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Schools, Signs, and Separation: Quebec Anglophones, Canadian Constitutional Politics, and International Language Rights

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SCHOOLS, SIGNS, AND SEPARATION: QUEBEC ANGLOPHONES, CANADIAN CONSTITUTIONAL POLITICS, AND INTERNATIONAL LANGUAGE RIGHTS

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I. INTRODUCTION

Contemporary Canadian politics has been defined by Quebec's vision of the province as a linguistically distinct society and by its 1980 and 1995 sovereignty referendums.[1] Quebec's rejection of Canada as a bilingual nation, embodied in the 1982 Charter of Rights and Freedoms,[2] and Canada's obsession with keeping Quebec in Canada have, however, left unexamined the impact of the province's language policies on its anglophone minority. In Quebec, the enactment of the Charter of the French Language[3] and the government's promotion of a French culture have intruded upon the Canadian Charter freedom of its anglophones to conduct their business in English and their Canadian Charter right to have their children educated in English.[4] In response, the

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1. Studies of minority language include the following recent examples: LANGUAGE RIGHTS IN CANADA (Michael Bastarache ed., 1987); MICHAEL MANDEL, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA 90-127 (1989); SCOTT REID, LAMENT FOR A NOTION: THE LIFE AND DEATH OF CANADA'S BILINGUAL DREAM (1993); TOWARDS RECONCILIATION? THE LANGUAGE ISSUE IN CANADA IN THE 1990'S (Daniel Bonin ed., 1992); CAROLYN TUOHY, POLICY AND POLITICS IN CANADA: INSTITUTIONALIZED AMBIVALENCE 298-345 (1992); JEREMY WEBBER, REIMAGINING CANADA: LANGUAGE, CULTURE, COMMUNITY, AND THE CANADIAN CONSTITUTION (1994); Denise Reaume & Leslie Green, *Education and Linguistic Security in the Charter*, 34 MCGILL L. J. 777 (1989); Leslie Green, *Are Language Rights Fundamental?*, 25 OSGOODE HALL L. J. 639 (1990).

2. CANADIAN CONSTITUTION ACT, Part I: CANADIAN CHARTER OF RIGHTS AND FREEDOMS(1982) being Schedule B to the CANADA ACT, R.S.Q., ch. 11 (1982) (Can.) [hereinafter CANADIAN CHARTER].

3. CHARTER OF THE FRENCH LANGUAGE, R.S.Q., ch. 11 (1977) (Can.) [hereinafter Bill 101].

4. Peter H. Russell, *The End of Mega Constitutional Politics in Canada*? 26 PS: POL. SCI. & POL. 33-37 (1993).

Quebec anglophones have litigated business and education language issues in provincial, national, and international courts and made the suppression of their language a significant part of the debate over Canadian national unity and Quebec sovereignty.

Canadian constitutional lawyers and political scientists suggest that three dimensions have structured the politics of minority language rights. One defines the nature of domestic constitutional politics and distinguishes between micro- and macro-level constitutional disputes, i.e. between litigation over the meaning of legislative and constitutional provisions and disputes about the nature of the state. The second focuses on the participants in these constitutional conflicts, provincial governments and their official language minorities, and examines the interrelationship of the micro and macro-constitutional actions they take to advance their linguistic objectives.[5] The third considers the influence of the international legal environment on the participants in domestic constitutional politics who rely upon international law and legal institutions with their commitment to human rights and charters and their sensitivity to the interests of ethnic, linguistic, and cultural minorities.[6]

This study of Canadian minority language rights weaves together these three dimensions. Part I identifies three language law regimes that structure the micro-constitutional litigation over minority language politics. Parts II through V use this framework to explore the domestic and international litigation over Quebec anglophone rights — the Supreme Court of Canada's decisions in the Quebec Protestant School Boards Case (1984)[7] and the Ford Public Signs Case (1988),[8] and the UN Human Rights Committee decision in Ballantyne v. Canada (1993)[9]—and its impact on the current domestic and international legal initiatives by anglophones to establish the right of Quebec children to be taught and businesses to advertise in English. Part VI briefly explores the interplay between this micro-level litigation by Quebec anglophones and the macro-level efforts of their provincial government to either redesign the Canadian Constitution to further the linguistic and cultural objectives of its distinct society or to separate from Canada. Then Part VI brings the article to a close by asking: what might be the

5. *See* F. Morton, *Judicial Politics in Canadian-Style: The Supreme Court's Contribution to the Constitutional Crisis of 1992, in* CONSTITUTIONAL PREDICAMENT: CANADA AFTER THE REFERENDUM OF 1992 132-148 (Curtis Cook ed., 1994).

6. Maxwell Cohen, *Reflections on Human Rights, The Canadian Charter, and International Influences, in* INTERNATIONAL HUMAN RIGHTS LAW: THEORY AND PRACTICE 159-68 (Irwin Cotler & F. Pearl Eliadis eds., 1992).

7. A.G. (Que.) v. Que. Ass'n of Protestant Sch. Bds. [1984] 2 S.C.R. 66 [hereinafter *Quebec Protestant School Boards*]

8. Ford v. Quebec [1988] 2 S.C.R. 712 [hereinafter *Ford*].

9. Ballantyne, Davidson, and McIntyre v. Canada, U.N. Comm. H.R., 47th Sess., CCPR/C/47/D359/D385/1989 (1993) [hereinafter *Ballantyne*].

status of anglophone minority language rights if Quebec chooses to sever its federal ties and become a sovereign state?

II. THE POLITICAL AND LEGAL SETTING OF MINORITY LANGUAGE RIGHTS IN CANADA

In Canada, the dispute over English and French has been defined primarily by domestic politics and has been entangled in the macro-constitutional question of whether Quebec, as a uniquely French culture, shares enough in common with the Rest of Canada "to go on sharing a common constitution."[10] Canada has addressed this question in its debate over the Meech Lake Accord, the Charlottetown Accord, and since the razor-thin 1995 Quebec referendum rejecting separation, Quebec separation and partition. This question, along with the micro-constitutional litigation over minority language rights, has also been shaped by the international arena.[11] The growth of nationalism and ethnicity, the support for constitutionally-entrenched bills of rights, and the emergence of an international body of human rights law have influenced the definition of three language regimes —the Quebec priority regime, the Canadian bilingual regime, and the UN non-discriminatory regime— which have provided the structure for the language rights litigation involving Quebec anglophones and their provincial government.

The Quebec language regime is based on the Charter of the French Language (Bill 101) which declares French to be the official language of the provincial legislature, courts, government agencies, and public schools.[12] French is also the official language of provincial commerce, business and labor relations.[13]Tempered by amendments and court decisions, Bill 101's unilingual character now gives priority to French while not prohibiting the use of other languages.[14] Its business provisions which regulate the use of French and other languages in the names, signs and advertising of private firms have generated substantial anglophone opposition.[15] So have its education provisions which require that instruction in provincial "elementary and secondary schools shall be in French,"[16] even though they permit limited access to English

10. PETER H. RUSSELL, CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE? 75 (1993).

11. ALAN CAIRNS, CHARTER VERSUS FEDERALISM: THE DILEMMAS OF CONSTITUTIONAL REFORM 11-32 *passim* (1993).

12. BILL 101, *supra* note 3, at §§7-29. Sections 7-13 govern the legislature and the courts and sections 14-29 govern civil administration.

13. *Id.* at §41-71. Sections 41-50 govern labor relations and sections 51 to 71 govern commerce and business.

14. The Charter of the French Language has been amended several times but it is still known by the title of its original legislation: Bill 101.

15. Bill 101, *supra* note 4, at §§51-71.

16. *Id.* at §72.

language education.[17] In sum, Bill 101 defines Quebec's current language policy and, along with Party Quebecois policy statements,[18] it provides the framework for Quebec's language policy as a sovereign state.

The Canadian bilingual language regime has its origins in the British North America Act.[19] Now called the Constitution Act, 1867, it contains in Section 133 a bilingual language requirement for provincial legislatures and courts.[20] The Canadian Charter of Rights and Freedoms of 1982 (Canadian Charter) substantially extends this bilingual regime. Section 2(b)'s guarantee of freedom of expression includes linguistic expression.[21] Section 16 establishes English and French as Canada's official languages.[22] Sections 17 to 20 guarantee bilingual rights in federal parliamentary and judicial proceedings and records and in public communications with the federal government.[23] Section 23 grants the right to publicly funded minority language education to the children of three categories of English-speaking parents in Quebec and French-speaking parents in the other provinces as long as the "the number of children . . . is sufficient to warrant the expenditure of public funds."[24] In sum, these Charter provisions and Section 133, define Canada's bilingual language policy.

The United Nations nondiscriminatory language regime is based on the UN Charter. As a UN member, Canada's legal commitment flows from the International Bill of Rights: the Universal Declaration of Human Rights[25] and UN treaties such as the International Covenant on Civil and Political Rights (1976),[26] the International Covenant on Economic, Social, and Cultural Rights (1976),[27] and the UN Convention on the Rights of the Child (1989).[28] As a signatory to these treaties, Canada has committed itself to the general principle of linguistic nondiscrimination. Canada did not sign the UNESCO Convention Against

17. *Id.* at §§73-86.

18. NATIONAL EXECUTIVE COUNCIL OF THE PARTI QUEBECOIS, QUEBEC IN A NEW WORLD (Robert Chudos trans., 1984) [hereinafter PARTI QUEBECOIS].

19. Constitution Act, 1867, 30&31 Vict., ch. 3 (Eng.) [hereinafter Constitution Act, 1867].

20. *Id.* at §133.

21. CANADIAN CHARTER, *supra* note 2, at §2(b).

22. *Id.* at §16.

23. *Id.* at §§17(1), 18(1), 19(1), and 20(1).

24. *Id.* at §23(3).

25. Universal Declaration of Human Rights (1948).

26. International Covenant on Civil and Political Rights, December 19, 1966, 999 U.N.T.S. 14668 [hereinafter ICPR Covenant].

27. International Covenant on Civil and Political Rights, December 19, 1966, 993 U.N.T.S. 14531 [hereinafter IESCR Covenant].

28. United Nations Convention on the Rights of the Child, U.N. Doc. A/RES/44/25 (1989) [hereinafter UNRC Convention].

Discrimination in Education (1960),[29] because education is subject to provincial jurisdiction, but as a UNESCO member, it has accepted the Recommendation Against Discrimination in Education.[30] In sum, these international human rights documents define the UN language regime.

