

# LINGUISTIC MINORITY EDUCATIONAL RIGHTS IN CANADA: AN INTERNATIONAL AND COMPARATIVE PERSPECTIVE

## I. INTRODUCTION

Canada's recent revision of its constitution under the Constitution Act of 1981 recognizes special educational rights for certain linguistic minorities.<sup>1</sup> Under section 23 of the constitution's new Bill of Rights, French and English-speaking citizens of Canada who are in the linguistic minority in the province where they reside have the right to choose to have their children taught in either French or English.<sup>2</sup> This is the first time that Canada has recognized on a national level the right of linguistic minorities to be

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<sup>1</sup> CAN. CONST., as amended by Constitution Act (1981) [hereinafter cited as CONST.]. Section 23 of the revised constitution states:

(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.

*Id.* §23. The revised constitution also contains several sections which grant certain linguistic rights in other areas. *See id.* §16 (English and French to have equal status in institutions of government), §17 (the right to use either English or French in parliamentary debates), §19 (the right to use either English or French in court), §20 (the right to use either English or French in all communications with the government). The preceding sections apply to both the federal government and the government of New Brunswick.

<sup>2</sup> CONST., *supra* note 1, §23(1).

taught in their mother tongue.<sup>3</sup>

The action of a nation, such as Canada, in regard to the educational instruction of linguistic minorities requires the utmost care and consideration. The language of a cultural group is an essential unifying force for its members. Therefore, the opportunity for a group to have its children instructed in its mother tongue is vital for its survival as a distinct entity.<sup>4</sup> This need, however, must be weighed against the conflicting necessity of ensuring that the children of the minority group are able to function in their country as a whole so that their opportunities are not unduly limited.<sup>5</sup>

In addition to considerations of individual welfare, the welfare of the nation must be taken into account. If a nation is too strict or harsh as to the rights of cultural, linguistic minority groups, that nation risks an escalation of tension, and possibly even rebellion, within its borders.<sup>6</sup> A failure to create some degree of cultural and linguistic integration, however, exposes a nation to the dangers of

<sup>3</sup> The decision whether to grant linguistic minority educational rights on the federal level varies from nation to nation. In Switzerland, for instance, the decision whether to grant certain rights to linguistic minorities has been left to the cantons (the equivalent of provinces or states). This had been the policy of Canada prior to its constitutional revision in 1981. See *infra* notes 30-31 and accompanying text. In contrast, Austria guarantees linguistic minority educational rights in its federal constitution similar to those recognized in Canada's new constitution. See Study on the Rights of Persons Belonging to Ethnic, Religious, and Linguistic Minorities, U.N. Doc. E/CN.4/Sub.2/384/Rev. 1 (1979) at 85, paras. 501-02 [hereinafter cited as U.N. Study].

<sup>4</sup> "In multiethnic and multilingual countries, the use of the languages of the various populations in the educational system is a crucial test for determining the ability of these groups to maintain and develop their own characteristics. . . ." U.N. Study, *supra* note 3, at 84, para. 493. The importance of this test is reflected in the observation that "language is the most important exteriorization or manifestation of the self, of the human personality. If the school, the all-powerful school, rejects the mother tongue of an entire group of children, it can be expected to affect seriously and adversely those children's concept of their parents, their homes, and themselves." Gaarder, *Bilingualism and Education*, in *THE LANGUAGE EDUCATION OF MINORITY CHILDREN* 51, 52 (B. Spolsky ed. 1972).

<sup>5</sup> See U.N. Study, *supra* note 3, at 87, para. 513 (expressing need for official language instruction when minority language education cannot be pursued beyond primary level).

<sup>6</sup> In 1919, following the creation of several multiethnic countries in Europe, Woodrow Wilson stated, "Nothing . . . is more likely to disturb the peace of the world than the treatment which might in certain circumstances be meted out to minorities." *Id.* at 17, para. 92.

Wilson's concerns were addressed specifically to the newly created or expanded countries of Eastern Europe. These nations included Poland, Czechoslovakia, and Yugoslavia. There was fear that minorities would destabilize these nations through internal unrest and would possibly seek the help of members of their ethnic group living in neighboring countries. *Id.*

Today this same concern continues to exist in many parts of the world. For instance, in Africa unrest has been generated in nations such as Algeria, Mauritania, and Sudan by ethnic minorities who perceive their governments' policies as a threat to their continued well-being. Weinstein, *Africa*, in *PROTECTION OF ETHNIC MINORITIES* 208, 217 (R. Wirsing ed. 1979).

factionalism and dissolution.<sup>7</sup>

This Note examines Canada's recent attempt to walk the tight-rope between the competing interests involved in the issue of linguistic minority educational rights. Canada's present actions are analyzed in light of its own past actions, the actions required and urged under international law, and the actions taken in the United States. This Note is divided into two primary sections: (1) a background examination of the issue in Canada, under international law, and in the United States; and (2) an analysis of the present Canadian course in light of divergent considerations and alternatives.

## II. BACKGROUND

### A. Canada

#### 1. General

The Canadian population can be broken down into three linguistic groups: English-speaking Canadians, French-speaking Canadians, and Canadians who speak neither English nor French.<sup>8</sup> The English-speaking Canadians are by far the most populous group. They constitute over sixty percent of the Canadian population and are the majority linguistic group in nine of Canada's ten provinces.<sup>9</sup> The French-speaking Canadians comprise twenty-six percent of the total Canadian population<sup>10</sup> and are primarily concentrated in Quebec, where they are in the overwhelming majority.<sup>11</sup> In addition to these two groups, thirteen percent of Canadians

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<sup>7</sup> In Canada, the existence of a distinct French culture in the Quebec province has led to the rise to power of a Quebec separatist party in that province. Short, *Restrictions on Access to English Language Schools in Quebec: An International Human Rights Analysis*, 4 CAN.-U.S. L.J. 1 (1981). In Thailand, the Malay minority is still fighting cultural domination by the Thai majority which has existed for 600 years. Sybrks, *Southeast Asia: The Muslims in Southern Thailand*, in PROTECTION OF ETHNIC MINORITIES 313, 326-28 (R. Wirsing ed. 1979). Ethnic groups in the Ivory Coast, Ethiopia, Uganda, and Nigeria are actively seeking greater sovereignty. Weinstein, *supra* note 6, at 217.

<sup>8</sup> See STATISTICS CANADA, MINISTRY OF SUPPLY AND SERVICES, CATALOGUE No. 95-902, 1981 CENSUS OF CANADA 1-1 (1982) [hereinafter cited as 1981 CENSUS OF CANADA].

When referring in this Note to a person belonging to a particular linguistic group, the term "mother tongue" will be used to refer to their native language. The Canadian Census Report defines mother tongue as "the first language learned and still understood by an individual." *Id.* at VI.

<sup>9</sup> *Id.* at 1-1. (The total population of Canada is 24.3 million. The English-speaking population is 14.9 million.)

<sup>10</sup> *Id.* (The French-speaking population is 6.2 million.)

<sup>11</sup> Over 80% of the population of Quebec is French-speaking. *Id.* at 1-17.

speak neither English nor French as their first language.<sup>12</sup> This third group includes Canadians of Ukranian, German, Italian, and American Indian origin.<sup>13</sup>

Canada's diverse linguistic makeup originated in the nation's early history. The first white settlers of Canada were the French in the seventeenth and first half of the eighteenth century.<sup>14</sup> In 1760, when France ceded Canada to England, settlers from English colonies in America and from the British Isles began to immigrate to Canada.<sup>15</sup> By 1806, the French-speaking population made up only one-half of the total population, and by 1871, the percentage decreased to the level it currently holds.<sup>16</sup> The French-speaking Canadians, however, maintained predominance in Quebec, the location of their early settlements.<sup>17</sup> The immigration to Canada of persons who spoke neither English nor French corresponded to the immigration of such groups to the United States in the nineteenth and twentieth centuries.<sup>18</sup>

The demographic concentration of the French-speaking population in Quebec, where five-sixths of this group resides, is the source of deep division within Canadian society. Eighty percent of Quebec is French-speaking, and eighty percent of Canada outside of Que-

<sup>12</sup> *Id.* at 1-1. (The non-English, non-French-speaking population is 3.2 million.)

<sup>13</sup> See S. LIEBERSON, LANGUAGE AND ETHNIC RELATIONS IN CANADA 37-38 (1970).

<sup>14</sup> Henripen, *Quebec and the Demographic Dilemma of French Canadian Society*, in QUEBEC SOCIETY AND POLITICS 157, 158 (D. Thomson ed. 1973).

<sup>15</sup> The predominance of the French-speaking population in Canada began to erode from the time Canada was transferred to England. The British had a far higher rate of immigration to their colonies than did the French. For instance, both New England and Canada initially had been settled by England and France respectively at about the same time in the seventeenth century. However, by 1760 there were over 1.5 million colonists in New England but only 70,000 colonists in Canada. *Id.* at 158-59.

<sup>16</sup> *Id.* at 159. For the current French-speaking percentage of the Canadian population, see *supra* text accompanying note 10.

<sup>17</sup> French-speaking Canadians have consistently remained the overwhelming majority linguistic group in Quebec. This majority has been maintained, despite a flow of English-speaking immigrants to Quebec favoring the English-speaking minority, by an unusually high fertility rate in the French-speaking population. Between 1760 and 1960, while the world population multiplied by three, the French-Canadian population multiplied by 80. Henripen, *supra* note 14, at 158-59.

