the Ukrainian as well as the French students or by increasing taxes for all residents, Ukrainian and French.

It is this writer's view that section 27 would influence the remedies provided for section 23.[359] The court's broad, remedial powers under section 24 could give rise to two alternatives:

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358. R. v. Angelo (1915) 5 W.W.R. 1303 (where judicial notice was taken of riots in the community and the reasons for the rioting); see also: Eddy v. Stewart [1932] 2 W.W.R. 699 (where the court took judicial notice of the depression and its effects)

359. For a contrary view, see: MAGNET, J.E. - The Charter's Official Languages Provisions: The Implications of Entrenched Bilingualism, (1982) 4 Supreme Court L.R. 163 at pp. 173-175 (Butterworths, Toronto)

(a) the court could order reinstatement of both language programs; or

(b) the court could decline to grant the application for French language instruction as reinstatement of the French language program would not enhance multiculturalism.

Although ethnic groups other than French and English, have not been given specific educational language rights, the foregoing example shows how section 27, used in conjunction with section 23, could result in either additional educational language rights or in the diminishment of section 23 language rights.[360]

(D) INTERNATIONAL COMPARISONS

Parliament is deemed not to intend to legislate in violation of international law without express words.

Maxwell[361] expresses the rule in this way:

> *"Under the general presumption that the legislature does not intend to exceed its jurisdiction, every statute is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by clear and unambiguous language. But if the language of the state is clear, it must be followed notwithstanding the conflict between international law and municipal law which results."*

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360. In Alberta, the mother-tongue of 62,145 persons is French and of 68,130 persons is Ukrainian - Source: Statistics Canada, 1981, pp. 1 and 2

361. MAXWELL - Op. cit., f. 145, p. 183

The canon has been adopted by Justice Pigeon of the Supreme Court of Canada[362] and by Lord Denning in R. v. Secretary of State et al.[363] Justice D.C. MacDonald[364] links the canon with the Charter.

1. International Conventions

The Universal Declaration of Human Rights[365] the first major international declaration of rights, declares that "Everyone has a right to education ...". The promotion of understanding, tolerance and friendship "among all nations, racial or religious groups" was stated but no reference was made to any linguistic rights in education. It also provides that "parents have a prior right to choose the kind of education to be given to their children".[366]

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362. Daniels v. White and the Queen, [1968] S.C.R. 517 Justice Pigeon's conclusion was his individual view, not that of the court

363. [1975] 2 ALL E.R. 1081

364. MacDONALD, D.C. - Legal Rights in the Canadian Charter of Rights and Freedoms, Carswell (Western) (1982) p. 10; see also DRIEDGER, Elmer A. - The Construction of Statutes, Butterworths, Toronto 1974, p. 129 and p. 161

365. Proclaimed December 10, 1948, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948); reprinted in Human Rights, a Compilation of International Instruments of the United Nations 1, U.N. Doc. ST/HR/1 (1973), Article 26

366. Section 23 of the Charter adopts the "parental right of choice" concept that is provided for in the Universal Declaration

The Universal Declaration sets forth goals to be achieved but, in itself, is unenforceable.[367] Each signatory to the Declaration is to make attempts to implement enforcement mechanisms for the goals set forth in the Declaration. Canada, through section 23 of the Charter, has partially achieved the goals of the Universal Declaration.

The right of everyone to education is guaranteed in the International Covenant on Economic, Social and Cultural Rights.[368] When Canada ratified and became a signatory to the Covenant in 1976 with the consent of all the provinces, the Covenant became binding on Canada.

Article 13 of the Covenant reiterated the educational goals as expressed in the Universal Declaration. "Parental right of choice" was further refined as follows:

> "Article 13
>
> 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions."

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367. For a contrary view see HUMPHREY, John P. The World Revolution and Human Rights p. 147 in Human Rights, Federalism and Minorities edited by Allan Gotlieb, Canadian Institute of International Affairs, 1970. Humphrey suggests that the Declaration is now part of customary international law because of its general acceptance as a standard of necessary conduct. It is therefore unimportant in his view that the Declaration was not intended to be binding. p. 159 and p. 175.

368. Opened for signature December 16, 1966, G.A. Res. 220, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316, entered into force January 3, 1976.

The Covenant contains specific undertakings relating to the fundamental goals of education and its accessibility. The goals of education are similar to the goals provided in the Universal Declaration. Included in the goals are references to the "full development of the human personality and the sense of its dignity" and "to enabling persons to participate effectively in a free society". Although these general and broad goals have no specific reference to language, the development of the human personality, the sense of dignity, and effective participation in society will be furthered by education in one's own language.

The International Covenant on Civil and Political Rights[369] provides rights for the use of minority language but does not reference education. It does provide for the enjoyment by linguistic minorities of their own culture and use of their own language.[370]

A Convention Against Discrimination in Education was adopted by the General Conference of U.N.E.S.C.O. in 1960 and entered into force in 1962.[371] The Convention Against Discrimination defines discrimination in education to include "any distinction, exclusion, limitation or preference based on race, colour, sex, language, religion,

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369. Adopted by the General Assembly of the United Nations on December 16, 1966; entered into force on March 23, 1976. For a review of the United Nations activities in education see: MARKS, Steven - UNESCO and Human Rights - The Implementation of Rights Relating to Education, Science, Culture and Communication, (1977), 13 Texas International Law Journal 35

370. Article 27 of the Covenant

371. 74 countries have ratified the Convention including the United Kingdom but not including Canada

political or other opinion, national or social origin, economic conditions or birth". Exceptions to the general rule are made for separate educational systems or institutions for pupils of the two sexes and for religious or linguistic reasons.

The particulars of the non-discrimination include the "limiting of any person or group of persons to education of an inferior standard".[372] Education is defined to refer to all types and levels of education including "access to education, the standard and quality of education, and the conditions under which it is given".[373] The separate educational systems or institutions for linguistic reasons shall be:

(a) in keeping with the wishes of the parents;

(b) optional; and

(c) having standards set by competent authorities.[374]

The States parties are to eliminate and prevent discrimination by allowing or removing obstacles to access to educational institutions for all pupils including nationals and foreign nationals resident in the country.[375] Differences of treatment by public authorities are to be eliminated.[376] Further, the States parties are to promote equality of opportunity and treatment. The quality of education is also to be equivalent.[377]

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372. Convention Against Discrimination in Education, 1960, Article I-1.(b)

373. Id., Article I-2

374. Id., Article 2.(b)

375. Id., Article 3.(c)

376. Ibid.

377. Id., Article 4

The goals of education as set out in the Universal Declaration are continued in the Convention Against Discrimination.

It is contrary to the Convention Against Discrimination for public authorities to grant assistance to educational institutions "solely on the ground that pupils belong to a particular group".[378] It specifically enunciates minority language rights.

> *"It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however:*
>
> *i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;*
>
> *ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and*
>
> *iii) That attendance at such schools is optional."*[379]

In the European Convention on Human Rights, (to which the United Kingdom is a signatory),[380] Article 14 prohibits discrimination on the basis of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Article 2 of its Protocol states:

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378. Id., Article 3.(d)

379. Id., Article 5.(c)

380. Signed November 4, 1950

> *"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."*

The European Court of Human Rights declared these provisions not to guarantee state-funded minority language educational rights.[381]

The Belgium language case concerned a challenge to the laws of Belgium that prevented in unilingual districts, the establishment of state schools not in conformity with the linguistic requirement of that district. The parents were seeking a French subsidized school in a Dutch unilingual district. The court held that Article 2 does not require the establishment of educational establishments.[382] Article 2 refers to "religious and philosophical convictions" but does not expressly cover linguistic preferences. In reviewing the scope of "religious and philosophical", the court concluded that "to interpret these as guaranteeing the right to education in the language of one's choice would lead to absurd results"[383] and further, that "if the parties intended to create a specific right with respect to language of instruction, it would have done so in express terms".[384]

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381. Case Relating to certain aspects of the laws in the use of languages in education in Belgium, (1968) 11 Yearbook of the European Convention on Human Rights, 832.

382. Id., p. 912

383. Id., p. 866

384. Ibid.

Article 14 was considered in relation to Article 2 as it expressly provided for no discrimination on the basis of language. The court determined that the Belgium legislation generally was not discriminatory.[385] It stated that the intention of the Belgium government was "to favour linguistic unity within unilingual districts and to promote among pupils a knowledge in depth of the usual language of the region".[386] As the intention was concerned with the public interest, it was not discriminatory.

In two recent decisions, the European Court has held that it is "not incompatible with Article 2 to restrict access to educational facilities to those who have attained an academic level required to benefit from the course offered".[387] In X v. United Kingdom[388]

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385. On one of the six questions submitted, the court held, by 8 votes to 7, that the legislation was discriminatory and did not comply with Article 14 and Article 2 of the Protocol insofar as it prevented French-speaking children who reside outside the six communes with special facilities from access to French-language schools in the six communes. Dutch-speaking children living outside the six communes have access to the Dutch-language schools in the same six communes.

386. Id., p. 974

387. X v. United Kingdom (1982) 14 E.H.R.R. 252 (prisoner sought time off from prison work to complete a university level correspondence course); and Patel v. United Kingdom (1982) 14 E.H.R.R. 256 (readmission to university was sought after having failed)

388. (1981) 23 Council of Europe: Decisions and Reports 228

the European Court referred to its decision respecting French language rights in Belgium and commented that Article 2 is not an absolute right to all forms of education.[389] This right requires "regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals".[390]

Although the European Court has placed limitations on the right to an education, it has also given recent indications that school systems should accommodate parental convictions. In Case of Campbell and Cosans,[391] the European Court considered complaints by two Scottish mothers regarding corporal punishment in Scottish schools. The Court was of the view that alternative ways of respecting the parents' convictions ought to be adopted "such as a system of exemption for individual pupils".[392] The Court accepted that a dual system whereby corporal punishment would be administered in one system but not in the other "would be incompatible, especially in the present economic situation, with the avoidance of unreasonable public expenditure".[393]

2. Minority Language Educational Rights in Other Countries

Canada's bilingual and multicultural heritage is not unique. Other countries have developed from a similar base, and in

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389. Id., p. 229

390. Ibid.

391. Series A, Judgments and Decisions, Vol. 48 (publication of the European Court of Human Rights) (February 25, 1982)

392. Id., p. 18

393. Ibid.

doing so, have established constitutional guarantees for minority languages. An examination of minority language developments in education in other countries formed a partial base or background for the Royal Commission recommendations.

(a) Belgium

In Belgium there are two major language groups, Dutch or Flemish and French or Walloons. Although the Flemings constitute a majority, French due to its prestige, developed as the language of government and higher education. The growth of Flemish nationalism in the 20th century lead to Dutch being recognized as an official language.[394]

Both Flemish nationalism and fear of assimilation of the Flemish people lead to the enactment of language legislation for schools in 1932.[395] This legislation[396] provided for language of instruction to be determined on a regional basis with Brussels

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394. AUCAMP, A.J. - Bilingual Education and Nationalism with Special Reference to South Africa (1926) J.L. Van Schaik Ltd., Pretoria (The author at p. 99, refers to the weaker language (Flemish) having gained a footing in the face of a powerful, well-established and universally spoken language.)

395. SWING, Elizabeth Sherman - Bilingualism and Linguistic Segregation in the Schools of Brussels (1980) International Research on Bilingualism, pp. 70-76

396. Language Law of July 14, 1932

remaining as an official bilingual administrative zone as it had been since 1910. Parents found ways of circumventing the 1932 legislation so that the attempt to guarantee linguistic monopoly by region failed.[397]

In 1963, major revisions in the Belgium constitution took place including revisions in the law relating to language of instruction. The intent of the revisions was to further and guarantee the continued existence, on an equal footing, of the two great cultural communities.[398] Belgium was divided into four language regions or territories. The language of each territory became the language of instruction. Brussels remained as a bilingual territory. In the unilingual territories, the language of instruction in schools was mandated as the language of the territory. The revisions eliminated the loopholes of the 1932 legislation and the practices that had evolved from 1932 to 1963 for schools of the "other" language in the unilingual districts.[399]

Numerous court challenges ensued[400] including those consolidated and heard by the European Court.[401]

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397. SWING _ Op. cit., f. 395, p. 76

398. SENELLE, Robert - Belgium, The Revision of the Constitution, 1967-70 (Diplomatic Mission Information Services - Brussels, 1971) pp. 18-19

399. SWING - Op. cit., f. 395, p. 88 (Subsidies to non-conforming schools ended; the boundary lines were frozen; total hegemony of the regional language was mandated so that early education in the mother-tongue was eliminated; and homologation was introduced so to restrict University enrolment and access to government jobs)

400. Id., p. 104 (the author describes the situation in Brussels between 1966-1971 - "Brussels was the scene of tense conflict scarcely reported beyond the borders of that troubled country")

401. Belgium Language Case - Supra, f. 381

Although Brussels was a bilingual district, the 1963 revisions did not provide any free choice for parents with respect to language of instruction. Schools were split into autonomous linguistic segments. The child's attendance was determined by his "mother-tongue or usual tongue".[402] Language declarations from the parents or previous school were instituted with review and appeal mechanisms.[403]

The deficiencies of and potential and real abuses of the language declarations resulted in the law being amended in 1971.[404] The new law for Brussels provided for attendance of a child according to the choice of the father of the family.

Other amendments to the Constitution created cultural councils for the unilingual regions. The councils have legislative powers in education and are able to regulate by decree, the use of language for education in establishments created, subsidized or recognized by the public authorities.[405] There have developed in the territories, areas where pre-school and elementary education may on certain conditions, be given in the child's native language that is not the official language of the territory.

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402. Belgium Constitution, 1963, Article 5

403. SWING - Op. cit., f. 395, pp. 111-131 (the author describes the mechanisms of the legislation and the various appeals and resulting decisions)

404. Id., p. 134

405. The Freedom of Education in Belgium, Belgium Information and Documentation Institute

All schools, whether French or Dutch, require students to study in the "other" language.

Non-citizens must comply with the Belgium law. In the Flemish areas where French schools operate, children of foreigners whose mother-tongue is not French or who cannot prove that French is their usual spoken language, are forbidden from attending the French school.[406]

(b) South Africa

South Africa is similar to Belgium in that two major linguistic groups have existed with the weaker group, albeit majority, having gained official status in the face of the stronger language group.[407]

In the 19th century, English became the chief language of commerce and public life. Africaans or Dutch remained the language of the home.[408] After the Boer War, the Articles of Capitulation guaranteed language rights in public schools but provided for only three hours per week for the Dutch language. Separate Dutch church schools were thus established to overcome the inequity.[409]

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406. Education in Belgium, Belgium Information and Documentation Institute (Antwerp); and Report on Education Facilities, June 16, 1978.

407. AUCAMP - Op. cit., f. 394, p. 99

408. Id., p. 129

It was not until the union of South Africa in 1910 that both languages became recognized as official languages.[410] The *South Africa Act* also provides that provincial councils have authority over education, primary and secondary but not higher education.[411] Each of the four provinces has developed its own system and its own policy of education.

The *National Education Policy Act* which governs the language of instruction provides for separate schools for each language group. Children are required to enrol in the school of their home language or whichever language is best known. There is no choice of language of instruction. After Standard 8, parents may request that instruction be changed to the other official language.[412]

All students are required to study the second language. Immigrant students have the right to receive special instruction in the two official languages "where numbers warrant".[413]

Two major problems with respect to language and education in South Africa have occurred, one regarding parental choice of instruction and the other regarding mixed schools.[414]

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410. The *South Africa Act*, s. 137

411. Id. s. 85

412. Equivalent to grade 10 in Canada.

413. Source: Educational Facilities in the Republic of South Africa, August, 1981 (printed in Republic of South Africa, Cape Town)

414. This phrase is referred to as parallel - medium schools in South Africa. Dual - medium schools are schools that offer instruction in both languages to all students

In 1949, the province of Transvaal passed an Ordinance[415] that prevented a parent from choosing in which language his child would be educated. The Ordinance required the child to be educated in the language in which he was proficient. The legality of the Ordinance was questioned in court,[416] having regard to section 137 of the Constitution that provided that the two official languages are to be "treated on a footing of equality and possess and enjoy equal freedom, rights and privileges". The Ordinance was ruled to be valid in that mandatory instruction in the mother-tongue of the child is not contrary to the Constitution.

The mixed schools issue was solved by adoption of policy that separate or single-medium schools for each language group were to replace the mixed schools. The cultural, as well as the linguistic identity of the child could be supported in a single or separate school.[417] Schools are divided into English and Africaans medium schools. In a minority of schools where both English and Africaans speaking children are in the same school, parallel mother-tongue instruction is given.[418]

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415. Education Act (Language) Amendment Ordinance (Ordinance 19 of 1949 (T))

416. Swart N.O. and Nicol, N.O. v. deKock and Garner 1951 (3) S.A. 589 (A.D.)

417. ROYAL COMMISSION - Op. cit., f. 15, para. 345

418. Law of South Africa, vol. 8, Butterworth Durban (Education) p. 181, para. 156

(c) Cameroun

On October 1, 1961 the French and British Camerouns were united as the Cameroun Federal Republic, with the British Southern Camerouns becoming West Cameroun and the French Cameroun Republic becoming East Cameroun.[419] At the time of union, West and East Cameroun were two different countries, two different cultures and two different economies.[420]

The two educational systems reflected the different cultures. East Cameroun's system was one based upon French models. West Cameroun's system was based on British matriculation and grading patterns.[421] The language problem was described as "one of the most vexing faced by Cameroun's educational reformers".[422] Although it was official policy that French be taught in schools above the primary level in West Cameroun and English be taught in schools above the primary level in East Cameroun, most instruction in West Cameroun continued to be in English and most instruction in East Cameroun continued to be in French.[423]

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419. Five African States Responses to Diversity, (c. IV - "The Cameroun Federal Republic", Victor T. LeVine, 1963, Cornell University Press, p. 281)

420. EYONGETAH, Tambi and Robert Brain - A History of the Cameroun, Longman Group Ltd., 1974, p. 165

421. LeVINE, Victor T. - The Cameroun Federal Republic, 1971, Cornell University Press, p. 72

422. Ibid.

423. Id., pp. 72-73

Major constitutional change occurred in 1972 when the Federal Republic of Cameroun became the United Republic of Cameroun.[424] West and East Cameroun ceased to exist as distinct political entities[425] but English was preserved as an official language.[426]

President Ahidjo, on the eve of the constitutional change, stated:

> *"We know the role that languages play as repositories and vehicles of culture. By affirming our bilingualism in this way, it goes without saying that we intend to offer the cultures linked to our official languages the possibility of developing in such a way as to give birth, in symbiosis with our traditional cultures, to an authentic national culture."*[427]

(d) Finland

Finland is unique in that the small Swedish-speaking minority[428] is guaranteed equal treatment with the Finnish-speaking majority. A "numbers" qualification exists to limit the equality doctrine.[429]

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424. Op. cit., f. 420, pp. 180-181

425. Id. p. 181

426. East Cameroun is ten times the size of West Cameroun with two-thirds of the budget for West Cameroun coming as a direct subsidy from the Federal Government (see: "Cameroun Compexities", West Africa, April 23, 1966, p. 447)

427. Op. cit., f. 420, p. 181

428. 6.3% of the 1979 population

429. Educational Development in Finland (1978 - 1981) November 1981, Report by the Finnish Ministry of Education to the 38th Session of the International Conference in Education in Geneva

There are separate Swedish and Finnish schools and separate Swedish and Finnish school boards where numbers warrant.[430]

New legislation is pending in Finland. According to section 18 of the July 1, 1957 Act, there are separate elementary school districts for the minority language if the number of children is at least eighteen. The new legislation (Government Bill 1982:30), section 8 will reduce the number to thirteen.[431]

The language of instruction for the student is determined by his ability to speak the language as he reaches school age.[432] Instruction in the second language is compulsory from the 5th-grade.[433]

(e) Switzerland

The 1848 Constitution of Switzerland established a Council of States. The Council allowed linguistic and religious minorities, taken together, to have a blocking vote on federal legislation. The Constitution guaranteed complete equality of languages with German, French and Italian being adopted as national languages of Switzerland.[434]

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430. Royal Commission - Op. cit., f. 15, paragraphs 349-351

431. Letter dated December 7, 1982 from Professor of Law, Tore Modeen, University of Helsinki, to J. Anderson, provided these figures.