Together these language regimes give expression to major features of the international community: the pervasiveness of ethnic nationalism, the commitment to charters of individual rights entrenched in domestic constitutions, and the growth of a cosmopolitan body of human rights law.[31] These language regimes also provide the framework for the micro-constitutional litigation of Canadian minority language rights by domestic and offshore courts. The Canadian Charter confers upon the Supreme Court of Canada the final domestic authority to decide whether Quebec's language statutes governing private business and public education violate the constitutional language rights of the province's anglophones.[32] However, Canada's UN membership and commitment to international human rights treaties grant international tribunals the authority to determine whether Quebec language laws and the Canadian Supreme Court's Charter decisions violate the linguistic human rights of Quebec anglophones.[33]

III. THE CANADIAN AND QUEBEC LANGUAGE REGIMES PRIOR TO 1982

The Canadian constitutional odyssey began with Quebec's Quiet Revolution of the 1960's which led to the creation of the province's priority language regime based on Bill 101.[34] Before then provincial laws were silent on the language of education. In 1969, Quebec's Union Nationale government passed an Act to Promote the French Language in Quebec (Bill 63) which took the first tentative steps towards making French the priority language in the province, but explicitly recognized the freedom of linguistic choice in education.[35] The Liberal government repealed Bill 63 in 1974 and ended linguistic equality by replacing it

29. United Nations Educational, Scientific, and Cultural Organization Convention Against Discrimination in Education, December 15, 1960, 93 U.N.T.S. 6193 [hereinafter UNESCO Convention].

30. United Nations Educational, Scientific, and Cultural Organization Recommendation Against Discrimination in Education, Dec.14, 1960, 429 U.N.T.S. 93 [hereinafter UNESCO Recommendation].

31. *See* CAIRNS, *supra* note 11.

32. CANADIAN CHARTER, *supra* note 2, at §52(1).

33. *See supra* text accompanying notes 26-30. But personal human rights claims are not always available: See discussion *infra*, notes 184 and 195.

34. For studies of the Quiet Revolution, *see, e.g.*, WILLIAM JOHNSON, A CANADIAN MYTH: QUEBEC, BETWEEN CANADA AND THE ILLUSION OF UTOPIA 19-34 (1994); MARC LEVINE, THE RECONQUEST OF MONTREAL: LANGUAGE POLICY IN A BILINGUAL CITY 39-64 (1990); RUSSELL, *supra* note 10, at 72-106; *Towards Patriation: Constitutional Reform, 1960-1982, in* WEBBER, *supra* note 1, at 92-120.

35. An Act to Promote the French Language in Quebec, R.S.Q., Bill 69 (1969).

with the Official Language Act (Bill 22) which declared that "French is the official language of Quebec."[36] Bill 22 did not create a French unilingual language regime, but gave official priority to French in government, business, and education. English schooling was still guaranteed, but French was encouraged by the requirement that access to English schools was only available to Francophones and immigrants who passed an English proficiency test. Otherwise, they were required to attend French language schools.[37] Quebec's commitment to qualified bilingualism ended with election of a Parti Quebecois government in 1976 and its enactment of the Charter of the French Language (Bill 101) the following year.[38]

Quebec anglophones had only limited Canadian constitutional means to challenge its provincial government's language laws. The Constitution Act 1867, contains in Section 133 a bilingual language requirement for provincial legislatures and courts, but no provision governing the language of education.[39] Constitutional authority over education was entrusted to the provinces. Section 93 of the Constitution Act 1867 permits provincial legislatures to "exclusively make Laws in relation to education" including the language of instruction.[40]

When Bill 22 ended linguistic choice and gave French official priority as the language of education, Quebec anglophones relied upon Section 93 to challenge its language education provisions. In *Protestant School Boards of Greater Montreal v. Minister of Education of Quebec* (1976), however, the Quebec Superior Court found no constitutional violation, because Section 93 protected denominational rights, not linguistic rights.[41] In 1978, the Quebec Court of Appeals dismissed the appeal, because the new Parti Quebecois government had repealed Bill 22 and replaced it with Bill 101.[42] Then Quebec anglophones challenged Bill 101's requirement which permitted only French to be used in the drafting and enactment of provincial legislation, but allowed their printing and publication in an unofficial English translation.[43] In *Attorney General of Quebec v. Blaikie* (1979), the Canadian Supreme Court found that Bill 101's French-only requirement for provincial legislation violated Section 133 which mandated the use of both English and French.[44]

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36. The Official Language Act of 1974, R.S.Q., Bill 22, preamble (1974).

37. LEVINE, *supra* note 34 at 98-109.

38. Bill 101, *supra* note 3. *See also* LEVINE, *supra* note 34, at 114-20.

39. Constitution Act, 1867 *supra* note 19, at §133.

40. *Id.* at §93.

41. Protestant Sch. Bd. Of Greater Montreal v. Minister of Educ. of Que., [1976] 83 D.L.R. 645.

42. Protestant Sch. Bd. of Montreal v. Minister of Educ. of Quebec, [1978] 83 D.L.R. 679.

43. *Id.* at §§7-15.

44. A.G. (Que.) v. Blaikie [1979] 2 S.C.R. 1016.

Neither Bill 101's business language provisions, nor those governing public education confronted any constitutional legal challenges, because the freedom of speech guarantee in the 1960 Canadian Bill of Rights applied only to the federal government,[45] and Section 93 bestowed upon provincial governments constitutional authority over education.[46] This constitutional landscape would change dramatically with the patriation of the Constitution and the promulgation of the Canadian Charter of Rights and Freedoms.

IV. THE CANADIAN AND QUEBEC LANGUAGE REGIMES AFTER 1982: CONSTITUTIONAL CONFLICTS OVER THE LANGUAGE OF EDUCATION AND BUSINESS

The defeat of Quebec's sovereignty association referendum of 1980 gave Canadian Prime Minister Pierre Trudeau the opportunity to patriate the Constitution and obtain a constitutionally-entrenched Charter of Rights and Freedoms (Canadian Charter).[47] The Supreme Court of Canada upheld his efforts and laid the foundation for Quebec alienation from post-Charter Canada with its decisions in the *Patriation Reference* (1981) that a constitutional convention required only a "substantial degree" of provincial consent,[48] and in the *Quebec Veto Reference* (1982) that Quebec's consent was not necessary to satisfy the "substantial degree" requirement.[49]

The Charter of Rights and Freedoms substantially expanded the scope of the Canadian language regime in two ways that are important to the micro-constitutional disputes over the language of business and education. The Charter's Section 2(b) provides a broad guarantee of freedom of expression which extends to the choice of linguistic expression.[50] The Charter's Section 23, as the federal government's direct response to the Bill 101, grants the right to a minority language education by conferring upon English-speaking parents in Quebec and French-speaking parents in the other provinces "the right to have their children receive primary and secondary school instruction in the [minority] language in that province"[51] if "the number of children . . . is suf-

45. The Canadian Bill of Rights, S.C., ch. 44, §1(d) (1960) (Can.). The Canadian Bill of Rights is a statute which binds only the federal government.

46. Constitution Act, 1867 *supra* note 19, at §93.

47. For studies of the patriation of the Constitution, *see, e.g.*, PETER HOGG, CONSTITUTIONAL LAW OF CANADA 51-59 (3d ed. 1992); JOHNSON, *supra* note 34, at 175-88; RUSSELL, *supra* note 10, at 107-27.

48. Patriation Reference (RE: Amendment to the Constitution) [1981] 1 S.C.R. 753, 905.

49. Quebec Veto Reference (RE: Objection to Resolution to Amend the Constitution) [1982] 2 S.C.R. 793, 817-18. *See also*, Morton, *supra* note 5, at 138.

50. CANADIAN CHARTER, *supra* note 2, at §2.

51. HOGG, *supra* note 47, at 122.

ficient to warrant the provision of minority language education . . . in minority language education facilities."[52]

The Quebec Clause, the Language of Education and the Quebec Protestant School Boards Case (1984)

Shortly after the patriation of the constitution and the promulgation of the Canadian Charter, Quebec anglophone parents relied upon the Charter's Section 23 to challenge Bill 101's Quebec Clause, which largely limits English language instruction to children whose parents have received their education in English in Quebec.[53] The Quebec Association of Protestant School Boards asked the provincial Superior Court to decide whether the Quebec Clause violated Section 23's Canada Clause, which confers the right to a minority language education upon the children of Canadian parents in Quebec "who received their primary school instruction in Canada in English or French;"[54] and the Sibling Clause, which grants Canadian parents the right to minority language education for the brothers and sisters of their children who are receiving or have received "their primary or secondary school instruction in English in Canada."[55]

The Quebec Superior Court ruled in favor of the school boards, and the Quebec Court of Appeals unanimously affirmed its judgment.[56] On appeal, the Supreme Court of Canada in *Attorney General of Quebec v. Quebec Association of Protestant School Boards* first examined the purposes of the framers of Section 23 and then turned to the true nature and effects of Bill 101's education provisions.[57] The Court found that the framers of Section 23 were well aware of the preferred treatment Bill

52. CANADIAN CHARTER, *supra* note 2, at §23(3).

53. Bill 101, *supra* note 3 at §73. The Quebec Clause, Section 73 states that "the following children . . . 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 the date of the coming into force of this act [August 26, 1977] received his or her elementary instruction in English outside Quebec; (c) a child who, in his last year of school in Quebec before [August 26, 1977], was lawfully receiving his instruction in English, in a public kindergarten class or in an elementary or secondary school; [and] (d) the younger brothers and sisters of a child described in paragraph c.

54. CANADIAN CHARTER, *supra* note 2, at §23(1)(b). Section 23's Canada Clause confers the right upon the children of parents who "received their primary school instruction in Canada in English or French and who 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."

55. *Id.* at §23(2). Section 23's Sibling Clause confers upon the children of a third category of parents: those who have any child who "has received or is receiving . . . instruction in English or French in Canada, have the right to have all their children receive . . . instruction in the same language."

56. A.G. (Que.) v. Que. Ass'n of Protestant Sch. Bds. [1983] C.A. 77, 1 D.L.R. (4th) 139, *aff'g* [1982] C.S. 673, 140 D.L.R. (3rd) 33, 3 C.R.R. 114.

57. *See* Quebec Protestant School Boards, [1984] 2 S.C.R. 66, at 79.