<sup>18</sup> The two largest groups of non-English and non-French-speaking Canadians are Ukrainians and Italians. The majority of Ukrainians have settled in the western provinces and came to Canada primarily in three different time periods: 1894-1914, the 1920's and 1930's, and the late 1940's and early 1950's. The Italians mostly settled in eastern provinces and immigrated primarily in three periods of time: at the end of the 19th century, just before and after World War I, and after World War II. W. METCALFE, UNDERSTANDING CANADA: A MULTIDISCIPLINARY INTRODUCTION TO CANADIAN STUDIES 378-86 (1982).

bec is English-speaking.<sup>19</sup> Therefore, while there are areas in Canada where a truly multilingual society is present, the Canadian social structure on the whole is not a multilingual one, but rather consists of two distinct monolingual societies contained within one nation.<sup>20</sup>

These two separate societies coexisted within Canada largely because of the stabilization in Quebec of a predominant French-speaking population.<sup>21</sup> Two events in the late 1960's, however, led to the fear that this stability was eroding. There was both a decline in French-Quebeckers' traditionally high birth rate as well as a sudden rise in immigration of English-speaking people into Quebec.<sup>22</sup> These two events, coupled with the feeling of being surrounded by an alien culture, led to an increase in the sentiment of many French-Quebeckers that radical means were necessary to preserve their culture.<sup>23</sup> This sentiment resulted in the 1976 election which gave to the Quebec nationalist party, *Parti Quebécois*, control of the province's legislature.<sup>24</sup> The *Parti Quebécois* failed in 1981 to rally a majority of Quebeckers to support a referendum for Quebec's sovereignty,<sup>25</sup> but the party has imposed measures designed to reinforce dominance of the French language.<sup>26</sup> The Charter of the French Languages, passed by the Quebec legislature in 1977, made French the sole recognized language and greatly restricted the use of other languages in business, commerce, labor relations, semi-public agencies, civil administration, and education.<sup>27</sup>

<sup>19</sup> 1981 CENSUS OF CANADA, *supra* note 8, at 1-1, 1-17.

<sup>20</sup> In eight of the nine English-speaking provinces in Canada, the French-speaking population is 5% or less. *Id.* at 2-1, 2-81. These eight provinces are: British Columbia, *id.* at 1-81; Saskatchewan, *id.* at 1-69; Alberta, *id.* at 1-74; Manitoba, *id.* at 1-61; Ontario, *id.* at 1-42; Nova Scotia, *id.* at 1-5; Prince Edward Island, *id.*, and Newfoundland, *id.* at 1-1. The only English-speaking province where there is a significant French-speaking population is New Brunswick. *Id.* at 1-9 (36%).

<sup>21</sup> See Henripin, *supra* note 14, at 157.

<sup>22</sup> *Id.* at 160-62.

<sup>23</sup> See generally Burnet, *Historic Background of Quebec's Challenge to Canadian Unity*, in QUEBEC SOCIETY AND POLITICS 39, 45-46 (D. Thomson ed. 1973).

<sup>24</sup> *Time to Start Thinking the Unthinkable*, MCLANS, Nov. 29, 1976, at 18.

<sup>25</sup> 'Non' - *What Now?*, MCLANS, May 26, 1980, at 17. The referendum advocated a "sovereignty-association" status for Quebec. With this status, Quebec would have had the authority to enact laws, levy taxes, and conduct foreign relations. However, Quebec would continue to maintain an economic relationship with the rest of Canada. Short, *supra* note 7, at 1.

<sup>26</sup> Charter of the French Languages, QUE. REV. STAT. ch. c-11 (1977).

<sup>27</sup> *Id.*

## 2. *British North American Act*

The British North American Act (BNA Act) is Canada's original constitution, and its provisions, although revised, are still included in the recently amended constitution.<sup>28</sup> Under the original BNA Act, there was no nationally recognized right to be educated in one's mother tongue.<sup>29</sup> Section 93 of the BNA Act placed the administration of education under the control of the provinces,<sup>30</sup> and the courts had consistently held that such control included exclusive discretion over linguistic instruction.<sup>31</sup> In 1917, French-speaking parents and educators first tested the validity of a restriction on the use of French in Ontario.<sup>32</sup> The Canadian Supreme Court

<sup>28</sup> CONST., *supra* note 1, §52.

<sup>29</sup> *But see* British North American Act §133 (1867) [hereinafter cited and referred to as the BNA Act]. This statute grants the right to use either English or French before Parliament or any court created by Parliament and provides that the statutes and journals of Parliament and the federal courts must be in both languages. The section also applies to the legislature and courts of Quebec. *Id.*

<sup>30</sup> The section states:

In and for each Province the Legislature may exclusively make Laws in Education, subject and according to the following Provisions:

(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 in the Province at the Union;

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec;

(3) Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Other Decision 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;

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite of 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. (43).

*Id.* §93.

<sup>31</sup> *See, e.g.,* Ottawa Separate Schools v. Mackell, 32 D.L.R. 1 (1917); Atty Gen. of Que. v. Blairkie, [1981] 1 S.C.R. 312.

<sup>32</sup> The parents and educators argued that under §93 of the BNA Act the province of Ontario could not infringe upon the Catholic School Board's ability to set their curriculum, including the choice of language. *Ottawa Separate Schools v. Mackell*, 32 D.L.R. at 2, 5 (1917).

upheld the province's course of conduct by holding that the restrictions on a province's actions in section 93 did not apply to linguistic groups. Consequently, the province alone could determine the availability of minority linguistic instruction.<sup>33</sup> This decision was reaffirmed in 1981 by the high court in a decision concerning Quebec's restrictions on access to English-speaking schools.<sup>34</sup>

Exclusive provincial control over minority linguistic education led to varied actions by the provinces, resulting in a disparity in the availability and accessibility of such education. The disparity is especially pronounced for Canadians who speak neither English nor French. There are five provinces in which the percentage of non-English and non-French-speaking populations equals or exceeds the national average—British Columbia (16%),<sup>35</sup> Alberta (16%),<sup>36</sup> Saskatchewan (18%),<sup>37</sup> Manitoba (23%),<sup>38</sup> and Ontario (17%).<sup>39</sup> Only two of these provinces, Alberta and Saskatchewan, recognize the right of instruction in a language other than French or English.<sup>40</sup> In Manitoba, school children normally may use a language other than English or French in the classroom for three purposes only: (1) as a transitional tool to ease the children's adjustment into the English language; (2) as a part of an authorized religious function; or (3) for the purpose of learning the language.<sup>41</sup> In neither Ontario nor British Columbia are there statutory provisions for the use of a language other than English or French in the classroom for any purpose.<sup>42</sup>

<sup>33</sup> *Id.* at 3. The court did not find it persuasive that 116 of the 192 schools under the control of the Catholic School Board were French-speaking schools. The court held that §93 of the BNA Act protected those bound together by faith and not by language. *Id.* at 2, 4.

<sup>34</sup> *Atty. Gen. of Que. v. Blairkie*, [1981] 1 S.C.R. at 324, 325.

<sup>35</sup> 1981 CENSUS OF CANADA, *supra* note 8, at 1-81.

<sup>36</sup> *Id.* at 1-74.

<sup>37</sup> *Id.* at 1-69.

<sup>38</sup> *Id.* at 1-61.

<sup>39</sup> *Id.* at 1-42.

<sup>40</sup> The School Act, ALTA. REV. STAT. ch. 5-3, §159 (1981); The School Act, SASK. REV. STAT. ch. 5-36, §215 (1978). The Saskatchewan School Act provides, "Subject to the regulation of the department, where a board passes a resolution to [that] effect, a language other than English may be taught or used as a language of instruction in the district or in a school designated by the board. . . ." *Id.*

<sup>41</sup> Public School Act, MAN. REV. STAT. ch. 33, §79(2) (1980). The statute also allows use of a language other than English or French in pilot courses approved by the province's Minister of Education for up to 50% of the regular school hours. *Id.*

<sup>42</sup> The Ontario statutes only provide for the use of English or French. See The Education Act, ONT. REV. STAT. ch. 129, §§258-77 (1980). The British Columbia statutes contain no language provisions, but by custom English alone has been used in school. See U.N. Study,

The fate of French-speaking Canadians has been somewhat better. In seven of the nine provinces where French-speaking Canadians are in the minority, instruction in French is permitted either by statute or by administrative act.<sup>43</sup> Most of these provinces, like Ontario, allow instruction in French only if it is shown that there exists a sufficient number of French-speaking students and taxpayers in a particular school district.<sup>44</sup> New Brunswick, which has the largest percentage of French-speaking Canadians outside Quebec,<sup>45</sup> is the sole province where the right to instruction in either French or English is unconditional.<sup>46</sup>

English-speaking Canadians in Quebec have faced stiff restrictions on the accessibility of English-speaking instruction under the Charter of the French Languages.<sup>47</sup> Only those English-speaking

*supra* note 3, at 85.

<sup>43</sup> The five provinces which by statute permit course instruction in French are: New Brunswick, Official Languages of New Brunswick Act, N.B. REV. STAT. ch. 0-1, §12 (1973); Ontario, The Education Act, ONT. REV. STAT. ch. 129, §§258-77 (1980); Manitoba, The Public School Act, MAN. REV. STAT. ch. 33, §79 (1980); Saskatchewan, The School Act, SASK. REV. STAT. ch. 5-36, §215 (1978); and Alberta, The School Act, ALTA. REV. STAT. ch. 5-3, §159 (1981). In addition, two provinces, Nova Scotia and Prince Edward Island, permit course instruction in French under administrative provisions. See U.N. Study, *supra* note 3, at 85.

<sup>44</sup> In Ontario a minimum of ten French-speaking rate-payers and 30 French-speaking students is required in a school district for French-speaking instruction to be provided in that district. The Education Act, ONT. REV. STAT. ch. 129, §§258-77 (1980).