432. Royal Commission - Op. cit., f. 15, paragraph 350

433. Ibid.

434. SCHMID, Carol L. - Conflict and Consensus in Switzerland, University of California Press, London, Berkely, 1981, p. 7 (Romanche was adopted as the fourth national, not official, language of Switzerland in 1938 through an amendment to Article 116 of the Federal Constitution, see DOKA, Carl - Switzerland's Four National Languages (Pamphlet) Pro Helvetia, 1973, p. 7

The cantons or territories were given authority for education.

Switzerland's language policy is based on the cantons. Of the twenty-five cantonal units, twenty-one are officially unilingual with the language of instruction following that of the official language of the canton.

In the four mixed cantons, the general rule is that the language of instruction is dictated by the majority with study of a second language compulsory.[435]

Assimilation of migrants from other linguistic groups is primarily accomplished through the schools. Switzerland produces a large number of bilingual and plurilingual individuals.[436] Where language groups are significantly large, provision is made for two school systems.[437]

Whereas the Belgian and South African systems create strife resulting from the existence of more than one major language group in a country, Switzerland "defies the norm",[438] and represents peaceful coexistence of heterogenious people. Respect for smaller language groups, linguistic equality and over-representation of minorities in public life have been cited as reasons to explain the situation in Switzerland.[439]

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435. Id., p. 46 (The author provides this insight into the high regard accorded the learning of other national languages in Switzerland "This disposition facilitates assimilation and mutual understanding reduces prejudice."

436. McRAE, Kenneth D. - Switzerland: Example of Cultural Coexistence, Canadian Institute of International Affairs, Toronto, 1964, p. 30

437. ROYAL COMMISSION - Op. cit., f. 15, para. 347 (This compromise is unusual)

438. SCHMID - Op. cit., f. 434, (preface)

439. Id., p. 7

The rigidity of the territorial principle is mitigated by the fact that language groups tend to be concentrated geographically.[440]

Carl Doka[441] comments on modern day language questions in Switzerland. He offers useful words of wisdom in relation to "minority safeguards":

> *"Neither the linguistic minority nor the linguistic majority like to speak of 'minority safeguards'. The minority does not wish to be 'safeguarded' but respected, and the majority must not abuse its numerical superiority. The majority, in particular, must remain aware of the fact that the four national languages, and with them the four cultures emanating from them, are essential to what we understand by Switzerland."*[442]

(f) General

Other countries have Constitutions that specify educational rights for citizens. Certain basic elements are found in such Constitutions:

(a) right of citizens to an education;

(b) free primary education, usually compulsory;

(c) optional participation in religious instruction; and

(d) right to establish private schools based on religious and language preferences.[443]

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440. ROYAL COMMISSION - Op. cit., f. 15, paragraph 348

441. DOKA, Op. cit., f. 434

442. Id., p. 11

443. For examples of Constitutional provisions see: BROWNLIE, I. - Basic Documents on International Law, The Clarenden Press, Oxford, 1977: pp. 20-21, Germany; p. 26, U.S.S.R.; p. 37, India; p. 48, China; p. 55, Egypt; pp. 78-79, Venezuala

The right to an education together with prohibitions against discrimination in education are basic tenets within which the international community is governed.

3. Summary

International conventions support the general outline and scope of section 23, except for the unequal access to minority language educational rights.[444] The recognition of a parent's right of choice,[445] the use of the terms primary and secondary education, the free education concept,[446] and the optional nature of the minority education right[447] in section 23 have roots in the international documents.

The Convention Against Discrimination in Education enunciates emphatically and repeatedly, the need for equality in education in terms of quality, access to and equal treatment. Support for the claim by Canadian parents that minority instruction should be equal to that of majority instruction is found in the Convention.

The European Convention on Human Rights expressly provides for a right to an education and prohibits discrimination on the basis of language. The decisions of the European Court make

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444. Contrary to Article 3 of the Convention Against Discrimination in Education

445. Universal Declaration of Human Rights, Article 26

446. International Covenant on Economic, Social and Cultural Rights, Article 13

447. Convention Against Discrimination in Education, Article 2.(b)

it clear that any right to an education, no matter how worded, has inherent limitations. The right is not an absolute right that exists independent of the situation at hand.

Other countries faced with diverse linguistic populations serve as examples for Canada. In its preliminary research, the Royal Commission studied the developments in other countries but concluded that "the wholesale adoption of either the territorial or personality principles for a Canadian linguistic regime" would not be recommended.[448]

South Africa and Belgium have similar historical developments and have evolved linguistic education rights with some similarities. Both have provided for separate facilities or institutions for each linguistic group. Both have generally,[449] eliminated parental choice and have instituted other means of classification. For Belgium, residency is the determining factor. For South Africa, mother-tongue of the child is the determining factor. Both have mandated learning of the second or "other" official language.

Cameroun and Switzerland have regionalized linguistic instruction. The language of the area determines the language of instruction as in Belgium. Finland, as in South Africa, provides for rights of instruction dependent on the child's ability to speak the language but also adds a numbers qualification. In most of the bilingual or multilingual countries, second language training is compulsory.

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448. ROYAL COMMISSION - Op. cit., f. 15, paragraph 355

449. Since 1971, Brussels is the exception.

Regional control over education is the general pattern of distribution of powers.

For Canada, the territorial approach has been rejected in favour of linguistic rights in education being dependent upon numbers as in Finland. To be determined through judicial interpretation of section 23, are the rights in Canada regarding separate school facilities, a principle that has been recognized in the countries examined. Compulsory second language training is not in place in Canada as it is in other bilingual countries.

The Royal Commission concluded that much can be learned from other countries "but inevitably our recommendations must be formulated in terms of the Canadian context".[450]

(E) REMEDIES

1. After Breach

(a) Section 52

Section 52 of the *Constitution Act, 1982* provides that the Constitution of Canada is the supreme law. Any other law that is inconsistent with the Constitution is of no force and effect.

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450. Royal Commission - Op. cit., f. 15, paragraph 355

The rendering of a law as of no force or effect is only to the extent of its inconsistency with the Constitution. This provision is very important as it makes clear that parliamentary sovereignty is not a defence to a law passed by parliament or by a provincial government. Provincial laws could be declared null and void if in conflict with section 23 of the Charter.[451]

Existing provincial laws have been examined and have been compared to section 23 for possible inconsistencies. The most distinct and definite inconsistency was found by Chief Justice Deschênes[452] when he compared the Quebec Charter with section 23 of the Canadian Charter. His finding was that the Quebec Charter was a denial of section 23 rights and as such, he declared those provisions that were inconsistent to be of no force and effect. Section 52 is the legal authority for so declaring.

There is potential for inconsistencies to be found between the numbers test provided for in section 23 and the provincial legislated "numbers".

(b) Section 24(1)

Section 24(1) of the Charter provides a remedy for anyone whose "rights or freedoms" have been infringed or denied.

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451. See Chapter III (B) (6) for a detailed discussion of Chief Justice Deschênes judgment.

452. Quebec Association of Protestant School Boards - Supra, f. 70

There is no requirement that an Act or regulation be the source of the infringement. For section 23, this provides an avenue for a remedy when a provincial government fails to provide the rights that are granted by section 23. If there is a provincial law that infringes or denies a section 23 right, section 52 together with section 24(1) will provide the necessary remedy. Where there is no provincial law or regulation, only a government action or inaction that breaches section 23, section 24(1) will provide an appropriate remedy.

The legislation for Nova Scotia, Prince Edward Island and New Brunswick provides for a right to a minority language education if the child's mother-tongue is that of the minority. It does not recognize the same rights for the categories outlined in section 23. Section 24(1) could be used to broaden the scope of minority language education rights in those provinces by extending the rights to the children of parents who qualify pursuant to section 23 regardless whether the child's mother-tongue is that of the minority.

As the verb used in section 24(1) is in the past tense, it suggests that no remedy is possible for future or potential infringements. Due to the broader French version as well as other reasons, Chief Justice Deschênes held that section 24(1) could apply to future infringements.[453]

The scope of remedies available pursuant to section 24(1) is stated to be "whatever a court considers appropriate and

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453. Quebec Association of Protestant School Boards - Supra, f. 70, pp. 42-43

just in the circumstances". Hogg describes this new remedial power in this way:

> *"It is probable that the court could grant remedies which were not within its usual jurisdiction. Conceivably, totally new remedies could be invented. In any event, a court of general equitable jurisdiction can tailor the injunction to meet new situation, ..."*[454]

The important feature of section 24(1) is that it leaves remedies in the discretion of the court. Declarations have been found to be included within the scope of section 24(1).[455]

The European Court has shown a temperate and moderate approach when defining remedies with respect to the educational rights provided by the European Convention.[456] In Campbell and Cosans[457] the European Court cited "current economic times" as a reason not to invoke drastic measures, such as the creation of two separate schools, in order to respect the parents' convictions regarding corporal punishment.[458] The avoidance of unreasonable public expenditure was also cited.

In the Belgium language case[459] the European Court stated that the right to an education by its very nature, calls for regulation by the state; regulation which may vary in time and place according to the needs and resources of the community and of individuals provided it does not injure the substance of the right.[460]

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454. HOGG - Op. cit., f. 356, p. 65

455. Quebec Association - Supra, f. 70, p. 41

456. See Chapter III(D)(1) for a description of the European Convention as it relates to education

457. Supra, f. 391

458. See general discussion of the case in Chapter III(D)(1)

459. Supra, f. 381

460. Id., p. 860

This means that the European Court will accept the *prima facie* need for school rules, regulations and restrictions with respect to education rights. The Court will review the case in its entire context and will not grant remedies unless the substance of the right has been denied or infringed. Regulations of the right that do not affect the substance will not be the subject for a remedy.

This same reasoning could be adopted by Canadian courts when considering appropriate remedies for possible infringements or breaches of section 23. If the approach is accepted, the Canadian judicial review will be a moderate review and concentrate on whether minority language rights have been granted and not on the methods and means by which the rights are granted.[461]

(c) Reasonableness Doctrine

Section 23 by its very nature requires educational decisions or policies to be made by school authorities. In the past, judicial review of educational decisions has been limited to consideration of proper statutory authority and the good faith or reasonableness test. Lord Denning described the review authority of the judiciary in relation to policies adopted by school boards:

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461. For a contrary view of the approach to be adopted by Canadian courts, see: MAGNET, J.E. - Minority Language Education Rights, (1982) 4 Supreme Court Law Review 195 at pp. 215-216. Magnet suggests that courts will be required to provide mandatory and injunctive remedies that will resemble legislation and will reorder priorities for the expenditure of public funds.

> *"If the policy is one which could reasonably be upheld for good educational reasons, it is valid. But, if it is so unreasonable that no reasonable authority could entertain it, it is invalid."*[462]

Lord Greene in Associated Provincial Picture Houses Ltd. v. Wednesbury Corp[463] had previously enunciated this principle of "reasonableness" when considering the exercise of discretion of an authority in granting licences for Sunday cinematograph performances subject to whatever conditions are set by the authority. Lord Greene cautioned that a court must not substitute itself for the authority and act as an appeal authority. The review of the decision by a court is limited to a review of bad faith, dishonesty, or irrelevant considerations.

Justice D.C. MacDonald of the Alberta Supreme Court also adopted Lord Greene's decision. In considering whether the amount of honoraria set by a Board of Trustees was illegal, he concluded:

> *"It may be that ... honorarium for the services of each trustee might be held by a court in a proper proceeding not to be 'honoraria' within the meaning of s. 65(4)(f). For example, if the statutory power to set the honoraria were not exercised reasonably, in the sense that there has been bad faith, or dishonesty, or the board has taken into consideration matters which are irrelevant to the matter, or if the amount decided upon is so absurd that no sensible person could ever dream that it lay within the powers of the board to pay it, then it might be held that there was no statutory power to pay the amount decided upon as 'honoraria'. Such might be the effect of applying the principles enunciated by Lord Greene M.R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., [1948] 1 K.B. 223, [1947] 2 All E.R. 680, although I recognize that that was a case of the exercise of executive or administrative discretion rather than the exercise of delegated legislative power."*[464]

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462. Cummings v. Birkenhead Corp., [1972] Ch. 12, p. 37

463. [1947] 2 ALL E.R. 680

464. Vladicka v. Board of School Trustees of Calgary School District No. 19 [1974] 4 W.W.R. 159 at p. 171

Several Canadian courts adopted similar reasoning when considering parental choice of schools for their children.[468]

Recent judicial review trends in England appear to be more extensive and are commented on by McGowan in this way:

> *"Nowhere have the developments in this regard been more dramatic than in England. There the courts have a great creative tradition of law-making in the resolution of private disputes, but the parliamentary system of government has severly limited the intrusion of the judiciary into the determination of public policy. Recent decisions, however, presage a much greater role for the English courts in the review of ministerial discretion, providing palpable encouragement to those in England who have been insisting for some years now that enlarged judicial power be brought to bear in this field."*[466]

The judicial decision on which McGowan bases his conclusion is Tameside.[467] The Secretary of State for Education and Science

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465. Crawford et al v. Ottawa Board of Education, - Supra, f. 287, and see: Lapointe v. Board of School Trustees, 25 N.B.R. (2d) 91; and see: MacDonald v. School Board, 30 N.S.R. (2d) 433; and see: Howden Parents Association - Supra, f. 262

466. McGOWAN, Carl - Congress, Court and Control of Delegated Power, (1977) 77 Columbia Law Review 1119 at p. 1121

467. Secretary of State for Education and Science v. Tameside Metropolitan Borough Council, [1976] 3 W.L.R. 641, applied in Laker Airways Ltd. v. Department of Trade, [1977] 2 ALL E.R. 182; referred to in Smith and Others v. Inner London Education Authority, (1978) 1 ALL E.R. 411; and explained by Lord Salmon in Attorney-General of St. Christopher, Nevis, Anguilla v. Reynolds, [1979] 3 ALL E.R. 129, at p. 138, in this way:

> *"The Tameside case was exceptional in that the Secretary of State had to be satisfied not that the local authority had made a wrong decision in the exercise of the power conferred on them but that they had made a decision which no reasonable local authority could have made. The decision which the local authority made, that certain grammar schools should continue in existence and should not be turned into comprehensive schools, was a policy decision. It*

had ordered a school board (council) to discontinue the operation of grammar schools that were designed for students with special aptitudes. The Order was made pursuant to a statutory provision that gave the Secretary wide discretionary power to make orders as he deemed expedient if he is satisfied that a school council has acted unreasonably. The Judicial Committee of the House of Lords struck down the Secretary's act as the record did not reveal any "unreasonableness" on the part of the local council.[468]

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467. -(cont.) *may have been right or wrong but it certainly was not a decision at which no reasonable local authority could have arrived. Similarly, the local authority's decision that there was plenty of time before the beginning of the next term in which to make the necessary arrangements for the grammar schools to continue in existence may have been right or wrong. It was, however, impossible for the Secretary of State to have been satisfied that no reasonable authority could have come to that decision on the evidence which was before them. Accordingly, it followed either that the Secretary of State had misdirected himself as to the true meaning of s. 68 of the Education Act, 1944 or that no reasonable Secretary of State could have been satisfied that the local authority's decision was a decision at which no reasonable local authority could have arrived."*

468. Canadian acceptance of the English trend is in doubt as Tameside was distinguished in Re Irving Oil Co. Ltd. et al v. Attorney-General of Nova Scotia, 106 D.L.R. (3d) 465 by Chief Justice MacKeigan of the Nova Scotia Supreme Court (Appeal Division), although it was referred to by Chief Justice Deschênes in the Quebec Charter decision

The common law test of reasonableness permits a court to review in a limited sense administrative and statutory acts of school boards. This includes policy decisions such as those that may relate to the implementation of section 23. For example, a school board may determine that, although there are sufficient numbers to justify minority language instruction in the local school, the children will be transported to a different school for the instruction. Parents of smaller children may object to the bussing requirement and argue that the instruction should take place in the local school. If the broadened review as suggested by Tameside[469] is followed, it will not only be necessary to show lack of bad faith, it will also be necessary to show some kind of objective reasonableness for the decision to bus instead of providing instruction at the local school. The school board will be required to show that it had some objective reason to support the educational decision it made. Although the Court will not become an appellate authority, it will determine if the decision is one that a reasonable school board would make based on all the relevant facts.

There is a further "reasonableness" test built into the Charter by express reference. Section 1 of the Charter limits the rights and freedoms set forth in the Charter to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". This limitation applies to section 23.[470]

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469. Tameside - Supra, f. 467

470. Quebec Association - Supra, f. 70, p. 52

In the absence of express limitations on fundamental rights or a Bill of Rights, both the European Court[471] and the American courts[472] have recognized such limitations to be implicit. No rights are absolute. In Canada, the limitation has been expressly described in section 1.

Chief Justice Deschênes provided a judicial interpretation and application of the "reasonable limits" phrase of section 1.[473] The three fold test for determining "reasonable limits" includes a means proportionate to the aim, evidence of the contrary implies evidence of a wrong that hurts common sense, and a caution for a court not to substitute its opinion for that of the legislation. Prior to the formulation of the test, Chief Justice Deschênes held that a denial of a right is not a limit.[474]

Chief Justice Evans of the Ontario High Court of Justice in Re Federal Republic of Germany v. Rauca[475] determined that the

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471. Belguim Language Case - Supra, f. 381, see: f. 460

472. Tinker - Supra, f. 99; see also, cases listed under f. 100

473. See f. 313. His decision was upheld on appeal and has been followed by Justice Durand of the Quebec Superior Court in Re Jamieson and the Queen (1982) 70 C.C.C. (2d) 430

474. Supra, f. 70, p. 65. The same conclusion was reached in Re Ontario Film & Video Appreciation Society and Ontario Board of Censors (March 25, 1983) 19 A.C.W.S. (2d) 62 (Ont. Div. Ct.)

475. 70 C.C.C. (2d) 416, affirmed on appeal 41 O.R. (2d) 225 (Ont. C.A.)

onus rests on the government[476] that is on the party seeking to rely on section 1, to demonstrate that the restriction is reasonable.[477] He further concluded that "reasonable limits" imports an objective test as follows:

> *The phrase "reasonable limits" in s. 1 imports an objective test of validity. It is the judge who must determine whether a "limit" as found in legislation is reasonable or unreasonable. The question is not whether the judge agrees with the limitation but whether he considers that there is a rational basis for it -- a basis that would be regarded as being within the bounds of reason by fair-minded people accustomed to the norms of a free and democratic society. That is the crucible in which the concept of reasonableness must be tested."*[478]

Both Chief Justice Deschênes and Chief Justice Evans make it clear that a court is not to "yield to the temptation of too readily substituting their opinion for the legislature".[479] A court is to examine the legislation and determine if the legislation, from an objective viewpoint, is a reasonable limit justified by the legitimate government aim underlying the limitation.

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476. His interpretation is editorialized by KOBLIN, Hal, editor of Rights and Freedoms, (September-October, 1982) in this way: "Section 1 has been defined in a fairly narrow context by a provincial superior court. By ruling that the Quebec government had to establish the reasonableness of its "arguments in an overwhelming way", the decision has gone a long way towards ensuring that the rights prescribed by the Charter are maintained in actual practice."