101 gave to French language instruction and they had drafted Section 23 to correct Bill 101's special language regime. "The framers' objective appears simple," the Court said: "to adopt a general rule guaranteeing the francophone and anglophone minorities in Canada an important part of the rights which the anglophone minority in Quebec had enjoyed with respect to the language of instruction before Bill 101 was adopted."[58] When the Court compared Section 23 with Sections 72 and 73, it found that the combined effect of the latter two provisions constituted "a permanent alteration of the classes of citizens who are entitled to the protection afforded [by Section 23 and has] the effect of depriving an entire class of individuals of the right conferred by [section] 23."[59]

Then the Court turned to Canadian Charter Section 1 which provides that the Charter's rights and freedoms are subject to "reasonable limits prescribed by law as can be justified in a free and democratic society."[60] The Court acknowledged that Section 1 applied without exception to all Charter rights including Section 23,[61] but rejected its application in this case, because of the framers' purpose to use Section 23 to override Bill 101.[62] Nor was Section 73 saved by the Canadian Charter Section 33's Notwithstanding Clause, which permits legislation to continue in force in spite of a judicial decision that it violates the Charter, because Section 33 applies only to Charter Sections 2 and 7-15.[63] Finally, the Court found that Section 73 had altered the effect of Section 23 without following the Constitution's amending procedures set forth in Charter Clauses 38 to 49.[64]

In sum, the Supreme Court unanimously concluded that the Quebec Clause violated Section 23 of the Canadian Charter and that Quebec government had to admit the children of Canadian parents and siblings who had been educated anywhere in Canada to provincial English language schools. The Court's decision affirmed the bilingual vision of Canada by restoring to Quebec's anglophone minority parents the right to have their children receive an education in their minority language. As Christopher Manfredi observed, the Court "simply restored rights that English-speaking Quebecers had enjoyed prior to Bill 101 . . . through the relatively straightforward remedy of judicial nullification."[65] Since Section 23 is restricted to Canadian citizens, English, French and allophone (speakers of other languages) immigrant parents

58. *Id.* at 84.
59. *Id.* at 87.
60. CANADIAN CHARTER, *supra* note 2, at §1.
61. Quebec Protestant School Boards, [1984] 2 S.C.R. at 85.
62. *Id.* at 84.
63. *Id.* at 86.
64. *Id.*
65. Christopher Manfredi, *Constitutional Rights and Interest Advocacy, in* EQUITY AND COMMUNITY: THE CHARTER, INTEREST ADVOCACY, AND REPRESENTATION 103 (F. Leslie Seidle, ed., 1993).

were, however, still required by Section 23 to send their children to French-language schools.

In effect, the Supreme Court's first post-Charter language case led the Quebec government, unable to use Section 33's Notwithstanding Clause to override the Court's decision, to respond to federal government's invitation to open macro-constitutional negotiations to gain the province's agreement to the 1982 Constitution.[66] Known as the Quebec Round, it produced the Meech Lake Accord of 1987 which included Quebec's proposal to amend the Canadian Charter by inserting a clause recognizing the province as a distinct society.[67] Quebec clearly intended the clause to serve as a "constitutional trump card," allowing the province to argue in future Charter litigation that the preservation of its culture would require the Supreme Court to uphold provincial language education legislation under Section 1 as a reasonable limitation on its anglophones' Charter 23 rights.[68]

The Quebec French-Only Signs Law and Ford v. Quebec (1988)

In spite of the *Blaikie* and *Quebec Protestant School Boards* cases, Bill 101 had "generated a sense of 'relative linguistic security' in the French-speaking community" which led the Party Quebecois government to pass Bill 57.[69] The bill met some of the anglophone community's concerns by amending Bill 101's preamble to meet "anglophone demands for 'institutional' as opposed to 'personal' bilingualism in English language hospitals, schools, and social service agencies."[70] The 1985 provincial elections brought in a Liberal Party government which subsequently enacted legislation further modifying Bill 101 by granting amnesty to students enrolled in English language schools,[71] streamlining the language bureaucracy,[72] and guaranteeing anglophones the right to receive social and health services in English.[73] The Liberal Party election also signaled the relaxed enforcement of Bill 101's French-only commercial signs provisions, but the government took no legislative action to modify the signs provisions.[74]

Quebec anglophones had already initiated a legal challenge to the French-only signs requirement when the Supreme Court decided the

66. Quebec Protestant School Boards, [1984] 2 S.C.R. 66, at 88.

67. LEVINE, *supra* note 34 at 128.

68. Morton, *supra* note 5, at 139.

69. For studies of the Meech Lake Accord, *see, e.g.*, DAVID JAY BURCUSON & BARRY COOPER, DECONFEDERATION: CANADA WITHOUT QUEBEC 199-131 (1991); JOHNSON, *supra* note 34, at 199-251; P. MONAHAN, AFTER MEECH LAKE: THE INSIDE STORY (1991); RUSSELL, *supra* note 10, at 127-53; and WEBBER, *supra* note 1, at 121-76.

70. Morton, *supra* note 5, at 142.

71. LEVINE, *supra* note 34, at 128.

72. *Id.* at 130.

73. *Id.* at 131-33.

74. *Id.* at 133-34.

Quebec Protestant School Boards Case. In 1984, five anglophone businesses[75] claimed that Section 58 requiring French-only commercial signs, posters, and advertising,[76] and Section 69 requiring French-only commercial firm names,[77] infringed their freedom of linguistic expression protected by Section 2(b) of the Canadian Charter of Rights and Freedoms[78] and Section 3 of the Quebec Charter of Human Rights and Freedoms (Quebec Charter).[79]

The Quebec Superior Court agreed that Section 58 violated Section 3 of the Quebec Charter, but not Section 2(b) of the Canadian Charter.[80] Two years later (1986), the Quebec Court of Appeals unanimously held that the Quebec government could require signs to include French, but Sections 58 and 69's French-only provisions violated both Section 2(b) and Section 3.[81] The Court of Appeals' decision provoked considerable linguistic discord in Quebec, but the Liberal Party government ruled out any legislative action until the Supreme Court of Canada decided the signs issue.[82]

The Supreme Court's unanimous *per curiam* decision, handed down December 15, 1988, held that freedom of expression guaranteed by Section 2(b) included the freedom to express oneself in the language of one's choice.[83] "Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice."[84] This freedom to choose, given the Court's "large and liberal interpretation" of Section 2(b) in *Dolphin Delivery (1986)*[85] and *Irwin Toy (1989)*,[86] extended to the commercial expression addressed by Sections 58 and 69, because it "plays a significant role in enabling individuals to make informed economic choices, an important aspect of in-

75. *Ford*, [1988] 2 S.C.R. at 722-23.

76. Bill 101, *supra* note 3, at §58. Section 58 states: "Signs and posters and commercial advertising shall be solely in the official language."

77. *Id.* at §69. Section 69 states: "[O]nly the French version of a firm name may be used in Quebec." Bill 101, R.S.Q. 1977, §69.

78. CANADIAN CHARTER, *supra* note 2, at §2(b)

79. QUEBEC CHARTER OF HUMAN RIGHTS AND FREEDOMS, R.S.Q., ch. C-12, § 3 (1977)(Can.).

80. Ford v. Quebec, [1985] C.S. 147, 18 D.L.R. (4th) 711.

81. Ford v. Quebec, [1986] R.J.Q. 80, 5 Q.A.C. 119, 36 D.L.R. (4th) 374.

82. LEVINE, *supra* note 34, at 134.

83. *See Ford*, [1988] 2 S.C.R. at 712. A companion case, Divine v. Quebec (AG) [1988] 2.S.C.R. 790, held that other sections of Bill 101 which did not require the exclusive use of French for brochures, orders, invoices, and other business documents also violated the CANADIAN CHARTER, §2(b). For studies of the Ford case, see e.g.: *R. Yalden, Liberalism and Language in Quebec: Bill 101, the Courts, and Bill 178* 47 U.T. FAC. L.REV. 973 [1984].

84. *Ford*, [1988] 2 S.C.R. at 748.

85. RWDSUV v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

86. *See* Irwin Toy Ltd. v. A.G. (Que.), [1989] 1 S.C.R. 927.

dividual self-fulfillment and personal autonomy."[87] The Court did not decide that Section 58 violated Section 2(b) of the Canadian Charter, because it was protected by a valid Notwithstanding Clause,[88] but it did hold that Section 58 violated Section 3 of the Quebec Charter[89] and that Section 69 violated both Section 2(b) and Section 3, because they prohibited Quebec anglophones from using the language of their choice.[90]

Then the Court addressed whether limits imposed on freedom of expression by Sections 58 and 69 were justified by Quebec as reasonable limits under Section 1 of the Canadian Charter and Section 3 of the Quebec Charter. Using a two part test it had created in *R. v. Oakes (1986)*,[91] the Court first asked whether Quebec's legislative purpose was sufficiently important. Quebec had argued that the French-only signs and firm names provisions were enacted to respond to "the vulnerable position of the French language in Quebec and Canada,"[92] and "to assure that the 'visage linguistique' of Quebec would reflect the predominance of the French language."[93]

The Court agreed that these purposes were "serious and legitimate,"[94] and then turned to the second requirement: that Sections 58 and 69, as legislative means, be proportional or appropriate to these purposes. Applying the *Oakes* proportionality element, the Court found that there was a "rational connection" between Sections 58 and 69 and the provincial government's goals of protecting the French language and communicating the reality of Quebec society, but their prohibition on the use of any language other than French was not necessary to achieve those goals.[95] "Predominant display of the French language, even its marked predominance," the Court suggested, "would be proportional to the goal of promoting and maintaining a French 'visage linguistique' in Quebec . . . [because it would] reflect the reality of Quebec society."[96] In sum, the Court recognized Quebec's distinct character, but concluded that Bill 101's signs provisions were not tailored to protect and enhance the French language in the province while minimally impairing the freedom of expression of its anglophone minority.