<sup>45</sup> Thirty-six percent of New Brunswick's population is French-speaking. 1981 CENSUS OF CANADA, *supra* note 8, at 1-9.

<sup>46</sup> Official Languages of New Brunswick Act, N.B. REV. STAT. ch. 0-1, §12 (1973). The statute states:

In any public, trade or technical school

(a) where the mother tongue of the pupils is English, the chief language of instruction is to be English and the second language is to be French;

(b) where the mother tongue of the pupils is French, the chief language of instruction is to be French and the second language is to be English;

(c) subject to paragraph (d), where the mother tongue of the pupils is in some cases English and in some cases French, classes are to be so arranged that the chief language of instruction is the mother tongue of each group with the other official language the second language for those groups; and

(d) where the Minister of Education decides that it is not feasible by reason of numbers to abide by the terms of paragraph (c), he may make alternative arrangements to carry out the spirit of this Act.

*Id.*

<sup>47</sup> Charter of the French Languages, QUE. REV. STAT. ch. c-11, §§72-73 (1977), provides: 72. Instruction in the kindergarten classes and in the elementary and secondary schools shall be in French, except where this chapter allows otherwise.

This rule obtains in school bodies within the meaning of the Schedule and also applies to subsidized instruction provided by institutions declared to be of public interest or recognized for purposes of grants in virtue of the Act respecting private



students whose parents received their primary or secondary education in an English-speaking school in Quebec could themselves be taught in a publicly supported English-speaking school in the French-speaking province.<sup>48</sup> This restriction was imposed by the *Parti Quebecois* in the hope of nullifying the effect of the increased immigration of English-speaking individuals into Quebec and of the declining French-speaking birthrate.<sup>49</sup>

### 3. *The New Constitution*

Section 23 of the new constitution recognizes certain linguistic minority educational rights.<sup>50</sup> Under section 23, citizens of Canada who speak either English or French and who are in the linguistic minority in the province where they reside may have their children educated in either French or English provided they fall into one of two categories: (1) the minority language in the province must be the first learned and still understood language of the parent; or (2) the parent must have a child who is already being educated in a primary or secondary school that instructs its pupils in the minority language of the province.<sup>51</sup> This right extends to education on both the primary and secondary level and requires the province to use public funds to provide such education where the number of such children warrants.<sup>52</sup>

education.

73. In derogation of section 72, the following children, at the request of their father and mother, may receive their instruction in English:

(a) a child whose father or mother received his or her elementary instruction in English, in Quebec;

(b) a child whose father or mother domiciled in Quebec on 26 August, 1977, received his or her elementary instruction in English, outside Quebec;

(c) a child who, in his last year of school in Quebec before 26 August, 1977, was lawfully receiving his instruction in English, in a public kindergarten class or in an elementary or secondary school;

(d) the younger brothers and sisters of a child described in paragraph c.

*Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See *supra* notes 17 and 22 and accompanying text. The legislation may have been effective. Between 1971 and 1981 the Quebec province's total population increased 7%, but among English-speaking Canadians in the province there was a 12% decrease in population. STATISTICS CANADA, MINISTRY OF INDUSTRY, TRADE, AND COMMERCE, CATALOGUE No. 92-725, 1971 CENSUS OF CANADA 20-5 (1973); 1981 CENSUS OF CANADA, *supra* note 8, at 1-17.

<sup>50</sup> For the rights recognized under section 23 of the new constitution and the control traditionally held by the provinces under §93 of the BNA Act, see *supra* notes 1 and 30 and accompanying text.

<sup>51</sup> CONST., *supra* note 1, §23.

<sup>52</sup> *Id.* §23(3).

This provision does not completely preempt traditional provincial control over the subject. Since the provisions of the BNA Act are still valid except where amended, the discretion and control over education given to the provinces under section 93 of the BNA Act still exist except where specifically limited by section 23 of the new constitution.<sup>53</sup>

Section 23 removes from the provinces' complete discretion two groups of Canadian citizens: French-speaking Canadians outside Quebec and English-speaking Canadians inside Quebec.<sup>54</sup> The provinces now must provide instruction in either English or French to the children of these two groups subject only to two reservations. First, under paragraph 3 of section 23, provinces may continue to restrict the availability of such instruction where the number of people in these two groups does not warrant the use of public funds.<sup>55</sup> Second, under section 1, the rights afforded by the new constitution, including those under section 23, may be subject to reasonable limits that can be "demonstrably justified in a free and democratic society."<sup>56</sup>

Because of inherent ambiguities in the phrases "demonstrably justified" and "where the numbers so warrant," the degree of discretion that can be maintained by the provinces over these protected groups is uncertain. A district court in Quebec has ruled, however, that the restrictions of the Charter of the French Languages on English-speaking Quebecers' access to English-speaking education cannot be justified under section 1 of the amended constitution.<sup>57</sup> Another possible target is the restriction imposed by

<sup>53</sup> See *Hearings on the Proposed Constitution of Canada Before the Special Joint Committee on the Constitution of Canada*, 30th Parliament, 3rd Sess. (issue 3) 17 (1978) (testimony of Mr. Marc Lalonde, Minister of Federal-Provisional Relations) [hereinafter cited as *Special Joint Committee Hearings*].

Mr. LaLonde stressed that the purpose of section 23 was not to preempt all provisional action on the subject, but merely to lay down a "ground floor" of rights, with the provinces being free to add to them as they see fit. *Id.* See also CONST., *supra* note 1, §51.

<sup>54</sup> CONST., *supra* note 1, §23(3)(a),(b).

<sup>55</sup> *Id.*

<sup>56</sup> CONST., *supra* note 1, §1.

<sup>57</sup> The ruling is discussed in Official Press Release of the Canadian Embassy, Sept. 9, 1982. The district court held that the restrictions imposed in Quebec which excluded from English-speaking schools English-speaking students whose parents were not taught in Quebec were unconstitutional under section 23 of the new constitution. The court stressed that the Quebec government had failed to show that the restrictions in the Charter of the French Languages were sufficiently necessary under section 1 of the new constitution. As evidence of this failure, the court pointed to two aspects in particular as evidence of Quebec's true convictions on the necessity of the restrictions: the testimony of demographers who believed that lifting the restrictions would have only a "negligible" effect on total enrollment in the

Ontario requiring a sufficient number of French-speaking taxpayers to support French-speaking instruction in a school district.<sup>58</sup> Paragraph 3 of section 23 allows restriction on availability of minority language instruction only where the number of children so warrants and is silent on the number of taxpayers.<sup>59</sup>

The provinces still maintain complete discretion over two major groups of citizens:<sup>60</sup> English or French-speaking Canadians who are in the majority in their province<sup>61</sup> and all non-English and non-French-speaking Canadians.<sup>62</sup> English and French-speaking Canadians who are in the majority in their province do not have the freedom, under section 23, to choose to have their children taught in their province's minority language.<sup>63</sup> French-speaking Quebecers, therefore, do not have the right to choose to have their children taught in English, while under section 23, French-speaking Canadians in neighboring New Brunswick and in all other provinces do have the right to this choice.<sup>64</sup> Non-English and non-

English-speaking schools and Quebec's offer in 1977 to lift the restrictions if the other provinces would give more language rights to French-speaking Canadians. *Id.* See also Toronto Globe and Mail, Sept. 9, 1982, at 1, col. 4.

<sup>58</sup> See *supra* note 44 and accompanying text.

<sup>59</sup> CONST., *supra* note 1, §23(3). Mr. M.F. Yalden, Commissioner of Official Languages, opposed the use of such an ambiguous term as "where the number . . . so warrants." He stressed that "the purpose of a constitution is to enshrine in broad but unambiguous terms those fundamental and generally applicable principles we hold to be important." He further pointed out that today there are alternative methods of education (e.g. closed circuit television) that would allow education in the minority language regardless of the number of children in a district who want a minority language education. *Special Joint Committee Hearings*, 32d Parliament, 1st Sess. (issue 6) 14 (1980) (testimony of Mr. M.F. Yalden, Commissioner of Official Languages).

<sup>60</sup> Non-citizens are also excluded from protection under section 23. See CONST., *supra* note 1, §23(1). This is the only right enumerated in the new constitution which excludes aliens. See CONST., *supra* note 1, §§1-24.

<sup>61</sup> See *supra* note 1; see also *Special Joint Committee Hearings*, *supra* note 59, at 11 (testimony of Ms. Joan Dougherty, Chairman, Protestant School Board of Greater Montreal).

<sup>62</sup> See *supra* note 61.

<sup>63</sup> See *supra* note 1.

<sup>64</sup> For one explanation of why the majority was not included, see *supra* note 53. The provinces' treatment of the linguistic majority's ability to be taught in the minority language of the province varies. In four of the six provinces which statutorily regulate the languages to be used in school, members of the majority linguistic group have the freedom to choose the minority language of the province. These provinces are Alberta, Saskatchewan, Ontario, and Manitoba. For the statutes according this right, see *supra* note 43. In New Brunswick a child's mother tongue is his primary language of instruction and the other language (English or French) is the secondary language. Official Languages of New Brunswick Act, N.B. REV. STAT. ch. 0-1, §12 (1973). In Quebec a member of the majority group may be taught only in French. Charter of the French Language, QUE. REV. STAT. ch. c-11, §72 (1977).