477. Rauca - Supra, f. 475, p. 427.

478. Id., pp. 427-8

479. Quebec Association, Supra, f. 70, p. 77

This limitation on the rights provided by section 23 closely resembles the past common law review of the exercise of administrative or statutory powers based on the concept of "reasonableness". The section 1 review is in the context of limits prescribed by law, whereas the common law "reasonableness" review is in terms of the exercise of an administrative or statutory power. Section 1 allows reasonable limits prescribed by law to be placed on section 23 rights and the common law requires that educational decisions relative to minority language instruction be reached "reasonably".

An example of a possible "reasonable limit" prescribed by law is provincial legislation that defines necessary numbers to warrant minority language instruction. Manitoba, for example, has legislated 23 as the required number.[480] Such legislation is a limit, not a denial, of minority language instruction. A court would review the numbers limitation and determine whether there is a rational or objective basis for the limitation. The court's opinion as to reasonable or proper numbers would be irrelevant. The judicial review would be an objective assessment of the evidence presented by the government in justification for the limit.

In summary, a reasonableness review will occur both with respect to implementation of the rights that accrue and with respect to any limitations that may be placed on the rights.

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480. Manitoba *Public Schools Act*, Supra, f. 254

(d) United States Remedial Action

The Brown[481] decision marked the beginning of judicial intervention in educational decisions in the United States. The United States Supreme Court was asked to resolve a social issue, namely, racial segregation in schools, and to provide solutions. Chief Justice Warren referred to the importance of education and the need for equal opportunities:

> *"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."*[482]

This passage may be interpreted as the rationale for judicial determination of major educational policies.

Later, in one of the numerous school segregation cases that followed Brown, Judge Skelly Wright commented on the judicial role:

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481. Brown et al v. Board of Education of Topeka Shaunee County, Kan et al, 347 U.S. 483 (1954)

482. Id.; p. 493

> *"It is regrettable, of course, that in deciding this case this Court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance. So it was in Brown v. Board of Education. ... So it is here."*[483]

Since Brown, the judicial intervention in educational policy-making has continued and flourished.[484]

Some insight into factors to be considered by American courts when reaching social or policy decisions in education is found in the following passage from Guadalupe Organization v. Tempe Elementary School District[485] where equal educational opportunities was again considered:

> *"Responding to this question also involves considering the interests of the children being educated, their parents, and the local school authorities, the respective roles of the state and federal governments, the competency of the federal courts to undertake the requested education oversight, and, at least in this case, the nature of the social compact that binds this Nation together."*[486]

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483. Hobsen v. Hansen, 269 F. Supp. 401 (D.C.D.C. 1967) p. 517 (this statement is described as "Parting Word")

484. HAZARD, William R. - Education and the Law, (2nd Ed.), MacMillan Publishing, The Free Press, New York, 1971, at p. 277 The author writes "Court defined educational policies, a concept contrary to the widely held notion that state legislatures and the local school board defined policy, are both a reflection and an initiator of change in schooling."

485. 587 F. (2d) 1022 (9th Cir.) 1978 U.S. Court of Appeals

486. Id., p. 1025

The U.S. Supreme Court did not order special remedies in Brown. It held that the "separate but equal" doctrine was unconstitutional as it did not provide equality of treatment. The doctrine contravened the Fourteenth Amendment of the American Bill of Rights which provided for equal protection of the laws. Chief Justice Warren dealt with the question of remedies in this way:

> *"Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question -- the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument."*[487]

The court thus concluded that although it was prepared to set general broad guidelines, it was not prepared to mandate how the decisions would be implemented without assistance from the parties. In other words, the school officials were required to find solutions that would ultimately pass judicial scrutiny.

In Brown II,[488] the sequel to Brown, the Supreme Court considered the formulation of decrees for the elimination of separate or segregated schools. As many implementation plans had already begun and due to the varied local school problems, the court again left

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487. Brown - Supra, f. 481, p. 495

488. 75 S. Ct. 753 (1955)

the matter of remedies to the parties involved. It also remanded the cases to the original courts to provide the judicial appraisal of the implementation plans as need arose. Chief Justice Warren stated that "courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles".[489]

Numerous desegregation cases evolved as remedies were not easily found or implemented. Gradually, two desegregation plans evolved; bussing[490] and reorganizing of school district boundaries.[491]

The Fourteenth Amendment guarantee of equal protection has been alleged to include bilingual-bicultural education. In Lau v. Nichols,[492] the U.S. Supreme Court avoided deciding that issue. A class action was brought by non-English-speaking Chinese students. The students sought relief against unequal educational opportunities. The language deficiency was viewed as resulting in unequal opportunities in the school system and as such, should be remedied. Justice Douglas emphasized that the failure of the school district to teach remedial English excluded Chinese-speaking students from any meaningful education.[493]

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489. Id., p. 299

490. Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1 (1970)

491. Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33 (1970) (restricting of attendance areas)

492. 94 S. Ct. 786 (1974)

493. Id., p. 568

The decision in favour of the petitioners was founded in the *Civil Rights Act, 1964*[494], which banned discrimination on the grounds of race, colour or national origin in any program or activity receiving federal financial assistance. Affirmative remedial efforts to give special attention to linguistically deprived children was the remedy for the breach. Justice Blackmun, in a separate opinion, made it clear that the same decision would not result if only a few students claimed relief.[495]

Lower courts have been faced with constitutional claims to bilingual and bicultural education. The Lau decision only dealt with remedial action for students who were not proficient in English. It did not deal with a request for a bilingual-bicultural program for an identifiable ethnic group. In 1978, in Guadalupe,[496] the United States Court of Appeals determined that no constitutional duty existed for school districts to provide bilingual-bicultural education to non-English-speaking students.[497] The court determined that measures to cure language deficiencies was sufficient. The court also concluded that "appropriate action" pursuant to the *Equal Educational Opportunity Act of 1974* need not include bilingual-bicultural education and that

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494. 42 U.S.C. 2,000 d (1964)

495. Lau, Supra, f. 492, p. 572 ("numbers are at the heart of this case")

496. Guadalupe - Supra, f. 485.

497. Support for this decision is found in Keyes v. School District No. 1, 521 F. (2d) 465 (10th Cir. 1975); Otero v. Mesa County Valley School District No. 51 408 F. Supp. 162 (D. Colo. 1975); and Morales v. Shannon, 366 F. Supp. 818 (W.D. Tex 1973)

the *Civil Rights Act of 1964*, relied on in Lau, provided no remedy or requirement for bilingual-bicultural education. The appellants, elementary school children of Mexican-American and Yaqui-Indian origin sought teachers, and curriculum for a bilingual-bicultural education program in order that they might receive benefits equal to the benefits of English-speaking students.

The denial of a bilingual-bicultural program has not been consistent by American courts. In Serna v. Portales Municipal Schools,[498] the court found an unconstitutional denial of equal eduational opportunity. Spanish surnamed students claimed discrimination against the City of Portales school system for failure to provide bilingual instruction that takes into account special educational needs of the Mexican-American student. The following were cited as examples:

(a) failure to hire teachers of Mexican-American descent;

(b) failure to structure a curriculum that takes into account the particular education needs of Mexican-American children;

(c) failure to structure a curriculum that reflects the historical contributions of people of Mexican and Spanish descent to the State of New Mexico and the United States; and

(d) failure to hire and employ administrators of Mexican-American descent.

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498. 351 Supp. 1279 (D.N.M. 1972) U.S. District Court; affirmed on other grounds on appeal, 499 F. (2d) 1147 (10th Cir.)

The district court found that the children did not have equal educational opportunity and ordered the school system to submit a plan for remedial action.

On occasion, American courts have considered bilingual-bicultural education claims in relation to remedies fashioned to eliminate *de jure* segregation. The District Court in United States v. Texas[499] concluded that, with the goal in mind of true integration as opposed to mere desegregation, it could issue an order in relation to an educational plan which would give special educational consideration to Mexican-Americans who should be recognized as a separate group. The court found:[500]

(a) Mexican-American students in the State of Texas are a cognizable ethnic group and may avail themselves of the protections afforded by the Fourteenth Amendment.

(b) Mexican-American students have been subjected, over the years, to unequal treatment with respect to educational opportunities.

The comprehensive linguistic and cultural plan approved by the court as an appropriate remedy included the following elements:[501]

(a) professional staff treatment assignment;

(b) curriculum design and content and instructional methodology;

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499. 342 F. Supp. 24 (E.D. Tex. 1971); aff'd 466 F. (2d) 518 (5th Cir. 1972) at p. 24

500. Ibid.

501. Id., p. 29

(c) student assignment and classroom organization;

(d) staff development;

(e) parent and community involvement;

(f) special education;

(g) non-structural support;

(h) funding and timing; and

(i) evaluation of comprehensive plan.

In another school desegregation case, United States v. Texas Education Agency,[502] bilingual-bicultural education was held to be a proper remedy to eliminate *de jure* segregation. In the desegregation decree, the court provided that:[503]

(a) active efforts to recruit Mexican-American teachers take place;

(b) the ongoing bilingual-bicultural program continue; and

(c) the board locate newly constructed schools in such a manner as to maximize integration or court approval of the school site would be withheld.

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502. 532 F. (2d) 380, 398 (5th Cir.) vacated sub-nom Austin Independent School District v. United States, 429 U.S. 990, 97 S. Ct. 517, 50 L. Ed. (2d) 603 (1976). The judgment was vacated by the U.S. Supreme Court and referred back for reconsideration to determine if no violation. The remedy was not in issue.

503. Id., p. 398

These decisions suggest the following approach:

(1) Broad constitutional policies will be determined by the courts.

(2) Specific remedial plans will be devised by school authorities subject to judicial scrutiny based on good faith.

(3) Bilingual-bicultural programs are not guaranteed by the constitution.

(4) Bilingual-bicultural programs may form part of remedial measures to eliminate *de jure* segregation.[504]

The American approach may lend itself well for adoption by Canadian courts. The administrative detail or regulations would be formulated by school authorities and courts would set the broad policies and review the regulations on a "good faith" test. This clear separation of function allows the past "reasonableness" common law doctrine to be maintained as a review test for the lower levels of decision or policy-making. Courts would use their new judicial policy-making constitutional authority for formulating broad policy principles.

The bilingual-bicultural issue in the United States is dissimilar to the constitutional issue in Canada as the constitutional provisions bear no relationship to each other. The constitutional

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504. For details of current legislative developments in bilingual-bicultural education in the United States, see: KIRP, and YUDOF Educational Policy and the Law, (2nd Ed.) McCutcheon Publishing, 1982, pp: 800-811

findings are thus inapplicable. Notwithstanding the constitutional inapplicability, the remedial plans for bilingual-bicultural programs offer useful suggestions for the implementation of minority language educational rights in Canada. The various elements include bussing, teacher hiring and cultural activities.

(e) Court Challenges Program

On December 21, 1982, the Secretary of State, the Honourable Serge Joyal and the Minister of Justice, the Honourable Mark MacGuigan announced an extension to the Court Challenges Program of the federal government to include the equal status of official languages in Canada and minority education rights. Since 1978, the Program was directed to challenges based on sections 93 and 133 of the *Constitution Act, 1867*.

The stated purpose of the Program is to seek court rulings clarifying language rights guaranteed by the Constitution. Financial assistance in the case of section 23, is judged on stated criteria including:

(1) the issue is to involve a challenge based on section 23;

(2) the issue is to have substantial importance and legal merits;

(3) the issue should have consequences for a number of people;

(4) duplication is to be avoided;

(5) generally, intervenors are not to be funded; and

(6) no assistance if the authorities concerned have given assurances to modify the legislation or action under challenge.[505]

Six challenges have been accepted for funding since 1978.[506]

This Program enables or assists individuals and groups with limited financial resource to challenge breaches of or assert rights under section 23.

2. Before Breach

Education touches every person in Canada in some way. Its importance and relevance to each and every one of us is shown by the traditional grass-roots, lay control over school decisions. Litigation involving school affairs tends to cause irreparable damage to schools and communities. Parents fight with each other, teachers

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505. Source: News Release dated December 21, 1982

506. Included in those six, are Mecure v. The Queen, [1981] 4 W.W.R. 435; Bureau des écoles protestantes du Grand Montréal v. Procureur général du Quebec (a case involving the right of school boards to receive grants for students who were considered "illegals" by officials enforcing Bill 101); and Quebec Federation of Home and School Associations et al v. Attorney-General of Quebec (a case involving the resolution of problems faced by numerous students wishing to attend English language schools following the introduction of Bill 101)

and the community are hostile to each other, and the adult confrontations are reflected by students in class. The Attorney-General of Ontario, Roy McMurtry, was quoted in the Ottawa Citizen as stating that "he feared a court battle over Franco-Ontarians' right to control their own schools because it would divide the francophone community".

Magnet[507] best describes how undesirable court action is for implementation of section 23:

> *"Although litigation is inevitable, the cases will produce certain undesirable effects. Litigation of this type creates frictions within the community. It places the government in an adversarial position to large segments of the population. No matter what the outcome of the litigation, certain segments of the public will feel wronged. The government loses initiative, and the ability to control events. It is placed in the position of reacting to crises as they develop."*

Methods for achieving a peaceful, non-litigious resolution are offered.

(a) Inter-Provincial Co-ordination

The need for inter-provincial co-ordination is obvious. Many conflicts by virtue of section 23 will be avoided if proper inter-governmental co-ordination and communication take place.

The Special Joint Committee in 1972 came to the conclusion that education should remain an exclusively provincial power. It

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507. MAGNET - Loc. cit, f. 461, p. 214

did express the hope and desire for continued co-operation and co-ordination through the establishment of a permanent national office.[508]

The Task Force on Canadian Unity received proposals for the creation of a department of education to co-ordinate and expand activities in education. Greater federal-provincial co-operation was stated to be a desirable asset in areas such as curriculum development, education research and the methodology of teaching French or English as a second language.[509]

The Council of Ministers of Education, Canada (C.M.E.C.) is an establishment that could be structured to provide this co-ordinating function. Created in 1967 by the provincial Ministers of Education, the Council's terms of reference include providing provinces with a mechanism for consultation in educational matters of mutual interest and concern and facilitating inter-provincial co-operation in a broad range of activities.

When the Premiers at the St. Andrews Constitutional Conference resolved to investigate the provincial state of affairs in language instruction, it was the C.M.E.C. that produced the extensive report[510] for the use of the Premiers.

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508. SPECIAL JOINT COMMITTEE - Op. cit., f. 24, p. 78

509. Task Force on Canadian Unity, A Time to Speak - The Views of the Public Minister of Supply and Services Canada 1979, p. 115

510. Council of Ministers of Education, Canada - Op. cit., f. 137

The C.M.E.C. meets regularly at least once a year. It has a permanent Secretariat in Toronto with a staff of approximately twenty-five. A committee on language instruction has been established primarily to review and co-ordinate minority language instruction.

A further role for the C.M.E.C. is in the planning and research area. The Royal Commission recommended the creation of a Language Council to act as a research centre and as a clearing house for information.[511] The Language Council was recommended to be established by the federal government. Although the federal government accepted the education recommendations of the Royal Commission,[512] no action has been taken on this recommendation.

The Official Languages Commissioner fully supports the need for such service.[513] He recommends federal funding for the Council.

The functions described by the Royal Commission for the Language Council could easily be performed by the C.M.E.C. These functions include:

(1) close liaison with provincial departments of education;

(2) development of a comprehensive library on all aspects of language training;

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511. ROYAL COMMISSION - Op. cit., f. 15, recommendation 46

512. Statement - Supra, f. 18

513. Language Commissioner Annual Report - Op. cit., f. 187, p. 39; and Op. cit., f. 194, p. 35

(3) clearinghouse for information

(4) co-ordination of curriculums;[514] and

(5) employment of experts to render advice.

The C.M.E.C. could also develop language tests for provincial implementation in determining which citizens qualify under section 23(1)(a) of the Charter for instruction rights. This would be a logical function if it assumes the functions recommended by the Royal Commission for a Language Council.

The provincial control over education would be maintained and furthered if the C.M.E.C. assumes these functions as opposed to a federal government funded entity. If provinces expect to retain authority over education, they must be prepared to assume the responsibilities and costs that go with providing a suitable and effective language program.

It is admitted that the C.M.E.C. has not performed these functions in the past in spite of an obvious need for the services. It has made some efforts,[515] particularly as a gatherer of information.

At a meeting of representatives of the Canadian Association for French Language Education, the Canadian Parents for French, the Canadian Association of French Language School Trustees, the Canadian School Trustees' Association, the Association of Universities and Colleges of Canada, the Canadian Teachers' Federation and the Official

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514. ROYAL COMMISSION - Op. cit., f. 15, pp. 263-265

515. Official Language, 1981 Annual Report - Op. cit., f. 190, pp. 38-39

Languages Comimssioner, to discuss a proposal for a Canadian language centre, all the representatives agreed to the following:

> "* *that there was a lack of and a need for readily available information and mechanisms for exchanging information on official languages in education.*
>
> * *that a national centre should complement not duplicate the work being done by existing resource and research centres; and*
>
> * *that the centre's services should operate in such a way that both English- and French-speaking Canadians would benefit and feel entirely at home using them."* 516

Following that agreement, discussions took place between the Canadian Teachers' Federation and C.M.E.C. with a view to finding means of responding to the identified needs.

The need is clear, the C.M.E.C. should undertake these functions at its earliest opportunity.

(b) Federal Funding

Although education is and should remain an exclusive provincial function, the federal government should provide funding to assist with minority language instruction.

Bilingualism in general, and minority language instruction specifically, are federal government commitments. Priorities in education have been determined by the federal government with the implementation of section 23. The provinces, during the constitutional discussions, until the November accord, maintained that education matters should

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516. Id., p. 39

be left to provincial determination. The federal government persisted with its proposal to constitutionally enshrine section 23 in spite of the disagreement of the provinces. Ultimately the provinces, with the exception of Quebec, agreed in order to reach a consensus on the Constitution generally.

Since minority language education is a federal government priority, it is logical that the federal government provide funds for its implementation.

The Royal Commission recognized the need for federal funding of minority language instruction in two of its recommendations:

> *"26. We recommend that the federal government accept in principle the responsibility for the additional costs involved in providing education in the official minority language. (§ 502)*
>
> *27. We recommend that the federal grant to each province be based on the number of students attending official language minority schools in the province, and that the grant be 10 percent of the average cost of education per student within the province. (§ 504)*

The Official Languages Commissioner describes the need for federal and provincial funding in this way:

> *"From the point of view of the taxpayer, the lines of responsibility are clear: the Federal Government is committed to financing as generously as possible educational programmes which fulfil national priorities. The provincial governments, for their part, have the responsibility to see to it that this money is used in ways that enable young Canadians to meet their first and second language needs to the fullest possible extent."*[517]

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517. Language Commissioner Annual Report - Op. cit., f. 190, p. 37

The Canadian Bar Association agreed that federal funding is necessary for the implementation of minority language programs by stating that:

> *"... but there is no doubt that with the support of federal grants -- linguistic equality of the official languages being a national goal -- it could be accomplished."*[518]

Provincial legislative authority was found not to be incompatible with federal grants by the Royal Commission on National Development in the Arts, Letters and Sciences, 1951, as follows:

> *"There is no general prohibition in Canadian law against any group, governmental or voluntary, contributing to the education of the individual in its broadest sense. Thus, the activities of the Federal Government and of other bodies in broadcasting, films, museums, libraries research institutions and similar fields are not in conflict with any existing laws."*[519]

The federal government has accepted a role in the funding of minority language education. In order to bring about the Royal Commission recommendations, it implemented a financial support program composed of two parts:

(1) formula payments;

(2) non-formula payments.