Bill 178

A week after the Supreme Court decision, the Quebec Liberal gov-

87. *Ford*, [1988] 2 S.C.R. 748 at 767.
88. *Id.* at 742.
89. *Id.* at 767.
90. *Id.*
91. *See* R. v. Oakes, [1986] 1 S.C.R. 103, *aff'd* in R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, 768-69.
92. *Ford*, [1988] 2 S.C.R. at 777.
93. *Id.* at 778.
94. *Id.*
95. *Id.*
96. *Id.* at 780.

ernment enacted Bill 178, which amended Section 58 to require the exclusive use of French on outside commercial signs, but permitted English inside small businesses as long as French was predominant, and protected both Sections 58 and 69 with a notwithstanding clause provision.[97] Bill 178's "indoor outdoor compromise" may have satisfied the Ford "predominant display standard,"[98] but the bill and its Notwithstanding Clause were politically controversial in Quebec and across Canada.[99]

Bill 178 helped doom the Meech Lake Accord and its centerpiece, a "distinct society" clause which was included to entice Quebec to sign the 1982 Constitution. The rest of Canada saw the use of Section 33 "as an attack on the Charter and a betrayal of national bilingualism . . . and the distinct society clause as a clever ruse that would allow Quebec to achieve indirectly what it was now perceived as doing directly [by means of Section 33]: denying equality to its English-speaking minority."[100] Bill 178 also had an impact on the 1989 Quebec election which returned the Liberal Party to power. An alienated anglophone community created the Equality Party and, "running on the single issue of opposition to Bill 178," elected four members to the provincial legislature[101] and then supported the appeal of Bill 178 to the United Nations Human Rights Committee.[102]

V. THE UNITED NATIONS LANGUAGE REGIME AND THE LANGUAGE OF BUSINESS: *BALLANTYNE V. CANADA (1993)*

John Ballantyne and Elizabeth Davidson, two Quebec anglophone business people, initiated a UN Human Rights appeal in April 1989.[103] Later joined by Gordon McIntyre,[104] they claimed that Sections 58 and 69 violated their rights under Articles 2, 19, 26 and 27 of the International Covenant of Civil and Political Rights (ICPR Covenant), because they had been forbidden to use any language other than French on their commercial signs and in their firm names.[105] They also claimed that Bill 178's notwithstanding clause overrode their human rights guarantees in the Canadian Charter and Quebec Charter and that the override

97. An Act to Amend the Charter of the French Language, R.S.Q., §10 (1988) (Can.) [hereinafter Bill 178].

98. RUSSELL, *supra* note 10, at 145.

99. LEVINE, *supra* note 34 at 135. *See also* JOHNSON, *supra* note 34, at 262-67; *Yalden*, *supra* note 83.

100. Morton, *supra* note 5 at 143.

101. LEVINE, *supra* note 34 at 137.

102. MAURICE J. KING, THE FIRST STEP 207 (1993).

103. *Ballantyne*, supra note 9. (Communication No. 359/1989).

104. *Id*, communication No.385/1989. The McIntyre case was financially supported by the Chateauguay Valley English-Speaking People's Association (CVESPA), a Quebec Anglophone organization and was chronicled in KING, *supra* note 102.

105. *Ballantyne, supra* note 9 at 3.1.

provisions in those charters tolerated human rights abuses and violated Canada's obligation under Article 2 of the ICPR Covenant.[106]

Ballantyne v. Canada

The UN Human Rights appeal was a lengthy process which the UN Human Rights Committee (Committee) did not decide until March 1993.[107] Canada, given six months to respond to the complaints, provided its submission on December 28, 1990.[108] After receiving responses from the anglophone authors of the communication (authors), the Committee declared the complaints admissible on April 11, 1991.[109] With six months to address the merits of the complaint, Canada delayed its response until March 6, 1992 when it made two submissions: one requested a review of the Committee's admissibility decision and the other, prepared by Quebec, addressed the merits of the author's complaints.[110] After receiving the authors' responses,[111] the Committee, once again, declared the complaints admissible and then decided their merits.[112]

Article 2 of the ICPR Covenant's Optional Protocol permitted Quebec anglophones, as private parties, to submit their complaints to the UN Human Rights Committee, but since the Committee serves as an international tribunal of last resort, Article 2 also protects its jurisdiction by requiring private parties to exhaust their domestic remedies.[113] Canada objected to the admissibility of the complaint, because it claimed that the anglophone businesses who had made no attempt to challenge Bill 178 could still apply for a declaratory judgment that Bill 178 was invalid.[114] The authors denied that a declaratory judgment action would have any legal value, because Bill 178 contained a Notwith-

106. *Id.* at §3.1 & §3.3. See also THE CANADIAN CHARTER, supra note 2, at §33(1); Quebec Charter of Human Rights and Freedoms, R.S.Q., ch. C-12, §52 (1977) (Can.); and ICPR Covenant, supra note 27, at §2.

107. The appeal of Bill 101 to the UN Human Rights Committee was a lengthy process which was handled solely in writing. After the Committee received the communications, the first (Ballantyne and Davidson) on April 10, 1989 and the second (McIntryre) on November 21, 1989, Canada replied on December 28, 1990 challenging the admissibility of the complaints. In April 11, 1991, the Committee decided that the communications were admissible. Canada requested reconsideration and submitted its arguments on the merits on March 6, 1992. The Committee declined to reconsider its decision on admissibility, decided the case on the merits, and announced its views on March 31, 1993. *See* KING, *supra* note 102.

108. *Ballantyne, supra* note 9, at 5.1-5.5.

109. *Id.* at 6.1-6.10 & 7.1-7.4.

110. *Id.* at 8.1-8.10.

111. *Id.* at 9.1-9.10

112. *Id.* at 10.1-10.5.

113. Optional Protocol to the International Covenant of Civil and Political Rights, art. 2, Mar. 23, 1976, U.N.T.S. 302, [hereinafter Optional Protocol].

114. *Ballantyne, supra* note 9, at 8.2.

standing Clause.[115] They also rejected Canada's argument that the Canadian Charter's Notwithstanding Clause was compatible with Canada's obligations under Article 2 of the ICPR Covenant, because the clause rendered inoperable the rights to "freedom of expression and protection from discrimination protected under the [ICPR] Covenant."[116]

The Committee declared the author's communications admissible, because it "disagreed with the State party's contention that there were still effective remedies available."[117] Even though Bill 101's business provisions had been declared unconstitutional, the Committee found that they had been replaced by provisions similar in substance and protected by Bill 178's notwithstanding clause which was not at issue in the cases before the Quebec courts.[118] The Committee then found that the authors might have a claim as victims of a violation of the ICPR Covenant's Optional Protocol.[119]

When the Committee turned to the merits, it held that Bill 178 did not violate Article 26 of the ICPR Covenant. The Committee accepted Quebec's argument that Sections 58 and 69 are "general measures applicable to commercial advertising which lay down the same requirements and obligations for all tradesmen, regardless of language."[120] The French-only restrictions on commercial advertising and firm signs, the Committee concluded, met Article 26's equality before the law requirement, because they apply equally to francophones and anglophones.[121] Nor did Bill 178 violate Article 27. The Committee also accepted Quebec's argument that Article 27's protection of linguistic minorities could not be invoked by Quebec anglophones, because the article is intended to protect the language and culture of Quebec francophones.[122] The Committee agreed that Quebec francophones would be entitled to protection under Article 27, but not Quebec anglophones, because the article applies to linguistic minorities within states, including federal states, not to a linguistic minority within a province.[123]

Bill 178 did, however, violate Article 19 of the ICPR Covenant. The Committee rejected Quebec's narrow reading of Article 19(2) that freedom of expression "concerns only political, cultural, and artistic expression and does not extend to the area of commercial advertising," and even if this were not the case, "freedom of expression in commercial advertising requires lesser protection than that afforded to political

115. *Id.* at 9.1
116. *Id.* at 9.10.
117. *Id.* at 7.2.
118. *Id.* at 10.2-10.3
119. *Id.* at 10.4
120. *Id.* at 11.5.
121. *Id.*
122. *Id.* at 11.2 in response to Quebec's arguments in 8.5.
123. *Id.*

ideas."[124] The Committee held that Article 19 should be interpreted "as encompassing every form of subjective ideas and opinions capable of transmission to others" and the form of commercial expression did not remove "this expression from the scope of protected freedom."[125] Then the Committee crafted a three part test for any restriction on freedom of expression: "[1] it must be provided for by law, [2] it must address one of the aims enumerated in paragraph 3(a) and (b) of Article 19, and[3] [it] must be necessary to achieve the legitimate purpose."[126]

Applying the test to Bill 178, the Committee acknowledged that the French-only commercial signs and firm names were provided for by law and the "rights of others," as the aim of Article 19(3)(a), "could only be the rights of the francophone minority within Canada under Article 27 . . . to use their own language.[127] But the French-only provisions which prohibited others from advertising in English were not necessary "to protect the vulnerable position in Canada of the francophone group . . . . This protection," the Committee concluded, "may be achieved in other ways that do not preclude freedom of expression [by Quebec anglophones] in a language of their choice . . . . The law could have required advertising be in both French and English."[128]

The Committee's definition of freedom of expression, its test for governmental restrictions on expression, and its decision that Bill 178's French-only commercial signs and firm names requirements violated Article 19, was a defining moment in Canadian constitutional language politics. The Committee, acting as an off-shore constitutional court, had used the human rights guarantees in the ICPR Covenant, an international treaty, to provide a binding offshore constitutional legal standard for Canada's language debate that may have partially overruled the Supreme Court of Canada's decision in the Ford case.

Ballantyne and Ford Cases Compared

The Human Right Committee (Committee) and the Canadian Supreme Court (Court) agreed that freedom of expression in Article 19 and Section 2(a) should be given a broad reading that includes freedom of linguistic choice in commercial expression. The Committee and the Court also agreed that Bill 178's French-only public signs and firm names requirements served at least a legitimate purpose, but were not necessary to protect the Quebec francophone community in Canada. However, the Committee's conclusion did not address the issue of the role of the French language in the public domain: whether Quebec could use the French-only requirement to assure the province's *visage linguis-*

124. *Id.* at 8.9.
125. *Id.* at 11.3.
126. *Id.* at 11.4.
127. *Id.*
128. *Id.*

tique. Finally, the Committee and the Court agreed that Quebec could have achieved its purposes in other ways that did not preclude freedom of choice in linguistic expression.

Thereafter, the Committee's and the Court's analyses diverged. For the Committee, a State could choose one or more official languages, but it could not deny the private use of the language of one's choice. Then it suggested that "the law could have required advertising be in both French and English."[129] The Court went much further. Using the *Oakes* proportionality test, it focused on Quebec's public domain argument (which the Committee had not considered) and found that "the [p]redominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French 'visage linguistique' in Quebec . . . [because it would] reflect the reality of Quebec society."[130]

Given the controlling character of the Committee's decision for Canadian constitutional law, the question is whether the *Ford* decision is consistent with *Ballantyne*. The answer depends on whether the Article 19(3)(a) grounds, "rights of others" which the Committee read to include "the rights of the francophone minority within Canada under Article 27 . . . to use their own language,"[131] is the exclusive basis under domestic law to uphold a government's action which limits freedom of linguistic choice. If it is not, then the Court's consideration of the importance of French in the public domain of Quebec and its use of the *Oakes* proportionality test to allow both languages to appear, but for French to be given "marked predominance," does not violate *Ballantyne*. If the test is exclusive, then *Ballantyne*, as it has been incorporated into Canadian constitutional law, has partially overruled *Ford*, because it does not permit Quebec to give "marked predominance" to French in commercial signs and firm names.