French-speaking Canadians are doubly denied protection under section 23. They are given the freedom neither to choose their own language, nor to choose in which of the two languages cited in section 23 their children will be instructed.<sup>65</sup>

### B. *International Law*

The Statute of the International Court of Justice (I.C.J.) sets out a list of sources from which the applicable requirement under international law in a particular situation may be determined.<sup>66</sup> Three of these sources have particular applicability to the issue of linguistic minority educational rights. Listed in order of priority, they are: (1) international conventions and treaties establishing rules expressly recognized by the consenting states; (2) international custom as evidenced by a general practice accepted as law; and (3) prior judicial decisions.<sup>67</sup>

Two international agreements dealing with the subject of minority language education are binding upon Canada: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (together referred to as the International Human Rights Covenants).<sup>68</sup> The International Covenant on Civil and Political Rights (I.C.C.P.R.) recognizes the right of persons belonging to linguistic minorities to enjoy their own culture and to speak their own language in the community with other members of their group.<sup>69</sup> The I.C.C.P.R. also re-

<sup>65</sup> See CONST., *supra* note 1, §23. Of the six provinces which statutorily regulate the languages to be used in school, all except for New Brunswick accord the same freedom of choice to non-English and non-French-speaking Canadians as is accorded the linguistic majority. See *supra* note 64. In New Brunswick, Canadians who speak neither English nor French are not mentioned directly or indirectly. Official Languages of New Brunswick Act, N.B. REV. STAT. ch. 0-1, §12 (1973). A possible reason for this exclusion is that these people constitute only 1.5% of the New Brunswick population. 1981 CENSUS OF CANADA, *supra* note 8, at 1-9.

<sup>66</sup> Statute of the International Court of Justice, June 16, 1945, art. 38, 59 Stat. 1055, 1060, T.S. No. 933.

<sup>67</sup> *Id.* art. 38(1).

<sup>68</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6319 (1966). Both covenants were ratified by Canada on May 19, 1976. See HUMAN RIGHTS: INTERNATIONAL DOCUMENTS 350-53 (J. Joyce ed. 1978).

<sup>69</sup> The Covenant states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

quires each state to adopt the measures necessary to give effect to this recognized right and bars the state from discriminating against individuals on the basis of language in the implemented measures.<sup>70</sup>

The International Covenant on Economic, Social and Cultural Rights (I.C.E.S.C.R.) deals explicitly with the right to an education.<sup>71</sup> The I.C.E.S.C.R. recognizes the universal right to an educa-

International Covenant on Civil and Political Rights, *supra* note 68, art. 27.

<sup>70</sup> Each State Party to the present Covenant undertakes to:

respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*Id.* art. 2(1).

<sup>71</sup> The International Covenant on Economic, Social, and Cultural Rights states:

(1) The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

(2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

(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.

(4) No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

tion. Under the I.C.E.S.C.R., primary education is to be compulsory and free, and secondary education is to be made generally available and accessible.<sup>72</sup> This right to education must be recognized by the state without discrimination of any kind toward any person.<sup>73</sup>

In addition to the International Human Rights Covenants, there is a third agreement dealing with the right to education, the United Nations Economic, Social and Cultural Organization (UNESCO) Convention Against Discrimination in Education. The UNESCO Education Convention has not been ratified by Canada.<sup>74</sup> Although such an agreement is not strictly binding on a state that has not ratified it, the I.C.J. has held that the existence of such an agreement may be viewed as persuasive evidence of customary international law.<sup>75</sup> The UNESCO Education Convention, like the I.C.E.S.C.R., recognizes the right to education and bars discrimination based on language.<sup>76</sup> The UNESCO Education Con-

International Covenant on Economic, Social, and Cultural Rights, *supra* note 68, art. 13.

<sup>72</sup> *Id.* art. 13, paras. 2(a) and (b).

<sup>73</sup> *Id.* art. 2, para. 2, provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>74</sup> UNESCO Convention Against Discrimination in Education, *opened for signature* Dec. 14, 1960, 429 U.N.T.S. 93. Canada has not signed the Convention since education is primarily under the control of the provinces and not the federal government. *See Short, supra* note 7, at 22.

<sup>75</sup> *See North Sea Continental Shelf (Ger. v. Den.) (Ger. v. Neth.)*, 1969 I.C.J. 4, 44. The court imposed two conditions in determining when a non-party to an international agreement could nevertheless be bound by it. The requirements found in the agreement must amount to settled practice, and the agreement must be followed in such a way as to evidence a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. *Id.*

<sup>76</sup> The UNESCO Convention states:

#### *Article 1*

(1) For the purpose of this Convention, the term "discrimination" includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:

(a) Of depriving any person or group of persons of access to education of any type or at any level;

(b) Of limiting any person or group of persons to education of an inferior standard;

(c) Subject to the provisions of article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or

(d) Of inflicting on any person or group of persons conditions which are

vention, however, goes a step further by addressing linguistic mi-

incompatible with the dignity of man.

(2) For the purposes of this Convention, the term "education" refers to all types and levels of education, and includes access to education, the standard and equality of education, and the conditions under which it is given.

*Article 2*

When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of article 1 of this Covenant:

....

(b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;

(c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.

*Article 3*

In order to eliminate and prevent discrimination within the meaning of this Convention, the States Parties thereto undertake:

(a) To abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education;

(b) To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions;

....

(d) Not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group;

(e) To give to foreign nationals resident within that territory the same right to education as that given to nationals.

*Article 4*

The States Parties to this Covenant undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular:

(a) To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law;

(b) To ensure that the standards of education are equivalent in all public education institutions of the same level, and that the conditions relating to the quality of the education provided are also equivalent;

....

nority education. The Convention does not compel a state to provide education in the language of the linguistic minority, but it does permit the establishment of such an opportunity, provided that three important restrictions are followed: attendance at schools providing education in the minority language must be voluntary; the standard of education must not be lower than the general standard approved by the authorities; and such educational instruction cannot prevent a student from being able to communicate within the "community" as a whole.<sup>77</sup>

There also have been two United Nations General Assembly declarations, the Universal Declaration of Human Rights and the Declaration of the Rights of the Child, addressing the subject of linguistic minorities and education.<sup>78</sup> The I.C.J. views United Nations resolutions, like international agreements which have not been ratified by the states involved, as persuasive evidence of international custom.<sup>79</sup> The Universal Declaration of Human Rights recognizes the right of everyone to education and bars discrimination based on language.<sup>80</sup> The Declaration of the Rights of a Child goes fur-

UNESCO Convention Against Discrimination in Education, *supra* note 74, arts. 1-4.

<sup>77</sup> Article 5, paragraph 6, of the UNESCO Convention states:

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.

*Id.* art. 5(c).

<sup>78</sup> Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A(III), U.N. Doc. A/810 (1948) at 71; Declaration of the Rights of the Child, G.A. Res. 1386, U.N. Doc. A/4249 (1959).

<sup>79</sup> See *Western Sahara*, 1975 I.C.J. 1, 31-33 (Advisory opinion issued Oct. 16, 1975). The court analyzed the rights of inhabitants in the Western Sahara using United Nations resolutions as a means for establishing customary international law. *Id.*

<sup>80</sup> The Universal Declaration states:

*Article 2.* Everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*Article 26.* (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.



ther by specifying that the education given to a child must promote *his* general culture.<sup>81</sup>

The issue of linguistic minority educational rights has never come before the I.C.J., but the European Court of Human Rights has heard a case on this issue.<sup>82</sup> The case dealt with the validity of a Belgian statute which provided for the establishment of French and Dutch-speaking schools.<sup>83</sup> The statute allowed admission to the Dutch-speaking schools to all children in a district, but it restricted admission to the French-speaking schools to children of French-speaking parents from particular areas in the district.<sup>84</sup> The European Court of Human Rights stated that although a country is under no obligation to provide a multilingual education system,<sup>85</sup> when such a system is provided, the country may not exclude or admit students solely because of the mother tongue of a student or his parents.<sup>86</sup> The court held that a state was prohibited from offering greater educational opportunities to some linguistic groups than to other linguistic groups.<sup>87</sup>

### C. *United States*

Canada's southern neighbor, the United States, has a different perspective on the issue of linguistic minority educational rights. The United States contains a smaller percentage of linguistic minorities than does Canada. Only nine percent of the United States population uses a language other than English as a first language.<sup>88</sup>

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Universal Declaration of Human Rights, *supra* note 78, arts. 2 and 26.

<sup>81</sup> The Declaration of the Rights of the Child states, "The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture. . . ." Declaration of the Rights of the Child, *supra* note 78, principle 7.

<sup>82</sup> Case Relating to Certain Aspects of the Law on the Use of Languages in Education in Belgium, 1968 Y.B. EUR. CONV. ON HUMAN RIGHTS 832 (judgment of July 23) [hereinafter cited and referred to as Belgium Linguistic Case].

<sup>83</sup> *Id.* at 922.

<sup>84</sup> *Id.* at 922-28.

<sup>85</sup> *Id.* at 882-84.

<sup>86</sup> *Id.* at 938-42.

<sup>87</sup> *Id.*

<sup>88</sup> U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED

Nevertheless, the number of affected individuals is significant. Among children between the ages of five and seventeen, over 3.8 million are in a linguistic minority.<sup>89</sup> These children are primarily Hispanic, but there is also a number of such children of Oriental or European origin.<sup>90</sup>

In the same manner as the Canadian BNA Act, which allowed provincial control over education, the United States Constitution leaves the administration of education to the states.<sup>91</sup> Prior to the mid-1970's, this administrative control included discretion over the nature of the education received by linguistic minorities.<sup>92</sup> As a result of this discretion, widely disparate action was taken by different states. In Texas, Spanish-speaking students were routinely segregated until such activity was prohibited in 1948,<sup>93</sup> after which Spanish-speaking students still were not allowed to speak in their native language anywhere on school grounds until as late as 1968.<sup>94</sup> In contrast, New Mexico has always required under its state constitution that the legislature provide Spanish-speaking teachers to aid English-deficient children.<sup>95</sup> In addition, the New Mexico constitution forbids segregation of Spanish-speaking students and guarantees them the right to equal education.<sup>96</sup>

STATES 35 (1981).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> U.S. CONST. amend. X.