The formula payments were designed to cover the additional costs of minority language education. They are based on average provincial

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518. Canadian Bar Assoc. - Towards a New Canada, Canadian Bar Foundation, Montreal, (1978), p. 26

519. Report of the Royal Commission on National Development in the Arts, Letters and Sciences, (1951) pp. 7-8

education costs and enrolments.[520]

The non-formula programs cover special projects, language training centres, minority official language teacher training institutions, official language fellowships, teacher bursary, travel bursary, official language monitor programs, and summer language bursaries.[521]

There are two problems with the current federal plan:

(1) Funding has been frozen since 1979 because the federal and provincial governments have failed to negotiate a new plan.[521A]

(2) The funding does not cover capital projects.

The disagreement between the federal and provincial governments centres around non-accountability by the provinces for the funds.[522]

The answer to the disagreement is to require the provinces to show positive results in the area of minority language education.

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520. Federal-Provincial Programmes for the Official Languages in Education - Supplementary Tables (Secretary of State, November 1981) There are four formula programmes: (1) elementary-secondary official language (9%); (2) elementary-secondary administrative costs (1.5%); (3) post-secondary (10.85%); and (4) elementary-secondary second official language (5%)

521. Id., p. 5-8

521A. In December, 1983 a transfer agreement was signed between the Federal-Provincial governments for $600 million over the next three years for minority language.

522. For a general description of the funding and the provincial positions, see: Canadian Parents for French (National Newsletter, January, 1981)

If the federal government concentrates on results and avoids ear-marking grants and implementing control devices so as to usurp provincial education authority, it will maintain the proper federal role.

Provinces for their part, must be prepared to show positive results if federal funding is to continue. It is agreed that the provinces should determine educational priorities and the means of achieving those priorities. It is not agreed that the provinces demonstrate no tangible positive results.

Monies for capital projects are needed if mixed schools are to be eliminated. The federal government has identified the need for separate schools. It should now assume some responsibility for attainment of that goal by making provision for capital funds.

(c) Provincial Legislative Action

Conflicts between section 23 and existing provincial legislation have been examined[523] and should be eliminated by the applicable provincial government at its earliest opportunity.

The design of section 23 includes flexibility to take account of prevailing circumstances. This general design would not be well-served by extensive provincial legislation. There are three areas, however, where provincial action should take place.

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523. See Chapter III(B)

First, all provinces should implement through legislation, an advisory role for members of the minority language group.

Several provinces have made provisions for advisory committees, either at the ministerial level or at the local school board level. Manitoba and Ontario have created Languages of Instruction Advisory Committees (Commissions) to advise the Ministers of Education. These committees are described in and guaranteed by legislation.

Other provinces have established on an informal basis similar advisory committees for its Ministers of Education. Legislation should be enacted in all provinces to guarantee this role and machinery for minority groups. The duties and responsibilities will vary from province to province depending on the needs. Before implementing the legislation, meaningful consultation with representatives of the minority group should take place. One of the roles for such committees would be to act as a watchdog for the Minister with respect to minority language instruction in the province.

Second, each province should ensure that permissive legislation is in place to allow school boards flexibility in implementing section 23. Arrangements between boards for minority language instruction including joint operation of a school, must be permitted by legislation. The Nova Scotia model[524] for joint operation of a school is worthy of consideration as are the Manitoba[525] and Prince Edward Island[526] models which provide for groupings of students from more than one jurisdiction.

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524. *Education Act*, - Supra, f. 327

525. *Public Schools Act*, - Supra, f. 253

526. Prince Edward Island Regulation - Supra, f. 325

Third and finally, provincial governments should ensure that funds are available for the elimination of mixed schools. New Brunswick and Ontario have legislation and a grant structure in place for this objective. The evidence is conclusive that mixed schools are detrimental to the minority groups. Every effort should be made to eliminate such establishments.

(d) Federal Remedial Education Powers

Section 93(4)[527] of the *Constitution Act, 1867* grants the federal government remedial powers in education. Tremblay suggests this power may be used for violations of section 23.[528]

This approach to resolution of section 23 problems is not a proper solution for three reasons.

First, the wording of section 93(4) does not lend itself to application for remedying problems related to minority language instruction. Section 93(4) requires the appeal to lie from "any

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527. Section 93(4) provides:

> *In case any such provincial law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not made or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf then and in every such case, and as far only as the circumstances of each case require the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor General in Council under this section.*

528. Tremblay - Op. cit., f. 113

Act or decision ... affecting any right or privilege of the Protestant or Roman Catholic minority ...". Linguistic appeals are outside the "religious" reference so are not covered by section 93(4).

Second, any federal remedial education legislation would be viewed as interference with provincial powers. Prime Minister Trudeau referred to the federal government's role with respect to section 93(4) when he introduced Bill C-60.[529] What he failed to mention was that the federal government has never used the power due to its sensitive political nature.[530]

Third, the remedial power is obsolete. It has never been used by the federal government in the past. Hogg indicates that section 93(4) has 'in practice become obsolete".[531] The Canadian Bar Association addressed itself to this question in its Recommendations for the Constitution, in this way:

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529. Trudeau stated in referring to section 93(4) that the concept of the federal government intervening "to protect minorities in the educational system" was not new.

530. Federal legislation was prepared to settle the Manitoba school question but was not implemented due to political pressures and alternative solutions (see SCHMEISER, D. - Civil Liberties in Canada, Oxford University Press, 1964, pp. 158-166)

531. HOGG - Constitutional Law of Canada, Carswell, Toronto, 1977 p. 41 quoting DAWSON - The Government of Canada, (4th Ed.), University of Toronto Press, Toronto, 1963, p. 90

"There are definitional problems regarding when a sufficient number of persons exist to warrant providing the necessary facilities and what is the main language of instruction but these questions can usually be settled with good will. Ultimately they are questions that courts can determine or a constitutional formula might be devised to regulate the matter. Certainly, in light of the history of federal inaction regarding separate schools under section 93 of the B.N.A. Act, one cannot recommend resort to the federal government even if it were wise to have that government oversee provincial action in this area."[532]

This method of resolving section 23 disputes is not a solution to potential problems that will arise by virtue of section 23.

(e) Constitutional Reference

A constitutional reference may be resorted to by a provincial authority for a determination of ambiguous elements of section 23. Most provinces have in place legislation that allows the Lieutenant Governor in Council to refer for judicial determination and opinion "any matter he thinks fit" to so refer. Matters of law and fact may be submitted under provincial reference legislation.[533]

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532. CANADIAN BAR ASSOCIATION - Op. cit., f. 518, p. 26

533. *Constitutional Questions Act*, R.S.O. 1980, c. 86; R.S.N.S. 1967, c. 51; R.S.M. 1970, c. 180; *Judicature Act*, R.S.P.E.I. 1974, CAP J-3, s. 38; R.S.N. 1970, c. 187, s. 6; R.S.A. 1980, c. J-1, ss. 25-27; R.S.N.B. 1973, c. J-2, s. 22; Loi sur les renvois à la Cour d'appel R.S.Q. 1977, R-23

The advantages of a provincial constitutional reference are a speedy judicial determination and the avoidance of litigation both in terms of costs and controversy at the local level. These points are particularly important for education so as to avoid adverse effects on the child in the classroom. The best interests of the child must always be paramount.

The reference power in education has been employed once in the Manitoba schools question controversy.[534] The questions put to the Court related to the right of appeal to the Governor General in Council, either pursuant to section 93(3) of the *British North America Act* or section 22 of the *Manitoba Act*. The court stated that a right of appeal did lie to the Governor General in Council.[535]

The difficulty with this alternative is that section 23 is for the most part, dependent on the particular facts of each case. Any changed factual situation may result in different conclusions and remedies. For example, a court could provide an opinion that the reference to educational facilities includes a reference to a separate school building. That advanced ruling does not solve local controversies as the right to the school may or may not arise depending on the numbers test. The numbers test is a question of fact.

The other difficulty is that each province has its own unique provincial educational structure. Any provincial constitutional

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534. Brophy v. A.G. Manitoba [1895] A.C. 202

535. Ibid.

reference would have little value elsewhere in Canada.[536]

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536. See f. 284 The Ontario Attorney-General has referred the following questions to the Court of Appeal pursuant to section 1 of the Ontario *Constitutional Questions Act*

1. Are sections 258 and 261 of the *Education Act* inconsistent with the Canadian Charter of Rights and Freedoms and, if so, in what particular or particulars and to what extent?

2. Is the *Education Act* inconsistent with the Canadian Charter of Rights and Freedoms in that members of the French linguistic minority in Ontario entitled to have their children receive instruction in the French language are not accorded the right to manage and control their own French language classes of instruction and French language educational facilities?

3. Do minority language educational rights in the Canadian Charter of Rights and Freedoms apply with equal force and effect to minority language instruction and educational facilities provided for denominational education under Parts IV and V of the *Education Act* and to minority language instruction and educational facilities provided for public education under the *Education Act*?

4. Is it within the legislative authority of the Legislative Assembly of Ontario to amend the *Education Act* as contemplated in the White Paper of March 23, 1983 in relation to boards of education, to provide for the election of minority language trustees to Roman Catholic separate school boards to exercise certain exclusive responsibilities as minority language sections of such school boards?

CHAPTER IV DENOMINATIONAL, SEPARATE AND DISSENTIENT SCHOOLS

The *Constitution Act, 1867*, section 93, empowered provincial legislatures to make laws in relation to education subject to safeguards for religious minorities. Rights and privileges existing by law at the Acts of Union for denominational, dissentient, and separate schools were protected from provincial interference. Parliament was given the power to enact remedial laws to protect the minority's educational rights.

Other provinces, on entering Confederation, were governed by section 93 or by an alteration thereof. The *Manitoba Act*[537] substituted the phrase "have by law" for "~~ha~~ve by law or practice". The *Alberta Act*[538] and *Saskatchewan Act*[539] provided for altered, but similar, versions of section 93 limitations. For Newfoundland, although its Terms of Union[540] rendered section 93 inapplicable, provincial jurisdiction over education was made subject to denominational school rights and privileges.

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537. 33 Vict., c. 3 [Canada] sec. 22(1) (1870) The words "in practice" were added as there were no existing laws, only practice in relation to education in Manitoba in 1870.

538. 4-5 Edw. VII, c. 3, s. 17

539. 4-5 Edw. VII, c. 42, s. 17

540. 12-13 Geo. VI, c. 22 [U.K.] Term 17

(A) SUMMARY OF RIGHTS - SECTION 93

Schmeiser eloquently and in detail reviewed the history, judicial precedents, provincial differences and generally, all matters relating to section 93 minority rights.[541]

Not all provinces are affected by the "rights and privileges" guarantee of section 93. Only Ontario, Quebec, Alberta, Saskatchewan and the Territories have denominational tax-supported schools. The Newfoundland system is entirely denominational. In these provinces, it is clear that the guarantee affects provincial laws passed in respect of denominational schools.

It is also well settled law that there are no rights or privileges with respect to denominational schools in New Brunswick, Nova Scotia, Prince Edward Island and British Columbia.

In Ex Parte Renaud,[542] the court determined that no rights or privileges respecting denominational schools existed in New Brunswick. Chief Justice Ritchie made the following determination:

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541. SCHMEISER, D. - Civil Liberties in Canada, Oxford University Press, (1964), Chapter IV, Denominational Schools. For other similar writings see: LEFROY - Canada's Federal System, Carswell, Toronto, (1918), Chapter 26, pp. 144-149, and see: CLEMENT - The Canadian Constitution, (3rd Ed.), Carswell, Toronto, (1916), Chapter 38, and see: WHYTE, J. and W.R. Lederman - Canadian Constitutional Law, (cases and material), Butterworths, Toronto, (1975), Chapter 21, and see: McCONNELL, W.H. - Commentary on the B.N.A. Act, MacMillan, Toronto, (1977), pp. 288-293

542. (1873) 14 N.B.R. 273

> "... the rights contemplated must have been legal rights: in other words, rights secured by law, or which they had under the law at the time of the Union. If any such existed, they must have been capable of being clearly and legally defined, and there must have existed legal means for their enforcement, or legal remedies for their infringement".[543]

The same reasoning applies to the other three provinces referred to above.

Chief Justice Deschênes of the Quebec Superior Court in 1976, reviewed all major Canadian and Privy Council judicial decisions that interpret and apply the "rights and privileges" guarantee. He summarizes the jurisprudence as follows:

> "(a) to the religious minority of Saskatchewan as well as of Ontario, the Courts showed that they had to prove prejudice in order to successfully attack legislation which would contravene s. 93;
>
> (b) to the Catholic minority of New Brunswick, the Courts showed that they must bring proof of real religious rights sanctioned by the law and not a simple fact situation or simple tolerance;
>
> (c) to the Catholic minority of Manitoba, the Courts showed that they must bring proof of previous religious rights, before entry into Confederation;
>
> (d) to the Catholic minority in Ontario, the Courts showed that language is distinct from faith and that only faith enjoys the protection of s. 93;
>
> (e) to the Jewish and Protestant minorities of Quebec, the Courts showed that they also must refer to pre-confederate rights and not to simple tolerance; that religion and not language is at the basis of the protection under s. 93; but with these restraints there exists freedom of conscience in Canada."[544]

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543. Id., p. 292

544. Protestant School Board of Greater Montreal - Supra, f. 7, pp. 666-667

In the last decade the right of separate systems to dismiss or discipline teachers has, on three occasions, involved a determination of the section 93 guarantee.

The Saskatchewan legislature in 1973, enacted legislation that provided for two-level bargaining with teachers. Certain school boards alleged that the legislation prejudicially affected rights and privileges of separate schools by partially removing their right to bargain in favour of the provincial government.

Justice MacPherson of the Saskatchewan Court of Queen's Bench held that the institution of two level bargaining was *intra vires* the provincial government.[545] He also held that section 32 of the Act did trespass upon the rights and privileges of a separate school board. Section 32 provided to each party to a grievance arising out of a collective agreement between a school board and its teachers, a right to have the grievance resolved by final and binding arbitration. The definition of a grievance included "any matter involving disciplinary action by a school board against a teacher except dismissal". Justice MacPherson concluded:

> *"Thus, a grievance could get to binding arbitration without a board's consent and involve one of the rights and privileges of a separate school board elsewhere preserved to it, as I have said, namely, the regulation of the selection of teachers, the administrative and instructional duties of teachers or the nature or quality of an instructional*

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545. Board of Education for Moose Jaw School District No. 1 of Saskatchewan et al v. Attorney-General of Saskatchewan et al, (1974), 41 D.L.R. (3d) 732

program, including religious instruction. It follows that I am of the view that s. 32 is ultra vires for the reason that it permits interference with the separate school board's right to operate the system to such an extent as to affect it prejudicially."[546]

The Saskatchewan Court of Appeal upheld Justice MacPherson's decision relating to the validity of the two-level bargaining scheme. The Court of Appeal declined comment on the one offending section as the provincial government had amended the section in line with Justice MacPherson's decision by the time the appeal was heard.[547]

In Ontario, two teachers were dismissed by a Catholic school board when they divorced and married outside the faith. The teachers appealed the dismissals to a Board of Reference in accordance with their general rights as teachers. The teachers were reinstated by the Boards of Reference. On appeal to the Divisional Court, the Board of Reference decision was quashed[548] when section 93(1) rights were invoked by the school board. Justice Zuber of the Ontario Court of Appeal confirmed the Divisional Court's decision and in doing so, stated:

"I take it to be obvious, that if a school board can dismiss for cause, then in the case of a denominational school cause must include denominational cause. Serious departures from denominational standards by a teacher cannot be isolated from his or her teaching duties since within the denominational school religious instruction, influence and example form an important part of the educational process. (Roman Catholic Separate School Trustees for Tiny v. The King, [1928] A.C. 363 at 390). I therefore conclude that as

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546. Id., p. 739

547. (1975) 57 D.L.R. (3d) 315 (C.A.)

548. Re Essex County Roman Catholic Separate School District v. Porter et al (1977) 16 O.R. (2d) 433 (Div. Ct.)

> *of 1867, separate school trustees in Ontario possessed the power to dismiss teachers for denominational cause. In my view, it follows that the power of the trustees to dismiss for denominational cause is a "right or privilege with respect to denominational schools" possessed by separate school supporters and by virtue of s. 93 of the British North America Act, 1867, nothing in the legislation of the Province of Ontario can prejudicially affect that right."*[549]

The Newfoundland Supreme Court distinguished the Essex County decision in 1979.[550] Justice Noel dismissed a similar argument advanced by a school board. He concluded that the phrase "denominational cause" is descriptive only and that it has no meaning in law. He distinguished the case before him from the Essex County decision on the basis that Newfoundland has no statutory Board of Reference provisions. Teacher dismissals are heard and determined by Arbitration Boards pursuant to the terms of collective agreements.

In 1982 Justice Noel continued his restricted interpretation of separate school rights in Newfoundland when he dismissed an application by a school board to set aside an award of an Arbitration Board constituted pursuant to a teacher collective agreement.[551] The school board had

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549. Re Essex County (1979) 21 O.R. (2d) 255 (C.A.) p. 57. The Ontario Divisional Court has also determined that a school board may agree to refer a dispute over discharge for denominational reasons to final and binding arbitration pursuant to the provisions of a collective agreement and thus modify rights protected under s. 93 of the *Constitution Act, 1867* (Re Essex County Roman Catholic Separate School Board and Tremblay-Webster 142 D.L.R. (3d) 479.

550. Stack v. Roman Catholic School Board for St. John's, 23 Nfld. and P.E.I. R. 221

551. Roman Catholic School Board Exploits - White Bay v. Newfoundland Teachers' Association, 39 Nfld. and P.E.I.R. 429

closed one school and assigned teachers to teaching positions under the seniority provisions of the collective agreement. Five priests with fewer years of service than the other teachers were placed in priority to other teachers on the seniority list. A grievance was filed and the Arbitration Board to which the grievance was submitted found that the seniority provisions applied to the priests and that the preferential treatment of the priests was contrary to the collective agreement provisions. The school board, in support of its position, relied upon Term 17 of the Terms of Union of Newfoundland[552] and section 19 of the *Teacher (Collective Bargaining) Act, 1973* which provided that no provision in a collective agreement could infringe upon a right or privileqe guaranteed by Term 17. Justice Noel determined that, at the time of Union, public schools in Newfoundland were conducted as denominational schools and teachers who were members of a religious order were subject to the same legislation as other teachers. The school board had no right at that time to negotiate the terms and conditions of employment as those terms were specified in legislation. As terms and conditions of a teacher's employment were uniformly dealt with in legislation and as the collective agreement relates to terms and conditions of employment of teachers, Justice Noel held that there was no infringement on a right or privilege that existed at the date of union.

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552. Supra, f. 540

Justice Noel did not consider the Moose Jaw decision[553] in either Stack or Exploits - White Bay.[554] If the Newfoundland Court had considered the Moose Jaw decision together with the Essex County decision, the outcome may have been different. Justice Noel placed great emphasis on the general application of law. In his view, legislation of general application could not be interpreted as prejudicially affecting a denominational school right. Yet, in both the Moose Jaw and Essex County decisions, the law complained of was of general application.

Further, Justice Noel distinguished the Essex County decision because it dealt with a statutory Board of Reference. The method of resolving teacher dismissals in Newfoundland was through arbitration. Yet, in the Moose Jaw decision, the Saskatchewan Court found legislation in relation to arbitration and collective agreements to be *ultra vires*.

(B) SECTION 29

Section 29 of the Charter provides that the rights and privileges guaranteed with respect to denominational, separate or dissentient schools will prevail when and if a conflict arises with a Charter provision. The words "Nothing in this Charter abrogates

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553. Supra, f. 550

554. Supra, f. 551

or derogates from" are the crux of the section. In the absence of those words, section 29 would be redundant. Section 93 of the *Constitution Act, 1867* and similar provisions for provinces who entered Confederation after 1867 have not been displaced by the Charter.