In sum, the UN Human Rights Committee decision in the *Ballantyne* case has brought about a major change in Canadian minority language politics. No longer are language issues defined solely in terms of the Quebec and Canadian language regimes, nor will its participants be guided solely by the Supreme Court of Canada's interpretation of the Canadian Charter provisions governing the use of language on commercial signs and in public schools. The *Ballantyne* decision has expanded the parameters of the micro-constitutional debate over Canadian minority language rights to include the UN language law regime.

Bill 86

The UN Human Rights Committee's *Ballantyne* decision, adopted on March 31, 1993, called upon Canada to remedy its Article 19 viola-

129. *Id.*

130. *Ford*, [1988] 2 S.C.R. at 780.

131. *Ballantyne, supra* note 9 at 11.4.

tion by "an appropriate amendment of the law."[132] On December 22, 1993, the Quebec Liberal government enacted Bill 86 which contained substantial changes in the use of language in business and education.[133] Bill 86, and the regulations which it authorizes the Quebec government to promulgate, currently define the province's language law regime, the political debate about the role of language in the life of the province, and the basis for anglophone legal challenges to its business and education provisions.

Bill 86 incorporated the language from the *Ford* decision by revising Section 58 to read: "public signs and commercial advertising must be in French, [but t]hey may be both in French and in another language provided that French is markedly predominant."[134] Section 63 requires firm names to be in French, but Bill 86 revises Section 68 to permit a firm name to "be accompanied with a version in a language other than French provided that . . . the French version of the firm name appears at least as prominently."[135] Section 58 and 68 also delegate authority to determine, by regulation, where commercial signs, posters, and advertising and firm names "must be in French only, where French need not be predominant, or . . . may be in another language."[136]

Bill 86 was also a belated response to the *Quebec Protestant School Boards* decision. The provincial government had impeded access to English language education for nine years.[137] Now Bill 86 provides access to anglophone schools to the children of Canada Clause and Sibling Clause parents by revising Section 73 to incorporate as Section 73(1) and (2) a version of the Canadian Charter Section 23(1)(b) and Section 23(2).[138] But these parents are required by Section 73 to make a request to have their children receive instruction in English.[139] Then Section 80

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132. *Id.* at 13-14.

133. An Act to Amend the Charter of the French Language R.S.Q. (1993) (Can.) [hereinafter Bill 86].

134. *Id.* at §58.

135. *Id.* at §68.

136. *Id.* at §§58. Section 68 states: "In public signs and posters and commercial advertising, the use of a version of a firm name in a language other than French is permitted to the extent that the other language may be used in such signs and posters or in such advertising pursuant to section 58 and the regulations enacted under that section. Bill 86, *supra* note 133, at §68.

137. *See* TASK FORCE ON ENGLISH EDUCATION, REPORT TO THE MINISTER OF EDUCATION OF QUEBEC (1992); *see also,* Don C. Donderi, *English-Language Population of Quebec Has Shrunk*, MONTREAL GAZETTE, August 17, 1995, at B3.

138. Bill 86, *supra* note 133, at §73.

139. *But cf.,* Bill 86, *supra* note 133, at §73(1)-(2); CANADIAN CHARTER, *supra* note 2, at §§23(1)(b) and 23(2). Note that Bill 86 is more restrictive than §23. The Canadian Charter's §23(1)(b), unlike Bill 86's §73(1) does not require that the parent's "instruction constitutes the major part of the elementary he or she received in Canada." The Canadia Charter §23(2) does not require, as does §73(2) that to be entitled to an English language education in Quebec, a child must have a parent and siblings who have "received or is receiving elementary or secondary instruction in English in Canada . . .provided that that

authorizes the provincial government to prescribe by regulation the procedures these parents must follow and "the elements of proof they must furnish in support of their request" to receive a certificate of eligibility for their children.[140] Still Bill 86 gives the province's francophone and immigrant anglophone and allophone parents no choice. They must send their children to French language schools.

In sum, Bill 86 was the Liberal government's attempt to bring the Quebec language law regime into compliance with the Supreme Court of Canada's interpretation of the Canadian Charter's Section 23 linguistic education rights in the *Quebec Protestant School Boards* case and the Charter's Section 2(b) freedom of linguistic choice in the *Ford* case. At the same time, it does not appear that the Liberal government in enacting Bill 86's business provisions was sensitive to UN Human Rights Committee's interpretation of the ICPR Covenant in the *Ballantyne* case, nor to the ICPR Covenant and other UN human rights treaties by its authorization of the provincial government to promulgate regulations governing the language of business and education. So it is not possible to indulge a presumption of constitutionality on behalf of the regulations Bill 86 authorizes the provincial government to promulgate, and those it has promulgated, nor is it possible to indulge a presumption of their conformity, and the conformity of the legislation's business provisions, with UN human rights treaties.

VI. THE UNITED NATIONS LANGUAGE REGIME: THE CONTINUING CONFLICT OVER THE LANGUAGE OF BUSINESS AND EDUCATION

The Quebec anglophone community, encouraged by the *Ballantyne* case, has explored a challenge to Bill 86's business and education provisions as violations of the Canadian and international language regimes.[141] The Montreal-based Parents Support Group, then the Equal-

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instruction constitutes the major part of the elementary or secondary instruction by the child." For the regulations which impede access to English language schools further, see *infra*, note 140.

140. Bill 86, *supra* note 133, at §80.(Regulations Adopted Under the Charter of the French Language); Regulations Respecting Requests to Receive Instruction in English, R.S.Q., ch. C-11, §4-2 (1981) (Can.). These regulations further impede access to English language schools to Canada Clause and Sibling Clause children.

141. Several Anglophone organizations have considered both domestic and international legal challenges to Bill 101's education provisions: the Parent's Support Group, Equality Party, the Chateauguay Valley English-Speaking Peoples Association (CVESPA) and Alliance Quebec.

The Parents Support Group, an association of Quebec English and French parents which offered advice and assistance to parents seeking admission for their children to English language schools, raised the issue of Quebec's compliance with the UNESCO Recommendation on Discrimination in Education and the United Nations Convention on the Rights of the Child before the Commission on the Sovereignty of Quebec on February 10, 1995. *See* B. TYLER, BRIEF OF PARENTS SUPPORT GROUP SUBMITTED TO THE COMMISSION

ity Party, and now Alliance Quebec have not limited their legal challenge to the ICPR Covenant and its provisions governing the freedom of expression,[142] equality before the law[143] and linguistic freedom.[144] Rather, they have considered other UN treaties which define the meaning of Canadian linguistic human rights. These treaties include the International Economic, Social and Cultural Rights Covenant (IESCR Covenant), which bestows the right to an education without discrimination on linguistic grounds;[145] the United Nations Rights of the Child Convention (UN Convention), which recognizes the educational rights of children;[146] and the UNESCO Recommendation on Education, which recognizes the right of national minorities to carry out their own educational activities.[147] In sum, the willingness of Quebec anglophones to rely upon these human rights treaties further expands the parameters of the micro-constitutional debate over Canadian minority language rights.

The Bill 86 Signs Provisions: Canadian and International Legal Issues

Do Bill 86's commercial signs provisions violate Section 2(b) of the Canadian Charter and Article 19 of the ICPR Covenant? Section 58's requirement that the use of French on commercial signs be "markedly predominant" clearly complies with the *Ford* standard and Section 68's requirement that the French version of the firm name appear "at least as prominently" as another language is more generous than *Ford* requires.[148] Whether Sections 58 and 68 violate the ICPR Covenant depends on whether the *Ford* decision is consistent with *Ballantyne*. If the Article 19(3)(a) grounds, "rights of others," is the exclusive basis under

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ON SOVEREIGNTY OF QUEBEC ON THE SUBJECT OF QUEBEC'S INTERNATIONAL OBLIGATIONS IN THE AREA OF DISCRIMINATION IN EDUCATION (1995) [hereinafter BRIEF OF PARENTS SUPPORT GROUP].

Similar testimony was given to provincial and federal government by the Equality Party and CVESPA. See: Keith Henderson, Equality Party Submission to the Estates General on Education (1995); Joint Presentation of the Chateauguay Valley English-Speaking Peoples Association (CVESPA) (1997). When William Johnson became president of Alliance Quebec in June 1998, he proposed that the Alliance Quebec challenge Bill 101's education and business language restrictions on the ground that they violate the UNESCO Recommendation on Discrimination in Education and the United Nations Convention on the Rights of the Child. *See* Diane Francis, *Johnson Wins an Important Skirmish in the Language War*, FIN. POST, June 4, 1998; Herbert Bauch, *Alliance Foes Bury Hatchett: Group "Moving Harmoniously Forward"*, MONTREAL GAZETTE, June 21, 1998, at A3.

142. ICPR Covenant, *supra* note 26, at art.19.

143. *Id.* at art. 26.

144. *Id.* at art. 27.

145. IESCR Covenant, *supra* note 27, at art.13.

146. UNRC Convention, *supra* note 28, at art.28.

147. UNESCO Recommendation, *supra* note 30, at art.5(c)

148. Bill 86, *supra* note 133, at §§58 & 68.

domestic law to uphold a government's action which limits freedom of linguistic choice, then Quebec may not give "marked predominance" to French in commercial signs, but it may require the French version of the firm name to appear "at least as prominently."[149] If the Article (19)(3)(a) grounds are not exclusive, then Quebec may give consideration to the importance of French in the public domain of the province, per *Ford*, by giving French "marked predominance."[150]

The language regulations which Bill 86's authorizes the provincial government to enact do, however, clearly fail to meet the standards established in *Ford* and *Ballantyne* and provide the basis for a legal challenge in the Quebec courts with an appeal to the Supreme Court of Canada, and, perhaps, to the UN Human Rights Committee, because they transfer to the Quebec government the authority to determine by regulation, where commercial signs, posters, and advertising and firm names "must be in French only, where French need not be predominant, or . . . may be in another language."[151] As a consequence, Sections 58 and 68 delegate to the government the discretion to prohibit the use of a language other than French on billboards, the sides of buses, and in metro stations and, thereby, to deny freedom of linguistic expression to Quebec anglophones guaranteed by Article 2(a) and Article 19.[152]

The Bill 86 Education Provisions: Canadian and International Legal Issues

Bill 86's language education provisions, Section 73's Canada Clause and Sibling Clause, respect the Canadian Charter. Bill 101 does not contain the Canadian Charter's Section 23(1)(a) Mother Tongue Clause,[153] but its omission does not violate the Canadian Constitution, because Section 59(1) of the Canadian Charter provides that Section 23(1)(a) will not apply to Quebec until its legislature approves, which it has not yet done.[154] Yet Bill 101, even with its Bill 86 revisions, may violate Canada's international legal obligations.