<sup>92</sup> See *Morales v. Shannon*, 366 F. Supp. 813, 824 (W.D. Tex. 1973), *rev'd* 516 F.2d 411 (5th Cir. 1975). The district court held that even though the school district had failed to deal with English language deficiencies in Mexican-American students, such a failure would not amount to denial of equal educational opportunity under either the fourteenth amendment or the Civil Rights Act of 1964.

<sup>93</sup> *Delgado v. Bastrop Independent School Dist.*, C.A. No. 338 (W.D. Tex. 1948) (unreported), *cited in* *United States v. Texas*, 506 F. Supp. 405, 412 (E.D. Tex. 1981).

<sup>94</sup> See *United States v. Texas*, 506 F. Supp. 405, 412 (E.D. Tex. 1981), *rev'd on other grounds*, 680 F.2d 356 (5th Cir. 1982).

<sup>95</sup> N.M. CONST. art. CII, §8, provides:

The legislature shall provide for the training of teachers in the normal schools or otherwise so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils and students in the public schools and educational institutions of the state, and shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to such pupils and students.

<sup>96</sup> *Id.* §10 provides:

Children of Spanish descent in the state of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public educational institutions of the state, and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the state, and the legislature shall

This situation changed in 1974. The United States Supreme Court held in *Lau v. Nichols* that under the Civil Rights Act of 1964, which bars discrimination on the grounds of national origin, schools which receive federal funds must take special steps to educate students who do not speak English.<sup>97</sup> The *Lau* decision was subsequently codified by Congress in the Equal Education Opportunity Act of 1974.<sup>98</sup> This Act specifically mandates that all educational agencies take appropriate action to aid students who are deficient in English language skills.<sup>99</sup>

In response to this legislation, the states have adopted one of three kinds of programs: English as a Second Language (ESL), immersion, or bilingual education.<sup>100</sup> The ESL program pulls students with deficient English skills out of English-speaking classrooms for a number of hours each day in order to provide them with special aid in learning English.<sup>101</sup> The immersion program takes ESL one step further by removing these students entirely from their substantive programs and by giving them intense instruction in English until they acquire minimum proficiency sufficient to permit their return to English-speaking programs.<sup>102</sup> Bilingual education differs greatly from the other two programs since the linguistic minority student is taught substantive subjects in his native language while he learns English through an ESL-type instruction.<sup>103</sup>

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provide penalties for the violation of this section. This section shall never be amended except upon a vote of the people of this state, in an election at which at least three-fourths of the electors voting in the whole state and at least two-thirds of those voting in each county in the state shall vote for such amendment.

<sup>97</sup> *Lau v. Nichols*, 414 U.S. 563, 566 (1974). The Court held that equality of treatment is not achieved by providing students who do not understand English with the same facilities, textbooks, teachers, and curriculum.

<sup>98</sup> Equal Education Opportunity Act of 1974, §204, 20 U.S.C. §1703 (1974).

<sup>99</sup> *Id.* The Act states:

No state shall deny equal educational opportunity to an individual on account of his or her race, sex, or national origin by . . .

(f) the failure of an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program.

<sup>100</sup> See Marquilles, *Bilingual Education, Remedial Language Instruction, Title VI, and Proof of Discriminatory Purpose: A Suggested Approach*, 17 COL. J.L. & SOC. PROB. 99 (1981).

<sup>101</sup> *Id.* at 103.

<sup>102</sup> *Id.* States with only a few linguistic minority students, like Georgia, prefer the ESL program and the immersion program because of the minimum cost in teachers and textbooks. Atlanta Constitution, Sept. 12, 1982, at 1B, col. 2.

<sup>103</sup> Marquilles, *supra* note 100, at 103. The bilingual education program had been en-

The federal courts have given the states broad discretion in choosing the particular program to implement in their schools.<sup>104</sup> Federal court review is limited to examining whether the chosen program provides the rights conferred by the Supreme Court and by Congress.<sup>105</sup> The courts typically look for three requirements when examining a program: (1) the program must be based on an educational theory recognized as sound or at least as a legitimate experimental strategy by some experts in the field; (2) the program must be reasonably calculated to implement that theory; and (3) the program must have produced satisfactory results after having been used for a sufficient period of time.<sup>106</sup>

### III. ANALYSIS

#### A. Section 23 in the Canadian Society

##### 1. Objectives of Section 23

Section 23 of the new constitution incorporates two competing objectives. These two objectives are: (1) acceptance of both the English and French languages in Canada and (2) maintenance of the

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couraged for a time by the federal government. The Bilingual Education Act was passed in 1978 by Congress to aid school systems that initiated such a program. Bilingual Education Act, 20 U.S.C. §3221 (Supp. 1981). The program, however, has lost favor under the present administration which cut its budget by 20% between 1981 and 1982. *Toughen Up: U.S. Schools Must Improve*, TIME, May 16, 1983, at 73.

<sup>104</sup> See *Guadalupe Organization, Inc. v. Temple Elementary School Dist. No. 3*, 517 F.2d 1022 (9th Cir. 1978); *Castaneda v. Pichard*, 648 F.2d 989 (5th Cir. 1981); *United States v. Texas*, 506 F. Supp. 405 (E.D. Tex. 1981), *rev'd* 680 F.2d 356 (5th Cir. 1982); *but see Cintron v. Brentwood Union Free School District*, 455 F. Supp. 57 (E.D.N.Y. 1978); *Rios v. Reed*, 480 F. Supp. 14 (E.D.N.Y. 1978). The district court in New York has on these two occasions ruled that only bilingual-bicultural programs are permitted under the *Lau* decision and the Equal Education Opportunity Act of 1974. The court in *Cintron* held that, because of the psychological trauma on a child thrust rapidly into an English-speaking classroom and because his own mother tongue is subjugated to secondary status, the immersion technique is unacceptable. 455 F. Supp. at 62-64. The court in *Rios* also stressed that bilingual instruction is mandated even where it is shown that alternative programs result in a quicker understanding of English. 480 F. Supp. at 23. The district court in *United States v. Texas*, 506 F. Supp. 405 (E.D. Tex. 1981), partially followed the *Cintron* and *Rios* decisions by holding that, while bilingual education is not required per se, because it is uniquely suited to handle the problem of Spanish-speaking Americans it must be implemented where no existing program is in place. 506 F. Supp. at 433-34. This decision was subsequently reversed by the Fifth Circuit Court of Appeals. 680 F.2d at 371.

<sup>105</sup> In *Guadalupe*, the court held that no specific kind of action is required as long as an adequate remedial program is in place. *Guadalupe Organization, Inc. v. Temple Elementary School Dist. No. 3*, 587 F.2d at 1029-30.

<sup>106</sup> *Castaneda v. Pichard*, 648 F.2d at 1009-10; *United States v. Texas*, 680 F.2d at 371.

provinces' power to shape and bolster their cultural identity.<sup>107</sup> In consolidating these two objectives, the section compromises both by resting on a middle ground.<sup>108</sup>

The section recognizes that both English and French are legitimate languages of instruction in Canada, but it stops short of sanctioning equal usage of the two languages in educational systems.<sup>109</sup> The right to choose to have one's child taught in either English or French is limited to English or French-speaking parents who are in the minority in a province.<sup>110</sup> An English-speaking Canadian inside Quebec or a French-speaking Canadian outside Quebec may choose to have his child taught in either of the two languages.<sup>111</sup> In contrast, an English-speaking Canadian living outside Quebec, a French-speaking Canadian living inside Quebec, and a non-English and non-French-speaking Canadian living anywhere in Canada do not have this freedom of choice.<sup>112</sup>

By limiting those who have the freedom to choose the language in which the child is educated, section 23 enables provinces to maintain considerable control over their cultural identity.<sup>113</sup> The section does not remove provincial discretion over the majority of individuals in the educational systems.<sup>114</sup> The provinces still decide what instructional language choices, if any, will be offered to the English or French-speaking majority and to the non-English and non-French-speaking minority.<sup>115</sup> The section, therefore, forces the provinces to accept their English or French minority culture while allowing them to develop the majority culture in whatever way they see fit.<sup>116</sup>

<sup>107</sup> See U.N. Study, *supra* note 3, at 84, para. 493; Gaarder, *supra* note 4, at 51-52. See also *supra* note 4 and accompanying text.

<sup>108</sup> Mr. Marc Lalonde, the Minister of Federal-Provincial Relations, stated that the purpose of section 23 was to protect only those people who had the greatest self-interest in the continued use of English or French. The provinces, he stressed, could decide for themselves the other rights they wished to recognize. *Special Joint Committee Hearings, supra* note 53.

<sup>109</sup> See CONST., *supra* note 1, §23. Section 23 is the only section in either the new constitution or the BNA Act which recognizes the use of both English and French but fails to provide for equal rights of usage. See CONST., *supra* note 1, §§1-24; BNA ACT, *supra* note 29, §93.

<sup>110</sup> CONST., *supra* note 1, §23.

<sup>111</sup> See *supra* notes 54-58 and accompanying text.

<sup>112</sup> See *supra* note 1; see also *supra* notes 60-65 and accompanying text.

<sup>113</sup> Compare CONST., *supra* note 1, §23 with BNA ACT, *supra* note 29, §93.

<sup>114</sup> See *supra* notes 60-65 and accompanying text.