Potential conflicts between section 93 rights and Charter provisions include the freedom of religion and the equality provisions.

The legal advice given to the Special Joint Committee prior to the insertion of section 29 into the Charter was to the effect that section 29 was not needed. The Charter did not affect or interfere with any rights or privileges possessed by the religious minority schools. That advice is questionable in view of the following examples.

Section 15 of the Charter guarantees equality without discrimination based on religion. The dismissal of the two teachers by the Essex County Board was based on denominational cause.[555] The contravention by the teachers of the Catholic Church's dictates was the direct cause of the dismissals. In the absence of section 29, a strong argument could be advanced by the teachers that the denial of the right to reinstatement was discrimination based on religious reasons.

A second example of discrimination based on religion arose in Alberta in Schmidt v. Calgary Board of Education and Alberta

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555. Re Essex County - Supra, f. 549

Human Rights Commission.[556] Schmidt, a Catholic and a resident of the City of Calgary, attempted to enrol his children in the public school system. Although his children were allowed to attend the public schools, he was considered to be a Catholic school supporter, so a non-resident tuition fee was levied. Schmidt alleged discrimination based on religion and invoked the *Individual's Rights Protection Act*[557] provisions. The Alberta Human Rights Commission agreed with his allegation.

A Board of Inquiry dismissed his claim for several reasons, one of which was the group guarantees of section 93(1) for Catholic school operation. The Alberta Supreme Court disagreed and upheld his claim. On appeal to the Court of Appeal, Justice Moir dismissed his claim based on section 93 and in doing so, said this:

> "*In order to have two separate school systems, it is necessary to have a legislative method of dividing or separating the minority from the majority. That method is and always has been religion. It was held by the Supreme Court of Canada in* A.G. Can. *v.* Lavell; Isaac *v.* Bedard, 23 C.R.N.S. 197, 11 R.F.L. 333, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481, *and in* A.G. Can. and Rees *v.* Canard, [1975] 3 W.W.R. 1, [1976] 1 S.C.R. 1970, 4 N.R. 91, 52 D.L.R. (3d) 548, *it is*

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556. [1975] 6 W.W.R. 279 (S.C.); reversed [1976] 6 W.W.R. 717 (C.A.); see also: McCarthy v. City of Regina et al, [1917] 1 W.W.R. 1088 where the Saskatchewan Supreme Court held that a person who was not of the minority religious faith could not escape the obligation of being assessed for the support of the public school system.

557. R.S.A. 1980, c. I-2

essential to legislation dealing with 'Indians' that Parliament be able to define the class to which the legislation is to apply. Likewise if separate schools are to be permitted a mechanism for separating the group had to be found.

The method chosen was religion. That method existed before Alberta became a province and is thereby specifically approved by s. 17 of the Alberta Act. It is elementary to say that the provisions of the statute of Alberta are incapable of affecting the validity of the B.N.A. Act, 1867, or of the Alberta Act. The scheme, having been approved of by the Imperial Parliament, the Parliament of Canada, as well as by the legislature of Alberta, is binding. In my opinion it cannot be held to be inoperative by reason of the Alberta Human Rights Act."[558]

In the absence of section 29, based on the section 15 equality provisions, a case similar to Schmidt could have a reverse disposition.

The individual rights created and guaranteed by the Charter are limited by the minority religious rights provided by section 29. Section 29 provides no insight into the nature or extent of the group rights[559] nor does it create new rights or privileges for denominational, separate and dissentient school systems. Section 29 maintains the present position under section 93 without dilution from Charter rights.

(C) INTER-RELATIONSHIP OF SECTION 29 AND SECTION 23

Throughout the parliamentary debate and consideration of the composite parts of the Charter, no reference is made to a connection

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558. Schmidt - Supra, f. 556, pp. 721-722

559. The Protestant School Board of Greater Montreal commenced legal proceedings on February 2, 1983 to clarify the rights and privileges existing under section 93 by way of a Declaratory Motion (Superior Court #500-05-001 887-833)

between section 23 and section 29. The only exception is the refernce to section 93 not guaranteeing language rights. That argument was used in support of a need for minority language educational rights.

Without any consideration of the possible effect on section 23, section 93 rights are to prevail if a conflict arises.

1. *Constitution Act, 1867* - Education Language Rights

Pre-Charter litigation in both Ontario and Quebec established the division between religious rights and language rights.

The Privy Council examined Ontario legislation that restricted the use of French in both public and separate schools.[560] It dismissed a claim by a separate school board that the language restrictions "prejudicially affected" a right of the separate school board. The Privy Council concluded that:

(a) the "class of persons" protected by section 93 was a class according to religious belief and not according to race or language; and

(b) the broad legislative power at the time of Union to determine "the kind and description of schools to be established" did not confer a right to determine language of instruction and was restricted by the government power to regulate with respect to language.

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560. Ottawa Separate School Trustees v. MacKell - Supra, f. 6

The Quebec Superior Court adopted similar reasoning when considering language rights of Quebec Protestant school boards at the time of Union.[561] The same general power to manage schools subject to the Council of Public Instruction's right to pass regulations existed for minority religious schools at the time of Union. Provincial laws in 1976 restricting the use of English in minority religious schools were declared *intra vires* and not contrary to rights of denominational or dissentient schools pursuant to section 93.

Ontario and Quebec had no specific legislation dealing with French or English instruction at the time of Union. Saskatchewan and Alberta did have such specific legislation in 1905 when they joined Confederation. Section 136 of the Northwest Territories Ordinance[562] provided:

> *136. All schools shall be taught in the English language but it shall be permissible for the board of any district to cause a primary course to be taught in the French language.*
>
> *(2) The board of any district may subject to the regulations of the department employ one or more competent persons to give instruction in any language other than English in the school of the district to all pupils whose parents or guardians have signified a willingness that they should receive the same but such course of instruction shall not supersede or in any way interfere with the instruction by the teacher in charge of the school as required by the regulations of the department and this Ordinance.*

Section 17 of the Alberta Act and the Saskatchewan Act provided for the substitution of section 93(1) of the *Constitution Act, 1867* with a paragraph that guaranteed separate school rights

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561. Protestant School Board of Greater Montreal - Supra, f. 7

562. N.W.T. Ordinance, Supra, f. 222

and privileges that existed under the terms of Chapters 29 and 30 of the Northwest Territories Ordinance.[563] Thus, any rights or privileges of separate schools as contained in the two referenced Ordinances were given constitutional status.

A recent Alberta decision supports this status for the rights of separate schools. In R v. Lefevre,[564] the Alberta Provincial Court considered a request for a trial to be held in French. It was argued that section 110 of the Northwest Territories Ordinances guaranteed a right to a trial in French and that section 16 of the *Alberta Act* continued section 110. The court held that section 110 of the Northwest Territories Ordinance was not constitutionally entrenched by virtue of section 16, as section 16 was classified as a transitional section. In so finding, the court compared section 16 with section 17 of the *Alberta Act* and held that if the legislature had intended to guarantee language rights, it would have done so by express reference as it did with religious school rights. Both rights were classified as contentious subjects in 1905.

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563. Section 17 provides:

> *17. Section 93 of the British North America Act 1867, shall apply to the said province with the substitution for paragraph (1) of the said section 93, of the following paragraph:*
> *(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.*

564. (1982) 134 D.L.R. (3d) 329

Section 136 of the Northwest Territories Ordinance will attain constitutional status if it qualifies as a separate school right or privilege. The Privy Council when considering the MacKell[565] case held that the lack of a specific right to determine language of instruction resulted in no rights of separate schools being affected in Ontario. Section 136 does provide a specific discretionary right for separate schools in Alberta and Saskatchewan to institute French instruction. The choice of whether to offer French instruction in school or not was left to the school.

Other decisions have held that the existence of a right or privilege is not enough to guarantee the continuation of that right. In order to gain the protection of section 93(1), the separate boards must establish not only a right existing at the time of Union but also a law that prejudicially affects that right. It is not enough to establish a change in the status quo. The change must result in prejudice to the minority religious system.[566] The change must also relate to the religious nature of the separate schools.[567] The removal of the discretion of section 136 for providing French instruction with the mandatory requirement to provide French instruction if the criteria of section 23 are met will not automatically show that the separate school has been prejudicially affected.

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565. MacKell - Supra, f. 6 and f. 560

566. Board of Trustees of Roman Catholic Separate Schools of Belleville v. Granger et al (1878) 25 Gr. 570 (Ontario Chancery); and see: Regina Public School v. Gratton Separate School and City of Regina, (1914), 18 D.L.R. 571 (Sask. C.A.)

567. Re Essex County - Supra, f. 548 and f. 549

If a separate school board could show that the imposition of French language instruction adversely affected the religious nature of the school, then a conflict between section 136 of the Northwest Territories Ordinance and section 23 of the Charter would arise. In most situations, there will be no adverse effect. The exception could arise if, due to the local costs of implementing French instruction, the religious programs were cut or reduced so as to adversely affect the religious nature of the school.

The existence of section 136 does distinguish the situation in Alberta and Saskatchewan from that in Ontario and Quebec. Its existence does not automatically result in a conflict with section 23.

2. Quebec White Paper 1982[568]

On June 21, 1982 Camille Laurin, the Quebec Minister of Education, tabled in the National Assembly a White Paper that proposed major revisions to the Quebec school system.

The White Paper proposes the elimination of the present school board structure, including the confessional school boards. New school boards, drastically reduced in number, approximately 100, would be created on a non-denominational basis. All boards would

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568. The Quebec School: A Responsible force in the Community

be unified in that there would be no distinction according to religion. Some exceptions were provided for.[569]

The denominational character of French Catholic schools is viewed in the Paper as possessing problems that should be eliminated. Linguistic rights are substituted for denominational rights. Where a school board has at least three minority language schools, comprising ten percent of the population, a minority language committee with certain powers is to be created.

The White Paper was followed by Bill 40,[570] in June, 1983. Bill 40 proposes in legislative form the abolition of Protestant and Catholic school boards to be replaced by a system of common English or French language commissions.

Bill 40 recognizes the constitutional protection afforded the religious minority in that the Bill states that nothing in Chapter IX is to be interpreted so as to prejudice rights and privileges possessed

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569. The Island of Montreal was an exception. The Protestant and Catholic school boards of Montreal and Quebec City were given the option to preserve their original boundaries of 1867 and the dissentient boards were able to retain their current status. Protestant and Catholic minorities who wish to establish dissentient boards would be allowed to do so in the future.

570. Bill 40, An Act respecting public, elementary and secondary education, (tabled in June, 1983 in National Assembly of Quebec)

in 1867 by classes of persons respecting religious schools.[571] Protection is given to the areas of the cities of Montreal and Quebec within the boundaries of 1867 (elementary education only) and to five present dissentient boards. Article 338 provides for the continued right to form a dissentient school board. Other provisions of Bill 40 are made applicable to those religious boards such as control of human resources, material resources, financial resources and school curriculum.[572] Management powers with respect to control of courses of study, control of finances through the power of local taxation, and control over hiring of qualified personnel are greatly restricted[573] for school boards with ultimate control resting with the provincial government.[574]

This proposed elimination of and reduction in management powers for denominational or separate religious school boards in Quebec may, in part, directly conflict with section 93 of the *Constitution Act, 1867*. It prejudicially affects a right guaranteed for religious minorities. Lord Buckmaster[575] held that "the right of electing managers

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571. Id, Chapter IX, Articles 330-339

572. Control over these resources is given either to the Ministry or to the government. (see Chapter IV, Articles 219-291). Further, these religious boards are governed by Bill 40 except Chapter III and Division I to V of Chapter X. Those provisions relate to the new school structure such as elections for new school commissioners and their duties and responsibilities.

573. Ibid.

574. Id, Chapters IV, V, VI.

575. Trustees of the Roman Catholic Separate Schools for Ottawa v. Ottawa Corporation et al [1917] A.C. 76 at p. 81

is thus conferred on the supporters of a separate school or schools for Roman Catholics ..." in Ontario. The same is equally applicable for Quebec. Religious Protestant minorities in Quebec are guaranteed their own school boards with authority to manage their own schools.

The proposed linguistic restructuring may have merit, but those rights are not the rights that are guaranteed by section 93(1) of the *Constitution Act, 1867* and section 29 of the Charter.

Although linguistic rights are provided by section 23 of the Charter, it is the religious rights provided by section 29 that prevail. The Quebec Association of Protestant School Boards, at its Annual General Meeting in 1981 passed the following resolution:

> *"BE IT RESOLVED*
>
> *That the Q.A.P.S.B. insist that the Minister of Education accept the principle that Protestant schools require the support of a system of locally elected Protestant school boards; and*
>
> *That the Q.A.P.S.B. insist that the Minister of Education in his re-organization proposals, include the continued existence of locally elected Protestant school boards with real powers to manage, operate, maintain and develop their constituent schools."*

In October 1982, at its Annual General Meeting, Q.A.P.S.B. provided an alternative:

> *"That ... this Association wishes to indicate publicly at this time that it is prepared to accept the establishment in Quebec of democratically elected school boards organized on a linguistic basis with the functions, responsibilities and authority of existing boards, and on the condition that such school boards enjoy the same protection as that presently afforded by convention and by law to the present confessional school boards in Quebec."*

The Q.A.P.S.B.'s alternative for "linguistic" guarantees would necessitate amendments to the Canadian Constitution. The amendments

could be made by totally eliminating religious rights in section 93(1) and in section 29 of the Charter and by replacing the guarantees with linguistic guarantees. As there is no existing law affecting linguistic rights that is to be preserved, the constitutional amendment would provide the details of the linguistic guarantees.

This alternative is not recommended. Alberta, Saskatchewan and the Northwest Territories, with a relatively small linguistic French population, would be adversely affected. The religious aspect is much more significant. Ontario would also be affected. As it has a larger linguistic element, the proposal would be acceptable to some persons but would be violently opposed by the Roman Catholic community. In view of the controversy over separate school rights during the constitutional debate and the ultimate agreement to insert section 29 in the Charter, this alternative is not likely to be favourably received.

A different alternative would be to amend the Constitution so as to affect only Quebec. Section 59 of the Constitution serves as an example for different treatment for Quebec. Due to the unique situation in Quebec, this alternative may assist in the resolution of some problems that now exist in Quebec.

3. Ontario Governance of French Language

Ontario school legislation confers legal and official status upon French language elementary schools. The legislation does

not provide nor guarantee the right of French-speaking persons to govern these schools. Since the inception of the legislation in 1968, the issue of French language school governance has been debated and reviewed. As a result of meetings between Premier Davis, Minister of Education Stephenson, the Honourable Thomas Wells and representatives of French language associations, a Joint Committee on the Governance of French Language, Elementary and Secondary Schools was established in February 1982.

In its Final Report dated April 1982, the Joint Committee recommended guaranteed representation of minority language ratepayers on school boards whether public or separate.[576] In response to the Final Report in March, 1983, the two Ministers of Education and Colleges and Universities developed and circulated for response a proposal of the government regarding French language education and English-language education in a minority language situation. The proposal includes removal of "where numbers warrant" so that every child is entitled to an education in his or her language and includes the election of minority-language trustees to public boards of education where the minority language pupil enrolment consists of 500 or more pupils or represents at least 10% of of the total full-time equivalent enrolment. The minority language trustees would be empowered to exercise certain exlusive responsibility as a minority-language section of the school board.[577]

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576. Ontario Report of the Joint Committee on the Governance of French Language Elementary and Secondary Schools, April 1982, pp. 12-14

577. Op. cit., f. 288

The proposal closely resembles the Final Report except that it excludes the separate school boards from the "minority language trustees" provisions and requests the separate school supporters to consider the appropriateness of the governance concept for separate school boards and to advise the government.[578]

The proposal is aimed at guaranteeing a greater degree of control by Francophones over their schools without establishing a third school system. In view of the many responses to the proposal, particularly in relation to the non-application of the governance provisions to separate school boards and the limited governance proposed for minority language trustees, Premier Davis has announced that all options will be considered before legislation is introduced in 1984.[579]

The proposal, if made applicable to separate school boards will create conflicts within section 29 and section 93(1). The principle that separate school supporters have the right to manage and to elect their own managers for separate schools is well-established.[580] The proposal places restrictions on this right by eliminating or restricting the right of school board supporters to elect who they wish to manage.

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578. Id., p. 5-6

579. Premier Davis has stated that the province will not proceed with its proposal to guarantee Francophone school board representation until all options, including separate Francophone school boards, are examined by a government committee. Legislation is to be introduced in March, 1984. (Source: O.S.T.C. Education Reports, Vol. 8, No. 15, Dec. 12 - Dec. 16, 1983)

580. Trustees for Ottawa, Supra, f. 575

An attempt is made in the Final Report to diffuse the possible illegality if the governance provisions are implemented for separate school boards. Recommendation 10 provides that no minority language representative on a school board may move, second or vote on motions that affect majority language schools exclusively. This allows control or management of the schools to remain in the hands of the "religious" trustees for majority language schools. That does not eliminate the interference with the exclusive right to manage that arises on matters that affect both kinds of schools, such as teacher salaries, budgets and capital projects, or matters that affect the minority language schools.

The alternative is to establish a third school system for minority language schools. This alternative was reviewed in 1977 in relation to a French language school board in the Ottawa-Carleton region. The specific recommendation of the Mayo Commission was the establishment of a French language board for elementary and secondary French language schools of the region. The board was to respect religious rights. It would cover approximately sixty French language schools under the jurisdiction of four different school boards, both Catholic and Public. Public and Catholic school supporters would be mixed together in one school system. The management of French schools would be shared and the exclusivity of religious French schools would cease to exist. The proposal would be contrary to section 93(1) as minority Catholic supporters would no longer control or exclusively manage their own language schools.

These problems may be eliminated in either of two ways:

(a) Create two language school boards, one for public and one for separate schools.

(b) Separate the language school system into two separate and distinct components, one public and one separate.

Provided the two elements are kept separate and distinct, the separate school rights should not be affected.

4. Funding

For the most part, the majority of minority language persons are also the majority of the minority religion. *Ergo*, the largest demand for minority language instruction will be on the minority religious school systems. Although a cost analysis for the implementation of section 23 is not available, it is reasonable to assume that the costs will be considerable. Separate school systems will bear the greatest burden of the costs.

Magnet[581] reviews the current inequities in funding Ontario Catholic schools. Recent legislation has eliminated an inequity in Alberta in the funding of separate schools.[582] The legislation regarding redistribution of undeclared corporate property tax was

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581. MAGNET - Loc. cit., f. 461, pp. 213-214

582. *School Act*, R.S.A. 1980, c. S-3, ss. 57-64.1 and s. 117

challenged in court and was held not to infringe the rights and privileges guaranteed by section 93(1) of the *Constitution Act, 1867*.[583]

The new Alberta legislation provides for division of undeclared corporate property tax on the basis of percentages of pupils resident in each district. For example, in an area that is served by both a public and a separate board, the public board would receive seventy percent of the tax if it has seventy percent of the pupil population of the area that are its residents. The previous legislation provided for the undeclared corporate tax to be distributed on the basis of religious percentages.

The court held that there was no negative right in favour of public schools in that section 93(1) is protective legislation for minority residents. Justice Stevenson stated that "it does not lie in the mouth of the public board to attack legislation on the basis that its rights are prejudiced."[584] As the religious percentages tended, at least in the City of Calgary, to provide smaller percentages for the Catholic school board than did percentages based on resident pupils, the public board received less money from the new provincial scheme.

This decision makes it clear that a redistribution of tax monies for public and separate school systems so as to benefit the separate school system will not result in an infringement of

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583. Calgary Board of Edcuation v. Attorney-General for Alberta and Board of Trustees of Calgary Roman Catholic Separate School District No. 1, 106 D.L.R. (3d) 415; affirmed on appeal (1981) 122 D.L.R. (3d) 249 (C.A.)