International Covenant on Civil and Political Rights

The ICPR Covenant commits Canada in Article 2 "to respect and ensure" the rights of individuals without linguistic distinction,[155] which

149. ICPR Covenant, *supra* note 26, at art.19(3)(a).

150. *Id.*

151. Bill 86, *supra* note 133, at §58.

152. *Id.* at §§58 & 68.

153. Canadian Charter, *supra* note 3, at §23(1)(a). Section 23's Mother Tongue Clause confers the right to a minority language education upon the children of parents whose "first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside."

154. *Id.* at §59(1).

155. ICPR Covenant, *supra* note 26, at art.2

Article 27 defines to include the right of persons belonging to linguistic minorities not to "be denied the right, in community with others of their group, . . . to use their own language."[156] Article 27's right does not explicitly extend to minority language education. Even so, it has been widely accepted that Article 27 does apply, but "requires only that the State Parties allow minorities to set up private schools, at their own expense, to provide instruction in their own language. The State is not legally obligated either financially or materially to assist the minorities concerned. . . or set up a minority public school system for their benefit."[157] If this is so, then Section 73 will not violate Article 27, because it does not hinder private anglophone and allophone private education. It only discourages Section 73 Canada Clause and Sibling Clause parents from sending their children to English language public schools and requires allophone immigrants who choose to have their children educated at public expense to attend French language schools.[158]

Canada has probably violated Article 26 of the ICPR Covenant which prohibits a state from discriminating on the basis of language, national origin, and birth, because Section 23 (1) (a), the Mother Tongue Clause, does not apply in Quebec.[159] Since all the provinces, except Quebec, have adopted Section 23(1) (a), francophone immigrant parents living in Ontario have a constitutional right to send their children to a French language public school as long as there is a sufficient number of eligible students, but anglophone immigrants parents living in Quebec would not have a corresponding right under Bill 101 to send their children to an English language education public school.[160]

International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (IESCR Covenant) commits Canada in Article 2(2) to guarantee the right to an education without discrimination on the basis of language, as set forth in Article 13(1).[161] Article 13(1), like Article 27 of the ICPR Covenant, may be read to apply to minority language education, and, like Article 27, does not bestow a positive right which will require the state to provide minority language education at public expense. Rather, it confers a negative right which forbids the state from intruding upon the right of linguistic minorities to set up private minority

156. *Id.* at art. 27

157. Jose Woehrling, *Minority Cultural and Linguistic Rights and Equality Rights in the Canadian Charter of Rights and Freedoms,* 31 MCGILL L.J. 50, 58 (1985).

158. *Supra* note 133 with regard to Canadian Anglophones, but not Anglophone and allophone immigrants who must comply with Bill 101, §72, supra note 3, requiring a French language public education, since they do not qualify for a public English language education.

159. CANADIAN CHARTER, *supra* note 2, at §59(1).

160. Woerhling, *supra* note 157, at 72.

161. IESCR Covenant, *supra* note 27, at §§ 2(2) & 13(1).

language schools at their own expense.[162] As a consequence, Section 73 does not violate Article 13(1), just as it does not violate Article 27 of the ICPR Covenant, because it does not hinder private anglophone and allophone education.[163] If, however, Articles 2(2) and 13(1) are read jointly and incorporate Article 2(2)'s prohibition of discrimination on the basis of national origin and birth, Canada may also violate the IESCR Covenant, as it may violate Article 26 of the ICPR Covenant, by permitting a province, using Section 59(1) of the Canadian Charter, to discriminate on the basis of language, national origin, and birth in providing publicly financed education.[164] Since all the provinces except Quebec have adopted Section 23(1)(a), the difference in the treatment of Canadian and anglophone and allophone immigrants creates a difference in treatment within Canada in violation of the IESCR Covenant.[165]

UNESCO Recommendation Against Discrimination in Education

The UNESCO Recommendation Against Discrimination in Education (UNESCO Recommendation) gives member states the freedom to organize their school systems, but only grudgingly permits separate education.[166] Section 1 prohibits "any distinction, limitation or preference which, being based on . . . language, . . . national origin, . . . or birth, has the purpose or effect . . . of nullifying or impairing equality of treatment in education and in particular of depriving any person or group of persons of access to education . . . and establishing or maintaining separate educational systems for persons or groups of persons."[167] Section 2 , however, allows states to establish separate linguistic educational systems "if participation and attendance is optional,"[168] so long as they do not prohibit national minorities whose attendance is also optional "from understanding the language and culture of the community as a whole."[169]

Quebec anglophones will argue that Bill 101 violates the UNESCO Recommendation.[170] Section 73 has the purpose of creating a distinct francophone community in Quebec by establishing two separate and unequal linguistic educational systems for three groups of parents and denying those parents the option to participate in a francophone educational system. Section 73 furthers this purpose by giving a preference to francophone education and placing limitations on the access to anglo-

162. Woerhling, *supra* note 157, at 58.

163. *Id.*

164. CANADIAN CHARTER, *supra* note 3, at §59(1).

165. Woerhling, *supra* note 157, at 72.

166. PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 289 (1991).

167. UNESCO Recommendation, *supra* note 30, at §1(1).

168. *Id.* at §2(b).

169. *Id.* at §5(c)(i) & (iii).

170. *Supra* note 141; *see also*: B. Tyler, *Bill 101 Regarding Signs and Access to Schools, the Facts Underlying the Pending Language Debate*, DIALOGUE, April 1996, at 24.

phone education in a manner which nullifies or impairs equality of treatment by depriving parents of the option to participate in the francophone educational system. Canadian anglophone parents who qualify under Section 73's Canada and Sibling Clauses do have a choice, but not an unburdened one. Section 73 requires them to request a public anglophone education for their children[171] and then, per Section 80, to comply with detailed administrative regulations to receive a certificate of eligibility in order to attend anglophone schools.[172]

Bill 101 does not require francophone and immigrant parents to request a public francophone education for their children, nor obtain certificates of eligibility for them to attend French schools, because attendance at anglophone schools is not an option for these parents. Their children are required to attend francophone schools. Bill 101 also violates the UNESCO Recommendation Section 5 rights of these francophone and immigrant allophone parents. Since they are members of Canadian national minorities who are deprived of access to anglophone education, they are prevented from "understanding the culture and language of the [Canadian] community as a whole and from participating in its activities."[173] In sum, Quebec anglophones will make a persuasive argument that Bill 101 violates the UNESCO Recommendation, because it limits "access to children whose parents were Canadian citizens educated in Canada .... [and] denies to immigrants and French-speaking Quebecers ... the freedom of choose between two publicly funded systems of education in Quebec."[174]

UN Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (UN Convention) commits Canada in Article 2(1) to guarantee that child's right to an education, as set forth in Article 28(1), without discrimination on the basis of the child's or his or her parent's language, national origin, or birth.[175] States are bound by Article 28(1) to recognize this right of the child to an education by making "primary education compulsory," secondary education "available and accessible," and both freely available to all children.[176] Do Section 23 of the Canadian Charter and Section 73 of Bill 101 violate the UN Convention?

A child's Section 23 Charter right to a minority language education depends upon the parents' citizenship, provincial residence, and language of instruction. Quebec children do not have access to English schools under Section 23(1) (a), the Mother Tongue Clause, because the

171. Bill 86, *supra* note 133, at §73
172. *Id.* at §80
173. UNESCO Recommendation, *supra* note 30, at §5(c).
174. BRIEF OF PARENTS SUPPORT GROUP, *supra* note 141, at 1.
175. UNRC Convention, *supra* note 28, at arts. 2(1) & 28(1).
176. *Id.* at art. 28(1).

Quebec government has not enacted legislation authorized by Section 59(1) of the Canadian Charter.[177] "This means that children of British, American, or Australian parentage are discriminated against by not being allowed to go to school in their mother tongue."[178] Nor do French and allophone immigrant Quebec children have access under Bill 86 or Section 23 Canada and Sibling clauses.[179] In fact, Bill 86 further restricts the child's right to an education, because it mandates French as the language of instruction for the children of all Quebec, Canadian, and immigrant francophone parents.[180] As a consequence, Quebec parents argue that a child's right to a minority language education depends upon some factual characteristic of his or her parents and, thereby, constitutes discrimination on language, national origin, and birth in violation of the UN Convention.

The UN Convention is unlikely to bear the weight of the Quebec parents' argument when their claim includes "a right to choose on behalf of their children between two publicly funded systems of [language] education" in Quebec.[181] Article 28(1), like Article 13(1) of the IESCR Covenant and Article 27 of the ICPR Covenant, does not require Quebec to provide minority language education at public expense, but merely prohibits the province from intruding upon the right of a linguistic minority to establish private minority language schools at their own expense.[182] As such, Section 73 does not violate Article 28(1), because it does not hinder private minority language education. At the same time, Canada may violate Article 2(1) and 28(1) of the UN Convention, as it may violate Article 26 of the ICPR Covenant and Article 13 of the IESCR Covenant, by not requiring Quebec to be bound by Section 23(1)(a), the Mother Tongue Clause, and, thereby, permitting Quebec, unlike other provinces, to discriminate in the provision of public education to Canadian and immigrant anglophones.[183]

Summary

The Quebec anglophone community has taken the opportunity to expand the legal parameters of the micro-constitutional debate over Canadian minority language rights by exploring the possibilities of both domestic and international language regime challenges to Bill 86's business and education provisions. Bill 86's business language provisions, Sections 58 and 68, do not violate the Canadian Charter.

177. CANADIAN CHARTER, *supra* note 2, at §59(1)

178. Diane Francis, *UN Committee Says Quebec Discriminates Against Children*, FIN. POST, July 20, 1995, at 11.

179. *See* CANADIAN CHARTER, *supra* note 2, at §23(1)(b); Bill 86, *supra* note 133 at §§73-86.

180. Bill 86, *supra* note 133, at §§72-73.

181. Brief of Parents Support Group, *supra* note 141, at 7.

182. Woerhling, *supra* note 157, at 58.

183. *Id.* at 72.

Whether they violate the ICPR Covenant will depend on whether the *Ford* decision is consistent with *Ballantyne*. However, there should be no doubt that the regulations which Bill 86 authorizes the provincial government to promulgate fail to meet the standards established in *Ford* and *Ballantyne* and provide the basis for domestic and international legal challenge as violations of Article 2(a) of the Canadian Charter and Article 19 of the ICPR Covenant.