<sup>115</sup> *Id.*

<sup>116</sup> For an explanation of past actions of the provinces, see generally *supra* notes 35-49 and accompanying text.

The fulfillment of both of these objectives is important in light of Canada's present social and political situation. The English and French languages are deeply engrained in Canadian society, and a failure to accept this could lead to great hardship and possible unrest.<sup>117</sup> At the same time, the federal government does not wish to appear to be stripping Quebec of its ability to sustain its French culture.<sup>118</sup> A major reason for the failure of the 1981 sovereignty referendum in Quebec was the belief among French Quebecers that their culture could be protected by statutes enacted by the *Parti Quebecois*.<sup>119</sup> Section 23 attempts to leave the provinces as much discretion as possible so that French Quebecers can continue to feel that they are able to remain both French-speaking and Canadian.<sup>120</sup>

## 2. *Effect of Section 23*

The compromise of the two competing objectives renders section 23 applicable only to a small percentage of Canada's population. The section covers five percent of the English-speaking population, seventeen percent of the French-speaking population, and none of the non-English and non-French-speaking population.<sup>121</sup> Those citizens who are covered now have the right to have their children educated in the language of the parent or of the majority in their province.<sup>122</sup> The choice is left to the parents.<sup>123</sup> For those Canadians not included in section 23, the choice remains with the prov-

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<sup>117</sup> See *supra* notes 14-18 and accompanying text. Canada has refrained from extending equal recognition to other languages, partly for fear of creating a "Tower of Babel." See *Special Joint Committee Hearings*, 23d Parliament, 2d Sess. (issue 45) 44 (1971) (statement of Senator Forsey). In addition, there exists the feeling that unlike English and French, which are used by Canadians nationwide, other languages are used in only a few select areas. Therefore, it is appropriate to leave concerns about these languages at the provincial rather than national level. *Id.* at 43 (statement of Mr. Ross Densmore).

<sup>118</sup> See generally *Special Joint Committee Hearings*, *supra* note 117, at 41 (statement of Joint Chairman, Mr. MacGurgan). Mr. MacGurgan feared that by expanding section 23 to include all Canadians, the Quebec situation would only be aggravated.

<sup>119</sup> Short, *supra* note 7, at 1. For an outline of the present situation in Quebec, see *supra* notes 21-27 and accompanying text.

<sup>120</sup> This attempt, however, may not succeed. Following the recent Quebec district court decision on the language rights of English-speaking Canadians in Quebec, see *supra* note 57, the *Parti Quebecois* stated that it intended to use this decision as a strong argument favoring sovereignty for Quebec. *Toronto Daily Star*, Sept. 9, 1982, at 1, col. 3.

<sup>121</sup> See CONST., *supra* note 1, §23; 1981 CENSUS OF CANADA, *supra* note 8, at 1-1 and 2-17. The section protects the 700,000 English-speaking Canadians in Quebec and the 1.8 million French-speaking Canadians outside Quebec.

<sup>122</sup> See CONST., *supra* note 1, §23.

<sup>123</sup> *Id.*

ince.<sup>124</sup> Most of the Canadians excluded by the section are not adversely affected, although some are greatly disadvantaged.

Canadians in the linguistic majority of a province cannot choose between English and French under section 23.<sup>125</sup> This is irrelevant to most members of the majority since they probably want their children to receive educational instruction in the majority language of the province. In Quebec, however, some French-speaking Canadians may have strong reasons for wanting their children taught in English. Being educated in French can greatly restrict a child's future, both geographically and economically. Outside Quebec, Canada is only ten percent French-speaking.<sup>126</sup> High level positions, even within Quebec, require proficiency in English.<sup>127</sup> The exclusion from coverage under section 23 and the restrictions contained in the Charter of the French Languages do not permit these Canadians to receive an English-speaking education in government-supported schools in Quebec.<sup>128</sup>

A group more particularly disadvantaged by exclusion from section 23 are Canadians who speak neither English nor French. These Canadians are denied not only the right to have their mother tongue used in the educational system, but also the right to choose between the two languages cited in section 23.<sup>129</sup> Instead, they must accept the majority language of the province unless the province itself offers them a choice.<sup>130</sup> Outside Quebec this does not pose a great problem since non-English and non-French-speak-

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<sup>124</sup> See *supra* notes 59-65 and accompanying text.

<sup>125</sup> See CONST., *supra* note 1, §23; but see *supra* note 64.

<sup>126</sup> 1981 CENSUS OF CANADA, *supra* note 8, at 1-1 and 2-17.

<sup>127</sup> A recent study states that although proficiency in English is not necessary for most jobs in Quebec, it is necessary in career plans which require French-speaking Canadians to compete with English-speaking Canadians. See *Toronto Globe and Mail*, Nov. 2, 1982, at 29, col. 1.

<sup>128</sup> CONST., *supra* note 1, §23; Charter of the French Languages, QUE. REV. STAT. ch. C-11, §§72-73 (1977). In addition to restricting access to English-speaking schools, the Quebec government has also imposed limitations on the availability of English instruction in the French-speaking schools. The English language cannot be taught until the fourth grade. Furthermore, the quality of instruction in French-speaking schools has been steadily declining in recent years, in contrast to the amount of French instruction given in English-speaking schools. Children who attend these schools are taught French beginning in kindergarten and are given access to French immersion courses at "different levels of their schooling." As a result of these activities, English-speaking students are becoming bilingual while the French-speaking students are becoming monolingual. *Toronto Globe and Mail*, Nov. 2, 1982, at 29, col. 1.

<sup>129</sup> See *supra* notes 59-65 and accompanying text.

<sup>130</sup> See *supra* notes 40-42, 65 and accompanying text (rights and restrictions of non-English and non-French-speaking Canadians in the provinces).

ing Canadians in the English-speaking provinces prefer at a rate of nine to one that their children be taught in English rather than in French.<sup>131</sup> Inside Quebec, however, this can result in a government-imposed language of instruction which would not be selected by most of these citizens. Prior to the passage of the restrictive French language provisions in Quebec, non-English and non-French-speaking Canadians chose at a rate of three to one to have their children taught in English rather than in French.<sup>132</sup> This preference was reasonable in light of the very limited use of French outside of Quebec.<sup>133</sup> The Quebec language charter, however, takes the ability to choose English away from these Canadians.<sup>134</sup> Section 23 of the new constitution perpetuates the same deprivation by failure to include citizens who speak neither English nor French.

### 3. *Present Status of Linguistic Educational Rights in Canada*

The rights provided in section 23 and the exercise of provincial control over groups not receiving these rights result in the establishment of three different levels of linguistic educational rights for Canadians. The first level is granted to English and French-speaking Canadians who constitute a minority in their province. Under section 23, these Canadians may choose to have their children taught in either English or French.<sup>135</sup> The second level of rights is granted to English and French-speaking Canadians who are in the majority in their province. Under privileges granted by the provinces, members of the linguistic majority can have their children taught in their mother tongue.<sup>136</sup> Section 23, however, takes away the possibility of the majority groups' choosing to have their children taught in their provinces' minority languages.<sup>137</sup> The third

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<sup>131</sup> Henripen, *supra* note 14, at 159.

<sup>132</sup> *Id.*

<sup>133</sup> See *supra* note 8; see also *supra* note 126 and accompanying text.

<sup>134</sup> See Charter of the French Language, QUE. REV. STAT. ch. C-11, §§72-73 (1977).

<sup>135</sup> See CONST., *supra* note 1, §23.

<sup>136</sup> Six provinces specify by statute which languages may be used in the educational system. They all provide that the majority language of the province is to be the normal language of instruction. These six provinces are: New Brunswick, Official Language of New Brunswick Act, N.B. REV. STAT. ch. 0-1, §12 (1973); Ontario, The Education Act, ONT. REV. STAT. ch. 129, §§258-77 (1980); Manitoba, The Public School Act, MAN. REV. STAT. ch. 33, §79 (1980); Saskatchewan, The School Act, SASK. REV. STAT. ch. 5-36, §215 (1978); Alberta, The School Act, ALTA. REV. STAT. ch. S-3, §159 (1981); and Quebec, Charter of the French Language, QUE. REV. STAT. ch. C-11, §72 (1977).

<sup>137</sup> CONST., *supra* note 1, §23. See *supra* note 64 (rights of majority to be taught in the



level of educational rights applies to Canadians whose first language is neither English nor French; this third level actually constitutes a denial of educational rights. In all but two provinces, these Canadians cannot choose their mother tongue as the language of instruction for their children, and under section 23 they cannot choose between English or French.<sup>138</sup>

## B. *Section 23 and International Law*

### 1. *The Problem*

The existence of three tiers of linguistic educational rights in Canada raises a serious question under international law: does the establishment of different levels of rights constitute permissible distinction or unlawful discrimination? In order to answer this question it is necessary to examine the positions taken in those international agreements which are binding on Canada as well as in those which are merely persuasive evidence of Canada's obligations.<sup>139</sup>

### 2. *International Covenant on Civil and Political Rights*

The I.C.C.P.R.<sup>140</sup> recognizes a general right possessed by linguistic minority members and imposes a duty on Canada to respect that right.<sup>141</sup> Article 27 of the I.C.C.P.R. states: "In those States in which . . . linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of the group . . . to use their own language."<sup>142</sup> Article 2 requires the State "to respect and to ensure that all individuals . . . subject to its jurisdiction [enjoy] the rights recognized in the present covenant, without distinction of any kind, such as . . . language."<sup>143</sup>

These two articles do not impose any affirmative duty upon the state to take positive action, but they do require the state to refrain from certain courses of conduct.<sup>144</sup> Article 27 obliges the state

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minority language in the different provinces).