584. Id., p. 421 (Court of Queen's Bench)

the rights and privileges of section 93(1). The Ontario funding of separate school systems could be revised with no fear of a constitutional challenge.

There are primarily two sources of funding for school systems in Ontario:

(a) Direct government funding or grants;

(b) Local taxation through property assessments.

Both sources have constitutional protection for the separate school boards,[585] so may not be altered so as to adversely affect the separate school funding. Both may be altered so as to provide equal sources of revenue based on percentages of pupils either resident or actually enrolled in the school system. Unequal per pupil grants to separate schools could be eliminated and funding for grades beyond grade 10 could be implemented.

The division of corporate property tax could be modified so that it is based on percentages of resident pupils and not on religion as is now the case.[586]

(D) PRIVATE SCHOOL RIGHTS

The Minister of Education of Alberta, David King, on the advice of the Alberta Attorney-General's Department, observed:

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585. For government grants, the right is granted by the *Common Schools Act* of 1859 and the *Separate Schools Act* of 1863. For taxation, the right existed at the date of Confederation so is protected by section 93(1).

586. *Education Act* R.S.O. 1980, c. 129, s. 126

"Built into the Canadian Charter of Rights is Section 29, which is to protect the status quo ante interests of denominational, separate or dissentient schools. It is uncertain, at the moment, whether the demands of private schools for state support could now be justified on the basis that, as some dissentient schools are provided for, all should be provided for."[587]

1. Relevance of Section 29 to Religious Private Schools

When section 29 was first introduced (at the Special Joint Committee proceedings), Mr. Tobin, the speaker to the amendment to the motion made the following statement:

"Mr. Chairman, in addition there are religious schools authorized or recognized by law which are not covered by constitutional guarantees, such as the Pentecostal schools in Newfoundland and no doubt there are others in other provinces of Canada.

In other provinces, while the religiously operated schools are not authorized by law, they do not receive benefits by law, such as government provided text books and exemptions from property taxation. Consequently, if this issue is to be put beyond doubt with respect to any religious schools authorized by the constitution or by provincial law, there should be a provision in the charter which gives the same assurance to all such schools.

Mr. Chairman, I point out in the amendment we move, the words "abrogates or derogates from any rights or privileges guaranteed by or under the consttitution of Canada" -- "under" meaning under the authority of the constitution of Canada; and therefore any provincial statute or legislation which gives religious schools rights in the provinces would be protected from any challenge by the charter by the very nature of the fact that provincial legislation ultimately flows from the authority granted to the provinces in the constitution."[588]

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587. Address at Legal Issues in Education Conference, June 1982

588. SPECIAL JOINT COMMITTEE - Op. cit., f. 49, 48:127-128

The significant phrase is "by or under". The distinction between the two words was illustrated in Re Smith[589] in reference to incorporation of companies. A company incorporated by Act of Parliament, that is a Private Act of Parliament, setting up the company means a company which "by" an Act is brought into existence. A company that is incorporated pursuant to the terms and requirements of an Act, that is an Act for the incorporation of companies, means a company that is incorporated under an Act.

Justice O'Bryan in R. v. Clyne, Ex Harrap[590] reviewed the meaning of "under":

> *"In one sense every act of a body which is the creature of statute may be said to be done 'under' or by virtue of the statute creating it. In another sense the acts of such a body may be said to be done 'under' or by virtue of some provision granting a general jurisdiction to act in relation to a variety of matters. But the expression is also quite commonly used in relation to a particular act, when the general jurisdiction to act is assumed, to designate the more particular power to do that particular act. It is rash to attempt to substitute a different expression for the more simple and usual one used, but in this connection 'under' is perhaps more aptly translated by the expression 'pursuant to' than by the phrase 'by virtue of'. It is necessary to have regard to the context to determine in which sense the word is used."*[591]

The foregoing support the explanation provided by Mr. Tobin with respect to the phrase "by or under". The phrase "by or under" includes rights and privileges that are specifically set out in the *Canada Act* and that arise pursuant to its terms, including

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589. [1896] 2 Ch. 590

590. [1941] V.L.R. 200

591. Id., p. 201

provincial legislation that derives its authority from the constitutional distribution of power. However, the rights and privileges protected by section 29 are not only "by or under" the Constitution, they are also "in respect of denominational, separate and dissentient schools".

The phrase "denominational, separate and dissentient schools" is used in section 93 of the *Constitution Act*. As similar phrases are to be given similar meanings,[592] and as the *Constitution Act, 1867* and the *Constitution Act, 1982* are statutes *in pari materia*, the phrase should be given the same meaning in each Act.

It is well-established what schools qualify as denominational, separate and dissentient schools. It is equally well-established that private religious schools do not fit within the phrase.

In order to achieve the intention expressed by the mover of the motion that introduced section 29, the plain meaning of section 29 must be distorted. A broader application of the phrase in the *Constitution Act, 1982* than in the *Constitution Act, 1867* would be required. There are no known rules of interpretation that would support the meaning attributed to section 29 as expressed by its mover.

2. Equal Benefit of the Law

Section 15 of the Charter provides for equality without discrimination based on, among other grounds, religion. It will not come into effect until 1985.

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592. MAXWELL - Op. cit., f. 145

Catholic and Protestant religious minorities are given rights and privileges including the right to state-funded education in facilities separate and apart from the majority. Will section 15 in the Charter provide similar rights for religious private schools in Canada when it is in force in 1985?

"Every individual" is entitled to claim the benefit of section 15. The word "individual" has been interpreted not to include a corporation within the meaning of the Canadian Bill of Rights with respect to the reference to "discrimination".[593]

In the interpretation of the Charter, the British Columbia Supreme Court held that "any person" referred to in the Charter does include a corporation when the word "can reasonably bear that interpretation".[594] In the context of section 11(f) it does not include a corporation.[595] This decision follows Southam Inc. v. Director of Investigations and Research of the Combines Investigations[596] where Justice Cavanagh held that the word "everyone" in Section 8[597] of the Charter includes a corporation. He stated that he was giving the Charter a broad interpretation.[598]

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593. R. v. Colgate Palmolive Ltd., (1972) 8 C.C.C. (2d) 40 (County Court)

594. PPG Industries Canada Ltd. v. Attorney-General Canada, #A822930 October 14, 1982, Supreme Court of B.C., Vancouver Registry

595. Id., p. 3 Section 11(f) provides for a period of imprisonment that is not applicable for a corporation

596. [1982] 4 W.W.R. 673 (Alta Q.B.)

597. Right to be secure against unreasonable search and seizure

598. Southam - Supra, f. 596, p. 682

The context of section 15 does not lend itself to application to a corporation. Discrimination is prohibited based on personal characteristics. A corporation is not capable of possessing the personal characteristics cited. The Charter distinguishes the application of its provisions by the use of different nouns including citizen or citizens,[599] persons,[600] anyone or everyone,[601] and individual.[602] Within the context of the Charter, different meanings should result from the use of different words. "Person" is defined by various *Interpretation Acts*[603] in Canada to include "corporation". It follows that "individual" does not include a corporation.

A religious private school with corporate status would be unable to benefit from section 15 but the individual parent or group of parents who support the religious private school would not encounter the same prohibition.

Any parents who support religious schools that are Protestant in nature could not claim inequality or discrimination based on religion. Both Catholic and Protestant minorities are treated equally by the provisions of section 29 but followers of other religions would not have the benefit of section 29. The issue to be considered is whether section 15, the equality provision, grants to those persons equal status with the Protestant and Catholic minorities.

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599. The Charter of Rights and Freedoms, ss. 3, 6 and 23

600. Id., s. 11

601. Id., ss. 2, 7, 8, 9, 10, 12 and 14

602. Id., s. 15

603. Supra, f. 74 (federal) and various provincial Acts

The better view is that section 15 will not place other religious groups on equal footing with the Catholic and Protestant minorities and their rights as guaranteed by section 29.

The minority religious rights of section 29 are specific rights. The Charter and the *Constitution Act, 1867*, single out Catholic and Protestant minorities for special treatment. If all religions are to have special rights because of section 15, section 29 of the Charter and section 93 of the *Constitution Act, 1867* lose their preferential effect. In order to maintain the intent of the Charter as shown by the existence of section 29, it is necessary to maintain and continue the special treatment and not to make it universal.

Several sources provide guidance for the possible interpretation and application of section 15. It is generally accepted that equality clauses may not be taken literally as no right is an absolute right. The relationship between equality and discrimination is described in this way by one writer:

> *"One soon finds that the equal protection clause just quoted cannot be taken literally and without qualification, because persons and groups of persons differ in many of their interests, beliefs and inherent characteristics, and in the interests of justice the law must take some account of this diversity. Nevertheless, human diversity is not unlimited; it rests on an essential foundation of common humanity. So, looked at from the point of view of its total treatment of human individuals and groups, the law is a mixture of equal treatment and discrimination between them. Accordingly, the dilemma of justice for legislators and judges is to determine when equal treatment for all is the fair and proper thing and when, on the other hand, some discriminations are necessary and fair."*[604]

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604. MacDONALD, R.S. and J., and J.P. Humphrey - The Canadian Constitution and the Protection of Human Rights, c. 24, p. 410 in LEDERMAN W.R. - Continuing Canadian Constitutional Dilemmas, Butterworths, Toronto, (1981)

And further,

> *"So we see once again in this analysis that abstractions such as the equality clause are semi-manufactured products that need to be completed in more detail before they can be made meaningful at the level of everyday life. With equality clauses, we must ask in what particular respects we should legislate equality and in what particular respects we should legislate for discrimination, that is, for legally sanctioned diversity. If we make these specific decisions fairly in our courts and parliaments, we make progress towards justice, step by step."*[605]

The Belgium language case[606] is relevant. The European Court of Human Rights considered the phrase "without discrimination" as follows:

> *"It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14. On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."*[607]

The State had eliminated a subsidized French language school for children of French parents who resided in unilingual Dutch regions. French schools were State funded in other areas in Belgium. The court held:

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605. Id., p. 411

606. Belgium Language Case - Supra, f. 381

607. Id., Op. cit., f. 381, pp. 865-866

> *"Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention."*[608]

This decision exemplifies the non-absoluteness of equality provisions from the European prospective. Discrimination or unequal treatment "founded on an objective assessment" and "based on the public interest" will be permitted in spite of a "no discrimination" provision.

The Canadian Bill of Rights decisions also provide some guidance or assistance. The cases have shown that discriminatory laws are not *per se* contrary to an equality provision. Again, the question to be addressed is not whether there is inequality but whether the distinctions are fair, reasonable and justified. Hogg provides a brief summary of some of the limitations to the equality provision:

> *"But some of the cases have suggested that the critical question is whether the allegedly discriminatory law pursues a 'valid federal objective' (R. v. Burnshine [1975] 1 S.C.R. 693; Prata v. Minister of Manpower and Immigration [1976] 1 S.C.R. 376; MacKay v. The Queen [1980] 2 S.C.R. 370), and in the MacKay case McIntyre J. made an attempt to elaborate this rather vague conception, using such phrases as 'created rationally', 'not arbitrary or capricious', 'not based upon any ulterior motive', 'a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective' [1980] 2 S.C.R. 370, 407."*[609]

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608. Id., p. 884.

609. HOGG - Op. cit., f. 356, p. 52, see also: LASKIN, John - The Canadian Charter of Rights and Freedoms, Canadian Law Book Ltd., Toronto, (1982), 20.1-20.4 for a summary of the Canadian Bill of Rights equality cases.

Justice McIntyre in MacKay further stated that needs of society and the welfare of its members may dictate inequality in order to achieve the socially desirable purposes.[610]

Special treatment for Catholic and Protestant minorities has been in place since 1867. Evidence is available to show the object of this preferential status. The aim was to secure to the Protestant and Catholic minorities educational rights that existed in 1867. The provincial legislative power in education was limited in favour of the retention and sanctity of separate school rights.

During the debate on the Charter, the special status was again considered and reviewed. The ultimate provision was section 29 which, in essence, continues the special status for Protestant and Catholic minorities. It must be understood that in spite of Canada's multicultural composition in 1981 as contrasted to its bicultural composition in 1867, the special status for the two founding religious groups of Canada was entrenched in the Constitution through section 29.[611]

There are arguments, however, to be advanced in favour of equal educational status for all religious groups based on section 15 of the Charter. Section 15 is a stronger and more extensive provision

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610. MacKay v. The Queen [1980] 2 S.C.R. 370 at p. 406-7

611. GOLD, Marc. A Principled Approach to Equality Rights: A Preliminary Inquiry (1982), 4 Supreme Court L.R. 131 at p. 149. Gold refers to the problem between section 29 and the "religion" classification in view of the "equality" section.

than the equality provision of the Canadian Bill of Rights. Section 15 not only includes a reference to "equality before the law", it also includes "equality under the law", "equal protection of the law", and "equal benefit of the law". A number of grounds are specifically listed and protected by section 15 including "religion".

Tarnopolsky suggests that the test adopted for review of the Canadian Bill of Rights cases resembles the American "minimal scrutiny" test and further that a stricter review such as the "strict scrutiny" test may be applied to section 15 of the Charter.[612] He describes the test this way:

> *"When faced with an inherently suspect classification, by applying close judicial scrutiny, the court has required proof that the classification was for an overriding state interest which could not be accomplished in any less prejudical manner".*[613]

The phrase "equal protection of the law" is also part of the Fourteenth Amendment of the American Constitution. The American judiciary have applied the "strict scrutiny" test to unequal religious treatment based on "equal protection of the law" constitutional guarantee.[614] Tribe[615] observes that strict scrutiny is necessary with respect to the protection of fundamental rights in order to "preserve substantive

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612. TARNOPOLSKY, Walter - The Equality Rights Ch. 13, pp. 421-422 in TARNOPOLSKY, Walter and Gerald Beaudoin, Canadian Charter of Rights and Freedoms, Op. cit., f. 113.

613. Id., pp. 404-405

614. Hunter v. Erickson 393 U.S. 385 (1969)

615. TRIBE, Laurence American Constitutional Law, Foundation Press, Minneola, N.Y., 1978 at p. 1000

values of equality and liberty". Relatively little government activity has withstood the application of the "strict scrutiny" test in the United States.[616]

Religion is specifically included in section 15 in relation to equality and discrimination and in section 2 in relation to freedom. It follows that the special constitutional protection for religion may invoke the "strict scrutiny" test in the context of equal educational benefits for religious groups.

Notwithstanding the possible application of the "strict scrutiny" test, it is this writer's view that as the foundation for the inequality is a constitutional provision, namely section 29, preferential provincial legislation for separate school jurisdictions will withstand the judicial review.[617] That is not to say that preferential provincial educational legislation for a religious group other than as covered by section 29 will withstand the test.

For example, provincial legislation may provide for the establishment of and funding for Mennonite schools but not for Hindu or Moslem schools. It is difficult to envisage any evidence that would support such distinction to withstand the "strict scrutiny" test.

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616. Ibid.

617. R. v. W.H. Smith Ltd. Supra, f. 355. Judge Jones of the Alberta Provincial Court observed that religions in Canada are not on a "fully equal footing" as shown by section 29 (see pp. 28-29)

In summary, there is little support for section 15 providing religious rights similar to those provided for Catholic and Protestant minorities pursuant to seciton 29 of the Charter.

CHAPTER V APPLICATION OF THE CHARTER

The application of the Charter is limited to matters that are within the scope of section 32(1). As education is a provincial concern, section 32(1)(b) is of most significance. It provides that the Charter applies to the legislature and the government of each province "in respect of all matters within the authority of the legislature". The actions of the legislature as signified by legislation are covered. Subordinate bodies such as school boards and school officials must also be covered by section 32(1)(b) in order for the Charter to apply to their actions.

In Canada, a common legislative scheme is the cloaking of school boards with authority to provide for education. Many areas including minority language instruction are often left for school board determination. The parliamentary debate sheds light on the Minister of Justice's intentions with respect to the application of the Charter to school board actions:

> "**Mr. Chretien:** *The school boards are under the provincial authorities and they are created by the provinces.*
>
> *If the courts look into their actions and decide, well, they will determine what should be done.*
>
> **Mr. Epp:** *They would be able to override the decisions of the school boards who are living within the education act of that province. Is that correct?*
>
> **Mr. Chretien:** *If the decision that is made is judged by the courts to be unreasonable, the constitutional rights of the citizen will prevail."*

And further,

> "**Mr. Chretien:** *The school boards decision have to comply with the constitution of Canada. They know they have to comply with provincial legislation and they will comply with those provisions of the Canadian constitution.*
>
> *They know, when looking at any particular problem, what is the provincial law and what is the constitutional obligation, and they will pass their judgment if their judgment is considered by the court as being not reasonable, the court will so rule."*[618]

This statement clearly expresses the intention of the Minister of Justice and is useful in the interpretation of section 32.

The Supreme Court of Canada[619] considered the application of section 133 of the *Constitution Act, 1867* to regulations or by-laws of school boards. It held that section 133 did not apply to municipal or school board regulations or by-laws even when the by-laws were subject to the approval of the government, a Minister or a group of Ministers. The court was very careful to state that the decision with respect to school boards should not be interpreted as applying to any other language rights case:

> *"It should be observed in this regard that the court is solely concerned with the applicability of s. 133 of the B.N.A. Act to regulations passed pursuant to a delegation of legislative power by the Legislature of Quebec. The court refrains from expressing any view as to other issues which might relate to language rights and arise in future cases."*[620]

The non-applicability of section 133 to school board regulations and by-laws was based on two conclusions. First, as with

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618. SPECIAL JOINT COMMITTEE Op. cit. f. 49, 48:110-111

619. Attorney-General of Quebec v. Blaikie et al, (1981) 123 D.L.R. (3d) 15

620. Id., p. 26

municipalities, the lack of specific reference to school boards in section 133 was considered to be significant.[621]

Section 92(8) of the *Constitution Act, 1867* specifically references the municipal level of government. Thus, the omission of a similar reference in section 133 may not be considered to be an oversight.

The second reason was the reference in section 93 of the *Constitution Act, 1867* to religious safeguards and not to linguistic safeguards. On this point the Court made this comment:

> *"Since the B.N.A. Act is explicit on the subject of religious safeguards with respect to education, its silence on the language of school by-laws is also a deliberate one. It is a silence which speaks and it speaks against the application of s. 133 to school by-laws."*[622]

This decision is not of assistance for its finding of non-applicability of section 133 to school boards. Both the difference in language between section 133 and section 32 and the use of section 93 to assist in the interpretation are reasons to support the non-applicability of the decision. The decision does contain interesting *obiter* that may shed some light on how the Supreme Court of Canada will define the "government" reference in section 32. The Court held:

> *"Last but not least, municipal institutions constitute a distinct albeit subordinate order of Government at the local level, the administration of which is usually in the hands of locally elected mayors and members of council..."*[623]

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621. Id., p. 25

622. Ibid.

623. Ibid.

And further,

> *"Much the same can be said, a fortiori, about school bodies regulations."*

The *obiter* equates school boards to government, an equation that must take place in order for school board decisions to be covered by the Charter. Government as referred to in section 32 is a word that is not easily definable. Halsbury defines it as:

> *"From the legal point of view, government may be described as the exercise of certain powers and the performances of certain duties by public authorities or officers, together with certain private persons or corporations exercising public functions. The structure of the machinery of government, and the regulation of the powers and duties which belong to the different parts of this structure, to some extent, the mode in which these powers are to be exercised or these duties are to be performed."*[624]

This definition suggests that government includes certain functions whether performed by public officials or private persons.[625]

Justice Sellars provided a limited definition of government that excluded subservient authorities as follows:

> *"The clause refers to national governments, not to a subservient authority such as a municipal or provincial government. The qualities or character required by the body giving the order or on whose behalf it was given or puported to be given must, therefore, include essentially the exercise of full executive and legislative power over an established territory."*[626]

This decision is distinguishable as Justice Sellars was considering a phrase "government of the nation ...". The word "nation" was critical to his conclusion.