Bill 86's education provision, Section 73, may also violate the ICPR Covenant, IESCR Covenant, UNESCO Recommendation, and UN Convention which prohibit discrimination on the basis of language, nationality, origin, and birth. All but the ICPR Covenant explicitly extend this prohibition to education. Together they could provide the basis for challenging Section 23 of the Canadian Charter and Section 73 of Bill 101. At the same time, all of these international human rights documents confer negative educational rights which forbid Quebec from intruding upon the freedom of anglophone and allophones to establish a privately funded minority language education, but do not obligate Quebec to financially or materially assist them or to provide a public school system for them. The ICPR Covenant, IESCR Covenant, and the UN Convention should also provide the basis for a claim that Section 23 of the Canadian Charter, because of its joint operation with Section 59(1) permits Quebec to discriminate on the basis of language, national origin, and birth in the provision of public education.

Whether Quebec anglophones will have the opportunity to have these human rights complaints heard will depend upon whether the international procedures permit private persons to submit complaints. The UN Human Rights Committee and the UNESCO Committee on Conventions and Recommendations in Education will be able to hear Quebec anglophone claims submitted under the ICPR Covenant and the UNESCO Recommendation, because the ICPR Covenant contains an optional protocol and the UNESCO's 1978 procedure permits human rights advocates to submit individual cases.[184] Since the IESCR Covenant and the UN Convention do not contain any procedures for individual complaints, Quebec anglophones will be unable to initiate a legal complaint in spite of their persuasive case against Bill 101.[185] Still, the Quebec anglophones may be able to use their international human rights complaints to influence the direction of the current national unity discussions and, if Quebec separates from Canada, the debate

184. *See* Optional Protocol, *supra* note 113 and UNESCO Executive Board, 1978: Decision 104 EX/3.3. On the UNESCO Decision, *see* S. Marks, *The Complaint Procedure of the United Nations Educational, Scientific, and Cultural Organization, in* GUIDE TO INTERNATIONAL HUMAN RIGHTS 86 (Hurst Hannum ed., 1992).

185. The IESCR Covenant and the UN Convention contain no individual complaint procedures. *See* Letter from Fiona Blyth-Kubota, *Human Rights Officer, Centre for Human Rights,* to Keith Henderson, *Equality Party Leader* (August 22, 1995).

over its admission to the United Nations.[186]

VII. MACRO-CONSTITUTIONAL IMPLICATIONS OF MINORITY LANGUAGE RIGHTS

Quebec anglophones and their provincial government have not limited their efforts to preserve or alter language policy to micro-constitutional litigation. Interwoven into the analysis of micro-level litigation, so far, has been Quebec's macro-constitutional response to the *Quebec Protestant School Boards Case*, the Meech Lake Accord, and following the passage of Bill 178 in response to the *Ford* commercial signs case, the death of the Accord in 1990. Since then Quebec and the Rest of Canada have been torn between two macro-constitutional strategies: keeping Quebec in Canada or permitting the province to separate. Still, the micro-constitutional question remains: What will either path mean for Quebec anglophones and minority language rights in business and education?

Anglophone Minority Language Rights in the Province of Quebec

While the UN Human Rights Committee had been involved with the *Ballantyne* case, the Quebec Liberal government, angered from the rejection of the Meech Lake Accord, committed the province to a sovereignty referendum in October 1992.[187] The Rest of Canada responded with the Canada Round, the second effort to "induce Quebec to acquiesce in the Constitution Act, 1982."[188] The Canada Round produced the Charlottetown Accord of 1992 which included a substantially broadened distinct society clause intended to guide the courts in interpreting the Canadian Charter in a manner consistent with "the vitality and development of official language minorities throughout Canada."[189] The Accord was, however, such a comprehensive response to so many matters of constitutional discontent and created so many cross-cutting cleavages that Quebecers and the Rest of Canada rejected it in a popular referendum on October 26, 1992.[190]

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186. BRIEF OF PARENTS SUPPORT GROUP, *supra* note 141, at 7.

187. For studies of post-Meech Lake Canada and the events leading to the Charlottetown Accord, *see, e.g.*, CONSTITUTIONAL PREDICAMENT: CANADA AFTER THE REFERENDUM OF 1992, *supra* note 5; JOHNSON, *supra* note 34, at 311-45; RUSSELL, *supra* note 9, at 154-89.

188. For studies of post-Meech Lake Canada and the events leading to the Charlottetown Accord, *see, e.g.*, CONSTITUTIONAL PREDICAMENT: CANADA AFTER THE REFERENDUM OF 1992, *supra* note 5; JOHNSON, *supra* note 34, at 311-45; RUSSELL, *supra* note 9, at 154-89.

189. Charlottetown Accord, Consensus Report on the Constitution, §1.2(1)(d) (1992) (Can.)(visited,June7,1999)<http://www.solon.org/Constitutions/Canada/English/Proposals/CharlottetownConsensus.html>.

190. For studies of the making of the Charlottetown Accord and its defeat, *see, e.g.*, CONSTITUTIONAL PREDICAMENT: CANADA AFTER THE REFERENDUM OF 1992, *supra* note 5;

The UN Committee's *Ballantyne* decision four months later led the Quebec Liberal government to pass Bill 86 by the end of the year. During the 1994 provincial election campaign, Parti Quebecois candidates avoided the language issue, although Jacques Parizeau, the PQ leader, remarked that he would reactivate the provincial language police and would "get rid of the decisions of the Supreme Court of Canada that condemned whole chapters of Bill 101."[191] Parizeau's comment was consistent with the PQ party platform which called for restoring Bill 101 to its original form and tightening the francisation rules to business and education, but he promised that there would be "no changes . . . in language laws before the sovereignty referendum" which the PQ promised within a year.[192]

A Parti Quebecois victory ushered in a third round of constitutional self-examination when the new government, fulfilling its election promise, introduced legislation on sovereignty.[193] During the first ten months of 1995, public discourse in Quebec focused on the issue of whether the province should separate. On September 8, the Quebec Superior Court's decided that Bill 1, the referendum law, violated the Canadian Constitution's amending provisions, but the PQ was not deterred from holding the referendum, because the court refused to issue an injunction.[194] On October 30, Quebecers went to the polls and said No to sovereignty by the narrow margin of 50.6% to 49.4%.[195] Minority language rights were clearly a decisive factor. "Montrealers, ethnic, and anglophone voters joined together to defeat Yes voters who were overwhelmingly francophone native-born Quebecers from other regions."[196]

Since the Quebec referendum, Canada has been involved in another

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BROOKE JEFFREY, *STRANGE BEDFELLOWS, TRYING TIMES*: OCTOBER 1992 AND THE DEFEAT OF THE POWER BROKERS (1993); C. Manfredi, *On the Virtues of a Limited Constitution: Why Canadians Were Right to Reject the Charlottetown Accord, in* RETHINKING THE CONSTITUTION: PERSPECTIVES ON CANADIAN CONSTITUTIONAL REFORM, INTERPRETATION, AND THEORY 40-60 (Anthony A. Peecock ed., 1996); RUSSELL, *supra* note 10, at 190-227.

191. *I'll Reactivate the Language Watchdogs, Parizeau Says,* MONTREAL GAZETTE, September 9, 1994, at A8.

192. *Id.*

193. Bill 51, An Act Respecting Sovereignty, 1st Sess., 35th Leg., (1994) (Can.). After the bill was tabled in the Quebec National Assembly on December 6, 1994, Premier Parizeau announced that the bill would be considered at the next session in September 1995. On September 7, 1995, Bill 1, "An Act Respecting the Future of Quebec" was passed and the referendum date (October 30, 1995) and question were announced. An Act Respecting the Future of Quebec, R.S.Q. (1995) (Can.).

194. Guy Bertrand, a Quebec City lawyer, former PQ separtist leader, and now a federalist, challenged the referendum in Bertrand v. Quebec (AG), *see*: GUY BERTRAND, ENOUGH IS ENOUGH: AN ATTORNEY'S STRUGGLE FOR QUEBEC 151-90 (1996).

195. Anthony Wilson-Smith, *A House Divided* [A Special Edition: The Quebec Referendum], MACLEANS, November 6, 1995, at 14; *see also* H. Clarke and A. Kornberg, *Choosing Quebec? The 1995 Quebec Sovereignty Referendum*, 29 PS: POL. SCI. & POL. 676-82 (1996).

196. Wilson-Smith, *supra.*note 195.

effort to gain the province's assent to patriation of the 1982 Constitution and to counter Quebec's campaign for an independent French-speaking nation. The federal government, which had taken a low profile until shortly before the referendum vote, became actively involved in promoting national unity. Parliament responded to Quebec's interests by enacting semi-constitutional resolutions in early 1996 which recognized Quebec as a distinct society and gave the province a veto over constitutional changes.[197] At the same time, the federal government adopted two anglophone Quebecer arguments by submitting a reference to the Canadian Supreme Court in 1996 which asked for a legal opinion on whether the Canadian Constitution or international law allow secession;[198] and by arguing that if Quebec separated, it would not maintain its current boundaries. In other words, if Canada can be partitioned by Quebec separation, so can a post-separation Quebec be partitioned to keep anglophone Quebecers in Canada.[199]

The provincial premiers from the rest of Canada also took the initiative to counter Quebec's separation impulse. At Calgary in September 1997, they issued a declaration which established a process for public consultation on national unity based on seven principles which affirm "the vitality of the English and French languages;" the equality of all provinces; "the unique character of Quebec society, its French-speaking majority, [and] its culture;" and the role of the Quebec government in protecting and developing "the unique character of Quebec society within Canada."[200] In sum, the Calgary Declaration, vaguely

197. S. Delacourt, *Provinces Given Last Word on Veto*, THE GLOBE AND MAIL, November 29, 1995; T. Wills, *Veto Over Constitutional Changes Now Law*, MONTREAL GAZETTE, February 3, 1996.

198. Anthony DePalma, *Canada Seeks Legal Advice on the Status of Quebec* N.Y. TIMES, February 17, 1998, at A5. The federal government's reference began when Guy Bertrand and Stephen Scott, a McGill law professor, challenged the constitutionality of a future Quebec referendum. The federal government intervened on September 26, 1996 and referred the case to the Supreme Court of Canada which heard oral arguments on February 16 to 19, 1998. *See In the Matter of Section 53 of the Supreme Court Act*, R.S.C., ch. S-26 (1995) (Can.). The text of the decision is online at <http://www.droit.umontreal.ca.html> . *See also* In the Matter of a Reference by the Governor in Council P.C. 1996-1497 (Reference re Secession of Quebec), File No. 25506, 37 I.L.M. 1340 (August 20, 1998). The decision's text is online at <http://canada.justice.gc.ca/Orientations/scess/index_en.html>. In a unanimous decision, the Supreme Court held that the Canadian Constitution required Quebec to negotiate with the federal government and the provinces if it wanted to secede and that international law did not apply because Quebecers were not a suppressed or colonized people.