<sup>138</sup> CONST., *supra* note 1, §23. See *supra* note 65 (rights of non-English and non-French-speaking minorities to a choice between English or French instruction).

<sup>139</sup> See *supra* note 66 and accompanying text.

<sup>140</sup> International Covenant on Civil and Political Rights, *supra* note 68.

<sup>141</sup> *Id.* arts. 2 and 27. See *supra* notes 69-70 and accompanying text.

<sup>142</sup> International Covenant on Civil and Political Rights, *supra* note 68, art. 27.

<sup>143</sup> *Id.* art. 2.

<sup>144</sup> The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities stressed that article 27 merely required the state to allow linguistic minorities

to refrain from taking action which "denies" the right expressed therein, while article 2 requires the state to refrain from distinguishing according to language when ensuring and respecting the rights recognized under the Covenant.<sup>145</sup> Together, these articles provide that all state action dealing with a linguistic minority member's ability to use his own language must be applied without distinguishing among the different linguistic minorities.<sup>146</sup>

Section 23 of Canada's new constitution gives linguistic minority members who speak one of two particular languages the right to have their children taught in their mother tongue, but it fails to grant this right to linguistic minority members who speak another language.<sup>147</sup> Under this section, only linguistic minority members whose mother tongue is English or French have the right to use their language in school instruction.<sup>148</sup> Section 23, therefore, makes a distinction in the rights afforded linguistic minorities based on the language used by the minority;<sup>149</sup> such a distinction may be viewed as a contravention of the Covenant.<sup>150</sup>

### 3. *International Covenant on Economic, Social and Cultural Rights*

The I.C.E.S.C.R.<sup>151</sup> establishes a general right to education.<sup>152</sup>

to use their own language. It did not give those minorities the right to demand that the state adopt positive measures. U.N. Study, *supra* note 3, at 36.

<sup>145</sup> International Covenant on Civil and Political Rights, *supra* note 68, arts. 2 and 27. For texts of articles 2 and 27, see *supra* notes 69 and 70.

<sup>146</sup> See Short, *supra* note 7, at 17-18. Short emphasizes that "whatever may be the specific mechanisms which a state adopts in order to assure recognition of the rights conferred under article 27, those mechanisms must be made available to all who qualify for the protection of the article, i.e., all members of a minority group without distinction based on the various criteria enumerated in article 2." *Id.*

<sup>147</sup> See CONST., *supra* note 1, §23.

<sup>148</sup> *Id.*

<sup>149</sup> The problem with section 23 is compounded by the activities of the provinces regarding those linguistic minorities excluded from the section. Article 50 of the International Covenant on Civil and Political Rights makes the Covenant applicable to "all parts of the federal states without any limitations or exceptions." International Covenant on Civil and Political Rights, *supra* note 68, art. 50. The failure to provide non-English and non-French-speaking linguistic minorities with the right to use their own language in school in all but two provinces means that Canada is making distinctions on the rights of linguistic minorities based on language. See *supra* notes 39-45 and accompanying text.

<sup>150</sup> If section 23 had merely recognized the rights to use either English or French without specifying who could exercise these rights, the section would not be in violation of the Covenant. The section would merely be favoring one language over another, not necessarily one group over another. See *Belgium Linguistic Case*, *supra* note 82, at 884-86.

<sup>151</sup> International Covenant on Economic, Social and Cultural Rights, *supra* note 68.

<sup>152</sup> *Id.* art. 13.

Article 13 requires the state to guarantee a right to primary education to all people and to make secondary education generally available.<sup>153</sup> Article 2 prohibits discrimination of any kind based on language in the exercise of this right and duty.<sup>154</sup>

The I.C.E.S.C.R. does not address directly the issue of linguistic minority educational rights, but articles 2 and 13 dictate that the right to education be granted to all people regardless of their language.<sup>155</sup> In order to determine what duties are imposed upon the state by this requirement, the Covenant will be examined through the interpretation of the *Belgium Linguistic Case*.<sup>156</sup>

The *Belgium Linguistic Case* was decided by the European Court of Human Rights, which was interpreting the European Convention of Human Rights.<sup>157</sup> Although the case is not binding on Canada,<sup>158</sup> it is nonetheless useful in analyzing Canada's obligations because the court based its finding on article 14 of the European Convention<sup>159</sup> and on article 2 of the Protocol of March 20, 1952 (the Protocol),<sup>160</sup> both of which are similar in content to articles 2 and 13 of the I.C.E.S.C.R.<sup>161</sup>

The applicants in the *Belgium Linguistic Case* made two arguments that are applicable to the Canadian situation.<sup>162</sup> They con-

<sup>153</sup> *Id.* art. 13(2).

<sup>154</sup> *Id.* art. 2.

<sup>155</sup> *Id.* arts. 2 and 13. In addition, article 28 of the Covenant makes the provisions of that instrument applicable to all parts of the federal system of government. This means that section 23 should be viewed in conjunction with the activities of the provinces. *Id.* art. 28.

<sup>156</sup> *Belgium Linguistic Case*, *supra* note 82. For an analysis of Quebec's Charter of the French Language in light of the *Belgium Linguistic Case*, see generally Short, *supra* note 7, at 14-16.

<sup>157</sup> *Belgium Linguistic Case*, *supra* note 82, at 834.

<sup>158</sup> The European Court of Human Rights jurisdiction only extends to nations which have ratified the Convention and have accepted the jurisdiction of the court. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 45 and 48, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

<sup>159</sup> *Belgium Linguistic Case*, *supra* note 82, at 834.

<sup>160</sup> *Id.* Article 2 of the Protocol states:

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 right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, art. 2, 213 U.N.T.S. 262 (entered into force May 18, 1954).

<sup>161</sup> International Covenant on Economic, Social, and Cultural Rights, *supra* note 68, arts. 2 and 13.

<sup>162</sup> Before the applicants could reach the two arguments in question, they first had to overcome the threshold question of whether article 14 of the European Convention and article 2 of the Protocol were to be read together. The court ruled that the two were to be read

tended that the European Convention's article 14 and the Protocol's article 2 necessitated the establishment of linguistic minority schools and, in the alternative,<sup>163</sup> that the European Convention obligated the state to provide for equal treatment of all language groups in the educational system.<sup>164</sup> The applicants asserted that the European Convention's prohibition against educational discrimination based on languages bars the establishment of a system that denies to children who are members of linguistic minorities a complete education in their own language.<sup>165</sup> The applicants believed that a unilingual educational system discriminates against linguistic minorities because the system enables one linguistic group, normally the majority, to have its children taught in its mother tongue while it denies this privilege to other linguistic groups.<sup>166</sup>

The Belgian government, the European Commission on Human Rights, and ultimately the European Court stressed that a unilingual system does not promote one group over another, but merely one language over another.<sup>167</sup> The European Court held that the European Convention does not prohibit a government from making distinctions which are made on an "objective assessment" of a situation and which constitute an attempt to promote the general welfare.<sup>168</sup> Without the ability to make such distinctions, the state could not promote the interests of the nation.<sup>169</sup>

The European Court agreed, however, with the second argument offered by the applicants.<sup>170</sup> The court held that, although the state is not required to establish a multilingual educational system, where such a system is created, no linguistic group can have greater access to it than other linguistic groups.<sup>171</sup> In the *Belgium Linguistic Case* the government had set up an educational system

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in conjunction and that, therefore, the right to education in the Protocol must be granted without discrimination based on language under article 14 of the European Convention. *Belgium Linguistic Case*, *supra* note 82, at 856-68.

<sup>163</sup> *Id.* at 870-72.

<sup>164</sup> *Id.* at 928-32.

<sup>165</sup> *Id.* at 870.

<sup>166</sup> *Id.* at 870-72.

<sup>167</sup> *See id.* at 872-76.

<sup>168</sup> *Id.* at 884-86.

<sup>169</sup> In examining the Belgian practice of making only one of the two national languages (Dutch and French) generally available for public school instruction in essentially unilingual regions, the European Court recognized as legitimate the desire to achieve regional linguistic unity. *Id.*

<sup>170</sup> *Id.* at 938-42.

<sup>171</sup> *See id.* at 940.

in a province that prevented Belgians who came from particular areas in the province from attending French-language schools.<sup>172</sup> The court suggested that limitations based on administrative or financial reasons might be justified, but that absent such a showing, a distinction based solely on language was impermissible.<sup>173</sup> The European Court's conclusion was that the right to be educated in existing schools must be "secured to everyone without discrimination on the ground, in particular, of language."<sup>174</sup>

Section 23 of the Canadian constitution goes beyond expressing which languages must be used in the educational system. It also gives some linguistic groups greater access than others to different programs in the system.<sup>175</sup> English and French-speaking minorities have the right to choose between English and French-speaking schools while all other linguistic groups are denied this right.<sup>176</sup> Since the section already allows for administrative and financial circumstances which could limit the rights available, the further limitations in the Canadian system are difficult to justify.<sup>177</sup> If the distinction is based solely on language, however, it is in violation of the I.C.E.S.C.R.

#### 4. *Persuasive Evidence*

Whereas the International Human Rights Covenants establish rights of linguistic minorities, the UNESCO Convention on Discrimination in Education outlines how minority language schools should be administered.<sup>178</sup> Article 2 of the Convention requires that attendance at such schools be optional.<sup>179</sup> Article 5 mandates that these schools not alienate the child from his community as a whole.<sup>180</sup> Section 23 is not inconsistent with either of these requirements. Under section 23 linguistic minorities who are protected are not forced to attend linguistic minority schools.<sup>181</sup> Those minorities covered by the section simply have the option to send their children to linguistic minority schools if they so desire.<sup>182</sup> In addition,

<sup>172</sup> *Id.* at 922-28.