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624. Halsbury's Laws, (3rd Ed.) 187

625. This same general approach is suggested by ordinary dictionary definitions. Both Webster's Third International and Oxford Illustrated define government as the act of governing or a like phrase.

626. Luigi Monta of Genoa v. Cechofracht Co. Ltd., [1956] 2 ALL E.R. 769 at p. 773

It must also be noted that the Charter applies to the "government in respect of all matters within the authority of the legislature". "Government" is limited by the phrase that follows it. It is not enough that it be a government function. It must be with respect to a matter within the authority of the legislature.

The legislative history of section 32 is interesting but confusing. The Resolution introduced in the House of Commons in October, 1980 used "and to" as the connecting words between "government of the province" and "all matters within the authority of the legislature". It is clear that, as education is a provincial matter, it would be covered by the reference to "all matters within the authority of the legislature". As this phrase was independent of the reference to "government of the province" there was no need to prove the existance of a governmental function in order for the Charter to apply. Wording similar to the wording in the 1980 Resolution was accepted and recommended by the Special Joint Committee[627] and adopted by the House of Commons in April, 1981.

The final Constitutional Conference in November, 1981 produced a written agreement signed by nine Premiers, that outlined the changes required in the Resolution in order for it to have provincial support. The written agreement made no reference to section 32.

On November 19, 1981 Mr. Chretien introduced a new Resolution in the House of Commons. He indicated that the new Resolution

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627. SPECIAL JOINT COMMITTEE - Op. cit., f. 49, vol. 57, (Final Report)

contained new wording for section 32. The connecting words "and to" were changed to read "in respect of". Mr. Chretien offered no explanation nor did any members of the House of Commons question the change.

The change was deliberate and appears by implication to be motivated by the provincial Premiers.

"In respect of" is more limiting than "and to" as it requires the existence of both components. Not only must there be legislative authority, there must be a governmental function.

The conclusion that one is drawn to is that legislative authority is not enough to bring a matter or action within the purview and application of the Charter. Some acts that arise from legislative authority may not be subject to the Charter's application.

It is helpful to illustrate by reference to the field of education. Education is a matter, by virtue of section 93, that falls within the provincial legislature's authority. It is then a "matter within the authority of the legislature" as referenced by section 32. There may be matters regarding education that are not covered by section 32(1)(b) as the government function part of section 32(1)(b) need also be satisfied. The crux of the matter is "government".

Hogg[628] and Swinton[629] both conclude that school boards are covered by section 32(1)(b). The very brief rationale for their

628. HOGG, Peter W. A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights, Ch. 1, p. 6 in TARNOPOLSKY, Walter and Gérald Beaudoin Canadian Charter of Rights and Freedoms Commentary, 1982 Carswell Co., Toronto, Canada

629. SWINTON, Katherine Application of the Canadian Charter of Rights and Freedoms Ch. 3, p. 59 in TARNOPOLSKY, Walter and Gérald Beaudoin Canadian Charter of Rights and Freedoms Commentary 1983 Carswell Co., Toronto, Canada.

conclusions is that school boards exercise statutory governmental authority and carry out legislative functions. No elaboration is given except the general reference to the functions performed by school boards.

The Supreme Court of Ontario has ruled that "municipalities" are covered by section 32(1).[630] Justice Linden made the following statement:

> *"The Charter of Rights and Freedoms is meant to curtail absolute parliamentary and legislative supremacy in Canada. As such, the Charter addresses itself expressly to the two levels of government whose primary legislative organs have been held in the past to be sovereign within their respective spheres. Municipalities, though a distinct level of government for some purposes, have no constitutional status; they are merely "creature of the legislature", with no existence independent of the legislature or government of the province. Hence, just as the provincial legislatures and governments are bound by the Charter, so too are municipalities, whose by-laws and other actions must be considered, for the purposes of s. 32(1), as actions of the provincial government which gave them birth."*[631]

The same reasoning could be applied to school boards.

It seems clear that school boards are covered by the "government" reference. The Blaike *obiter*, the general definitions, Mr. Chretien's views, and the Ontario ruling regarding municipalities are all supportive of this conclusion.

What is not considered is the extent of the application to school boards and school officials. If it is the function being performed that is crucial for the determination of the application

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630. McCutcheon v. Corp of the City of Toronto (1983) 3 C.R.D. 125.20-01. Justice Linden was considering the validity of a municipal by-law.

631. Id., p. 22

of the Charter, then one is not able to conclude that all educational matters performed by a school board and school officials are automatically covered. There must also be an examination of the function that is being performed and a finding that the function is a government function.

The United States "state action" cases provide assistance in this determination. The American Bill of Rights contains no application clause. The Fourteenth Amendment uses the phrase "no state shall ...". It is this reference that is called "state action" and that gives rise to judicial interpretations of what matters are covered by the Fourteenth Amendment.

The first conclusion to be drawn from the American jurisprudence is that "state action" is not easily definable nor should there be firm guidelines in its interpretation. The Supreme Court of the United States has stated that the state action doctrine is to be applied on a case by case basis.[632] Swinton explains that various factors, primarily with emphasis "on the integration or "*nexus*" of the private and government activity will be considered.[633] It is the function that is being performed that is an important consideration. Tribe concludes that "the Supreme Court has not succeeded in developing a body of state action "doctrine", a set of rules for determining whether governmental or private action are to be responsible for an assented constitutional violation.[634]

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632. Burton v. Wilmingham Parking Authority 365 U.S. 715 (1961) at p. 721. In Reitman v. Mulkey 387 U.S. 369 (1967) at p. 378, the court stated that "formulating an infallible test of state action is an impossible task".

633. SWINTON, Loc. cit, f. 629, p. 56

634. TRIBE, op. cit., f. 615 pp. 1148-1149. Tribe developes an "anti-doctrine" to provide a structure for determining state action problems at pp. 1148-1174.

The second conclusion that is found is that inaction may be considered to be sufficient state action so as to invoke the Fourteenth Amendment.[635] This is clearly illustrated by the Guadalupe[636] decision where the court held that the school district's affirmatively choosing to provide a course of education other than bilingual and bicultural education, was sufficient "state action" to merit review. In this way, the court circumvented the "inaction" hurdle.

Third, both courts[637] and constitutional scholars[638] in the United States conclude with little difficulty that school boards, as recipients of legislative authority are part of the reference to state.

The fourth relevant conclusion is that a direct power grant from the state to either school boards or school officials shows state or governmental involvement. The status of the recipient of

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635. TRIBE, Op. cit., f. 615. (The author notes that the Supreme Court has had to decide whether government inaction, acquiescence or tolerance could be judged to be tacit ratification and if so, if that is a form of state action.)

636. Guadalupe - Supra, f. 485

637. Brown - Supra, f. 481; The court automatically, without discussion, applied the Fourteenth Amendment to school board policies.

638. TRIBE - Op. cit., f. 612, p. 1147; There is a brief reference to school boards being covered. It is a matter that is assumed with no justification needed.

the power is not relevant. It is the power that is granted and thus exercised that gives rise to state action. This conclusion is explained by Elkind.[639]

The final conclusion is that, although there appears to be a presumption with respect to the application of the Bill of Rights to all school board actions, there is not a similar presumption with respect to actions of school officials. For example, the administration of corporal punishment to students by school officials is covered by the Fourteenth Amendment procedural due process provisions[640] whereas searches of students and seizure of property by school officials is at times covered but not consistently.[641]

It is therefore reasonable to assume that any school board acts will be subject to the application of the Charter. Whether school officials are acting as governmental officials will be determined according to the function performed and will not automatically follow from their positions within the school organization. It is the function that is the determining factor and not the title or position held.

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639. ELKIND, David S. - State Action: Theories for Applying Constitutional Restrictions to Private Activity 74 Col. L.R. 656 at p. 663 The author further concludes at p. 691 that defining "governmental power" and "functions" is problematic: these terms have little judicial content.

640. Ingraham v. Wright 97 S. Ct. 1401 (1977)

641. In Re Donaldson 75 Cal Rptr 220 (1969) at p. 222, the court found that a Vice Principal of a high school who "searched and seized" marijuana from a student was not acting as a governmental official. He was acting "*in loco parentis*" (p. 223). See also: Mercer v. State of Texas 450 S.W. (2d) 715 (Texas Civ. App., Austin 1970) For a contrary conclusion see: State v. Mora 307 So (2d) 317 (S. Ct. of Louisiana, 1975)

CHAPTER VI GENERAL CONCLUSIONS

Our Fathers of Confederation, in their wisdom, assigned education to the provinces. Federal intervention in education has been minimal until October, 1980 when the government of the day introduced the Proposed Resolution in the House of Commons.

The Federal-Provincial Constitutional Conferences leading up to the Proposed Resolution reached basic agreement on minority language instruction within the context of provincial control. The government committees established to study and recommend regarding the Constitution agreed that education should remain an exclusive provincial power. Bill C-60 recognized provincial control over minority language instruction.

A major indicator to support the need for the proposed intrusion into provincial education power was the Quebec situation, including the Quebec Referendum and its campaign promises. The Quebec situation may have been sufficient justification for the intrusion except for one point, namely section 59. The November, 1981 addition of clause 59 to the Proposed Resolution represented a major step backward if the reason for the intrusion into provincial affairs was to assist the people of Quebec and to provide equality and mobility throughout Canada. A category of people that the minority language rights were designed to benefit have been excluded from its application.

Prime Minister Trudeau referred to section 93(4) of the *Constitution Act, 1867* as justification for federal government involvement in education. In view of the obsolescence of section 93(4), his justification becomes hollow and meaningless.

The goal of section 23 is not objectionable; it is in fact commendable. All of the provinces, with the exception of Quebec, agreed that minority language rights in education are desirable and should be implemented. The actions of the provinces in this regard since 1978 show the sincerity and willingness to achieve the goal. New Brunswick has created a school system based on language. Ontario is moving toward the elimination of mixed schools. British Columbia, with a small Francophone population, has provided for exclusive Francophone instruction based on ten pupils. In Saskatchewan, after the Leblanc decision, the government moved to change the regulations so that the Francophone wishes would be guaranteed. Alberta, in order to implement the St. Andrews Agreement, allocated an additional 2.5 million in provincial funds for the priorities that it set for minority language education.

Section 23 guarantees minority language education rights on a national basis. The better approach would have been to guarantee minority language education rights on a provincial or regional basis. Several of the objectionable or ambiguous components of section 23 would be eliminated if the individualized provincial approach had been taken. The citizenship requirement of section 23 was identified during the consitutional debate as objectionable as it limited the right to minority language instruction. The individualized approach would have eliminated this restriction in nine out of ten provinces as is demonstrated by existing provincial legislation that makes no distinction based on citizenship for access to minority language programs. Only Quebec desired the citizenship restriction.

The reference in section 23 to primary and secondary instruction is ambiguous. The individualized provincial approach could recognize and adopt the appropriate provincial language and thus eliminate the ambiguity. Mixed schools is or has been a serious problem in Ontario and New Brunswick. In order to ensure adquate language rights, more elaborate and extensive remedies are required for the elimination of mixed schools in those provinces than in other provinces. The reference to "educational facilities" could be applied more extensively in some provinces than in others where need was not proven.

Minority language education rights on a provincial or regional basis could have been achieved in several different ways. First, the Charter could have provided different minority language rights for each province or region, similar to the different provisions for religious minorities in education. Second, provinces could have retained absolute authority to legislate as circumstances warranted. Those provinces with cultural minorities of equal or greater size than French may have chosen a multicultural approach to rights in education. Third, this issue could have been left for future discussion, similar to aboriginal rights, pending individual provincial legislative action to guarantee linguistic rights.

Notwithstanding the desirability of an individual provincial approach, the flexibility provided by section 23 both by its wording and by the broad scope of judicial remedies in the Charter is ideal for a country of wide cultural and demographic differences. It allows different standards and individualized approaches for different

regions in Canada. Individualized provincial approaches may still occur through the interpretation and application of section 23 in each province. Judicial determination may provide the source of authority for fair treatment based on the situation in each province.

Parental choice of education for his or her child is a basic tenet of the Universal Declaration of Human Rights. It was recognized and adopted by the Royal Commission on Bilingualism and Biculturalism. Throughout the debate on the Constitution, parental choice was advocated except by Quebec. The Quebec government viewed parental choice as a possible threat to the French language in Quebec. Experience from other countries, such as Belgium and South Africa, show the difficulties that result when the state eliminates the parental right to determine his or her child's type of education. The Charter of Rights and Freedoms through section 23 places no obligation on parents to participate in minority language instruction.

Mandatory teaching of the second official language was recommended by the Royal Commission on Bilingualism and Biculturalism. The desirable stated objective was the introduction of second official language in Grade 1 in English language schools and in Grade 3 in French language schools. All provinces currently mandate the learning of the majority language as part of the minority language instructional program. In the Belgium Languages Case, it was argued, unsuccessfully, that compulsory teaching of Dutch to French children was depersonalizing and contrary to the European Convention. The Convention against Discrimination in Education provides that where linguistic schools are established by a minority, the members of the minority must not be prevented from understanding the culture and language of the community as a whole.

Section 23 does not specifically refer to mandatory instruction in the second language nor does it reference the amount of instruction in the minority language that is necessary in order to qualify for receiving instruction in the minority language. The legislative history of section 23 includes section 21 of Bill C-60, 1978. The federal government, in explaining the purpose of section 21, indicated that mandatory instruction in the majority language was possible if the province so required. It is unlikely that any serious challenge will be made to the compulsory majority language component of minority language programs.

The first category of parents who have rights pursuant to section 23, those whose first langauge learned and still understood is that of the minority language group of the province, suggests the need for language tests or declarations to determine linguistic proficiency. Language tests were suggested by Roger Tassé as an alternative available to provinces to ascertain entitlement of parents to minority language rights. Unfortunately, the history of the use of language tests or declarations is not encouraging. The Quebec government discarded mother-tongue or linguistic competency when it repealed Bill 22 and replaced it by Bill 101. In doing so, Camille Laurin explained that determination of a child's native language posed serious problems. Declarations were considered to be open to deceit and falsification. The Belgium experience in the use of mother-tongue and parental declarations is a further example of the inherent problems surrounding determination of mother-tongue or language proficiency. In spite of these historical examples of problems, entitlement to section 23 rights is partially based on mother-tongue or language proficiency of parents.

Access to minority language facilities by pupils who are not linguistically competent in the minority language is a problem that has been identified. The Royal Commission on Bilingualism and Biculturalism recommended that majority language pupils not be allowed to attend minority language facilities. Ontario, British Columbia, and New Brunswick have followed this recommendation and have limited access to minority language facilities to those who are linguistically competent in the minority language.

The contradiction to this identified problem is the three categories of parents whose children qualify for minority language instruction pursuant to section 23. Although the first category, namely mother-tongue of the parent, may tend to produce linguistically competent children to exercise the section 23 rights, there is no reason to assume the other two categories will produce similar linguistic competency. In fact, none of the categories in any way limit access to minority language instruction based on the linguistic competency of the child. Where access to provincial programs and facilities is restricted to children with a language proficiency, those qualifying pursuant to section 23 may be denied such access. An obvious dichotomy results. Children who qualify are denied access to facilities that are designed in accordance with the best recommendations possible.

Section 23 is history. The continuing linguistic problems in Quebec are not history. Events since the enactment of section 23 show that the education language issue in Quebec is very much unresolved in spite of the attempt to draft section 23 for Quebec. Chief Justice Deschênes' decision and the 1982 White Paper followed

by Bill 40 are the two most glaring examples of the continuing raging controversy.

A new and unique individualized approach to Quebec in the future should be considered. The method of achieving peace and stability may be found in the proposal of the Quebec Protestant School Boards Association to replace constitutional religious guarantees with new and more extensive language guarantees.

The American jurisprudence shows how extensive the remedies may be for providing bilingual-bicultural equality.

Provincial implementation of minority language rights must include the elements outlined and described in Chapter III (E)(2). Those elements are minimums for adequate provision of minority rights in education.

The international comparison shows how important free choice for parents is in the field of education. Although each country must develop its own scheme for dealing with language differences, similarities often occur. Equality of opportunity regardless of personal characteristics such as mother-tongue must be the goal of any scheme that is adopted. Compulsory learning of the second language, as adopted in many other countries, may well achieve equality of the two language groups on a long-term basis.

The continuation and paramountcy of religious minority rights retains the status quo. It clarifies the interrelationship between the religious group rights and the new individual rights provided by the Charter. It does not clarify the nature of the past rights nor does it modernize the concept that was intended to be protected

in 1867. Legal confrontations continue as a result of the ambiguous antiquated section 93 protection.

The Charter provides an opportunity or incentive to create true equality for the two founding languages of Canada. It will now take commitment and compromise on the part of the federal and provincial governments working together with members of the minority communities.

APPENDIXES

APPENDIX "A"

St. Andrews Premiers' Conference - Statement of Language

Recognizing our concern for maintenance and, where indicated, development of minority language rights in Canada; and

Recognizing that education is the foundation on which language and culture rest;

The Premiers agree that they will make their best efforts to provide instruction in education in English and French wherever numbers warrant.

The Premiers direct the Council of Education Ministers to meet as soon as possible to review the state of minority language education in each Province.

The Premiers ask further that the Council of Education Ministers report to each Premier within six months. Following this, each Province would undertake to ensure such provision of Canadian minority language education, and would then make a declaration of the policy plan and programme to be adopted by the Government of that Province, in this respect.

APPENDIX "B"

Premiers Conference - (Montreal) February, 1978

Recognizing their concern for the maintenance and development of minority language education rights throughout Canada as expressed in St. Andrews and recognizing that education is the foundation on which language and culture rest;

The Premiers took note of the significant progress accomplished during the last years, as highlighted in the Ministers' of Education's report and further recognize the need for continued progress.

The Premiers reaffirm their intention to make their best efforts to provide education to their English or French speaking minorities, and in order to ensure appropriate levels of services, they also agree that the following principles should govern the availability of, as well as the accessibility to, such services:

(a) Each child of the French-speaking or English-speaking minority is entitled to an education in his or her language in the primary or the secondary schools in each Province wherever numbers warrant,

(b) It is understood, due to exclusive jurisdiction of provincial governments in the field of education, and due also to wide cultural and demographic differences, that the implementation of the foregoing principle would be as defined by each Province.

The Premiers requested the Council of Ministers of Education to assume the responsibility to suggest ways and means of achieving further progress in minority language education and second language instruction consistent with the progress thus far made.

APPENDIX "C"

Bill C-60

21.(1) Where the number of children in any area of a province in respect of whom notice has been given as contemplated by this section, warrants the provision of the facilities required to give effect to the right provided for by this section, any parent who is a citizen of Canada resident within that area and whose primarily spoken language is not that of the numerically larger of the groups comprising those persons resident in that province whose primarily spoken languages are either English or French, has the right to have his or her children receive their schooling in the language of the numerically smaller of those groups, in or by means of facilities that are provided in that area out of public funds and that are suitable and adequate for that purpose.

(2) The exercise by any parent of the right provided for by this section shall be subject to such reasonable requirements respecting the giving of notice by that parent of his or her intended exercise thereof as may be prescribed by the law of the province in which that parent resides.

(3) Nothing in this section shall be held to limit the authority of the legislature of any province to make such provisions as are reasonable for determining, either generally or in any particular case or classes of cases, whether or not the number of children in any area of that province in respect of whom notice has been given as contemplated by this section, warrants the provision of the facilities required to give effect to the right provided for by this section.