199. B. Cox, *Partition After Separation OK: Dion*, MONTREAL GAZETTE, January 27, 1996, at B1. Quebec Anglophones put partition on the national agenda by creating the Special Community for Canadian Unity and arguing that if Canada were divisible, so was Quebec. *See* DIANE FRANCIS, FIGHTING FOR CANADA (1996); and KEITH HENDERSON, STAYING CANADIAN: THE STRUGGLE AGAINST UDI (1997).*Calgary Declaration*, 1997 (visited April 10, 1999)<http://www.uni.ca/calgary.html>.

200. *Calgary Declaration*, 1997 (visited April 10, 1999)<http://www.uni.ca/calgary.html>

reminiscent of the Charlottetown Accord, has no constitutional authority, but it does provide a basis for future national unity discussions.

Anglophone Minority Language Rights in a Post-Separation Quebec: Canadian and International Legal Perspectives

Politicians, academics, and journalists continue to debate the great "if." What will happen if Quebec votes for sovereignty in a forthcoming referendum? Speculation ranges from a "velvet divorce" to civil strife and U.S. military intervention.[201] The questions focus on how Canada, outside Quebec, may be politically, economically, and culturally restructured, and what political and economic challenges Quebec will confront as a new nation in an international political economy.[202] Speculation also focuses on the nature of the new Quebec and Canadian constitutional orders: the powers their governments will exercise and the rights their citizens will possess.[203]

In terms of this study, the question is what the character of minority language rights in a post-separation Quebec may be if the current macro-constitutional discussions fail and Quebec votes for sovereignty. One major macro-constitutional query is whether Quebec will separate by constitutional means or issue a unilateral declaration of independence.[204] A closely related issue is whether an independent Quebec will be defined by its current provincial boundaries or be partitioned with

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201. LANSING LAMONT, BREAKUP: THE COMING END OF CANADA AND THE STAKES FOR AMERICA (1994); L. Gagnon, *The Sorties by Bertrand and Bourgault Rocked the Sovereignty Boat*, THE GLOBE AND MAIL, January 21, 1995, n.p.

202. For studies of the political, economic, and cultural impacts of separation, *see, e.g.*, MARCEL COTE & DAVID JOHNSTON, IF QUEBEC GOES: THE REAL COST OF SEPARATION (1995); ALAN FREEMAN & PATRICK GRADY, DIVIDING THE HOUSE: PLANNING FOR A CANADA WITHOUT QUEBEC (1995); BEYOND THE IMPASSE: TOWARD RECONCILIATION (R. Gibbins & G. LaForest eds.,1998); NEGOTIATING WITH A SOVEREIGN QUEBEC (Daniel Drache & Roberto Perin eds., 1992); KIMON VALASKAKIS & ANGELINE FOURNIER, THE DELUSION OF SOVEREIGNTY: WOULD INDEPENDENCE WEAKEN QUEBEC (1995); ROBERT A. YOUNG, SECESSION OF QUEBEC AND THE FUTURE OF CANADA (1995).

203. For analyses of the constitutional and legal impacts of separation, *see, e.g.*, BEYOND THE IMPASSE, *supra* note 202; JOHNSTON, *supra* note 202; DONALD G. LENIHAN, GORDON ROBERTSON, et al., CANADA: RECLAIMING THE MIDDLE GROUND (1994); PATRICK J. MONAHAN, COOLER HEADS SHALL PREVAIL: ASSESSING THE COSTS AND CONSEQUENCES OF QUEBEC SEPARATION (1995); YOUNG, *supra* note 202.

204. *See, e.g.*, BERCUSON & COOPER, *supra* note 69; K. Banting, If Quebec Separates: Resturcturing Northern North America, in The COLLAPSE of CANADA? (1992); ALAN C. CAIRNS, LOOKING INTO THE ABYSS: THE NEED FOR A PLAN C (1997); GORDON GIBSON, PLAN B: THE FUTURE OF THE REST OF CANADA, (1994); HENDERSON, supra note 201; MONAHAN, supra note 205; PATRICK J. MONAHAN, MICHAEL J. BRYANT ET AL., COMING TO TERMS WITH PLAN B: TEN PRINCIPLES GOVERNING SECESSION (1996); P. RUSSELL & B. RYDER, RATIFYING A POST-REFERENDUM AGREEMENT ON QUEBEC SOVEREIGNTY (1997); YOUNG, *supra* note 202; John E. Trent, Neither Integration Nor Disintegration: An Agenda for Renewal of the Canadian Federation, DIALOGUE CANADA, March 1998, <http://www.uni.ca/dialogue/trent_dc3.html>.

anglophones and aboriginals remaining in Canada.[205]

Assuming Quebec could be linguistically partitioned, Quebec anglophones who remained in Canada as a new province would have no need to rely on their Canadian Charter Section 23 minority language rights, because they would be the linguistic majority. What about the language rights of immigrant allophones who will live in the new province? Whether they would be able to raise any international human rights claims, now made on their behalf by Quebec anglophones, will depend upon whether official bilingualism persists in a Canada where the francophone minority will fall from 25% to 3% after separation, and whether the new anglophone province adopts Section 23(1) (a), the Mother Tongue Clause.[206] Assuming Quebec separates and maintains its current boundaries, what might be the character of minority language rights in a the new state? The Parti Quebecois in *Quebec in a New World*, its plan for sovereignty, clearly envisions a Quebec in which the French language will be "the cornerstone of Quebec's cultural identity[,] . . . the official language of Quebec . . . and the preferred instrument for integrating newcomers into Quebec society."[207] Still, the PQ says it is committed to a pluralistic society and that sovereignty will lay the foundation "for Francophone and Anglophone Quebecers to live together more harmoniously and fruitfully."[208] In a sovereign Quebec, the PQ affirms "[t]he individual rights of Quebec anglophones will be guaranteed and the community will be able to continue to count on a secure network of educational, social, and cultural institutions that can maintain its vitality."[209]

The PQ government's 1995 draft legislation on sovereignty is, however, more cautious when it states that the new Quebec Constitution "shall guarantee the English-speaking community that its identity and institutions shall be preserved . . . . Such guarantee . . . shall be exercised in a manner consistent with the territorial integrity of Quebec."[210] Premier Parizeau's 1994 election remarks about his intention to "get rid of" the Supreme Court's decisions in the *Quebec School Board Case (1984)* and the *Ford Case (1988)* give even greater cause for concern.[211] His remarks drew upon other parts of the PQ program which call for the restitution of the French-only commercial sign law, further restrictions on English language education, and extension of the requirement

205. For studies of partition, *see, e.g.*, LIONEL ALBERT & WILLIAM F. SHAW, PARTITION: THE PRICE OF QUEBEC'S INDEPENDENCE (1980); HENDERSON, *supra* note 199; SCOTT REID, CANADA REMAPPED: HOW THE PARTITION OF QUEBEC WILL RESHAPE THE NATION (1992).

206. Kenneth McRoberts, *Protecting the Rights of Linguistic Minorities, in* NEGOTIATING WITH A SOVEREIGN QUEBEC, *supra* note 202, at 173-88.

207. PARTI QUEBECOIS, *supra* note 18, at 37.

208. *Id.* at 39.

209. *Id.*

210. *See supra* note 193.

211. *I'll Reactivate the Language Watchdogs, Parizeau Says*, *supra* note 191.

that businesses operate in French. Quebec anglophones who believe that a post-separation government will bring out the "tongue troopers" who will tighten down the "language screws" direct attention to the current PQ government which has toughened its enforcement of its language laws with the passage of Bill 40, instead of revising Bill 86.[212]

Still, it seems unlikely that Quebec would adopt a vengeful approach to anglophones. Bill 101's restriction on English language schools are already an object of international attention. "Quebec will [further] tarnish its image in international public opinion if, in acceding to sovereignty, it decides to reduce or abolish the constitutional rights that [linguistic] minorities have traditionally enjoyed."[213] Quebec will also need to be sensitive to the views of other states and the UN, UNESCO, and other international organizations. The PQ's government has announced that Quebec would assume Canada's international legal rights and obligations and apply for admission to the United Nations, UNESCO, and other international organizations.[214]

Granted, the ICPR Covenant, the IESCR Covenant, and the Convention on the Rights of the Child would not obligate Quebec to actively support the freedom of anglophone businesses to advertise in English and anglophone and allophone immigrant parents to send their children to English schools, but merely to refrain from overtly discriminating against them; and "their education clauses [would] only require covert toleration of minority mother tongues."[215] Still, a newly sovereign Quebec which moved to further restrict the commercial use of English would violate the spirit of *Ballantyne v. Canada*, and further limits on English language education would also raise questions about Quebec's compliance with the UNESCO Recommendation Against Discrimination in Education. As Kenneth McRoberts observes, the readiness of the international community "to recognize Quebec's sovereignty [and admit it to membership] might well be influenced by how the Quebec government treats its anglophone minority."[216]

VIII. CONCLUSION

Minority language rights have been a central feature of Canadian legal and political life for the past thirty years. Quebec's vision of the province as a distinctly French society has clashed with the freedom of

212. An Act to Amend the Charter of the French Language, R.S.Q., Bill 40 (1996) (Can.).

213. Freeman & Grady, *supra* note 202, at 189.

214. *Supra* note 193.

215. Tove Skutnabb-Kangas & Robert Phillipson, *Linguistic Human Rights: Past and Present*, *in* LINGUISTIC HUMAN RIGHTS: OVERCOMING LINGUISTIC DISCRIMINATION 86 (1995).

216. McRoberts, *supra* note 206, at 183

its anglophone minority to conduct its business in English and its right to educate its children in English. Quebec anglophones have litigated these issues before the Supreme Court of Canada in the *Quebec Protestant School Boards* and *Ford* cases and before the UN Human Rights Committee in the *Ballantyne* case. Quebec has been adept at resisting changes in the Charter of the French Language, but Quebec anglophones, buoyed by their successes in domestic and international litigation, have contemplated further litigation to challenge Bill 86 as a violation of the Canadian Charter and the international human rights covenants and conventions. The outcome of future litigation will be interwoven, as it already has been, with the macro-constitutional question of whether Quebec shares enough in common with the Rest of Canada to remain within the federation.