<sup>173</sup> *Id.* at 932.

<sup>174</sup> *Id.* at 942.

<sup>175</sup> See *supra* notes 1, 64-66, and 136.

<sup>176</sup> *Id.*

<sup>177</sup> See *supra* notes 1, 44, 57, and 59.

<sup>178</sup> See UNESCO Convention Against Discrimination in Education, *supra* note 74.

<sup>179</sup> *Id.* art. 2(b).

<sup>180</sup> *Id.* art. 5(1)(c).

<sup>181</sup> See CONST., *supra* note 1, §23.

<sup>182</sup> *Id.*

section 23 does not deal with the content of the education offered in linguistic minority schools. Therefore, the requirement of not alienating the child from his community is inapplicable to discussion of section 23.<sup>183</sup>

The two United Nations Declarations previously discussed, the Universal Declaration of Human Rights<sup>184</sup> and the Declaration of the Rights of the Child,<sup>185</sup> add little on the subject of minority linguistic rights to the binding and persuasive international conventions already discussed. The Universal Declaration's education and non-discrimination provisions provided the foundation for the articles of the I.C.E.S.C.R. on the subject.<sup>186</sup> The Declaration of the Rights of the Child requires that the education provided promote the child's general culture.<sup>187</sup> This second declaration, however, does not require that cultural promotion be accomplished by providing linguistic minority education to all such minorities.<sup>188</sup>

#### 5. *Section 23 and International Law: Conclusion*

Section 23 of Canada's revised constitution fails to meet the requirements of certain international agreements to which Canada is a party. The section discriminates against some linguistic minority groups by giving preferential treatment to others<sup>189</sup> and discriminates against all Canadians excluded from section 23 by giving greater access to different educational programs to those included.<sup>190</sup> The existence of three different levels of rights, therefore, appears to conflict with international law.

#### C. *The United States Approach*

The United States recognizes that its society is multilinguistic and seeks to compensate for this diversity in the educational sys-

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<sup>183</sup> The content and substantive nature of the education which a child receives is still left to the discretion of the provinces rather than being governed by the constitution. See *supra* note 30 and accompanying text.

<sup>184</sup> Universal Declaration of Human Rights, *supra* note 78.

<sup>185</sup> Declaration of the Rights of the Child, *supra* note 78.

<sup>186</sup> See *supra* notes 68, 71-73 and accompanying text.

<sup>187</sup> Declaration of the Rights of the Child, *supra* note 78, principle 7.

<sup>188</sup> There is a close association between language and culture. See generally *supra* note 4 and accompanying text. The Declaration, therefore, probably requires at the very least that the province initiate some program similar to that set up in Manitoba. See *supra* notes 140-50 and accompanying text.

<sup>189</sup> See generally *supra* notes 140-50 and accompanying text.

<sup>190</sup> See generally *supra* notes 151-77 and accompanying text.

tem.<sup>191</sup> The nature of the adjustments made in the United States, however, is different from those made in Canada.<sup>192</sup>

The United States does not recognize the right of any linguistic minority group to use its own language in the educational system. In *Lau v. Nichols*, the United States Supreme Court merely required that the schools take into account a child's language abilities when developing programs and that the programs be adjusted accordingly.<sup>193</sup> The Court based its decision on the belief that without special treatment, children whose primary language is not English would be denied equal access to education.<sup>194</sup> The Court did not hold, however, that the child must receive classroom instruction in his mother tongue.<sup>195</sup>

In every subsequent case decided by the federal circuit courts which sought to determine the acceptability of programs enacted after *Lau*,<sup>196</sup> the courts once again held that the question of whether a program was acceptable depended not upon whether the child is taught in his mother tongue, but rather upon whether the child received an education which took his special needs into account.<sup>197</sup> The courts have rejected attempts to force the use of bilingual programs which teach children substantive courses in their mother tongue<sup>198</sup> in schools that have linguistic minority students.<sup>199</sup> According to the courts, therefore, the primary consideration is whether a linguistic minority member receives adequate educational opportunity in light of his linguistic abilities, not whether he is taught in his mother tongue.<sup>200</sup>

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<sup>191</sup> See *supra* notes 88-106 and accompanying text.

<sup>192</sup> See generally *supra* note 1 and accompanying text.

<sup>193</sup> *Lau v. Nichols*, 414 U.S. 563, 565-69 (1974).

<sup>194</sup> *Id.* at 566.

<sup>195</sup> The court simply required that the language spoken by a student be taken into account when determining if that student has been given a meaningful opportunity to participate. *Id.* at 568.

<sup>196</sup> *Guadalupe Organization, Inc. v. Temple Elementary School Dist.*, 587 F.2d 1022 (9th Cir. 1978); *Castaneda v. Pichard*, 648 F.2d 989 (5th Cir. 1981); *United States v. Texas*, 680 F.2d 356 (5th Cir. 1982). See also *supra* notes 104-06 and accompanying text.

<sup>197</sup> See *Guadalupe Organization, Inc. v. Temple Elementary School Dist.*, 587 F.2d at 1026-30; *Castaneda v. Pichard*, 648 F.2d at 1009-12; *United States v. Texas*, 680 F.2d at 371.

<sup>198</sup> See *supra* note 103 and accompanying text.

<sup>199</sup> See *supra* notes 105-06 and accompanying text.

<sup>200</sup> See also *Cintron v. Brentwood Union Free School Dist.*, 455 F. Supp. 57 (E.D.N.Y. 1978); *Rios v. Reed*, 480 F. Supp. 14 (E.D.N.Y. 1978). In these two district court cases the courts mandated that bilingual programs be implemented. Both courts stressed, however, that the purpose of such programs was to keep English language deficient children from being denied the right to an education. As soon as the children received the necessary skills in English, they were to be transferred into an English-speaking classroom. 455 F. Supp. at

The different states, when implementing programs designed to satisfy the federal courts' requirements, generally look upon the language of the linguistic minority as merely a hurdle to be overcome. The ultimate goal of ESL, immersion, and even of most bilingual programs is to help the linguistic minority student adjust to the English-speaking classroom as soon as possible.<sup>201</sup> Under California's bilingual program, for instance, linguistic minority school children are periodically tested for proficiency in English, and when they attain a certain level of aptitude, they are placed in English-speaking classes.<sup>202</sup>

This United States approach is not completely different from that of Canada toward non-English and non-French-speaking minorities.<sup>203</sup> Both nations want the children of linguistic minorities to become assimilated into the surrounding majority language.<sup>204</sup> The difference between the United States and Canada is that the United States accepts only one language while Canada accepts two. Proponents of continuing a monolingual approach in the United States advocate their position from the viewpoint of both the child and the nation. A child who does not know English in the United States is precluded from virtually every avenue of economic success which would be otherwise available.<sup>205</sup> A single language also provides an essential unifying force in a geographically large and ethnically diverse nation.<sup>206</sup> This approach, despite some recent challenges, remains the basic policy of the United States government.<sup>207</sup>

63-64; 480 F. Supp. at 23. In *Cintron* the court also stated that a failure to provide a mechanism for transfer back into the English-speaking classroom is a violation of the child's rights under the Equal Educational Opportunity Act of 1974. 455 F. Supp. at 63.

<sup>201</sup> See *supra* notes 100-03 and accompanying text. See also Foster, *Defusing the Issues of Bilingualism and Bilingual Education*, PHI DELTA KAPPA, Jan. 1982, at 342-43.

<sup>202</sup> Cal. Educ. Code §52163.5 (West Supp. 1983). See also preamble to California Bilingual Education Act which states that "[t]he Legislature finds and declares that the primary goal of all [bilingual] programs . . . is, as effectively and efficiently as possible, to develop in each child fluency in English." Cal. Educ. Code §52161 (West Supp. 1983).

<sup>203</sup> See generally *supra* note 117.

<sup>204</sup> *Id.* See also *Cintron v. Brentwood*, 455 F. Supp. at 63.

<sup>205</sup> N.Y. Times, Aug. 12, 1979, §4, at 20, col. 2. See also *Toughen Up: U.S. Schools Must Improve*, *supra* note 103, at 73. A recent study on United States schools by the Twentieth Century Fund states that "[a]lthough this nation has become more aware of the value of ethnic identities, anyone living in the U.S. who is unable to speak English cannot fully participate in our society." *Id.*

<sup>206</sup> N.Y. Times, Aug. 12, 1979, §4, at 20, col. 1.

<sup>207</sup> Foster, *supra* note 201. The Reagan Administration cut federal aid to bilingual educational programs by almost 20% between 1981 and 1982. *Toughen Up: U.S. Schools Must Improve*, *supra* note 103, at 73.



## IV. CONCLUSION

Canada's position on the issue of linguistic minority educational rights reveals the competing pressures that beset a nation on this issue. The existence of two deeply rooted languages in the country makes a monolingual approach, like that adopted in the United States, both socially and politically impossible. The same forces that create the need to recognize both English and French, however, also make completely equal acceptance difficult. The tensions in Quebec over preservation of its cultural heritage have led to a compromise on those who may and those who may not enjoy the rights afforded under section 23 of the Canadian constitution.

These competing pressures and the resulting compromise place section 23 in opposition to basic rights recognized under international law. Both the I.C.C.P.R. and the I.C.E.S.C.R. prohibit a state from granting some linguistic groups greater rights and abilities than other groups. Section 23, however, creates three different levels of linguistic educational rights and allocates the levels of rights according to the language spoken by an individual. The section, therefore, grants or denies an individual special rights according to his mother tongue. This is in clear violation of covenants which Canada has ratified and by which the nation is bound under international law.

*Edward H. Lindsey, Jr.*