(4) Nothing in this section shall be held to derogate from or diminish any legal or customary right or privilege acquired or enjoyed in any province either before or after the commencement of this Act to have any child receive his or her schooling in the language of basic instruction that is the primarily spoken language of the numerically larger of the groups referred to in subsection (1) within that province, or to limit any authority conferred or obligation imposed either before or after that time by the law of that province to require any child, during any period while that child is receiving his or her schooling in any language of basic instruction that is not that primarily spoken language, to be given instruction in the use of that primarily spoken language as part of his or her schooling in that province.

(5) The expression "parent" in this section includes a person standing in the place of a parent.

Explanatory Notes - Bill C-60

Section 21 would, upon adoption by a Province, create a new right relating to the language of instruction in the schools of that Province. In any area of an English-speaking Province in which there are sufficient francophones to warrant the provision of basic school instruction in French, any resident non-anglophone parents who are citizens of Canada would have the right to have their children receive their schooling in French in public school facilities. The same right would apply in Quebec to entitle resident non-francophone citizens to have their children receive their schooling in English. The right would be subject to the giving of notice and to reasonable provincial determination of whether there are sufficient eligible children to warrant the provision of facilities. This new right would not limit existing or future rights of minorities to choose to have their children receive their schooling in the language primarily spoken in the Province, or limit any such right or obligation to have their children instructed in the use of the primarily spoken language.

APPENDIX "D"

A Future Together, Observations and Recommendations - by the Task Force on Canadian Unity, January 1979, at pp. 121-122

3. Linguistic rights should be expressed in provincial statutes, which could include:

(i) the entitlement recognized in the statement of the provincial first ministers at Montreal in February 1978: "Each child of a French-speaking or English-speaking minority is entitled to an education in his or her language in the primary or secondary schools in each Province, wherever numbers warrant." This right should also be accorded to children of either minority who change their Province of residence.

(ii) the right of every person to receive essential health and social services in his or her principal language, be it French or English, wherever numbers warrant.

(iii) the right of an accused in a criminal trial to be tried in his or her principal language, be it French or English, wherever it is feasible.

4. Should all Provinces agree on these or any other linguistic rights, these rights should then be entrenched in the constitution.

5. The Provinces should review existing methods and procedures for the teaching and learning of both French and English and make greater efforts to improve the availability and quality of instruction in these languages at all levels of education.

APPENDIX "E"

Proposed Resolution, 1980

23.(1) Citizens of Canada whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside have the right to have their children receive their primary and secondary school instruction in that minority language if they reside in an area of the province in which the number of children of such citizens is sufficient to warrant the provision out of public funds of minority language educational facilities in that area.

(2) Where a citizen of Canadd changes residence from one province to another and, prior to the change, any child of that citizen has been receiving his or her primary or secondary school instruction in either English or French, that citizen has the right to have any or all of his or her children receive their primary and secondary school instruction in that same language if the number of children of citizens resident in the area of the province to which the citizen has moved, who have a right recognized by this section, is sufficient to warrant the provision out of public funds of minority language educational facilities in that area.

Explanatory Note

23. New. Subsection (1) would establish a right for Canadian citizens whose first language learned and still understood is English or French to have their children educated in that language. Subsection (2) would enable citizens who move from one province to another to have their children educated in English or French if any of their children started their studies in that language. In both cases, the right would be subject to there being a sufficient number of students in a given area to warrant the provision in that area of minority language educational facilities.

APPENDIX "F"

Proposed Resolution, 1980 - Amendment to Section 23

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.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under this section to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province applies where they reside in an area of the province in which the number of children of citizens who have such a right is sufficient to warrant the provision out of public funds of minority language instruction in that area.

Explanatory Notes

23.(1) This amendment would, in addition to the right guaranteed in the present draft subsection (1), guarantee to citizen parents who have received their primary school instruction in Canada in one of the official languages, the right to have their children receive school instruction in the same language in a province in which that language is the minority language. (See also subsection (3).)

23.(2) This amendment would delete the limitation in the present subsection (2) whereby the right to have all children instructed in the language of school instruction of the first child applies only where the parents move from one province to another. (See also subsection (3).)

23.(3) The limitation of the language of instruction rights to situations where the number of children warrant the provision of instruction is restated in subsection (3) to remove references to the provision of "educational facilities".

APPENDIX "G"

Section 23 - Charter of Rights and Freedoms

MINORITY LANGUAGE EDUCATIONAL RIGHTS

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.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(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.

CASES, ACTS AND STATUTES

A. CASES, ACTS AND STATUTES

Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick, 1981, S.N.B., c. O-1.1

Alberta Act, 1905 (Can.), c. 3

Alberta Regulation 490/82 (School Act)

Associated Provincial Picture Houses Ltd. v. Wednesbury Corp., [1947] 2 ALL E.R. 680

Attorney-General of Quebec v. Blaikie et al, (1981) 123 D.L.R. (3d) 15

Attorney-General of St. Christopher, Nevis, Anguilla v. Reynolds, [1979] 3 ALL E.R. 129

Babineau v. Babineau, (1981) 122 D.L.R. (3d) 508 (Ont. H.C.); aff'd (1982) 37 O.R. (2d) 527 (Ont. C.A.)

Bachmann v. St. James - Assinaboia School Division No. 2, Court of Queen's Bench Court No. 2668/83, dated Nov. 17, 1983

Barrett v. City of Winnipeg (1891) 19 S.C.R. 374; reversed on appeal (1892) AC. 445

Bill C-60, The Constitutional Amendment Act, House of Commons, 1978

Bill 62, An Act respecting the Constitution Act, 1982 (assented to June 23, 1982) (National Assembly of Quebec)

Blackwell v. Issaquena County Board of Education, 363 F. (2d) 749 (Miss. 1966)

Board of Education for Moose Jaw School District No. 1 of Saskatchewan et al v. Attorney-General of Saskatchewan et al, (1974) 41 D.L.R. (3d) 732; aff'd (1975) 57 D.L.R. (3d) 315 (C.A.)

Board of Trustees of Roman Catholic Separate Schools of Belleville v. Granger et al, (1878) 25 Gr. 570

Borowski v. Minister of Justice, (1981) 130 D.L.R. (3d) 588

British Columbia Regulation 436/81 (School Act)

Brophy v. A.G. Manitoba [1895] A.C. 202

Brown et al v. Board of Education of Topeka Shaunee County, Kan et al, 347 U.S. 483 (1954)

Brown et al v. Board of Education of Topeka Shaunee County, Kan et al, (Brown II) (1955), 75 S. Ct. 753

Burton v. Wilmingham Parking Authority, 365 U.S. 715 (1961)

Calgary Board of Education v. Attorney-General for Alberta and Board of Trustees of Calgary Roman Catholic Separate School District No. 1, 106 D.L.R. (3d) 415; aff'd on appeal (1981) 122 D.L.R. (3d) 249 (C.A.)

Campisi v. P.g. du Québec et autres, [1977] C.S. 1068; aff'd on appeal [1978] C.A. 520

Canada Act, 1982 (U.K.) c. 11

Canadian Bill of Rights, S.C. 1960, c. 44

Capital Grocers v. Registrar of Land Titles, [1953] 1 D.L.R. 318

Case "Campbell and Cosans", Series A, Judgments and Decisions, Vol. 48 (publication of the European Court of Human Rights)

Case "Relating to Certain Aspects of the Laws in the Use of Languages in Education in Belgium", (1968) 11 Yearbook of the European Convention on Human Rights, 832

Charter of the French Language, R.S.Q. 1977, c. C-11

Chi Sum Mak v. Minister of Education and Attorney-General of Quebec, (Cour Superieure, Dt. of Montreal), No. 500-05-008960-823, September 8, 1982

Common Schools Act, 1859 (22 Vict., c. 64, Upper Canada)

A Consolidation of the British North America Act, 1867-1975, Consolidation as of June 1, 1976, prepared by Elmer A. Driedger for Department of Justice, Canada

Constitution Act, 1867, 30 and 31 Vic. c.3

Constitution Act, 1982, [en. by the Canada Act, 1982] (U.K.) c.11

Constitutional Questions Act, R.S.O. 1980, c. 86

Constitutional Questions Act, R.S.N.S. 1967, c. 51

Constitutional Questions Act, R.S.N. 1970, c. 180

Convention Against Discrimination in Education, General Conference of U.N.E.S.C.O. (1962)

Crawford et al v. Ottawa Board of Education, [1971] 1 O.R. 267

Cummings v. Birkenhead Corp., [1972] Ch. 12

Daniels v. White and the Queen, [1968] S.C.R. 517

Darlaston v. Larden and North Western Railway, [1894] 2 Q.B. 694

Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33 (1970)

Eddy v. Stewart, [1932] 2 W.W.R. 699

Education Act, R.S.N.S. 1967, c. E-2 and amendments

Education Act, R.S.O. 1980, c. 129 and amendments

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Ex Parte Renaud, (1873) 14 N.B.R. 273

Giffels and Vallett v. The King, [1952] 1 D.L.R. 620

Guadalupe Organization v. Tempe Elementary School District, 587 F. (2d) 1022 (9th Cir.) 1978

Henchel v. Board of Medicine Hat School Division No. 4, [1950] 2 W.W.R. 369

Heydon's Case, 76 E.R. 637

Hobsen v. Hansen, 269 F. Supp. 401 (D.C.D.C. 1967)

Howden Parents Association et al v. Board of School Trustees of St. Boniface School Division No. 4 and the Minister of Education of Manitoba, (1981) 5 M.R. (2d) 278 (Q.B.)

Hunter v. Erickson, 393 U.S. 385 (1969)

Individual's Rights Protection Act, R.S.A. 1980, c. I-2

Ingraham v. Wright, 97 S. Ct. 1401 (1977)

Interpretation Act, R.S.C. 1970, c. I-23

Interpretation Act, (U.K.) 1978, c. 30

In Re Calgary Charter, [1933] 3 W.W.R. 385

In Re Donalson, 75 Cal. Rptr. 220 (1969)

IN THE MATTER of Section 55 of the Supreme Court Act, AND IN THE MATTER of a Reference by the Governor-in-Council Concerning the Validity of the Anti-Inflation Act, as Set Out in Order-in-Council P.C. 1976-581 dated the 11th day of March, 1976, (1976) 68 D.L.R. (3d) 452

Judicature Act, R.S.P.E.I. 1974, CAP J-3

Judicature Act, R.S.N. 1970, c. 187

Judicature Act, R.S.A. 1980, c. J-1

Judicature Act, R.S.N.B. 1973, c. J-2

Keyes v. School District No. 1, 521 F. (2d) 465 (10th Cir.) 1975

Konigsberg v. State Bar of California, 366 U.S. 36 (1961)

La société des Acadiens du Nouveau-Brunswick Inc. and L'Association des Conseillers Scolaires Francophones du Nouveau-Brunswick v. Minority Language School board No. 50 48 N.B.R. (2d) 361 (New Brunswick Court of Queen's Bench Trial Division, Judicial District of Edmundson)

Laidlaw v. Metropolitan Toronto, [1978] 2 S.C.R. 736

Laker Airways Ltd. v. Department of Trade, [1977] 2 ALL E.R. 182

Lapointe v. Board of School Trustees, 25 N.B.R. (2d) 91

Lau v. Nichols, 94 S. Ct. 786 (1974) Supreme Court of the U.S.

Loi sur les renvois à la Cour d'appel R.S.Q., 1977 R-23

Luigi Monta of Genoa v. Cechofracht Co. Ltd., [1956] 2 ALL E.R. 769

Manitoba Act, 33 Vict., c. 3

Manitoba Education Reference, (1984) 22 S.C.R. 577

Manitoba Regulation 5/81, (Public Schools Act)

MacDonald v. School Board, 30 N.S.R. (2d) 433

Mackay v. The Queen [1980] 2 S.C.R. 370

McCarthy v. City of Regina et al, [1917] 1 W.W.R. 1088

McCutcheon v. Corp. of City of Toronto, (1983) 3 C.R.D. 125 20-01

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Mercer v. State of Texas, 450 S.W. (2d) 715 (Texas Civ. App., Austin 1970)

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Ottawa Roman Catholic Separate School Trustees v. MacKell, [1917] A.C. 62

Patel v. United Kingdom, (1982) 14 E.H.R.R. 256

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P.P.G. Industries Canada Ltd. v. Attorney-General of Canada, #A822930, October 14, 1982, S.C. of B.C., Vancouver Registry

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R. v. Lefebvre, (1982) 134 D.L.R. (3d) 329

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R. v. Secretary of State et al, [1975] 2 ALL E.R. 1081

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PRECIS

The *British North America Act* assigned education as a provincial concern with minority religious, but not language, guarantees. The federal Royal Commission on Bilingualism and Biculturalism in 1968, made major recommendations for language rights in education in Canada. The federal government, constitutionally unable to implement the education language recommendations, accepted the priorities of the Royal Commission which were designed to redress the imbalance and to ensure access to education in the minority as well as the majority language across Canada.

The federal government, throughout the federal-provincial constitutional conferences, maintained that minority language education rights was an essential element of any Canadian Charter of Rights and Freedoms. Each Constitutional Amendment Bill from 1978 to 1982, included the minority language education rights in varying forms.

Section 23 of the Charter provides for minority language education rights for the children of citizens of Canada whose first language learned and still understood is that of the minority of their resident province; who received primary instruction in the minority language; and, who have a child who has received minority language instruction. The right is limited by the reference to "where numbers warrant".

Although not clearly referenced, the kind of instruction that qualifies for the rights to accrue or for the implementation

of the right could include both minority language education, the common reference for instruction in the same language as that spoken by the pupils, and second language learning, including immersion programs designed for pupils who do not speak the "second language".

Educational facilities as well as instruction are guaranteed with a similar, albeit higher, numbers test. Educational facilities cover separate buildings, correspondence courses, educational television and the like. It is questionable whether the right to govern is covered by the reference to educational facilities. Any rights that arise under section 23 are to be paid for out of public funds.

Each province in Canada has devised different legislation, regulation or practice with respect to minority language education. Quebec's legislative scheme has been declared to be inconsistent with the Charter. Some provinces provide a number figure from a minimum of one to a maximum of twenty-five for implementation of language rights. Newfoundland and Alberta provide no guarantees for minority language instruction. Some provinces recognize groupings of students in order to establish the necessary numbers.

Only New Brunswick has created minority language school boards, although Ontario is considering the creation of French language school boards within the public school structure.

International conventions and declarations recognize goals for education including, at times, certain linguistic rights for parents.

Other countries with two or more founding races have approached linguistic rights in different ways. South Africa and Belgium provide separate facilities or institutions for each linguistic group. Residency determines attendance in Belgium and mother-tongue determines attendance in South Africa. Cameroun and Switzerland have regionalized linguistic instruction as in Belgium. Finland provides rights based on mother-tongue as in South Africa.

Remedies to avoid constitutional challenges and judicial remedies where constitutional breaches occur are reviewed. Both section 52 and section 24(1) provide broad judicial discretion to declare provincial law to be of no force and effect where inconsistent with the Charter and to order remedies to rectify the problem. The American approach suggests broad judicial remedial intervention whereas the European approach is one of moderation. Reasonable limits are expressly provided through section 1 and may also be implied in the assessment of school board or provincial action.

Avoidance of resort to judicial review is preferable and could be achieved through inter-provincial co-ordination through the Council of Ministers of Education, through federal funding, and through immediate provincial legislative action.

Section 29 of the Charter gives paramountcy to the rights and privileges guaranteed with respect to denominational, separate or dissentient schools when and if a conflict arises with a Charter provision. If French language instruction adversely affects religious guarantees, a conflict could result between section 29

and section 23. Recent proposals in Ontario and Quebec suggest possible conflicts between religious and linguistic rights and guarantees.

The Charter expressly applies to provincial legislation and regulation. The reference to "government" in section 32, the application section, will include school board policies and decisions.

Canada represents vast cultural and regional diversities. An individualized provincial interpretative approach for implementation of section 23 would best achieve the goals and intent of the section. Further constitutional educational linguistic considerations may be required for Quebec.

Honorable Ministers

Members of the Caucus Committee on Agriculture:

We are grateful for this opportunity to reflect the views and concerns of rural women in the areas of education, health and general well-being of farm families.

We are aware that many of our concerns are not directly related to work of your committee in respect to the economics of the agricultural industry. However, being representative of rural women, we feel it is appropriate to seek your support should the matters we are about to discuss be presented for consideration by the Legislative Assembly.

As an integral part of Unifarm, we of Women of Unifarm, wish to reaffirm our support of policies of the parent body that have been presented for your consideration.

Assistance Appreciated

At this time we would like to express our appreciation for financial assistance extended by Alberta Agriculture for our program of fifteen conferences on "Planning for Security" held last year in each of our regional jurisdictions across the province. The conferences, designed to ease the financial approach to retirement, were well attended by enthusiastic participants at each meeting site.

Women of Unifarm are sure that with Alberta Agriculture's assistance, we have been successful over the past several years in providing the stimulation for much better informed farm women among the many who have taken advantage of this annual learning opportunity.

Gifted Children

We seek your support for increased learning facilities to accommodate the needs of from three to five percent of the school population who fall into the "gifted" category. Represented in this small group are youngsters with the inherent ability to become the great scientists, artists, doctors and leaders in many other fields in the future.

Many gifted children find the regular school curriculum boring and there is a great need for special enrichment programs to let them proceed at a rate which reflects their abilities and which will stimulate their intellects and develop their potential. It is our view that there is as much need for special programs for gifted children as there is for slow learners.

The tragedy of gifted children is that many become drop-outs, delinquents, or worse, as a result of a stifling educational experience. They think at a much higher level than classmates and often don't feel a part of the school group.

We urge the Department of Education to establish special training for teachers that will enable them to recognize gifted children in their early school years and institute special programs to stimulate their interests and activities in addition to regular studies.

Education Costs

While still on the subject of education, we accept the inconsistency of seeking expanded programs and reduced taxes in the same breath. However, over the years the cost of education has become a heavy burden on taxpayers and we ask that the provincial government remove some of the load from the shoulders of property owners by assuming responsibility for a larger share of education costs from provincial sources.

Defensive Driving Courses

As a further means of reducing the high toll of motor vehicle accidents, we urge the Solicitor General of Alberta to make a defensive driving course a requirement before issuing a beginner's driving license.

Drinking Age

We are concerned that the incidence of teenage drinking appears to have increased greatly, even below the age of 18 and both in and outside of schools. We are disturbed that irresponsibility and problems associated with consumption of alcohol, if not increasing, certainly do not appear to be decreasing, and consequently we urge that consideration be given to raising the legal drinking age to 19 years.

Farm Safety

Farming is recognized as a dangerous occupation with serious accidents and death a daily hazard. In the light of past statistics we urge continued support of Alberta Agriculture's farm safety program and that funding be made available to intensify and expand this valuable life-saving undertaking. Women of Unifarm feel proud and privileged to be a part of the program which we feel can, and does, play a significant part in helping to reduce the farm accident toll.

Pornography

We are deeply concerned and object strongly to the insidious growth and increased visibility of pornography in our society. Evidence proves that pornography contributes to a more violent and demeaning attitude toward women and children. The use of pornographic material on television is particularly disturbing, and although we recognize federal responsibility in this area, we hope that the provincial government will support attempts to repress this revolting blight wherever it appears in society.

Sunday Opening

We believe that the opening of stores and other places of business on Sunday interferes with the quality of family life and adds to consumer costs, and we urge entrenchment of Sunday as a day of rest with enforceable penalties for infractions. To overcome objections by groups that observe a day other than Sunday for religious purposes, we suggest a change in legislation to replace the "Lord's Day Act" with a "Common Day of Rest".

Respectfully submitted by,

WOMEN OF UNIFARM

March 7, 1984